

## Revised Clause 4.6 Variation: Building Height

---

RESIDENTIAL FLAT BUILDINGS

LOTS 12 & 13, BUTU WARGUN DRIVE, PEMULWUY



*Prepared by: Think Planners Pty Ltd*

*Document Date: 22<sup>nd</sup> March 2018*

*Consent Authority: Sydney West JRPP via Cumberland Council*

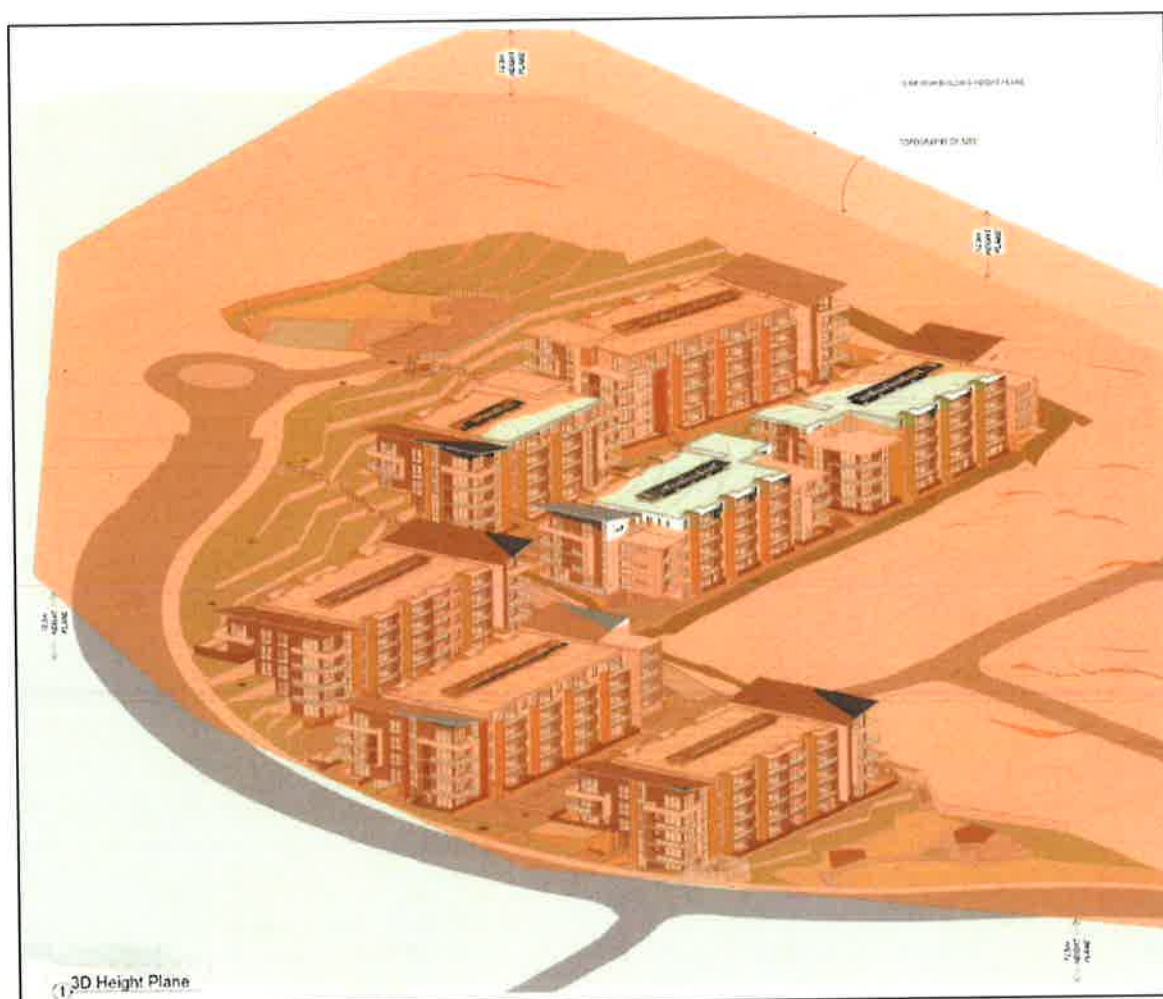


*Lots 12-13 Butu Wargun, Pemulwuy*

## Clause 4.6 Variation: Height of Building

### Height Departures

As shown on the sections below, the proposed development comprises a series of 4-5 storey residential flat buildings that predominantly complies with the 12.5m maximum building height control with the exception of a proportion of the building and roof structure, as illustrated by the 3D height plane below.



