

Clause 4.6 Variation: Building Height

DA19-01518: Residential Apartment Building

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Table of Contents

| | |
|--|---|
| Background to Building Height..... | 2 |
| Relevant Case Law | 4 |
| The Variation & Design Response | 6 |
| Address of Clause 4.6 Provisions | 7 |

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 12m for the subject site and broader locality- as indicated on the height of building map extract below. Noting the 'M' notation reflects the area showing the 12m building height limit. The site is within the Riverstone East Precinct, reflected in Appendix 12 of the Growth Centres SEPP 2006.



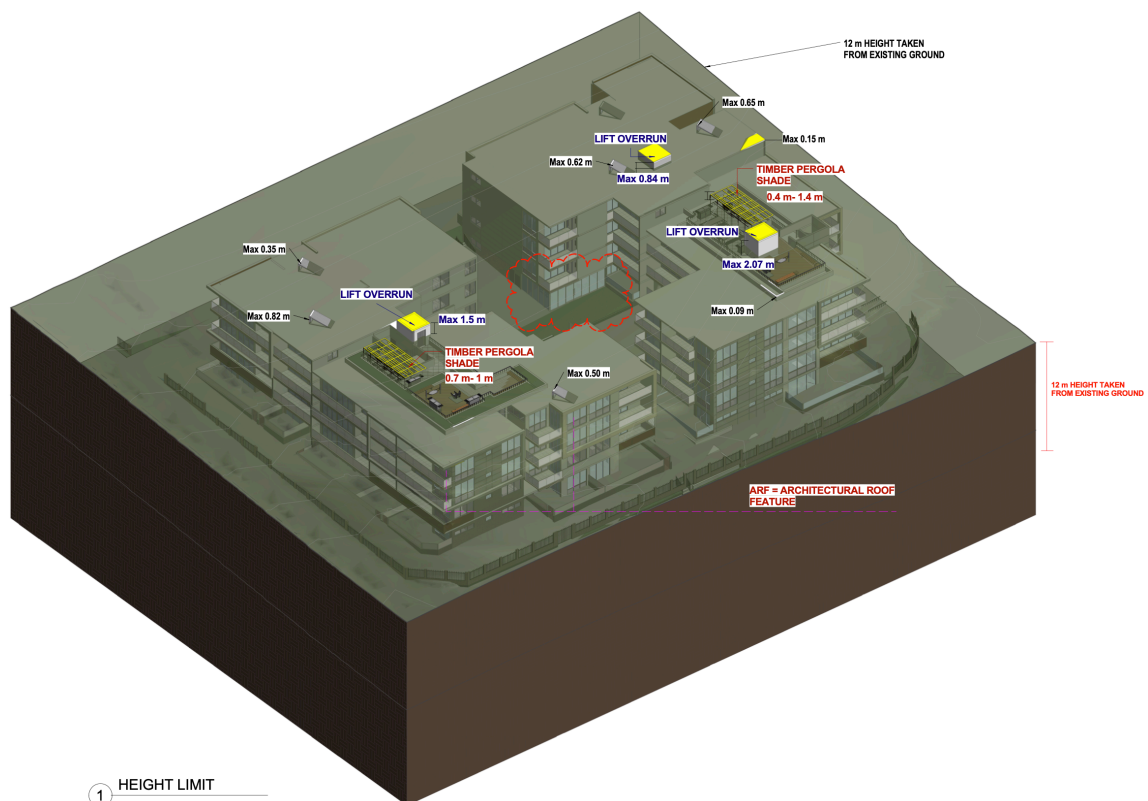
The development application plans that accompany this Clause 4.6 departure illustrate that a portion of both buildings exceeds the mapped 12m height control.

The extent of departure to both blocks is associated with the lift over-runs, the timber pergola shade structures for the rooftop COS areas, some clerestory windows, and a small part of the parapet elements and roof form to Block B.

The lift over-run exceedance arises from the need to provide lift access to all levels of the building and to the rooftop communal open space- in addition to the pergolas designed to provide shade and is a preferred outcome. The clerestory windows are provided to maximise light and ventilation to the top floor apartments. The elements over the height limit are recessed centrally to the building such that they are not 'read' in the streetscape other than the roof element to Block B that marginally protrudes where there is a step in the building.

A 3d extract of the extent of departure is provided below that is drawn from the Architectural Drawing labelled Building Height Compliance- DA024, Rev H, dated 17/8/21.

Extract of Height Plane



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 12m for the subject site.

The extent of departure is nominated below noting this takes the highest extent of departure for the various elements.

- Block A
 - o Lift Over-run: 1.5m or 16.3%
 - o Timber Pergola: 1m or 8.3%
 - o Clerestory windows: 820mm or 6.8% however these are considered to be architectural roof features but for caution are included.
- Block B
 - o Lift Over-run: 2.07m or 17.25%
 - o Timber Pergola: 1.4m or 11.6%
 - o Roof element 0.15m or 1.25%
 - o Clerestory windows: 0.65m or 5.41% however these are considered to be architectural roof features but for caution are included.

The areas of departure result in a preferred planning outcome as compared to strict compliance noting:

- The feature frame/parapets could be removed to enable compliance but the design merit would be reduced;
- The pergolas could be removed but would remove shade;
- The lift over-run could be reduced but it eliminates the ability to access the rooftop for all persons. This could be replaced with only a stair access provided with a platform lift) which would eliminate this departure however this would lead to an inferior access arrangement to the rooftop common open space than that currently proposed. It would erode ease of access to the space noting the rooftop communal open space is a preferred planning outcome to enable high quality communal open space areas that receive excellent solar access and a series of functional and useable spaces for residents. The provision of lift access to this area is fundamental to ensuring suitable access to the space by all residents.
- The clerestory windows could be removed but it would reduce amenity for the units to which they are provided.

It is also noted that the extent of departure is minor in the context of the broader development and they are limited when considering the surface area of the roof.

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 12m 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 in the immediate locality, and this development is a 4 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 in terms of the 'frame' element whereby the parapet protrudes .
- The maximum height of all parts of the building are generally below the height limit, other than the lift overrun, pergola, and the parapet element. The extent of the minor non-compliance could be reduced by the removal of these areas; however, this would be a poorer design outcome with the removal of shade elements to the communal area, access via lift to the rooftop, and the architectural treatment of the frame element.
- The proposal is consistent with the intended maximum height limit for the locality, being 4 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 additional overshadowing that results from the height non-compliance is limited owing to the lot orientation and the minor extent of the height breach and the sites relationship to the adjoining allotments.
- 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.

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:

- 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 the frame element, lift overrun, and pergola are below the 12m 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, and lessen the presentation of the building in terms of the frame elements should they be removed. 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.

Therefore, the current proposal is a preferred 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 which 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.

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 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.