

Clause 4.6 Variation: Building Height

Lot 8: Child Care and Residential Apartment Buildings
LEC Proceedings No. 2019/376150



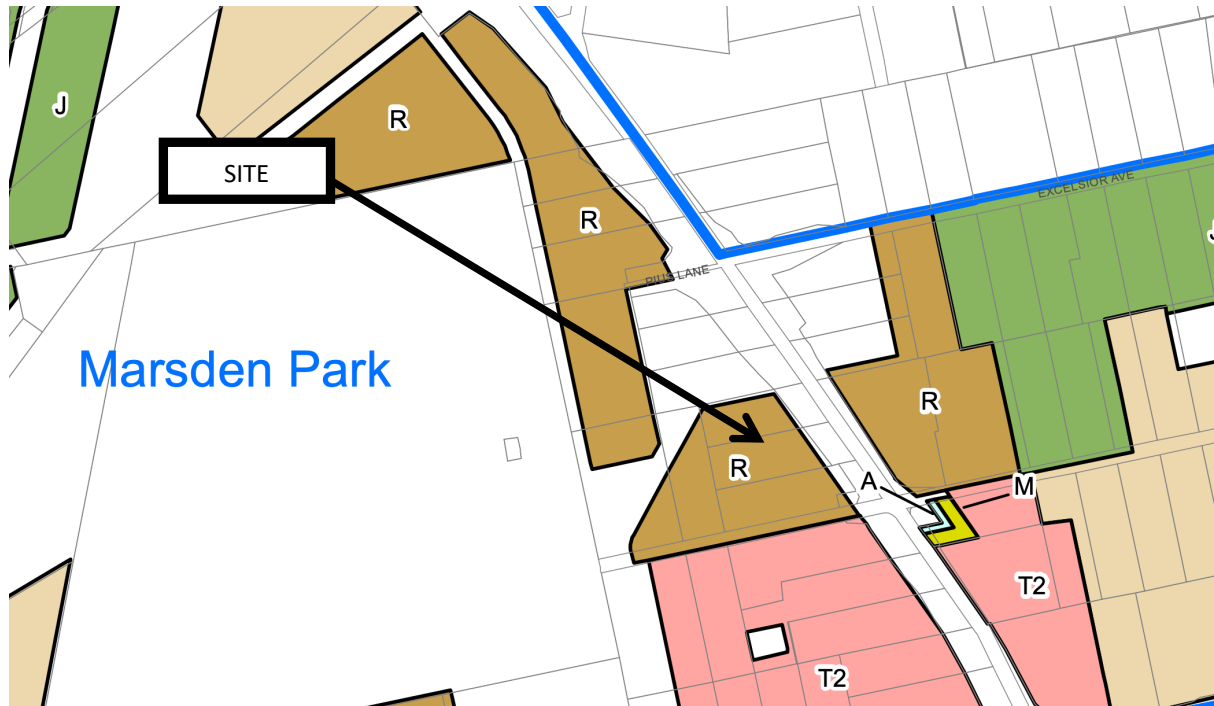
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Background to Building Height & The Departure

Clause 4.3 of Appendix 12 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 21m for the subject site and broader locality- as indicated on the height of building map extract below. Noting the 'R' notation reflects the area showing the 21m building height limit. The site is within the Marsden Park Precinct, reflected in Appendix 12 of the Growth Centres SEPP 2006.



Relevant definitions of 'building height' and 'ground level (existing)' are set out below to understand how the building height must be measured in assessing compliance with the standard.

building height (or height of building) means the vertical distance between ground level (existing) at any point 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.

ground level (existing) means the existing level of a site at any point.

Of key importance is that the definition of ground level (existing) requires assessment of the existing level of a site at any point- rather than a proposed finished level.

The site is currently undeveloped, and is rural in nature, and hence it is those levels that must be used in assessing the building height.

This is despite the approval on the site for the subdivision, civil works, and roads, that will regrade the site and form a new ground level across the site.

The development application plans that accompany this Clause 4.6 departure illustrate that a portion of Building A & Building B exceeds the mapped 21m height control with part of the lift over-run Building B, and upper-level roof form to Building A exceeding the height limit relative to the existing ground levels on the site.

In reviewing the height of the proposal, relative to the existing ground level, it is noted that:

- Block B: Exceeds the height limit to the lift-over run by 240mm, being 1.14%
- Block A: Exceeds the height limit to the lift-over run by 500mm, being 2.3%, and part of the northern upper-level roof form by up to 1.34m which equates to 6.38%.

