

23 August 2019

Request for variation to a development standard pursuant to Clause 4.6 of the Parramatta Local Environmental Plan 2011 (PLEP).

This Report has been prepared in accordance with clause 4.6 of the Parramatta Local Environmental Plan 2011 (PLEP) in response to a Request for Information received from Parramatta City Council (PCC), dated 6 August 2019, for the development application DA/340/2019, located at 11-13 Aird Street, Parramatta.

The development application is described as follows:

Demolition of all existing structures; construction of a 35-storey mixed use development comprising one basement level car park, ground floor retail and building services, five above ground car parking levels, commercial floor area, communal open space on a podium and rooftop level and 104 residential apartments.

Clause 4.6 of the PLEP allows for a development standard to be varied. The proposed development seeks to vary the development standard for height of buildings, as set out at Clause 4.3 of the PLEP. The permitted building height is 117 m and the proposed development seeks to vary the standard by 3.9 m, being 3.33% over that permitted. The variation relates only to building services and common open space area and does not relate to any additional habitable space within the development, which would otherwise derive commercial benefit.

The purpose of this Report is therefore to provide sufficient justification to vary the development standard.

In preparing this report, the amended plans prepared by PTI Architecture & Interiors have been relied upon and are the plans for which development consent is sought.

The Site

The site is located 11-13 Aird Street, Parramatta and is legally described as Lot 101, Deposited Plan 709151. The site has a total area of 815 m².

The Development Application (DA)

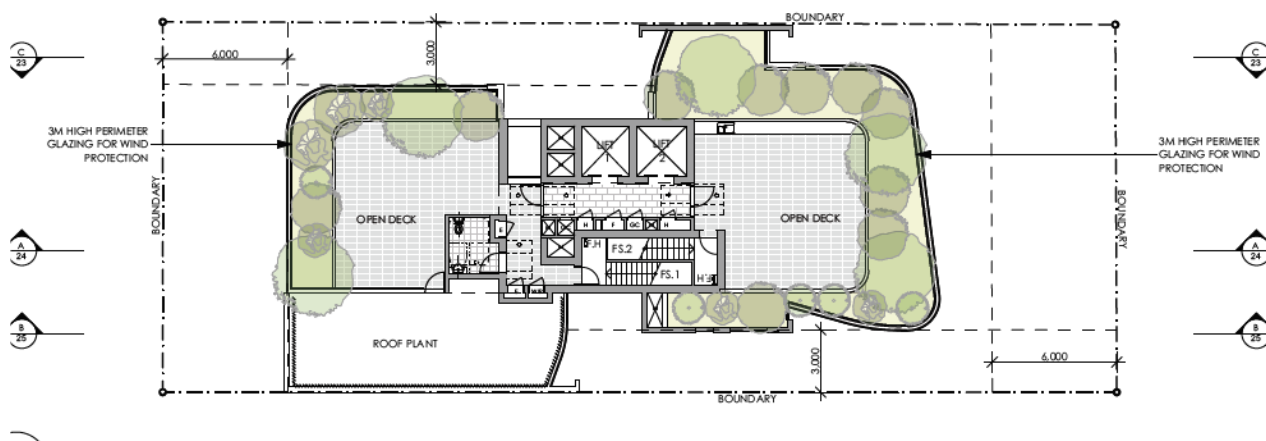
The development application is as described above.

The land is subject to a site-specific amendment to the height and floor space provisions pertaining to the site, in accordance with Amendment 21, dated 29 January 2019. This permitted the building height to be increased to 102m and the FSR to 10:1. This excludes the design excellence provisions which allow for an FSR of 11.5:1 and a height of building to 117 m.



The proposed building height, including lift overrun and a 3m high glazing barrier for wind protection to ensure adequate amenity to the open deck area on the roof top enables a building height of 120.9m, resulting in a non-compliance with the development standard for height of buildings, of 3.9 m. This results in a non-compliance of 3.3%.

Figure 1: Proposed Roof Top at 11--13 Aird Street, Parramatta



The Development Standards

Height of Buildings (clause 4.3)

Clause 4.3 of the HHLEP states:

- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the [Height of Buildings Map](#).*

The height of buildings map stipulates a limit of 102 m, in accordance with the Figure below.

