

19 February 2021

**CUMBERLAND COUNCIL**

Att: Olivia Yana

**MOD2020/0414- 9-11 SHERWOOD ROAD, MERRYLANDS WEST**

I refer to Councils most recent correspondence regarding the above mentioned application and commentary from the Sydney West Central Planning Panel. Amended plans and documents have been prepared in support of the application that seek to resolve those matters raised by Council.

The resubmission includes:

- Revised Architectural Plans
- Revised Traffic Statement
- Legal Advice regarding Permissibility and Substantially the Same Provisions.

The issues raised are responded to in turn.

**Shop Top Housing Permissibility**

In relation to this issue legal advice has been obtained from Emma Fleming, of Swaab Attorneys, that addresses this specific issue. Of key importance is that the revised scheme now provides for only commercial parking spaces situated below Block B, such that all elements of the residential comment are situated above commercial uses. Further every unit is 'above' the ground floor commercial to the respective parts of the development. Such that the proposal meets the definition of permissibility as set out in the original SEE and as confirmed in the legal advice.

**Additional Building Height**

As discussed in the recent meeting the height of the development has been amended and lowered by a further 500mm as reflected on the amended architectural plans noting the accurate reflection of the departure is reflected on the section drawings. The exceedance of the height limit is a function of the additional units proposed that are necessary for the feasibility of the proposed development and to provide a logical step and transition between the Sherwood Road frontage and the lower height to Coolabah Street. An discussion on the height departure is provided at Annexure 1 of this letter including the reduced height.

## **Building Separation**

In relation to the building separation at the upper most levels to Block A (COS) and Block B (Units) the plans have been amended to adjust the design of the development to reflect the likely future development to the north- noting the provision of a pedestrian right of way that is 6m wide means that when considering future built forms it is likely a compliant 18m of separation would be achieved as reflected on the amended plans.

In relation to the COS it is worth noting the garden and planter box elements to the edge of the COS and the use of a 1.8m high privacy screen to the southern edge with the zero alignment.

Therefore the separation and setbacks are considered suitable at the upper levels.

## **Parking Arrangement**

The parking arrangement has been amended as well as a revised traffic report dealing with the amended scheme and efforts have been made to separate out the commercial parking spaces from the resident and visitor spaces.

## **Substantially the Same Development**

The legal advice confirms that the proposal is substantially the same development and the submitted SEE contains further detail on this aspect of the proposal. Of note is the fact that:

- The proposal is for a shop top housing development
- The building footprint is fundamentally the same, noting the extra 6 units at the top of Block B and the inclusion of units at L2 (which is above the commercial level fronting Coolibah Street)
- The streetscape presentation and relationships are fundamentally the same.
- The changes to the scheme removing vehicular access from Sherwood Road is a positive design outcome enabling greater activation of the primary frontage and the removal of the central retail space at L1 is a more sensible and rationale design approach noting the retail space is maintained to Coolibah Street. In simple terms this scheme refines and improves the way in which the development will work and operate and seeks to provide greater activation to the Sherwood Road frontage and concentrating vehicular access from the Coolibah Street frontage rather than the shared arrangement previously proposed.

Refer to the legal advice for further detail

## Section 4.55 (3) of the Environmental Planning and Assessment Act 1979- Reasons for Prior Decision

Section 4.55(3) outlines the following:

*(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

The reasons for the decision are outlined below from the former Panel Members:

### REASONS FOR THE DECISION


1. The Panel has considered the Applicant's request to vary the development standard contained in Clause 4.3 Height of Buildings of Holroyd LEP 2013 and considers that:
  - i. the applicant's submissions adequately address the matters required under cl.4.6;
  - ii. the development remains consistent with the objectives of the standard and the objectives of the zone;
  - iii. there are sufficient environmental planning grounds to justify the variation; and
  - iv. compliance with the standard is unreasonable and unnecessary in the circumstances of this case as the proposed variations are acceptable from a streetscape perspective, will not generate unacceptable impacts on adjoining or nearby properties and will not result in development inconsistent in form and scale with that planned for the locality. Additionally, in respect of Blocks A and B, the variations will provide for a better planning outcome through the provision of additional communal open space for residents of those Blocks.

