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GTPL

**Googong NH2 Town
Centre**

Clause 4.6 Request

wsp

November 2022

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1 Introduction

This Clause 4.6 request for variation request has been prepared by WSP on behalf of Googong Township Pty Ltd (GTPL) - the client - in support of a Development Application (DA) submitted to Queanbeyan–Palerang Regional Council (QPRC) in relation to the proposed development of the of Googong Neighbourhood 2 (NH2) Town Centre - the Site.

GTPL is seeking development approval under Part 4 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) for, amongst other things, the physical construction of commercial and retail premises, landscaping works, public domain works, car parking and associated infrastructure as an initial stage of development within the Googong Town Centre (known as the ‘**Works DA**’)

The proposed commercial and retail premises include structures that breach the building height limit identified in the *Queanbeyan Local Environmental Plan 2012* (**QLEP**). Clause 4.6 of the QLEP enables the granting of consent to a proposed development which contravenes a development standard, if appropriately justified. QLEP clause 4.6 provides an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. These development standards include building height.

This request for a variation of the relevant development standard being made under QLEP clause 4.6 (**Clause 4.6 Request**) should be read in conjunction with the Works DA, specifically the Architectural Plans, prepared by BN Group and submitted with Works DA, and the Works DA Statement of Environmental Effects (**SEE**), prepared by WSP.

The following assessment of the proposal against QLEP clause 4.6 provides the relevant justification for the departure from QLEP clause 4.3 – *Height of buildings*. QLEP clause 4.6 requires a consent authority to be satisfied of three matters before granting consent to a development that contravenes a development standard:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [QLEP clause 4.6(3)(a)]
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [QLEP clause 4.6(3)(b)]
3. That 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 [QLEP clause 4.6(4)(a)(ii)]

The NSW Land and Environment Court (**LEC**) and the NSW Court of Appeal (**Court of Appeal**) have established principles under which an assessment authority can consider a variation to a development standard against the provisions of Clause 4.6. The key principles were established in the following Court cases:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**)
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**)
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**)
4. *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (**Baron Corporation**)
5. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 (**RebelMH**)
6. *Doumit v Canterbury – Bankstown Council* [2018] NSWLEC 1028 (**Doumit**)
7. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170 [2018] NSWCA 24 (**Al Maha**)

The principles established by the above court cases have been applied in justifying a departure from QLEP clause 4.3 *Height of buildings*.

The relevant approval body can exercise assumed concurrence in determining this clause 4.6 request for variation, in accordance with planning circular PS 20-002.

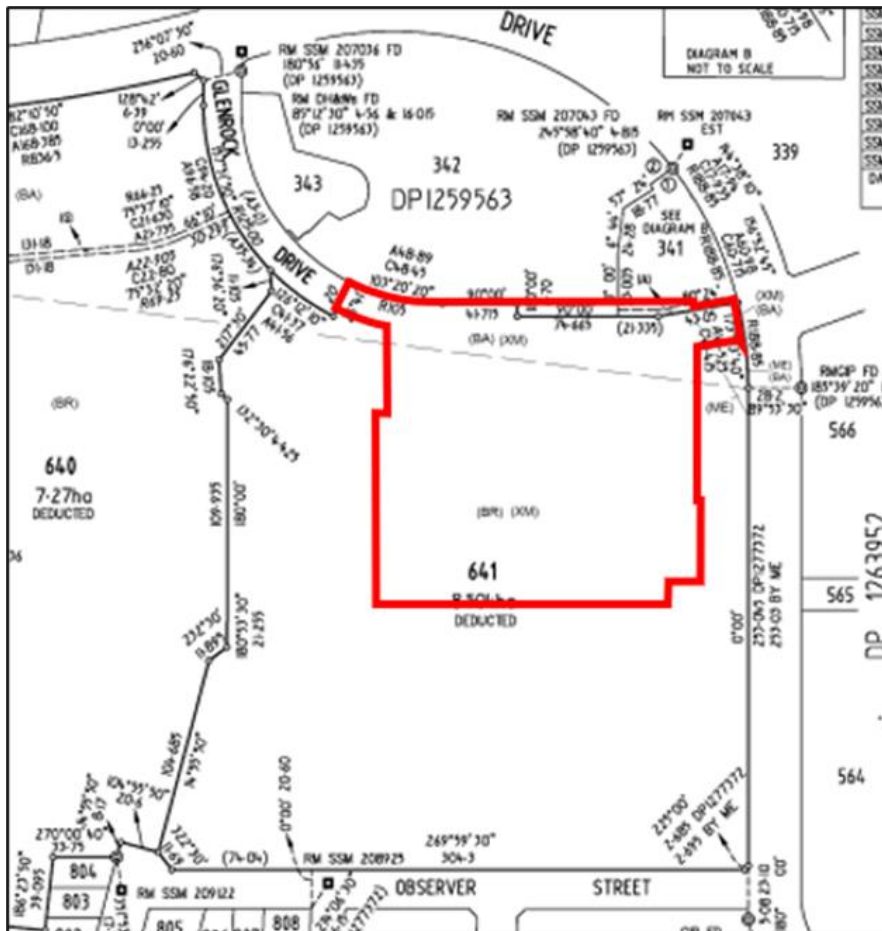
2 Site Context

2.1 Neighbourhood 2 Town Centre (The Site)

This Clause 4.6 Request forms part of the 'Works DA' and relates to land within the Googong Town Centre.

The Works DA comprises lands that are part of existing Lot 341 in DP1259563; part of existing Lot 342 in DP1259563; and part of existing Lot 641 in DP1281684 (the Site). Refer Figure 2.1 below:

Figure 2.1: Location of the Works DA (land outlined in red)



