

6.4.2 HEIGHT OF BUILDING

The Height of Building Map specifies a maximum height of 57 metres as shown in Figure 51. Clause 4.3 (Height of buildings) of the RLEP also includes objectives for the site as follows:

- To ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,
- To minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,
- To encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,
- To minimise the impact of development on the amenity of surrounding properties,
- To emphasise road frontages along road corridors.

The proposed development complies with the maximum 57 metre height of buildings development standard as illustrated in **Figure 51**.

FIGURE 51 – HEIGHT OF BUILDING MAP (RLEP 2014)



6.4.3 CLAUSE 4.6 EXCEPTION TO HEIGHT OF BUILDING STANDARD

Introduction

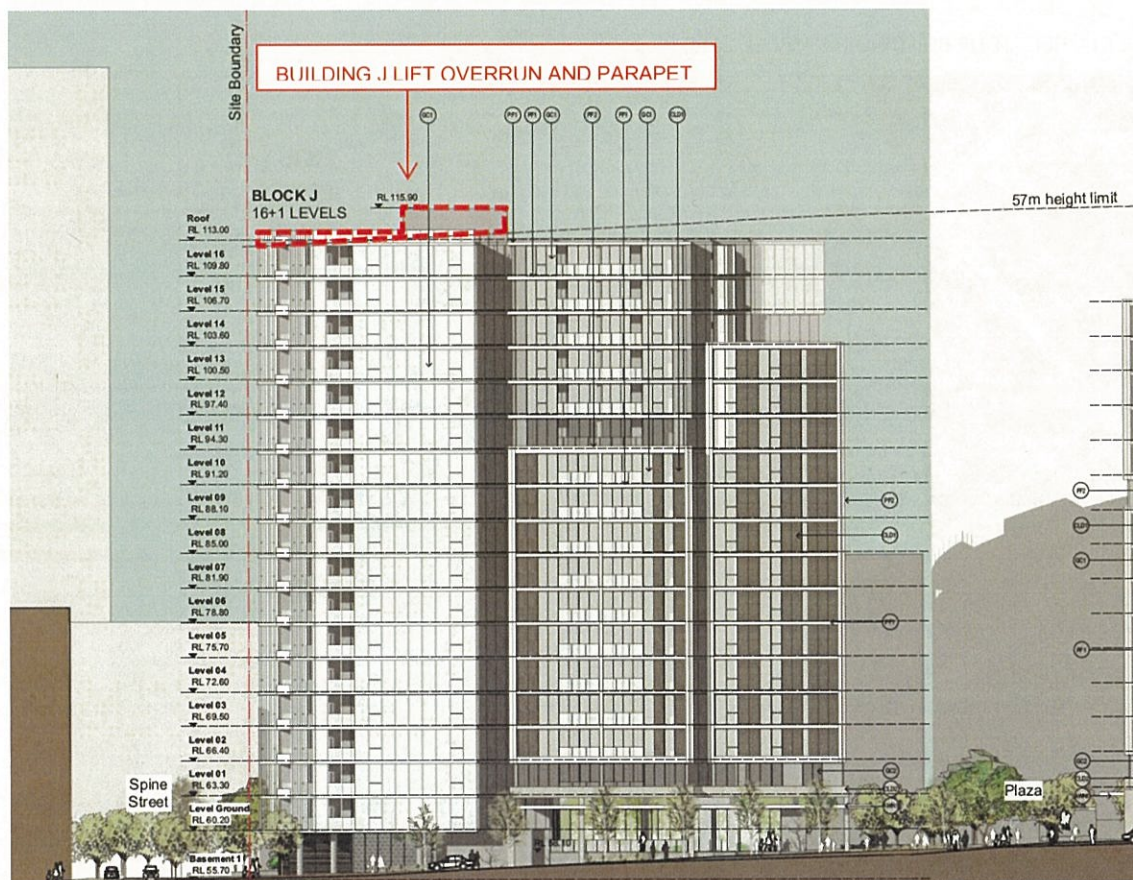
This written request has been prepared in accordance with the provisions of clause 4.6 “Exceptions to Development Standards”. The request seeks a variation to the Height of Building development standard adopted under clause 4.3 of the Ryde Local Environmental Plan 2014 (RLEP 2014).

