

# Clause 4.6 Variation Request Building Height

10 BOUVARDIA STREET, ASQUITH



QUALITY ASSURANCE	
<b>PROJECT:</b>	Clause 4.6 – Height
<b>ADDRESS:</b>	No. 10 Bouvardia Street, Asquith
<b>LOT/DP:</b>	Lot 56 in DP 8437
<b>COUNCIL:</b>	Hornsby Council
<b>AUTHOR:</b>	Think Planners Pty Ltd

Date	Purpose of Issue	Rev	Reviewed	Authorised
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## CLAUSE 4.6 DEPARTURE – HEIGHT

### BACKGROUND

This Clause 4.6 departure has been prepared in support of a development application that seeks approval for demolition, tree removal and construction of a 5 storey residential flat building on an isolated allotment at 10 Bouvardia Street, Asquith.

The residential flat building will contain a total of 15 residential units over a level of basement parking providing 18 parking spaces. The residential flat building contains the following dwelling mix:

- 1 x 1 bedroom apartment; and
- 14 x 2 bedroom apartments.

The site is identified by Hornsby LEP 2013 as having a mapped height of 16.5m with the development seeking to vary this control with portions of the roof and lift overrun exceeding the 16.5m height limit.

Given that the 16.5m height control is a development standard a clause 4.6 departure is required to seek to vary this standard.

### SITE

The subject site is legally defined as Lot 56 in DP 8437 but commonly known as 10 Bouvardia Street, Asquith.

The development site is an irregular shaped mid-block allotment located 150m north of the intersection of Peats Ferry Road and Bouvardia Street. The site has an 18.31m frontage to Bouvardia Street and a depth of between 50.44m to 51.27m resulting in a total site area of approximately 931.2mm<sup>2</sup>.

Located within an established residential area, the subject site is within walking distance to the Asquith Shopping Precinct and the Asquith Train Station. The subject site surrounded by five storey residential flat buildings to the north and south and adjoins Asquith commercial centre to the east with sites on the western side of Bouvardia street containing low density dwellings that reflects their R2 -low density residential zoning.

The site is located approximately 450m from Asquith Train Station with bus stops with services to Hornsby, Berowra, Mount Colah and Asquith are located within a 170m walking distance as well as another bus stop 110m away from the subject site.

