

1. Introduction

This Report contains a variation to the development standard in accordance with Clause 4.6 of the Auburn Local Environmental Plan 2010 (ALEP2010) which provides the framework for consideration of proposed variations to development standards.

The variation sought under Clause 4.6 of the LEP has been prepared in accordance with the Land and Environment Court Ruling *Initial action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. The case further clarified the correct approach of Clause 4.6 requests including that the clause does not require a development with a variation to have a better or neutral outcome.

The proposal seeks to vary the building height development standard, which is set out in Clause 4.3 of the LEP. The proposed variation to the height standard arises from small parts of the fire stair egress from the roof and plant areas slightly encroaching above the proposed building. This minor encroachment is because of the sites topography which generally falls from the eastern boundary at RL 12.10 to the western boundary at RL 7.30.

2. Definition of development standard

Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act) lists the items (not limited to) that are considered to be development standards, and are listed below.

- (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 proposed variation of the height of buildings under Clause 4.3 of the LEP is a development standard for the purposes of the EPA Act and Clause 4.6 of the LEP.

3. Proposed variation

The proposal seeks variation to Clause 4.3 of the LEP, which states:

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 Height of Buildings Map nominates a maximum height of 42 metres for the site, this is shown in Figure 1 below (with the subject site outlined in yellow).

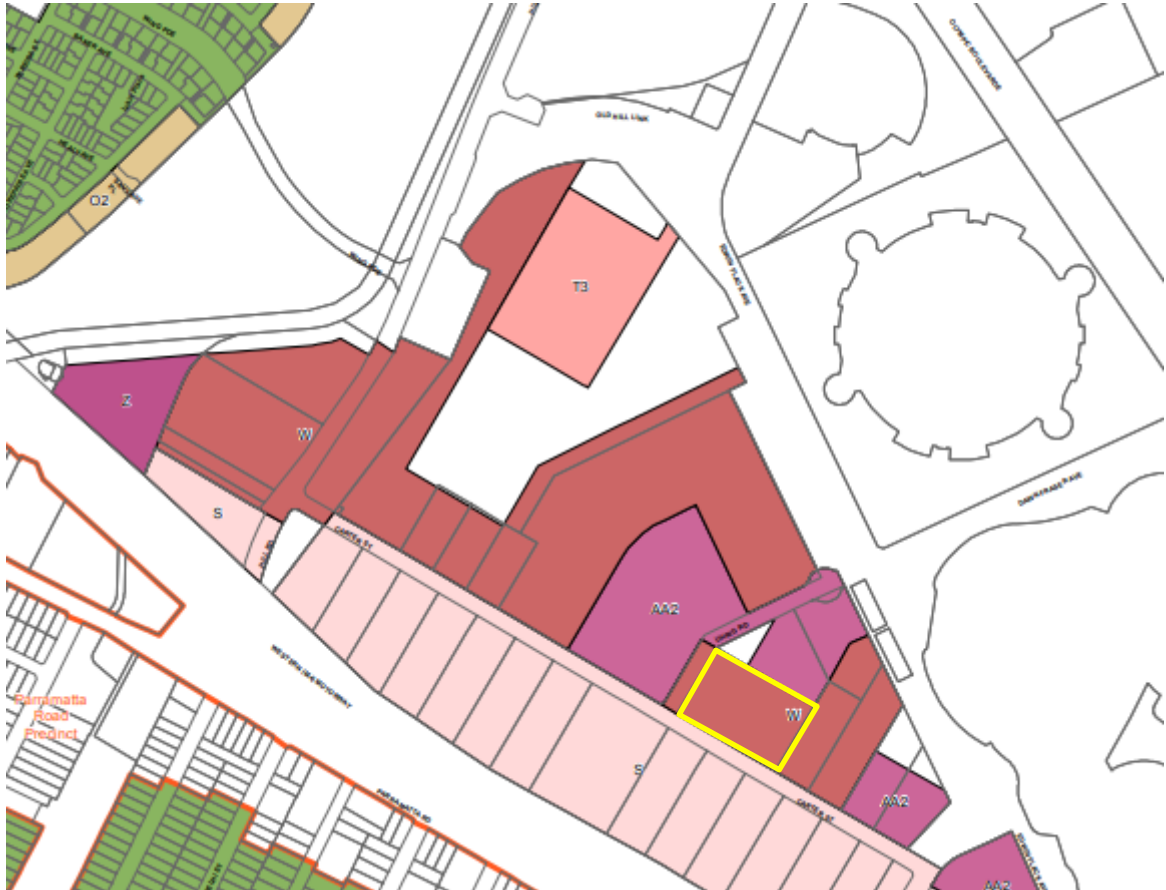


Figure 1: Height of Buildings Map

Building Height is defined in the LEP as follows:

means the vertical distance between ground level (existing) and 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.

