

## Revised Clause 4.6 Variation: Building Height March 2016

This clause 4.6 addresses variations to the Height control contained in the Holroyd Local Environmental Plan.

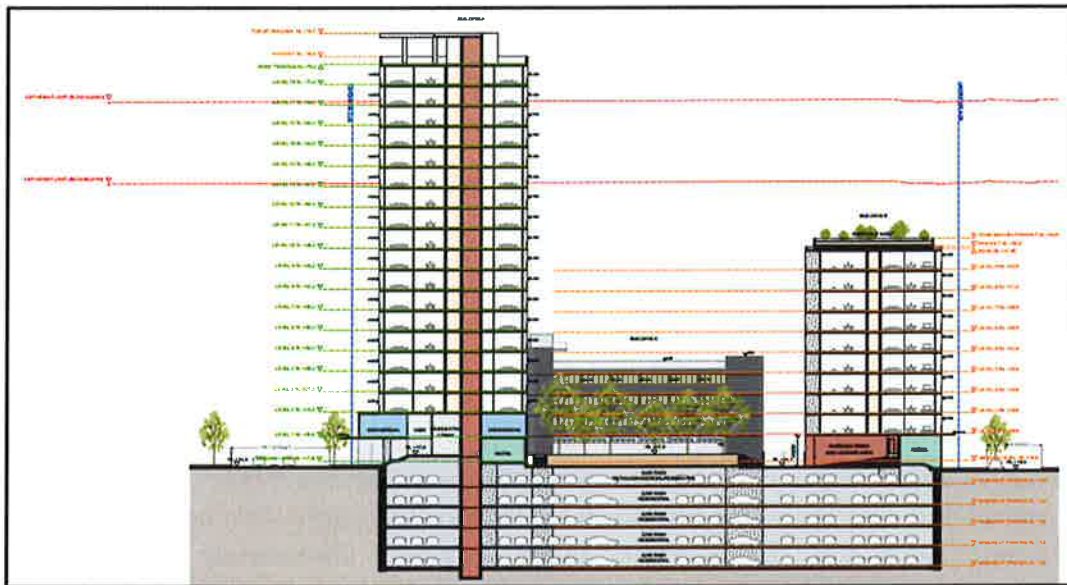
The variation is a function of flooding, increased floor to ceiling heights, and the desirability to arrange floor space in taller forms over the large site area and distribute the building envelopes in a manner more appropriate for a town centre environment. Compliance with the height control would be achievable through an alternative building envelope and a redistribution of floor space, but this would result in a poor urban design outcome inconsistent with the intent of the planning controls and contrary to the best form for the site and particularly having regard to its prominent and central town centre location, immediately adjacent the Merrylands Railway Station and on a prominent road entry to the town centre.

The proposal represents a superior outcome to that which would be achieved if compliance with the height control were incorporated.

Building	LEP Height	Proposed Height & Variation	Compliance
A	53m	63.2 (19%) (Pergola roof feature) OR 59.8 (12.8%) (to Parapet)	No
B	32m & 41m	32.45m (1.4%) & 44.3m (8%)	No
C	32m	<32m (no variation)	Yes

The extracts of the building height controls are outlined below.

