



PLANNING DEVELOPMENT PROPERTY

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## Clause 4.6 Variation

### RE: DEVELOPMENT APPLICATION FOR PROPOSED CONSTRUCTION OF NINE-STOREY MIXED USE DEVELOPMENT AT 42 HONEYSUCKLE DRIVE, NEWCASTLE NSW 2300

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#### 1 Introduction

The development to which this submission relates is for the construction of a nine (9) storey mixed-use development located at 42 Honeysuckle Drive, Newcastle NSW 2300.

Specifically, the State Significant Development (SSD) proposal seeks approval for:

- A ground floor retail premises with kitchen facilities and outdoor dining space;
- Hotel comprising a total of 147 hotel rooms and 7 serviced apartments;
- 52 apartments including a mix of one, two and three-bedroom typologies;
- 220 carparking spaces associated with the uses on site, provided within the building; and
- 25 surplus carparking spaces available for public use.

The development control that is to be varied is Clause 4.3 of the Newcastle Local Environmental Plan 2012 (NLEP 2012) which relates to building height. The extent of the variation is limited to a water tank located on the roof, and a small portion of roof parapet at the southern end of the building. The variations proposed are 6.1% (water tank) and 2.4% (parapet).

In summary, the proposal largely complies with the provisions of the NLEP 2012, except for this minor exceedance to building height. An assessment of this variation is provided in the following pages in accordance the requirements of Clause 4.6 of NLEP 2012.

The proposed variation is considered reasonable on the basis that:

- The proposed height variation is situated in a location which will not result in any detrimental impact to any sensitive land uses and therefore the impact of the variation is negligible;
- The proposed built form will reflect the emerging contemporary character of the locality and positively upgrade the existing streetscape. The projection of the building above the height limit will not result in an overbearing visual impact; and
- The variation is marginal and strict compliance with the exact standard would not achieve a greater planning or urban design outcome.

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## 2 Site Details

### 2.1 Site Location and Context

The site is described as 42 Honeysuckle Drive Newcastle, situated within the Local Government Area (LGA) of Newcastle. The site is legally described as Lot 22 DP 1072217. The site is undeveloped land, 3,728m<sup>2</sup> in area with a ground covering of low maintained grass. The site is under the ownership of Hunter Development Corporation (HDC).

The site is a regular quadrilateral configuration, its boundaries shared with public space on three sides, being Honeysuckle Drive (north), public reserve (west), Light Rail Corridor (south) and private land that supports a three-storey commercial building to the immediate east.

The Newcastle Transport Interchange is located approximately 200 metres west of the site, with the new Light Rail Corridor extending along the rear, southern boundary of the site. The light rail infrastructure is currently under construction.

## 3 Exception to development standards

The Department of Planning and Environment's publication "*Varying Development Standards: A Guide*" (August 2011), states that:

*The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:*

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and*
- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the NLEP 2012 is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

### 3.1 Clause 4.6

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

***(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.***

The proposal seeks to vary the height standard applicable to the site and does not introduce new controls across an area. The Clause 4.6 guidelines also express when this clause is *not* to be used, namely:

*"...in Rural or Environmental zones to allow subdivision of land that will result in 2 or more lots less than the minimum area specified for such lots by a development standard, or the subdivision of land that will result in any lot less than 90% of the minimum area specified for such lots by a*

*development standard in the following SI zones: Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.”*

Neither the site nor the proposal is included within these criteria and therefore, the use of Clause 4.6 is appropriate to vary the height standard in this instance.

### 3.2 Legal context to varying development standards

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline 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

In the decision of *Moskovich v Waverley Council* [2016] NSWLEC 1015 it was deemed consistent with the decision in *Four2Five* and the Court agreed that the public interest test (incl 4.6(4)(a)(ii)) is different to the “unreasonable or unnecessary in the circumstances of the case” test (incl 4.6(3)(a)). The Court said that “*the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in Wehbe at [70-76]*”.

