

61-75 Forest Road and 126 Durham Street, Hurstville

## Clause 4.6 – Height Development Standard

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**61-75 FOREST ROAD AND 126 DURHAM STREET,  
HURSTVILLE**

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## 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 4.3 of the Hurstville Local Environmental Plan 2012 (HLEP). The request relates to an application for the demolition of all existing structures and construction of a mixed use development containing 4,274 square metres of commercial floor space, a hotel with 42 suites and 76 keys, and 260 apartments, within 4 buildings ranging in height from 3 to 20 storeys above a 4 basement levels containing 476 car parking spaces, and stratum subdivision at 61-75 Forest Road and 126 Durham Street, Hurstville.

### 1.2 Clause 4.6 Exceptions to development standards

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

However, clause 4.6(3) states that development consent must not be grant 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 height of buildings development standard be varied.

### 1.3 Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows:
  - (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
  - (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas and public domain, including parks, streets and lanes.
  - (c) to minimise the adverse impact of development on heritage items,
  - (d) to nominate heights that will provide a transition in built form and land use intensity,
  - (e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,
  - (f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,

(g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Building height (or height of building) is defined in the dictionary of THLEP 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.

There are six height zones for the site with 12, 15, 21, 28, 40 and 65 metres across the site as shown in Figure 1 below.



Figure 1:

Extract from the HLEP Height of Buildings Map

#### 1.4 Extent of Variation to the Development Standard

The proposed development is generally as anticipated by the DCP controls for the site, noting that Building A is only half the anticipated height at 3 storeys to achieve a more sensitive interface with Roberts Lane to the north-east.

All buildings are compliant with the height control, with the exception of Building D, which has a parapet which has been designed as an architectural roof feature, with lift overrun and plant behind, which exceeds the 65 metre height control to the extent provided in the table below:

Building	Height Control	Max Height	Variation
D	65m	<ul style="list-style-type: none"> <li>Parapet: 67.4m</li> <li>Lift overrun</li> <li>Screen and plant: 66.6m</li> </ul>	<ul style="list-style-type: none"> <li>Parapet: 2.4m or 3.7%</li> <li>Lift overrun: 2.4m or 3.7%</li> <li>Screen and plant: 1.6m or 2.46%</li> </ul>

The encroachments are illustrated in Figure 2 below:

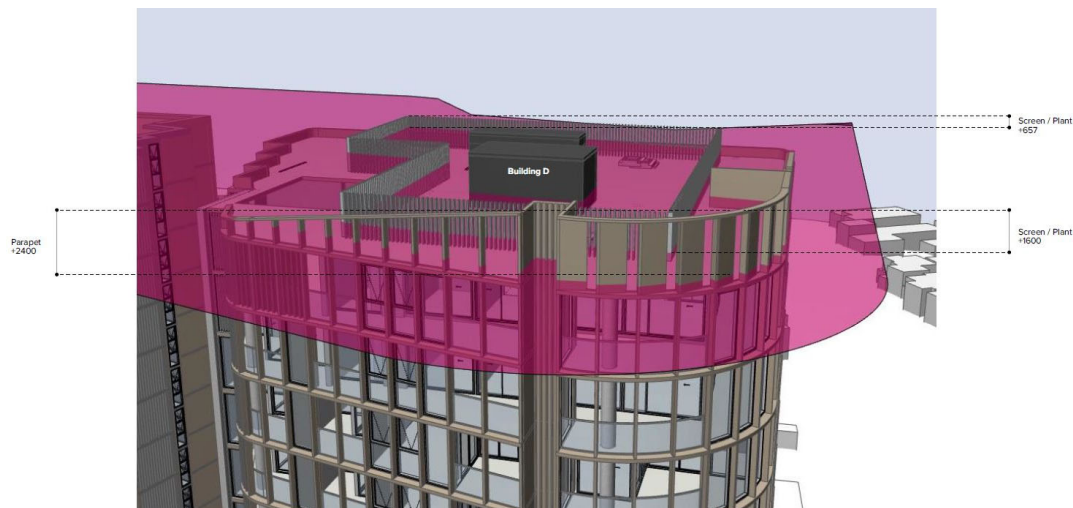


Figure 2:

Height plane drawing which illustrates the components which are above the height control for Building D

#### 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 test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice 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 five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

##### 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 4.3 of the HLEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

Careful consideration has been given to the location, size and design of the proposed development to ensure that a high quality outcome will be achieved which will sit comfortably within the forthcoming streetscape.

