

# Clause 4.6 Request to Vary Development Standard

## 280 -298 Railway Pde Carlton

### I. Introduction and Preamble

This Clause 4.6 Exceptions to Development Standards request is submitted in support of a development Application (DA) for the redevelopment of the site at 280-298 Railway Parade, Carlton for the construction of a Mixed Use development with Stage 1 comprising ground floor retail with a Commercial Premises above and Stage 2 comprising ground floor retail with a Residential Flat Building above.

Specifically, the request seeks approval to vary the height of buildings development standard in clause 4.3 of the KLEP 2012. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of KLEP 2012.

Clause 4.3 prescribes a numerical building height limit of 21m over the subject site. The proposed building height departs from this standard as demonstrated in Part 2 of this variation request.

Clause 4.6 of the *Kogarah Local Environmental Plan 2012* (KLEP 2012) enables consent for development to be granted even though it contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

As the following request demonstrates, flexibility may be afforded by Clause 4.6 because compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard.

This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

Consideration has been given to the following matters within this assessment:



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- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law.

Commissioner Preston confirmed in that judgement that the consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests.

On the 'Five Part Test' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827 it was further established that the following :

- It may only be necessary that the variation request satisfies one consideration:

*"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way..."*

- In establishing 'sufficient environmental planning grounds' the focus must be on the contravention and not the development as a whole:

*"The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole"*

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

*"Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard will have a better environmental planning outcome than a development that complies with the development standard."*

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

In accordance with the KLEP 2012 requirements, this Clause 4.6 variation request:

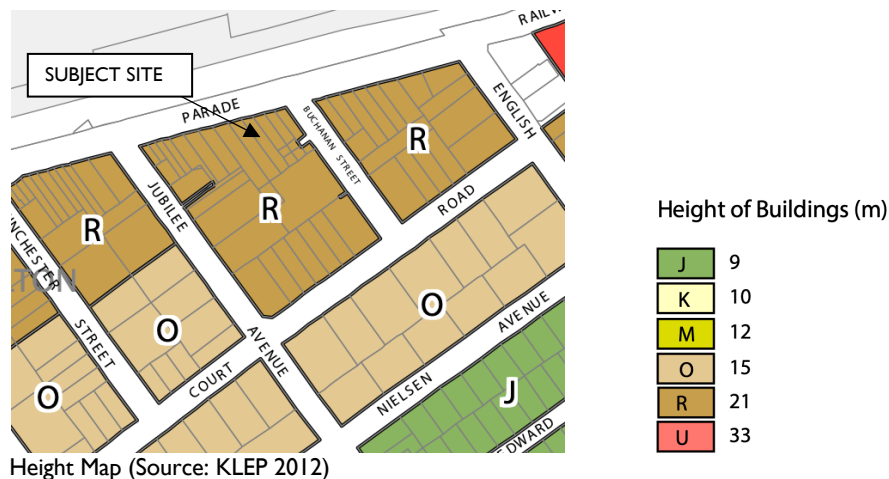
- identifies the development standard to be varied (**Part 2**);
- identifies the extent of the variation sought (**Part 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Part 4**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Part 5**);
- demonstrates that the proposed variation is in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (**Part 6**); and
- provides an assessment of the matters the secretary is required to consider before providing concurrence (**Part 7**); and
- provides a conclusion summarising the preceding parts (**Part 8**).

This Clause 4.6 Exceptions to Development Standards should be read in conjunction with the Architectural Plan details prepared by Marchese Partners Architects

## 2. Development Standard to be Varied

The following Clause 4.6 variation request relates to Clause 4.3 (2) of KLEP 2012 and the related height shown on the associated map for the site.

