

Clause 4.6 Variation – Height of Building

59-63 Trafalgar Avenue, 1A & 1B Valley Road, Lindfield

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1.0 Introduction

This Clause 4.6 Variation Request has been prepared by Planning & Co on behalf of Castle Hill No. 8 Pty Ltd (**the Applicant**) in support of a State Significant Development Application (**SSDA**) pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

This report should be read in conjunction with the Environmental Impact Statement (**EIS**) prepared by Planning & Co and other relevant technical documentation that accompanies the EIS.

This Clause 4.6 Variation Request relates to the development standard for building height under Section 16(3) of the *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*. Clause 4.6 of the *Ku-ring-gai Local Environmental Plan 2015 (KLEP)* enables a consent authority to grant consent for a development even though the development contravenes a development standard of the KLEP or another environmental planning instrument, such as in this occasion.

Clause 4.6(3) of the KLEP requires that a consent authority be satisfied of two matters before granting consent to a development that contravenes a development standard. These two matters are that the applicant has demonstrated that:

- a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The consent authority's satisfaction in respect of those matters must be informed by the objectives of Clause 4.6, which are to provide an appropriate degree of flexibility in the application of the relevant development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

1.1 Legal Guidance

The Land and Environment Court (LEC) has established planning principles to guide assessment of whether a variation to development standards should be approved. Guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Turland v Wingecarribee Shire Council [2018] NSWLEC 1511;
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386; and
- Moskovich v Waverley Council [2016] NSWLEC 1015.

1.2 Overview

In accordance with the above requirements, this Clause 4.6 Variation Request:

- Identifies the development standard to be varied (Section 2.0);
- Identifies the variation sought (Section 4.0);
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Section 5.0);
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (Section 6.0); and,

In summary, this Clause 4.6 variation demonstrates that, notwithstanding the minor non-compliance with the Building Height development standard:

- Compliance with the development standard would be unreasonable and unnecessary, as the proposed development satisfies the objectives of Chapter 2 of the Housing SEPP and the aims of Chapter 5 of the Housing SEPP,
- There are sufficient environmental planning grounds to justify the contravention of the height of building control, as the proposed development causes no unreasonable additional impact in terms of overshadowing or view loss as a result of the non-compliance, and is compatible with the future desired character of the area,

- The minor non-compliance is specific to the circumstances of the proposed development, as the Site slopes significantly and the height exceedance is only to a small portion of the upmost storey where the ground level (existing) falls away.

Therefore, in accordance with the flexibility allowed under Clause 4.6 of the KLEP, this SSDA may be approved with the variation as proposed.

2.0 The Site & Context

2.1 Site Description

The Site is located at 59-63 Trafalgar Avenue, 1A and 1B Valley Road, Lindfield in the Ku-ring-gai LGA. The Site has a primary frontage to Trafalgar Avenue, with secondary access from Valley Road. The Site consists of five allotments and has a total site area of 6,672sqm. The site falls approximately 11.5 from the south-east down to the north-west.



Figure 1: The Site (SDT Explorer, Planning & Co)

2.2 Surrounding Context

The area surrounding the site is undergoing renewal as a medium and high density mixed-use centre as a result of the Transport Oriented Development (TOD) and the Low and Mid Rise Housing Policy (LMR). This renewal continues recent redevelopment of the station precinct over the last decade in Lindfield.

The Site is within the Lindfield TOD area. The NSW Government has identified the TOD areas including Lindfield as strategic centres capable of delivering new homes including affordable housing. The TOD applies within heritage conservation areas, but not on lots containing an item of heritage significance.

The LMR applies to sites outside of the Lindfield TOD east of the Site. The LMR makes residential flat buildings and shop top housing permitted in the R2 Zone and provides non-discretionary standards for greater height and gross floor area.



Figure 2: Overlay of TOD sites (Purple), Indicative LMR (Orange), heritage items (brown) and heritage conservation areas (hatched) (Planning&Co)

2.3 Summary of relevant height controls applying to the Site

As above, the Site is located within the Lindfield TOD area. Pursuant to s155 of Chapter 5 of the Housing SEPP, development for the purposes of a residential flat building with a height of up to 22m is permitted with consent.

The proposed development provides 15% of the total gross floor area as infill affordable rental housing pursuant to s16(1) & (2) of Part 2, Chapter 2 of the Housing SEPP, the proposed development can utilise 30% additional floor space ratio (FSR). Therefore, the maximum permitted building height for the proposed development is the height permitted under the Chapter 5 TOD provisions (22m) plus an additional height that is the same percentage as the additional FSR permitted under s16(1), being 30% in this case.

