

**Applicant's Clause 4.6 request to vary the height of buildings development standard****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 96 Cudgegong Road and 88 and 104 Rouse Road, Rouse Hill:

The subject development application seeks consent for the third detailed 'Stage 2' development application for Phase 3 within the Stage 1 Concept Plan. The proposal specifically seeks consent for the following works:

- Subdivision of 'Lot 22' into 2 allotments to reflect the subject development site, the remaining parcel which will be a future park, and roads to be dedicated to Council as part of Phase 3;
- Creation of the final north-south road between Phase 3 and the future park;
- Construction of 4 storey residential flat buildings (Buildings H and J) above one basement car park; and
- The development provides for 163 residential apartments and 202 car parking spaces.

**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 12 metres.

#### Extent of Variation to the Development Standard

The extent of variation to the building height controls is illustrated in the table below:

SEPP Height	Stage	Parapet	Variation	Plant	Variation
12m	Phase 3	10.08m - 13.42m	Max 1.42m	11.94m - 15.42m	Max 3.42m

#### 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:

### **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 proposal seeks to provide a development which presents as 4 storeys to the public domain. (It is noted the site has some internal areas where a lower mezzanine level has been inserted in order to 'sleeve' what would otherwise be an exposed basement to the internal courtyard, however, the development presents externally as a collection of 4 storey buildings). The 12 metre height control is intended to facilitate 4 storey development and therefore the proposal is consistent with the intent of the 12 metre maximum height control notwithstanding the variation to the height control.

- (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 proposed 4 storey scale across the site results in a visual impact which is anticipated by the height control. The variation to the height control does not result in any significant increase in shadow and the development does not result in any unreasonable shadow impacts to adjacent properties, the new public park or the buildings within the development itself. The majority of the new public park with the site will remain free from shadow throughout the day.

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

The approved Stage 1 concept plan for the site, within which the subject proposal is described as Phase 3, only results in an FSR of 1.3:1 which is still well below the maximum permissible FSR of 1.75:1 for the site. Strict compliance with the height control would result in an even lower density and a 3 storey scale 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 medium 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.

### **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 emerging 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. The number of storeys proposed are consistent with that which was envisaged by the 12 metre height control.

### **The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable**

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 proposed development, it successfully achieves these objectives. Strict compliance with the height control would lead to a less satisfactory outcome as it would result in only a 3 storey scale across the entirety of the development on the site which is inconsistent with the emerging scale of development within the area. 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.

**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 minor variations to the 12 metre height control to allow for encroachments where a 4 storey scale is maintained and height encroachments occur due to the fall of the site. This demonstrates that whilst a 12 metre height control is intended to facilitate 4 storey development, it is frequently varied to allow for such a scale of development. 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.

**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 heights are generally consistent with the approved Stage 1 Concept Plan.
- The development provides for a 4 storey scale to all streets in accordance with the envisaged scale of development for the site by the planning controls and other recently approved developments under the same controls.
- The areas of variation for the parapets are only relatively minor and are point encroachments due to the steep fall of the site with a balanced provision of areas of the development both below and above the 12 metre height control.
- The plant areas are located centrally within the building envelopes such that they will not be readily visible from the public domain.
- 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 development results in significantly lower density of 1.3:1 than the 1.75:1 FSR control which applies to the site.

- The non-compliance with the height control ultimately improves the urban form of the development as it allows a consistent 4 storey development across the entire site and facilitates an efficient form of development for the site which responds appropriately to the topography of the site.

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 of the development is based on a conventional perimeter block form with a central common open space areas within Phase 3. There are breaks between the buildings which surround the courtyard to provide visual permeability and the internal courtyard is generous in size and receives quality sunlight to ensure that it provides a sanctuary within Phase 3.

The distribution of built form and scale is the result of a desire to achieve a 4 storey development as envisaged by the 12 metre height control which also properly deals with the significant change of level across the site to ensure that all edges of the buildings at the ground floor, both to the internal courtyard and external streets, are properly activated.

There are some minor height variations as a result of the steep fall of the site and the desire to provide a parapet to the buildings, however, these are minor and the development provides a 4 storey scale to all streets as envisaged by the controls for the site.

Compliance with the height control could only be achieved with either further excavation into the site which would result in subterranean apartments with compromised amenity, or with a significantly more stepping of the buildings which is impractical and compromising disabled access within the development. The proposed variation to the height control allows for a sensible approach towards the topography of the site which achieves the envisaged scale of development and without any adverse impact in comparison to strict compliance with the height control.

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 12 metre height control.

**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 proposal seeks to provide a development which presents as 4 storeys to the public domain. (It is noted the site has some internal areas where a lower mezzanine level has been inserted in order to 'sleeve' what would otherwise be an exposed basement to the internal courtyard, however, the development presents externally as a collection of 4 storey buildings). The 12 metre height control is intended to facilitate 4 storey development and therefore the proposal is consistent with the intent of the 12 metre maximum height control notwithstanding the variation to the height control.

(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 proposed 4 storey scale across the site results in a visual impact which is anticipated by the height control. The variation to the height control does not result in any significant increase in shadow and the development does not result in any unreasonable shadow impacts to adjacent properties, the new public park or the buildings within the development itself. The majority of the new public park with the site will remain free from shadow throughout the day.

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

The approved Stage 1 concept plan only results in an FSR of 1.3:1 which is still well below the maximum permissible FSR of 1.75:1 for the site. Strict compliance with the height control would result in an even lower density and a 3 storey scale 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 medium 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 residential flat buildings which provide for the housing needs of the community within a medium density residential environment. For the reasons given the proposal is considered to be consistent with the objectives of the R3 Medium Density Residential zone.

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### Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. The locality in which the site is located contains many other approvals which provide for similar variations. Accordingly, in an area undergoing transition there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accord with the vision for the area. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

### 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 properly deals with the fall across the site to ensure that a suitable relationship is achieved between the future public domain and the ground floor plane of the buildings. The package also demonstrates that the buildings are frequently stepped to respond to the fall of the site. The proposed variation to the height control will achieve a better outcome for the development because it will ensure that practical buildings can be constructed on the site which will achieve a 4 storey scale as anticipated by 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

Strict compliance with 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 has been found to be both unreasonable and unnecessary 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.