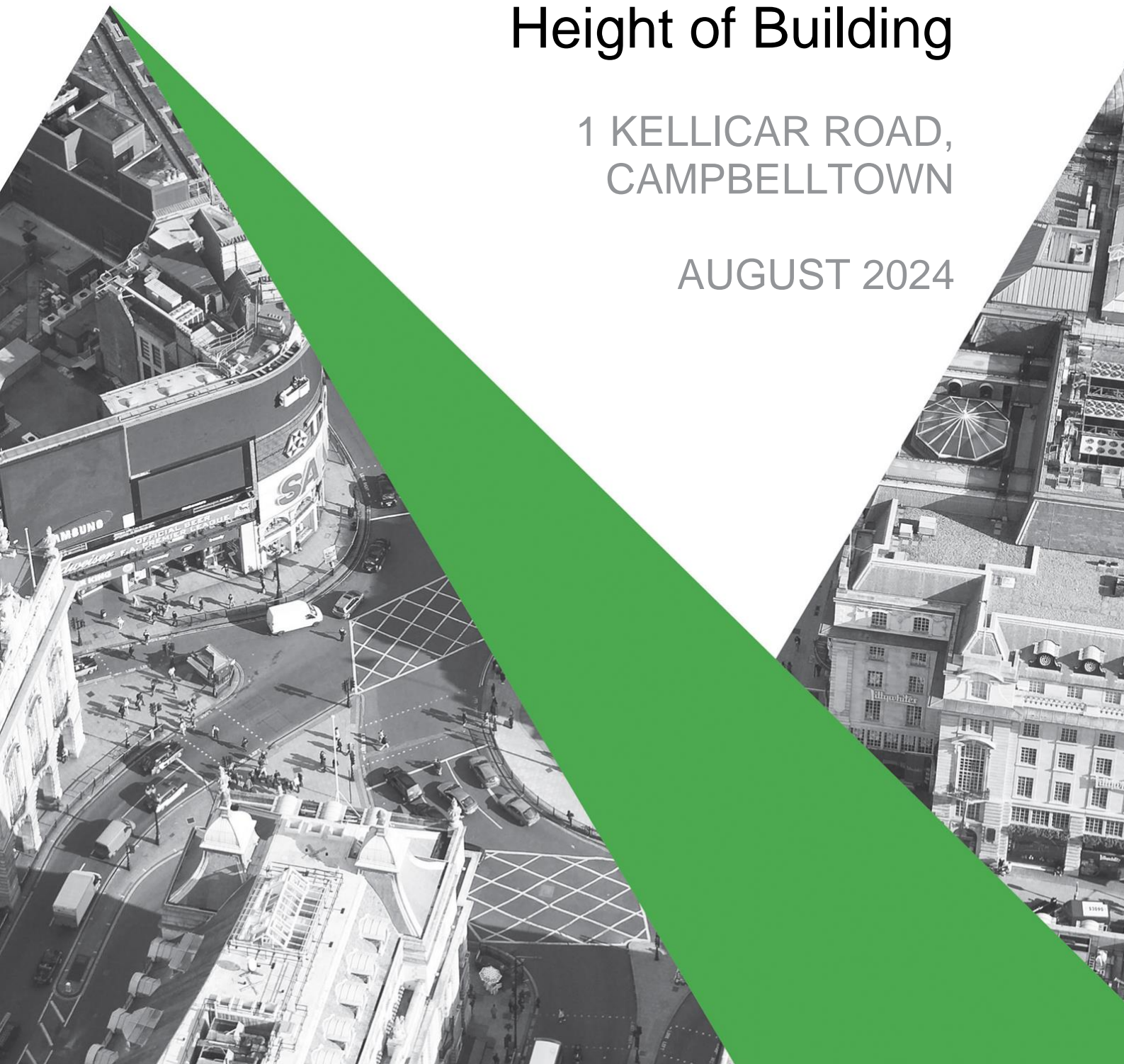


Clause 4.6 Variation

Height of Building

1 KELLICAR ROAD,
CAMPBELLTOWN

AUGUST 2024



CONTENTS

CLAUSE 4.6 DEPARTURE – HEIGHT	3
BACKGROUND	3
DEVELOPMENT STANDARD TO BE VARIED	5
EXTENT OF VARIATION	6
RELEVANT CASE LAW	7
THE DESIGN RESPONSE	8
ADDRESS OF CLAUSE 4.6 PROVISIONS	10
CLAUSE 4.6(3): COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE	11
CLAUSE 4.6(4)(A)(ii): CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE AND THE PUBLIC INTEREST	15
CONCURRENCE OF THE SECRETARY	17
CONCLUSION	17