For the above reasons, the Panel is satisfied that the variation from the LEP development standard is in the public interest.

2. The proposed development will add to the supply and choice of housing within the Sydney Central City Planning District and the Cumberland local government area in a location with good access to services and amenities.
3. The proposed development adequately satisfies the relevant State and Regional Environmental Planning Policies including SEPP 55 - Remediation of Land, SEPP (Infrastructure) 2007, SEPP (BASIX) 2004, Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 and SEPP 65- Design Quality Residential Apartment Development and its associated Apartment Design Guide.
4. The proposal adequately satisfies the applicable provisions and objectives of Holroyd LEP 2013 and Holroyd DCP 2013.
5. The proposed development is considered to be of appropriate scale and form, adequately consistent with the planned character of the locality in which it is placed.
6. The proposed development, subject to the conditions imposed, will have no unacceptable adverse impacts on the natural or built environments including the local ecology, the amenity of adjacent and nearby premises and the operation of the local road system.
7. In consideration of conclusions 1-6 above the Panel considers the proposed development is a suitable use of the site and approval of the proposal is in the public interest.

Following the numbering in the statement of reasons:

1. There is no technical Clause 4.6 that applies to this modification, however in terms of the merit considerations the discussion of the departure contained at Annexure 1 confirms the development remains consistent with the objectives of the standard and there are sufficient environmental planning grounds. As was the case with the prior scheme the location of non-compliance is central to the site such that the streetscape impacts are limited and the amended scheme will not result in an inconsistent form and scale for development planned in the locality. The proposal also retains the large, consolidated COS to Block A that is connected directly to both Block A and Block B.
2. The amended scheme will continue to add to the supply and choice of housing;
3. The amended scheme adequately satisfies the relevant environmental planning instruments referred to here;
4. The amended scheme satisfies the applicable provisions of the HLEP 2013 and HDCP 2013.
5. The amended scheme continues to be of an appropriate form and scale noting the additional height in the middle of the site is suitable and will not have any significant streetscape impacts and serves to provide a transition through the site.

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6. The proposed development will have no unacceptable impacts on the natural or built environments.
  7. The development, as amended, continues to be a suitable use of the site and the proposal is in the public interest.

On that basis the amended scheme appropriately takes into consideration the prior statement of reasons- noting that the provisions require them to be 'taken into consideration' as opposed to a finding that the amended development must be consistent with the provisions. Regardless the amendments are considered to be satisfactory when considering the prior statement of reasons.

## Conclusion

We believe the final amendments are suitable and enable the application to be progressed by way of approval.

