

Clause 4.6 Variation

BUILDING HEIGHT
205-209 GRANGE AVENUE,
MARSDEN PARK
5 AUGUST 2021



BACKGROUND TO HEIGHT CONTROL AND THE VARIATION

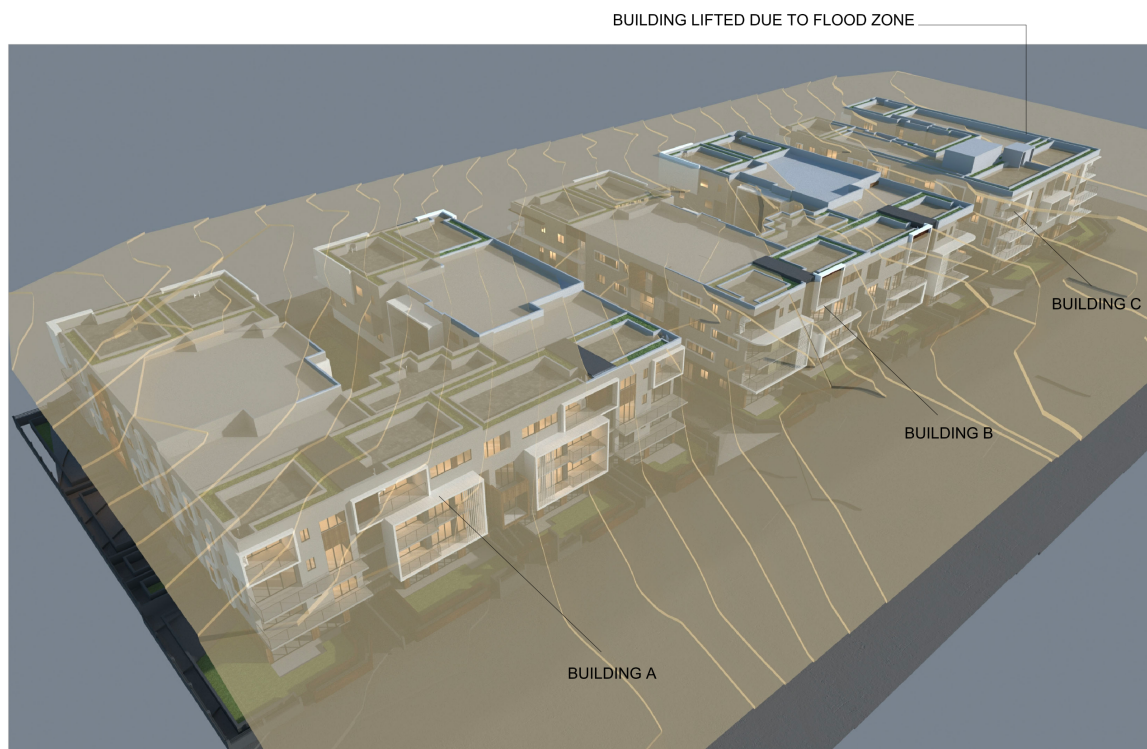
Clause 4.3 of Appendix 12 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 14m for the subject site and broader locality identified with the R3 zoning.

The development application plans that accompany this Clause 4.6 departure illustrate that the three (3) residential apartment buildings exceed the mapped 14m height control that is referenced by Clause 4.3 of Appendix 12 of SEPP (Sydney Region Growth Centres) 2006.

The parapets, lift overruns and stair access to the rooftop are the elements that exceed the height limit and the extent of departure to each of the buildings is as follows:

- Building A: parapet – 1.2m (8.5%)
- Building B: parapet – 1.65m to parapet (11.78%) and lift overrun – 1.2m (8.5%)
- Building C: parapet – 0.8m (5.7%) lift overrun – 2.6m (18.5%)

The extent of departure is shown on the height plane diagram below.



HEIGHT PLANE STUDY

It is noted that these departures are a function of five (5) fundamental matters:

1. The general undulation prevalent throughout the site;
2. The significant variations to the natural ground level that has occurred historically as a result of agricultural activities such as construction of a dam and retaining land to create flatter portions for uses such as horse keeping;
3. Ensuring that built form is appropriately aligned to the levels required for the new public road infrastructure throughout the site, and adjoining the site; and
4. Accommodating point encroachments for small portions of the upper level of some buildings, and also lift and stair overruns; and
5. Providing access to and provision of rooftop communal open space areas on top of the buildings. The provision of rooftop common area enables the provision of quality common open space areas that achieves solar access for residents and private open space well in excess of the minimum requirements set out in the planning controls. The provision of additional height to rooftop areas facilitates a good planning outcome- that strict compliance with the control would prevent from occurring and hence flexibility in the application of the height control enables a better design outcome and provides planning grounds to support such a departure to the height control.