CLAUSE 4.6 DEPARTURE – HEIGHT

BACKGROUND

This variation statement has been prepared in accordance with Clause 4.6 of the Campbelltown Local Environmental Plan 2015 to accompany a development application to undertake demolition, tree removal, excavation, erection of a mixed use building, and strata subdivision of a staged Mixed Use Development at 1 Kellicar Road Campbelltown.

A detailed description of the development is provided within the submitted Statement of Environmental Effects prepared by Think Planners.

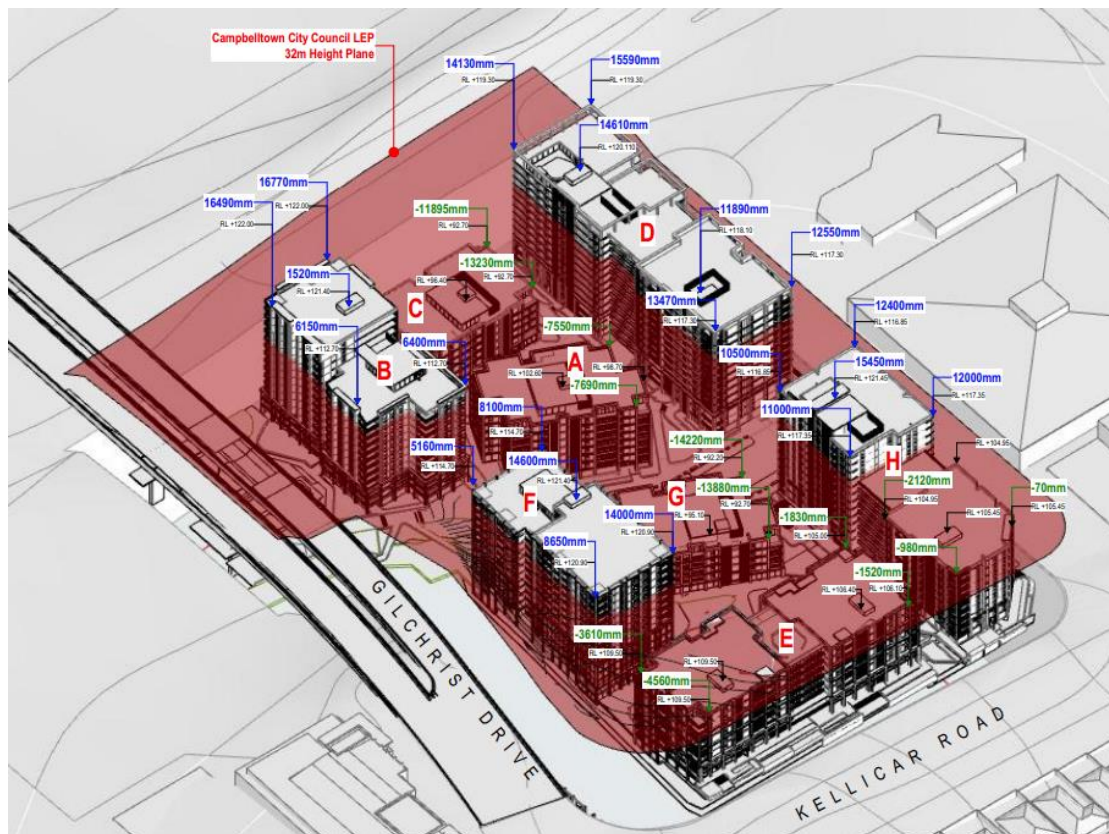
This variation statement relates to the maximum building height of 32m applicable to the site.

