

Clause 4.6 Variation Request – Building Height

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.

Clause 4.3 of ALEP 2010 specifies that the height of a building may not exceed the maximum height specified on the relevant Height of Buildings Map. The site is subject to a height limit of 72 metres. The proposed development exceeds the maximum height allowance when measured in accordance with the ALEP 2010 definition of building height which is as follows:

*“**building height** (or **height of building**) 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.”*

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

“(2) Consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument...”

“(3) 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.”

Accordingly, we set out below the justification for the departure to the height controls applicable under the LEP.

2. Definition of development standard

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

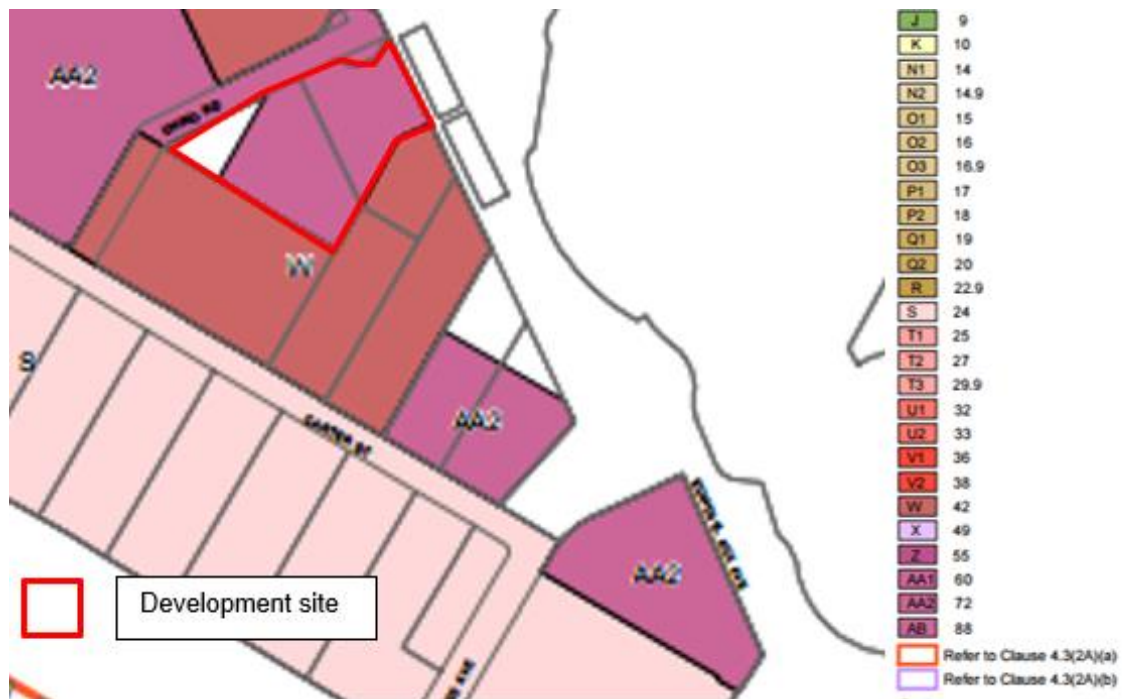
- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) ***the character, location, siting, 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 EP&A Act and Clause 4.6 of the LEP.

3. Proposed Variation

Pursuant to Clause 4.3 of the ALEP 2010 and the accompanying height map a maximum height standard of 72 metres applies to the site as shown in **Figure 1** below.

FIGURE 1: EXTRACT FROM LEP HEIGHT MAP



The proposal involves the construction of a mixed use development involving two residential towers above a podium base. The height of the proposed buildings to the roof line varies from RL83.63 metres to RL85 metres. Plant rooms and lift overruns project above this height to a maximum RL87.4 metres. When measured from existing ground level, the proposed development has a variable building height to a maximum 72.82 metres. This departure from the height control (maximum 0.82m) relates to discrete portions of the tower roof top elements arising as a result of the placement of plant equipment and lift overrun, and a small component of the parapet wall to the roof. The extent of the height variation is illustrated in the plan at **Attachment 1**.

