

Attachment C

Clause 4.6 Variation Request – Ceiling Heights
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Clause 4.6 Variation Request

Section 148(2)(c) of the Statement Environmental Planning Policy (Housing) 2021

905 South Dowling Street, Zetland D/2024/1055

Clause 4.6 –Minimum Ceiling Heights Under the Apartment Design Guide

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1 Introduction

This Clause 4.6 variation request has been prepared by Karimbla Construction Services (NSW) Pty Ltd in accordance with Clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP). It accompanies a development application (DA) to the City of Sydney Council (Council) for the construction of a mixed-use development in the South Stage of the Suttons development site and basement car parking. The buildings include two mixed use buildings (S1 and S2) and two residential buildings (S3 and S4) at 905 South Dowling Street, Zetland

Section 148 of the *State Environmental Planning Policy (Housing) 2021* (HSEPP) sets out a number of non-discretionary development standards for residential apartment development. Specifically, Section 148(2)(c) requires compliance with Part 4C of the Apartment Design Guide (ADG) in relation to floor to ceiling heights for ground level and first floor in mixed use areas.

Clause 4.6 of the LEP enables the consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

The following assessment of the proposal against Clause 4.6 of the LEP provides the relevant justification to the modification of the minimum floor to ceiling heights under Section 148 of the HSEPP. It should be read in conjunction with the Statement of Environmental Effects (SEE) and the accompanying plans.

1.1 Requirements of Clause 4.6

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)]
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]

Clause 4.6 was amended in November 2023 to delete subclause 4.6(5) which (inter alia) included a requirement that the consent authority be satisfied that ‘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’.

The Department of Planning Housing and Infrastructure’s (DPHI) announcement material states that ‘*the existing test that applicants must meet in order to seek to vary development standards will not change*’. DPHI stated that the removal of specific references to the public interest in Clause 4.6, simplify the drafting, noting that consent authorities are already obliged to consider the public interest.

The NSW Land and Environment Court and the NSW Court of Appeal have established principles under which an assessment authority can consider a variation to a development standard against the provisions of Clause 4.6. The key principles were established in the following Court cases:

- *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe)
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 1009 (Four2Five)
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action)
- *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (Baron Corporation)
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 (RebelMH)

- *Doumit v Canterbury – Bankstown Council* [2018] NSWLEC 1028 (Doumit)
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170 [2018] NSWCA 24 (Al Maha)

The principles established in the above cases have been applied in justifying a departure from the minimum floor to ceiling height requirement under Section 148 of the HSEPP.

2 Proposed Variation

2.1 Is the Planning Control a Development Standard

Development Standard is defined under Section 4(1) of the EP&A Act as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”

Whilst there are differing interpretations as to whether the minimum ceiling height design criteria under Section 148 of the HSEPP is in fact a development standard. Council has indicated that their interpretation is that Section 148 is a development standard. Section 148 of the HSEPP states as follows:

“148 Non-discretionary development standards for residential apartment development—the Act, s 4.15

(1) The object of this section is to identify development standards for particular matters relating to residential apartment development that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

(2) The following are non-discretionary development standards—

(a) the car parking for the building must be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide,

(b) the internal area for each apartment must be equal to, or greater than, the recommended minimum internal area for the apartment type specified in Part 4D of the Apartment Design Guide,

(c) the ceiling heights for the building must be equal to, or greater than, the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide.”

2.2 Development standard to be varied

Section 148 of the HSEPP refers to Part 4C of the ADG which requires a minimum floor to ceiling height of 3.3m for ground and first floors of developments in mixed use areas. The site is located on land zoned MU1 – Mixed Use and therefore considered a mixed-use area.

This Clause 4.6 variation request seeks to justify a contravention of the minimum 3.3m floor to ceiling height development standard set out in the ADG for the first floor across all buildings, as well as at the ground floor of the residential buildings S3 and S4.

For all buildings, the floor-to-floor height from Level 1 to Level 2 is 3160mm, with a ceiling height of 2700mm.

- For S1 and S2, there are no ground-level units.

- For S3, the floor-to-ceiling height for the single ground-level apartment is 3200mm.
- For S4, the ground-level floor-to-ceiling height is 3260mm.

only.

2.2.1 Extent of variation

The proposed development will result in a variation to the development standard of between 1% and #% in localised areas across the site. A detailed table of the variations and the particular buildings is provided below. It is important to note that variations are not across the board, and are localised to certain levels in certain buildings.

