

Introduction

Clause 4.6 of *Tweed City Centre Local Environmental Plan (TCCLEP) 2012* provides a mechanism for the consent authority to grant development consent even though the development would contravene a development standard imposed under TCCLEP or any other Environmental Planning Instrument (EPI). Clause 4.6 of *TCCLEP 2012* does not apply to a development standard that is expressly excluded from the operation of this clause.

The proposed development involves 95 self-contained dwellings including one Managers Residence as part of a Seniors Housing development. The development also involves signage, lot consolidation, tree removal and a pool. As part of the proposed built form, the development seeks to provide for two (2) statutory variations to EPI's. The two (2) variations sought as part of this Clause 4.6 are:

- Clause 4.3 – Height of buildings pursuant to *TCCLEP 2012*; and
- Clause 4.4 - Floor space ratio pursuant to *TCCLEP 2012*.

This Clause 4.6 pursuant to *TCCLEP 2012* seeks to vary these controls, to achieve a reasonable and appropriate outcome that is considerate of the proposed design, operational needs of residents and surrounding built form in the locality. The extent of variation sought to the two (2) Clauses are provided in **Table 1** below.

Table 1. Development Standards Sought to be Varied.

Development Control	Development Standard	Proposed Development	Variation Extent
Clause 4.3 Height of Buildings TCCLEP 2012	22m above natural ground.	22.6m above natural	0.6m or 2.72% variation extent.
Clause 4.4 Floor Space Ratio TCCLEP 2012	1.8:1, allowing gross floor area of 8,818.2m ² . Plus 15% per Cl. 87 of Housing SEPP Maximum permissible 2.07:1 (10,140.93m ²)	11,498.8m ² of gross floor area at 2.3:1 FSR	1,357.87m ² or 13.38% variation extent.

The building elements to be varied can be readily identified in the enclosed plans.

Planning Circular 20-002 issued 5 May 2020 in relation to assumed concurrence does not extend to Regional Planning Panels who exercise consent authority on behalf of Councils. Due to the proposed Capital Investment Value of the development, the Northern Joint Regional Planning Panel is the nominated consent authority and therefore can also consider and determine the variations sought subject to this Clause 4.6 request.

The following forms a written request to vary the development standards under Clause 4.6 of the *TCCLEP 2012*.

Request to Vary Under Clause 4.6

Clause 4.6 of *TCCLEP 2012* is detailed below. Omitting Clauses 6 and 8 as they are of no relevance to the subject variation request.

(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.

Omission – Clauses 6-8.

The relevant provisions of clause 4.6 are addressed as follows.

Clause 4.6 (2)

The development standards of Clause 4.3- Height of Buildings and Clause 4.4 – Floor Space Ratio of TCCLEP 2012 are not expressly excluded from the operation of Clause 4.6 and as a result can be varied.

Clause 4.6 (3)- Standards Unreasonable in this Case and Sufficient Environmental Planning Grounds

Compliance with the development standards is unreasonable and sufficient environmental planning grounds are afforded as demonstrated in *Tables 2 and 3*, building height and floor space ratio respectively.

Table 2. Clause 4.3 Height of Building Comment

Development Standard: Clause 4.3 Height of Building TCCLEP 2012
<ul style="list-style-type: none">• The additional building height of 2.72% will not be visible from the public domain surrounding the proposed Seniors Housing development. This is achieved when appreciating the lift overrun measures approximately 19.14m² comprising only 0.82% of the total roof area and the lift overrun is located within the centre of the roof area, servicing level 6 / building module B and is setback approximately 20m from the road frontage of Powell Street and Florence Street.• The minor height variation retains appropriate building massing, scale, view sharing and ultimately, appropriate street character to both Powell Street and Florence Street. In this regard, the minor additional building height is complemented with a building that provides for appropriate frontage setbacks, provides for building modulation with the building separated into three (3) distinct elements of A, B and C that enable internal separation for view sharing to be preserved from surrounding dwellings.• The additional building height of 0.6m or 2.72% variation, will not create any further overshadowing impacts to other surrounding land uses including residential accommodation. This is achieved by way of the location of the overrun being located in the centre of module A and due to the minor variation extent. The shadow cast by the proposal including the additional building height will not be any greater than if the building complied with the height. This further enable the residential amenity of the surrounding area to be retained.• The lift overrun is a non-habitable element and does not provide access to the roof. The minor height variation will not impact the visual privacy of adjoining and nearby properties.• Given the sites locality within walking distance to surrounding facilities, services and recreation areas (notably Tweed Shopping Centre, Tweed Heads Bowls Club, Tweed Heads Hospital, public park along Tweed River etc) and acknowledging the site is close to transport facilities bus stops and pedestrian footpaths, the development affords ability to provide for greater population densities together with building heights. This is consistent with the objectives of Clause 4.3 Height of Buildings pursuant to <i>TCCLEP 2012</i>.• The development including the additional building height is consistent with the existing and emerging urban character of the locality in which has been defined by traditional detached

dwellings, however which are now giving way to contemporary residential flat buildings and Seniors Housing having a building height of 22m or thereabouts. Indeed, many newer residential flat buildings and Seniors Housing exceed the permitted building height in the local area, including the examples as noted below:

