



LandDynamics
AUSTRALIA

UPDATED CLAUSE 4.6 REQUEST FOR VARIATION TO CLAUSE 4.3 OF PORT MACQUARIE HASTINGS LEP 2011

DEVELOPMENT APPLICATION (DA)

Proposed Residential Flat Building

Lot 1 DP 538077 – 10 Pacific Dr, Lot 2 DP 538077 - 13 Pacific Dr,
Lot A DP 441800 – 13 Pacific Dr & Lot 101 DP 1244390 – Pacific Dr,
Port Macquarie

On behalf of
Laurus Projects Pty Ltd

V2 - October 2021



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Disclaimer

This report was prepared in accordance with the scope of works set out in correspondence between the client and Land Dynamics Australia. To the best of Land Dynamics Australia's knowledge, the report presented herein accurately reflects the Client's intentions when the report was printed. However, it is recognised that conditions of approval at time of consent, post development application modification of the proposals design, and the influence of unanticipated future events may modify the outcomes described in this report.

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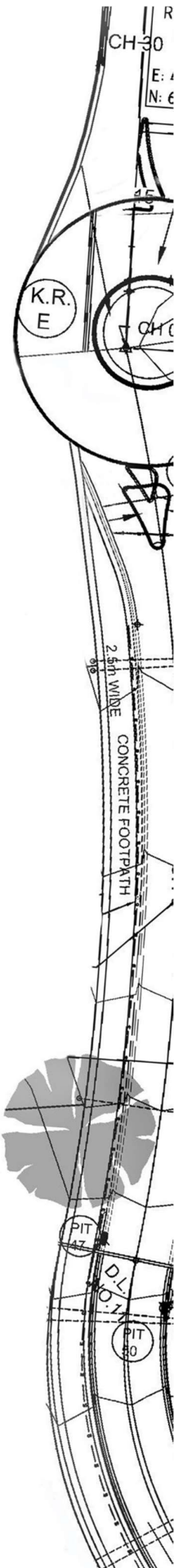
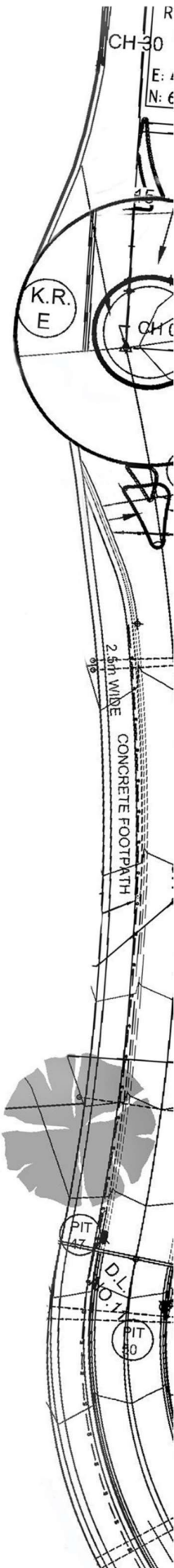


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1. Introduction

This is a request to vary a development standard pursuant to the provisions of Clause 4.6 of Port Macquarie Hastings Local Environmental Plan 2011 (LEP 2011), the relevant clause being Clause 4.3 Height of Building.

The relevant maximum height of 17.5m. The relevant maximum height of building control is a development standard for the purposes of the EP&A Act 1979.

This request to vary the maximum height development standard considers the judgment in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action"), *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Council* [2020] NSWLEC 1112 (SJD DB2). This request also draws upon the findings in *Whebe v Pittwater Council* which are adopted to deal with the unreasonable and unnecessary test under Cl. 4.6(3)(a) of Clause 4.6 of LEP 2011.

The more recent case establishes that the extent of the numerical variation permitted by the consent authority is discretionary.

The objectives of Clause 4.6 1(a) are to provide an appropriate degree of flexibility in applying certain development standards to particular development. The intent is to allow flexibility in particular circumstances in accordance with Clause 4.6 1(b). Flexibility is requested in relation to the proposal in regard to the application of the LEP building height control. In accordance with Clause 4.6, the following is a written request justifying departure from Clause 4.3 in relation to the proposed height of the development.

This Updated Clause 4.6 Variation written request should be read in conjunction with the Statement of Environmental Effects which accompanies a development application (DA) lodged with Port Macquarie Hastings Council (Council) for a Residential Flat Building.

The site is identified as Lot 1 DP 538077 -10 Pacific Dr, Lot 2 DP 538077 – 13 Pacific Dr, Lot A DP 441800 – 13 Pacific Dr and Lots 101 and 102 DP 1244390, Pacific Drive, Port Macquarie, comprising vacant land and an existing Motel. The site is located on the southern edge of Port Macquarie and is located on the western side of the Pacific Drive. The eastern portion of the development site comprises Lot 101 DP 1244390, which is currently owned by Port Macquarie Hastings Council and the purchase is underway. Owner's consent will be provided in accordance with Council's resolution of 15 March 2017, as per discussions with Council's Property Section. Civil works are proposed on Lot 102 to the south of the development site.

