

Attachment D

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Clause 4.6 Variation Request to Clause 4.3 - Building Height

Stage 2 DA for
Mixed Use Development
219-231 Botany Road, Waterloo

On behalf of
Vantager Group
June 2022






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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

This Clause 4.6 variation request has been prepared by Place Design Group on behalf of Vantager Group in relation to the development application for 219-231 Botany Road, Waterloo (the site). This request seeks to vary the Building Height standard prescribed for the site under Clause 4.4 of Sydney Local Environment Plan 2012 (the LEP).

Clause 4.3 of the LEP (Height of Buildings) specifies that:

The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Building height (or height of building) is defined by the LEP as:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The relevant Height of Buildings Map nominates a building height of 22 metres for the site. While the roofs of all proposed buildings are less than 22 metres above ground level, and Stage 1 DA2015/1358 grants approval for lift overruns in excess of this height, various other rooftop structures are also proposed to exceed this height. Such structures include balustrades and fire stairs, which are required for the rooftop to be trafficable, and planter beds, which increase the amenity of the common area on the roof.

This Clause 4.6 variation has been amended following Council's Request for Information dated 19 May 2021 and following several workshops with staff in November 2021, which has resulted in numerous amendments to the building design and subsequent treatments to the roof subject of the non-compliance.

Key changes on the roof include the introduction of 3 x pergola structures that are strategically positioned in areas near existing lift access areas to provide greater integration of the built form.

The introduction of pergola structures does not result in an increase to the previously submitted variation, but does provide for additional areas that sit above the height plane. As such, the underlying rationale for the variation remains unchanged, only the extent of variation arising from the pergola structures.

Table 1 – 2 provides a numeric overview of the various non-compliances, which are illustrated at **Figure 1 – 3**.

Table 1: Building A2			
Building Element	Maximum height	Variation to Standard	Percentage Variation
Top of planter	22.875m	0.875m	3.97%
Fire stair/pergola	24.391m	2.391m	10.8%

Table 2: Building B

Building Element	Maximum height	Variation to Standard	Percentage Variation
Top of planter	23.113m	1.113m	5.09%
Fire stair/pergola	23.589m	1.589m	7.22%

As stated earlier, Stage 1 DA2015/1358 grants approval for lift overruns beyond the maximum LEP height. This Clause 4.6 relates to additional elements above the height limit but below the approved lift overrun, such as fire stairs, pergola, top of planter.

It is noted there are no breaches to building height for Building A1 and C.



Figure 1 Encroachments to the 22m height standard (Source: Coffee Parker)



Figure 2 Plan of proposed Variations to Building Height Standard

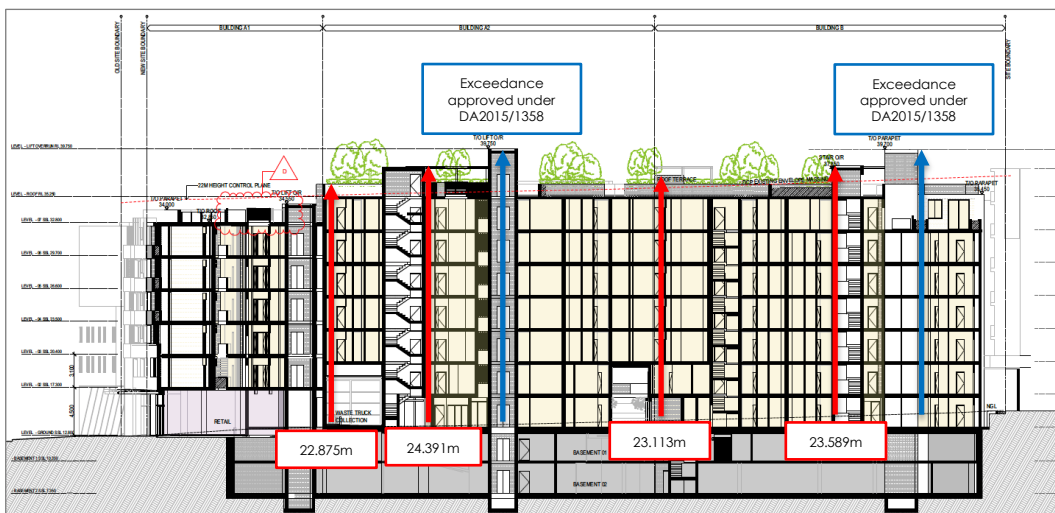


Figure 3 Section of proposed Variations to Building Height Standard

This request has been prepared in accordance with the aims and objectives contained within Clause 4.6 of the LEP and the Building Height Development Standard. The following sections of this report provide an assessment of the request to vary the Development Standard relating to the Building Height in accordance with Clause 4.6 of SEPP. Consideration has been given to the following matters within this assessment:

- *Varying Development Standards: A Guide, prepared by the Department of*

Planning and Infrastructure dated August 2011; and

- Relevant planning principles and judgements issued by the Land and Environment Court.

2 Exception to Development Standards

Clause 4.6 of the LEP includes provisions that allow for exceptions to Development Standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

- (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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain Development Standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for the development.

In determining whether to grant consent for development that contravenes a Development Standard, Clause 4.6(3) requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

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

Furthermore, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained. The concurrence of the secretary has been assumed in this instance. The proposed non-compliance in Height has been assessed against the objectives of the zone and Development Standard in Section 3.

The assessment of the proposed variation has been undertaken in accordance with the requirements of the LEP, Clause 4.6(3) Exceptions to Development Standards in the assessment in Section 3 and Section 4.

