

Attachment 1

Clause 4.6 variation request – Height of buildings

Residential flat building development

Lot 13, DP 4215, 24 Russell Avenue, Lindfield

Lot 14, DP 4215, 26 Russell Avenue, Lindfield

Applicant: CE 7Hills Investment Pty Limited

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 State Environmental Plan Policy (Housing) 2021 (SEPP Housing)

2.1 Chapter 2, Part 2, Division 1, clause 16(3) - Affordable housing requirements for additional floor space ratio

Pursuant to clause 16(3) of SEPP Housing, if the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

I confirm that this application is made pursuant to Chapter 5 of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). Further, the application proposes the provision of 8 affordable housing apartments, representing 15% of total GFA, in accordance with the affordable housing height and FSR incentive provisions contained within Chapter 2, Part 2, Division 1 Infill affordable housing of the Housing SEPP.

In this regard, we note that clause 155 of the Housing SEPP prescribes a maximum building height for development across the land of 22 metres. Applying the 30% building height incentive results in a maximum building height for development across land of 28.6 metres.

It has been determined that lift overrun and elements of roof top plant and adjacent screening breach the 28.6 metre Chapter 2 Housing SEPP building height incentive standard by a maximum of 1.47 metres or 5.1%. The breaching elements are depicted in the plan extract below.

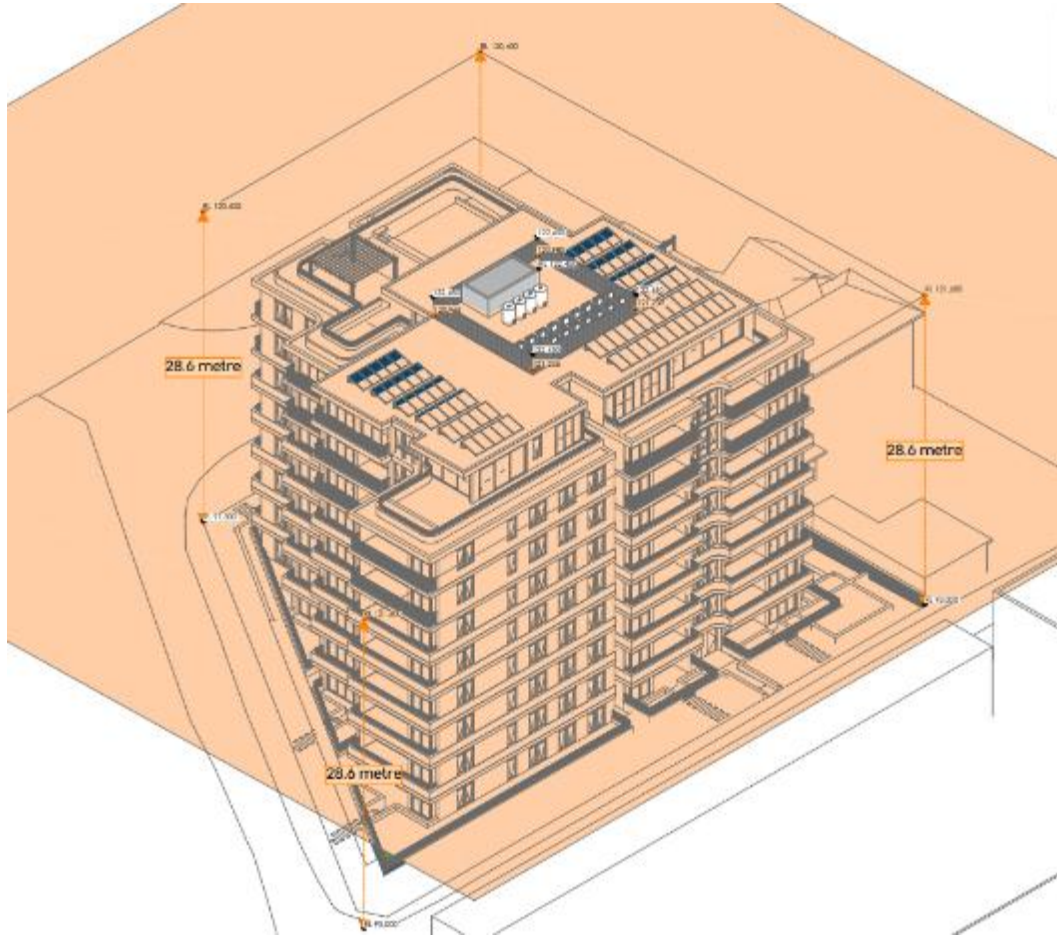


Figure 1 – Plan extract of 28.6 metre building height blanket diagram depicting minor non-compliant projecting elements.

