

(Amended) Clause 4.6 Variation Request – Building Height

1. Introduction

This Clause 4.6 variation accompanies a Development Application (DA) for the comprehensive redevelopment of 2-10 Cottonwood Crescent, Macquarie Park for mixed use development including residential apartments and a childcare centre. The proposed variation relates to the building height development standard that applies to the site pursuant to the *Ryde Local Environmental Plan 2014* (RLEP 2014) which provides the framework for consideration of proposed variations to development standards.

The variation sought under Clause 4.6 of the LEP has been prepared in accordance with the Land and Environment Court Ruling *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. The case further clarified the correct approach of Clause 4.6 requests including that the clause does not require a development with a variation to have a better or neutral outcome.

2. Background

A DA for the construction of buildings on the site was lodged with Ryde Council on 22 July 2020. The DA proposes the redevelopment of the site to accommodate a high density mixed use development which will generally include:

- Construction of a part 13 storey / part 14 storey building accommodating:
 - 207 residential apartments including a mix of one, two and three bed units together with recreational facilities for use by residents;
 - Car parking for 191 vehicles (including car wash bay, car share spaces and one on-street bay); and
 - A childcare centre.
- Excavation to create a three level basement accommodating car parking spaces together with bicycle parking, waste storage areas, servicing and plant areas.
- Provision of communal open space and site landscaping.

The site is located within the evolving Macquarie Park locality. It is bounded to the north by Cottonwood Crescent and to the east and west by public reserves and Shrimptons Creek to the south. It comprises a regular shaped parcel of land with an area of 4,227sqm. It has frontages of 109.55m to Cottonwood Crescent, 45.98m to Cottonwood Reserve, 106.68m to Shrimptons Creek and 39.63m to Wilga Park. Existing development on the site comprises 5 x four storey walk up residential flat buildings, each comprising 12 units accommodated over three levels with garages below. The floorplate of the existing buildings extends over the majority of the site with little landscaped space, most notably to the rear

The site slopes from a high point on Cottonwood Crescent down to Shrimptons Creek. Levels range from RL47.7 to RL42.44.

The applicable setback requirements for the future development of the site are identified in the *Ryde Development Control Plan 2014* (RDCP 2014). The requirements are as follows:

- East and West: 5 metres
- South: 10 metres
- North: 5 metres

In addition to the above, a 20 metre riparian setback applies. Given the meandering nature of the creek line this results in a variable setback requirement along the site's southern boundary.

FIGURE 1: EXISTING AND PROPOSED BUILDING FOOTPRINT OVERLAID ON TO SURVEY PLAN (REFER ALSO TO ANNEXURE 2)

