

## Clause 4.6 Variation: Building Height

---

ESQ 1818- STAGE 2/3- MULGOA ROAD, PENRITH



*Prepared by:* Think Planners Pty Ltd  
*Document Date:* 29 June 2019  
*Consent Authority:* Penrith City Council

**QUALITY ASSURANCE**

**PROJECT:** Clause 4.6  
**COUNCIL:** Penrith City Council  
**AUTHOR:** Think Planners Pty Ltd  
**ARCHITECT:** Turner

Date	Purpose of Issue	Rev	Reviewed	Authorised
29 June 2019	SWCPP	1	JW	JW

## Table of Contents

Background to Building Height.....	<b>Error! Bookmark not defined.</b>
Other Development in the Locality & Context & Desired Future Character .....	<b>Error! Bookmark not defined.</b>
Relevant Case Law .....	5
The Variation & Design Response .....	6
Address of Clause 4.6 Provisions .....	7
Annexure 1: Built Form Analysis of Approved Developments in Locality	<b>Error! Bookmark not defined.</b>

## Introduction

Clause 4.3 under the Penrith LEP stipulates a maximum building height of 15m-20m for the subject site. There is a current Planning Proposal that will amend the height of building control to adopt a height of 20m across the site. That Planning Proposal is considered to be certain and imminent and is pending the execution of a Road Works Planning Agreement.

The relevant extracts of the current height of building map, and the LEP amendment, is reflected below.

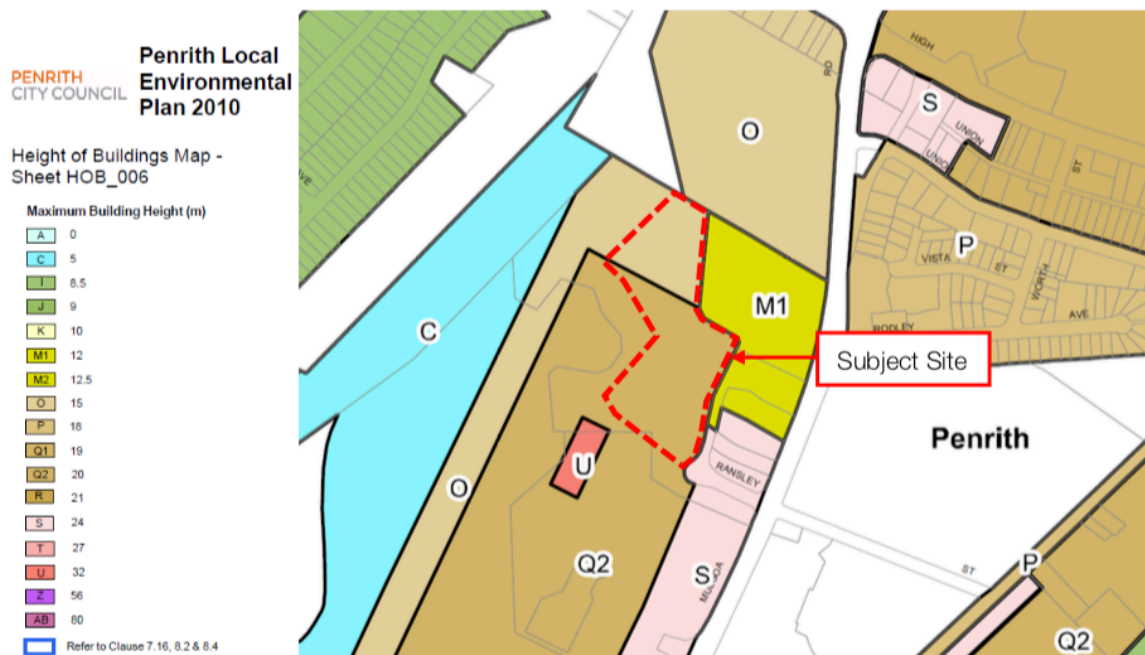


Figure 1: Extract of PLEP 2010 Height of Buildings Map (subject site outlined in red)

