

CLAUSE 4.6 (Revised) BUILDING HEIGHT & GROUND FLOOR DEVELOPMENT

PROPOSED MIXED USE DEVELOPMENT

870 - 898 PACIFIC HIGHWAY, GORDON

July 2015



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1 Overview

DA 0180/14 was first lodged in May 2014. In December 2014, a revised scheme was submitted in response to issues raised by Council as part of their initial assessment process.

In April 2015, Council raised further concerns, which now form the basis of this current submission.

The purpose of this report is to provide a brief overview of the overall proposal and includes updated Clause 4.6 submissions to both building height and the use of the ground floor for residential purposes.

For reference purpose, a comparative summary of what was submitted in the original DA and subsequent revisions is provided in Table 1.

The amended design now proposes the construction of a mixed use development comprising three residential flat buildings (A, B and C) with heights ranging from 7 storeys fronting Pacific Highway and 8 storeys fronting Fitzsimons Lane with:

- A total of 144 apartments (67 x 1 bed; 10 x 1 bed + study; 58 x 2 bed and 9 x 3 bed) with three basement levels of car parking totalling 213 car spaces;
- A total residential GFA of 12,790.6m² (including retail space of 730m² to both Pacific Highway and Fitzsimons lane);
- Floor space ratio of 2.109:1
- Roof gardens now to be created on all three buildings comprising Building A – 217m² on level 5 and 278 m² on level 6; Building B – 216 m² on level 6 and Building C – 381m² on level 5;
- Vehicular access off Fitzsimons Lane in lieu of Merriwa Street;
- A revised footprint and unit layout to Building A;
- Increased setback of Building A to northern boundary to allow for the future redevelopment of the neighbouring property.
- Reduced height and change of unit mix to Buildings A and B;
- Increased height and change of unit mix to Building C;
- Apartments are now generally orientated away from the view to the west and to the north for as a means of improving solar access;
- Additional retail/commercial floor space has now been added to the ground floor level fronting Pacific Highway an increase from 268m² fronting Fitzsimons lane to 730m² fronting both Fitzsimons Lane and Pacific Highway; and
- The retention of two Sydney Blue Gums (T4 and T9) in the southern corner of the site.

The proposed 144 units represents a 15% reduction (26 units) on the original 170 units originally proposed. Refer to Table 2 for a breakup of unit types.

Table 1: Comparative Information Details

	May 2014 Original Proposal	Dec 2014 Revised Proposal	July 2015 Revised Proposal
Total no. of units	170	147	144
No. 1 bedroom units	93	80	77
No. 2 bedroom units	75	58	58
No. 3 bedroom units	2	9	9
FSR	2.28:1	2.136:1	2.109:1
GFA	13,582m ²	12,960m ²	12,790m ²
Retail space	268m ² to Fitzsimons Lane	531m ² to Pacific Highway & Fitzsimons Lane	730m ² to Pacific Highway & Fitzsimons Lane
Building Height	Not all buildings complied with 26.5m height control	All buildings comply with 26.5m controls – minor breach with lift over runs	All buildings comply with 26.5m controls – minor breach with lift over runs
Vehicular access	Merriwa Street	Fitzsimons Lane	Fitzsimons Lane

Table 2: Unit Types

	Building A	Building B	Building C	Total
1 bedroom	22	38	7	67
1 bedroom & study	6	4	0	10
2 bedroom	26	25	7	58
3 bedroom	0	2	7	9
Total	54	69	21	144

2 Clause 4.6 - Exceptions to Development Standards

2.1 Height of Building

Clause 4.3(2) of KLEP (TC) 2012 stipulates that the height of buildings is not to exceed the maximum height identified on the Height of Building Map, which is 26.5m as measured in accordance with 'building height'.

'Building height (or height of building)' means the vertical distance between ground level (existing) and 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.

As submitted in the original Statement of Environmental Effects and discussed at the meeting with Council on 8 October 2014 and 2 June 2015, it is our view that the application of existing ground level as defined in KLEP (TC) 2012 is too onerous an interpretation for the site considering the topographical constraints and excess slope. Adopting existing ground level as a means of interpreting building height creates a distorted ground plane, which we submit is unreasonable for reasons that will be discussed in the following Clause 4.6 submission.

Adopting interpolated ground line is considered to be a more practicable measure, which takes into account the various changes in level and cross fall. On this basis, all three buildings now comply with the 26.5m height control, with the exception of lift over runs to Buildings A and B, which are located in the middle of each building.

2.1.1 Clause 4.6 – Exceptions to Development Standards – HEIGHT

This submission contends that strict compliance with the maximum building height limit of 26.5m is unreasonable and unnecessary on the grounds that the variation being sought can be adequately justified under the provisions of Clause 4.6. Architectural drawings and shadow diagrams prepared by Nettleton Tribe Architects have been used to explain and support this variation submission.

