



Clause 4.6 Variation Request

[Clause 4.3 Ku-ring-gai Local
Environmental Plan (Local
Centres) 2012 Height of
buildings Development
Standard]

**Roseville RSL Memorial Club, Part 62, 64-66 Pacific
Highway Roseville**

Submitted to Ku-ring-gai Council

On Behalf of Roseville Returned Servicemen's Memorial Club Ltd

MAY 2020

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1. EXECUTIVE SUMMARY

This is a formal written request that has been prepared in accordance with Clause 4.6 of the Ku-ring-gai (Local Centres) Local Environmental Plan 2012 (KLEP) to support a mixed use development consisting of ground floor memorial club and shop-top housing at part 62, 64-66 Pacific Highway, Roseville (site).

The proposal is for the demolition of the existing club and the construction of a six (6) storey building consisting of ground floor new Memorial Club, thirty-three residential units above, basement parking and associated landscaping and infrastructure works.

The subject site has two numerical height standards applicable, being 14.5m for a portion of the site and 20.5m. However, no portion of the building exceeds the 14.5m height restriction where it applies.

The maximum height proposed is 23.927m, being a maximum variation of 3.42m (or 16.7% variation). This maximum height proposed relates to the top of the lift over-run providing equitable access to the communal open space and which is situated in the centre of the site. Also shade structures and amenities for the communal open space exceed the maximum height by 1.97m (representing a 9.6% variation). Some safety balustrading and planter beds for the communal open space and plant room/acoustic screening also exceed the maximum height. No residential habitable areas exceed the height standard.

This formal request demonstrates that compliance with the 20.5m height of building development standard for part of the site would be unreasonable and unnecessary in the circumstances of this case, and there are sufficient environmental planning grounds to justify the variation. Further, the proposal is in the public interest because it is consistent with the objectives of the development standard and the zone for the subject site.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (KLEP) to justify a variation to the Height of Buildings development standard proposed in a development application submitted to Ku-ring-gai Council for the mixed use development consisting of ground floor memorial club and shop-top housing at part 62, 64-66 Pacific Highway, Roseville (site). This request includes all of the architectural drawings that form part of the amended development application.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the "building height" development standard which is set out in clause 4.3 of the Ku-ring-gai *Local Environmental Plan (Local Centres) 2012 (KLEP)* as follows:

4.3 Height of buildings

(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 map referred to above demonstrates that the site is affected by two (2) maximum building height standards. An extract of the map is shown in Figure 1 below. The map prescribes two (2) maximum building height standards of 14.5m and 20.5m for the subject site.

The development standard to be varied is not excluded from the operation of clause 4.6 of the KLEP.

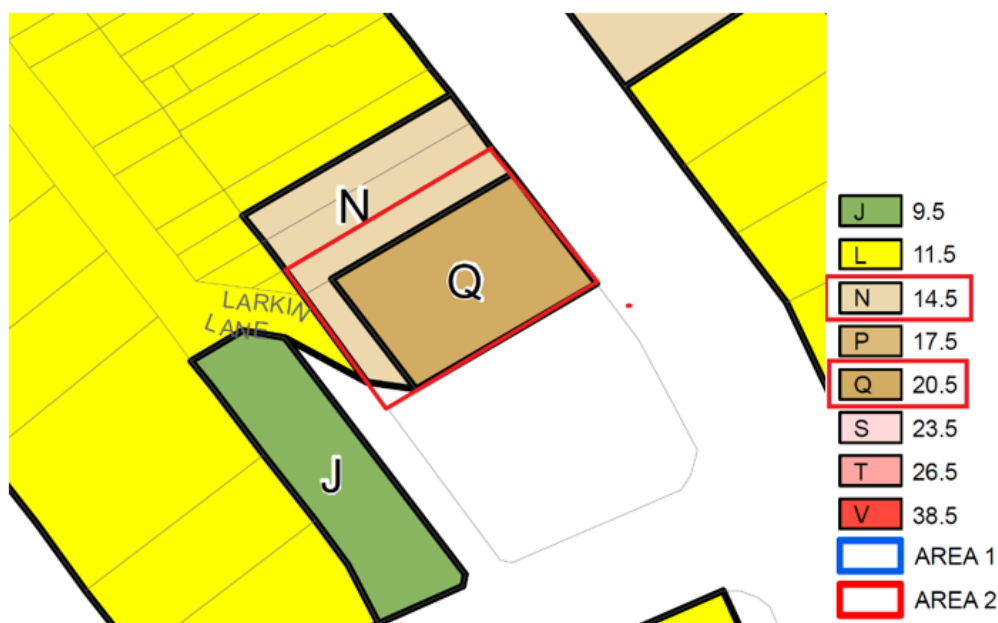


Figure 1: Building height map, site highlighted with red boundary (Source: NSW Legislation)