*Randwick City Council v Micaul Holding Pty Ltd* [2016] NSWLEC 7 is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the Standard Instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed those matters. This lessens the force of the Court’s earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The decision in *Micaul* is an example of discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger Residential Flat Buildings (RFBs) that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the Commissioner was satisfied that the variation was justified.

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

- (1) Is the planning control in question a development standard;*
- (2) What is the underlying object or purpose of the standard;*
- (3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;*
- (4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*

- (5) *Is a development which complies with the development standard unreasonable or unnecessary; and*
- (6) *Is the objection well founded.*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision Preston CJ 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* [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) *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
- (3) *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- (4) *Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
- (5) *Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

Of particular relevance in this instance is Part 1, that "*the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives*".

## 4 Development standard to be varied

This section pertains to the "*Application form to vary a development standard*" by the Department of Planning and Environment.

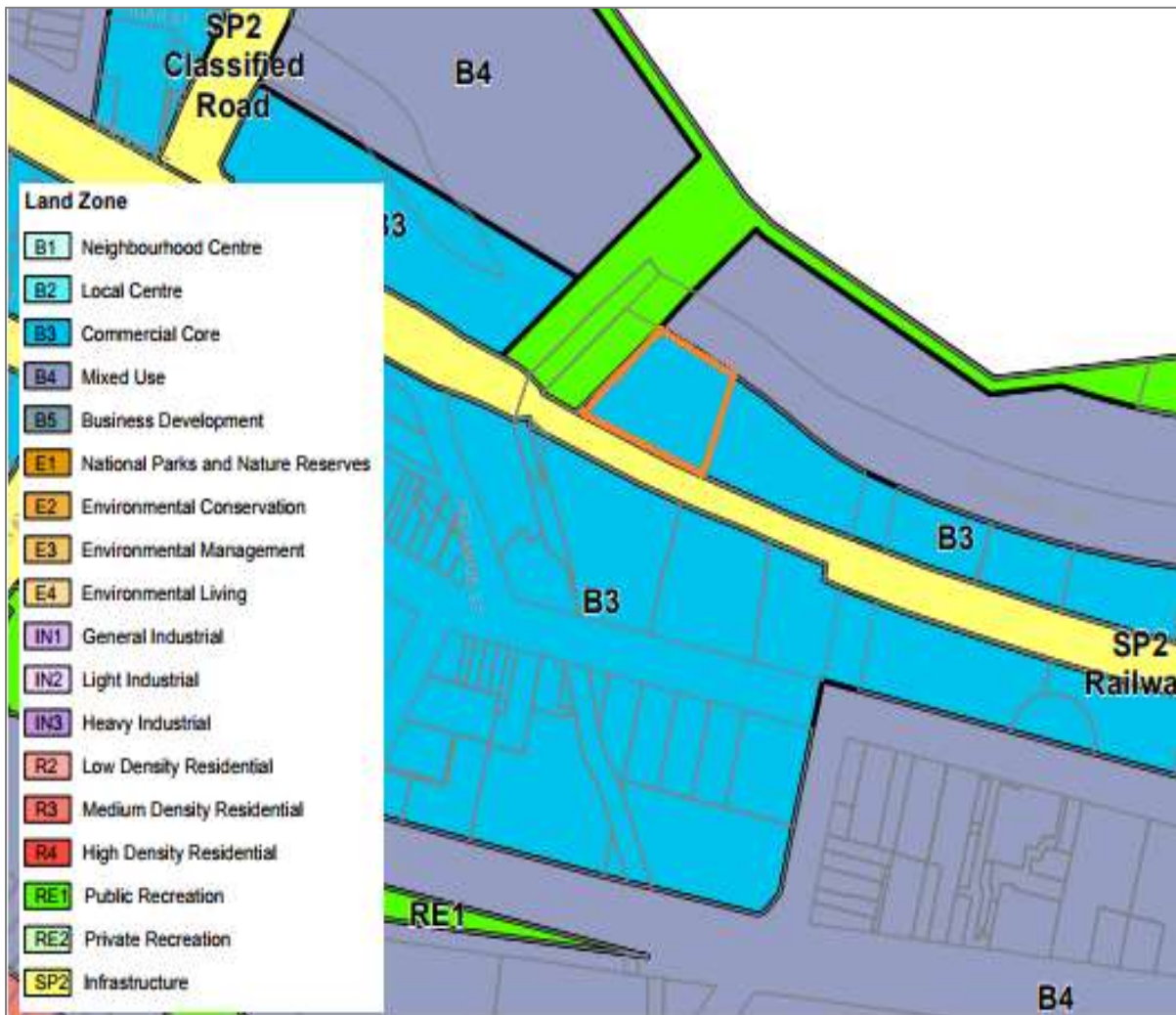
What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012

