

CLAUSE 28 TO CLAUSE 18 OF STATE ENVIRONMENTAL PLANNING POLICY
(PRECINCTS – WESTERN PARKLAND CITY) 2021

EXCEPTIONS TO DEVELOPMENT STANDARDS – **HEIGHT VARIATION**

*Demolition of the existing structures and construction of a mixed-use development
comprising 598 apartments, 1289.90sqm of retail space, basement parking accommodating
926 car parking spaces, landscaping and associated structures*

164-170 CROATIA AVENUE, EDMONDSON PARK

PREPARED BY

ABC PLANNING PTY LTD

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STATE ENVIRONMENTAL PLANNING POLICY (PRECINCTS – WESTERN PARKLAND CITY) 2021 - CLAUSE 28 EXCEPTION TO DEVELOPMENT STANDARDS

This Clause 28 variation request has been prepared to accompany the development application for demolition of the existing structures and construction of a mixed-use development comprising 598 apartments, 1289.90sqm of retail space, basement parking accommodating 926 car parking spaces, landscaping and associated structures. This Clause 28 variation report accompanies architectural plans prepared by Plus Architecture, dated 28 October 2022.

Clause 28 of the State Environmental Planning Policy (Precincts – Western Parkland City 2021) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 28 variation request takes into account the relevant aspects of the Land and Environment Court judgement in *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, and more recently the decision of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

It is noted in particular that in the SJD decision, the Court at [73] held that "*it should be noted cl 4.6 of [LEP] is as much a part of [LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome.*"

Clause 28 is reproduced in full immediately below, and each aspect of the clause is addressed in this written request.

Clause 28 Exceptions to development standards – other development

- (1) This section applies to development on land within the Edmondson Park South site, other than development that is part of a transitional Part 3A project.
- (2) The objectives of this section 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.
- (3) Development consent may, subject to this section, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this section does not apply to a development standard that is expressly excluded from the operation of this section.
- (4) 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.
- (5) 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 subsection (4), 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 Secretary has been obtained.
- (6) 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, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.
- (7) Development consent must not be granted under this section for a subdivision of land in Zone E4 Environmental Living if—
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (8) After determining a development application made pursuant to this section, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subsection (4).
- (9) This section does not allow development consent to be granted for development that would contravene any of the following—
- (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated.

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 18 of the State Environmental Planning Policy (Precincts – Western Parkland City 2021- maximum height of 24m, demonstrated in the SEPP map in **Figure 1** below. The proposal has a maximum building height of 30.5m, representing a height breach of 6.5m (27.08% variation).

