

Variation Request for Condition A8(2) of Concept Approval MP 07_0166

Stage 1 & 2 Central Church Precinct, Wahroonga Estate Residential Development

Submitted to Ku-ring-gai Council

On behalf of Capital Corporation Wahroonga



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

Contact	Michael Oliver Director	MOliver@ethosurban.com (02) 9956 6962
----------------	----------------------------	--

This document has been prepared by:

This document has been reviewed by:

Justin Tse	19/05/2023	Claire Burdett	19/05/2023
Version No.	Date of issue	Prepared By	Approved by
1.0 (DRAFT)	04/11/2022	JT	MO
2.0 (FINAL)	07/11/2022	JT	MO
3.0 (RFI Response May 2023)	19/05/2023	JT	CB

Reproduction of this document or any part thereof is not permitted without written permission of Ethos Urban Pty Ltd. Ethos Urban operates under a Quality Management System. This report has been prepared and reviewed in accordance with that system. If the report is not signed, it is a preliminary draft.



Ethos Urban Pty Ltd | ABN 13 615 087 931 | 173 Sussex Street Sydney NSW 2000 (Gadigal Land) | +61 2 9956 6962 | ethosurban.com

Contents

1.0	Introduction.....	4
2.0	Compliance with the building envelope approved under Condition A8(1) is unreasonable or unnecessary in the circumstances of the case.....	7
2.1	The underlying objectives or purposes of condition A8.....	7
2.2	The objectives of the condition A8 are achieved notwithstanding non-compliance with the standard.....	8
3.0	Environmental planning grounds to justify contravening the building envelope approved under Condition A8(1)	8
3.1	Nature of the private open space area and building balustrade	8
4.0	In the public interest because it is consistent with the objectives of the zone and building height condition	9
4.1	Consistency with objectives of the building height condition	9
4.2	Consistency with objectives of the zone	9
5.0	Conclusion.....	10

Table of Figures

Figure 1	Location of the proposed variation on Building C, Level 3 floor plan (outlined in red).....	5
Figure 2	Location of the proposed variation on Building C (outlined in red).....	5

1.0 Introduction

This variation request has been prepared by Ethos Urban on behalf of Capital Corporation Wahroonga Pty Ltd in support of a Section 4.56 application (S4.56) to modify development consent DA/0539/21 which relates to residential development at 161-163, 167, 169 and 185A Fox Valley Road, Wahroonga within the Central Church Precinct (Precinct B) of the Wahroonga Estate site.

Condition A8 Building Height of the Wahroonga Estate Concept Plan MP07_0166 (as modified) enables development consent to be granted even though the development contravenes the prescribed heights in the Concept Plan (as modified).

This variation request has been prepared in accordance with Control A8(2) relating to Building Height under the Concept Plan (as modified) and should be read in conjunction with the Section 4.56 modification statement prepared by Ethos Urban dated 4 November 2022 and Response to Request for Further Information dated 19 May 2023.

It is noted that a variation request accompanied DA/0539/21 for a variation of the building envelope. This variation sought design changes to Building C that resulted in increased floor to floor heights, which in turn increased the height of the building where the variation occurs.

This variation request also relates to the Building C building envelope, and demonstrates that compliance with the building height condition is unreasonable and unnecessary in the circumstances of the case; that there are sufficient environmental planning grounds to justify contravention of the standard, and that the proposed development will be in the public interest because it is consistent with objectives for development within the zone.

This variation request demonstrates that, notwithstanding the non-compliance with the height condition, the proposed development:

- Does not increase the maximum approved height of the building above the highest point of the approved building envelope, nor does it include any habitable floorspace beyond the approved building envelope, thus ensuring that the proposed built form is compatible with its surrounds;
- Will deliver significantly improved private amenity space to Unit C310. The variation would allow for the provision of a large 100m² private open space area and the installation of a lightweight safety balustrade and as such the proposed variation is minor in nature. The variation will not contribute to any perceived increase in building height or mass and will have negligible impacts in relation to building bulk and scale, overshadowing and visual impact;
- Is consistent with the objectives of the building height condition and the objectives of the R4 High Density Residential zone and is in the public interest.