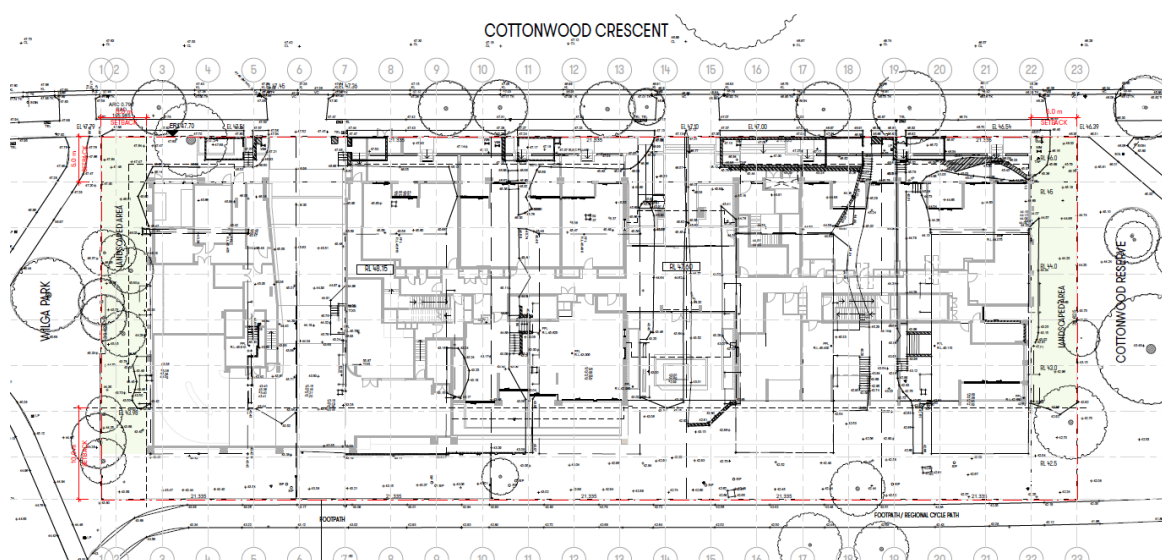
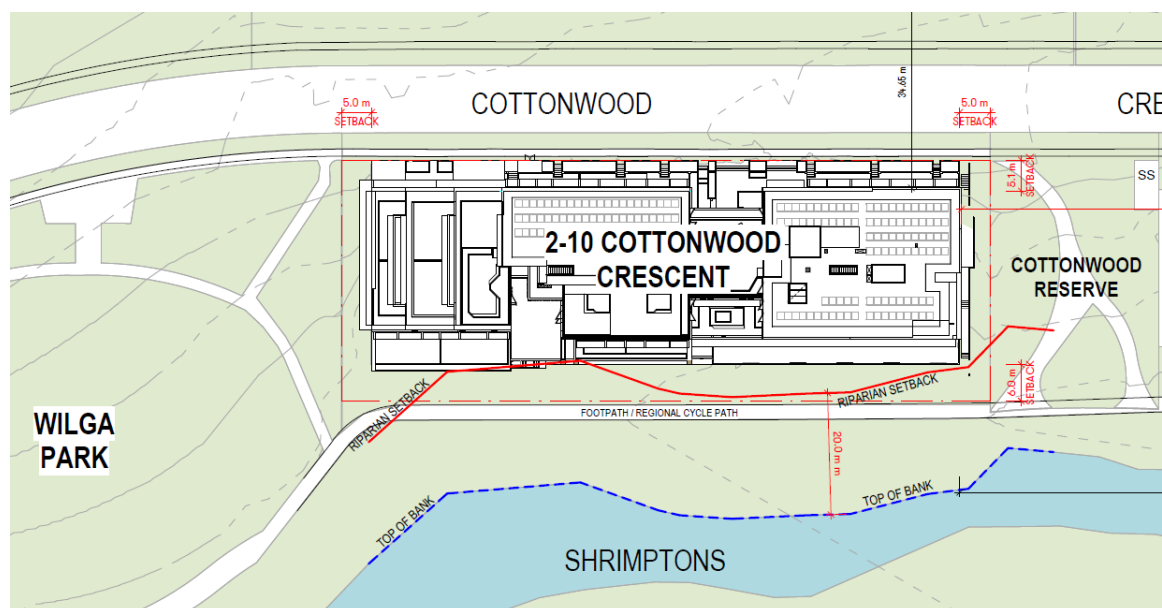


FIGURE 2: PROPOSED SETBACKS (REFER ALSO TO ANNEXURE 3)



The proposed development adopts the setback requirements specified by the DCP. This results in the footprint of new development being pushed northward towards Cottonwood Crescent to create a more generous landscaped setback to the rear adjacent to Shrimptons Creek. The need to maintain a 20 metre setback to the creek line results in creation of a narrow building form concentrated on the northern portion of the site.

3. Clause 4.6 Exceptions to Development Standards

Clause 4.3 of SLEP 2012 specifies that the height of a building may not exceed the maximum height specified on the relevant Height of Buildings Map. The site is subject to a variable height limit of RL22m, RL35.3m, RL44m and RL69.3m. The proposed development exceeds the maximum height allowance when measured in accordance with the RLEP 2014 definition of building height which is as follows:

*“**building height** (or **height of building**) means the vertical distance between ground level (existing) and 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.”*

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

“(2) Consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument...”

“(3) 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.”*

Accordingly, we set out below the justification for the departure to the height controls applicable under the LEP.

4. Definition of development standard

Section 1.4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) lists the items (but not limited to) that are considered to be development standards, and are listed below.

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) **the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,***
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*

- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) *such other matters as may be prescribed.”*

The proposed variation of the height of buildings under Clause 4.3 of the LEP is a development standard for the purposes of the EP&A Act and Clause 4.6 of the LEP.

5. Proposed Variation

Pursuant to Clause 4.3 of the RLEP 2014 and the accompanying height map a maximum height standard of 45 metres applies to the site. A single height limit applies to the entire 2-10 Cottonwood Crescent site (refer to **Figure 3** below).

FIGURE 3: EXTRACT FROM LEP HEIGHT MAP



The proposed development involves the construction of a mixed use building of variable height. The building rises to up to 14 storeys. Of note, the western elevation has been stepped to moderate the extent of overshadowing to the public reserves adjoining. At its tallest point the roof element of the building projects above the maximum height limit specified by the LEP and as such the proposal is inconsistent with Clause 4.3 of the LEP.

The height above the LEP limit relates to roof top elements, specifically the plant lift overrun. The exceedance is minor and does not add additional visual bulk to the building form. The additional height would be indiscernible when viewed at street level and in the context of the development as a whole.

