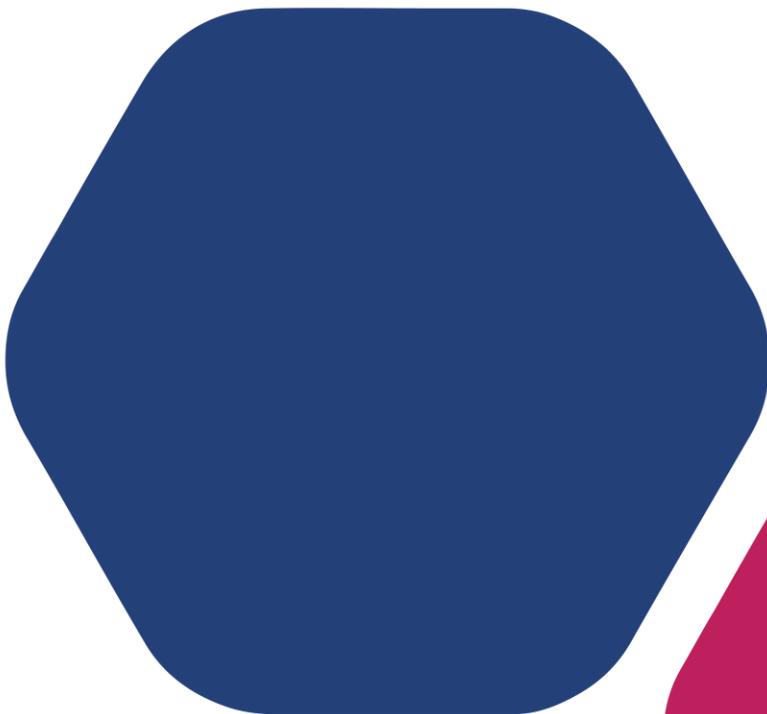


JULY 2018

810 Pacific Highway, Gordon

Clause 4.6 Variation – Maximum Building Height



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1.1 Introduction

This report has been prepared in support of a Clause 4.6 variation to the Height of Buildings controls within Clause 4.3 of the *Ku-ring-gai Local Environment Plan (Local Centres) 2012* (Local Centres LEP). This report has considered the following items applicable to the proposed development:

- Clause 4.6 of the Local Centres LEP;
- The objectives of Clause 4.3 of the Local Centres LEP;
- The objectives of the B2 Local Centre zone;
- “Varying Development Standards: A Guide” published by the Department of Planning and Infrastructure (August, 2011); and
- Relevant case law specifying the considerations for assessing development standards including *Wehbe v Pittwater Council [2007] NSWLEC*, *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386*; and *Moskovich v Waverley Council [2016] NSW LEC*.

This request for variation of the development standard provides an overview of the development standard and the extent to which the proposed works vary that standard. The variation is then assessed in accordance with Clause 4.6 of the LEP and the relevant principles of the court rulings.

The variation to the strict application of Clause 4.3 maximum height of buildings is considered appropriate for the proposed development as:

- The breach in height does not result in a breach of the maximum floor space ratio (FSR) of the site and the extent of the variation is minimal;
- The proposed development benefits the Gordon Local Centre through an additional anchor store increasing customers to Gordon;
- The design of the proposed development benefits the adjacent heritage listed Council Chambers through the landscaping of the ‘green’ buffer, Council’s Landscape Officer has proposed specific plants which suit the Council Chambers setting;
- The design of the proposed development will not result in any detrimental impacts on local amenity or on any sensitive land uses such as open space or heritage items;
- The development will be in keeping with the desired future character of the Gordon local centre being a local retail hub complementing the existing Gordon Centre; and
- The site’s proximity to local services, retail and the Gordon railway station means that it is in an ideal strategic location to increase population density within the Ku-ring-gai LGA.

1.2 Development Standard

Clause 4.3 Height of Buildings of the LEP specifies the following:

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

(a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

(c) to enable development with a built form that is compatible with the size of the land to be developed.

(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 maximum building height is 26.5m as identified on the Height of Buildings Map. The steep slope of the site combined with a cross fall to the south west results in range of variances proposed. The maximum variation measured is in the middle of the southern elevation of 5.11m (19.2%). On the eastern & western elevation the variation is 0.9m (3%) as measured to the top of the lift shaft.



Figure 1 Pacific Highway & Dumaresq Street Elevations Demonstrating Variation

1.3 Clause 4.6 of the LEP

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the particular circumstances and where there are sufficient environmental grounds to justify the departure.

Clause 4.6 states the following:

(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 Secretary has been obtained.*

(5) *In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

Accordingly, justification is set out below for departure from the applicable controls of Clause 4.3 of the Kuring-gai LEP (Local Centres) 2012. The purpose of the information provided is to demonstrate that strict compliance with this standard is unreasonable or unnecessary in the circumstances of this proposal.