4. EXTENT OF VARIATION

Under the KLEP the subject site is affected by two maximum height development standards. The maximum height of the building for each portion of the site are outlined below:

- 14.5m Height Standard - No portion of the building on this part of the site exceeds the height standard.
- 20.5m Height Standard - Maximum height proposed is 23.927m, being a maximum variation of 3.42m (or 16.7% variation). This maximum height relates to the top of the lift over-run providing equitable access to the communal open space and which is situated in the centre of the site. Also shade structures and amenities for the communal open space exceed the maximum height by 1.97m (representing a 9.6% variation. Some safety balustrading for the communal open space and plant room/acoustic screening exceed the maximum height.

The variation to the standard is indicated in Figures 2 to 3 below.



Figure 2: 3D height plane with the blue representing the 2 x maximum heights for the site and showing the sections that encroach the 20.5m maximum height. No portion of the building exceeds the 14.5m height limit. (Source: PBD Architects)

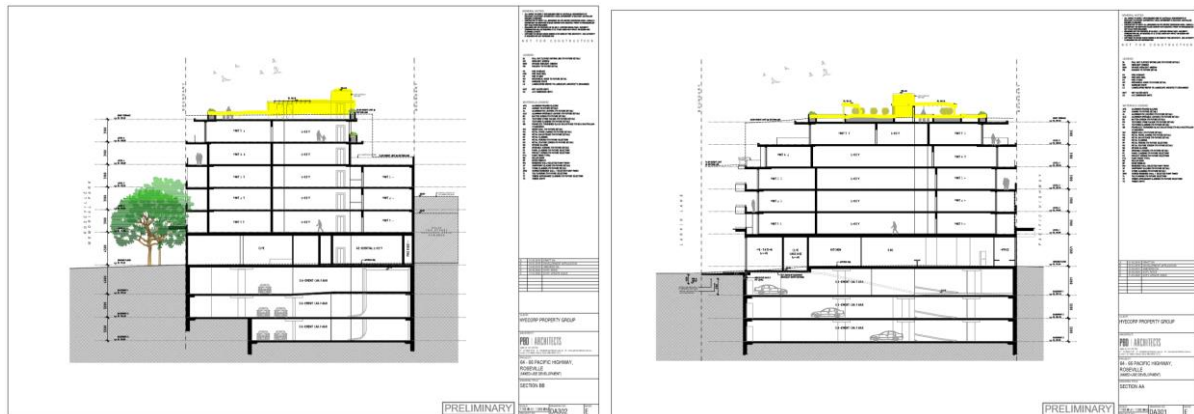


Figure 3: Sections of the proposal with yellow highlight showing the portion of the building which exceeds the 20.5m. (Source: PBD Architects)

5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the KLEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that compliance is unreasonable;
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 the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

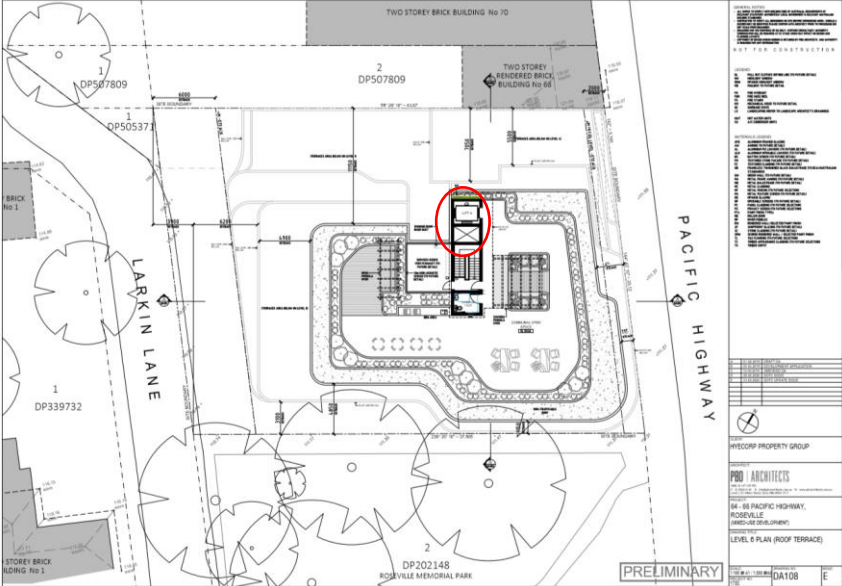
In this case, it is demonstrated below that Test 1 and 3 has been satisfied.

