CLAUSE 4.6 VARIATION REQUEST

Exception to Development Standards in relation to Clause 4.3(2) Height of buildings, of the Manly Local Environmental Plan 2013.

Height of Buildings

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to the NSW Land and Environment Court and NSW Court of Appeal judgments in the matters of *Wehbe v Manly Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *FouB6Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 (MLEP)

2.1 Clause 4.3(2) - Height of buildings

Building height (or height of building) is defined in the Dictionary of the MLEP as:

> ***building height*** *(or* ***height of building****) means—*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
>
> *including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

Clause 4.3(2) of MLEP 2013 states:

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

The maximum height shown for the site on the Height of Buildings Map as shown in Figure 1 below is 11m.

Figure 1. Extract from the MLEP Height of Buildings Map with site identified by blue star

Building height has been calculated using the approach adopted by the NSW Land and Environment Court in its judgment of *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* may, which allows building height to be calculated from extrapolated natural ground level, rather than existing ground level, if the entire site has been subject to prior excavation. Given that the whole site has been excavated, the Bettar approach is considered the most appropriate in this case.

The architectural drawings prepared by Centric Architects depicts the 11m maximum building height and extrapolated ground level as blue lines. An extract of Drawing 0432 - 6000 ISSUE: J in Figure 2 shows building section 1 - identifying the parts of level 2 above the building height.

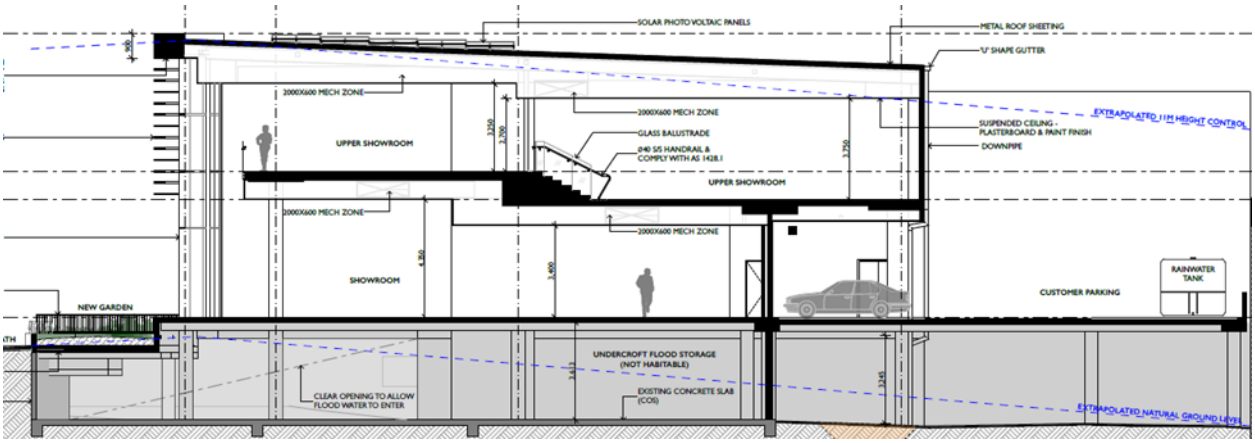

Figure 2. Section diagram showing the non-complying building elements above the dotted blue line with the HOB development Standard (source: Centric Architects)

The reason for the height breach is that the floor level is required to be elevated to satisfy Council's flood controls and to accommodate floor storage below the building.

Details of the non-compliance

The maximum breach of the building height occurs at the northeast corner of the building where the building height is 12.355m which exceeds the maximum building height of 11m by 1.355m representing a 12.3% variation to the development standard.