6. Extent of variation

The site falls from a high point of RL46.3m to the north down to RL42.2m to east and RL43.8m to the south. Existing ground levels vary, following the slope of the land. ground levels will be modified to create a level building pad for the building's ground floor resulting in a new ground floor level of RL47.6m. Floor levels are a response to the required flood planning levels for the site, as such it is not possible to reduce the overall level of the building.

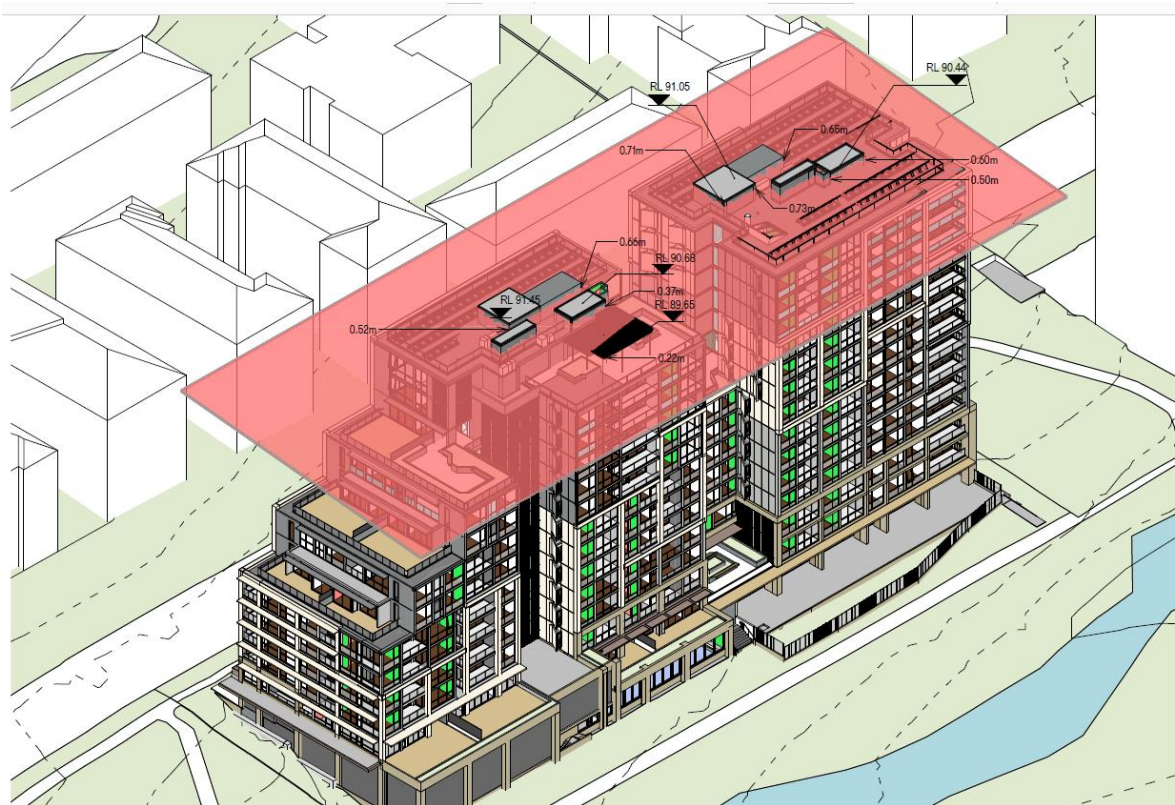
The maximum building heights proposed are as follows:

TABLE 1: BUILDING HEIGHT

BUILDING COMPONENT	LEP HEIGHT LIMIT	PROPOSED MAXIMUM BUILDING HEIGHT
Top of building	45m	Building A – RL89.05m / 44.02m Building B – RL88.65m / 43.14m
Top of plant	45m	Building A – RL91.05m / 46.22m Building B – RL91.45m / 45.94m

The proposal seeks a variation to the maximum height limit specified by Clause 4.3. As shown in **Table 1** above and **Figure 4** below, various discrete roof elements proposed on the building breach the maximum height specified by RLEP2014 by up to 1.22m. This represents just 2.7% of the overall allowable height for the site.

FIGURE 4: EXTENT OF EXCEEDANCE ABOVE THE LEP HEIGHT LIMIT (REFER ALSO TO ANNEXURE 4)



7. Objectives of the Standard

The objectives of Clause 4.3 Height of Buildings are as follows:

- (a) To ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,
- (b) To minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,
- (c) To encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,
- (d) To minimise the impact of development on the amenity of surrounding properties,
- (e) To emphasise road frontages along road corridors.

8. Objectives of the Zone

The objectives of the B4 mixed use zone are as follows:

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.
- To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.

Clause 4.6(3)(a) – Is the development standard unreasonable or unnecessary?

In Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118, 5 matters were listed to demonstrate whether compliance of a development standard was unreasonable or unnecessary, as established in Wehbe v Pittwater Council (2007) NSWLEC 827. This case also stipulated that all 5 methods may not need demonstrate compliance is necessary where relevant. Each of the matters are addressed below.

- a) **Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].**

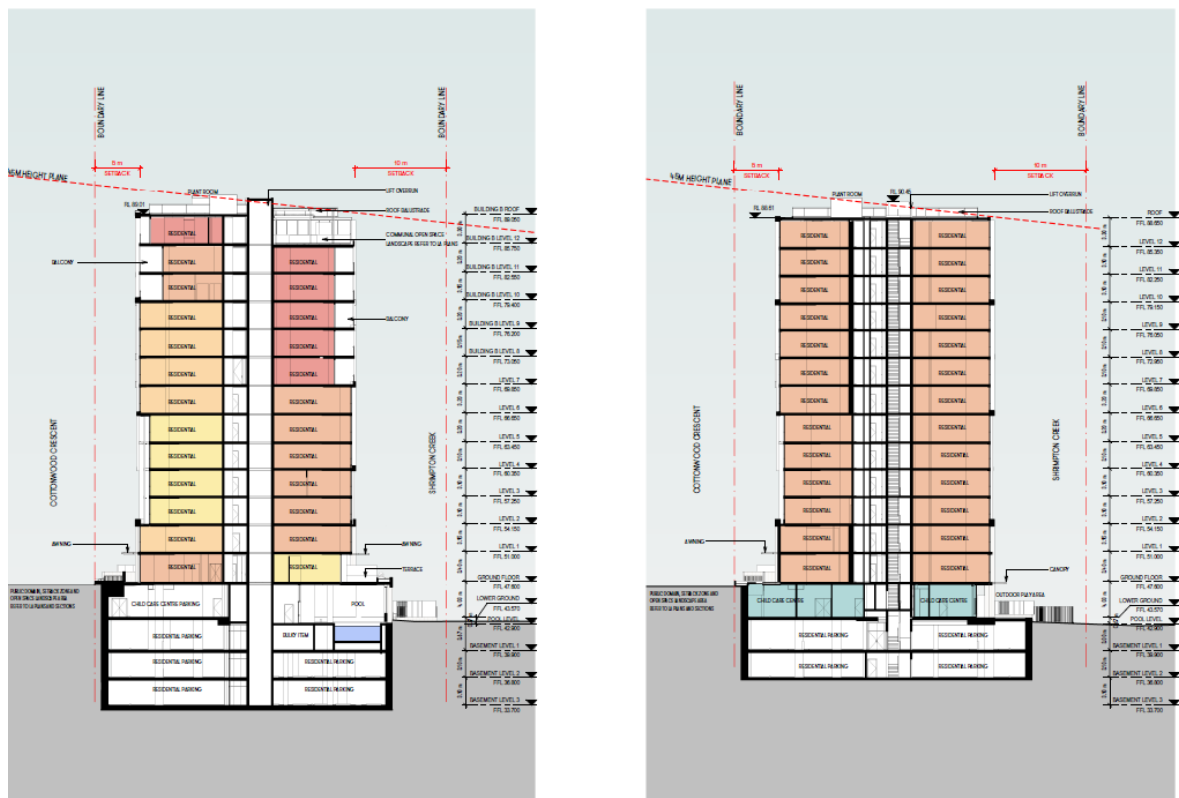
The proposal results in a built form outcome that is compatible with the desired future built form for the site and the immediate area. As noted in **Section 2**, the proposed development adopts the setback requirements specified by the DCP. This results in the footprint of built development being located northwards towards Cottonwood Crescent to allow for a generous setback to the rear adjacent to Shrimptons Creek, resulting in a narrow building footprint.

Additionally, the development has been stepped along its western extent to minimise potential overshadowing to the adjoining reserve. This stepped building form reduces the overall bulk and massing of the built form. This is further achieved through the incorporation of a recessed section between the building components. These generous cut out zones reduce the overall floorspace achievable on the site.

Strict compliance with the height standard across the site, when combined with the required setbacks (specifically the riparian setback to the south) and the stepped building form, would not allow the maximum density to be achieved. The proposed variation to discrete areas of the roof has been used as a means of enabling the introduction of essential servicing equipment. Achieving a fully compliant development has not been possible for the following reasons:

- Building at a lower RL is not possible given the flood constraints that apply to the site. Additionally, the site has been designed to respond to street level.
- The relocation of the lift cores to the northern extent of the buildings, where site levels would allow for the height proposed whilst remaining entirely within the LEP height limit, is undesirable for the following reasons:
 - Given the narrow building footprint, the approach would create an inefficient internal layout resulting in the lift core and associated servicing occupying space which is better utilised by apartments to take advantage of the northern aspect. The alternative would be to increase the number of units fronting the southern portion of the buildings by providing a narrower unit configuration with lower amenity value. The approach would result in non-compliance with key ADG criteria.
 - Shifting the tallest elements of the proposal northwards would also increase the visibility of this component of the development at street level, adding to the bulk of the development when viewed at this side.
 - It would reduce the extent of roof area available for the introduction of solar panels as proposed, thereby impacting on the sustainability credentials of the development.

