



Clause 4.6 Variation Request Building Height

8 -12 MANSON STREET, TELOPEA



QUALITY ASSURANCE	
PROJECT:	Clause 4.6 – Height
ADDRESS:	8 -12 Manson Street, Telopea
LOT/DP:	Lots 158, 159 & 160 in DP 36691
COUNCIL:	City of Parramatta
AUTHOR:	Think Planners Pty Ltd

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CLAUSE 4.6 DEPARTURE – HEIGHT

BACKGROUND

This Clause 4.6 departure has been prepared in support of a development application that seeks approval for tree removal, demolition of existing structures, site amalgamation and the construction of a six storey 'Residential Flat Building'. The proposal comprises of 48 residential units, and 53 carparking spaces within three basement levels at 8 -12 Manson Street, Telopea.

The development incorporates the following dwelling mix:

- 9 x 1 bedroom units;
- 36 x 2 bedroom units; and
- 3 x 3 bedroom units.

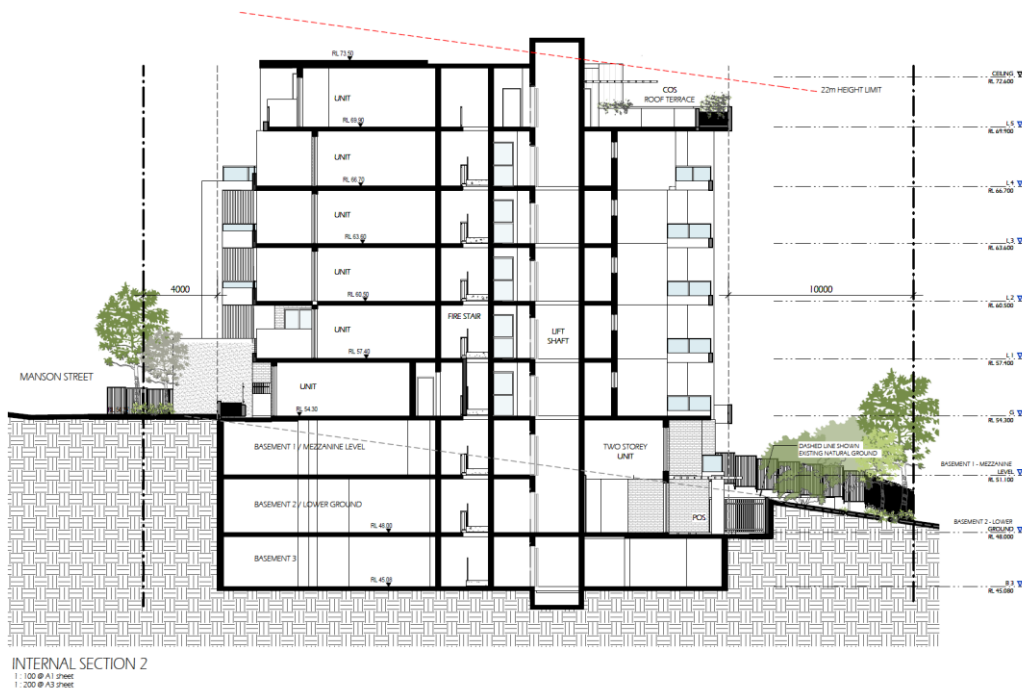
The site is identified by Parramatta LEP 2011 as having a mapped height of 22m with the development seeking to vary this control with a portions of the lift overrun exceeding the 22m height limit and having a maximum height of 23.45m. The lift overrun are the highest point of the development and it exceeds the height control by up to 1.45m or 6.5%.

Given that the 22m height control is a development standard a clause 4.6 departure is required to seek to vary this standard.

A detailed discussion against the relevant provisions of Clause 4.6 are provided below with further discussion against the relevant case law 'tests' set down by the Land and Environment Court.

A section drawing is provided below to demonstrate the nature of the departure and the portion of the building height control that is exceeded.

Figure 1: Section illustrating height departure



The extent of variation is 1.45m and equates to 6.5% of the control. Given the development is substantially proposed within the suggested building envelope, the bulk and scale of the development is consistent as to what has been approved in the precinct, and the form of development is appropriate for its location.

Clause 4.6 of the Parramatta LEP 2011 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.

The applicant asks that the Consent Authority consider this request, and grant development consent to the proposal, despite the departure from the control, for the reasons stated below.

PROVISIONS OF CLAUSE 4.6

Clause 4.6 of the Parramatta LEP 2011 provides that development consent may be granted for development even though the development would contravene a development standard.¹ That clause is in the following terms:

“4.6 Exceptions to development standards

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

(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.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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 Secretary has been obtained.

(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, 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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or 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

¹ Clause 4.6(2)

(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.

(7) After determining a development application made pursuant to this clause, 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 subclause (3).

(8) This clause 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,

(c) clause 5.4,

(ca) a development standard that relates to the height of a building, or a floor space ratio, in Parramatta City Centre (as referred to in clause 7.1 (1)) by more than 5%,

(cb) clause 8.1 or 8.2."

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

*"(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."*

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

*"(i) (this 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 Secretary has been obtained."*

RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

1. *this request has adequately addressed the matters required to be demonstrated by subclause (3),² namely that:*
 - a. *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,³ and*
 - b. *there are sufficient environmental planning grounds to justify contravening the development standard⁴;*
2. *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*
3. *the concurrence of the Secretary has been obtained.⁵*

The request deals with each relevant aspect of clause 4.6 on the following pages.

² Clause 4.6(4)(a)(i)

³ Clause 4.6(3)(a)

⁴ Clause 4.6(3)(b)

⁵ Clause 4.6(4)(b)

NSW CASE LAW

This request also addresses several relevant Land and Environment Court cases including, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council* and *Initial Action Pty Ltd v Woollahra Municipal Council*.

