

Request to Vary a Development Standard Clause 4.6



9 - 11a Livingstone Avenue

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1.0 Request to Vary a Development Standard

Clause 4.6 of *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (KLEP Local Centres) allows Council to grant consent for development even though the development contravenes a development standard imposed by KLEP Local Centres. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

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

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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 consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

An additional principle in relation to Clause 4.6 was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal.

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of KLEP Local Centres and other standard LEP instruments. Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

1.1 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of the KLEP Local Centres, relating to the height of buildings. Under KLEP Local Centres the site is afforded a maximum building height of 11.5m.

1.2 Is the Planning Control in Question a Development Standard?

'Development Standards' are 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,...”

The maximum building height control under Clause 4.3 of the KLEP Local Centres is clearly and unambiguously a development standard.

2.0 Extent of Variation Sought

As described in the Statement of Environmental Effects (SEE) and illustrated on the Architectural Drawings prepared by Brewster Murray Architects provided at **Appendix A**, the height of the proposed development will exceed the maximum building height of 11.5m by up to 4.4m (to a maximum height of 15.9m). The 11.5m height plane that applies to the site, along with the elements of the proposed development that exceed this plane, is presented in **Figure 12**.

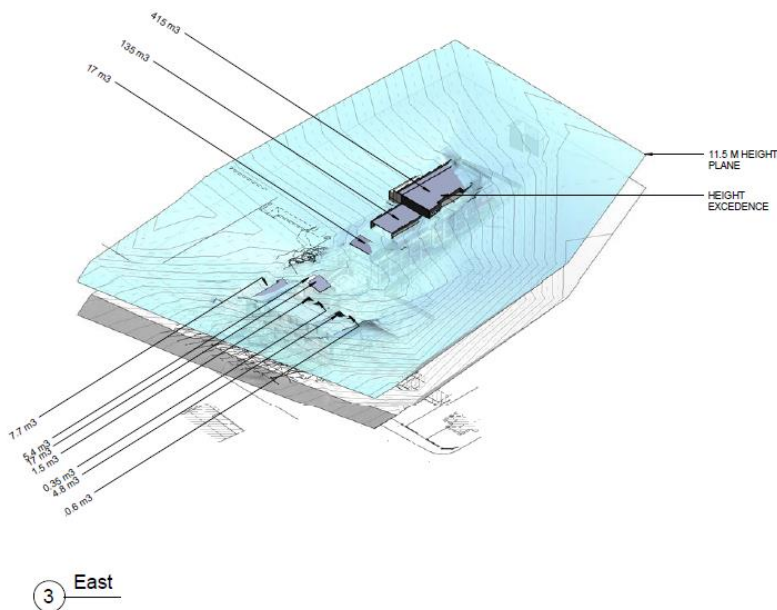


Figure 1 – Elements of the proposed development shown protruding through the 11.5m height plane

As shown in **Figure 1**, although the at the highest point the building is up to 4.4m above the 11.5m height plane, due to the topography of the site, the area of the building that exceeds the height control is limited to a small footprint only.

A volumetric measurement of the proportion of the proposed development that exceeds the height limit was undertaken. This assessment calculated that just 6% of the total volume of the building a will be above the 11.5m height plane.

The principle reason for the exceedance of the maximum building height limit is the need to respond to the sites existing topography. Building height is measured from the natural ground level, the natural ground level on the site falls steeply from both ends of the site towards the riparian zone in the centre. Therefore, the height exceedance is concentrated in the centre of the site where it has limited impacts.

In addition, the presence of the riparian corridor and significant vegetation on the site means that much of the site is sterilised for redevelopment. In order for the permissible floor space on the site to be realised, it is necessary to provide it in parts of the development which may exceed the height control, but where the impact is not significant.

Strict numerical compliance with the development standard would not result in an appropriate outcome for a site that is zoned for 'High Density Residential'.

In order to achieve the density of development that is envisaged by the site's zoning and floor space ration (FSR) development standard, a departure from the maximum building height standard is required. Additionally, as the ground level of the site falls steeply away from the site's only street frontage, the application of the height of buildings development standard is considered onerous and unnecessary. As shown below in **Figure 2**, when viewed from Livingstone Avenue the proposed development appears to comply with the development standard.

