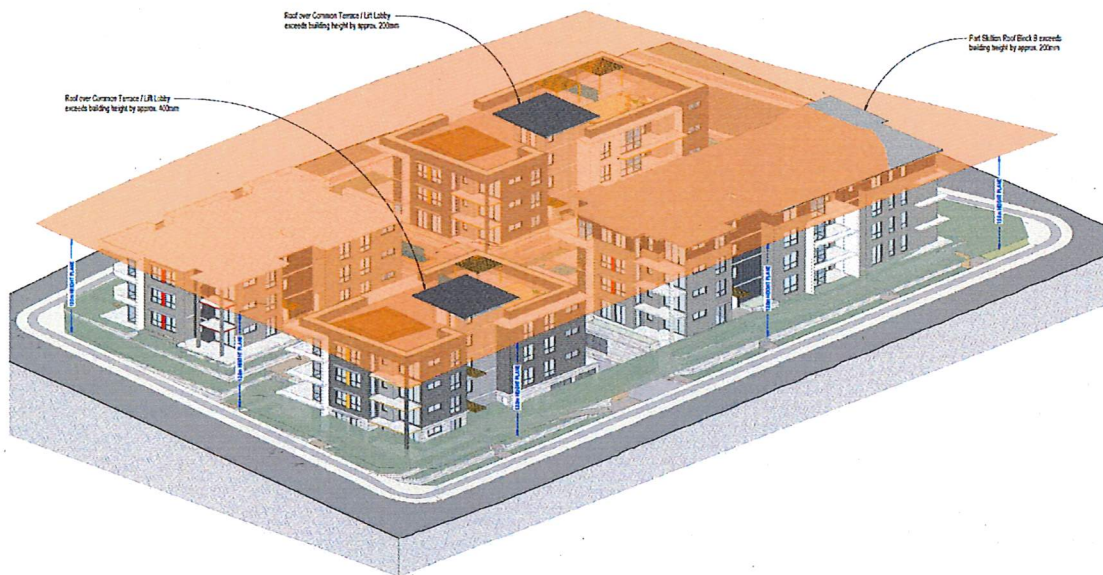




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Annexure 1: Clause 4.6 Variation: Building Height

The development concept results in the height of the proposal exceeding the permissible height as shown on the LEP height map, noting that the proposal is predominantly compliant with the maximum building height. It is noted that the proposal is predominantly compliant with the maximum building height however a small portion of the upper level, skylights, roof structure, associated with the various blocks exceeds the maximum building height requirement as illustrated by the 3D height plane below.



Height Departures

As shown on the sections above the proposed development comprises a series of 3-4 storey residential flat buildings that predominantly complies with the 12m maximum building height control.

As shown on the section above the majority of the development is below the height limit, with the following exceptions

- Block C: A small portion of the corner of Block C exceeds the building height to the upper level roof form by 200mm which equates to 1.6%. The departure is a function of the topography of the site.
- Block A & Block D: A small portion of the roof element over the common open space area of Block A and Block D exceeds by 200mm-400mm (1.6%-3.2%). The departure is a function of providing the common open space areas and achieving suitable amenity to the upper most level of the development through the provision of common open space as well as a roof over the lift/fire stair, and toilet and bbq facility. This results in an improved planning outcome compared to a scheme that reduces the COS area to the ground floor only (which would still comply with the 15% DCP control).



Relevant Case Law

There are 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*, as well as *Zhang v Council of the City of Ryde*.

In addition, a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

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*.
- The proposal is required to be in ‘the public interest’.



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In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control' and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating consistency with the R3 zoning;
- Demonstrating there are sufficient environmental planning grounds to vary the standard; and
- Satisfying the relevant provisions of Clause 4.6.



Clause 4.6 Variation

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 four (4) separate buildings 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 greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings. Further the proposal provides modulated building heights- being 2 buildings of 3 storeys (well below the 12m) and 2 buildings of 4 storeys (primarily below 12m). Lastly the variation directly enables the provision of greater COS in the form of the rooftop COS area and the provision of amenities to the roof area including a toilet and BBQ.

Strict compliance to the height through flattening of the buildings to achieve the 12m control would mean larger floorplates that reduces the design merit by removing quality landscaping and common open space with a northern aspect and would provide a homogenous building height with limited design merit. This would be similar to the original DA scheme submitted. Further this would reduce amenity through a reduction in the COS of the development to the ground level areas- that would comply with the DCP 15% but would not provide a diversity of COS spaces.

Response to Topography: It is also noted that the stepped building form is a direct design response to the cross-fall experienced by the site. Practically it is necessary to have a suitable balance between achieving suitable amenity for ground floor units (avoiding excessive cut) and level floor plates for accessibility. This means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall- as is the case with the current proposal.

Consideration of Clause 4.6

Clause 4.6 of the SEPP 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:

- (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:*



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- (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)- Compliance Unreasonable and Unnecessary

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 satisfied.

Underlying Objectives are Satisfied

In *Wehbe v Pittwater* it was set out that compliance can be considered unreasonable or unnecessary where:

- (i) The objectives of the standard are achieved notwithstanding non-compliance with the standard*

It is considered that this approach can be followed in this instance.

The objectives of the building height development standard are stated as:

- (a) to establish the maximum height of buildings for development on land within the Alex Avenue and Riverstone Precincts,*
- (b) to protect the amenity of adjoining development and land in terms of solar access to buildings and open space,*



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(c) to facilitate higher density development in and around commercial centres and major transport routes while minimising impacts on adjacent residential, commercial and open space areas,

(d) to provide for a range of building heights in appropriate locations that provide a high quality urban form.