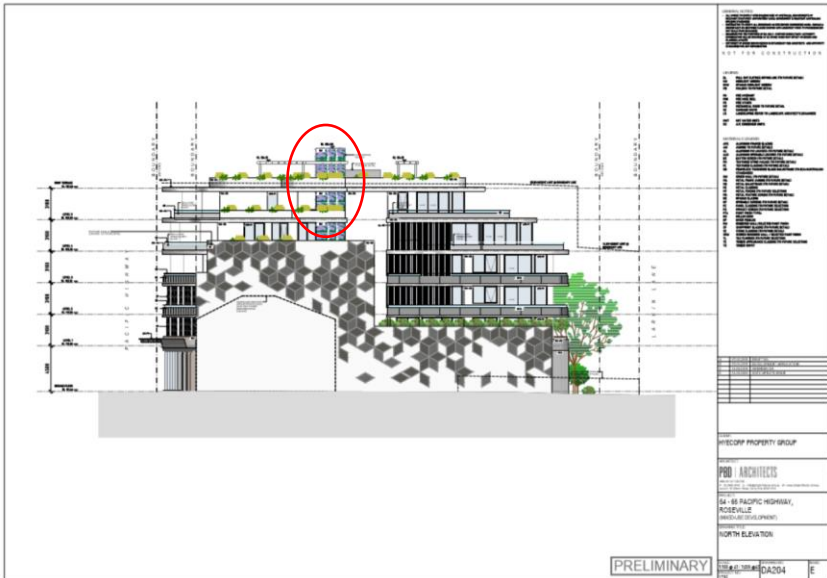
5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

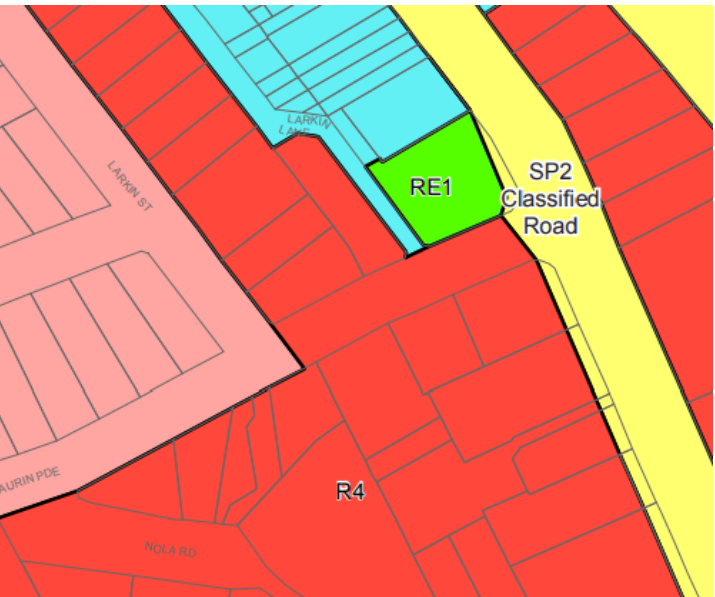
The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (Test 1 under *Wehbe*).