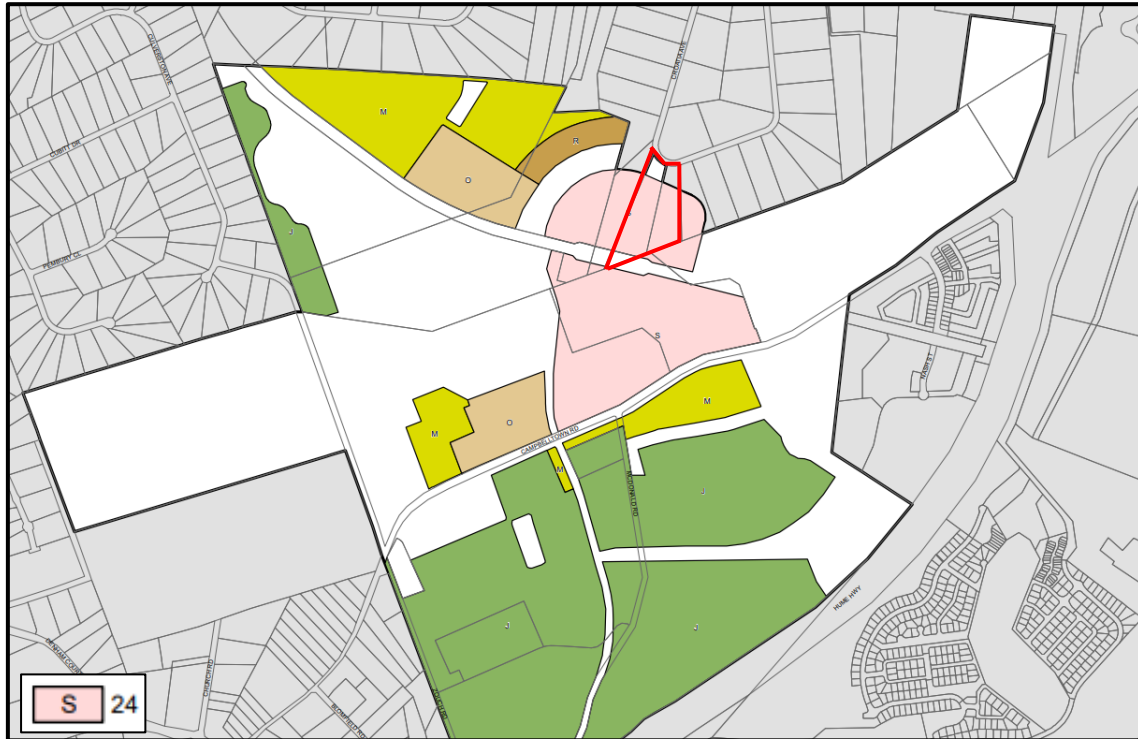


Figure 1: Building Height Map

As demonstrated in the height plane diagram excerpt below, the maximum height deviation of 6.5m applies to Building G (Stage 4), as per the approved variation in the Tony Owen Scheme Concept DA (DA33/2021). The remainder of the development either complies with the building height development standard or protrudes above the height standard to the same extent as that approved in the concept DA. In addition, the majority of the building components that do not comply with the height control comprise the roof, planter boxes, pergola structures and the top of the lift cores:

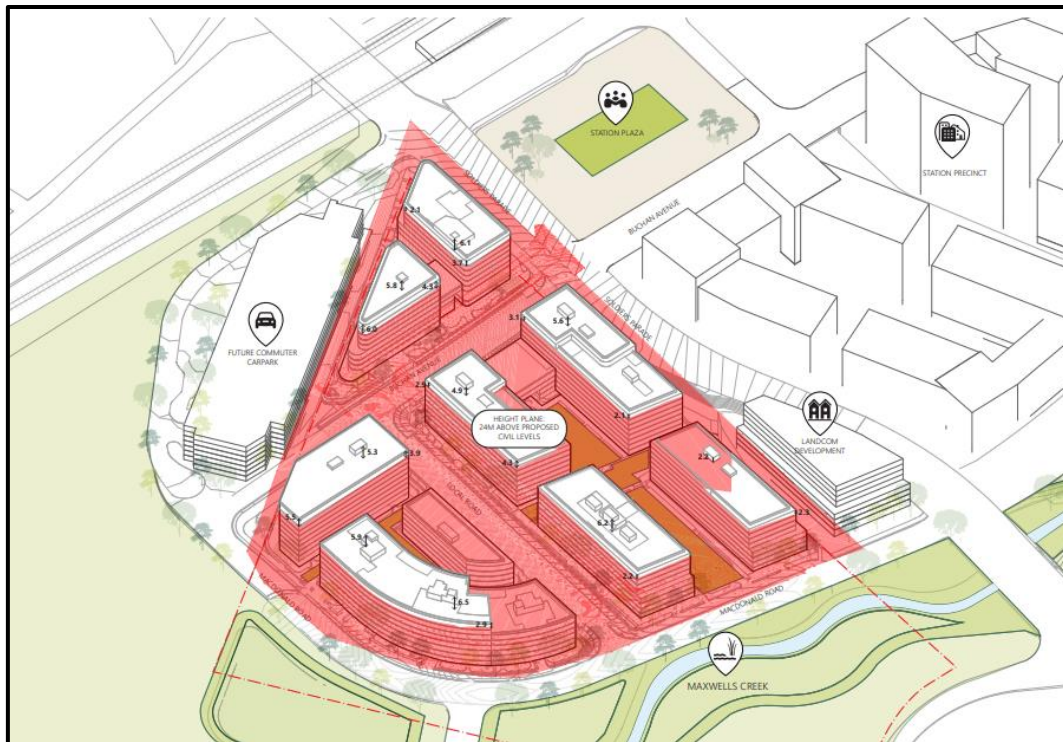


Figure 2: Extract of height plane diagram of the proposed scheme, demonstrating the maximum height deviation of 6.5m at Building G (stage 4) from the 24m height control

