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WRITTEN REQUEST PROVIDING GROUNDS FOR VARIATION TO HEIGHT DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6 OF SHOALHAVEN LEP 2014

120-122 QUEEN STREET AND 77-83 PRINCESS STREET, BERRY

ALTERATIONS AND ADDITIONS TO THE BERRY HOTEL, EXPANSION OF THE BERRY HOTEL ONTO 122 QUEEN STREET, CONSTRUCTION OF NEW HOTEL ACCOMMODATION, CONSOLIDATION OF 4 LOTS, ASSOCIATED PARKING AND LANDSCAPING, TOGETHER WITH FORMALISATION OF ACCESS AND PARKING ON 77 PRINCESS STREET

Context – Clause 4.6 of Shoalhaven LEP 2014

This written request has been prepared in respect of Clause 4.6 of Shoalhaven LEP 2014 (the LEP) to accompany a Development Application for alterations and additions to the Berry Hotel at 120 Queen Street, Berry, expansion of the Berry Hotel onto 122 Queen Street, construction of new hotel accommodation at 79-83 Princess Street, consolidation of 4 lots, associated parking and landscaping, together with formalisation of access and parking on 77 Princess Street at 120-122 Queen Street and 77-83 Princess Street, Berry.

The Development Application seeks a variation to the development standard contained within Clause 4.3 of the LEP – maximum building height of 8.5m.

The proposed new hotel accommodation building fronting Princess Street reaches a maximum height of 9.3m (from ground level to roof ridge top) (see **Figure 1**, below).

The proposed building represents a variation of 0.8m or 9.4% from the numerical standard in the LEP which is considered minor.

It is noted the Berry Hotel building has an existing maximum height of 10.52m and therefore exceeds the height standard. However, no works are proposed to the existing building that breach the height standard. The proposed works have a maximum height of 6.95m, well within the height standard.

Clause 4.6 of the LEP provides:

(1) The objectives of this clause are as follows:

- (a) to provide **an appropriate degree of flexibility** in applying certain development standards to **particular development**,*
- (b) to achieve **better outcomes** for and from development by allowing **flexibility in particular circumstances**.*

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

- (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.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
- (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) 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, and
 - (b) the concurrence of the Planning Secretary has been obtained.
- (5) 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.

[Our emphasis in **bold**]

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's variation to the height development standard.

It is noted that the NSW Department of Planning and Environment (**DP&E**) provides guidance on how to prepare clause 4.6 variations in the form of *Varying development standards: A Guide* (August 2011). This written request to vary the standard is based on the DP&E's Guide.

This written request has also been prepared having regard to the judgment in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**). At paragraphs 17 – 21 of *Initial Action*, Preston CJ confirmed the findings in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**), regarding the available avenues to establish that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case (in accordance with the test provided by cl 4.6(3)(a) of the LEP) including:

- Establishing that the objectives of the development standard are achieved notwithstanding non-compliance with the standard: (*Initial Action* at [17]);
- Establishing that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary (*Initial Action* at [19]);
- Establishing that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: (*Initial Action* at [19]); and
- Establishing 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 is unnecessary and unreasonable: (*Initial Action* at [20]).

Further, Preston CJ found in *Initial Action*, at paragraphs 87 and 88, in the context of Clauses 4.6(3)(a) and (b) 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...

...The requirement in Clause 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 have a better environmental planning outcome than a development that complies with the development standard...**”

[Our emphasis in **bold**].

Written Request

As stated above, and as set out in the Statement of Environmental Effects dated September 2023 (the SEE), when measured in accordance with the definition in the LEP, the proposed hotel accommodation building has a maximum height of 9.3m (from ground level to roof ridge) (see **Figure 1**).



Figure 1: Extract from E-W Section showing Building Height (8.5m height line shown red dashed)
Source: H&E Architects

The proposed works therefore exceed the 8.5m standard by up to 800mm.

As shown in **Figure 1** above, the eastern end of the proposed building complies with the maximum building height standard.

The questions set out in the DP&E's Guide are addressed below.

1. **What is the name of the environmental planning instrument that applies to the land?**

Shoalhaven Local Environmental Plan 2014 (the LEP).