The proposal, despite the numerical non-compliance identified, remains consistent with the objectives based on the following:

- The key requirement for development in the R3 zone is the desired future character of the locality. The building is compatible with the height, bulk and scale of the desired future character when having regard to the forms of development and the approved building heights of those developments that are comparable in numerical terms to this proposal and also adopt 4 storey forms and rooftop common areas. Therefore, the establishment of the maximum height of 12m is informed by these other developments.
- The proposal, and specifically the additional building height, has been carefully designed to ensure that privacy impacts are minimised, and the proposal will not obstruct existing view corridors noting that no significant view corridors are identified for the site.
- The proposal, and specifically the additional building height, does not result in any discernible increased shadow impact given the orientation of the site and setbacks that fully comply with the requirements of the Apartment Design Guide and the recessed areas of the upper most levels and the non-compliance to the height relative to the levels below mean that the shadow cast is reduced. The centrally located rooftop elements are designed to be pulled away from the building edges to avoid generating additional overshadowing impacts.
- The proposal is in close proximity to the future Cudgegong Railway Station and Local Centre and the extent of non-compliance represents an appropriate higher density on the site noting compliance to the minimum prescribed density control under the SEPP (Sydney Region Growth Centres) 2006. This aligns with the desire to facilitate higher density development in and around commercial centres (nearby business zoned land to the north) and transport routes (main roads and the rail corridor that is nearing completion).
- The proposal, despite the non-compliance, minimises impacts on adjacent residential, commercial and open space areas when having regard to the sensitive design of the development and the locations of the non-compliance which are recessed from surrounding development.
- The site is large and the impacts arising from overshadowing, visual impact and loss of privacy are manageable within the site, and have no significant impact on adjoining properties or open space areas given that the development is contained within its own street-block meaning shadows cast by the proposal fall on the street with the extent of overshadowing is not unreasonable for density envisaged of this scale within the Riverstone East precinct;



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- The proposal provides an appropriate building form that is consistent with the desired future character of the locality and is reflective of the objectives for the zone and locality generally- noting the uneven topography is the key driver of the height variation rather than a desired to achieve greater yield on the site;
- The extent of non-compliance could be reduced via the elimination of roof top common areas however this reduces amenity for occupants with no discernible benefit in terms of streetscape presentation- i.e. this specific design response is an improved planning outcome as:
 - It enables 30% of the site as COS vs the DCP requirement of 15%;
 - It enables a series of COS spaces- including the ground floor space and the roof spaces that provide a diversity in the size and scale of the COS areas.
- The proposal presents an appropriate height on the site that facilitates a high quality urban form to contribute to building diversity across the Riverstone East Precinct.
- 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 given the adoption of the 3 storey form and 4 storey forms that modulate and vary the building height.
- 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.

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.

Sufficient Environmental Planning Grounds & Better Design Response on the Subject Site

The below points demonstrate suitable environmental planning grounds exist to justify contravening the height development standard.

- The extent of non-compliance could be reduced via the elimination of roof top common areas however this reduces amenity for occupants with no discernible benefit in terms of streetscape presentation- i.e. this specific design response is an improved planning outcome as:
 - It enables 30% of the site as COS vs the DCP requirement of 15%;
 - It enables a series of COS spaces- including the ground floor space and the roof spaces that provide a diversity in the size and scale of the COS areas.
- Therefore, the provision of this additional height to the rooftop area facilitates a good planning outcome- that strict compliance with the control would prevent from occurring and hence flexibility in the application of the height control enables a better design outcome on this site and provides planning grounds to support such a departure to the height control.



- The provision of the toilet at the rooftop level also improves amenity and functionality for users and is also facilitated through the departure to the building height control. The provision of the rooftop common area is consistent with the desired future character of the locality when observing the other approved development in the locality that also feature rooftop common areas.
- The variation to the height control does not generate unacceptable adverse impacts to surrounding properties or as viewed from the public domain;
- The variation to the height control does not result in unacceptable overshadowing and privacy impacts to the adjoining residential properties;
- The variation to the height control enables a development form on the site that presents a suitable bulk and scale and intensity of development on the land having regard to the desired 3-4 storey form of development in the 12m height area as reflected by past approvals of similar developments;
- The variation to the height control provides for a variety of building heights and building modulations, with the development distributed across four (4) separate buildings 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 greater than the minimum required levels of solar access and natural ventilation to dwellings to present a more suitable and site responsive layout of the buildings. Further the proposal provides modulated building heights- being 2 buildings of 3 storeys (well below the 12m) and 2 buildings of 4 storeys (primarily below 12m). Lastly the variation directly enables the provision of greater COS in the form of the rooftop COS area and the provision of amenities to the roof area including a toilet and BBQ.
- It is also noted that the stepped building form is a direct design response to the cross-fall experienced by the site. Practically it is necessary to have a suitable balance between achieving suitable amenity for ground floor units (avoiding excessive cut) and level floor plates for accessibility. This means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall- as is the case with the current proposal.

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



Clause 4.6(4) Zone Objectives & The Public Interest

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 relation to the provisions of Clause 4.5(4)(a)(ii) the consent authority can be satisfied that the development, including the numerical building height departure, is in the public interest given that:

- The proposed development remains consistent with the objectives of the building height control.
- The proposal is consistent with the objectives of the R3 zone.

The proposal provides for the housing needs of the community and contributes to a variety of housing forms within a high density residential environment. The development site is in close proximity to public transport and the design concept recognises the key site attributes and provides for an attractive built form that relates to the existing and future site context.

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. The significant public benefit of the proposal must be emphasised in considering the merits of the departure to the height control and the proposal is a site specific response and is not replicated elsewhere in the precinct and as such 'precedent' issues are not relevant.



Conclusion

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.