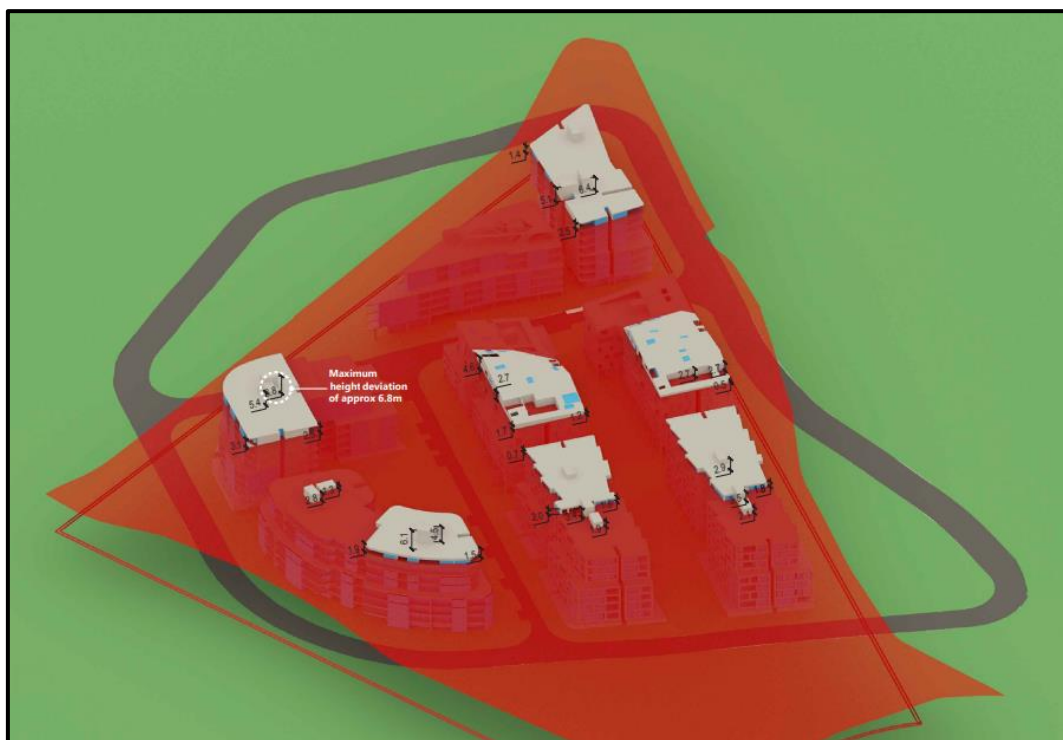


Figure 3: Extract of height plane diagram of the approved Concept DA (DA-33/2021), demonstrating the maximum height deviation of 6.8m from the 24m height control located on stage 4

Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 28(4), of which there are two primary aspects. Both aspects are addressed below:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Assessment: It is considered that strict compliance with the development standard for height on the site is unreasonable and unnecessary in the circumstances for the following reasons:

Tony Owen Scheme Concept DA Approval

A concept DA was prepared for the subject site for a mixed-use development comprising 676 residential apartments, 2000sqm of retail space, and associated structures. Subsequently, the Concept DA was recently approved by the Sydney Western City Planning Panel (SWCPP) on 5 September 2022. The Concept DA was approved with a maximum height of 30.8m, representing a 6.8m maximum variation. The SWCPP assessed and determined that compliance with the 21m SEPP development standard is unreasonable and unnecessary. The following excerpts provide Council's comments regarding the variation within the SWCPP Assessment report:

Council Comment

Based on the applicant's comments and investigation into the variation to the building height, and the review of the potential impact of the height extrusion it is considered that strict compliance will not reduce any impact and that it is argued that the height variation for the purpose of lift overruns and the rooftop gardens provides improved amenity for future residents and does not negatively impact on the local area in terms of additional overshadowing or determinantal impact to the design of the building. Furthermore, the additional height is not contributing to any detrimental increases in bulk and scale over the site including compliance with the floor space ratio provisions for the whole development as provided in this concept. Compliance with the standard is unreasonable in this case as the development can be sited with adherence to local provisions and any future development on the allotments would still be able to provide a valuable housing product suitable for the area and provide for the housing needs for the community.