As discussed in Section 2.1, the deemed non-compliance with the 26.5m height standard is worsened from the application of existing ground level as defined in KLEP (TC) 2012. The basis of this submission is that the height standard fails to recognise sites that are burdened by severe slope or that have been previously modified, or in the subject case, extensively excavated. Consequently, this results in dramatic changes in level that have significantly changed the natural ground levels of the site thereby producing complex height planes.

Topographically, the site poses a number of unique challenges – the most significant being that the land has a two directional cross fall of approximately 12.0 metres from Pacific Highway down to Fitzsimons Lane and 5.0 metres from its north western boundary to the south eastern boundary.

Given the significant site cross falls and an existing heavily excavated basement, it is our view that a more reasonable approach is to use interpolated ground level in lieu of the existing ground level as the height control. To use existing ground level is too onerous an interpretation and creates a distorted ground plane which in turn results in a 3-D building height plane that adversely impacts the development potential of the site.

A more reasonable interpretation of ground level for sites like 870-898 Pacific Highway with deep excavations is to establish the likely "natural" fall of the site prior to excavation by joining existing levels at the boundary on the high side (Pacific Highway) with existing levels at the boundary on the low side (Fitzsimons Lane). Effectively, this creates a more uniform and natural sloping ground plane from which maximum building height can be determined in accordance with what we believe is the intention of the Town Centre LEP.

As demonstrated in Figure 1, the maximum building heights of Building A and B both comply with the maximum 26.5m across the entire site. However, there are some minor breaches to this, namely some of the lift over runs, which are all located in the middle of each building. This is best depicted in Figure 3 and 4.

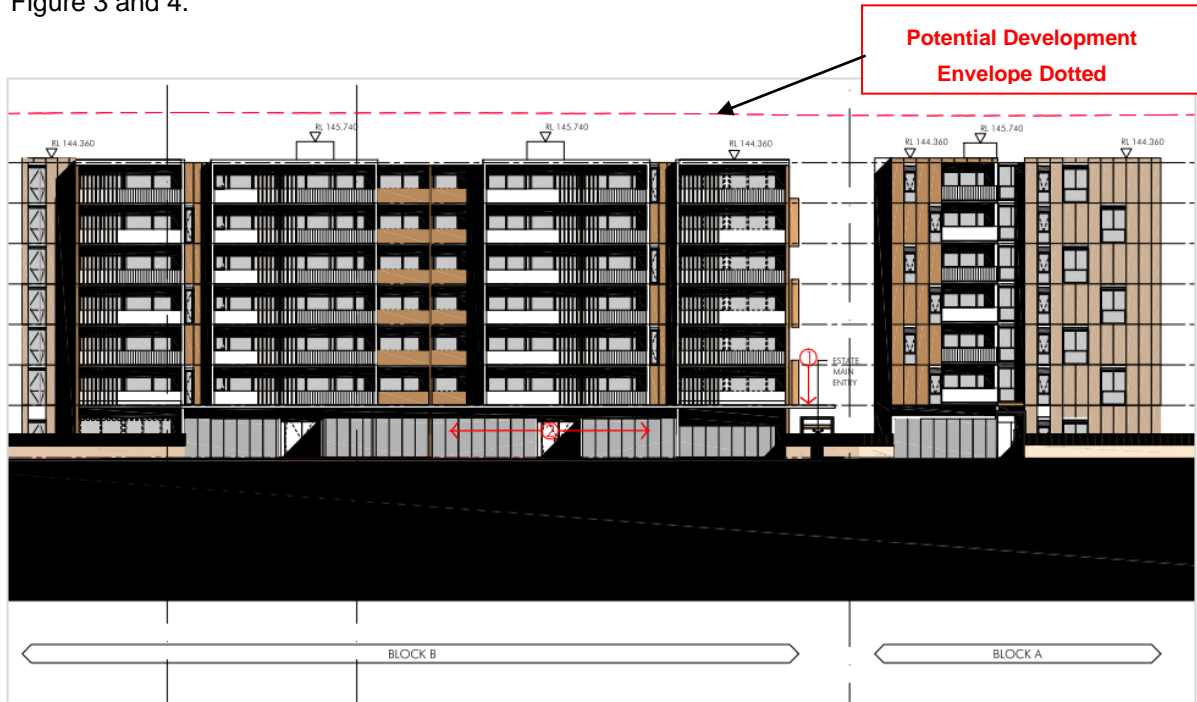


Figure 1: Pacific Highway Street Elevation – both Buildings A and B comply with 26.5m height control. Source: DA Drawing 2838_201 [D]