This Clause 4.6 Variation to the height limit has been requested as the topography of this site makes the design of the building difficult to strictly adhere to the height limit. It is important to note that the requested height variation does not relate to this northern area of the building, but rather as the building steps down the slope towards the southern portion of the site. The building complies with the height control for this northern portion of the site where there is a potential for view loss and the western portion where there is a transition to a lower height limit, to ensure the impact is minimised.

2. Development Standard to be Varied – Maximum Height

Clause 4.3 of LEP 2011 indicates a maximum height of 17.5m as shown on the Port Macquarie Hastings Local Environmental Plan 2011 – Height of Buildings Map. Clause 4.3 of LEP relevantly provides:

"4.3 Height of buildings

(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,
 - (c) to minimise the adverse impact of development on heritage conservation areas and heritage items,
 - (d) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan.
- (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 relevant LEP maximum height map is identified below:



The relevant *development standard* to be varied is the maximum height of 17.5m development control, as referenced under Clause 4.3.

It is important to note that the adjoining land to the west has a lower height limit of 11.5m.

3. Nature of Variation Sought

The height control on the subject site is 17.5m under Clause 4.3. The development largely complies with the height control, except for minor roof components as detailed below. The exceedance relating to the upper parts of the units only in small portions only as shown above and generally includes ceiling, roof and lift overrun. The exceedances are primarily located in the central and central-southern areas of the roof.

The portion of the roof which exceeds the controls is unlikely to result in amenity impacts and will not be discernible from the public domain. The images below detail the maximum height at the worst point above natural ground level, noting it is a small portion only due to the slope, and not the entire building exceeding the height limit.

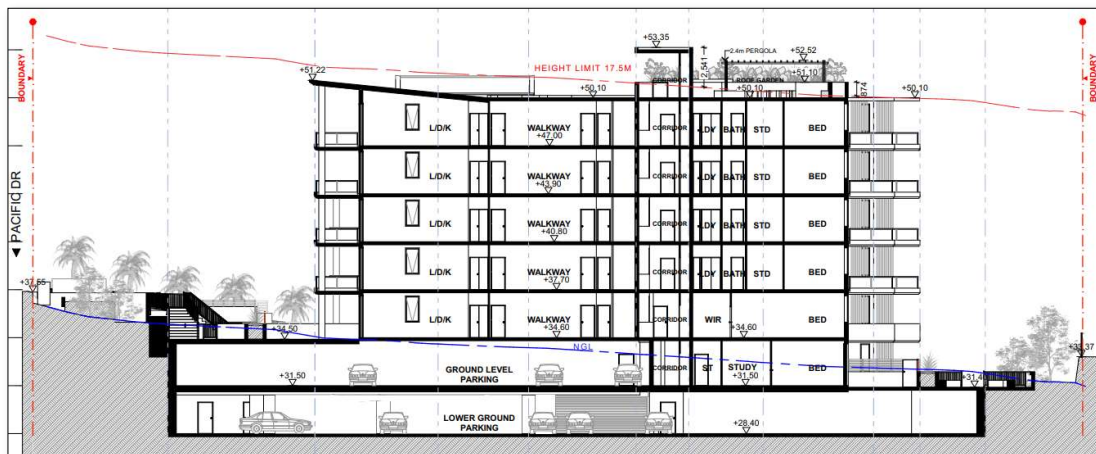
Deliberately, the exceedance of the height standard is confined to the central portion of the proposed development, with the western areas of the proposed development being within the 17.5m building height envelope which is relevant to the subject site and the setback to the areas of non-compliance being between 10m- 20m.

