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Clause 4.6 Variation Request to vary the Height Limit Standard in State Environmental Planning Policy (Sydney Region Growth Centres) 2006, Appendix I, Oran Park and Turner Road Precinct

Proposed Oran Park Tavern

62-68 Central Avenue, 76 Central Avenue and 600E The Northern Road, Oran Park.

DA 2019/402/I

Prepared for: Momento Hospitality Pty Ltd
January 2020

Printed: 17.01.2020
File Name: https://dfpplanningptyltd.sharepoint.com/sites/Projects/Shared Documents/20584A Oran Park
Tavern/Reports/Clause 4.6 A.docx
Project Manager: Warwick Gosling
Client: Memento Hospitality Pty Ltd
Project Number: 20584A

Document Control

Version	Prepared By	Reviewed By	Issued To	Date
Rev_1, Draft	N. Bartley	R. Player	Client/ Council	15.01.2020

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1 Introduction

1.1 Commission

DFP has been commissioned by Momento Hospitality Pty Ltd (“the Applicant”) to prepare a written request (“Variation Request”) pursuant to cl4.6 of Appendix 1 Oran Park and Turner Road Precinct Plan within, *SEPP (Sydney Region Growth Centres (SRGC))* 2006 for the proposed Oran Park Tavern at 62-68 Central Avenue, 76 Central Avenue and 600E The Northern Road, Oran Park (the Site).

The Proposal includes a 3 storey (Ground floor, level one (1) and level two (2)) pub and entertainment facility, including function room, training rooms, at-grade and basement parking, earthworks, infrastructure and services work, landscaping and associated works.

The Proposal exceeds the 9.5m building height development standard under cl4.6 of Appendix 1, within SEPP (SRGC) 2006, having a maximum height of 12.15m in respect to the part of the proposed building located in the R3 zone. It is noted that the majority of the proposed building is located within the B2 zone and it complies with the 24m building height development standard under cl.4.3 of Appendix 1 within SEPP (SRGC) 2006.

Notwithstanding the contravention of the development standard, the Proposal is consistent with the objectives of the development standard and the objectives of the zone within which the development is to be carried out and there are sufficient environmental planning grounds to justify the contravention in this instance.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the height development standard.

In preparing this Clause 4.6 Variation regard has been given to the following matters relating to the preparation of Clause 4.6 variations.

- NSW Department of Planning and Infrastructure’s Varying Development Standards: A Guide, August 2011;
- *Whebe v Parramatta City Council* [2007] NSW LEC 287;
- *Four2Five v Ashfield Council*; and
- *Initial Action Pty Ltd v Woollahra Council*

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural Drawings prepared by Archebiosis and other supporting drawings and reports which are appended to the Statement of Environmental Effects (SEE) report prepared by DFP dated May 2019.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and documents appended thereto and DFP letter dated xxx and documents appended thereto.

2 The Relevant SEPP Provisions

2.1 State Environmental Planning Policy (Sydney Region Growth Centres) 2006, Appendix 1

2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map of SEPP (SRGC) 2006 provide that the Site is zoned partly R3 Medium Density Residential (the R3 zone) and partly B2 Local Centre (the B2 Zone) and the Land Use Table to Clause 2.3 specifies the objectives of these zones as follows:

R3 Medium Density Residential

- *To provide for the housing needs of the community 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 wellbeing of the community, including educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.*
- *To provide for a variety of recreational uses within open space areas.*
- *To allow for small scale kiosks, function centres, restaurants and markets that support the primary function and use of recreation areas, public open space and recreation facilities located within residential areas.*

B2 Local centre

- *To provide a range of retail, business, entertainment and community uses which serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To ensure that residential development does not detract from the primary function of the centre being to provide for retail, business, entertainment and community uses.*
- *To ensure that residential development does not preclude the provision of active uses at street level.*
- *To provide for land uses of a higher order and density within the Local Centre Zone than are permitted within the Neighbourhood Centre Zone or the Mixed Use Zone.*
- *To provide for residential development that contributes to the vitality of the local centre.*

This variation request relates to part of the proposed building, located in the R3 zoned land.

The proposed land use is permissible with development consent in the R3 Zone pursuant to the SEPP (SRGC) 2006, Appendix 1.

2.1.2 Clause 4.3 of SEPP (SRGC) 2006, Appendix 1, Oran Park and Turner Road Precinct Plan

The Height of Buildings Map identifies the site as having a maximum building height of 16m, however as the proposal is not for a residential Flat Building, the reduced level for building height for all other developments is 9.5m metres within the R3 zoned portion of the site. Refer to Figure 1 below.