Source: Lonergan and WSP

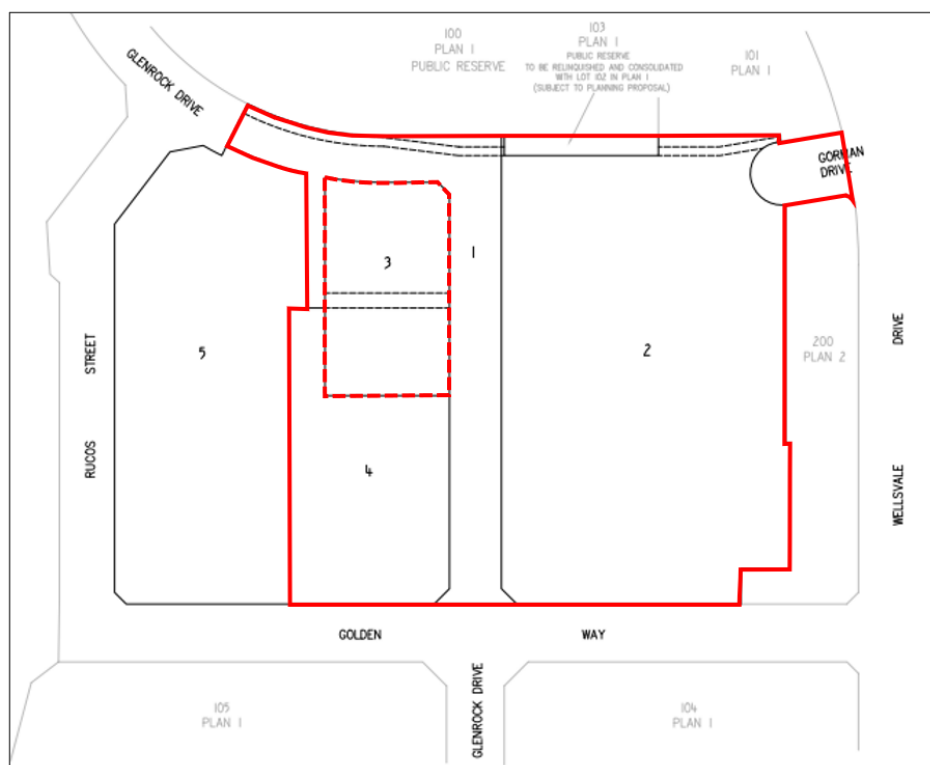
It is important to note that the Works DA has been prepared in conjunction with a separate lot subdivision application for the Site ('**Subdivision DA**'). The Subdivision DA seeks approval for the amalgamation and re-subdivision of Lot 341 in DP1259563; Lot 342 in DP1259563; and Lot 641 in DP1281684.

The amalgamation and re-subdivision of the above lots will ultimately result in a series of individual parcels for future Town Centre development. This Works DA is restricted to four of those individual parcels, namely:

1. the physical works for an initial stage of retail and commercial development and associated car parking and infrastructure etc are located within proposed **Lot 1**; proposed **Lot 2**; proposed **Lot 3**; and proposed **Lot 4**; and
2. the concept approval for the proposed pub, located within proposed **Lot 3**.

The area of the Works DA is set out in Figure 2.2 below, comprising: proposed Lot 1, Lot 2, Lot 3 and Lot 4 (where proposed physical works are located) are outlined in red; and proposed Lot 3 (where the concept approval for the pub is sought) is outlined in a dashed red line.

Figure 2.2 - Location of the proposed physical works and concept approval.



Source: Lonergan and WSP

Both the Works DA and the Subdivision DA have been lodged concurrently and should be read together in order to gain a full understanding of the proposals for the NH2 Town Centre

In specific terms, this Works DA seeks approval for the following physical works and development:

- Construction of 3 x two-storey mixed-use buildings containing retail and commercial premises, a single-storey supermarket, cafes and restaurants, specialist retail outlets, and a medical centre, to provide for the day to day needs of the community.
- Construction of undercroft car parking, mainly contained beneath the supermarket building, to the north-east corner of the site, to incorporate loading docks, 'Centre Management' offices and other facilities like bicycle parking.
- Construction of at-grade car parking areas to the south and south-west of the mixed-use buildings and supermarket with associated site works, landscaping and tree planting.
- Provision of outdoor seating and dining areas and a plaza to the north of the proposed mixed-use building, adjoining Bunyip Park.
- Road works, including the associated landscaping and amenities such as street furniture and pedestrian crossings, for a privately owned and managed north-south road connecting Glenrock Drive to Golden Way as a "main street" through the middle of the Town Centre.
- Provision of a variety of high-quality public domain, both in between the mixed-use buildings and in the open space area north of the mixed-use buildings and supermarket.
- Provision of business identification and wayfinding signage associated with and as necessary for the proposed development.
- Concept approval for a pub, subject to a separate application (by others) for the physical works.

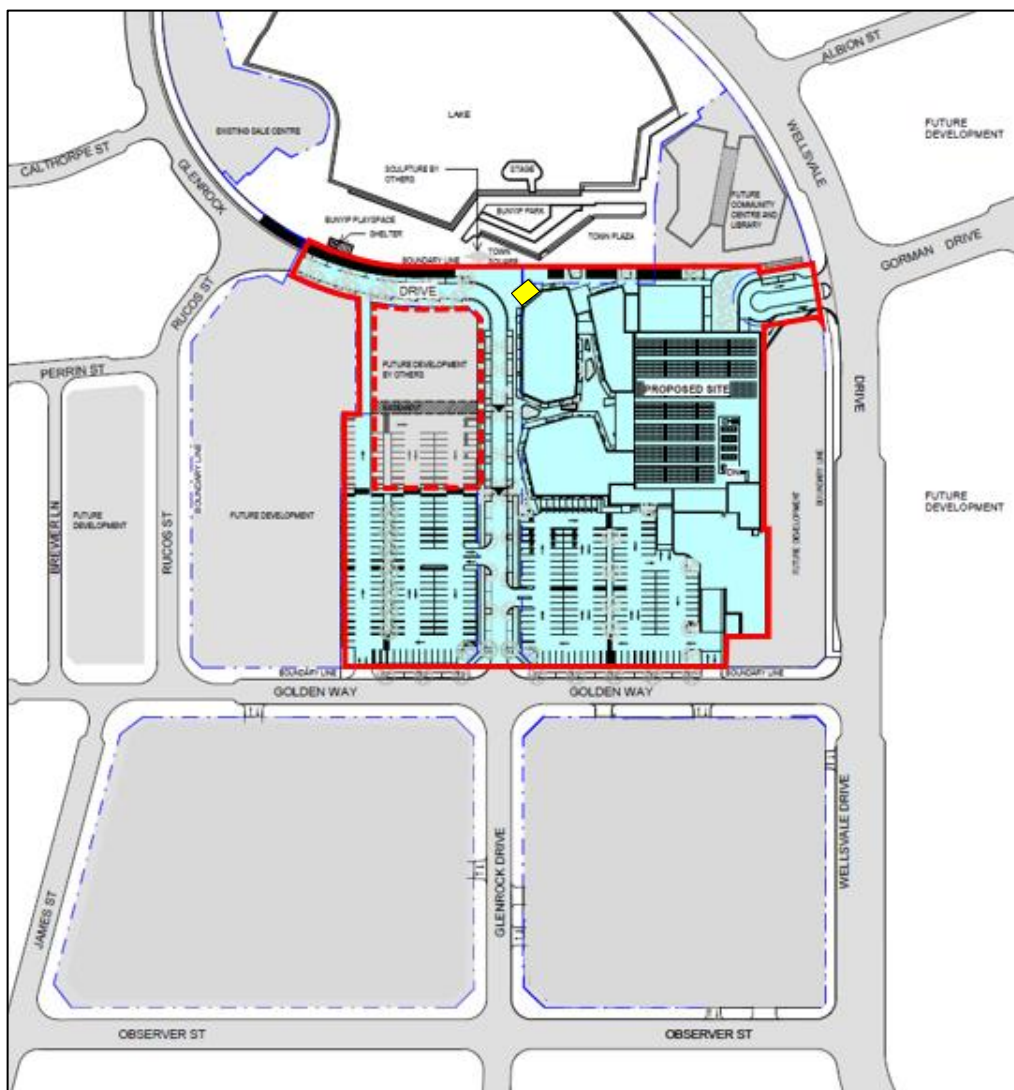
The above details are shown on the architectural drawings and 3D perspectives accompanying this application. The proposed works include a 'tower' element above the entrance to the main commercial and retails area measuring 17.7m in height.