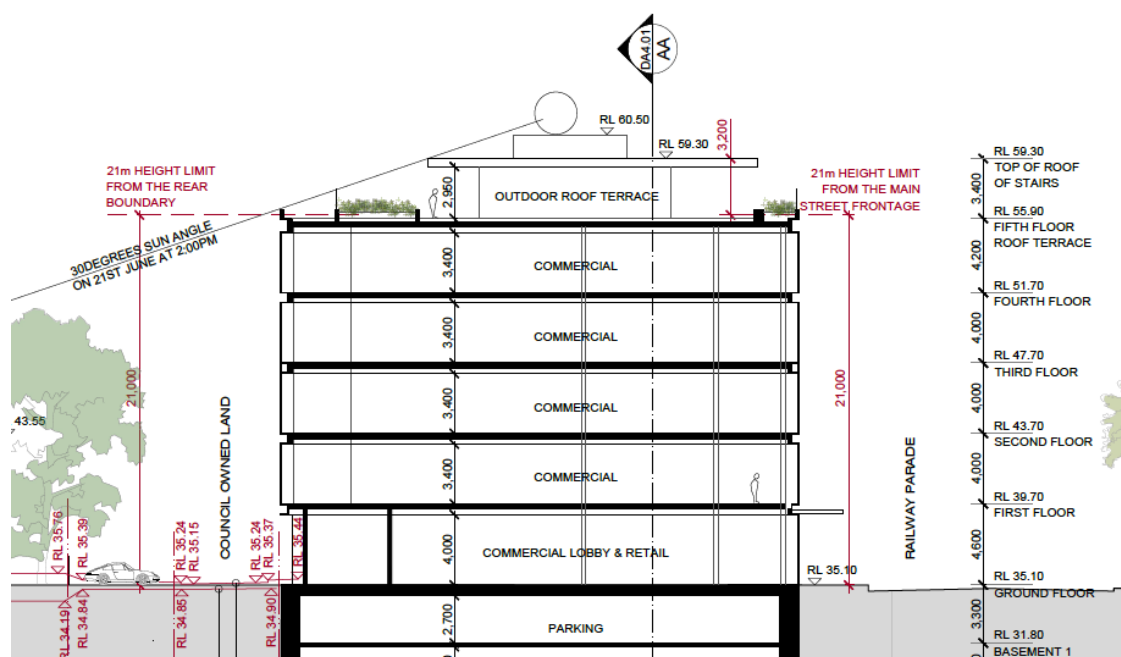
As indicated on the associated “Height of Buildings” Map (shown below) the site is within Area R and the permitted height is therefore 21m.

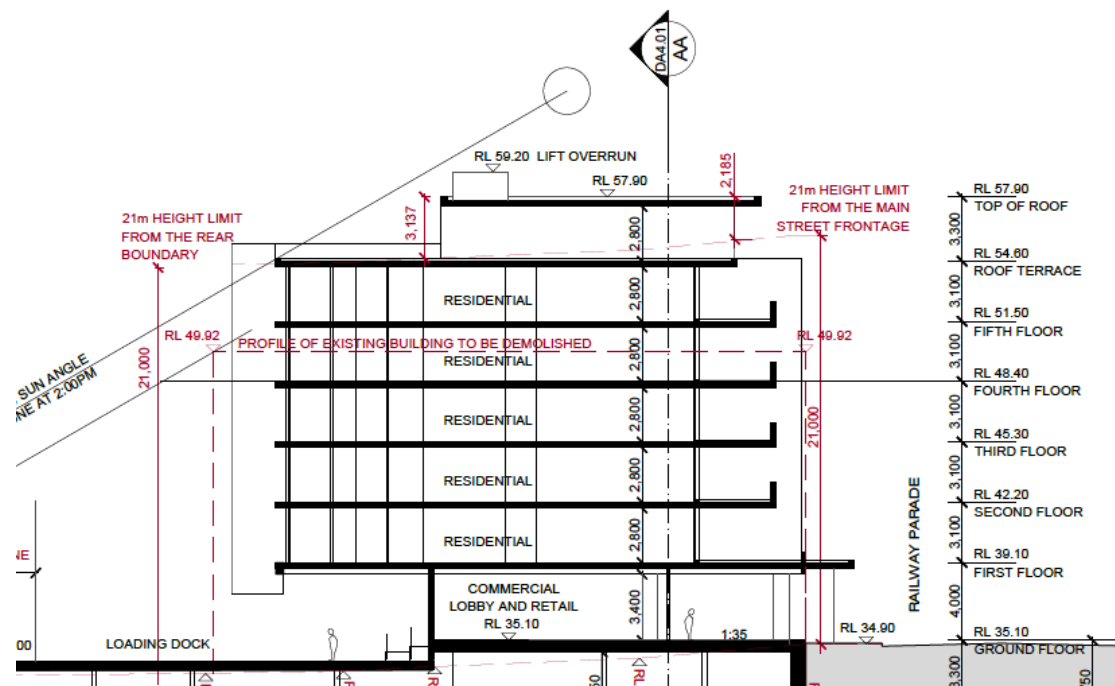


### 3.Extent of Variation

The proposed buildings reach maximum heights above the 21m Height of Building Standard as summarised below and shown in the following architectural plan extracts:

	Outdoor Terrace /Common Room Roof	Top of lift	Max. Extent of Variation
Building 1 (Commercial)	3.2m (24.2m)	4.4m (25.4m)	20.9%
Building 2 (Commercial/ RFB)	2.185m – 3.137m (23.185m and 24.137m)	3.485m (24.486m)	16.6%



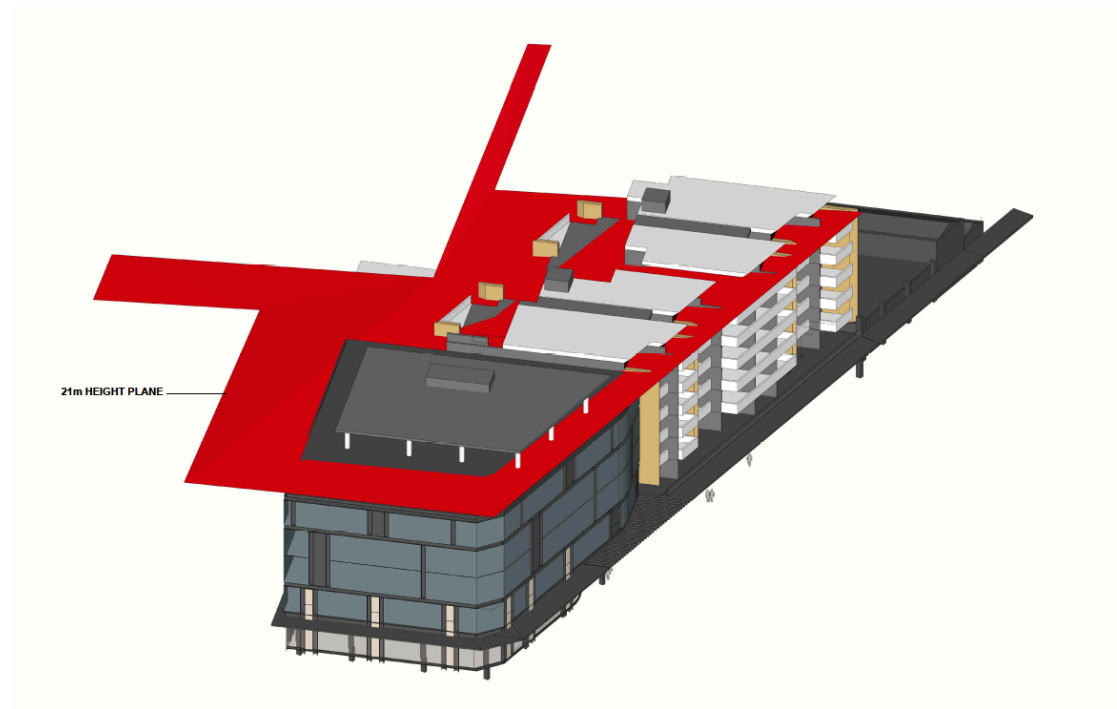


These maximum building heights exceed the prescribed height ranging between 2.185m or 10.4% (Railway Pde street front projecting roof over the common open space in Building 2) and 4.4m or 20.9% (Lift overrun roof to Building 1).

Cross sections through the site demonstrate general compliance with the height limit on the corner of the site at the intersection of Railway Parade with Buchanan Street and, due to the falling slightly to the west and south, minor height exceedance for the upper commercial floor along the rear lane frontage at the south western corner of the Stage 1 building. The proposed rooftop recreation areas and lift access to that building also generally exceed the height limit.

Similarly, the Stage 2 building variation arises primarily through fall in site topography with general compliance with the height limit on the Railway Parade streetfront façade and exceedance for the rooftop communal open space, common room and lift access.

