



CLAUSE 4.6 VARIATION REQUEST

100 EDINBURGH ROAD
CASTLECRAIG

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1.0 INTRODUCTION

- 1.1 This Clause 4.6 request supports the variation to the Height development standard pursuant to Clause 4.3 and 4.3A(6) of Willoughby LEP 2012.
- 1.2 The subject site is zoned E1 Local Centre Zone under Willoughby LEP 2012. Part of the site is also zoned RE1 Public Recreation, however there is no building within this part of the site.
- 1.3 Clause 4.3 of the LEP provides the objectives and maximum height of buildings. The accompanying map specifies the site is located in Area 4 and applies a maximum height of RL 97.49.
- 1.4 Clause 4.3A(6) provides exemptions to the height shown on the map under Clause 4.3 for Area 4 as follows:

(6) The following structures located on the rooftop of a building on land identified as “Area 4” on the Height of Buildings Map may exceed the maximum height shown for the land on the map—

- (a) balustrades with a height of less than 1.2m above the finished floor level of the rooftop,*
- (b) a structure, with a height of no more than 3.75m above the finished floor level of the rooftop, used to enclose a lift for access to communal areas on the rooftop,*
- (c) a structure, with a height of no more than 2.55m above the finished floor level of the rooftop, used to enclose—*
 - (i) stair access to the rooftop, or*
 - (ii) shared facilities for the use of residents of the building, such as bathrooms,*
- (d) service installations, including air conditioning systems, lights, solar panels and skylights, with a height of less than 2m above the finished floor level of the rooftop.*

- 1.5 To accommodate a 4.5m high driveway clearance, a minor variation to the height control is proposed in a localised part of the building.
- 1.6 Clause 4.6 allows for the contravention of a development standard with approval of the consent authority.
- 1.7 The request is structured to address the requirements of Clause 4.6 and in reference to the following Land and Environment Court judgements:
 - *Wehbe V Pittwater Council NSW [2007] LEC 82*
 - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*

- *Randwick City Council v Micaul Holdings [2016] NSWLEC 7*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018*

