

31 October 2022

General Manager
Penrith City Council
PO Box 60
Penrith NSW 2751

**REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD
PROPOSED HOTEL AT 28-32 SOMERSET STREET, KINGSWOOD.**

A request is made to vary the maximum building height development standard in relation to a Development Application (DA) for a hotel at 28-32 Somerset Street, Kingswood.

The maximum building height development standard to be varied is provided by clause 4.3(2) of the Penrith Local Environmental Plan 2010 (the PLEP 2010).

This request is made having regard to:

1. The provisions of Clause 4.6 of the *Penrith Local Environmental Plan (PLEP) 2010*; and
2. *Varying development standards: A Guide (August 2011)* prepared by the Department of Planning and Infrastructure.

The objectives of Clause 4.6 of the PLEP 2010 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 Guide “contains details of the information applicants are required to submit to the council to assist council assess development applications and associated applications to vary a standard.”

1. INTRODUCTION

The subject site is zoned B4 Mixed Use pursuant to *Penrith Local Environmental Plan (PLEP) 2010* and is located in the Penrith Health and Education Precinct as identified in the *Clause Application Map* of PLEP 2010. Hotel is a permissible land use in the B4 zone subject to Council consent.

The maximum building height shown for the subject site is provided by clause 4.3 of the PLEP 2010 and is shown as 18.0 metres on the *Height of Buildings Map* in the PLEP 2010.

The subject site lies within the Penrith Health and Education Precinct. Pursuant to clause 7.11 (3) of the PLEP 2010 consent may be granted to development on land that exceeds the maximum height shown for that land on the *Height of Buildings Map* by up to 20% (ie 21.6m) if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres. However, the proposed development has a floor to ceiling height on the ground floor of 3.5 metres and a floor to ceiling height on the first floor of 3.0 metres so the provision of an additional 20% building height under clause 7.11 is not available to this DA.

Accordingly, this clause 4.6 request seeks to vary the maximum building height development standard of 18 metres provided by clause 4.3(2) of the PLEP 2010.

As detailed in the Height Plane Diagram that forms part of the Architectural Plans lodged with the Development Application (DA) at its maximum height, the building is 23.854 metres high (RL 72.00), including the lift overrun. The non-compliance with the maximum building height standard triggers the requirement for a request for an exception to the development standard pursuant to clause 4.6 of the PLEP 2010. This development application seeks approval for the same building height) approved by Council in September 2021 under DA20/0767.

While the extra 20 per cent available under clause 7.11 is not available to this DA, it is still relevant to this clause 4.6 request because it assists in establishing the existing and desired future character of the area (ie the PLEP 2010 anticipates that buildings will be built to this height in the locality).

For comparison purposes:

1. The maximum building height applying to the subject site is 18m;
2. The desired future character building height achievable if clause 7.11 were available is 21.6m; and
3. The building height approved for the site pursuant to DA20/0767 is 23.854m.

The provision of a food and beverage facility on the roof top does not increase the number of hotel keys in the development but instead is a direct response to discussions with Nepean Blue Mountains Local Health District that are formalised in correspondence provided at Appendix 1 of the Statement of Environmental Effects that accompanies the DA. By letter dated 7 September 2020 the CEO of the Nepean Blue Mountains Local Health District wrote that:

"A high quality medi-hotel such as this with food and beverage and conference facilities is much needed in the area adjacent to Nepean Hospital and will make a valuable contribution to the community generally. The services and facilities proposed by Boston Global in this location will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff".

2. CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE ZONE

The proposed development is considered to be in the public interest because it is consistent with both the objectives of the building height standard in clause 4.3 of the PLEP 2010 and the objectives of the B4 zone.

Development Standard Objectives

The following provides comment on how the proposed development achieves consistency with the objectives of the building height standard.