- DA15/0726- comprising 13 Units at 24 McGregor Crescent, Tweed Heads (approved RL25.960, proposing 860mm height exceedance (3.9%) for lift overrun;
- DA16/0766- 9 units Seniors Housing units comprising at 31 Florence Street and 7 Powell Street, Tweed Heads (approved at RL25.95, proposing 1.77m height exceedance (8.04%) for the lift overrun). This development also exceeded the flood space ratio by 11%.
- The objectives of the development standards are achieved despite the building height exceeding that permitted under the Clause. See assessment against 4.6(4) below.

In summary, compliance with the development standard is unreasonable and sufficient environmental planning grounds are afforded primarily as the additional 0.6m of height (for 0.82% of the roof area) will not be visible from the public domain surrounding the site and the development will maintain appropriate bulk and scale as well as no further impacts on shadows or views. This is achieved through the design of the building providing for modular architectural, façade treatments, sufficient landscaping, appropriate setbacks and architectural design excellence.

Table 3. Clause 4.4 Floor Space Ratio Comment

Development Standard: Clause 4.4 Floor Space Ratio of <i>TCCLEP 2012</i>
<p>The character of the local area is comprised of traditional single detached single Dwelling Houses giving way to contemporary Residential Flat Buildings and Seniors Housing, many of which exceed the maximum permitted floor space ratio consistent with this control. Indeed, the following existing built form and development approvals in the local area exceed the floor space ratio as permitted by Clause 4.4 Floor Space Ratio of <i>TCCLEP 2012</i>:</p> <ul style="list-style-type: none"> ○ 10 Ivory Crescent, Tweed Heads (DA17/0799) exceeding FSR by 145.44m² or 9.13%; ○ 2 Ivory Crescent, Tweed Heads (DA20/0271) exceeding FSR by 107.02m² or 7.96%; ○ 24 McGregor Crescent (DA15/0726) exceeding providing a FSR of 1.817 ○ 31 Florence Place, Tweed Heads (DA08/0138) providing a floor space ratio of 6,713.73m² (2.24:1) being 24.4% exceedance- despite no floor space ratio clause at the time of determination; ○ 31 Florence Street and 7 Powell Street, Tweed Heads (DA16/0766) exceeding the flood space ratio by 11%; ○ 6-12 Powell Street (DA11/0304) providing a floor space ratio of 8,467.96m² (3.1:1) being exceeding FSR by 2731.6m² being 72.2% exceedance – despite no floor space ratio clause at the time of determination. <p>In addition to demonstrating Councils willingness to support increased density in the locality these approvals and existing built form are contributing to an emerging character with which, the proposed development would be compatible in terms of site coverage and massing. In addition to other design features, despite the additional floor space, the development would be consistent with the streetscape character whilst also mitigating environmental impacts.</p> <ul style="list-style-type: none"> • The development (including the additional floor space ratio) proposes an appropriate building scale, bulk and mass for the consolidated sites. In this regard, the development

breaks up the bulk through modulation enabling the building into three distinct and usable portions, provides for compliant front setbacks of 4m, sufficient landscaping of 30%, deep soil zone of 15%, generous separation from existing established built form and landscape podiums and planters to soften the front façade. Consequently, the development achieves key development controls enabling environmental impacts to be addressed and a suitable floor space ratio to be afforded.

- The development proposes an appropriate mass that enables view sharing for surrounding residential accommodation despite the building exceeding the floor space ratio. In this regard, the development provides for a distinct view corridor along Powell Street and provides for modular architecture with active communal open spaces in between. The result is a building mass that is appropriately broken up and retains views.
- The objective of the development standard is achieved despite the development exceeding the permitted floor space ratio. See description under item 4 below of this report.
- The sites locality in close proximity to services, facilities and transport nodes supports the maximisation of density.. Indeed, is within walking distance proximity to surrounding facilities, services, recreation areas (notably Tweed Shopping Centre, Tweed Heads Bowls Club, Tweed Heads Hospital, public park along Tweed River etc) and transport facilities bus stops and pedestrian footpaths ensure residents will not be car dependant and making the site ideally suited for greater density than permitted and the application of that density to a critical housing need, such as seniors housing, lends further weight to the circumstances of this case.