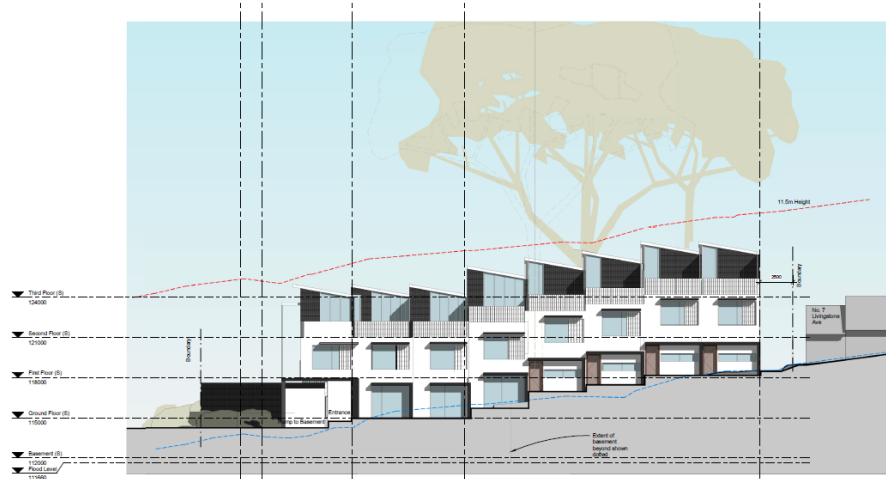


Figure 2 – Proposed Livingstone Avenue Elevation

3.0 Justification for Contravention of the Development Standard

3.1 Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. Specifically, the proposed development is located within the Pymble Local Centre, approximately 200m from Pymble Railway Station. Development to the south of the site is predominantly characterised by low density residential development in an established landscape setting. Development to the north increases in density and scale as it approached the Pymble Local Centre. The site's close proximity to the Pacific Highway and train line promotes a variety of high activity mixed land uses in the broader area. As such, the site forms an interface between the high density and environmental housing zones.

Immediately to the north of the site a development application that provides 102 residential units is currently under assessment. That proposal provides three buildings of up to seven storeys within a large land parcel. This application is anticipated to be determined by the JRPP later this year.

3.2 Public Benefit

Clause 4.6(4)(a)(ii) of KLEP Local Centres requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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 proposed development has been assessed against the objectives for the R4 High Density Residential zone below. Despite the proposed non-compliance with the maximum building height development standard, the proposal is considered to be in the public interest as it nevertheless satisfies the objectives of the zone and the objectives of the development standard.

3.3 Consistency with the R4 High Density Residential zone

The consistency of the proposed variance of a Development Standard against the objectives of the R4 High Density Residential zone is outlined below.

To provide for the housing needs of the community within a high density residential environment.

The proposed development fundamentally seeks to respond to residential market conditions by providing new residential apartments in an existing centre where there is high demand. Despite the site's zoning for high density residential development, the topography of the site, as well as the presence of significant trees, limits the potential to achieve the permitted density on the site (and therefore satisfying the objective to provide high density residential development in the R4 zone) without a variation to the height control. The proposal provides new housing stock to the LGA whilst responding to the site controls and surrounding context and is therefore considered to be consistent with this zone objective.

To provide a variety of housing types within a high density residential environment.

In order to achieve the density of development that is envisaged by the site's zoning and FSR control, the proposed scheme includes a mixture of multi-level apartments and single-level penthouses. The proposed multi-level apartments will contribute to the variety of housing types within an area that is currently dominated by detached dwellings and smaller apartments. The site creates an interface between the high density residential zone and the environmental living zone. The proposed development provides a built form and scale that is sympathetic to the existing landscape character of the area.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposed residential development will increase housing supply to support the growing population of Pymble, generating greater demand for the services and facilities currently located in the Pymble Local Centre. It is anticipated that the future residents on the site will stimulate the local economy, particularly compared to the existing situation where the site is underutilised.

To provide for high density residential housing close to public transport, services and employment opportunities.

The site of the proposed development is strategically located in a highly accessible locality, with the following key attributes:

- 200m walking distance to Pymble Railway Station;
- Direct connection to the bus corridor of the Pacific Highway, with bus stops located in close proximity to the site;
- Ample opportunity to utilise the existing transport networks to access large employment centres such as Chatswood, St Leonards, North Sydney and the Sydney CBD; and
- Located in walking distance of the Pymble Local Centre which contains facilities and services.

The proposed development will take advantage of the site's strategic location to deliver additional housing in close proximity to existing transport and services. The proposed development will integrate into the existing locality and maximise the locational benefits of the site in terms of accessibility to public transport and encouragement of utilising local services.

