

SUTHERLAND & ASSOCIATES PLANNING

**REQUEST TO VARY HEIGHT OF BUILDINGS
DEVELOPMENT STANDARD**

Sutherland & Associates Planning Pty Ltd

REQUEST FOR AN EXCEPTION TO THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 4.3 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006. The request relates to an application for the following development at 60 Cudgegong Road and 99 and 107 Rouse Roads, Rouse Hill:

- construction of a part 6, part 7 and part 8 storey residential flat development (Building D1 and Building D2) containing 215 apartments above three levels of car park containing 299 car parking spaces; and
- construction of an extension of both Roland Street and Torrelli Street along the boundaries of the site.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 provides that development consent may be granted for development even though the development would contravene a development standard imposed by Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

Clause 4.6 requires a qualitative merit assessment based on evaluative questions that are specific to each particular development application, and which must be assessed against the context of that particular site. It advocates an entirely performance-based approach to the assessment of each application, based upon the “the circumstances of the case”, and whether compliance is subjectively considered by the consent authority to be “unreasonable or unnecessary” in the particular circumstances.

Clause 4.6 does not provide any quantitative or numerical limitation to cap the extent of non-compliance that may be approved. This conclusion has been confirmed by the Courts on a number of occasions such as the Court upheld decision of North Sydney Council to approve a building where the applicable FSR control was 3.5:1 and the approved FSR was 15:1 and the applicable height control was five storeys whereas the approved height was 17 storeys: *Legal and General Life v North Sydney MC*. (1989) 68 LGRA 192. Similarly, in another matter the Court approved an FSR of 5:1 on a site where the allowable FSR was 1:1: *Hosking Munro Pty Limited v City of Sydney Council* [2008] NSWLEC 1485.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows:
 - (a) to establish the maximum height of buildings on land within the Area 20 Precinct,
 - (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,
- (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.

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The maximum height shown for the land on the Map for the site to which the proposed development relates is 16 metres.

Extent of Variation to the Development Standard

A comparison of the proposed height against the development standard applicable to the site and approved height under the Stage 1 DA is illustrated below:

Element	Stage 1 DA approved height	Proposed Height	Variation to 16m control
Building D1	31m	22.8m – 29.0m – parapet 29.8m - top of plant	+13.8m (86.25% over)
Building D2	31m	22.8m - 28.7m – parapet 29.2m – lift overrun	+13.2m (82.5% over)

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has recently required additional ways of establishing that compliance is unreasonable or unnecessary

beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

The specific objectives of the building height development standard, as specified in clause 4.3 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to establish the maximum height of buildings on land within the Area 20 Precinct,

The approach towards height for the overall concept plan site involves a large proportion of the development being significantly under the height control including the terraces and the community title park. The areas of the development that are under the height control are offset by other buildings towards the southern part of the site which are above the height control, including the residential flat development now proposed. The proposed alternative approach to height provides a more specific and considered response to the distribution of scale across the site, in preference to a homogenous 5 storeys, which allows for a more integrated solution having regard to the desired distribution of height within Area 20.

(b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,

The distribution of height across the overall site provides a gradual increase in scale from north to south and achieves an appropriate visual transition to the higher future buildings adjacent to the south-east and south-west. The Sunlight Analysis prepared by Turner Architects which accompanied the Stage 1 DA illustrates the relationship of the residential flat development within the concept plan site and also the integration of the built form with the desired future character for the adjacent sites. The analysis also demonstrated that the proposed development only result in very minor shadow impacts to the southern adjacent site and will not prevent the achievement of complying solar performance for future residential development on the southern adjacent site. The Solar Analysis also illustrated that the proposed development will result in buildings and open space areas receiving solar access in accordance with minimum requirements of the Apartment Design Guide and Blacktown City Council Growth Centres Precinct Development Control Plan 2010.

c) to facilitate higher density development in and around commercial centres and major transport routes,

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite the individual allotments exceeding the permissible floor space ratio. The density proposed on the subject lot is consistent with the density approved under the Stage 1 Concept Plan.