Compliance with the development standard is unreasonable and sufficient environmental planning grounds are afforded despite the additional 13.38% of floor space ratio proposed. The development proposes an appropriate bulk, scale, and mass using architectural features to break up the building into three distinct portions along with other design elements above mentioned. The development achieves key building envelope controls enabling environmental impacts to be addressed and a suitable floor space ratio for the site to be afforded. A review of the local area reveals six (6) other development exceed the floor space ratio as permitted, three (3) of which are Seniors Housing. In addition to other design features and despite the additional floor space, the development would be compatible with the surrounding character whilst also mitigating environmental impacts.

Clause 4.6 (4)- Public Interest and Objectives of the Zone

The proposed development remains consistent with the objectives of the development standards including Clause 4.3 Height of Building and Clause 4.4 Floor Space Ratio in addition to the R3 Medium Density Residential zone. Schedule 3 of Seniors Housing SEPP does not incorporate objectives, rather assessment has been made to the aims of the Policy and objectives of Chapter 3 (containing Clause 41 whereby Schedule 3 requires compliance). See **Tables 4** and **5** for a detailed assessment.

Table 4. Height of Building - Objectives Assessment

Clause 4.3 Height of Building Objective
<p>(1) <i>The objectives of this clause are as follows—</i></p> <ul style="list-style-type: none"> <i>(a) to establish the maximum height for which a building can be designed,</i> <i>(b) to ensure that building height relates to the land’s capability to provide and maintain an appropriate urban character and level of amenity,</i> <i>(c) to ensure that taller development is located in more structured urbanised areas that are serviced by urban support facilities,</i> <i>(d) to encourage greater population density in less car-dependant urban areas,</i> <i>(e) to enable a transition in building heights between urban areas comprised of different characteristics,</i> <i>(f) to limit the impact of the height of a building on the existing natural and built environment,</i> <i>(g) to prevent gross overshadowing impacts on the natural and built environment.</i> <p>Comment: The 0.6m variation to the building height representing a 2.72% variation does not preclude the development from complying with the Building Height objectives. The objectives of Clause 4.3 is achieved by way of the following:</p> <ul style="list-style-type: none"> • The proposed development achieves an appropriate urban character and amenity by way of building design initiatives including through building modulation, setbacks and landscaping afforded throughout. • The site is within close proximity to many urban support facilities in which this objective encourages taller developments; • The site proximity to services and facilities enables it to be a less car dependant area and this objective encourages greater population density in this area. • The development has been amended for a more site sensitive urban design, retaining the large lemon scented gum tree on the corner of Florence and Powell Street and provides for compensatory planting within the site for any loss of trees. With respect to the built environments, the development mitigates adverse impacts and provides for appropriate bulk, scale and shadow and view sharing for surrounding residential accommodation. • The development is located on the corner of Powell and Florence Street and solar diagrams have demonstrated the majority of the overshadowing will be on these local streets and not surrounding residential accommodation.

The proposed development achieves the objectives of Clause 4.3 Height of Building pursuant to TCCLEP 2012.

Table 5. Floor Space Ratio - Objectives Assessment

Clause 4.4 Floor Space Ratio Objective
<p>(1) <i>The objectives of this clause are as follows—</i></p> <ul style="list-style-type: none"> (a) <i>to define the allowable development density of a site and for particular classes of development,</i> (b) <i>to enable an alignment of building scale with the size of a site,</i> (c) <i>to provide flexibility for high quality and innovative building design,</i> (d) <i>to limit the impact of new development on the existing and planned natural and built environment,</i> (e) <i>to encourage increased building height and site amalgamation at key locations in the area of Tweed City Centre.</i> <p>Comment: The additional floor space ratio representing a variation of 13.38% does not preclude the development from complying with the objectives of Clause 4.4 Floor Space Ratio within TCCLEP 2012. The objectives of this clause is achieved by way of the following:</p> <ul style="list-style-type: none"> • The development provides for a suitable building scale in relation to the size of the site. The site is a consolidated lot and the size of the building has been designed consistent with the area of the site. In this regard, a suitable and complying setback of 4m has been provided from each street and the building has been separated into three (3) modules to enable internal separation, appropriate bulk and scale and visual relief as viewed from the street. The development also provides for compliant landscaping and deep soil zones. • The objectives acknowledge that flexibility for high quality and innovative building design is possible. The development achieves design excellence, exhibited through high quality and innovative space planning and architecture that provides for an environmentally sensitive design and does not adversely impact surrounding residential accommodation regarding streetscape character, visual privacy, view sharing and overshadowing. • The development has been designed to ensure it does not adversely impact the natural and built environments. In this respect, the development retains significant natural features of the site including the lemon scented gum tree fronting both Powell Street and Florence Street and provides for compensatory planting for any loss of prescribed vegetation. The development mitigates the impact to the built environment by way of the elected building mass that has been again broken up into sections and allows for view corridors. • The amalgamated site can be considered a key location in Tweed City Centre in which is proposing design excellence and consistent with the objectives of the Clause encourages increased building height/ gross floor area. The proposed development is considered suitable for the key location and attributes it affords.