The Works DA has a total development cost of \$44,121,016 and as such the DA (and this Clause 4.6 Request) would be determined by the Southern Regional Planning Panel (SRPP).

The Googong Town Centre will be developed in stages. The purpose of the Works DA is to create the initial stage of the Town Centre as a new civic, commercial and cultural centre for the whole Googong, as well as providing the residents of NH2 with their necessary day to day needs. The proposed community and entertainment land uses will be provided in a pedestrian friendly environment for both residents and visitors and will be accessible by a variety of transport options, e.g. active and public transport or private cars.

Googong Town Centre is shown Figure 2.3 below, together with the boundaries of the Works DA (in red) and the broad area of proposed works highlighted in light blue. The location of the proposed tower is shown in yellow.

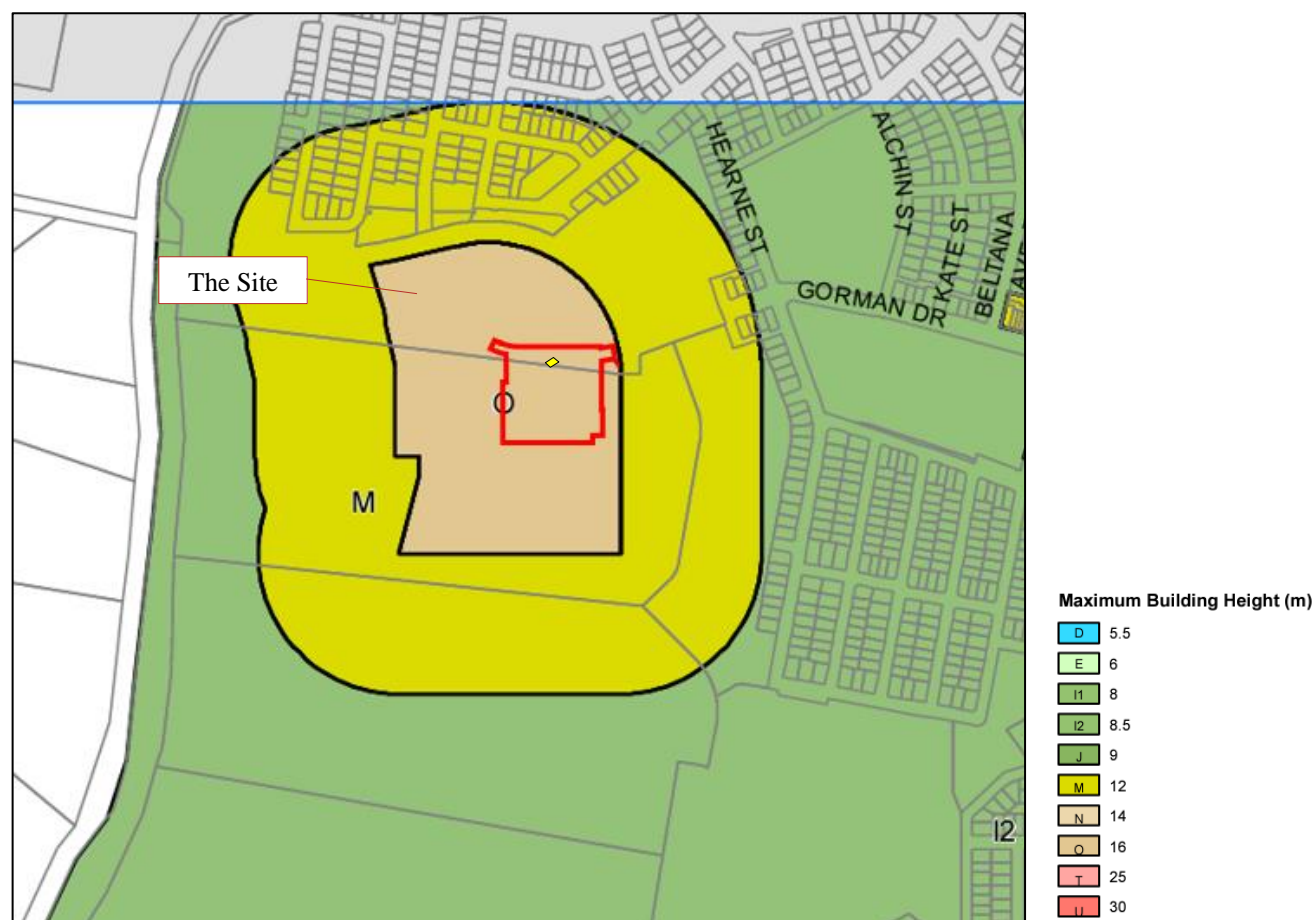
Figure 2.3 Googong Town Centre – The Site and Works DA



Source: Architectural Plans, BN Group

This Clause 4.6 Request relates to a building which forms part of Works DA, located across proposed **Lot 1** and **Lot 2** in Figure 2.3 above. Figure 2.4 below shows the relevant *Height of Buildings Map* from QLEP 2012 with the Works DA boundary shown in red. The approximate location of the proposed tower is shown in yellow.

Figure 2.4 Height of Buildings Map – QLEP 2012



Source: QLEP 2012

The footprint area of the proposed tower measures approximately 50 Sqm. The GFA of the main commercial / retail building located on proposed Lot 2 measures approximately 6,600 Sqm (refer Figure 2.3 above). As a result, the proposed tower represents approximately 0.76% of the overall GFA proposed in the Works DA.

The area to which the QLEP 16m Height of buildings limit applies to approximately 16.5 Ha (165,000 Sqm) of the Googong Town Centre (refer Figure 2.4 above). As a result, the tower represents approximately 0.03% of the overall area where the 16m building height limitation is set.

It is fair to conclude that the overall “area” of non-compliance above the 16m height limit is negligible – regardless of whether that is measured as part of the GFA in the Works DA, or across the whole area where the 16m building height limit applies.

2.1.1 Key characteristics of Neighbourhood 2 Town Centre

Table 2.1 below provides a summary of the key characteristics and landform features of Googong Town Centre that relate to this Clause 4.6 Request for variation.

The information has been summarised from the architectural plans and supporting technical documents prepared for this DA as well as previous DAs.

