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## **Clause 4.6 – Request to Vary a Building Height and FSR Standard under Newcastle LEP 2012**

### **Proposed Mixed Use Development (SSD: 18\_9827)**

**Property:**

45 Honeysuckle Drive, Newcastle  
Pt Lot 40 DP 1251908

**Applicant:**

Horizon Newcastle Pty Ltd

**Date:**

February 2020

Project Management • Town Planning • Engineering • Surveying  
Visualisation • Social Impact • Urban Planning

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## Document Control Sheet

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| A         | Draft         | 10/05/2019 | CM          | JB         |
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## 1.0 Introduction

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Horizon Newcastle Pty Ltd seeks development consent for a proposed mixed-use development at 50 Honeysuckle Drive, Newcastle (Pt Lot 40 DP 1251908), known as "Lee 5".

Specifically, the development proposes the construction of three (3) buildings on the site. The buildings are proposed along the waterfront as seven (7) storeys, and a small portion of the development fronting Honeysuckle Drive as eight (8) storeys. Two (2) levels of basement car parking are also proposed.

The ground floor will be utilised predominately for commercial purposes, however several residences will be incorporated to provide additional openings and activations to the public domain. The remaining storeys will contain approximately 105 apartments.

The proposed development requires a variation to height and FSR development standards within the Newcastle LEP 2012 in order to support the outcome.

Clause 4.6 of NLEP 2012 provides an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

This report sets out the applicant's written request under Clause 4.6 of NLEP 2012 to vary the development standards identified under Clause 4.3 – Height of buildings, and Clause 4.4 – Floor space ratio to achieve the proposed development outcome.

The proposed variation is considered to be reasonable, it will not have any significant impacts, is of a relatively small scale and is pursuit of a desired planning outcome established through master planning for the locality. Strict compliance with the standards would not achieve a better urban planning outcome.

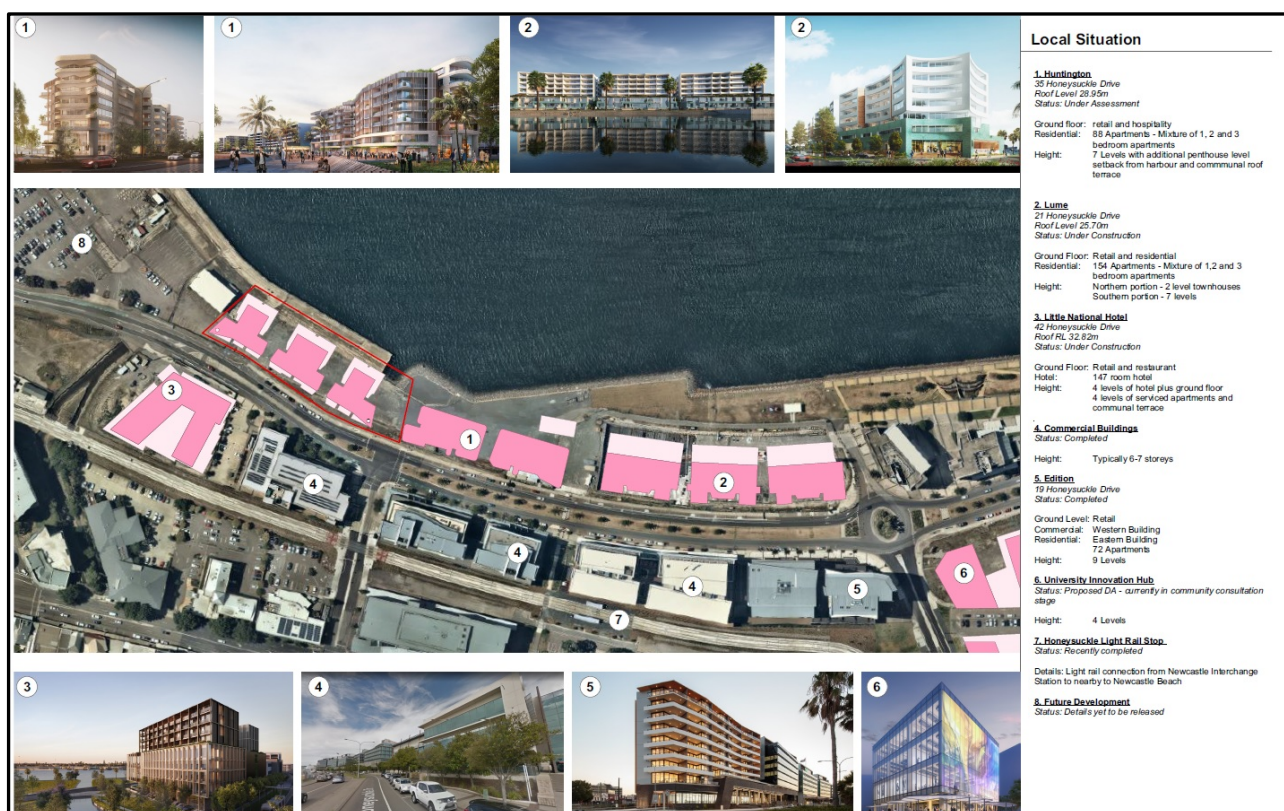
This report demonstrates that the proposed development including the variations sought can be supported.

## 2.0 Site

The site is situated in the suburb of Newcastle, in the area known as Honeysuckle. Honeysuckle is an emerging hub, and currently comprises a mix of relatively new multi-storey development, construction sites and vacant parcels identified for future development and open space. The site has been identified for redevelopment, and is specifically identified by and specifically identified by the Hunter & Central Coast Development Corporation (HCCDC) as part of their Cottage Creek Precinct.