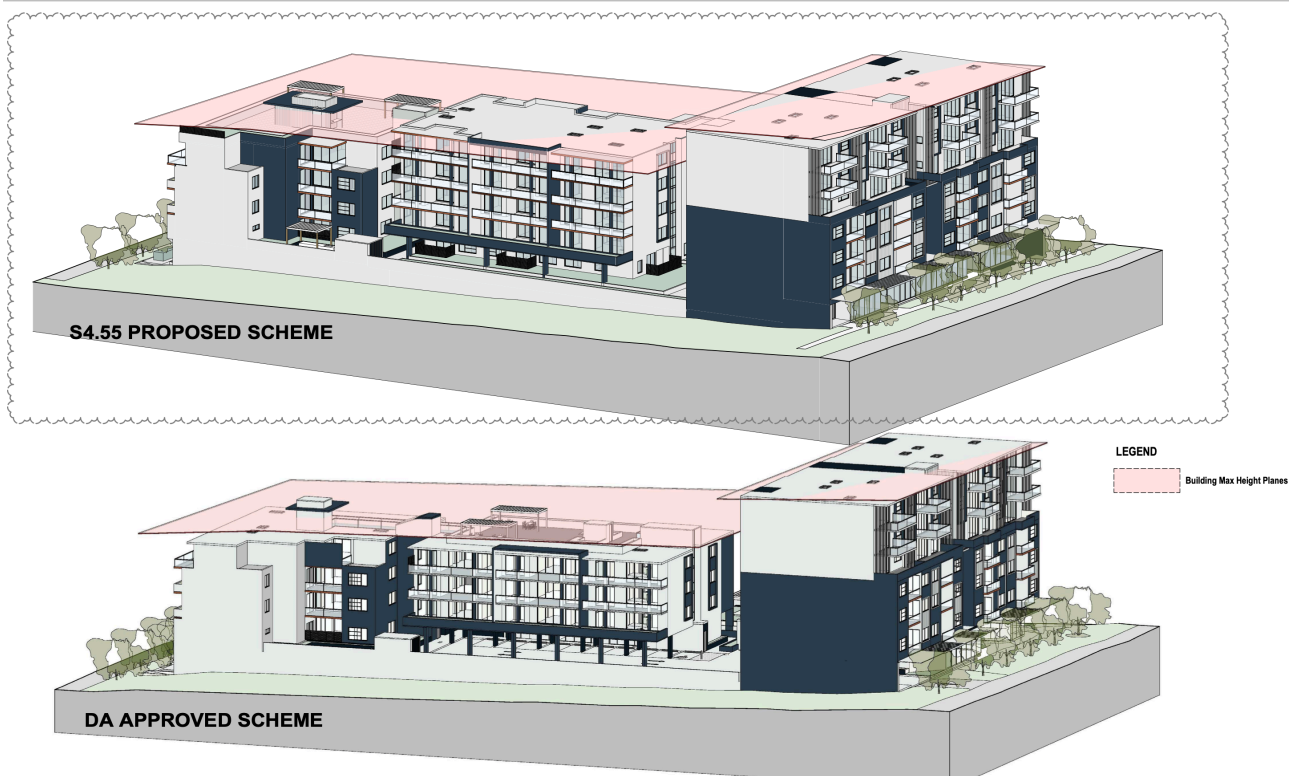


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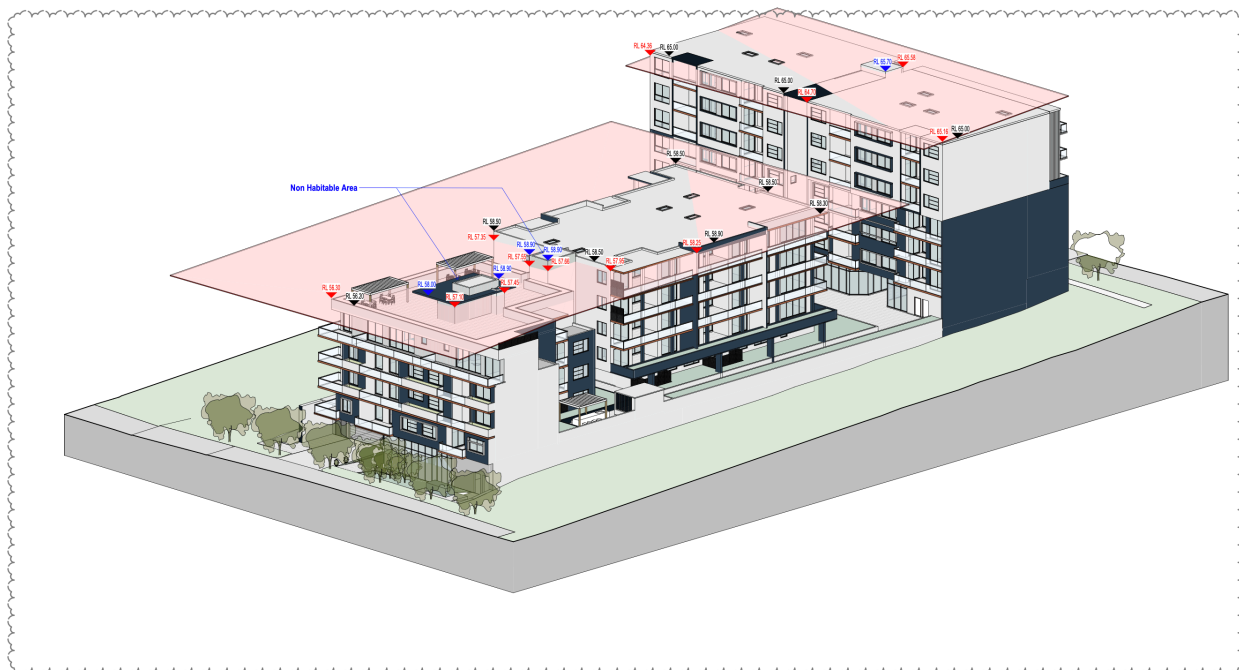
## Annexure 1: Height Discussion

The amended proposal increases the height of Block B, clearly shown in the comparison 3D height plane reproduced below with the top image being the amended scheme and the bottom image being the previously approved scheme.