As a result of the assessment above, it is also considered that compliance with the height of buildings development standard is unreasonable or unnecessary due to the circumstances of this case and that there are sufficient environmental planning grounds to justify contravening the development standard. The proposed development is considered to be consistent with the built form proposed within other precincts of the Edmondson Park Town Centre and is much less compared to what has been approved over the adjoining Landcom and Frasers precincts. Additionally, the increase in the height proposed ensures that better amenity can be provided to the future occupants of the buildings with communal open space on rooftops and opportunities for better open space areas. The objectives of the Height of Buildings clause, as per the Liverpool LEP 2008, have also been addressed, as well as the objectives of the zone.

Having regard to the above, it is considered that there are sufficient environmental planning grounds to vary Clause 18 – Height of Buildings in this instance.

As outlined above the variation will provide for enhanced urban form outcomes including increased built form variation, enhanced solar access and increased open space, public domain and landscaping. This position has been supported by the Liverpool Design Excellence Panel. The proposal to allow heights of up to 30.8m will allow for enhanced urban form through variations in height across the site, reduced overshadowing through the sensitive location of height across the site, and consolidation of built form to provide for increased open space and landscaping.

Figure 4: SWCPP assessment of the 6.8m height deviation, supported in the Tony Owen Scheme

As outlined in the SWCPP assessment report, the approved height of 30.8m is considered acceptable for the subject site and the proposed development as it provides the opportunity to improve amenity, provide interesting built forms and design outcomes, is compatible with the desired future character of the locality (i.e. Landcom and Frasers precincts) and will result in minimal external amenity impacts, as demonstrated in the sites compliance with ADG standards.

The proposed DA and associated height variation also include a maximum height deviation of 6.5m, as demonstrated in the architectural plans and height plane diagrams. Whilst the built form and location of the variation differs from the approved Concept DA (refer to **Figures 2 and 3** above), the proposed height variation is also considered acceptable as it improves amenity for future occupants of the site, provides visually interesting built forms by providing a variety of storeys and recessive upper levels, is compatible with the character of the locality and complies with the applicable ADG requirements of SEPP 65. This is outlined in the following assessment:

Streetscape compatibility

The proposed mixed-use development and associated height variation will be compatible with the scale and massing of contemporary developments, particularly with the existing and future developments proposed within and around Edmondson Park. Refer to the extract of nearby approved developments below. It is noted that nearby developments have been approved with height breaches, namely:

- 190 Croatia Avenue (DA/265/2018): Approved 3 x 6-storey residential flat buildings (135 dwellings) with a maximum building height of 22.21m to the top of the lift overrun (building height control of 21m).
- Landcom masterplan: Approved mixed-use precinct providing a variety of heights, bulk and scale ranging from 8 to 20-storeys.



Figure 5: Context of surrounding/approved developments which characterises the desired future character of the locality



Figure 6: 7-storey Edmondson Park Commuter car park to the south of the subject site (adjacent to proposed Buildings A & B – Stage 1). The commuter car park will have a blank interface with the northern facades of the proposed Stage 1 buildings