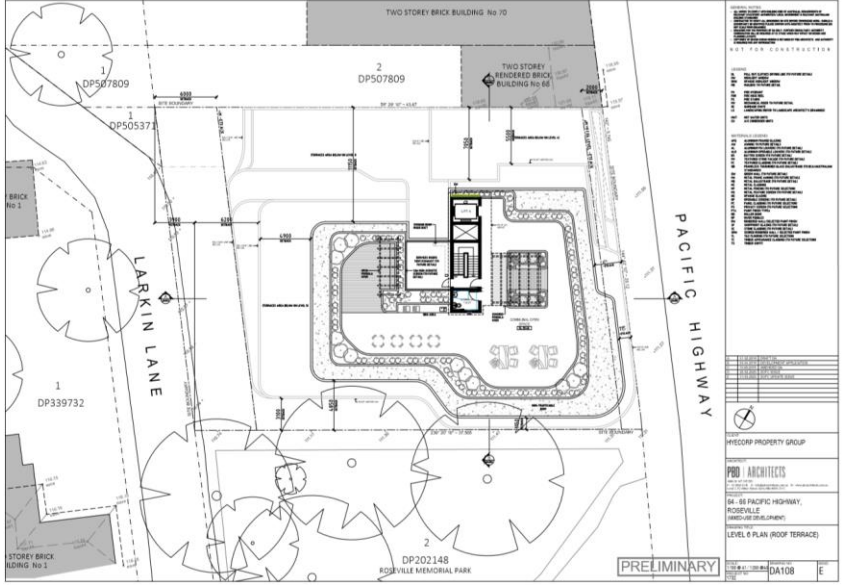
Table 1: Achievement of Objectives of Clause number of LEP.



Objective	Discussion
(a) to ensure that the height of the	The subject site is located within the Roseville Local Centre and is situated on the corner identified for a Landmark building. The variation to the standard

Objective	Discussion
<p>development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,</p>	<p>is solely related to the provision of equitable access to the Communal Open Space on the roof of the building as well as some shade structures to improve the amenity of the Communal Open Space. None of the habitable portions of the building exceed the maximum height provision.</p> <p>The parts of the building that are above the height standard have been setback from the edges, with the maximum variation (i.e. lift over-run) located centrally on the site. To lessen the perceived bulk when viewed from the north, the northern elevation of the lift over-run has been provided as a green wall and in time, as the sites to the north develop to their maximum potential, the visibility of this lift over-run will be reduced. (Refer to Figures 4 and 5 below showing the relative location of the lift on the site and the green wall facing the northern elevation.</p>  <p><i>Figure 4: Red circle depicts the location of the lift core in relation to the site boundaries. (Source: PBD Architects)</i></p>

Objective	Discussion
	 <p><i>Figure 5: Red circle identifies the north-facing wall of the lift over-run as a green wall. (Source: PBD Architects)</i></p> <p>Although the protruding elements can be seen from the north, the proposal maintains a scale as anticipated for the Local Centre. The proposed variation of the standard does not affect achievement or consistency with this objective.</p> <p>The building has been skilfully designed such that it steps away from the north and western elevations, which is where the lower maximum height provisions apply, and has "pushed" the main bulk towards the eastern and south-eastern corner. The benefits of this is two-fold.</p> <p>It enhances the south-eastern corner of the site, which is identified as suitable for a landmark building within Section 14F.9 Built Form of the Roseville Local Centre provisions of the Ku-ring-gai Local Centres Development Control Pan, and it ensures the scale of development closest to the lower-density zoned sites (to the west) is reduced. This preserves their amenity and demonstrates that despite the departure, the proposal provides a height that is consistent with the scale anticipated. (Refer to Figure 6 below).</p>

Objective	Discussion
	 <p>Figure 6: 3D context showing the stepping of the building away from the western boundaries and from the north, assuming future development to the north is developed to the 11.5m max potential. (Source: PBD Architects)</p>
<p>(b) To establish a transition scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,</p>	 <p>Figure 7: The above is an extract from the LEP's zoning map. (Source: NSW Legislation)</p> <p>The site is within the B2 (Local Centre) and RE1 (Public Recreation). Refer to Figure 7 above.</p> <p>The proposed building is located within the B2 zoned land. The proposed building is surrounded by either other B2 land or SP2 (Infrastructure) land. The land on the opposite side of both Larkin Lane and the Pacific Highway is zoned R4 (High Density Residential). In short, there is no R2 (Low Density Residential) land in the immediate vicinity of the site.</p> <p>The RE1 land adjacent the proposed building is arguably an 'open space zone' for the purposes of this objective.</p>