As shown in **Figure 51**, the land the subject of this request is labelled “Z” coloured purple and is identified as being subject to a 57 metre maximum Height of Buildings (HoB) development standard under the provisions of RLEP 2014.

The proposed Building J on Lot 105 involves a minor non-compliance in the parapet height equal to a maximum of 58.3 metres and lift overrun of 59.9 metres.

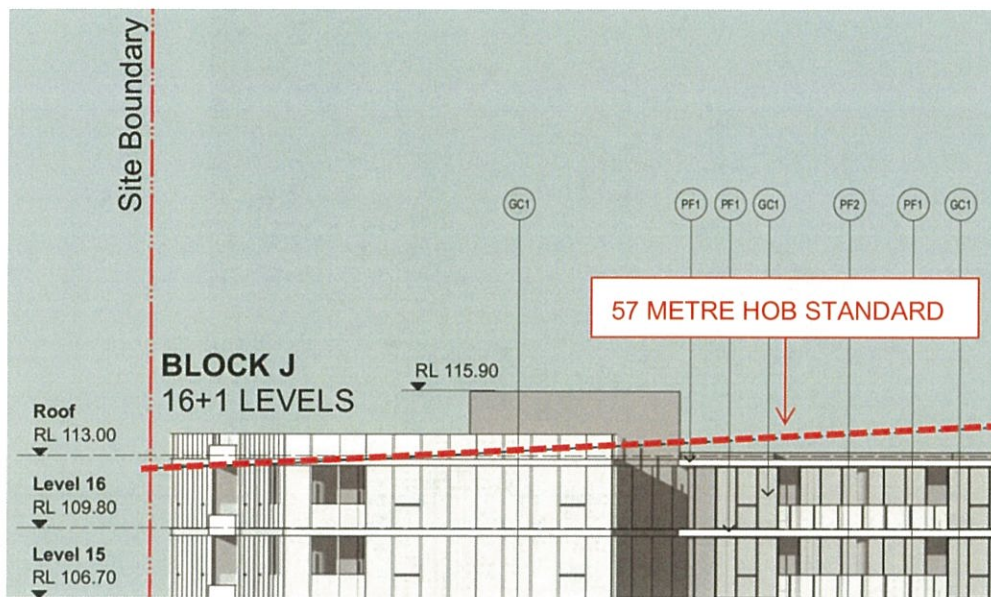
The identified non-compliance is confined to a portion of the parapet façade at the roof, in particular the parapet edge fronting Spine Road. An overlay of the maximum height of building line above the point of existing ground level below is shown in **Figure 52** and **Figure 53**.

FIGURE 52 – BUILDING J LIFT OVERRUN AND PARAPET WEST ELEVATION, TURNER STUDIO



A summary of the building heights, when measured from the variable existing ground level below, is outlined in **Table 24**.

FIGURE 53 – BUILDING J LIFT OVERRUN AND PARAPET AND HOB STANDARD, TURNER STUDIO



The lift over run and parapet at the eastern end of Building J is above the maximum permissible 57 metre height of buildings imposed by clause 4.3 of the RLEP 2014. The extent of the non-compliance in relation to the lift overrun is approximately 2.9 metres. As such a variation to the development standard from 57 metres to 59.9 metres is requested.

The maximum point of non-compliance is for the lift overrun, which is located approximately at the centre the roof of Building J, and setback from the parapet of the building. The non-compliance represents a 5.1 per cent variation on the height control (as a total).