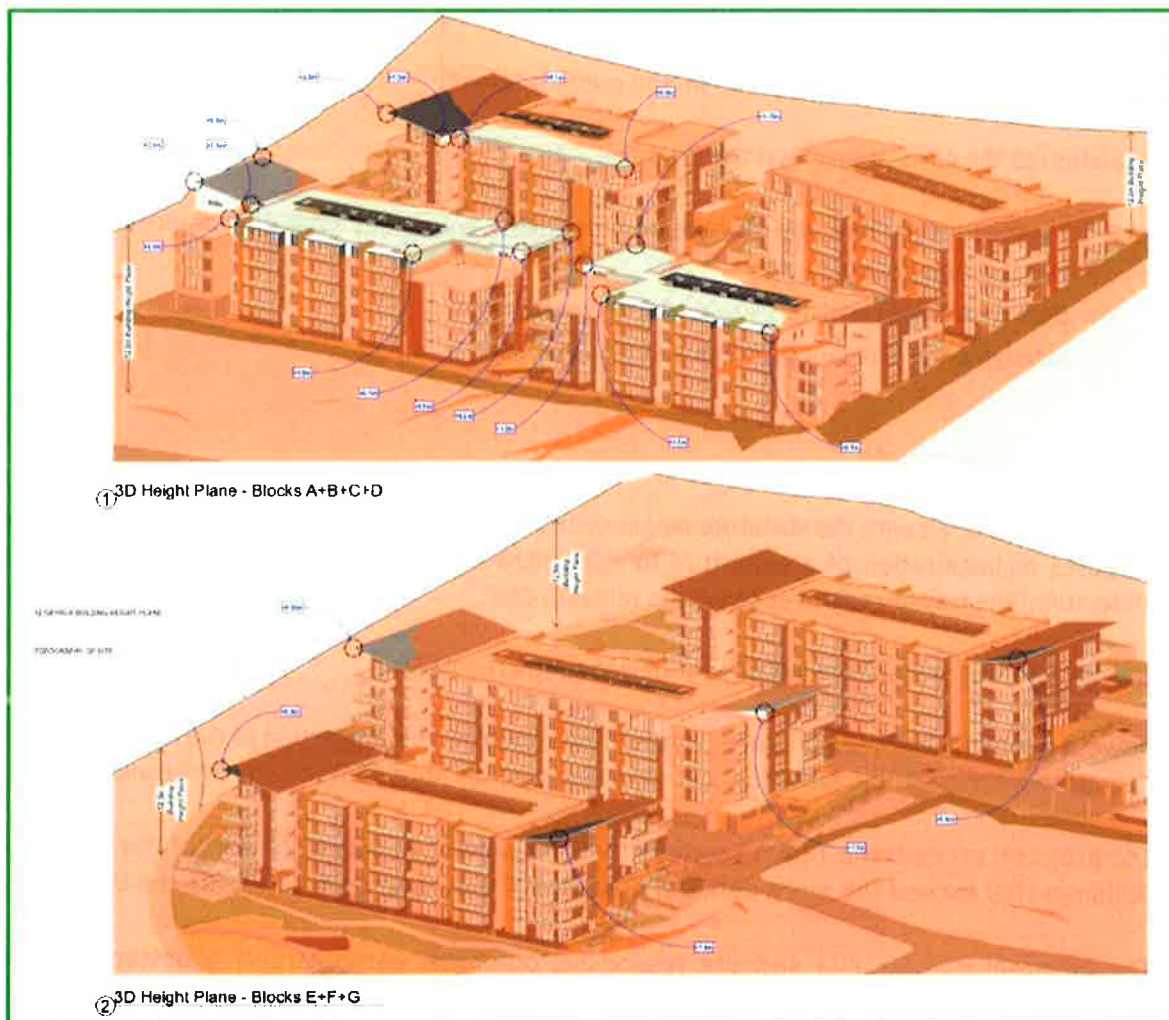
As shown on the 3D height plane diagram in the previous page, the majority of the development is below the LEP height of building control, with 4 of the 7 blocks fully compliant.

