PLANNING
INGENUITY

Clause 4.6 Variation –
Height of Buildings

Clause 4.6 Variation Statement – Building Height (Clause 4.3)

1. HEIGHT OF BUILDINGS STANDARD

Clause 4.3 of HLEP 2012 relates to the maximum height requirements and refers to the *Height of Buildings Map.* The relevant map identifies the subject site as having a maximum height of 17.5m. Building height is defined as:

> ***building height*** *(or* ***height of building****) means—*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum 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.*

The relevant map [sheet HOB_017] indicates that the maximum building height permitted at the subject site is 17.5m.

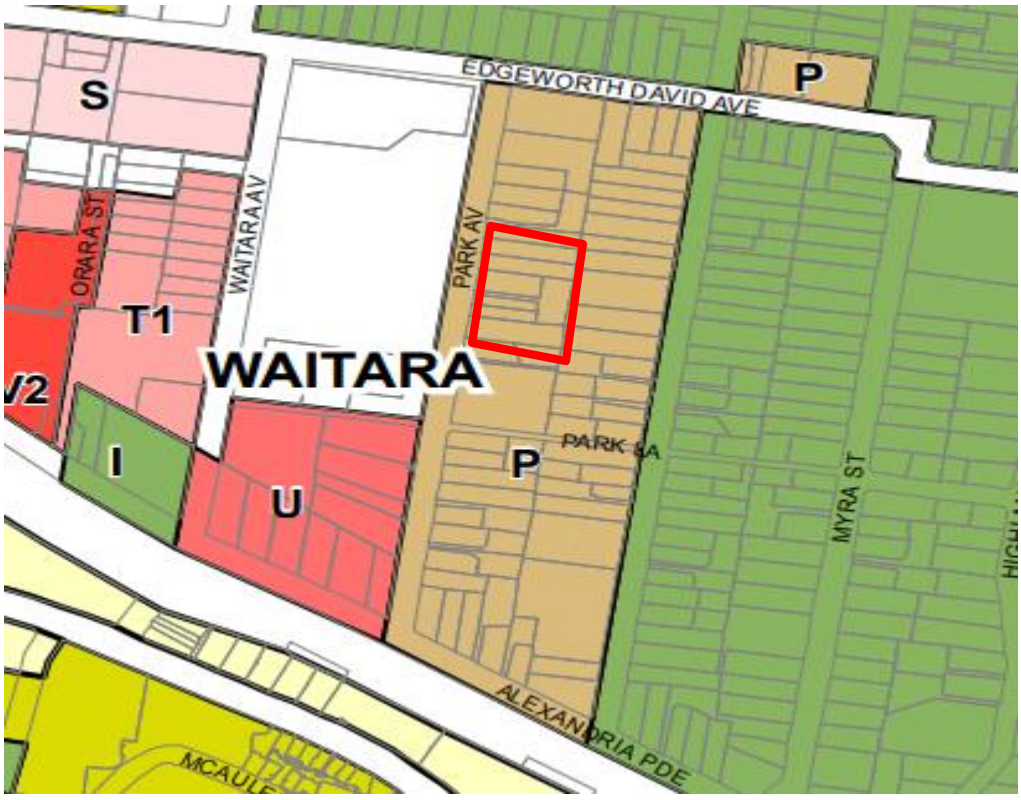

Figure 1 Extract from the Height of Buildings Map [P=17.5m]

Whilst the savings provisions in Clause 1.8A of HLEP 2013 preserve the 17.5m height, Amendment 11 of HLEP 2013 has been gazetted which has the effect of reducing the height of buildings to 16.5m under Clause 4.3 of HLEP 2013. It is held in judgments of the Land and Environment Court that the savings provisions in HLEP 2013 preserve the 17.5m height limit, however it is acknowledged that the 16.5m height limit under Amendment 11 is a matter for consideration but not a determinative matter. This is considered in *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) NSWCA 289 where Spigelman CJ found:

> *54 When Cowdroy J addressed the planning issue, he treated cl 51(2) of LEP 2000 as a relevant matter for consideration (at [66]), but not something that could be given determinative weight (see at [72]). His Honour weighed the competing evidence of the experts as to the reasonableness of the minimum gross floor space standard, preferring to uphold and apply it on its merits, but not as a mandated prescription (see at [67]-[72]).*

