

Clause 4.6 Variation

HEIGHT
67 HIGH STREET, PARRAMATTA
8 SEPTEMBER 2021



QUALITY ASSURANCE	
PROJECT:	Clause 4.6 – Height
ADDRESS:	67 High Street, Parramatta
LOT/DP:	Lot B in DP 421592
COUNCIL:	City of Parramatta
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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 the retention of a heritage listed building and construction of a four storey residential flat building containing 12 apartments over basement carparking at 67 High Street, Parramatta.

The site is identified by Parramatta LEP 2011 as having a mapped height of with the development seeking to vary this control with the top of the lift overrun to the building having a height of 12.6m.

Given that the 12m height control is a development standard a clause 4.6 departure is required to seek to vary this standard.

It is further noted that clause 4.6(3) (ca) indicates that 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)) cannot be varied by more than 5%.

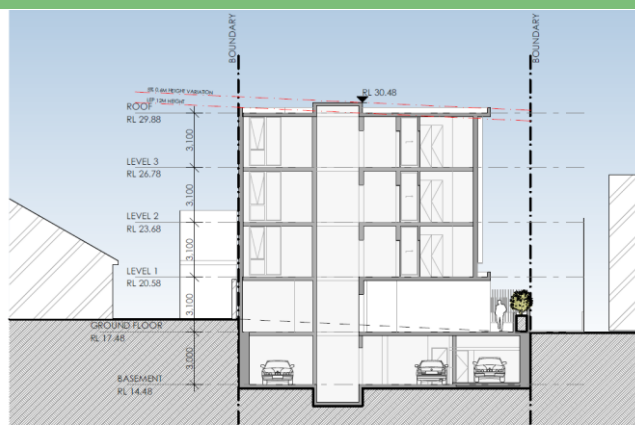
A detailed discussion against the relevant provisions of Clause 4.6 are provided below with further discussion against the relevant case law ‘tests’ set down by the Land and Environment Court. As shown on the sections below, the proposed development varies the height control to a portion of the lift overrun.

The proposal presents the following departures to the height controls:

- The height, relative to habitable floor areas, equates to 12.6m or a 5% variation.

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 –(Source PTI Architects)



Given the proposed height, the proposal is noncompliant with Clause 4.3 – height of buildings that stipulates that the height of a building is not to exceed 12m on the subject site.

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 more recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Canterbury 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 departure 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. This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from recent 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 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 maximum building height standard;
- Demonstrating consistency with existing streetscape;

- Demonstrating compliance with objectives of the B4 zone; and
- Satisfying the relevant provisions of Clause 4.6.

This Clause 4.6 Variation request deals with the maximum building height matters in turn below.

ADDRESSING CLAUSE 4.6 PROVISIONS -HEIGHT

Clause 4.6 of the Parramatta Local Environmental Plan 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, 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 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.*

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

Clause 4.6(3)- Environmental Planning Grounds

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the building 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 is consistent with the underlying intent of the control based on the following key points:

- The overall height of the development presents as a compatible form of development to the anticipated high density residential development that are emerging in the locality, noting that the emerging character is for 4 plus storey residential developments. The lift overrun is recessed behind the main building alignment to downplay visual dominance as viewed from the public domain and adjoining residential /industrial properties.
- The proportion of the building that protrudes above the 12m height limit contains no habitable floor space and presents with a dominant 4 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 for the suites at this level.
- The proposed development incorporates a complying floor space ratio as per the provisions of the PLEP 2011, which will ensure that the scale of the proposed development will be appropriate and will be visually consistent with the permitted building height with the upper levels recessed and designed using a lighter design style to ensure a positive streetscape presentation.

- The additional height does not generate any additional amenity impacts given the location of the site 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 substantially recessed behind the building perimeter.
- The proposed articulation of the built form will ensure that the additional building height will not be discernably noticeable from street level and that the proposed development will provide a strong and identifiable building line that will pronounce the site's prominent and strategic gateway entry location at the edge of the Parramatta CBD.
- The proposal provides for a better planning outcome as the same density of apartments could be achieved in a building that is squashed into 4 levels of development with a bigger floor plate that would be less articulated and would be located closer to adjoining properties. Therefore, the response has been to maximise the amenity of suites.
- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors.
- The proposal will not unreasonably impact on the significance of the heritage item on the site or on the adjoining property having regard to the details in the submitted HIS.
- The proposal provides residential accommodation opportunities, the proposal will strongly contribute towards revitalising the subject area, as it will increase employment opportunities both during the construction phase and at the completion of the proposal. The 12 apartments will provide augmented patronage in the locality thus both components will contribute towards boosting the local economy of Parramatta.
- The proposal will provide for a number of distinct public benefits:
 - Delivery of additional housing within close proximity to the Employment Precinct of the Parramatta CBD;
 - Creation of jobs during the construction stage;
 - Activation of the street level;
 - Amenity impacts to adjoining properties are mitigated and the distribution of additional floor space across the site will not be discernibly different to a built form that is compliant with the height control.
 - The scale and intensity of the development is appropriate noting that the proposal complies with the maximum FSR, , which demonstrate an appropriate development outcome.

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.

Clause 4.6(4)

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. In addition, the proposal is consistent with the objectives of the B4 zone, being:

- *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 development that contributes to an active, vibrant and sustainable neighbourhood.*
- *To create opportunities to improve the public domain and pedestrian links.*
- *To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.*
- *To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre*

The proposal ensures that the desired mixed-use nature of the zone is augmented with the proposal providing additional residential housing types to augment the existing housing stock within the Parramatta CBD.

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:

- a) 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 and the site specific design response to the allotment configuration and orientation.
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal when noting that the area of non-compliance is so minor that it is indistinguishable from a compliant height. 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.

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.