

## 1. INTRODUCTION

Clause 4.6 of Auburn Local Environmental Plan 2010 (LEP) provides the framework for consideration of proposed variations to development standards.

This Clause 4.6 variation request forms part of the Statement of Environmental Effects supporting documentation for the proposed Development Application DA/620/2016.

The proposed development seeks approval for a mixed use development with residential apartments and a child care centre.

The details of the proposal are included in Section 4 of the Statement of Environmental Effects report prepared by Meriton and reflected on the amended plans prepared by SJB.

## 2. PROPOSED VARIATION

The proposal seeks variation to Clause 4.3(2) of the LEP, which states:

*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.*

The Building Height Map nominates a maximum Building height of 72 metres for the site. Building Height is defined in the LEP as follows:

*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.*

Existing ground levels are highly variable ranging from RL14.8m in the southern western corner of the site rising to RL24.5m in the centre of the site. An additional plan is provided with the submitted Development Application which overlays the proposed heights of the building onto the survey plan base. This plan clearly is useful in identifying the exact locations where the proposal departs from the LEP height control (i.e. exceeds 72m when measured from “existing ground level”) and highlights that the departure is limited to small portions of the overall development, specifically the parapet wall and plant rooms, and that the true extent of the departure is extremely minor.

The site will be modified to create a suitable building platform for the development. Existing ground levels will be modified as follows:

- Limited excavation to a maximum depth of RL15m will be undertaken to create a new ground floor level for the development.
- A level building pad will be created for the building's ground floor resulting in a new ground floor level of between RL15m (western side) and RL19m (eastern side). The variation in levels across the site allows for a partial basement level to be created (eastern side).

The height of the proposed buildings to the roof line varies from RL86.6metres to RL90.2metres. When measured from existing ground level, the proposed development has a variable building height to a maximum 72.85 metres. This more significant departure from the height control (maximum 0.85m) relates to discrete portions of the tower roof parapet (southern tip only) with additional height exceedances occurring in the central portions of Tower A as a result of the placement of plant equipment and lift overrun.

The following table provides a summary of the variation.

	Existing ground level (minimum spot level)	Maximum height (RL)	Maximum height (m) measured from existing ground level	Extent of departure from LEP height control	% exceedance
<b>Tower A</b>					
Lift overrun	RL18.01m	RL90.2m	72.19m	0.19m	0.26
Plant room	RL17.99m	RL90.20m	72.21m	0.21m	0.29
Parapet wall (southern tip only)	RL17.69m	RL90.47m	72.78m	0.78m	1.1
<b>Tower B</b>					
Lift overrun	18.15	RL90.2m	72.05	0.05	0.07
Plant room	18.14	RL90.2m	72.06	0.06	0.08
Parapet wall (southern tip only)	RL17.62m	RL90.47m	72.85m	0.85m	1.18

The height limit has been breached for the following reasons:

- Two plant rooms and lift overruns are proposed above the roof of the buildings to house plant equipment required for the development (one above each tower). These spaces project to a height of RL90.2m. Spot levels beneath this equipment in Tower A are a minimum of RL17.99m (Tower A) resulting in a maximum exceedance in the height limit of 0.21m. The plant equipment is set back within the centre of the tower form and the additional height would be indiscernible when viewed at street level.
- The southern tip of the parapet walls of both towers project above the height limit resulting in a maximum height exceedance of 0.78m (Tower A) and 0.85m (Tower B). The parapet wall contributes to the visual appearance of the development. While this element could be removed it would result in a poorer design outcome for the site.

### 3. MATTERS FOR CONSIDERATION

**a) Is the requirement a development standard?**

The variation sought relates to the Building Height of the proposal. The Building Height control is a development standard, as it provides a numerical restriction to a particular aspect of the development, rather than a prohibition.

**b) Is the development standard excluded from the operation of this clause?**

Clause 4.6(8) outlines the exclusions of the operation of Clause 4.6, which are:

- Complying Development;
- Statement Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
- Clause 5.4 – certain miscellaneous permissible uses.
- Clause 6.8 - Arrangements for contributions to designated State public infrastructure (Carter Street Priority Precinct)

As the proposal does not relate to any of these types of developments, the variation to the Building Height control sought is not excluded from the operation of Clause 4.6.

