



30 Alma Street, Paddington

Clause 4.6 – Building Height Development Standard

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Prepared under instructions from
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1.0	CLAUSE 4.6 REQUEST – BUILDING HEIGHT	4
1.1	Introduction	4
1.2	Clause 4.6 Exceptions to development standards	4
1.3	Development Standard to be varied	4
1.4	Extent of Variation to the Development Standard	6
1.5	Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?	6
1.6	Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?	9
1.7	Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)	11
1.8	Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives	11
1.9	Clause 4.6(5) Secretary Considerations	12
1.10	Objectives of Clause 4.6	13
1.11	Conclusion	13

1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

The Stage 1 Concept Plan application DA 438/2015 which applies to the site was approved on 15 December 2015 with variations to the height control. Since approval of the Stage 1 concept proposal, the project was rationalised to achieve a viable economic model which supports the revitalisation of White City as a sporting destination including the continued use of the site for tennis as well a range of other sporting activities whilst properly celebrating the heritage of the site in a sustainable fashion. A Section 4.55 modification to the Stage 1 concept proposal was subsequently lodged and approved on 5 September 2019 to reflect a rationalisation of the development and the approved modifications include the removal of the child care centre drop-off pick-up deck adjacent to Glenmore Road, retention and adaptive reuse the southern grandstand, and other changes to the distribution of built form and massing of the three building envelopes.

The proposed Stage 2 development is generally contained within the approved envelopes and mirrors the height variations which have already been approved. Nonetheless, for completeness and to satisfy the jurisdictional requirement, the issue of the proposed height variation must be addressed again pursuant to the provisions of Clause 4.6 of the Woollahra Local Environmental Plan 2014.

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 4.3 and Clause 4.3B of the Woollahra Local Environmental Plan 2014. The request relates to an application for a multi-purpose sports centre and registered club facilities at White City (30 Alma Street, Paddington).

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Woollahra Local Environmental Plan 2014 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Woollahra Local Environmental Plan 2014, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.3 Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows:
 - (a) to establish building heights that are consistent with the desired future character of the neighbourhood,

(b) to establish a transition in scale between zones to protect local amenity,

(c) to minimise the loss of solar access to existing buildings and open space,

(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

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

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point to 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.

The maximum height shown for the land on the Map for the site to which the proposed building relates is 9.5 metres.

However, the site is also located in “Area I” and Clause 4.3B of the WLEP provides the following additional provisions in relation to building height:

4.3B Exceptions to building heights (Area I–White City Tennis Club)

(1) The objectives of this clause are as follows:

(a) to retain views from Glenmore Road over certain land surrounding White City Tennis Club,

(b) to permit a greater maximum building height on part of that land, subject to certain criteria,

(c) to protect the visual privacy and amenity of nearby residences,

(d) to conserve and recognise the heritage significance of the existing centre courts.

(2) Despite clause 4.3, the maximum height of a building on the land identified as “Area I” on the Height of Buildings Map is 11.5 metres if:

(a) the building is located on the western side of the centre courts, and

(b) the consent authority is satisfied that the development does not affect view lines from Glenmore Road, and

(c) the building maintains the heritage significance of White City Tennis Club.

Accordingly, subject to satisfaction of the objectives of Clause 4.3B, the eastern part of the site is subject to a 9.5 metre height limit and the western part of the site (defined by the western alignment of the centre court) is subject to an 11.5 metre height limit. It must be stressed that these height controls apply to the entirety of the site such that it would be possible to locate buildings of several storeys at any point of the site and remain compliant with the height control.

1.4 Extent of Variation to the Development Standard

The relationship of the proposed building elements which protrude above the two height controls which apply to the site are tabulated below:

Element	Max Height	Variation to 9.5 metre control	Variation to 11.5 metre control
Clubhouse	19.25m	9.75m	7.75m
Shade structure above multi-purpose courts	12.675m	3.175m	1.175m
Pro-shop	10.77m	1.27m	N/A

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the building height development standard, as specified in clause 4.3 of the Woollahra Local Environmental Plan 2014 are identified below. A comment on the proposal’s consistency with each objective is also provided.

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,

Due to the topography of the site and surrounds and the fact that the subject site is significantly lower than the adjacent Sydney Grammar site, the height control does not result in a consistency of scale within the neighbourhood. The proposed heights of the buildings are commensurate with the heights of the adjacent Sydney Grammar building to the west and the residential flat building to the east and therefore

satisfy the objective of the height control to achieve building heights which are consistent with the character of the neighbourhood.