The site has an area of approximately 5,711m<sup>2</sup> and has frontage to Honeysuckle Drive. The site is adjoined by the Hunter River to the north, and Cottage Creek to the west. Vacant development sites adjoin the site to the east, and further to the west. South of Honeysuckle Drive are a number of multi-storey commercial buildings.

The subject site is underutilised, currently being used by a construction firm as an office, and comprising hardstand areas remnant from previous industrial uses that is used for car parking. As mentioned previously, the Honeysuckle area is earmarked for redevelopment, which is reinforced by the construction occurring on a number of other mixed-use multi-storey buildings that tie in with the existing development of Honeysuckle, as shown in **Figure 1** below.



**Figure 1 - Urban Analysis (CKDS, April 2019).**

## 3.0 Exceptions to Development Standards

The proposed development seeks variation to height and FSR standards (as detailed in **Section 4** and **5** of this report).

Clause 4.6 of NLEP 2012 provides for the opportunity to vary development standards. The relevant sections of Clause are:

### 4.6 Exceptions to development standards

(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.*



The variation to development standards has been addressed by the Land and Environment Court in a number of cases, both in its former application under State Environmental Planning Policy 1 and also in the current format as it appears under Clause 4.6.

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following NSW Land and Environment Court (Court) judgements:

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;
- Wehbe v Pittwater Council [2007] NSWLEC 827;
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five No 1);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (Four2Five No 2);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (Four2Five No 3);
- Moskovich v Waverley Council [2016] NSWLEC 1015;
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7; and
- Initial Action Pty Ltd V Woollahra Council [2018] NSW LEC 118

Key elements from the above cases are outlined below.

In the decision of *Wehbe v Pittwater Council [2007] NSW lec 827*, Chief Justice Preston outlined the rationale for the development standard, and the ways by which a development standard might be considered unreasonable and/or unnecessary. In his decision Chief Justice Preston noted:

*"The rationale is that development standards are not ends in themselves, but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)".*

*Wehbe v Pittwater Council [2007] NSW LEC 827* also established the 'five-part test' to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- 1) *The objectives of the development standard are achieved notwithstanding non-compliance with the standard (unreasonable and unnecessary);*
- 2) *The underlying objective or purpose is not relevant to the development (unnecessary);*
- 3) *The underlying objective or purpose would be defeated or thwarted if compliance was required (unreasonable);*
- 4) *The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consent that departs from the standard (unreasonable and unnecessary); or*
- 5) *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 was unreasonable or unnecessary.*

In *Initial Action Pty Ltd V Woollahra Council* [2018] two key elements are applicable.

*Firstly, the consent authority must be satisfied that the request seeking to justify the contravention of the development standard has adequately addressed the following matters required to be demonstrated by clause 4.6(3):*

- (a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*
- (b) There are sufficient environmental planning grounds to justify contravening the development standards.*

*Secondly, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out (clause 4.6(4)(a)\*(ii)). The consent authority must be directly satisfied about the matter in clause 4.6(4) (a) (ii) and not indirectly satisfied that the written request has adequately addressed the matter.*

**Section 5** of this report addresses the relevant requirements of Clause 4.6 including with consideration of the guidance provided the relevant judgments.