Therefore, the Modification Application may be approved with the variation as proposed in accordance with the flexibility allowed under Condition A8(2) of the Concept Plan (as modified).

1.1 Details of variation

The proposed variation to the approved building envelope relates to:

- The balustrade of Unit C310; and
- The floor level of the Private Open Space (POS) of Unit C310.

The proposed top most point of the balustrade of Unit C310 protrudes above the maximum building height prescribed by Condition A8 of the Concept Plan (as modified) by 1.35m. The floor level of the POS area also exceeds the envelope height by 0.3m.

The Concept Approval (as modified) has a building envelope height of RL 172.5 in this location.

The proposed variation arises from a 50mm increase to the building floor slab of the ground floor and Levels 1, 2 and 3. This is due to changes in the 2019 BCA which referenced the revised AS3600 Concrete Structures Code (2018) and necessitated an additional 50mm thickness in concrete slabs.

The variation is isolated to a single location which comprises the private open space to Unit 310 in Building C. For clarity, no habitable built form is located over the height plane.

It is noted that the original approved variation request also sought a variation to the height condition in this location.

The location of this variation is identified in both plan and elevation form in **Figures 1-3** below.

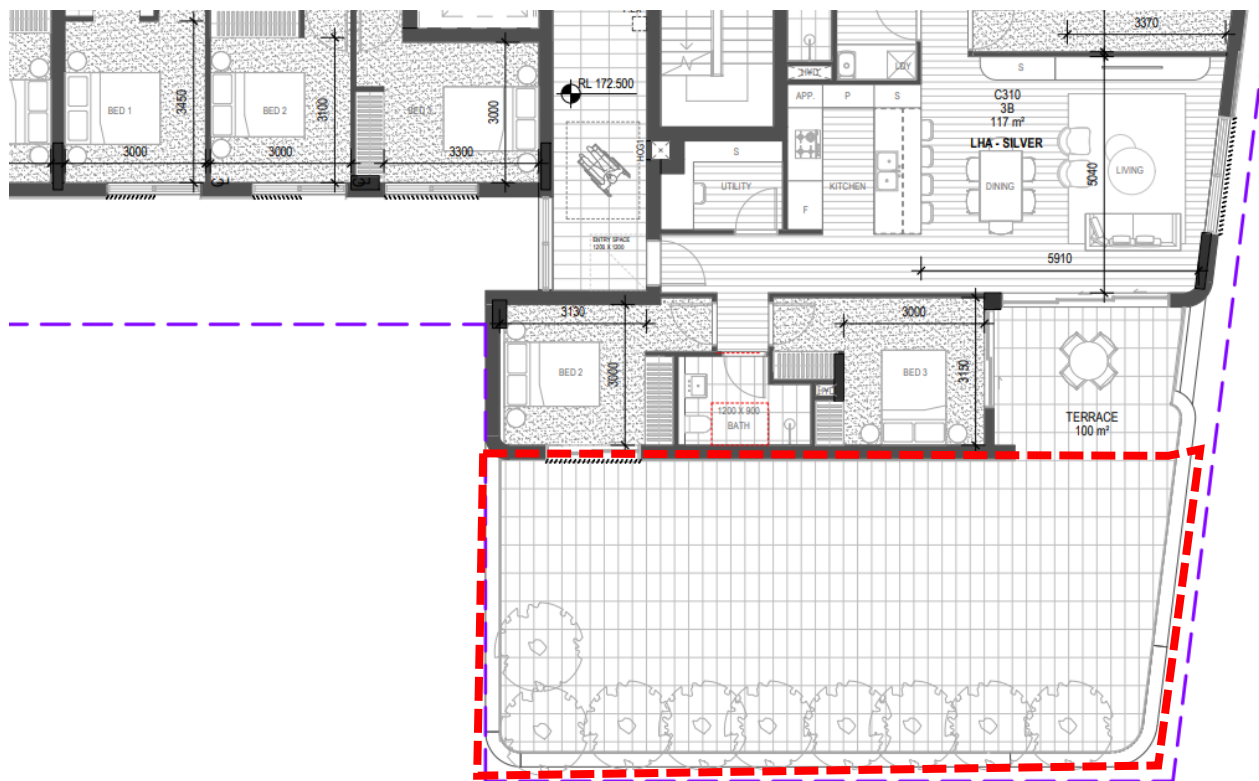


Figure 1 Location of the proposed variation on Building C, Level 3 floor plan (outlined in red)

