

7-11 Pockley Avenue, Roseville

Clause 4.6 – Building Height Development Standard

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1.0	CLAUSE 4.6 REQUEST – BUILDING HEIGHT	4
1.1	Introduction	4
1.2	Clause 4.6 Exceptions to development standards	4
1.3	Definition of Site Area for the Purpose of Clause 4.3(2A)	Error! Bookmark not defined.
1.4	Development Standard to be varied	4
1.5	Extent of Variation to the Development Standard	5
1.6	Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?	5
1.7	Clause 4.6(3)(b) Are there sufficient environmental planning grounds to justify contravening the development standard?	8
1.8	Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)	11
1.9	Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives	11
1.10	Clause 4.6(5) Secretary Considerations	12
1.11	Conclusion	13

1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 155(2) of of State Environmental Planning Policy (Housing) 2021.

The request relates to a development application for the demolition of existing structures and construction of a new 7 storey residential flat development containing 42 apartments over 3 basement levels containing 84 car parking spaces at 7-11 Pockley Avenue, Roseville.

1.2 Clause 4.6 Exceptions to development standards

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

However, clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the building height development standard at Clause 155(2) of SEPP Housing be varied.

1.3 Development Standard to be varied

Clause 155(2) of SEPP Housing states:

- (1) This section identifies development standards for development under this chapter that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Note— See the Act, section 4.15(3), which does not prevent development consent being granted if a non-discretionary development standard is not complied with.

- (2) The maximum building height for a residential flat building in a Transport Oriented Development Area is 22m.

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

1.4 Extent of Variation to the Development Standard

Due to the steep fall of the site there are some very minor point encroachments as illustrated in the height plane diagram, with a maximum encroachment of 1.92 metres or 8.7% for the lift overrun as illustrated in Figure 1 below.