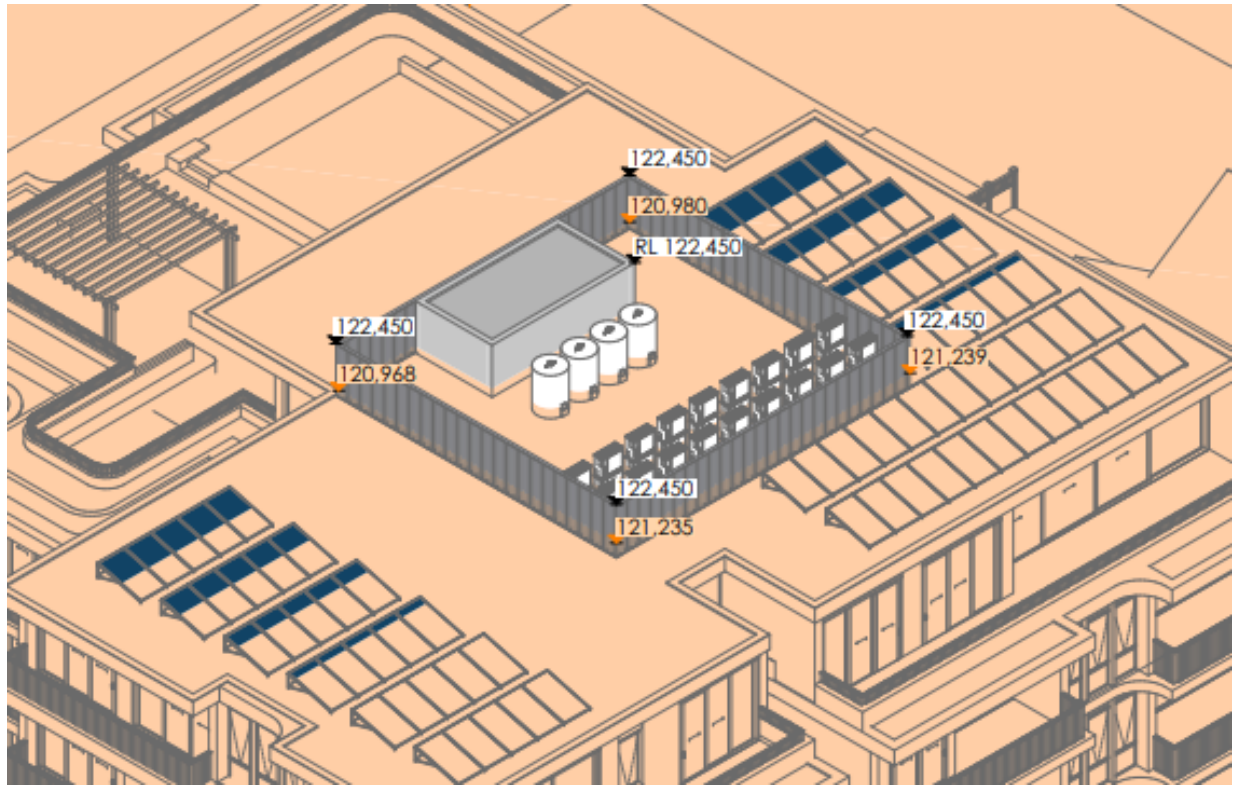


Figure 2 – Plan extract of 28.6 metre building height blanket diagram depicting minor non-compliant projecting elements.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of KLEP provides:

- (1) *The objectives of this clause are:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of KLEP provides:

Development 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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 16(3) of SEPP Housing maximum building height development standard.