2. **What is the zoning of the land?**

The zoning of the land on which the proposed hotel accommodation building is located is E1 Local Centre.

3. What are the objectives of the zone?

The objectives of the E1 zone are:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To ensure that development is of a scale that is compatible with the character of the surrounding residential environment.*

4. What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

5. Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the LEP.

6. What are the objectives of the development standard?

The objectives of clause 4.3 are:

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) *to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.*

7. What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the development standard in the LEP is 8.5m.

8. What is the proposed numeric value of the development standard in your development application?

The maximum numeric value of the proposed variation from the development standard arising from the works proposed in the development application is 9.3m.

9. What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation at its highest point above existing ground level is 9.4%.

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In the circumstances of the case, it is considered that strict compliance with the height of buildings development standard applicable to the site is unreasonable and unnecessary for the following reasons:

A. The objectives of the development standard are achieved notwithstanding non-compliance with the standard (cl 4.6(3)(a), cl 4.6(4)(ii) and *Initial Action* at [17])

Objective 4.3(1)(a) - to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality

Assessment:

The proposed development is located within the Berry Town Centre for the purposes of Council's controls. There are no "desired future character" controls for the town centre.

For the purposes of the above objective, the desired future character of the locality is taken to be expressed through the area specific objectives and controls for the Berry Town Centre, contained in Chapter N2 of Shoalhaven DCP 2014.

The purpose of Chapter N2 is "*to reinforce the role of Berry as a service centre and to ensure that development in Berry Town Centre is compatible with the historic character of Berry*". The objectives of the Chapter are to:

- i. *Maintain the economic viability of the town centre.*
- ii. *Ensure that new development is complementary to, and respects, the heritage characteristics of the town.*
- iii. *Retain the visual importance and setting of heritage items and conservation areas.*
- iv. *Identify efficient traffic route within the centre and into and out of the centre.*
- v. *Identify safe, accessible and efficient paths for pedestrians.*
- vi. *Identify opportunities for providing additional car parking facilities.*
- vii. *Provide guidelines for street improvements.*
- viii. *Ensure that the parks and open space that contribute character are maintained.*
- ix. *Provide for outdoor dining, sitting and viewing in active and safe public spaces.*
- x. *Provide for commercial uses on the properties facing Queen Street and residential uses on properties facing Princess Street.*
- xi. *Encourage development which is of a suitable bulk and scale to adjoining development.*
- xii. *Encourage residential development in commercial areas through the construction of new mixed use commercial/residential developments.*

The provisions on the Chapter are accompanied by controls illustrated on the supporting map.

The proposed development, including the height variation, is considered to be an appropriate response to the character and built form of surrounding development, the heritage significance of the town centre and Council's objectives for the Berry Town Centre.

The proposed hotel accommodation building, including the height variation, is a well-designed contemporary building which will make a positive contribution to the character and streetscape of Princess Street and the town centre generally. In this regard, it is noted

that the parcels fronting Princess Street forming part of the site are zoned E1 Local Centre under the LEP. While Council's controls encourage residential development on parcels fronting Princess Street, such uses are limited under the E1 zoning applicable to the site. The proposed hotel accommodation is considered to be a use that is complementary to residential development and provides a buffer between commercial/retail uses and residential uses.



Figure 2: Proposed Princess Street Elevation

Source: H&E Architects

The proposed accommodation building, including the height variation, presents to Princess Street as a two storey building with rooms in the roof over the western part stepping up from two storeys at the eastern end (see **Figure 2**). The built form is further modulated by the indented entry, reinforced by the proposed façade detailing and materials. The use of the mansard roof form over the western end moderates the bulk and scale, together with the façade design and articulation, use of materials and fenestration (see **Figure 3**).



Figure 3: Proposed Princess Street Photomontage

Source: H&E Architects

The height of the proposed hotel accommodation building, including the height variation, is compatible with surrounding existing development, including the recent two storey residential development to the west of the site at 75 Princess Street and the Berry Hotel itself, directly to the north (see **Figure 2**). The height of the proposed building is subservient to the Berry Hotel.