4. Extent of variation

The proposed development application seeks consent for the construction of a mixed use development comprising a 3 storey podium with towers above. Building A is 41.60 metres in height from the ground plane and Building B is 41.20 metres in height from the ground plane.

The proposal seeks a minor variations to the Height of Buildings development standard. As shown in **Figure 2** below, the fire stair egress from the roof and plant areas proposed in the south west corner of Building A slightly breach the maximum height specified by ALEP by 1.17m or approximately 2.8%, and as such the proposal is inconsistent with Clause 4.3 of the LEP.



Figure 2: Height Plane Study

The Development Application proposes the following heights:

Table 1: Building Height

Building	Proposed Height	Extent of Departure	% Variation
Podium Parapet	8.67m to 9.72 along pedestrian link.	-	-
Pool Roof	13.43m to 14.23m along pedestrian link	-	-
Building A	41.6m (with the exception of south western corner)	1.17m	2.8%
Building B	41.2 m	-	-

5. Clause 4.6(3)(a) – Is the development standard unreasonable or unnecessary?

In Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118, 5 matters were listed to demonstrate whether compliance of a development standard was unreasonable or unnecessary, as established in Wehbe v Pittwater Council (2007) NSWLEC 827. This case also stipulated that all 5 methods may not need demonstrate compliance is necessary where relevant. Each of the matters are addressed below.

- a) **Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].**

Objectives of the development standard are achieved for the height. There is a minor height breach to the fire stair egress from the roof and plant areas slightly encroaching above the proposed building due to the slope of the land. All other parts of the development continue to comply with the height controls in the Auburn LEP 2010.

- b) **Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].**

The urban fabric of the Carter Street Precinct is undergoing significant transformation following the State Government initiated up-zoning of the locality. The character of the Precinct will evolve significantly as the urban fabric transitions from industrial and business land uses to a combination of high density residential, employment and retail services.

The underlying objectives of the LEP remain compliant, as only a small section of the lift pierces the height limit due to the sloping topography of the land as shown in Figure 2.

- c) ***Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].***

The slight increase in height is consistent with objectives of the development controls and responds to the emerging pattern of development that surrounds the site, to create a town centre.

The underlying objective is to establish a mix of uses in the land in accordance with the ALEP 2010. The proposed construction of a mixed use development for the purpose of a hotel, increases the height in Building A marginally and is permissible in the zone. Therefore compliance would be unreasonable.

- d) ***Establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].***

The design of the development is challenged to a degree by site topography, which falls approximately 4.8m from the east of the site to the west. Despite the minor non compliance of the fire stair egress from the roof and plant areas, the proposed buildings comply with the building height controls and have been designed in response to specific contextual issues associated with this site.

The objective and purpose of the building height standard is to ensure development is compatible with the character of the surrounding locality. The Sydney Regional Planning Panel approved a similar variation for Phase 1, Carter Street to the building height development standard due to minor encroachment of fire stair egress and plant rooms from the roof. The extent of the variation in this example is highlighted in **Figures 3 and 4.**

Given the extent of variations, the maximum building height has been varied to a degree whereby strict compliance building height standard is unreasonable due to the topography of the land.