2 The Relevant SEPP Provisions

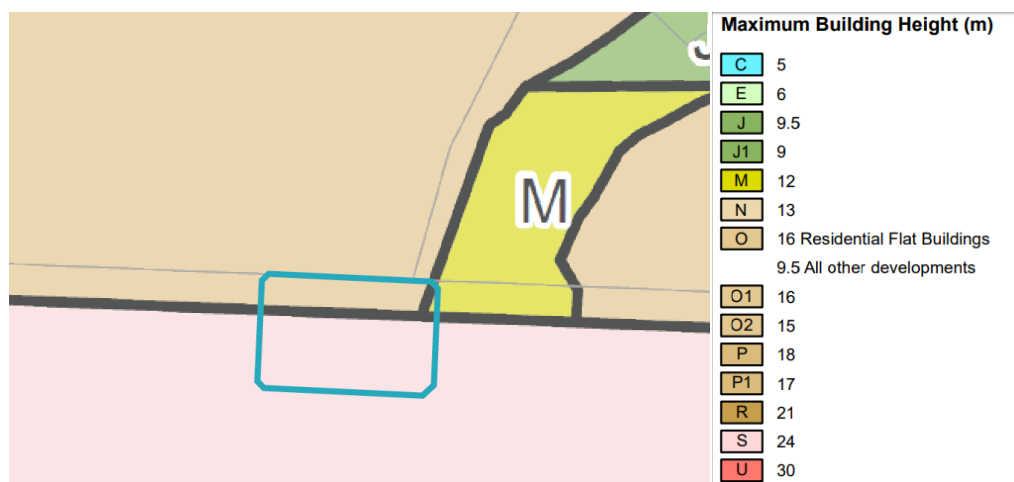


Figure 1 Extract of SEPP (SRGC) South, Height of Building Map (Sheet_004)

The SEPP (SRGC) defines **building height (or height of building)** 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”

2.1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of the SEPP (SRGC) 2006, Appendix 1, states the objectives of the clause as follows:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”, Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument.

Clause 4.6(2) provides that:

- (2) *Consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

The building height development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (3) *Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the*

2 The Relevant SEPP Provisions

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.*

The proposed development does not comply with the 9.5 building height development standard which applies to the R3 zoned portion of the site, pursuant to cl4.3 of SEPP (SRGC) 2006, Appendix 1, however, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in Section 5.2.1.

In addition, it is considered, there are sufficient environmental planning grounds to justify contravening the development standard as detailed in Section 5 of this written request.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (4) 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 Secretary has been obtained.*

Sections 5.2 of this written request address the matters required under cl4.6(4)(a) of the SEPP (SRGC) 2006, Appendix 1 and Section 5.3 addresses cl4.6(4)(b).

Clause 4.6(5) provides that:

- (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.*

Section 5.5 of this written request addresses the matters required under cl4.6(5) of the SEPP (SRGC) 2006, Appendix 1.

Clauses 4.6(6) and (8) are not relevant to the proposed development and cl4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

3 The Nature of the Variation

The site has two mapped height limits, being 9.5m to the northern most part of the site (R3 zoned land) and 24m for the remainder of the site (B2 zoned land). The site is located within Oran Park Town Centre, bound by four (4) street frontages, and no separation is provided between zones or uses. The site is mapped as having two different zones and subsequently two different building height controls.

The variation seeks approval for the building height development standard in the R3 zone to be increased to 12.15m, being the maximum proposed building height of the development. Although this is a contravention of the height development standard in the R3 land, the permissible 24m maximum building height in the B2 zoned land has not been maximised.

The variation relates to the northern section of the proposed building, which has a maximum building height control of 9.5m. The proposed building height of the development is 12.15m, being a maximum non-compliance of 2.65m, for less than 10% of the proposed development.

As shown on the eastern and western elevation, the variation sought, is minor in comparison to the whole proposed development.

The extent of the non-compliance is shown in extracts of the eastern and western elevations at **Figures 3 and 4**, below.