Source: Group GSA

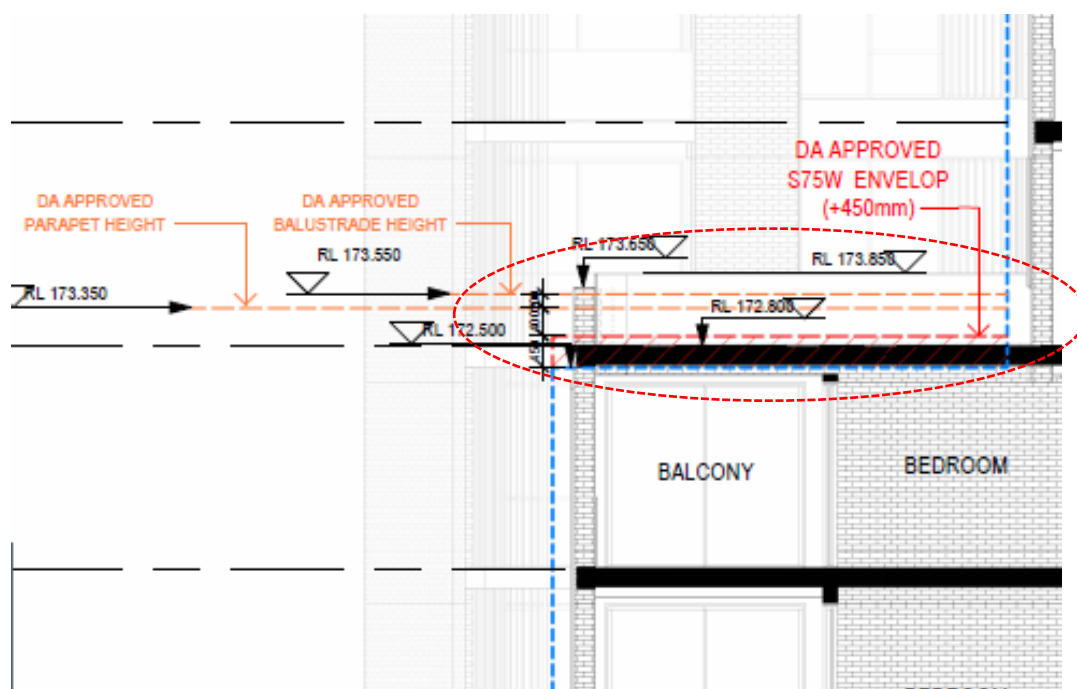


Figure 2 Location of the proposed variation on Building C (outlined in red)

Source: Group GSA

1.2 Control to be Varied

This variation request seeks to justify a variation to Condition A8 of the Concept Plan (as modified) which requires that *“Precinct B: Central Church residential flat buildings shall be restricted to the maximum RLs as shown on Drawing A007 ‘Section 75W – Urban Form Control Diagram – Roof Plan Issue G dated 24.07.2020”*.

The maximum RLs vary across the development site and are shown in blue outline in **Figure 2** above.

1.3 Justification for Contravention of the building envelope approved under Condition A8(1)

Condition A8 Building Height of the Concept Plan (as modified) provides that:

A8 Building Height

- (c) *Buildings shall generally comply with the Ku-ring-gai Planning Scheme Ordinance Wahroonga Estate Height of Buildings Map, except as follows:*
- (j) *Precinct B: Central Church residential flat buildings shall be restricted to the maximum RLs as shown on Drawing A007 ‘Section 75W – Urban Form Control Diagram – Roof Plan Issue G dated 24.07.2020 and the top levels shown in green on the plans are not to include any residential floor space.*

Further, Clause (2) provides that:

- (2) *Notwithstanding A8(1) above, development consent may be granted for development that exceeds the maximum building height stipulated in A8(1) if the consent authority has considered and is satisfied with a written request from the applicant that seeks to justify the contravention of the maximum building height by demonstrating:*
- (a) *that compliance with the maximum building height is unreasonable or unnecessary in the circumstances of the case;*
- (b) *that there are sufficient environmental planning grounds to justify exceeding the maximum building height;*
and
- I 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.*