What is the zoning of the land?

NLEP 2012 indicates that the site is within the B3 Commercial Core Zone, as illustrated in Figure 1.

Figure 1 – Land Zoning Map Extract (Map LZN\_04FA)



What are the objectives of the zone?

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide for commercial floor space within a mixed-use development.*
- *To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region.*

What are the development standards being varied?

The building height development standard contained in Clause 4.3 of the NLEP 2012.

Are the standards to be varied a development standard?

Yes, the standard is considered to be a development standard in accordance with the definition contained in Section 4(1) of the Environmental Planning and Assessment Act 1979 and not a prohibition.

What are the objectives of the development standard?

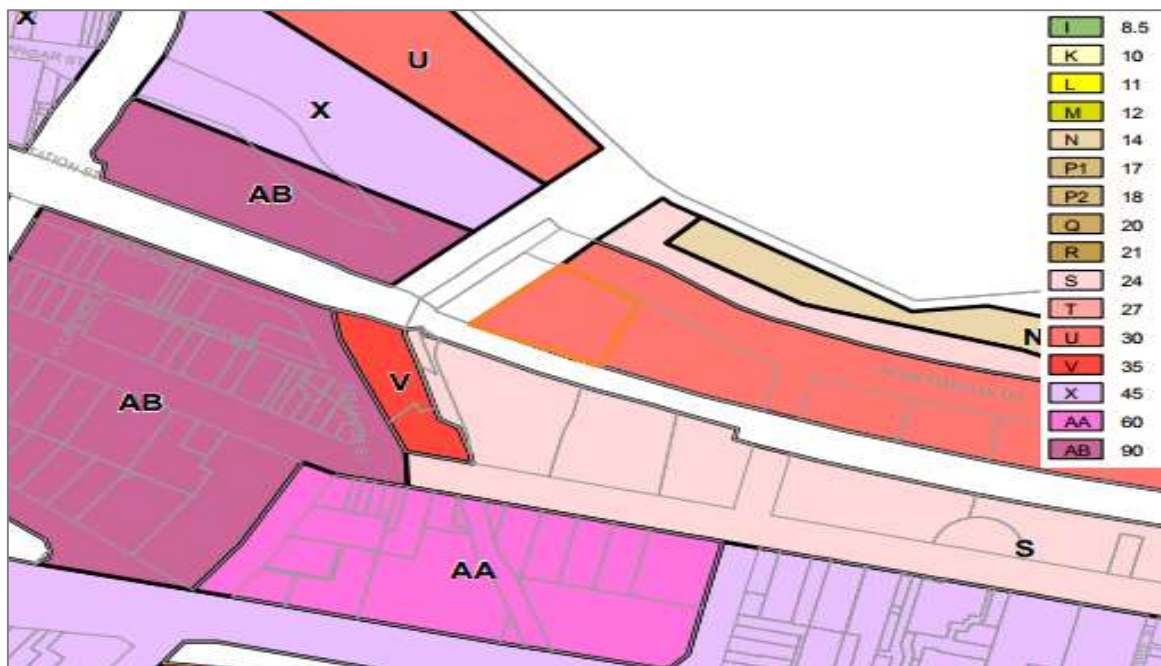
The objectives of Clause 4.3 – Height of Buildings are as follows:

- (a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,
- (b) to allow reasonable daylight access to all developments and the public domain.