The nominated height excludes design excellence, which takes the permitted building height to 117 m.

Definitions

The Dictionary to the HHLEP provides the following in relation to building height:

building height (or height of building) means:

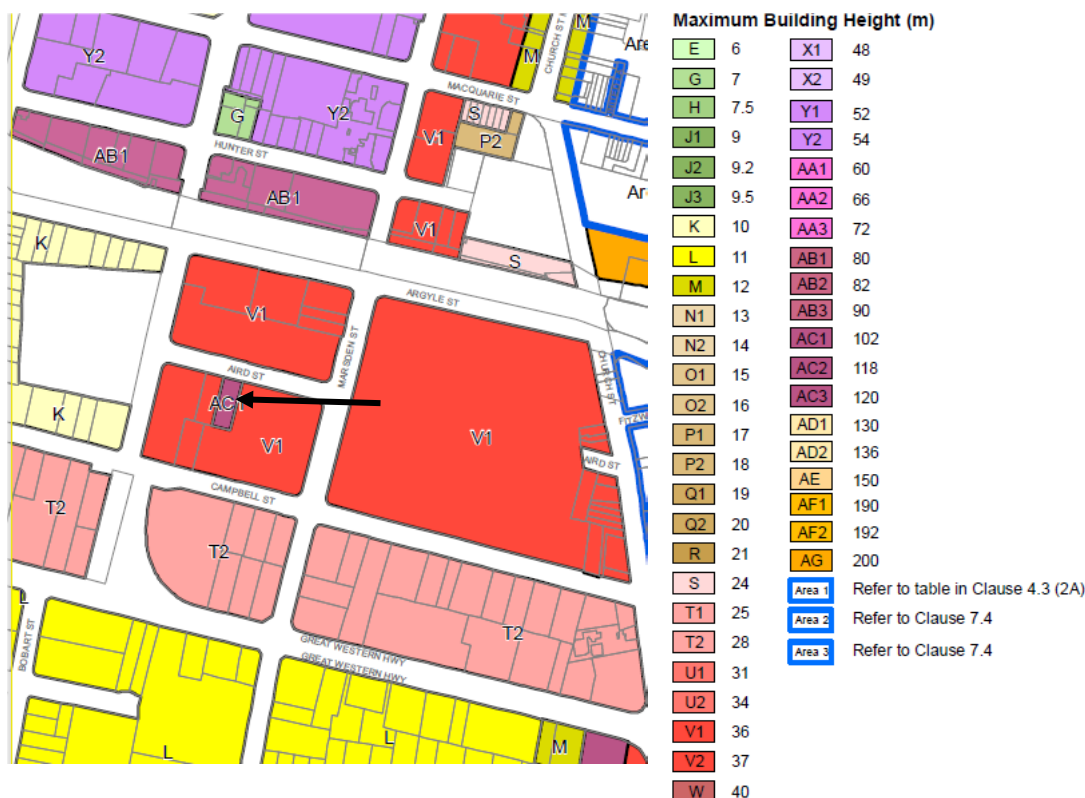
(a) *in relation to the height of a building in metres—the vertical distance from ground level (existing)^j to the highest point of the building, or*

(b) *In relation to the RL of a building—the vertical distance from the Australian Height Datum to 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



Figure 2: Extract from the LEP: HOB Height of Buildings Map – Sheet HOB_002



Source: Extract from HOB Height of Buildings Map – Sheet HOB_010

Is Clause 4.3 a Development Standard?

