

CLAUSE 4.6 VARIATION TO DEVELOPMENT STANDARD Height of Buildings

Accompanying a Development Application for

Concept Proposal for a Residential Flat Building

at

**Lots 81 - 83 DP 35865
20-22 MINDARIE STREET and 30 PINAROO PLACE,
LANE COVE NORTH**

September 2019

Concept DA – Clause 4.6 – Exceptions to Development Standards – Height of Buildings (cl. 4.3)

Address: 20-22 Mindarie Street and 30 Pinaroo Place, Lane Cove North.

Proposal: Concept Development Application for Building Envelope, Height and GFA relating to a residential flat building development.

1.0 Introduction

This is a written request prepared by LAHC to seek an exception to a development standard pursuant to Clause 4.6 Exceptions to Development Standards of the Lane Cove Local Environment Plan 2009 (LCLEP 2009). The development standard for which the variation sought is Clause 4.3 Height of Buildings under the LCLEP 2009. This submission has been prepared with regards to a Concept Development Application (DA) regarding land at 20-22 Mindarie Street and 30 Pinaroo Place, Lane Cove North (the site).

This Clause 4.6 variation demonstrates that compliance with the maximum height of building development standard is unreasonable and unnecessary in the circumstances of this case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This submission has been prepared in accordance with the NSW Department of Planning and Environment (DoPE) guideline to *Varying development standards: A Guide*, August 2011, and has incorporated the relevant planning principles and judgements.

The restriction on delegates determining applications involving numerical or non-numerical standards does not apply to regionally significant development. This is because all regionally significant development is determined by a panel and is not delegated to council staff. Given this Concept DA is classified, as regionally significant development, in accordance with *Department of Planning and Environment – Planning Circular PS18-003*, the Sydney North Planning Panel will assume the Secretary's concurrence for this Clause 4.6 submission.

2.0 Overview: Clause 4.6

Clause 4.6 of the LCLEP 2009 is the statutory mechanism that allows the consent authority to grant consent to development that departs from a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards, including the height control, to achieve better outcomes that are in the public interest.

Clause 4.6(3) of the LCLEP 2009 provides that:

(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.*

Further, Clause 4.6(4)(a) of the LCLEP 2009 provides that:

(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 Secretary has been obtained*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five No 1);*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (Four2Five No 2);*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (Four2Five No 3);*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7.*

In accordance with the statutory requirements, and as guided by the above case law, this Clause 4.6 request:

- identifies the development standard to be varied (Section 3.4);
- identifies the nature and extent of the variation sought (Section 3.9);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances (Section 4.2);
- demonstrates that there are sufficient environmental planning grounds to justify the variation (Section 4.3);
- demonstrates such that the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the standard and the objectives for development within the R4 High Density zone (Section 4.4); and

- provides an assessment of the matters the Secretary is required to consider before granting concurrence (Section 4.5) namely:
 - whether the contravention of the development standard raises any matter of significance for State or regional environmental planning; and
 - the public benefit of maintaining the development standard; and
 - any other matters required to be taken into consideration by the Secretary before granting concurrence.

Accordingly, development consent can be granted to the proposal despite the proposed deviation of the development standard because, pursuant to Clause 4.6(4)(a), the consent authority can be satisfied that:

- this written request has reasonably addressed the matters required to be demonstrated by Clause 4.6(3); and
- the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone.

This report should be read in conjunction with the Concept DA Statement of Environmental Effects prepared by LAHC and dated May 2019.

3.0 Description of the planning instrument, development standard and proposed variation

3.1 What is the name of the environmental planning instrument that applies to the land?

The Lane Cove Local Environmental Plan 2009 (LCLEP 2009) is the applicable environmental planning instrument that applies to the site.

3.2 What is the zoning of the land?

The land is zoned R4 High Density Residential.

3.3 What are the objectives of the zone?

The objectives of the R4 High Density zone are:

- *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 provide facilities or services to meet the day to day needs of residents.*
- *To provide for a high concentration of housing with good access to transport, services and facilities.*

- *To ensure that the existing amenity of residences in the neighbourhood is respected.*
- *To avoid the isolation of sites resulting from site amalgamation.*
- *To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

3.4 What is the development standard being varied?

The development standard being varied is the height of buildings standard.

3.5 Is the development standard a performance based control?

No. The development standard is not a performance based control.

3.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.3 of the LCLEP 2009.

3.7 What are the objectives of the development standard?

The objectives of the development standard contained in Clause 4.3(1) of the LCLEP 2009 include:

- (a) to ensure development allows for reasonable solar access to existing buildings and public areas,*
- (b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,*
- (c) to seek alternative design solutions in order to maximise the potential sunlight for the public domain,*
- (d) to relate development to topography.*

3.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) establishes a maximum height of building control for the site. The building height control is expressed as a maximum of 17.5m for the entirety of the site. Refer to Figure 1 for an extract of the LCLEP 2009 height of buildings map.



Figure 1: Extract from LEP 2009 (Map HOB_001)

3.9 What is the proposed numeric value of the development standard in the development application?

Given the slope of the site, the encroachment of the height of building standard is variable across the proposed envelope. Table 1 and figure 2 below specifically illustrate the height variation.