The proposed departure from the height control on the site occurs only as a result of a desire to accentuate the height of Building D to give it the prominence that the planning controls intended for this building.

Council has expressed a strong preference for Building D to be the clearly dominant building when compared to Building C. However, there is only a 1 storey difference between the two buildings required by the DCP, and due the fall along each site frontage, Building D is at the lowest point of the site which further diminishes the apparent difference in scale between Buildings C and D such that they appear similar in height. In order to create a prominence for Building D, the architectural expression has deliberately emphasised the verticality of the building, which is terminated by a parapet which has been designed as an architectural roof feature. Whilst there is a lift over run and plant area which also breach the height control for Building D, these are located behind the parapet and are not visible.

There is no habitable floor space above the height control. The proposal presents with the number of storeys as anticipated by the new planning controls for the site and has a scale as anticipated by the DCP and therefore achieves an appropriate contextual fit which is compatible with the future adjoining development and the future streetscape, notwithstanding the height non-compliance.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas and public domain, including parks, streets and lanes.

#### **Visual Impact and Disruption of Views**

The visual impact of the proposed height variation is considered to be acceptable as discussed above in relation to Objective (a) as the area of increased height is minor and the result of a desire to accentuate Building D. The proposal fits appropriately within the future desired character of the area.

#### **Privacy**

The proposed development provides ADG compliant separation from the adjacent properties (or sufficient privacy measures), such that the proposed variation in height does not result in any adverse privacy impacts to adjacent properties.

#### **Overshadowing**

The areas of additional height are minor within the context of the overall building height such that the variation does not result in any meaningful difference in shadow to the adjacent properties to the south beyond a compliant scheme.

(c) to minimise the adverse impact of development on heritage items,

The minor nature of the height variations and the location of these areas at a significant height above, and distance from, the nearby Hurstville Scout Hall is such that the areas of encroachment will not result in any adverse impact to the heritage item.

(d) to nominate heights that will provide a transition in built form and land use intensity,

The proposal is predominantly consistent with the varied heights across the site with the exception of some minor encroachments for Building D, such that the proposed development reflects the intended transition in heights across the site as intended by the LEP Building Heights which apply to the site.

(e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,

The Building Height controls for the site have been established to achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre. The proposed variations are minor and do not compromise this objective in that the proposed heights of the buildings still achieve an appropriate urban form as anticipated by the planning controls which apply to the site.

(f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,

The proposed height encroachments are minor such that they do not compromise the overall transition in scale across the site. In particular, it is noted that Building A which is located on the eastern part of the site and required to be much lower in order to achieve a sensitive transition in scale to the lower density residential context to the east is only half the anticipated height.

(g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

The minor extent of the areas of height encroachment and the central location of the lift overruns and plant are such that the proposed variations to the height control do not result in any meaningful or adverse environmental impacts on the use or enjoyment of adjoining properties and the public domain.

2. **the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

3. **the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

The underlying objectives and purpose of the standard relates to compatibility and impact and are relevant to the proposed development. The underlying objective and purpose would be satisfied by a compliant proposal, but is also demonstrated to be satisfied in this instance notwithstanding the proposed height variation.

4. **the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;**

The development standard has not been virtually abandoned.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**



Strict compliance with the maximum height of buildings development standard is considered to be unnecessary and unreasonable in the circumstance of this site as discussed below:

- The proposed variations arise as a result of a desire to ensure that Building D is clearly the dominant building when compared to Building C. However, there is only a 1 storey difference between the two buildings required by the DCP, and due the fall along each site frontage, Building D is at the lowest point of the site which further diminishes the apparent difference in scale between Buildings C and D such that they appear similar in height. In order to create a prominence for Building D, the architectural expression has deliberately emphasised the verticality of the building, which is terminated by the proposed parapet which has been designed as an architectural roof feature. Whilst there is a lift overrun and plant area which also breach the height control for Building D, these are located behind the architectural roof feature and are not visible.
- The proposed departure from the height control for the lift overrun and plant on the top of Building D is located behind the parapet and such that they are recessive which eliminates their visual impact to the surrounding streets.
- The locality is undergoing a transition in its character and other similar developments are occurring within the vicinity of the site. The proposed variation to the height control is minor and will not result in a building which is inconsistent with the emerging character of development in the zone and locality generally.
- The proposed areas of height non-compliance do not result in any significant or meaningful additional overshadowing to the surrounding properties due to the minor nature of the height exceedances and the central location of rooftop elements such as the lift overrun, plant and screening.
- 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.
- 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.
- Requiring strict compliance 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 and instead would impact on the achievement of an optimal built form outcome for the site as anticipated by the new planning controls.