Clause 4.6(3) of KLEP provides:

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 that:

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

The proposed development does not comply with the height of buildings provision at clause 16(3) of SEPP Housing which specifies a maximum building height across the land however strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that 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].*
18. *A second way is to 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].*
19. *A third way is to 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].*
20. *A fourth way is to 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].*
21. *A fifth way is to 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]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].*

The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 16(3) of SEPP Housing a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 16(3) of SEPP Housing a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 16(3) of SEPP Housing prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 16(3) of SEPP Housing is a development standard.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

First way - Consistency with objectives of the standard

There are no stated objectives associated with the clause 16(3) height of buildings standard although the objective 2 Chapter 2 Division 1 In-fill affordable housing of SEPP Housing is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The building height variations are quantitatively and qualitatively appropriately described as minor and do not compromise the development's ability to achieve the objective of the Chapter as outlined above. In fact, approval of the minor variations will facilitate a development of exceptional design quality which will appropriately increase housing density within 400m of the Lindfield Station in a building form which is well designed, of appropriate bulk and scale and which provides exceptional amenity and liveability whilst also providing affordable housing to meet the needs of essential workers and vulnerable members of the community.

Notwithstanding the building height breaching elements the objective of the Chapter is achieved.

I also consider it appropriate to assess the proposed building height against the objectives of the height of building standard contained at clause 4.3 KLEP to the extent that they do not derogate from Chapter 2 and Chapter 5 provisions of SEPP Housing.

An assessment as to the consistency of the proposal when assessed against the objectives of clause 4.3 KLEP are as follows:

- (a) *to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*

Comment: The building height breaching elements are quantitatively and qualitatively appropriately described as minor and do not compromise the development's ability to achieve the objective noting that the breaching elements are located centrally on the roof scape and accordingly will not be readily discernible as viewed from outside the site.

The subject property is located within 400m walking distance of the Lindfield Station making it ideally suited to increased residential densities.

The building height breaching elements do not contribute to overall building height to the extent that the development is inconsistent with the height provisions or will be perceived as inappropriate or jarring having regard to the desired future high-density residential context in which it is located.

Notwithstanding the building height breaching elements the proposal satisfies this objective.

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

Comment: The building height breaching elements do not contribute to the scale of the development to the extent that it is rendered inappropriate having regard to its spatial relationship to the adjoining lower density residential zoned land. The building height breaching elements will not give rise to residential amenity impacts in terms of views, shadowing or privacy.

Notwithstanding the building height breaching elements the proposal satisfies this objective.

(c) to enable development with a built form that is compatible with the size of the land to be developed.

Comment: The building height breaching elements do not contribute to overall building height to the extent that the development will be perceived as inappropriate or jarring having regard to the high-density residential TOD context in which it is located.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the overall height of the development, in particular the contribution made by the minor building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably be concluded that, notwithstanding the building height breaching element, the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the building height breaching element, the resultant development is compatible with the height and scale of existing nearby development and provides for a building form that is compatible with the size of the land to be developed.

Notwithstanding the building height breaching elements the proposal satisfies this objective.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see 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 Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Ground 1 - Minor nature of breach & lack of impact

The building height breaching elements are appropriately described both quantitatively and qualitatively as minor. I am satisfied that the building height breaching elements do not contribute to building height or massing to the extent that the overall building will be incompatible with the desired future character of the precinct as anticipated by the Chapter 2 Affordable Housing and Chapter 5 TOD provisions of SEPP Housing.

I am also satisfied that the building height breaching elements will not give rise to adverse streetscape, heritage conservation or residential amenity impacts. Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Ground 2 – Objective of Chapter 2 SEPP Housing

The building height variations are quantitatively and qualitatively appropriately described as minor and do not compromise the development's ability to achieve the objective of Chapter 2 of SEPP Housing as previously outlined. In fact, approval of the minor variations will facilitate a development of exceptional design quality which will appropriately increase housing density within 400m of the Lindfield Station in a building form which is well designed, of appropriate bulk and scale and which provides exceptional amenity and liveability whilst also providing affordable housing to meet the needs of essential workers and vulnerable members of the community.

Ground 3 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of the minor building height breaching elements will promote the delivery of housing consistent with objective 1.3(d) of the Act.

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

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

24th April 2025