Campbelltown LEP 2015 Clause 4.3 – Height of Buildings and relevant map stipulates that the height of a building is 32m on the subject site.

The proposal has been the subject of discussions with Council's Design Excellence Panel and the variation to the built form is an appropriate urban design response to the site, particularly noting that the yield of the development is not increased by the height departure and the variation is predominantly driven by a response to site topography and to provide a superior urban design and amenity outcome through height variation, than if complying with the height control across all buildings across the site.

The application submitted to Council includes buildings below the height control (up to 14.22m lower) and above the height control (up to 16.77m higher), as illustrated in the height plane plan overleaf.

The maximum variation sought for the encroachment at the north west corner of the site is 51.5%, being a maximum height of 48.77m, against the control of 32m (+16.77m).



DEVELOPMENT STANDARD TO BE VARIED

Clause 4.3 of the Campbelltown Local Environmental Plan 2015 states:

4.3 Height of buildings

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

(a) to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,

(b) to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to employment centres and transport facilities,

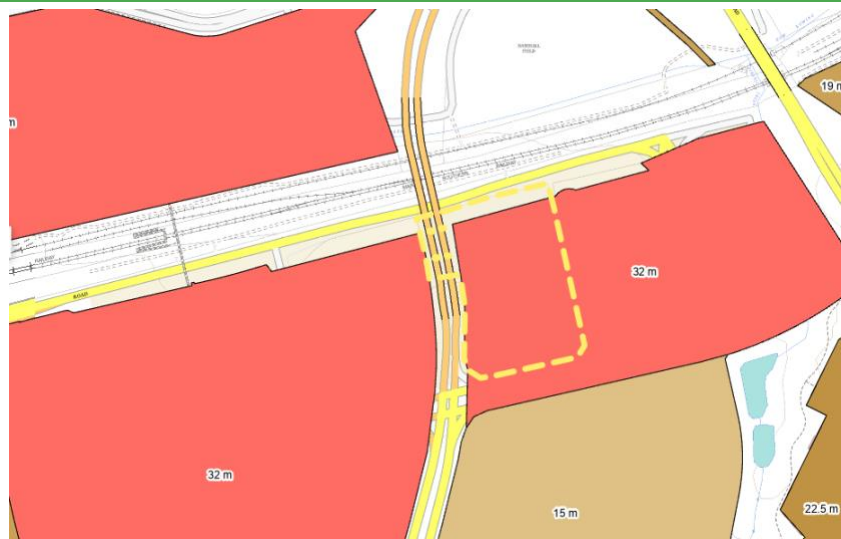
(c) to provide for built form that is compatible with the hierarchy and role of centres,

(d) to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.

(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.*

The relevant height control for the subject site and broader locality ss demonstrated by Figure 1 below.

Figure 1: Height of Building Map Sheet (Source: NSW Planning Portal Spatial Viewer)



 **Subject Site**

EXTENT OF VARIATION

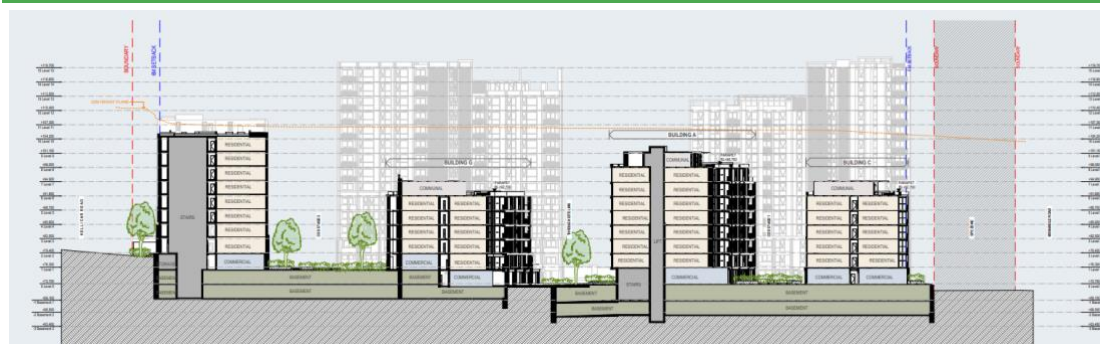
The development incorporates two stages and contains a total of eight (8) buildings. Four (4) of the eight (8) buildings vary the 32m height control. The compliance and noncompliance for each building is outlined in the table below:

