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**CLAUSE 4.6 REQUEST FOR VARIATION
TO
CLAUSE 4.3 (2) (HEIGHT OF BUILDING) OF
PENRITH LOCAL ENVIRONMENTAL PLAN 2010
(PLEP 2010)**

**27-28 PARK AVENUE
KINGSWOOD**

31ST March 2021



1.0 Introduction

- This is a request to vary a development standard pursuant to the provisions of Clause 4.6 of Penrith Local Environmental Plan 2010 (PLEP 2010), the relevant clause being Clause 4.3(2) (Height of Building).
- The relevant maximum height of building control is **8.5m**.
- The relevant Height of Building control is a *development standard* for the purposes of the *EP & A Act 1979*.
- This request to vary the height development standard considers the judgment in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ("Initial Action").
- The relevant case law confirms that the consent authority not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather that it "*only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed*".
- The objective of Clause 4.6 1(a) is to provide an appropriate degree of flexibility in applying certain development standards to particular development. The intent is to achieve better outcomes for and from development by allowing flexibility in particular circumstances in accordance with Clause 4.6 1(b).
- The relevant plans relied upon are those identified as the plans prepared by CK Design.

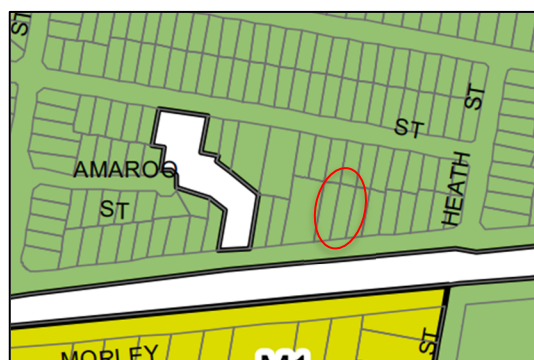
2.0 Development Standard to be Varied – Height

The relevant *development standard* to be varied is the **8.5m** height control under Clause 4.3(2). Clause 4.3 of PLEP relevantly provides:

4.3 Height of buildings

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
 - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
 - (c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
 - (d) *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*
- (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 of buildings map is identified below:



Map 1- Height Map PLEP (Map HOB__013)

The subject site is mapped "I" – 8.5m(max).

3.0 Nature of Variation Sought

The requested variation is as follows:

The variation requested is up to a maximum **500mm** over the 8.5m height control - when the *site level existing* definition is applied. This maximum is shown in the south-east of the building in Figures 1 & 2 below. The variation equates to a 5.88% variation and is considered minor.

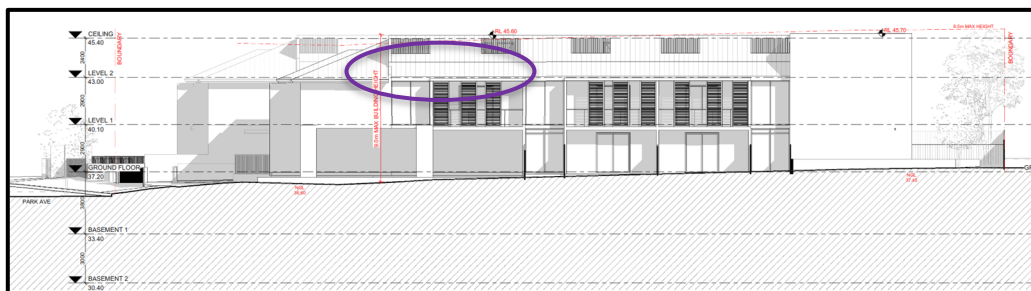


Figure 1: Extract of Eastern Elevation showing maximum height in the south-east corner of the building