1.4 Clause 4.6 Assessment

This section assesses the proposed variation to consider whether compliance with the minimum subdivision requirements is unreasonable or unnecessary in the circumstance of this particular case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the three matters for consideration identified in the Wehbe Land and Environment Court judgment:

- *The applicant must satisfy the consent authority that “the objection is well founded” and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979 (EP&A Act); and*
- *It is also important to consider:*
 - *Whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
 - *The public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Consideration has also been given to the findings in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson and 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-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);
- That there are sufficient environmental 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); and
- That maintenance of the development standard is unreasonable or 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 which applies to site.

An assessment of the variation to the maximum height of buildings requirement against the provisions of Clause 4.6 and the relevant case law is provided in the following sections.

1.5 Compliance is Unreasonable or Unnecessary

In the Wehbe judgement, Preston CJ set out five ways in which a variation to a development standard can be supported as follows:

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



Figure 2 Land use zoning (Source: Ku-ring-gai Local Environmental Plan (Local Centres) 2012)

The height of building standard aims to “ensure a transition in scale between the centres and the adjoining low density residential and open space zones to protect local amenity”. The building height proposed exceeds the control of 26.5m by 0.9m, however the development provides a transition between the adjoining Gordon Centre and is generally in accordance with the desired future character of the Gordon local centre.

As shown in **Figure 1**, the site of the existing Gordon Centre (south of the site on the opposite side of Dumaresq Street) has a maximum building height of 38.5m in the LEP. If future redevelopment of the Gordon Centre site was proposed, the redevelopment could build to this maximum height.

The standard also aims to “ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of the Ku-ring-gai centres”.

Beyond the site, along Dumaresq Street there is a transition to a high density residential zone, with many new apartment dwellings being built in proximity to Pacific Highway.

The proposed development provides an opportunity to both increase the amount of retail floorspace in the local centre to support the growing population and to increase the housing density in proximity to the Gordon railway station.

It is important to note that there no variation is proposed to the FSR of the site, with an FSR of 3.0:1 being maintained for the site. This suggests that the impacts of the non-compliance with the height control is negligible, particularly when considering the future character of the Gordon local centre and the expected population growth in the area.

The development will also increase the housing choice within Gordon and the Ku-ring-gai LGA, an area characterised by large amounts of established, low-density housing typologies. The increase in housing choice will meet changing household needs, lifestyle choices and population growth within the area.

The design of the development ensures that it does not detract from the heritage-listed Council Chambers located at 818 Pacific Highway. The unique design of the building with two ground floor levels that respond to the site's topography allows for a large portion of communal open space on the northern portion of the site. This space, coupled with the improved pedestrian link connecting Pacific Highway and Radford Place allows the development to make a bold new statement on its prominent corner position, while also protecting and maintaining the heritage value of the adjacent Council Chambers.

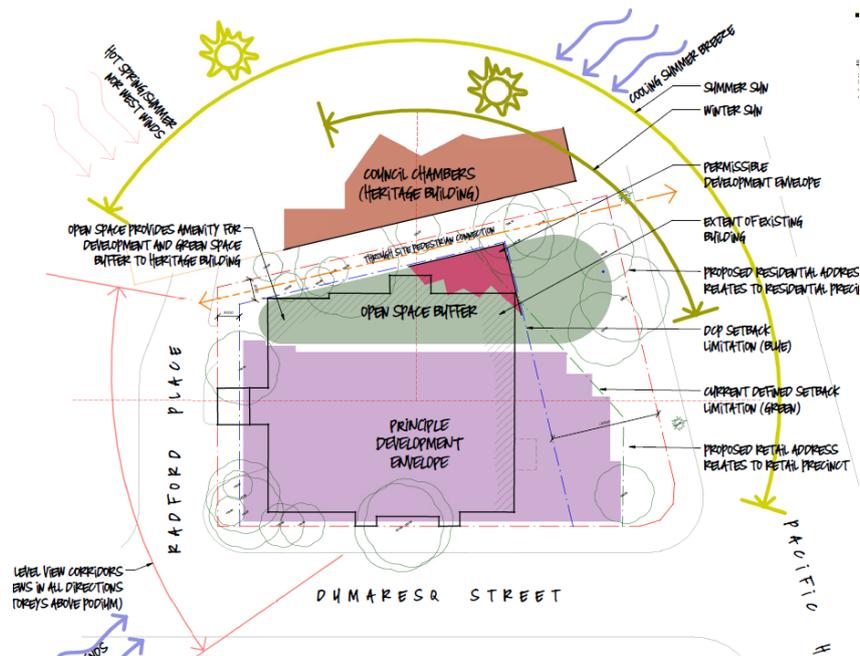


Figure 3 – Site Analysis Plan

A *Plan for Growing Sydney* aims to achieve future urban renewal from Hornsby to North Sydney via Gordon. The proposed development will do so, with its frontages to Pacific Highway and Dumaresq Street providing street activation and connection between the Gordon local centre and the growing high-density residential area to the west of the site.