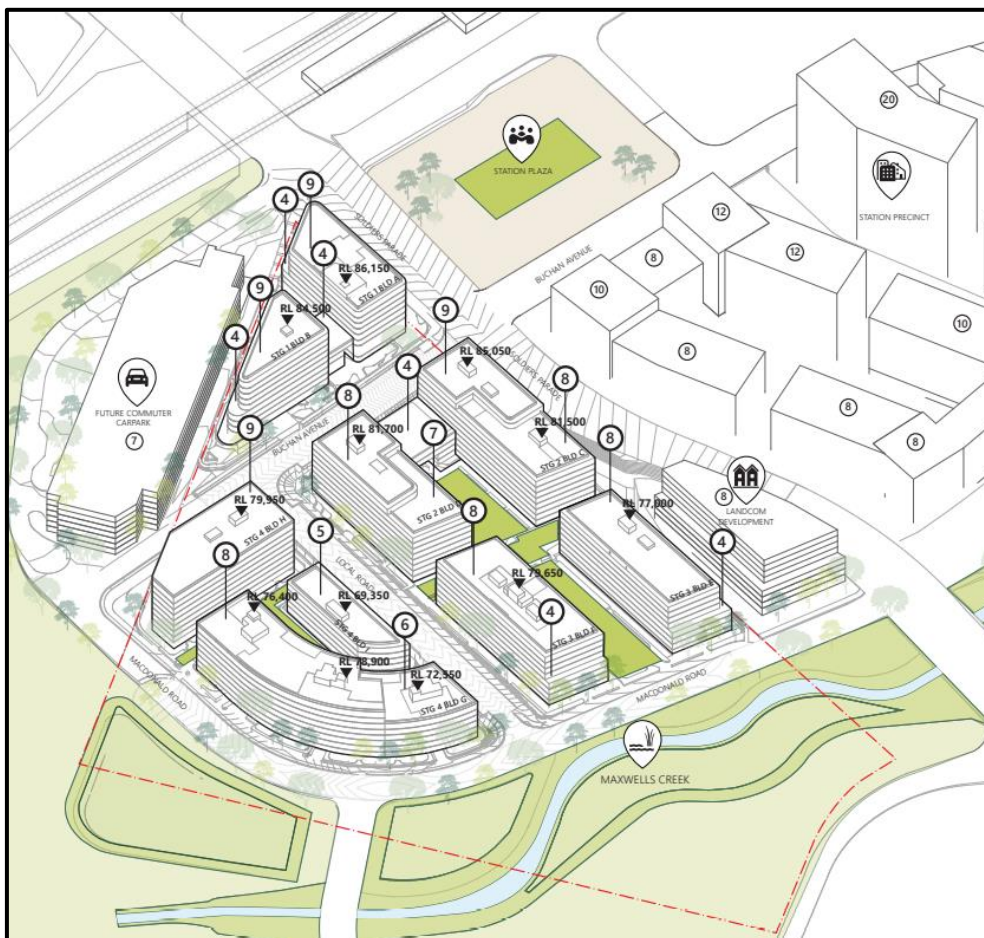


Figure 7: 3D envelope diagram excerpt indicating the heights of surrounding developments to the west and south of the site, which includes heights that are greater and/or on par with that proposed

Compliance with the 24m height development standard would enable a development with a maximum height of 7-storeys. The proposed variation in height is considered acceptable in this instance as it provides the opportunity for unique built forms of various heights, bulk and scale, which will be compatible with the streetscape and enhance the locality. This is demonstrated in the following:

- The proposal generally provides built forms comprising 8 to 9-storeys with 4-storey components to aid in breaking up the bulk and scale of the precinct and provide a street wall interface mainly along Buchan Avenue.
- The proposal incorporates setback, and recessive elements from the storeys below, providing a greater level of articulation and mitigating any perceived bulk and scale from the public domain.
- Increased setbacks between each building and neighbouring sites are implemented in the site design to improve amenity, i.e. privacy, solar access and visual amenity, whilst also providing compliant ground floor open communal open spaces and interlinks to other public open spaces in the locality. The proposal provides appropriate separation, proposing 6m setbacks along Soldiers Parade and Buchan Avenue and 4.5m setbacks along the Local Road and Macdonald Road.
- The proposal includes landscaping throughout the site to soften the appearance of the built form, add visual interest and amenity to the area and ensure that the development sits well within the local context. The proposed green connector spines at the ground level link major public and communal open spaces within the site and the locality, thereby providing through-site links and encouraging sustainable transport modes, i.e. walking and cycling.