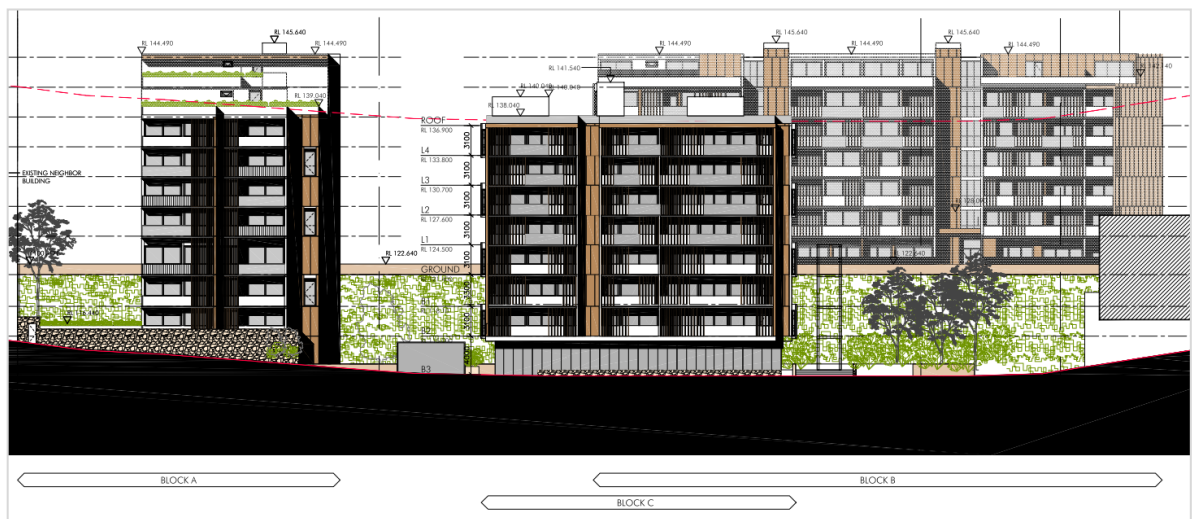


Figure 2: Fitzsimons Lane Street Elevation best describes the topographical constraints and significant cross fall. Source: DA Drawing 2838_202 [D]