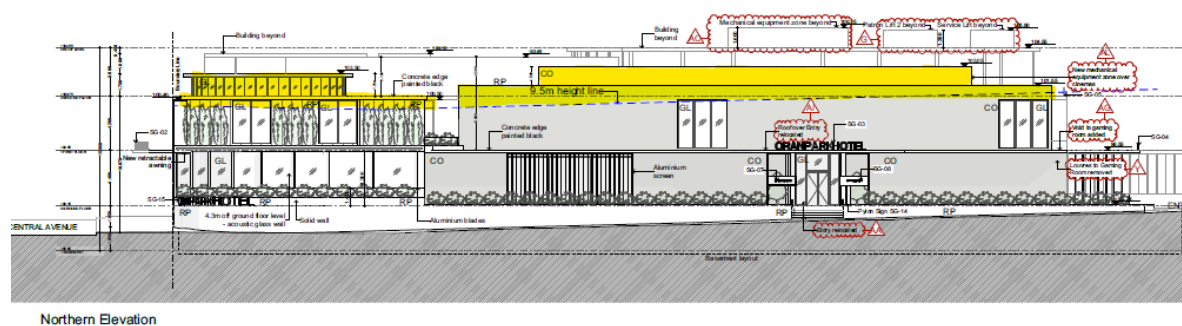


Figure 2 North Elevation - height variation

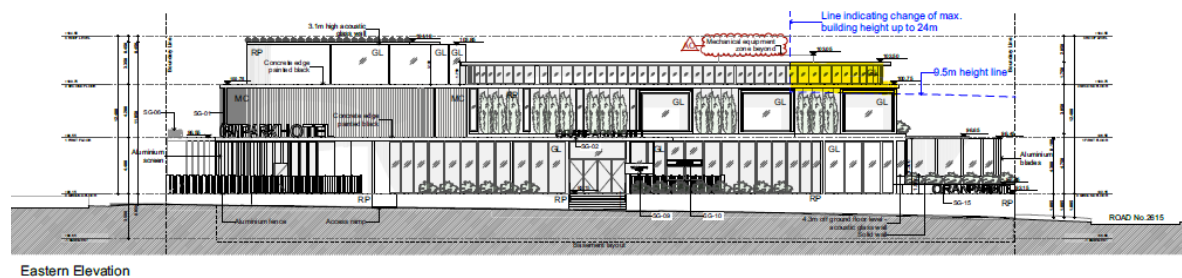


Figure 3 Eastern elevation – height variation

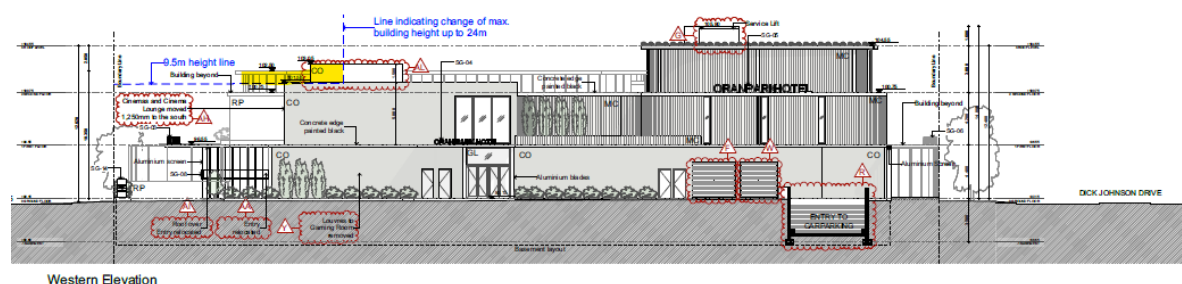


Figure 4 Western elevation – height variation

4 Case Law

4.1 Introduction

The proposed variation to the 9.5m building height development standard has been considered in light of the evolving methodology and “tests” established by the NSW Land & Environment Court (the Court) including the following cases:

- Winten Developments Pty Ltd v North Sydney Council [2001]
- Wehbe v Pittwater Council [2007]
- Four2Five Pty Ltd v Ashfield Council [2015]
- Randwick City Council v Micaul Holdings Pty Ltd [2016]
- Moskovich v Waverley Council [2016]
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

The Land and Environment Court of NSW, through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001], established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. This 5-part test was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection is to be consistent with the aims of the policy (being State Environmental Planning Policy No. 1 Development Standards (SEPP1)).

Whilst these Judgments related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to clause 4.6 and accordingly, we have applied this methodology to the assessment below.

5 Assessment of the Variation and Grounds of the Objection

The proposed variation to the 9.5m building height development standard for a small portion of the proposed building has been considered in light of the above Court cases, the objectives of the development standard, the R3 Medium Density Residential zone which applies to part of the site, and potential environmental impacts.

5.1 Step 1 - Is the planning control a development standard?

This question is the 1st 'test' in Winten. The height control in cl4.3 of Appendix 1 in SEPP (SRGC) 2006 is a development standard, defined in Section 1.4 of the EP&A Act as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a)
- (b)
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d)”

The 9.5 building height control is a development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted to exceed the height standard.

5.2 Step 2 – Pursuant to cl4.6(4)(a(i)), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

The matters in clause 4.6(3) are:

- (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.”*

The elements of the proposed Tavern building that exceed the 9.5m building height development standard are located such that they will not cause adverse impacts on the built environment or the amenity of nearby properties. Specifically, future residential properties to the north and west, will not be adversely affected in terms of overshadowing impacts or privacy/overlooking impacts as these have been mitigated through the location of perimeter roads around the proposed tavern and design features such as screen landscaping.

The non-compliance with the 9.5m building height development standard allows for the orderly and economic use of the land, which has the capacity to accommodate a high-quality Tavern within the current and expanding Oran Park Town Centre. The setbacks and screen landscaping are considered suitable for the height and scale of the proposed development. The Level 2 and roof components of the proposed development have been setback from the ground and first floor levels, to reduce the overall visual prominence of the Tavern from the future residential areas, as demonstrated in the plans below (**Figures 5 and 6**).