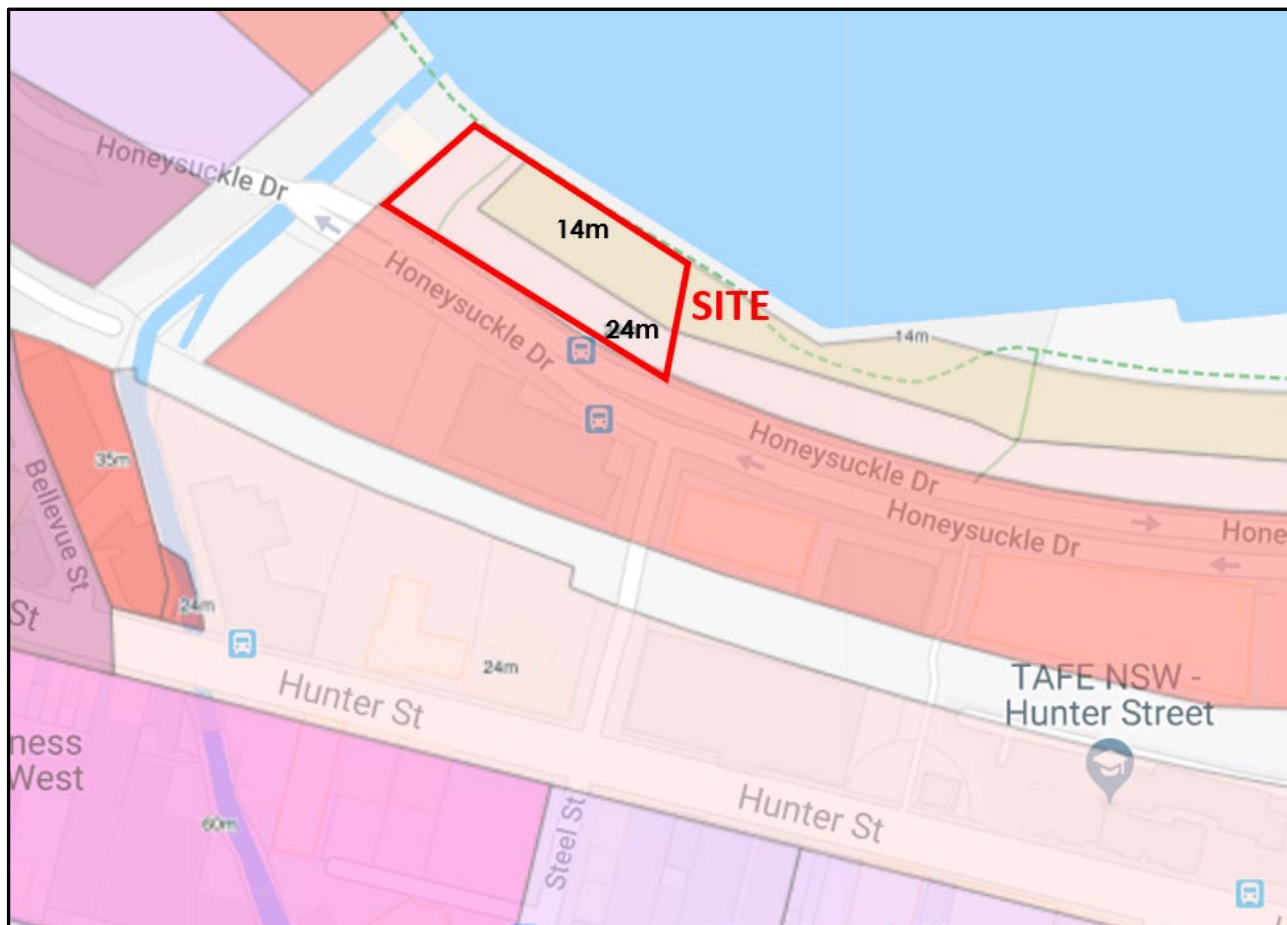


## 4.0 The Development Standards

The proposed development seeks variation to the following development standards imposed by Newcastle LEP 2012:

### 4.1 CLAUSE 4.3 - MAXIMUM BUILDING HEIGHT

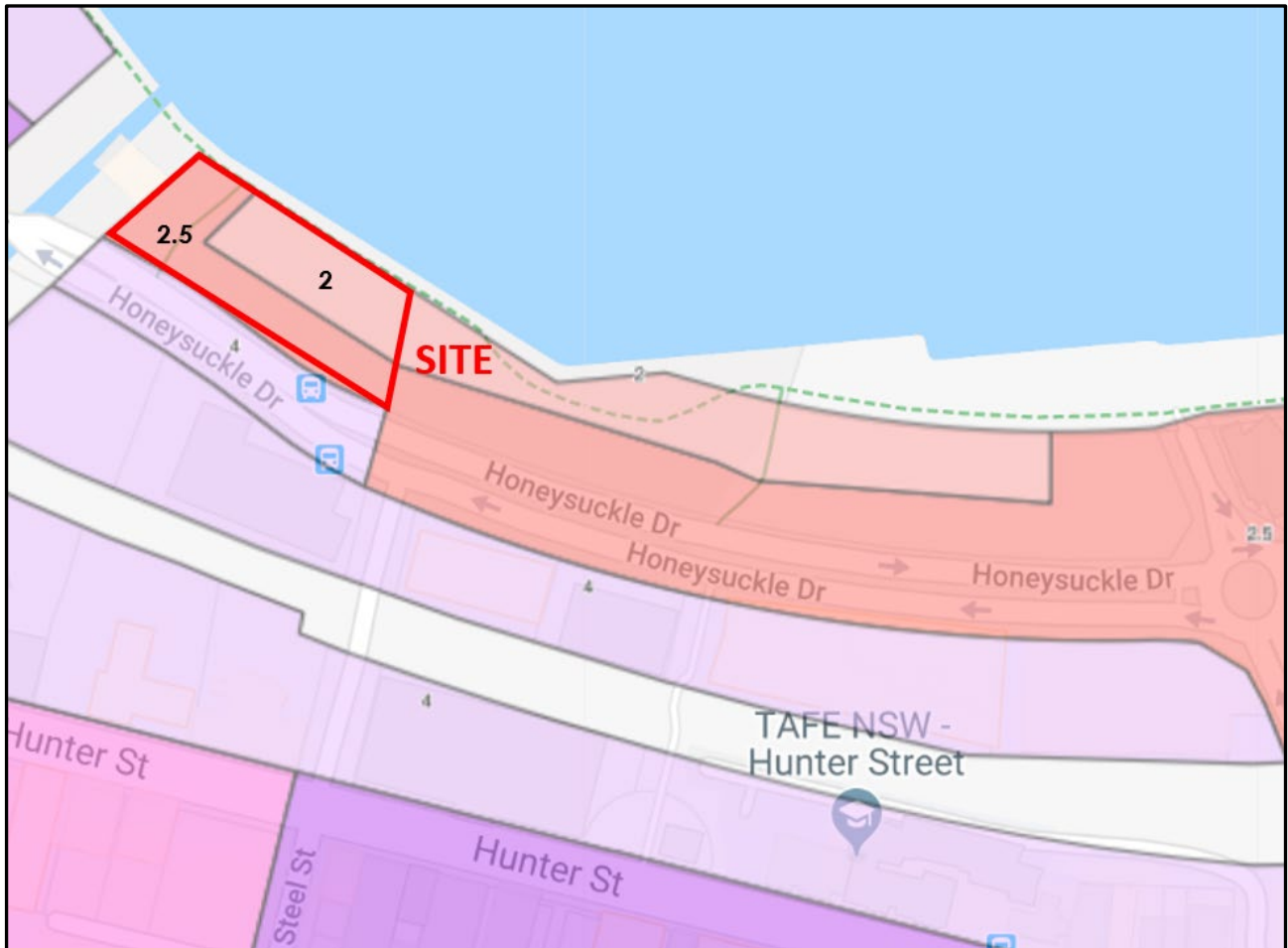
Clause 4.3 of NLEP 2012 prescribes a maximum building height of 14m within the northern portion of the site, and 24m within the southern and western portions of the site (refer to **Figure 2** below).



**Figure 2 - Extract from Newcastle LEP 2012 Maximum Building Height Map.**

### 4.2 CLAUSE 4.4 - MAXIMUM FLOOR SPACE RATIO

Clause 4.4 of NLEP 2012 prescribes a split maximum floor space ratio (FSR) of 2:1 within the northern portion of the site, and 2.5:1 within the southern and western portions of the site (refer to **Figure 3** below).