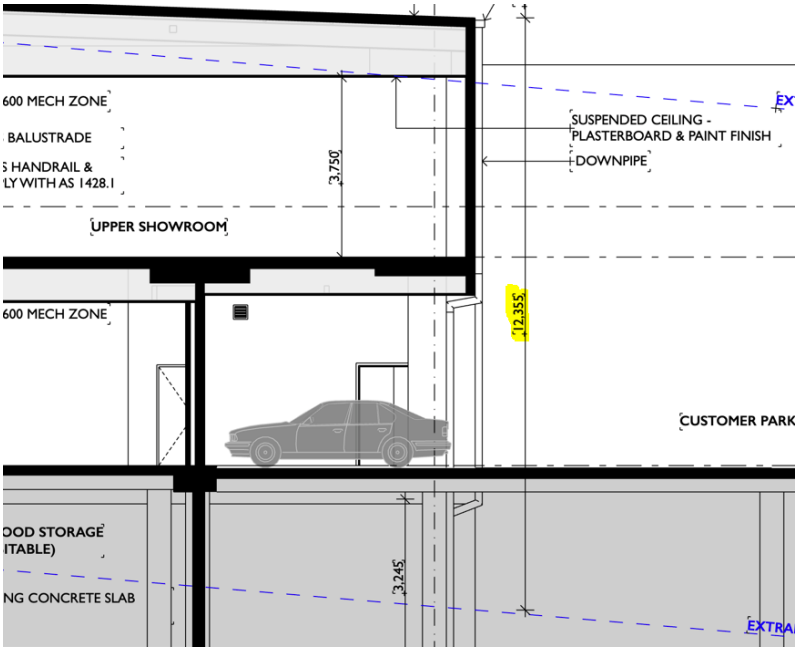

Figure 3. Section diagram showing the measurement of the maximum building height (source: Centric Architects)

The front of the building complies with the 11m building height, however, as ground level slopes toward the east, the rear of the building breaches the 11m height plane.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent

authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP provides:

(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.

This clause applies to the clause 4.3(2) Height of Buildings Development Standard.

Clause 4.6(3) of MLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

The proposed development does not comply with the building height provisions at clause 4.3(2) of MLEP which specify a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

(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.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Manly Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

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

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

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

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

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

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

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3(2) of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the clause 4.3(2) standard and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3(2) of MLEP?

4.0 Request for variation

4.1 Is clause 4.3(2) of MLEP a development standard?

I am of the opinion that clause 4.3(2) of MLEP height of buildings is a development standard to which clause 4.6 of MLEP applies.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary is set out in *Wehbe v Manly Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the building height standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality.

Response:

The proposed development is consistent with the objectives for the B6 Enterprise Corridor zone as it utilises the site to its full potential thus contributing to the overall economic growth of the locality.

The proposed 2 storey, furniture showroom is consistent with the scale of buildings constructed in the B6 Business Enterprise zone which vary from 1 to 3 storeys.

Figure 3 below shows the proposed development in its streetscape context and demonstrates consistency with the height and scale with surrounding development. The proposal is also consistent with the large-scale Woolworths building adjoining the site to the west at 17 Roseberry Street.

An examination of buildings in the immediate context shows that the proposed development is consistent with the heights of the newer buildings, and the emerging character of the area, both in terms of maximum RLs and number of storeys.

Figure 4. Photomontage of Condamine St streetscape(Source: Centric Architects)

The proposed development satisfies objective (a).

(b) to control the bulk and scale of buildings,

Response:

The proposed development complies with the FSR development standard which is the primary control for bulk and scale.

As noted above, the proposed development is compatible with the height and scale of surrounding and nearby development.

The proposed development complements the range and form of buildings within the Balgowlah commercial area.

The building height will not give rise to any inappropriate or jarring visual impacts when compared to the built form characteristics of existing development within the area. As shown in Figure 5, the use of a highly articulated front facade avoids a bulky appearance.

Figure 5. Perspective of the front façade (source: Centric Architects)

Having considered the characteristics of the proposed development, the following observations are made:

- The proposed development complements the range and form of buildings within the commercial area. The bulk and scale of the proposal is consistent with the desired future character of the locality and provides a scale of development that is commensurate with the existing and planned infrastructure.

- The proposal provides for superior architectural detailing and finishes.

- The proposal is complementary to the architectural diversity of the area with an appropriate scale and massing for furniture showroom building within an enterprise corridor zone.

- The proposal provides for complementary and compatible building heights and setbacks.

- The building is well articulated with an articulated façade and landscaping providing a positive streetscape impact. The proposal will not be visually dominant when viewed from outside of the site.

- The proposed skillion roof form adopts a parapet level consistent with the roof height of the adjoining building at 206 Condamine Street.