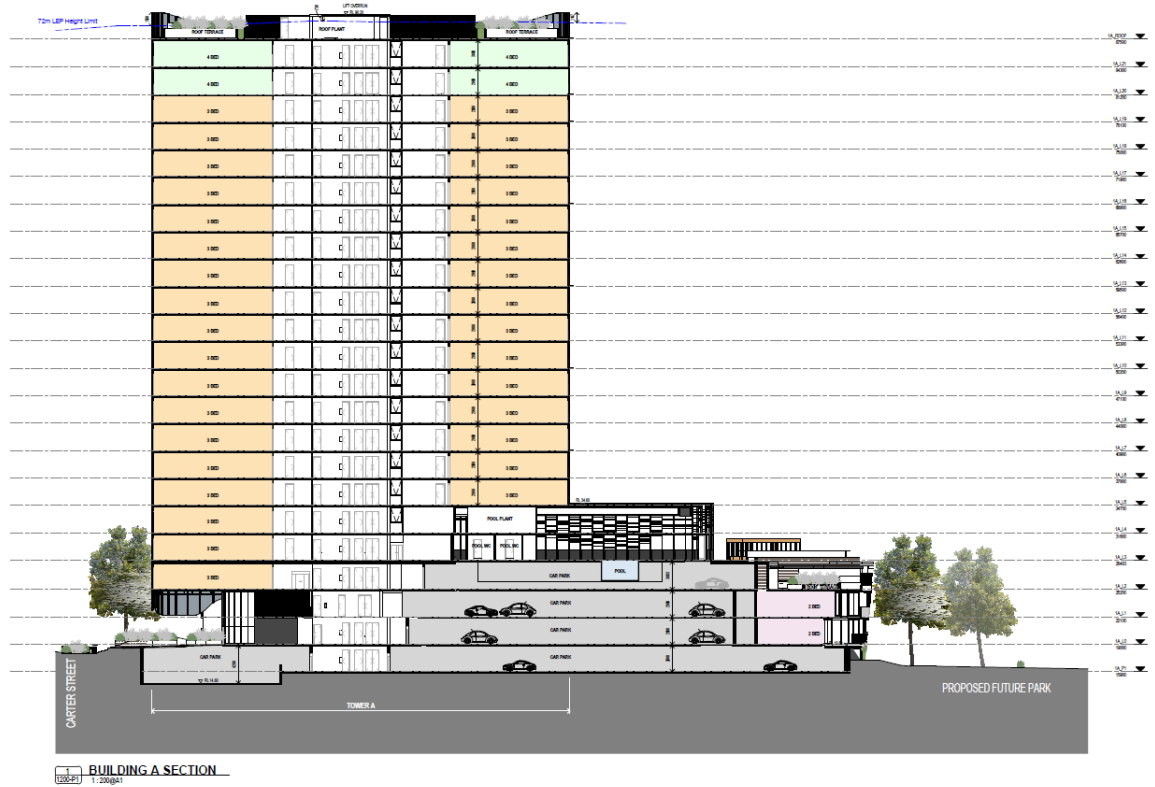


Figure 3: Approved Phase 1 Development

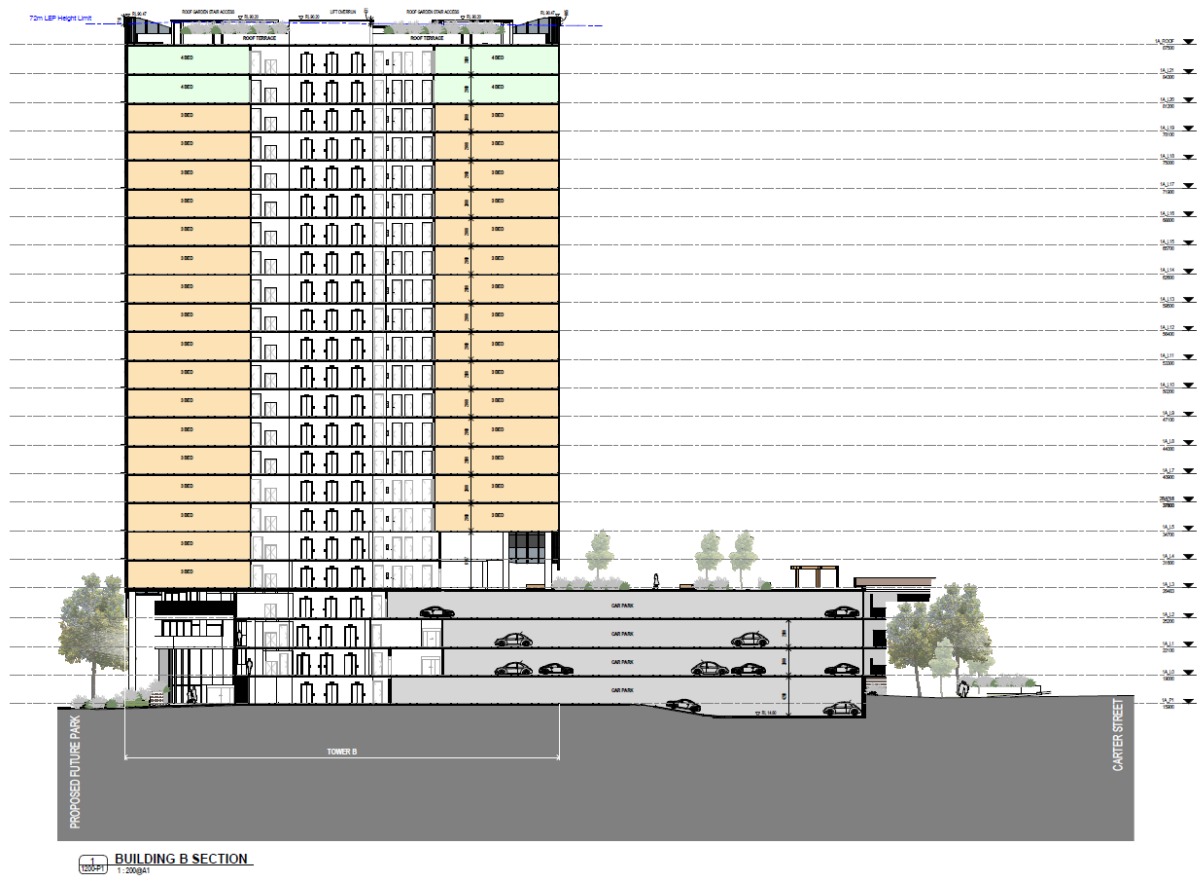


Figure 4: Approved Phase 1 Development

- e) ***Establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].***

The slight increase in Height for Building A is consistent with objectives of the development controls and responds to the emerging pattern of development that surrounds the site, and proposed town centre that the site is located within.

6. Clause 4.6(3)(b) – Is there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118, the written request under Clause 4.6 must be “environmental planning grounds” by their nature established under Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA.

- a) ***to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,***

As outlined throughout the SEE and this Clause 4.6 Variation Statement, the proposal is consistent with the objectives of the Maximum Height development standard and objectives of the B2 Local Centre Zone.

The proposed Height is considered to be acceptable particularly when balance against the benefits of the project which are:

- providing for a site responsive design that provides for a variety of permissible land uses in a highly accessible location;
- positively contribute to the local economy at all stages of development, by employing a range of contractors during the construction stage and employees during operation stages; and is well integrated with surrounding development.
- Opportunity to increase the supply and diversity of tourist accommodation within the Carter Street Precinct and proposed light railway station ; and
- Development of an under-utilised site (being currently occupied by industrial warehouses) identified for future mixed use development.

- b) ***to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,***

The proposed variation to the Maximum Height development standard does for a minor encroachment of the fire stair egress and plant areas does not conflict with any matters of State or regional environmental planning significance, State Planning Policies or Ministerial directives. The significance of the non-compliance is acceptable in the context of the Carter Street Precinct and the broader Parramatta LGA.