Those areas that exceed the height control are:

- Blocks B: 1m-1.5m or 8%- 12%
- Block C: 1.9 – 2.5m or 15% - 20%
- Block D: 0.4m – 1.1m or 3% - 8%

A small portion of the architectural roof features to Block E, F, and G exceed the height limit. However, these roof forms are primarily key design elements to respond to the context of the site and provide a roof form that is articulated to emulate the topography of Prospect Hill that has been informed by Urban Design analysis. Strictly speaking, these elements are architectural roof features that are not a subject of the Clause 4.6, however, for completeness are included.

The diagram below has been prepared by the architects to illustrate the areas of non compliance.





Lots 12-13 Butu Wargun, Pemulwuy

Given the building height departures 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 is that:

- The consent authority be 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 the objectives, rather than having to ‘achieve’ the objectives.
- 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 as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- 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 building height standard;
- Demonstrating consistency with the R4 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

### ***Height Control Hierarchy***

The Clause 4.6 deals with the statutory height control contained within the LEP. However, for the purposes of justification of a departure to the height control, it is important and relevant to understand the height control as set in the relevant DCP.

The LEP adopts the standard instrument height control of 12.5m.

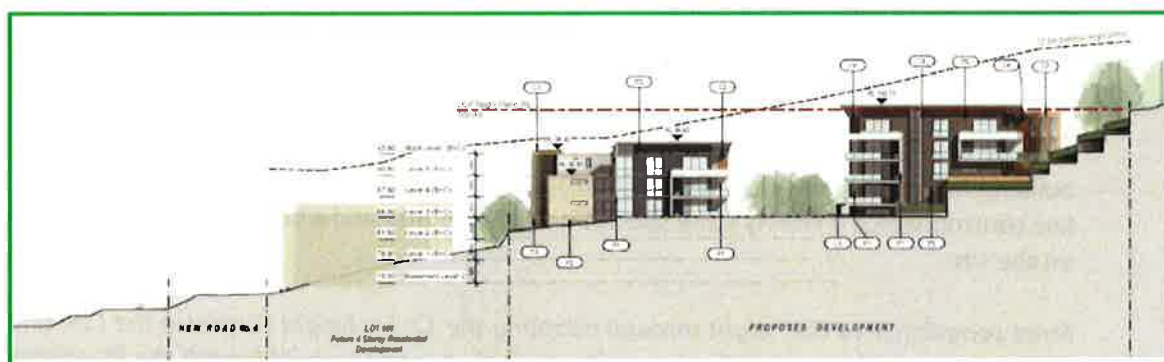
However, the DCP has been prepared to specifically address the protection of the historical views to and from Prospect Hill, and adopts RL view line controls honed for the site (94RL and 100RL).

The proposal exceeds the 12.5m height of building control, however, no part of the proposed buildings that exceed the more detailed RL94/RL100 view line controls within the DCP.

The proposal is a suitable and site responsive outcome; demonstrably a better planning outcome is achieved rather than strict compliance with the 12.5m control; and is not associated with any attempt to achieve a non compliant FSR outcome.

Despite the statutory hierarchy of height controls, it is submitted that the practical hierarchy of height controls is that the DCP provides a more detailed, robust and informative height control, that should be carefully considered as part of the request for variation.

The extract below from the Architectural Plans illustrates the LEP height standard + the DCP height RL. It is noted that compliance with the LEP control at the upper part of the site (right side of image) would result in a built form that would compromise the view to the ridgeline, contrary to the intent of the DCP and the better heritage outcome.