At the same time, the height of the proposed accommodation building steps down to the east to provide a transition to the single storey dwelling houses (facing Prince Alfred Street) to the east. The proposed building has a height of 6.9m at its eastern end, well within the height standard.

The bulk and scale of the proposed accommodation building, including the height variation, is also moderated by the landscaping proposed to the Princess Street frontage with tree plantings within front courtyards which will moderate and screen the height of the building and landscaping across the frontage which is responsive to a residential context. The design and layout of the front setback, with ground level courtyards facing the street is complementary to a residential context.

The proposed development, including the height variation, is also responsive to the heritage context and character of the site. The site (excluding the parcels on the Princess Street frontage) contains two heritage items and is within the Queen Street heritage conservation area. The site also adjoins and is in the vicinity of other heritage items. As set out in the submitted HIS (see Annexure 3 to the SEE):

The house at 81-83 is to be replaced with a three storey building is set to the central section of the site and to the current drive with an inset entry lobby to the east with staff and plant areas off.

The building is in face brick with a mansard, metal roof with dormers and a parapet to the two storey section to the east. The front garden walls are in perforated brick and timber.

Princess Street is more domestic in scale and detail than Queen Street though there is a two storey, commercial premise at the corner of Prince Alfred Street and Princess Street and the St Luke's Anglican Church complex is opposite.

The proposed development is higher than the buildings close to though lower than that Hotel parapets) but has a two storey form to the east adjoining the cottage to Prince Alfred Street with a three storey form to the west that is slightly higher than the modern development to the west.

Parking is provided below ground with an access ramp to the north from the car park.

The development will provide destination accommodation for visitors to allow longer stays than the short stop-overs common for those leaving the recently completed bypass.

The new building is brick to the lower facades with a mansard, metal roof to the three storey section to provide for rooms in the roof and limit the overall scale and provide articulation.

The building has gardens to Princess Street with perforated brick walls, plantings and palisade style, timber fences to provide privacy to the ground floor rooms. The detail here has been changed from higher brick walls to reflect previous comments to provide a more relaxed frontage to the street (pp. 58-9).

...

Overall, we consider that the proposals are a very well-considered approach to improving the amenity of the Hotel and providing accommodation and are designed to minimise the impact of the development on a place of some significance with well-planned changes and sympathetic additions.

The works involve limited alteration to original layouts and fabric and the proposals will maintain both layers of character evident in the Hotel.

The new accommodation building is sensibly sited, well scaled and detailed and is in appropriate materials and will have a limited and acceptable impact on the heritage components close to the site.

The works will considerably improve the amenity of the Hotel while retaining its most significant aspects. We consider that the development will have a very limited and acceptable impact on the heritage significance of the place, the surrounding conservation area and the heritage items in the vicinity.

The proposals are also in line with the heritage objectives and controls of the SLEP and SDCP (p. 68).

The proposed development, including the height variation, is considered to be consistent with the existing and desired future character of the locality as expressed through the aims and objectives of Chapter N2 of the DCP. It meets the purpose of the Chapter in that it will reinforce the role of Berry as a service centre and will be compatible with the historic character of Berry.

In addition, it is consistent with the relevant objectives of the Chapter, in that it:

- will maintain and enhance the economic viability of the town centre;
- provides for new development that is complementary to, and respects, the heritage characteristics of the town;
- retains the visual importance and setting of heritage items and conservation areas (see above and Annexure 3 to the SEE);
- provides for safe, accessible and efficient paths for pedestrians through and around the site;
- provides car parking facilities on the site consistent with the opportunities identified in the Chapter;
- provides for outdoor dining, sitting and viewing on the Queen Street frontage, contributing to active and safe public spaces;
- provides for commercial use facing Queen Street and a use compatible with residential use and permissible in the E1 zone facing Princess Street; and
- provides for development of a suitable bulk and scale to adjoining development, as detailed above.

Accordingly, the proposed development, including the height variation is compatible with the height, bulk and scale of the existing and desired future character of the town centre locality.