Objective	Discussion
	<p>The proposed variation relates to the 20.5m height standard. The site is also subject to a 14.5m height standard, and the proposal does not exceed this standard.</p> <p>The areas that vary the standard have been setback from the edges of the building and located centrally on the roof. The Level 6 roof terrace plan shows the building is stepped in from all sides and the central location of the sections that encroach the height limit. Even on the south-east corner, where the main building height is maximised to reinforce the landmark corner, it is only the Communal Open Space balustrading which encroaches into the maximum height. (Refer to Figures 8 and 9 below). (The landmark corner is the intended planning outcome for the building's relationship with the 'open space' zone to the south, both under the DCP and in terms of the specific transition to the higher height limit on the corner, as shown in figure 1.)</p> <p>The proposed variation of the standard does not detract from the development's consistency with this objective.</p>  <p><i>Figure 8: Level 6 Roof Terrace shows the central location of the portions that vary the height limit and that the building steps away from the lower density residential zones to the west and north-west (noting that there are allotments with that zoning on the other side of Larkin Lane as shown above). (Source: PBD Architects)</i></p>

Objective	Discussion
	<div data-bbox="491 353 1359 958">  </div> <div data-bbox="491 981 1359 1585">  </div> <p><i>Figure 9: The East (Highway) and South elevations showing that only the Communal Open Space balustrading and planter beds on the south-eastern corner encroaches the maximum height limit. (Source: PBD Architects)</i></p> <p>The site benefits from ground level amenities in the form of the new club and associated cafes and facilities. Further the site adjoins the existing park where outdoor activities may occur. The site is zoned B2. Accordingly, it would be reasonably open to the applicant to propose the development with no communal open space within the proposed building and instead rely on the club areas and the existing adjacent public open space (which, in any event, forms part of the overall development site — as all of Lot 2 DP 202148 is to be subject to the proposed subdivision).</p> <p>The only requirement of the Apartment Design Guide (in terms of the quantum of communal open space) is the objective 3D-1. Only objective 3D-1 itself must be achieved. Design criteria and design guidance are merely means to inform ways in which an ADG objective may be achieved.</p>

Objective	Discussion
	<p>Objective 3D-1 says that there should be an "adequate area of communal open space ... provided to enhance residential amenity and to provide opportunities for landscaping".</p> <p>The design guidance offers examples of sites where communal open space equal to 25 per cent of the site might not be achieved. Relevantly, this includes sites within business zones or in a dense urban area, and in such cases they can, instead, demonstrate good proximity to public open space and facilities.</p> <p>(DCP provisions on communal space must give way to the provisions of the Apartment Design Guide, as per clause 6A(1)(c) of the <i>State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development</i>. The introduction to objective 4F explains that 'common circulation and spaces' are spaces within a building shared communally by residents — they include community rooms and other spaces.)</p> <p>Accordingly, no further specific communal open space is actually required to be provided</p> <p>A reasonable alternative to providing communal open space on the rooftop is the provision of no communal open space (within the proposed Lot 100) and reliance on the club facilities and the adjacent public open space (within the proposed subdivision area). However, it is preferable., in terms of protecting local amenity (as the objective seeks to do) to provide the communal open space on the rooftop area, rather than add to the use of the public open space (in circumstances where there are no material adverse impacts from that rooftop use).</p> <p>In essence the club can be used as a 'common room', the apartments do have larger balconies and there is a park adjoining the site.</p> <p>Nevertheless, it remains desirable to provide a more private communal open space for residents and so provision has been provided on the roof. The provision on the roof results in improved residential amenity (an aspect of "local amenity" under the objectives) and improved amenity for other park users (as the use of the park may be mitigated) without any material detrimental impacts.</p> <p>The proposal has been designed to provide an appropriate transition to the buildings to the north-west fronting Pacific Highway. Similarly, the proposal has also stepped the building in height from the western boundary (i.e. Larkin Lane) to provide a transition in scale to both the R4 high density zone to the west, and to the adjoining Memorial Park to the south. The stepping of the building, whilst not required by Council's DCP built form controls, has been undertaken to ensure that both the park and the residential property of 1 Maclaurin Parade receive adequate amenity and sunlight throughout the day.</p> <p>The western section of the site (the Council land) has no above-ground development on it, apart from some infrastructure works; ensuring the separation and transition between the western laneway and adjoining lower zoned residential areas. (Refer to Figures 2 and 8 above)</p> <p>Thus, the building, despite the minor variation to height, achieves this objective.</p> <p>The proposed variation of the standard does not detract from the development's consistency with this objective.</p>
(c) to enable development with a built form that is	<p>As noted above, the areas of the building that exceed the height standard have been setback from the edges of the building, with the maximum height of the building, being the lift over-run, being located centrally on the roof.</p>