**c) What is the underlying objective or purpose of the standard?**

The objectives of the height control in clause 4.3 are as follows:

- (a) To establish a maximum height of building to enable appropriate development density to be achieved, and*
- (b) To ensure that the height of buildings is compatible with the character of the locality.*

The proposal is consistent with the above objectives, in that:

- a) The height exceedance relates to discrete elements of the building form and is in part a result of the highly variable nature of existing ground levels which range from RL14.8m to RL24.5m. In the part of the site where the height breach occurs spot levels are RL17.99 RL17.62m.

The departure from the LEP control does not result in additional storeys over those envisaged by the DCP to be added to the development. The proposed built form remains consistent with the site specific DCP envelopes for the site.

- b) No additional loss of views will result because of the proposed height exceedance. The additional height is largely required to accommodate plant equipment at roof level. The additional height will be indiscernible when viewed at street level. Residential properties are located to the north of the site and will not be impacted by overshadowing as a result of the proposed development.

Buildings to the west are of comparable height to the proposed development.

The taller elements of the proposal, being the two plant rooms are well spaced and set back within the roof. These elements will not be visible at street level.

The additional height does not materially impact the physical appearance of the building. The proposed rooftop plant equipment is set back above the roof line and will not be visible from surrounding streets.

**d) Is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?**

In *Wehbe v Pittwater Council* (2007) NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

- 1) *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development are achieved notwithstanding noncompliance with the standard.*
- 2) *Establish that the underlying objective or purpose is not relevant to the development with the consequences that compliance is unnecessary.*
- 3) *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required that the consequences that compliance is unreasonable.*
- 4) *Establish that 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 unreasonable and unnecessary.*
- 5) *Establish that 'the zoning of particular land' was 'unreasonable or unnecessary' so that 'a development standard for that zoning was also unreasonable or unnecessary as it was applied to that land' and that compliance with the standard in that case would also be unreasonable and unnecessary.*

In applying the test in *Wehbe v Pittwater Council*, only one of the ways of establishing the development standard is unreasonable and unnecessary needs to be demonstrated. As outlined in Section 3(c) above, the proposed development is able to achieve the objectives of the height development standard, even though the development results in a non-compliance with the numerical standard. On this basis, the development is able to demonstrate that the development is unreasonable and unnecessary in accordance with the first way Preston CJ outlines in *Wehbe v Pittwater Council*.

In the recent decision of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 Pain J upheld the decision of Pearson C which indicated that a variation must be justified on sufficient environmental planning grounds particular to the circumstances of the proposed development and development site rather than grounds that would apply to a similar development on the site or a development in the vicinity.

However, in a the more recent case of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 Preston CJ stated that the consent authority did not have to be satisfied directly that compliance with each development standard was unreasonable and unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request adequately addressed the matter in Clause 4.6(3)(a) that compliance with each development standard was unreasonable and unnecessary. This decision indicates a move away from the more prescriptive approach to consideration of Clause 4.6 variation requests taken in *Four2Five v Ashfield Council*.

Applying Preston's CJ decision in *Randwick City Council v Micaul*, the proposed development is able to demonstrate that strict compliance with the numerical height development standard is unnecessary in the particular circumstances of the proposal, as the development is able to:

- Meet the objectives of the development standard as outlined in Section 3(c);
- Meet all other built form development standards;
- Satisfactorily address all relevant planning considerations as detailed in section 3(e).

**e) Are there sufficient environmental planning grounds to justify contravening the development standard?**

The proposed development does not conflict with the intent of Clause 4.3 which is to maintain existing views, to safeguard the amenity of existing dwellings and to maintain the visual character of the area. The proposed development achieves this outcome.

The exceedance is a result of:

- The proposed parapet wall extends marginally above the 72m height plane. The incorporation of this element enhances the appearance of the development.
- Roof top plant is required. The plant housings are discreetly located, being well spaced and set back within the roof form.