The minor variation to the fire stair egress and plant areas does not have any impact, in terms of economic, environmental and social considerations. The minor variation will in fact facilitate these matters.

- c) ***to promote the orderly and economic use and development of land,***

The proposed development consists of two buildings which provide commercial, retail and tourist and visitor accommodation land uses.

The opportunity for growth in the tourism market is high and the proposed mixed-use development has the opportunity to generate new opportunities for the Carter Street Precinct. The additional height of 1.17m in Building A is associated with fire stair egress and plant areas results from the slope of the land and will not interfere with the orderly and economic use and development of land. The minor height variation has no implications on this objective.

d) to promote the delivery and maintenance of affordable housing,

Not applicable. The proposed development has the opportunity to increase the supply and diversity of tourist accommodation within the Carter Street Precinct.

e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

The minor variation to the fire stair egress and plant areas will have no impacts in respect of threats to native animals and plants, ecological communities and their habitats.

f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

The subject site contains no Aboriginal cultural heritage. The additional lift height will have no impacts in this respect.

g) to promote good design and amenity of the built environment,

The design of the development is challenged by site topography for an urban renewal site in a future town centre, which falls approximately 4.8m from the east of the site to the west. The development is, for the most part, comfortably compliant with the maximum building height requirement and only breaches the 42m height plane at one particular point in Building A. The additional height of 1.17m is associated with fire stair egress and plant areas.