FIGURE 5: SECTION DRAWING SHOWING PROPOSED BUILDING HEIGHT IN RELATION TO MAXIMUM HEIGHT PLANE PERMITTED BY THE LEP (REFER ALSO TO ANNEXURE 5)



Strict application of the height standard would necessitate the removal of a level from each building, the consequence of which would be a reduction in the yield that could be achieved across the development and would threaten the viability of the development. The proposed height is considered to be acceptable when balanced against the comparative benefits of the approach as detailed above.

Further the approach allows for the yield anticipated by the relevant controls to be achieved on the site, thereby providing an opportunity to increase the supply and diversity of residential accommodation within Macquarie Park.

- b) **Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].**

N/A. The underlying objective of the Building Height control is relevant to the development.

- c) ***Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].***

The underlying objective of the Building Height control is to protect the amenity of surrounding properties. In view of the development context and the extent of exceedance proposed in this case strict compliance with Clause 4.3 of the LEP is considered to be both unnecessary and unreasonable. The exceedance relates to non-habitable floorspace, comprising parapet roof form, plant room and lift overrun only. Strict compliance with the height control would result in an inferior design outcome as discussed above, resulting in the overall development being reduced by one level.

Establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

There are numerous buildings within the locality that have been approved with a height greater than than nominated on the LEP height map. These applications include the following:

TABLE 2: APPROVED VARIATIONS TO RLEP CLAUSE 4.3

DA REF	SITE ADDRESS	DATE	EXTENT OF DEPARTURE
LDA2018/0185	9 Peach Tree, Macquarie Park	26/09/2018	9.7%
LDA2017/0107	137-143 Herring Road, Macquarie Park	16/02/2018	9.9%
LDA2016/0395	25-27 Epping Road, Macquarie Park	30/11/2017	2.6%
LDA2016/0524	80 Waterloo Road & 16 Byfield Street, Macquarie Park	11/10/2017	Up to 10.7%
LDA2016/0567	101-107 Waterloo Road, Macquarie Park	07/08/2017	11%
LDA2016/0602	82-84 Waterloo Road, Macquarie Park	27/07/2017	1.385 – 4.23%

Given the minor nature of the departure proposed in this instance and noting that consent has been granted to other buildings within the immediate area for heights which in some instances considerably exceed the maximum building height control it would be unreasonable for strict compliance to be applied in this case.

- d) ***Establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].***

N/A. The site is appropriately zoned.

9. Clause 4.6(3)(b) – Is there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118, the written request under Clause 4.6 must be “environmental planning grounds” by their nature established under Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA.

The characteristics of the site, specifically its relationship to the riparian zone to the south, warrants an approach that properly considers and mitigates this factor beyond strict adherence to the LEP provisions. No unreasonable impacts will result from the variation to the maximum height of buildings standard, whilst better planning outcomes are achieved. Specifically these include the following:

Relocation of lift cores would result in a poorer design and amenity outcome

The footprint of the development is extremely narrow, largely owing to the incorporation of the riparian setback to the south. Relocating the lift cores from their central positions within each building would create an inefficient internal layout resulting in the lift core and associated servicing occupying space which is better utilised by apartments to take advantage of the northern aspect. The alternative would be to increase the number of units fronting the southern portion of the buildings by providing a narrower unit configuration with lower amenity value. The approach would result in non-compliance with key ADG criteria.

Additional height does not allow for additional habitable floorspace

The minor increase in building height proposed relates to servicing areas. The breach of the height control does not result in a breach in maximum floorspace so there is no tangible nexus between the height variation and the overall intensity of site use. No more density is proposed for the site than that envisioned under RLEP 2014, noting that compliance with the maximum FSR standard is achieved. The proposed development merely seeks to allow for plant equipment in the most suitable position within the overall building forms.

Additional height does not add visual bulk to the development

The proposed development exhibits good design and has been through a rigorous design assessment process. The uppermost elements of the development are well thought out and have been successfully integrated into the overall design of the buildings. The height variation relates to discrete sections of the two buildings. These tallest elements of the proposal are setback away from the building edge and as such are not visible from street level.