Table 1 – Numeric variation to the development standard

Control	Proposed Height	Compliance	Maximum Variation	Percentage Variation
17.5m	21.03m RL 67.6	No	2.57m	South east corner of Level 5 12.2%

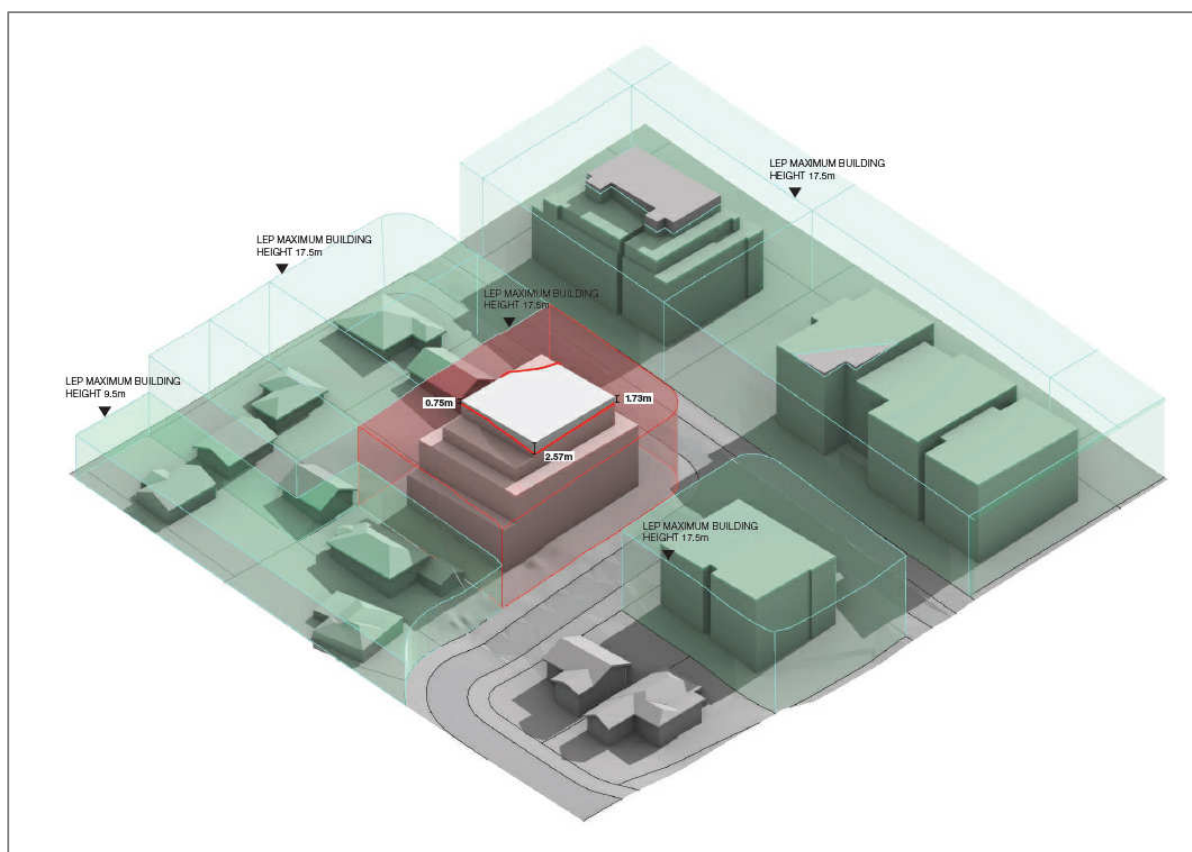


Figure 2 – Height intrusion plan

3.10 What is the percentage variation (proposal and environmental planning instrument)?

Table 1 identifies the percentage variation from the relevant development standard as nominated in metres.

3.11 Site Context

Site context is an important consideration when determining the appropriateness and necessity of a development standard. The site is located within the Mowbray Road Precinct, a strategically significant corridor, which presents a unique opportunity to deliver social, affordable and private housing stock in close proximity to key transport infrastructure, services and employment. The rationale for deploying the R4 zone across the precinct was based on the proximity to frequent bus services along Epping and Mowbray Road, as well as the employment opportunities and commercial services available at the Chatswood major centre.

The Precinct is characterised by a mix of new medium rise high-density residential uses and older low scale residential dwellings. The Precinct is intended to deliver a significant number of dwellings by 2021, transforming the area into a vibrant residential centre that leverages off available transport infrastructure and the precinct's proximity to jobs and services. Overall, the proposal is comparable to other developments in the locality, consistent with other residential flat building developments approved, or currently under assessment in the Lane Cove locality.

4.0 Assessment of the Proposed Variation

4.1 Overview

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

The five methods outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
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 (Fourth Method).*
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 (Fifth Method).*

This Clause 4.6 variation request establishes that compliance with the development standard is unreasonable and unnecessary in the circumstances of the proposed development given the objectives of the standard are achieved, justifying the variation to the height control pursuant to the First Method outlined in *Wehbe*.

Furthermore, in the recent judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (our emphasis) the matters in Clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

4.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

The objectives underpinning the building height control are outlined in Clause 4.3 of the LCLEP 2009 and are:

- (a) to ensure development allows for reasonable solar access to existing buildings and public areas,*
- (b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,*
- (c) to seek alternative design solutions in order to maximise the potential sunlight for the public domain,*
- (d) to relate development to topography.*

Consistency with these objectives, and the absence of any environmental impacts, would demonstrate that strict compliance with the height standard would be both unreasonable and unnecessary in this instance.