Although marginally non-compliant, the additional height proposed for the development will not lead to any unreasonable or adverse impacts on the amenity of neighbouring land, the development that may occur on that land in the future, or the amenity of occupants within the subject development. The minor height variation has no impact on amenity being hidden from view by being located on the roof's centre.

h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

The fire stair egress and plant areas is required to comply with the health and safety requirements to maintain the lift mechanics.

i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

The minor variation to the fire stair egress and plant areas will have no impacts on the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State.

j) to provide increased opportunity for community participation in environmental planning and assessment.

The proposal will be subject to any neighbour notification upon Council's receipt of the subject Development Application.

7. Clause 4.6(4)(a)(i) – The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written justification has been carried out in accordance with the most recent court cast “Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC11” demonstrating the variation of the development standard is acceptable.

8. Clause 4.6(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

From the case Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC1, the proposed development will be in the public interest as it remains consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. Further the case states that *“it is the It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest”*.

A response to each of the objectives of the Height of Buildings control in clause 4.3 of the LEP follows:

a) *“to establish a maximum height of buildings to enable appropriate development density to be achieved”*

Despite the minor non compliance of the fire stair egress and plant areas , the proposed buildings comply with the building height controls and therefore achieves a development that is consistent with that anticipated by Councils Planning Provisions.

The additional height, is for the most part, nominal, and is associated with fire stair egress and plant areas that are positioned away from the edges of the building and do not contribute to the perceived density of the development.

b) *“to ensure that the height of buildings is compatible with the character of the locality.”*

The urban fabric of the Carter Street Precinct is undergoing significant transformation following the State Government initiated zoning of the locality in 2017. The character of the Precinct will evolve significantly as the urban fabric transitions from industrial and business land uses to a combination of high density residential, employment and retail services.

The development principles for the Precinct as articulated in the Carter Street DCP describe a compact, walkable urban community which provides a mix of medium and high density housing types in a diverse and innovative building form. In this scenario, it is clearly inappropriate to make reference to existing character but rather to focus on the desired future character of the Precinct as defined in the Carter Street DCP and also by the core development standards.

Despite the minor non-compliance with the height of building standard of the encroaching fire stair egress and plant areas in Building A, the overall development is demonstrably compatible with the desired future character of the locality, as follows:

- The proposed buildings comply with the building height controls and therefore achieves a development that is consistent with that anticipated by Councils Planning Provisions.
- The additional height associated with the fire stair egress and plant areas, is positioned away from the edges of the building and does not contribute visually to any extra height;

- Although marginally non-compliant, the height of the development will not lead to any unreasonable or adverse impacts on the amenity of neighbouring land, the development that may occur on that land in the future, or the amenity of occupants within the subject development.

9. Clause 4.6(4)(b) - The concurrence of the Secretary has been obtained

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6 of the LEP, subject to the conditions in the table in the notice (**Annexure 1**).

The proposal seeks to add an additional 1.17m of height to Building A from the lift overrun. The variation sought is 2.8% above the development standard. This slight variation can be approved by Council.

10. Conclusion

In conclusion, the assessment above provides a sound basis that justifies the flexible application of the development standard for height in this instance. As a consequence it is our strong view that the proposed variation to the Height of Building development standard will result a better outcome as required by the objectives of Clause 4.6. These have been documented in detail but are summarised as follows:

- The proposed variation to the height standard arises from small parts of the fire stair egress and plant areas encroaching above the proposed building A. This minor encroachment is because of the sites topography which generally falls from the eastern boundary at RL 12.10 to the western boundary at RL 7.30.
- The variation sought is minor in nature (approximately 2.8%) and is associated with fire stair egress and plant areas that are positioned away from the edges of the building and does not visually contribute to any extra height;
- The slight height variation from the fire stair egress and plant areas in Building A is required to ensure that the sites levels and overall built form is consistent with the sites topography;
- The proposed additional height from the fire stair egress and plant areas in Building A has no impact on surrounding development and land uses;
- The proposed development will make a positive contribution to the streetscape. Buildings have been designed to a high standard and comprise good quality materials and finishes;
- Is deemed unreasonable or unnecessary in the circumstances of the case;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- the objectives of the zone are not contravened and the proposed additional height is therefore in the public interest. The public benefit of maintaining the development standard in this instance is not put at risk by allowing the departure from the LEP;
- Variation to the development standard is consistent with the relevant objects in clause 1.3 of the EPA Act;
- The variation to the development standard remains consistent with the objectives of the zone; and
- Compliance with the standard is unnecessary and unreasonable.

