



Clydesdale Precinct 2 Stage 1

1270 Richmond Road, Marsden Park

Clause 4.6 Request

Prepared on behalf of Cyanstone Clydesdale Estate 2

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COVER

Illustration of development concept from adjoining landscape drainage reserve

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1 Introduction

This report has been prepared to supplement the Statement of Environmental Effects (SEE) for the Stage 1 Development Application for Clydesdale Precinct 2 - 1270 Richmond Road, Marsden Park to request technical variations under Clause 4.6 of Appendix 12 of *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (Growth Centres SEPP).

The variation requested is to the height of building development standard arising predominantly as a result of approved bulk earthworks required to mitigate flooding and improve stormwater management and thereby raising the “existing ground level”. Minor exceedances on very limited areas of the roof from access stairs, lift overruns, plant, and some clerestory skylights also occurs above the height limit when adjusted to approved finished earth works.

This report explains the nature of the proposed variation and assesses the need for flexibility, potential impacts and better planning outcome that will arise with references to the provisions of clause 4.6 and guidance from Land and Environment Court cases in addressing the requirements of the *Environmental Planning and Assessment Act 1979*.

1.1 CASE LAW

This request has been prepared under Clause 4.6 of Appendix 12 to justify the departures from development standards for height of building within clause 4.3.

The request meets the objectives of clause 4.6(1),

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances,*

and demonstrates for the purpose of clause 4.6(3):

- (a) that compliance with the development standards is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standards.*

Case law (*Winten V North Sydney Council*, *Wehbe V Pittwater*, *Four2five V Ashfield Council*) provides guidance when considering an exception to development standards as follows:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?

- *Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives.*
 - *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
 - *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
 - *Has Council by its own actions, abandoned or destroyed the development standard.*
- Is compliance with the development standard consistent with the aims of Clause 4.6?
 - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
 - Are there sufficient environmental planning grounds (specific to the site and particular to the circumstances of the proposed development) to justify contravening the development standard and therefore is the objection well founded?

Recent case law (*Micaul Holdings v Randwick City Council, Moskovich v Waverley Council*) has also established that:

- the written request has to adequately address everything necessary in clause 4.6(3), rather than the consent authority being “satisfied directly”;
- the consent authority must be satisfied that development will be “consistent with” the objectives of the zone and the development standard;
- being “consistent with” these objectives is not a requirement to “achieve” them but that development be “compatible” with them or “capable of existing together in harmony”;
- establishing that “compliance with the standard is unreasonable or unnecessary” does not always require that the objectives of the standard are achieved but also that it may not be achieved or would be thwarted by a complying development;
- when a clause 4.6 variation request is being pursued, it is best to demonstrate how the proposal achieves a better outcome than a complying scheme.