The extent of the rooftop areas that are in excess of the Height of Building standard are shown in the following diagram:



#### **4. Compliance with the development standard is unreasonable or unnecessary in the circumstance of this case - Clause 4.6(3)(a)**

As noted above in Wehbe, five examples of situations in which compliance with a development standard might be shown as unreasonable or unnecessary were identified and these are as follows:

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;

4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and
5. That "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary."

The development will now be assessed against each of these five ways in turn. Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the **First Method**.

**1. The objectives of the standards are achieved notwithstanding non-compliance with the standards.**

The objectives for the height of buildings development standard and associated commentary on the achievement of the objective are as follows:

***To establish a maximum height for buildings.***

This objective is declaratory of its purpose with the underlying purpose to ensure that new development is designed so that the building height will appropriately respond to both the existing and future context in a controlled manner.

The recessive nature of the height breach, being composed of rooftop elements setback from the primary street front and rear edges of the building, will enable the proposed primary building form to visually integrate with the future scale of potential neighbouring buildings.

The proposed variations for recessive and minor built form elements have no significant consequence for the general appreciation of the scale or intensity of the development and are not considered to derogate from this objective of the height control.

***To minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas.***

The position of the building elements that primarily breach the height of building standard are recessed from the primary building façades. In terms of overshadowing impact Marchese Architects have prepared a comparative shadow analysis, illustrating the extent of additional overshadowing impact resulting from the height variation.

Those diagrams are included in full under separate cover and extracts are shown below. Those diagrams demonstrate that any additional overshadowing resulting from the height non-compliance will generally fall upon the upper roof level of the proposed building itself, or upon the roof areas of adjoining sites, with no significant additional impact arising from the variation.



21st JUNE 10:00





21st JUNE 14:00

On balance, the extent of additional shadow cast by the proposed development over that of a height compliant development is not anticipated to result in any discernible increase to the extent of impact incurred to either the adjoining public domain nor adjoining properties than that anticipated by the establishment of the primary building controls for the land.

The visual impact of the non-compliant height elements are not considered significant because:

- They are comprised of recessed uppermost roof levels whereby any breaching height elements are suitably integrated into the overall design of the building and are of a form and materiality that do not create any unwarranted visual impact;

- The planter boxes and balustrades have been appropriately recessed back from the building edges and therefore do not have a high degree of visibility as viewed from neighbouring properties or public domain.
- The landscaped treatments proposed to the roof of the building will serve to soften the visual presentation of the building.

Having regard to the above, the elements in breach of the height are not considered to add significantly to perception of bulk and scale of the development compared to a height compliant building on this site.

With regard to possible impacts on privacy it is noted that the trafficable areas of communal rooftop spaces and the recreational terrace on the commercial building have been appropriately oriented away from adjoining sensitive residential uses and are setback from the edges of the building with perimeter landscaping provided to prevent direct overlooking and mitigate visual impact.

The residential flat building component has also been sited in a manner whereby compliant levels of building separation in accord with the ADG requirements have been provided.

In summary the non-compliance with the height standard does not contribute to an unreasonable overshadowing or visual impact or significant intensification of loss of privacy to adjoining properties. This is due to the setback and recessive nature of the building elements on the rooftop that service the communal open spaces and rooftop recreation terrace and that perimeter landscaping is also provided to prevent direct overlooking and mitigate visual impact. The objective is therefore considered to be satisfied despite the non-compliance.

***To provide appropriate scale and intensity of development through height controls.***

The scale, form and intensity of the building presents a building envelope generally achievable under the primary Floor Space Ratio and Building Height controls of the LEP with the proposal presenting a built form generally consistent with that anticipated by the controls, namely a five (5) storey commercial or six (6) storey mixed development built form.

Importantly, the subject site is located on a highly distinguishable corner with landmark characteristics benefiting from its prominent position and twin streetscapes.