The proposed development achieves the objectives of Clause 4.4 Floor Space Ratio pursuant to *TCCLEP 2012*.

The proposal is also consistent with the objectives of the zone in which it is located. The Seniors Housing development is permissible with consent in the R3 Medium Density Residential zone, in which the site lies pursuant to *TCCLEP 2012*.

The zone objectives of the R3 Medium Density Residential zone are provided below:

- *To provide for the housing needs of the community within a medium density residential environment;*
- *To provide a variety of housing types within a medium density residential environment;*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The development provides for 95 Seniors Housing dwellings that is a permissible land use and is a use that is in demand in the locality. People aged 65+ are expected to increase by 48% 29,515 persons by 2036. This development directly attributes to the housing supply and need for this age group.

The proposed development achieves diversity in the local area, by providing a variety of dwelling types from 1-3 bedroom dwellings. In this regard, the development provides for 17.8% as 1 bedroom units, 69% as 2 bedroom units and 12.6% as 3 bedroom units achieving the required dwelling mix consistent with Section B2 Tweed City Centre DCP.

Finally, the development enables other land uses that provide facilities or services to continue to meet the day to day need of the residents. The development surrounds many businesses and facilities, and additional accommodation will increase the use of these businesses and in doing so improve the local economy.

The proposal will not conflict with the public interest as it is consistent with the objectives of the standard and the zone in which the development is located.

Clause 4.6 (4b) Concurrence of the Director – General/ State or Regional Environmental Significance

Whilst the proposed development seeks to contravene the Clause 4.4 Floor Space Ratio TCCLEP 2012 by greater than 10%, due to the proposed Capital Investment Value of the development, Northern Joint Regional Planning Panel is the nominated consent authority. Consistent with Planning Circular 20-002, the Northern Joint Regional Planning Panel is able to consider the variations sought subject to this Clause 4.6 pursuant to *TCCLEP 2012*.

The proposed variations will not raise any matters of significance for State or regional environmental planning.

Five (5) Part Test

In accordance with the Department of Planning and Environment's '*Varying development standards: A Guide, 2011*' 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.

The 5 different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy are discussed below.

(1) the objectives of the standard are achieved notwithstanding noncompliance with the standard;

The objectives of the development standards are achieved as outlined above in Tables 4 and 5. The proposal is well founded on this test.

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

The proposal is not founded on this test.

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

Compliance with the standard would defeat the underlying object or purpose of the standards and therefore compliance is considered unreasonable.

Table 6. Development Standard Objective Assessment.

Clause 4.3 Height of Building Objective
<p>Comment:</p> <p>Strict compliance with the maximum building height of 22m above natural ground for the development would defeat the following objectives contained within Clause 4.3:</p> <ul style="list-style-type: none"><i>(b) to ensure that building height relates to the land's capability to provide and maintain an appropriate urban character and level of amenity,</i><i>(c) to ensure that taller development are located in more structured urbanised areas that are serviced by urban support facilities,</i><i>(d) to encourage greater population density in less car-dependant urban areas,</i><i>(g) to prevent gross overshadowing impacts on the natural and built environment.</i> <p>The minor exceedance of the building height relating to the lift overrun does not preclude the development from achieving an appropriate urban character and level of amenity as demonstrated by the design/ excellence initiatives exhibited above in this report. The development would not result in gross overshadowing impacts.</p> <p>The development is in an urban locality and is within walking distance to many important services and facilities for residents including a hospital, shopping facilities, social and recreation</p>

establishments and public recreation areas. The subject site is also within close proximity to bus stops and is highly connected through pedestrian footpaths and is considered a transit-oriented development. As a result, restricting the building height of 22m would limit the density on the site and compliance with the objective.