No additional amenity impacts

The proposed height variation will not result in any demonstrable detrimental impact to any sensitive land uses so the impact of the variation is negligible. The proposed height variation is situated in a location which will not result in any demonstrable detrimental impact to any sensitive land uses:

- Visual impact: The additional height subject to this variation is generously setback from Cottonwood Crescent and the adjoining public reserves to ensure that the relationship with the surrounding public domain is respected.
- No disruption to views: There are no significant views that are affected by the proposal noting the nominal extent of the departure proposed.
- No loss of privacy: The additional height relates to non-habitable space and as such will not impact on the privacy of adjoining uses.
- No loss of solar access or additional overshadowing: The lift cores are sensitively located within the central areas of the buildings. Shadows created by these components fall entirely over the building roof line (refer to **Annexure 6**).

With reference to the above, the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

10. Clause 4.6(4)(a)(i) – The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written justification has been carried out in accordance with a recent court judgement “*Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC11.*” It demonstrates that the variation to the development standard is extremely minor and acceptable.

11. Clause 4.6(4)(a)(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

The proposed development is in the public interest. The principle aim of the proposal is to provide new residential apartments and a new childcare centre that will contribute to the local supply of housing and associated services within the Macquarie Park suburb. The proposed variation to the height control does not result in the loss of amenity to the neighbouring properties as a result of overshadowing or loss of privacy, and the proposed height is therefore considered to be acceptable particularly when balanced against the substantial benefits of the project which are:

- Restoration and rehabilitation of the riparian corridor and associated environmental benefits.
- Provision of new housing opportunities on land zoned for this purpose within the short term.
- Development of an under-utilised site (being currently occupied by dated residential flat buildings which do not contribute to the appearance of the street) identified for future mixed-use development (being zoned B4 mixed use).
- Contribution to the delivery of key infrastructure through the payment of the relevant Section 7.11 contributions.

Clause 4.3 sets out the objectives of the maximum building height development standard. The consistency of the proposed development with these objectives is set out in **Table 2** below.

TABLE 2: HEIGHT OBJECTIVES

OBJECTIVES	PROPOSED DEVELOPMENT
(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,	The subject land is identified for future mixed use development. The urban density and built form scale permitted under the existing controls allows for more intensive development on the site than currently exists. The existing controls recognise that development on this site will be prominent in terms of scale.

OBJECTIVES	PROPOSED DEVELOPMENT
	The height exceedance relates to discrete elements of the building form. It involves the addition of roof top elements and does not result in additional storeys being added to the building. The proposal does not result in a building that would be disproportionate in scale when compared to surrounding development.
(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,	<p>The departure from the 45m height limit which applies to the site will have little or no visual impact on the surrounds as the additional height relates to plant equipment fully contained within the roof element of the proposed building. The lift overrun comprises a small proportion of the proposal's roof area and will not be visible at street level (being set back within the building's roof).</p> <p>No additional overshadowing to existing development will occur as a result of the proposal.</p>
(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,	The site occupies a prominent position within the suburb of Macquarie Park close to the public transport network. It is currently underdeveloped but has been identified as the site of future mixed-use development. The proposed scale of buildings reflects this.
(d) to minimise the impact of development on the amenity of surrounding properties,	<p>The underlying objective of the building height limit is to manage the scale of any future built form in order to mitigate any adverse impacts on the amenity of residential areas. The character of the surrounding area is evolving and is becoming increasingly mixed in terms of bulk, scale and density. The proposed development is compatible with the height and scale of surrounding and nearby development. Buildings opposite (approved and proposed) are of a consistent height and density.</p> <p>The proposal has negligible view impacts on neighbouring properties. No additional view impacts are anticipated from the elements of the proposal that exceed the controls. There would be no difference in views when compared to a fully compliant development.</p>
(e) to emphasise road frontages along road corridors.	The built form is concentrated towards Cottonwood Crescent. The additional height relate to discrete roof forms that will not be visible at street level.

12. Clause 4.6(4)(b) - The concurrence of the Secretary has been obtained

Under Clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6 of the LEP, subject to the conditions in the table in the notice (**Annexure 1**).

The proposal seeks to add additional height to the proposed building to allow for the roof parapet, roof top plant equipment and lift overrun. The variation sought is extremely minor representing 2.7% of the allowable height for the site. This minor variation may be approved by Council or the relevant assessment panel as specified in PS18-003 as it satisfies the relevant Secretary's assumed concurrence conditions as outlined in **Table 3** below.

TABLE 3: CONSISTENCY WITH ASSUMED CONCURRENCE CONDITIONS SPECIFIED IN PS18-003

CONDITION	PROPOSED VARIATION
The development does not contravene a development standard by more than 10%	Complies. The variation sought is extremely minor representing up to 2.7% of the allowable height for the site.
The variation is numerical	Complies. The variation relates to a numerical standard, being the numerical height control for the site.

