

6.0 REQUEST TO VARY A DEVELOPMENT STANDARD

6.1 Introduction

Clause 4.6 of Appendix 9 within the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the Growth Centre's SEPP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That 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.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this written clause 4.6 request:

- identifies the development standard to be varied;
- identifies the variation sought;
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- demonstrates that there are sufficient environmental planning grounds to justify the contravention;
- determines that the proposal is in the public interest;
- provides an assessment of the matters the Secretary is required to consider before granting concurrence.

6.2 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of Appendix 9 within the Growth Centre's SEPP, relating to the height of buildings. Under the Growth Centre's SEPP the site is afforded a maximum building height of 12m.

6.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 4(1) of the EP&A Act as follows:

"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ..."

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,...

The maximum building height control under Clause 4.3 of Appendix 9 within the Sydney Region Growth Centre's SEPP is clearly and unambiguously a development standard.

6.4 Extent of the Variation Sought

The height of the proposed development will exceed the maximum building height of 12m by up to 450mm which equates to a maximum 3.75% variation (Refer to **Figure 5** to **Figure 7**). The proposed variation accommodates a negligible percentage of the total building volume proposed and relates to lift over runs, and a portion of the Building D parapet and rooftop terrace pergola. The street facades are below the maximum height limit and no habitable space is located above the 12m height limit.

The principle reason for the exceedance of the maximum building height limit is the need to respond to the site's topography. The existing ground level of the site varies from RL87.29 at the Rickard Road boundary to RL93.73 at the eastern boundary representing a level change of 6.44m. Subsequently, the Lot 2 built form has been stepped to respond to the site's gradient. Notwithstanding the stepping of the Lot 2 built form the slope across the site results in minor protrusions on Lot 1 and Lot 2. The elements that protrude above the height limit are setback from the street elevations and will not be visible from the public domain.

Strict numerical compliance with the development standard would result in the deletion of the fourth storey which is not an appropriate outcome for a site that is zoned for 'Medium Density Residential' with a 12 metre height limit. The site is within walking distance of Leppington Railway Station and is adjacent to future employment areas. In order to achieve residential density that is appropriate and envisaged by the site's zoning, a minor departure from the maximum building height standard is required.

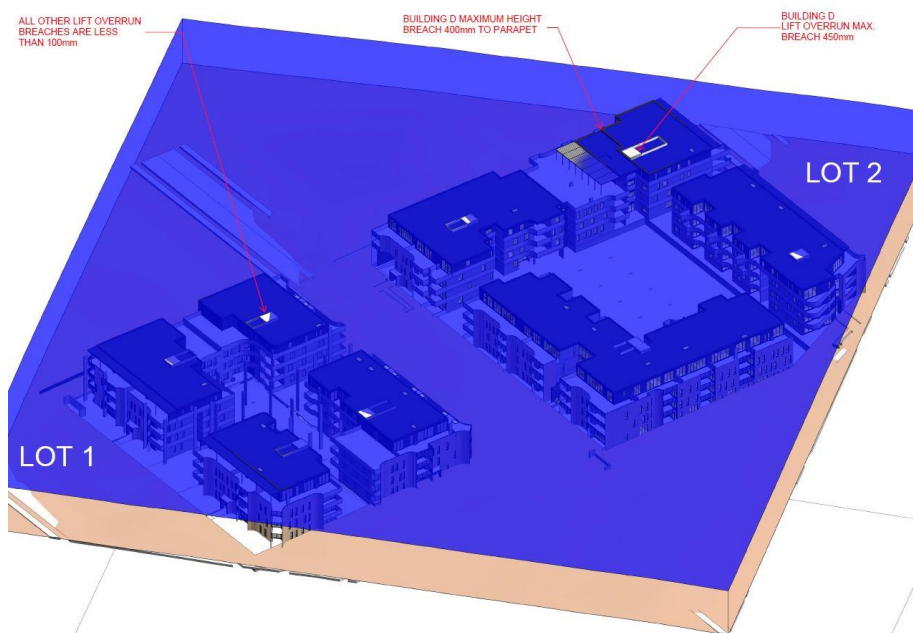


Figure 2 – Elements of the proposed development shown protruding through the 12m height plane to a maximum of 450mm
Source: Rothelowman