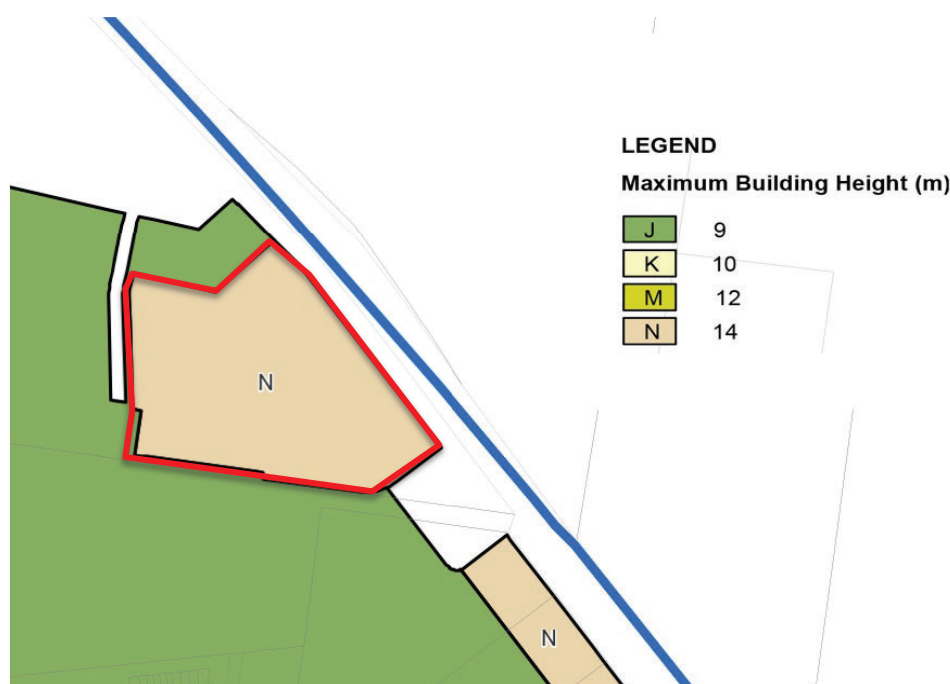
2 Proposed Variation

The Concept Development Application for Precinct 2 seeks to vary the prescribed development standards within Appendix 12 of the Growth Centres SEPP relating to Clause 4.3 – Height of buildings.

The Height of Buildings development standard contained in Clause 4.3(2) of Appendix 12 states:

(2) The height of a building on any land is not to exceed the maximum height shown for the land on Height of Building Map.

The site is subject to height of building development standards of Category N or 14 metres above existing ground level.

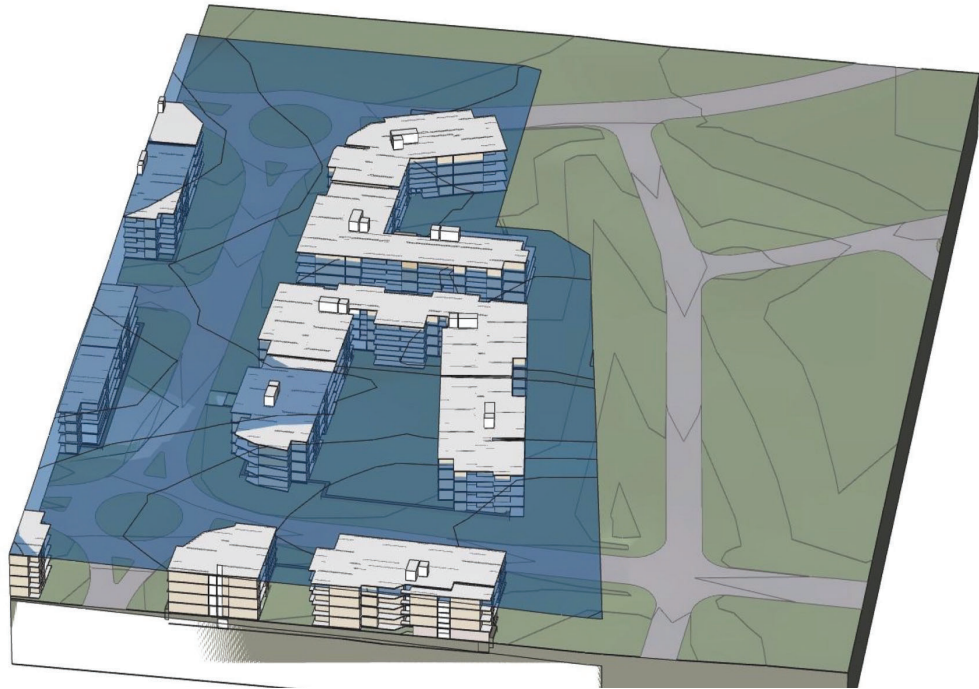


Extract of Height of Buildings Map Source: Growth Centres SEPP – Marsden Park

The buildings proposed in the development concept will have maximum heights technically above 14m as a consequence of approved earthworks that have raised ground levels in areas across the site whereby 'finished' ground levels from which buildings will be constructed are at times higher than the 'existing' ground level.

The change in ground levels was required for improved flooding and stormwater management purposes to make the land suitable for urban development and were subject of a sperate bulk earthworks development consent from Council.

Accordingly, the height of buildings technically breach the SEPP controls predominantly as it is required to be measured from 'existing' ground levels rather than the 'finished' ground levels. The standard instrument definition of ground level (finished) means, "for any point on a site, the ground surface after completion of any earthworks for which consent has been granted or that is exempt development."



