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Urban & Environmental Design Partners

ACN. No: 075 903 669 ABN: 80 075 903 669

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31st January 2018

Jonathan Cleary
Senor Development Assessment Officer
Development Assessment Services
City of Parramatta
P.O. Box 32
PARRAMATTA 2124

Dear Mr Cleary,

**DA#/529/2017 – Proposed Residential Flat Building
#5-9 Smith Street, Parramatta
RESPONSE TO ISSUES – CLAUSE 4.6 VARIATION TO BUILDING HEIGHT**

I refer to the above application and in particular the variation sought to the building height standard under Clause 4.3 of the Hornsby Local Environmental Plan 2013. The following additional information is provided in support of the variation:-

Height of Buildings Development Standard

Clause 4.3 – Height of Buildings deals with issues relating to building height and the impact on built form and amenity. The objectives of this clause is to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

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 subject lands are designated P and currently have a maximum height of 17.5 metres under the Hornsby Local Environmental Plan 2013 as shown in **Figure 1**.

The height of the proposed residential flat building is shown on the attached amended **Architectural Plans** (Issue E) prepared by **Giles Tribe Architects** and in particular Sheet A503 Issue E which shows the building height plane encroachments. The proposed residential building does not fully comply with the provisions under Clause 4.3 with a section of the roof element encroaching outside the 17.5 metre height plane together with the proposed communal rooftop terrace as shown **Figure 2**.

The total area of encroachment is 236.45m². With a total roof footprint of 1,293.20m², the percentage of encroachment is 18.28%. The variation is considered to be only minor with the communal rooftop terrace encroachment arising from discussions during the DEAP process. It should be noted that the majority of the encroachment is due to the addition of the communal open space area, lift overrun and service areas.

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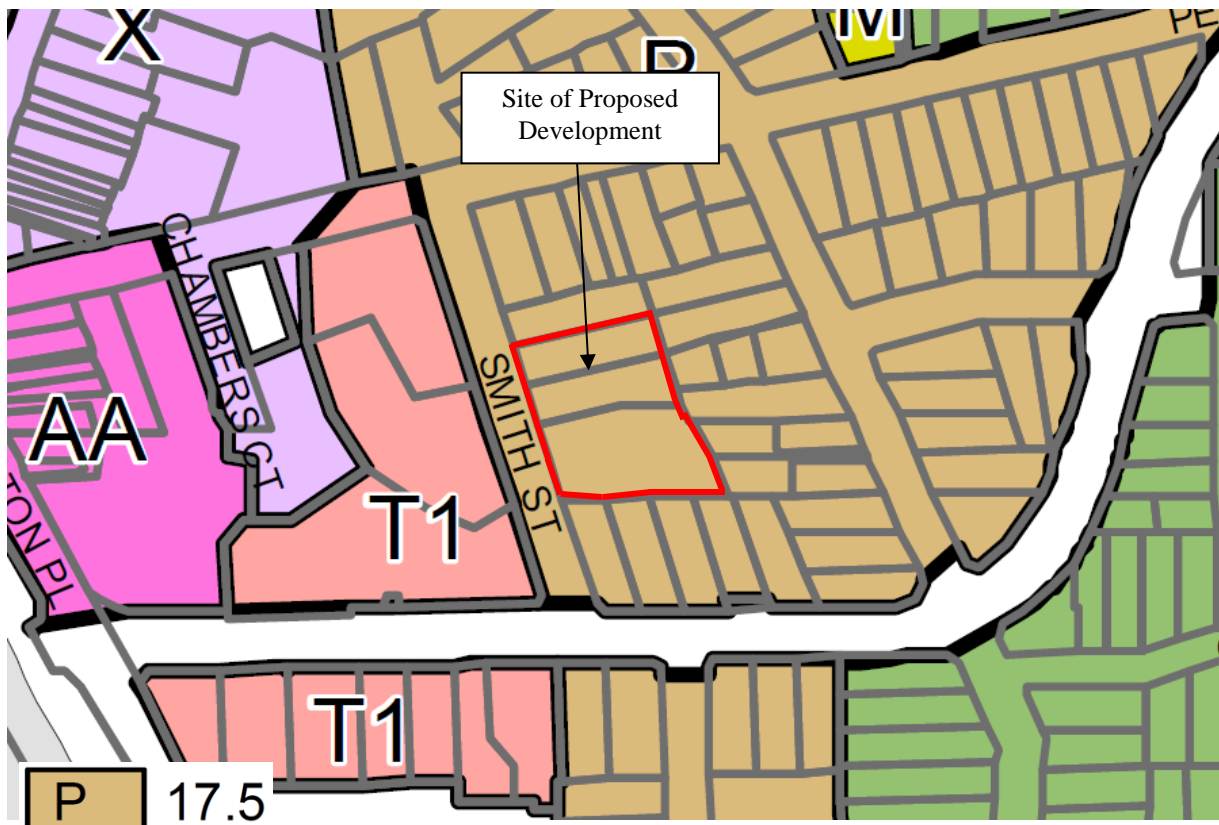