It is noted that the requirement under Section 3B(2)(d) of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (the Transitional Regulation) is that a development application made in respect of a site must only be “generally consistent with the terms of the approval of the concept plan” and is not required to be satisfied that the development is strictly compliant with every aspect of every term. Accordingly, a variation from the requirements of Condition A8(1) should not be treated with the same weight that the variation from a development standard contained in an environmental planning instrument would be. This is particularly the case where the variation is minute in scale in the context of a concept approval that deals with a master plan developed at a much broader scale ahead of detailed building design.

It is noted that the wording of Condition A8(2) is similar to the wording of Clause 4.6 of the Standard Instrument Local Environmental Plan. Whilst Condition A8(1) is not a development standard and is not a statutory precondition to the granting of consent, assistance on the approach to justifying a contravention to a control expressed in similar terms has been taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*); and
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).

To inform the below discussion, the relevant matters contained in Condition A8 Building Height of the Concept Plan (as modified) are each addressed below, including with regard to these decisions. We note that this does not strictly constitute a formal Clause 4.6 variation request, however the general principles of Clause 4.6 have been adopted to guide this variation request in addressing the requirements of Condition A8(2).

2.0 Compliance with the building envelope approved under Condition A8(1) is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class. It is also noted that Condition A8(1) is not a development standard, but it is noted that the wording of Condition A(2) is similar to the traditional wording used in consideration of a variation to a development standard.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in A8(2) of the Concept Plan (as modified) is similar to the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- The development standard has been virtually abandoned or destroyed by the Coun’l’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
- 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**).

The first method is of particular assistance in this matter, in establishing that compliance with the building envelope approved under Condition A8(1) is unreasonable or unnecessary.

2.1 The underlying objectives or purposes of condition A8

As there are no objectives of the A8(1) building height condition in the Concept Plan (as modified), the objectives are to be inferred. Reference has been taken from the Preferred Project Report dated January 2010 which informed the original Concept Plan for the Wahroonga Estate.

The inferred objectives of the building height condition in Clause A8 of the Concept Plan (as modified) are:

- Built form is to respond to the height of existing buildings on the site and surrounding areas; and
- Built form should not exceed the height and mass of the existing hospital building.

2.2 The objectives of the condition A8 are achieved notwithstanding non-compliance with the standard

Objective (a): to respond to the height of existing buildings on the site and surrounding areas,

The proposed variation is minor, and results in a single balustrade of 26.8m in length exceeding the approved building envelope height by 1.35m. The proposed variation results from minor 50mm building slab increases in floors below as a result of amendments to the BCA and is isolated to a single instance involving the private open space and balustrading to Unit 310 in Building C. As such, no habitable built form is located over the height plane.

The roof of the building presented a significant opportunity to provide a large POS area to one Level 3 unit and the balustrade is proposed to be a lightweight, and necessary safety structure associated with the use of the private open space area. The building steps down to the south of the site as envisioned by the approved building envelopes and appropriately transitions between the residential apartments in Central Church Precinct and the Wahroonga Adventist School to the south.

The proposed variation will continue to result in the building appearing as part of the broader Wahroonga Estate and will respond to the height of the existing buildings on the site, particularly the neighbouring apartment buildings in the Central Church Precinct. It is not expected that the balustrade would be visible from Fox Valley Road or from nearby properties.

The proposed variation to the approved height envelope is minor in nature and will have negligible impacts in relation to building bulk and scale, overshadowing and visual impact.

It is noted that the original approved variation request also sought a variation to the height condition which was also deemed to have negligible impacts and appropriately responds to the height of existing buildings in the wider Wahroonga Estate.

Objective (b): Built form should not exceed the height and mass of the existing hospital building.

The proposed variation will not result in Building C exceeding the height and mass of the existing hospital building. The variation is located on the third storey of Building C which is six storeys below the hospital's existing roof line and does not result in an increase to the maximum approved roof height for the proposed building. Further, the proposed variation relates only to a balustrade to one private open space area. It has been designed as a glazed, lightweight structure that is a necessary safety device. It will not materially contribute to any perceived increase in building mass when viewed from its surrounds.

