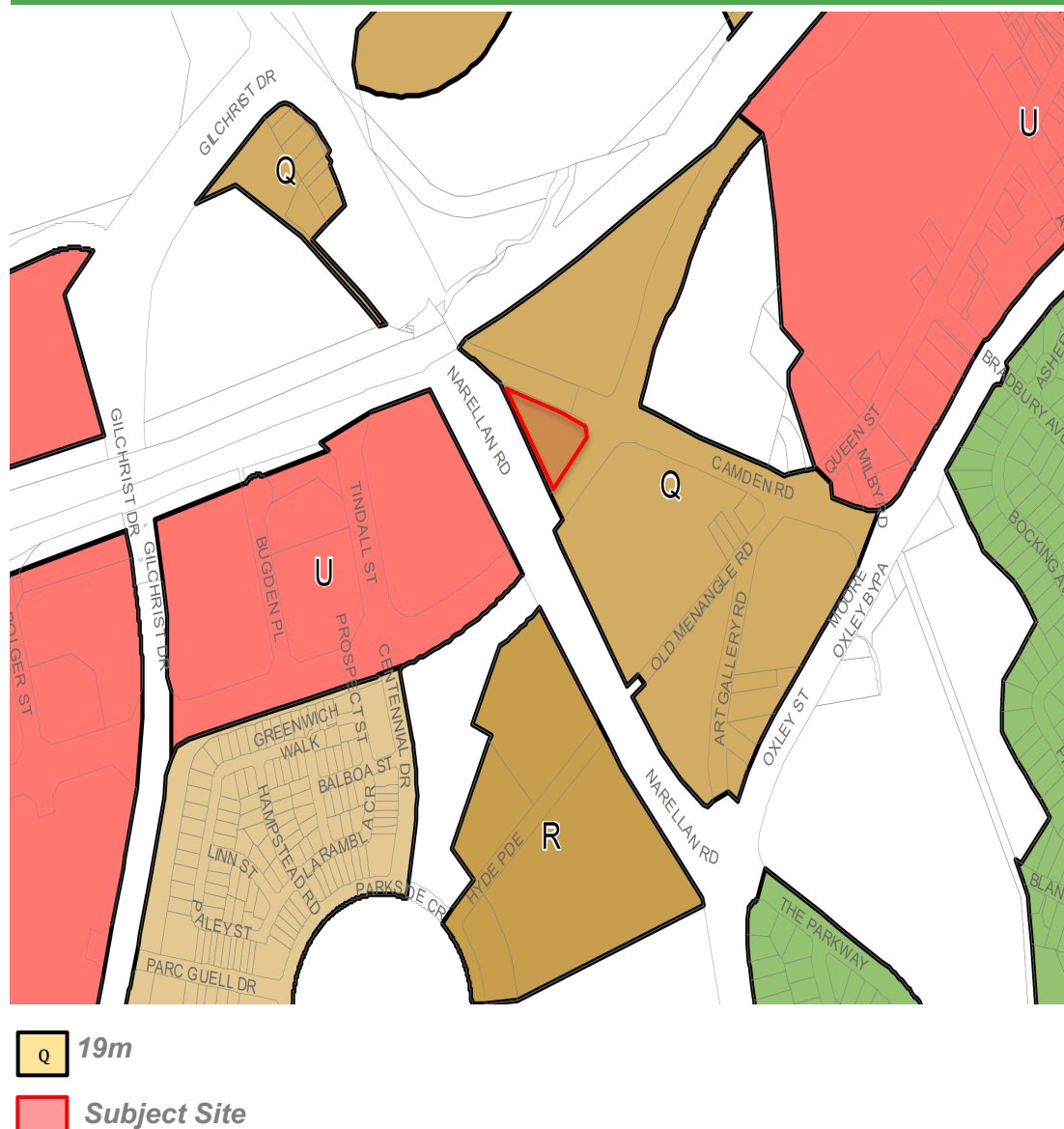


ANNEXURE 1: CLAUSE 4.6 VARIATION, BUILDING HEIGHT

The Height Departure

As outlined in Council's height of building map sheet below, the development site is subject to a maximum building height of 19m.

Figure 18: Height of Building Map Sheet HOB_008 Extract (Source: Campbelltown LEP 2015)





The proposal presents the following departures to the height controls:

- Encroachment to the prescribed height limit by 549mm comprising of a small percentage of the photovoltaic array, parapet and the building.

An elevation of the building form compared with the LEP building height limits is provided below with a 3D Height Plane provided on the following page.

