



*Shellharbour City Council*

*Business Paper*

23 August 2022

Item no. 10.3.3 Attachment 3

4.6 Exception Request Statement

# GYDE

## Clause 4.6 Variation Request

Clause 4.3(2) Shellharbour Local  
Environmental Plan 2013  
Shop Top Housing  
9 Minga Avenue, Shellharbour



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**Report Version:** Final

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## 1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.3(2) height of buildings in the Shellharbour Local Environmental Plan 2013 (SLEP 2013) that is proposed in a development application (DA) for a new shop top housing development at 9 Minga Avenue, Shellharbour (the site).

The objective of the proposed development is to develop the vacant lot and provide a development which contributes positively to the existing Shellharbour town centre. Key design principles of the proposal include an active shop top development with a retail and commercial ground and first floor, dwellings that achieve contemporary standards of amenity, as well as an improved pedestrian environment.

Clause 4.3(2) of the SLEP 2013 prescribes a maximum building height of 18m for the southern end of the site, whilst a maximum height of 15m is prescribed for the majority of the site. The majority of the proposed envelope complies with the 15m standard and, if not for the site's significant gradient, substantial compliance would have been achieved for that part of the site subject to the 18m standard. In effect, though, the proposal exceeds the 18m standard by up to 7.6 metres (RL 53.5) and the 15m standard by up to 2.8m (RL 47.1).

In summary, the proposed variation of the height of buildings development standard is justified in the circumstances applying to this development application because:

- The proposal satisfies the objectives of the height of buildings development standard and the objectives of the B3 Commercial Core zone that applies to the land. There are sufficient environmental planning grounds to justify the variation including:
  - The site is characterised by a substantial gradient which rises 7.6m over approximately 30m. It is inevitable that any functional floor plan within such an area would breach a height standard. To achieve compliance would require multiple 'steps' within the floor plan, which is highly inefficient and impractical.
  - The proposal includes several meaningful public benefits, such as a pedestrian through site link from the Amaroo Way public car park to City Park, as well as a widened pedestrian pathway along the site's Amaroo Way frontage in order to improve pedestrian safety and amenity. The proposed height variation offsets the loss attributed to these public benefits.
  - The impacts resulting from the height breach, in particular view impacts, are negligible. Specifically, impacts on the nearest development (i.e. 73 Cygnet Avenue) are negligible given the subject site's maximum permitted height (i.e. 18m) is greater than what is permitted at 73 Cygnet Avenue (i.e. 15m). That is, even a compliant development on the subject site would obstruct views from 73 Cygnet Avenue. Impacts on views from sites elsewhere in the town centre are similarly negligible because they retain a very wide viewing angle (i.e. the proposal only occupies a very small component of their viewing angle).
  - The site's location, being a prominent corner of the town centre, warrants additional height. The height, in combination with the site's gradient in particular, achieves desirable place making and urban design outcomes.
  - The proposed height variation is consistent with other variations approved within and around the Shellharbour Town Centre, including 16 College Avenue, 76 Cygnet Avenue, and 4-6 Benson Avenue.

This request has been prepared according to clause 4.6 of the SLEP 2013 and demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case, there are sufficient environmental planning grounds to justify the contravention and that the variation is in the public interest.

## 2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the Shellharbour Local Environmental Plan 2013 to justify a variation to the development standard contained in clause 4.3(2) Height of Buildings. This variation is submitted in relation to a proposal for a shop top housing development at 9 Minga Avenue, Shellharbour (site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning, Industry and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That 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 [clause 4.6(4)].

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

### 3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of Buildings development standard which is set out in clause 4.3(2) of the Shellharbour Local Environmental Plan 2013 (SLEP 2013) as follows:

#### 4.3 Height of buildings

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

(a) to ensure the height of buildings complements the streetscape, rural or natural scenic character of the area in which the buildings are located,

(b) to ensure the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views,

(c) to protect areas of scenic or visual importance.

(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 numerical value of the development standard applicable in this instance is 18m and 15m.

The development standard to be varied is not excluded from the operation of clause 4.6 of the SLEP 2013.