Figure 1

Extract from the Hornsby Local Environmental Plan 2013 HOB_011
(courtesy of the former Hornsby Shire Council)

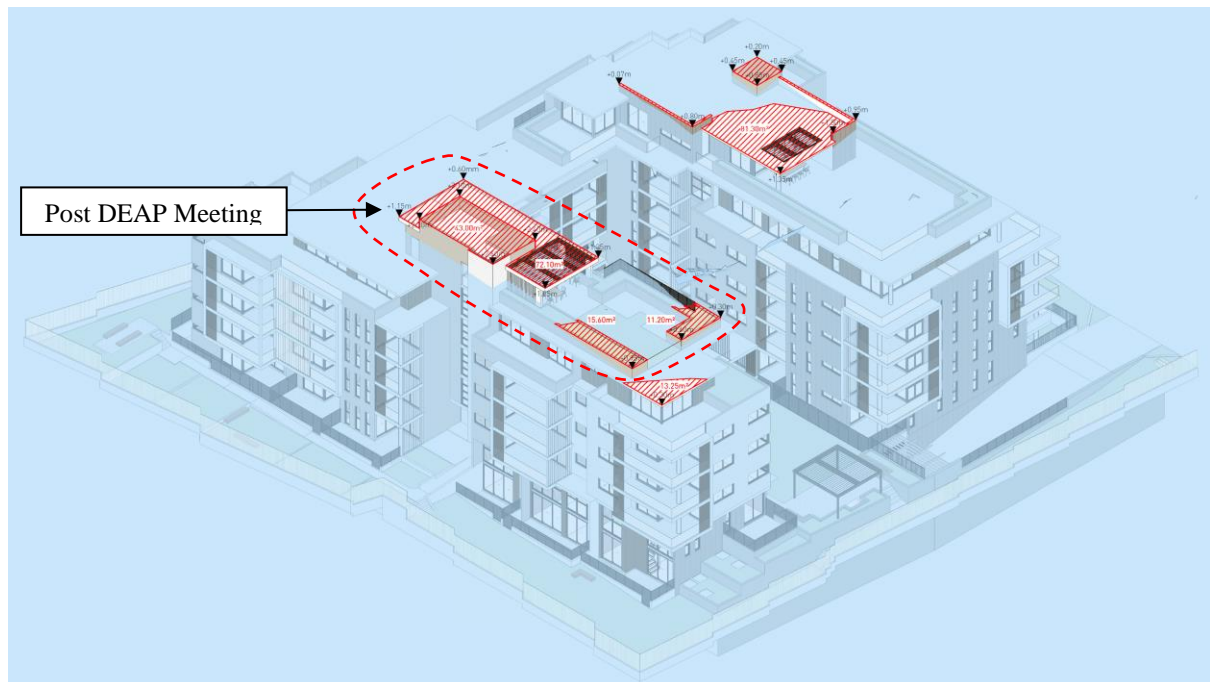


Figure 2

Extract from architectural plans showing 3D representation of the 17.5m height plane

The following assessment is provided in relation to the variation to the 17.5 metre height limit under Clause 4.6 – Exemption to Development Standard under the Hornsby Local Environmental Plan 2013.

Introduction

Reference is made to the requirement for a variation request under Clause 4.6 – Exemption to Development Standard under the Hornsby Local Environmental Plan 2013 in relation to the 17.5 metre height standard and the departure from this standard where a portion of the roof elements protrude above the height plane. The departure from the standard is considered to be only minor and will not adversely impact on the adjoining residence to the north or the south.

