

## Appendix A – Clause 4.6 Exceptions to development standards written request – Height of Buildings

Development of the land, including a twelve (12) lot residential subdivision, civil and creek line works and construction of integrated residential development including two (2) residential flat buildings containing thirty-four (34) apartments



43 Warriewood Road Warriewood – Lot 2, DP 972209

45 Warriewood Road Warriewood – Lot 2, DP 349085

49 Warriewood Road Warriewood – Lot 1, DP 349085

Prepared for: Archidrome

Project No: D221

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## Clause 4.6 Written Request to Vary a Development Standard

### Pittwater Local Environmental Plan 2014

<b>Applicant's name</b>	Archidrome C/O Creative Planning Solutions Pty Limited
<b>Site address</b>	43 Warriewood Road Warriewood – Lot 2, DP 972209 45 Warriewood Road Warriewood – Lot 2, DP 349085 49 Warriewood Road Warriewood – Lot 1, DP 349085
<b>Proposal</b>	Development of the land, including a twelve (12) lot residential subdivision, civil and creek line works and construction of integrated residential development including two (2) residential flat buildings containing thirty-four (34) apartments
<b>Environmental Planning Instrument</b>	<i>Pittwater Local Environmental Plan 2014</i>
<b>Development standard to be varied</b>	Clause 4.3 – Height of buildings  (1) The objectives of this clause are as follows:  (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality, (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development, (c) to minimise any overshadowing of neighbouring properties, (d) to allow for the reasonable sharing of views, (e) to encourage buildings that are designed to respond sensitively to the natural topography, (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

This document contains a written request relating to the proposed variation to clause 4.3 (height of buildings) of *Pittwater Local Environmental Plan 2014* (PLEP 2014) in accordance with the provisions of clause 4.6 (Exceptions to development standards) of PLEP 2014. The written request has been prepared in accordance with clause 4.6(3) of the PLEP 2014.

### Details of development standard sought to be varied

Pursuant to Clause 4.3(2) of PLEP 2014, the height of a building is not to exceed the maximum height shown on the Height of Buildings Map. The Height of Buildings Map indicates that the site is affected by two different height limits, which are outlined as follows:

- 10.5 metres, pursuant to clause 4.3(2) of PLEP 2014, and
- 8.5 metres, pursuant to clause 4.3(2F) of PLEP 2014.



Figure 1: An extract of the PLEP 2014 height of buildings map, showing the location of the subject site.

Source: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

Clause 4.3(2F) imposes an 8.5 metre height limit within the site to 12.5 metres of the boundary with Warriewood Road. Given that the 'super lot' containing the two proposed residential flat buildings (RFBs) will be more than 12.5 metres from the Warriewood Road boundary, and that this application does not propose to develop the allotments fronting Warriewood Road, the provisions of clause 4.3(2F) do not apply.

Measured from existing ground level, particular points of the proposed development will exceed the 10.5-metre height limit, which include the following:

- Parts of the upper floors,
- Sections of the roofs, and
- Four (4) lift overruns (two (2) per building).

Due to the slope of the site, the earthworks being proposed and the stepping of the two RFBs along the slope, the maximum heights of each RFB are variable. Each RFB contains three 'steps' along the slope, with the greatest breaches of the height standard occurring at the southern end of each 'step'; as the slope begins to level out towards the southern end of the site, the highest point of each RFB is located at the southern end of the middle 'step'.

The maximum heights of the buildings are therefore as follows:

- Block C: 12.34 metres. This is a 1.84 metre (i.e. a 17.5%) breach of the 10.5 metre building height standard
- Block D: 11.61 metres. This is a 1.11 metre (i.e. a 10.6%) breach of the 10.5 metre building height standard

While there are other breaches of the height standard, the other breaches are all less than those detailed above.