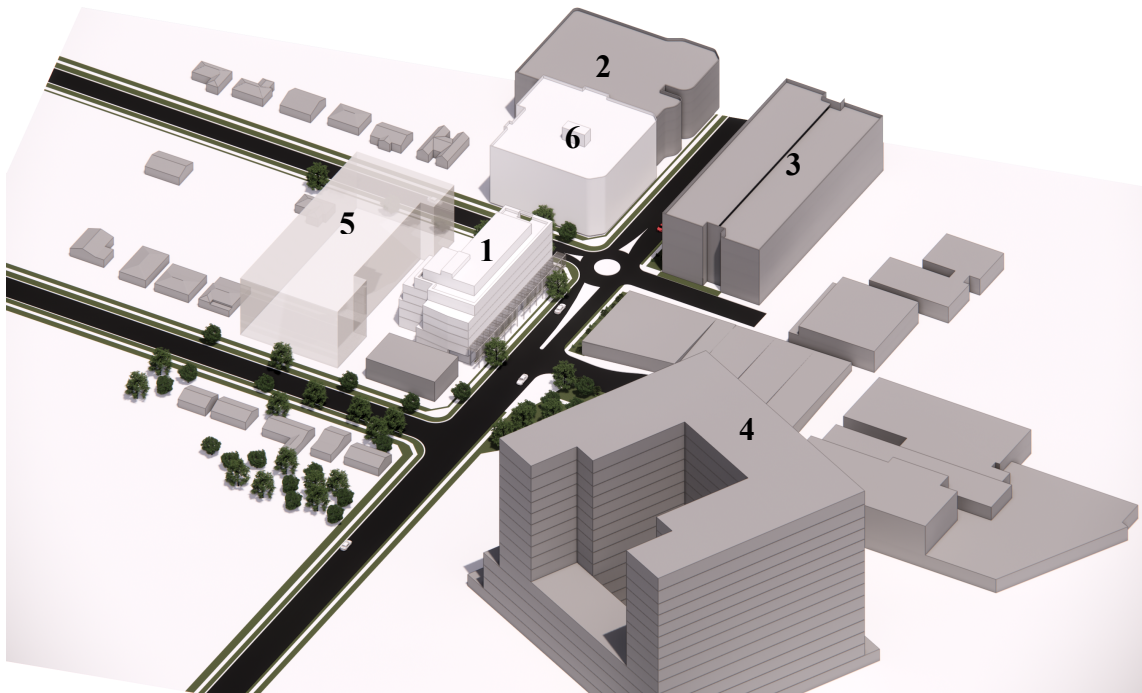
Objective #1

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

Comment

The height, bulk and scale of the desired future character of the locality is best described by the built form that comprises a significant part of the immediate visual catchment (i.e. context) of the subject site as described in the following table and diagram.

No.	Site	Status	Building Height (m)
1	Subject Site (28-32 Somerset Street)	Proposed development	23.854
2	Somerset Specialist Centre (29-33 Derby Street and 38 Somerset Street)	Completed	21.6
3	Nepean Hospital Car Park	Completed	22.3 (approx.)
4	Nepean Hospital Redevelopment	Under construction	67.8
5	Private Hospital (Australian Unity site)	Concept only	21.6
6	Private Hospital (34-36 Somerset Street)	DA approved	25.26
	48-56 Derby Street	Completed	25.35
	84-88 Parker Street	Under construction	23.9
	1-11 Barber Avenue	Under construction	20.9
	39-43 Orth Street	Under construction	21.6
	10-12 Hargrave Street	Under construction	21.6



Source: Rothelowman Architects

The proposed development is consistent with this objective because:

- The proposed building is consistent with the height, bulk and scale of the desired future character of the locality that comprises buildings up to 14 storeys in height.
- The strict terms of clause 4.3 of the PLEP 2010 do not define the desired future character (*Woollahra Municipal Council v SJD DB2 Pty Ltd* [2020] NSWLEC 115 at [53]).
- The desired future character of the locality establishes the building heights for buildings on land in the locality and not the other way around (cf *SJD DB2 Pty Ltd* (at [56])). This means that the building heights set out under clause 4.3 alone do not establish the desired future character.
- This necessarily means that the desired future character of the locality can be evaluated by reference to matters other than the strict provisions of clause 4.3 (cf *SJD DB2 Pty Ltd* (at [59])).
- In this case, the desired future character of the locality can be evaluated by reference to matters other than the building height established by the height development standard in clause 4.3 (cf *SJD DB2 Pty Ltd* (at [59])).
- The proposed building is seen to be consistent with the height, bulk and scale of the existing character of the locality as can be seen in the figure above. The proposed development is not out of character in terms of height, scale or bulk
- The desired future character cannot be said to be an 18-metre height limit. This is because the PLEP 2010 itself anticipates that a building of 21.6 metres in

height can be built on the site (provided that the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres — which does not apply to the proposed development). This also shapes what should be understood as being the desired future character (SJD DB2 Pty Ltd [at 53]). Additionally, the likely heights of future buildings in the vicinity (that are also the subject of clause 7.11) are not the heights set under clause 4.3, but the heights set under clause 7.11.