Figure 8: Diagram excerpt demonstrating the proposed green connector spin that provides a connection between the subject site, other masterplan precincts and the local centre

- High-quality external materials, colours and finishes are proposed, with each building reflecting a unique set of materials, thereby increasing visual interest and mitigating repetitive, monotonous built forms, as demonstrated in the following montages:



Figure 9: 3D model of the proposed development demonstrating the façade concepts proposed and the array of high-quality materials, colours and external finishes, which provide distinct, unique façade characters, thereby enhancing the streetscape outlook



Figure 10: 3D model of the proposed development



Figure 11: 3D model of the proposed development



Figure 12: 3D model of the proposed development

In this regard, the overall height and scale of the proposal are compatible with the surrounding approved development and the desired future character of the area, i.e. high scale mixed-use development. Therefore, the proposed height will sit comfortably within the context of the bulk and scale of the surrounding approved development. Refer to the extract of nearby approved developments above.

Minimal amenity Impacts

The development provides a building type and layout that optimises solar access to the individual units where possible and the POS and COS available for the development. Units are oriented to the northern elevation where possible, whilst the proposed COS areas at the rooftop and ground floor will receive compliant solar access.

In addition, the proposed height variation associated with the mixed-use development will not create adverse overshadowing impacts to the adjoining neighbours to the west, which will retain 2 hours of solar access to principal living and private open space areas per the ADG requirements.

Refer to the following shadow diagram excerpts below, which compare the additional shadow resulting from the height variation in comparison to a 24m compliant height standard. As highlighted in the diagrams, existing and future developments to the west of the site will continue to receive adequate solar access to principal and POS areas.

The shadow projected to the south of the site is considered acceptable, with minimal difference between a compliant height and the proposed variation. In addition, a 7-storey commuter car park is located to the south of the site, with nil impacts to the principal and POS areas.

The proposal utilises the northern aspect by strategically positioning Stage One apartments to the northern and western facades where possible.

Stage Two and Three comprises built forms in a north-south direction to increase sunlight and daylight from the eastern and western sun.

Stage Four showcases a crescent-shaped built form oriented to the eastern and northern aspects, thereby increasing solar opportunities for future occupants.

In this regard, the proposed mixed-use development, irrespective of the height deviation, will comply with the 70% requirement for 2 hrs of solar access during the winter solstice.