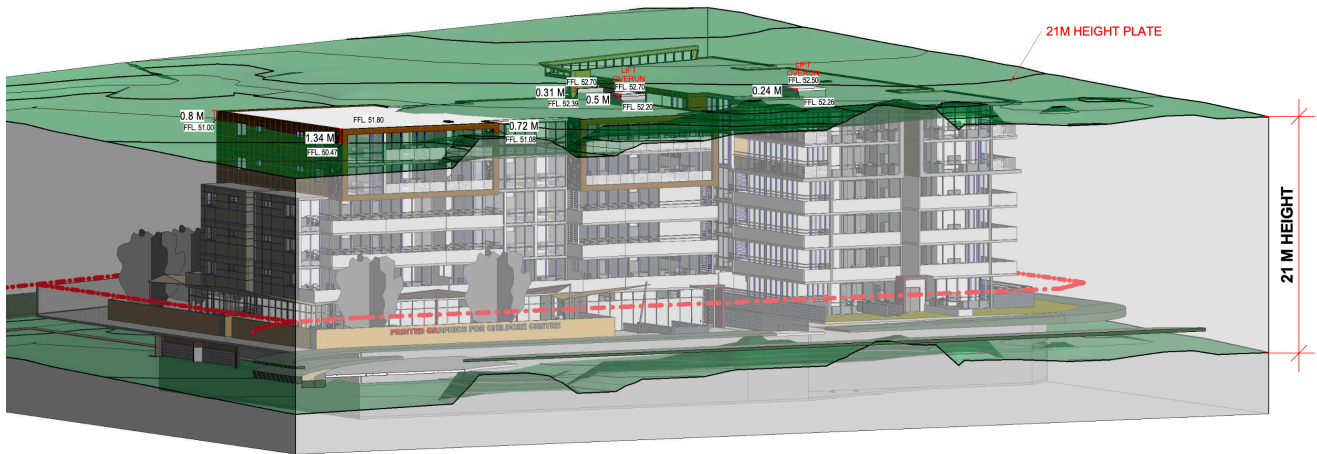
It is noted that the site is subject to a separate development consent for subdivision and on completion of those works the new ground level will be at approximately RL 32.5- 33 across the site.

When comparing the building height to that new finished ground level the proposal would be fully compliant, which is reflected in the comparison of the height 'blanket' provided over the page. It is the fact that the site has not undergone the required regrading- to establish a new ground level (existing)- that results in the departure to the standard.

Hence the departure is purely related to the timing of the new subdivision works- and if the DA was submitted post the completion of the bulk earthworks, with a new survey to show the new ground level (existing) there would be no variation to the height standard based on the new site levels.

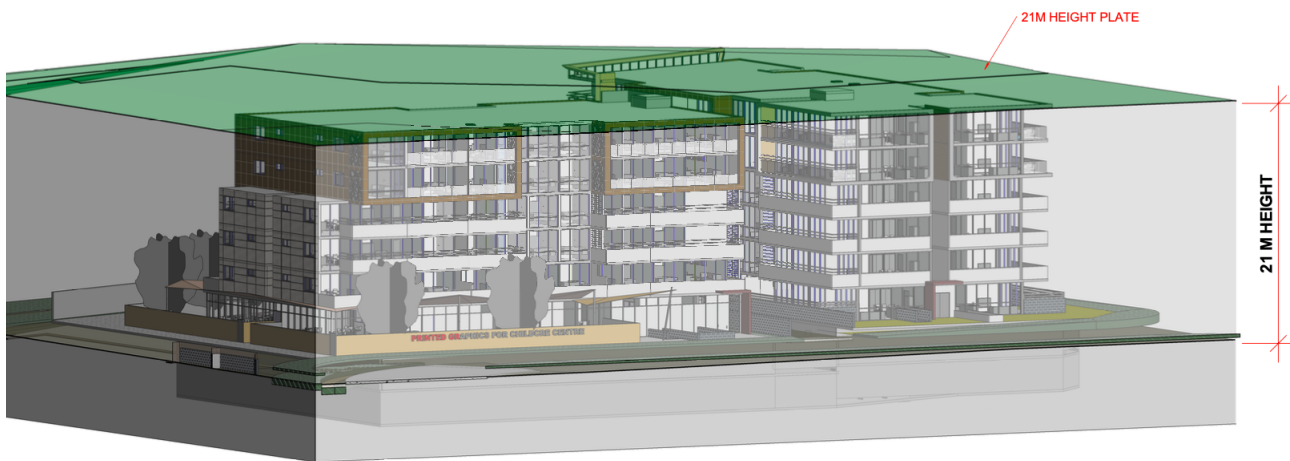
The 3D extracts over the page show the existing ground level calculation and then the new ground levels once the subdivision and bulk earthworks is complete.