## 4. EXTENT OF VARIATION

The subject site has maximum building height standards of 18m and 15m. For that part of the site subject to the 18m standard, the proposal achieves a maximum height of 25.8m (RL 53.500) as measured from the existing ground level. Therefore, the proposal exceeds the 18m development standard by 7.8m. For that part of the site subject to the 15m standard, the proposal achieves a maximum height of 17.8m (RL 47.1), as measured from existing ground level. Therefore, the proposal exceeds the 15m standard by 2.8m.

The area relating to the non-compliant height includes some parapets, lift cores and roof top communal open space associated with level 5, as well as some habitable floor area associated with levels 6,7 and 8.

The proposed height of the building, and the non-compliant height elements, are illustrated in the sections, elevations and height plan diagrams in Figures 1 – 4.



Figure 1: Extract of Section A with the portions above the 18m and 15m height standard circled in blue (Source: DWA Architects)



Figure 2: Extract of eastern elevation with the portions above the 18m height standard circled in blue (Source: DWA Architects)



Figure 3: Extract of western elevation with the portions above the 18m and 15m height standard circled in blue (Source: DWA Architects)

Clause 4.6



Figure 4: Extract of Hight Plane diagram showing the extent of variation (Source: DWA Architects)

## 5. UNREASONABLE OR UNNECESSARY

In this section, it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the SLEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

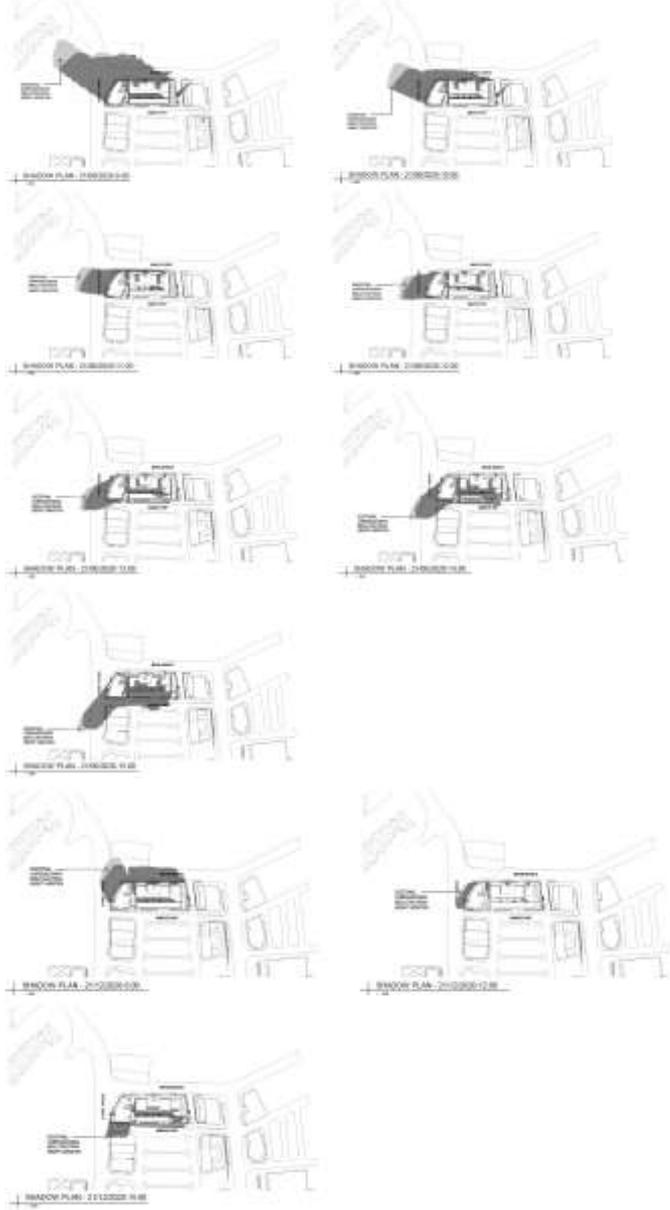
We have considered each of the ways as follows.