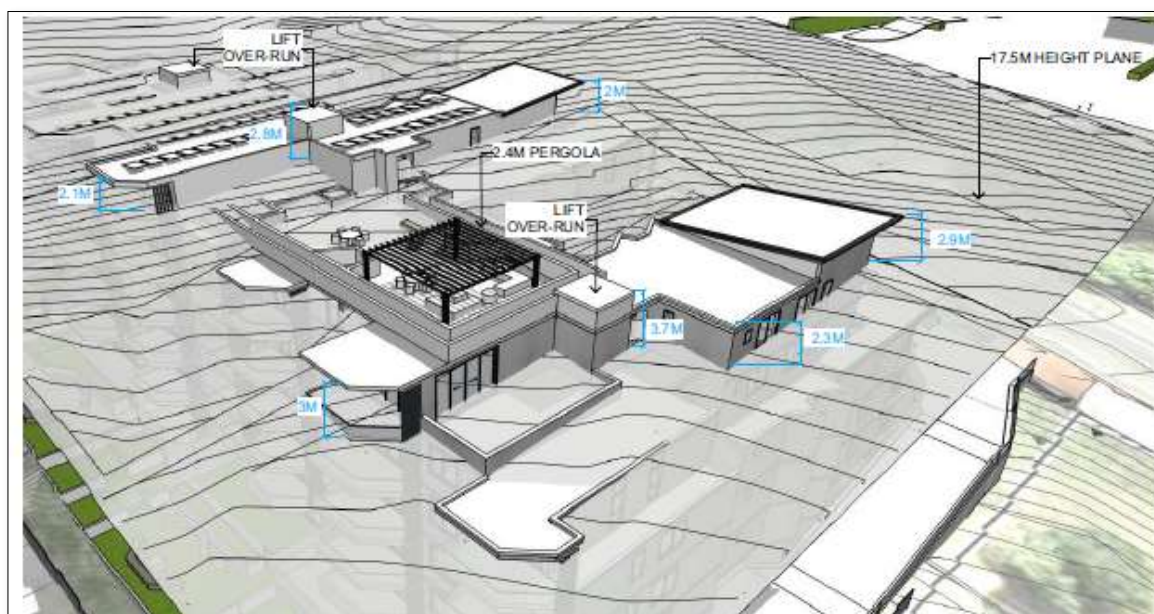
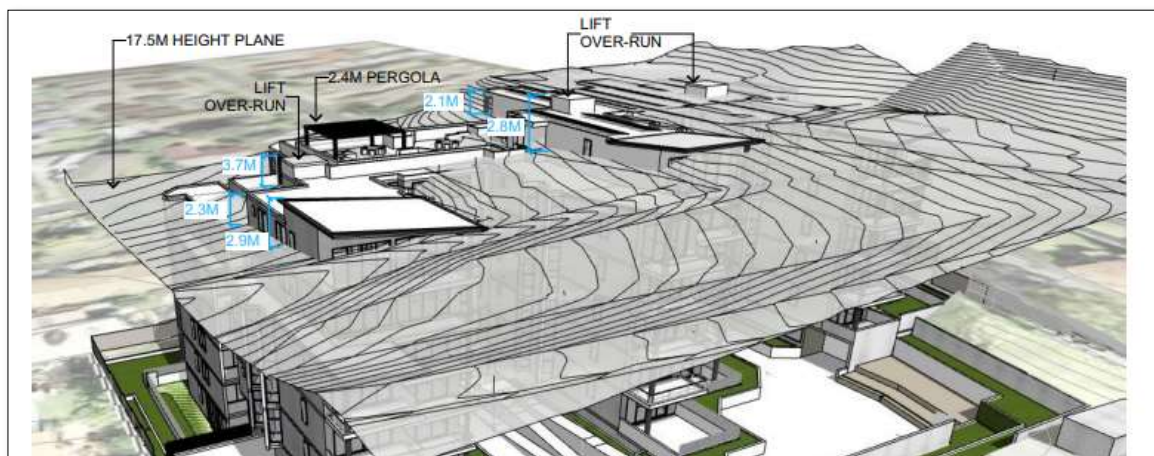
The height of the building breaches the 17.5m height limit marginally in isolated portions for habitable floor space, however, is below the limit for the large majority of the development, as shown in the images below. The following justification as to why strict compliance with the height control is unreasonable in this instance:

- The exceedances as indicated on the plans and comprises a portion of the roof or upper component in the central and southern portions of the building, with the exceedances setback 10m to 20m from the western boundary. And often relates to lift overrun or upper portions of the building.
- The building design responds to the topography by stepping up the sites and the built form is consistent with the existing built form in the wider locality on sloping sites. This is clear from the recent applications for similar developments along the coastal transitioning area, also with height variations.

- The non-compliance results from the slope of the land. When averaged across the site, it can be seen that the development is well below the limit in other areas, which is a direct response to the slope of the land. The design allows for the use of the land to be maximised whilst responding to the slope.
- The variation results in maximum amenity to future residents of the units. Due to the slope and orientation to maximise views, the building has been designed to step down the hill and as such views are over the dwelling below and onto its roof.
- The variation allows diversity in residential accommodation in the area. The bulk and scale are acceptable despite the non-compliance, with the height breach being virtually imperceptible.
- The height variations do not result in an unacceptable or overbearing visual appearance from Pacific Drive.
- The slope in the land and well-designed layout achieves maximum efficiency of the site, despite the small non-compliance.
- The “E” shape of the building will reduce the building’s overall bulk and reduce the extent of building above the height limit.
- Any potential amenity impacts are directed to the east or over the adjoining properties due to the line of sight from the rooftop garden and upper units where there is a minor exceedance.
- Landscape design will provide opportunity for screening throughout the entire development and the roof, which also assists with reducing privacy impacts and visual bulk of the areas of exceedance.
- The design with a minor height non-compliance does not impact on solar access and the proposed landscaping assists with all amenity requirements.
- No impacts arise on adjoining properties as a result of the non-compliance.
- Given that the FSR control is not exceeded by the overall development, there is no additional floor space benefit from the height variation.
- The objectives of the LEP and zone continue to be achieved despite the minor variation.

The topography of this site makes the design of the building difficult to strictly adhere to the height limit. The original design had significant variations to the height limit and the Architects have worked to reduce the height variation to components only.





