



Table 8 Building height

Tower	Maximum height	Extent of departure	% variation
Tower C (2A)	43.34m	1.34m	3.2%
Tower D (2A)	46.10m	4.10m	9.8%
Tower E (2B)	44.26m	2.26m	5.4%
Tower F (2B)	44.19m	2.19m	5.2%



Figure 19 Height blanket diagram showing extent of non-compliance

3. Clause 4.6 to ALEP 2010

The objectives and provisions of clause 4.6 are as follows:

"4.6 Exceptions to development standards

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

- (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.*





- (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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
 - (3) *Development 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, and*
 - (b) *the concurrence of the Director-General has been obtained.*
 - (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*
 - (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note.** *When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
 - (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*





(ca) clause 6.8."

The development standards in clause 4.3 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

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

As previously noted, the *Height of Buildings Map* nominates a maximum building height of 42m on the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum building height of 46.10m, as described in Section 2 above.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.3 are addressed in turn below.

Objective (a): "to establish a maximum height of buildings to enable appropriate development density to be achieved"

Despite minor non-compliance with the height of building standard, the proposal complies with the applicable floor space ratio requirement and therefore achieves a development density that is consistent with that anticipated by Council's planning provisions. The additional height is, for the most part, nominal, and is associated with lift overruns, plant rooms and light-weight awning structures that are positioned away from the edges of the building and do not contribute to the perceived density of the development.

Objective (b): "to ensure that the height of buildings is compatible with the character of the locality"

The urban fabric of the Carter Street Precinct is undergoing significant transformation following the State Government initiated up-zoning of the locality. The character of the Precinct will evolve significantly as the urban fabric transitions from industrial and business land uses to a combination of high density residential, employment and retail services.

The development principles for the Precinct as articulated in the Carter Street DCP describe a compact, walkable urban community which provides a mix of medium and high density housing types in a diverse and innovative building form. In this scenario, it is clearly inappropriate to make reference to existing character but rather to focus on the desired future character of the Precinct as defined in the Carter Street DCP and also by the core development standards.

Despite minor non-compliance with the height of building standard, the proposal is demonstrably compatible with the desired future character of the locality, as follows:

- The proposal complies with the floor space ratio standard in ALEP 2010 as well as relevant street setbacks and building separation requirements and therefore the perceived density of the development is consistent with that anticipated by the planning controls. The additional building height is associated with lift overruns, plant rooms and light-weight awning structures that are positioned away from the edges of the building and do not contribute to the perceived density of the development.



- Proposed massing is such that the height breaches are localised and do not occur across a large portion of the development site. That is, building height varies significantly across the development and will be read as a series of fine-grained towers above a robust podium 'platform', rather than a structure that is overwhelming in terms of scale and visual presence which would be uncharacteristic of emerging development in the locality.
- Although marginally non-compliant, the height of the development will not lead to any unreasonable or adverse impacts on the amenity of neighbouring land, the development that may occur on that land in the future, or the amenity of occupants within the subject development. In fact, the proposed approach to massing, which has resulted in minor height breaches, reduces the extent of overshadowing that would otherwise be cast if development density were to be distributed horizontally rather than vertically so as to comply with the maximum building height requirement.

For the reasons described above, the height of the proposed development is considered to be entirely compatible with the emerging character of the locality, despite the marginal height non-compliance, and is therefore consistent with objective (b).

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The objectives of the Zone R4 High Density Residential are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage high density residential development in close proximity to bus service nodes and railway stations.*

The proposal aligns with the objectives of Zone R4, as described below:

- The proposal involves the construction of two residential flat buildings and will provide for the housing needs of the community within a high density residential environment. Each building contains a combination of single, two and three bedroom dwellings, a portion of which are adaptable, and in this regard, the proposal provides for a variety of housing types within a high density residential environment.
- The subject site is highly accessible in that it is located in close proximity to Olympic Park railway station and numerous bus routes. The level of accessibility is but one of the reasons the State Government commenced the process of rezoning the Carter Street Precinct. The proposal to provide high density housing in this location aligns with this objective.

4. Sufficient environmental planning grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the building height standard, it is considered that there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties.

On "planning grounds" and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve "a better outcome for and from development", it is considered that:

- The proposal provides for a more effective and appropriate massing of the allowable building density so as to minimise impacts on neighbouring properties. That is, extent of overshadowing is mitigated, potential views and outlooks are improved and perceived streetscape bulk is lessened. As indicated, the proposal provides

for a floor space ratio which complies with the maximum permitted and accordingly, the height breach is not associated with additional density beyond what is expected by the controls.

- The design of the development is challenged to a degree by site topography, which falls approximately 3.5m from the north of the site to the south. The development is, for the most part, comfortably compliant with the maximum building height requirement and only breaches the 42m height plane in localised areas as a result of the fall of the site.
- The height breach is associated with lift overruns, plant rooms and light-weight awning structures that relate to roof top terrace spaces, and are setback from the edge of the building, thus reducing their presence from the street and surrounding public land. Those features of the proposal that breach the height limit will not be readily perceived by the casual observer at street level and in this regard, the scale and appearance of the proposed development is substantively the same as an entirely compliant development.
- The building height development standard allows a 42m building height on the subject site and it is commonly accepted that a 42m building height will comfortably permit a fourteen storey structure without any significant height breach. It follows that ALEP 2010 anticipates a fourteen storey building form on the subject site. It is submitted that to require strict compliance with the building height development standard in this instance would effectively preclude the upper-most level and therefore the development would fail to realise the desired built form anticipated by ALEP 2010.
- The height breach allows for the rooftop space to be utilised as an additional open space area for upper level apartments thus optimising residential amenity and capitalizing on the regional views that would be obtained from this space. If strict compliance with the development standard were required, this opportunity would be lost without any meaningful benefit.

For the reasons listed above, it is considered that there are sufficient environmental planning grounds to support a variation to the maximum building height standard.

5. Insistence on compliance is unreasonable and unnecessary

Returning to Clause 4.6(3)(a), in *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*



- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Having regard to all of the above, it is our opinion that compliance with the maximum building height development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. Additionally, the proposed design provides for apartments which offer a high degree of residential amenity in an acceptable built form. As such, there are sufficient environmental planning grounds to justify an exception to the development standard.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied.