Therefore, the total maximum height of building at the site for the purposes of residential flat buildings is 28.60m.

We note that the proposed development also provides an additional 2% of GFA as affordable housing pursuant to s156 of Chapter 5 of the Housing SEPP as required in TOD areas. The proposed development therefore provides 17% of the total gross floor area as affordable housing.

3.0 Development Standard to be Varied

3.1 Relevant development standard applicable to the Site

The development standard to be varied is s16 of Part 2, Chapter 2 of the Housing SEPP:

16 Affordable housing requirements for additional floor space ratio

(1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).

(2) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} + 2$$

(3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

(4) This section does not apply to development on land for which there is no maximum permissible floor space ratio.

4.0 Nature of the Variation Sought

As outlined in **Section 2.0** above, the Site has a maximum permitted height of building of 28.60m, made available under Chapter 2 and 5 of the Housing SEPP.

The proposed development has a maximum height of 33.07m at its highest point, exceeding the maximum building height by 4.47m (15.6%). The parts of the proposed development exceeding the maximum height are limited to a part of the uppermost levels of each building, and are a result of the significant slope across the site.

No habitable floor space is located above the permitted height.



Figure 3: Height Plane Diagram (DKO)



Figure 4: North Elevation – Valley Road (DKO)

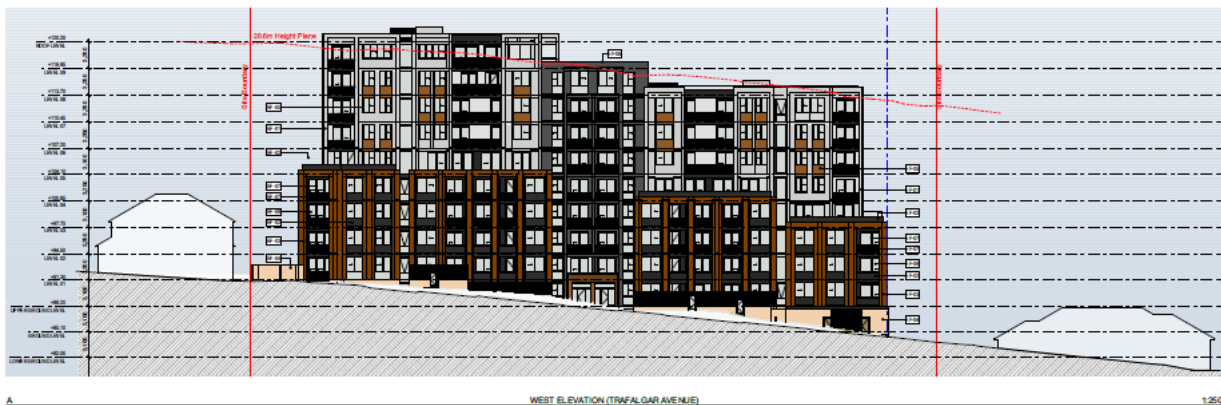


Figure 5: West Elevation - Trafalgar Avenue (DKO)

5.0 Compliance with the development standard is unreasonable or unnecessary

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five ways in which it could be shown that compliance with a development standard is unreasonable or unnecessary. His Honour in that case (and subsequently in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis is of assistance in applying Clause 4.6 given that subclause 4.6(3)(a) uses the same language as Clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

The five methods outlined in *Wehbe* were:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).

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 (Fourth Method).
5. The zoning of the particular 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 (Fifth Method).

5.1 Objective of Chapter 2, Part 2 of SEPP Housing

In this instance, the First Method is of particular assistance in establishing that compliance with the development standard is unreasonable or unnecessary. Part 2 of Chapter 2 of the Housing SEPP (the infill affordable provisions) includes a single objective at s15A:

15A Objective of division

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The proposed development satisfies the above objective as it will facilitate the delivery of new in-fill affordable housing that will meet the needs of very low, low and moderate income households. The proposed development will provide 17% of the total gross floor area of the building as affordable housing, including 15% under Chapter 2 of the Housing SEPP, and an additional 2% under Chapter 5.

The proposed development, notwithstanding the proposed height exceedance, satisfies the objective of Part 2, Chapter 2 of the Housing SEPP. In fact, the proposed exceedance, which is predominately a result of the steep, sloping nature of the site, will facilitate the delivery of new in-fill affordable housing. A compliant building height that stepped with the sloping terrain would provide less affordable housing, as a direct result of less floor area, but also as a result of accessibility and constructability challenges and additional costs related to more complex suspended slab elements and other structural implications.