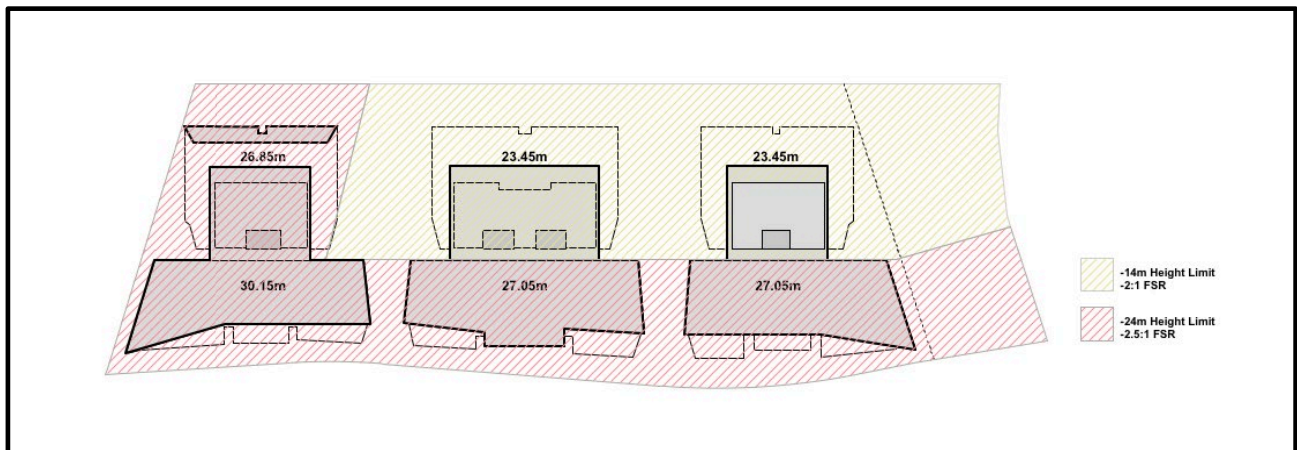


**Figure 3 - Extract from Newcastle LEP 2012 Maximum FSR Map.**

## 5.0 Extent of Variation

### 5.1 BUILDING HEIGHT

**Figure 4** below identifies the proposed height of the three (3) building elements relative to the NLEP height map. The proposed building heights within the 24m height mapped area range from 27.05m to 30.15m and the proposed building heights within the 14m height mapped area are at 23.45m.



**Figure 4 - Proposed Building Heights relative the NLEP Height Mapping.**

To properly calculate the proposed variation it is also necessary to have regard to Clause 7.5 (6) of NLEP 2012:

*7.5 (6) The consent authority may grant consent to the erection or alteration of a building to which this clause applies that has a floor space ratio of not more than 10% greater than that allowed by clause 7.10 or a height of not more than 10% greater than that allowed by clause 4.3, but only if the design of the building or alteration has been reviewed by a design review panel.*

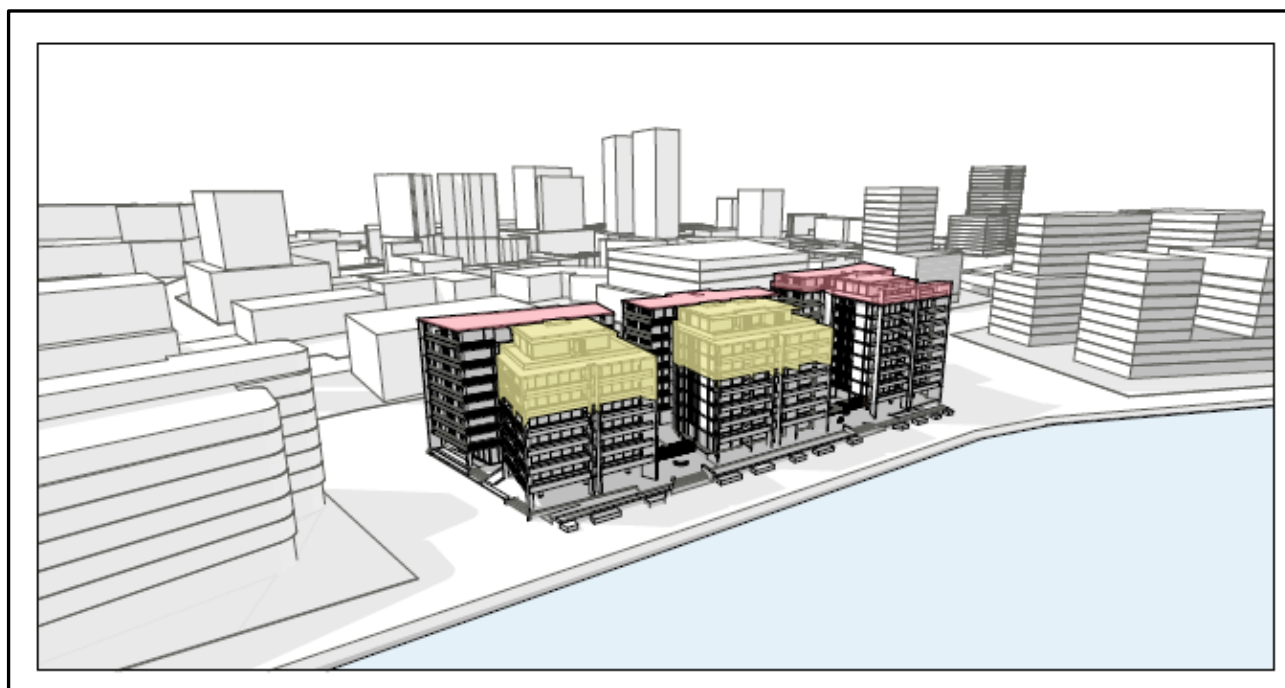
The proposed development has been the subject of a Design Review Panel process and on this basis the 10% bonus can be applied. In applying the bonus, this increases the available height under the NLEP 2012 to 26.4m for the southern and western portions of the site, and 15.4m for the northern section of the site.