- The desired future character for a neighbourhood or area should be derived from not only the provisions of clause 4.3 of the PLEP 2010, but also to developments that may be carried out or anticipated under clause 7.11 of the PLEP 2010 (cf GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [63]-[64], [71]-[72], [77], [79], [82]-[83], [85], [87]-[88], [102]-[103]).
- The perceived size and scale of development is 6-storeys with the roof top amenity, that part of the building in excess of the building height, being set back from each boundary so that it is not clearly visible from the public domain and reduces the visual impact.
- The proposed building is compatible with the bulk and scale of nearby developments and provides a suitable transition in scale from the significantly higher built form in the Nepean Hospital to the medical mixed-use precinct to the east and the residential precinct further east.
- The non-compliance is not a result of excessive floor space with the maximum permissible floor space ratio for the subject site not being achieved.
- Council recently approved DA20/0767 on the subject site with similar proposed building height.
- There is at least one other nearby case at 48-56 Derby Street, Kingswood where the Council has departed from the maximum building height standard and approval was granted for an 8-storey residential flat building.

Objective # 2

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

Comment

The detailed assessment in the **Statement of Environmental Effects** and reports that accompany the DA for the subject site provide supporting information on how the development has been designed to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas. These documents form part of this clause 4.6 request.

The development, even with the proposed contravention, still minimises adverse impacts on the amenity of the locality. Minimising impacts does not mean no impacts or no variation in impacts (cf Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115 at [81]).

The development has been designed to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas.

The architectural plans accompanying the DA provide a very comprehensive analysis of the shadow impacts from the proposed development and a complying development scheme on the subject site. This assessment shows there is a minimal/insignificant shadow impact from a scheme that is exceeding the building height limit as proposed and there would not be any improved benefits from a scheme that was compliant with the building height.

The **Acoustic Report** accompanying the DA outlines management and building controls that will ensure acceptable management of noise impacts from dining and bar areas located on the rooftop. In particular recommendations are made (which are adopted by the development applicant as commitments) in relation to hours of operation, no background music, a 1.8m high continuous glazed/solid balustrade to be constructed around the entire perimeter of the outdoor dining/bar area and the number of people that can be reasonably accommodated in each space.

The roof top bar and dining area is also setback from the edge of the predominant built form below and there is landscape screening proposed to the outer edges of the outdoor rooftop areas that will ensure there are no overlooking or privacy issues.

Preliminary site and broader locality analysis indicates there are no potential views that can be disrupted by the development or by the addition of the roof top amenities.

Objective # 3

to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

Comment

As per the detailed site and broader locality analysis that accompanies the DA, there are no heritage items, conservation area and areas of scenic or visual importance identified that could be impacted by the proposed development.

Objective # 4

to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

Comment

The proposed hotel displays design excellence and is strategically located in an area that is best suited to provide a transition in built form and land use intensity from the development in the Nepean Hospital to the supporting development in the surrounding mixed use zone. The subject site is located on Somerset Street and directly opposite key entries into the Nepean Hospital precinct and the new 14-storey redevelopment site. In short, this site is ideally suited to accommodate additional building height i.e. along Somerset Street and directly opposite the Nepean Hospital.

As discussed previously, the desired future character of the locality establishes the building heights for buildings on land in the locality and not the other way round. The proposed development will complement the desired future character of the health and education precinct that includes a range of building heights up to 14 storeys and which anticipates buildings up to 21.6m in height (where the pre-condition under clause 7.11 relating to floor to ceiling heights is met).

Zone Objectives

The proposed development is consistent with the relevant B4 zone objectives. Objectives for the B4 zone are identified below and comment is provided on the proposal's consistency with each objective.

Objective #1

To provide a mixture of compatible land uses.

Comment

Penrith Council "encourages development that would support the operation of the hospital, such as medical offices, pharmacies, short-term accommodation, convenience stores and other forms of retail that will meet the needs of visitors and people using the medical services offered within the precinct". The proposed development will provide short-term accommodation, conference facilities and food and beverage facilities that support the operation of the Nepean Hospital.