Building	No of storeys	Max Parapet Height	Extent of variation	Lift Overrun or stair height	Extent of variation
A	8	24.31m	-24%	<32m	
B	15	48.77m	52%	47.2m	47%
C	6	18.77m	-41%	<32m	
D	14	47.59m	48%	46.9m	46%
E	11	27.44m	-14%	<32m	
F	15	46m	43%	46.6m	45%
G	6	17.78m	-44%	<32m	
H	14	44.4m	38%	47.45m	48%

Figure 2: Elevation Extract along the internal site link



Figure 3: Section Plan through Buildings C, A, G & E



RELEVANT CASE LAW

There are a number of relevant Land and Environmental cases that assist with preparing a clause 4.6 objection including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition, a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure.

In particular a judgement in *Ricola Pty v Woollahra Municipal Council [2021] NSWLEC 1047* emphasised whether the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance, which in this case is against the height standards. This is closely linked to the establishment of sufficient environmental planning grounds to justify the contravention.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.

- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the key points to be established are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating that the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance.
- Demonstrating consistency with the MU1 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

THE DESIGN RESPONSE

Having regard to the location and scale of the development permitted by the planning controls, the applicant held two separate consultations with the Campbelltown Design Excellence Panel, on 21 April 2023 and 30 June 2023.

The Panel noted the projects scale and its place making endeavour. The Panel noted at the April meeting the need to investigate built form arrangements, modelling and overshadowing impacts to provide opportunities for integration with the surroundings and to inform the mix of uses, streetscapes, bulk and scale. The Panel also noted that variation in height would assist with improved solar access outcomes.

Subsequently at the June meeting the Panel noted:

The panel is particularly concerned about the solar access to communal open spaces on each side of the site. Solar penetration appears minimal due to self-shadowing created by the building placement. The options testing should include greater variation in building heights to achieve better solar outcomes.

The Panels commentary and notes confirm that the crude adoption of built form that complies with the height control and relevant ADG separation distances of buildings would not result in a place making outcome that would provide good amenity, due to shadow impacts, nor would assist in creating a sense of place.

As a result, the architects have prepared a scheme that provides a superior outcome with respect to place making and amenity, notwithstanding the variation to the height control.

Merits, infrastructure and community benefits

The key benefits of the current proposal include:

- The creation of a new public through site link, incorporating passive and active recreational spaces and landscaping that will enhance community and resident outcomes and deliver new opportunities for additional landscaping and through site permeability.
- Creation of a rationalised approach and response to the topography of the land that slopes down to the north, and ensure that built form appropriately addresses the streets at the edges of the site, while also creating a sense of place within the site.
- Providing space on the ground plane for communal open spaces, arising from intentional placement of buildings, that lead to buildings framing two large communal open space areas; each of which introduce landscaped communal areas and provide a sense of place for the community on site.
- Allocation of height appropriately across the site. In particular, all buildings fronting Kellicar Road are designed to be below the height plane of 32m, thereby providing an intentional reduction in bulk and scale to this established street, which is fronted by lower density housing on the southern side of Kellicar Road. To preserve amenity through the centre of the site, buildings C, A, G & E are below the permitted height. The 4 buildings below the height control are matched by 4 buildings that exceed the height control at the edges and lower part of the site. Buildings D & H include roof top open space in these zones, thereby providing for each stage an elevated space that will enjoy broader locality views and recreational space. The allocation of height across the site results in a superior outcome than a series of buildings designed to the 32m height control and simple obeisance of the ADG separation guidelines.
- The proposed design that has been prepared for the site and accompanies this DA submission is consistent with the density planned for the site, yet the variation to the height of building control will deliver a more appropriate design led response that will facilitate the introduction of increased open space opportunities, provide a through site link, and responds to the scale of development across Kellicar Road, the Gilchrist Drive overpass, and anticipated in the vicinity. An alternative and complying design response would not deliver the positive design and community outcome proposed with this application.

