

Clause 4.6 Variation: Building Height

MIXED USE DEVELOPMENT AT 971 RICHMOND ROAD, MARSDEN PARK
LEC Proceedings No. 2021/00055619



Prepared by: Think Planners
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QUALITY ASSURANCE

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ADDRESS: Lot 13, DP1190560: 971 Richmond Road, Marsden Park
COUNCIL: Blacktown City Council
AUTHOR: Think Planners Pty Ltd

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Background to Building Height

Clause 4.3 of Appendix 12 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 14m to the R3 portion of the site and 26m to the B4 zone portion of the site. This request deals with the B4 Zoned land parcel that adopts a maximum height of 26m for the subject site and the other B4 and B2 parts of the Marsden Park Town Centre.

This is as indicated on the height of building map extract below. The site is within the Marsden Park Precinct, reflected in Appendix 12 of the Growth Centres SEPP 2006.

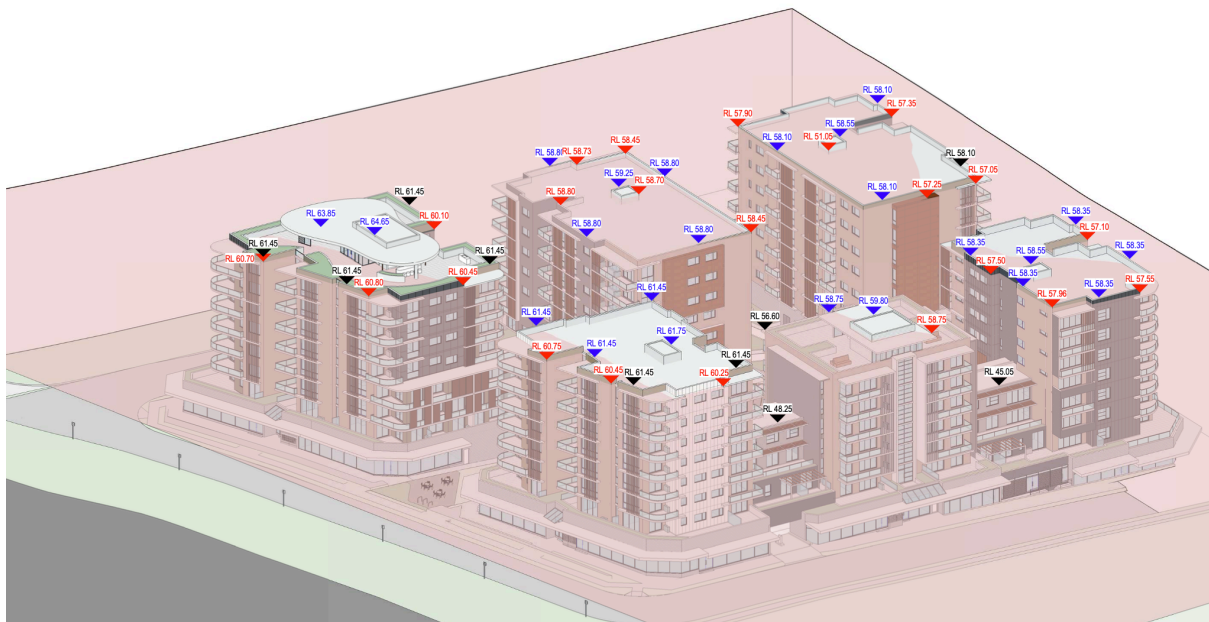


The development application plans that accompany this Clause 4.6 departure illustrate that a portion of both buildings exceeds the mapped 26m height control.

The development concept results in the height of the proposal exceeding the permissible height as shown on the LEP height map, noting that the proposal is predominantly compliant with the maximum building height. It is noted that the proposal is predominantly compliant with the maximum building height however a small portion of the upper level, skylights, roof structures for common areas exceeds.

This is illustrated by the 3D height plane produced below and can be clearly seen on the submitted section drawings.