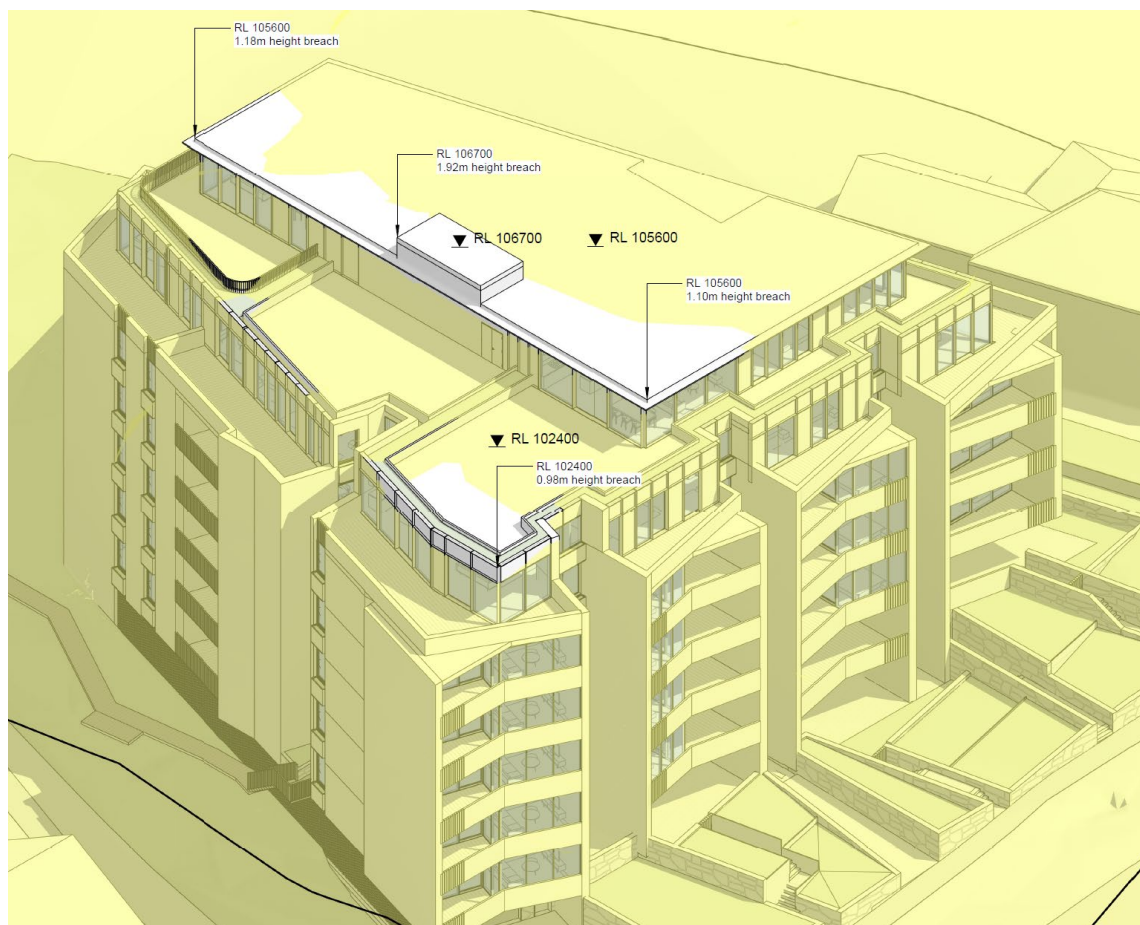


Figure 1:

Height Plane Diagram

The extent of the variation is also shown in the elevation drawings, the section drawings and the building height diagram, from which figure 1 is extracted, prepared by Place Studio. These drawings form part of this request.

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

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

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at

[34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. It should be noted that this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The objectives of the standard are achieved notwithstanding non-compliance with the standard
(the first method *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

There are no stated objectives within Clause 155 of SEPP Housing. However, there are stated aims for Chapter 5 which are:

- (a) to increase housing density within 400m of existing and planned public transport,*
- (b) to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that—*
 - (i) are well designed, and*
 - (ii) are of appropriate bulk and scale, and*
 - (iii) provide amenity and liveability,*
- (c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.*

Due to the fall of the site, the eastern end of the building is below the height control, whilst leading edges of areas of the roof at the western end of the building are marginally above the height control. In addition, there is a height variation as a result of the lift overrun.

The total proposed floor space is well below the maximum achievable for the site.

The proposed variations to the height control support a balanced approach to the fall of the land and ensure that the development is able to maximise the delivery of housing supply on an ideal site within 400 metres of the Roseville train station.

Notwithstanding the minor variations to the height control, the proposed development is highly articulated, particularly well designed noting full compliance with all other DCP controls, and of an appropriate bulk and scale. The development provides a very high level of amenity with both natural cross ventilation and solar access performance well in excess of the minimum design guidance on the Apartment Design Guide.

Therefore, the proposed development achieves the aims of the 22 metre height control in Chapter 5 of SEPP Housing, notwithstanding the minor variations.

Key facts that support the above reasons why strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The proposed departure from the height control on the site occurs only as a result of the significant fall across the site with some minor protrusion of roof elements. The point encroachments are more than balanced by areas of the building which are well below the height control.
- The proposal presents as a 7 storey scale to the adjacent street as anticipated by the height control and therefore achieves an appropriate contextual fit which will be compatible with the emerging scale of development within the area.
- The proposed areas of non-compliance are particularly minor along the western edges of the building, with the greatest extent of non-compliance located centrally within the floorplate of the building, such that it is unlikely to be visible or perceptible from the ground floor around the proposed building.
- The proposed areas of height non-compliance do not result in any meaningful additional overshadowing to the adjacent properties to when compared to that which would result from a strictly compliant development.
- There are no adverse impacts in terms of privacy impacts to adjacent sites resulting from the proposed variation to the height development standard which would warrant strict compliance.
- The proposed variation allows for the most efficient and economic use of the land and a sensible response to the steep fall of the site to achieve practical floor layouts for the proposed apartments, and in particular it is noted that the proposed development has an FSR of only 1.78:1 against a maximum control of 2.5:1.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.
- The proposed variation to the height control is minor and will not result in a building which is inconsistent with the desired future character of development in the zone and locality generally.

