

Amended Clause 4.6 Variation to the Height Standard of the draft LEP Amendment to Lane Cove LEP 2009

This Clause 4.6 Variation Request has been provided as supplementary information to the Statement of Environmental Effects prepared in August 2015. The variation request has been prepared for abundant caution to address the total proposed building height, including the proposed architectural roof features on Tower 1 and 2, notwithstanding the provisions of Clause 5.6 of Lane Cove LEP.

1.1 OVERVIEW

This addendum forms a variation request to the applicable height standard. It has been prepared with regard to the following considerations:

- Clause 4.6 of LLEP 2009.
- The objectives of Clause 4.3, being the development standard to which a variation is sought.
- Relevant case law specifically addressing the considerations for assessing development standards set out by Preston CJ in *Wehbe v. Pittwater Council* [2007] NSWLEC 827.
- “*Varying Development Standards: A Guide*” published by the Department of Planning and Infrastructure (August 2011).

The variation request provides a brief assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* judgment.

1.2 THE DEVELOPMENT STANDARD

Clause 4.3(2) of LLEP 2009 specifies the following:

“(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”

Building height is defined by LLEP 2009 as follows:

*“**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.”*

The relevant Height of Buildings Map nominates a height limit of RL 204.46 for the western half of the site and RL180.46 for the eastern half of the site. When measured in accordance with the LEP definition of building height, the following heights are proposed:

	BUILDING HEIGHT STANDARD	TOP OF ROOF SLAB	TOP OF ARCHITECTURAL ROOF FEATURE
Tower 1	RL 180.46	RL 180.70	RL 186.46
Tower 2	RL 204.46	RL 203.30	RL 210.46

1.3 LLEP 2009 CLAUSE 4.6

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

“(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...”

(3) 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.”

Accordingly, justification is set out below for the departure from the height control applicable under the LEP. The purpose of the information provided is to demonstrate that strict compliance with the height standard under the LEP is unreasonable or unnecessary in the circumstances of this particular case. It also provides justification for the departure from the height controls specified in the LEP.

1.4 CLAUSE 4.6 ASSESSMENT

This section assesses the proposed variation to consider whether compliance with the height standard can be considered unreasonable or unnecessary in this particular case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the three matters for consideration identified in the Wehbe Land and Environment Court judgment:

1. *“The applicant must satisfy the consent authority that “the objection is well founded,” and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
2. *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be*

unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)i() and (ii) of the Environmental Planning & Assessment Act 1979; and

3. *It is also important to consider:*

- a. *Whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
- b. *The public benefit of maintain the planning controls adopted by the environmental planning instrument.”*

1.4.1 COMPLIANCE IS UNREASONABLE OR UNNECESSARY

In the Wehbe judgement Preston CJ set out five ways in which a variation to a development standard can be supported as follows:

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 of 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Consideration (1) which requires a demonstration that the objectives of the height standard can be achieved notwithstanding non-compliance, is relevant in this case. The compliance of the proposed development and building height variation with the objectives of the height standard in Clause 4.3 of the LEP is demonstrated below.

The objectives of Clause 4.3 are as follows:

- (a) *to minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet, and*
- (b) *to maximise sunlight for the public domain, and*
- (c) *to relate development to topography.*

Those portions of the buildings exceeding the maximum building height, being the architectural roof features on Tower 1 and Tower 2, have been designed as an integrated design response to the upper elements of each building. The additional building height above the building height standard will not cause any material impact to neighbouring land.

The proposed height exceedance is caused by architectural roof features that have been designed to visually and physically integrate with each building. The two roof feature structures will not materially increase the extent of shadow cast by the buildings themselves. Further, these non-habitable structures will cause no privacy or visual impact issues to neighbouring properties given their location on the roof of the buildings well above the sight lines from these neighbouring properties.

No material reduction in solar access to the public domain south of the site will result from the architectural roof feature structures. This has been established in the shadow assessment.

The additional height of the proposed structures will not be readily perceptible from public domain spaces in the immediate locale, yet will improve the appearance of the buildings when viewed from afar. The extent of the variation is small enough such that there will be no impact on the building's visual relationship with site topography.

Clause 5.6 of Council's LEP also permits equipment for servicing the buildings (such as plant, lift motor rooms, fire stairs and the like) to be contained in or supported by the roof feature which the design proposal does.