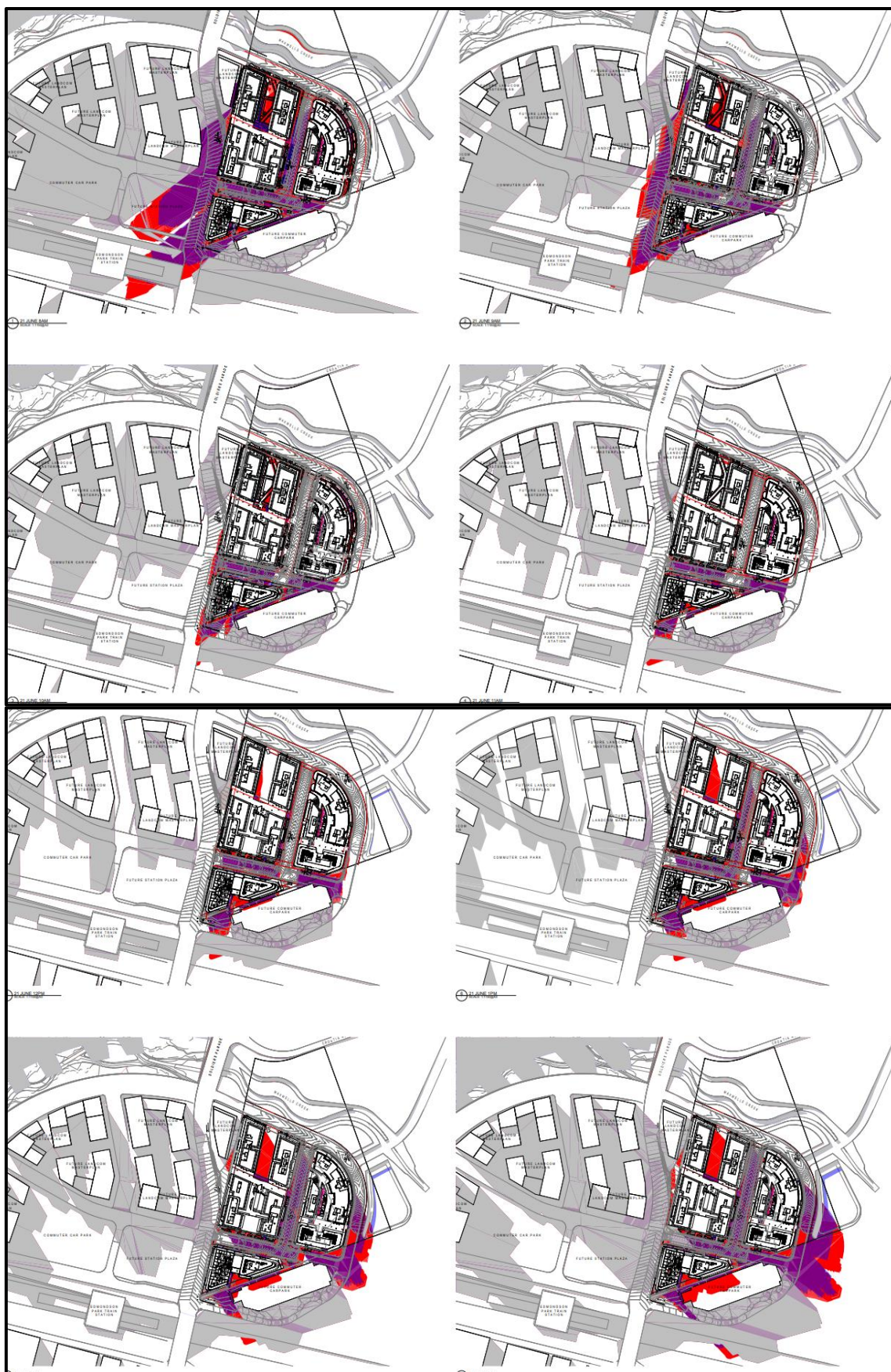


Figure 13: Shadow diagram excerpt demonstrating the proposed overshadowing caused by a 24m compliant height (purple) and the proposed shadow of the development with a 30.8m height (red)

The proposed height and scale will not adversely affect views from private or public land in terms of view impacts.

The proposal has considered the location of the buildings on the site, the internal layout and the building materials used. Hence, the proposed building height non-compliance will not result in adverse privacy impacts. In this regard, the proposed development has been designed and sited to maintain adequate visual and acoustic privacy between the subject development and the adjoining/future developments through appropriate setbacks, providing a suitable degree of visual privacy to both the subject site and adjoining properties.

The design and height of the proposed development ensure that the proposal is compatible with the anticipated future character of the area and provides for excellent internal amenity (as demonstrated by compliance with the ADG communal open space, solar access, cross ventilation, and private open space controls) whilst also preserving external amenity to surrounding properties in a reasonable manner.

The above factors demonstrate that the height variation is reasonable in the circumstances and that the development standard is unreasonable and unnecessary in the circumstances of this application.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

| Consistency with the objectives of the height standard in the SEPP | |
|---|---|
| Objectives | Assessment |
| The height of a building on any land within the Edmondson Park South site is not to exceed the maximum height shown for the land on the Height of Buildings Map . | <p>Merit Assessment</p> <p>The proposed height variation associated with the mixed-use development is suitable for the subject site and compatible with the context of the locality. The maximum height deviation of 6.8m has been assessed and approved in the Concept DA scheme under DA/33/2021, which Council have noted the suitability of the height breach.</p> <p>It is noted that other residential flat buildings/mixed-use developments within the locality also breach the 21m control whilst including heights, bulk and scale on par with that proposed. Therefore, it is considered that the proposed built form is compatible with the envisioned desired character of the locality.</p> <p>Importantly, the proposed height variation will not be responsible for any adverse amenity impacts to neighbouring properties, including view loss, overshadowing or privacy impacts.</p> <p>Therefore, the high-quality design and articulated façade outcome ensure that the proposed development will sit comfortably with existing and future development along the street networks, notwithstanding the height variation.</p> |
| Consistency with the objectives of the BB Mixed Use zone | |
| Objectives | Assessment |
| <p>(a) to provide a mixture of compatible land uses,</p> <p>(b) to integrate suitable business, office, residential, retail and other development in accessible locations</p> | <p>Complies</p> <p>The proposed height variation does not reduce the site's ability to comply with the zone's objectives. Irrespective of the height variation, the proposed development will</p> |