The area of the subject site proposed to be built upon is zoned B2 Local Centre, as is immediately adjoining land along Railway Parade, and is also adjoined by a high density residential zoning to the south and east with future development in those areas having potential to achieve a comparable built form, in terms of building height, to that allowable on the subject site

The objective is considered to be achieved by virtue of the primary usable floor areas of the proposed buildings being provided in building envelopes which conform to the height control, with the height exceedance generated by elements that do not contribute to the scale and intensity of the development, due to their recessive physical nature, or due to those elements being ancillary and subordinate facilities that are used in conjunction with the primary use and do not therefore intensify the use of the site *per se*.

The proposed development is considered to therefore achieve the objective as the scale and intensity are consistent with that permitted by the control and consistent within a future context of comparably scaled new development on adjacent lands.

## **Summary**

As noted in Wehbe, the rationale behind this way of showing that compliance with a development standard is unreasonable or unnecessary:

‘is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).’

Specifically the design sensitively positions those areas of the building that project above the height of building standard to ensure that additional overshadowing is primarily cast upon the lower floor and roof elements of the proposed building itself. This siting therefore ensures no appreciable additional impact of overshadowing, visual impact or loss of privacy arising from the proposed building elements that exceed the standard and the objectives of the standard can be considered to be satisfied.

In view of the above, the requirement to strictly adhere to the development standard for Height of Building is considered to be unreasonable and unnecessary in this instance as the proposed development achieves and is consistent with the relevantly applicable objectives of the standard.

- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary.**

#### Comment

The purpose of the standard is considered to be relevant to the development and on that basis this way is not applicable ground for justification of the variation.

- 3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.**

#### Comment

The underlying purpose of the standard is to influence building form and scale and limit possible impact on solar access and privacy impact on adjoining lands. The underlying object of purpose of the standard would not be defeated or thwarted if compliance was required and on that basis this way is not applicable ground for justification of the variation.

- 4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.**

#### Comment

Council has not generally abandoned this development standard, despite Council conceding similar variations of this nature on other like developments elsewhere in the Council area, and on that basis this way is not applicable ground for justification of the variation.

- 5. Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.**

#### Comment

The current use and character of the land is generally for commercial purposes with the current strategic direction for the precinct, the current zoning of the land and applicable development controls anticipating an intensification of the use of the site, which is appropriate and pursued by this application and, on that basis, this way is not applicable ground for justification of the variation.

## **5. There are sufficient environmental planning grounds to justify contravening the standard - Clause 4.6(3)(b)**

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118).

The proposed development is supportable on environmental planning grounds for the following reasons:

- A compliant building would lose valuable rooftop recreational facilities with no appreciable improvement to the perception of scale or intensity of the development nor improvement in the amenity of adjoining lands;
- The proposal (notwithstanding the LEP contravention) is consistent with the objectives of the development standard as provided in clause 4.3 of the KLEP 2012.
- Despite the lift overrun and roof structures exceeding the Height of Buildings principal development standard, the remainder of the building sits within the 21m height limit. As such, the overall bulk and scale of the building is considered to be acceptable in terms of its urban form and no additional floor space over that permitted by the applicable Floor Space Ratio (inclusive of that available under the ARH SEPP bonus provision) is generated by the proposed variations;
- The cross fall of the site from the Railway Pde frontage to the rear exacerbates the extent of the technical non-compliance with the Height of Building standard with no appreciable intensification of the perception of building bulk or scale. Notwithstanding, the proposed development has been designed to provide appropriate levels of building modulation and massing whereby the various portions of the building and relative setbacks from the viewing perspectives, particularly from the residential areas to the south, enable a visual appreciation of a built form that remains appropriate for the site and commensurate with both existing and envisaged development likely to occur on neighbouring undeveloped sites.
- When considering overshadowing, the extent of additional shadow cast by the proposed development in comparison to a 21m height compliant development is not unreasonable.

- Future redevelopment to the south west and north east of the site along Railway Parade would likely result in a finished building height not visually at odds with that proposed by this development.
- The additional height maintains a building of a scale and form that is appropriate for the location, accentuating the high profile corner location of the site, providing visual interest and a varied building profile. The additional height above the height limit will minimally accentuate the corner site presentation of the building, presenting a well-considered building of high architectural merit when viewed from Railway Parade and acting as a key site and identification of entry to the Carlton Centre.
- Strict compliance with the development standard would result in a failure to achieve an appropriate provision of affordable housing by the resultant need to reduce the residential flat building by a floor, in a highly appropriate location, consistent with the underlying objectives of the zoning of the land and the ARH SEPP bonus floorspace provisions which is considered contrary to the orderly and economic use of the land.