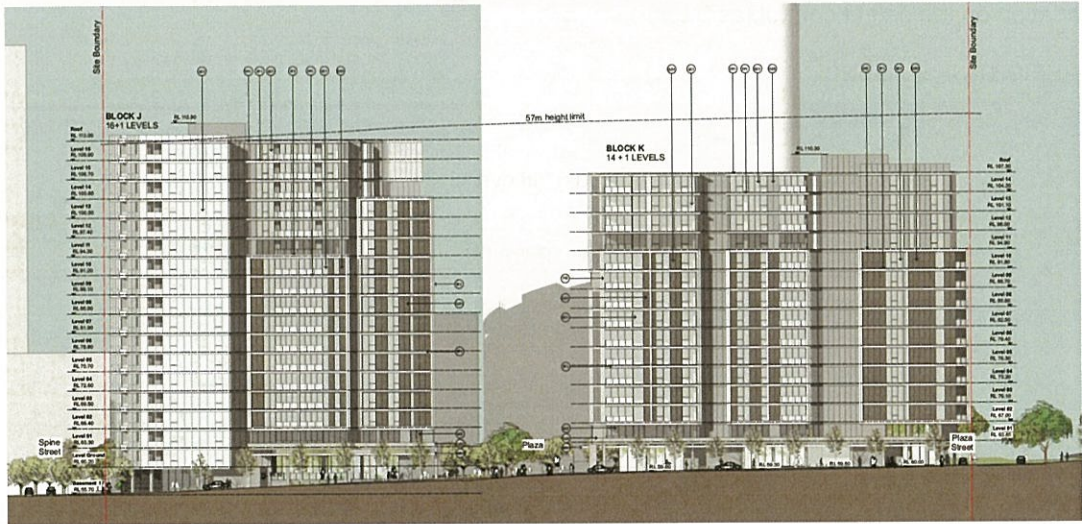
TABLE 24 – HEIGHT OF BUILDING

BUILDING	PERMITTED	PROPOSED HEIGHT
J	57 metres	RL115.9 (max) (lift overrun) 59.9 metres RL113 metres (parapet) 58.3 metres

FIGURE 54 – 3D PERSPECTIVE VIEW OF BUILDING J AND K LOOKING SOUTH EAST, TURNER STUDIO



FIGURE 55 - BUILDING J LIFT OVERRUN AND PARAPET AND BUILDING K AND HOB STANDARD, TURNER STUDIO



Principles of Exceptions to Development Standards

Environmental Planning instrument provisions - Clause 4.6

Clause 4.6 of the RLEP 2014 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development. Subclauses (3), (4), (5) and (8) from clause 4.6 of RLEP 2014 are extracted below:

- (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.*
- (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 4.3, to the extent it applies to Precinct 2 (Town Core) shown on the Ryde Town Centre Precincts Map.*

NSW Land and Environment Court: case Law (tests)

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters is outlined in the following discussion.

Winten v North Sydney Council

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the *Standard Instrument templates*.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded.

Wehbe V Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP; and
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

The following section addresses the local provisions of clause 4.6 of RLEP 2014 together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

Is the Planning Control in question a development standard?

The planning control in question is clause 4.3 of the RLEP 2014. Clause 4.3 nominates a maximum Height of Buildings of 57 metres for the site. The planning control as a numerical control is a development standard capable of being varied under the provisions of clause 4.6 of the RLEP 2014.

What is the underlying objective of the Standard?

The objectives for Height of Buildings development standard provided at subclause 4.3(1) of RLEP 2014 state the following:

- (1) *The objectives of this clause are as follows:*
 - (a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*
 - (b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*
 - (c) *to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*
 - (d) *to minimise the impact of development on the amenity of surrounding properties,*
 - (e) *to emphasise road frontages along road corridors.*
- (2) *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 general underlying intent of the clause is to control the bulk of development and to ensure compatibility of the building form, define the street edge, preserve amenity and encourage land consolidation around public transport nodes.

The proposed development, as proposed is considered consistent with the relevant objectives of the control for the following reasons:

- The proposal will be compatible with the height and scale of adjacent development and is in proportion to the width of the Retail Street, Spine Road and Central Park. Good separation is afforded the nearest neighbouring properties;
- The proposed development and in particular the additional height does not contribute unreasonably to additional overshadowing impacts or diminish the amenity of adjacent land. Notably the variation does not cause a contravention of Council's solar access control for adjacent residential lots;

- The parapet height proposed enhances the architectural quality of the building by containing the glazed façade above the roof slab to provide a architectural crowing of the western end of Building J;
- The lift overrun, which is setback from all sides of the building and located close to the centre of the floor plate, will not result in any significant adverse environmental impacts
- The additional height of the parapet from the façade extension above the roof level assist to define a key arrival point from the residential to the mixed use precincts.

The development despite the minor non-compliance with the development standard is consistent with the planning and environmental objectives of the control.

Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act

The objects set down in section 5(a)(i) and (ii) are as follows:

- “(a) to encourage
- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.
 - (ii) the promotion and co-ordination of the orderly and economic use and development of land...”

The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within an urban environment undergoing significant transformation for high density and mixed use development. The redevelopment of the site for mixed use development contributes to urban consolidation and may contribute to reducing demand to develop more environmentally sensitive lands.
- The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.
- The height variation, as requested, will enable construction of an approved project.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The development, as proposed be modified, is consistent with the objectives of the development standard as provided in clause 4.3 (1) of the RLEP 2014.
- The variation to the HOB standard does not:
 - Result in Gross Floor Area or cause a non-compliance with floor space ratio;
 - Contribute unreasonably to amenity impacts, including privacy loss or overshadowing;
 - Alter parking or traffic impacts associated with the development; or
 - Alter the built form character or design quality of the outcome.
- Strict compliance would result in the lowering of the lift over run to Level 17, and potentially the provision of stairs to the top most residential floor, located below the 57m HOB standard. It is

understood that stairs in units are not preferred for the majority of people living in residential units. Introducing stairs is considered to be unreasonable and have an adverse impact on residents of the top most floor. Alternatively a step in the building massing would be required to achieve strict compliance. A step in the building form is considered undesirable urban design response to this key corner of the Lachlan's Line mixed use precinct. A strong vertical expression is a desirable urban design response to this specific location.

- Strict compliance with the HOB standard would result in the lowering of the façade extension to the height of the roof level, which would undermine the well considered architectural expression of this end
- The potential environmental impacts of the variation have been documented and detailed in this Statement of Environmental Effects. It is our view that compliance in this instance would not contravene the environment planning objectives of the height control, in particular the proposed minor increase in the parapet height does not contribute to significant or unreasonable overshadowing impacts of adjacent residential land.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard to facilitate an appropriate urban design and architectural response to eastern end of Building J fronting Spine Road and Central Park. A reduction in height would not improve the development but rather would result in a diminished response to this part of the Lachlan's Line site.

In this instance, numerical compliance would not contribute to an improved outcome. As such it is considered that a complying development is neither, reasonable or necessary in circumstances of the case.

Is the development standard a performance based control?

No. The development standard is not a performance based control.

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

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- There are no reasonable alternatives to achieve compliance with the standard without adversely affect the residential amenity or design quality of the building;
- The variation does not result in unreasonable adverse amenity impacts on adjacent land;
- The variation does not diminish the development potential of adjacent land;
- The variation in height does not cause a non-compliance with the FSR development standard;
- The development provides all necessary supporting facilities and infrastructure within the site; and
- Despite the additional height, the scale of development along Spine Road will be comparable.

Is the objection well founded?

The proposed exception to the Height of Building development standard will, in part, facilitate the delivery of additional housing located within an area undergoing significant transformation within proximity to public transport connections.

The development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Compliance in this circumstance would not improve the outcome. Rather it would unreasonably impact on the building quality of the development. It is the opinion of the author of this report that to force

compliance in the circumstance would be antipathetic to the inherent flexibility provided by clause 4.6, thereby hindering the attainment of its objectives.

Would non-compliance raise any matter of significance for State or Regional Planning?

The non-compliance will not raise any matter of State or Regional Significance.

Is there a public benefit of maintaining the planning control standard?

The approved development, as proposed to be modified, is not contrary to the public interest accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

Conclusion

The development exceeds the permissible HOB standard by a maximum of 2.9 metres equal to a variation of 5.1 per cent of the adopted development standard. Taking into account the particular circumstances of this development, strict compliance with the numerical standard in this instance be both unreasonable and unnecessary owing to the following:

- A numerically complying development would not result in an improved amenity outcome for adjacent land; and
- A numerically compliant development would require design modifications likely to compromise the residential amenity of future occupants of the top level of the building and result in diminished building quality.

The approved development, as proposed to be modified is consistent with Council's key development controls to define streetscape character and control bulk and mass such as floor space ratio, setbacks, landscaped areas, building articulation and massing controls. Accordingly, once constructed the development will be compatible with the surrounding likely future development and is consistent with the objectives of the height control.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.