Additionally, the environmental impacts of the part of the building that exceeds the permitted height is addressed in Section 6.0, and determine that there are sufficient environmental planning grounds to justify the contravention.

5.2 Aims of Chapter 5 of SEPP Housing

Chapter 5 of the Housing SEPP does not include objectives, however, for completeness this Clause 4.6 Request considers the proposed development against the *aims* of the chapter provided in s150. The aims of Chapter 5 are addressed below and demonstrate that the proposed development achieves the aims of the Chapter notwithstanding the proposed height non-compliance.

Table 1: Aims of Chapter 5 of the Housing SEPP

150 Aims of chapter	Response
<i>(a) to increase housing density within 400m of existing and planned public transport,</i>	<p>The proposed development will increase housing density within 400m of existing public transport, notwithstanding the contravention of the height standard.</p> <p>The proposed height exceedance will directly increase the housing density within 400m of Lindfield rail station.</p>
<i>(b) to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that</i>	The proposed height contravention will facilitate the delivery of mid-rise residential flat buildings around Lindfield rail station.
<i>(i) are well designed, and</i>	<p>The proposed development is well designed and has been refined through the State Design Review Panel (SDRP) process. Refer to the Architectural Design Report prepared by DKO and provided as an appendix to the EIS.</p> <p>No habitable space is above the height control.</p>
<i>(ii) are of appropriate bulk and scale, and</i>	The proposed development is of an appropriate bulk and scale, notwithstanding the proposed height exceedance, which is a result of a significantly sloping site. The bulk and scale of the proposed development is considered further in Section 0.

<i>(iii) provide amenity and liveability,</i>	<p>The proposed development provides a high level of amenity and liveability to residents and surrounding development.</p> <p>The proposed development exceeds minimum ventilation requirements and maximises solar access. The environmental impacts of the proposed development are minor as demonstrated in Section 6.0.</p>
<i>(c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.</i>	<p>The proposed development provides affordable housing under Chapter 2 and Chapter 5 of the Housing SEPP, far exceeding the minimum 2% affordable housing required pursuant to s156(2)(a) of Chapter 5.</p> <p>The additional height sought for the provision of affordable housing under Chapter 2 will deliver additional affordable housing to meet the needs of essential works and vulnerable members of the community.</p>

6.0 Environmental planning grounds to justify the contravention

Clause 4.6(3)(b) of the KLEP requires the consent authority to be satisfied that the Applicant’s written request has adequately addressed this clause by demonstrating *that there are sufficient environmental planning grounds to justify contravening the development standard.*

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, the Commissioner found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. On appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J upheld this as a valid approach.

There are sufficient environmental planning grounds to justify contravention of the height of building standard in the specific circumstances of the proposed developments, as demonstrated in the following sections of this report.

6.1 Topography

The site falls approximately 11.5 from the south-east down to the north-west.

The parts of the proposed development that exceed the maximum permitted height are limited to the ‘lower’ parts of each building, where the ground level (existing) falls away. No entire habitable floors are located above the permitted height plane.

A compliant building height that stepped with the sloping terrain would result in significant accessibility and constructability challenges and additional costs related to more complex suspended slab elements and other structural implications to these parts of the building. It is unreasonable in the specific circumstances of the proposed development, given the challenging topography of the land, to require strict compliance with the height of building control, and it has been demonstrated above that the proposed development including the part of the building exceeding the height control does not unreasonably impact on other existing or future development.

6.2 Overshadowing

Shadow diagrams and sun-eye diagrams have been prepared by DKO and are provided within the Architectural Plans included in the EIS and provided as in Figure 6 below. In summary, the diagrams demonstrate that overshadowing caused by the proposed development is minor, notwithstanding the height exceedance, as:

- Neighbouring dwellings to the west will receive at least 2 hours of solar access between 9am and 3pm on 21 June. The impact of the additional proposed height compared to a compliant TOD and Infill Affordable height is negligible.
- Neighbouring dwellings to the south and east will receive at least 2 hours of solar access between 9am and 3pm on 21 June, and solar impacts on these developments is very minor. The impact of the additional proposed height over the maximum permitted height is minor and does not result in additional overshadowing of any properties.
- The proposed building has increased setbacks to the heritage lots to the south to ensure solar access to these lots. As a result, the building form was massaged and bulk redistributed to the areas that do not impact any other lots in terms of solar or other amenity impacts.

- The proposed development has been carefully designed to reduce solar impacts and will cast less shadow on 21 June than a compliant TOD and Infill Affordable Housing envelope.
- The site is located in a dense urban centre undergoing renewal. The proposed development reflects the anticipated future character of the area and the minor exceedance does not create any unreasonable additional impact in terms of overshadowing compared to a compliant TOD and Infill Affordable Housing envelope.