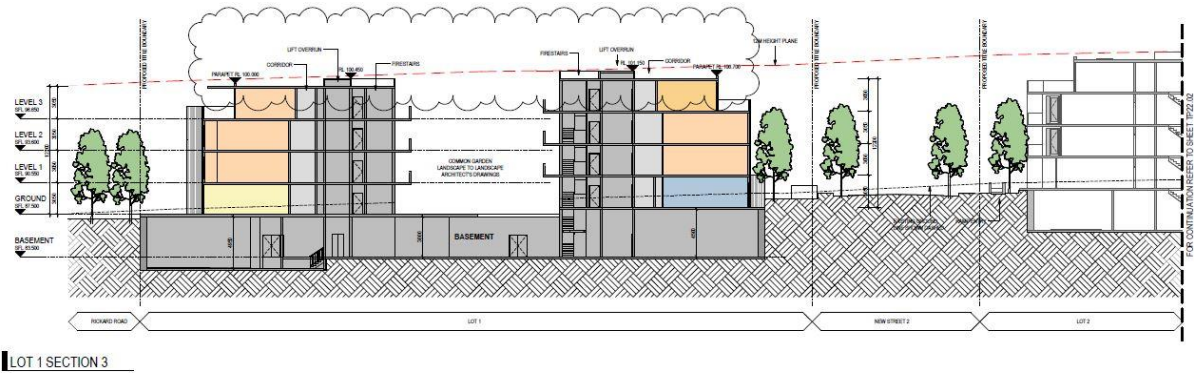


Figure 3 – Lot 1 illustrating the 12m height plane
Source: Rothelowman

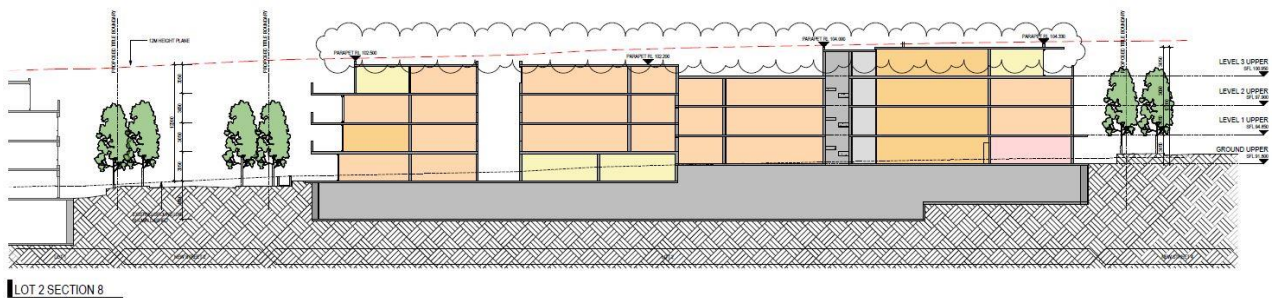


Figure 4 – Lot 2 illustrating the 12m height plane; Source: Rothelowman

6.5 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

The five ways outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
- 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 (**Fourth Way**).
- 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 (**Fifth Way**).

The **First Way** and **Third Way** are of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary.

In the recent judgement in *Micaul Holdings v Randwick City Council* the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case the Commissioner) did not have to be **directly** satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's **written request adequately addresses** the matters in clause 4.6(3)(a) (**Our emphasis**).

6.6 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way)

The consistency of the proposal against the objectives of the maximum building height standard is outlined below.

To establish the maximum height of buildings

The current building height standard of 12 metres would generally facilitate a four storey development. The development is four storeys, however the site is very large and accommodates a 6.44 metres cross fall towards Rickard Road. This will result in the highest points of the buildings exceeding the maximum building height limit, necessitating the request to vary the development standard.

To minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space

The proposed variation is limited to the lift overruns, and a minimal portion of the Building D parapet and rooftop terrace pergola. The proposal has a street wall of three storeys with the fourth storey setback 3 metres to allow good solar access to neighbouring properties, public and private open space. The building elevations to all streets comply with the 12 metre height limit.