3 Clause 4.6 (3)(a) Compliance with the Development Standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe V Pittwater* [2007] NSW LEC 827 a five part test was established in which a variation to a development standard is considered to be unreasonable or unnecessary as per Clause 4.6(3A). The five ways are (emphasis added):

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 or 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 zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Satisfaction of any one of these tests is sufficient to demonstrate the compliance with the standard is unreasonable or unnecessary.

4 The objectives of the standard are achieved notwithstanding noncompliance with the standard

Consideration (1) which requires a demonstration that the objectives of the Building Height standard can be achieved notwithstanding noncompliance is relevant in this case. The compliance of the proposed development with the objectives of the Building Height standard in Clause 4.3 of the LEP is demonstrated in Table 2 below.

Table 2: Building Height Objectives

Objective	Comment	Objective Achieved
<i>(a) to ensure the height of development is appropriate to the condition of the site and its context,</i>	The proposed development is compliant with ADG requirements regarding building separation between habitable and non-habitable rooms. As the height breaches are minor and are centrally located within the site, resulting impacts to neighbouring sites with regard to overshadowing or overbearing impacts are negligible.	✓
<i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas</i>	While the site adjoins the heritage listed Green Square Primary School, all of the subject structures are located on Buildings A and B, such that they are separated from the School by Building C, which fully complies with the height standard.	✓
<i>(c) to promote the sharing of views,</i>	The proposed development is consistent with the maximum building height under the original concept approval for the site. Any remaining views from neighbouring buildings are partial at best and subsequently of low value. Any expectation to retain views across a side boundary is unrealistic.	✓
<i>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining</i>	Being setback from prominent building frontages and being less than the equivalent of an additional storey in height, the proposed structures will not undermine the spatial distribution of building heights planned across the precinct.	✓

Table 2: Building Height Objectives

<p>areas,</p>		
<p><i>(e) in respect of Green Square—</i></p> <p><i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p><i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p>	<p>The subject structures will not be perceptible from or have any perceptible environmental effect on any public domain space, including parks and roads.</p>	<p>✓</p>

Despite the proposed variation from the relevant height standard the proposed development remains consistent with the objectives of Clause 4.3 of the LEP and therefore strict compliance with the FSR standard is unreasonable and unnecessary in this instance.

5 Clause 4.6 (3)(b) Sufficient Environmental Planning Ground to justify contravening the Development Standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. This section demonstrates that the impacts of the proposed development with the proposed variation will be consistent with the external site impacts that may be reasonably expected by a complying development in the following regards:

- The proposed height variation will not result in a significant intensification of the use.
- The subject structures are located above the height of surrounding development and are setback from the building edge such that they will not result in any significant visual, noise or shadow impacts upon surrounding properties (see Figure 4 and Section 8 of the accompanying SEE).
- The proposed development will provide a high level of amenity to future occupants and will provide a more attractive roofscape than a standard utilitarian service roof;
- The proposed height variation will not be perceptible from the streetscape or any public place and will therefore be in keeping with the desired future character of the area,
- Existing development on surrounding sites limits the ability to achieve ADG solar access requirements to ground level communal open space. While the site has excellent access to surrounding public open spaces with ample solar access and private balconies achieve ADG solar access requirements, the provision of a rooftop communal open space will provide a sunny alternative to the more shaded ground level communal open space.



Figure 4 Protrusion above 22 metre height standard, seen from the upper level of 2-6 Allen Street

6 Clause 4.6 (4a) (ii) Public Interest

Clause 4.6(4a)(ii) requires that the consent authority consider whether 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 compliance of the propose variations with the objectives of the standard have been considered above.

Further, it is considered that the proposal will remain consistent with the objectives of the B4 Mixed Use zone as summarised in Table 3 below.

Table 3: Consistency with the Objectives of B4 Mixed Use Zone	
Objectives	Compliance with Objective
<ul style="list-style-type: none"> • <i>To provide a mixture of compatible land uses.</i> 	The proposed variation will not influence the proposed mix of land uses.
<ul style="list-style-type: none"> • <i>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.</i> 	The purposed variations arise from the provision of attractive, secure rooftop communal space, which enhances the appeal of living in a dense mixed use precinct, thereby encouraging the use of public transport, walking and cycling
<ul style="list-style-type: none"> • <i>To ensure uses support the viability of centres.</i> 	The proposed variation will not influence the viability of any centre.

7 Clause 4.6(5) Grounds for Consideration

In deciding whether to grant concurrence, subclause 4.6(5) requires that the Secretary consider:

1. *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
2. *The public benefit of maintaining the development standard, and*
3. *Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The proposal has been assessed against the relative criteria below:

Would non-compliance raise any matter of significance for State or regional planning?

The proposed variations facilitate the provision of a landscaped and shaded trafficable roof, which is consistent with emerging State planning principles in support of green roofs and reduced urban heat effects.

Is there a public benefit of maintaining the development standard?

Removal of the subject structures would not result in any perceptible public benefit. The only potential impact would be a reduction in on-site open space, which could potentially lead to increased demand on surrounding open space facilities.

Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

Conclusion

It is requested that Council supports the proposed variation to Clause 4.3 Building Height of the LEP for the following reasons:

- Compliance with the Development Standard is unreasonable and unnecessary as the subject structures will be barely perceptible outside the site;
- There are sufficient environmental planning grounds to justify contravening the Development Standard;
- The subject structures will not result in an unreasonable environmental impact; and
- There is no public benefit in maintaining the strict compliance with the Development Standard.

Overall, it is considered that the proposed variation is considered appropriate and can be supported under the provisions of Clause 4.6 of the LEP.