The submitted Elevations clearly indicate the height limit and where the residential flat building exceeds the limit. As can be seen from the extracts above, the portion of the roof which exceeds the controls is unlikely to result in amenity impacts and will not be discernible from the public domain due to the location of the variation and the inability to identify when viewing from the public domain at street level. The images detail the maximum height at the worst point above natural ground level, noting it is a portion only due to the slope, and not the entire building exceeding the height limit. The red line on the elevation plans reflects the maximum height limit and the portion of the building which exceeds the limit. The areas of exceedance in the images demonstrates the minor nature of the variation.

Maximum Height – Development Standard

A development standard is defined in Section 1.4 of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") to mean:

"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) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed."*

The maximum height of 17.5m standard is a *development standard* as defined under the *EP&A Act 1979*.

Surrounding Development

The site is located within the established residential area and forms part of one of the remaining vacant parcels in the area. The subject land is surrounded by a range of single and two storey dwellings to the south and west and residential flat buildings in Windmill Street to the north of the site. These buildings to the north range between 2 to 3 storey, however due to the topography are considerably higher than the other surrounding dwellings. Retaining walls have been utilised along the northern and western boundaries and within the site due to the topography of the land.

Photographs of surrounding development is included in the Statement of Environmental Effects.

Below are extracts from the Statement of Environmental Effects which clearly show the zone boundaries, height and floor space controls together for easy comparison.

Zoning



Maximum Height



Maximum Floor Space Ratio



As can be seen from the three images, the zoning of the area is attempting to provide increased density along the northern, eastern and southern areas, which includes the subject site. As such, these areas have increased height limits up to 17.5m and increased floor space ratios of up to 2:1, with the subject site 1.5:1.

The land immediately to the west of the subject site has a maximum height limit of 11.5m and maximum FSR of 0.65:1, noting a pocket of land of 1.5:1. The current development on the immediately adjoining land to the west is for 1 & 2 storey dwellings, which is well below the future desired planning for the land which has a height limit which would equate to 4 storeys.

The land immediately to the south of the subject site has a maximum height limit of 17.5m and maximum FSR of 1.5:1, which is the same as the subject site.

4. Clause 4.6 of Hastings Local Environmental Plan 2011

The following provides a response to relevant Clause 4.6 provisions. Clause 4.6 allows Council to grant consent for development where it does not satisfy a development standard.

Clause 4.6 states:

“4.6 Exceptions to development standards

(1) The objectives of this clause are 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.

(2) Development 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.

(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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made, it did not include Zone RU4.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (ca) clause 6.1, 6.2 or 6.3."*

The proposed variation to the height control provides for an improved planning outcome with respect to the overall development meeting the above objectives.

Clause 4.3 (2) of LEP 2011 provides that development on the subject land shall not exceed the maximum building height shown on the Height of Buildings Map. The map shows the maximum permissible 'baseline' building height on the subject land to be 17.5m. The elevation plans show that the proposed development has a relatively minor exceedance to the maximum permitted building height when considering the overall size of the development, as shown on the plans above.

Clause 4.6 (2) of LEP 2011 permits the consent authority to exercise an appropriate degree of flexibility in applying the maximum permissible building height development standard to the proposed development. This written request addresses the matters required by Clauses 4.6 of LEP 2011 in order to satisfy the Council and the Director-General that any requirement for the proposed development to strictly comply with the maximum permissible building height development standard is unreasonable or unnecessary in the particular circumstances.

Council is requested to agree to the proposed development's non-compliance with the maximum height of 17.5m with respect to the upper portions of the proposed Residential Flat Building and grant consent to the proposed development with a maximum height marginally above the control, having regard to the matters addressed in this request and the minimal extent of the encroachment.

The maximum height development standard is not expressly excluded from the operation of Clause 4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify the contravention of a development standard where compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development does not comply with the maximum height development standard as required under Clause 4.3 of the LEP 2011. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed further in this written request.

Sufficient environmental planning grounds exist to justify contravening the development standard as detailed in Section 8.

Clause 4.6(4) (stated above) provides that consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being unreasonable and unnecessary in the circumstances of the specific case and the proposed development will be in the public interest, and the concurrence of the Secretary has been obtained.

Sections below of this written request address the matters required under Clause 4.6(4)(a) of the LEP 2011 and Clause 4.6(4)(b).

Sections below of this written request addresses the matters required under Clause 4.6(5) of the LEP. Clauses 4.6(6) and (8) are not relevant to the proposed development and Clause 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

5. Varying Development Standards: A Guide – August 2011

The publication *Varying Development Standards: A Guide*, dated August 2011 provides guidance when preparing a Clause 4.6 Variation request. Specifically, it states:

"The 'five part test'

Written applications to vary development standards will not only address the above matters but may also address matters set out in the 'five part test' established by the NSW Land and Environment Court. Councils may choose to not only use the principles of Clause 4.6 and SEPP 1 but also this five part test.

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded:

- 1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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 compliance with the standard is unnecessary and unreasonable;*
- 5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone."*

Each point is addressed below:

- 1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*

The underlying objective or purpose of the maximum permissible building height development standard applicable to the subject land under Clause 4.3 and the proposed development is stated within the objectives to Port Macquarie Hastings LEP 2011 - Clause 4.3 (1) - Height of Buildings, 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,

- (c) *to minimise the adverse impact of development on heritage conservation areas and heritage items,*
- (d) *to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan."*

Importantly, and as reflected within the objectives, the proposed development reflects the intended strategic land use direction as outlined in Council's LEP and DCP controls and achieves the desired future character of the area, which transitions from low density to medium to high density.