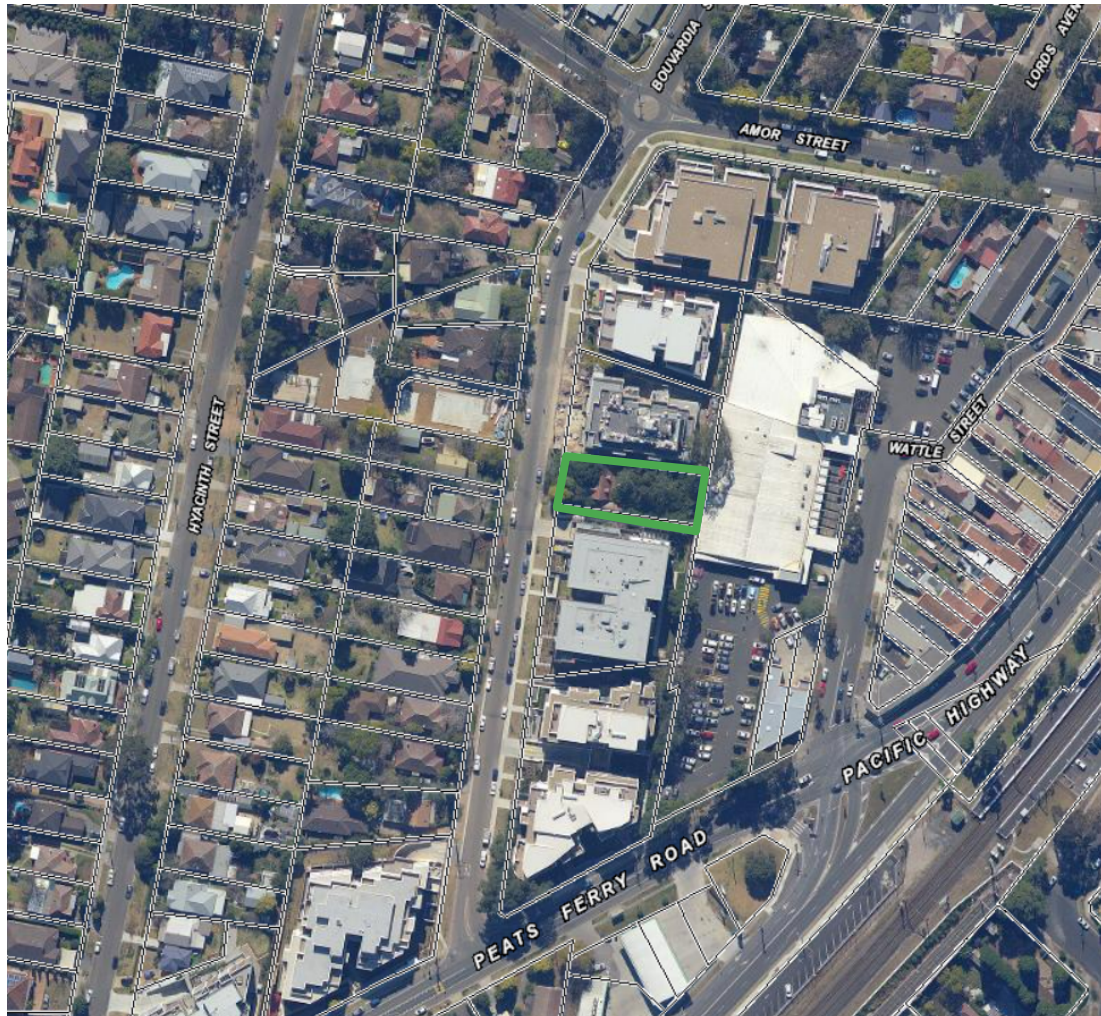




The subject site is situated within a large street block that is bound by Bouvardia Street to the west, Amor Street to the north, and Peats Ferry Road to the south.

The aerial extract and photographs of the locality provided overleaf give context to the development site.