### Comparison of Proposed vs Approval



The elements in blue show the 'non-habitable' parts of the building and those in red are 'habitable'- i.e. where the unit or parapet exceeds. The habitable parts of the building over the height limit arise because of the extra level proposed.



Accordingly the departure (beyond that originally approved) is limited to Block B and part of the roof cover over the COS area to Block A.

The departures, at the highest point, are as follows:

- Block A Lift Over-run:  $1.245\text{m}/17\text{m} = 7.3\%$
- Block B Roof Form & Lift Over-run: Roof/Parapet  $1.14\text{m}/17\text{m} = 6.7\% + \text{Lift: } 1.105\text{m}/17=6.5\%$
- Block C: No Change to Approved with minor reduction to height departure on the southern side of the building arising from the changes.

The exceedance to Block B and Block A is not visually apparent as it is contained at the centre of the site and the departure is a function of the topographical cross-fall and the need to maintain a suitable finished floor level to the upper level of the building. It is noted that there are areas of habitable floor area at Block B that does exceed- as a storey has been added- as shown on the updated 3D height plane.

The extra height to the habitable area is considered reasonable as it is not visually read at the street levels owing to its location centrally to the site and won't unreasonably impact surrounding development in terms of privacy and overshadowing.

It is noted that the proposal will not result in any unacceptable additional overshadowing impacts to adjoining properties, especially to land parcels that bound the site to the south and therefore, the non-compliance with the maximum height control is considered appropriate.

#### **Clause 4.6 Does Not Apply**

The consideration of development standards pursuant to Section 96 amendments has been an ongoing issue dealt with in the Land and Environment Court. It is important to note that the Court has consistently described the section 96 modification provision of the Act as “beneficial and facilitative” (as is Section 4.55).

It is designed to assist the modification process rather than to act as an impediment to it; “It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision” (see *North Sydney Council v Michael Standley & Associates Pty Limited* 1998).

Consistent with this philosophy it is noted that a Council can approve a section 96 modification application even where it would contravene a development standard. In such cases, neither a SEPP1 nor Clause 4.6 variation is required.

In *North Sydney Council v Michael Standley & Associates Pty Ltd* the judgement identified that section 96 is a ‘free-standing provision’. This means that a section 96 “*modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application.*”

It is clear that Section 96/4.55 authorises the development to be approved irrespective of any breach of development standards. The tests for a section 4.55 are different to that of a development application, as it includes that of “substantially the same”. Accordingly, a determination pursuant to Section 4.55 does not require a SEPP1 or Clause 4.6 variation to give Council power to approve.

Sutherland Shire Council argued in *Gann v Sutherland Shire Council* that it is illogical for a developer to have the opportunity to gain consent for a compliant development by virtue of a Development Application and then be granted opportunity to ignore development standards via the former section 96 modification processes.

The Court noted:

*“This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s 79C, which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s 76A(1) does not apply.”*

Having regard to the above discussion, we note that section 96/4.55 authorises the approval of modifications to be given by the consent authority where there is a breach of a development standard.

**Neither Clause 4.6 nor SEPP1 are applicable to a Section 96/4.55 modification, as these are only relevant during the development application and assessment stage. However a consent authority is still to have regard to the control and the merit, or otherwise, of supporting a variation to a control.**

As set out above a detailed Clause 4.6 variation is not legally required for the modification application.

However the following reasons indicate that the departure to the height control is acceptable for the revised development and the discussion below follows the general provisions of Clause 4.6 to provide a merit assessment- noting that no Clause 4.6 variation is actually required- only consideration of the merit of the height breach.