The zoning of the immediate area is attempting to provide increased density along the northern, eastern and southern areas, which includes the subject site. As such, these areas have increased height limits up to 17.5m and increased floor space ratios of up to 2:1, with the subject site 1.5:1.

The land immediately to the west of the subject site has a maximum height limit of 11.5m and maximum FSR of 0.65:1, noting a pocket of land of 1.5:1. The current development on the immediately adjoining land to the west is for single storey dwellings, which is well below the future desired planning for the land which has a height limit which would equate to 4 storeys.

The land immediately to the south of the subject site has a maximum height limit of 17.5m and maximum FSR of 1.5:1, which is the same as the subject site. The Architectural Plans identifies the future possible development on the land to the south having regard to LEP controls and proposed separation. It is clear that the proposed building is appropriately design along the southern portion to transition to a future permissible development, as envisaged in the planning of the area.

Below is an extract from D2: Port Macquarie East of Port Macquarie Hastings Development Control Plan 2013, specifically relating to the Windmill Hill Precinct.

All of the sites in the planned increased density area along the coast will face transition issues due to the topography and the need for a rudimentary LEP line to be drawn between zones, height limits and floor space controls. In summary, the desired future character of the area identified by Council's LEP and DCP controls would see the land to the south developed in a similar fashion to the subject proposals being 6 to 7 storeys in height and the land to the west being 4 storeys. The large setbacks, in particular to the west, allows for the redevelopment of the adjoining sites to have greater opportunity to achieve separation requirements of the ADG.

The substantial setbacks, in particular to the west which are over 10m is reflected in the second image below. This image reinforces the suitable transition between the proposed building and the existing adjoining buildings. What is not clear however, is that the land to the west is able to be increased to 4 storeys under the current planning controls and desired future character.

Windmill Hill

The Windmill Hill Precinct will continue to evolve as a medium density residential precinct with a diverse range of housing types. Building forms along the northern and eastern edges of the precinct will reflect the higher landform in this area and form a distinct edge to the open space, stepping down in height towards the west.

The eastern end of Burrawan Street and northern end of Pacific Drive will be developed with sensitive building design that reduces their visual impacts on views from the public domain and on open space. Home Street will link the neighbourhood to the Town Centre and the landscape view corridors to the west will be further enhanced through tree planting and soft landscaping.

Owen Street will be strengthened as the main north-south link through the precinct with tree planting and soft landscaping.

Burrawan Street will have higher densities between Owen Street and Pacific Drive creating a consistent edge to the school and Oxley Park, and could become a green focal point for community activity through the planting of edible streetscaping.

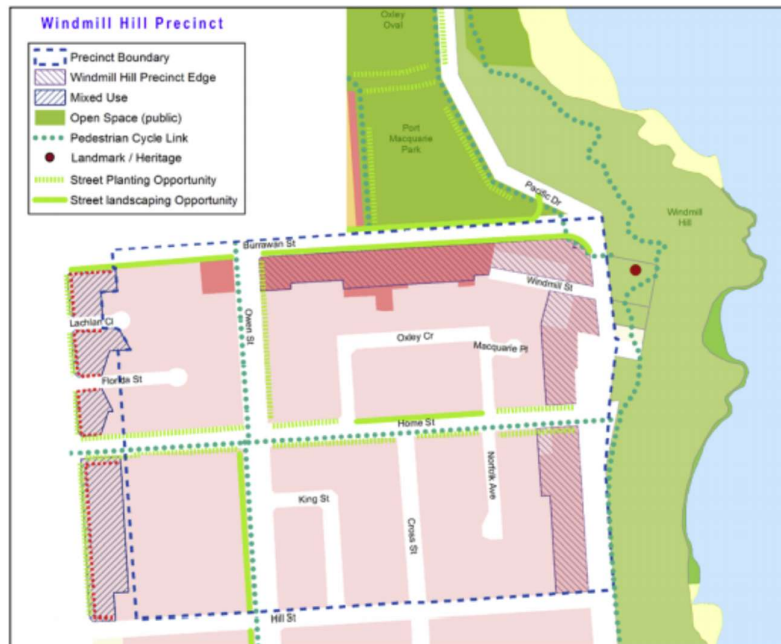


Figure 63: Windmill Hill Precinct Structure Plan



It is important to consider the variation in the context of the intended scale of development and the proposed form of this proposal with the variation to height is reflective of the desired bulk and scale and density of this site and immediately surrounding area. Importantly, Council's recent Draft Housing Strategy has reinforced the need for infill development such as this proposed in order to achieve the necessary housing needs for the growing population.

As can be seen on the building elevations, the proposed development exhibits only a minor variation to the maximum permitted building height. This is principally a reflection of site levels and topography.