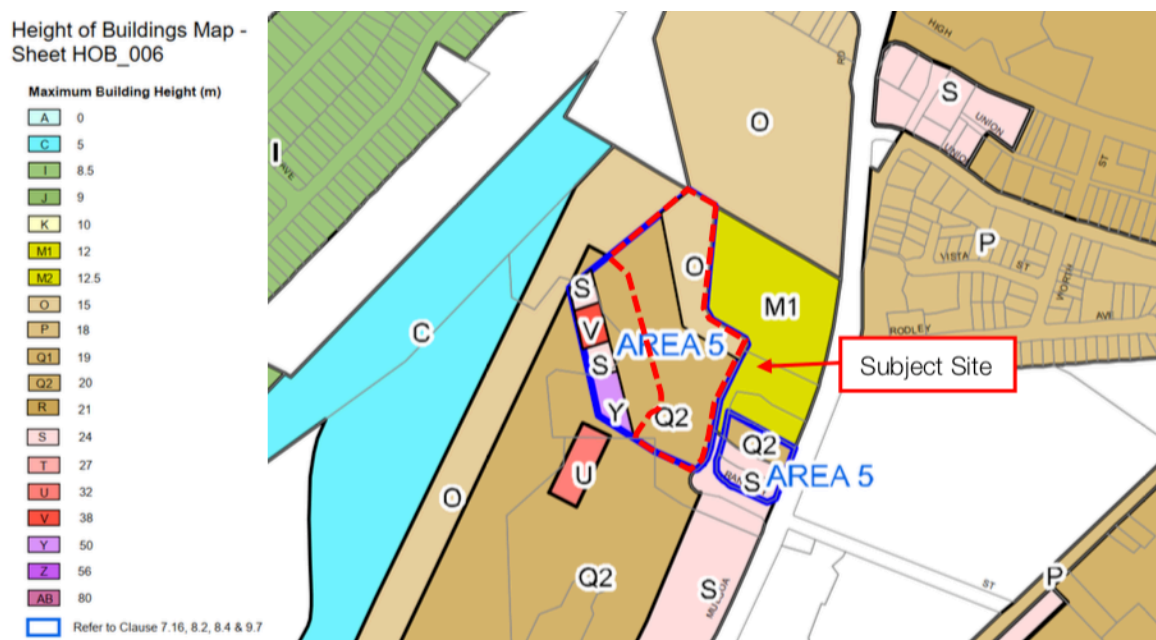


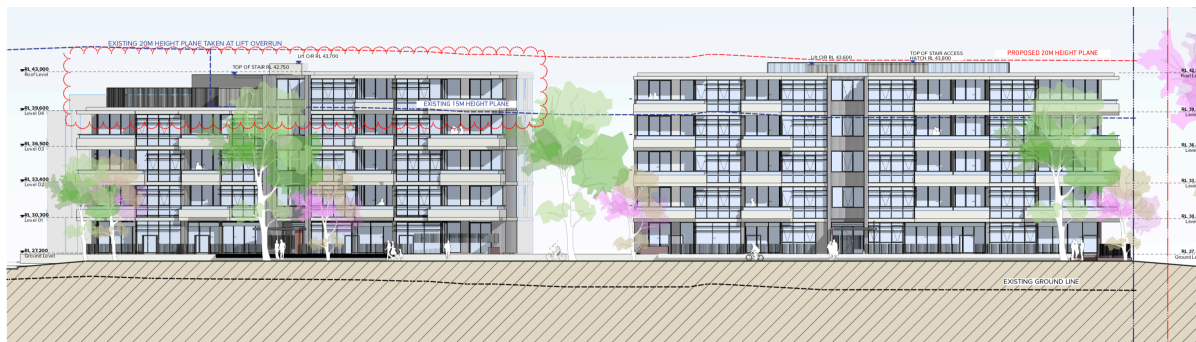
Figure 2: Approved Height of Buildings Map Amendment to PLEP 2010

It is noted that the variation to the building height control is limited to Building G which is the part of the site subject to a 15m height control that will subsequently change to a 20m height control upon amendment of the LEP.

The existing 15m height limit and 20m height limit is reflected on the elevations below.



1 The Address Elevation  
1:200



3 East Elevation  
1:200

Building G has a maximum height of 19.7m and exceeds the 15m control by 4.7m or 31.33%.

Upon gazettal of the LEP amendment Building G will be fully compliant and therefore the departure is a technical departure to the current LEP that will be resolved upon gazettal of the LEP amendment.

## 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’.

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 SP3 zoning;
- Demonstrating there are sufficient environmental planning grounds to vary the standard; and
- Satisfying the relevant provisions of Clause 4.6.

## The Variation

It is noted that the variation to the building height control is limited to Building G which is the part of the site subject to a 15m height control that will subsequently change to a 20m height control upon amendment of the LEP.

The existing 15m height limit and 20m height limit is reflected on the elevations below.



1 The Address Elevation  
1:200



3 East Elevation  
1:200

Building G has a maximum height of 19.7m and exceeds the 15m control by 4.7m or 31.33%.

Upon gazettal of the LEP amendment Building G will be fully compliant and therefore the departure is a technical departure to the current LEP that will be resolved upon gazettal of the LEP amendment.

## Address of Clause 4.6 Provisions

A detailed discussion against the relevant provisions of Clause 4.6 are provided below.

Clause 4.6 of the Penrith Local Environmental Plan 2010 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:*
  - (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 individually below.



**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.

This follows Wehbe test 1.