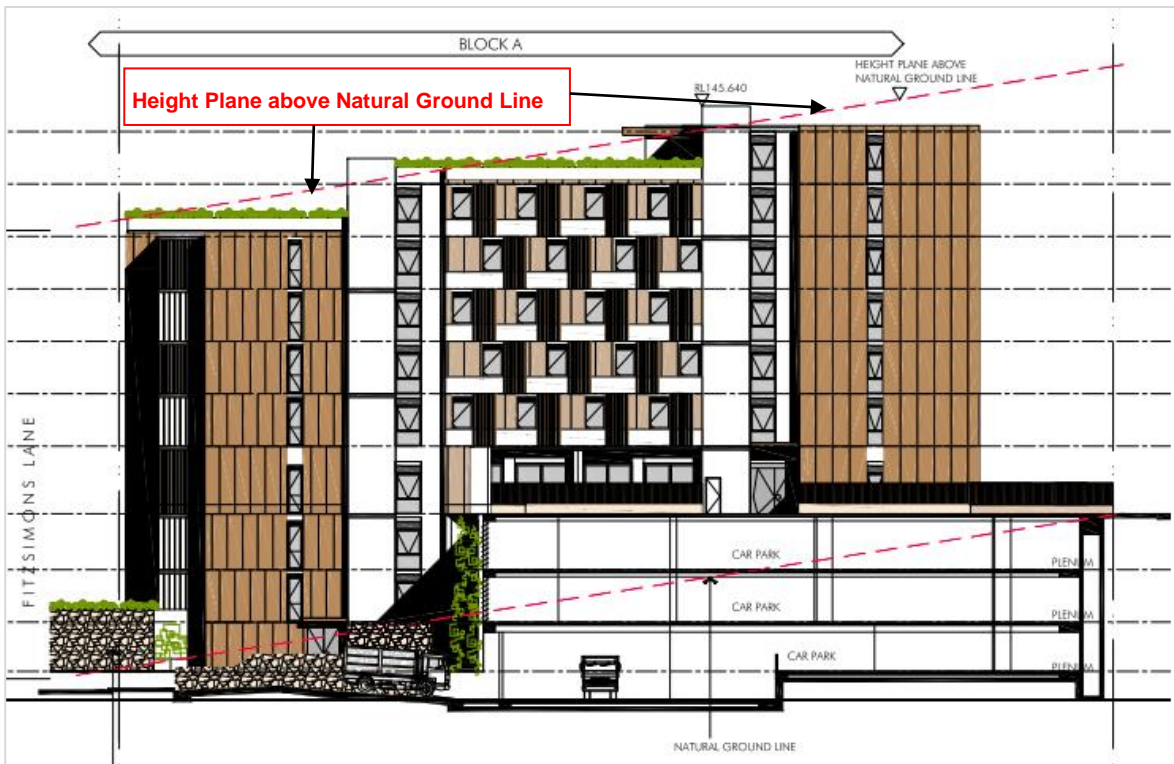
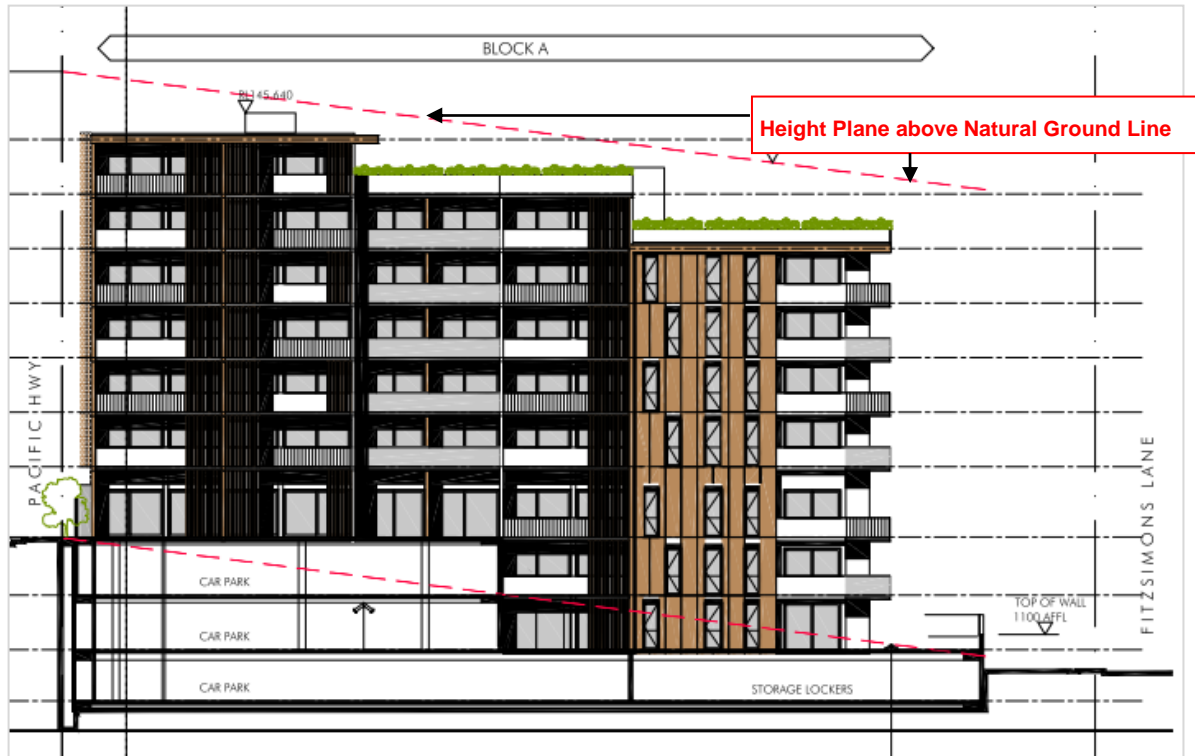


Figure 3: Cross sectional elevations of Building A from Pacific Highway to Fitzsimons Lane.

Source: DA Drawing 2838_301 [D]