On this basis, the proposed variation to the development standard should be supported under the provisions of Clause 4.6 of the Auburn Local Environmental Plan 2010.

ANNEXURE 1: CIRCULAR PS18-003 SECRETARY CONCURRENCE



Circular	PS 18-003
Issued	21 February 2018
Related	Revokes PS17-006 (December 2017)

Variations to development standards

This circular is to advise consent authorities of arrangements for when the Secretary's concurrence to vary development standards may be assumed (including when council or its Independent Hearing and Assessment Panel are to determine applications when development standards are varied), and clarify requirements around reporting and record keeping where that concurrence has been assumed.

Overview of assumed concurrence

This circular replaces Planning Circular PS 17-006 and issues revised assumed concurrence, governance and reporting requirements for consent authorities.

All consent authorities may assume the Secretary's concurrence under:

- clause 4.6 of a local environmental plan that adopts the *Standard Instrument (Local Environmental Plans) Order 2006* or any other provision of an environmental planning instrument to the same effect, or
- *State Environmental Planning Policy No 1 – Development Standards*.

However the assumed concurrence is subject to conditions (see below).

The assumed concurrence notice takes effect immediately and applies to pending development applications.

Any existing variation agreed to by the Secretary of Planning and Environment to a previous notice will continue to have effect under the attached notice.

Assumed concurrence conditions

Lot size standards for dwellings in rural areas

The Secretary's concurrence may not be assumed for a development standard relating to the minimum lot size required for erection of a dwelling on land in one of the following land use zones, if the lot is less than 90% of the required minimum lot size:

- 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, Zone E4 Environmental Living

- a land use zone that is equivalent to one of the above land use zones

This condition will only apply to local and regionally significant development.

Numerical and non-numerical development standards

The Secretary's concurrence may not be assumed by a delegate of council if:

- the development contravenes a numerical standard by greater than 10%; or
- the variation is to a non-numerical standard.

This restriction does not apply to decisions made by independent hearing and assessment panels, formally known as local planning panels, who exercise consent authority functions on behalf of councils, but are not legally delegates of the council (see section 231, to be renumbered 4.8 from 1 March 2018).

The purpose of the restriction on assumed concurrence for variations of numerical and non-numerical standards applying to delegates is to ensure that variations of this nature are considered by the council or its independent hearing and assessment panel and that they are subject to greater public scrutiny than decisions made by council staff under delegation.

In all other circumstances, delegates of a consent authority may assume the Secretary's concurrence in accordance with the attached written notice.

Independent hearing and assessment panels

From 1 March 2018, councils in Sydney and Wollongong will be required to have independent hearing and assessment panels that will determine development applications on behalf of councils (see section 231, to be renumbered section 4.8 from 1 March 2018).

The attached notice allows independent hearing and assessment panels to assume the Secretary's concurrence because they are exercising the council's functions as a consent authority.

Independent hearing and assessment panels established by councils before 1 March 2018 also make decisions on behalf of councils. The attached notice applies to existing panels in the same way as it will apply to panels established after 1 March 2018.

Regionally significant development

Sydney district and regional planning panels may also assume the Secretary's concurrence where development standards will be contravened.

The restriction on delegates determining applications involving numerical or non-numerical standards does not apply to all regionally significant development. This is because all regionally significant development is determined by a panel and is not delegated to council staff.

However, the restriction on assuming concurrence to vary lot size standards for dwellings in rural areas will continue to apply to regionally significant development. The Secretary's concurrence will need to be obtained for these proposals in the same way as it would for local development.

State significant development and development where a Minister is the consent authority

Consent authorities for State significant development (SSD) may also assume the Secretary's concurrence where development standards will be contravened. This arrangement also applies to other development for which a Minister is the consent authority for the same reasons.