Table 2.1 Natural characteristics of NH2 Town Centre and its surrounding context

Item	Description
Current conditions	<p>Googong Town Centre has been cleared and earthworks are currently being undertaken on site to prepare for development.</p> <p>Wellsvale Drive that bounds the Town Centre has been constructed and is operational. All internal roads within NH2 and the Town Centre are currently under construction.</p>
Heritage	<p>The Archaeological and Aboriginal Cultural Heritage Assessment prepared for the NH2 subdivision (DA123-2017) application identified that a previously recorded artefact was found in the Town Centre. This artefact has been salvaged via AHIP (No. C0001687). No further artefacts were visible at the location, following the salvage operation, and no items of significance are likely to be located at the site.</p>
Topography	<p>The site has a gentle slope of between 9-10 metres from the south-western corner of the Town Centre to the north-eastern corner. Bunyip Park and the lake are located on the lower side of the Town Centre.</p> <p>Nangi Pimble (Hill 800), with its two crest points (noted as ‘Twin Hills’ in the Local Planning Agreement), is the tallest landform within Googong, having the highest point of approximately 810 AHD. This hill is visible from most areas within Googong and has 360-degree views from its summit.</p>

3 Proposed Variation

3.1 Development standard to be varied

The development standard that is sought to be varied as part of this application is QLEP clause 4.3, which sets the maximum height for buildings in the LGA, including the Googong Town Centre.

QLEP clause 4.3 is reproduced below:

4.3 Height of buildings

(1) *The objectives of this clause are as follows—*

- (a) *to ensure that the height of buildings complement the streetscape or the historic character of the area in which the buildings are located,*
- (b) *to protect the heritage character of Queanbeyan and the significance of heritage buildings and heritage items,*
- (c) *to nominate heights that will provide a transition in built form between varying land use intensities.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map*

3.2 Is the planning control in question a development standard?

A Development Standard is defined under Section 1.4 of the EP&A Act as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of...**(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,..** [emphasis added]

QLEP clause 4.3 *Height of buildings* is a development standard as it prescribes a maximum height for buildings on the land to which Clause 4.3 applies. Also, we understand it has continually been applied in this manner by the consent authority.

3.3 Extent of the Variation

QLEP clause 4.3 *Height of buildings* states:

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map*

QLEP clause 4.3 applies to the Works DA site.

According to the QLEP Height of Buildings Map, the maximum permissible height of a building on the Works DA site is 16 metres, as shown in Figure 2.3 above. The maximum height of the proposed tower element above the entrance to the main commercial and retail area is 18.0 metres (see images below).

This results in a variation of **2.0m** or **12.5%** from the *Height of buildings* development standard under QLEP clause 4.3. The remainder of proposed development within the town centre is below the 16m height limit.

The images below are a visual representation to demonstrate the extent of the variation in the context of the entire site.

Figure 3.1 Elevation Plans from BN Group illustrating the height non-compliance



Source: BN Group

Figure 3.2 Elevations



Figure 3.3 Elevations



Source: BN Group

Figure 3.4 Elevations

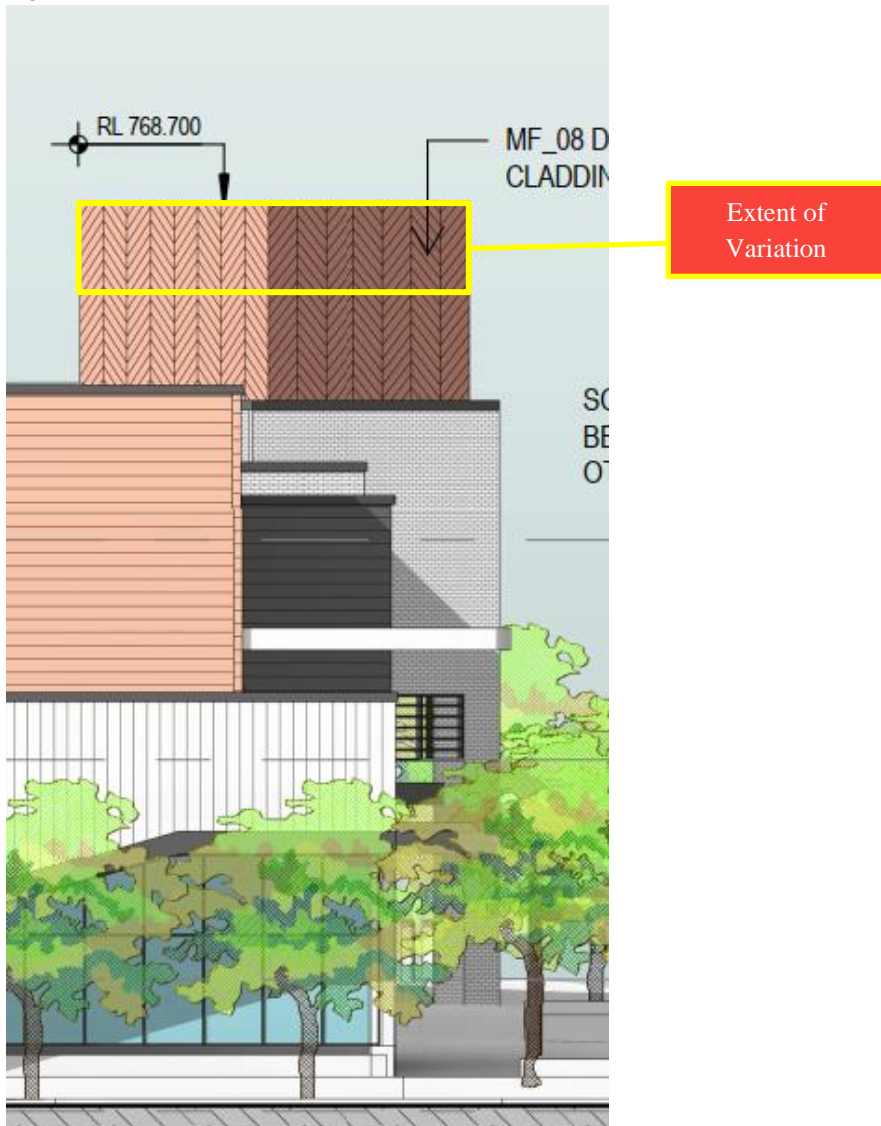
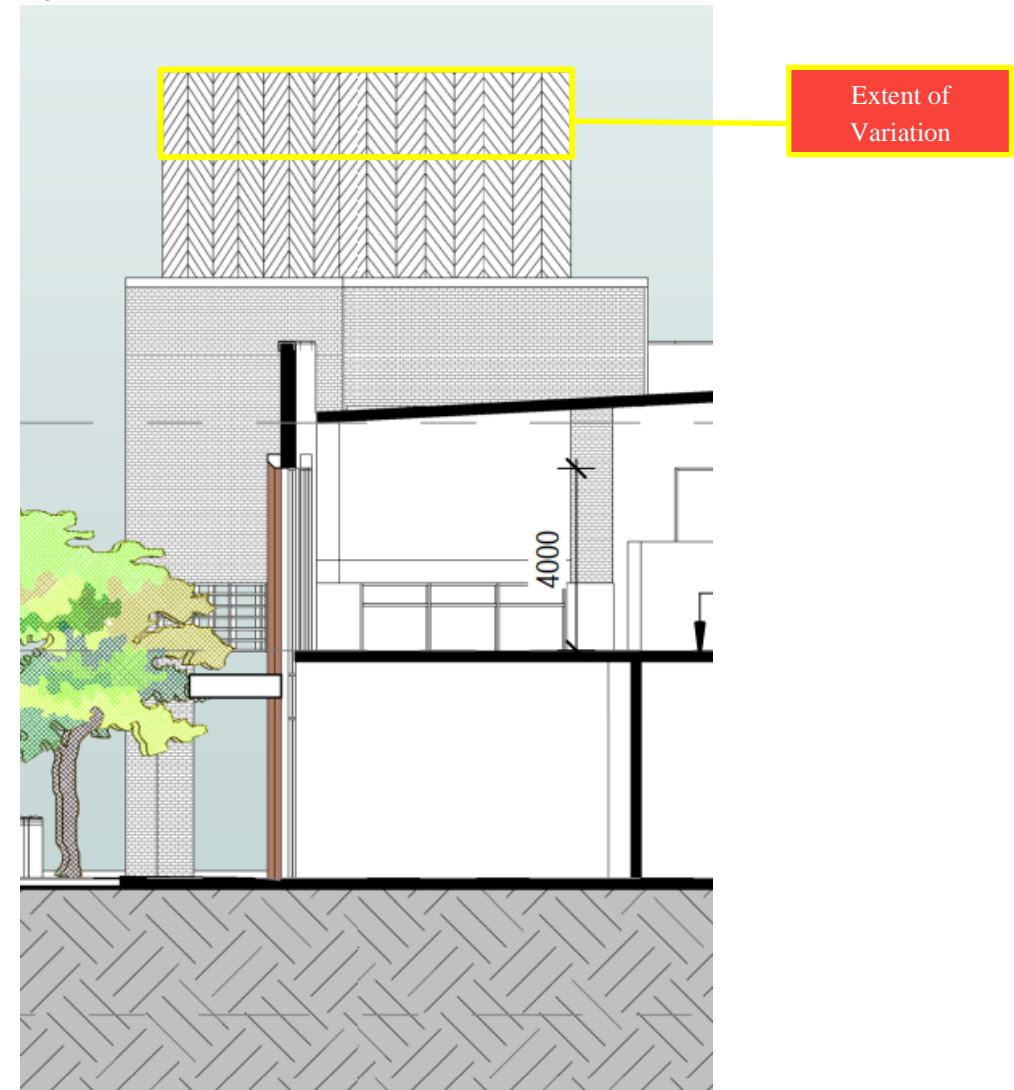