Figure 19: Section – AA Extract

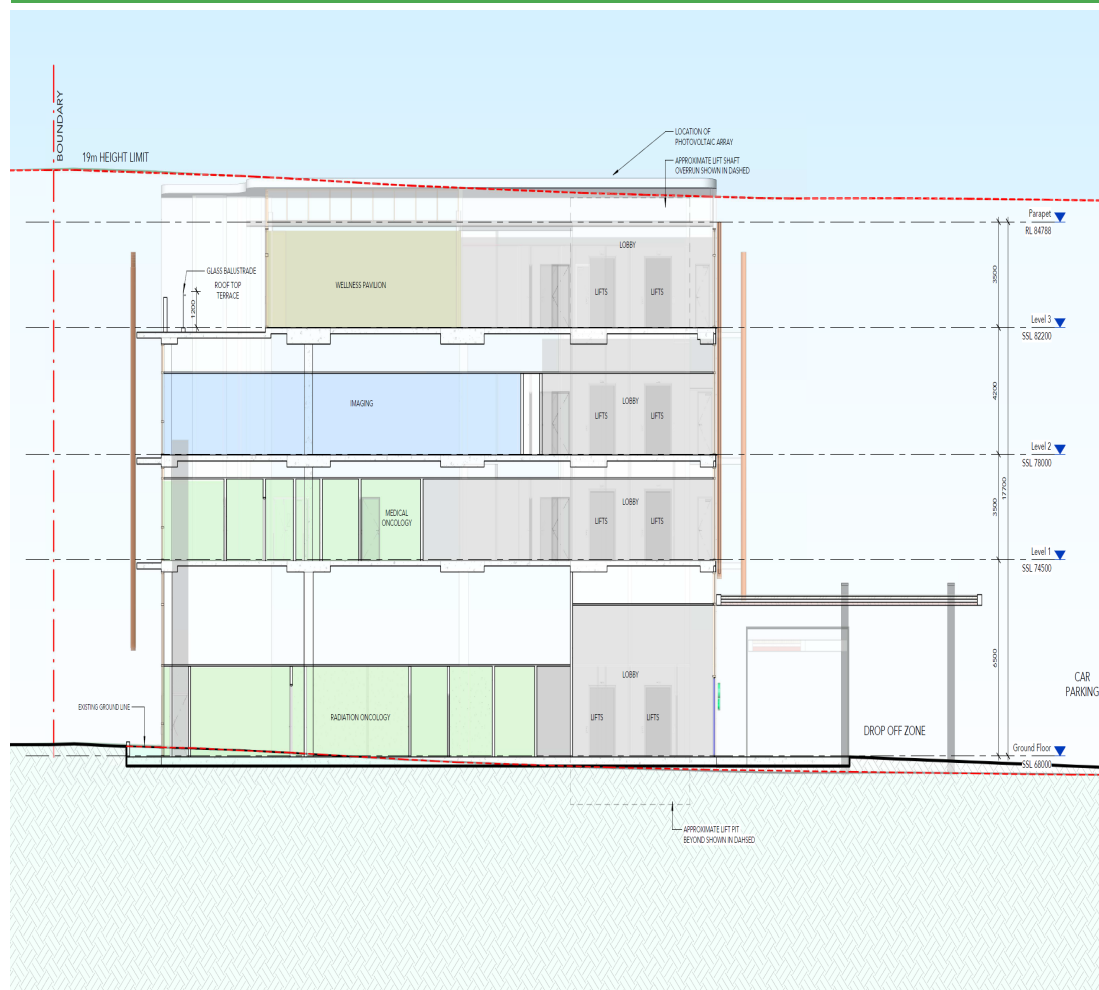
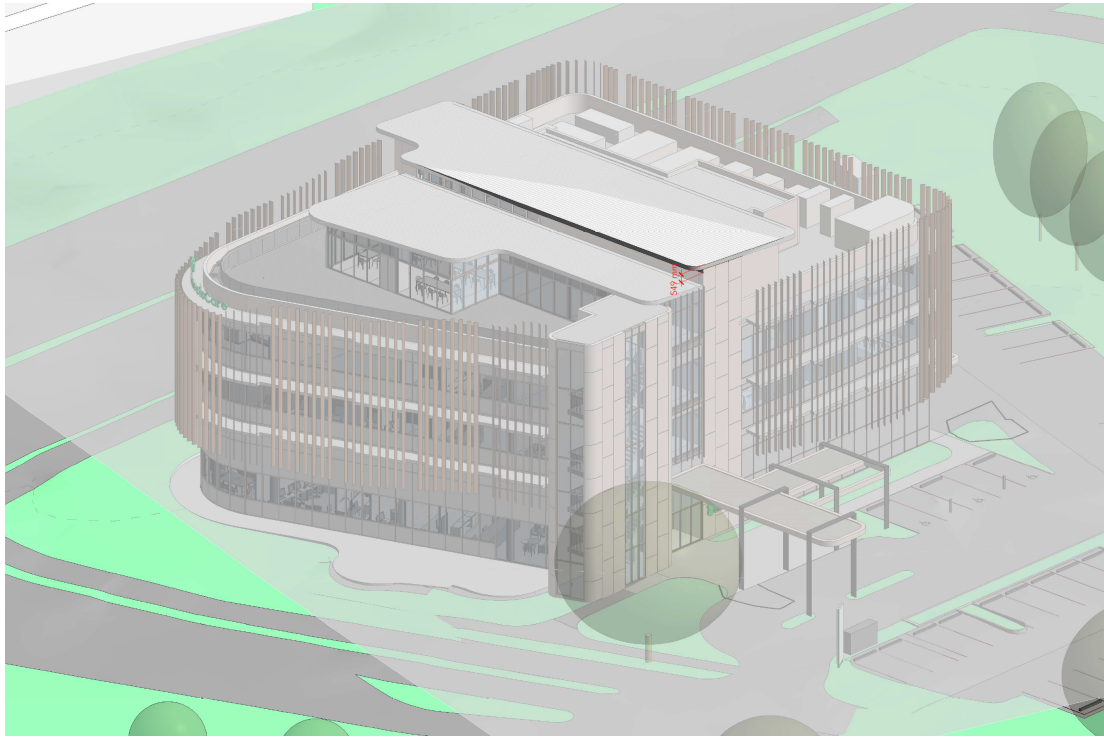