The additional height and accommodation of a rooftop will improve the ability of the building to cater for a greater range of compatible land uses.

Objective #2

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.

Comment

The subject site is very well located in relation to public transport and the hospital so as to encourage use of public transport, walking and cycling. The Traffic Report that accompanies the DA provides further detail on the public transport options identified in the locality.

The proposed development integrates a number of land uses including hotel, food and drink premises and wellness centre that are in an accessible location and will maximise public transport patronage and encourage walking and cycling.

Objective #3

To minimise conflict between land uses within the zone and land uses within adjoining zones.

Comment

The proposed hotel land use is compatible with the desired future character and medically related land uses for the locality. Preliminary discussions indicate the development of a private hospital on the adjoining land to the rear and this will increase demand on the services of the hotel and in particular, the roof top amenities.

Objective #4

To create opportunities to improve public amenity.

Comment

The public amenity along Somerset Street in particular will be significantly improved with the development of a hotel that exhibits a high level of design excellence. The arbour treatment to the front building facade will create a unique ambience along the Somerset streetscape as highlighted in the image on the following page.

Public amenity will also be significantly boosted by the addition of a roof top food and beverage facility that is currently not being provided in the locality.

The additional rooftop area will:

- provide a valuable contribution to the community generally and will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff;
- not result in additional unacceptable impacts on both the natural and built environments, particularly from overshadowing, overlooking and noise;
- not result in detrimental social or economic impacts; and
- will improve the general amenity of development in the locality.

The additional rooftop area and subsequent public benefits can only arise if a contravention is allowed.



View of arbour treatment to front building facade

Objective #5

To provide a wide range of retail, business, office, residential, community and other suitable land uses.

Comment

The proposed hotel use will add to the wide range of land uses that are currently and proposed to be developed that support the operation of the hospital. This includes:

- Tourist and Visitor Accommodation (Hotel)
- Food and Drink Premises
- Shops

3. COMPLIANCE UNREASONABLE OR UNNECESSARY

The development achieves the standard's objectives despite the non-compliance with the 18-metre height development standard (based on the assessment set out earlier) and this is considered sufficient to establish that compliance with the building height standard is unreasonable or unnecessary in the circumstances of the case.

4. ENVIRONMENTAL PLANNING GROUNDS

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

Environmental planning benefits have been identified that arise as a consequence of the building height contravention, including adverse impacts that are avoided.

The environmental planning grounds are established, in part, by further reliance on some of the matters dealt with above. That is, the non-compliant development will provide a better built form closely reflecting the existing and desired future character for the area established by the PLEP 2010 as a whole (rather than just clause 4.3).

The non-compliant development better contributes (when compared with a compliant development) to the relevant zone objectives. As described previously, the provision of an extra building level provides for a roof top food and beverage facility that:

- will improve the ability of the building to cater for a greater range of compatible land uses (refer Zone Objective 1);
- creates opportunities to improve public amenity (refer Zone Objective 4); and
- will provide for a wider range of suitable land uses (refer Zone Objective 5)

Subsequently, the 18m-height standard required under clause 4.3 is considered not appropriate for the site and adherence to the 18m-height standard would (in the circumstances) have a suboptimal environmental planning outcome that can be avoided by allowing the contravention.

The proposed non-compliant development better achieves (when compared with a compliant development) key social and economic aims that Penrith Council is trying to achieve. The provision of the additional facilities associated with the increased building height will:

- Ensure social infrastructure meets the changing needs of the community living and working in the health precinct as described in Council's Local Strategic Planning Statement 2020

- foster jobs growth in areas such as tourism, health etc complemented by jobs growth in the night-time economy as envisioned in Council's *Economic Development Strategy 2017*.

A rooftop food and beverage facility is appealing to many, entices more guests to dine at the hotel and local residents and health care workers can gather in a safe and pleasant environment. As described by the CEO of Nepean Blue Mountains Local Health District, the services and facilities proposed as part of this development in this location will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff.

Requiring the development proposals to comply with clause 4.3 will require the loss of the rooftop amenities and would have negative social and economic consequences when compared with the proposed contravening development. These adverse social and economic consequences are an adverse environmental impact under the *Environmental Planning & Assessment Act 1979* (the **EP&A Act**). The avoidance of such adverse environmental impacts are (in themselves) an environmental planning ground that justifies the contravention.