The Ku-ring-gai population increased from 104,340 at the 2006 Census to 122,996 at the 2016 Census. The population within 2km of the Gordon local centre has increased by over 5,000 people or 26% since 2006 (source: *Supermarket Demand & Impact Assessment* prepared by Deep End Services, dated 27 September 2017). The site provides an opportunity to increase housing density in close proximity to public transport, with the Gordon railway station located approximately 300m from the site. This close proximity will promote public transport patronage and walking, another objective of the Local Centre zone.

This proximity to the railway station and to the Gordon local centre will assist in enhancing the liveability of Gordon by providing access to jobs, services and recreation for new residents, as well as access to the Greater Sydney region.

The Greater Sydney Commission's *Draft Greater Sydney Regional Plan (2017)* has developed housing targets for each of the five districts in Greater Sydney. Ku-ring-gai LGA is part of the North District, which has a target of 25,950 new dwellings by 2021 and 92,000 by 2036. The Ku-ring-gai LGA has a target of 4,000 new dwellings by 2021. The proposed development will increase the housing density in Ku-ring-gai and assist in achieving this housing target.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

N/A

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

N/A

4. 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;

N/A

5. 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.

N/A

1.6 Adequate grounds for contravening the development standard

Clause 4.6 requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. In this instance, there are strong planning grounds in support of the variation to the maximum building height control.

- The proposed development will fully comply with the objectives of the B2 Local Centre zone within which the site is located as it will:
 - provide employment opportunities in an accessible location;
 - maximise public transport patronage and encourage walking and cycling;
 - provide for residential housing close to public transport, services and employment opportunities; and
 - be a mixed use building integrating commercial and residential uses.
- The creation of the supermarket space for ALDI provides an additional anchor store for the Gordon Town Centre.
- Contravention of the height control will enable the provision of seven levels of residential apartments above the ground floor thus providing greater housing supply and choice in the Ku-ring-gai LGA and assisting with achieving regional housing targets.
- The breach in height in part is a result of the built form having a slender building, with increased separation to the adjacent heritage listed Council Chambers at 818 Pacific Highway, Gordon. This building siting and design allows for increased visual separation and landscape buffer to the adjacent Council Chambers.
- The proposed slender design situated on the southern boundary allows for improved environmental amenity to the pedestrian through site link.

- The breach in height does not result in a breach of the maximum floor space ratio (FSR) of the site and the extent of the variation is minimal.
- The design of the proposed development will not result in any detrimental impacts on local amenity or on any sensitive land uses such as open space or heritage items.
- The site slopes steeply from its front boundary to the rear of the site therefore the minor contravention of the height control enables the building to respond to the topography appropriately.
- There will be no adverse amenity impacts upon surrounding uses, including the heritage-listed Council Chambers to the north of the site.
- The height contravention will not be out of character with the desired future character of the Gordon local centre and the greater density which the zoning of the centre provides for.

1.7 Significance for State or Regional Planning

The non-compliance will not raise any matter of State or regional significance.

1.8 The Public Interest

Clause 4.6 requires that the consent authority consider the public benefit in determining whether to support the variation.

The proposed development is in the public interest as it will generate positive economic, social and environmental impacts for the local community. The development will provide additional housing in a strategic position within the Gordon local centre, on Pacific Highway. This area has been earmarked by Council for future development in the Ku-ring-gai Gordon local centre DCP and the proposed development responds to the desired future character of Gordon. Further, the development will aid in meeting Ku-ring-gai Council's dwelling target of 4,000 new dwellings by 2021.

The site is located approximately 300m from Gordon railway station, meaning that it is considered transit oriented development. Increasing densities along established transport corridors is an aim of the Sydney metropolitan plan *A Plan for Growing Sydney*.

The development of an Aldi supermarket on the site will provide more competition in the local shopping centre market and will work towards meeting the demands of the growing population in Gordon and surrounding suburbs. An additional anchor store in the Gordon town centre has many multiplier benefits.

The development has been designed to achieve the desired built form. The design minimises the potential amenity impacts upon surrounding uses, most notably the adjacent heritage listed Council Chambers.

The development is considered to be in the public interest.

1.9 Conclusion

Clause 4.6 of the Ku-ring-gai LEP (Local Centres) 2012 aims to provide an appropriate degree of flexibility in applying development standards. In view of the development context, strict compliance with the maximum building height requirements outlined in Clause 4.3 of the LEP is considered unreasonable and unnecessary in this case. The proposed development warrants favourable consideration under clause 4.6 because it has been demonstrated that:

- Contravention of the development standard does not raise any matters of State or regional significance.
- There will be no adverse impacts on the amenity of the surrounding area or on any sensitive land uses such as open space or heritage items as a result of the non-compliance with the height control and thus, in this instance, there is no public benefit in maintaining the development standard.

In particular, the variation proposed to the building height will result in a better planning outcome when compared to a compliant scheme on the site as it allows the achieve of a viable mixed use development of the site which protects the heritage significance of the adjacent Council Chambers of the site, which is in the public interest for the reasons outlined through this report.



Figure 4 Proposal as viewed from Public Domain of Pacific Highway