Figure 3.5 Sections



Source: BN Group

Figure 3.6 3D perspective overall view



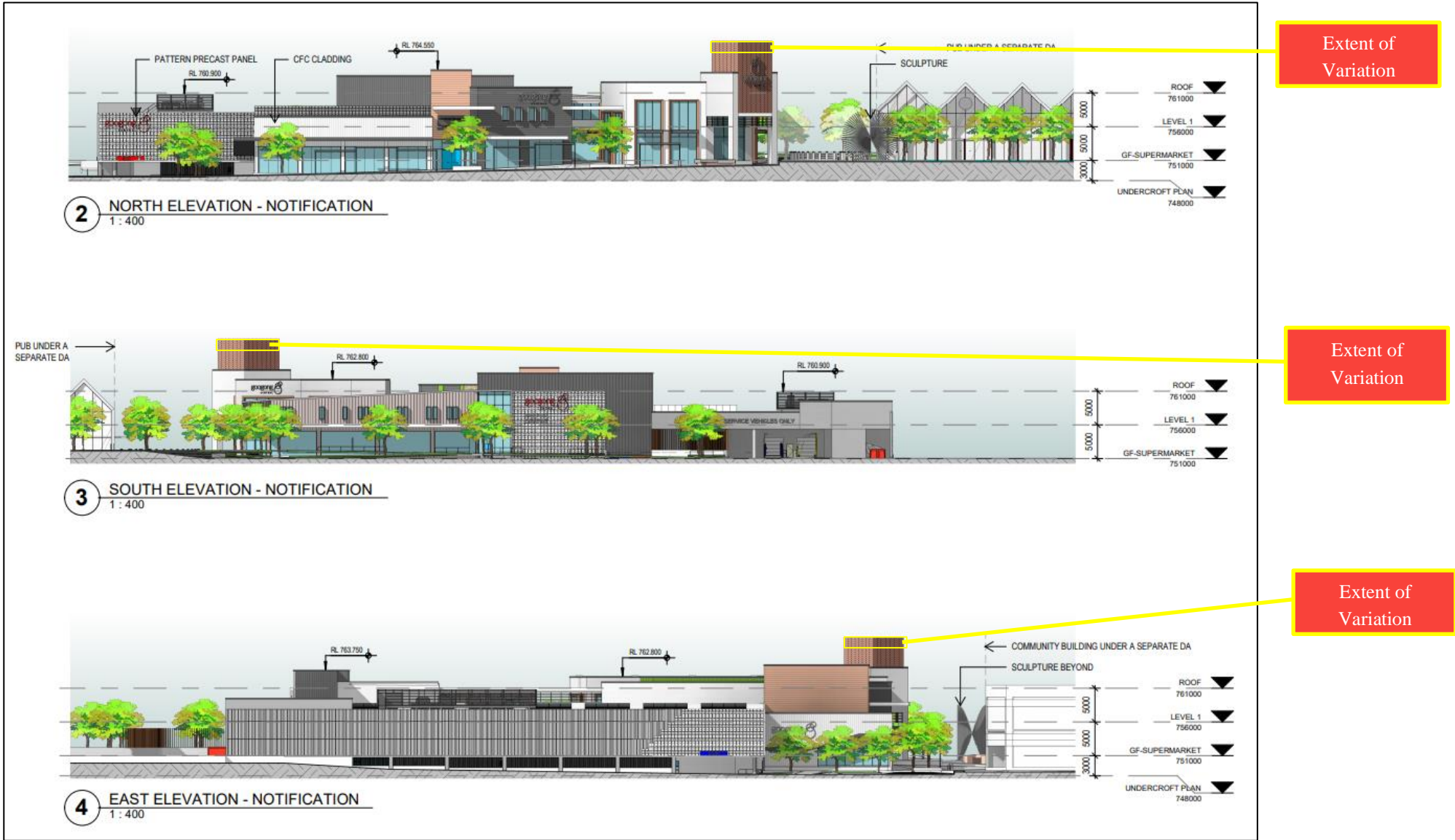
Source: BN Group

Figure 3.7 3D perspective view from Glenrock Drive



GOOGONG TOWN CENTRE LOT 841 (DP1201896)	ISSUE DATE P1 13/06/2022	DESCRIPTION SUBMIT FOR DEVELOPMENT APPLICATION	3D PERSPECTIVE VIEW FROM GLENROCK DRIVE	A02.06 - P1 1:1 @ A1	10 Alexander Street Googong NSW 2688 060 46 060 460 T 06 26427 061 www.googongtowncentre.com.au	BN Architecture Urban Design Masterplanning Graphics Interiors
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Figure 3.8 Elevations



The potential adverse environmental impacts of the proposed height variation are considered to be negligible.