In *Presrod Pty Limited v Wollongong City Council [2010] NSWLEC 1257*, Brown C considered the weight to be given to a draft LEP as follows:

> *20 The question to be answered is whether LEP 2009 should be given such weight that it should be preferred to LEP 2007 in the consideration of the application. In my view the question should be answered in the negative. The weight to be attributed to a draft environmental planning instrument will be greater if there is a greater certainty that it will be adopted (Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) NSWCA 289 at par 5). Relevantly, in Terrace Tower, Spigelman CJ states at pars 6 and 7 that:*
>
> > *6. Notwithstanding 'certainty and imminence', a consent authority may of course grant consent to a development application which does not comply with the draft instrument. The different kinds of planning controls would be entitled to different levels of consideration and of weight in this respect.*
> >
> > *7. Where a draft instrument seeks to preserve the character of a particular neighbourhood that purpose will be entitled to considerable weight in deciding whether or not to reject a development under the pre-existing instrument, which would in a substantial way undermine that objective.*
>
> *21 Terrace Tower (par 7) raises the question of whether the proposed development will preserve the character anticipated by the R1 zone and whether the proposed development will undermine the objectives of the R1 zone in LEP 2009. The submissions of Mr Mantei and Mr Hemmings come to different conclusions, however, I agree with the conclusions of Mr Hemmings.*

Whilst the facts and degree of the above cases vary for the proposed development, it is clear that Amendment 11 to HLEP 2013 can be given weight, but not determinative weight, and consideration needs to be given to the character to ensure the objective is not undermined. It is important to note that while the maximum height limit has been reduced from 17.5m to 16.5m, the objective of Clause 4.3 of HLEP 2013 has not changed. That is, the effect of Amendment 11 of HLEP 2013 simply changes the numerical variation and does not change the way a Clause 4.6 is considered against the objective of Clause 4.3 of HLEP 2013.

Turning to the character element this is discussed below, but it is noted that character or desired future character of the locality is not defined under HLEP 2013 and consistent with the judgment in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* is therefore subjective and can relate to the existing and approved development in the locality. As discussed above, the Balmoral Street, Waitara precinct is not characterised by height compliant or five storey residential flat buildings. Importantly, even with the reduction in height to 16.5m, Part 3.4.4 of HDCP still contains provisions that allow for mezzanines even though this is the very element that Council contends to be removed from the locality.

The character of the locality is that of five storey residential flat buildings plus a mezzanine level. No building to the south of the site on Park Avenue, including Nos. 4-6, 8-10, 12-14 or 16-20 Park Avenue would comply with the 16.5m height limit under Amendment 11 of HLEP 2013 and has less or no impact from flooding when compared to the proposed development. That is, the gazettal of Amendment 11 of HLEP 2013 will have no effect in preserving character given the scale of development already approved or existing in the locality.

Turning to the objectives of Clause 4.3 (which have not altered despite the gazettal of Amendment 11), the construction of Clause 4.3(a) of HLEP 2013 requires a consideration of the site constraints, development potential and infrastructure capacity of the locality to establish a height that is "*appropriate*". There is no definition of the terms "site constraints", "development potential" and "infrastructure capacity" under HLEP 2013. Accordingly, these terms are subjective. However, the fact that heights of buildings are only required to be "*appropriate*" when considering the site constraints,

development potential and infrastructure capacity sets a lower bar when considering the Clause 4.6 variation against the objective of the height of building development standard. These requirements are considered below.

It is clear from the case law that weight can be given to Amendment 11 of HLEP 2013, but not determinative weight and the consent authority, being the Court, may grant consent to a development application which does not comply with Amendment 11 of HELP 2013.

2. PROPOSED VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

The proposed development results in the following variations to the HOB standard for all five buildings are as follows:

- Building A would be 17.91m high and breaches the height standard by a maximum of 410mm or 2.3%,
- Building B would be 17.66m high breaches the height standard by a maximum of 160mm or 0.9%,
- Building C would be 18.45m high and breaches the height standard by a maximum of 955mm or 5.4%,
- Building D would be 18.59m high and breaches the height standard by a maximum of 1235mm or 7%,
- Building E would be 18.49m high and breaches the height standard by a maximum of 995mm or 5.6%.