Clause 4.6 can only be used to vary a development standard. Development standards are relevantly defined in s 1.4 of the *Environmental Planning & Assessment Act 1979 (EP & A Act)* *inter alia* as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

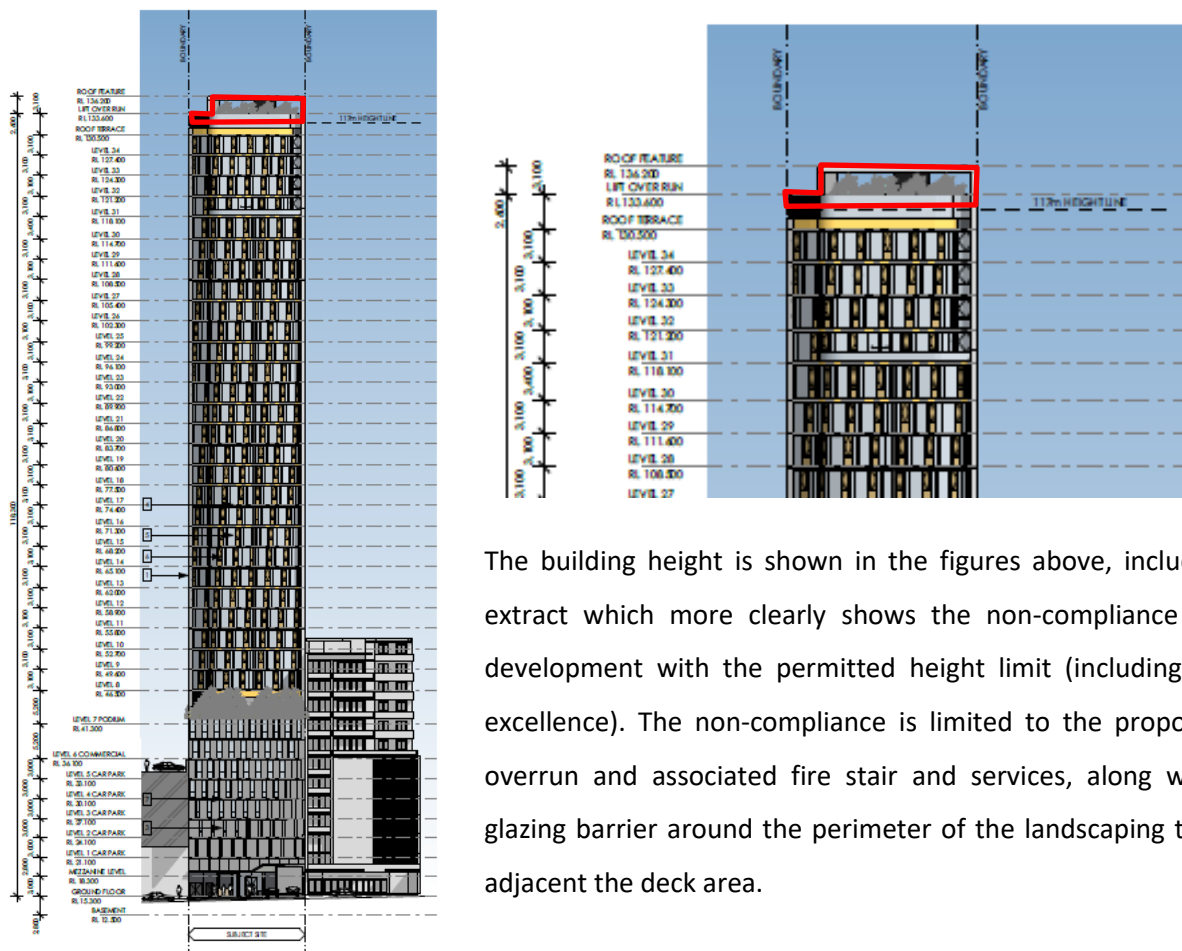
Being a provision of the PLEP in relation to the carrying out of development, under which a requirement is fixed in respect to height of buildings in the relevant zone, clause 4.3(2) of the PLEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation to the standard.

As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [*Initial Action*], clause 4.6 is facultative in permitting a consent



authority to grant consent for development even though that development would contravene a development standard set by an environmental planning instrument

The Proposal's Non-Compliance with the Development Standards



The building height is shown in the figures above, including an extract which more clearly shows the non-compliance of the development with the permitted height limit (including design excellence). The non-compliance is limited to the proposed lift overrun and associated fire stair and services, along with the glazing barrier around the perimeter of the landscaping that sits adjacent the deck area.

The table below provides both the development standard and the proposed building height.