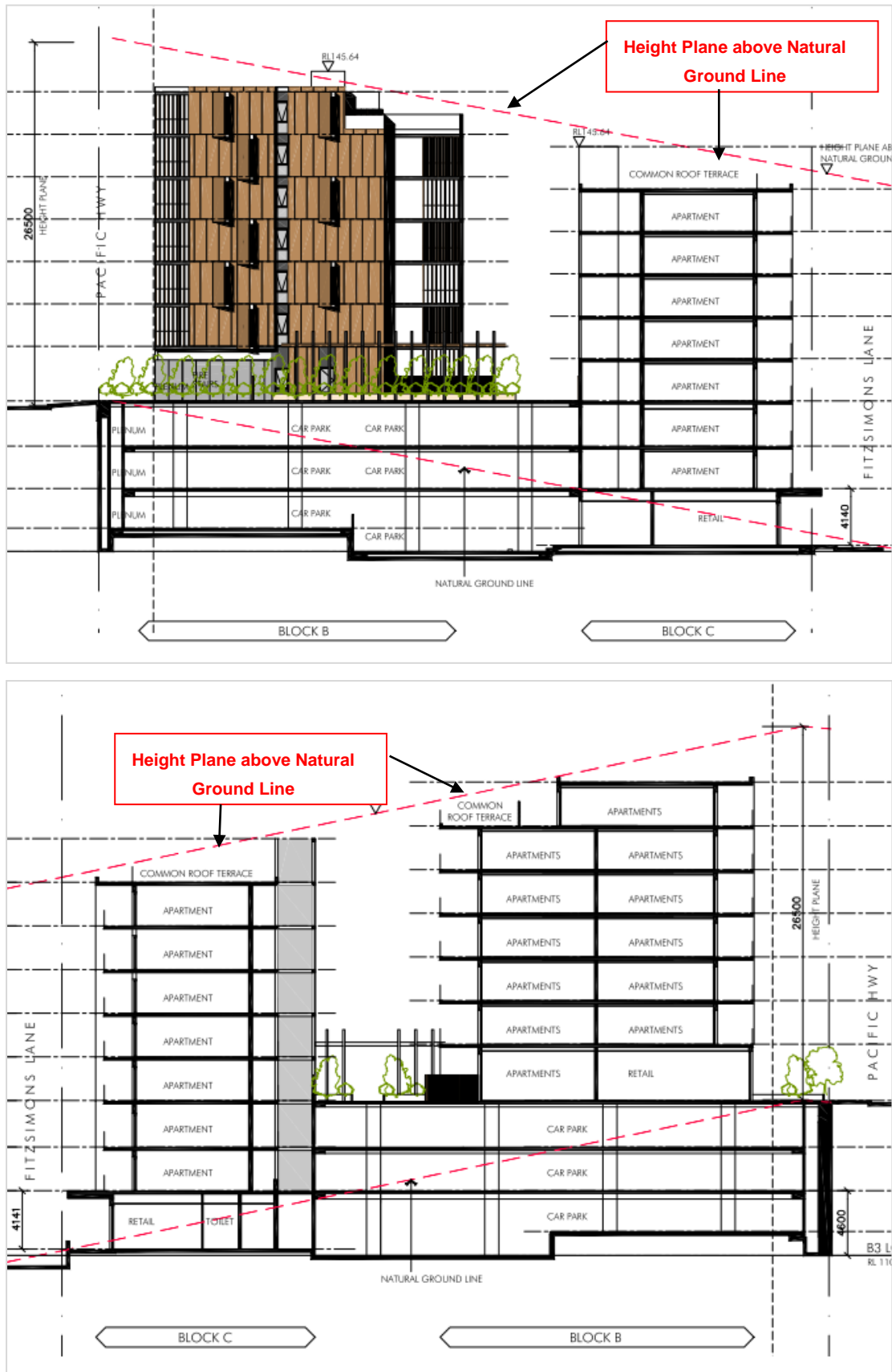


Figure 4: Cross sectional elevations of Building B and C from Pacific Highway to Fitzsimons Lane

Source: DA Drawing 2838_302 [D]