2.0 CLAUSE 4.6 VARIATION REQUEST

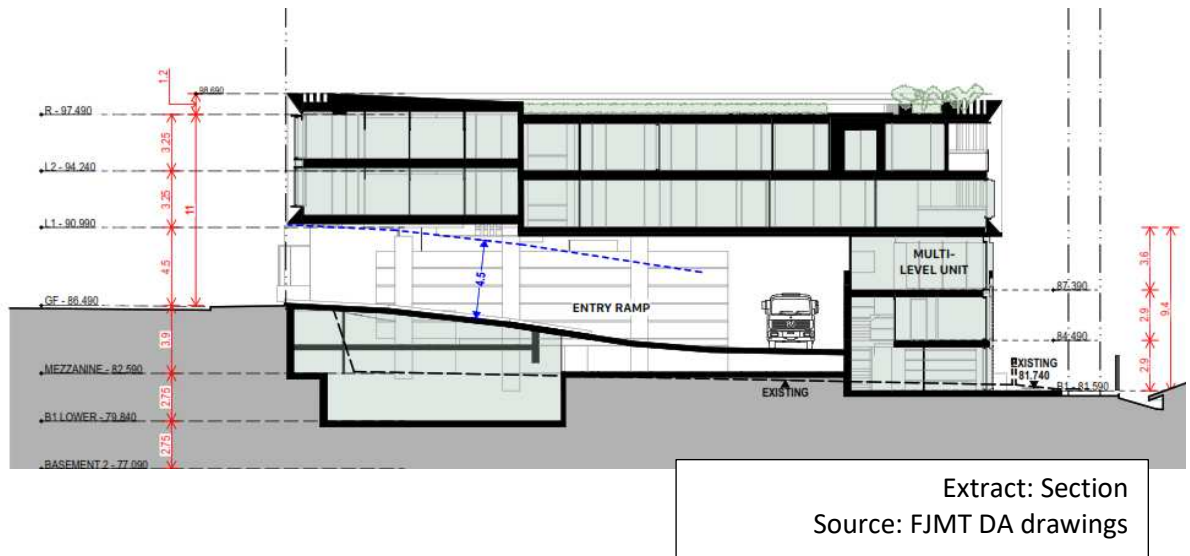
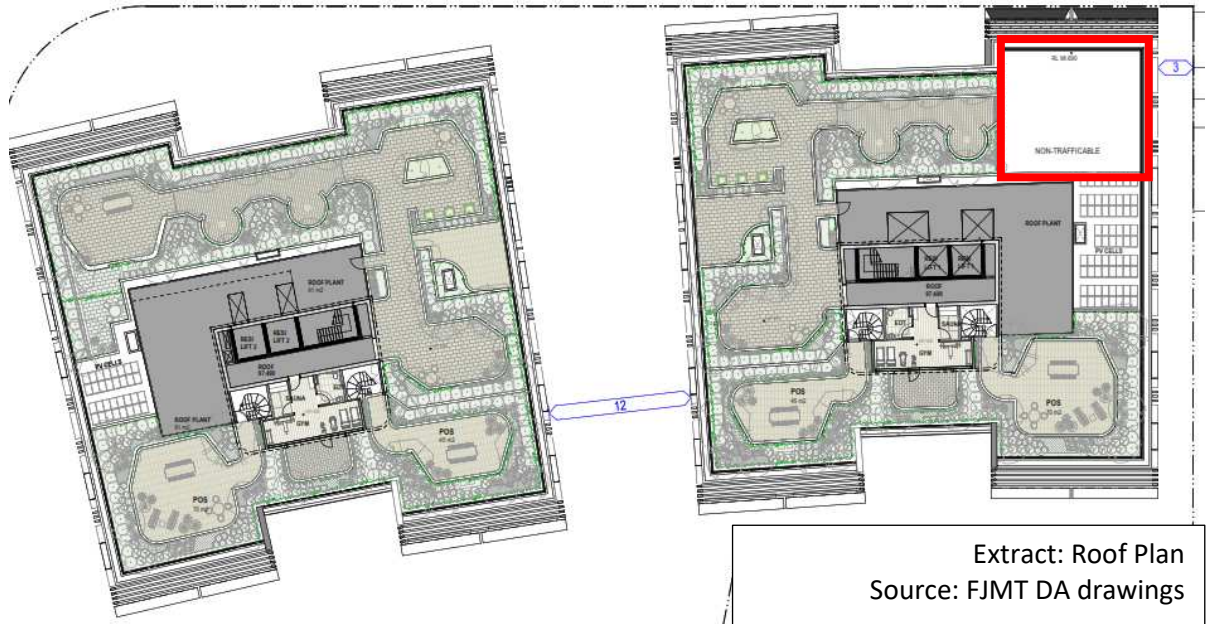
Standard to be varied

- 2.1 Clause 4.3 and 4.3A(6) of the LEP relates to height. Clause 4.3A(6) of the LEP allows an exception to the height of buildings on land identified as Area 4 on the Height of Buildings Map. The clause allows the roof of the building to extend to an overall height of RL 97.49.

Extent of Variation

- 2.2 The proposed building seeks to vary the height control to accommodate the required 4.5m driveway clearance. Council's Development Control Plan adopts the Waste Management Technical Guide and Development Controls by North Sydney Regional Organisation of Council's for multi dwelling housing, residential flat buildings and mixed use developments (The Guide). The Guide was produced in 2018 and adopted by Willoughby Council through its 2023 DCP update. The Guide recommends 'A minimum basement height of 4.5m to allow sufficient overhead clearance heights to ensure collection vehicles to enter basement and operate to empty waste and recycling bins'. These amendments to the driveway requirements in the DCP came into effect on 4 October 2023, after the Planning Proposal was approved.
- 2.3 The site was subject to a site specific planning control that established specific heights in relation to the roof, lifts, stair access, shared facilities and service installations. The detailed heights were determined on the basis of the provision of a 3.8m high clearance for garbage trucks entering and exiting the basement. This established the height across the entire site. This stage resulted in a design that was extensively detailed in the Planning Proposal submission. At no stage during the planning proposal or developer led design competition was the requirement for a 4.5m high clearance raised or considered. The amendments to the driveway requirements came into effect after the Planning Proposal was approved. Council now requires a 4.5m clearance for garbage truck to service the development, as part of Council's "future proofing". To comply with this requirement, which was not considered when the heights were established, the north eastern corner of the building has been raised. The increase in height is limited to the area above the driveway entry.
- 2.4 **The development seeks to vary the height to the roof in the north east corner of the building above the driveway beyond RL97.49. The height of the roof in this location seeks to be raised to the balustrade height permitted under Clause 4.3A(6)(a) of RL98.690. The floor level of Unit 111 & 211 is raised by to accommodate the driveway clearance.**

- 2.5 The extent of variation is 1.2 metres limited in area to a small section of the roof as shown in red outline below:



- 2.6 This section of the roof is non-trafficable and therefore there is no additional balustrade in this location. Essentially the height of the roof is proposed to the height of the permitted balustrade. This does not strictly comply with Clause 4.3A(6) and therefore requires a Clause 4.6 Request.
- 2.7 The remainder of the roof and elements on the roof are fully compliant with Clause 4.3A(6).