Figure 6: Solar Studies (DKO).

6.3 Visual Impact

The proposed development will retain and share existing views. A Visual Impact Assessment (VIA) prepared by Urbaine Design Group supports the proposed development and determines:

“This Visual Impact Assessment has undertaken a review of the proposal, within its future setting and concludes that, although there may be a small number of locations within neighbouring properties that are impacted by the new development, the relevant views, as selected within the report, are all observed from static and dynamic public viewing locations.

The assessment of view loss experienced by local pedestrians, or vehicle occupants varies between Nil and Moderate. This is as a result of the existing topography of the landform and the unavailability of distant views, combined with the dense, mature landscaping surrounding the site in all directions. In particular, the tall, mature trees along Gordon Creek screen many of the views from the south and east towards the subject site - entirely at the lower levels and significantly at the upper levels.”

Importantly, the proposed height exceedance does not cause any additional impact on public or private views compared to a compliant height.

6.4 Bulk, Scale and Character

The bulk and scale of the proposed development has been carefully developed over the course of the project, including through the SDRP, to minimise impacts on surrounding development and public space.

The proposed development is of an appropriate scale, notwithstanding the proposed height exceedance, and is compatible with the future desired character of Lindfield as established by the Housing SEPP. The Lindfield TOD area is a precinct undergoing change aligned to relevant strategic frameworks and government directives, and the recent amendments to the Housing SEPP to deliver housing in well located areas. Impacts on nearby items of heritage significance have been managed and are acceptable, and the proposed development is compatible with the heritage conservation area.

In *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161, Commission O’Neill established that desired future character is not determined only by the development standards that control building envelopes for an area, and “[cannot] account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development.”

The proposed bulk and scale of the building including the proposed height is appropriate mindful of this context, and is compatible with the future desired character of the area. We note that the maximum height permitted under the infill affordable housing provisions in the TOD area is 28.6m, for the delivery of 15% of the total GFA as infill affordable housing. The proposed development seeks a maximum building height of 33.07m, due to the sloping nature of the site, and will result in the delivery of a total of 17% affordable housing including under s156 of the Housing SEPP provisions.

The proposed development has been designed with consideration of the existing and future streetscape in terms of building articulation, use of materials and landscaping in setbacks and on structure.

6.5 Consistency with the Objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but can refer to grounds that relate to the subject matter, scope and purpose of the Environmental Planning & Assessment Act 1979 (EP&A Act), including the objects in Section 1.3 of the Act. Whilst this does not require that the proposed development be consistent with all of the objects of the Act, the proposed developments consistency with each object is considered in Table 2.

Table 2 Assessment of proposed development against the Objects of the EP&A Act

Object	Assessment
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources</i>	The proposed height exceedance is not anticipated to have any impact on the promotion of the social and economic welfare of the community or the development and conservation of the State’s natural and other resources.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment</i>	The proposed development is supported by an ESD report and will incorporate ecologically sustainable development into the design, construction and ongoing use of the building. The proposed development meets or exceeds BASIX requirements and the additional proposed building height will have no unreasonable impact on environmental and social considerations.
<i>(c) to promote the orderly and economic use and development of land</i>	The proposed development including the proposed exceedance of height will facilitate the renewal of a large consolidated site identified within the Lindfield TOD area as suitable for greater density and more economic use of land.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposed development promotes the delivery and maintenance of affordable housing, and provides a total of 17% of the total GFA as affordable rental housing pursuant to Chapter 2 and 5 of the Housing SEPP.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	The proposed building height will not impact on the conservation of threatened and other species or native animals and plants, ecological communities and their habitats.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The exceedance of the height standard will not negatively impact the proposed development’s ability to promote the sustainable management of built and cultural heritage.

<i>(g) to promote good design and amenity of the built environment,</i>	The proposed development has been designed by DKO and has been refined through the SDRP process. The proposed development promotes good design and amenity by maximising internal and external amenity for residents and neighbouring development.
<i>h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposed building will meet all relevant Australian Standards and the BCA in order to protect the health and safety of occupants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	This object is not relevant to this proposed development.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The proposed development including this Clause 4.6 Variation Request will be publicly notified in accordance with Council's requirements.

7.0 Conclusion

This written variation request made under Clause 4.6 of the KLEP to vary the maximum permitted height pursuant to s16 of Chapter 2, Part 2 of the Housing SEPP has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

This request has demonstrated that the proposed development, notwithstanding the variation to the maximum height of building standard, is consistent with the relevant aims and objectives of the Housing SEPP and the objects of the Act.