As required by this clause, a written request for an exception to the required maximum 17.5 metre height is now made. It is noted that in order for Council to support the variation to the development standard pursuant to Clause 4.6, the provisions of the clause and specifically sub-clause (4) need to be met.

Clause 4.6

Clause 4.6 – Exceptions to development standards under the Hornsby Local Environmental Plan 2013 states:-

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*

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- (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.*

Development Standard to be Varied

It is proposed to vary the standard set out under Clause 4.3 – Height of Buildings of the Hornsby Local Environmental Plan 2013 which deals with those issues relating to the maximum permissible building height.

Clause 4.3 states:-

4.3 Height of buildings

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

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*
- (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 subject lands are designated P and currently have a maximum height of 17.5 metres under the Hornsby Local Environmental Plan 2013 as shown in **Figure 1**.

Extent of the Variation to the Development Standard

The proposal seeks a variation to the building height of:-

- (i) between 20mm and 1500mm in the south west corner of the building (roof of Unit 501);
- (ii) up to 30mm in the north east corner (roof of Unit 407); and
- (iii) up to 2400mm above communal roof terrace (see **Figure 3**)

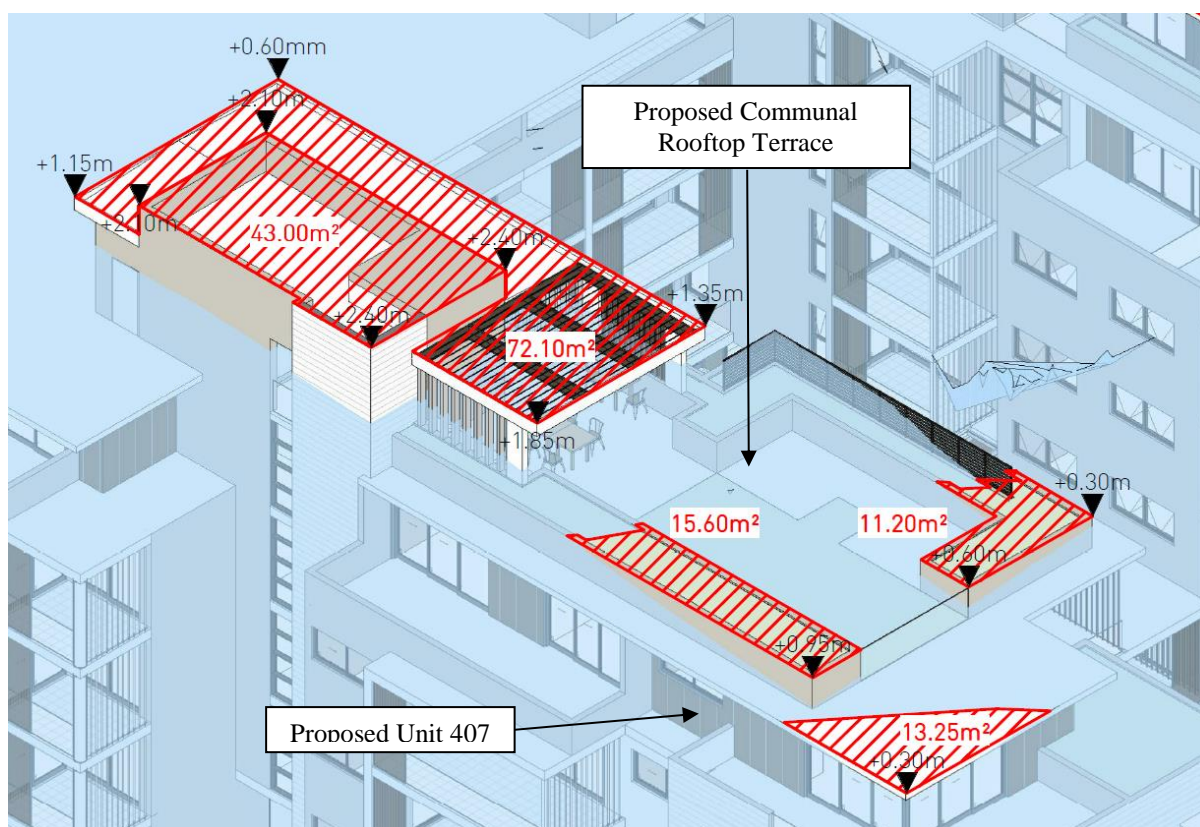


Figure 3
Extract from Architectural Plans (Sheet A503 Issue E)

In the case of the projection on the south west corner of the building, the variation is partly attributable to the projection of the lift overrun and partly to the Vergola roof over the private open space associated with Unit 501 protruding through the building height plane.