Additional height is predominately plant space and lift overrun, comprising a total area of 90sqm above Tower A (1% of the total developable site area) and will not have any significant impact on adjoining properties in regard to overshadowing or view loss. Furthermore, the proposed plant rooms are well setback from the building edge and as such are not visible at street level.

The number of storeys envisaged under the DCP controls for the site have been adhered to (23 storeys).

The proposed variation to the height control is justified on the following environmental planning grounds:

- Consistent with Government policy which supports intensive development in proximity to public transport the project seeks to maximise the development potential of a site within walking distance of public transport. The proposed design achieves an appropriate balance between achieving more intensive development on the site whilst ensuring that unreasonable amenity impacts do not arise as a result of the additional building height proposed.
- The subject land is identified for future mixed use development and has recently been rezoned through the Priority Precinct process for this purpose. The urban density and built form scale permitted under the existing controls allows for more intensive development on the site than currently exists. The existing controls recognise that development on this site will be prominent in terms of scale.
- The site occupies a prominent position within the suburb of Lidcombe close to the public transport network. It is currently underdeveloped but has been identified as the site of future mixed use development. The proposed scale of buildings reflects this.

- The underlying objective of the building height limit is to manage the scale of any future built form in order to mitigate any adverse impacts on the amenity of residential areas. The character of the surrounding area is evolving and is becoming increasingly mixed in terms of bulk, scale and density developing from industrial to residential apartment buildings of up to 23 storeys. The proposed development is compatible with the height and scale of surrounding and nearby development.
- The proposal is largely contained within the 72m height limit and is aligned with the LEPs objectives with regards to height. A departure from the height control arises due to the inconsistent levels across the site and rooftop plant infrastructure.
- The rooftop plant only extends over a small proportion of the roof top area (single, centrally placed housing) and is reasonably required to service the development.
- The departure from the 72m height limit will have little or no visual impact on the surrounds as the plant equipment comprises a small proportion of the proposal's roof area and will not be visible at street level (plant being set back within the building's roof).
- The proposal has limited view impacts on neighbouring properties. No additional view impacts are anticipated from the elements of the proposal that exceed the 72 metre height control, noting that the site is distanced from existing residential properties. There would be no difference in views when compared to a fully compliant development.
- The departure from the height control does not result in any additional floor space being created. The proposal complies with the FSR standard for the site.

**f) Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone in which the development is proposed to be carried out?**

As outlined throughout the SEE and this Clause 4.6 Variation Statement, the proposal is consistent with the objectives of the Building Height development standard and objectives of the R4 zone.

The principle aim of the proposal is to provide new residential apartments complemented by a new childcare centre. The provision of a new public park is also proposed.

The proposed variation to the height control does not result in the loss of amenity to the neighbouring properties as a result of overshadowing or loss of privacy and the proposed height is therefore considered to be acceptable particularly when balanced against the benefits of the project which are:

- Provision of new housing and employment opportunities on land zoned for this purpose within the short term.
- Development of an under-utilised site (being currently occupied by industrial warehouses) identified for future mixed use development (being zoned R4 high density residential).
- Contribution to the delivery of key infrastructure through the payment of the relevant Section 94 contributions.
- The proposal will provide positive social outcomes through the provision of on-site housing, child care facilities and a new public park.

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

The proposed variation to the height development standard does not conflict with any matters of State or regional environmental planning significance, nor does it conflict with any State Planning Policies or Ministerial directives. The significance of the non-compliance is acceptable in the context of the overall development of the Lidcombe area and the broader Parramatta City area.

**h) The public benefit of maintaining the development standard.**

It is considered that due to the absence of any demonstrable adverse impacts arising from the proposed development, adherence to the subject development standards would hinder the attainment of the objectives of the Act. Further, the proposed development is consistent with the objectives of the development standard. Therefore, such adherence would not be in the public interest in this instance.

## **4. CONCLUSION**

The proposal seeks variation to the Building Height development standard. The proposal will have no adverse impacts and will have no conflict with any matters of State or regional environmental planning significance. Nor does it conflict with any State Planning Policies or Ministerial directives.

On the basis of the above, support should be given to the proposed variation to the Building Height development standard under the provisions of clause 4.6 of the LEP.