As shown in the plans above, the proposed height breach does not adversely impact on any streetscape elements or have a detrimental impact on the character of the Town Centre, nor does it result in loss of amenity for the surrounding properties (see assessment in **Section 5.2.3**).

The proposed minor height breach creates a prominent and visible tower element and a focal point for the Googong Town Centre which then transitions in built form and height to lower building heights and less dense buildings in the immediate surroundings that comprise the immediate commercial core and the broader Googong development (see assessment in **Section 5.2.3**)

4 NSW Land and Environment Court: Case Law

There are several key NSW LEC planning principles and NSW LEC judgements which have refined the approach and the manner in which variations to development standards are able to be justified.

The appropriate approach to the preparation of a variation request under Clause 4.6 has been provided by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

An extract of the relevant part of this judgement is provided in **Appendix A** to this report for reference.

In short, the five methods recommended in the judgement are as follows:

- 1 *The objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2 *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3 *the underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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;*
- 5 *the compliance with 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;*

Our assessment of the proposed QLEP clause 4.6 variation is prepared in accordance with the instructions provided by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, as explained in the following sections.

5 Assessment of Clause 4.6 Variation

The following sections of this report provide a comprehensive assessment of the proposed variation to the development standard under QLEP clause 4.3 *Height of buildings*

Section 5.1 below provides detailed responses to the key questions and Section 5.2 addresses the considerations required for a satisfactory assessment of the proposed variation request under QLEP clause 4.6.

5.1 Key Questions

Is the Planning Control a Development Standard?

QLEP clause 4.3 *Height of buildings* is a development standard, as explained in Section 3.2 of this report. Therefore, it can be varied under QLEP clause 4.6.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The *Height of buildings* development standard is not excluded from the operation of QLEP clause 4.6(2) as it does not comprise any of the matters listed under QLEP clause 4.6(6) or QLEP clause 4.6(8).

What is the Underlying Object or Purpose of the Standard?

4.3 *Height of buildings*

(1) *The objectives of this clause are as follows—*

- (a) *to ensure that the height of buildings complement the streetscape or the historic character of the area in which the buildings are located,*
- (b) *to protect the heritage character of Queanbeyan and the significance of heritage buildings and heritage items,*
- (c) *to nominate heights that will provide a transition in built form between varying land use intensities.*

An assessment of the proposed development against the above objectives is provided in **The objectives** of the development standard (LEP clause 4.3 *Height of buildings*), and explanations of how the proposal satisfies these objectives are provided in Table 5.1.

Table 5.1.

5.2 Consideration

5.2.1 QLEP Clause 4.6(3)

QLEP clause 4.6(3) states:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The judgements in *Baron, Rebel* and *Al Maha* recognise the need for the consent authority to form its own view on whether the written variation request has adequately addressed the matters required to be demonstrated by clause 4.6(3), in order to be discharged from its responsibility for carrying out this determination. Accordingly, this Clause 4.6 Request for variation must ‘demonstrate’ that the requirements of clause 4.6(3) have been ‘adequately addressed’ and is discussed in the following section.

5.2.2 Clause 4.6(3)(a) – Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

In accordance with the requirements of QLEP clause 4.6(3)(a), this section demonstrates why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.

In *Wehbe*, Preston CJ of the Land Environment Court NSW provided a list of recommendations for identify the correct methods under which a variation to a development standard can be deemed suitable, and compliance with the standard is seen to be unreasonable or unnecessary.

The five methods recommended in the judgement are as follows:

- 1. *The objectives of the standard are achieved notwithstanding noncompliance with the standard;*** [emphasis added]
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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;*
- 5. the compliance with 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;*

An applicant may rely on more than one of these methods to justify non-compliance with a development standard in the circumstances of a particular case and there may be other ways of demonstrating that compliance with a development standard is unreasonable or unnecessary in particular circumstances.

The proposed departure from the development standard is assessed in accordance with the first of the five above-mentioned methods to establish that the strict imposition of the development standard QLEP clause 4.3 *Height of buildings*, is unreasonable and unnecessary in this instance and the proposal can satisfy the objectives of the standard, notwithstanding its non-compliance..

First method: The objectives of the standard are achieved notwithstanding non-compliance with the standard

In accordance with the principle established in *Wehbe*, one of the ways in determining whether a Clause 4.6 request for variation has demonstrated the achievement of the requirements in clause 4.6(3)(a) is to show that it is unreasonable or unnecessary to strictly apply the development standard when the proposed development satisfies the relevant objectives of the standard, notwithstanding its contravention with the development standard (QLEP clause 4.3 *Height of buildings*).

In *Baron*, Preston CJ noted that demonstrating that the development achieves the objectives of the development standard involves:

1. Identification of what the objectives of the development standard are; and
2. establishing that those objectives are, in fact, achieved.

Preston CJ noted that both of the above requirements need to be addressed in a written Clause 4.6 variation request, and that the consent authority must form its own view on whether both of these matters have been adequately addressed.

The objectives of the development standard (LEP clause 4.3 *Height of buildings*), and explanations of how the proposal satisfies these objectives are provided in Table 5.1.

Table 5.1 Objectives of Clause 4.3 – Height of Building

OBJECTIVE	CONSISTENCY
<i>(a) to ensure that the height of buildings complement the streetscape or the historic character of the area in which the buildings are located,</i>	<p>The proposed development, specifically the tower element above the entrance to the retail/commercial centre, is complementary of the future character of Googong and aligns with the expectation of QPRC for Googong Township.</p> <p>The proposed height of building for the tower element complements the streetscape at the main entry to the Googong Town Centre as it functions as a way finder and the focal point for pedestrians in the Googong Town Centre and surrounding area.</p> <p>The proposal is for a greenfield development that is currently vacant of physical structures apart from the nearby lake.</p> <p>Historically a rural area, Googong will maintain its historic character through new development with relatively low heights and density in the area. The proposed development provides for a streetscape character that is consistent with the Masterplan for Googong which maintains views and vistas to the surrounding rural context. The proposed tower element does not adversely affect this setting.</p>
<i>(b) to protect the heritage character of Queanbeyan and the significance of heritage buildings and heritage items,</i>	<p>There are no remaining heritage items on the site. As noted above, the development is sympathetic to the historic rural character of Googong through maintenance of views and vistas.</p>
<i>(c) to nominate heights that will provide a transition in built form between varying land use intensities.</i>	<p>Figure 2. above illustrates that Googong Township contains three rings of building heights with the highest being in the centre associated with land zoned B2 Local Centre. This is where the Googong Town Centre will be located. Lower building heights apply to the surrounding land that is zoned R1 General Residential.</p> <p>The proposed height variation is solely related to the tower element above the entrance to the retail/commercial centre of Googong Town Centre and acts as a focal point by guiding visitors to the main entrance and therefore reinforces the hierarchy of centres and transition in built form from the primary area of the Googong Town Centre to lower density areas.</p>

Compliance is demonstrably unreasonable or unnecessary in some other way.