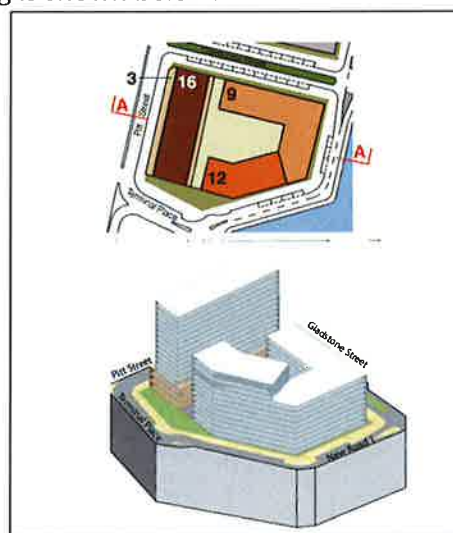




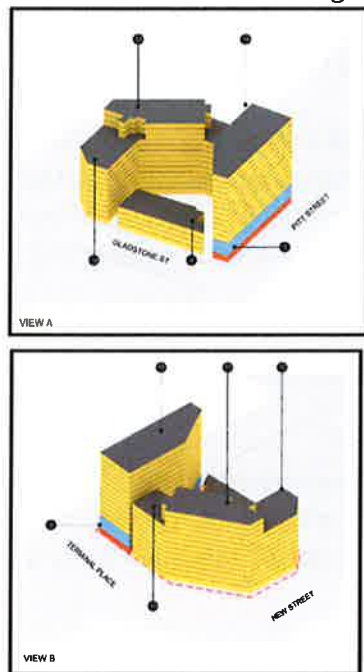
### **Design Rationale**

The redevelopment of the broader precinct has been subject to significant investigations exploring development options in the context of the planning controls and the site specific DCP. This has revealed the significant impact of flooding on building locations that has served to stall planning and design elsewhere in the Precinct. Therefore the intention has been to proceed with the detailed planning for 'Site C' that equates to Block 3 in the Town Centre DCP. Detailed design and analysis of the DCP envelopes has been undertaken and in essence the design development has identified the LEP and DCP range of storeys approach on the site is not practical once taking into account matters such as required levels of solar access, natural ventilation, building separation and the like. Therefore a revised distribution of storeys and building envelopes has been undertaken to enable compliance with SEPP 65 matters and to achieve a superior outcome than would occur with strict compliance with the planning controls.

The DCP mass modelling is shown below:



The current proposals indicative mass modelling is shown below, noting that this has been further refined on the submitted DA drawings.



It is important to note that the amendments continue to comply with the LEP FSR control and that the proposal is not seeking to increase the development potential of the site, rather to improve the building envelopes and therefore the public domain and apartment amenity.

The relevant provisions of Clause 4.6 of the LEP are addressed below in order to permit Council to vary the LEP requirement in these unique circumstances.

#### **Clause 4.6(3)**

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 achieved. The objectives of the height of buildings development standard are stated as:

*(1) The objectives of this clause are as follows:*

- (a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
- (b) to ensure development is consistent with the landform,*
- (c) to provide appropriate scales and intensities of development through height controls.*

The current development proposal is consistent with the above objectives and is considered to be appropriate on environmental planning grounds based on the following:

- The design rationale has been driven through analysis of solar access to the site and the reduced height to the northern perimeter is offset by the increased height along Pitt Street and part of the new road at the south-east corner which is the driver of the height variation;
- The proposal adopts a total FSR of less than the 6.5:1 (being substantially below by over 1000m<sup>2</sup>) which demonstrates that the height variation is not a means of capturing additional yield - but a site specific design response to acknowledge the sites opportunities and constraints;
- Given the overall heights of the development, a compliant built form, is likely to be imperceptible as compared to a fully compliant building to the naked eye from public areas;
- The development site is constrained by flooding which has necessitated an increase to the natural ground level to provide an adequate freeboard that effectively increases the height of the building to ensure that flood waters cannot enter the building;
- The proposal has been designed to comply with the maximum permitted FSR on the site and also complies with key controls pertaining to setbacks, open space, and car parking which indicates an appropriate scale of development on the site;
- The proposal will not obstruct existing view corridors; and
- The spatial arrangements of buildings is appropriate and aligns with the overall intent of the split height controls on the site and presents the best outcome in terms of achieving required levels of amenity and solar access.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

#### **Clause 4.6(4)**

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). As addressed the proposed development is in the public interest, as it remains consistent with the objectives of the height control. In addition the proposal is consistent with the objectives of the zone.

The proposal provides for the housing needs of the community and contributes to a variety of housing forms within a high-density urban centre context. The development site is in close proximity to public transport and existing facilities. The

design concept recognises the key site attributes and provides for an attractive built form that relates to the existing and future site context.

It is understood that the concurrence of the Director-General can be assumed in the current circumstances.

**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 height control does not raise any matter of significance for State or regional environmental planning given the highly unique site attributes that are not replicated in any meaningful way elsewhere Merrylands Town Centre as it relates specifically to this Block within the Neil Street Precinct; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal given that the proposal is responding to the unique site attributes in terms of orientation and solar access. The departure from the 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.