### ***Design Intent***

The site has been designed with the intention to comply with the RL under Holroyd DCP in-order to ensure that views to/from the Ridgeline Park and Prospect Hill are protected. It is also noted that the stepped building form is a direct design response to the significant cross-fall experienced on the site, noting that the DCP acknowledges that on steep sites, the storey control can be exceeded.

### ***Building Height Context Considerations: Better Development Outcome***

The proposed non-compliance occurs as a means of achieving a better development outcome because it enables the development to achieve the following.

- Adopt an appropriate Urban Form, and Quality Common Open Space: The proposal provides for a variety of building heights and building modulations, with the development distributed across seven (7) separate buildings to achieve a series of buildings in a landscaped setting that substantially exceeds the required levels of landscaped area, deep soil, and common open space. The roof forms that break through the height limit are a direct response to the site context and the desire to articulate the roof forms to eliminate entirely flat roof forms and to emulate and relate better to the topography of Prospect Hill.

It also enables the proposal to achieve greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings;





Lots 12-13 Butu Wargun, Pemulwuy

*Strict compliance to the height through flattening of the buildings to achieve the 12.5m control would mean larger floorplates that reduces the design merit by removing quality landscaping and common open space with a northern aspect and would provide a homogenous building height with limited design merit.*

- Retain the Heritage View Corridors: When having regard to the DCP height controls applying to the proposal- being the RL controls- that have been implemented specifically for the site in order to maintain view-lines to and from Prospect Hill.

The site has been designed with the intention to comply with RL under Holroyd DCP in order to ensure that view to/from the Ridgeline Park and Prospect Hill is protected. A key consideration in the variation request is that technical compliance with the 12.5m control to Block E, G, A, and D would substantially exceed the RL controls contained within the DCP. Further the top most portion of the site has remained undeveloped given that any building at the western edge of the site would break the DCP RL control. Therefore the building height and mass has been modulated across the site to respond to the RL view line controls which is clearly a site specific design response and a better planning outcome on the site.

*Strict compliance to the height through adopting the 12.5m height control in the LEP, and manipulating building mass further to Blocks E, G, A, and D would breach the RL control and impact on view corridors to Prospect Hill.*

Response to Topography: It is also noted that the stepped building form is a direct design response to the excessive cross-fall experienced by the site, noting that the DCP acknowledges that on steep sites, the storey control can be exceeded and it is suitable to have consideration to the overall relative heights on the site- i.e. those buildings that breach the height control sit lower in the landscape than the buildings further to the west when having regard to natural topography on the site.

Providing additional height in the central portion, and lower heights at the edges, is a more responsive design outcome that mitigates views to Prospect Hill and impacts surrounding properties.

Articulate / Undulated Roof Form: The roof form has been revised to incorporate an articulated/undulated roof form to emulate the topography of Prospect Hill. The roof form will provide visual interest to the proposal whilst having negligible impact on the amenity of neighbouring properties in terms of overshadowing or privacy.

- Full Compliance with the DCP Controls: The departure enables full compliance with all DCP controls, including the maximum permitted RL heights contained in the DCP.



### **Supplementary Expert Reports**

The Clause 4.6 should be read in conjunction with the amended architectural plans and in particular the Heritage Impact Statement and separate Urban Design Assessment.

The Heritage Impact Statement carefully considers the proposal against the heritage elements of Prospect Hill and surrounds. The report outlines the view corridors and analyses the way in which the proposal relates to the view corridors. The report concludes that the proposal does not adversely affect the identified heritage significance of the Prospect Hill Conservation Area.

Similarly the Urban Design Report provides a series of photomontage images of the proposal in relation to key view corridors, confirming that the proposal is recessive and will not interrupt view corridors or result in a built form that dominates the view.

### **Consideration of Clause 4.6**

Clause 4.6 of the Holroyd Local Environmental Plan 2013 provides that development consent may be granted for development even though the development would contravene a development standard.

This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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:*



Lots 12-13 Butu Wargun, Pemulwuy

- (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.*

Each of these provisions are addressed in turn.