In accordance with the principle established in *Wehbe* one of the ways to determine whether a Clause 4.6 request for variation has demonstrated the achievement of the matters in QLEP clause 4.6(3)(a) is to show that it is unreasonable or inappropriate to strictly apply the development standard in some other way.

The desired future character of Googong Town Centre is outlined further in the Googong DCP and Googong Master Plan. These documents demonstrate the Googong Town Centre should create **visual interest**, vitality, and variety of spaces. Special attention is to be paid to the **entrances** to the Googong Town Centre (the tower element is above the main ‘entrance’ to the commercial / retail centre that also comprises the main entry to, and focal point of, the whole Googong

Town Centre), the transition with the surrounding residential areas and **visual** and physical links with the broader township (the height variation functions as a way finder for the surrounding area).

The proposed design for the development of Googong Town Centre, including the tower element, is the outcome of the following objectives and desired future character for the Googong Town Centre from the Googong DCP:

- *Create a transition from lower density residential fringes to the mixed-use centres.* The proposed tower element provides a focal point and a wayfinding device and helps establish a transition from the surrounding residential areas to the mixed-use Town Centre.
- *To ensure that the detailed design of the Town Centre is undertaken in a coordinated manner in order to achieve a high-quality urban design outcome.*
- *Building heights will be the highest in the centre of the town and neighbourhood centres and tapering down towards residential areas adjoining.*
- *Special attention is to be paid to the entrances to Town Centre, the transition with the surrounding residential areas, visual and physical links with the broader township, hill tops and Googong Common.*

The proposed non-compliance in building height relates directly to the tower element above the main entrance to the commercial / retail centre of Googong Town Centre. The design of the tower element and the Googong Town Centre align with the objectives and desired future character for the Googong Town Centre DCP in the following ways:

- Utilising height and building form creating a marker to assist with the orientation within the town centre (way finder) and a sense of arrival
- Providing a town centre typology that uses variety of built forms and heights to avoid a homogenous built mass.
- Designing a Googong Town Centre which tapers down towards the surrounding residential areas to the south, east, and west.
- Creating a focal point within the town centre consisting of retail, commercial or community facilities and providing visual interest.
- Relating building height to street widths and functions to promote a comfortable urban scale of development (see Section Drawings in **Section 3.3**).
- Providing a building height that defines streets and open spaces through reinforcing the hierarchy of entrances.
- Maintaining views to surrounding Googong Township features such as Hilltops and Googong Common.
- Ensuring the proposed building height provides adequate solar access to the adjoining public spaces to ensure they are usable and of high quality.

Based on the above criteria, the proposed development is both compliant with the objectives of the Googong DCP and helps to reinforce the desired future character for the Googong Town Centre.

For the above reasons it is reasonable for this proposed development to exceed (by **2.0m**, or **12.5%**) the prescribed maximum height of buildings, as the built form outcome will help reinforce the objectives and desired future character of the Googong Town Centre by creating a transition in height with no adverse amenity or environmental impacts on the surrounding area.

5.2.3 *Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?*

The following section demonstrates that there are sufficient environmental planning grounds to justify contravening QLEP clause 4.6 *Height of buildings*.

In *Initial Action*, Preston CJ observed that, in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd*, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

In this instance, the relevant aspect of the development that relates to the extent of the departure from the *Height of buildings* standard is the 2.0m extra height of the tower element above the main entry to the commercial / retail centre of the town centre as explained in **Section 3** of this variation request. The justification provided for this variation only applies to this particular element of the proposal and not the whole of the proposed development.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the maximum *Height of buildings* control as it applies to the site. These environmental planning grounds are discussed below:

- The variation will promote good design and amenity by providing a wayfinding feature on site without generating any tangible adverse environmental, social or economic impacts on the surrounding context.
- The height variation partially arises from the undulating slope of the site. The site is gently undulating with a slope of 10 metres from the southwestern corner of the Googong Town Centre to the north-eastern corner.
- The height variation does not adversely affect the historical rural character of the site and incorporates the desired future character of Googong.
- The overshadowing diagrams accompanying this application demonstrate there will be no significant impact on any future residential developments as a result of the height variation. Furthermore, the height variation does not result in overshadowing of the public space to the north of the town centre. The tower element will not block views to prominent features of Googong Township including Googong Common as shown in **Section 3.3** and the architectural drawings accompanying the DA package.
- In terms of scale and intensity, the proposed development is designed with human scale in mind. The proposed built form confirms with the Googong Master Plan and desired future uses of the land.
- The SEE provides a detailed assessment of the environmental planning matters related to the proposed development and demonstrates there are sufficient environmental planning grounds to support the proposal.
- Overall, the proposal has undergone a rigorous design process and responds to the constraints of the site through:
 - The provision of appropriate built form which relates to its context and the adjacent planned development.
 - Absorbing the undulating topography of the site with a transitional change in the height of buildings.
 - Mitigating overshadowing and view impacts resulting from the height variation.
- The footprint area of the tower measures approximately 50 Sqm. The GFA of the main commercial / retail building located on proposed Lot 2 measures approximately 6,600 Sqm. As a result, the tower represents approximately **0.76%** of the overall GFA proposed in the Works DA.
- The area to which the QLEP 16m Height of buildings limit applies to approximately 16.5 Ha (165,000 Sqm) of the Googong Town Centre. As a result, the tower represents approximately **0.03%** of the overall area where the 16m building height limitation is set.
- It is fair to conclude that the overall “area” of non-compliance above the 16m height limit is negligible – regardless of whether that is measured across the whole area where the 16m limit applies, or as part of the GFA in the Works DA

Given compliance with all other development standards, alignment with the desired future character of the area (both in terms of built form and land use) and the appropriate mitigation of environmental impacts, there are sufficient planning

grounds to justify the minor (2.0m, or 12.5%) departure from the maximum *Height of buildings* development standard under QLEP clause 4.3.

5.2.4 Objects of the EP&A Act

The judgment of Preston CJ in *Initial Action* provides guidance in determining whether there are ‘sufficient environmental planning grounds’ to justify a variation to development standard. These are:

- Do the grounds for variation relate to the subject matter, scope, and purpose of the EP&A Act?
- Does the ground justify contravention of the development standard?
- Does the written request demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard?

This document demonstrates that there are sufficient environmental planning grounds to justify a contravention of the development standard. In addition, the departure from the QLEP *Height of buildings* control does not stop the proposal from satisfying the objects of the EP&A Act, particularly objects (b), (c), (e), (f) and (g):

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

- The proposal will facilitate an ecologically sustainable development given no negative impacts on economic, environmental, and social considerations will arise from the variation to the QLEP *Height of buildings* control. This is demonstrated in **Section 5.2.2** above and **Section 5.6** below.
- The proposed development will promote the orderly and economic use and development of the land by way of providing a land use consistent with that envisaged by QPRC. This is demonstrated in **Section 5.3** below.
- Given the nature and characteristics of the site the proposed development will not impact on threatened species or ecological communities.
- The proposed development promotes the sustainable management of built and cultural heritage (including Aboriginal cultural heritage) through consistency with the objectives of QLEP clause 4.3 *Height of buildings*. This is discussed in **Sections 5.2.2**.
- The proposed development is of a high-quality design and aesthetically appropriate for the site and surrounding context. The proposed development is considered to appropriately respond to the established and future characteristics of the site.