**Figure 1: Aerial Map Extract of the Subject Site (Source: Six Maps 2022)**

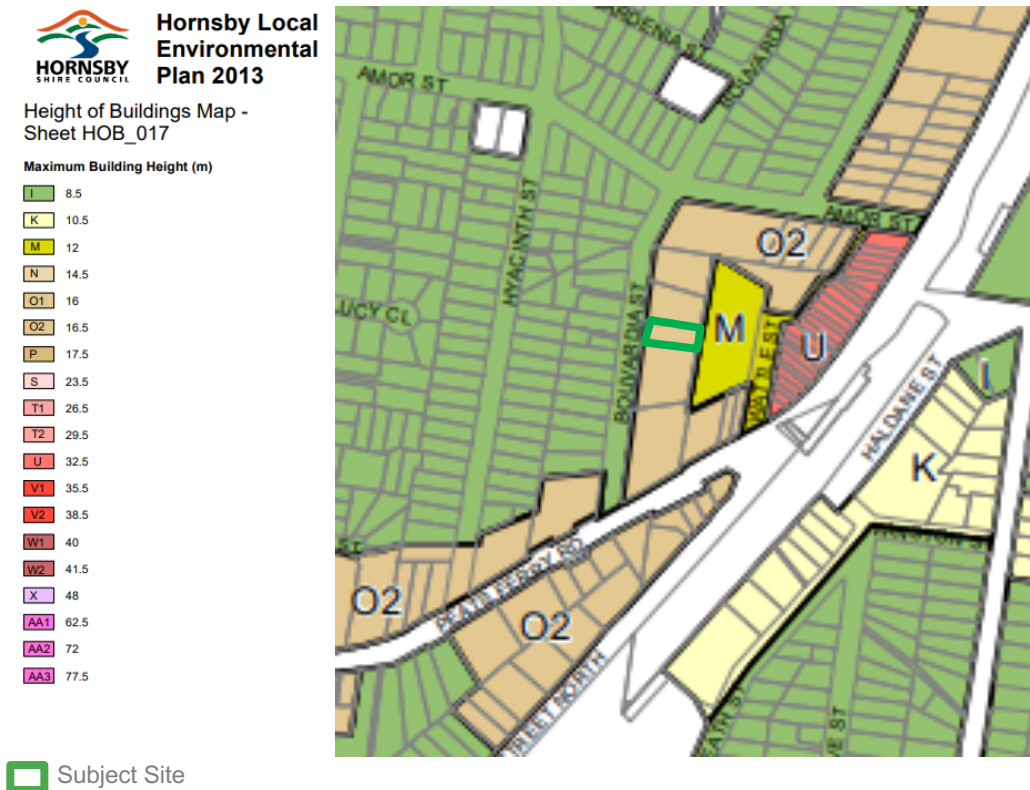


 **Subject Site**

## THE DEVELOPMENT STANDARD TO BE VARIED

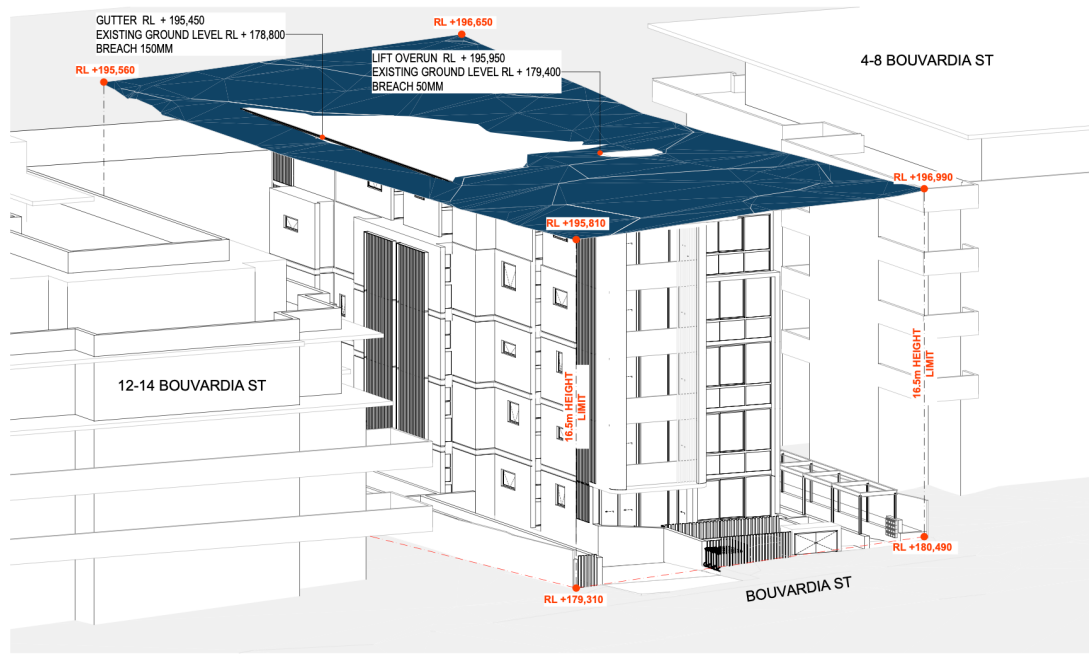
As illustrated below, the site is identified by Hornsby LEP Height map Sheet HOB\_011 as having a mapped height of 16.5m.

Figure 3: Hornsby LEP Height Map HOB\_011 extract (Source HLEP 2013)



A height blanket and section drawings are provided overleaf to demonstrate the nature of the departure and the portion of the buildings that exceed the height control.

Figure 4: Height Blanket (Source: Mackenzie Architects International)



As illustrated above the departure predominantly relates to the roof and lift overrun with no habitable space exceeding the 16.5m height control. Relevantly the departures are within the roof plane and do not extend to the edge of the roof plane.

The proposal incorporates a 150mm departure above the height of building control.

Clause 4.6 of the Hornsby LEP 2013 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.

The applicant asks that the Consent Authority consider this request, and grant development consent to the proposal, despite the departure from the control, for the reasons stated below.

#### PROVISIONS OF CLAUSE 4.6

Clause 4.6 of the Hornsby LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard.<sup>1</sup> That clause is in the following terms:

##### *“4.6 Exceptions to development standards*

<sup>1</sup> Clause 4.6(2)



- (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.*
- (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,*

## RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

1. *this request has adequately addressed the matters required to be demonstrated by subclause (3),<sup>2</sup> namely that:*
  - a. *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,<sup>3</sup> and*
  - b. *there are sufficient environmental planning grounds to justify contravening the development standard<sup>4</sup>;*
2. *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*
3. *the concurrence of the Secretary has been obtained.<sup>5</sup>*

The request deals with each relevant aspect of clause 4.6 on the following pages.

## NSW CASE LAW

This request also addresses several relevant Land and Environment Court cases including, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council* and *Initial Action Pty Ltd v Woollahra Municipal Council*.

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*;

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- When pursuing a clause 4.6 variation request it is appropriate to demonstrate *that there are sufficient environmental planning grounds to justify contravening the development standard*, and
- The proposal is required to be in ‘the public interest’.

It is important to note that the Chief Judge of the Land and Environment Court in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not.

An extract of this judgment is provided below:

*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.*

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the height standard;
- Demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard;
- Demonstrating consistency with the R4 zoning;
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed overleaf, noting that the proposal has a bulk and scale that is consistent with the emerging built form in this high density residential area.

## COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the reasons which follow.

Compliance with the objectives of the development standard and the zone are achieved despite non-compliance with that standard. The objectives of the height development standard are stated as:

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

*(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality*

The current development proposal remains consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- The development proposal is consistent with the intent of the maximum height control and will provide an attractive 5 storey building that addresses the site's frontage to Bouvardia Street.
- The non-compliance is minor in nature with the majority of the building being compliant with the building height control and only a small portion of the building encroaches upon the prescribed height control and as such its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level, noting that the 5<sup>th</sup> floor is recessed.
- The proposed height is consistent with that of the constructed 5 storey residential flat buildings constructed on the eastern side of Bouvardia Street many of which were approved when the precinct benefited from a 17.5m height control and accordingly benefited from approvals for buildings greater than 16.5m in height. Given that this is an isolated parcel, the development will have a height that is consistent and compatible with adjoining apartment buildings.
- The departure will not unreasonably impact on the solar access of adjoining properties or the public areas in the vicinity of the site particularly noting that the southern portion of the building complies with the height control.
- Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard it is noted:
  - The variation will have no adverse impact on the physical bulk, height or scale of the development, noting the small scale nature and location of the point encroachment.
  - The variation will not lead to a significant reduction in solar penetration on site or to adjoining properties nor will it lead to any unacceptable sunlight loss or overshadowing.
  - The proposed variation will not lead to view loss or interrupt views to and from the site.
  - The proposed variation will not lead to a reduction in privacy afforded to existing residents or future residents of the proposal.
- The proposal has been designed to ensure that privacy impacts are mitigated and that the proposal will not obstruct existing view corridors.
- The proposal is not located within a low-density area and the proposal represents an appropriate built form on the site.
- The proposed variation is minor in nature with the majority of the buildings being compliant with the building height control and the variation is also due to the extensive undulation of the site. The extent of non-compliance will also not be a visually prominent element in the streetscape;

- The overall height of the development presents as a compatible form of development to the anticipated high density residential development that exist in the locality. The portions of the building that exceeds the height control is recessed behind the main building alignment to downplay visual dominance as viewed from the public domain and adjoining residential properties;
- 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 uneven topography is the key driver of the height variation rather than a desired to achieve greater yield on the site;
- The additional height does not generate any additional amenity impacts given the location of the breeches and the surrounding site context;
- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors;
- Given the sites orientation, and the minor height departure the additional height will not have any additional adverse overshadowing impacts on nearby developments that incorporate residential components;
- The development proposal is consistent with the intent of the maximum height control and has a bulk and scale that is not discernible from a development that complies with the control;
- The proposal has been designed to ensure that privacy impacts are mitigated that the proposal will not obstruct existing view corridors with appropriate setbacks provided to promote view sharing opportunities;
- The non-compliance to the height control has no unacceptable impact on the setting of any items of environmental heritage or view corridors;
- The proposal will sit comfortably in the streetscape relative to the desired future character of the locality; and
- The development will not exceed the infrastructure capability of the locality.

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



## ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the floor space ratio development standard. For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.

- The additional height supports the provision of a residential flat building on an isolated height that will have a similar or lesser massing than adjoining properties.
- The proposal ensures that the high density nature of the zone is achieved and the development is consistent with the existing character of the locality;
- The character of the locality is undergoing transition to larger and more contemporary built forms that are all permitted in the R4 zone and the bulk and scale of the residential flat development is comparable to that of surrounding Mixed Use Developments in the Asquith Precinct.
- The form and presentation of the development maintains an appropriate visual relationship to adjoining properties and does not present a bulk and scale from the street or adjoining properties that is detrimental to the existing and desired future character of the area;
- The building is compatible with the desired future character of the area in terms of the building presentation to the street, the materials, and the relationship to surrounding properties.;
- The proposal will provide for a number of distinct public benefits:
  - Delivery of additional housing within close proximity to the Asquith Town Centre;
  - Creation of jobs during the construction stage;
  - Amenity impacts to adjoining properties are mitigated and the distribution of floor space across the site will not be discernibly different to a built form that is compliant with the height control.
  - The scale and intensity of the development is consistent with other approved and constructed residential flat buildings in the immediate precinct, which demonstrates an appropriate development outcome.

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

## CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST

As clause 4.6(4)(a)(i) requires, the Consent Authority must also be satisfied that 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.*

The Applicant has already addressed the objectives of the development standard in the context of cl 4.3 in demonstrating that compliance is unnecessary or unreasonable.

The objectives of the R4High Density Residential Zone are as follows:

### *Objectives of zone*

- To provide for the housing needs of the community within a high density residential environment.*
- To provide a variety of housing types within a high density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents*

The proposal is consistent with these objectives as:

- It provides for the housing needs of the community within a high density residential setting; and
- It provides a mix of apartment types and a range of different bedrooms to provide a variety of housing types; and

The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved 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.

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

## CONCURRENCE OF THE SECRETARY

1. The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.
2. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

## CONCLUSION

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive maximum height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including the departure to the maximum height control.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the subject area. The proposal promotes the economic use and development of the land consistent with its zone and purpose. The Consent Authority is requested to invoke its powers under Clause 4.6 to permit the variation proposed.