

Clause 4.6 Variation – Building Height (Clause 4.3 of the Shoalhaven LEP 2014).

Gould Ave / Kalendar St / Kinghorne St NOWRA – RA17/1002

Introduction

Clause 4.6 sets out provision that enable certain development standards within the SLEP 2014 to be varied.

In this instance, Clause 4.6 is relied upon to vary Clause 4.3 of the SLEP 2014. Clause 4.3 relates to height of buildings.

The SLEP 2014, through Clause 4.3 sets an 11m height limit for the subject land.

Parts of the building proposed exceed the 11m height limit.

Clause 4.6 reads 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 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.*
- (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.*
- (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,*
 - (ba) *clause 4.1E, to the extent that it applies to land in a rural or environment protection zone,*
 - (bb) *clause 4.2B,*
 - (c) *clause 5.4,*
 - (ca) *clause 6.1 or 6.2,*
 - (cb) *clause 7.25.*

The following information is provided to Council in support of the proposal and to justify the request made for this application to be approved pursuant to Clause 4.6 of the SLEP 2014. The written request made below aims to demonstrate that:

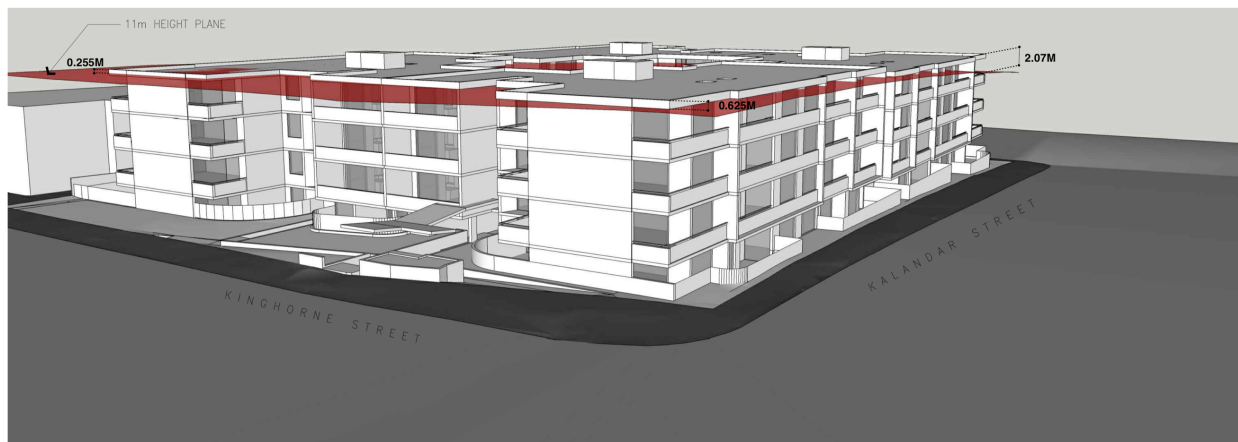
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Extent of the Variation

The development proposed exceeds the 11m height limit by as much as **2.32m**. The submitted section drawings and the diagrams below clearly show the extent of the exceedance.



SOUTH EAST PERSPECTIVE



SOUTH WEST PERSPECTIVE

The diagrams above illustrate that the height limit breach is not uniform. The attached elevation drawings with the 11m height plane shown together with the detailed calculation table show the average height limit breach expressed as a percentage is 10%.

The Development Standard is Unreasonable or Unnecessary

The way in which compliance with a development standard is established as unreasonable or unnecessary is by demonstrating that the underlying objectives of the development standard are met despite the non-compliance. However, in *Wehbe v Pittwater Council* (2007) NSWLEC 827, Preston J identified to four (4) other ways to establish that compliance with a development standard is unreasonable or unnecessary as follows:

- (1) establish that the “*underlying objective or purpose is not relevant to the development*” and consequently compliance is unnecessary;

Comment: The purpose of the development standard (height limit) is relevant to the development in this instance.

- (2) establish that the “*underlying objective or purpose would be defeated or thwarted if compliance was required*”, and therefore compliance is unreasonable;

Comment: This is not applicable as the objectives of the Development Standard remain relevant to the proposal.

- (3) establish that the “*development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard*”, therefore compliance is both unreasonable and unnecessary; or

Comment: This is not applicable.

- (4) establish that “*the zoning of particular land’ was ‘unreasonable or inappropriate’ so that ‘a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land’*”, and therefore compliance with the standard is unreasonable and unnecessary.

Comment: This is not applicable.

In this instance it is considered that the best way to demonstrate compliance is both unreasonable and unnecessary is because the underlying objectives of the development standard (Clause 4.3) are achieved.