ADDRESS OF CLAUSE 4.6 PROVISIONS

A detailed discussion against the relevant provision of Clause 4.6 is provided below.

Clause 4.6 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

(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 Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 standards, and*
- (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Each of these provisions are addressed individually.

CLAUSE 4.6(3): COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

In *Wehbe v Pittwater* [2007] NSWLEC 827 (**'Wehbe'**), Preston CJ identified a variety of ways in which it could be demonstrated that compliance with a development standard is unreasonable or unnecessary in the case. This list is not exhaustive. It states, inter alia:

"An objective under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish the compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

While *Wehbe* relates to objection made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

The judgement goes on to state that:

"The rationale 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 objectives 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)."

Preston CJ in the judgement then expressed the view that there are at least 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number one and two for the purposes of this Clause 4.6 variation [our underline]):

- The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- The underlying objectives or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 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;

- *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is sufficient to demonstrate **only one** of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

The objectives of the standard are to be achieved notwithstanding non-compliance with the standard.

This Clause 4.6 variation statement establishes that compliance with the maximum building height development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objectives of the standard are achieved despite the non-compliance with the numerical standard.

The objectives of Clause 4.3(2) Height of Buildings pursuant to the Campbelltown Local Environmental Plan 2015 are responded to as follows:

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

(a) to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,

(b) to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to employment centres and transport facilities,

(c) to provide for built form that is compatible with the hierarchy and role of centres,

(d) to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.

The proposal, despite the numerical non-compliance identified, is consistent with the objectives of cl. 4.3 – Height of Buildings of LEP 2010. Each objective is considered below and within the following pages.

- **Objective (a):** The site is located between land zoned MU1, Railway Corridor and R4 High Density. The height distribution of the proposal responds to the range of building heights and built form and land use intensity of the adjacent

zones. The proposal meaningfully reduces the height of buildings at the southern edge of the site, which is directly opposite the R4 land that has a height control of 15m. Whereas the proposed height breaches are located at the edges of the site where there is a similar height control as the subject site, and the maximum breach occurs to the north of the site, opposite an area that does not have a height control in the LEP. The proposal directly responds to the objective of built form transition in response to zones.

- The development is consistent with the MU1 zone objectives that aim to provide a high density residential development on the site.
- The development contains a range of building heights, that generates visual interest; protects amenity; and creates pockets of open space, all of which contribute to place making and delivery of amenity for residents, visitors, and passers-by.
- The density of the proposal is not increased by the proposed height departures. A development that strictly complied with the height control would achieve the same yield however would not deliver the superior urban design outcomes of this scheme.
- **Objective (b):**
- As discussed above, the height of buildings reflect the scale of development intended for the site, and in particular responds to the locality. The MU1 zoned land will be developed for mixed use high density development, reflecting the location proximate to Macarthur Railway Station and Macarthur Square Shopping Centre.
- The height of buildings on the site responds to adjoining zones, with the breaking of the height control oriented towards the nearby nodes (retail and transport) and the railway corridor where there is no height control. Equally the height of buildings reflect the scale of development to the south, by reducing that proposed form to below the height control of 32m and referencing the lower height of 15m to the south.
- The site is large and the impacts arising from overshadowing, visual impact and loss of privacy have been acknowledged as part of the building and site design process and have no significant impact on adjoining properties or open space areas with the extent of overshadowing considered to be well reasoned and acceptable.