The proposed development exhibits a high degree of architectural quality and urban form and the development steps to respond to the topography. The building's proportions have been developed in consideration of its visual impact on the skyline and impacts for adjoining properties. The proposed building design maximises the roof space and provides a superior level of urban design. The building is articulated and massing within the prescribed envelope aims to reduce the building bulk. The design is stepped, and the upper level stepped back, and the overall building articulated at various points to provide an interesting design and reduces the bulk of the development. The proposed minor building height exceedance does not significantly reduce the opportunity for either the proposed development, or public areas to receive satisfactory exposure to sunlight. Further, the form of the development allows greater exposure to daylight and solar access.

The design height of the proposed development is appropriate in the context of the surrounding residential form and has had regard to the proposed downslope in this development. A minor departure only is proposed from the 17.5m maximum permissible building height development standard and does not cause significant visual impact and does not adversely impact view corridors from public spaces or adjoining neighbours. The proposed development will not be visually dominant due to the slope of the land and the cut proposed. Additional Architectural Plans have been provided in response to Council's Request for Information which further supports this visual impact discussion above.

Whilst there is a request for a variation to height which is difficult to avoid due to the topography of the land, the Architect has been explicit in the design to ensure the FSR controls are not exceeded. This is able to be achieved through a deliberate increase in the setback of the building, in particular to the west which are over 10m and to the east which are up to 23m. A reduced FSR and increased setbacks enable the additional requested height to be limited to the central upper portion of the building ensures the building remains appropriate in terms of bulk and scale, minimising potential amenity impacts such as privacy or view loss from the exceedances.

The design allows for a transition to the existing buildings to the north, as well as the future buildings on the adjoining land to the west and south, in accordance with Council's planning for the area. There is an existing transition disparity between the residential flat buildings to the north and the single dwellings immediately to the south of those buildings (and west of the proposed building). However, once redevelopment of the area is complete, there will be a suitable transition from the higher density (5-7 storeys) to the medium density (3 to 4 storeys) throughout this area.

The proposed areas of variation are not directly related to an increase in shadowing (as demonstrated on the solar access plans), nor a loss of views or increased overlooking or privacy issues.

There are no heritage items in the vicinity of the site.

The final objective specifically acknowledges that this area is under transition and requires the built form to provide a transition between the subject site and adjoining sites with a varying land use intensity. In this regard, the land to the west is the only adjoining property with a lower density zone and smaller height limit. As discussed earlier, this has been a key consideration by the Architect in the design and as such the substantial separation to the

western boundary, which is greater than the separation requirements of the ADG, has been proposed. This increased separation will visually provide a greater distance between buildings, but also assist with minimising amenity impacts and allow greater flexibility in the future design of new buildings on the adjoining land, which ultimately will provide an appropriate transition between the higher and medium density sites in this area.

The objectives of the standard are achieved notwithstanding noncompliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

As discussed above, the objectives of Clause 4.3 aim to achieve the desired character of the area and this is achieved through the proposed development. The non-compliance with respect to height is justifiable given the design of the building was considered to be better than a compliant development. In this regard, the proposed height variation, which is not over the complete development but rather in a small part, is directly correlated to the topography of the land and the resulting design of the building and associated benefits from a compliant development are not so significant that it warrants compliance. A better design outcome is achieved on this site with minor variations to the height control.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

It is not possible for planning standards to consider the individual circumstances of every site when being prepared. The 17.5m height limit is appropriate for the site in achieving the desired residential flat building and increased density in the area. However, the topography of the site is a factor which cannot easily be reflected within the planning controls.

Should strict compliance be required, there would be a significant reduction in density and housing supply for the area, contrary to the intent of the planning controls. This would be disappointing given that the proposed development (with the height variation) is below the maximum floor space ratio and has increased eastern and western setbacks for greater amenity. Given the height of the building and the central location of the areas of variation, there would be little or no amenity improvement from strict compliance and in return, the footprint of the building would need to be increased and setbacks to adjoining properties reduced, which have more severe amenity impacts for adjoining properties.

The underlying object or purpose of the LEP height control is to allow a higher form of density of housing on the site. Should the variation not be accepted, it is considered that the underlying objective of the control for increased density would be defeated. As such, compliance in this instance 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 compliance with the standard is unnecessary and unreasonable;

Council is in a position where the areas identified for increased density are not flat and as such, it is common that a Development Application for redevelopment in the R3 areas along the coast are accompanied by a Clause 4.6 variation with respect to height and often floor space ratio also.

Whilst Council is allowing variations to occur, the development standard has not been abandoned. The variations are related to the upper floor and roof and often to components only such as lift overruns or upper portions of the roof. It is not obvious that considerable variations such as full extra storeys have been supported, and as such, it is deemed that the development standard has not been abandoned or destroyed and the unique circumstances of each site has been considered appropriately.

The same consideration of the unique circumstances of this site is sought.

5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The site is deemed suitable for the zoning of the land for increased housing density. The broader topographical feature of the wider area provides challenges for strict compliance.