The allowable gross floor area under the approved Stage 1 Concept Plan was 22,385 square metres for Stage 4, and 76,608.9 square metres for the overall site. The proposal provides a gross floor area

of 22,174 square metres and a floor space ratio of 2.11:1 which exceeds the floor space ratio development standard of 1.75:1 which applies to the site but is less than floor space the approved for the site under the Stage 1 Concept Plan.

Strict compliance with the floor space ratio control would result in an even lower density of development which is contrary to the desire to maximise the benefit of the state government investment in the North West Rail Link and the Cudgegong Road train station by facilitating high density housing within close proximity of the train station. The proposed development is consistent with the objective to deliver housing within close proximity to the train station.

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

The underlying objectives and purpose of the height controls are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed heights are compatible with the envisaged scale of development within the visual catchment of the site and will sit comfortably with the context of the site with no unreasonable impacts to adjacent properties or the public domain.

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

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the development the subject of the concept plan area, it successfully achieves these objectives and will achieve a significantly improved interface with the adjacent sites when compared to a compliant 5 storey height across the entire site. Strict compliance with the height control would lead to a less satisfactory outcome as it would require a redistribution of mass across the overall site, an increase in the terrace housing component from 2 to 5 storeys, and the replacement of the park and community facility with another residential flat building. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site and surrounding area.

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;

There is a history of variation to the height controls within the Area 20 Precinct to allow for encroachments where an appropriate scale is provided and height encroachments occur due to the fall of the site or are offset by parts of a development which are under the height control. This demonstrates that Council has adopted a sensible and site specific consideration in relation to height. Examples include:

- JRPP14-91 at 9 Terry Road, Rouse Hill which for a 4 storey development also with a minor variation to the 12m height control which was supported by Council staff and approved by the JRPP in December 2014.
- JRPP14-1593 at 828 Windsor Road, Rouse Hill for a 4 storey development also with a minor variation to the 12m height control which was supported by Council staff and approved by the JRPP in July 2015.

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.

The proposed zoning of the land is considered to be reasonable and appropriate.

The proposed variation to the building height development standard is reasonable and necessary in the circumstances of the case in that:

- The proposed variation to the height control is consistent with the approved Stage 1 Concept Plan which allowed for buildings above the 16 metre height control on the southern portion of the overall site, and the delivery of buildings which were well under the height control at the northern end of the site. The distribution of scale across the overall site increases from north to south to provide a transition to the higher density areas immediately adjacent to the forthcoming Cudgegong train station.
- The distribution of building heights across the overall site within the approved Stage 1 Concept Plan was considered critical to achieving a variety of housing typologies within the site and also allowed for the introduction of a significant 4,833 square metre community park within the centre of the site which would otherwise have needed to accommodate a building. The community park represents a particularly positive contribution and is a core element to the philosophy behind the development to deliver a community and not simply a collection of residential buildings.
- The proposed variation to the height control allows the approved floor area of 22,385 square metres to be accommodated within slimmer buildings with a high level of separation which provides improved environmental performance within the development, reduced impacts on surrounding properties, and a much higher level of visual permeability throughout the site and when combined with the variation in architectural language for the individual buildings, will provide a fine grain for the development which will create the feeling of living within an integrated neighbourhood.
- Any reduction in the height of the development to achieve a compliant building height would likely necessitate additional excavation for the basement car park and an associated lowering of the dwellings which would negatively impact on the relationship that is achieved between the future public domain and the ground floor plane of the building.
- The Solar Analysis prepared by Turner Architects illustrates that the proposed development will result in buildings and open space areas receiving solar access in accordance with minimum requirements of the Apartment Design Guide and Blacktown City Council Growth Centres Precinct Development Control Plan 2010.
- There are no unreasonable impacts in terms of overshadowing, views, visual and acoustic privacy to adjacent sites resulting from the proposed variation to the height control which would warrant strict compliance.
- The proposed variation to height will have no impact upon views from Rouse Hill House and Farm to the subject site because these views are completely obstructed by protected trees within Rouse Hill Regional Park. Even in the absence of these trees, due to the considerable distance of the subject site and Rouse Hill House and Farm and the fact that a building height of 8.5 metres and 12 metres is permitted on sites to the north, and a building height of 26 metres is permitted on sites to the south and west of the subject site, it would not be possible to

distinguish any difference in scale between that provided on the subject site and the northern adjacent site.