Table 1: Summary of Proposed Development

	Standard	Proposed	Non-Compliance
Height of Building	102m + 15% design excellence = 117 m	120.9 m	3.9 m

Variation to the Development Standards

Clause 4.6(3) of the PLEP states:

(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.*

These matters are addressed below.

- (a) *that compliance with the development standard is unreasonable or unnecessary*

The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.

There are five alternatives set out in *Wehbe*, but only one need be satisfied as provided in the table below.

Table 2: The Principles

The objective of the development standard is achieved notwithstanding non-compliance with the standard	In this case, the objective of the development standard is achieved, notwithstanding non-compliance with the standard.
The underlying objective or purpose of the development standard is not relevant	Not applicable
The underlying objective or purpose would be defeated or thwarted if compliance was required	Not applicable
The standard has been abandoned or destroyed	Not applicable
The zoning of the land was unreasonable or inappropriate such that the standards for the zoning are unreasonable or unnecessary.	Not applicable

Achievement of the objectives of the development standards

The objectives for building height are set out at clause 4.3(1) and are addressed below having regard to this amended application.

- (a) *to nominate heights that will provide a transition in built form and land use intensity in areas covered by this Plan*

The height of the proposed development is generally consistent with that which was deemed acceptable on the land, on a site-specific basis, through the planning proposal process.

The outcome desired under this development application seeks to vary that standard for servicing purposes (lift, fire stair and building services), as well as to ensure that there is maximum opportunity for the occupants of the development to benefit from meaningful communal open space, having regard to the density of



development on surrounding sites, which provides limited opportunities for such provision. That portion of the built form has only limited enclosure for services; however, the height of the glazing wall is open and clear in its materiality, such that this does not add to the perceived bulk or density of the built form. The eye is instead drawn to the landscaping that is afforded to the open deck areas.

The open nature of the glazing ensures that this additional element proposed above the height limit, having regard to the position of this, being setback from the site boundaries, and the materiality, ensures that a transitional approach is achieved. Further, the composition of form that is over the height limit does not impinge on the land use intensity afforded to the site, as the proposal is compliant with the floor space ratio permitted thereon. Further, the non-compliance does not allow for additional commercial return by virtue of a greater intensity of development as there is no additional commercial or residential accommodation afforded by this non-compliance; the outcome is simply to ensure that there is sufficient and useable common open space, with adequate amenity to service the residents of the development.

As such, the proposal is consistent with this objective.

(b) To minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development

The visual impact of the built form is limited, given the generally open nature of the proposed structures (except for the lift, fire stair and associated services), which are positioned to the western side of the floor). Further, the elements are recessed from the edges of the building, being a minimum distance of 3 m to the east and west of the building edge and 6 m or more to the north and south of the building edge, such that these do not appear to be visually prevalent, nor even visible when viewed from areas surrounding the site. Any visibility is softened by the landscaping treatment which borders the periphery of the common open space area, such that the appearance of glazing will blend in.

The height of the non-compliant component of the building will not have any material effect on views. Given the generally open design of the glazing, the proposal enables for views across the common open space area, such that any potential loss is mitigated.

The common open space area which forms the non-compliant element of the building, is positioned and designed such that it will not cause adverse impact in terms of the privacy enjoyed from future development sites within proximity to the subject site.

Given the recessive composition of the proposed structures as detailed above, there is no adverse consequence in terms of solar access to neighbouring sites. Any impact is derived from the proposed building form proper, long before the non-compliant component would otherwise have any effect.



(c) To require the height of future buildings to have regard to heritage sites and their settings

The non-compliant component of the development has no adverse consequence in terms of heritage items and their settings within the vicinity of the site.

(d) To ensure the preservation of historic views

The non-compliant component of the development will have no impact on historic views within the vicinity of the subject site.

(e) To reinforce and respect the existing character and scale of low density development

The subject site is located within the Parramatta CBD where there is a general expectation of higher density building form and scale; this is reflected in the Height of Buildings map above. As such, this objective is not relevant to this application.