6. Relevant Decisions

The following decisions are relevant when considering a Clause 4.6 variation:

Initial Action

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action'), Preston CJ indicated that Clause 4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard. The relevant test is whether the environmental planning grounds relied upon and identified in the written request are "sufficient" to justify the non-compliance sought.

In addition, Preston CJ ruled that Clause 4.6 does not directly or indirectly establish a "test" that a development which contravenes a development standard results in a "better environmental planning outcome" relative to a development that complies with the development standard. There is no provision in Clause 4.6 that requires a development that contravenes a development standard to achieve better outcomes.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191 Moore J (herein referred to as Rebel MH").

In *Rebel MH Neutral Bay Pty Ltd v North Sydney Council [2018] NSWLEC 191* Moore J identifies the steps provided in *Initial Action* confirming what the consent authority must do in order to satisfy itself as follows:

"For me to grant development consent for this development as it contravenes the permitted maximum building height development standard, cl 4.6(4)(a) requires me to be satisfied that:

(1) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposed development (cl 4.6(3)(a) and cl 4.6(4)(a)(i)); and

(2) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)); and

(3) The proposed development will be in the public interest because it is consistent with the objectives of the standard in question - set out in cl 4.3 of the LEP (cl 4.6(4)(a)(ii)); and

(4) The proposed development will be in the public interest because it is consistent with the objectives of the R4 High Density Residential Zone (cl 4.6(4)(a)(ii))”

For the first of the above matters, Preston CJ made it clear, in *Initial Action* at [25], that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather that it “only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed those matters.”

SJD DB2 Pty Ltd v Woollahra Council [2020] NSWLEC 1112 (SJD DB2).

This appeal sought consent for the construction of a six-storey shop top housing development at 28-34 Cross Street Double Bay (the DA). The Court approved the proposed development, having a height of 21.21m where the control was 14.7m – representing a maximum variation of approximately 44% (or 6.51m) – and a floor space ratio (FSR) of 3.54:1 where the control was 2.5:1 – representing a variation of approximately 41%.

The Court drew from the decisions in *Initial Action* and *RebelMH* in the *SJD DB2* judgment, and noted that although there are a number of ways to demonstrate that compliance with a development standard is unreasonable or unnecessary, it may be sufficient to establish only one way (at [35].) In considering the clause 4.6 variation requests submitted by the Applicant, the Court considered that they could be treated together, as the breaches they related to were fundamentally related, as where there is greater building form with additional height, so too is there greater floor area (at [63].)

Acting Commissioner Clay makes it clear in his judgment, ‘cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on Clause 4.6 for an appropriate planning outcome’ (at [73]).

7. Clause 4.6(3)(a): Compliance is Unreasonable or Unnecessary

In dealing with the “unreasonable and unnecessary” Preston CJ identifies and validates the 5 options available to an applicant in *Wehbe v Pittwater Council* which can be adopted in dealing with the *unreasonable and unnecessary* test under Cl. 4.6(3)(a).

Preston CJ concluded as follows:

“As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

The first way identified in *Wehbe* to justify this written variation (as set out at 42 of the judgment):

“42 An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard”.

This Clause 4.6 responds to the matters required to be demonstrated by sub-clause 4.6(3) namely:

- that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, and
- that there are sufficient environmental planning grounds to justify contravening the development standard.

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

As in *SJD DB2 Pty Ltd v Woollahra Municipal Council 2020 NSWLEC 1112* the Court considered that although the development significantly exceeded the FSR and building height development standards, these non-compliances were justifiable given the design of the building was considered to be better than a compliant development. In this regard, the proposed height variation, which is not over the complete development but rather in a central part only, is directly correlated to the topography of the land and the resulting design of the building and associated benefits from a compliant development are not so significant that it warrants compliance. Similar to this Court case, a better design outcome is achieved on this site with minor variations to the height control.

Refer to the detailed discussion above in Part 5.

Council is requested to agree to the proposed development's non-compliance with the maximum permissible building height development standard of 17.5m with respect to a portion of the roof of the building only and grant consent to the proposed development with a maximum building height in excess of the controls, having regard to the matters addressed in this request and the minimal extent of the encroachment.

8. Clause 4.6(3)(b) – Sufficient Environmental Planning Grounds

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The variation relates to maximum height and as such calls upon those matters considered to be environmental planning grounds relevant to the subject matter.

Refer to the detailed discussion above in Part 5.

The environmental planning grounds justification for the maximum height variation is provided as follows:

- The proposed development provides outcomes which are consistent with the development standards which are relevant to internal and external privacy, amenity and solar access and the additional height does not result in additional adverse impacts.
- The separation between the proposed building and the adjoining properties assists with reducing any bulk or scale impacts from the minor height variation, in particular to the transitioning area to the west.
- The height variation does not impact upon the desired future character of the area and the proposed built form, layout and design reference allows for a rhythm within the development to be established which is not repetitious and uninteresting in form.
- The proposal in its current form provides additional residential options in the wider area. Strict compliance with the height control may result in the partially exposed upper units being located elsewhere, with corresponding reduction in generous setbacks and greater building footprint.
- The portion of the roof which exceeds the controls is unlikely to result in amenity impacts and will not be discernible from the public domain due to the location of the variation and the inability to identify when viewing from the public domain at street level. The images detail the maximum height at the worst point above natural ground level, noting it is a portion only due to the slope, and not the entire building exceeding the height limit.
- Due to the slope and orientation to maximise views, the building has been designed to step down the hill and as such views are over the dwelling below and onto its roof. The additional height on the centre of the building will not be directly overlooking the immediately adjoining neighbours.