Objective	Discussion
compatible with the size of the land to be developed.	<p>They do not include any habitable areas and relate only to equitable and safe provision of communal open space, shade structures, plant room and portions of balustrading and garden beds. These elements above the standard do not contribute to excessive bulk or scale to the building, as these are predominantly hidden from view from the surrounding area.</p> <p>The proposal has been designed to be compatible with the existing and desired future character of the area, noting that the existing properties to the north-west fronting the highway have yet to be developed to the current planning controls. Further and as discussed under objective (b), the proposal has provided a stepped built form to the western boundary, whereas the controls allow a 0m setback up to the 14.5m</p> <p>The proposed variation of the standard does not detract from the development's consistency with this objective.</p>

As demonstrated in Table 1 above, the objectives of the Height of Building development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of Buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

5.3. The objective would be defeated, thwarted or undermined if compliance was required with the consequence that compliance is unreasonable.

Objective (b) of the height standard would be undermined if the variation was not allowed.

Objective (b), as set out above, is "to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity".

The discussion with regard to objective (b) in the table above is adopted here. To briefly summarise, a reasonable alternative to providing communal open space on the rooftop is the provision of no communal open space (within the proposed Lot 100) and reliance on the club facilities and the adjacent public open space (within the proposed subdivision area).

However, it is preferable, in terms of protecting local amenity (as the objective seeks to do) to provide the communal open space on the rooftop area, rather than add to the use of the public open space (in circumstances where there are no material adverse impacts from that rooftop use). It also leads to a better amenity outcome for residents of the development (which is an aspect of 'local amenity').

In short, objective (b) could be less effectively achieved (in terms of its desire to secure local amenity outcomes) by a compliant development, when compared with the proposed development.

Compliance with the Height of Buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

5.5. The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

5.6. Other grounds.

For completeness, this request also seeks to demonstrate that the "unreasonable and unnecessary" requirement is met because the burden placed on the community by not permitting the variation (and allowing for rooftop communal open space area with equitable access within the proposed Lot 100) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development. This disproportion is, in itself, sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

In this regard, all of the earlier discussion is adopted and advanced.

Compliance with the Height of Buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, the proposal breaches the maximum height of buildings standard of 20.5m that applies to part of the site.

The environmental planning grounds to justify the departure of the named standard are as set out in the preceding section 5 in detail. They can be summarised as follows:

- The proposed variation to the standard allows for equitable access to Communal Open Space for the residents of the apartments and avoids the need to rely only on the provision of ground floor amenities in the form of the club and adjoining public open space for communal purposes.
- Much of the area that exceeds the development standard is not discernible as viewed from the public domain as it has been setback from the edges of the building, and the lift over-run and fire stairs (which exceeds the standard the greatest) have been located more centrally on the roof. The proposed elements that breach the height standard does not contribute to distinguishable bulk, scale or density of the building;
- Various elements that breach the standard are related to providing high levels of amenity to the communal open space area, such as planter boxes, and shade structures.
- The proposal does not result in any unacceptable overshadowing impacts to adjoining properties (the impacts that do occur are what are anticipated by Council's controls). The shadows caused from the non-complying built form has no material adverse impact on the adjoining development as the shadows fall on the roof of those adjoining buildings and a marginal section of the Larkin Lane side setback during mid-winter. Refer to figure 10 below which demonstrates the difference between the proposal and a building complying with height and floor space ratio controls.
- The variation of the standard does not result in any material adverse environmental impacts to adjoining properties, and the building has been designed to respond to the existing and future built form character of the area.
- It promotes good design and amenity of the built environment, resulting in improved urban design and amenity considerations for both the local community and the future occupants of the building.

Some examples that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Auswin TWT Development Pty Ltd v Council of the City of Sydney* [2015] NSWLEC 1273 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a 28 per cent height exceedance over a 22-metre building height standard.
- In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a 21 per cent height exceedance over a 18-metre building height standard.
- In *Amarino Pty Ltd v Liverpool City Council* [2017] NSWLEC 1035 the Land and Environment Court granted development consent to a mixed-use development on the basis of a clause 4.6 request that sought a 38 per cent height exceedance over a 15-metre building height standard.