The surrounding land to the north, east and west has the same 12 metre height limit; and the land to the south has a 9 metre height limit. Therefore, none of the future buildings will have habitable levels with views over and beyond the proposal. As such, the proposed variation is extremely unlikely to reduce any views from future apartments in the surrounding area.

The proposal will not have any additional impact on solar access to the likely future open space and development of the adjoining properties.

The shadow diagrams prepared by Rothelowman (submitted separately) indicate that the proposed variations will have no additional shadow impact to neighbouring dwellings or the public domain beyond the shadows cast by a compliant envelope.

To facilitate higher density development in and around commercial centres and major transport routes

The proposed development proposes 216 apartments directly adjacent to the planned future Leppington Major Centre employment area, the planned Rickard Road Major Transit Boulevard and within walking distance of Leppington Railway Station. Enforcing the development standard will undermine the achievement of this objective by unnecessarily limiting the site's ability to deliver an appropriate level of density in a location that will be well served by high frequency public transport.

6.7 The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).

Objectives otherwise achieved

As detailed in the section above, the proposal satisfies the building height objectives despite the height variation. These objectives are satisfied by the proposal (as shown above) despite the numerical variation with the building height standard. The proposed development, including the proposed building

elements that exceed the height limits, will continue to achieve the objectives of the standard. As the objectives of the development standard are met notwithstanding the breach of the height of buildings standard, this Way is considered to be satisfied.

Objective thwarted

Due to the site's topography, development would not be able to achieve the objectives of the building height development standard (or those of the R3 zone) if strict compliance with the standard is required. Notably, strict compliance with the building height development standard would require the deletion of the fourth storey (45 dwellings) which would significantly reduce the site's potential to facilitate higher density residential development and meet the objective of the standard:

(c) To facilitate higher density development in and around commercial centres and major transport routes

As this objective would be thwarted by a development that strictly complies with the height of buildings development standard, this Way is considered to be satisfied.

Having regard to the above, in our view it would be unreasonable and unnecessary to enforce strict compliance with the maximum building height development standard contained within Clause 4.3 of Appendix 9 within the Sydney Region Growth Centre's SEPP.

6.8 Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of Appendix 9 within the Sydney Region Growth Centre's SEPP requires the departure from the development standard to be justified by demonstrating:

that there are sufficient environmental planning grounds to justify contravening the development standard.

There are considered to be sufficient environmental planning grounds to justify contravention of the maximum building height development standard in this specific instance. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. In this regard, the proposed variation is particular to the circumstances of the proposed development on the site for the following reasons:

- The proposed height variation is a direct result of an approximately 6.44 metre change in level across the site (i.e. RL87.29 at the Rickard Road boundary to RL93.73 at the eastern property boundary).
- Designing a four storey development with a finished ground floor that steps repeatedly to follow the 6.44m change in level would result in an inefficient design that would require numerous internal level changes that would create significant internal planning, access, servicing and structural issues.
- The proposed development steps across the site to follow the existing ground level between Lot 1 and Lot 2. To continue following the existing ground Lot 2 provides a change in level between the buildings with frontage to New Street 2 and frontage to New Street 4. This results in minimal protrusions through the height plane.

In light of the above, it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the numerical building height standard in this instance. Rather, there are clear and justifiable environmental planning merits which justify the application of flexibility allowed by clause 4.6.

6.9 In the public interest because it is consistent with the objectives of the zone and development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in Section 5.6 of this letter. The consistency of the proposal against the objectives of the R3 Medium Density Residential zone is outlined below.

To provide for the housing needs of the community within a medium density residential environment

The R3 Medium Density Residential Zone permits a wide range of dwelling types including residential flat buildings to allow different built form outcomes in different locations within Leppington. This objective is purposefully seeking to achieve development that is at the higher end of the medium density spectrum in appropriate locations such as 76 Rickard Road which is close to the Town Centre, the station and the future transit corridor.