***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 Height development standard are stated as:

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

- a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
- c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

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

- The building height, bulk and scale are compatible with the desired future character of the locality reflected by the imminent change to the building height control to adjust the 15m height limit to the 20m height limit- which the development is fully compliant with;
- The additional height proposed is in a location that interfaces with the open space area on the subject site and the Panthers site. The location and distribution of the additional height has no discernible additional impact in terms of visual privacy and overshadowing when having regard to the lot orientation.
- The proposed height variation continues to respect the form and scale of surrounding buildings within the Panthers Precinct, as well as the future 10 and 14 storey residential development earmarked as part of the wider ESQ1818 development proposed to the west of the site, supported by the recently approved Planning Proposal;
- The height and form of the development will establish a new context for the Panthers Precinct that to some extent alters the character and scale of the streetscape. The character and identity of the Panthers Precinct is tied closely to the quality of architecture and its relationship to surrounding buildings. This relationship is being retained and enhanced;

- The scale of the proposed buildings is in keeping with the scale of the recently approved ESQ1818 Stage 1 development (DA Consent No.17/0766) located to the east of the site on the eastern side of Retreat Drive. It is also in keeping with the scale of the approved multistorey car park and serviced apartment development (DA14/1111) located to the southwest of the site on the southern side of Ransley Street;
- Proposed buildings will be comparable in both bulk and scale to that of the recently approved Concept Proposal, incorporating Western Sydney Community and Conference Centre (WSCCC) (DA18/0340) located on the existing car park site adjacent Mulgoa Road immediately to the south.
- The development provides for a high quality urban form for the development and there is no need for a transition in built form and land use intensity beyond the site given the site context and relationship to the Panthers land and the additional height that has been modelled and considered as being suitable for this location with regard to the LEP amendment that is imminent which has considered the visual and scenic view corridors which is largely down Ransley Street and is unaffected by the proposal.
- The non-compliance to the height control has no impact on the setting of any items of environmental heritage or view corridors.
- The proposal does not adjoin any low-density areas or sensitive interfaces and will integrate with future development to the north, east, south and west which will accommodate developments of comparable building height- and likely also breach the numerical height limit to the residential floor area at the upper level and to rooftop common areas.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable again reiterating the variation to the control is a technical departure and is a temporal issue that will be resolved upon gazettal of the LEP amendment.

### ***Sufficient Environmental Planning Grounds***

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

- The proposal satisfies the objectives of the SP3 Tourist zone and the objectives of the building height standards;
- Non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss;
- The non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development and streetscape as the proposal will ensure compliant heights to the roof of each building upon gazettal of the LEP amendment which will mean the development is fully compliant with the proposed height limit and clearly aligns with the desired future character for the Precinct;
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the PDCP 2014;
- The development as proposed is consistent with the provisions of orderly and economic development owing the temporal nature of the departure under the existing framework compared to full compliance with the certain and imminent LEP amendments.

Therefore, the current proposal is a suitable outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a suitable design response on the site.

#### **Clause 4.6(4) Zone Objectives & The Public Interest**

In accordance with the provisions of Clause 4.6(4)(a)(i) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) for the reasons set out previously.

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 as set out above
- The proposal is consistent with the SP3 zone objectives as follows
  - *To provide for a variety of tourist-oriented development and related uses.*

The development will establish uses across the site that assist in strengthening the Panthers Precinct as a destination for residential and leisure.

The proposal will provide additional retail and community employment opportunities at a location that is highly accessible by walking, cycling and public transport. Proposed uses will complement and support existing tourist-orientated development within the Precinct. On that basis the proposal contributes towards the provision of related uses.

- *To provide for diverse tourist and visitor accommodation and activities that are compatible with the promotion of tourism in Penrith.*

The development will establish uses across the site that assist in strengthening the Panthers Precinct as a destination for tourist oriented development.

The proposal will provide additional retail and community employment opportunities at a location that is highly accessible by walking, cycling and public transport. Proposed uses will complement and support existing tourist-orientated development within the Precinct and are compatible with the promotion of tourism in Penrith noting that the amendments to the LEP and DCP for the ESQ land set the desired future character of this portion of the Panthers Precinct.

- *To create an appropriate scale that maintains important views to and from the Nepean River as well as to the Blue Mountains escarpment, while also improving important connections to the Penrith City Centre and the Nepean River.*

The proposed development will be of an appropriate scale that will ensure important views to and from the Nepean River and Blue Mountains escarpment are retained and enhanced as nominated in the Panthers Chapter of the PDCP.

The proposal will also improve connections to the Penrith City Centre and Nepean River with increased permeability throughout the site. The finer ground plane and pedestrian linkages will improve accessibility and encourage walking.

On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the building height standard, and the objectives of the SP3 zone and the numerical departure from the building height control results in strict compliance with the LEP amendment that is certain and imminent applying to the land.

#### **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 given the proposal is fully compliant with the pending amendments to the LEP height limit that apply to the land.

#### **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 considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive building height control is unreasonable and unnecessary in the context of the proposal and its particular 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 proposal will not have any adverse effect on the surrounding locality, and is consistent with the future character envisioned, while supporting the role of Penrith as a strategic centre. 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 proposed variation.