Height of building envelopes and 14m height plane from existing ground levels. (Turner)

The technical breach is demonstrated in the diagram above which shows the proposed height of building envelopes within a 14m height plane projected from 'existing' ground levels.

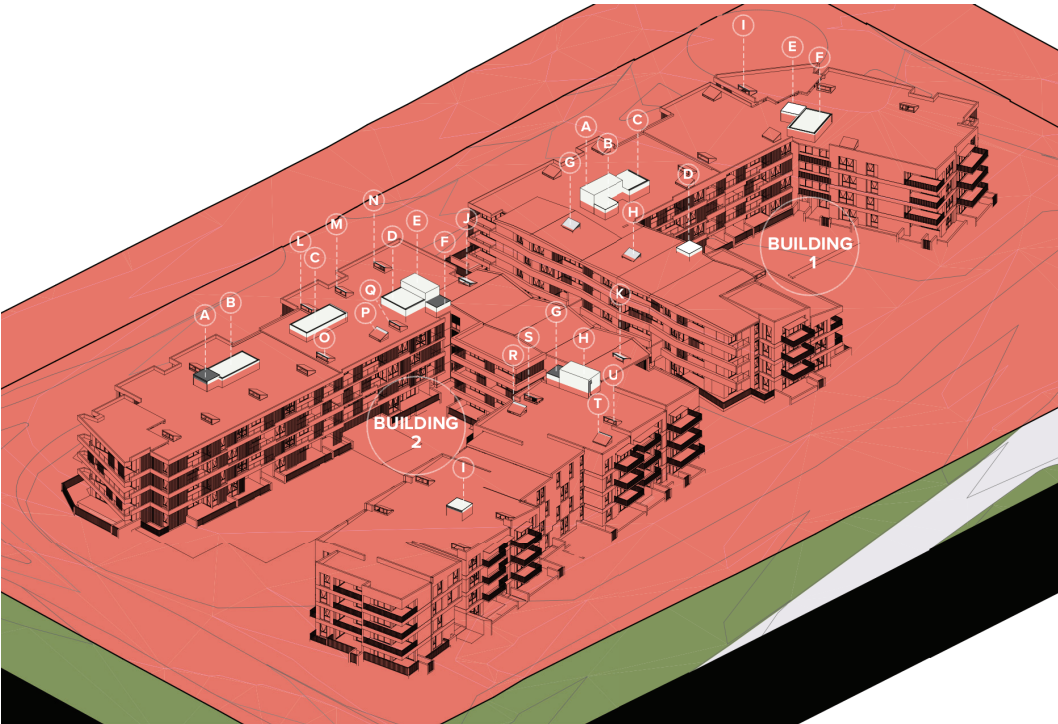
The cross sections provided in the submitted architectural plan set reference the technical height of building line above 'existing' ground level and 'finished' ground levels as shown in the example below.



Sample extract of DA-820-003 elevations showing typical technical breaches of building heights.

Once the height plane is adjusted from ‘existing’ ground levels to the approved ‘finished’ ground levels, exceptions to the building height standard only remain for the upper parts of stair access, lift overruns, plant and some clerestory skylights.

These are highlighted in the cross section extract above and graphic below showing the proposed height of buildings within a 14m height plane projected from finished ground levels.



Extract from plan DA 460-006 showing build height limit above finished ground levels and lift overruns, plant and clerestory skylights.

The anticipated adjusted breach of the height standard and extent is as set out on plan DA-460-006 which is reproduced below.