- In *Landco (NSW) Pty Ltd v Camden Council* [2018] NSWLEC 1252 the Land and Environment Court granted development consent for a land subdivision with clause 4.6 variations of between 47-51 per cent on the minimum 450m² lot size (allowing lots sizes ranging from 220 to 240m²).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1)
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1)
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).

In short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for large variations to be approved in the right circumstances.

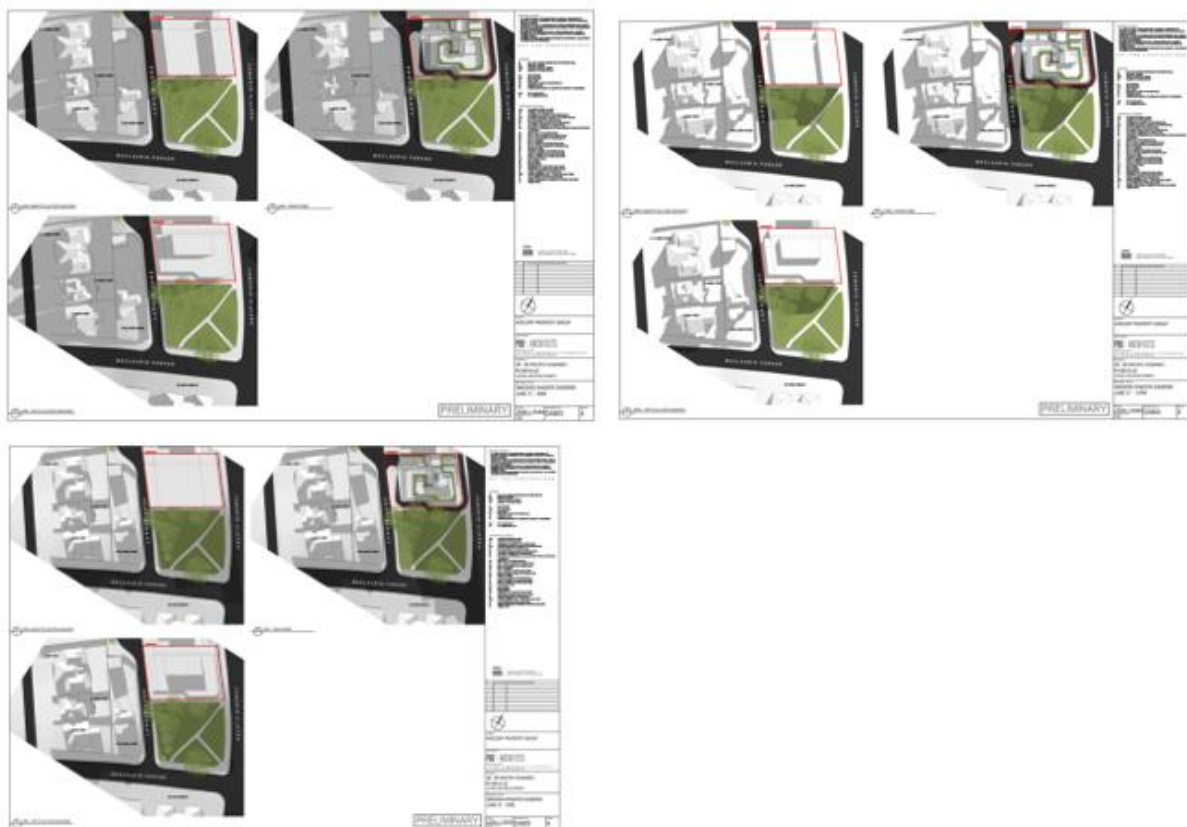


Figure 10: Extent of shadows cast from two compliant developments compared with the proposed development. (Source: PBD Architects)

7. PUBLIC INTEREST

In this section it is explained how 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. This is required by clause 4.6(4)(a)(ii) of the KLEP.

In section 5 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under "public interest" in Table 1).

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency with Zone Objectives.

