

## Annexure 1: Clause 4.6 Variation: Building Height

### Height Departure

As shown on the sections below, the proposed development comprises a complex of two x 7 storey residential flat buildings that predominantly complies with the 21m maximum building height control with the exception of the lift overruns that exceed by 600mm or 2.86%, as illustrated by the architectural drawings.



As shown on the Section drawing above the majority of the development is below the height limit, with the exception of the lift overruns which protrude above the height plane by up to 600mm or 2.86%.

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*.

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- 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.

These matters are addressed below, noting that the proposal presents a more site responsive development than a complying scheme when having regard to the fact that the building steps to follow the topography and introduces a series of roof features to give greater articulation to the roof profile and attributing architectural merit to the final building form- this would be eroded by the removal of these roof features and strict compliance with the height control could be achieved by 'sinking' the buildings further into the site which would lead to poor outcomes for residents for the sake of strict compliance.

***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 the site 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 the required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings;

Response to Topography: It is also noted that the stepped building form is a direct design response to the natural topography of the site. The proposal provides a stepped building form but the need for consistent finished floor levels dictate the need for a consistent finished floor level to each building- which results in a technical departure to height due to the topography. Compliance with the height control could be achieved by 'sinking' the buildings further into the site which would lead to poor outcomes for residents for the sake of strict compliance.

***Consideration of Clause 4.6***

Clause 4.6 of the LEP 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:

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- (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.**

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 establish the maximum height of buildings,*
  - (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,*
  - (c) to facilitate higher density development in and around commercial centres and major transport routes.**

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The remains consistent with the objectives based on the following:

- Buildings have been stepped to address the site's 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 which indicates a suitable design response.

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 the site 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 the required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings;

Response to Topography: It is also noted that the stepped building form is a direct design response to the natural topography of the site. The proposal provides a stepped building form but the need for consistent finishes floor levels dictate the need for a consistent finished floor level to each building- which results in a technical departure to height due to the topography. Compliance with the height control could be achieved by 'sinking' the buildings further into the site which would lead to poor outcomes for residents for the sake of strict compliance.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

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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 R3 zone.

The proposal ensures that the medium 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 to the street frontages.

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.

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.