The following **Table 1** identifies the proposed height against the available height, having regard to the 10% bonus allowed for under Clause 7.5(6).

**Table 1**

| CONTROL                         | PROPOSAL        | NUMERICAL VARIATION     |
|---------------------------------|-----------------|-------------------------|
| 26.4m (southern & western area) | 26.85m – 30.15m | Between 0.45m and 3.75m |
| 15.4m (northern area)           | 23.45m          | 8.05m                   |

The variation sought in height is demonstrated in the following diagram.

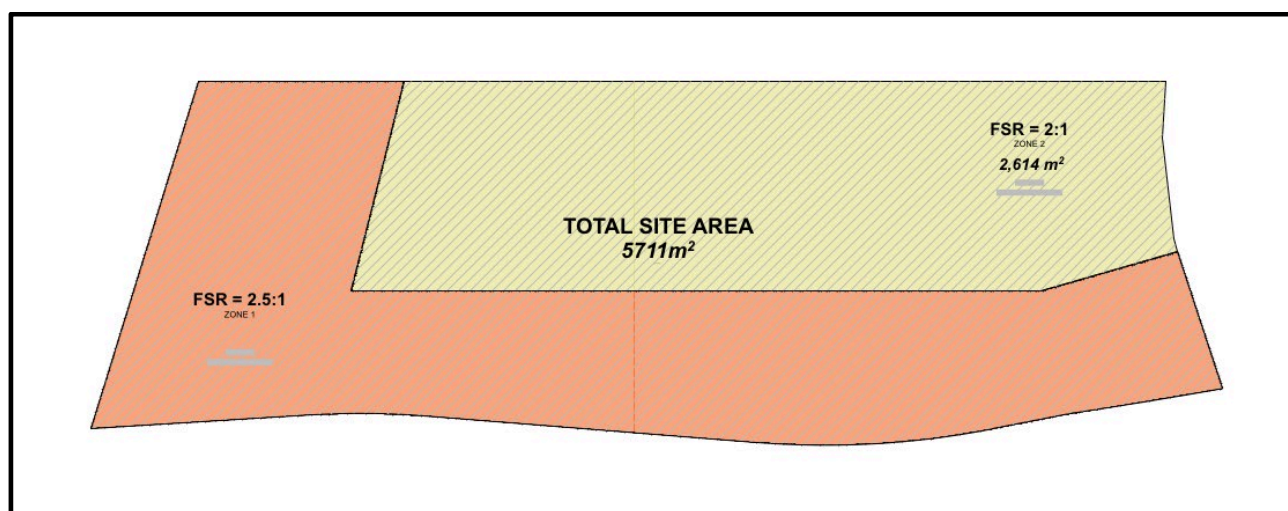


**Figure 5 - Proposed Height Variation.**

## 5.2 FLOOR SPACE RATIO

The development proposes a maximum GFA of 13,634.5m<sup>2</sup>. The subject development site has a total area of 5,711m<sup>2</sup>, resulting in a total proposed FSR of 2.39:1 for the entire site.

The site is divided into 2 FSR categories as identified in **Section 3** and shown diagrammatically in **Figure 6** below, notated to show the land area calculations for each FSR category.



**Figure 6 - Site FSR.**

Based on the area calculations for the FSR categories, under the NLEP controls a total available GFA for the development is 12,970.5m<sup>2</sup> resulting in a total available FSR of 2.27:1. As referenced above a total building GFA of 13,634.5m<sup>2</sup> is proposed, equating to a proposed FSR of 2.39:1 resulting in an overall variation of approximately 5.1%.

For completeness, the available and proposed FSR in each FSR category for the site has been calculated, and presented in **Table 2** below.

**Table 2**

| CONTROL FSR                       | PROPOSED FSR             | NUMERICAL VARIATION                   |
|-----------------------------------|--------------------------|---------------------------------------|
| 2.5:1 (southern and western area) | 2.80:1                   | 0.30                                  |
| GFA allowed: 7742.5m <sup>2</sup> | 8695.5m <sup>2</sup> GFA | 953m <sup>2</sup> GFA                 |
| 2:1 (northern area)               | 1.88:1                   | No variation                          |
| GFA allowed 5228m <sup>2</sup>    | 4939m <sup>2</sup>       | (289m <sup>2</sup> under allowed GFA) |

As per **Table 2** above, a variation of 0.30:1 (953m<sup>2</sup> GFA) in respect of the southern and western area is sought. However, no variation is sought for the northern area.



## 6.0 Justification of Variation

In accordance with Clause 4.6(3)(a) of NLEP 2012 and having regard to the established law on matters pertaining to the use of Clause 4.6, this Section identifies that the FSR and Height Standards are unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify the variation sought.

### 6.1 ZONING AND ZONE OBJECTIVES

In consideration of the request to vary the identified development standards it is necessary to identify the zoning of the land and the zone objectives. The site is zoned B4 Mixed Use Zone under NLEP 2012, as shown in **Figure 7** below.



**Figure 7 - Land Zoning (NLEP2012).**

The objectives of the B4 zone are set out and addressed below:

- *To provide a mixture of compatible land uses.*

The proposed development features commercial / retail uses at ground floor level that are accessed directly from the Honeysuckle Drive frontage, as well as the Promenade. In addition, the proposal provides an increased supply of residential accommodation in an area characterised by a mix of uses including business, entertainment, and community uses.

- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*



The proposed mixed use development, comprising both commercial / retail units, and residential accommodation, is in a highly accessible location with good proximity to existing pedestrian and cycle links, bus stops, and the light rail Interchange and Honeysuckle stops.

- *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

The subject site is located within easy walking distance of existing and emerging business development within the Honeysuckle Precinct and the wider Newcastle City Centre (including the CBD, Hunter Street Mall, and Darby Street Precinct). The proposed mixed-use development, and associated increase in population and patronage within the locality, will support the viability of these commercial centres.

The proposed variations sought to the height and FSR development standards do not prevent the zone objectives from being achieved.

## 6.2 PRECINCT DESIGN

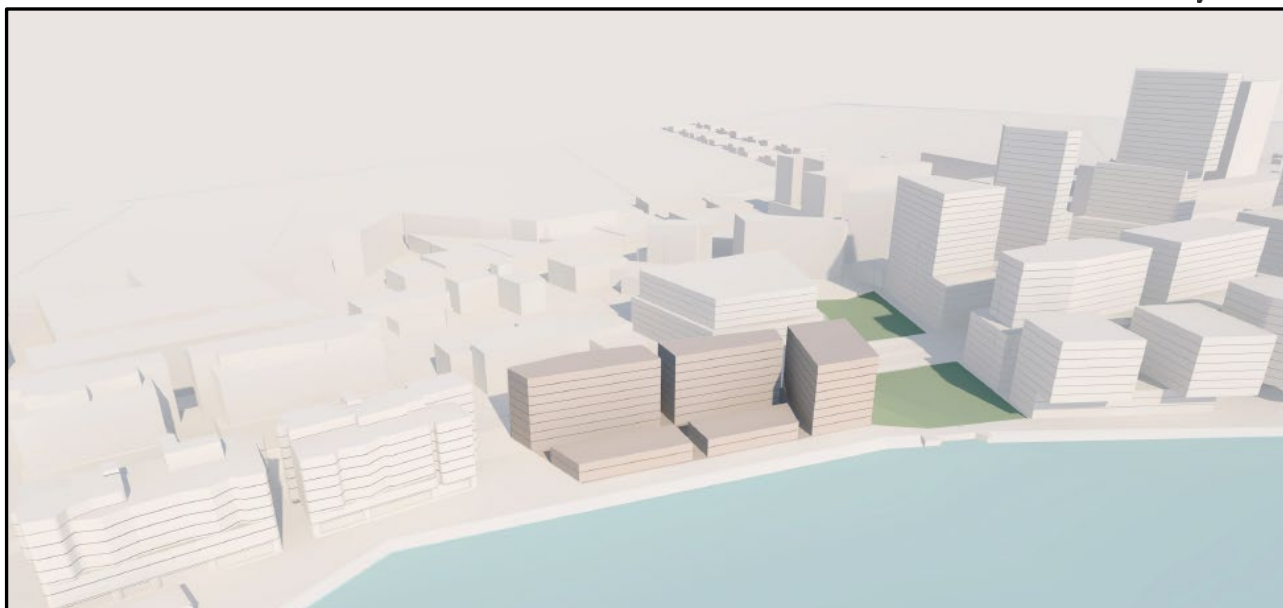
Important to understanding the variations to the development standards sought is the more detailed Lee 5 precinct design work that has been completed post the commencement of NLEP 2012.

A detailed design exercise was undertaken on behalf of HDC (now HCCDC) by CHROFI in 2018. This detailed design established a criteria for the future development of the site, and various surrounding development sites within the Honeysuckle Precinct. The criteria guided the tender process for securing the site by the current Proponent (Horizon Newcastle Pty Ltd), and was strongly referred to by Hill Thalys and CKDS Architecture in their winning tender bid as well as in the final design of the project submitted for approval.

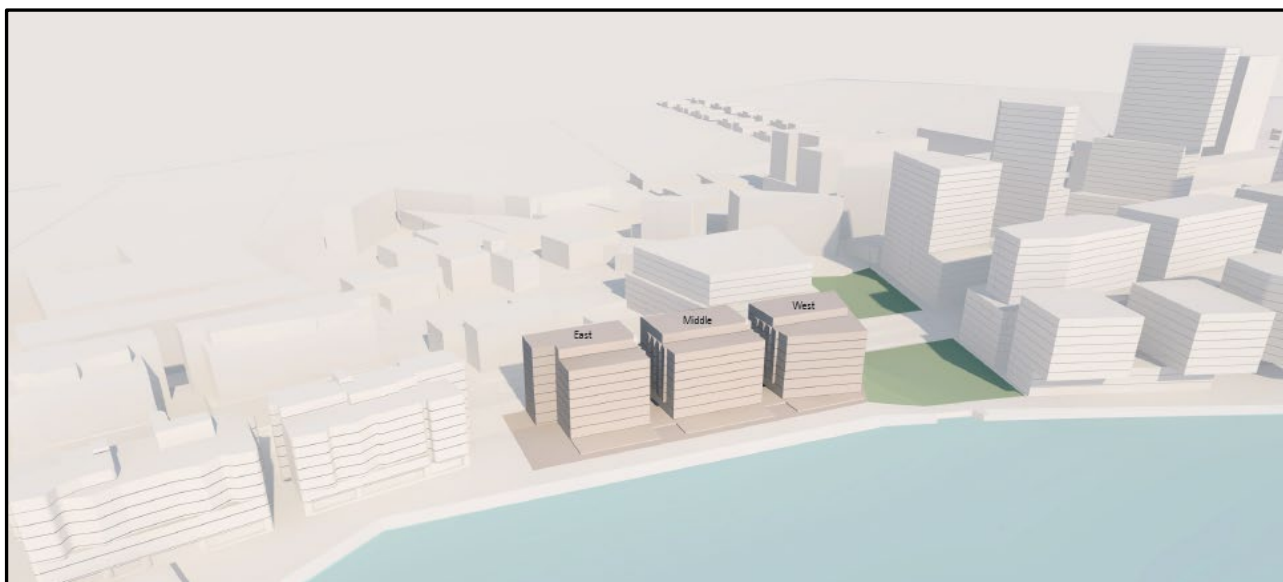
Key elements of the CHROFI guidelines are:

- Strong and consistent edges that reinforce the linear character;
- The built form for Lee 5 should be consistent with the predominant scale of adjacent buildings along the foreshore; and
- The building height should match the neighbouring building height at 35 Honeysuckle Drive.

