

Clause 4.6 Variation

LOTS 12 & 13 BUTU WARGUN DRIVE
PEMULWUY



CLAUSE 4.6 VARIATION REQUEST: HEIGHT OF BUILDINGS

CLAUSE 4.6 IS NOT REQUIRED

We note that as the current application is a Section 4.55 modification, there is no development standard test, rather the key planning question relates to whether the development is substantially the same. Notwithstanding there being no formal requirement for a Clause 4.6 Variation request to be submitted, the Council has requested that the applicant provide such.

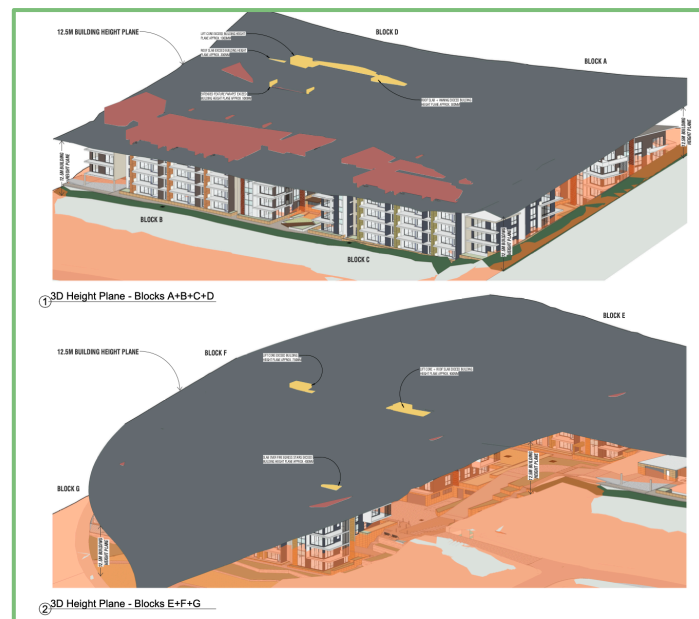
In good faith this Clause 4.6 has been prepared at Councils request, although there is no statutory requirement.

INTRODUCTION AND BACKGROUND

A maximum building height of 12.5m is identified for the site under the relevant LEP Maximum Building Height Map.

The development approval comprises predominantly 4-5 storey residential flat buildings, that have been designed to respond to the site and in particular the slope circumstances of the site.

A proportion of the building exceeds the 12.5m height of building control as illustrated below.



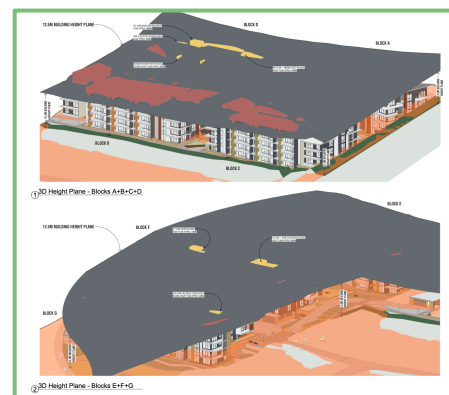
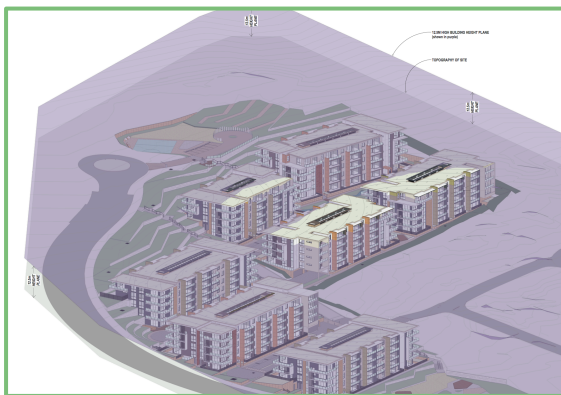


Given that the 12.5m height control is a development standard a clause 4.6 departure would be required if the proposal was seeking development approval. It is noted that a Clause 4.6 variation to the height standard has been granted to this proposal, and that this document is provided in support of a clause 4.6 variation.

THE SECTION 4.55 PROPOSES A REDUCTION IN THE HEIGHT VARIATION

It should be noted that the Section 4.55 application proposes a reduction in the extent of building area that exceeds the height control, from that which is approved. Notwithstanding the section 4.55 maintaining elements of the building above 12.5m, the proposed modification is to result in less variation than that approved.

The below comparison illustrates the original variation approved (on the left) against the amended variation proposed in the Section 4.55 (on the right). It confirms the reduction in impact.



CLAUSE 4.6

The maximum point of variation for the modified proposal is for a lift overrun and is a height of 13.62m representing a variation of 9%. This is less variation than the current approval which grants a 12% variation.

It is important to note that the design for this site is cognisant of the topography and in particular has been intentional in responding to the built form remaining below the ridgeline, as illustrated below.



Clause 4.6 of the relevant LEP 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.

The applicant asks that the Consent Authority consider this request, and grant development consent to the proposal, despite the departure from the control, for the reasons stated below.

PROVISIONS OF CLAUSE 4.6

Clause 4.6 of the Holroyd LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard.¹ That clause is in the following terms:

- (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.*

¹ Clause 4.6(2)

- (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.*

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

- "(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."*

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

- "(i) (this request) has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Secretary has been obtained."*

RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

1. *this request has adequately addressed the matters required to be demonstrated by subclause (3),² namely that:*
 - a. *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,³ and*
 - b. *there are sufficient environmental planning grounds to justify contravening the development standard⁴;*
2. *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*
3. *the concurrence of the Secretary has been obtained.⁵*

The request deals with each relevant aspect of clause 4.6 on the following pages.