- (b) to establish a transition in scale between zones to protect local amenity,

The subject site has the same height control as the adjacent residential zones to the north and the west as well as the SP2 zone to the west for Sydney Grammar. The eastern adjoining site has a higher height of 13.5 metres to reflect the higher density residential zone. The proposed development provides a transition in scale in that whilst the height control applies across the entire site, the buildings are setback a significant distance from the northern boundary in particular and the lower scale of the residential dwellings in Walker Street. Accordingly, the distribution of buildings on the site ensures that an appropriate transition is achieved to the lower scale Walker Street dwellings notwithstanding the proposed height variation.

- c) to minimise the loss of solar access to existing buildings and open space,

The proposed buildings are located on the southern side of the site such that the proposed variation to the height control does not result in any significant overshadowing impacts. The proposal results in some minor shadow to a corner of the playground of Sydney Grammar early in the morning on 21 June, however, this shadow is removed by mid-morning. There is no shadow impact from the proposal to any residential properties.

- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

The proposed development will maintain views across the site from Glenmore Road. Due to the distance of the proposed buildings from adjacent residential properties, the proposal does not result in any adverse privacy impacts. The proposal does not result in any unreasonable shadow impacts as discussed above.

- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas

The amenity of the public domain is significantly enhanced as a result of the proposal which will update the existing presentation to Glenmore Road to achieve an activated streetscape and presence to the street. The proposal will maintain views across the site from Glenmore Road.

The specific objectives of the building height development standard, as specified in clause 4.3B of the Woollahra Local Environmental Plan 2014 are also identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to retain views from Glenmore Road over certain land surrounding White City Tennis Club,

The proposal will adaptively reuse the existing southern grandstand and will maintain existing views from Glenmore Road over the site.

- (b) to permit a greater maximum building height on part of that land, subject to certain criteria,

The proposal meets the criteria under Clause 4.3B(2) in that the development does not adversely affect view lines from Glenmore Road and the proposed development will preserve and respect the heritage significance of White City Tennis Club. Accordingly, the 11.5 metre height control applies to the area of the site which is located to the west of the existing centre court.

(c) to protect the visual privacy and amenity of nearby residences,

Due to the distance of the proposed buildings from adjacent residential properties, the proposal does not result in any adverse privacy impacts.

(d) to conserve and recognise the heritage significance of the existing centre courts

The development maintains and celebrates the heritage significance of White City Tennis Club and implements the measures outlined in the approved Heritage Interpretation Strategy.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height controls are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed heights are compatible with the existing scale of the adjacent buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties. The proposed heights do not compromise the ability of the proposal to properly celebrate the heritage significance of the site.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the context of the site and maintains views across the site, provides a transition to adjacent properties and preserves the privacy of adjacent properties. Due to the design, location and configuration of the proposed buildings, the proposal successfully achieves these objectives. However, strict compliance with the height control would likely lead to a less satisfactory outcome as it would encourage a redistribution of buildings closer to the eastern boundary which would reduce the privacy enjoyed by the eastern adjacent apartments. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the site.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The height control is a relatively new standard within the Woollahra Local Environmental Plan 2014 and has not been abandoned or destroyed as a result of Council granting consents departing from the standard.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposed heights are all contained within the previously approved building envelopes for the site and the variations were supported by the Joint Regional Planning Panel.
- The proposed height of the “clubhouse” building is of a very similar level to the top of the Sydney Grammar building to the west as well as the top of the roof of 400 Glenmore Road to the east. In fact, there is only a difference of several metres between the roofs of the existing and proposed buildings such that the proposed buildings will sit comfortably within this family of buildings which are all of essentially the same scale.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.
- The proposed development will not result in any meaningful change to the scale of development of the site when viewed from Glenmore Road because it retains and adaptively re-uses the existing southern grandstand which is immediately on the boundary with the street.
- The application maintains view sharing across the site.
- The proposed variation to height is the result of a desire to minimise the footprint of buildings on the site to preserve as much open space as possible and to maintain the same relationship to the residential neighbours. This is also of assistance in maintaining the flood storage capacity of the site. Compliance with height could be achieved by expanding the footprints of the buildings, however, this is considered to be a less desirable outcome given the height variation still achieves a compatible outcome with the context of the site.
- The proposed variation in height does not result in any adverse overshadowing or privacy impacts to adjacent sites. The shadow diagrams submitted with the Stage 1 Concept Plan application illustrated that there is no overshadowing of adjacent residential properties and only a minimal amount of overshadowing of the north-eastern corner of the playground of Sydney Grammar early in the morning on 21 June. The proposed buildings are located a significant distance of over 50 metres from the adjacent residential uses and therefore will not result in any adverse privacy impact.
- The non-compliance with the height control does not prevent the achievement of a compatible relationship with the surrounding context and allows for a better outcome strict compliance with the height control which would result in more open space on the site being consumed by the proposed buildings.