Clause 4.6(3)(a) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

- 2.8 The proposed variation to the height control is assessed with consideration to the principles established by the Land and Environment Court in *Wehbe V Pittwater Council [2007] NSW LEC 82*. His Honour Preston CJ set out 5 ways of establishing that compliance with the standard is unreasonable or unnecessary. The 5 parameters were further tested in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* where Justice Pain found that meeting the objectives of the standard was not sufficient to demonstrate that compliance was unreasonable or unnecessary.
- 2.9 In *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, it was held that *'establishing that the development would not cause environmental harm and is consistent with the objectives of the development standard is an established means of demonstrating compliance with the development standard is unreasonable or unnecessary'*.
- 2.10 In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018* Preston CJ held that *'an applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way'*
- 2.11 Accordingly, clause 4.6(3) of the LEP can be satisfied if a development satisfies one or more of the 5 ways which are addressed in detail below:

(a) The proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard.

- 2.12 Yes, the proposal meets the objectives of the standard as demonstrated below.
- (a) *to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- The variation to the height will ensure the bulk and scale of the building is in harmony with the streetscape. Due to the clever design resolution, the difference in height will not be noticeable from Edinburgh Road. The change to the floor levels occurs behind the architectural frame. This ensures the retention of the key architectural features of the development which is the consistent frame elements to Edinburgh Road. An alternate compliant option was considered, however this resulted in an inferior design outcome that impacted the quality of the architecture and how the building is viewed in the streetscape. A comparison of Edinburgh Road elevation between the compliant and non-compliant height is shown below:



Edinburgh Road Elevation – Compliant Height



Edinburgh Road Elevation – Proposed Non-Compliant Height

- 2.13 Although a compliant option is possible, in the absence of any additional impacts the non-compliant option is a better design outcome.

(b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

- 2.14 Notwithstanding the variation to part of the roof it has no impact on views, privacy, overshadowing or visual intrusion. The variation is discretely hidden behind the architectural frame.

(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,

- 2.15 The view of the building will be improved with the inclusion of the variation to the height as demonstrated above.

(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,

- 2.16 The variation to part of the roof will have no impact on view sharing.

(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,

- 2.17 This site is unique in that it has specific allowance for elements at the top of the building. The variation, which matches the permitted height of the balustrade will ensure consistency of the height on this site and future development.

(f) to use maximum height limits to assist in responding to the current and desired future character of the locality,

- 2.18 The LEP recognises that elements of the building, such as the balustrade can extend beyond the permitted roof. The desired future character of the precinct will deliver buildings of consistent scale and form as proposed on this site. The building design utilises the provisions of the LEP to vary the height to a small section of the roof to ensure the quality architectural outcome that is desired for this precinct.

(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,

- 2.19 This objective is not relevant to the location of the site.

(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.

- 2.20 The variation to part of the roof does not affect the overall building scale.

- 2.21 For the reasons discussed above, the variation to the height control will still achieve the building height objectives.

(b) The underlying objective or purpose is not relevant to the development;

- 2.22 The expressed objectives for height are still relevant.

(c) The underlying objective or purpose would be defeated or thwarted if compliance was required with the standard;

- 2.23 The expressed objective and purpose of the height control would be thwarted if strict compliance was required. In particular as the objectives of the height control seek to achieve ‘development in harmony with the streetscape’ and ‘high visual quality’. These objectives would not be achieved if strict compliance with the height control was required. As demonstrated above, the compliant height option results in adverse impacts to the architectural design of the building and overall streetscape outcome.

(d) The development standard has been virtually abandoned or destroyed by Council’s own actions.

- 2.24 Council has not abandoned the height controls.

(e) The zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable and unnecessary.

- 2.25 The zoning of the land primarily E1 Local Centre is appropriate.

Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

2.26 In the judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018* it was established that a Clause 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with a compliant development. Further, the environmental planning grounds relied upon must be “sufficient”. There are two respects in which the request needs to be “sufficient”

1. The environmental planning grounds advanced in the written request must be sufficient “to justify the contravening of the standard”. The focus is on the aspect or element of the development that contravenes the development standard, not the development as a whole.
2. The request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

2.27 This written request focuses on the elements of the development that breach the height control. This is limited to minor section of the roof in the north east corner of the site. The remainder of the roof is fully compliant with the site specific control.