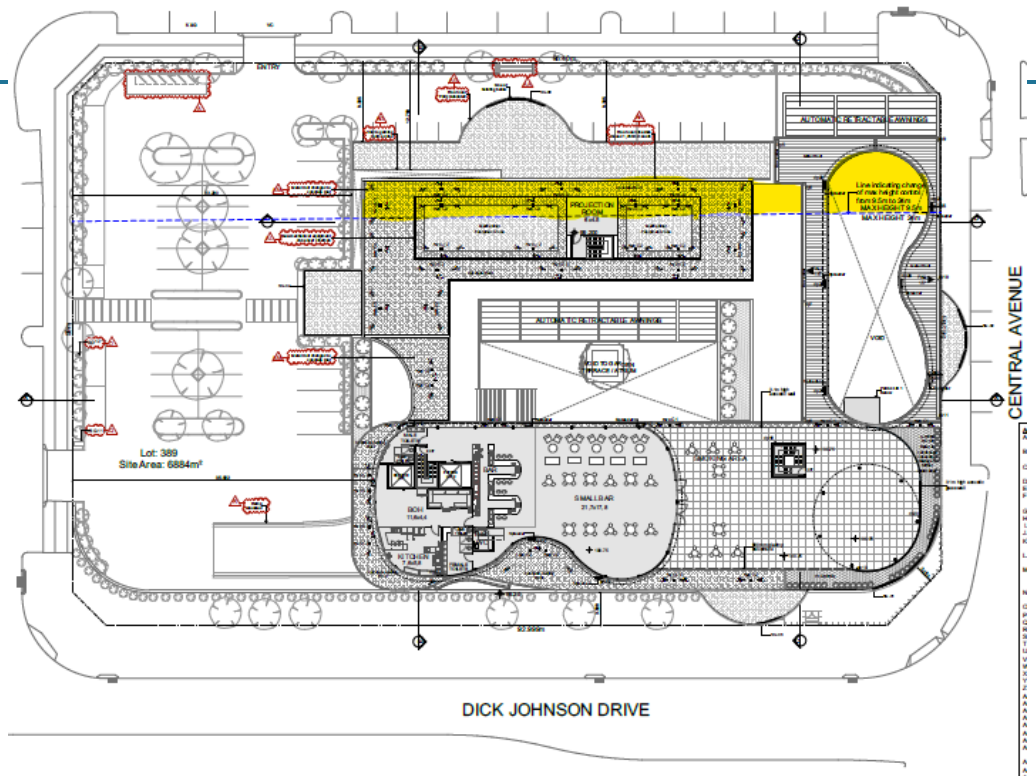


Figure 5 Level 2 – area subject to variation request

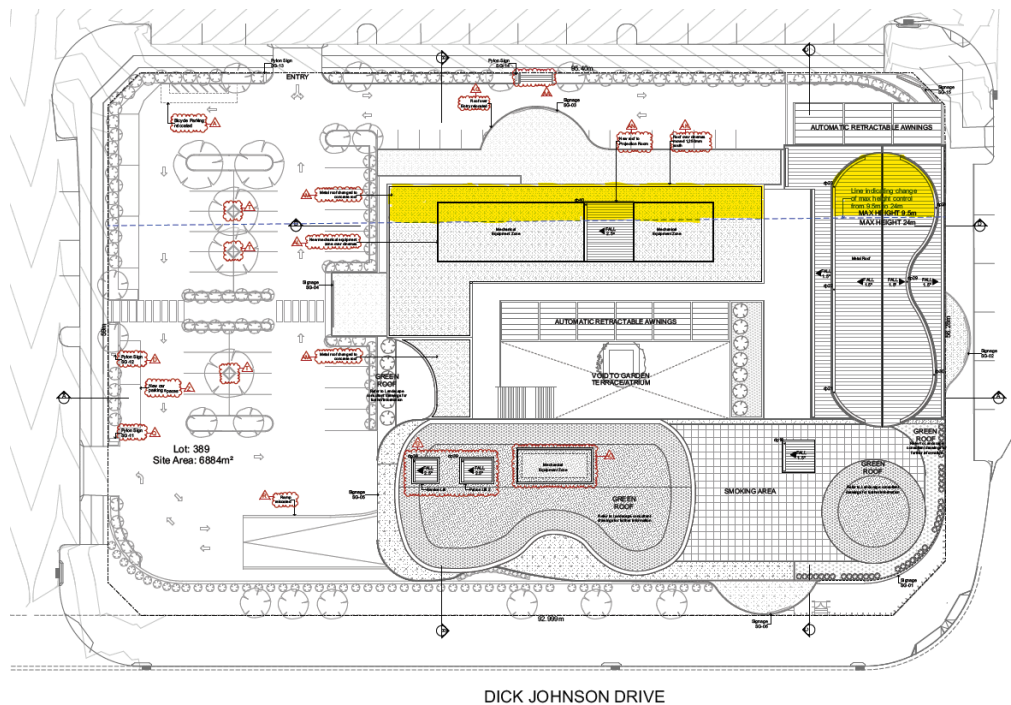


Figure 6 Roof Plan – Area subject to variation requires

5 Assessment of the Variation

Overall, the proposed Tavern building has been designed to respond to the natural topography. The proposed development responds to the constraints of the site, including the requirement for gradient levels for access requirements, basement carparking, as well as providing appropriate floor-to-ceiling heights within the proposed Tavern. The proposal is a good planning outcome.

Strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as the proposal achieves and/or is not inconsistent with the relevant objectives of the 9.5 building height development standard in that:

- The height of the proposed building maintains the desirable attributes and is not out of character with the vision of the future Oran Park Town Centre;
- The building height does not result in any overshadowing or loss of privacy to existing and proposed future residential properties;
- The building design contributes positively to the existing character of the town centre and future visual amenity of the area; and
- The additional height on the northern section of the proposed building will not overshadow any public open spaces or public domain areas.