The contentions below demonstrate how this proposal is consistent with the objectives in Clause 4.3 of the LC LEP 2009.

Objective: *(a) to ensure development allows for reasonable solar access to existing buildings and public areas*

Given the topography and the dominant orientation of the site and buildings (north south axis), the impact of the proposed development in terms of overshadowing on neighbouring properties is as follows:

North

The adjacent northern site is 31 Mindarie Street, and given the siting and orientation of the buildings, there is no overshadowing associated with the proposed development on this property.

South

Adjoining the site to the south is Nos 26 and 28 Pinaroo Place, supporting single storey dwellings. These properties will be impacted in terms of solar access from the proposed building envelope. To mitigate the impact, the southern elevation has been afforded additional upper level setbacks from the common boundary, greater than required in the LCDCP 2010. The southern setbacks are as follows:

South (rear) - 6m at Ground and Level 1

South (rear) – 9m at Level 2/Level 3

South (rear) – 12m at Level 4

South (rear) – 16.74m at Level 5

The overshadowing plans conclude:

- At 9am, the shadow cast by the proposed development on the site will fall within the dwellings to the south and southwest. There will be a substantial impact on the southern neighbouring dwelling's (28 Pinaroo Place) rear private open space. However, the front open space and majority of rooms within the front portion of the dwelling will still have access to morning sun. There will be a substantial impact on the dwellings to the southwest fronting Merinda Street; however, these properties are zoned R4 High Density Residential, with multi-unit development expected to occur.
- At 12pm, the shadow cast will fall within the central portion two adjoining properties to the south, 26 and 28 Pinaroo Place. It is noted the shadow cast at this time does not impact the rear private open space of 26 or 28 Pinaroo Place, with solar access provided to the rear rooms of both dwellings. The inclusion of an additional 3m setback from the western boundary at Level 4 on the proposed building envelope enhances access to midday sun for 28 Pinaroo. Even when high density development occurs on the adjoining R4 zoned western properties (24 – 26 Mindarie Street), the 12m corridor created by DCP setback controls will safeguard midday sun to the rear yard and bedrooms of 28 Pinaroo Place.
- At 3pm, the directly adjoining property to the south (28 Pinaroo) is only partially affected, with solar access provided to the majority of the dwelling and open space areas at this time. The shadow cast falls over a substantial portion of the Pinaroo Place road reserve and the southeastern property, being 6 Pinaroo Place, with the proposed envelope precluding afternoon solar access to the majority of this property. Notwithstanding, 6 Pinaroo Place achieves early morning sun and it should be noted solar access has been modelled on the worst-case scenario, being a maximum envelope (25-30% greater than the achievable floor area) and on the winter solstice. More critically however, the solar access comparative analysis between the proposed envelope and a compliant design indicates an extremely minor difference in solar access for 6 Pinaroo Place at 3pm. Given the other built form considerations of the proposed envelope have achieved a better outcome in terms of protecting neighbouring amenity and visual impact, the proposal is considered an acceptable consequence in this regard.

East

There will be no impact on the neighbouring property directly to the east, being 2-4 Mindarie Street, given that there is an approximate 24m separation between the proposed development and existing residential flat building.

West

Between 9am and 12pm, there will be a moderate impact on the adjoining properties to the southwest, being 24 Mindarie Street and 2 - 6 Merinda Street. The impact is considered reasonable given 24 Mindarie Street and 2 - 4 Merinda Street are zoned R4 High Density Residential and there will be limited overshadowing post 11am. The proposal will not preclude these properties from achieving 3 hours solar access on the winter solstice.

Furthermore, the proposal is considered acceptable when relying on the Land and Environment Court's consolidated and revised planning principle on solar access, outlined in *The Benevolent Society v Waverley Council* [2010]. In particular, the following principles are highlighted:

- *The ease with which sunlight access can be protected is inversely proportional to the density of development. At low densities, there is a reasonable expectation that a dwelling and some of its open space will retain its existing sunlight. (However, even at low densities there are sites and buildings that are highly vulnerable to being overshadowed.) At higher densities sunlight is harder to protect and the claim to retain it is not as strong...*
- *... Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours...*
- *... In areas undergoing change, the impact on what is likely to be built on adjoining sites should be considered as well as the existing development...*

As demonstrated in the above principles, solar access should not be assessed in isolation. Due consideration needs to be given to the transitioning nature of the locality to high density, and the vulnerability of properties zoned E4 Environmental Living when interfaced with R4 zoned land to the north. Regarding design, the intent of the proposed scheme has largely been to reduce and mitigate overshadowing given the sensitivity of the southern neighbouring properties.