Case Law

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the building height departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and

- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and zone is not a requirement to “*achieve*” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in Wehbe v Pittwater.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating consistency with the R3 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

Address of Clause 4.6 Provisions

A detailed discussion against the relevant provisions of Clause 4.6 are provided below.

Clause 4.6 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

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 Director-General has been obtained.*
5. *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Each of these provisions are addressed individually below.

Clause 4.6(3)- Compliance Unreasonable and Unnecessary

In accordance with the provisions of this clause it is considered that compliance with the development standard, being the 14m height limit contained in Clause 4.3 of Appendix 12 of SEPP (Sydney Regional Growth Centres) 2006 is unreasonable or unnecessary in the circumstances of the case as:

- The underlying objectives of the control are satisfied.

In addition, it is noted that the 14m numerical requirement has been regularly applied as a 4 storey maximum height control. This sets the desired future character for development in the R3 zone and the proposal is 4 storeys in terms of those levels containing units.

Underlying Objectives are Satisfied

In *Wehbe v Pittwater* it was set out that compliance can be considered unreasonable or unnecessary where:

(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard

It is considered that this approach can be followed in this instance.

The objectives of the Height development standard are stated as:

- (a) to establish the maximum height of buildings,*
- (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,*
- (c) to facilitate higher density development in and around commercial centres and major transport routes.*

The proposal, despite the numerical non-compliance identified, remains consistent with the objectives based on the following:

- Providing lift access to the development is essential to enable equitable access for all residents and visitors. The extent of non-compliance could be substantially reduced by the removal of these areas; however, this would be a poor planning and amenity outcome.
- The proposal provides for a variety of building heights and building modulations, with the development distributed across a series of separate buildings to achieve a series of buildings in a landscaped setting that exceeds the required levels of landscaped area, deep soil, and common open space.
- The variation in building form and height is a direct design response to the cross-fall of the site. Practically it is necessary to have a suitable balance between achieving suitable amenity for ground floor units (avoiding excessive cut) and level floor plates for accessibility, while ensuring the building levels are aligned to the levels of the public road infrastructure being provided across the site. This means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall

and significant historical level changes, as is the case with the current proposal.

- The height variation enables, among other things, the creation of a rooftop common open space areas to provide for high levels of amenity and solar access during the winter months whilst maintaining ground floor level common areas to the development with greater landscaping and shading during summer months.
- The development is consistent with the intent of the maximum height control and will provide high quality architecturally designed buildings that appropriately addresses the surrounding public roads and public spaces.
- The additional overshadowing that results from the height non-compliance will be cast within the site and will have no impact on future adjoining development in terms of solar penetration to buildings or open space areas.
- The lift over runs and stair cores which exceed the height control are located towards the middle of the buildings. Given this, these functional portions of the buildings that exceed the height control will not be discernible when viewed from the immediate surrounding public domain. Where there are small areas of roof or parapets over the height limit, these are not discernible and can be generally described as minor and point encroachments.
- The site is large and the impacts arising from overshadowing, visual impact and loss of privacy are manageable within the site and have no significant impact on adjoining properties or open space areas given that the development is contained within its own street-block meaning shadows cast by the proposal falls on the street with the extent of overshadowing is not unreasonable for density envisaged of this scale within this precinct.
- The proposal provides an appropriate building form that is consistent with the desired future character of the locality and is reflective of the objectives for the zone and locality generally, noting the building has no full habitable floorspace levels that protrude above the 14m height control, but rather minor upper level point encroachment that relate to undulation in the ground below, rather than an attempt to achieve additional levels or floor space yield.

- The proposal presents an appropriate height on the site that facilitates a high quality urban form to contribute to building diversity across Marsden Park.
- The proposed development complies with other key planning controls applying to the proposal.
- The building is compatible with the height, bulk and scale of the desired future character established for the area when having regard to the forms of development approved in the locality, and the approved building heights of those developments that are comparable in numerical terms to this proposal. This clearly shows the desired future character for the precinct being 4 storey residential flat buildings, with many of these buildings exceeding the 14m height limit to habitable areas (i.e. top most part of residential floor) as well as to the rooftop common areas and associated lift over-run and fire stairs.
- The overall height of the development presents as a compatible form of development to the anticipated high density residential development that are emerging in the locality, noting that the emerging character is for 4 storey residential flat buildings in the locality and 4 storeys is the prevailing form of development being carried in the R3/14m height limit area.
- The proposed buildings will present an appropriate bulk and scale on the site with balanced vertical components/proportions that are consistent with other approved 4 storey residential flat building developments in the broader area. Further the building height proposed provides for a high quality urban form and the height departure to the habitable areas or the rooftop areas does not take away the fact the proposal presents a high quality urban form.
- The non-compliance to the height control has no impact on the setting of any items of environmental heritage or view corridors.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable.