As the proposal is consistent with the objectives of the height of buildings control, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

Whilst there are a range of variations to the height control, there are many areas of the site such as the Glenmore Road frontage, the tennis courts and soccer field where there are no buildings proposed even though the height control would allow structures in these locations.

Of critical importance to the consideration of height, is an understanding of the topography of the subject and adjacent sites and the relationship of levels across the subject site. There is a significant embankment along the Glenmore Road frontage of the site which extends around to the western and southern boundaries adjacent to the Sydney Grammar site. Under the height control it is possible to erect a building on the top of the embankment which presents as 9.5 metres and 11.5 metres to Glenmore Road. However, the existing centre court at the bottom of the embankment is some 7 to 10 metres lower than the Glenmore Road frontage of the site. As a result, whilst the club building in particular exceeds the height control it is nonetheless considerably lower compared to that which could be proposed for a complying building immediately along the Glenmore Road frontage.

Due to the embankment, the site is also 4 to 5 metres lower than the western adjacent Sydney Grammar site which also has the same 9.5 metre height control. This means that a complying building on the adjacent Grammar site would be 4 to 5 metres higher than an equivalent complying height on the subject site. These variations in topography are fundamentally important in considering an appropriate scale for the proposed buildings on the subject site having regard to the context.

There are sufficient environmental planning grounds to justify contravening the development standard:

- The proposed heights are all contained within the previously approved building envelopes for the site and the variations were supported by the Joint Regional Planning Panel.
- The proposed variation in height does not occur along the Glenmore Road frontage and the proposed buildings do not exceed the permissible height when viewed from Glenmore Road.
- The proposed arrangement of heights are commensurate with the heights of the surrounding and adjacent buildings and therefore are compatible the existing scale of development within the visual catchment of the site.
- The proposed development maintains view lines over the site and the proposed variation in height does not compromise the ability to achieve increased view sharing.
- The proposed variation to height does not result in any adverse impacts to nearby residential properties in relation to overshadowing, visual or acoustic privacy.
- The proposed variation to the height development standard allows a reduction in building footprints on the site which facilitates a greater amount of open space on the site for outdoor recreation, increased flood storage capacity on the site, and reduced impacts to nearby residential properties due to increased separation distances.
- Due to the topography of the site and steep embankment on the southern boundary down into the site, the majority of the proposed scale is located below the Glenmore Street level.

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- The proposed variation allows for the most efficient and economic use of the land

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

‘to encourage:

i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

ii) the promotion and co-ordination of the orderly and economic use and development of land...’

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliant with the building height development standard in this particular instance would prevent the attainment of an optimised overall site outcome.
- The proposed variation allows for the most efficient and economic use of the land.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 [Clause 4.6\(4\)\(a\)\(i\) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6\(3\)](#)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 [Clause 4.6\(4\)\(a\)\(ii\) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives](#)

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the RE2 Private Recreation zone which has the following objectives:

- To enable land to be used for private open space or recreational purposes
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes

The proposal seeks development consent for the development and use of the site as a sporting, cultural and community facility. The proposed development will significantly increase the range of available sporting and recreational activities within the site in a new and updated contemporary setting. The site layout and arrangement of building and uses retains a similar relationship to adjacent residential uses and therefore the proposed uses of the site remain compatible with the adjacent sites. An acoustic report and light spill report accompany this application and demonstrate that the proposal is compatible with the adjacent uses because they do not result in an unacceptable impact. Ultimately, the proposed development will serve to reinvigorate the site and will strengthen the capacity of the site to satisfy the zone objectives. For the reasons given the proposal is considered to be consistent with the objectives of the RE2 Private Recreation zone.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives 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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum building height development standard.

The architectural packages prepared by Cottee Parker JPRA and MASQ architects which accompanies the subject application illustrates the relationship of the proposed development with the existing scale of buildings on the adjacent and surrounding sites. It demonstrates a compatible relationship with the context of the site. Strict compliance with the height control would require buildings with larger footprints which would reduce the availability of open space on the site, reduce the flood storage capacity of the site and also reduce the separation distance to adjacent residential properties. Strict compliance with the height control also has the potential to substantially impact on the economic viability of the project which is a fundamental consideration in providing the capacity for the site to be reinvigorated and for the heritage significance of the site to be properly celebrated and to reverse the decline on the site which has occurred since 1999 with Tennis NSW vacated the site.

The development application has therefore demonstrated that it is appropriate in this circumstance to provide flexibility in the application of the building height development standard because this will achieve a significantly better urban design outcome in this instance in accordance with objective 1(b).

1.11 Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 and clause 4.3B of the Woollahra Local Environmental Plan 2014 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation which is in the public interest. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.