- The overall height of the development presents as a compatible form of development given the anticipated high density residential development of this precinct.
- The proposal provides an appropriate building form that is consistent with the desired future character of the locality and is reflective of the objectives for the zone and locality generally- noting the sloping topography and the alternative built form that delivers additional open space, public through site link, and passive and active recreation spaces, are the key drivers of the height variation rather than a desired to achieve greater yield on the site.
- **Objective (c) -**
 - The proposed variation to the height control is consistent with the objective of ensuring that built form is compatible with the hierarchy and role of centres. As discussed above, the allocation of the height across the site not only seeks to create amenity and contribute to place making, it is also located toward the MU1 zoned land and the railway corridor. This effectively reinforces the hierarchy and role of the centre in a visual manner. While the height reduction to the south, responds to the residential area south of the site.
- **Objective (d) –**
 - The additional height does not generate any additional adverse amenity impacts given the form and layout of the proposed design and its sensitive integration with surrounding land uses.
 - The proposal has been carefully designed to ensure that no adverse visual or acoustic amenity impacts will be created by the proposed building height along site boundaries as the upper levels are located in the most appropriate areas of the site in relation to surrounding land uses and topography.
 - The proposal has been designed to ensure that privacy impacts are mitigated against, and that the proposal does not have any impact on view corridors.
 - Given the sites orientation, and the nature of the height departure the additional height will not have any additional adverse overshadowing impacts on nearby developments.
 - The proposal will sit comfortably in the streetscape relative to the desired future character of the locality and adjoining land uses and zones.
 - The proposal will not unacceptably impact on views enjoyed from the public domain or adjoining properties.

As outlined above, the proposal remains consistent with the underlying objectives of the planning control and as such compliance is considered unnecessary or unreasonable.

CLAUSE 4.6(4)(A)(ii): CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE AND THE PUBLIC INTEREST

Clause 4.6(3)(b) of the Campbelltown Local Environmental Plan 2015 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening.

As the provisions of Clause 4.6(4)(ii) requires, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard and
2. the objectives for development within the zone in which the development is proposed to be carried out.

In respect of the first matter, it has already been established above that the proposal achieves the objectives of the maximum building height development standard, or alternatively that the underlying objective or purpose of the standard is not relevant to the development and/or that the underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.

In respect of the second matter, the objectives of the zoning of the site are as follows:

Zone MU1 Mixed Use

1 Objectives of zone

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To encourage the timely renewal and revitalisation of centres that are undergoing growth or change.*

- *To provide a focal point for commercial investment, employment opportunities and centre-based living..*

The proposal is consistent with the objectives of the MU1 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*).

The development is otherwise consistent with both zone objectives noting that:

- It provides a mix of uses across the site, encouraging diversity within the site, including retail, commercial, residential, open space, and public through site pedestrian movement. The retail and commercial areas are located across the ground floor plane, consistent with the desire for employment opportunities on site, and the relevant provision of the LEP.
- It provides for the housing needs of the community within a high density residential setting.
- The proposed built form addresses the public streets and creates a new pedestrian through site link that all contribute to diverse and active street frontages that will attract pedestrian traffic, and contribute to place making in the CBD.
- The proposal is cognisant of the sites relationship to adjoining zones, employing built form, bulk and scale variations that respond to the character and nature of adjoining land. In particular the height is modulated across the site in a way that responds to adjoining landuses and adjoining zones.
- The subject site previously housed a Bunnings, which is no longer operational on the site. Temporary uses are currently being undertaken within the former Bunnings building. The site is in need of renewal and revitalisation, to ensure that it contributes to the broader precinct and centre. The application is entirely consistent with this objective of the zone, as it comprises direct renewal and revitalisation of this key site within the centre, which is undergoing growth and change, consistent with the vision for Campbelltown and Macarthur.
- The development will provide employment opportunities in an accessible location.
- The project is a focused investment into the CBD, that will provide ongoing opportunity for commercial investment, employment opportunities and centre-based living.

For those reasons, the consent authority would be satisfied the development is in the public interest.

CONCURRENCE OF THE SECRETARY

Subclause 4.6(4)(b) of the Campbelltown Local Environmental Plan 2015 requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard.

The points in Clause 4.6 (5) are responded to as follows:

- The contravention of the maximum building height development standard does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal.
- There is no public benefit in maintaining the maximum building height development standard as it relates to the current proposal. The proposed variation is acceptable in the circumstances given the underlying objectives of the control are achieved as well as the underlying zone objectives of the zone and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

CONCLUSION

For the reason set out above, the Applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of Clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objectives of the MU1 zone.

The variation is well founded and should be upheld.