The objectives of Clause 4.3 are to;

- i. *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
- ii. *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- iii. *to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.*

The proposal is not inconsistent with the above objectives for the following reasons:

1. The submitted urban design assessment report verifies that the building proposed is compatible with the height bulk and scale of the existing and desired future of the locality. The information provided with the development application verifies that;

- The arrangement of the development on the site, occupying the full block width, together with the site orientation, ensures that no overshadowing, significant view loss, or other amenity impacts arise out of the proposed height exceedance. In addition, the absence of nearby development on Kalendar Street at a comparable height, together with its generous street width, means that the additional height will be imperceptible to most people using Kalendar Street (where the exceedance is at its highest).
- The proposed development addresses this emerging neighbourhood character and desired future character by:
 - Providing a greater number of dwellings in order to address housing growth and in recognition of the site's location west of the Princes Highway and approximately 800m south of the CBD within the existing urban area providing access to a wide range of services, community facilities and shopping
 - Responding to the site's location at the edge of the identified urban consolidation areas (particularly Nowra CBD South) and at one of the area's more significant intersections by accentuating this significant corner with a larger and appropriately scaled development in keeping with the scale of development anticipated by the planning controls and by recent planning proposals lodged with Council.
 - Providing larger building form reflecting the likely future increasing urban character of the area and helping include a greater diversity of housing types and housing choice in Nowra.

One of the most significant aspects of the proposed development's fit with its context, and its desired future character arises out of the consolidation of sites so that the development occupies the entire width of the block between Kinghorne and Gould Avenue. This allows for scale relationships and appropriate transitions to lower intensity uses to be effectively managed across the interface of the public streets. These provide a highly effective buffer between different development types, and the result is considered to be a high quality interface.

2. Further to the above, it is noted that the Shoalhaven Council commissioned the preparation of an 'urban design and SEPP 65 review report' prepared by Kennedy Associates Architects in response to the proposal and to assist with its assessment of the same. The report is dated February 2018. With respect to context and neighbourhood character the report states:

"In our opinion, the proposed development responds appropriately to both its current and future context and neighbourhood character.

In particular it:

- provides additional housing, of differing sizes, to fulfil a need identified by several strategic plans
- provides the above in close proximity to Nowra CBD and the employment, health and education opportunities it presents
- is of an appropriate bulk, scale and design to provide adequate transition between neighbouring developments and zones, both now and in the future (see principle 2 below)

- *is of a high quality, visually appealing contemporary design, which will set a benchmark for new development in the area"*

3. The additional height to select portions of the building within site will not result in any additional density. Therefore, the height variation is not attributed to any additional density on the site but rather a direct response to the specific topography and to achieve a better outcome for end users of the development – that is a building with a logical arrangement and finished level at the ground floor. To explain this point further, it would have been possible to arrange the same number of apartments within the development in a different way, or, excavate a deeper basement towards the eastern end of the site to ensure compliance with the 11m height limit. This however would have created more problems than it solved as:

- With the basement being deeper this would have led to increased excavation, likely uneven basement floors and longer more intrusive vehicle access ramps – all of which would have resulted in a loss of car parking.
- Uneven floor levels between buildings would create issues and complications with respect to producing a logical and user-friendly ground floor and communal area – particularly with respect to disabled access and considering movement requirements for families with young children, aged, and older persons.
- It would result in the building having an inconsistent built form with no clear benefit.

4. Photomontages have been prepared and submitted with the development application. The photomontages illustrate how the new building will sit within the street and the extent to which it enhances the built environment.
5. The building will not obstruct any important views. Privacy impacts associated with the development have been managed through ensuring compliance with SEPP 65 and the associated ADG. Further to this, the development will not overshadow any adjoining development.
6. Overshadowing studies have been undertaken the results of which have been depicted on shadow diagrams which form part of the architectural plan set. The shadow diagrams demonstrate that the proposal is acceptable with respect to how it impacts on the adjoining residential properties. The diagrams demonstrate that the proposal does not unduly impact on solar access to adjoining properties.
7. The proposal will have no adverse impacts on any heritage items.

For these reasons it is considered that the proposal meets the objectives of Clause 4.3 of the SLEP 2014.

There are Sufficient Environmental Planning Grounds

The Environmental Planning grounds in favour of the variation are as follows:

- a. Careful revision of the submitted plans and diagrams attached to this submission will reveal that the extent of the encroachment is reasonable and limited to only a small portion of the building near Gould Ave.
- b. The physical form of the building is well articulated and a variety of building materials are proposed to be used in construction. The proposal will enhance the streetscape qualities of the area despite the encroachment made to the 11m height limit.
- c. The structure will not be visually prominent from any important public places. The height of the structure will be compatible with the existing built environment.
- d. The origins of the 11m height limit are such that it is a default height limit applied to sites across the City of the Shoalhaven which have no allocated height limit on the SLEP 2014 height of buildings Map. The 11m height limit is therefore not in place for this site as a result of any area specific urban design studies or assessments undertaken by the Council. In this regard, there are no documented urban design or planning reasons for the strict imposition of an 11m height limit for the subject land.
- e. Considering d) above, Urbanac (urban design experts) were engaged to provide advice to the design team and prepare an urban design report to assess the appropriateness of the proposal and the potential for the building to be granted consent despite the encroachment to the applicable 11m height limit. The Report prepared by Urbanac supports the proposed height of the new building in urban design terms for reasons including:
 - It allows the building to maintain a consistent built form, with accessible internal circulation (strict compliance would result in a stepped building interior circulation with associated equitable accessibility issues for no clear benefit)
 - The scale of the building has been well managed through the deep articulation of the building frontages on the east and west elevations and the proposed perimeter landscape design
 - There are no overshadowing, or significant view loss or other amenity impacts arising out of the proposed height exceedance
 - The Kalandar Street environment has no nearby buildings at a comparable height, and a generous street width, which means that the additional height will be imperceptible to most people using Kalandar Street.
- f. One way of achieving compliance would be to have the offending building / part of the development cut into the site further. The benefits of this (i.e. achieving full compliance with the height limit) are outweighed by the disadvantages which would include increased excavation, a deeper basement, and uneven building floor levels. Further to this, no neighbouring properties would benefit in terms of noticeable reduced impacts with respect to overshadowing / solar access.