Furthermore, strict compliance with the 9.5m building height development standard would require a redesign of the proposed Tavern to accommodate the training and function rooms, which would result in a poor planning outcome and inefficient use of the land, being:

- Requirement for additional basement carparking and an increase in site coverage to accommodate these facilities within the 9.5m building height limit.
- Additional building height on the southern section of the proposed building to accommodate the training and function rooms, resulting in a poor urban design.

Compliance with the 9.5m building height development standard would result in an inferior design outcome with either additional footprint occupying more of the site, or additional height on the southern side of the site which has a 24m building height development standard, and which would potentially create solar and view impact issues.

Compliance with the 9.5m building height development standard is also considered unnecessary in this instance as the building height variation does not give rise to adverse impacts to the built environment or surrounding properties and therefore there are sufficient environmental planning grounds to justify the variation.

5.2.2 **Clause 4.6 (3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.**

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

The site-specific environmental planning grounds that support the proposed variation to the 9.5m building height development standard in this circumstance include:

- The topography of the site falls from west to east, which exasperates building height non-compliance on the eastern side of the building.

5 Assessment of the Variation

- The entire site is better suited for business/ commercial use due to the proximity to the town centre, and it is considered the planning outcome within the ILP and SEPP (SRGC) Appendix 1 maps are inconsistent with best planning practice.
- There is also inconsistency with planning maps and planning controls. The depth of the R3 zoned area (approximately 18m) is not suitable for residential development, Oran Park Precinct Development Control Plan, Clause 7.3, Blocks, states 'Street blocks are to be generally a maximum of 250m long and 70m deep'. This indicates a maximum lot depth of 35m, almost double what has been identified in the ILP. When the front and rear setbacks are considered, the current provision of 18m deep allotments, would result in a poor planning outcome of 8.5m buildable area.
- The location of the proposed development site, being within the town centre, compliments a lower scale commercial development such as the proposed Tavern as a transition to adjacent residential uses, therefore improving the public domain of the town centre.
- As the site is currently undeveloped, there will be no loss of views from the proposed future residential properties.

In addition to the above grounds, in *Micaul and Initial Action*, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts.

As outlined in Section 5.2.1, there is considered to be a lack of adverse amenity impacts arising from the proposal as it will not result in adverse overshadowing, overlooking or acoustic impacts. Furthermore, view impacts have been minimised to the extent that view loss is considered to be negligible.

Notwithstanding the contravention of the 9.5m building height development standard, the proposal minimises significant adverse amenity impacts.

5.3 **Step 2 – Pursuant to cl4.6(4)(a(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,**