A visual representation of the extent of variation is provided in the building height plane diagram below. It is noted that extent of the variation for the proposed development when compared to the extent of variation for the surrounding existing development at Nos. 16-20 Park Avenue and 35-39 Balmoral Street, Waitara is not significant.

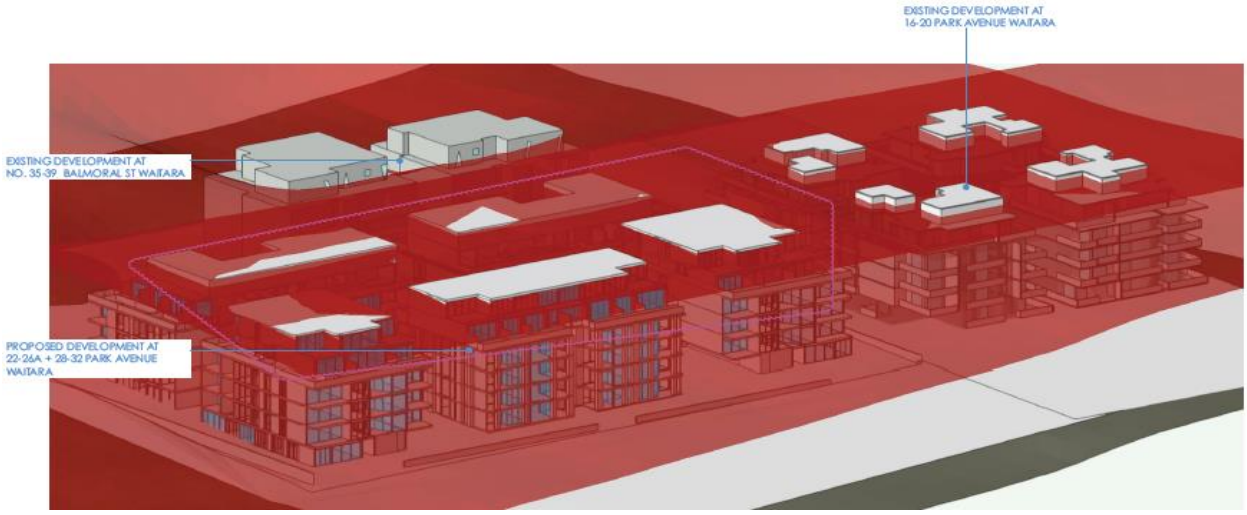

Figure 2 Height Blanket Diagram

3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of clause 4.6 are as follows:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.

The development standards in clause 4.3 are not "expressly excluded" from the operation of Clause 4.6. The focus for the consent authority's satisfaction is cl.4.6(4).

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 4.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 5.

4. MATTERS REQUIRED BY CL.4.6(3) ARE REQUIRED TO BE ADEQUATELY DEMONSTRATED – CLAUSE 4.6(4)(a)(i)

4.1 THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

> *"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

The Judgment goes on to state that:

> *" The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

Preston CJ in the Judgment then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Whilst the height of buildings has been reduced to 16.5m, the objective of Clause 4.3 has not been changed and there is no further consideration of desired future character required. Furthermore, as detailed in Figure 2 (above), the height plane diagram details the existence of other height non-compliant buildings in the immediate locality which sets a different context to a locality that is strictly compliant with the 17.5m height of buildings development standard. Whilst this argument is not pressed in the Clause 4.6 submission it is noted for consideration.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

> *"…Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

The sole objective of Clause 4.3(1) of HLEP 2013 provides:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

The construction of Clause 4.3(a) of HLEP 2013 requires a consideration of the site constraints, development potential and infrastructure capacity of the locality to establish a height that is "*appropriate*". There is no definition of the terms "site constraints", "development potential" and "infrastructure capacity" under HLEP 2013. Accordingly, these terms are subjective.