Building	Level	Required	Proposed	Difference
Building S1 (Mixed Use)	Ground	3.3m	Complies	N/A
	Level 1	3.3m	2.7m	18%
Building S2 (Mixed Use)	Ground	3.3m	Complies	N/A
	Level 1	3.3m	2.7	18%
Building S3 (Mixed Use)	Ground	3.3m	3.2m	3%
	Level 1	3.3m	2.7m	18%
Building S4 (Mixed Use)	Ground	3.3m	3.26m	1%
	Level 1	3.3m	2.7m	18%

The ADG recommends that developments located in a mixed-use area provide a minimum ceiling height of 3.3m for ground and first floor levels to promote future flexibility of use. The proposed development achieves (and exceeds) the recommended floor to ceiling heights on ground floor for all mixed use development and proposes only a minor departure from the ground floor in residential buildings. However, floor to ceiling heights on Level 1 are below 3.3m.

3 Clause 4.6(3)

Clause 4.6(3) of the LEP states as follows:

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.

The judgements in Baron, Rebel and Al Maha recognise the need for the consent authority to form its own view on whether the requirements of Clause 4.6(3) have been achieved, in order to discharge its responsibility to determine whether it is satisfied that the written variation request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). Accordingly, the written Clause 4.6 variation request must 'demonstrate' that the requirements of Clause 4.6(3) have been 'adequately addressed'.

This section demonstrates that the relevant requirements of Clause 4.6(3) are adequately addressed.

3.1 Clause 4.6(3)(a) – Unreasonable or unnecessary

In accordance with the requirements of Clause 4.6(3)(a) of the LEP, this section demonstrates why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.

In Wehbe, Preston CJ of the Land Environment Court provided relevant assistance by identifying six methods under which a variation to a development standard can be deemed suitable, and compliance with the standard is seen to be unreasonable or unnecessary. The six methods are as follows:

- 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone; and
6. Compliance is demonstrably unreasonable or unnecessary in some other way.

The proposed departure from the development standard is assessed using method one to establish that the strict application of the development standard under Section 148 of the HSEPP, is unreasonable and unnecessary in this instance.

3.1.1 First method - The objectives of the standard are achieved notwithstanding noncompliance with the standard

In accordance with the principle established in *Wehbe*, one of the ways in to determine whether a Clause 4.6 variation request has demonstrated the achievement of the matters in Clause 4.6(3)(a) is to show that it is unreasonable or unnecessary to strictly apply the development standard as the development achieves the objectives of the development standard, notwithstanding the contravention of the development standard.

In *Baron*, Preston CJ noted that demonstrating that the development achieves the objectives of the development standard involves:

1. identification of what the objectives of the development standard are; and
2. establishing that those objectives are, in fact, achieved.

Preston CJ noted that **both** of these the above requirements need to be addressed in a written Clause 4.6 variation request, and that the consent authority must form its own view on whether both of these matters have been **adequately** addressed.

There are no objectives explicitly associated with minimum floor to ceiling heights under Section 148 of the HSEPP. In lieu, the proposal has been assessed against the relevant objectives of Part 4C of the ADG to demonstrate how the objective has been met notwithstanding non-compliance with the minimum floor to ceiling height standard. Objective 4C-1 of the ADG states as follows:

“Objective 4C-1

Ceiling height achieves sufficient natural ventilation and daylight access”

TABLE 1: RELEVANT OBJECTIVES OF PART 4C-1 OF THE ADG

OBJECTIVE	CONSISTENCY
Objective 4C-1 Ceiling height achieves sufficient natural ventilation and daylight access	The proposed development is design to provide a high-quality, contemporary development which is reflective of the bulk, scale and character as desired within the Epsom Park Precinct. The proposal underwent a comprehensive competitive design alternatives process with the City of Sydney, and has been deemed to achieve design excellence. The proposed variation to the minimum ceiling height development standard, which is overall minor, will not impact the development achieving sufficient natural ventilation and daylight access. The proposed development is compliant with the solar access and natural ventilation requirements under the ADG (see architectural plans). Apartments which do not meet the required ceiling height achieve good solar access and natural light where possible. Any apartments not achieving solar access or natural ventilation would not benefit from increasing the ceiling height. It is highly unlikely that the residential units located on Level 1 of the development will be converted to non-residential uses in the future. This outlook is echoed by the consent authority. In the event that Level 1 residential is converted to non-residential, the best land use for above ground tenancies (i.e. no ground floor street presence) is commercial office space which can readily be accommodated within a 2.7m floor to ceiling. The apartments will be compliant with the relevant provisions in the ADG and demonstrate design excellence in accordance with the principles set out in Chapter 4 of <i>State Environmental Planning Policy (Housing) 2021</i> (the Housing SEPP).
Objective 4C-2 Ceiling height increases the sense of space in apartments and provides for well proportioned rooms	The ADG also seeks to ensure that the proposed ceiling heights increase the sense of space in apartments and provides for well-proportioned rooms under Objective 4C-2. The proposed units comply with the relevant requirements for unit size and depth under the ADG creating high quality and livable spaces optimising a sense of space and outlook. The heights still meet and exceed the minimums required under the NCC and ADG for all other residential levels, with no low bulkheads in habitable rooms.