Figure 20: 3D Height Plane



Land and Environment Case Law

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a ‘better outcome’.

However recent developments in the law in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (‘*Al Maha*’) is also relevant.

In simple terms *Al Maha* requires that a Clause 4.6 will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself.

The key tests or requirements arising from recent judgements are that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a

requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.

- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation; and
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the building height standard;
- Demonstrating consistency with the zoning; and
- Satisfying the relevant provisions of Clause 4.6.

Consideration of Clause 4.6

Clause 4.6 of the Campbelltown Local Environmental Plan 2015 provides that development consent may be granted for development even though the development would contravene a development standard.

This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

(3) 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 circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must consider:

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

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

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Each of these provisions are addressed in turn.

Clause 4.6(3) & Underlying Objectives of the Standard

Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

The objectives of the building height development standard are stated as:

(1) The objectives of this clause are as follows:

(a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,

(b) to ensure development is consistent with the landform,

(c) to provide appropriate scales and intensities of development through height controls.

The current development proposal, despite the numerical non-compliance, remains consistent with the objectives, which are identified accordingly, based on the following:

- The overall height of the development presents as a compatible form of development within the western edges of an established town centre.
- The development site resides within its own island isolated from other land uses via road networks and considering the size of the subject land parcel, the additional amenity impact associated with the encroachment to the height control will have negligible impact to neighbouring properties in terms of shadow and privacy. Furthermore, considering it sits within a small pocket towards the eastern edges of the town and away from other land uses, the minor encroachment to the height control will not result in setting any height precedent.
- The encroachment of the building and parapet is negligible and will not be highly visible from the public domain.
- The proposal will not unreasonably impact on the significance of any heritage items.
- The proposal is predominantly consistent with the height control and is appropriate in scale and intensity.
- The encroachment is located at that part of the building that is not readily visible, being internal and central to the site, and does not result in a visual impact.
- The proposal will provide for a number of distinct public benefits:
 - Delivery of specialised cancer care to within Campbelltown;
 - Creation of jobs both during the construction stage and through the delivery of additional commercial floor space upon completion of the proposal; and
 - The traffic and parking assessment has found that the impact of the development on the surrounding traffic network is acceptable.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control. This also satisfies Wehbe Test 1.

Clause 4.6(3) & Environmental Planning Grounds

As outlined above the proposal remains consistent with the underlying objectives of the control. In addition to the above it is noted that the development, including the departure to the height control enables the following to occur which demonstrates environmental planning grounds to support the numerical non-compliance.

- Adopt an appropriate Urban Form: The proposal provides for a building height and building modulations, with the development to be viewed within an urban setting.

The demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Clause 4.6(4) – Public Interest and Objectives of the Zone

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control and the objectives of the B4 zone.

The objectives of the B4 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 encourage the timely renewal and revitalisation of centres that are undergoing growth or change.*
- *To create vibrant, active and safe communities and economically sustainable employment centres.*
- *To provide a focal point for commercial investment, employment opportunities centre-based living.*
- *To encourage the development of mixed-use buildings that accommodate a range of uses, including residential uses, and that have high residential amenity and active street frontages .*
- *To facilitate diverse and vibrant centres and neighbourhoods.*
- *To achieve an accessible, attractive and safe public domain.*
- *To provide healthy, attractive, vibrant and safe mixed use areas.*

The proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*).

The development is consistent with the zone objectives noting that:

- The proposal contributes to the mix of land uses within the zone, providing a positive health contribution to the mix of uses.
- The development will contribute to the building mix within the town centre with the deliver of a contemporary four storey medial health facility that exhibits design excellence
- The development will positively contribute to the renewal of the town centre by redeveloping a vacant site located within a prominent corner within the western edges of the town centre
- Maximises public transport patronage and encourages walking and cycling, being within close proximity to bus stops with services to Campbelltown and Liverpool;
- By providing employment opportunities within accessible locations; and
- By providing valuable medical services specialising in cancer care that serve the needs of the local and wider community.

Clause 4.6(5)

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 points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal. The proposed development meets the

underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

CONCLUSION

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The objection is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law.