2.28 There are sufficient environmental planning grounds to justify the variation as outlined in this request and summarised as follows:

- The site was subject to a site specific planning control that established specific heights in relation to the roof, lifts, stair access, shared facilities and service installations. The detailed heights were determined on the basis of the provision of a 3.8m high clearance for garbage trucks entering and exiting the basement. This established the height across the entire site. This stage resulted in a design that was extensively detailed in the Planning Proposal submission. At no stage during the planning proposal or developer led design competition was the requirement for a 4.5m high clearance raised or considered. The amendments to the driveway requirements came into effect after the Planning Proposal was approved. Council now requires a 4.5m clearance for garbage truck to service the development, as part of Council’s “future proofing”. To comply with this requirement, which was not considered when the heights were established, the north eastern corner of the building has been raised. The increase in height is limited to the area above the driveway entry.
- The variation to the roof in the north eastern corner extends to the permitted height of 1.2 metres above finished floor that is permitted by the Clause to a balustrade. This section of the roof is no longer trafficable, and therefore does not require an additional balustrade beyond the roof.
- The section of roof that is non-compliant does not result in any additional adverse shadow to adjoining properties or the public domain beyond what would be

expected by a compliant scheme. Any additional shadow is absorbed on the roof of the building.

- Due to the clever design resolution, the difference in height will not be noticeable from Edinburgh Road. The change to the floor levels occurs behind the architectural frame. This ensures the retention of the key architectural features of the development which is the consistent frame elements to Edinburgh Road. An alternate compliant option was considered, however this resulted in an inferior design outcome that impacted the quality of the architecture. Refer to the comparison of a compliant and non-compliant scheme in response to the objectives of the standard above.
- There are no views that will be affected by the non-compliant component.
- The proposed development achieves the objectives the E1 Local Centre.
- The proposed development meets the objectives of the development standard notwithstanding the breach of the height control.

2.29 Based on the above, there are sufficient planning grounds to justify the variation.

Is the development in the Public Interest under Section 4.15(1)(e) of the EPA Act

2.30 The former Clause 4.6 included a requirement that the consent authority be satisfied that the proposed development was in the public interest because it is consistent with the objectives of the standard and the zone in which the development is carried out. This test has been removed. Notwithstanding, Clause 4.15(1)(e) of the Environmental Planning and Assessment Act requires consideration of the public interest.

2.31 In the judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018*, Preston CJ indicated that a consent authority must consider if the development *is in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed. It is the developments consistency with the objectives of the development standard that make the proposed development in the public interest.*

2.32 It has been established above that the development is consistent with the objectives of the height standard.

2.33 The zoning of the land where the building is located is E1 Local Centre.

2.34 The objectives of the E1 Local Centre zone are:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To provide for services and employment within walking distance of residences.*
- *To generally conserve and enhance the unique sense of place of local centres by ensuring new development—*
 - (a) displays architectural and urban design quality, and*
 - (b) integrates with the desired character and cultural heritage of local centres.*

2.35 The proposed Development Application satisfies the objectives of the E1 zone, as outlined below:

- Residential and retail uses on this site are an appropriate type of development that is complimentary to the existing mixed-use nature of the existing and surrounding buildings. The provision of a through site link connection to The Postern will improve access to the site for residents to the south.
- The development will enhance the public domain at the street/pedestrian level by providing an active street frontage that due to its curvilinear alignment of the through site link will draw pedestrians into the site. The location of active uses flanking the publicly accessible central spine will activate the spaces and create visual interest.
- The public domain will be improved through the alignment of the podium and the curved form which provides a positive extension of the public domain that will enhance the permeability of the site.
- The site will deliver a range of non-residential uses that will provide for the daily needs and services for the surrounding and wider community.
- The striking form of the architectural detailing displays a high quality built form complimented by the landscaping will enhance the Castlecrag locality. The adoption of key elements of the Walter Burley Griffin subdivision is evident in the design which will enhance the cultural heritage of the Castlecrag centre.

2.36 It is therefore considered that the development, notwithstanding the variation to the development standard, achieves the objectives of the E1 Local Centre zone.

2.37 Furthermore, there is no material benefit of maintaining strict compliance with the standard for the reasons explored in this Clause 4.6 request.



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