However, the fact that heights of buildings are only required to be "*appropriate*" when considering the site constraints, development potential and infrastructure capacity sets a lower bar when considering the Clause 4.6 variation against the objective of the height of building development standard. Contrary to Council considerations in the SNPP Assessment Report and SOFAC, the above objective does not necessitate an assessment of HDCP 2013 and ADG requirements, especially in terms of number of storeys or desired future character.

In terms of *"site constraints"*, the subject site has site specific constraints with regard to flooding and topography that necessitate a built form that does not "nestle" into the site like surrounding buildings. The site has a slope from east (rear) to west (front) of 2.2m with the eastern side of all buildings compliant or below the 17.5m height limit while the western side results in the variation. In any event, the resultant building height is demonstrated to step with the gradual fall of the topography along Park Avenue and comprise of a height that is entirely "*appropriate*" when considered in the context of the height of surrounding developments (refer to Figure 3 below).

Figure 3 The proposed Buildings B & D detailing the slope of the land and 17.5m height limit (dotted blue)

In terms of the *"development potential"*, it is noted that HLEP 2013 does not contain a maximum FSR and the SNPP Assessment Report considers that the "development potential" is reliant upon the DCP envelopes to establish development potential. This was considered in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* (para 46-47) where Preston CJ found that s3.42(1) of the EPA Act does not make it permissible to construe the provisions of a LEP by reference to a DCP. Whilst it is permissible to do so, it is not mandated and the undefined terms are therefore subjective. In any event, strict application of the LEP and/or DCP controls would render Clause 4.6 of HLEP 2013 having no work to do which is contrary to the objectives of Clause 4.6 and consistent with a decision in Para 43-44 of *Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161*.

A similar situation exists regarding compliance with the HDCP envelope and setbacks where Clause 4.15(3A) of EPA Act would have no work to do. These requirements provide flexibility from strict application of the controls and in this instance, the proposed variation to the height standard will permit additional accommodation in the form of mezzanine levels that is entirely compatible with the mezzanines and height of surrounding properties.

The Hornsby LSPS details that this area around Waitara has been specifically rezoned in order to assist with delivering the 4,500 dwellings for the locality. Therefore, there must have been a level of satisfaction that the subject site and its surrounds could accommodate additional development potential as is currently proposed. Interestingly, insistence on full compliance with the height of buildings development standard would result in the removal of a number of bedrooms and bathrooms on Level 6 but it would not reduce the number of apartments given the mezzanine design.

The additional development potential will achieve a planning purpose by providing high quality residential accommodation in a suitable location in close proximity to services and transport. These benefits are in the absence of any significant additional adverse streetscape or amenity impacts on neighbouring properties that significantly breach the development standard and the variation is considered "*appropriate*" or not antipathetic to this objective.

In terms of *"infrastructure capacity"*, insisting on compliance with the height of buildings development standard will not alter the number of apartments provided in the proposed development but simply reduce the amount of habitable floor space (bedroom and bathroom). Therefore, the impacts on the local road network, essential services such as electricity and water, access to shops, public transport and local facilities and other similar services will not be significantly different if the height variation is permitted. It is therefore considered that the variation to the height limit is considered "*appropriate*" or not antipathetic to this objective.

The burden of insisting on strict compliance would result in the effective removal of the mezzanines which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with other high density developments in the vicinity and the planning controls, subject to flexibility available under Clause 4.6, permit a development of this general scale.

Summary

The above adequately demonstrates that compliance with the Height is unreasonable or unnecessary in the circumstances in this case where the Proposal achieves the objective of the standard, notwithstanding the Variation.

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out above. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

4.2 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that, despite non-compliance with the Height, the proposed scale and form of the development is compatible with the emerging character of the locality and fits well within the streetscape.

It is important to reiterate here that the maximum variation (or contravention) is 1.235m or 7%.

It has been held in *Eather v Randwick City Council* [2021] NSWLEC 1075 that a particularly small departure from the actual numerical standard which lacks any material impacts consequential of the departure will be a sufficient environmental planning ground to justify contravening the development standard.