	Description		Exceedence	Area	% of Roof
Blg 1	A	Fire Stairs	1680mm	20m2	0.7%
	B	Lift overrun	140mm	7m2	0.2%
	C	Hot Water Plant Area	560mm	16m2	0.6%
	D	Lift overrun	120mm	7m2	0.2%
	E	Lift overrun	400mm	8m2	0.3%
	F	Exhaust Fan Plant	250mm	24m2	0.9%
	G	Clerestory Window	600mm	3.5m2	0.1%
	H	Clerestory Window	530mm	3.5m2	0.1%
	I	Clerestory Window	120mm	3.5m2	0.1%
Sub Total				94.5m2	3.4%
Blg 2	A	Lift overrun	110mm	7m2	0.2%
	B	Exhaust Fan Area	50mm	25m2	0.7%

C	Exhaust Fan Area	503mm	25m2	0.7%
D	Hot Water Plant Area	975mm	20m2	0.6%
E	Fire Stairs	1935mm	17m2	0.5%
F	Lift overrun	368mm	7m2	0.2%
G	Lift overrun	348mm	7m2	0.2%
H	Fire Stairs	1873mm	17m2	0.5%
I	Lift overrun	400mm	8m2	0.2%
J	Clerestory Window	520mm	3.5m2	0.1%
K	Clerestory Window	400mm	3.5m2	0.1%
L	Clerestory Window	200mm	3.5m2	0.1%
M	Clerestory Window	160mm	3.5m2	0.1%
N	Clerestory Window	160mm	3.5m2	0.1%
O	Clerestory Window	160mm	3.5m2	0.1%
P	Clerestory Window	160mm	3.5m2	0.1%
Q	Clerestory Window	160mm	3.5m2	0.1%
R	Clerestory Window	100mm	3.5m2	0.1%
S	Clerestory Window	100mm	3.5m2	0.1%
T	Clerestory Window	100mm	3.5m2	0.1%
U	Clerestory Window	70mm	3.5m2	0.1%
Sub Total			183m2	5.1%
Total			277.5m2	4.4%

3 Clause 4.6 Assessment

3.1 ARE THE PLANNING CONTROLS A DEVELOPMENT STANDARD?

The planning control in Clauses 4.3 relating to maximum height of buildings is a development standard as defined within the *Environmental Planning and Assessment Act 1979* as follows (*EP&A Act, Part 1 Section 4. Definitions*)

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,

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

3.2 ASSESSMENT AGAINST THE PURPOSE/OBJECT OF THE STANDARD

The objectives of the height of building development standard under clause 4.3 are:

- (a) to establish the maximum height of buildings,*
- (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,*
- (c) to facilitate higher density development in and around commercial centres and major transport routes.*

The objectives of the height of building controls will remain satisfied by firstly, ensuring that the height of buildings are in the main, well within the 14m standard even when allowing for the slope of the land; the proper amenity of ground floor apartments in relation to external spaces; and appropriate interfaces between the buildings and the landscape.

Secondly, the visual impact of the intrusions of the fire stairs, lift overruns plant and the like is negligible when viewed from the from the public domains and immediately surrounding apartments because of their central position in the roof area limiting respective sightlines. The visual impact is limited from further distances because of the gently slope of the land, the limited scale of the overruns and plant, and the potential to employ design treatments to maintain an aesthetic outcome.

Otherwise, the visual effect of the building heights from the approved earthworks is neutral given the gentle slope of land over extensive areas and the maintenance of the proportion of building height to adjoining public domain and communal spaces.

In addition, earthwork adjustment and the fire stair access, lift overrun and plant breaches will not impede the achievement of mid-winter solar access requirements for respective apartments and communal open spaces.

Thirdly, the use of fire stairs and lift overruns is a reasonable requirement of the anticipated density of development through residential flat building typologies and especially having regard to earthwork changes to existing ground levels for flood mitigation and stormwater management to facilitate implementation of the Growth Centres SEPP plans.

Accordingly, the objectives of the standard are served by the proposed departures from the prescribed height of building as described.

3.3 IS COMPLIANCE CONSISTENT WITH THE REQUIREMENTS OF CL 4.6?

The aims of Clause 4.6 are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

When the development is tested against the underlying objectives of the standard, compliance would not be inconsistent with the aims of the clause because flexibility should be reasonably applied to adjust the building heights to finished ground levels, and to allow for proper roof access by stair for fire management and maintenance, and the practical needs of lift overruns, plant and clerestory skylights.