Height Plane Diagram



Height Departures

As shown on the section above the majority of the development is below the height limit, with the following exceptions.

- Building A: A small portion of the roof structure and lift over-run elements exceed by 1.3m (5%) to the building and 1.5m to the lift overrun (5.7%). The departure is a function of the topography of the site and the requirement for the lift overrun to extend above the roof line. It also enables the parapet elements to improve the building design and presentation.
- Building B: A small portion of the roof structure and lift over-run elements exceed by 700mm (2.6%). The departure is a function of the requirement for the lift overrun to extend above the roof line to provide access to the common area. It also enables a parapet element to the building to improve its form and presentation.
- Building C: A small portion of the roof structure and lift over-run elements exceed by 1300mm (5%) to the building and 1.5m to the lift overrun (5.76%). The departure is a function of the topography of the site and the requirement for the lift overrun to extend above the roof line noting the cross-fall on the site is the main driver and the desire to only have a single split in the building. It also enables a parapet element to the building to improve its form and presentation.
- Building D: A small portion of the roof structure and lift over-run (4.345m or 16.7%) elements exceed. The departure is a function of the topography of the site and the achievement of the rooftop common area for the development which provides a planning benefit in an elevated communal open space with high quality space and solar access.
- Building E: A small portion of the roof structure and lift over-run elements exceed by 355mm (1.36%) to the building and 515mm to the lift overrun (1.98%). The departure is a function of the topography of the site and the requirement for the lift overrun to extend above the roof line noting the cross-fall on the site is the main driver and the desire to only have a single split in the building.
- Building F: A small portion of the roof structure and lift over-run elements exceed by 790mm (3.03%) to the building and 955mm to the lift overrun (3.6%). The departure is a function of the topography of the site and the requirement for the lift overrun to extend above the roof line noting the cross-fall on the site is the main driver and the desire to only have a single split in the building.

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 B4 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.

Building Height Context Considerations: Better Development Outcome

The proposed non-compliance occurs as a means of achieving a better development outcome because it enables the development to achieve the following.

- Adopt an appropriate Urban Form, and Quality Common Open Space: 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 substantially exceeds the required levels of landscaped area, deep soil, and common open space. It also enables the proposal to achieve greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings. Further the height variation enables the creation of a rooftop common open space area 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.

Strict compliance to the height through flattening of the buildings to achieve the 12m control would mean larger floorplates that reduces the design merit by removing quality landscaping and common open space with a northern aspect and would provide a homogenous building height with limited design merit.

Response to Topography: It is also noted that the stepped building form is a direct design response to the cross-fall experienced by 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. This means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall- as is the case with the current proposal.

- Full Compliance with the DCP Controls: The departure enables full compliance with all key remaining planning controls.

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 26m numerical requirement has been regularly applied as an 8 storey maximum height control. This sets the desired future character for development in the B4 zone in the immediate locality, and this development is an 8 storey built form consistent with the desired future character.

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:

- At the outset the variation is minor, to the extent that the non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties- noting the recessed nature of the pergolas and lift over-run elements and the cohesive design response.
- The proposal is consistent with the intended maximum height limit for the locality, being 8 storeys;
- The development is consistent with the intent of the maximum height control and will present a series of 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 is in close proximity to the future Local Centre (and forms part of the actual edge of the Local Centre) and the extent of non-compliance represents an appropriate higher density on the site noting compliance to prescribed density control under the SEPP (Sydney Region Growth Centres) 2006.
- 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 fall on the street with the extent of overshadowing is not unreasonable for density envisaged of this scale within the Marsden Park 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 uneven topography is the key driver of the height variation rather than a desired to achieve greater yield on the site;
- The extent of non-compliance could be reduced via the elimination of roof top common areas however this reduces amenity for occupants with no discernible benefit in terms of streetscape presentation.
- The proposal presents an appropriate height on the site that facilitates a high quality urban form to contribute to building diversity across the Marsden Park Precinct.
- Buildings have been stepped to address the site's cross-fall that will contribute towards minimising building height, bulk and scale when viewed from the street level.
- The size of the site permits sufficient separation of building on site and also from neighbouring land parcels and also have negligible impacts in terms of privacy and overshadowing to adjoining properties.
- The increased height and modulation of building locations enables greater amenity to the proposed units through better solar orientation and increased levels of natural ventilation.
- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a residential flat building that provides good address to the street frontage.
- The proposed development complies with key planning controls applying to the proposal including FSR, landscape, deep soil zones and communal open space.