Any matters arising from contravening development standards will be dealt with in Departmental assessment reports.

The restriction on assuming concurrence to vary lot size standards for dwellings in rural areas will not apply to SSD or where a Minister is the consent authority for the same reasons.

Notification of assumed concurrence

Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, consent authorities are notified that they may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the SILEP (or any other provision of an environmental planning instrument to the same effect), or clause 6 of SEPP 1.

The notice takes effect on the day that it is published on the Department of Planning's website (i.e. the date of issue of this circular) and applies to pending development applications.

Procedural and reporting requirements

In order to ensure transparency and integrity in the planning framework the below Departmental monitoring and reporting measures must be followed when development standards are being varied:

- Proposed variations to development standards cannot be considered without a written application objecting to the development standard and dealing with the matters required to be addressed by the relevant instrument.
- A publicly available online register of all variations to development standards approved by the consent authority or its delegates is to be established and maintained. This register must include the development application number and description, the property address, the standard to be varied and the extent of the variation.
- A report of all variations approved (including under delegation) must be submitted to developmentstandards@planning.nsw.gov.au within 4 weeks of the end of each quarter (ie March, June, September and December) in the form provided by the Department.
- A report of all variations approved under delegation from a council must be provided to a meeting of the council meeting at least once each quarter.

Councils are to ensure these procedures and reporting requirements are carried out on behalf of Independent Hearing and Assessment Panels and Sydney district or regional planning panels.

Audit

The Department will continue to carry out random audits to ensure the monitoring and reporting measures are complied with. The Department and the NSW Independent Commission Against Corruption will continue to review and refine the audit strategy.

Should ongoing non-compliance be identified with one or more consent authorities, the Secretary will consider revoking the notice allowing concurrence to be assumed, either generally for a consent authority or for a specific type of development.

Further information

A Guide on Varying Development Standards 2011 is available to assist applicants and councils on the procedures for managing SEPP 1 and clause 4.6 applications to vary standards.

Links to SEPP 1 and the Standard Instrument can be found on the NSW Legislation website at: www.legislation.nsw.gov.au

For further information please contact the Department of Planning and Environment's information centre on 1300 305 695.

Department of Planning and Environment circulars are available at:

www.planning.nsw.gov.au/circulars

Authorised by:

**Carolyn McNally
Secretary**

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Assumed concurrence notice

I, Carolyn McNally, Secretary of the Department of Planning and Environment, give the following notice to all consent authorities under clause 64 of the *Environmental Planning and Assessment Regulation 2000*.

Notice

All consent authorities may assume my concurrence, subject to the conditions set out in the table below, where it is required under:

- clause 4.6 of a local environmental plan that adopts the *Standard Instrument (Local Environmental Plans) Order 2006* or any other provision of an environmental planning instrument to the same effect, or
- *State Environmental Planning Policy No 1 – Development Standards*.

No.	Conditions
1	<p>Concurrence may not be assumed for a development that contravenes a development standard relating to the minimum lot size required for the erection of a dwelling on land in one of the following land use zones, if the variation is greater than 10% of the required minimum lot size:</p> <ul style="list-style-type: none">– 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, Zone E4 Environmental Living– a land use zone that is equivalent to one of the above land use zones <p>This condition does not apply to State significant development or development for which a Minister is the consent authority</p>
2	<p>Concurrence may not be assumed for the following development, if the function of determining the development application is exercised by a delegate of the consent authority:</p> <ul style="list-style-type: none">– development that contravenes a numerical development standard by more than 10%– development that contravenes a non-numerical development standard <p>Note. Local planning panels constituted under the <i>Environmental Planning and Assessment Act 1979</i> exercise consent authority functions on behalf a council and are not delegates of the council</p> <p>This condition does not apply to State significant development, regionally significant development or development for which a Minister is the consent authority</p>

This notice takes effect on the day that it is published on the Department of Planning's website and applies to development applications made (but not determined) before it takes effect.

The previous notice to assume my concurrence contained in planning system circular PS 17-006 *Variations to development standards*, issued 15 December 2017 is revoked by this notice. However, any variation to a previous notice continues to have effect as if it were a variation to this notice.

Dated: 21 February 2018



Carolyn McNally
Secretary, Department of Planning and Environment