| | |
|---|---|
| <p><i>so as to maximise public transport patronage and encourage walking and cycling.</i></p> | <p>continue to provide for a mixture of compatible land uses ranging from retail to residential.</p> <p>The proposal seeks to activate the retail corridor along Buchan Avenue and promote walking and cycling through the through-site links proposed, providing easy access to the public open spaces, the train station and to other nearby precincts.</p> <p>In addition, the proposal will not inhibit other land uses from being provided in the area that provides facilities or services to meet the day-to-day needs of residents.</p> <p>Therefore, the proposed height does not generate any inconsistency with the zone objectives.</p> |
|---|---|

Based on the above assessment, it is considered that strict compliance with the SEPP height standard is unreasonable and unnecessary in this instance.

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

Assessment:

As outlined above, the proposed height variation is reasonable as it will not generate any unreasonable amenity impacts to surrounding properties as all shadows from the additional height will fall over to the south where the approved commuter car park is located and will not affect any private living area or private open space area. It is also confirmed that the extent of shadowing is consistent with a compliant height.

The proposed height is also not responsible for any adverse view impacts on any surrounding properties.

The proposed height does not generate any adverse privacy impacts as the proposal incorporates adequate setbacks, landscaping, screening and splayed windows to mitigate visual privacy concerns.

It is also confirmed that there are no adverse visual bulk impacts to any surrounding property as the proposed height variation will be perceived in a manner that is cohesive with the desired character and specifically to the western Landcom precinct.

The height variation also provides for a better level of amenity for the proposed residential units as the communal roof terraces have access to sunlight and expansive views over Maxwells Creek.

The approved concept (Stage 1 DA) which was approved with a height variation consistent with that proposed is considered to constitute a sufficient environmental ground. It is acknowledged that a greater number of buildings within the development exceed the 24-metre height limit, however, it should be noted that the proposed scheme adopts greater setbacks and thinner floor plates, albeit with an FSR consistent with that approved. The provision of thinner and better performing floor plates (in terms of access to sunlight, daylight and ventilation) results in a height variation across a greater extent of the site. The architect has provided a series of comparison floor plates which show that the proposed scheme provides a higher level of amenity through the replacement of deep floor plates which include embedded bedrooms (which have 'snorkel' type openings) with shallower unit layouts. The

proposed development is therefore considered to represent a superior scheme to the design which contained a height variation to the same extent as that proposed.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the height variation in this instance.

Other Matters for Consideration

5(a)(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

Assessment: The above assessment demonstrates that the proposed height satisfies the objectives of the height standard and the B4 zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the minor height variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

*(6) 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*

Assessment: The proposed height variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed height allows for the achievement of a compatible building envelope without creating a development with overbearing height, bulk or scale and without compromising the desired future character of the area.

Concurrence

The Secretary's concurrence under Clause 28(5) of the SEPP has been delegated to the Council by written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018. That concurrence may also be assumed by the Court pursuant to s39(6) of the Land and Environment Court Act.

Nevertheless, the Court may wish to consider the concurrence requirements

(b) the public benefit of maintaining the development standard

Assessment: The above assessment demonstrates that the proposed height satisfies the objectives of the standard and the zone and confirms that the proposed height allows for a better planning outcome on the subject site.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the height variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the SEPP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

It is also noted that there is no public benefit in maintaining the height standard given the limited amenity impacts associated with the development and the positive streetscape outcome that would arise from the development of the subject site.

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

Assessment: There are not considered to be any additional matters to consider beyond those discussed above.

Generally as to concurrence, for the reasons outlined above – and particularly having regard to the site specific nature of this Clause 28 variation request – there is nothing about this proposed height variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. There are no other relevant matters requested to be taken into consideration before granting concurrence.

Conclusion

For reasons mentioned herein, this Clause 28 variation is forwarded to Council in support of the development proposal at 164-170 Croatia Avenue, Edmondson Park and is requested to be looked upon favourably by Council.