(f) To maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the side and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

The non-compliant component of the development ensures that adequate sky exposure is maintained, such that view lines are available through the open space area, aside from the small proportion that results from building services. This outcome will not impede the view of the sky, nor daylight. The recessive nature of the non-compliant component of the development ensures that there is no adverse impact when the building is viewed from parks, streets, lanes, or other areas of the public domain within the vicinity of the site.

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

There are sufficient environmental planning grounds, despite non-compliance with the development standard for height.

- Most importantly, the lift, fire stair and associated services that exceed the height limit are with the principle purpose of providing a rooftop communal open space area for residents within the development. Despite the site area and width, having regard to neighbouring built form, the opportunity to provide meaningful communal open space at the lower levels of the building is extremely limited, having regard to the density of adjoining development, both existing and potentially in the future, in a dense, CBD environment. Instead, by providing this on the roof top area ensures that a high degree of amenity is available to maximise useability and encourage resident interaction within the development, which would not otherwise be available, if all of the common open space area were confined to the lower levels of the building.



By providing these services to the roof top area also ensures equitable access to all residents of the building, which is a positive social outcome.

In absence of providing these to the roof top area, the proposal would not provide the same level of benefit that is afforded by the proposed design. This produces a better environmental planning outcome than if the development standard were complied with, which would otherwise compromise the living environments associated with the proposed development.

- There is no additional adverse solar impact on the adjoining properties as a result of the building services being non-compliant with the development standard. These are positioned on the western side of the floor plate, and well back from the site boundary. Further, it is the compliant component of the building that causes any effect, before the non-compliant component does, such that requiring compliance with the development standard would provide no material benefit to adjoining properties, given the recessive position of the non-compliant components of the building form.
- The affected part of the building does not allow for additional floor space on the site that would derive additional commercial benefit for the landowner such as an increased number of apartments within the development. The proposal, instead, seeks to maximise the efficiency of the lower levels of the building and ensure that an appropriate level of common open space is provided to service residents of the development in the location that is most practical for that purpose.
- From the public domain, the non-compliant part of the building does not compromise the overall streetscape appearance of the development, nor the broader streetscape. Most importantly, it is not visible such that it creates a built form presence that dominates these frontages, particularly when standing in nearby streets and certainly not when considered from the public domain.
- The additional height does not compromise views from the public domain surrounding the site.

Therefore, having regard to the above, there are sufficient environmental planning grounds to permit variation to the development standard for height.

The Public Interest

Clause 4.6(4) states as follows:

(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*

The fourth element that the Court needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard and zone objectives.

Preston CJ in *Initial Action* (para 27) described the relevant test for this requirement as follows:

"The matter in cl 4.6(a)(ii) with which the consent authority or the Court on appeal must be satisfied is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. 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. If the proposed development is inconsistent with either the objectives of the development standard or objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purpose of clause 4.6(4)(a)(ii)."

As demonstrated, the proposed development will comprehensively meet the objectives of the development standard for height of buildings and the zone objectives for the B4 Mixed Use zone as evidenced in the Statement of Environmental Effects accompanying the development application. Accordingly, the Court can be satisfied that it is in the public interest to vary the standard for the purpose of this development application. The implementation of the development, despite non-compliance, will ensure that existing resources are utilized without placing undue pressure on the surrounding environment, both natural and built, while complying with the relevant objectives and producing a better outcome for the development,



with additional amenity to residents of the development. The flexibility enabled by clause 4.6 will, in this case, produce a better environmental planning outcome than would result from strict compliance.

Secretary's concurrence

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests except in the circumstances set out below:

- Lot size standards for rural dwellings
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The Circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

Conclusion

The development application for the site at 11-13 Aird Street Parramatta, does not comply with the development standard contained at clause 4.3 of the PLEP. However, the proposal achieves the requirements pertaining to clause 4.6 of the PLEP, which allows for development standards to be varied.

Accepting the control for height of buildings, the components of the building that exceed this provide a superior outcome for the site that is enunciated through a skilful and quality design and is consistent with the objectives of the standard and the zone objectives. As such, the proposal satisfies the public interest by deviating from the development standard.

The variation to the development standard should therefore be supported by the consent authority in the circumstances of the case.

ⁱground level (existing) means the existing level of a site at any point