#### **Land and Environment Case Law**

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a 'better outcome'.

However recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130** have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('*Al Maha*') is also relevant.

In simple terms *Al Maha* requires that a Clause 4.6 will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself.

This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from recent judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation ; and
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the building height standard;
- Demonstrating consistency with the B2 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

### **Consideration of Clause 4.6**

Clause 4.6 of the Holroyd Local Environmental Plan 2013 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
  - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Each of these provisions is addressed individually below.

#### Clause 4.6(3) & Underlying Objectives of the Standard

##### Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the building height development standard are stated as:

- (1) The objectives of this clause are as follows:*
  - (a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
  - (b) to ensure development is consistent with the landform,*
  - (c) to provide appropriate scales and intensities of development through height controls.*

The current development proposal is predominantly consistent with the building height with the exception of the external corridors containing lift shafts, stairwells and a small portion of the roof form as well as the central Building to Block B where the additional level is proposed and the proposal remains consistent with the objectives based on the following:

- The development proposal is consistent with the intent of the maximum height control as the minor non-compliance to the rooftop of Block A is recessed and the central recessed area within Block B that exceeds to the habitable area will ensure that the proposal complies with the height limit relative to the streetscape;
- The proportion of the building that protrudes above the 17m/23m height contains limited habitable floor space (other than to Block B), reinforcing that the breach to the height standard does not result in the development representing an overdevelopment of the site but rather from the topographical fall from Sherwood Road towards Coolabah Street for the front and rear building. The middle buildings location means the additional height in this location is not 'read' from the streetscape and visual impacts are limited.
- The proposal has been designed to ensure that privacy impacts are mitigated noting the nature and location of the breaches to Block B is centrally located to the site and that the proposal will not obstruct existing view corridors;

- Detailed shadow analysis demonstrates that the property to the south retains reasonable solar access. Of key importance is that Council controls permit a zero front, rear and side setback for the sites within this B2 zone and the current design enables future redevelopment on adjoining sites and doesn't compromise solar access.
- The proposal will provide a high quality urban form that relates well to the context of the site in terms of the natural topography and adjoining development;
- The development proposal is consistent with the intent of the maximum height control and will provide an attractive building that addresses its two (2) street frontages.
- Non-compliance is minor in nature with the majority of the building being compliant with the building height control with only a small segment of the roof outline exceeds the height where the natural ground line falls away at the rear of Block C, noting that its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level.

The exceedance to Block B and Block A is not visually apparent as it is contained at the centre of the site and the departure is a function of the topographical cross-fall and the need to maintain a suitable finished floor level to the upper level of the building. It is noted that there are areas of habitable floor area at Block B that does exceed- as a storey has been added- as shown on the updated 3D height plane. The extra height to the habitable area is considered reasonable as it is not visually read at the street levels owing to its location centrally to the site and won't unreasonably impact surrounding development in terms of privacy and overshadowing.

- It is noted that the proposal will not result in any unacceptable additional overshadowing impacts to adjoining properties, especially to land parcels that bound the site to the south and therefore, the non-compliance with the maximum height control is considered appropriate.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

#### Clause 4.6(3) & Environmental Planning Grounds

As outlined above the proposal remains consistent with the underlying objectives of the control. In addition to the above it is noted that the development, including the departure to the height control enables the following to occur which demonstrates environmental planning grounds to support the numerical non-compliance.

- The additional height to Block B is centrally located such that it is not easily read from the street frontage and it serves to provide a suitable transition between the taller height on Sherwood Road and the lower height to Coolibah

- Street- it serves as the transition between the 2 which is considered acceptable.
- The proportion of the building that protrudes above the 17m/23m height contains limited habitable floor space (other than to Block B), reinforcing that the breach to the height standard does not result in the development representing an overdevelopment of the site but rather from the topographical fall from Sherwood Road towards Coolabah Street- noting the slope of the land also has played a part in the height breach given the site falls from Sherwood Road to Coolabah Street and the need for appropriate finished floor levels at the street frontages rather than 'sinking' these areas which would be a poor outcome in terms of the retail interface.
  - Detailed shadow analysis demonstrates that the property to the south retains reasonable solar access. Of key importance is that Council controls permit a zero front, rear and side setback for the sites within this B2 zone and the current design enables future redevelopment on adjoining sites and doesn't compromise solar access.
  - The development proposal is consistent with the intent of the maximum height control and will provide an attractive building that addresses its two (2) street frontages with a suitable 'transition' through the centre of the site.
  - The rooftop COS to Block A provides good amenity for residents of Block A and B facilitated by the height departure.