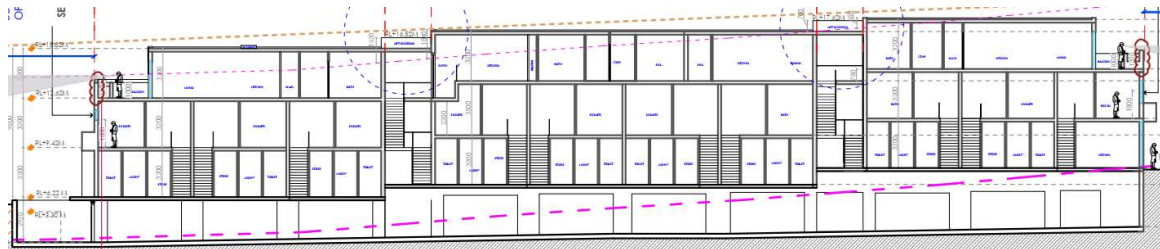


Figure 2: An extract of the section plan of Block C.

Source: Archidrome, 2021

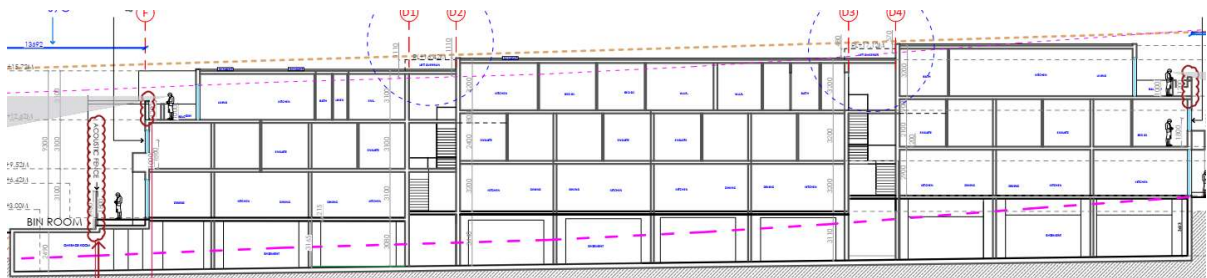


Figure 3: An extract of the section plan of Block D.

Source: Archidrome, 2021

The breaches of the height standard are technical noncompliances, which have been created both as a result of:

- The ground levels being raised towards the southern end of the site due to the flood hazard that affects the land, and
- The proposal being lodged as an 'integrated' development (i.e. subdivision works and residential development are contained as one development proposal).

It is however acknowledged that the height of the development must be measured from 'existing ground level'; the height noncompliances are therefore created because they must consider the combined height of the groundworks *and* the RFBs, thereby creating the variation to the height standard.

The RFBs have been designed to comply with the 10.5 metre height standard when measured from the modified ground levels associated with the subdivision works (noting that such ground levels generally reflect those of adjoining sites to either side. If the subdivision were approved, and then the RFBs were proposed later as part of a separate

Development Application (as has been done within other approved subdivisions and subsequent RFB proposals elsewhere within the Warriewood Valley), then the RFBs as proposed will otherwise comply with the building height standard.

#### **Clause 4.6 Exceptions to Development Standards – Pittwater Local Environmental Plan 2014**

Clause 4.6 of PLEP 2014 is the mechanism by which a consent authority is able to grant consent to a development despite a non-compliance(s) with a prescribed development standard. Clause 4.6 is reproduced below:

- (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 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.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*
  - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
  - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note.** *When this Plan was made it did not include all of these zones.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
  - (a) *a development standard for complying development,*
  - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
  - (c) *clause 5.4,*

**Note:** The development application does not cause a contravention to any of the provisions within clause 4.6(8).

**Clause 4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are environmental planning grounds to justify the contravention of the standard**

The authority established by *Four2Five Pty Ltd v Ashfield Council (2015)*, necessitates that environmental planning grounds for the proposed variation must be established aside from the consistency of the development with the objectives of the standard and the objectives of the zone. This is consistent with the ruling of *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112*, which requires that the function of the consent authority must be satisfied that the written request must demonstrate that compliance with the standard is unreasonable and unnecessary, and that it establishes sufficient environmental planning grounds to justify contravention of the development standard.

The common way to demonstrate that compliance with the standard is unreasonable or unnecessary is summarised by *Wehbe V Pittwater Council (2007) NSW LEC 827*, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

1. *The objectives of the standard are achieved notwithstanding non-compliance 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 or 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 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 generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above points. In this instance point 1 is investigated and considered well founded for the proposed development.