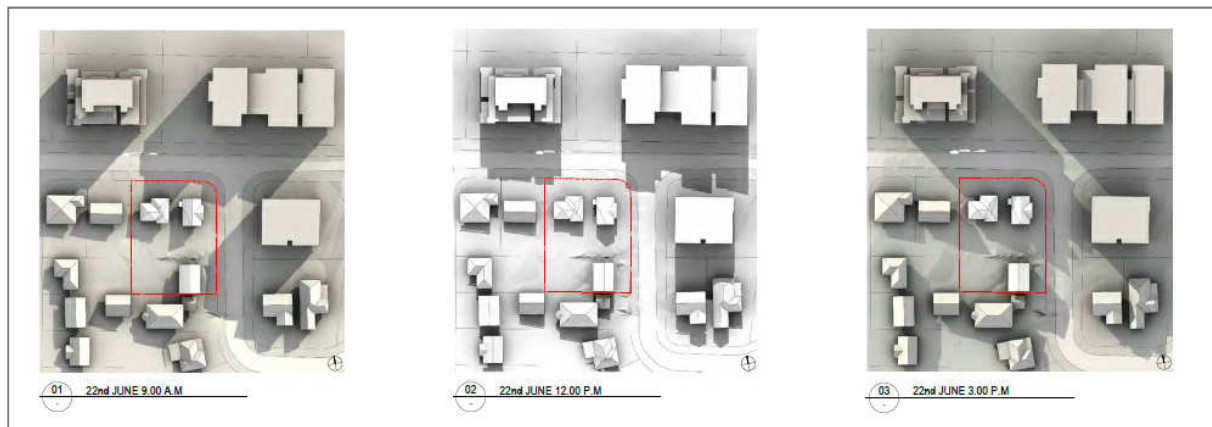


Figure 3 – Shadow diagrams - envelope view

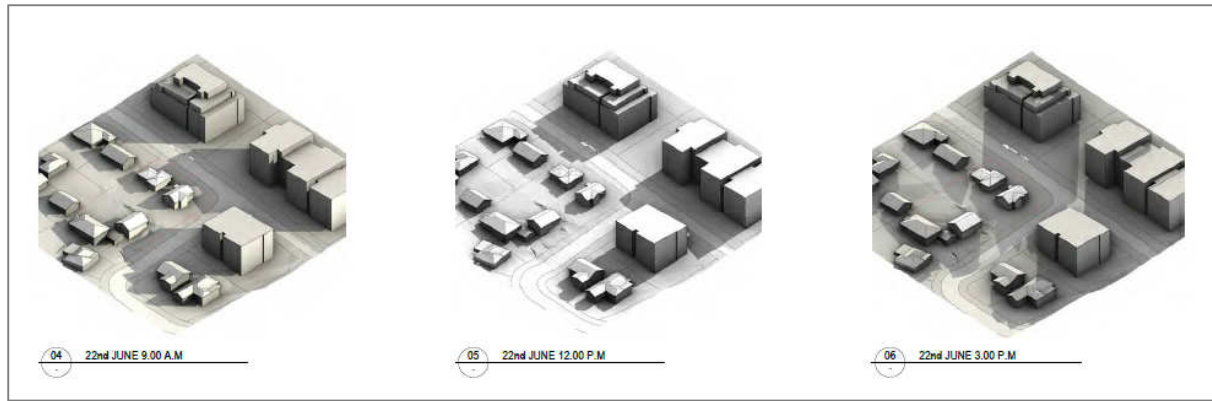


Figure 4 – Shadow diagrams – perspective view

As demonstrated above, reasonable daylight access is provided to all surrounding developments. The proposed height variation is situated in a location that will not result in any unreasonable impact to nearby sensitive land uses.

Objective: (b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable

Visual Impact

Despite the height variation, the visual impact of the proposal on the surrounding neighbours is considered negligible, due to the natural topography of the site and stepped design. The land slopes to the south east towards Pinaroo Place. The proposed envelope steps down with the slope to reduce protrusions above the height limit where possible. The areas of the proposed development, which exceed the 17.5m height control, are acceptable and visually negligible within the context of the Mowbray Road precinct. Refer to the diagrams below.