the underlying objective or purpose of the development standard would be undermined, if compliance was required with the consequence that compliance is unreasonable (the third method *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

The underlying objective and purpose of the standard relates to aims to incentivise and facilitate the delivery of new housing within 400 metres of identified train stations. This objective would be thwarted by strict compliance because it would simply result in the loss of housing supply without any public benefit.

Strict compliance with the height control would not meaningfully reduce the impact of the development on the streetscape or neighbouring properties and would provide reduced amenity to occupants of the development. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the incentivised height control because it would encourage a less desirable outcome for the site.

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

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

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

The primary basis for the proposed variation to the building height control is as a result of responding to the particularly steep fall of the land, noting that there are many areas of the building which are generally equally below the height control as there are areas which exceed the height control as illustrated in Figure 2 below:



Figure 2:
South elevation

Due to the particular site circumstances and the design of the proposal, elimination of the components which breach the height control will not result in a better planning outcome (when compared to a strictly compliant development). As illustrated in Figure 2, the components which breach the height control to the greatest extent are located centrally within the building from the front and rear of the building. The point encroachments which occur along the western side of the top of the building are only up to a maximum of approximately 1.2 metre. Accordingly, the areas of protrusion are either so minor, or centrally located, such that the majority of the areas of breach will not be readily apparent from the public domain or the ground floor plane around the site.

The proposal still presents as a 7 storey scale to the adjacent street as anticipated by the incentivised height control and therefore achieves an appropriate contextual fit which will be compatible with the future desired character of the area, notwithstanding the height non-compliance.

The proposed areas of variation to the height control do not result in any meaningful adverse impact to adjacent properties. In particular, there are no additional privacy implications associated with the elements which breach the height control as they are predominantly areas of roof setback, from the edges of the building. In relation to overshadowing, detailed solar views and shadow diagrams have been prepared by Place Studio in support of the application to illustrate the additional shadow impact resulting from the proposed height variation. These illustrate that there is only a very minor increase in shadow associated with the height breaches. The additional shadow is of such a minor extent that it is not determinative in relation to the assessment of solar access performance of the adjacent sites.

The proposed variation to the height control allows for the most efficient and effective use of the land to achieve a sensible response to the steep fall of the land and a practical internal floor layout for the proposed development. Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will remain compatible with its context notwithstanding the minor areas of height breach.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any meaningful benefits to the owners or occupants of the surrounding properties or the general public in the particular circumstance of this site and this proposal, but would constrain the achievement of sensible internal planning for the proposal and potentially encourage:

- an increase in height in areas of the development which are well below the height control in an attempt to regain floor space elsewhere; and
- greater excavation on site.

For reasons already explained earlier in this request, that would be a suboptimal planning outcome. Avoiding that suboptimal planning outcome and achieving the proposed superior outcome constitutes sufficient environmental planning grounds to warrant the proposed variation to the current height control. The proposal will achieve a reasonable and balanced outcome with regard to the steep fall of the land, achieve a scale in terms of number of storeys as anticipated by the height control, and without meaningful impact to adjacent properties.

While this could complete the analysis, more can be said.

The relevant objects specified in section 1.3 of the EP&A Act are:

- 'a) to promote the social and economic welfare of the community and a better environment by the proper management, development... of the State's ... resources,
- b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment ...'
- c) to promote the orderly and economic use and development of land
- g) to promote good design and amenity of the built environment...