It is considered that a better planning outcome will be achieved by permitting flexibility in this instance so as to eliminate the consequences from bulk site earthworks to mitigate potential flooding and ensure proper stormwater management to result in the built form scale intended by the planning provisions.

It is also considered that the variation requested for the proposed modification will also provide the better planning and design outcome by responding to the objectives of the height provisions and allow for the implementation of the Growth Centres SEPP plans without detrimental visual or shadowing impacts.

3.4 IS COMPLIANCE UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES?

Strict compliance with the height of building provisions of the Growth Centres SEPP is considered unreasonable and unnecessary in the circumstances of the case as it would impede the considered implementation of an acceptable design concept employed on a modified site and impede the achieving of a better planning and design outcome for the site.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstances based on the following:

- The development is consistent with the objectives of the development standard. (Refer to section 3.2 above)
- The proposed development firstly seeks to vary the building height controls for the site to achieve the number of storeys as intended as well as accommodating site conditions including the modified finished ground levels required for flooding and stormwater needs.
- The additional variation to accommodate fire stairs, lift overruns and plant is a reasonable expectation of the building typology that will assist building maintenance needs and occurs for limited occasions in locations that ensure visual and shadowing impacts are minimised.

3.5 ARE THERE SUFFICIENT GROUNDS TO JUSTIFY CONTRAVENTION?

As discussed above, contravention of the building height standard firstly responds to the inevitable consequence of modifying the existing ground level under approved bulk earthworks for the purpose of making the urban release land suitable for development otherwise in accordance with the Growth Centre SEPP by mitigating flood affectation and providing for suitable stormwater management.

Once adjusted to finished ground levels, the proposed building envelopes will ensure that subsequent buildings can comply with the 14m height limit preserving the intended scale of buildings in relationship with the topography.

The one exception to this outcome is the breach of 14m above finished ground level for the purpose of allowing lift overruns to provide access to the roofs for fire management and maintenance, as well as some plant and clerestory skylights, while not creating visual or shadowing impacts of any meaningful effect.

Accordingly, given the improved outcome for site drainage and flooding, suitable implementation of other Growth Centre SEPP requirements, and appropriate opportunity for fire management and the maintenance of buildings without

impact, it is considered that there are sufficient grounds to contravene the height standard in this circumstance.

3.6 IS THE REQUEST WELL FOUNDED?

This request under clause 4.6 of Appendix 12 is considered to be well founded in the circumstance as is it chiefly a consequence of making the site suitable for urban development in accordance with the planning framework for approval has been granted.

Further, it is also chiefly legally technical in nature as the resultant planning and design outcome is indistinguishable from that if the earthworks did not occur.

The minor breach that would occur is that required to permit lift overruns and roof access for fire management and maintenance, and plant which are reasonable needs for the buildings given that they are capable of being located central to roof areas and thereby minimising visual and shadowing impacts.

In addition:

- Strict compliance with the height of building controls in the circumstance would result in unnecessary limitations on development of urban release lands and a consequent diminished urban outcome for the site
- The proposed development is wholly consistent with the underlying objectives of the development standard.
- The proposed variations improve overall impact to adjoining land uses and activities as well as the compatibility with adjoining areas through flood mitigation and proper stormwater management.
- Consequently, the non-compliances do not result in any additional adverse environmental impacts on the amenity of the surrounding area in general.

3.7 CONCLUSION

It is concluded that the proposed contraventions to the building height development standard as described, do not undermine or frustrate the underlying objectives of that standard.

The non-compliances do not give rise to any significant additional adverse environmental impacts but provides for a better planning and urban design outcome. Compliance with the standards would likely result in a diminished planning and design outcome.

It is therefore considered that strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances

and that that there are sufficient environmental planning grounds to justify contravening the development standard as proposed.

It is also considered appropriate to provide the required flexibility in applying the development standards to achieve better outcomes for and from development as proposed for Stage 1 of Precinct 2 by allowing this flexibility in this particular circumstance.

Further, it is considered that this written request has adequately addressed the matters required to be demonstrated in establishing the above and that the proposed development will be in the public interest because it is consistent the objectives of the standards and the objectives for development within the respective zone.