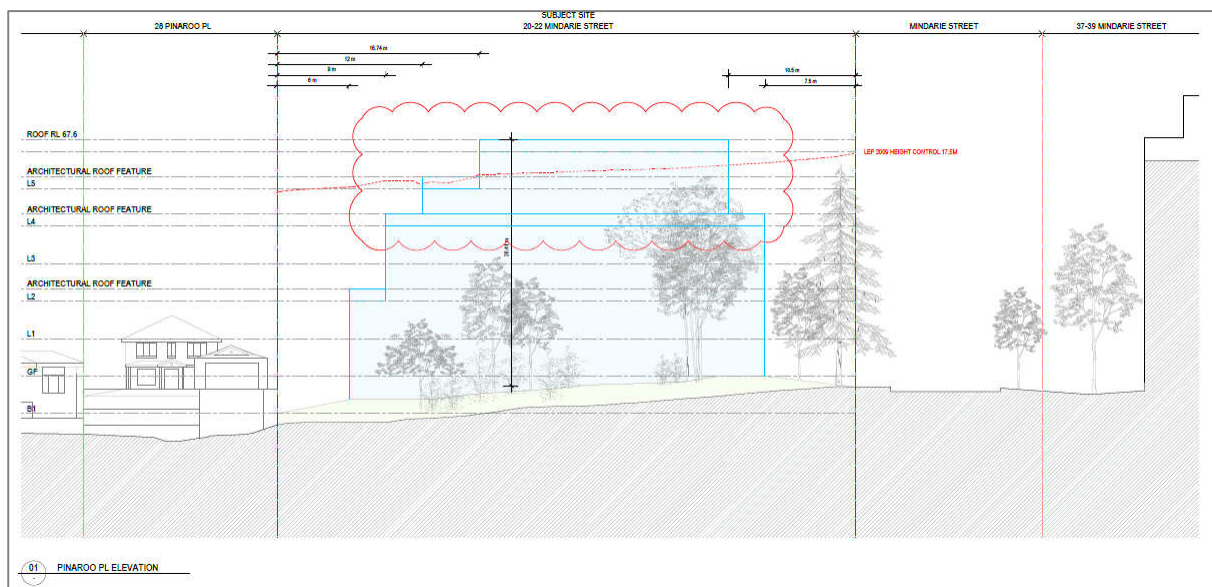


Figure 5 – Pinaroo Place elevation

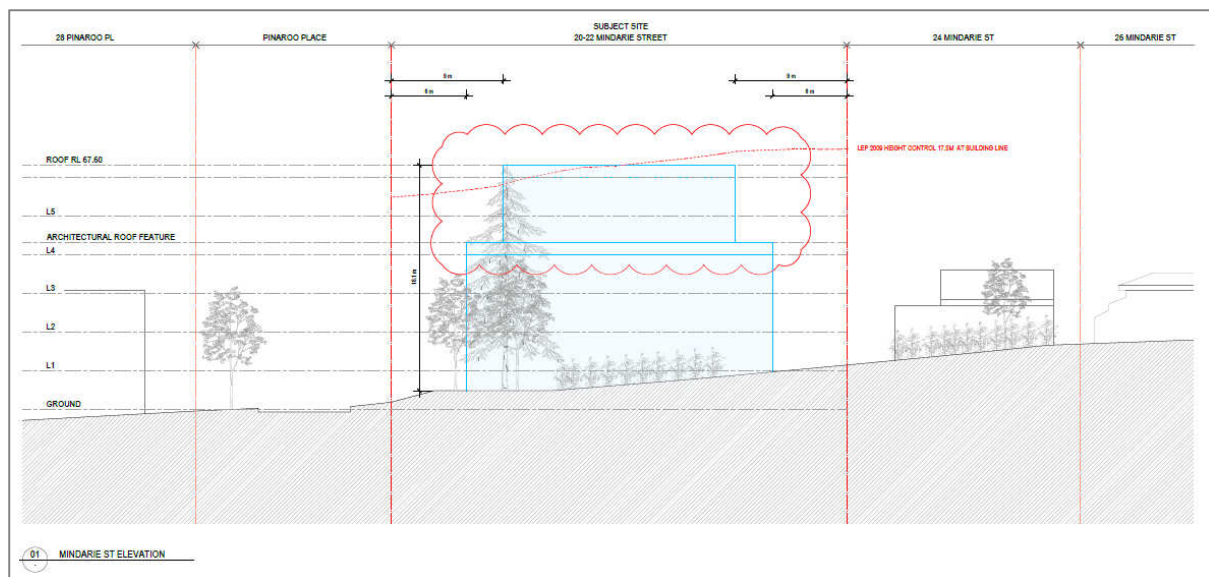


Figure 6 – Mindarie Street elevation

Planning principles have established that in order for a development to be compatible it does not necessarily need to be the same (*Project Ventures v Pittwater Council*). Instead, the built form emulates themes established in the immediate area, including five-storey development on Mindarie Street to the north and east of the subject site. The envelope maintains this established rhythm of development by allowing for a modern contemporary urban form and layout on a site zoned for high-density residential redevelopment. The non-compliance allows for a portion of the top level to reasonably fit within a future detailed envelope.

The Level 4 and 5 breach is located away from the periphery of the southern and western building lines to protect the adjoining sensitive land uses. Therefore, the departure to the height control will be barely discernible from the low-density areas as it is towards the north of the building and orientated away from sensitive uses.

While the overall visual impact of the proposal is acknowledged, this impact is reasonable on the basis that the proposal is considered to be consistent with the desired future character of the locality and provides an appropriate transition in height between the relevant parts of the new development. There have also been a number of design elements incorporated to assist in mitigating potential visual impacts, including the inclusion of vegetation buffers, appropriate building separation and building alignment to maintains view corridors through the site.

Overall, the proposal is consistent with key strategic planning documents that seek to transform the character of Mowbray Precinct and that the building envelope is generally consistent with the planning controls for the site, whilst delivering a number of community benefits.

Privacy

The buildings have been designed in consideration of the surrounding context and in accordance with the ADG building separation requirements. The building separation guidelines ensure that the proposed development does not unduly impact on neighbouring properties by providing sufficient distance between buildings to reduce direct overlooking and associated loss of privacy. In addition, the topography of the site acts to protect neighbouring properties from direct overlooking and provides filtered outlooks due to the varying interface of the buildings. A detailed discussion of building separation is provided below.

North

The northern building separation is over 24m between the proposed RFB and the existing development, at No. 31 Mindarie Street. This is a substantial setback and greater than the ADG requirements of 12m. Balconies can be attenuated with privacy screens, whilst the slope between the two buildings and landscaping will reduce any direct overlooking and loss of privacy.