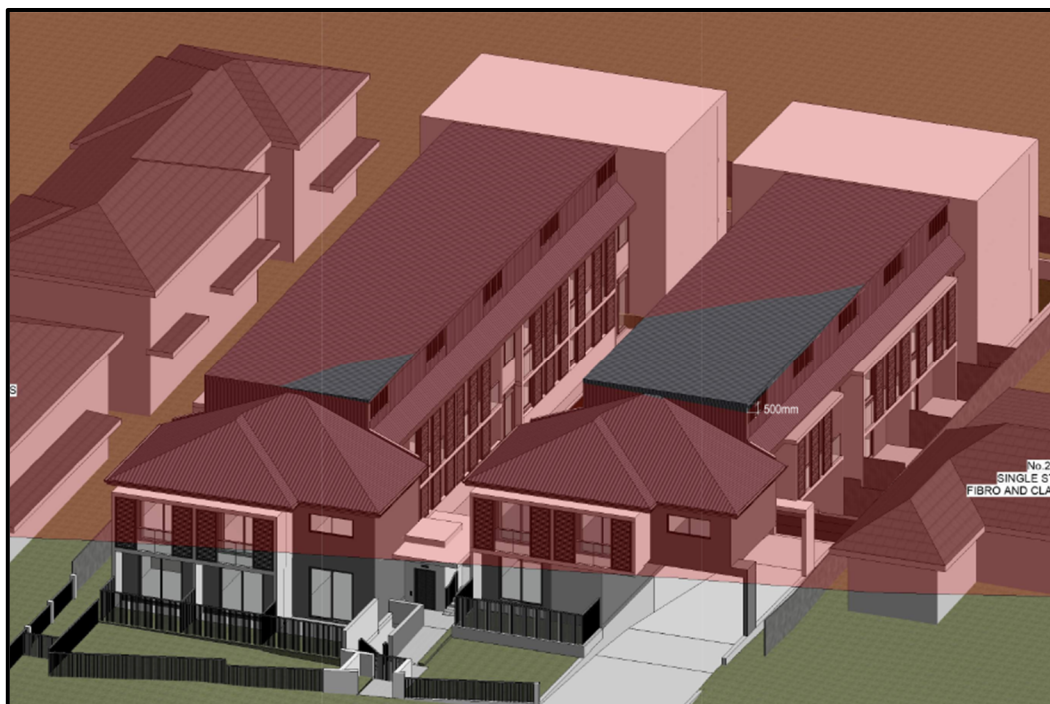


Figure 2: Height Plane showing 500m maximum variation in south-east corner of the eastern wing of the development. All areas of variation are numerically minor and do not impact on the adjoining properties

4.0 Height – Development Standard

A development standard is defined in S1.4 of the *Environmental Planning and Assessment Act 1979* (“EPA Act”) to mean:

"provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed."*

The **8.5m** maximum height standard is a *development standard* as defined under the *EP & A Act 1979*.

5.0 Clause 4.6 of Penrith Local Environmental Plan 2010

The following provides a response to relevant Clause 4.6 provisions:

Clause 4.6(2) provides that:

- (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.*

The HOB development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify the contravention of a development standard and states:

- (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:*
- (4) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(5) *that there are sufficient environmental planning grounds to justify contravening the development standard. (our emphasis)*

The proposed development does not comply with the **HOB** development standard pursuant to cl4.3 of the **PLEP 2010**. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed further in this written request.

Sufficient environmental planning grounds exist to justify contravening the development standard as detailed in Section 8.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (6) *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.*

Sections below of this written request address the matters required under cl4.6(4)(a) of the PLEP 2010 and cl4.6(4)(b).

Clause 4.6(5) provides that:

- (7) *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.*

Sections below of this written request addresses the matters required under cl4.6(5) of the PLEP 2010.

Clauses 4.6(6) and (8) are not relevant to the proposed development.

Cl 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

6.0 Relevant Decisions

Initial Action

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action'), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are

reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard. The relevant test is whether the environmental planning grounds relied upon and identified in the written request are “sufficient” to justify the non-compliance sought.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a “test” that a development which contravenes a development standard results in a “*better environmental planning outcome*” relative to a development that complies with the development standard. There is no provision in PLEP clause 4.6 that requires a development that contravenes a development standard to achieve better outcomes.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 Moore J (herein referred to as Rebel MH”).

In Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 Moore J identifies the steps provided in *Initial Action* confirming what the consent authority must do in order to satisfy itself as follows:

“For me to grant development consent for this development as it contravenes the permitted maximum building height development standard, cl 4.6(4)(a) requires me to be satisfied that:

(1) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposed development (cl 4.6(3)(a) and cl 4.6(4)(a)(i)); and

(2) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)); and

(3) The proposed development will be in the public interest because it is consistent with the objectives of the standard in question - set out in cl 4.3 of the LEP (cl 4.6(4)(a)(ii)); and

(4) The proposed development will be in the public interest because it is consistent with the objectives of the R4 High Density Residential Zone (cl 4.6(4)(a)(ii)),

For the first of the above matters, Preston CJ made it clear, in Initial Action at [25], that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather that it “only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed those matters.”

SJD DB2 Pty Ltd v Woollahra Council [2020] NSWLEC 1112 (SJD DB2).