## **Summary**

It is concluded that there is sufficient justification for contravention of the development standard for Height of Building under the particular circumstances of this case. This submission demonstrates that compliance with the standard is unreasonable and unnecessary as the objectives of the standard are achieved despite non-compliance and that there are sufficient environmental planning grounds to justify the variation.

The proposal satisfies the underlying intent of the relevantly applicable objectives of the LEP development controls, the ARH SEPP objective to facilitate affordable housing in appropriate locations and sound planning practice.

The variation does not give rise to any significant additional environment impacts on the site or to adjoining lands demonstrating that there are also sufficient general environmental and planning grounds to justify the departure from the control. An assessment of the matter under Clause 4.6 (3) can therefore be satisfied.

More generally the variation does not establish an unusual precedent in the locality that would undermine the applicability of the development standard to other development of comparable sites located within the local context due to the special circumstances of this proposal and the nature and extent of the variation that this particular development proposes.

## **6. The proposal is in the public interest as it is consistent with the objectives of the standard and the zone objectives - Clause 4.6(4)(a)(ii)**

Clause 4.6(4)(a)(ii) provides that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

In Part 3 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal, inclusive of the non-compliance, is also considered consistent with the objectives of the B2 Local Centre Zone and R3 Residential Zone.

The relevant objectives of the B2 zone and R3 zone are to:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*

And

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Despite the variation to the height of building development standard the proposal is considered to be of a type and nature that satisfies the objectives of the B2 Local Centre and R3 Medium Residential zone as:

- The proposal provides a mixture of compatible commercial uses on the site with the independent ground floor retail premises also providing an opportunity for support uses to local residents, workers and visitors.
- The proposal facilitates the ongoing employment opportunity provided by Netstrata in an accessible location within the Carlton Centre.

- The proposal provides for the housing needs of the community by providing a large affordable housing component in a highly accessible and well serviced locality.

Accordingly, granting consent to the proposed development is considered to be in the public interest. In accordance with the provisions of Clause 4.6(4) Council can therefore be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

## **7.Clauses 4.6(4)(b) and (5) – Concurrence of the Secretary**

Clause 4.6(4)(b) of KLEP 2012 states that:

‘Development consent must not be granted for development that contravenes a development standard unless:

...

(b) the concurrence of the Secretary has been obtained.’

Clause 4.6(5) of KLEP 2012 states that:

‘In deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.’

### **Comment**

It is understood the concurrence of the Director-General is not required to be sought in this circumstance as the matter is to be determined by the relevant regional planning panel, however the following points are made:

- a) The contravention of the Height of Building standard does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and the extent and nature of, and circumstances of, the variation to the standard that is proposed particularly as a significant contributor to the variation arises as a consequence of facilitating the additional bonus floor space available under the ARH SEPP; and



- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. To the contrary, there is significant public benefit in supporting the departure from the standard in the circumstances, given that insistence on compliance can only be achieved by further eroding the potential to achieve the ARH SEPP objective of encouraging affordable infill housing in well serviced and accessible locations.

## **8. Conclusion**

Strict compliance with the maximum Height of Building standard is considered unreasonable and unnecessary in the context of this proposal and its circumstances. The proposal is of a comparable built form to that envisioned for the locality through the underlying development controls and zoning of the land and does not result in unreasonable environmental amenity impacts due to the responsive design that is proposed.

It is considered that compliance with the standard as specified in clause 4.3 (2) is both unreasonable and unnecessary in this particular case and it has also been demonstrated that there are sufficient environmental grounds to justify contravening that standard. The objection is well founded and, taking into account the absence of adverse environmental, social or economic impacts, the proposal promotes the economic use and development of the land and furthers the provision of affordable housing in an accessible and well serviced location.

It is considered that the proposed development will not be contrary to the public interest and is consistent with the objectives of the standard and the objectives of the zone in which the development will be carried out and the objectives of the ARH SEPP. On that basis Council is requested to accept the proposed variation to the development standard.