South

The rear setback provided between the southern wall of the subject site and the site boundary is 6m up to Level 1, 9m at Level 2/3, 12m at Level 4 and 16.74m at Level 5, achieving a separation greater than the ADG requirements. The distance between the proposed development and the existing building varies from approximately 10m to 21m. This is a generous setback and will ensure that there is no loss of privacy or opportunities for overlooking.

Furthermore, the submitted reference scheme demonstrates the envelope can support an apartment layout with no balconies directly orientated to the south. Under the reference scheme, the two balconies proposed on this elevation are both orientated in an east west direction. In addition, the use of landscaping and tree planting can be incorporated to further mitigate any overlooking or loss of privacy.

East

The building separation to the east is separated by Pinaroo Place and has a distance of approx. 24m between the proposed development and the existing residential flat building. There will be no loss of privacy to the existing building given the setback distance and separation by Pinaroo Place. In addition, the change in gradient contributes to obscured outlooks, which offset sight lines, further enhance privacy for the existing dwellings by reducing direct overlooking.

West

A 6m side setback is provided to the western boundary, with an additional 6m setback at Level 4. Based on the reference scheme, there is minimal interface along the western elevation and balconies can be orientated to avoid direct overlooking. The use of privacy screens at the detailed DA stage will further ameliorate any privacy concerns.

Therefore, given the generous setbacks, topography of the site and provision of deep soil plantings areas, the proposal will achieve an acceptable privacy outcome along the western boundary.

Interface

The subject site, zoned R4 High Density adjoins 28 Pinaroo Place to the south, which is, zoned E4 Environmental Living. Therefore, any development on E4 zoned land will be of a low density built form. This is the only zone interface area associated with the subject site.

To address the zone interface, the proposed envelope has afforded significant consideration to visual impact, amenity and solar access for the adjoining properties to the south. As demonstrated in this Clause 4.6 submission and supporting Statement of Environment Effects, reasonable daylight access is provided to all surrounding developments with the proposed height variation situated in a location that will not result in any detrimental impact to adjoining sensitive land uses. In this regard, consideration also needs to be given to the Planning Principle *Seaside Property Development Pty Ltd v Wyong Shire Council*, where it was established that "any development proposal in one zone needs to recognise and take into account the form of the existing and/or likely development to occur in an adjoining zone."

Objective: (c) *to seek alternative design solutions in order to maximise the potential sunlight for the public domain*

The 'public domain' in this instance is Mindarie Street and Pinaroo Place. Given the site is located on a prominent north eastern corner block, the proposal will have limited impact on solar access to the public domain. The envelope has adhered to DCP setback requirements along these elevations, with the front (Mindarie Street) setback being 7.5m and side (Pinaroo Place) setback being 6m. Accordingly, the proposed development and the associated variation in height does not unreasonably affect nor reduce access to sunlight on usable and sensitive public domain areas. The building envelope establishes framework that contributes to a positive relationship between future development on the site and the public realm.

Objective: (d) *to relate development to topography.*

Topography has been a key determinant in the development of the concept building envelope on the site. The site sits atop a valley that slopes from the northern and western boundaries (RL 51.07 to RL 44.80) toward the lowest point of the site towards Pinaroo Place (eastern side) with steep gradients. The building envelope has been intentionally designed to be terraced or stepped in response to the natural slope. On balance, it is evident that the additional height proposed is largely in response to the topography of the site and that the variation has no impact in terms of overshadowing, loss of privacy and visual impacts of height on neighbouring properties and sunlight into the public domain.

The proposal has taken advantage of the flatter parts of the land to locate the majority of massing towards Mindarie Street, and ensure that the ground floor units are located at natural ground level or above to maximize solar access and amenity. The result of siting the building in this way significantly improves amenity for the dwellings to the south and is responsive in stepping of the building across the site. However, it results in localised height breaches to the 17.5m height control.

The proposal also responds to the topography of the site by locating landscaped open space in the south-western corner of the site to reduce the building bulk and improve solar access, views and amenity. This approach sits the building away from neighbours in an effort to not give rise to any adverse amenity impacts.