The CHROFI report identified a compliant scheme and a non-compliant scheme as per **Figure 8** and **9** below, with the non-compliant scheme representing the preferred format. This includes matching the heights of the adjoining built form as currently proposed for 35 Honeysuckle Drive.



**Figure 8 - Compliant Scheme.**



**Figure 9 - Preferred Non-compliant Scheme.**

The proposed height and FSR variations sought and dealt with hereunder are proposed in order to achieve the vision of the CHROFI design elements.

The proposed design has been through a Design Review Panel as outlined in Clause 7.5 of NLEP 2012. The Design Review Panel (DRP) consists of members from Council's Urban Design Consultative Group, NSW Government Architect and Hunter Development Corporation. The DRP has endorsed the final design and the variations proposed.

The CHROFI guidelines and the DRP process have sought to refine the preferred outcome for the site beyond that originally established in the LEP and has been done so in pursuit of better urban design outcomes.

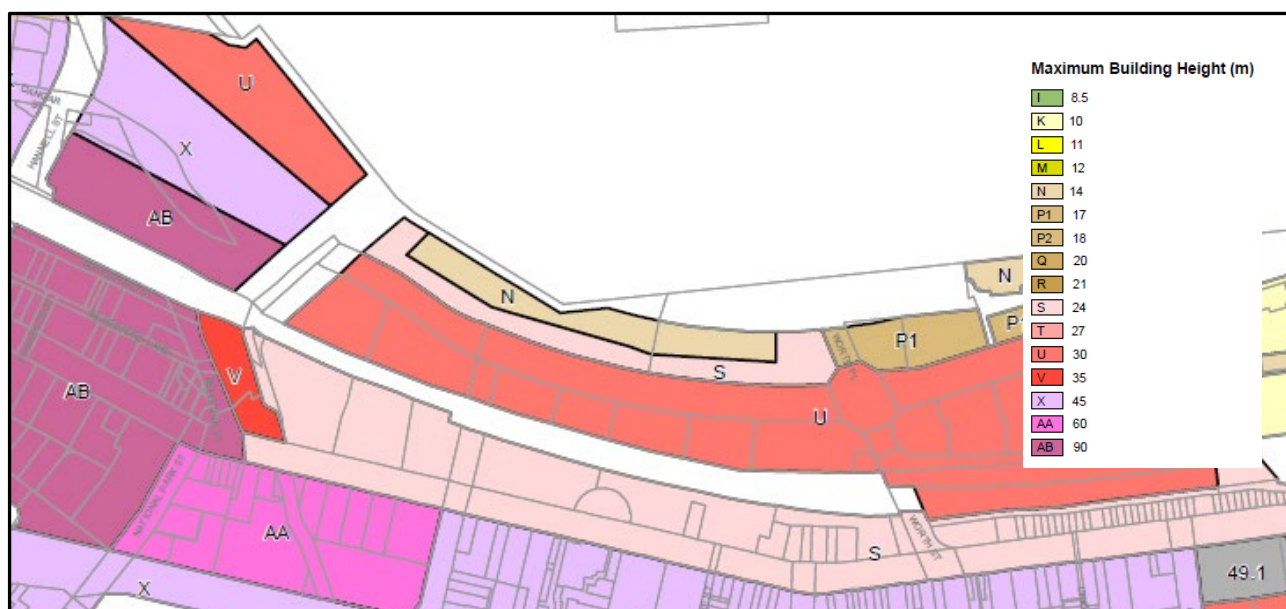
## 6.3 CLAUSE 4.3 - BUILDING HEIGHT

The objectives of the maximum building height development standard are set out in Clause 4.3(1)(a)(b) of the LEP and are addressed as follows:

- (a) *to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*

The extent of proposed variation for the southern portion of the site is 0.45m. It is considered negligible and visually not able to be distinguished from a compliant scheme. In this regard, it does not change the envisaged scale for the area.

The height of the western building element represents approximately one storey above the LEP mapped height. That is, a variation of 3.75m. However, the variation provides for an appropriate visual transitional step to the significantly greater building height to the west of the site, being 30m as nominated under the NLEP. The proposed building height will sit comfortably with the 30m heights to the west and south of the site, as shown in the LEP height map extract (refer to **Figure 10** below).



**Figure 10 - Maximum Building Heights (NLEP2012).**

The part of the proposed built form that extends higher than the NLEP Height Map on the harbour side is consistent with the design work completed by CHOFRI that calls for a strong edge to the harbour. The additional height to the south is hidden by the taller element of the proposed form and therefore has no impact.

As discussed previously, the proposal has been reviewed by the Design Review Panel, who support the proposed heights. The proposed building heights are entirely consistent with the zone objectives and indeed are considered to better achieve a scale of development that makes a positive contribution towards the desired built form consistent with the centre hierarchy. The proposed heights respond to the greater level of design refinement carried out for the site post the introduction of the NLEP 2012. Accordingly, it is considered unreasonable and unnecessary to enforce the LEP height standards when an improved outcome can be achieved.