The objectives of the building height development standard under clause 4.3 of the PLEP 2014 are provided below, and followed by a response on how that objective is achieved notwithstanding noncompliant with the standard:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

**CPS Response:** As demonstrated by the environmental planning grounds above, the proposed development is consistent with surrounding development (either existing and/or approved) in terms of height, scale and number of storeys. Further, once works are complete the height variations will not be discernible from surrounding sites and the public domain, as the levels of the earthworks (which contribute to the variation) will match those of surrounding allotments; the apparent height of the building would appear to be in accordance with the standard. Given that a number of developments with similar (if not greater) heights have also been approved within the surrounding area, support of the proposed variation will not result in an



undesirable development precedent, nor will it establish new height limits that would be reflected by similar future development within the surrounding area.

- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

**CPS Response:** New release areas containing residential development within the Warriewood Valley locality consist predominantly of R3-zoend areas; such zoning permits a wide range of residential development, which is reflected by housing typologies on new subdivisions on surrounding sites. Such development includes RFBs (both existing and approved) that are similar to the proposed development in terms of height and number of storeys. As indicated above, the apparent height and scale of the development will be reduced as a result of the earthworks altering the levels of the site in a manner consistent with surrounding allotments.

- (c) *to minimise any overshadowing of neighbouring properties,*

**CPS Response:** Solar impacts associated with the tallest points of the buildings will be mitigated by increased separation along the side and southwest boundaries. As such, the development fully complies with applicable solar access requirements; at least two hours of direct solar access will be provided to the private open space areas and likely dwelling locations of surrounding allotments, both on surrounding sites and within the proposed subdivision.

- (d) *to allow for the reasonable sharing of views,*

**CPS Response:** With regard to the planning principles associated with *Tenacity Consulting v Warringah Council [2004] NSWLEC 140*, there are no significant views that are obtainable from surrounding sites and areas. The development will subsequently have no impacts on views.

- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*

**CPS Response:** Both RFBs have variable floor levels that will result in a 'stepped' layout that respects the sloped topography of the site. The buildings have been designed to fully comply with the 10.5 metre height standard when measured from extrapolated ground levels associated with the completed subdivision works.

- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items,*

**CPS Response:** As indicated above, the RFBs have been designed to fully comply with the 10.5 metre height standard when measured from extrapolated ground levels associated with the subdivision works. Further, seven residential allotments will be situated between the super lot containing the RFBs and the creek line corridor to the south; dwellings and landscaping on these allotments will filter the RFBs from surrounding public areas. The proposed RFBs will subsequently have little impact on the natural environment. Visual impacts on heritage items are not applicable, noting that there are no heritage items within the surrounding area.

**Clause 4.6(3)(b) There are sufficient environmental planning grounds to justify contravening the development standard**

There are numerous and substantive environmental planning grounds to justify contravention of the development standard. These are detailed as follows:

**No impact on the surrounding area**

As demonstrated by the EIS to which this variation request is attached, the proposed variations to the height standard will not have adverse or unreasonable impacts on the amenity of the neighbouring properties and the public domain in terms of privacy impacts, reduced solar access, view loss and adverse streetscape impact. Any impacts associated with the tallest parts of the buildings are mitigated through increased setbacks.

**Character of the built form**

With regard to the significant size of the super lot (7,004m<sup>2</sup>) and the R3 Medium Density Residential zoning, the proposed building height is appropriate both for the site and the locality more broadly. Development within the surrounding area contains a variety of residential developments that include a number of RFBs with similar (if not greater) heights and scale to that being proposed by this application; examples of such development include the following:

- Numerous three-storey RFB developments along Macpherson Street on the southern side of Narrabeen Creek,
- The three storey 'Arcare' aged-care development at 23 Warriewood Road approved by Development Consent No. N0611/16 (as modified),
- Three storey RFBs approved as part of Development Consent No. DA2018/1826 (as modified) at 25-27 Warriewood Road
- A three-storey, 27-dwelling RFB at 64-69 Lorikeet Grove (formerly 31 Warriewood Road) approved by Development Consent No. DA2018/0607, and

- A ten-unit RFB was approved by Development Consent No. N0386/16 at 53B53, 53A and 53B Warriewood Road (though construction of this development did not proceed).