It is considered that the Variation is particularly small. This particularly small departure is also considered not to have any material impact, which arises as a consequence of the Variation, on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:

- The extent of the additional height creates no adverse additional overshadowing impacts to adjoining properties when compared to a compliant building envelope. This is detailed in the hourly shadow diagrams provided with this submission that detail the additional overshadowing as a result of the height variation. It is concluded the height breach will not result in any adverse loss of solar access to surrounding properties and continues to provide sufficient solar access. That is, the extent of additional overshadowing from the additional height would be insignificant and would not be noticeable to the owners of surrounding properties;

- The height breach does not result in any adverse additional privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy to the adjoining properties when compared to the approved built form. The extent of the variation is limited to the upper portion of the proposed development where windows that are compliant with the height limit will have a greater impact on privacy. As such, the loss of privacy caused by the non-compliant elements would be insignificant or nil; and

- The height breach will not result in any significant view loss. No significant views have been identified in the locality and therefore the extent of view loss caused by the non-compliant element would be insignificant or nil.

Accordingly, the Variation is justifiable.

Further the following discussion provides that not only does the Variation advance the objects of the *Environmental Planning and Assessment Act 1979*, but also advances an environmental and planning benefit:

1. The height breach, in part, can be attributed to the requirement to site the development above the Flood Planning Level. The following table details the extent of the variation when excluding flooding:

	FPL (RL)	Plus 17.5m (RL)	Proposed RL	Height over FPL
Building A	172	189.5	189.95	450mm
Building B	172	189.5	189.95	450mm
Building C	171.1	188.6	189.05	450mm
Building D	171.7	189.2	189.65	450mm
Building E	172.2	189.7	190.15	450mm

   The variation to the height of buildings development standard can be, in part, attributed to the requirement to provide development to the Flood Planning Level (including 500mm freeboard). When measuring the height of the each building above the FPL, the maximum height will be 17.95m. This is 450mm above the 17.5m height of building development standard. Therefore, if the FPL did not apply to each building the proposed development would need to be 450mm below existing ground level to ensure compliance with the 17.5m height of buildings development standard. Given the site has a maximum fall of 3.29m from the rear to front boundary, the development would be entirely capable of compliance with the height of buildings development standard had there not been a requirement to comply with the FPL.

   Therefore, it is a combination of the flooding and topography that result, in part, in a variation to the height of buildings development standard. Both of these factors are site specific factors that are not contemplated by Clause 4.3 of HLEP 2013.

2. The greatest extent of the variation occurs on the western elevations of Buildings C, D & E. The non-compliant elements are setback 13.3-16.6m from the front (western) boundary and are 3-8.7m behind the base element as detailed in Figure 3 above. Given the height and scale of the base elements, the top elements will be sleaved and appear as visually recessive elements that are not visually jarring to the casual observer on Park Avenue when viewed in context of surrounding properties.

3. The topography of Park Avenue includes a fall from south to north with the following typical RL heights:

Address	**RL Height**
4-6a Park Avenue	RL 191.6
8-10 Park Avenue	RL 190.99
12-14 Park Avenue	RL 190.64
16-18 Park Avenue	RL 190.47
Building E	RL 190.15
Building D	RL 189.65
Building C	RL 189.05

34-38 Park Avenue	subject to future redevelopment

As detailed above there is a gradual fall in the topography which is followed by existing development on the eastern side of Park Avenue. Despite the height variation, the proposed development will step with the change in topography and transition to the currently underdeveloped site at Nos 34-28 Park Avenue. Insistence on compliance with the height control would put the development out of step with the gradual fall of building heights with the topography. Figure 4 has been prepared which provides a visual presentation of the built form and topogpray and how the proposed development, despite the variation will sit in its context and appear from pedestrian level on Park Avenue.

Figure 4 Visual representation of the proposal within in context

4. The height of the proposed development, including the variation, will be entirely compatible with the height and character of surrounding development. As demonstrated in Figure 2, Nos. 16-20 Park Avenue and 35-39 Balmoral Street do not comply with Clause 4.3 of HLEP 2013. Whilst these variations in themselves are not a sufficient reason to vary the development standard, the height variations in the Balmoral Street, Waitara Precinct set a different context to one that is governed by the permissible planning controls. The Balmoral Street, Waitara precinct does not demonstrate a high level of compliance with the height of buildings development standard and therefore height variations can be considered in the context of existing and approved buildings. This is broadly consistent with Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* at Para 62-63. When considering the development in the context of the surrounding development, including existing non-compliant buildings, the proposal development, even with the height variation, will sit in harmony with surrounding development and is considered to be entirely compatible with the scale and character of surrounding development, noting that compatible does not mean sameness (*Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*).