- (b) to allow reasonable daylight access to all developments and the public domain.*

Reasonable daylight access is provided to all surrounding developments, and the proposed height variation will not result in any detrimental impact to any sensitive land uses, as illustrated in the shadow diagram analysis submitted with the application and having regard to the SEPP 65 design statement. Accordingly, it is considered unreasonable and unnecessary to comply with the height standard when the variation will not result in an adverse impact to daylight access to all developments or the public domain.

#### **6.4 CLAUSE 4.4 - FLOOR SPACE RATIO**

The objectives of the maximum floor space ratio development standard are set out in Clause 4.4(1)(a)(b) of the LEP and are addressed as follows:

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,*

The relatively small proposed additional FSR for the site (664 m<sup>2</sup> or 5.1%) does not alter the achieving of this objective. It is considered that the proposed variation, albeit relatively minor, is in fact complementary to this objective in that it will encourage higher density in a well-serviced and emerging area. Accordingly, it is considered unreasonable and unnecessary to enforce strict compliance with the NLEP FSR standard.

- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

The relatively small proposed additional FSR for the site (664m<sup>2</sup> or 5.1%) provides for the opportunity to strengthen the built form edge to the harbour and provide the appropriate visual transitional step to the development south and west of the site. The floor space (located within the minor increases in height) comfortably fits within the context of the city as demonstrated in the massing (and height) diagram below (**Figure 11**).

Importantly the additional FSR sought does not prevent the retention of important space, visual and pedestrian links around the building. Accordingly, it is considered unreasonable and unnecessary to enforce compliance with the NLEP 2012 standard as the objective of achieving an appropriate density of development consistent with established centres hierarchy will be met.



**Figure 11 - Perspective of the proposed development viewed from the harbour relative to surrounding future development.**

## 6.5 JUSTIFICATION ON ENVIRONMENTAL PLANNING GROUNDS

As outlined in **Section 3** there needs to be sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

In this instance there are two key environmental planning grounds that support the variation sought. That is, a superior built form outcome and achieving additional density in a key location.

### Built Form

The small increases in height and FSR allow the built form to provide for a strong edge to the development and appropriately step the building to the allowable taller building elements to the south and west of the site.

These forms are preferred to a compliant scheme, with the outcome being supported by the CHROFI precinct design work and the extensive project design work with the guidance and input from the Design Review Panel formulated specific for this project.

Improving urban design outcomes is an environmental planning ground and accordingly the variations sought can be justified.

### Density

The site is located in a key location with superior access to shops, services, recreation and transport. The provision of additional housing (through the provision of FSR and Height) whilst predominately proposed to promote a better urban design outcome has the benefit of providing for additional housing.



Residential density in key locations such as this contributes to urban consolidation and ESD objectives including:

- Better use of existing infrastructure, and reduced travel by placing people, jobs, education and services closer together;
- Proximity to public transport will reduce reliance on car travel, thus a better outcome for the environment;
- Reduce the need to develop the urban fringe. This has cost savings in terms of cost of infrastructure delivery and provides an improved outcome in terms of environmental conservation;
- Meeting the demand for additional housing and the provision of housing types to support the growing and diverse needs of the population; and
- Provision of higher density housing within Newcastle that will contribute to the revitalisation and renewal of the City Centre.

Noting the above, from a strategic planning perspective, there are strong reasons to encourage and achieve as much development in this location as is reasonably possible.

Achieving the proposed, albeit relatively minor, additional density in a key location is an environmental planning ground that can be supported. This beneficial outcome has been achieved without any significant adverse impact to the surrounding development and public spaces.

## 6.6 PUBLIC INTEREST

In accordance with Clause 4.6(4)(a)(ii) development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest.

The proposed development will be in the public interest because it is consistent with the objectives of the relevant development standards, and the objectives for development within the B4 Mixed Use Zone in which the development is proposed to be carried out.

The intent of the B4 Mixed Use Zone is to provide a wide range of residential, retail, business, office, entertainment, community, and other suitable and compatible land uses within a mixed-use development. The proposal is a mixed-use development which incorporates commercial/retail and residential components. These uses are compatible with the objectives of the zone and will complement surrounding uses.

The proposed development is in the public interest as it will make a quality contribution to the overall growth and revitalisation of the Newcastle City Centre, particularly in the vicinity of the active Honeysuckle Foreshore. It will provide additional housing in an ideal location close to the Wickham Transport Interchange, and associated light rail stop at Honeysuckle, as well as shops, services and recreation. Urban consolidation and ESD principles are public interest matters and will benefit from the proposed variation.

## 7.0 Concurrence

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In accordance with Clause 4.6(4)(b) of NLEP 2012 development consent must not be granted for development that contravenes a development standard unless the concurrence of the Secretary has been obtained.

It is understood that the Secretary's concurrence under Clause 4.6(4)(b) of NLEP 2012 has been delegated to the NSW Department of Planning and Environment for consideration.

## 8.0 Conclusion

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The applicant considers that the consent authority can be satisfied that:

- (a) This request adequately addresses the matters required to be demonstrated by Clause 4.6(3), being:
  - (i) Compliance with the development standard is unreasonable and unnecessary in the circumstances; and
  - (ii) There are sufficient environmental planning ground to justify contravening the development standard.
- (b) The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the relevant zone objectives.

In those circumstances, and subject to concurrence from the Secretary, the consent authority is permitted to grant development consent for the development notwithstanding the contravention of the development standard.

In summary the proposed variation is appropriate and can be supported for the following reasons:

- The extent of variation is minor and without significant adverse impact;
- The design ensures a strong edge to the harbour consistent with precinct urban design work completed for the site and the outcomes of the Design Review Panel process;
- The design provides for transitioning the height from the site to the adjoining allowable heights and sits comfortably within the context of the overall city form; and
- The variation is consistent with planning objectives for urban consolidation and meeting ESD principles through the provision of housing within well located and serviced areas.