**Four2Five Pty Ltd v Ashfield Council**

The above case has clarified that when seeking a cl4.6 variation, grounds particular to the circumstances of the proposed development are to be identified, as opposed to grounds that would apply to any similar development on the site or in the vicinity. Therefore it is necessary to establish that there are grounds other than the development achieves the objectives of the development standard.

The particular circumstances to this application that lead to, and justify, a variation to the standard are discussed above, but comprise –

- The design rationale has been driven through analysis of solar access to the site and the reduced height to the northern perimeter will provide improved solar access to apartments and the central courtyard; and
- The redistribution of floor space to the other buildings will not compromise the intent of the buildings to provide an appropriate height of development that is commensurate with the town centre location, but rather will serve to better reinforce the buildings roles as marking important streets in the town centre.

Because of the reasons stated above, the proposal provides a superior apartment development in terms of the public domain, amenity to open space and amenity to apartments.

Strict compliance with the prescriptive height requirement 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.

The proposal will not have any adverse effect on the surrounding locality in the context of the current planning controls, which is characterised by residential and mixed-use development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

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

**Revised Clause 4.6 Variation: FSR  
May 2016**

The proposal complies with the overall maximum permitted FSR of 6.5:1.

- The site area is 5162.2m<sup>2</sup>
- Overall GFA Proposed 32,024.6m<sup>2</sup>
- FSR = 6.21:1

It is noted that the site is the subject of two separate zones as follows –

B4 Zone – 1,674sqm

R4 Zone – 3,488.2sqm

The B4 portion of the site is within Area B and as such Clause 4.4(2B) applies which limits the residential portion on the western side of the site to:

6.5:1 – 1.7:1 = 4.8:1 (Residential)

To ascertain consistency with Clause 4.4(2B) it is necessary to quantify the maximum permitted residential vs. commercial on the western portion of the site. Interpreting from the survey and the zoning map the area identified as AA2 is approximately 1,674m<sup>2</sup> which would give the following maximum residential gross floor area:

- 8,035.2m<sup>2</sup> residential;

This leaves the residual site area subject to the 6.5:1 which equates to:

- 22,672m<sup>2</sup>

A clause 4.6 variation is provided as an Annexure to this statement.

**B4 Zone (Subject to Clause 4.4(2B))**

Permitted Residential GFA = 8,035.2sqm

Proposed Residential GFA = 14,060.14sqm

The proposal exceeds the permitted FSR for this part of the site by 6,024.94m<sup>2</sup> or 75%.

Although the FSR for the overall site is below that permitted, the FSR over the B4 land (Building A) exceeds the permitted FSR by 75%. This clause 4.6 Variation seeks to vary this detailed component of the FSR.

A Clause 4.6 variation request has been prepared, noting that the request addresses 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*.

The key tests or requirements arising from the above judgements are that:

- The consent authority be personally 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 them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.
- 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, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe “test” 3).
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate how the proposal achieves a better outcome than a complying scheme; and
- 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 FSR standard;
- Demonstrating consistency with the B4 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed below, noting that the proposal is a preferable outcome to a compliant scheme as it results in a better Urban Design outcome than the current proposal which adopts a compliant FSR but would lead to poor urban design consequences for other parts of the site.

The development proposal complies with the overall FSR control of 6.5:1 across the site. However Clause 4.4 (2B) provides:

*(2B) Despite subclauses (2) and (2A), if a building on a site area on land identified as “Area B” on the Floor Space Ratio Map is used for the purposes of residential accommodation or tourist and visitor accommodation, or a combination of such uses, the maximum floor space ratio for that part of the building that is used for such purposes is:*

$$(FSR_{max} - 1.7):1$$

*where:*

*$FSR_{max}$  is the maximum floor space ratio in accordance with this clause.*



### Purpose of the Control

It is understood that the control seeks to provide for sufficient streetscape activation and the delivery of sufficient commercial space on the site. The proposal provides 2487.9m<sup>2</sup> of commercial space across the site at the ground and first floor levels that aligns with the intent of the control. The location of commercial space at predominantly the ground floor ensures that the intention for activation and a positive contribution at the street level to the town centre is achieved.