13. Conclusion

The proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of the LEP. Strict compliance with the LEP in this case is considered to be unreasonable and unnecessary as follows:

- The additional height proposed relates to essential equipment (lift overruns), the placement of which within the buildings cannot reasonably be adjusted to respond to the height control for the reasons outlined within this report.
- The departure from the height control proposed is extremely minor, relating to rooftop plant equipment and lift overruns which exceed the specified height limits for the site by up to 1.22m. The departure represents just 2.77% of the overall allowable height for the site.
- Despite the minor departure to the height control proposed, the proposed development is consistent with the intent of Clause 4.3 of the LEP which is to minimise adverse amenity impacts on neighbouring residential properties and to support the desired future character of the area.
- The proposal will not result in the loss of views, nor will it result in adverse amenity impacts and satisfies all relevant amenity criteria of the ADG, including access to sunlight, natural ventilation and privacy.
- Departure to the LEP height limit for other buildings within the immediate vicinity where it has been demonstrated that no additional adverse impact would arise as a result of additional height over and above the nominated LEP height control have similarly been approved.

As outlined within this report, the proposed development is considered to be an appropriate response to the site. Importantly, the proposal has been informed by an analysis of site constraints and opportunities to provide a realistic indication of development potential. The proposal will ensure that development of the site can contribute to the local housing supply whilst providing an urban design response that is appropriate to the emerging context of the locality.

It is considered that the proposal provides an appropriate response to the planned redevelopment of the site for future mixed use and will assist in the orderly and economic development of the land in a timely manner.

Having considered all the relevant matters it is concluded that the proposal represents a sound development outcome for the site.

Meriton

March 2021

ANNEXURE 1: CIRCULAR PS18-003 SECRETARY CONCURRENCE



Circular	PS 18-003
Issued	21 February 2018
Related	Revokes PS17-006 (December 2017)

Variations to development standards

This circular is to advise consent authorities of arrangements for when the Secretary's concurrence to vary development standards may be assumed (including when council or its Independent Hearing and Assessment Panel are to determine applications when development standards are varied), and clarify requirements around reporting and record keeping where that concurrence has been assumed.

Overview of assumed concurrence

This circular replaces Planning Circular PS 17-006 and issues revised assumed concurrence, governance and reporting requirements for consent authorities.

All consent authorities may assume the Secretary's concurrence under:

- clause 4.6 of a local environmental plan that adopts the *Standard Instrument (Local Environmental Plans) Order 2006* or any other provision of an environmental planning instrument to the same effect, or
- *State Environmental Planning Policy No 1 – Development Standards*.

However the assumed concurrence is subject to conditions (see below).

The assumed concurrence notice takes effect immediately and applies to pending development applications.

Any existing variation agreed to by the Secretary of Planning and Environment to a previous notice will continue to have effect under the attached notice.

Assumed concurrence conditions

Lot size standards for dwellings in rural areas

The Secretary's concurrence may not be assumed for a development standard relating to the minimum lot size required for erection of a dwelling on land in one of the following land use zones, if the lot is less than 90% of the required minimum lot size:

- Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition
- Zone R5 Large Lot Residential
- Zone E2 Environmental Conservation, Zone E3 Environmental Management, Zone E4 Environmental Living

- a land use zone that is equivalent to one of the above land use zones

This condition will only apply to local and regionally significant development.

Numerical and non-numerical development standards

The Secretary's concurrence may not be assumed by a delegate of council if:

- the development contravenes a numerical standard by greater than 10%; or
- the variation is to a non-numerical standard.

This restriction does not apply to decisions made by independent hearing and assessment panels, formally known as local planning panels, who exercise consent authority functions on behalf of councils, but are not legally delegates of the council (see section 231, to be renumbered 4.8 from 1 March 2018).

The purpose of the restriction on assumed concurrence for variations of numerical and non-numerical standards applying to delegates is to ensure that variations of this nature are considered by the council or its independent hearing and assessment panel and that they are subject to greater public scrutiny than decisions made by council staff under delegation.

In all other circumstances, delegates of a consent authority may assume the Secretary's concurrence in accordance with the attached written notice.

Independent hearing and assessment panels

From 1 March 2018, councils in Sydney and Wollongong will be required to have independent hearing and assessment panels that will determine development applications on behalf of councils (see section 231, to be renumbered section 4.8 from 1 March 2018).

The attached notice allows independent hearing and assessment panels to assume the Secretary's concurrence because they are exercising the council's functions as a consent authority.

Independent hearing and assessment panels established by councils before 1 March 2018 also make decisions on behalf of councils. The attached notice applies to existing panels in the same way as it will apply to panels established after 1 March 2018.

Regionally significant development

Sydney district and regional planning panels may also assume the Secretary's concurrence where development standards will be contravened.

The restriction on delegates determining applications involving numerical or non-numerical standards does not apply to all regionally significant development. This is because all regionally significant development is determined by a panel and is not delegated to council staff.