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

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:

- At the outset the variation is minor, to the extent that the non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties.
- The maximum height of all parts of the building, other than lift overrun, and pergola are generally below the height limit. The extent of the minor non-compliance could be reduced by the removal of these areas; however, this would be a poorer design outcome through removal of shade elements to the communal rooftop area, reduced accessibility if the lift did not continue to the rooftop. Accordingly the minor departure enables a better design outcome, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

(g) to promote good design and amenity of the built environment,

It is noted that the rooftop communal open space areas are high quality and well-designed spaces with good solar access and the provision of lift access increases the useability and functionality of the space for residents.

- Adopt an appropriate Urban Form, and Quality Common Open Space: 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 substantially exceeds the required levels of landscaped area, deep soil, and common open space. It also enables the proposal to achieve greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings. Further the height variation enables the creation of a rooftop common open space area 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.

Response to Topography: It is also noted that the stepped building form is a direct design response to the cross-fall experienced by 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. This means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall- as is the case with the current proposal.

- Full Compliance with the DCP Controls: The departure enables full compliance with all key remaining planning controls.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

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 and the objective of the B4 Mixed Use Zone. The nominated objectives are:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To provide for residential development that contributes to the vitality of the local centre.*
- *To ensure that residential development adjacent to the local centre does not detract from the primary function of the centre, being to provide for retail, business, entertainment and community uses.*
- *To facilitate active retail, commercial, entertainment and community facility uses at ground level of mixed use developments.*
- *To encourage development that will contribute to the economic growth of, and creation of employment opportunities within, the City of Blacktown.*

Consistency with the objectives is evident as –

- The proposal contributes to the provision of compatible commercial and residential land uses.
- The proposal integrates a range of land uses in an accessible location to encourage and maximise public transportation.
- The extent of the residential component and creation of housing supply that will serve the communities demand for apartments and contribute to the vitality of the local centre.
- The extent of the residential development does not detract from the primary function of the centre to provide for employment generating uses.
- The proposal provides active commercial uses (retail, community) at the ground floor of the mixed use development.
- The proposal provides and encourages development to contribute to jobs, and economic growth within the City of Blacktown.

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 B4 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. The significant public benefit of the proposal must be emphasised in considering the merits of the departure to the height control and the proposal is a site specific response and is not replicated elsewhere in the precinct and as such 'precedent' issues are not relevant.

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 taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

The variation request also applies the principles established in *Winten Property Group Limited v North Sydney Council* (2001) NSW LEC 46 and further refined in *Wehbe v Pittwater Council* (2007) NSW LEC 827.

1. *Is the planning controls in question a development standard?*

Clause 4.3 states that the maximum building height control is 26m. This control is a numerical development standard, as defined in Section 4 of the Environmental Planning and Assessment Act 1979, and is therefore capable of being varied under the provision of Clause 4.6.

2. *What is the underlying object or purpose of the standard?*

The purpose of the standard in accordance with Clause 4.3(1) is:

(a) to establish the maximum height of buildings for development on land within the Alex Avenue and Riverstone Precincts,

- (b) to 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 while minimising impacts on adjacent residential, commercial and open space areas,*
- (d) to provide for a range of building heights in appropriate locations that provide a high quality urban form.*

3. *Is compliance with the standard consistent with the aims of the policy and does compliance with the standard hinder the object of the Act under s5a(i) and (ii)?*

The aims and objectives of State Environmental Planning Policy No.1 – Development Standards is (considered relevant in the assessment of Clause 4.6 departures):

“To provide flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or necessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.”