In the case of projection on the north east corner of the building, the variation is attributable to the roof protruding through the building height plane over that section of the unit used for the living and dining area.

In the case of the communal rooftop terrace, the variation arises from the agreement to provide additional communal open space on the rooftop to supplement the ground level areas. Sheet A107 Issue E of the amended architectural plans show the following:-

- (i) uncovered communal rooftop open space;
- (ii) covered area with Vergola to provide shade areas which contributes to the height encroachment;
- (iii) lift access which contributes to the height encroachment;
- (iv) stair access which contributes to the height encroachment;
- (v) accessible toilet which contributes to the height encroachment; and
- (vi) lobby which contributes to the height encroachment

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These encroachments are higher than the maximum permissible building height under the Hornsby Local Environmental Plan 2013. The extent of the variation to the height controls is shown in **Figure 2**.

Objectives of the Standard

The **objectives** of Clause 4.3 of the Hornsby Local Environmental Plan 2013 is to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

The subject site is currently zoned Zone R4 – *High Density Residential* under the Hornsby Local Environmental Plan 2013. The **objectives** of the zone are:-

- (i) to provide for the housing needs of the community within a high density residential environment;
- (ii) to provide a variety of housing types within a high density residential environment; and
- (iii) to enable other land uses that provide facilities or services to meet the day to day needs of residents

Assessment

Under the Hornsby Local Environmental Plan 2013, 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.

Subclause (2) of the Hornsby Local Environmental Plan 2013 states:-

“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”

This is to ensure that the height of buildings is compatible with that of adjoining development and the overall streetscape and to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

In this instance, the site falls away from the road to the north east by some 7 metres with the existing residences located down slope of Smith Street. The existing dwellings will be demolished and the new residential flat building constructed in a series of levels down slope. The bulk of the proposed structure will be hidden from street view by the building façade and the down slope contours. To the south and south east of the site are five (5) storey residential flat buildings under construction with further five (5) storey residential development occurring to the east of the site (see **Figure 3**).

It is considered that the design (with the small height variation) ensures that the building height is compatible with the adjoining building heights to the south and east. In fact, the proposed building represents a considerable improvement to the architectural quality of the former streetscape.

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Further, the height variation will not have any significant additional visual impact on the adjoining property to the south nor create any significant additional loss in privacy. The variation will enhance the private open space opportunities within the development with the provision of the communal rooftop terrace and supporting facilities.



③ View of 32 Essex Street under construction.

Figure 3

**Street View showing #32 Essex Street to the south east under construction
(image provided by Giles Tribe Architects)**

As previously highlighted under *Extent of the Variation to the Development Standard*, in the case of the projection on the south west corner of the building, the variation is partly attributable to the projection of the lift overrun and partly to the Vergola roof over the private open space associated with Unit 501 protruding through the building height plane.

In the case of projection on the north east corner of the building, the variation is attributable to the roof protruding through the building height plane over that section of the unit used for the living and dining area.

In the case of the communal rooftop terrace, the variation arises from the agreement to provide additional communal open space on the rooftop to supplement the ground level areas. Sheet A107 Issue E of the amended architectural plans show the following:-

- (i) uncovered communal rooftop open space;
- (ii) covered area with Vergola to provide shade areas which contributes to the height encroachment;

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- (iii) lift access which contributes to the height encroachment;
- (iv) stair access which contributes to the height encroachment;
- (v) accessible toilet which contributes to the height encroachment; and
- (vi) lobby which contributes to the height encroachment

The encroachment allows for a highly usable communal open space area that provide both cover and uncovered areas with accessible toilet facilities.