3.4 Consistency with the objectives of the maximum building height development standard

Clause 4.3 of KLEP Local Centres sets out the following objectives for the building height standard:

4.3 Height of Buildings

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

- (a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*
- (b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*
- (c) to enable development with a built form that is compatible with the size of the land to be developed.*

Despite the proposed variation to the maximum building height development standard, the proposed development will still result in buildings which achieve the objectives of the development standard. The consistency of the proposed development with the objectives of the maximum building height development standard is outlined below.

To ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres

The proposed design has been carefully considered with respect to the development standards applicable to the site and the broader locality. When viewed from the public domain along Livingstone Avenue, the proposed development will appear as a row of townhouses which will be consistent with the established building height for the area (i.e. 11.5m). In this regard, the proposal will deliver an outcome that is compatible with the hierarchy of local centres, including the desired character of the Pymble Local Centre area.

To establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity

The site forms an interface between land zoned for *R4 High Density Residential* and that zoned for *E4 Environmental Living*. The proposed exceedance of the building height standard development standard will not affect the ability of the scheme to interface between these two zones. In this regard, the proposed development has been designed to minimise building bulk at the zone boundary by setting habitable rooms back from the boundary of the site by 6m. Circulation and plant areas are set back from this boundary by at least 3m.

To enable development with a built form that is compatible with the size of the land to be developed.

The building coverage, form and scale have been restricted by the existing site constraints including the riparian corridor that bisects the site, as well as the presence of significant vegetation on the site. However, the exceedance of the height standard has generally been limited to the centre of the site where it will not result in adverse impacts.

Despite the proposed exceedance of the development standard, the provision of deep soil zones and communal open space has not been compromised. The development will also be generally consistent with the ADG design guidelines and will exceed the minimum internal amenity standards in some case. Subsequently, the proposal presents a built form appropriate for the size of the land.

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

Clause 4.6(3)(a) of the KLEP Local Centres requires the departure from the development standard to be justified by demonstrating:

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

In the decision of Wehbe, the Chief Justice expressed the view that there are five different ways in which an objection to a development standard might be shown as unreasonable or unnecessary and is therefore well founded. Of particular relevance in this instance is the first and third way, as follows:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard; and

3. the underlying objective or purpose would be defeated or thwarted if compliance is required with the consequence that compliance is unreasonable;

Objectives otherwise achieved

As detailed in Section 3.4 above, the proposal satisfies the building height objectives despite the height non-compliance.

These objectives are satisfied by the proposal (as shown above) despite the numerical variation with the building height standard. The proposed development, including the proposed building elements that exceed the height limits, will continue to achieve the objectives of the standard for the following reasons:

- the proposed variation of the development standard will not result in any additional adverse impacts on the amenity of the neighbouring buildings in terms of overshadowing, privacy, outlook and amenity when compared to a complying scheme;
- the variation to the building height control will have no impact on the streetscape, and on the visual privacy and solar access of neighbouring developments;
- the building is suitable for the size and dimensions of the site in its context;
- the building provides appropriate setbacks to reduce the impact on amenity experienced by the site neighbours;
- the proposed density is appropriate in the context of a *R4 High Density Residential* zone in the Pymble Local Centre;
- Geographically, the proposal is located in a low-lying area of the locality with limited opportunities for substantial views. The proposed building elements above the height limit will not obscure any significant view lines and respects the values of view sharing; and
- the proposed development is consistent with the objectives of the building height control as described above.

As the objectives of the development standard are met notwithstanding the breach of the height of buildings standard, this Way is considered to be satisfied.

Objective thwarted

Due to the extreme gradient of the site's topography, development on the site would not be able to achieve the objectives of the building height development standard (or those of the R4 zone) if strict compliance with the standard is required. Notably, strict compliance with the building height development standard would require a built with a larger footprint that would have adverse environmental outcomes. If strict compliance with the height standard is enforced, it would be difficult to address the following objectives of the standard:

- (a) *to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres, or*
- (c) *to enable development with a built form that is compatible with the size of the land to be developed.*

As these objectives would be thwarted by a development that strictly complies with the height of buildings development standard, this Way is considered to be satisfied.

Having regard to the above, in our view it would be unreasonable and unnecessary to enforce strict compliance with the maximum building height development standard contained within Clause 4.3 of the KLEP Local Centres.

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

Clause 4.6(3)(b) of the KLEP Local Centres requires the departure from the development standard to be justified by demonstrating:

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

There are considered to be sufficient environmental planning grounds to justify contravention of the maximum building height development standard in this specific instance.

In *Four2Five*, the Court 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.