Aside from being consistent with the future character of the locality, approval of the development would be consistent with other similar approvals within the surrounding area as outlined above and will therefore not set an undesirable development precedent.

#### Visual impact of the variation

Only relatively small sections of the building breach the height standard, though once the subdivision works and associated changes to ground levels complete the visual appearance of the RFBs, they are structures that would otherwise comply with the height standard and would appear as such from both surrounding sites and the public domain. Further, with regard to:

- The stepped building platforms,
- The highly articulated design of the buildings,
- The landscape design of the site (which includes deep soil areas that are well in excess of minimum requirements, and which will accommodate large trees that would progressively filter and screen the development as they mature), and
- Low-density residential development on surrounding/oversized allotments that will likely contain expansive landscaped areas filtering the appearance of the building from the surrounding public domain, any visual impact associated with the development's height is likely indiscernible from surrounding areas.

The largest breaches of the standard are to be created by steps in the roof that are integrated into the overall design of the building. The lift overruns will be situated below the 'steps' in the roof and will be centralised within the recessed lobby areas (i.e. they will not be located at the peripheries of the building, and will not form dominant features when viewed from surrounding sites and the public domain). As such, elements which breach the height standard would have negligible (if any) visual impact.

#### Excavation limitations

Given the levels of the site, it would not be possible to excavate further into the land in order to attain compliance with the height standard; to do so would be contrary to the objectives of the building height standard (see below), and will likely have adverse outcomes with regard to the amenity of terrace units on lower levels and site drainage.

#### Height limitations associated with earthworks

As indicated above, the proposed variation to the building height standard is a consequence of factoring in the heights of both the RFBs *and* the earthworks associated with the proposed

subdivision. Whilst it is necessary to incorporate both elements in accordance with the PLEP 2014 'building height' definition, to enforce the building height standard when earthworks are required to protect residential allotments from local flood hazards is unreasonable.

If the proposal were not 'integrated' development (i.e. the subdivision and subsequent residential development were subject to separate proposals), then a future proposal for residential development would be based upon the proposed ground levels of the subdivision; such development could therefore be constructed to the same RLs as that currently proposed without breaching the height standard (i.e. the 'existing ground level' of future residential development would be higher than current ground levels, therefore the height standard would permit future development to be the same height as that proposed by this application).

The variation sought by this written request is a result of proposing concurrent subdivision and residential development. Given that the staging of works and/or the lodgement of applications (i.e. one for subdivision/earthworks and another for the RFBs) would enable an identical outcome (in terms of building height), enforcing compliance with the standard in this instance is therefore both unnecessary and unreasonable.

In summary, there are substantive environmental planning grounds which demonstrate why the strict application of the building height standard in this instance are both unnecessary and unreasonable. If the development were to be staged, the altered ground levels associated with the subdivision component would allow the same height outcome as that proposed by this application. Further, the proposed variation to the building height standard will not adversely affect surrounding sites and the locality more broadly, as it would not present to surrounding areas in a manner that would be inconsistent with the existing and desired future character of the area and as such will not set a new and/or undesirable planning precedent.

**Clause 4.6(4)(a)(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.**

In the recent judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

The objectives of the R2 Low Density Residential zone under MLEP 2013 are as follows:

- *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

**CPS comment:** As demonstrated by the environmental planning grounds above, the proposed development is consistent with surrounding development (either existing and/or approved) in terms of height, scale and number of storeys. Further, once works are complete the height variations will not be discernible from surrounding sites and the public domain, as the levels of the earthworks (which contribute to the variation) will match those of surrounding allotments; the apparent height of the building would appear to be in accordance with the standard. Given that a number of developments with similar (if not greater) heights have also been approved within the surrounding area, support of the proposed variation will not result in an undesirable development precedent, nor will it establish new height limits that would be reflected by similar future development within the surrounding area.