The relevant provisions of Clause 4.6 of the LEP are addressed below in order to permit Council to vary the LEP requirement in these unique circumstances.

### **Clause 4.6(3)**

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 achieved. The objectives of the FSR development standard are stated as:

*(1) The objectives of this clause are as follows:*

- (a) to support the viability of commercial centres and provide opportunities for economic development within those centres,*
- (b) to facilitate the development of a variety of housing types,*
- (c) to ensure that development is compatible with the existing and desired future built form and character of the locality,*
- (d) to provide a high level of amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping.*

The current development proposal is entirely consistent with the above objectives and is considered to be appropriate on environmental planning grounds based on the following:

- The proposed building exhibits a bulk and scale that is consistent with the desired future character of the locality. Following discussions with Council staff and urban designers it is agreed that the proposal represents a suitable and preferable density, bulk and scale that is consistent with the desired future character of the Town Centre.
- The variation is a function of the desire to achieve a built form outcome that appropriately arranges floor space across the large site, to achieve superior amenity and urban design outcomes to an alternative compliant floor space allocation. The allocation of floor space across the site has been undertaken in consultation with Council to provide more residential floor space on Building A, where the building can provide a strong presentation to the street and town centre, and remove residential floor space on Building B to create a lower built form along the northern boundary of the site and dramatically improve the amenity to residents and open space areas, without compromising other parts of the site or adjoining land.

- The proposed departure to the FSR control has no additional adverse impact, but results in a better built form outcome than a compliant scheme.
- The proposed additional floor space results in a high quality development that is an improved Urban Design outcome. The removal of the residential floor space would result in its redistribution to other parts of the site and a poor urban design outcome.
- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a prominent building that provides good address to the street frontage and meeting the intent of the key planning controls applying to the proposal.
- The development proposal provides a sympathetic, activated street frontage that addresses the context, streetscape and future character of the Town Centre and adjoining developments. The development provides a mix of dwellings that will contribute towards increasing housing choice, diversity and stock of Holroyd LGA.
- The proposal provides for a variety of housing type with a mix of 1, 2, and 3 bedroom units.
- The proposal provides for high levels of amenity given the manipulation of the DCP envelopes to maximise solar access to the overall development.
- The development proposal provides for a suitable amount of commercial space on the site in those areas which are most amenable to the delivery of this space- i.e. along the most active frontages.
- It is noted that a strict application of the 4.4(2B) control to Building A would result in the tower being significantly comprised of commercial floor space, over many levels of the building. Such would be entirely inconsistent with the intent of the control, which is to ensure that there is an activated street level of commercial and some commercial immediately above.

The unique circumstances of the case that warrant support of the departure are:

- The distribution of the residential floor space to Building A enables a preferred Urban Design outcome through the achievement of a design that enables a future street wall to be developed along the western boundary of the site and create an internal courtyard that will benefit from good solar access by lowering the height of Building B.

- The allocation of residential floor space results in a better design response on this site, which has been agreed in meetings with Council staff and Councils urban design consultant.
- The proposal adopts an overall total FSR of 6.21:1 across the entire site, which is less than the 6.5:1 FSR, thereby demonstrating that the variation is not a means of capturing additional yield and the overall density is suitable across the site.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

#### **Clause 4.6(4)**

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). As addressed the proposed development is in the public interest, as it remains consistent with the objectives of the FSR control. In addition the proposal is consistent with the objectives of the zone.

The proposal provides for the housing needs of the community and contributes to a variety of housing forms within a high-density urban centre context. The development site is in close proximity to public transport and existing facilities. The design concept recognises the key site attributes and provides for an attractive built form that relates to the existing and future site context.

It is understood that the concurrence of the Director-General can be assumed in the current circumstances.

#### **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 FSR control does not raise any matter of significance for State or regional environmental planning given that the proposal is consistent with the overall maximum FSR applying to the site; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal given that the proposal is responding to the unique site attributes in terms of orientation and solar access. The departure from the FSR 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.

Strict compliance with the prescriptive FSR requirement 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.

The proposal will not have any adverse effect on the surrounding locality in the context of the current planning controls, which is characterised by future residential and mixed-use development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

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