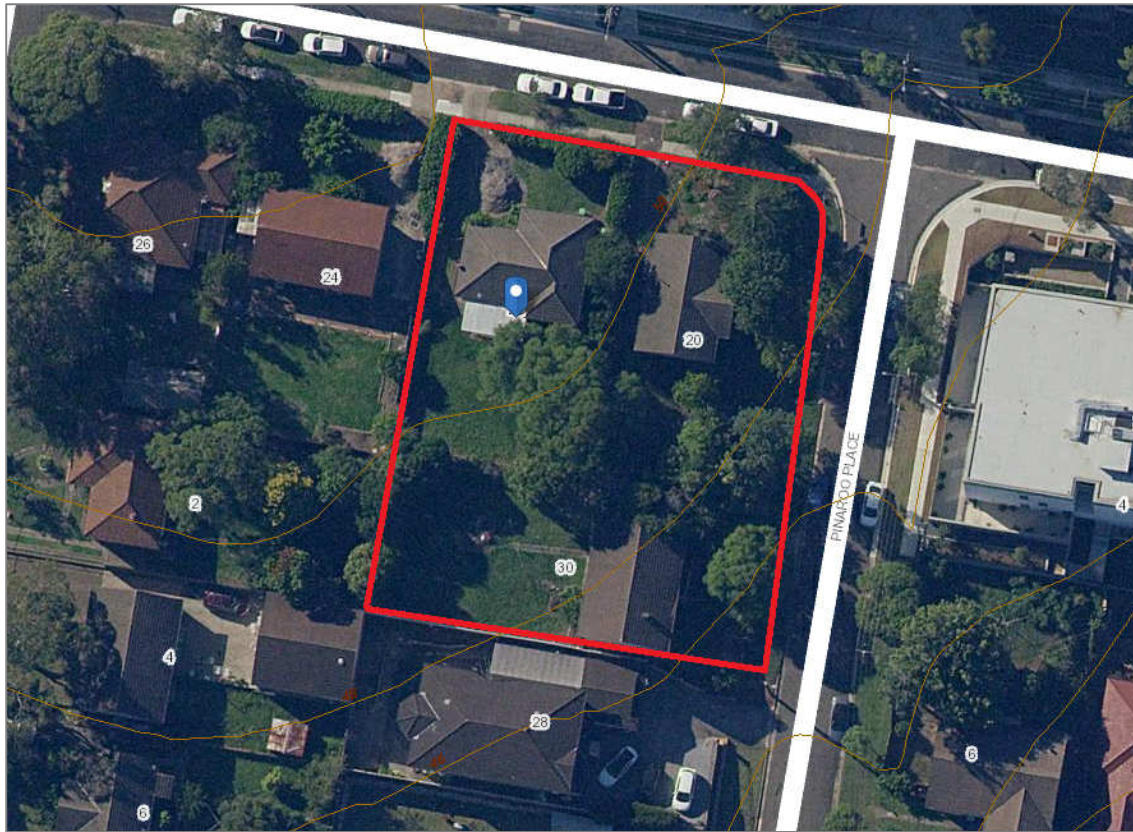


Figure 7 – Site contours

Comparative Analysis between Proposed Envelope and Compliant Envelope

To further demonstrate the maximum building height standard is unreasonable and unnecessary in this instance, a solar access comparative analysis between the proposed envelope, reference design and a compliant design has been prepared by Stewart Hollenstein. The study indicates a negligible difference in solar access for the sensitive neighbouring properties, being 26, 28 and 6 Pinaroo Place.

- At 9am, there is a marginal increase to overshadowing on the Merinda Street properties, however, these properties are zoned R4 High Density Residential, with multi-unit development expected to occur. The morning sun loss for 6 Merinda Street, which is zoned E4 Environmental Living, is comparable between the compliant design and the proposed envelope.
- At 12pm, the overshadowing impact of the proposed envelope is no greater than the compliant envelope.

- At 3pm, the comparison indicates an extremely minor difference in solar access for 6 Pinaroo Place at 3pm. The only additional solar access is limited to minor portions of the south eastern segment of the roof.

As demonstrated above, a compliant envelope results in comparable overshadowing impacts to that of the proposed. Conversely, the added benefits of the proposed envelope, pertaining to reduced visual impact from the south, improved amenity for future residents, better consistency with the ADG criteria and social benefits through the provision of social and affordable housing, demonstrate a better planning outcome.

A compliant building would not result in a better planning outcome, with the proposed envelope demonstrating a solution that is consistent with the objectives of Clause 4.3. Therefore, strict compliance with a 17.5m height limit would be unreasonable, unnecessary and would not achieve a greater planning or urban design outcome.

Conclusion on clause 4.6(3)(a)

At a maximum height of 21m (i.e. 6 storeys), the potential visual, privacy and solar access impacts of the development will be no greater than a compliant development. The architectural plans and shadow diagrams provided demonstrate the negligible impact of the proposed height variation. As previously acknowledged, the concept proposal achieves the objectives of Clause 4.3 and therefore strict compliance with a 17.5m height limit would be unreasonable, unnecessary and would not achieve a greater planning or urban design outcome.

It is also important to acknowledge the height variation is not a result of increased GFA, with the envelope complying with the FSR development standard. Evidently, the height variation is a design solution to achieve a better planning outcome.

For the reasons outlined above, the objectives of the standard are achieved notwithstanding the non-compliance and therefore, the first method of the *Wehbe* test is satisfied.

4.3 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the LC LEP 2009 requires the departure from the development standard to be justified by demonstrating:

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

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site, and that there are sufficient environmental planning grounds to justify the contravention. In this instance, there are sufficient environmental planning grounds to justify the contravening development as per the below considerations.

Social and Affordable Housing

The key driver of this proposal is to renew and provide additional social housing on the site whilst also contributing to the stock of affordable and market housing. NSW FACS confirms

that the total number of applicants in NSW currently on the waiting list for social housing is close to 60,000 people, which excludes people waiting for a transfer. There is also a well-recognised demand for affordable housing, housing that caters to an ageing population, and housing that can meet substantial forecast population growth. The proposal will increase the supply of social housing and provide private housing to help meet existing and forecast demands.

The site represents an ideal opportunity to move away from the former 'housing estate' model, and towards integrated communities with better social outcomes, which is a key driver of the concept plan. It represents the pioneering concept of blending social housing with private and affordable housing to create a strong, integrated and resilient community with excellent access to transport, employment, improved community facilities and open space. The proposed variation facilitate maximising the provision of social and affordable housing on the site which provides a public benefit of State significance.