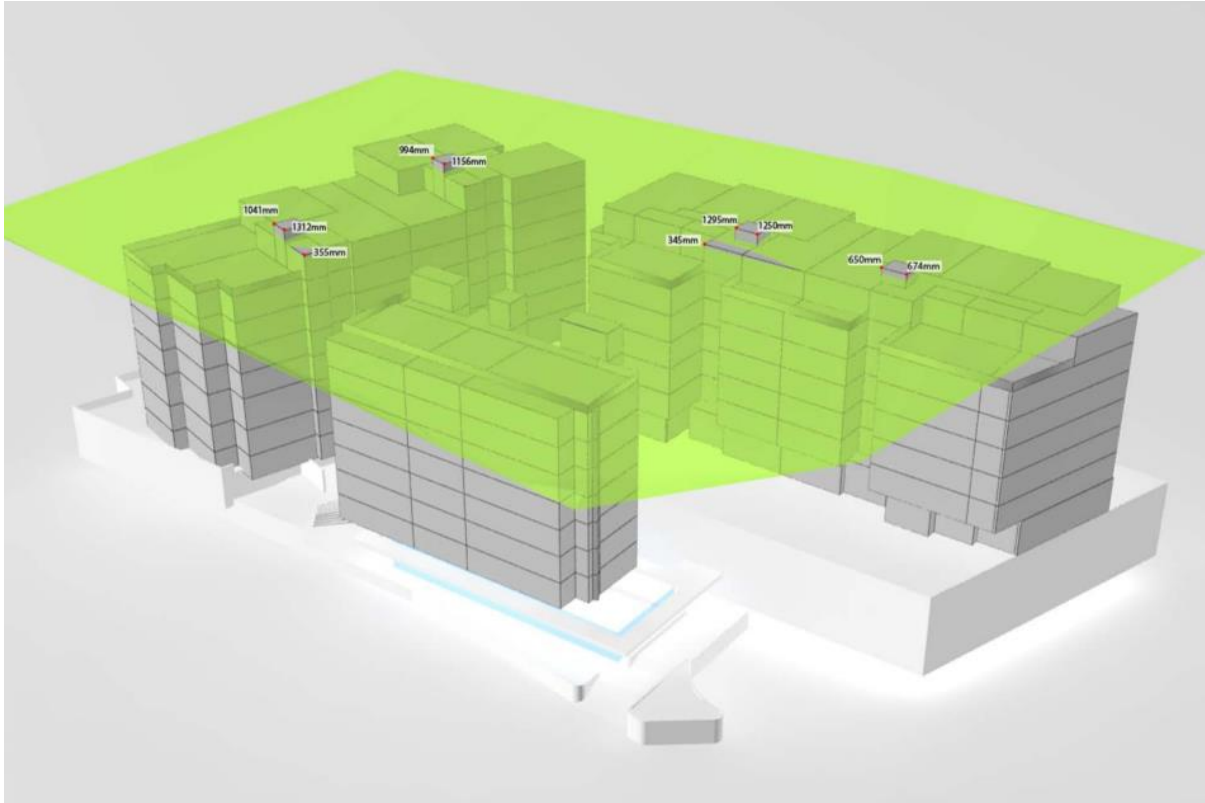


Figure 5: 3D model demonstrating minor breaches to 26.5m height control of lift over runs –all of which are located in the middle of the site and do not create any over shadowing of neighbouring properties.

JUSTIFICATION

The following submission addresses the relevant subclauses under Clause 4.6 of KLEP (TC) 2012.

Clause 4.6 (1)

The objectives of this clause are:

- (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.*

Response

Clause 4.6 is a mechanism used to relax numerical development standards set by environmental planning instruments. It is similar to State Environmental Planning Policy No. 1 – Development Standards, which by virtue of Clause 1.9(2) of the LEP no longer applies. It recognises that in exceptional circumstances standards, controls such as height may be unnecessary or unreasonable and thereby provides a means by which a variation to the standard can be achieved by adopting an appropriate degree of flexibility.

As further explained, the revised proposal is considered to be a suitable design solution on a site that has a number of challenges and topographical constraints.

Clause 4.6 (2)

Development consent may be granted even though the proposed development may contravene a development standard.

Response:

It is submitted that the building height standard is not excluded from the clause.

Clause 4.6 (3)

A written request is required in support of the contravention to the development standard that demonstrates:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravention.*

Response:

The objectives of Clause 4.3 Height of Buildings are:

- a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*
- b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*
- c) to enable development with a built form that is compatible with the size of the land to be developed.*

In our view, the proposed variation to allow lift over runs to breach the maximum building height standard is justified for the following reasons: -

- The revised proposal remains consistent with the objectives of a B4 Mixed use zone in providing:
 - a variety of housing types integrated with suitable retail uses which combined will assist in maximising public transport patronage;
 - high density housing close to the Gordon Town Centre and the neighbouring Macquarie Business Park will assist in supporting the viability of both localities;
 - the contravention of the height standard does not impact on the visual privacy or create overshadowing of adjacent properties – *(Note: this matter was one of Council's major concerns and considerable effort has been given to ensuring that loss of privacy and over shadowing do not pose an impact on neighbouring properties);*
 - a development, the scale of which is considered appropriate for a site that is 6,066m² in area and is within 400m of the Gordon Town Centre.
- The overall floor space ratio of 2.109:1 complies with the maximum 2.30:1 under KLEP (TC) 2012;
- The site is totally covered with hard paved areas and buildings with extensive excavation and basement structures - when measured against the definition of existing ground level creates a distorted ground plane which produces a 3-D building height that adversely impacts the development potential of the site.
- The site is severely constrained by a two directional cross fall of 12.0 metres from Pacific Highway down to Fitzsimons Lane and 5.0 metres longitudinally across the site from the North West boundary to the south east boundary.
- The excessive slope of the land combined with the degree of excavation has created a unique situation that requires special consideration and a site - specific design solution – which has been achieved.

- The overall height of all 3 buildings complies with the 26.5 standard across the site - the breach in height is located in the middle of the site in part obscured by parapets, when viewed from the corner of Merriwa Street and Fitzsimons Lane – consequently, the streetscape is not adversely impacted by the non-compliances.
- The scale and form of the proposed development is consistent with the expected outcomes of Council's strategic aims and objectives for the locality and is a direct response to the site's topographical constraints.
- The proposed heights are contextually appropriate for a site of 6,066m² and presents a responsive streetscape incorporating sound urban design principles and amenity outcomes within an emerging area close to the Gordon Town Centre.
- The total land holdings are under the one ownership that have been consolidated over many years with the specific purpose of being redeveloped to maximise the site's strategic location on Pacific Highway, surrounded by a mixture of residential, commercial and retail uses.
- As demonstrated in architectural drawings prepared by Nettleton Tribe, the revised scheme maintains the required 3 hours of sunlight to buildings located on the southern side of Merriwa Street.