- The proposed variation allows for the most efficient and economic use of the land.
- Strict compliance of the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Development v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

As the proposal is consistent with the objectives of the height of buildings control, strict compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The proposed distribution of built form and massing across the overall concept plan site is the result of a considered analysis of the future desired context of the site and the desire to deliver a positive urban design outcome.

The cornerstone of this approach to the site is to provide a diversity of housing product across the concept plan area and a collection of various residential building typologies and scale in preference to a strictly complying homogenous 5 storey building height across the entire site.

It is important to note that the approved FSR for the overall site of 1.27:1 is not only below the 1.75:1 control which applies to the site, but is also less than an FSR of 1.61:1 which could be achieved with a compliant 5 storey development across the entire site.

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite the individual allotments exceeding the permissible floor space ratio. The density proposed on the subject lot is consistent with the density approved under the Stage 1 Concept Plan.

The approved concept plan adopts a 2 storey scale along the northern end of the site adjacent to Rouse Road. Immediately to the south of the 2 storey terrace houses is a central community park and 1 storey community building which creates a central green focal point for the entire development which is framed by the surrounding residential flat buildings. The approved envelopes for the residential flat buildings are 6 storeys at the northern end of the site surrounding the community park before increasing in height to 7 and 8 storeys towards the southern and western boundaries.

The residential flat development now proposed is consistent with the scale of the development approved under the concept plan, and will present 6 storeys to the community park located on the northern side of the development and increase in height away from the park toward the southern boundary where a maximum of 8 storeys is proposed. The massing of the residential flat development is significantly modulated being broken into two distinct built forms that are visually disconnected by an area of communal open space.

The Solar Analysis prepared by Turner Architects which accompanied the Stage 1 DA demonstrated that the proposed development will result in buildings and open space areas receiving solar access in accordance with minimum requirements of the Apartment Design Guide and Blacktown City Council Growth Centres Precinct Development Control Plan 2010.

The impact of the height variation upon views from the heritage listed Rouse Hill House have also been examined and the Heritage Impact Statement prepared by Urbis confirms that the proposed variation to height will have no impact upon views from Rouse Hill House to the subject site because these views are completely obstructed by protected trees within Rouse Hill Regional Park. Even in the absence of these trees, due to the considerable distance of the subject site and Rouse Hill House and the fact that 8 storeys is permitted in the immediately southern site, it would not be possible to distinguish any difference in scale between that provided on the subject site and the southern adjacent site.

The approach to the overall site with a variation of housing typology and scale serves to generate a high level of visual interest with modulation to the skyline and meets the various housing needs of the community with housing to suit families through to single occupants. The community focus of the overall development is also emphasised by the delivery of the Stage 2 community title park which will serve as a focal point within the centre of the site and emphasise the desire to attract families to the development and to deliver a properly integrated community.

The introduction of significant modulation in scale of the buildings in response to their location within the site achieves optimal environmental performance, and when combined with the variation in architectural language for the individual buildings, will provide a fine grain for the development which will create the feeling of living within an integrated neighbourhood. Accordingly, the proposed variation to the building height control will facilitate a better urban form outcome in comparison to a strictly complying scheme comprising a homogenous collection of 5 storey residential flat buildings.

Strict compliance with the development standard could be achieved by proposing a homogenous 5 storey development for apartments across the site with no community title park. However, this approach is less desirable because it does not facilitate a variety of housing typology across the site, it reduces recreational open space, and it does not generate visual interest within the site or successful integration with the forthcoming scale on surrounding properties.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the 16 metre height control as the proposal will achieve a better integration with the surrounding sites, a higher level of residential amenity within the site and without any adverse impact to adjacent sites.