The height, bulk, scale and roof form proposed are entirely consistent with the built form characteristics established by development generally within the site's visual catchment.

(c) to minimise disruption to the following—
(i) views to nearby residential development from public spaces (including the harbour and foreshores),
(ii) views from nearby residential development to public spaces (including the harbour and foreshores),
(iii) views between public spaces (including the harbour and foreshores),

Response:

There are no public views available over the site or from adjacent properties that will be impacted by the proposed development.

The consent authority can be satisfied that a view sharing scenario is maintained between surrounding development consistent with the view sharing principles established by the Land and Environment Court in the matter of *Tenacity Consulting v Warringah [2004] NSWLEC 140*. The proposal is therefore consistent with this objective.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

Response:

The site does not adjoin any residential development therefore there will be no overshadowing and privacy impacts to any residential properties.

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

(f) Response:

The site is impacted by flooding and therefore the proposed development has been sensitively designed to respect the flood planning level set by Council and to accommodate floor storage below the building.

The building is proposed to be suspended above the 1% AEP flood level with the under-croft area designed to provide flood storage during flood events. A Finished Floor Level (FFL) of 11.80m AHD is proposed across the ground floor of the building. The proposed FFL is above the Flood Planning Level of 11.69m AHD outlined by Council's Flood Reports and is also higher than modelled existing case 1% AEP + 500mm level of 11.74m AHD.

(g) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

Response:

Not applicable. The site is not in a recreation or environmental protection zone.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Manly Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings when viewed from within the site, the public domain and surrounding residential properties. Having regard to the matter of *Veloshin v Randwick City Council [2007] NSWLEC 428* this is not a case where the difference between compliance and non-compliance is the difference between good and bad design.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments' consistency with the objectives of the standard, strict compliance is both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned B6 Enterprise Corridor pursuant to the provisions of MLEP. Specialised retail premises are permissible in the zone with the consent of the Council. The stated objectives of the B6 Enterprise Corridor zone are as follows:

- ***To promote businesses along main roads and to encourage a mix of compatible uses.***

  Response: The proposed development includes a business use permissible in the B6 Enterprise Corridor zone. The proposal is consistent with this objective.

- ***To provide a range of employment uses (including business, office, retail and Enterprise Corridor uses).***

  Response: The proposed redevelopment of the site will generate employment opportunities both during and after construction. The proposal is consistent with this objective.

- ***To maintain the economic strength of centres by limiting retailing activity.***

  Response: The proposal will enhance the economic strength of the locality which has an emerging agglomeration of furniture showrooms. The proposed development is consistent with the zoning of the site. The proposal is consistent with this objective.

The proposed development is permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the B6 Enterprise Corridor zone and the height of building standard objectives. Adopting the first option in *Wehbe,* strict compliance with the building height development standard has been demonstrated to be is unreasonable and unnecessary.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see FouB6Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

> *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see FouB6Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see FouB6Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the building height variation namely the need to comply with flood planning levels and consistency with surrounding development. The floor level of Level 1 has been set at the minimum level required to achieve compliance with Council's flooding requirements.

In addition, the proposed redevelopment will provide employment opportunities and contribute to economic growth and is therefore consistent with the desired future character for the Balgowlah Locality.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment).*
>
> *Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3(2) and the objectives of the B6 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

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

As demonstrated in this request, the proposed development is consistent with the objective of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.5 Secretary's concurrence

By Planning Circular PS 20-002, dated 5 May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The Secretary's concurrence may be assumed as the proposed development does not contravene the numerical development standard by more than 10%.

5.0 Conclusion

Having regard to the clause 4.6 variation provisions, I have formed the considered opinion:

- that the contextually responsive development is consistent with the zone objectives, and
- that the contextually responsive development is consistent with the objectives of the building height standard, and
- that there are sufficient environmental planning grounds to justify contravening the development standard, and
- that having regard to the points above, compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case, and
- that given the development's ability to comply with the zone and building height standard objectives, its approval would not be antipathetic to the public interest, and
- that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a building height variation in this instance.

Danielle Deegan
Director
D.M Planning Pty Ltd
25 November 2022