5. The proposed development will provide for a five storey development with a mezzanine style level that is entirely compatible with mezzanine style additions approved at Nos. 4-6a, 8-10, 12-14 and 16-18 Park Avenue, all of which are to the south of the site. The proposed top element with a fifth level and mezzanine style addition will only comprise of a bedroom and a bathroom for each apartment and represent a small proportion of the total area for each apartment.

6. The height breach facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development with the provision of mezzanine style additions without having an impact on the amenity of adjoining properties. The applicant has redistributed floor space from the side setbacks to other parts of the building, including the mezzanine levels to provide a superior separation distance and landscaped outcome. Insistence on compliance with the height control would result in the removal of the mezzanine style addition which would result in a redistribution of floor space back to the side setbacks and result in a disproportionate loss of amenity for the occupants with insignificant or nil benefits to the amenity of adjoining properties. Furthermore, insistence on compliance with the height development standard would reduce the height of Buildings C, D & E which would not facilitate the gradual stepping of buildings with the topography.

7. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone (as further detailed in Section 5 below);

8. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

    - The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilise site for residential uses (1.3(c));

- The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

9. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:

    - The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
    - Approval of the proposed variation will allow for a variation of building height and scale across the locality which is commonly accepted urban design approach instead of buildings with consistent height; and
    - Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the small variation, the lack of amenity impacts on adjoining properties, the flood levels, the topography and character of the precinct. Insistence on compliance with the height control will result in the removal of the mezzanine style level which is a disproportionate response given the insignificant impacts of the proposal. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is not visually jarring from the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the Variation will provide for a better or similar planning outcome than a Height compliant development. Accordingly the Variation is justifiable.

5. THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD, AND THE OBJECTIVES OF THE ZONE (CLAUSE 4.6(4)(a)(ii))

It is considered that in demonstrating that compliance with the Height is unreasonable or unnecessary because the Proposal otherwise achieves the objectives of the standard, it follows that the Proposal is also consistent with those objectives.

Clause 4.6(4)(a)(ii) however also requires consideration of the relevant 'R4 High Density Residential" zone objectives which are provided below:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development will provide for the housing needs of the community. The height variation will assist in providing additional accommodation when compared to the compliant parts of the building to assist in providing for the housing needs of the community within a high density environment.

- *To provide a variety of housing types within a high density residential environment.*

The height variation will assist in providing additional and varied accommodation when compared to the compliant parts of the building. That is, the proposed mezzanine apartments that will add and diversify the housing stock within a high density environment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

This objective is not relevant to the proposal.

For these reasons the Proposal is consistent the relevant objectives for development in Zone R4.

Accordingly, the consent authority can be satisfied that the Proposal is in the public interest, because it is consistent with the objectives of both the development standard and the zone.

6. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b)

The issue of the concurrence of the Secretary of the Department of Planning and Environment is dealt with by Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

Concurrence cannot be assumed for a request for a variation to a numerical standard by more than 10 per cent if the function is to be exercised by a delegate of the consent authority. This restriction does not apply to decisions made by local planning panels, who exercise consent authority functions on behalf of councils but are not legally delegates of the council. As such, it is anticipated that the development application will be determined by the local planning panel.

The Secretary can be assumed to have given concurrence to the variation.

7. CONCLUSION

The amended proposal requests variation to the height standard to ensure that the subject site accommodates an appropriate scale to Park Avenue. The amended proposal results in a superior distribution of floor space that will enhance the amenity of the occupants and the streetscape without having any adverse impact on the amenity of adjoining properties.

The Proposal is entirely compatible with the height of surrounding properties and provides a transition in building height down from south to north. The site is located within a highly accessible area, close to services, educational and commercial uses and is ideally located within Central Sydney.

Therefore, insistence upon strict compliance with that standard would be unreasonable or unnecessary. On this basis, the requirements of Clause 4.6(3) are satisfied and the Variation supported.