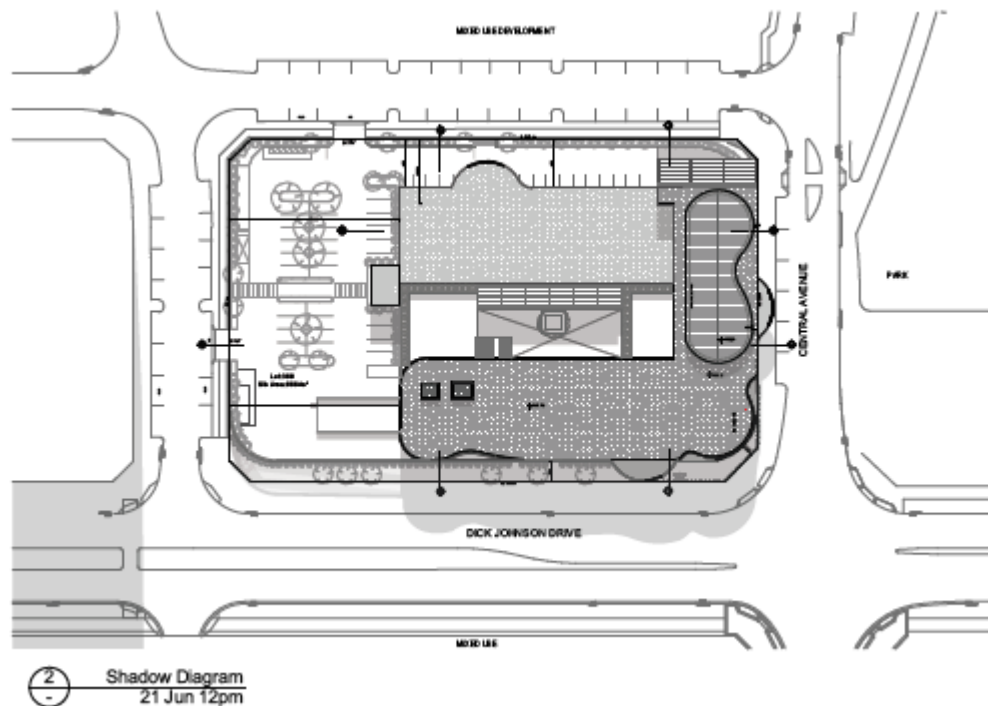
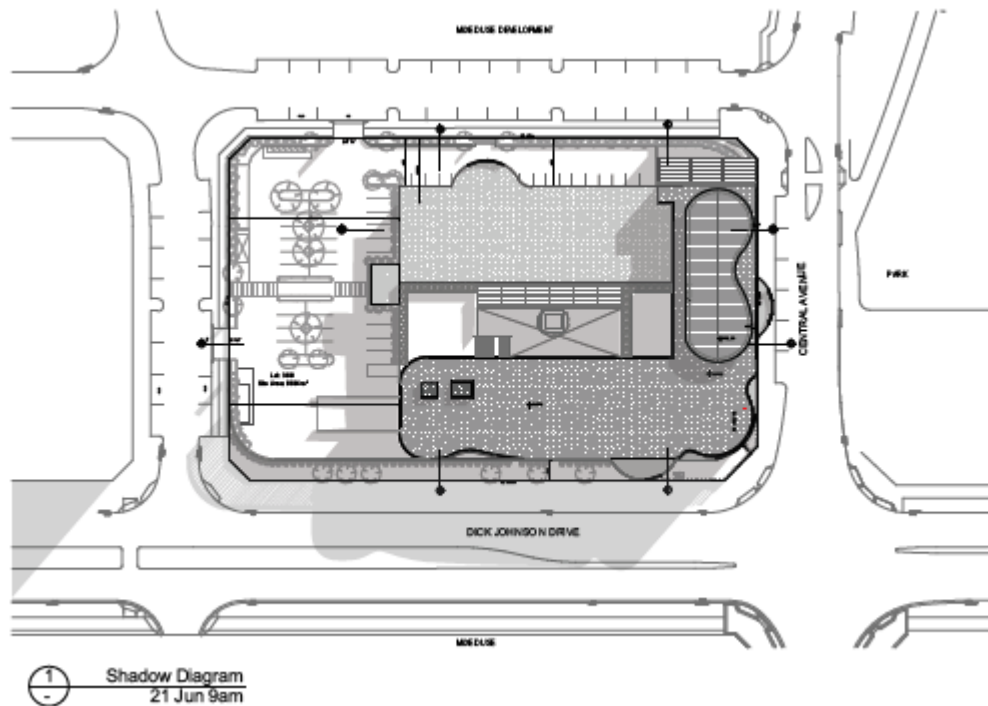
5.3.1 **The Objectives of Building Height Development Standard**

The objectives of the maximum height of buildings standard in Clause 4.3(1) are:

- (a) *to preserve the amenity of adjoining development in terms of solar access to dwellings, private open space and bulk and scale,*
- (b) *to provide for a range of residential building heights in appropriate locations that provide a high-quality urban form,*
- (c) *to facilitate higher density neighbourhood and town centres while minimising impacts on adjacent residential areas,*
- (d) *to provide appropriate height controls for commercial and industrial development.*

In terms of objective (a), as demonstrated in the shadow diagrams submitted with the development application (**Figure 7**), given the orientation of the site and the location of the proposed Tavern, shadows resulting from the proposed development will generally not affect development to the north, south or west. Minimal overshadowing impact will result to the park located to the east. Therefore, the proposal is not considered to result in an unacceptable impact upon solar access, as the proposal will not reduce solar access for any property to less than 3 hours during the day in mid-winter.

5 Assessment of the Variation



5 Assessment of the Variation

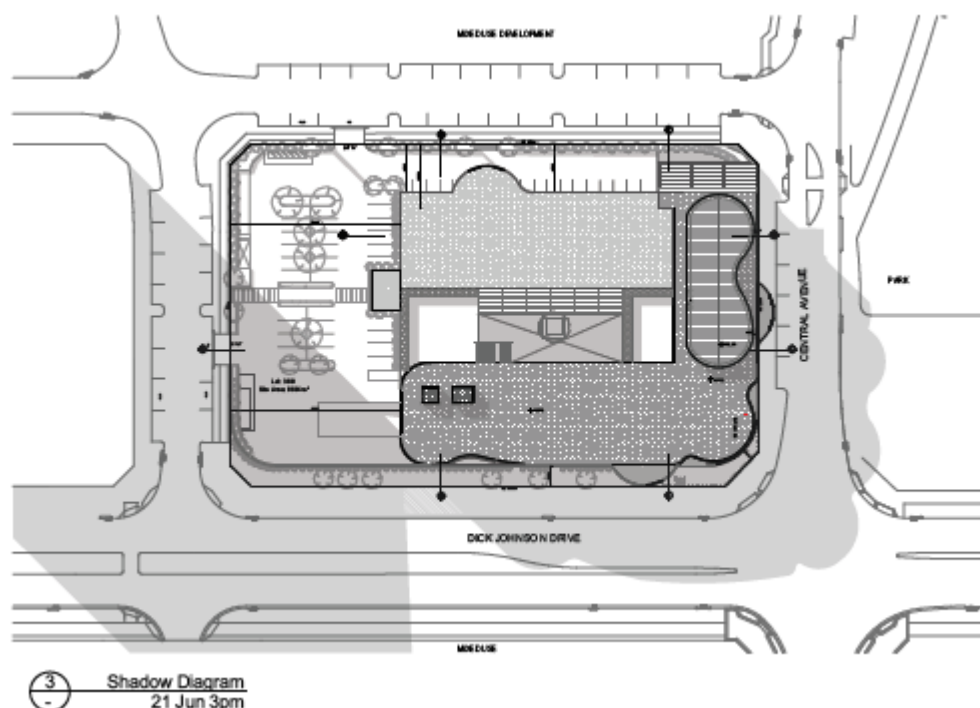


Figure 7: Overshadowing diagrams for Winter Solstice at 9am, 12pm and 3pm

Objective (b), is not relevant to this variation request as the proposal is not for residential development.