The proposed development fundamentally seeks to respond to the State Government's objectives for the South West Priority Growth Area by providing new residential apartments in Leppington close to existing rail, planned future services, retail, employment and education areas. The built form complies with the relevant medium density development controls established for the site in the Growth Centres DCP and the ADG.

To provide a variety of housing types within a medium density residential environment

The proposal will provide a variety of one, two and three bedroom apartments. The proposal comprises:

- 24 x 1 bedroom (11.1%);
- 183 x 2 bedroom (84.7%); and
- 9 x 3 bedroom (4.2%).

The proposed housing mix is appropriate for the location and as outlined directly above, the proposed built form is consistent with the Council's expectations for medium density development.

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

The proposed residential development will generate demand for existing and planned services within the precinct to be located, generally, in the adjacent Leppington Major Centre commercial area.

To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment

The proposed residential development will generate demand for educational, recreational, community, religious and other activities. The development of the site supports the achievement of this objective.

6.10 Secretary's Concurrence

Under Clause 4.6(5) in deciding whether to grant concurrence, the Secretary must consider matters discussed below.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation to the building height development standard of Appendix 9 within the Sydney Region Growth Centres SEPP will not raise any matter which could be deemed to have State or Regional significance. The variance of this development standard will not contravene any overarching State or Regional objectives or standard, rather it will contribute to the achievement of an attractive, liveable and economically viable place. Beyond this positive contribution, the proposed variations will not have any effects outside the sites immediate area.

The public benefit of maintaining the development standard

Maintaining the development standard would not result in any public benefit in this situation. If the current development standard was maintained it would be likely to severely limit the development feasibility of the site and prevent the site from achieving highest and best use. The development as a whole will deliver a number of public benefits to the area, including:

- Providing new roads and public domain upgrades in a location that will accommodate significant growth in the short-mid term;
- Providing a residential development that contributes to the viability of the future infrastructure and services within the Leppington Precinct and is immediately adjacent to the future Leppington Major Centre employment area;
- Delivery of additional housing to contribute to overcoming the shortfall of housing in Sydney;
- Generating activity in the early stages of the development of the Leppington precinct through the provision of 216 new dwellings in a prominent location;
- Providing housing in a locality which is well serviced by public transport and has direct access to services and facilities; and
- Promoting ecological sustainability and sustainable practices through the achievement of BASIX targets.

Any other matters required to be taken into consideration by the Director-General before granting concurrence

The proposed variation to the height of buildings development standard will facilitate the orderly and economic redevelopment of a site that is zoned for medium density residential development and is currently underutilised. The proposed development will therefore assist in the achievement and of the strategic objectives of A Plan for Growing Sydney and the Sydney Region Growth Centre's SEPP.

6.11 Summary

Clause 4.3 of Appendix 9 within the Sydney Region Growth Centres SEPP applies a maximum 12m height development standard to the site. The development proposes to exceed this limit up to a maximum height of 450mm, due to the steep slope of the site, this exceedance varies up to this maximum and only roof parapets and lift overruns and screens will be above the applicable height limit. This request under Clause 4.6 of Appendix 9 within the Sydney Region Growth Centres SEPP is submitted to Council in support of this departure from the building height standard.

There are unique constraints which affect the site, and design requirements which result in a development that exceeds the numerical height limit. To reiterate, the site is naturally constrained in terms of gradient.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility in certain circumstances to achieve better outcomes for and from development, a departure from the height standard is considered appropriate in these circumstances:

- Non-compliance with the building height development standard does not represent a significant variation in the context of the overall built form and would not be perceivable from the public domain or existing and future surrounding development; and
- There are sufficient environmental planning grounds to justify the contraventions to the development standard as the building provides an appropriate response to its site specific context and will maintain the level of the amenity for surrounding and future residents.

In light of the above, the proposed variation to the maximum building height development standard is considered acceptable and does not inhibit the ability for Council to favourably consider the subject DA. On this basis, the Clause 4.6 variation is considered well founded and Council's support for the variation to the maximum building height standard is requested.

Should you have any queries about this matter, please do not hesitate to contact me on 02 9956 6962 or jmurray@jbaurban.com.au.

Yours faithfully

Jim Murray
Principal Planner