### 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (Test 1 under *Wehbe*).

Objective	Discussion
(a) to ensure the height of buildings complements the streetscape, rural or natural scenic character of the area in which the buildings are located,	<p>The SLEP 2013 prescribes a maximum height of 15m (approximately 5 storeys) for much of the Shellharbour Town Centre. A height of 18m (approximately 6 storeys), is also allowed on most corner sites within the town centre. There are also isolated cases where 25m (approximately 10 storeys) is permitted.</p> <p>The Shellharbour Development Control Plan (SDCP) also prescribes a 'zero setback' line for development within the town centre.</p> <p>The majority of the proposal reads as 5 storeys, whilst the southern corner of the</p>

Objective	Discussion
	<p>proposed envelope reads as between 6 – 8 storeys. The proposal also adopts ‘zero setbacks’ and active uses at the ground level. In this case, the proposal is vastly consistent with the controls in the SLEP 2013 and the SDCP and would therefore complement the intended streetscape as sought by this objective.</p> <p>When viewed from a broader context, in particular from City Park, for example, the proposal will complement the streetscape and massing which is anticipated and emerging with the town centre. In particular, it would not be inconsistent with the streetscape and massing established by the existing Council administration building as well as the development currently under construction at 16 College Avenue, as demonstrated in the following contextual representation.</p> <div data-bbox="544 952 1490 1211" data-label="Image"> </div> <p data-bbox="646 1223 1182 1252"><i>Figure 5: Proposed context image (Source: DWA)</i></p>
<p>(b) to ensure the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views,</p>	<p>The amenity of neighbouring buildings, which in this case is 7 Minga Avenue and 73 Cygnet Avenue, is protected primarily because the proposal achieves compliance with the Apartment Design Guide’s (ADG) recommendations for building-to-building separation. That is, the proposal achieves 12 m separation between habitable rooms, although, this control would only apply to 7 Minga Avenue as the recently developed building at 73 Cygnet Avenue, is entirely commercial.</p> <p>The proposal complies with the solar access recommendations within the ADG, for adjoining habitable dwellings (i.e. at 7 Minga Avenue). This is largely because the subject site is located to the south of 7 Minga Avenue. Although not strictly applicable, the ADG’s solar access recommendations would be satisfied in relation to 73 Cygnet Avenue, as demonstrated in the solar access diagrams below prepared by DWA.</p>

Objective	Discussion
	 <p>Figure 6: Extract of solar access diagrams (Source: DWA)</p> <p>Amenity is also protected given, as mentioned earlier, most of the proposed envelope complies with the applicable 15m height standard. In this case, the proposal does not present as excessively bulky, or the like, from nearby development.</p>

Objective	Discussion
	<p>A view impact analysis was undertaken to determine impacts from nearby developments, as well as developments in the broader context of the town centre. Extracts of the subsequent perspective images are provided below, demonstrating that, in both cases, the impacts are negligible. In particular, impacts from 73 Cygnet Avenue are negligible given even a strictly compliant envelope at the subject site is taller than what is permitted at 73 Cygnet Avenue (i.e. 18m vs 15m).</p> <p>Impacts from the broader context are negligible because the overall extent of built form throughout the town centre is relatively low, therefore, allowing for a wide viewing angle. The proposal occupies very little volume within such an angle. This also ensures that views towards important landscape elements, such as mountain ranges and water bodies, is not impact by the proposal.</p>  <p>Figure 7: Extract of view analysis images (Source: Peter Sands)</p>
<p>(c) to protect areas of scenic or visual importance.</p>	<p>As discussed in relation to objective (b), and as demonstrated in image 7 above, the proposal does not impact on any scenic views of importance, such as views towards mountain ranges or water bodies.</p>

As demonstrated in above, the objectives of the Height of Building development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of Building development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

The underlying objective or purpose is relevant to the development and, therefore, this test is not relied upon.

- 5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

- 5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

Given there remains ample development capacity within the town centre, it would be difficult to conclude that the height standard has been abandoned. Nevertheless, it is worth noting that a number of exceptions to the height standard have been supported by Council as well as the Regional Planning Panel. For example, height related exceptions have been supported for development at 16 College Avenue, 76 Cygnet Avenue, as well as 4-6 Benson Street.

- 5.5. The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and, therefore, this test is not relied upon.

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the contravention of the height of buildings development standard are set out in the preceding sections in detail. As discussed above, the non-compliant development does not result in any meaningful additional adverse environmental impact and instead provides a built form that achieves the desired future character for the area for the area and is consistent with the objectives of clause 4.3.