[Clause 4.6\(4\)\(a\)\(i\) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6\(3\)](#)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 for consideration of whether

compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii)

Objective of the Development Standard

The specific objectives of the building height development standard, as specified in clause 4.3 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to establish the maximum height of buildings on land within the Area 20 Precinct,

The approach towards height for the overall concept plan site involves a large proportion of the development being significantly under the height control including the terraces and the community title park. The areas of the development that are under the height control are offset by other buildings towards the southern part of the site which are above the height control, including the residential flat development now proposed. The proposed alternative approach to height provides a more specific and considered response to the distribution of scale across the site, in preference to a homogenous 5 storeys, which allows for a more integrated solution having regard to the desired distribution of height within Area 20.

(b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,

The distribution of height across the overall site provides a gradual increase in scale from north to south and achieves an appropriate visual transition to the higher future buildings adjacent to the south-east and south-west. The Sunlight Analysis prepared by Turner Architects which accompanied the Stage 1 DA illustrates the relationship of the residential flat development within the concept plan site and also the integration of the built form with the desired future character for the adjacent sites. The analysis also demonstrated that the proposed development only result in very minor shadow impacts to the southern adjacent site and will not prevent the achievement of complying solar performance for future residential development on the southern adjacent site. The Solar Analysis also illustrated that the proposed development will result in buildings and open space areas receiving solar access in

accordance with minimum requirements of the Apartment Design Guide and Blacktown City Council Growth Centres Precinct Development Control Plan 2010.

c) to facilitate higher density development in and around commercial centres and major transport routes,

The approval of the Stage 1 Concept Plan recognised that the density proposed across the overall site was consistent with the density permitted pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 despite the individual allotments exceeding the permissible floor space ratio. The density proposed on the subject lot is consistent with the density approved under the Stage 1 Concept Plan.

The allowable gross floor area under the approved Stage 1 Concept Plan was 22,385 square metres for Stage 4, and 76,608.9 square metres for the overall site. The proposal provides a gross floor area of 22,174 square metres and a floor space ratio of 2.11:1 which exceeds the floor space ratio development standard of 1.75:1 which applies to the site but is less than floor space the approved for the site under the Stage 1 Concept Plan.

Strict compliance with the floor space ratio control would result in an even lower density of development which is contrary to the desire to maximise the benefit of the state government investment in the North West Rail Link and the Cudgegong Road train station by facilitating high density housing within close proximity of the train station. The proposed development is consistent with the objective to deliver housing within close proximity to the train station

Objective of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R3 Medium Density Residential zone which has the following objectives:

- 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 support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment

The proposed development provides for residential accommodation in the form of a residential flat development which will provide for the housing needs of the community within a medium density residential environment. A variety of housing types are provided within the development including adaptable housing that will meet the changing needs of the resident population. The overall development includes a comprehensive landscape scheme that will enhance the amenity and liveability for residents and visitors and support the well being of the community. For the reasons given the proposal is considered to be consistent with the objectives of the R3 Medium Density Residential zone.

Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

The architectural package prepared by Turner Architects which accompanies the subject application demonstrates a high quality outcome for the site which will result in the delivery of an integrated community of buildings within a landscaped setting which will contribute significantly to the amenity afforded to the future occupants and the wider community. This approach is only possible with a variation to the height control for the residential flat development component of the development on the subject site which is offset by the design of the townhouses and community title park that were approved under Stages 1 and 2 that are well below the height control.

The development application has therefore demonstrated that it is appropriate in this circumstance to provide flexibility in the application of the building height development standard because this will achieve a better outcome in this instance in accordance with objective 1(b).

Conclusion

The proposed variation to the height of buildings development standard contained within clause 4.3 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 is consistent with the approved height for the site under the Stage 1 DA and has been found to be both reasonable and necessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed in this circumstance.