The height limit has been breached for the following reasons:

- Plant rooms and lift overruns are proposed above the roof of the buildings to house plant equipment required for the development. These spaces project to a maximum height of RL87.4m. Spot levels across the site vary considerably resulting in a maximum exceedance in the height limit of 0.52m to 0.82m at specified locations. The plant equipment is set back within the centre of the tower form and the additional height would be indiscernible when viewed at street level.
- The eastern and northern ends of the parapet wall of the southern tower project above the height limit resulting in a maximum building height of 72.41 metres. The parapet wall contributes to the visual appearance of the development and to the safety of the rooftop zone. While this element could be removed it would result in a poorer design outcome for the site.

The proposed building heights are shown in **Table 1** below.

TABLE 1: EXTENT OF DEPARTURE TO LEP HEIGHT CONTROL

	Existing ground level (minimum spot level)	Maximum height (RL)	Maximum height (m) measured from existing ground level	Extent of departure from LEP height control	% Exceedance
NORTHERN TOWER					
Rooftop equipment	RL14.76m	RL87.4m	72.64m	0.64m	0.9%
SOUTHERN TOWER					
Rooftop equipment	RL12.03m	RL84.85m	72.82m	0.82m	1.1%
Parapet wall	RL11.22m	RL83.63m	72.41m	0.41m	0.6%

4. Extent of variation

Existing ground levels are highly variable ranging from RL10.14m in the southern western corner of the site rising to RL16.59m in the centre of the site. Existing ground levels are shown on the survey plan which accompanies the DA. An additional plan (refer to **Attachment 1** and **Figure 2**) is also provided which illustrates the areas of the building which extend above 72 metres when measured from existing ground level. This plan is useful in identifying the exact locations where the proposal departs from the LEP height control and highlights that the departure is limited to small portions of the overall development, specifically the parapet walls of the towers, and rooftop plant rooms and lift overruns, and that on this basis the extent of the departure is extremely minor.

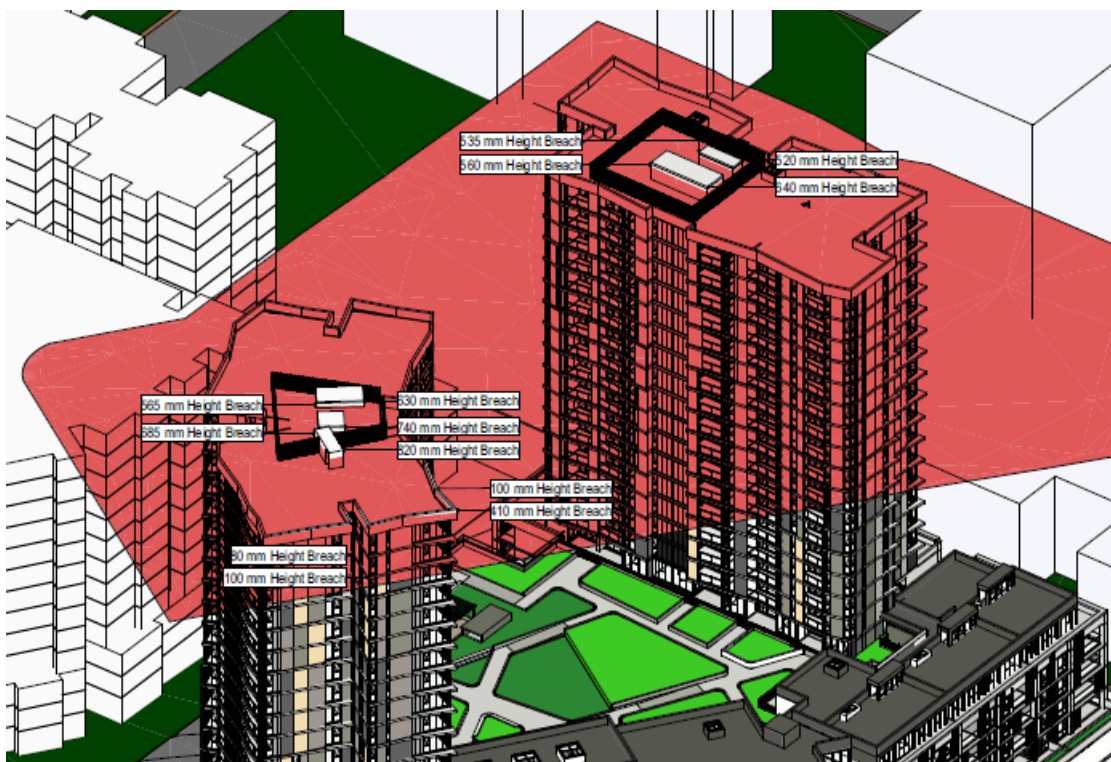
The site will be modified to create a suitable building platform for the development. Existing ground levels will be modified as follows:

- Excavation to create a single level basement.
- A level building pad will be created for the building's ground floor resulting in a new ground floor level of between RL15m (northern side) and RL11.75m (southern side).

While the vast majority of the new development is within the 72 metre height limit, part of the parapet wall of the southern tower and rooftop plant equipment will project marginally above 72 metres (by up to 0.41m). The tallest elements of the proposal, the proposed lift overruns above the two residential towers and the parapet wall of the southern tower, project to a maximum height of RL87.4 metre, RL84.85 metres and RL83.63 metres respectively. When measured above existing ground level this results in a maximum building height of 72.82m for the southern tower and 72.64 metres for the northern tower.

The extent of the variation is illustrated in **Figure 2** below.

FIGURE 2: EXTENT OF EXCEEDANCE ABOVE THE LEP HEIGHT LIMIT



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].**

In view of the development context and the nature of the exceedance proposed in this case strict compliance with Clause 4.3 of the LEP is considered to be both unnecessary and unreasonable.

The proposed development does not conflict with the intent of Clause 4.3 which is to maintain the visual character of the area and to allow for appropriate development densities across the Carter Street Precinct. The proposed development achieves this outcome. The additional height proposed does not allow for any additional habitable floorspace to be accommodated within the site.

- 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 underlying objective of the Building Height control is relevant to the development.

- 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 underlying objective of the building height limit is to manage the scale of any future built form in order to mitigate any adverse impacts on the amenity of residential areas. The character of the surrounding area is evolving and is becoming increasingly mixed in terms of bulk, scale and density developing from industrial to residential apartment buildings of up to 22 storeys. The proposed development is compatible with the height and scale of surrounding and nearby development.

In view of the development context and the minor exceedance proposed in this case strict compliance with Clause 4.3 of the LEP is considered to be both unnecessary and unreasonable. The exceedance relates to non-habitable floorspace, comprising plant rooms, lift overruns and rooftop architectural features only. Strict compliance with the height control would result in an inferior design outcome.

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].

There are a number of buildings within the Carter Street Precinct that have been approved with a height greater than than nominated on the LEP height map. The relevant development applications are shown in **Table 2** below.

Given the minor nature of the departure proposed in this instance and noting that consent has been granted to other buildings within the immediate area for heights which in some instances considerably exceed the maximum building height control it would be unreasonable for strict compliance to be applied in this case.

TABLE 2: APPROVED VARIATIONS TO ALEP CLAUSE 4.3

DA REF	SITE ADDRESS	DATE	EXTENT OF DEPARTURE
DA/1005/2016	29 Carter Street, Lidcombe	13/10/2017	Up to 23.2%
DA/1269/2016	5 Uhrig Road, Lidcombe	15/12/2017	Up to 20.9%
DA/1056/2016	5 & 7 Carter Street, Lidcombe	02/08/2017	Up to 9.8%
DA/620/2016	1-7 Carter Street and 23 Uhrig Road, Lidcombe	16/04/2017	Up to 1.18%

The variation sought by the subject development application is extremely minor compared to other recently approved departures, representing up to 1.1% of the allowable building height for the site.

- d) ***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 site is appropriately zoned.

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,***

The proposed height is considered to be acceptable particularly when balanced 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 residential accommodation within the Carter Street Precinct and within walking distance of existing and planned public transport infrastructure; and
- Development of an under-utilised site 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 proposal has been designed to meet BASIX requirements. The minor height variation has no implications on the development’s ability to comply with these requirements.