There are particular constraints that affect the subject site which inhibit the development's ability to achieve strict compliance with the maximum building height standard. These are detailed below.

Site Characteristics

The site contains unique characteristics in terms of its gradient and natural constraints with an RL ranging from 111.6m to 124.2m and a riparian zone that bisects the site at its lowest point. In addition, there are a number of significant trees and vegetation on the site which must be preserved and therefore limit the development footprint.

In response to the site sensitivities, the proposed development has been specifically designed to achieve a high quality built form that reflects the existing character of the area and is compatible with the envisaged built form of the locality.

Importantly, the integrity of the riparian corridor will be maintained by achieving 20m building separation in the centre of the site. Based on the gradient of the site, the development has been 'stepped' to principally satisfy the envisioned density for the site. As a result, the elements of the roofscape that protrude above the maximum building height - resulting in a variation - are directly related to the slope of the site.

The exceedance of the maximum building height development standard will have no more than a minimal impact on the streetscape, and on the visual privacy and solar access of neighbouring developments, as illustrated in the Architectural Drawings at **Appendix A**. The buildings are of a suitable size, dimension and scale in the context of the site and its surrounds.

Residential Amenity

The proposed exceedances of the height of buildings development standard respond to the unique environmental characteristics of the site and allow high level solar access where ground level access would not otherwise have been attainable due to the topography. When viewed from Livingstone Avenue the proposed development will not appear to breach the height of building development standard.

On balance, maintaining the development standard would result in an inferior amenity outcome for future residents and visitors to the site. Given the proposal will not result in any significant impacts to surrounding residents and will provide a higher standard of amenity to future residents; the proposal is considered to have sufficient planning grounds to justify the contravening of the maximum building height development standard.

4.0 Secretary's Concurrence

Under Clause 4.6(5) in deciding whether to grant concurrence, the Secretary must consider matters discussed below.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation to the building height development standard of the KLEP Local Centres will not raise any matter which could be deemed to have State or Regional significance. The variance of this development standard will not contravene any overarching State or Regional objectives or standard, rather it will contribute to the achievement of an attractive, liveable and economically viable place. Beyond this positive contribution, the proposed variations will not have any effects outside the sites immediate area.

The public benefit of maintaining the development standard

Maintaining the development standard would not result in any public benefit in this situation. If the current development standard was maintained it would be likely to severely limit the development feasibility of the site and prevent the site from achieving highest and best use. The development as a whole will deliver a number of public benefits to the area, including:

- Providing a residential development that contributes to the viability of the Pymble Local Centre around Pymble Railway Station;
- Delivery of additional housing to contribute to overcoming the shortfall of housing in Sydney;
- Providing housing in a locality which is well serviced by public transport and has direct access to services and facilities; and
- Promoting ecological sustainability and sustainable practices through the achievement of BASIX targets.

Any other matters required to be taken into consideration by the Director-General before granting concurrence

The proposed variation to the height of buildings development standard will facilitate the orderly and economic redevelopment of a site that is currently underutilised and will contribute to the diversity of developments and the supply of housing in the Ku-ring-gai LGA. The proposed development will therefore assist in the achievement and of the strategic objectives of A Plan for Growing Sydney and the KLEP Local Centres.

5.0 Summary

Clause 4.3 of the KLEP Local Centres applies a maximum 11.5 metre height development standard to the site. The development proposes to exceed this limit up to a maximum height of 15.9 metres, due to the steep slope of the site, this exceedance varies up to this maximum and only 6% of the building volume would be above the applicable height limit. This request under Clause 4.6 of the KLEP Local Centres is submitted to Council in support of this departure from the building height standard.

There are unique constraints which affect the site, and design requirements which result in a development that exceeds the numerical height limit. The site is naturally constrained in terms of gradient, existing vegetation and the presence of riparian corridor.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility in certain circumstances to achieve better outcomes for and from development, a departure from the height standard is considered appropriate in these circumstances:

- Non-compliance with the building height development standard does not represent a significant variation in the context of the overall built form and would not be perceivable from the public domain or the road (Livingstone Avenue); and
- There are sufficient environmental planning grounds to justify the contraventions to the development standard as the building provides an appropriate response to its site specific context and will maintain the level of the amenity for surrounding and future residents.

In light of the above, the proposed variation to the maximum building height development standard is considered acceptable and does not inhibit the ability for Council to favourably consider the subject DA. On this basis, the Clause 4.6 variation is considered well founded and Council's support for the variation to the maximum building height standard is requested.