Comment:

The NSW Land and Environment Court has determined that the most commonly invoked way to establish that compliance with a development standard is unreasonable or unnecessary is to determine if the objectives of the development standard are achieved notwithstanding non-compliance with the standard. Based on the above mentioned arguments, it is our view that full compliance with the 26.5m height control is unreasonable and that the objectives of the building height standard have been achieved.

Clause 4.6 (4)

The consent authority must not grant development consent that contravenes the standard unless it is satisfied that the applicant's written request has adequately addressed matters in subclause (3), and the proposed development is in the public interest.

Response:

Sufficient written justification has been provided under subclause (3) justifying that the request for variation is minor and is the direct result of the site's excessive slope and excavation. There is no public benefit to be gained by strictly enforcing the adoption of ground floor level to determine building height that does not facilitate sites that have a unique topography. The variation will allow additional residential units to be achieved which is beneficial to the local housing demands.

Clause 4.6 (5)

The Director-General must consider:

(a) whether contravention of the standard raises any matters of significance for State or regional planning, and

(b) public benefit of maintaining the development standard, and

(c) other matters required to be taken into consideration.

Response:

To allow minor lift over runs to breach the 26.5m height control does not give rise to any matters of State or regional planning that would be considered contradicting or negative – as there would be no public benefits in maintaining the standard when the overall bulk, scale and built form of the three buildings comply with the height control. To the contrary, the public will benefit from the site being

redeveloped because of its strategic location close to the Gordon Town centre and its ability to becoming a catalyst for future developments within the surrounding area. In fact, under the previous 2010 Town centres LEP, the site was nominated as a 'Key site' – this is proof that to approve the proposal as now submitted will be a positive public benefit.

Clause 4.6 (6)

This subclause does not apply to the proposed development.

Clause 4.6 (7)

Upon determining a development application, the consent authority must keep a record of matters in the written request referred to in subclause (3)

Response:

This provision is noted.

Clause 4.6 (8)

This clause does not allow development consent to be granted that contravenes:

- (a) a development standard for complying development,*
- (b) BASIX commitment*
- (c) Clause 5.4*

Response

This subclause does not apply to the proposed development.

2.2 Ground Floor Development in Business Zones

Clause 6.6 of KLEP (TC) 2012 requires that Council must be satisfied that the ground floor of commercial premises or a mixed use development is not used for residential accommodation or a car park and provide uses that encourage interaction between the inside of the building and the external public areas. The objective being to ensure that active uses are provided at the street level in business zones including a B4 zone.

As Council has already confirmed in writing, Clause 6.6 is a development standard and the ground floor is the street level, which the proposal has two. In addition to retaining the original 268m² retail space to Fitzsimons lane, the revised scheme now proposes an additional 462m² to the Pacific Highway frontage in Buildings A and B, totalling 730m². The spaces range in area from 62m² to 113m². Each space has a regular uniformed shape and openly addresses the Highway frontage. The landscape drawings have also been revised as a means of assisting in demonstrating the pedestrian interaction between the Pacific Highway and the retail spaces.

As submitted in the original SOEE, it is not practicable nor economically feasible to allocate the entire ground floors of both buildings as non-residential across all three buildings – made all the more difficult by the excessive slope of the site and dramatic changes in levels from Pacific Highway to Fitzsimons Lane.

2.2.1 Clause 4.6 - Exceptions to Development Standards – GROUND FLOOR DEVELOPMENT

The following submission addresses each of the individual subclauses under Clause 4.6 of KLEP (TC) 2012 in support of allowing non-residential uses at ground floor.

JUSTIFICATION

The following submission addresses the relevant subclauses under Clause 4.6 of KLEP (TC) 2012.

Clause 4.6 (1)

The objectives of this clause are:

- (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.*

Response

Clause 4.6 is a mechanism used to relax numerical development standards set by environmental planning instruments. It is similar to State Environmental Planning Policy No. 1 – Development Standards, which by virtue of Clause 1.9(2) of the LEP no longer applies. The clause recognises that in exceptional circumstances standards, controls such as prohibiting residential uses on the ground floor of a mixed use development may be unnecessary or unreasonable - thereby providing an acceptable means by which a variation to the standard can be achieved with an appropriate degree of flexibility. As previously explained it has been difficult to create a suitable design solution on a site that has a number of design challenges and topographical constraints.