What is the numeric value of the development standard in the environmental planning instrument?

The maximum height under the NLEP 2012 is 30 metres, as shown in Figure 2.

**Figure 2 - Height of Building Map Extract (Map 004G)**



What is the proposed numeric value of the development standard in your development application?

The numeric value of the proposed development and percentage variation are detailed in the following table.

Height

Clause	Control	Proposal	Variation
Clause 4.3 – Building Height	30m	30.74m (parapet)	0.74m (2.4%)
		31.92m (water tank)	1.92m (6.1%)

**Note:**

Newcastle LEP 2012 defines building height as the following:

**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*

The numeric values used in the table above are the vertical distance from ground level (existing) to the highest point of the building, as opposed to the RL of the building.

## 5 Justification for the Contravention

This section addresses Section (3), (4) and (5) of Clause 4.6 and justifies the contravention from development standard 4.3.

***(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.**

## 5.1 Compliance is unreasonable or unnecessary

As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the standard.

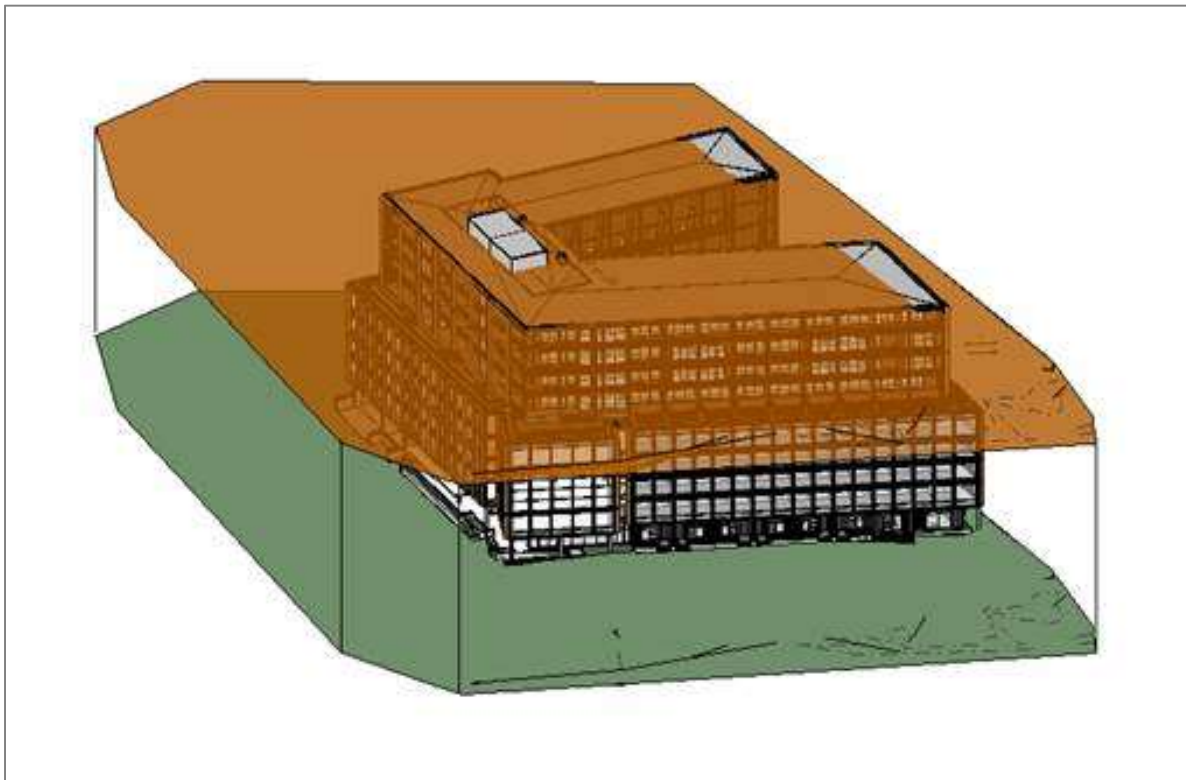
### Height

The proposed development achieves the objectives of Clause 4.3:

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

The proposed development has been designed by Batesmart Architects and consists of a high quality, architecturally designed building that makes a positive contribution to the street frontage of Honeysuckle Drive. The proposed built form will reflect the emerging contemporary character of the Honeysuckle Precinct. The projection of the building above the height limit will not result in an overbearing visual impact, as the exceedance is predominantly due to a water tank being located on the roof. Further to this, the exceedance in height is towards the centre of the site and will therefore have minimal impact on surrounding development. Details of the façade and articulation are provided in the revised Architectural plans provided at Attachment C. In this instance, strict application of the development standards for maximum height is unreasonable and unnecessary and would not achieve a greater planning or urban design outcome. Figure 3 shows the extent of the exceedance of the 30m building height. It should be noted that it is only the water tank and small sections of the towers on the southern extremity that exceed the maximum height.

**Figure 3 – Extent of building height exceedance proposed**



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

Reasonable daylight access is provided to all surrounding developments. The proposed height variation is situated in a location which will not result in any detrimental impact to any sensitive land uses. The development facilitates future development on adjoining property to the east without compromising the ability to develop and achieve the intended built form on the adjoining land. The revised Architectural plans and

shadow diagrams provided in Attachment C demonstrate the negligible impact of the proposed height variation. The proposed development achieves the objective of the clause and therefore strict compliance with a 30 metre height limit would be unreasonable, unnecessary and would not achieve a greater planning or urban design outcome.

Accordingly, the proposal is considered to be consistent with Clause 4.3 and the B3 Commercial Core Zone.

## 5.2 Sufficient environmental planning grounds to justify contravention

This submission demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3, there would be no additional benefit to the streetscape, neighbouring properties and the local area. The exceedance will likely not be visibly detected. The granting of development consent will enable a high quality, architecturally designed mixed use commercial and residential building to be constructed. The objectives of Clause 4.3 and B3 Commercial Core Zone have been met by the proposed development. In light of this, there is considered to be sufficient environmental planning grounds to justify contravening these two development standards in this instance.

## 5.3 Public interest

As demonstrated in this assessment, the proposed development will be in the public interest as it is consistent with the objectives of the height standards and the objectives of the B3 Commercial Core Zone.

The intent of the Commercial Core Zone is to provide a wide range of retail, business, office, entertainment, community, and other suitable land uses, and to provide commercial floor space within a mixed use development. The proposal is a mixed use development which incorporates retail, visitor and tourist accommodation, and residential components. These uses are compatible with the objectives of the zone and will complement the existing surrounding uses and strengthen the Newcastle City Centre.

The proposed development will provide a number of significant public benefits. The proposal contributes a mix of land uses to the locality, creating employment opportunities during construction and operational stages, while providing opportunities for sustainable living. The proposal provides a range of dwelling sizes, thereby providing a variety of housing choices for future residents. The proposed development represents a high quality urban design, which seeks to continue to redevelop and enhance the Honeysuckle Precinct of Newcastle City Centre. The minor height exceedance does not outweigh the merits of the proposal.

## 5.4 Secretary's concurrence

It is understood that the Secretary's concurrence under clause 4.6(4) of LEP 2012 has been delegated to the Department of Planning and Environment.

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## 6 Conclusion

This Clause 4.6 Variation to Development Standard submission has been prepared in response to minor numerical non-compliance with the development standard specified in Clause 4.3 – Height of Buildings in NLEP 2012. The extent of non-compliance is minor in the context of the site and the type and scale of development proposed.

As demonstrated within this submission and the revised Architectural plans, the overall massing, scale, bulk and height of the proposed development is consistent with the desired future character envisioned by Council for the precinct.

It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst allowing for a better outcome based on planning merits. Further, the proposal will not result in any unreasonable impact on amenity or any significant adverse environmental impacts.

The Department of Planning and Environment can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standard.

It is therefore requested that the Department of Planning and Environment grant development consent for the proposed development.

Yours sincerely,



Samuel Newman  
**Town Planner**  
**KDC Pty Ltd**