

## Annexure 1: Clause 4.6 Discussion – Height

Clause 4.3 under the Holroyd LEP 2013 stipulates a maximum building height of 15m for the subject site. The development exhibits the following building height elements:

<b>Portion</b>	<b>Maximum Height</b>	<b>Departure</b>
Upper level of residential units (i.e. habitable floor area)	15m	420mm
Lift Over-runs	15m	1770mm

As the development seeks to vary this control, a clause 4.6 submission is required to be provided to vary this development standard.

This request 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 are 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:

*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.*

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;
- 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 emerging built form in this Transitway Precinct.

As shown on the sections and 3D height plan below and within the following page, the variation to height control is only limited to a small portion of the upper level and the lift overruns for the development.

The height departure is a result of appropriately responding to the overland flow constraints of the site and the by-product of providing appropriate access throughout the development.

The 3D height plan and a section drawing provided below demonstrate the nature of the departure and the portion of the building height control that is exceeded.

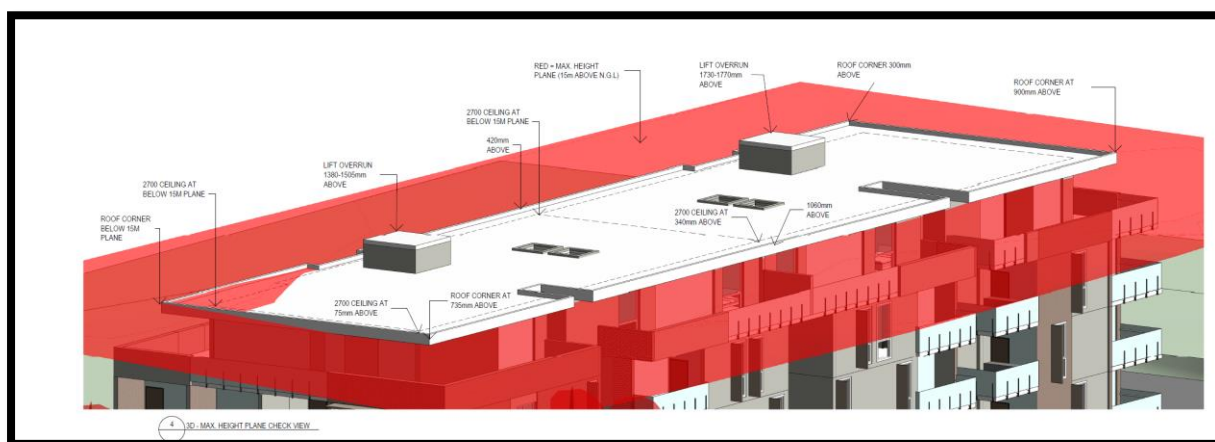


Figure 1: 3D Height Plane

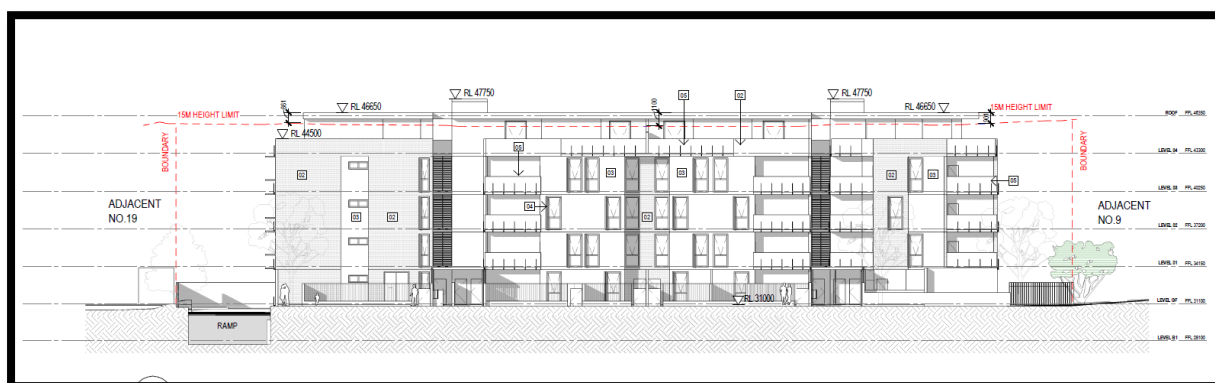


Figure 2 : Section Plan

In this case the variation stems from a portion of the upper level and lift overruns. It is noted that the lift overruns are recessed and not visible from the street level and as addressed below the proposal continues to be consistent with the underlying intent of the control and the variation is considered appropriate.

### 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 overleaf.

#### Clause 4.6(3)

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

The objectives of the building height development standard are stated as:

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

The 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 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 key planning controls applying to the proposal; and
- 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.

#### Clause 4.6(4)

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 zone objectives as ensures that the desired high density nature of the zone is achieved and there is not a significant change to the character of the locality. In addition the proposal complements and enhances the local streetscape by virtue of the careful siting of the development.

It is understood that the concurrence of the Director-General can be assumed in the current circumstances.

#### Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) 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 and minor nature of the variation;
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal as the proposal is consistent with the underlying objectives of the control and the fact that the minor non-compliance does not lead to excessive bulk and scale and it will not set an undesirable precedent for future development within the locality.

#### Conclusion

Having regard to the matters described previously in this submission the proposed numerical non-compliance does not frustrate the achievement of the underlying objectives of the standard.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its particular 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. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

Accordingly, the requirement for strict compliance is unreasonable and unnecessary and the variation to the identified building height should be supported and Council should exercise its power under Clause 4.6 to grant consent to the proposal notwithstanding the numerical non-compliance.