The proposed development is considered to be suitable for the subject site and will result in positive social and economic impacts in the locality as follows:

- New community infrastructure will be provided. The proposal includes the dedication of land for the creation of a new public reserve and public road.
- New residential apartments will add to the range of housing available within the area.
- New social infrastructure in the form of retail tenancies at ground floor level will be provided. This will contribute to the activation and enlivenment of the Carter Street Precinct, providing opportunities for people to meet and gather. A new childcare centre will also be provided.
- Section 7.11 contributions payable in respect of the proposed development will contribute to the introduction of new infrastructure.
- The proposal will stimulate the local economy through the capital investment spending on the project of \$108 million.

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

The site occupies a prominent position within the suburb of Lidcombe close to the public transport network and to future planned infrastructure. It is currently underdeveloped but has been identified as the site of future mixed use development. The proposed scale of buildings reflects this.

The proposed development has been designed to provide for the highest and best use of the land, which ensures that the most efficient use of land is achieved. Strict compliance with the height control that applies to the site would result in a reduction in the overall yield achievable on the site as it would likely necessitate a storey being removed from the development. This would be contrary to this object.

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

The proposal will deliver additional housing stock that will ensure the market supply promotes housing choice and affordability.

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

The subject site is a former industrial use and is largely devoid of vegetation. The proposed development will not result in impacts to threatened flora and fauna, ecological communities or their habitats. Nor would the additional height proposed over and above the LEP height control does not affect these matters.

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

The site is not heritage listed nor is it situated within the proximity of any heritage listed item of conservation area.

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

The proposed development exhibits good design. The rooftop elements of the development are well thought out and have been successfully integrated into the overall design of the buildings. The exceedance is a result of:

- The proposed parapet wall extends marginally above the 72m height plane. The incorporation of this element enhances the appearance of the development.
- Roof top plant is required. The plant housings are discreetly located, being well spaced and set back within the roof form.

Additional height is predominately plant space and lift overrun, set back within the roof top of the northern tower and will not have any significant impact on adjoining properties in regard to overshadowing or view loss. Furthermore, the proposed plant rooms are well setback from the building edge and as such are not visible at street level.

The number of storeys envisaged under the DCP controls for the site have been adhered to (22 storeys).

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

The Applicant has considerable experience in construction and the management of buildings and has drawn on this experience in the development of this project. The proposed buildings and additional height will be constructed in accordance with relevant BCA and AS requirements.

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

Consistent with State Government policy which supports intensive development in proximity to public transport the project seeks to maximise the development potential of a site within walking distance of public transport. The proposed design achieves an appropriate balance between achieving more intensive development on the site whilst ensuring that unreasonable amenity impacts do not arise as a result of the additional building height proposed.

The subject land is identified for future mixed use development and was rezoned by State Government through the Priority Precinct process for this purpose. The urban density and built form scale permitted under the existing controls allows for more intensive development on the site than currently exists. The existing controls recognise that development on this site will be prominent in terms of scale.

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

Council will consider submissions at the close of the exhibition period.

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 a recent court judgement “*Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC11*.” It demonstrates that the variation to the development standard is extremely minor and 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

The proposed development is strongly in the public interest. The principle aim of the proposal is to provide new residential apartments complemented by new local scale retail facilities together with a childcare centre which will contribute to the local supply of housing and associated services within the newly emerging Carter Street Precinct. The proposed variation to the height control does not result in the loss of amenity to the neighbouring properties as a result of overshadowing or loss of privacy and the proposed height is therefore considered to be acceptable particularly when balanced against the substantial benefits of the project which are:

- Provision of new housing and employment opportunities on land zoned for this purpose within the short term.
- Development of an under-utilised site (being currently occupied by industrial warehouses) identified for future mixed-use development (being zoned B2 Local Centre).
- Contribution to the delivery of key infrastructure through the payment of the relevant Section 7.11 contributions.
- The proposal will provide positive social outcomes through the provision of on-site housing, retail facilities, a childcare centre and a new public park and public road.