Despite the technical departure from the relevant height standard the proposed development remains consistent with the objectives of Clause 4.3 of LLEP 2009 and therefore it is demonstrated that strict compliance with the height standard in this instance is unreasonable and unnecessary.

1.4.2 ADEQUATE ENVIRONMENTAL PLANNING GROUNDS FOR CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard.

In this instance, there are strong planning grounds in support of the height variation.

- Planning strategy for metropolitan Sydney, including centres such as St Leonards, supports the provision of high quality residential accommodation in close proximity to infrastructure and services. All habitable floor space will be located below the applicable height standard and the relevant floor space ratio standard is not exceeded.
- Locating the plant and stair structures above the height limit enables the proposal to maximise the quantum of habitable floorspace below the nominated height limit, optimising the residential yield proximate to the frequent transport services available in St Leonards. The proposed roof feature which is permitted under the LLEP together with plant being contained within the roof feature will screen these elements which can otherwise be unsightly and detract from urban amenity.
- The impacts resulting from the proposed height breach will be negligible. The architectural roof features will cause no material impact to neighbouring properties over and above that which would result from a complying scheme. The roof features will however improve the appearance of the buildings when viewed from afar, being elements visually integrated with the design of the building.

It is considered that these are adequate environmental planning grounds to support the proposed variation to the height standard to accommodate the architectural roof features.

1.4.3 THE PUBLIC INTEREST

Clause 4.6(4)(a)(ii) requires that the consent authority consider the public interest in determining whether to support the variation.

It is considered that the proposed height variation will not be contrary to the public interest for reasons stated above. There will be no material impact resulting to neighbouring buildings resulting from the proposed architectural roof features. These structures will improve the appearance of the building when viewed from the public domain, screening roof plant and other structures, and will not reduce privacy, increase overshadowing or present visual impact to surrounding properties.

This report has also demonstrated that the proposed height variation will not contravene the objectives of the height standard at clause 4.3 of LLEP 2009.

Further, it is considered that the proposal will remain consistent with the objectives of the B4 zone, being:

- *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 encourage urban design maximising attractive public domain and adequate circulation space for current and future users.*
- *To maximise sunlight for surrounding properties and the public domain.*

The location of the architectural roof features above the applicable height standards will not detract from the first three objectives. They will also not materially reduce sunlight to surrounding properties or the public domain from that which would be caused by a complying scheme, as demonstrated in the shadow analysis. Given the scale of the development, the proposed non-compliance will be unperceivable and will improve the appearance of the top portion of the buildings positively contributing to the buildings' aesthetic.

1.5 SUMMARY

In view of the development context strict compliance with Clause 4.3 of the LEP is considered to be unreasonable in this case. Notwithstanding that Clause 5.6 of LLEP permits architectural roof features and allows these to contain and screen plant and fire stairs, the proposed variation to the building height standard, and the proposed development, is justified on the following environmental planning grounds as follows:

- The proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of the LEP despite a non-compliance with the standard itself. The proposed development does not conflict with the intent of Clause 4.3 which is to prevent additional overshadowing, minimise view loss, safeguard the amenity of existing nearby dwellings and to maintain the visual character of the area. The proposed development achieves this outcome. Strict application of the standard is therefore considered unreasonable and unnecessary.
- While the height standard is breached by the inclusion of the architectural roof features, there is no departure from the FSR standard applicable to the site. The non-compliance is restricted to the portion of the structure above the slab level of the roof. There are no residential uses that exceed the height limit – all GFA is within the height limit. Indeed, the proposed FSR is well within the allowable FSR limits for the site (11.47:1 proposed compared to an allowable FSR of 12:1).
- The proposal variation will not result in loss of views from neighbouring properties, nor will it result in adverse amenity impacts.
- The proposed development, despite the extremely minor non-compliance, contributes to achieving the objects of the EP&A Act.

- The non-compliance will not undermine the public benefit and legitimacy of the standard and no matters of State or regional planning would be affected by the proposed variation.

For these reasons, the proposed variation to the height standard in order to accommodate an architectural roof feature on each of the buildings should be supported as part of the assessment of this DA.

A handwritten signature in black ink, reading 'Stephen White'. The signature is written in a cursive, flowing style.

Director