This appeal sought consent for the construction of a six-storey Shop top housing development at 28-34 Cross Street Double Bay (the DA). The Court approved the proposed development, having a height of 21.21m where the control was 14.7m – representing a maximum variation of approximately 44% (or 6.51m) – and a floor space ratio (FSR) of 3.54:1 where the control was 2.5:1 – representing a variation of approximately 41%.

The Court drew from the decisions in *Initial Action* and *RebelMH* in the *SJD DB2* judgment, and noted that although there are a number of ways to demonstrate that compliance with a development standard is unreasonable or unnecessary, it may be sufficient to establish only one way (at [35].) In considering the clause 4.6 variation requests submitted by the Applicant, the Court considered that they could be treated together, as the breaches they related to were fundamentally related, as where there is greater building form with additional height, so too is there greater floor area (at [63].)

Acting Commissioner Clay makes it clear in his judgment, 'cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome' (at [73]).

7.0 **Clause 4.6(3)(a): Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case**

In dealing with the "unreasonable and unnecessary" Preston CJ identifies and validates the 5 options available to an applicant in *Wehbe v Pittwater Council* which can be adopted in dealing with the *unreasonable and unnecessary* test under **Cl. 4.6(3)(a)**.

Preston CJ at states as follows:

"As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

Based on the above the following identifies the first method identified in *Wehbe*:

"Ways of establishing that compliance is unreasonable or unnecessary

*42 An objection 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 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**: (our emphasis)*

Clause 4.6(3)(a) – UNREASONABLE AND UNNECESSARY

This clause 4.6 responds to the matters required to be demonstrated by sub-clause 4.6(3) namely:

- *that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, and*
- *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Having considered the above the applicant relies upon the first method demonstrating that compliance is *unreasonable and unnecessary* because the objectives of the development standard are achieved notwithstanding a variation with the standard.

In dealing with the control it is necessary to identify the purpose of the height control and then progress to dealing with the consistency or otherwise with the height objectives. The first consideration relates to overall scale of a building given that both height and FSR determines the scale of a building to another building or natural feature and noting that there is no FSR control applicable for this development.

A response to the objectives of the height standards is as follows:

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

The proposal does not offend this objective. The majority of the building complies with the 8.5m height limit. The only section that is required to be varied is the south-east corner roof of the eastern wing and a very minor roof section of the western wing (refer to Figure 2 above – Height Plane). The site and the surrounding area are zoned for medium density development. While the additional residential density has not yet been taken up by redevelopment of the area as a whole, the local planning provisions, together with the state legislation, allow for this type and density of development on the site. The proposal reflects more closely the likely future development of the area, the proposed height variation is only minor and only applies to a relatively section of the two separate wings of the development. The two roof lines where the variation occurs sit behind the front pitched roofs that present to Park Avenue. They will be barely discernible from the footpaths along the Park Ave frontage, noting that the pitched roof forms facing Park Avenue reflect the existing and likely future character of medium density development in this locality.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The development presents as two x two storey buildings when viewed various vantage points along the street. The frontages are staggered to generally align and be consistent with the front setbacks of the adjoining houses. Landscaping within the front setback outperforms the requirements of Council's DCP in terms of the amount of landscaped area within the front setback and the percentage of that area available as deep soil planting zones. This same design solution could potentially be expected of two new houses on the two properties. There are no view sharing impacts resulting from the development. Privacy is adequacy preserved and resolved through the siting of window openings and internal layout of the development. The north-south orientation of the site results in morning shadows to the west and afternoon shadows to the east. In each case the adjoining houses receive either good morning or afternoon sunlight – mid-winter. The objective is satisfied by the proposal.

(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance.

The site is not a heritage item, is not within a heritage conservation area and is not in proximity to any heritage that it would impact on the reading or historical significance of that item.

(d) to nominate heights that will provide a high-quality urban form for all buildings and a transition in built form and land use intensity

The site and surrounding area is zoned for low rise medium density development as evidenced by the combination of the height standard with the medium density zoning. The proposal offers a suitable design response to the local planning provisions with only a minor variation in two corners of the two wings of the development. These are less than 6% variations. Council has previously approved a boarding house on Park Avenue with both flat and pitched front roof forms facing Park Avenue. The design solution for this development reflects the pitched roof forms of the existing and likely future development in the area. The section of the building that exceeds the building height limit are the corners of the flat roofs. These flat roof forms are indicative of Council approved development in the area, but in this case, they are located behind the pitched roofs and will be barely discernible.