Clause 4.4 Floor Space Ratio Objective

Strict compliance with the maximum floor space ratio of 2.07:1 would defeat the following objectives contained within Clause 4.4:

- (b) to enable an alignment of building scale with the size of a site,*
- (c) to provide flexibility for high quality and innovative building design,*
- (e) to encourage increased building height and site amalgamation at key locations in the area of Tweed City Centre.*

Exceedance in the floor space ratio in this instance relates to an amalgamated site with a generous area of 4,899m² (average size area is 700m²). The generous site area affords ability to comply with other key development controls to achieve a suitable building envelope - preserving the natural and built environments whilst minor exceedance in the floor space ratio is proposed. Put simply, strict compliance of the floor space ratio for this large site would simply be for the sake of numerical compliance rather than appreciating the sites ability to accommodate the additional floor space without any other adverse environmental impacts.

The development as exhibited is one of high quality and innovation by way of the architectural design, form, external appearance, bulk, massing and modulation. Limiting the sites' ability to the maximum floor space ratio would prevent flexibility to enable high quality and innovative building design and therefore prevent this objective to be achieved.

The site is considered a key location being in a unique position in Tweed City Centre, having a suitable land zoning and near core services, facilities and transport nodes for the proposed land use. There is an economic need and efficiency that is necessary to feasibly deliver the development when it is amalgamated on this scale. Limiting the density of the site would limit the efficiency of the amalgamated site that would further restrict the economic revitalisation, affordability and dwelling mix. All are key objectives to both the EP& A Act and *TCCLEP 2012*.

By way of the comments provided above, the proposal is well founded on this test.

- (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;*

Whilst the development does not seek to be found on this test, it is acknowledged that Council has granted consent to many developments that have departed from the maximum permitted floor space ratio and maximum building height pursuant to *TCCLEP 2012*. The extent of variation to this control establishes an emerging character in the locality which departs from strict adherence to the current development standard.

The following are examples of recent development consents that exceed clause 4.3 Height of Buildings of TCCLEP 2012:

- DA15/0726- comprising 13 Units at 24 McGregor Crescent, Tweed Heads (approved RL25.960, proposing 860mm height exceedance (3.9%) for lift overrun;
- DA16/0766- 9 units Seniors Housing units comprising at 31 Florence Street and 7 Powell Street, Tweed Heads (approved at RL25.95, proposing 1.77m height exceedance (8.04%) for the lift overrun). This development also exceeded the flood space ratio by 11%.

Finally, following is a list of development consents that exceed clause 4.4 Floor Space Ratio of TCCLEP 2012:

- 10 Ivory Crescent, Tweed Heads (DA17/0799) exceeding FSR by 145.44m² or 9.13%;
- 2 Ivory Crescent, Tweed Heads (DA20/0271) exceeding FSR by 107.02m² or 7.96%;
- 24 McGregor Crescent (DA15/0726) exceeding providing a FSR of 1.817
- 31 Florence Place, Tweed Heads (DA08/0138) providing a floor space ratio of 6,713.73m² (2.24:1) being 24.4% exceedance- despite no floor space ratio clause at the time of determination;
- 31 Florence Street and 7 Powell Street, Tweed Heads (DA16/0766) exceeding the flood space ratio by 11%;
- 6-12 Powell Street (DA11/0304) providing a floor space ratio of 8,467.96m² (3.1:1) being exceeding FSR by 2731.6m² being 72.2% exceedance – despite no floor space ratio clause at the time of determination.

- (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.*

Whilst the development does not seek to be found on this test. It is noted that when compared with the building height of the locality being 22m, the maximum floor space ratio is considered comparatively low. For example, when comparing other land in Kingscliff, land with the same zoning (R3 Medium Density Residential) and with a lower building height of 13.6m above natural ground has a greater floor space ratio of 2.1:1. Other recent approvals noted above are also examples that when considering the zoning and building height the land provides for a very low floor space ratio.

In consideration of the Land and Environment Court five-part test, it is considered that the proposal would be consistent with two (2) of the tests and accordingly a departure from the standard is justified.

Conclusion

Considering the matters raised under Clause 4.6 of the *Tweed City Centre Local Environmental Plan 2012* and the 'Five Part' test, it has been demonstrated that there are sufficient planning grounds to justify the contravention of the standard and therefore compliance with the standard is unreasonable in the case.

Support for the proposed Clause 4.6 variation is respectfully requested.

Encl.

- ***Architectural Plans prepared by Raunik Design Group.***