Clause 4.6 (2)

Development consent may be granted even though the proposed development may contravene a development standard.

Response:

It is submitted that the *Ground Floor Development in Business Zones* standard is not excluded from the clause.

Clause 4.6 (3)

A written request is required in support of the contravention to the development standard that demonstrates:

- (a) *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 contravention.*

Response:

To allow residential uses to occupy selected parts of the ground floor of a mixed use development, the scale of which has been proposed, is considered justifiable for the following reasons: -

- Over the last number of years the owner/applicant has received a number of approaches from various companies and groups wishing to investigate the possible development of the site to allow for commercial or retail uses, particularly using the Pacific Highway frontage of the site. These approaches have resulted in discussions of potential development schemes, many of which were subsequently prepared to sketch stage. Each proponent has individually investigated various levels of interest in the site, from outright purchase of the site for development, to taking a lease of developed space once the development was completed.
- In every case, discussions were not able to be concluded as the proponents were not able to prepare a viable proposal for the site that included retail or commercial space on the Pacific Highway. Discussions were held with:

- Coles, for Officeworks
 - Bunnings
 - Aldi Stores
 - Woolworths
 - Fit n Fast Health Studio
 - McDonalds
 - Coles, for Liquor Store
 - Yum Restaurants (KFC)
 - Dal Cross Hospital
 - Coles for mixed use
- As previously documented in the original application and the December 2014 revision, for several years now the owners of the site have been attempting to obtain retail tenants for the site pending approval of the subject DA. The premises at 898 Pacific Highway has been vacant since 2008 and the shop at 870 Pacific Highway has been vacant since September 2007. This reflects on the findings of the *Market Assessment & Feasibility Analysis* prepared by Hill PDA in May 2012 that demand for commercial sites is decreased the further away they are from the Gordon Town Centre and rail station.
 - The revised proposal, which now comprises 730m² (i.e. 172% increase to what was originally proposed) of retail/commercial uses (including six (6) separate tenancies activating Pacific Highway, will provide for the orderly and economic development of the site in keeping with existing and recently approved developments on neighbouring sites;
 - The site is severely constrained by a two directional cross fall of 12.0 metres from Pacific Highway down to Fitzsimons Lane and 5.0 metres longitudinally across the site from the North West boundary to the south east boundary. These constraints are not conducive to being able to design a continuous retail strip along the Pacific Highway;
 - It is not economically viable to restrict the uses of the entire ground floors to non-residential in a development the scale of what is proposed on a site that is removed from the Gordon Town Centre;
 - The proposed retail has been strategically designed to integrate with the pedestrian ways and lobbies of each building to invite passing trade;
 - The individual floor areas of the various retail 'nodes' along Pacific Highway ranging in size from 62m²; 78m²; and 113m², are of practical size and conducive to accommodating a variety of uses, compared to providing for example, a smaller space that was only suitable to accommodating a café;
 - The development does not cause any adverse environmental impacts to neighbouring properties, and would be a welcome addition to the cafes and medical suites that have recently been approved in neighbouring developments.

Clause 4.6 (4)

The consent authority must not grant development consent that contravenes the standard unless it is satisfied that the applicant's written request has adequately addressed matters in subclause (3), and the proposed development is in the public interest.

Response:

It is submitted that sufficient written justification has been provided under subclause (3) justifying that the request for variation is minor and worthy of support. There is no public benefit to be gained by insisting that the entire ground floor across the entire site which has major topographical constraints and excess slope be used for non-residential uses. It is also not economically viable on a site that is removed from the Gordon Town Centre and is located on the Pacific Highway. It is our view that it is more important to ensure that sufficient retail space is available for the immediate residents, rather than strictly adhering to a standard as a means of simply ticking the box.

Clause 4.6 (5)

The Director-General must consider:

- (a) whether contravention of the standard raises any matters of significance for State or regional planning, and*
- (b) public benefit of maintaining the development standard, and*
- (c) other matters required to be taken into consideration.*

Response:

The proposed breach does not give rise to any matters of State or regional planning that would be considered contradicting or negative. There are however positive benefits of the consent authority endorsing the proposed height limits, namely the provision of increased housing close to public rail infrastructure and major employments centres such as Macquarie Business Park.

Clause 4.6 (6)

This subclause does not apply to the proposed development.

Clause 4.6 (7)

Upon determining a development application, the consent authority must keep a record of matters in the written request referred to in subclause (3)

Response:

This provision is noted.

Clause 4.6 (8)

This clause does not allow development consent to be granted that contravenes:

- (a) a development standard for complying development,*
- (b) BASIX commitment*
- (c) Clause 5.4*

Response

This subclause does not apply to the proposed development.



Michael Ryan
Ryan Planning Pty Ltd