8.0 4.6(3)(b) – Sufficient Environmental Planning Grounds

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

The variation relates to height and as such calls upon those matters considered to be environmental planning grounds relevant to the subject matter. Justification provided for the variation applies to this particular application and not environmental planning grounds that could apply to all lands zoned **R3 Medium Density Residential**.

The maximum additional height proposed by the development is **500mm**. The environmental planning grounds justification for the height variation is provided as follows:

- The variation enables the front pitched roof forms to complement the desired future character of the area with the flat roofs (where the two minor variations occur) essentially sit behind the pitched roofs and will not be discernible from various vantage points along Park Avenue.
- The 500mm variation is a maximum height with the large majority of the both roofs complying with the height limit.
- The streetscape along Park Avenue will change over time. It is one-sided due to the railway line opposite – to the south. As such there is no built form to complement or reflect on the southern of Park Ave. There are existing two storey townhouses on Park Avenue, older three storey walk-ups and low density, single detached dwellings which are likely to redevelop as their age and redevelopment viability allow.
- The proposal demonstrates that the site has the capacity to support the additional height without significant adverse impacts by way of privacy or overshadowing of adjoining properties. Therefore, the amenity of adjoining residences can be maintained and as such the proposed development achieves an appropriate urban design outcome for Park Avenue.
- Future development of the adjoining property to the east of the site is no disadvantaged by the variation due to excessive overshadowing or amenity issues resulting from the height variation

In dealing with the sufficient environmental planning grounds Preston CJ in Initial Action considers that it is available to the applicant to also deal with the Objectives of the Act under S1.3 in order to demonstrate that grounds exist to warrant a variation to height. Clause 1.3 of the *EP&A Act 1979* relevantly provides:

“1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,***
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,***
- (c) to promote the orderly and economic use and development of land,***
- (d) to promote the delivery and maintenance of affordable housing,***
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,***
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),***
- (g) to promote good design and amenity of the built environment,***
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,***

- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment. (emphasis added)*

A development that complies with the landuse zoning of the site (**R3 Medium Density Residential**) satisfies the objectives of under S1.3 EP&A Act 1979.

The plans by CK Design satisfies the objectives in bold given that:

- The development is located within a 'medium density' residential zone which recognises that the likely future character of Park Avenue will be characterised by medium density, not low density, development. The proposed boarding house is one development typology permissible in the R3 zoned area;
- The site is on the fringe of the main urban area but recognised as medium density and therefore functions as a transitional area for residential accommodation in the Penrith area;
- A variety of residential built forms, densities and ages of development exist in the area;
- The proposal remains medium-density and compatible with the likely future character of the area – being low rise, medium density residential accommodation – on the adjoining properties to the east and west along Park Avenue;
- The development allows for the timely and economic development of the land which is important given the site's ease of access to the local train station to the west on Park Avenue and to a variety of services and facilities in the local area;
- The redevelopment of two older dwellings with a new residential accommodation represents a positive social outcome as the development is in a highly accessible location in terms of employment, living and recreation;
- The design presents acceptable scale, bulk and form notwithstanding the minor height variation;
- The design and layout of the development maintains satisfactory access to daylight, sunlight and natural ventilation while maintaining adequate amenity for adjoining residents.

Based on the above the consent authority can be satisfied that there are sufficient environmental planning grounds to warrant the variation.

Notwithstanding the above Preston CJ clarified in Micaul and Initial Action, that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. In this case, these include:

- The proposal has an acceptable visual fit and balances the opportunities and constraints of the site, given its locational context.
- Maintains satisfactory levels of solar access and privacy to the neighbours.

In summary, the Height of Building variation is considered to be in the public interest given its ability to not cause significant adverse impacts but also because of its ability to provide site specific environmental planning grounds demonstrating that strict compliance is unreasonable and unnecessary in the circumstances of this particular case.

The proposal as one departing from the height standard is in the public interest given its ability to:

- not cause significant adverse natural and built form impacts;
- the additional housing supply and housing choice provided by the development;
- provide environmental planning grounds demonstrating that strict compliance is unreasonable and unnecessary in the circumstances. The justification and specific site considerations are not matters that would apply to all sites zoned R3 Medium Density Residential under the Penrith LEP 2010.

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.

Consistency with the Zone Objectives

An enquiry is now made in relation to the ability of the proposal and the identified variation, as one departing from the HOB standard, to reasonably satisfy the stated objectives of the zone.