#### 1.6 Clause 4.6(3)(b) Are there are 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 greatest extent of the height variation for Building D is associated with the parapet which has been introduced as an architectural roof feature for this building to address Council's desire for Building D to be the clearly dominant building when compared to Building C. There is only a 1 storey difference between the two buildings required by the DCP, and due the fall along each site frontage, Building D is at the lowest point of the site which further diminishes the apparent difference in scale between Buildings C and D such that they appear similar in height. In order to create a prominence for Building D, the architectural expression has deliberately emphasised the verticality of the building, which is terminated by the proposed parapet as an architectural roof parapet. Whilst there is a lift over run and plant area which also breach the height control for Building D, these are located behind the architectural roof feature and are not visible.

The environmental planning grounds that justify this component of the development are:

- The proposed development provides for a scale for each building as anticipated by the DCP and therefore the proposal provides for a compatible outcome with the forthcoming context of the site notwithstanding the height non-compliance.
- The height non-compliance is specifically the result of a desire to fulfill the intended urban design outcome as anticipated by the planning controls, which is to ensure that Building D is the dominant building within the street block.
- The proposed areas of height non-compliance do not result in any meaningful difference in shadow impact both to adjacent properties and also within the development itself when compared to a compliant height.
- The proposal also provides a more sensitive interface to Roberts Lane as Building A is only 3 storeys which is half the possible 6 storey height provided by the LEP and DCP.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

'to encourage:

i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

ii) the promotion and co-ordination of the orderly and economic use and development of land...'

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- 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.
- Strict compliance would prevent the achievement of an optimal urban design outcome and would diminish the visual prominence of Building D, contrary to the planning vision for the site.

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 with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 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 have 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 B4 Mixed Use zone.

The objectives of the B4 Mixed Use zone are:

- 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 allow for residential development in the Hurstville City Centre while maintaining active retail, business or other non-residential uses at street level.

The proposal provides a mixture of compatible uses comprising speciality retail, supermarket, food and drink premises, a hotel, and residential apartments and will contribute to the vibrancy of the area. The site is also particularly well located in relation to public transport being only 450 metres from Allawah train station and 750 metres from Hurstville train station and town centre and therefore provides a transit-oriented development that intensifies and diversifies activity around public transport infrastructure allowing for multiple activities and services, local employment and diverse housing options. The proposal is also in very close proximity to a range of recreational opportunities and services and facilities including Kemp Field which is directly opposite the site to the south.

The architecture of the development with buildings addressing the street frontages and the internal common landscaped open space, combined with a high quality public domain outcome will result in activated and vibrant places that are used both during the day and evening, increasing safety.

For the reasons given the proposal is considered to be consistent with the objectives of the B4 Mixed Use zone.

The proposal has been demonstrated to be consistent with both the objectives of the building height development standard as well as the objectives of the zone and therefore the consent authority can be satisfied that the proposal is in the public interest. Furthermore, the public interest is appropriately served by maximising the provision of housing, employment and hotel uses provided by the development, within the identified environmental capacity of the site.

#### 1.9 Clause 4.6(5) Secretary Considerations

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. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

#### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form as it would diminish the ability to give Building D prominence within the site and street block and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the context of the site and desire to deliver a positive urban design result for the site.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the minimum height of buildings development standard and will achieve a better urban design outcome in this instance in accordance with objective 1(b).

#### 1.11 Conclusion

Strict compliance with the minimum height of buildings development standard contained within clause 4.3 of Hurstville Local Environmental Plan 2012 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 variation. Finally, the proposed development and height variation is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the building height development standard to the extent proposed.