None of the above protrusions will be visible from the street and it is considered that the height variations achieve and are consistent with the objectives of the standard (see, for example *Moskovich v Waverley Council (2014) LEC No.10914 of 2014*). In that matter, the experts agreed that the height non-compliance would be limited to the lift over run and is acceptable as it would not be visible from the street or result in amenity impacts. In the subject development, the non-compliance extends to the adjacent Vergola (which provides shade and amenity) on Unit 501 and roof protrusions on Unit 407. Similar principles apply in the encroachments would not be visible from the street or result in amenity impacts.

Similarly, the proposal is compatible with the existing and emerging character of the locality with new apartment buildings of varying height, bulk and scale setting the new character context for the precinct. The minor encroachments to not detract from the emerging streetscape. The height of the building is modest, particularly within the context of Smith Street.

Consequently, a variation is sought to the Height of Buildings development standard under the provisions set out in Clause 4.6 – Exceptions to development standards of the Hornsby Local Environmental Plan 2013. The **objectives** of this clause are as follows:-

- (i) to provide an appropriate degree of flexibility in applying certain development standards to particular development; and
- (ii) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The architect for the project, **Giles Tribe Architects**, has designed the proposed residential flat development in such a manner as to:-

- (i) produce a high quality residential development that provides a high level of articulation and effective and efficient floor space;
- (ii) optimize the development outcomes for the site whilst being mindful of bulk and scale; and
- (iii) improve yields and development viability in line with both Council's and the public expectations for the precinct

The height variation is considered to be reasonable when considered within the context of the overall streetscape with its primary frontage to Smith Street (see **Figure 4**) and the intent of the Hornsby Local Environmental Plan 2013.



Figure 4
Building Mass Elevation
 (image provided by Giles Tribe Architects)

In relation to the *Underlying Objectives of the Standard of Clause 4.3 – Height of Buildings*, the proposed development and the variation to the Height of Buildings standard meets the underlying objectives by:-

- (i) ensuring the height of the proposed building is compatible with that of adjoining development under construction to the south and east and the overall streetscape;
- (ii) minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

In relation to Section 5(a)(i)(ii) – *Objects of the Environmental Planning & Assessment Act*, the variation to the development standard will not hinder the obtainment of the objectives. Under Section 5(a)(i)(ii), the objects of this Act are:-

(a) to encourage:

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, 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 variation to the Height of Buildings requirement will not hinder the proper management and development of the Epping residential catchment. The proposal will in fact improve the social and economic welfare of the local community and create a better environment by substantially improving the livability and amenity of the locality by improving the architectural standard of the Smith Street frontage and the provision of high quality residential and communal open space.

The proposal will improve the architectural standard of the locality and compliment other development in the precinct. Further, the variation to the Height of Buildings requirement will not hinder the promotion and co-ordination of the orderly and economic use and the development of the land. In fact, the proposal ensures the highest and best use of the subject site by formalizing the trend to higher quality residential flat buildings utilising the natural features of the land and activating the primary street frontage (ie: Smith Street).

(i) Clause 4.6(3)(a) – *Unreasonable and Unnecessary*

An objection under Clause 4.6 may be well founded and consistent with the aims of the policy in a variety of ways (see *Wehbe v Pittwater Council (2007) LEC No.10744 of 2006*). The most commonly invoked way is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. In this case, the objective of the building height standard is “*to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality*”.

In relation to the question as to whether compliance with the development standard unreasonable or unnecessary in the circumstances (Clause 4.6 Sub-clause (3)(a)), it is the applicants view that strict compliance with the Height of Buildings development standard is considered to be unreasonable in this particular case as the proposed minor variation:-

- (i) is sympathetic to the site constraints (ie: the slope of the land);
- (ii) enhances communal open space opportunities within the development that compliments the ground level open space areas;
- (iii) achieves the sites full development potential (ie: it is the highest and best use of the land); and
- (iv) does not place an unnecessary burden on public utilities and can be accommodated within the existing infrastructure capacity

It also proposes a high quality residential interface with the Smith Street frontage in line with the Hornsby Local Environmental Plan 2013. It will ensure a more viable development and higher standard of residential yield compared to that which would otherwise be provided should strict adherence to the LEP standard be applied. The proposal is an efficient use of the land which delivers social, economic and environmental benefits to the local community.