Lot 8 Residential Apartment Buildings & Child Care



1 NGL_HEIGHT LIMIT

Figure 1: Height blanket based on 'ground level (existing)'.



1 HEIGHT LIMIT

Figure 2: Height blanket based on the new site levels following completion of the approved subdivision and civil works

Relevant 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.

The Variation & Design Response

Clause 4.3 of Appendix 12 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 21m for the subject site.

The development application plans that accompany this Clause 4.6 departure illustrate that a portion of Building A & Building B exceeds the mapped 21m height control with part of the lift over-run Building B, and upper-level roof form to Building A exceeding the height limit relative to the existing ground levels on the site- following the definition of 'ground level (existing)' as set out previously in this request.

In reviewing the height of the proposal, relative to 'ground level (existing)' it is noted that:

- Block B: Exceeds the height limit to the lift-over run by 240mm, being 1.14%
- Block A: Exceeds the height limit to the lift-over run by 500mm, being 2.3%, and part of the northern upper-level roof form by up to 1.34m which equates to 6.38%.

It is noted that the site is subject to a separate development consent for subdivision and on completion of those works the new ground level will be at approximately RL32.5- 33 across the site. When comparing to that new finished ground level the proposal would be fully compliant, which is reflected in the comparison of the height 'blanket' provided previously at Figure 1 and Figure 2.

It is the fact that the site has not undergone the required regrading- to establish a new ground level- that results in the departure to the standard.

Hence the departure is purely related to the timing of the new subdivision works- and if the DA was submitted post the completion of the bulk earthworks there would be no variation to the height standard based on the new site levels as that would form the new ground level (existing).

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 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 21m numerical requirement has been regularly applied as a 6 storey maximum height control. This sets the desired future character for development in the R3 zone in the immediate locality, and this development is a 6-storey built form consistent with the desired future character and on completion of the subdivision works the building height of the proposal is compliant relative to the new levels on the site.

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:

- At the outset the variation is temporal, to the extent that the non-compliance is a function of the fact that the subdivision works are yet to be completed. On completion of new roads and the civil works the new finished ground levels will be at RL 32.5-RL33 and the building, relative to the new levels, would be compliant on that basis. Therefore, the departure is temporary and will be resolved upon establishment of the broader subdivision.
- The proposal is consistent with objective a) in that the maximum building height of the 6-storey building will be compliant on the new site levels to be established and the 6-storey form is the intended maximum height limit for the site.
- The non-compliance and its nature mean that there is no additional visual impacts or amenity impacts in terms of solar access to buildings and open space.

- The development is consistent with the intent of the maximum height control and will present two buildings that appropriately addresses the surrounding public roads and public spaces, and the height departure does not result in adverse visual impacts or impact on the amenity of adjoining development and land in terms of solar access.
- 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 again the departure is related only to the fact the civil works and re-grading associated with the subdivision are yet to be carried out.

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 site is subject to a separate development consent for subdivision and on completion of those works the new ground level will be at approximately RL 32.5- 33 across the site. When comparing to that new finished ground level the proposal would be fully compliant, which is reflected in the comparison of the height 'blanket' provided previously in this variation request. It is the fact that the site has not undergone the required regrading- to establish a new ground level- that results in the departure to the standard. Hence the departure is purely related to the timing of the new subdivision works- and if the DA was submitted post the completion of the bulk earthworks there would be no variation to the height standard based on the new site levels. Therefore, environmental planning grounds exist to support the departure on that basis, and this promotes the following Objects of the Environmental Planning and Assessment Act 1979:

(c) to promote the orderly and economic use and development of land,

To require strict compliance with existing site levels, rather than the approved new site levels associated with a greenfield subdivision where lot regrading occurs to establish new ground levels, would not promote the orderly and economic development of land and would not serve any planning benefit.

The above demonstrates that there is merit in varying the height control and demonstrates sufficient environmental planning grounds to support the departure.

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 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.

Based on 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.

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 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.