Clause 4.3 sets out the objectives of the maximum building height development standard. The consistency of the proposed development with these objectives is set out in **Table 2** below. This analysis demonstrates that the proposed development does not conflict with the objectives of Clause 4.3 of the LEP.

TABLE 2: HEIGHT OBJECTIVES

OBJECTIVES	PROPOSED DEVELOPMENT
(a) To establish a maximum height of building to enable appropriate development density to be achieved, and	<p>The height exceedance relates to discrete elements of the building form and is in part a result of the highly variable nature of existing ground levels which range from RL10.14m to RL16.59m.</p> <p>The departure from the LEP control does not result in additional storeys over those envisaged by the DCP to be added to the development. The proposed built form remains consistent with the site specific DCP envelopes for the site.</p> <p>The additional height does not relate to habitable floorspace. The FSR for the proposed development complies with the applicable FSR control for the site, resulting in a development yield that is consistent with that envisaged for the site.</p>
(b) To ensure that the height of buildings is compatible with the character of the locality.	<p>No additional loss of views will result because of the proposed height exceedance. The additional height is largely required to accommodate plant equipment at roof level. The additional height will be indiscernible when viewed at street level. Residential properties are located to the north of the site and will not be impacted by overshadowing as a result of the proposed development.</p>

OBJECTIVES	PROPOSED DEVELOPMENT
	<p>Buildings to the west are of comparable height to the proposed development.</p> <p>The taller elements of the proposal, being the two plant rooms are well spaced and set back within the roof. These elements will not be visible at street level.</p> <p>The additional height does not materially impact the physical appearance of the building. The proposed rooftop plant equipment is set back above the roof line and will not be visible from surrounding streets.</p>

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 is largely contained within the 72m height limit and is aligned with the LEPs objectives with regards to height. A departure from the height control arises due to the inconsistent levels across the site and rooftop plant infrastructure. The variation sought is extremely minor representing up to 1.1% of the allowable building height for the site. This minor variation may be approved by Council or the relevant assessment panel as specified in PS18-003 as it satisfies the relevant Secretary's assumed concurrence conditions as outlined in **Table 3** below.

TABLE 3: CONSISTENCY WITH ASSUMED CONCURRENCE CONDITIONS SPECIFIED IN PS18-003

CONDITION	PROPOSED VARIATION
The development does not contravene a development standard by more than 10%	Complies. The variation sought is extremely minor representing up to 1.1% of the allowable building height for the site.
The variation is numerical	Complies. The variation relates to a numerical standard, being the numerical height control for the site.

10. Conclusion

The proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of the LEP. Strict compliance with the LEP in this case is considered to be unreasonable and unnecessary as follows:

- The proposed development is consistent with the intent of Clause 4.3 of the LEP which is to support the desired future character of the area.
- Strict compliance with the height limit would result in a poorer design outcome for the site.
- The proposal will not result in the loss of views, nor will it result in adverse amenity impacts and satisfies all relevant amenity criteria of the ADG, including access to sunlight, natural ventilation and privacy.
- The departure from the height control proposed is extremely minor, relating to rooftop plant equipment and lift overruns which exceed the specified height limits for the site by up to 72.82m. The departure represents a maximum 1.1% of the overall allowable height for the site.
- Departure to the LEP height limit for other buildings within the immediate vicinity where it has been demonstrated that no additional adverse impact would arise as a result of additional height over and above the nominated LEP height control have similarly been approved.

As outlined within this report, the proposed development is considered to be an appropriate response to the site. Importantly, the proposal has been informed by an analysis of site constraints and opportunities to provide a realistic indication of development potential. The proposal will ensure that development of the site can contribute to the local housing supply whilst providing an urban design response that is appropriate to the emerging context of the locality.

It is considered that the proposal provides an appropriate response to the planned redevelopment of the site for future mixed use and will assist in the orderly and economic development of the land in a timely manner.

Having considered all the relevant matters it is concluded that the proposal represents a sound development outcome for the site. Given the above it is requested that the application be approved.

Meriton

July 2020

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