The provision of the rooftop facilities contribute to achieving the following aims of the PLEP 2010:

- *to promote development that is consistent with the Council's vision for Penrith, namely, one of a sustainable and prosperous region with harmony of urban and rural qualities and with a strong commitment to healthy and safe communities (clause 1.2(2)(b) of the PLEP 2010), and*
- *to foster viable employment, transport, education, agricultural production and future investment opportunities and recreational activities that are suitable for the needs and skills of residents, the workforce and visitors, allowing Penrith to fulfill its role as a regional city in the Sydney Metropolitan Region (clause 1.2(2)(d) of the PLEP 2010).*

The provision of the rooftop facilities give better effect to the following objectives of the *Environmental Planning and Assessment Act 1979*:

- to promote the social and economic welfare of the community and a better environment by the proper management, development ... of the State's natural and other resources' (section 1.3(a) of the EP&A Act); and
- to promote good design and amenity of the built environment (section 1.3(g) of the EP&A Act).

In terms of the EP&A Act objectives land is one type of State resource. Restricting the use of the site by imposing an 18m-height limitation would not reflect the proper management/development of the State's limited supply of land suitable for development of the kind proposed.

Finally, the proposed non-compliant development does not raise any material adverse impacts (compared to a compliant development) to existing development and public areas. Potential for detrimental noise impacts from and to the proposed development have been adequately addressed in a Noise Impact Report that accompanies the development application. Detailed analysis of visual impact,

overshadowing impacts and view loss has been undertaken and confirms the proposed development will not have any adverse impacts compared to a compliant development application (see also the analysis above in relation to consistency with the development standard's objectives).

While the numerical extent of the building height contravention is not minor this is not, in itself, a material consideration as to whether the contravention should be allowed because:

- Clause 4.6 of the PLEP 2010 is similar to the long-standing State Environmental Planning Policy No 1- Development Standards (SEPP 1). From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415.
- The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to a third-party legal challenge. The applicable floor space ratio control was 3.5:1, but - as a consequence of upholding the SEPP 1 objection - the approved floor space ratio was 15:1 (a variation to floor space of 329 per cent). The applicable height control was five storeys whereas the approved height was 17 storeys (a variation of 240 per cent). The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the Environmental Planning and Assessment Act 1979, is unconfined.

The Court upheld the validity of the Council's decision.

- Clause 4.6 of the LEP is in similar terms to SEPP 1 in this respect. Relevantly, like SEPP 1, there are no provisions that make it necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6 (*GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]).
- It is not necessary to consider case studies in order to address the above issue, as each case ultimately turns on its own facts. However, decisions of the Land and Environment Court are informative, as they demonstrate how the flexibility offered by clause 4.6 works in practice. Some examples are as follows:
 - In *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 a height exceedance of 103 per cent was approved, along with a floor space ratio exceedance of 44.7 per cent.
 - In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted a development consent for a three-storey shop top housing development in Woolloomooloo. In this decision, the Court approved a floor space ratio variation of 187 per cent.

- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583, the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *Moskovich v Waverley Council* [2016] NSWLEC 1015, the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. The exceedance was around 65 per cent.
- In *Edmondson Grange Pty Ltd v Liverpool City Council* [2020] NSWLEC 1594, the Court granted a development consent for three residential flat buildings. In this decision, the Court approved a floor space ratio variation of 59 per cent (from 0.75:1 to 1.19:1).
- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386, the Land and Environment Court approved a residential flat building in Randwick with a 55 per cent exceedance of the height limit (at its highest point) and a 20 per cent exceedance of the floor space ratio control.
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555, the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).

5. CONCURRENCE OF THE SECRETARY

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation if the application is not determined by a delegate of the Council (a Sydney district or local panel is not a delegate). This is because of Department of Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under clause 55(1) of the Environmental Planning and Assessment Regulation 2021. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

We look forward to Council's consideration of this request for an exception to the building height standard in relation to the proposed development for a hotel at 28-32 Somerset Street, Kingswood.

Regards

A handwritten signature in black ink, appearing to read 'A. Polvere', with a horizontal line extending to the right and a small dash at the end.

Anthony Polvere
Director
PPD Planning Consultants