The key tests or requirements arising from the above judgements is 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 *that there are sufficient environmental planning grounds to justify contravening the development standard*, and
- The proposal is required to be in ‘the public interest’.

It is important to note that the Chief Judge of the Land and Environment Court in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not.

An extract of this judgment is provided below:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the height standard;
- Demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard;
- Demonstrating consistency with the R4 zoning;
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed overleaf, noting that the proposal has a bulk and scale that is consistent with the emerging built form in this high density residential area.

COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the reasons which follow.

Compliance with the objectives of the development standard and the zone are achieved despite non-compliance with that standard. The objectives of the height development standard are stated as:

- (1) The objectives of this clause are as follows—*
- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,*
 - (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
 - (c) to require the height of future buildings to have regard to heritage sites and their settings,*
 - (d) to ensure the preservation of historic views,*
 - (e) to reinforce and respect the existing character and scale of low density residential areas,*
 - (f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.*

The current development proposal remains consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- The variation stems from providing communal open space and associated enclosed structure on the rooftop which could be removed however this would lead to a poor outcome for residents with reduced common open space;
- The proposal meets the 6 storey building height control in the DCP and does not present an attempt to attain additional development yield on the site given compliance with the FSR control applying to the site;
- The proposed variation is minor in nature with the majority of the building being compliant with the building height control and the variation is also due to the slight undulation of the site. The extent of non-compliance will also not be a visually prominent element in the streetscape;
- The overall height of the development presents as a compatible form of development to the anticipated high density residential development that exist in the locality, noting that the emerging character is for 6 plus storey residential developments. The lift overrun that exceeds the height control is recessed behind the main building alignment to downplay visual dominance as viewed from the public domain and adjoining residential properties;
- The portion of the building that protrudes above the 22m height limit contains no habitable floor space and presents with a dominant 6 storey building design, reinforcing that the breach to the height standard does not result in the

development representing an overdevelopment of the site but rather a suitable contextual response to the locational characteristics on the site in order to achieve a suitable ground floor outcome with sufficient amenity;

- The additional height does not generate any additional amenity impacts given the location of the breach and the surrounding site context;
- The proposal has been carefully designed to ensure that no adverse visual or acoustic amenity impacts will be created by the proposed building height along site boundaries as the upper levels are recessed behind the building perimeter;
- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors;
- Given the sites orientation, and the minor height departure the additional height will not have any additional adverse overshadowing impacts on nearby developments that incorporate residential components;
- The development proposal is consistent with the intent of the maximum height control and has a bulk and scale that is not discernible from a development that complies with the control;
- The proposal has been designed to ensure that privacy impacts are mitigated that the proposal will not obstruct existing view corridors with appropriate setbacks provided to promote view sharing opportunities;
- The non-compliance to the height control has no unacceptable impact on the setting of any items of environmental heritage or view corridors; and
- The proposal will sit comfortably in the streetscape relative to the desired future character of the locality; and

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.

ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the floor space ratio development standard.⁶ For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.⁷ As already noted, that departure is 1.45m and equates to 6.5% of the control

- The additional height supports the provision of appropriate rooftop common open space for the development and facilitates district views for all residents of the complex;
- The proposal ensures that the high density nature of the zone is achieved and the development is consistent with the existing character of the locality;
- The character of the locality is undergoing transition to larger and more contemporary built forms that are all permitted in the R4 zone and the bulk and scale of the residential flat development is comparable to that of surrounding residential flat buildings
- The form and presentation of the development maintains an appropriate visual relationship to adjoining properties and does not present a bulk and scale from the street or adjoining properties that is detrimental to the existing and desired future character of the area ;
- The building is compatible with the desired future character of the area in terms of the building presentation to the street, the materials, and the relationship to surrounding properties.;
- The proposal provides for a better planning outcome as a compliant height could be provided with the same yield of apartments be achieved by providing a building with no roof top common open space that provides visual interest to the architectural form; and
- The proposal will provide for a number of distinct public benefits:
 - Delivery of additional housing within Telopea;
 - Creation of jobs during the construction stage;
 - Activation of the street level;
 - Amenity impacts to adjoining properties are mitigated; and
 - The distribution of additional height across the site will not be discernibly different to a built form that is compliant with the height control.

⁶ As clause 4(3)(b) requires

⁷ As confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at 46, per Preston CJ

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

CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST

As clause 4.6(4)(a)(i) requires, the Consent Authority must also be satisfied that proposed development will be in the public interest because it is consistent with:

1. *the objectives of the particular standard and*
2. *the objectives for development within the zone in which the development is proposed to be carried out.*

The Applicant has already addressed the objectives of the development standard in the context of cl 4.3 in demonstrating that compliance is unnecessary or unreasonable.

The objectives of the R4High Density Residential Zone are as follows:

Objectives of zone

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.*
- *To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood*

The proposal is consistent with these objectives as:

- It promotes a walkable neighbourhood, and provides a residential flat building close to major transport nodes and employment centres;;
- It contributes to the housing needs of the community within a high density residential environment in a location that is close to a major transport node and services and employment opportunities in the Telopea Precinct.;
- Results in a development that is compatible with the existing bulk and scale of the locality as outlined on the submitted architectural plans;

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.

For those reasons, the applicant says the consent authority would be satisfied the development is in the public interest.

CONCURRENCE OF THE SECRETARY

1. 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.
2. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

CONCLUSION

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.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive maximum 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 objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including the departure to the maximum height control.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the subject area. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.