² Clause 4.6(4)(a)(i)

³ Clause 4.6(3)(a)

⁴ Clause 4.6(3)(b)

⁵ Clause 4.6(4)(b)

NSW CASE LAW

This request also addresses several recent Land and Environment Court cases including, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council* and *Initial Action Pty Ltd v Woollahra Municipal Council*.

The key tests or requirements arising from the above 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 *that there are sufficient environmental planning grounds to justify contravening the development standard*, and
- The proposal is required to be in ‘the public interest’.

It is important to note that the Chief Judge of the Land and Environment Court in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a ***neutral or better*** environmental planning outcome than one that does not.

An extract of this judgment is provided below:

87. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.

90. In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause.

In *Wehbe v Pittwater* [2007] NSWLEC 827 (‘Wehbe’), Preston CJ identified a variety of ways in which it could be established and demonstrated that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is

unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

While Wehbe related to objections made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are at least 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, as follows:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (Wehbe v Pittwater Council [2007] NSWLEC 827, Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22], RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]) and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31].

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the height standard;
- Demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard;
- Demonstrating consistency with the R4 zoning; and
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed below, noting that the proposal has a bulk and scale that is consistent with the desired and emerging built form in this high density residential area.

COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the reasons which follow.

Compliance with the objectives of the development standard and the zone are achieved despite non-compliance with that standard. The objectives of the height development standard are stated as:

- (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 remains consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- All built form heights are complying with the RL DCP heights that ensures that view to/from the Ridgeline Park and Prospect Hill is protected.
- Buildings have been stepped to address the site's steep cross-fall that will contribute towards minimising building height, bulk and scale when viewed from the street level.
- The size of the site permits sufficient separation of building on site and also from neighbouring land parcels and also have negligible impacts in terms of privacy and overshadowing to adjoining properties.
- The increased height and modulation of building locations enables greater amenity to the proposed units through better solar orientation and increased levels of natural ventilation.
- 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 residential flat building that provides good address to the street frontage.

- The proposed development complies with key planning controls applying to the proposal including FSR, landscape, deep soil zones and communal open space.
- The proposed variation is minor in nature with the majority of the building being compliant with the building height control. The extent of non-compliance will not be a visually prominent element in the streetscape.
- The additional height does not generate any additional amenity impacts given the location of the site and the surrounding site context.
- The proposal has been carefully designed to ensure that no adverse visual or acoustic amenity impacts will be created by the proposed building height along site boundaries.
- The development proposal is consistent with the intent of the maximum height control and has a bulk and scale that is not discernible from a development that complies with the control.
- The non-compliance to the height control has no unacceptable impact on the setting of any items of environmental heritage or view corridors.
- The proposal will sit comfortably in the streetscape relative to the desired future character of the locality.

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.

ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the floor space ratio development standard.⁶ For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.⁷ As already noted, that departure is 1.12 (13.62m) or 9%.

- The additional height supports the provision of appropriate rooftop common open space for the enjoyment of residents;
- The proposal ensures that the high density nature of the zone is achieved and the development is consistent with the existing character of the locality;

The character of the locality is undergoing transition and the bulk and scale of the proposal is well within the future character desired;

- The form and presentation of the development maintains an appropriate visual relationship to adjoining properties and does not present a bulk and scale from the street or adjoining properties that is detrimental to the existing and desired future character of the area;
- The building is compatible with the desired future character of the area in terms of the building presentation to the street, the materials, and the relationship to surrounding properties; and
- The proposal will provide for a number of distinct public benefits:
 - Delivery of additional housing in a designated high density precinct with access to services and facilities, which plays an important role in the delivery of a diverse range of housing for the suburb;
 - Creation of jobs during the construction stage;
 - Amenity impacts to adjoining properties are mitigated; and
 - The distribution of additional height across the site will not be discernibly different to a built form that is compliant with the height control.

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

⁶ As clause 4(3)(b) requires

⁷ As confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at 46, per Preston CJ

CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST

As clause 4.6(4)(a)(i) requires, the Consent Authority must also be satisfied that proposed development will be in the public interest because it is consistent with:

1. *the objectives of the particular standard and*
2. *the objectives for development within the zone in which the development is proposed to be carried out.*

The Applicant has already addressed the objectives of the development standard in the context of cl 4.3 in demonstrating that compliance is unnecessary or unreasonable.

The objectives of the R4 High Density Residential Zone are as follows:

Objectives of zone

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

The proposal is consistent with these objectives as:

- It promotes a high density residential building that provides housing of various sizes, layouts and dimensions, in a precinct designated for such housing;
- It is a compatible land use that contributes to the housing needs of the community;
- Results in a development that is compatible with the desired bulk and scale of the locality expressed in the planning controls and as outlined on the submitted architectural plans; and
- Includes landscaping, communal facilities and open spaces that will contribute visually and aesthetically to the neighbourhood, and in particular for the residents of the 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.

For those reasons, the applicant says the consent authority would be satisfied the development is in the public interest.

CONCURRENCE OF THE SECRETARY

1. 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.
2. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

CONCLUSION

For the reasons set out above, the applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objectives of the R4 zone.