Objectives of Zone B2 Local Centre	Discussion
To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.	<p>The proposal includes the re-development of the existing club that is currently operating on the site. Thus, the proposal will provide ground floor retail premises that will provide for the needs of people who live and work in the area.</p> <p>The variation to the standard does not affect consistency with this objective.</p>
To encourage employment opportunities in accessible locations	<p>The proposed development includes ground floor retail premises, that will create/maintain ongoing employment for the area.</p> <p>The variation to the standard does not affect consistency with this objective.</p>
To maximise public transport patronage and encourage walking and cycling.	<p>The variation to the standard does not affect consistency with this objective.</p>
To provide for residential housing close to public transport, services and employment opportunities	<p>The proposal provides for additional housing, in close proximity (i.e. 150m) of the Roseville train station.</p> <p>The variation to the standard does not affect consistency with this objective. However, it does contribute to the amenity of the residents who live in the building. Thus, the variation to the standard provides an improved amenity outcome to the residents of the building.</p>
To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development	<p>The variation is a result of providing Communal Open Space on the roof of the building. The provision of Communal Open Space is desirable in residential developments, as recommended in the ADG. Given the site is located in the Roseville Local Centre, and Council desire the ground floor to achieve activation through the provision of ground floor commercial/retail uses, locating Communal Open Space at the ground level is not as desirable for this site. Thus, the variation directly achieves this objective by integrating a desirable residential amenity element into the</p>

	<p>building, whilst maintaining the ground level commercial ground level activity.</p> <p>The proposal is consistent with and achieves this objective.</p>
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Objectives of Zone RE1 Public Recreation	Discussion
To enable land to be used for public open space or recreational purposes.	<p>The letter of advice from Mills Oakley dated 16 September 2019 (which is included in the development application documents) forms part of this request.</p> <p>The development proposes the subdivision of Lot 2 DP 202148, so that operational land owned by the Council is separated from parkland that is zoned RE1 and is maintained by the Council as a park.</p> <p>To be clear, the strip of Council land to be separated from the parkland is not a park— nor functionally part of a park in any legal or substantive sense. It makes sense that it be subdivided from land that is such land.</p> <p>Additionally, this strip of Council land is not, in reality or in law, presently set aside for public use. It is, in fact, signposted (with Council's acquiesce) as parking for the registered club. The proposed subdivision, together with the proposed easements, will make this strip of land available for public use as a landscaped and -maintained footpath.</p>
To provide a range of recreational settings and activities and compatible land uses.	<p>The proposed development does not adversely impact on the use or nature of the park. In fact, it positive contributes to the park by providing an additional means for pedestrians to comfortably access the park (via the new landscaped footpath to be constructed on the strip of Council land).</p> <p>Additionally, the mixed use development adjacent to the park will complement and reinforce the park use in the following ways:</p> <ul style="list-style-type: none"> ▪ The club entry is oriented to the park (south-east corner) and opens onto the parkland, ▪ This main entry links with the existing path from Pacific Highway to the centre of the park, ▪ The club incorporates a terrace which overlooks the park, and ▪ The park is a Memorial Park with plaques and services which is an integral part of the Returned Servicemen's Memorial Club.

<p>To protect and enhance the natural environment for recreational purposes</p>	<p>The proposed development will have no material adverse impact on the natural environment.</p> <p>The proposed landscaped footpath will improve access arrangements to the park environment, which will contribute positively to this objective.</p>
<p>To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic value.</p>	<p>The park is of aesthetic and cultural value, being a Memorial Park; and the proposed development respects and complements its qualities. The design of the development integrates the RSL Club with the park, providing outdoor terrace, main entry and glass frontage ensuring the club is oriented to the Memorial Park. It enhances the south-eastern corner of the site, which is identified as suitable for a landmark building within Section 14F.9 Built Form of the Roseville Local Centre provisions of the Ku-ring-gai Local Centres Development Control Plan; specifically due to the cultural and aesthetic value of the park.</p> <p>The design compliments the existing trees within the park and adds to the aesthetic value along the Larkin Lane, with the provision of the landscaped pedestrian path.</p>

As demonstrated in Table 2, the proposal is consistent with the objectives of the two zones and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation, provided that the determination is not made by a delegate of the Council. (It should be noted that a panel and the Court are not delegates of the Council.)

9. CONCLUSION

This submission requests a variation, under clause 4.6 of the Ku-ring-gai (Local Centres) *Local Environmental Plan 2012*, to the Height of buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B2 Local Centre zone.
- There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone B2 Local Centre notwithstanding non-compliance with the Height of buildings development standard and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.