Objective 4.3(1)(b) - to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development

Assessment:

Visual Impact and Views

As discussed above, the proposed development, including the proposed height variation, will not result in significant adverse visual impact on the streetscape of Princess Street or on surrounding existing development. The siting and form of the proposed building, including the height variation, is responsive to the existing surrounding development, including commercial and residential buildings. It has an apparent height of two storeys in the streetscape consistent with other surrounding development with the upper level of accommodation being contained within the roof form. At the same time, the built form steps down to the east to provide an appropriate transition to the neighbouring single storey dwelling houses fronting Prince Albert Street to the east. The built form is further modulated by the indented entry, reinforced by the proposed façade detailing and materials. Landscaped front gardens/courtyards address the street front in a manner complementary to the residential setting.

The proposed development, including the height variation, will not have any adverse impact on views. The subject site and surrounding area is relatively flat.

Privacy

The proposed height variation has been designed to provide for appropriate levels of privacy between the proposal and surrounding development. The proposed height variation only affects the very upper part of the upper level of the proposed accommodation building (see **Figure 1**, above) and would not give rise to any additional vantage points for potential overlooking and loss of privacy compared with a compliant building.

The proposed accommodation building, including the proposed height variation, has been designed to provide an outlook over Princess Street to the south and the central car park to the north. There are no windows to accommodation rooms facing any boundaries with neighbouring residential properties. Windows to the common corridors facing the side boundaries will be in translucent glass to prevent overlooking.

Potential for overlooking from the proposed rooftop swimming pool and terrace, which it is noted, complies with the height standard, is addressed in the proposed design through the setback from the eastern façade and proposed landscaping around the pool (see **Figure 4**). These features will prevent visitors from accessing the eastern end of the roof and overlooking the neighbouring properties.

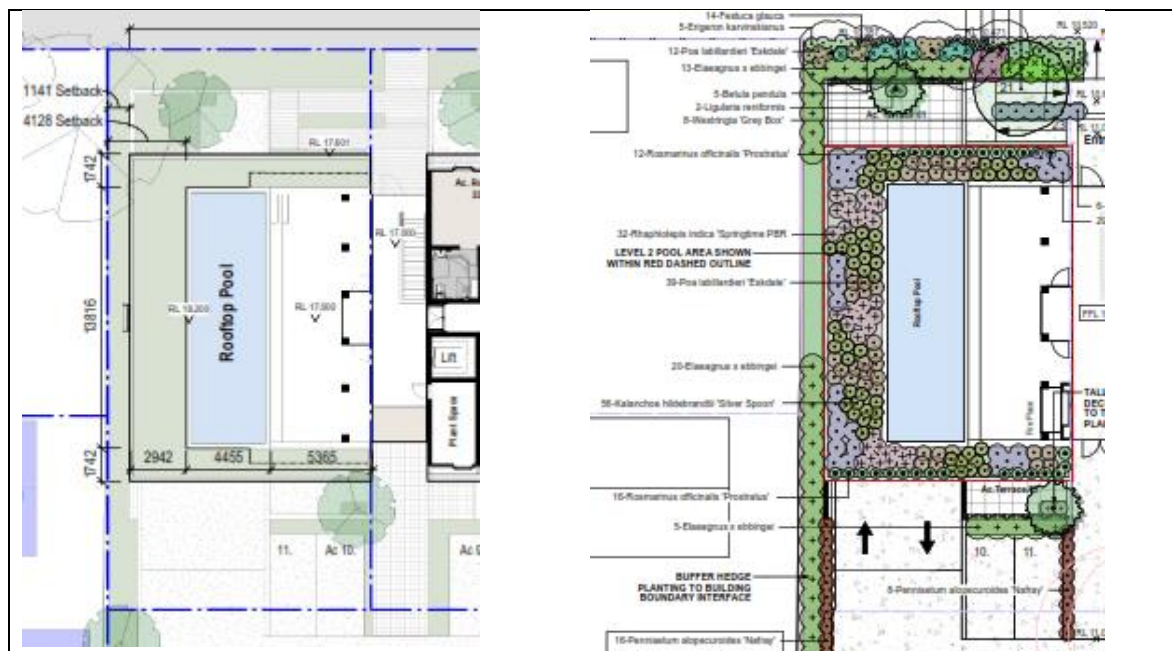


Figure 4: Rooftop Pool/Terrace and Landscaping

Source: H&E Architects; Site Design + Studios

Overshadowing

The shadow diagrams submitted with the application demonstrate that the proposed development, including the height variation, will not result in significant additional overshadowing to neighbouring properties (see **Figure 5** and Annexure 5 to the SEE).

