

Updated Clause 4.6 Variation: Building Height

DA141/2019 -11 -17 Joyner Street, Westmead



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Consent Authority: Cumberland Council



11 -17 Joyner Street, Westmead

QUALITY ASSURANCE

PROJECT: Clause 4.6- Building Height.
ADDRESS: 11 -17 Joyner Street, Westmead
COUNCIL: Cumberland Council
AUTHOR: Think Planners Pty Ltd

Date	Purpose of Issue	Rev	Reviewed	Authorised
11 October 2019	RFI Response Issue	Update	BD	AB
29 October 2019	LPP Report issue	Final	BD	AB

Introduction & Background

This Clause 4.6 variation request is prepared to assist with the finalisation of an assessment report for a Development Application at to 11 -17 Joyner Street Westmead. Council has verbally advised that a condition of consent is intended to be proposed to require the ground floor of the building to be raised a further 900mm to satisfactorily address the overland flood constraints that burden the site.

Clause 4.3 under the Holroyd LEP 2013 stipulates a maximum building height of 15m for the subject site.

The Height Departure

The development as condition will exhibit the following building height elements:

Portion	Maximum Height	Departure
Upper level of residential units (i.e. habitable floor area)	15m	1320mm
Lift Over-runs	15m	2670mm

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 departure 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 R4 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 are addressed in turn.

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.

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 development seeks to depart from the height control noting that the proposal remains consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- Non-compliance is minor in nature with the majority of the building being compliant with the building height control and with the lift overruns recessed, their impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level.
- The variation is primarily as result of appropriately responding to the overland flow constraints of the site. Given the extent of development within the catchment, the extent of overland flow is likely to have been reduced through the provision of OSD within these developments. Notwithstanding this, a conservative engineering approach has been adopted, resulting in the building being raised to cater for overland flows. The resultant development is consistent with the 5 storey development envisioned for the precinct;
- Due to the minor nature of the variation it will not have any adverse amenity impacts. In this regard it is noted:
 - The variation will be visually unnoticeable and will have no adverse impact on the physical bulk, height or scale of the development.
 - The variation will not lead to a reduction in solar penetration on site or to adjoining properties nor will it lead to sunlight loss or overshadowing.
 - The proposed variation will not lead to view loss or interrupt views to and from the site.
 - The proposed variation will not lead to a reduction in privacy afforded to existing residents or future residents of the proposal.
- The proposal has been designed to ensure that privacy impacts are mitigated and that the proposal will not obstruct existing view corridors;
- 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 an attractive mixed use building that provides good address to the street frontage and complying with other key planning controls applying to the proposal;

- The scale of the proposed development will be appropriate and will be visually consistent with the permitted building height with the upper level recessed and designed using a lighter design style to ensure a positive streetscape presentation.
- The development is lodged pursuant to the ARHSEPP 2009. Objective 3(b) of the ARHSEPP states that an objective of the SEPP is to facilitate:
the effective delivery of new affordable rental housing by providing by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards

Given the height control is based on a modelled building envelope that has regards to ADG setbacks, it is inevitable that 'something has to give' in order to give effect to the provisions in the ARHSEPP relating to bonus FSR. It is not that this is without merit limitation, it is of course, however, those are to be guided by the other provisions in (the SEPP) as well as looking at other general merit matters. The variation to the height control is consistent with the objective of the ARHSEPP;

- The development proposes an FSR of 1.64:1 which is less than the maximum FSR of 1.7:1 permitted by the ARHSEPP. This assists with demonstrating that the proposal is not an overdevelopment of the site;
- The proposal is consistent with the Cumberland Interim Affordable Housing Policy as this development provides for affordable housing and accommodation for key workers in a highly accessible location which is consistent with Transit Oriented Development.
- The proposal is not located within a low-density area and the proposal represents an appropriate built form on the site.

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.

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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.

- Adopt an appropriate Urban Form: The proposal provides for a variety of building heights and building modulations, with the development to be viewed within a high density urban setting at the front of the site and a landscaped setting at the rear that exceeds the required levels of landscaped area, deep soil, and common open space.

Articulate / Undulated Roof Form: The roof form reflects the emerging rhythm in this high density precinct. The roof form will provide visual interest to the proposal whilst having negligible impact on the amenity of neighbouring properties in terms of overshadowing or privacy.

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

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 R4 zone, being:

- *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 provides facilities or services to meet the day to day needs of residents.*

The proposal is consistent with the objectives of the R4 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 maximise public transport patronage by providing 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;
- 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.

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

The public benefit of the variation is that it will appropriately facilitate the provision of high density housing on a R4 zoned site and provide for a range of dwelling stock and different pricing points to be provided to future residents of this precinct in an accessible location and in proximity to employment opportunities. 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.