- With respect to views and the height variation, the areas of exceedance are generally in the central to central-southern area of the roof. The potential for view loss is from the northern properties only and the height variation in that area relates to a lift overrun only. The site could accommodate a larger, bulkier development than proposed and closer to the eastern boundary which would further obstruct views and result in a taller building due to topography, which would obstruct more views and has the potential to remove a large majority of water views. However, this is not what is proposed, and the building's siting and design is considered to be appropriate having regard to view sharing and reasonableness. Further, the views experienced are over a vacant private parcel of land, which has provided borrowed amenity for the residents for a large number of years. Council's planning controls for the area have envisaged this form of density on this land and a varied design would likely result in some obstruction of views in order to achieve the desired planning outcome for this area. The view impact of the proposed development is considered acceptable and the view sharing reasonable and equitable.
- Given that the FSR control is not exceeded by the overall development, there is no additional floor space benefit from the height variation and therefore no environmental impacts related to floor space.
- The additional height does not impact upon noise generation, pedestrian or vehicular access, waste management, heritage, drainage or services.
- This area has been identified for urban regeneration, which is more sustainable than further urban sprawl and is important for the Port Macquarie region to efficiently utilise existing residential land.

Based on the above, the consent authority can be satisfied that there are sufficient environmental planning grounds to warrant the variation.

In summary, the maximum height variation is considered to be in the public interest given its ability to not cause undue adverse impacts but also because of its ability to provide site specific environmental planning grounds demonstrating that strict compliance is unreasonable and unnecessary in the circumstances of this particular case.

9. Other Matters For Consideration

"Whether contravention of the development standard raises any matter of significance for State or regional environmental planning".

The proposed development is consistent with State and regional planning policies/strategic directions. Support of the proposed development and the proposed minor exceedance of the applicable maximum permissible building height development standard in this particular case, would not raise any matter of significance for State or regional planning.

"The public benefit of maintaining the development standard".

This report demonstrates that the proposed minor exceedance of the permissible maximum building height development standard does not have adverse visual impacts, or amenity impacts on either the public domain, or future neighbouring properties. Further, areas of exceedance are located away from adjoining properties and centrally within the development. When standing at ground level in the public domain or adjoining properties, the area of exceedance is unlikely to be clearly identified. As the proposed building height exceedance is minor, approval of the proposed development will not undermine the maintaining of the maximum building height development standards applicable elsewhere within the zone.

10. Conclusion

It is considered that any requirement for the proposed development to strictly comply with the applicable 17.5m maximum permissible building height development standard of Clause 4.3 of Port Macquarie Hastings LEP 2011 would be unreasonable or unnecessary in the particular circumstances as the proposed development is in the public interest as it will facilitate the economically viable redevelopment of the subject land in a manner consistent with the strategic planning objectives for the development of the overall planned development of the area.

Further, the proposed development is consistent with objectives for development within the zone and the proposed development is consistent with the objectives of the maximum building height development standard as expressed in Clause 4.3 (1) of Port Macquarie Hastings LEP.

The particular circumstances relating to the subject land and the proposed development are unique to this application, as outlined in this submission. Cumulatively there are not disbenefits which arise from the proposal as ultimately the development will not be visually intrusive from the road and desired character of the area will not be impacted. The broader medium density planning objectives of the zone are not undermined as the circumstances of the case are very particular to the subject site.

Overall, there is no planning purpose to be served in requiring the proposed development to strictly comply with the applicable development standard in this case

The particular circumstances relating to the subject land and the proposed development are unique to this application due to the slope at the eastern end and will not lead to similar development applications which would cumulatively undermine the planning objectives for the locality.

The proposed minor exceedance in maximum permissible building height does not significantly increase the bulk and scale of the proposed development, cause any additional view loss from neighbouring properties, or surrounding residential properties or have any significant additional adverse scenic/visual impacts or amenity (privacy/overshadowing) impacts on the public domain. There is a need for the infrastructure for a residential flat building and it is usual for it to be placed on the roof.

There is no public benefit to be derived, or planning purpose to be served, in requiring the proposed development to strictly comply with the applicable maximum permissible building height development standards of LEP 2011. This request demonstrates that there are sufficient environmental planning grounds for the proposed development to contravene the maximum permissible building height development standard applying to the subject land under Clause 4.3 of Port Macquarie Hastings LEP 2011.

Port Macquarie-Hastings Council is therefore requested to exercise its discretion under Clause 4.6 of Port Macquarie Hastings LEP 2011 and approve the proposed exceedance of the applicable maximum building height development standard for the proposed residential development proposed by this application.