Based on the above, the consent authority can be satisfied that the proposed development remains consistent with the objectives of the EP&A Act despite the minor breach from the QLEP *Height of buildings* control.

5.3 Clause 4.6 (4)(a)(i) – Has the Written Request adequately Addressed the Matters in Sub-Clause (3)

QLEP clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

The matters under subclause (3) have been comprehensively addressed in this request. The request has provided that there are sufficient environmental planning grounds, including matters specific to the Site and proposal which justify the proposed variation to the development standard.

5.4 Clause 4.6 (4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

As required by QLEP clause 4.6(4)(a)(ii), this section demonstrates that the proposed development will be in the public interest because it is consistent with the objectives of QLEP clause 4.3, *Height of buildings*, and the relevant objectives of the B2 Local Centre zone.

As set out in **Section 5.2** above, the proposed development is consistent with the objectives of QLEP clause 4.3 *Height of buildings*.

A summary of the proposal's consistency with the relevant zone objectives is provided in the table below.

Table 5.2 Objectives of the Zone B2 Local Centre – QLEP

OBJECTIVE	CONSISTENCY
<i>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.</i>	The proposal is for the development of a town centre that provides a mix of different uses including retail, commercial and residential (in future stages of the development). There is a collection of public open spaces which can serve the community who live, work or visit Googong/ Googong Town Centre.
<i>To encourage employment opportunities in accessible locations.</i>	<p>The proposed development creates many employment opportunities during the construction phase and ongoing use of the Googong Town Centre. Employment opportunities will be created by specific land uses in the centre including the service industry, retail, commercial and health services, as well as a proposed pub.</p> <p>Other employment opportunities post construction of the centre include the maintenance, securing and managing of the development into the future. The future employment opportunities will all be accessible through Glenrock Drive which connects the Town Centre with the greater Googong, as well as the opportunities for active transport through the open spaces and interface with the broader community.</p>

OBJECTIVE	CONSISTENCY
<i>To maximise public transport patronage and encourage walking and cycling.</i>	<p>There will be two levels of activity centres in Googong; a Town Centre (this proposal creates a part of the Town Centre) in Neighbourhood 2 and four neighbourhood centres within the other neighbourhoods, all to be readily accessible by public transport.</p> <p>Consultation with QPRC was conducted to confirm that the ultimate bus route for the Township aligns with their servicing strategy. The proposed route and stops were endorsed by QPRC on 29th April 2021 and will be provided adjacent to the Googong Town Centre.</p> <p>Glenrock Drive and Gorman Drive provide opportunities for active transport through the open spaces and interface with the broader community. Glenrock Drive has adequate space for pedestrians and has been designed in a way to reduce vehicular speeds and encourage walking. See the Traffic, Transport, and Parking capacity section of the accompanying SEE.</p>
<i>To encourage some limited high density residential uses to create vitality in town centres.</i>	Residential uses are identified as potential future stages of the Googong Town Centre but do not form part of the Development Application.
<i>To recognise town centres as important retail centres, which support the Queanbeyan central business district.</i>	The Googong Town Centre will form the civic, commercial and cultural heart of the new Googong Township. The Town Centre is to provide for higher order retail and commercial, community and entertainment uses for residents and visitors. It is also to function as the transport node to support the Queanbeyan Central Business District. This DA forms an initial stage of the development of Googong Town Centre to support existing residents and future residents as the Googong Township develops.

As demonstrated in **Clause 4.6** (4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

As required by QLEP clause 4.6(4)(a)(ii), this section demonstrates that the proposed development will be in the public interest because it is consistent with the objectives of QLEP clause 4.3, *Height of buildings*, and the relevant objectives of the B2 Local Centre zone.

As set out in **Section 5.2** above, the proposed development is consistent with the objectives of QLEP clause 4.3 *Height of buildings*.

A summary of the proposal's consistency with the relevant zone objectives is provided in the table below.

Table 5.2, the proposal achieves the objectives of the B2 Local Centre zone. It is also shown in **Section 5.2.2** that how the proposal achieves the objectives of QLEP clause 4.3 *Height of buildings* development standard. According to the parameters of QLEP clause 4.6(4)(a)(ii), the proposal is in the public interest.

5.5 Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the QLEP *Height of buildings* development standard will not raise any matter of significance for state or regional environmental planning.

5.6 Clause 4.6(5)(b) – Is There a Public Benefit of Maintaining the Planning Control Standard?

As demonstrated above, there is no significant public benefit in maintaining the development standard. The proposed variation is consistent with the objectives of the zone and the requirements of the QLEP clause 4.6.

Accordingly, strict compliance with the development standard is considered contrary to the public interest.

5.7 Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no known other or additional matters which are required to be taken into consideration before granting concurrence to this Clause 4.6 Request for variation.

6 Conclusion

This Clause 4.6 Request for variation is made pursuant to QLEP clause 4.6 and satisfies requirements to seek approval for a non-compliance with QLEP clause 4.3 *Height of buildings*.

This Clause 4.6 Request forms part of the 'Works DA' and relates to land within the Googong Town Centre.

The Works DA comprises lands that are part of existing Lot 341 in DP1259563; part of existing Lot 342 in DP1259563; and part of existing Lot 641 in DP1281684 (the Site). Refer Figure 2.1 above.

The Works DA seeks consent for (amongst other things) the physical construction of commercial / retail premises within Googong Town Centre and associated landscaping and public domain works. The proposed physical works include construction of a tower element above the main entry to the commercial / commercial centre which at **18.0m** in height is **2.0m** above the permitted 16m maximum QLEP *Height of buildings* control for the site, resulting in a **12.5%** non-compliance with the development standard across less than **0.03%** of the total surface area of the Googong Town Centre.

For this request to meet the requirements of QLEP clause 4.6(3), it must adequately demonstrate:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

This Clause 4.6 Request for variation has addressed the above requirements by providing the relevant justifications for why a non-compliance with QLEP clause 4.3 *Height of buildings* is acceptable in the circumstances of the case summarised as follows:

1. Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
2. There are sufficient environmental planning grounds to justify the contravention.
3. The proposal achieves the objectives of the development standard and is consistent with the objectives of the B2 Local Centre zone.
4. The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard.

On the basis of the above justification, it is appropriate to exercise the flexibility afforded by QLEP clause 4.6 in the circumstances of this application.

Appendix A

NSW Land and Environment Court: Case
Law



A1 NSW Land and Environment Court: Case Law

There are several key New South Wales Land and Environment Court (NSW LEC) planning principles and NSW LEC judgements which have refined the approach and manner in which variations to development standards are to be justified.

The appropriate approach to the preparation of a variation request under Clause 4.6 has been provided by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 as follows.

[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

*[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

*[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*

*[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].*

*[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].*

*[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].*

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These 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, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. 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: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard

that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice

*[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].*