R3 Medium Density Residential

The objectives of the R3 Medium Density Residential zone are as follows:

Zone R3 Medium Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a medium density residential environment.*
- To provide a variety of housing types within a medium density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To provide for a concentration of housing with access to services and facilities.*
- To enhance the essential character and identity of established residential areas.*
- To ensure that a high level of residential amenity is achieved and maintained.*
- To ensure that development reflects the desired future character and dwelling densities of the area.*

The following provides a review of the zone objectives:

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

The use of the two lots remains residential, meeting the housing needs of the community within a medium density development typology that is permissible in the zone. The objective is achieved.

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

The proposal increases the supply of housing for the area – within a development typology that adds variety to the available housing supply. The objective is achieved.

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

This objective is not relevant to the proposal.

- To provide for a concentration of housing with access to services and facilities.*

The subject site is well located to provide residents access to a variety of local services and facilities. The Western Sydney (Werrington) Campus is to the east, the Kingswood Train Station to the west, Werrington Lakes Reserve, Penrith Valley Regional Sports

Centre, TAFE NSW – Nepean, Kingswood, Kingswood South Public School, Nepean Hospital and a variety of shopping and employment opportunities within a 3-4km radius of the site. Therefore, the site has good access to these services and facilities.

- *To enhance the essential character and identity of established residential areas.*

The area is characterised by a variety of housing forms – from low to medium density, of various ages and levels of maintenance. The R3 zone permits a variety of medium density development, including boarding houses. There is no FSR for development of the subject site or within the immediate area, only a height limit. Therefore, it can be anticipated that medium density development that develops in this R3 zone over time will have a variety of densities, dependent upon the development typology proposed. The area will transition and morph over time. This has already commenced with the townhouses and boarding house to the west of the site, adding variety to the older three-storey walk-ups closer to the train station.

The proposed height is within the acceptable range and does not occur across the entire building footprint. The additional height, of itself, does not facilitate/promote an additional storey when viewed from the street or from adjoining site. In order to be compatible the new infill development does not necessarily need to be the same and on this basis the boarding house will be compatible with likely future character of development along Park Avenue. The objective is achieved.

- *To ensure that a high level of residential amenity is achieved and maintained.*

The development will provide a high level of internal amenity for residents by the grouping of the rooms into small clusters that will identify with each other via shared access and landing areas, then via the larger vertical associations, then the boarding house as a whole via the various communal open spaces. Onsite parking is sufficient for the development and cycling and walking will be encouraged by the relatively flat topography along Park Avenue and surrounds.

Externally the development is designed to appear as two x two-storey medium density developments with the central core separating the two wings. This is fronted by domestic style landscaping to complement the residential nature of the area. Overlooking and privacy to adjoining properties has been addressed via adequate setbacks and installation of window screens to the first floor level. The upper level has only highlight windows facing the side boundaries.

- *To ensure that development reflects the desired future character and dwelling densities of the area.*

As noted previously the proposal reflects the likely future character of development within the R3 zone along Park Avenue. The existing single dwelling sites contain older dwellings that will, over time, redevelop to their optimal development capacity. This has started to occur with the townhouses west of the subject site. This development may become a catalyst for more medium density development in the area. Its location close to the local services and facilities noted below will continue to make this area an attractive location for future redevelopment.

The departure from the HOB control does not hinder the ability of the development to provide appropriate residential accommodation for a variety of residents on adjoining site. The development does not isolate any sites and therefore does not hinder the future development potential of the area.

The height and scale of the development is acceptable given the locational context of the site and its proximity to the Kingswood Train Station, Penrith Valley Regional Sports Centre, Werrington Lake Reserve, Nepean Hospital, Western Sydney University (Werrington).

8.0 Other Matters For Consideration

Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl. 64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the PLEP.

The Court has power to grant development consent to the proposed development even though it contravenes the **HOB** development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that 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.*

The proposed contravention of the **HOB** development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular site. It is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in Section 7 and Section 8, the proposed contravention of the development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard.

The proposed development contravenes the **HOB** development standard under **cl4.3(2) of PLEP 2010** and the building control under **cl 4.3 of the PLEP 2010** is a development standard and is not excluded from the application of cl 4.6.

This written request to vary the development standard has been prepared in accordance with **cl4.6(3) of the PLEP** and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- the proposed development is consistent with the relevant objectives of the development standard pursuant to **cl4.3 of the PLEP 2010** and is consistent with the relevant objectives of the **R3** zone and therefore, the proposed development is in the public interest;

- the proposed dwelling will not result in significant adverse environmental harm in that the amenity of neighbouring properties will be satisfactory and the dwelling will enhance the Wilson Street streetscape.