However, the restriction on assuming concurrence to vary lot size standards for dwellings in rural areas will continue to apply to regionally significant development. The Secretary's concurrence will need to be obtained for these proposals in the same way as it would for local development.

State significant development and development where a Minister is the consent authority

Consent authorities for State significant development (SSD) may also assume the Secretary's concurrence where development standards will be contravened. This arrangement also applies to other development for which a Minister is the consent authority for the same reasons.

Any matters arising from contravening development standards will be dealt with in Departmental assessment reports.

The restriction on assuming concurrence to vary lot size standards for dwellings in rural areas will not apply to SSD or where a Minister is the consent authority for the same reasons.

Notification of assumed concurrence

Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, consent authorities are notified that they may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the SILEP (or any other provision of an environmental planning instrument to the same effect), or clause 6 of SEPP 1.

The notice takes effect on the day that it is published on the Department of Planning's website (i.e. the date of issue of this circular) and applies to pending development applications.

Procedural and reporting requirements

In order to ensure transparency and integrity in the planning framework the below Departmental monitoring and reporting measures must be followed when development standards are being varied:

- Proposed variations to development standards cannot be considered without a written application objecting to the development standard and dealing with the matters required to be addressed by the relevant instrument.
- A publicly available online register of all variations to development standards approved by the consent authority or its delegates is to be established and maintained. This register must include the development application number and description, the property address, the standard to be varied and the extent of the variation.
- A report of all variations approved (including under delegation) must be submitted to developmentstandards@planning.nsw.gov.au within 4 weeks of the end of each quarter (ie March, June, September and December) in the form provided by the Department.
- A report of all variations approved under delegation from a council must be provided to a meeting of the council meeting at least once each quarter.

Councils are to ensure these procedures and reporting requirements are carried out on behalf of Independent Hearing and Assessment Panels and Sydney district or regional planning panels.

Audit

The Department will continue to carry out random audits to ensure the monitoring and reporting measures are complied with. The Department and the NSW Independent Commission Against Corruption will continue to review and refine the audit strategy.

Should ongoing non-compliance be identified with one or more consent authorities, the Secretary will consider revoking the notice allowing concurrence to be assumed, either generally for a consent authority or for a specific type of development.

Further information

A Guide on Varying Development Standards 2011 is available to assist applicants and councils on the procedures for managing SEPP 1 and clause 4.6 applications to vary standards.

Links to SEPP 1 and the Standard Instrument can be found on the NSW Legislation website at: www.legislation.nsw.gov.au

For further information please contact the Department of Planning and Environment's information centre on 1300 305 695.

Department of Planning and Environment circulars are available at:

www.planning.nsw.gov.au/circulars

Authorised by:

Carolyn McNally
Secretary

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Assumed concurrence notice

I, Carolyn McNally, Secretary of the Department of Planning and Environment, give the following notice to all consent authorities under clause 64 of the *Environmental Planning and Assessment Regulation 2000*.

Notice

All consent authorities may assume my concurrence, subject to the conditions set out in the table below, where it is required under:

- clause 4.6 of a local environmental plan that adopts the *Standard Instrument (Local Environmental Plans) Order 2006* or any other provision of an environmental planning instrument to the same effect, or
- *State Environmental Planning Policy No 1 – Development Standards*.

No.	Conditions
1	<p>Concurrence may not be assumed for a development that contravenes a development standard relating to the minimum lot size required for the erection of a dwelling on land in one of the following land use zones, if the variation is greater than 10% of the required minimum lot size:</p> <ul style="list-style-type: none">– Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition– Zone R5 Large Lot Residential– Zone E2 Environmental Conservation, Zone E3 Environmental Management, Zone E4 Environmental Living– a land use zone that is equivalent to one of the above land use zones <p>This condition does not apply to State significant development or development for which a Minister is the consent authority</p>
2	<p>Concurrence may not be assumed for the following development, if the function of determining the development application is exercised by a delegate of the consent authority:</p> <ul style="list-style-type: none">– development that contravenes a numerical development standard by more than 10%– development that contravenes a non-numerical development standard <p>Note. Local planning panels constituted under the <i>Environmental Planning and Assessment Act 1979</i> exercise consent authority functions on behalf a council and are not delegates of the council</p> <p>This condition does not apply to State significant development, regionally significant development or development for which a Minister is the consent authority</p>

This notice takes effect on the day that it is published on the Department of Planning's website and applies to development applications made (but not determined) before it takes effect.

The previous notice to assume my concurrence contained in planning system circular PS 17-006 *Variations to development standards*, issued 15 December 2017 is revoked by this notice. However, any variation to a previous notice continues to have effect as if it were a variation to this notice.

Dated: 21 February 2018



Carolyn McNally
Secretary, Department of Planning and Environment