In terms of objective (c), the proposal has endeavoured to maintain the desirable attributes and future character of the area by providing a high-quality Tavern development that meets the recreational and training needs of the local residents and community as a whole. It is noted that the local future character of the area is generally based around a town centre with a residential zoning located towards the north and west of the subject site. Having regard to the permissible building height controls within the area, it is considered that the proposed Tavern building, which has a maximum three storey appearance to Dick Johnson Drive, proposed Central Avenue, and two future proposed (unnamed) roads, will not be out of character with the future town centre character.

Furthermore, the proposed Tavern has not maximised the prescribed 24m building height controls to the south of the site within the B2 zone.

In terms of objective (d), Having regard to the permissible building height controls within the area, it is considered that the proposed Tavern building, which has maximum three storey appearance to Dick Johnson Drive, proposed Central Avenue, and two future proposed (unnamed) roads, will not be out of character with the future town centre.

Overall, the proposal has been designed to provide an efficient built form which responds appropriately to the site and town centre character without resulting in significant adverse impacts.

5 Assessment of the Variation

5.3.2 The Objectives of the B2 Local Centre Zone

The Land Use Table of SEPP (SRGC) Appendix 1 states the zone objectives of the B2 Local Centre zone as follows:

- *To provide a range of retail, business, entertainment and community uses which serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To ensure that residential development does not detract from the primary function of the centre being to provide for retail, business, entertainment and community uses.*
- *To ensure that residential development does not preclude the provision of active uses at street level.*
- *To provide for land uses of a higher order and density within the Local Centre Zone than are permitted within the Neighbourhood Centre Zone or the Mixed-Use Zone.*
- *To provide for residential development that contributes to the vitality of the local centre.*

The objectives of the B2 zone do not specifically address building height but relate to encouraging other forms of land uses to service or meet the day to day needs of residents. The ability of the proposed Tavern to achieve these zone objectives is not affected by the proposed building height variation.

5.3.3 The Objectives of the R3 Medium Density Residential Zone

The Land Use Table of SEPP (SRGC) Appendix 1 states the zone objectives of the R3 Medium Density Residential zone as follows:

- *To provide for the housing needs of the community 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 wellbeing of the community, including educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.*
- *To provide for a variety of recreational uses within open space areas.*
- *To allow for small scale kiosks, function centres, restaurants and markets that support the primary function and use of recreation areas, public open space and recreation facilities located within residential areas.*

The objectives of the R3 zone do not specifically address building height but relate to encouraging other forms of land uses to service or meet the day to day needs of residents. The ability of the proposed Tavern to achieve these zone objectives is not affected by the proposed building height variation.

5.3.4 The Objectives of the RE2 Private Recreation Zone

The Land Use Table of SEPP (SRGC) Appendix 1 states the zone objectives of the RE2 Private Recreation zone as follows:

- *To enable land to be used for private open space or recreational purposes.*
- *To provide a range of recreational settings and activities and compatible land uses.*

5 Assessment of the Variation

- *To protect and enhance the natural environment for recreational purposes.*
- *To preserve and maintain the natural values of core riparian areas and to allow development where it can be demonstrated that the development will not destroy, damage or have any other adverse effect on those values.*
- *To ensure that residential development does not have an adverse effect on those values.*

The proposed built form is not located with the RE2 zoned portion of the subject site. Land adjacent to the site is identified in the ILP for recreational use.

5.3.5 Objectives of SEPP (Sydney Region Growth centres) 2006, Appendix 1, Oran Park and Turner Road Precinct Plan

Table 1 provides an assessment of the proposed development against the objectives of the Clause 1.2 of SEPP (SRGC) Appendix 1, Oran Park and Turner Road Precinct.