In relation to section 1.3(a) of the EP&A Act:

- The provision of additional housing (when compared with a compliant development) in a suitable location for such housing, without material adverse impact, better contributes to the social and economic welfare of the community.
- The proposed residential development, with its contravention, will deliver additional housing choice (when compared with a compliant development) that is in close proximity to a range of recreational opportunities, services and facilities and will maximise public transport patronage, cycling and walking.
- The diversity of the local community will be improved through the increased availability of housing (when compared with a compliant development). The proposal provides for a total of 42 residential apartments with a mix of 1 bedroom, 2 bedroom, 3 bedroom and 4 bedroom apartments. This level of provision would not be possible if there was a requirement to strictly comply with the height control.

In relation to section 1.3(b) of the EP&A Act:

- Every additional housing opportunity in an area that is well-served by public transport and that maximises cycling and walking opportunities is likely to correlate with a reduction, at a metropolitan scale, of car use. Reduction in car use means lower carbon and particulate emissions, reduced traffic congestion and more efficient energy usage. This is reflected in objective 33 of the Greater Sydney Region Plan 'A Metropolis of Three Cities':

A low-carbon city contributes to net-zero emissions by 2050 and mitigates climate change

On page 170 of the plan (under this objective) it says:

Developing the metropolis of three cities and aligning land use with transport planning will help slow emissions growth by planning the location of new homes near public transport, walkways and cycling paths.

In relation to section 1.3(c) of the EP&A Act:

- The proposed residential flat building form (as envisaged if the contravention is allowed) represents, in the context of the site, a more efficient use of the site area to deliver housing choice — when compared with a compliant development — in an approach consistent with the intent of the zone and relevant planning controls as they apply.
- In the absence of the contravention being allowed, more land would need to be consumed elsewhere, in less appropriate locations, to make up for the housing that is not able to be provided within overall site.

In relation to section 1.3(g) of the EP&A Act:

- The elements of the development that contravene the height standard relate to minor protrusions on the roof level. The majority of the building mass, however, sits below the maximum height limit. In this regard, the environmental impacts are negligible.
- There are no adverse environmental impacts associated with additional overshadowing, view loss or overlooking as a result of the proposed variation of the standard.
- The overall development is compatible with the bulk and scale of the area.

Having regard to the objectives of the EP&A Act and the specific planning aim/objectives outlined above (in relation to the ‘unreasonable or unnecessary’ requirement) there are sufficient environmental planning grounds to justify contravening the development standard, as follows:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any meaningful benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance would require a redesign with lost floor space redeployed to other areas of the building where height compliance could be achieved but with potential adverse impacts.
- The proposed variation allows for the most efficient and economic use of the land without adversely impacting on amenity of adjacent sites.

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

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

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

These matters are comprehensively addressed above in this written request for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

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

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Objective of the Development Standard

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

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R2 Low Density Residential zone pursuant to the Ku-ring-gai Local Environmental Plan 2015.

Whilst a residential flat building is ordinarily prohibited in the zone, Clause 154 of SEPP Housing applies to the site and states that development for the purposes of residential flat buildings is permitted with development consent on land in a ‘relevant residential zone’ in a Transport Oriented Development Area.

The objectives of the R2 High Density Residential zone are:

- To provide for the housing needs of the community within a low 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 housing that is compatible with the existing environmental and built character of Ku-ring-gai.

Whilst the proposal provides housing in a high density form of development, this is consistent with the permissible form of development provided by SEPP Housing. Notwithstanding, the proposal has been sensitively designed in relation to the environmental attributes of the site, and also provides a built form which reflects the fine grain character of existing development in the street, with vertical expression which reflects the traditional character of the street.

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the building height development standard, 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. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.9 Clause 4.6(5) Secretary Considerations

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation if the matter is determined by a panel or the Court (by way of section 34 agreement or hearing).

In any event, the matters for consideration under Clause 4.6(5) are addressed below:

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

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

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

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

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

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. Accordingly, there is no material public benefit in maintaining the standard in relation to the site specifically as the built form outcomes and development proposed achieves an acceptable contextual relationship with the area. There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Conclusion

Strict compliance with the height of buildings development standard contained within clause 55 of SEPP Housing has been found to be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the proposed variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.