- g. The structure will not be visually prominent from any important public places. The height of the structure will be compatible with the existing built environment.
- h. The extent to which the building is expected to overshadow adjoining properties as a result of the encroachment is minimal. Detailed shadow diagrams have been submitted in this regard which show the building does not impact on adjoining dwellings in terms of overshadowing.
- i. The site of the development adjoins only a motel building which is of commercial scale at the northern boundary of the development site. All other property boundaries are road / street frontage boundaries. The development therefore does not immediately adjoin any low density residential development and roads separate the site from nearby residential areas. Kinghorne St is characterised by commercial development and the opposite side of Kalendar St is undeveloped land and a cemetery. The point to be made here is that the site is well separated from low density residential development and as such, ordinary sensitivities to increased building heights in a low density residential context do not impact as significantly on the redevelopment of the subject land.
- j. Land in the immediate locality has recently been the subject of a Planning Proposal to, in part, increase the height of buildings provisions to 14m. The supporting material for this proposal included a development application for the construction of a 4 storey residential apartment building. This land is located on the corner of Albatross Road and Kinghorne St, diagonally opposite the site.
- k. The proposal if approved will not set an undesirable precedence. Further it is assessed that the Council ought to be satisfied that the proposal is within the public interest because it has been demonstrated that it is consistent with the objectives of Clause 4.3 and the objectives of the R3 zone.
- l. The proposal if approved, will not result in any inconsistencies with other environmental planning instruments or the objectives of the R3 zone as outlined within the SLEP 2014.
- m. The proposal remains consistent with the objectives of Clause 4.3 as outlined above;

The proposal if approved will not set an undesirable precedence for reasons outlined above.

Public Interest

When a proposal does not comply with a development standard the consent authority must be satisfied that, despite the non-compliance, the proposal will be in the public interest. The way in which it is considered appropriate to demonstrate this is to prove consistency with the objectives of the development

standard and the objectives of the applicable land use zone.

Objectives of the development standard

In relation to the objectives of the development standard, it has been demonstrated earlier in this statement that the proposal is consistent with these.

Objectives of the zone

Pursuant to the provisions of the SLEP 2014, the land is zoned R3 – Medium Density. The objectives of this zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide opportunities for development for the purposes of tourist and visitor accommodation where this does not conflict with the residential environment.*

The proposal is consistent with these objectives for the following reasons:

- 1) The proposal is for the construction of a 4 storey residential apartment building which is considered to be 'medium' density development. The proposal provides for increased housing choice and diversity in addition to providing affordable housing. There is well documented local demand for more affordable housing and housing choice.
- 2) The proposal provides for a variety of housing types.

Other Considerations

In deciding whether or not to grant concurrence to a proposal that contravenes a development standard, the Director-General of Planning is to consider whether the contravention of the particular development standard raises any matters of State or regional planning significance. Further to this, the public benefit of maintaining the development standard.

State and Regional Planning Matters

The contravention of the 11m height limit as proposed does not trigger any State or Regional planning matters. The proposal is consistent with all relevant State Environmental Planning Policies and regional strategies.

Public Benefit

It is considered that, having regard to the circumstances of the case, there is no public benefit to be gained by insisting upon strict compliance with the 11m height limit. The extent of the variation when the specific circumstances of the case are considered is reasonable and this statement provides sound justification for the approval of the exceedance to the height limit.

Concluding Remarks

The variation to the 11m height limit has been carefully reviewed with proper regard to clause 4.6 of SLEP 2014.

Accordingly, it is considered that the proposal will remain consistent with the objectives of the development standard (Clause 4.3) and the objectives of the R3 zone.

Strict compliance with the 11m height limit is considered to be unreasonable and unnecessary in this instance. The underlying objectives of the development standard will be achieved by the development proposal despite the exceedance of the 11m height limit. Further to this, a series of environmental planning grounds to support the variation have been outlined. The proposal is not inconsistent with State or Regional planning matters and the public interest is being maintained due to the minor nature of the exceedance which is outweighed due to the public benefits of the proposal proceeding including those associated with urban consolidation.

For the reasons outlined in this statement, the variation is recommended for support.

Lee Carmichael – PDC Planners

April 2018

Amended 1st April 2019.