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

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the B2 Zone, being:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To permit residential development that is complementary to, and well-integrated with, commercial uses.*

The proposal is consistent with the objectives of the B6 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21).

The development is consistent with the zone objectives noting that:

- The development will provide for the housing needs of the community within a high density environment;
- The development contributes to a variety of housing types in a high density environment;
- The development will provide increased employment opportunities and encourage people to shop and work within the Transitway Precinct
- The development will maximise public transport patronage by providing employment and residential accommodation in an accessible location;

- The development is designed to respond to the context and setting of the locality and the development is consistent with the desired future character of the locality; and
- The development is designed to minimise impact on the amenity of the area and adjoining properties.

#### Clause 4.6(5)

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.



## **Conclusion**

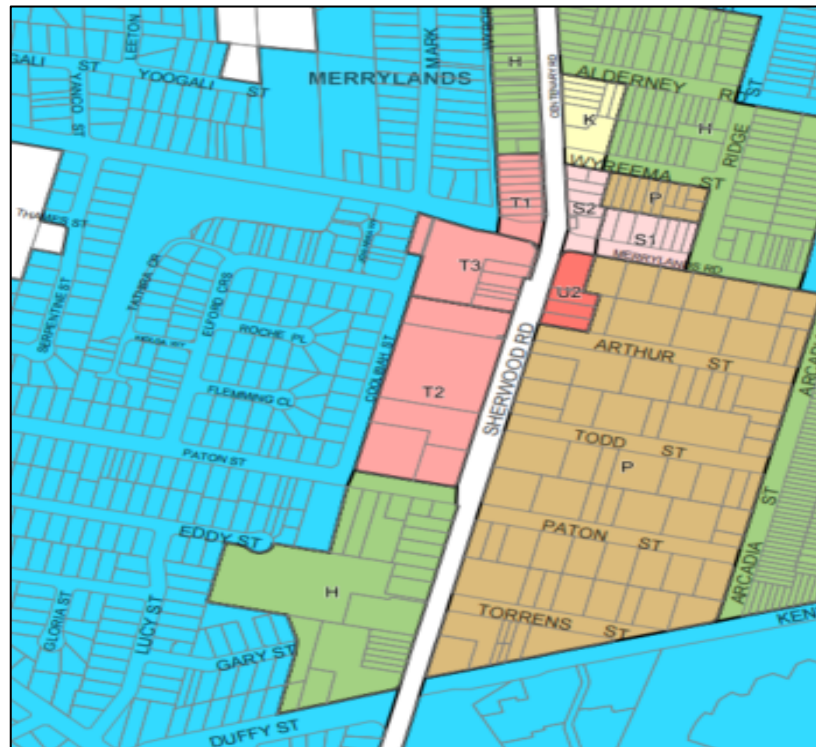
Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.



## FSR DEPARTURE

As noted against the height departure discussion there is no formal requirement for a Clause 4.6 variation per the findings in Gann vs Sutherland.

A maximum floor space ratio of 2.2:1 and 2.4:1 (small portion north-eastern corner of the site) is identified for the site under Holroyd Local Environmental Plan 2013 Floor Space Ratio Map.



The replacement of commercial car parking spaces within Level 2 with residential units and the reconfiguration to Level 6 communal open space from Block B to Block A to accommodate 8 additional residential units has increased the FSR from 2.19:1 to 2.28 (exceedance of 0.08:1) and then to 2.61 (exceedance of 0.21:1) and as such the development exceeds the maximum FSR permitted within the development site.

