



## ANNEXURE 1: CLAUSE 4.6 VARIATION

### INTRODUCTION AND BACKGROUND

This Clause 4.6 variation request is prepared to accompany the development application for 264-268 Pennant Hills Road, Carlingford.

Clause 4.3 under the Parramatta LEP 2011 stipulates a maximum building height of 14m for the subject site.

### THE HEIGHT DEPARTURE

As shown on the 3D height plane diagram below, the proposed development comprises a series of 4 storey residential flat buildings that predominantly complies with the 14m maximum building height control with the exception of minor point encroachments for the lift over-run and a small portion of the roof space due to the change in topography. See the 3D Height Plan Diagram below that confirms 3 point encroachments ranging from 110mm to 840mm.

The clause 4.6 relates to the most significant departure for numerical purposes, but addresses each departure with respect to an assessment against the objectives of the control, etc. The development exhibits the following maximum building height elements:

Portion	Maximum Height	Departure
Maximum upper level of the building	14m	840mm or 6%



As shown on the 3D height plane diagram above the majority of the development is below the height limit, with the exception of:

- Block A: lift overrun 300mm (2.1%) and parapet point encroachment up to 330mm (2.4%).
- Block B: lift overrun of 840mm(6%).
- Block C: lift overruns of 340mm(2.4%).

Given the building height departures a Clause 4.6 variation request has been prepared, noting that the request addresses a number of recent Land and Environment Court cases.

## 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 the above 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 how the proposal achieves a better outcome than a complying scheme; 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.

These matters are addressed below, noting that the proposal presents a site responsive development by responding to the cross-fall on the site that means that small parts of the building are beyond the height limit.

### ***Building Height Context Considerations: Better Development Outcome***

The proposed non-compliance occurs as a means of achieving a better development outcome because it enables the development to achieve the following.

- Adopt an appropriate Urban Form, and Quality Common Open Space: The proposal provides for a variety of building heights and building modulations, with the development distributed across three (3) separate buildings to achieve a series of buildings in a landscaped setting. The buildings are set on a site that falls from north to south and the coordination of ground floor levels to ensure at grade access to the central common open space area is a better development outcome than providing for further cutting of the ground and require excessive and unnecessary steps, ramps or platform lifts to connect with the central common open space.
- Retain the View Corridors: The building will not impact upon any existing view corridors. The point encroachments are not visible from the public domain having regard to the lifts being inset and central to the buildings and the parapet point encroachments being internal to the site. The cutting of the site to achieve compliance with the point encroachment, the removal of the lift overrun or the removal of the parapet point encroachments would result in a worse development outcome in relation to movement of people, provision of services and presentation of the built form.

## **CONSIDERATION OF CLAUSE 4.6**

Clause 4.6 of the Parramatta Local Environmental Plan 2011 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 below.

#### 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 three buildings being compliant with the building height control. The point encroachments are internal to the site and 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 topography of the land and the site context. The resultant development is consistent with the 4 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 from Pennant Hills Road or surrounding streets and will have no adverse impact on adjoining sites. Noting that the lifts are located centrally within the building envelopes and the point encroachments on the parapet are internal to the site.
  - The variation will not lead to a noticeable reduction in solar penetration, sunlight loss or overshadowing of adjoining properties.
  - 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 of the area or future residents of the proposal.
- The proposal has been designed to ensure that privacy impacts are mitigated, and that the proposal does not obstruct any recognised view corridors.
- The proposed development will permit the site to develop to its full zoning potential while complementing the future vision envisioned for the site by providing an attractive series of buildings, surrounding an internal courtyard and that provides good address to the street frontage and complies 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 to ensure a positive streetscape presentation.
- The development is lodged pursuant to the ARHSEPP 2099. 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*

The height control is based on a modelled building envelope that has regards to ADG setbacks and notwithstanding the provisions in the ARHSEPP relating

to bonus FSR, the proposal does not seek to provide any additional floor space over and above the height control. The non compliance arises from point encroachments where the land falls and does not arise from any attempt to input additional GFA above the height control.

The variation to the height control is consistent with the objective of the ARHSEPP;

- The development proposes an FSR which is less than the maximum FSR of 1.5:1 permitted by the ARHSEPP. This assists with demonstrating that the proposal is not an overdevelopment of the site seeking to extract maximum FSR under the ARHSEPP provisions.
- The proposal is consistent with the Central City District Plan as this development provides for affordable housing and accommodation for key workers in a highly accessible location which is consistent with the creation of 30-minute cities.
- 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 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, however set within a highly landscaped setting along the frontage of Pennant Hills Road, and providing significant levels of landscaped area, deep soil, and common open space consistent with the principles of the ARHSEPP and the ADG.



### Articulate Built Form and Harmonious Roof Form

The roof form reflects the emerging rhythm in this high density precinct. The roof form will provide visual harmony to the proposal through the adoption of a consistent parapet form, that has negligible impact on the amenity of neighbouring properties in terms of overshadowing or privacy. The building has been skillfully designed to be articulated both horizontally and vertically and provide visual interest, and engaging quality materials.

The discussions 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.*
- *To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.*
- *To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood.*

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.