The original variation request also related to the same portion of the site for a reduced variation to the height condition and did not contribute to any perceptible increase in building mass.

3.0 Environmental planning grounds to justify contravening the building envelope approved under Condition A8(1)

3.1 Nature of the private open space area and building balustrade

The approved building envelope allowed for the rooftop private open space terrace located to the south eastern portion of Building C (**Figure 1**). However, subsequent changes in the BCA resulted in minor 50mm increases to building slabs, a resultant increase in floor to floor heights and the envelopes did not account for the installation of balustrades as a safety device. These changes were necessitated due to the preliminary nature of the concept design.

The proposed POS area will deliver significantly improved amenity to unit 310 of building C as it will provide 100m² private open space to a family sized, 3 bedroom unit. The benefits of this additional private amenity space to one unit outweigh any perceived impacts from the minor height exceedance. The proposed balustrade is lightweight in nature, seeks to promote the safety of residents utilising the terrace area and presents negligible impacts in relation to building height and bulk.

The same building element, albeit of a lower height, was the subject of the previous approved height variation request.

4.0 In the public interest because it is consistent with the objectives of the zone and building height condition

4.1 Consistency with objectives of the building height condition

The proposed development is consistent with the objectives of the building height condition to the Concept Plan (as modified), for the reasons discussed in **Section 0**.

4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the R4 High Density Residential Zone, as demonstrated below.

Objective (a): To provide for the housing needs of the community within a high density residential environment.

The proposed development provides for the housing needs of the community in a manner consistent with and contemplated by the Concept Plan (as modified). The minor height variation largely arises from internal building slab increases will allow for a substantial private open space balcony and a safety balustrade to be installed which will facilitate the delivery of an improved private amenity space to one unit. This will assist with meeting the housing needs of the community. It does not otherwise impact or alter the wider concept plan for the Wahroonga Estate.

Objective (b): To provide a variety of housing types within a high density residential environment.

The proposed development seeks to provide a mix of apartment dwelling sizes to accommodate the various needs of future residents. The single balustrade that is proposed to exceed the approved building envelope height will facilitate the delivery of improved private amenity space to one unit. The provision of the private rooftop amenity space to this unit will assist in the delivery of a variety of housing types within the high density residential environment.

Objective (c): To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposed height variation to a limited portion of the building envelopes will accommodate a safety balustrade. The development has been designed in a manner which does not preclude the ability of other land uses to operate and provide facilities and services to meet the day to day needs of residents. The SAN Hospital and its ancillary uses as well as other medical uses will continue to be able to function appropriately and operate in the broader Wahroonga Estate and as envisioned in the concept plan.

Objective (d): To provide for high density residential housing close to public transport, services and employment opportunities.

The proposed development provides high quality, high density residential housing close to public transport, services and employment. The minor height variation of will allow for a large POS area to one unit and a safety balustrade to be installed, which will facilitate the delivery of an improved private amenity space to one unit. It will therefore contribute to the delivery of high density housing as envisioned in the Wahroonga Estate Concept Plan.

Therefore, as the proposed development is consistent with the objectives of the height condition and the zone, the proposal is in the public interest.

5.0 Conclusion

The assessment above demonstrates that strict compliance with the building height condition contained in Condition A8(1) of the Concept Plan (as modified) is unreasonable and unnecessary in the circumstances of the 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 also allows for a better design and amenity outcomes in planning terms.

This variation request demonstrates that, notwithstanding the non-compliance with the building height condition, the proposed development:

- Does not increase the maximum approved height of the building above the highest point of the approved building envelope, nor does it include any habitable floorspace beyond the approved building envelope, thus ensuring that the proposed built form is compatible with its surrounds;
- Will deliver significantly improved private amenity space to Unit C310. The variation would allow for the provision of a large 100m² private open space area and the installation of a lightweight safety balustrade and as such the proposed variation is minor in nature. The variation will not contribute to any perceived increase in building height or mass and will have negligible impacts in relation to building bulk and scale, overshadowing and visual impact;
- Is consistent with the objectives of the building height condition and the objectives of the R4 High Density Residential zone and is in the public interest.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under Clause A8(2) of the Concept Plan Approval (as modified).