The variation will not adversely affect the amenity of the immediate locality or compromise the objectives of Clause 4.3 of the Hornsby Local Environmental Plan 2013 (HLEP 2013) or Section 5(a)(i)(ii) of the EP&A Act.

In relation to this clause, it is considered that the objection to the Height of Buildings standard is well founded and that based on the details provided above, strict adherence to the development standard would appear to be unreasonable and unnecessary in the circumstances of this development application. Therefore, Council’s favourable consideration of the application under the provisions of Clause 4.6(3)(a) is sought.

(ii) Clause 4.6(3)(b) – *Environmental Planning Grounds*

With regards to the question as to whether there are sufficient environmental planning grounds to justify contravening the development standard, it should be noted that the subject site has particular circumstances in relation to the gradient of the site and street low point which has triggered the specific design response. The site has a difference in level of some seven (7) metres from south west to north east.

In *Randwick City Council v Micaul Holdings Pty Limited (2016) LEC No. 10170 of 2015*, the Court was noted that Clause 4.6 imposes four tests, the second of which is that there are sufficient environmental planning grounds to justify contravening the development standard. In the *Micaul* decision, the site was unusual in terms of its location at the low point of the locality which result in departures from the building height standard. The Clause 4.6 variation was supported by the Court. Similarly, the subject site is located in a low point where crossfall and localized drainage impacts have dictated to some extent the building form and building height (including to minor height encroachments).

By accommodating the height variation results in a more efficient and orderly use of the land which overcomes the gradient issues and impacts of the site lowpoint and will produce a better outcome than would otherwise be the case if strict adherence to the standard were observed. In relation to this clause, it is considered that the objection to the Height of Buildings standard is well founded.

(iii) Clause 4.6(4)(a)(ii) – Public Interest

In relation to the question as to whether the proposed development would be in the public interest, it is considered that the proposal is consistent with both the objectives of the standard and for development within the zone.

In relation to Clause 4.3 – Height of Buildings of the Hornsby Local Environmental Plan 2013, this standard deals with those issues relating to the maximum permissible building height. The **objectives** of this clause are to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

In relation to the *Underlying Objectives of the Standard of Clause 4.3 – Height of Buildings*, the proposed development and the variation to the Height of Buildings standard meets the underlying objectives by:-

- (i) ensuring the height of the proposed building is compatible with that of adjoining development to the south, east and the overall streetscape;
- (ii) minimising the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

With regard to the objectives for development within the zone, the subject site is currently zoned Zone R4 – *High Density Residential* under the Hornsby Local Environmental Plan 2013.

The **objectives** of the zone are:-

- (i) to provide for the housing needs of the community within a high density residential environment;
- (ii) to provide a variety of housing types within a high density residential environment; and
- (iii) to enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposed development **meets the objectives** of the zone in that:-

- (i) it provides for the housing needs of the community within a high density residential environment that is currently in transition; and
- (ii) it provides a variety of housing types within a high density residential environment

Therefore, it is considered that the proposal satisfies the public interest test as it is consistent with both the objectives of the standard and for development within the zone. In relation to this clause, it is considered that the objection to the Height of Buildings standard is well founded.

Conclusion


Based on the above assessment, the attached architectural plans and the submitted supporting documents, it is considered that the proposed residential flat development will deliver a better planning outcome than one that strictly complies with the current 17.5 metre height limit for the following reasons:-

- (i) strict compliance would not be responsive to the intent of the Hornsby Local Environmental Plan 2013;
- (ii) strict compliance would not be responsive to the intent of the Hornsby Development Control Plan;
- (iii) strict compliance would restrict building height and subsequent floor space outcomes to the extent that the alternative would be an underutilization of the site in an area within the Epping residential precinct that seeks residential development outcomes; and
- (iv) strict compliance will reduce the amenity available to residents

It is considered that the objection to the Height of Buildings standard is well founded and that based on the details provided above, strict adherence to the development standard would appear to be unreasonable and unnecessary in the circumstances of this development application. Therefore, Council's favourable consideration of the application under the provisions of Clause 4.6 is sought.

I trust the above information and attached documents will assist in your early assessment of the development application and satisfactorily addresses Council's issues.

Yours faithfully,



Matthew Wales
Director
Wales & Associates Pty Limited