OBJECTIVE	CONSISTENCY
Objective 4C-3 Ceiling heights contribute to the flexibility of building use over the life of the building	Objective 4C-3 of the ADG seeks to provide flexibility in uses over the life of the building within mixed-use areas. The non-compliance is minor in nature (13%) and still provides adequate opportunity for varying uses above ground without compromising amenity and spatial requirements.

The ADG also states that the purpose of providing a 3.3m for ground and first floor to promote future flexibility of use. The departure from the minimum floor-to-ceiling heights for ground floor in the residential buildings S3 and S4 is very minor and would not preclude the flexible use of these ground floor areas for alternative uses.

3.2 Clause 4.6(3)(b) - Sufficient Environmental Planning Grounds

This section of the report demonstrates that there are sufficient environmental planning grounds to justify contravening the minimum floor to ceiling height development standard as required by Section 148 of the HSEPP.

In Initial Action, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole. In Four2Five Pty Ltd, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the minimum floor to ceiling height control as it applies to the site, demonstrated as follows:

- Ground level floor to ceiling heights exceed the minimum 3.3m requirement in the mixed use buildings, and propose only a minor departure in the residential buildings, providing increased flexibility with ground floor presence and high visibility to pedestrians and vehicles.
- The development was the subject of a detailed Planning Proposal, Concept Plan and design excellence process which consistently proposed residential uses at level 1 and residential uses at the ground floor of Buildings S3 and S4.
- The overall development achieves the minimum non-residential floor space requirement established under the site-specific LEP. There is limited demand for additional non-residential floor space in this location.

3.2.1 Consistency with the zone objectives

Despite the minor non-compliance, the proposal will remain consistent with the objectives of the MU1 zone as detailed below:

TABLE 2: RELEVANT OBJECTIVES OF THE MU1 ZONE

OBJECTIVE	CONSISTENCY
To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.	The development will continue to provide ground level non-residential uses throughout the development, none of which are compromised by this variation. Level 1 residential units are capable of being converted to non-residential in the future and will continue to provide at least 2.7m floor to ceiling heights.
To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.	In mixed use buildings, ground floor non-residential uses are proposed to have floor to ceiling heights exceeding the minimum of 3.3m under Section 148 of the HSEPP. These tenancies have direct street access and visibility creating active street frontage with possibilities for diverse offering to the community. Only minor departures from the 3.3m control is proposed at the ground floor for residential buildings.
To minimise conflict between land uses within this zone and land uses within adjoining zones.	The development is entirely compatible with surrounding development and land uses. The proposal mirrors the same floor to ceiling minimums as the development across Zetland Avenue, creating continuity of appearance and non-residential offerings.
To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.	The proposal seeks to provide a variety of non-residential uses on ground floor to increase activation and visibility.

OBJECTIVE	CONSISTENCY
To ensure land uses support the viability of nearby centres.	The development site is not identified as a centre. As such, the non-residential uses on ground floor only seek to compliment the established centre, and meet the day-today needs of residents in the immediate area.
To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.	The site is located near Green Square Railway Station and Green Square Bus Interchange, providing excellent connectivity to the greater Sydney metropolitan area. The multiple uses will increase employment and housing opportunities in a highly accessible location,

3.2.2 Orderly and economic use of land & public interest

In accordance with the objects of the EP&A Act, the proposal provides for the orderly and economic use of the land when considering the site constraints, relationship to surrounding properties and accessible location. These characteristics support the proposed variation, and it would be entirely contrary to the public interest to request strict compliance as the variation is minor and the proposal is compatible with the character of the locality. A fully compliant development will result in the provision of subpar tenancies and in an inferior building arrangement and design, ultimately resulting in unleaseable tenancies whilst impacting the amenity of future residents.

The proposal will deliver additional housing supply in accordance with Federal and State government policy. It will replace unnecessary office space with critically needed housing supply.

There are no unreasonable impacts that will result from the proposed variation to the minimum non-residential floor space development standard. As such there is no public benefit in maintaining strict compliance with the development standard.

4 Conclusion

Having regard to all of the above, it is our opinion that compliance with the minimum floor to ceiling height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied, and the variation is worthy of support.