Numerically this is 3.6% to the predominant portion of the site- equating to 273.74m<sup>2</sup>, and 8.75% on the small part of the site with the 2.4:1 FSR- equating to 118.65m<sup>2</sup>. Hence the total extent of GFA beyond the maximum is 392.39m<sup>2</sup>.

A discussion of the merits of the departure is provided over the page and generally follows the Clause 4.6 format- despite Clause 4.6 not being relevant to a modification request.

### **Land and Environment Case Law**

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a ‘better outcome’.

However recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Sydney Council*** [2019] NSWCA 130 have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (‘*Al Maha*’) is also relevant.

In simple terms *Al Maha* requires that a Clause 4.6 will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself.

This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from recent judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation ; and
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the FSR standard.
- Demonstrating consistency with the B2 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

## Clause 4.6(3) & Underlying Objectives of the Standard

### Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

### **Clause 4.6(3)- Objectives of the Standard**

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The objectives of the FSR development standard are stated as:

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

- (a) to support the viability of commercial centres and provide opportunities for economic development within those centres,*
- (b) to facilitate the development of a variety of housing types,*
- (c) to ensure that development is compatible with the existing and desired future built form and character of the locality,*
- (d) to provide a high level of amenity for residential areas and ensure adequate provision for vehicle and pedestrian access, private open space and landscaping.*

The current development proposal is entirely consistent with the above objectives and is considered to be appropriate on environmental planning grounds based on the following:

- The proposed building exhibits a bulk and scale that is consistent with the desired future character of the locality.
- The extent and quantum of GFA proposed actually increases the commercial GFA and provides additional units to ensure that the proposal supports the viability of the Sherwood Road local centre. This directly satisfies objective a).
- The proposal provides for a variety of housing type with a mix of 1, 2, and 3 bedroom units. This directly satisfies objective b).
- The proposed additional floor space results in a high quality development that is an improved Urban Design outcome with the series of buildings across the site and better interfaces to Sherwood Road. The development proposal, and the GFA proposed, satisfies objective c).

- The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing a landmark development that provides high quality address and activation to the street frontage and meeting the intent of the key planning controls applying to the proposal.
- The development proposal provides a sympathetic, activated street frontage that addresses the context, streetscape and future character of the Town Centre and adjoining developments. The development provides a mix of dwellings that will contribute towards increasing housing choice, diversity and stock of Holroyd LGA.
- The proposal provides for high levels of amenity given the manipulation of the vehicular and pedestrian access arrangements to ensure a suitable response and through site movements both pedestrian and vehicular and then a series of quality spaces for residents with regard to private open space, landscaping and common areas. This satisfies objective d).

Therefore the proposal satisfies the objectives of the control.

#### **Clause 4.6(3)- Environmental Planning Grounds**

In relation to environmental planning grounds the variation to the FSR standard is satisfactory on these grounds for the following reasons:

- The proposal provides a suitable and sustainable quantum of non-residential floor space and enables a suitable development outcome on the site.
- The technical departure to the FSR standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
  - To promote the orderly and economic use and development of land- whereby strict compliance would hinder achievement of this and would present an underdevelopment of the land.
  - To promote the delivery of affordable housing through increased housing supply
  - To promote good design and amenity of the built environment- achieved through the changes to the scheme and the additional FSR.

Given the above, the technical departure to the FSR standard has planning merit and sufficient environmental planning grounds exist for the departure.

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

The proposal is consistent with the objectives of the B2 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21).

The proposal is consistent with the objectives of the zone, providing a mixture of compatible uses and for redevelopment in an accessible location that will further the objective to maximise public transport patronage as well as encouraging walking and cycling.

The proposal provides for a vibrant mixed use development with active retail, commercial and other uses at the ground floor level and a suitable quantum of non-residential floor space.

The development proposal encourages the development and expansion of business activities in this Local centre.

The proposal is consistent with the future desired character of the area as envisaged by the current planning controls.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the FSR control. In addition, the proposal is consistent with the objectives of the zone as addressed previously in this statement.

#### **Clause 4.6(5)**

It is understood that the concurrence of the Secretary can be assumed in the current circumstances.

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the FSR control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal

- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

### **Conclusion**

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by mixed use development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.