The shadow diagrams show that, at midwinter, additional overshadowing during the morning and at noon will primarily fall over Princess Street and the adjoining Council car park.

The proposal will result in additional overshadowing of the rear garden of the dwelling house at 21 Prince Albert Street during the afternoon. However, solar access to that property during the morning and noon is not affected. In addition, the part of the building resulting

in overshadowing of the neighbouring property, being the eastern end of the proposed building, complies with the height standard with a height of 6.9m.

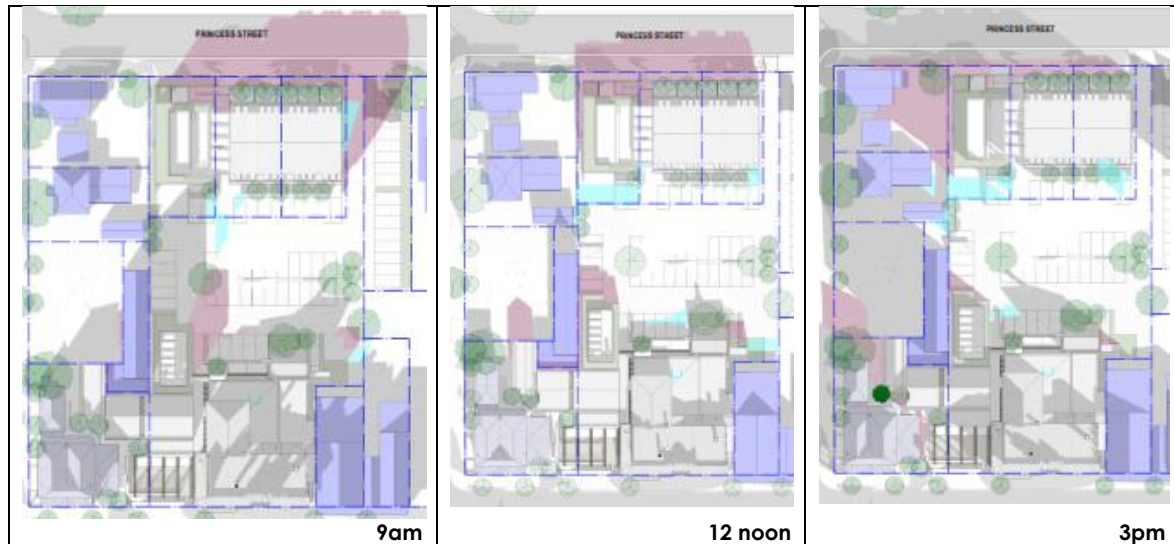


Figure 19: Shadow Diagrams – Midwinter (additional shadow shown pink)
Source: H&E Architects

Accordingly, the proposed height variation minimises visual impact, disruption of views, loss of privacy and loss of solar access to existing development.

Objective 4.3(1)(c) - to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance

Assessment:

As set out above, the assessment of the proposed development undertaken in the submitted HIS (see above and Annexure 3 to the SEE) demonstrates that the height of the proposed hotel accommodation building, including the height variation, respects the heritage significance of heritage items on the site and in the vicinity.

It is noted that the proposed hotel accommodation building, including the height variation, is not within a the heritage conservation area. Nevertheless, the HIS concludes that the impact of the proposed development is satisfactory (see above and Annexure 3 to the SEE).

B. Consistency with the objectives of the E1 Local Centre zone (cl 4.6(4)(a)(ii))

Assessment:

As well as achieving the applicable objectives of clause 4.3 as demonstrated above, the proposal, including the height variation, is also in the public interest as it is consistent with the relevant objectives of the E1 Local Centre zone in that it:

- Relates to an existing and well-established use which contributes to the range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area and seeks to upgrade and expand that use;
- Provides for investment in local commercial development that generates employment opportunities and economic growth;
- Provides for non-residential land uses on the ground floor of buildings; and
- Is of a scale that is compatible with the character of the surrounding residential environment.