Sufficient Environmental Planning Grounds & Design Response

The below points demonstrate suitable environmental planning grounds exist to justify contravening the height development standard and further demonstrates that the height departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- The variation to the height control enables delivery of a residential flat building that maximises amenity for residents through a building form that is designed to align with public infrastructure; provides excellent amenity through the provision of rooftop communal open space; and results in a built form that is consistent with the planning controls and the emerging desired future character for the area, as evidenced by other approvals granted of a similar form and height.

Therefore the modest height departure facilitates delivery of, and compliance with, these aspects of the proposal, and provides planning grounds to support the departure;

- The greatest area of height departure arises from the provision of the rooftop communal open space area on top of the building that necessitates the provision of the lift over-run (for accessibility reasons) and the fire stair (fire safety and fire egress reasons). The provision of the rooftop common area enables the provision of a quality common open space area that achieves solar access for residents and additional open space over and above that required by the controls, and provision of common open space in a range of alternative locations and forms across the overall development, thereby providing improved open space opportunities and choice to residents.

Therefore the provision of this additional height to the rooftop area facilitates a good planning outcome - that strict compliance with the control would prevent from occurring and hence flexibility in the application of the height control enables a better design outcome on this site and provides planning grounds to support such a departure to the height control. The provision of the rooftop common areas is consistent with the desired future character of the locality when observing the other approved development in the locality that also feature rooftop common areas;

- The variation to the height control does not generate unacceptable adverse impacts to surrounding properties or as viewed from the public domain;
- The variation to the height control does not result in unacceptable overshadowing and privacy impacts to the adjoining residential properties;
- The variation to the height control enables a development form on the site that presents a suitable bulk and scale and intensity of development on the land having regard to the desired 4 storey form of development in the 14m height area as reflected by past approvals of similar developments;
- There are also circumstances that relate to the topographical fall of the site and the relationship to the levels of the new roads. This undulation and historic landform modification means that to achieve strict compliance would result in the building levels to be further stepped and cut into the site which results in a poor outcome for the ground floor units, accessibility, entry to lobbies and alignment of buildings with the public domain; and it would result in a suboptimal outcome as compared to the current situation which results in the non-compliance to the building height control. Strict compliance is clearly not a preferred outcome.
- The proportion of the building that protrudes above the 14m height limit continues to present a 4 storey form, reinforcing that the breach to the height standard does not result in the development representing an overdevelopment of the site but rather a suitable contextual response to the topographical fall on the site in order to achieve a suitable ground floor outcome with sufficient amenity for the apartment.

Therefore, the current proposal is a suitable outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design response on the site.

Clause 4.6(4) Zone Objectives & The Public Interest

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) for the reasons set out previously.

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the R3 zone, being:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.*

Consistency with the objectives is evident as –

- The proposal contributes to the creation of housing supply that will serve the communities demand for apartments.
- The proposal complements and enhances the existing and future local streetscape by virtue of the careful siting of the development, ground floor presentation and the landscape embellishment work within the sites setbacks.
- The design concept recognises the key site attributes and provides for an attractive built form that relates to the existing and future site context.
- The proposal will provide a high quality residential development in a strategic location. The scale of the development will help to revitalise the area with delivery of an activated ground floor and an attractive overall development.
- The development provides for the delivery of a variety of housing types in a high density residential environment. The development also provides for a high level of residential amenity, provides for additional housing to contribute to housing supply and affordability and reflects the desired future character and dwelling densities of the area.

- The building height departure facilitates a better design response for the development with regard to siting of buildings in relation to road levels; responding to the undulating nature of the site and in providing for high levels of residential amenity that is facilitated by the maximum height departure in providing for the rooftop common open space. The rooftop common open space enables the achievement of high levels of residential amenity for residents and the absence of the rooftop common open space, if strict compliance with the height limit was maintained, would reduce the level of amenity afforded to residents.
- The development proposal, including the building height departure, is consistent with the desired future character of the locality as established by approved development in the locality.

On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the building height standard, and the objectives of the R3 zone and the numerical departure from the building height control facilitates a better design outcome on the site

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and the nature and height of approved developments in the locality.

Conclusion

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive building height control is unreasonable and unnecessary in the context of the proposal and its particular circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, and is consistent with the future character envisioned. The proposal promotes the economic use and development of the land consistent with its zone and purpose.