#### 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 building height 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 RL set by Holroyd DCP with proposal remains consistent with the objectives based on the following:

- All built form heights are complying with the RL DCP heights that ensures that view to/from the Ridgeline Park and Prospect Hill is protected.
- Buildings have been stepped to address the site's steep cross-fall that will contribute towards minimising building height, bulk and scale when viewed from the street level.
- The size of the site permits sufficient separation of building on site and also from neighbouring land parcels and also have negligible impacts in terms of privacy and overshadowing to adjoining properties.
- The increased height and modulation of building locations enables greater amenity to the proposed units through better solar orientation and increased levels of natural ventilation.
- 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 residential flat building that provides good address to the street frontage.
- The proposed development complies with key planning controls applying to the proposal including FSR, landscape, deep soil zones and communal open space.





Lots 12-13 Butu Wargun, Pemulwuy

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 unique circumstances of the case that warrant support of the departure are that the variation enables the development to:

- Adopt an appropriate Urban Form, and Quality Common Open Space: The proposal provides for a variety of building heights and building modulations, with the development distributed across seven (7) separate buildings to achieve a series of buildings in a landscaped setting that substantially exceeds the required levels of landscaped area, deep soil, and common open space.

It also enables the proposal to achieve greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings;

*Strict compliance to the height through flattening of the buildings to achieve the 12.5m control would mean larger floorplates that reduces the design merit by removing quality landscaping and common open space with a northern aspect and would provide a homogenous building height with limited design merit.*

- Retain the Heritage View Corridors: When having regard to the DCP height controls applying to the proposal- being the RL controls- that have been implemented specifically for the site in order to maintain view-lines to and from Prospect Hill. Reference should be made to the attached Heritage Impact Statement that also addresses this matter.

The site has been designed with the intention to comply with RL under Holroyd DCP in order to ensure that view to/from the Ridgeline Park and Prospect Hill is protected. A key consideration in the variation request is that technical compliance with the 12.5m control to Block E, G, A, and D would substantially exceed the RL controls contained within the DCP. Further the top most portion of the site has remained undeveloped given that any building at the western edge of the site would break the DCP RL control. Therefore the building height and mass has been modulated across the site to respond to the RL view line controls which is clearly a site specific design response and a better planning outcome on the site.

*Strict compliance to the height through adopting the 12.5m height control in the LEP, and manipulating building mass further to Blocks E, G, A, and D would breach the RL control and impact on view corridors to Prospect Hill.*

Response to Topography: It is also noted that the stepped building form is a direct design response to the excessive cross-fall experienced by the site, noting that the DCP acknowledges that on steep sites, the storey control can be exceeded and it is suitable to have consideration to the overall relative heights on the site- i.e. those buildings that breach the height control site lower in the landscape than the buildings further to the west when having regard to natural topography on the site. Providing additional height in the central portion, and lower heights at the edges, is a more responsive design outcome that mitigates views to Prospect Hill and impacts surrounding properties.



Articulate / Undulated Roof Form: The roof form has been revised to incorporate an articulated/undulated roof form to emulate the topography of Prospect Hill. The roof form will provide visual interest to the proposal whilst having negligible impact on the amenity of neighbouring properties in terms of overshadowing or privacy.

- Full Compliance with the DCP Controls: The departure enables full compliance with all DCP controls, including the maximum permitted RL heights contained in the DCP.

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 building height control.

In addition, the proposal is consistent with the objectives of the R4 zone, being:

- *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.*

The proposal ensures that the high density character envisioned for the land parcel is achieved. In addition, the proposal will complement and enhance the local streetscape by virtue of the careful siting of the development and the landscape embellishment works within the front setback areas and to Prospect Hill.

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 building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building 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 based on the observed building forms in the locality. The significant public benefit of the proposal must be



*Lots 12-13 Butu Wargun, Pemulwuy*

emphasised in considering the merits of the departure to the height control and the proposal is a site specific response and is not replicated elsewhere in the precinct and as such 'precedent' issues are not relevant.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique 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 design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

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.