It is therefore considered that the proposed height of buildings variation does not compromise the ability of the Development Application to satisfy the relevant E1 Local Centre zone objectives. The Development Application must therefore be considered to be in the public interest.

11. How would strict compliance hinder the attainment of the objects specified in Section 1.3(a) and (c) of the Act?

Compliance with the relevant height standard would hinder the attainment of the objects of section 1.3(a) and (c) of the Act, which are to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources, in addition to promoting and coordinating orderly and economic use and development of land.

The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The development as proposed, including the height variation, is consistent with the provisions of orderly and economic development as it provides for the redevelopment of the site in a manner which responds appropriately to existing surrounding development, the heritage significance of the site and surrounding area and which is compatible with the character of the streetscape and the wider town centre.

In this regard, the proposal also meets the object of the Act with respect to good design and amenity of the built environment.

12. Is the development standard a performance based control? Give Details.

The building height development standard is a performance based control as the control contains objectives to which compliance with the standard is targeted to achieve.

13. Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

This matter is addressed in detail above in the answer to Question 10. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development. The proposed development, including the height variation, achieves the objectives of clause 4.6(1) of the LEP despite the non-compliance, in circumstances where:

- the proposed development, including the height variation, is compatible with the desired future character of the area in terms of height, bulk and scale;
- the proposed development, including the height variation, minimises the visual impact of the building,
- the proposed development, including the height variation, will not adversely affect public and private views,
- the proposed development, including the height variation, minimises loss of privacy to existing development,
- the proposed development, including the height variation, minimises loss of solar access to existing development,
- the proposed development, including the height variation, respects heritage significance, including heritage items and the adjoining heritage conservation area.

The development, including the height variation, is consistent with the provisions of orderly and economic development and good design and amenity of the built environment.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details. (cl 4.6(3)(b) and *Initial Action* at [24])

There are sufficient environmental planning grounds to support the variation to the height of buildings development standard applicable to the site, being:

- the proposed height variation is minor and confined to the western end of the accommodation building relating to the upper part of the ceiling/roof of the proposed Attic level;
- the eastern end of the building complies with the height standard, being well within the permitted maximum;
- the height and form of the proposed development, including the height variation, is compatible with and complements existing development in the streetscape of Princess Street and will not result in adverse visual impacts. It is compatible with the height of the recent two storey residential development to the west at 75 Princess Street and effects an appropriate transition to the single storey dwelling house (facing Prince Alfred Street) to the east;
- the height of the proposed development is compatible with and subservient to the height of existing development on the site, being below the height of the existing Berry Hotel;
- the proposed development, including the height variation, is compatible with the desired future character of the town centre in terms of height, bulk and scale;
- the proposed development, including the height variation, is an appropriate response to the heritage significance of the town centre, including the heritage items on the site and in the vicinity and the adjoining heritage conservation area as detailed in the submitted HIS (see Annexure 3 to the SEE);
- the height variation will not give rise to significant adverse amenity impacts on surrounding development in terms of overshadowing, loss of privacy or loss of views; and
- the proposed development, including the height variation, achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.

The above factors confirm that there are sufficient environmental planning grounds to justify the variation and that the Clause 4.6 variation request is well-founded.

Summary

Accordingly, there are more than sufficient environmental planning grounds to justify the variation of the height standard on the basis that compliance with the standard would be unreasonable and unnecessary in the circumstances of this particular case. As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the height standard and the objectives of the E1 zone.

In the context of the other requirements of Clause 4.6, no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

The proposal also meets the objects of the EP&A Act 1979 with respect to good design and amenity of the built environment and will contribute to a better environment by providing a built form which is compatible with the scale and character of the existing streetscape,

by minimising external amenity impacts and complements the character and heritage significance of the town centre.

This request is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case.

Despite the proposal's non-compliance with the height development standard, the proposed development is considered to meet the objectives of the standard and the objectives of the E1 zone.