- *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

**CPS comment:** New release areas containing residential development within the Warriewood Valley locality consist predominantly of R3-zoend areas; such zoning permits a wide range of residential development, which is reflected by housing typologies on new subdivisions on surrounding sites. Such development includes RFBs (both existing and approved) that are similar to the proposed development in terms of height and number of storeys. As indicated above, the apparent height and scale of the development will be reduced as a result of the earthworks altering the levels of the site in a manner consistent with surrounding allotments.

- *to minimise any overshadowing of neighbouring properties,*

**CPS comment:** Solar impacts associated with the tallest points of the buildings will be mitigated by increased separation along the side and southwest boundaries. As such, the development fully complies with applicable solar access requirements; at least two hours of direct solar access will be provided to the private open space areas and likely dwelling locations of surrounding allotments, both on surrounding sites and within the proposed subdivision.

- *to allow for the reasonable sharing of views,*

**CPS comment:** With regard to the planning principles associated with *Tenacity Consulting v Warringah Council [2004] NSWLEC 140*, there are no significant views

that are obtainable from surrounding sites and areas. The development will subsequently have no impacts on views.

*(b) to encourage buildings that are designed to respond sensitively to the natural topography,*

**Comment:** Both RFBs have variable floor levels that will result in a 'stepped' layout that respects the sloped topography of the site. The buildings have been designed to fully comply with the 10.5 metre height standard when measured from extrapolated ground levels associated with the completed subdivision works.

*(c) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items,*

**Comment:** As indicated above, the RFBs have been designed to fully comply with the 10.5 metre height standard when measured from extrapolated ground levels associated with the subdivision works. Further, seven residential allotments will be situated between the super lot containing the RFBs and the creek line corridor to the south; dwellings and landscaping on these allotments will filter the RFBs from surrounding public areas. The proposed RFBs will subsequently have little impact on the natural environment. Visual impacts on heritage items are not applicable, noting that there are no heritage items within the surrounding area.

The objectives of the R3 Medium Density Residential zone, and a planning response to each demonstrating that such objectives will be satisfied are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*

**Comment:** The proposed subdivision and associated RFBs will provide land and dwellings that would cater for the housing needs of the community. By supporting the proposed building heights, a third storey can be added to each of the RFBs; these will better satisfy the objective through the provision of additional dwellings to meet the housing needs of the community.

- *To provide a variety of housing types within a medium density residential environment.*

**Comment:** The RFBs and the allotments (which, subject to future approvals would be capable of accommodating dwelling houses) provide a variety of housing that is similar to those constructed and approved on surrounding sites. By supporting the proposed building heights, a third storey can be added to each of the RFBs; this will



better satisfy the objective through enabling the provision of two-storey terrace housing with large private open space areas on the lower two levels and 'traditional' style apartments on the top level.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

**Comment:** The development will not affect the ability of surrounding sites to provide development containing facilities and/or services that would meet the regular needs of local residents.

- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

**Comment:** The development will not affect the ability of surrounding sites to provide development containing other land uses.

With regard to the above, irrespective of the height variation, the consent authority can be satisfied that the proposed development satisfies all objectives of the R3 Medium Density Residential zone. The proposed development is therefore in the public interest.

### Conclusion

It is acknowledged that the proposed development does not comply with the building height standard imposed by clause 4.3(2) of PLEP 2014. Such a noncompliance would be a technical variation, as calculation of the development's height is required to consider both earthworks associated with the proposed subdivision works in addition to the proposed RFBs; if the development were staged or the RFBs proposed as a future application once the subdivision works were completed, then the height standard will permit the same building heights as those currently proposed.

As demonstrated above however, the breach of the standard is not significant, nor will it adversely affect either surrounding sites and the public domain. The scale of the proposed development is also envisioned by the zoning and associated development controls which apply to the site, which is reflected by approvals for similar development with consistent heights in the surrounding area. The development is therefore consistent with the desired future character of the area and will not set an undesirable development precedent.

Aside from being consistent with the objectives of the zone, building height standard and subsequently the public interest, this written request has demonstrated that compliance with the standard in this instance would be unnecessary and unreasonable; there are also

sound environmental planning grounds to justify the contravention of the development standard.

As such, it is submitted that the requirements of Clause 4.6 have been satisfied and that the proposed building height variation can be supported.