Table 1 Assessment against the objectives of the SEPP (SRGC), Appendix 1, Clause 1.2	
Objective	Assessment
(a) <i>to make development controls for land in the Oran Park and Turner Road Precincts within the South West Growth Centre that will ensure the creation of quality environments and good design outcomes, and</i>	The proposal will result in an orderly and sustainable economic development which meets the social needs of the locally community by providing a high-quality Tavern for recreation and training.
(b) <i>to protect and enhance the environmentally sensitive areas and natural and cultural heritage of those Precincts, and</i>	The ILP has not reserved the site for environmental purposes, nor has any heritage items/ habitats or conservation areas been identified on the site. However, if during construction any heritage items are located on the site, works will cease until the object and/ or site have been further assessed.
(c) <i>to provide for multifunctional and innovative communities in those Precincts that encourage employment and economic growth, and</i>	The proposal provides a facility that will offer employment opportunities. Incorporation of a function and training rooms also creates a multifunctional Tavern.
(d) <i>to promote housing choice and affordability in those Precincts, and</i>	Not applicable
(e) <i>to provide for the sustainable development of those Precincts, and</i>	The proposal is generally in keeping with the ILP for Oran Park and Turner Road Precinct. The proposed development will create employment opportunities for current and future residents as well as short term construction jobs. Sustainability of materials for the proposed development can be detailed at CC stage.
(e) <i>to minimise the impact on existing and future communities of the full range of risks posed by natural hazards such as bushfires and flooding.</i>	Not applicable

5 Assessment of the Variation

5.3.6 Objectives of SEPP (SRGC) Appendix 1, Clause 4.3

Table 2 provides an assessment of the proposed development against the objectives of the SEPP (SRGC), Appendix 1, Clause 4.3 Height of Buildings.

Table 2 Assessment against the objectives of the SEPP (SRGC), Appendix 1, Clause 4.3

Objective	Assessment
(a) <i>to preserve the amenity of adjoining development in terms of solar access to dwellings, private open space and bulk and scale,</i>	<p>The Height of Building maps establishes the maximum height for development. The maximum Building Height Map indicates that the subject site has two maximum building heights, being 9.5m on the R3 zoned land and 24m on the B2 zoned land. The surrounding land zoned R3 and B2 zones also have the respective building heights. The site is proposed to be bounded by roads to the north, south, east and west, where there are no building height limits.</p> <p>Amenity of the surrounding properties in the R3 zoned land is preserved through the road separation.</p>
(b) <i>to provide for a range of residential building heights in appropriate locations that provide a high-quality urban form,</i>	<p>The section of the site zoned R3 is not considered suitable for residential purposes as it only has depth of approximately 18m. Oran Park Precinct Development Control Plan, Clause 7.3, Blocks, states 'Street blocks are to be generally a maximum of 250m long and 70m deep'.</p> <p>This indicates a maximum lot depth of 35m, almost double what has been identified in the ILP. When the front and rear setbacks are considered, an 18m deep allotment would only be left with an 8.5m buildable area.</p> <p>On this basis the continuation of the B2 building height development standards is considered more suitable for the subject site.</p>
(c) <i>to facilitate higher density neighbourhood and town centres while minimising impacts on adjacent residential areas,</i>	<p>The proposal minimises impact from adjacent neighbouring properties through utilising the carpark a separation mechanism between the future residential dwellings and the proposed tavern, in particular the section of tavern subject to this application.</p>
(d) <i>to provide appropriate height controls for commercial and industrial development.</i>	<p>The building height control for the commercial (B2 zoned) area of the land is 24m. This application seeks a variation to the R3 zoned land with a height limit of 9.5m, to be increased to match the proposed height of the Tavern, that is in the B2 zoned land being, 12.15m. This building height is still well below the permissible 24m in the B2 zone.</p>

5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Director General has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

As SEPP (Growth Centres) adopts cl4.6 of the SILEP and the conditions of the Notice are not relevant in this instance, the consent authority for the Proposal may assume concurrence in respect of the variation requested to the height development standard under SEPP (Growth Centres) 2006, Appendix 1.

In addition, the Court has power to grant development consent to the proposed development even though it contravenes the FSR development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

5 Assessment of the Variation

5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

In Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under s39(6) of the Court Act, the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the 9.5m building height development standard for a small portion of the proposed Tavern building located within the R3 zone has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is relevant to the design of the proposed development for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- The proposed contravention of the 9.5m building height development standard is considered to be in the public interest because it is consistent with the objectives of the R3 and B2 zones and the objectives of the building height development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the consent authority.

6 Conclusion

The proposed development contravenes the 9.5m building height development standard under clause 4.3 of SEPP (SRGC), Appendix 1 for a small portion of the proposed Tavern building that is located in the R3 zone.

The 9.5m building height control under clause 4.3 of SEPP (SRGC), Appendix 1 is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- Notwithstanding the contravention of the 9.5m building height development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to clause 4.3 of SEPP (SRGC), Appendix 1 of and is consistent with the relevant objectives of the R3, B2 and RE1 Zones and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the 9.5m building height development standard, the proposed height will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse impacts on the amenity of the locality will be minimised to a reasonable level; and

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the 9.5m building height development standard including:

- a lack of significant adverse environmental amenity impacts;
- Topography of the site;
- Orderly and economic development of the town centre;
- Conflict of land uses without sufficient separation as a consequence of the B2 and R3 split zoning and applicable planning controls of the site.

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under cl4.6(4) of the Appendix 1 of SEPP (SRGC).

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018. Alternatively, the Court can use its powers under s39(6) of the Court Act and be satisfied that contravention of the development standard does raise any matter of significance for State or regional environmental planning, there is no public benefit of maintaining the development standard and there are no other relevant matters required to be taken into consideration.

Accordingly, the consent authority can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.