The objects set down in Section 5(a)(i) and (ii) are:

“(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

“(ii) the promotion and co-ordination of the orderly and economic use and development of land,

It is considered that a variation to 4.3 of the SEPP (Sydney Region Growth Centres) 2006 would not hinder Council’s overall strategic objectives towards the proper management and development of land within the municipality, and is therefore consistent with the objectives of the Policy. It is reinforced that the building complies with the overall height control and there are no resultant impacts to adjoining sites resulting from this variation.

4. *Is compliance with the standard unreasonable or unnecessary in the circumstances of the case?*

It is considered that compliance with the standard contained in 4.3 would be unreasonable and unnecessary in the circumstances of the case given that:

- The proposal is in close proximity to the future Local Centre and the extent of non-compliance represents an appropriate higher density on the site noting compliance to prescribed density control under the SEPP (Sydney Region Growth Centres) 2006.

- 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 fall on the street with the extent of overshadowing is not unreasonable for density envisaged of this scale within the Marsden Park 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 uneven topography is the key driver of the height variation rather than a desired to achieve greater yield on the site;
- The extent of non-compliance could be reduced via increased however this reduces amenity for occupants with no discernible benefit in terms of streetscape presentation.
- The proposal presents an appropriate height on the site that facilitates a high quality urban form to contribute to building diversity across the Marsden Park Precinct.
- Buildings have been stepped to address the site's cross-fall that will contribute towards minimising building height, bulk and scale when viewed from the street level.
- The size of the site permits sufficient separation of building on site and also from neighbouring land parcels and also have negligible impacts in terms of privacy and overshadowing to adjoining properties.
- The increased height and modulation of building locations enables greater amenity to the proposed units through better solar orientation and increased levels of natural ventilation.
- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a residential flat building that provides good address to the street frontage.
- The proposed development complies with key planning controls applying to the proposal including landscape, deep soil zones and communal open space.

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

The unique circumstances of the case that warrant support of the departure are that the variation enables the development to:

- Adopt an appropriate Urban Form, and Quality Common Open Space: 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 substantially exceeds the required levels of landscaped area, deep soil, and common open space. It also enables the proposal to achieve greater than the minimum required levels of solar access and natural ventilation to dwellings to present a

more suitable and site responsive layout of the buildings. Further the height variation enables the creation of a rooftop common open space area 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.

Strict compliance to the height through flattening of the buildings to achieve the 12m control would mean larger floorplates that reduces the design merit by removing quality landscaping and common open space with a northern aspect and would provide a homogenous building height with limited design merit

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- Full Compliance with the DCP Controls: The departure enables full compliance with all key remaining planning controls.

5. *Is the objection well founded?*

In summary, it is considered that the objection to the development standard set down in Clause 4.3 is well founded, and compliance with the standard would be unreasonable and unnecessary, as the purpose or objectives of the building height control have been satisfied.

In that decision, it was further noted that there is public benefit in maintaining planning controls and that SEPP 1/Clause 4.6 should not be used in an attempt to effect general planning changes throughout the area. This variation request does not attempt to affect the planning outcomes for the broader locality, rather it reflects the identified site-specific development constraints and a performance based design approach in achieving the underlying intent of the controls.

Notwithstanding the departure from the numerical control set down in 4.3 the proposal is generally consistent with the aims of the Growth Centres SEPP, and the objectives set down in Clause 4.3(1) as addressed previously.

Conclusion

Having regard to the matters described previously in this submission the proposed numerical non-compliance does not frustrate the achievement of the underlying objectives of the standard.

Accordingly, the requirement for strict compliance is unreasonable and unnecessary and the variation to the identified building height should be supported and Council and the Sydney Commission should exercise its power under Clause 4.6 to grant consent to the proposal notwithstanding the technical non-compliance.