Additionally, the proposed development, notwithstanding the non-compliance with the height standard, better achieves important statutory goals. The superior outcome, in terms of statutory planning goals, combined with the absence of meaningful additional adverse environmental impacts are environmental planning grounds that justify the contravention.

The specific environmental planning grounds to justify the departure of the height of building standard are as follows:

- The vast majority of the proposed envelope complies with the applicable 15m height standard and, in doing so, the proposal is consistent with the anticipated built form character.
- The site is characterised by a substantial gradient of approximately 18%. It is inevitable that any functional floor plan within such an area would exceed the height standard. To achieve compliance would require multiple 'steps' within the floor plan, which is highly inefficient and impractical.
- The proposal includes several meaningful public benefits, such as a pedestrian through site link from the Amaroo Way public car park to City Park, as well as a widened pedestrian pathway along the site's Amaroo Way frontage in order to improve pedestrian safety and amenity. The proposed height variation offsets the loss attributed to these public benefits.
- The impacts resulting from the height variation, in particular view impacts, are negligible. Specifically, impacts on the nearest development (i.e. 73 Cygnet Avenue) are negligible given the subject site's maximum permitted height (i.e. 18m) is greater than what is permitted at 73 Cygnet Avenue (i.e. 15m). That is, even a compliant development on the subject site would obstruct views from 73 Cygnet Avenue. Impacts on views from sites elsewhere in the town centre are similarly negligible because they retain a very wide viewing angle (i.e. the proposal only occupies a very small component of their viewing angle).
- The site's location, being a prominent corner of the town centre, warrants additional height. The height, in combination with the site's gradient in particular, achieves desirable place making and urban design outcomes. Strict compliance with the height of building standard in a building with practical and accessible floorplates would fail to accentuate the corner of Minga and Cygnet Avenues even though this is clearly what the height of buildings standard seeks to achieve in this location.

The proposed height variation is consistent with others within and around the Shellharbour Town Centre, including breaches at 16 College Avenue, 76 Cygnet Avenue, and 4-6 Benson Avenue.

For completeness, we note that the maximum extent of the variation (30.2%) is not in itself, a material consideration as to whether the variation should be allowed. There is no constraint on the degree to which a consent authority may

depart from a numerical standard under clause 4.6, as outlined in *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for large variations to be approved in the right circumstances.

## 7. PUBLIC INTEREST

In this section it is explained how 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. This is required by clause 4.6(4)(a)(ii) of the LEP.

In section 5 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under “public interest” in Table 1).

The table below considers whether the proposal is also consistent with the objectives of the zone.

*Table 2: Consistency with Zone Objectives.*

Objectives of the B3 Commercial Core Zone	Discussion
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.	The proposal will allow for a mix of uses, including retail, business, commercial and residential within Shellharbour town centre. These will provide services to both the local and wider community. The proposed development will also provide support to similar businesses noting mixed use developments, hotel and shopping centres development within the immediate context.
To maximise public transport patronage and encourage walking and cycling.	The proposal encourages active transport with the inclusion of 37 bicycle spaces within the basement. Active transport is also encouraged given the proposal includes a pedestrian though site link and also proposed to widen the pedestrian footpath along Amaroo Way.  Concentrating higher density developments within town centres, as this proposal seeks to do, maximises the efficiency of public transport typically provided in town centres.
To strengthen the role of the Shellharbour City Centre to ensure that it continues to develop as a major regional centre with retail, entertainment, commercial, cultural and	The proposal strengthens the role of city centre via providing a shop top development with uses that are desired and will continue to develop the major regional centre.

Objectives of the B3 Commercial Core Zone	Discussion
residential uses.	
To allow for a limited range of residential accommodation while maintaining retail, business or other non-residential active uses at street level.	The proposal allows for strong activation at street level whilst maintaining residential and retail, business uses.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## 8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence. Concurrence in accordance with PS 20-002 is not assumed.

## 9. CONCLUSION

This submission requests a variation, under clause 4.6 of the Shellharbour Local Environmental Plan 2013, to the Height of Buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B3 Commercial Core zone.
- There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone B3 Commercial Core notwithstanding non-compliance with the Height of Building standard and is therefore in the public interest.

The concurrence of the Secretary is likely to be forthcoming because there is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard and there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.