Minimal Environmental Impact

This submission has demonstrated the environmental impacts of the proposed building envelope can be appropriately managed or mitigated and do not result in a massing that would represent an over development of the site. The proposed concept building envelope is appropriate for the site given:

- the height variation does not result in unreasonable adverse amenity impacts on adjacent land;
- the variation does not diminish the development potential of adjacent land;
- despite the additional building height, the scale of development is considered appropriate given the significance of the site as supporting the continued growth of the Mowbray Precinct; and
- this report and the accompanying solar access study demonstrates that any impacts associated with the proposed development are acceptable, particularly since there are no unreasonable solar access impacts on neighbouring properties or the public domain as a result of the height variation.

Conclusion on clause 4.6(3)(b)

The granting of development consent for a concept building envelope in this instance will be a catalyst to enable a high quality, architecturally designed, integrated social and private housing development to be constructed. As demonstrated in this submission, the objectives of Clause 4.3 and the R4 High Density zone have been met by the proposal. In light of this, there is considered to be sufficient environmental planning grounds to justify contravening this development standard that will result in the delivery of critical social housing.

This submission demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3 of the LCLEP 2009, there would be limited additional public benefit.

The consent authority can be reasonably satisfied that this written request has adequately addressed the matters in Clause 4.6(3) and that there are sufficient environmental planning grounds to justify contravening the development standard, as the non-compliance with the height control facilities a development that will provide a uniquely diverse range of housing types to strengthen the local community.

4.4 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

4.4.1 Consistency with objectives of the development standard

For the reasons discussed in this report, the proposed development is consistent with the objectives of the maximum height control development standard.

4.4.2 Consistency with objectives of the zone

The proposal in its entirety satisfies the R4 High Density zone objectives for the following reasons:

- the proposed medium scale residential flat building is an appropriate housing type within a high density residential environment. It is also a use which is not currently in use on the site;
- the site is exceptionally well located in terms of access to public transport, green infrastructure, employment and social services;
- the proposal will increase the supply of housing to help meet existing and forecast demands;
- the impact of the RFB on the surrounding uses has been fully assessed in this submission and it is demonstrated that the impact of the additional height is negligible terms of impacting on overshadowing, privacy and visual amenity; and
- no sites will be left “isolated” as a result of the site amalgamation.

4.4.3 Overall public interest

The redevelopment of the site is part of the NSW Government Communities Plus program, which seeks to deliver new housing for vulnerable members of the community. The integrated approach of blending social housing with private and affordable housing, with good access to transport, employment and community facilities, is in accordance with Future Directions for

In accordance with the requirements of Clause 4.6(4)(a)(ii), the proposal is demonstrably in the public interest because it achieves the objectives of both the development standard and the land use zone.

4.5 Other matters for consideration

Under Clause 4.6(5), in deciding whether to grant concurrence, the Director-General (or equivalent) must consider the following matters:

(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, and

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

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

These matters are addressed in detail below.

4.5.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The non-compliance will not raise any matter of State or Regional environmental planning significance.

4.5.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the numerical height development standard as demonstrated in this submission and supporting solar access comparative analysis. Maintaining and enforcing the development standard in this case would unreasonably constrain the orderly and economic development of this site, and unnecessarily reduce the significant community benefits that future development of the site would deliver. The height variation is a catalyst in enabling the delivery of additional social housing to the community and state.

Accordingly, there can be no quantifiable or perceived public benefit in maintaining the standard.

4.5.3 Clause 4.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence

To our knowledge, there are no other matters that the Secretary is required to take into consideration when granting concurrence to this Clause 4.6 variation request.

5.0 Conclusion

This submission demonstrates that compliance with the maximum height development standard contained in Clause 4.3 of the Lane Cove LEP 2009 is unreasonable and unnecessary in the circumstances of this case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst allowing for a better social and planning outcome.

This Clause 4.6 variation has demonstrated that, despite the non-compliance with the maximum height development standard, the proposed development:

- is in the public interest as the proposal is consistent with the applicable land use zones and development standards;
- does not represent an overdevelopment of the site, with the height and proposed intensity (density) consistent with the locality's desired future character and its evolving urban context;
- provides significant public benefit through the delivery of critical social housing;
- can accommodate the additional height within the proposed envelope, which the accompanying SEE has found is compatible with the scale and character of the area;
- a better planning outcome than a compliant envelope design;
- will not result in unacceptable adverse amenity or environmental impacts; and
- does not raise any matters of State and regional planning significance relating to the height development standard variation.

There is no public benefit in maintaining the height development standard adopted by the environmental planning instrument for this site. The flexible application of the height control achieves a better social and planning outcome than would be achievable by strict adherence to the controls applicable to the site.

Legal precedent has been addressed as part of this Clause 4.6 variation request, and concludes the unique circumstances of this concept proposal are such that this justification cannot be replicated.

Overall, the concept proposal optimises the opportunity to establish a high-quality development that contributes to the revitalisation of the Mowbray Road Precinct and provides significant public benefits through the provision of social housing.

For the reasons set out in this written request, the Concept DA should be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Lane Cove LEP 2009.