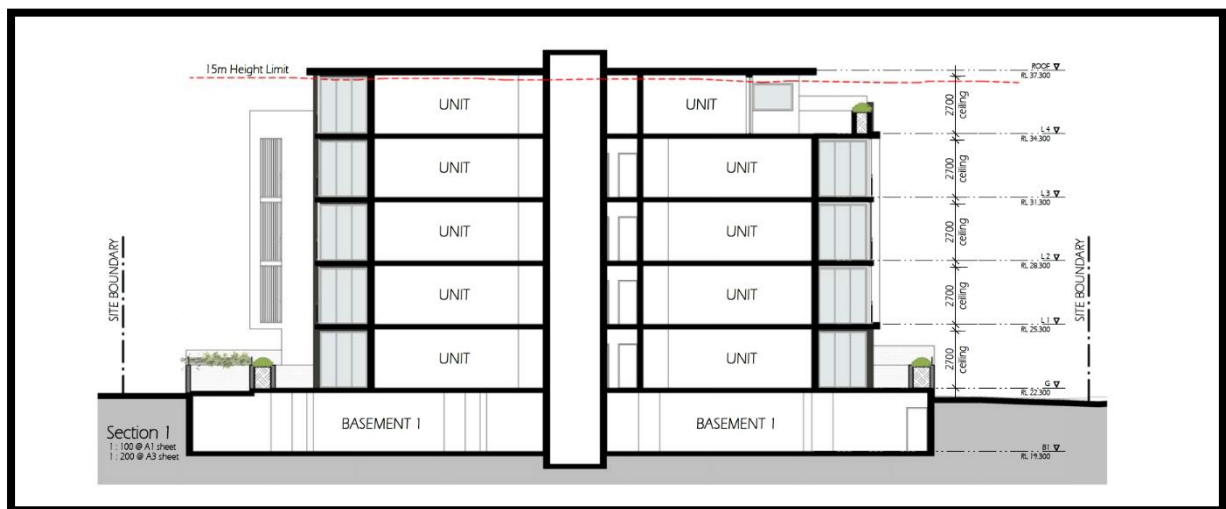


Appendix 2: Clause 4.6 Variation Request

As addressed previously within this statement and as evident in the section extract below and the architectural plans submitted, the proposed development will comprise a 5 storey residential flat building that predominantly complies with the permitted maximum 15m building height. However as illustrated below a small section of the building and the top of the lift core protrudes above the 15m control. The building height protrusion is at its maximum 720mm above the maximum height control of 15m or 4.8% and the top of the lift core represents a protrusion of approximately 850mm above the maximum height control of 15m or 5.6%.

The extract below highlights the area of building above the maximum permitted 15m height control.



As illustrated above the development exceeds the height control by up to 850mm.

Therefore, a Clause 4.6 variation request has been prepared, noting that the request addresses a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*.

The key tests or requirements arising from the above judgements is that:

- The consent authority be personally 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 them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.
- 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, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe “test” 3).

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate how the proposal achieves a better outcome than a complying scheme; 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 building height standards standard;
- Demonstrating consistency with the R4 zoning; and
- Satisfying the relevant provisions of Clause 4.6 of Holroyd LEP 2013.

These matters are addressed below, noting that the proposal presents a site responsive development by responding to the constrained nature of the subject land parcel meaning that the floorspace of the development is most appropriately accommodated within a fifth level, rather than bringing the building closer to adjoining properties.

Clause 4.6 Variation: Height of Building

The proposal is non-compliant with Clause 4.3 – Height of Building which stipulates that the maximum building height within the subject land parcel is 15m. The majority of the proposed 5 storey flat building complies with the prescribed height control. The building is designed to ensure that the majority of the habitable floor space is contained below the maximum building height line which indicates that the variation is not simply a means of achieving additional development yield on the site, but a site specific design response. In this case the variation stems from both the flooding constraints and the desire to appropriately accommodate the bonus FSR envisioned by the ARHSEPP. It is noted all structures that encroach upon the height control are recessed and not highly visible from the street level and will have negligible impact on the streetscape along either Bransgrove Street or Irwin Place.

Clause 4.6 of the Holroyd LEP 2013 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 sub clause 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.*

Each of these provisions are addressed in turn.

Clause 4.6(3)

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 minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,*
- b) *to ensure development is consistent with the landform,*
- c) *to provide appropriate scales and intensities of development through height controls.*

The current development proposal seeks to depart from the height control for small portions of the upper storey of the building and the top of liftcore. Despite this, the proposal remaining consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- The overall height of the development presents as a compatible form of development with only a small component of the upper level of the building and top of the lift core exceeding the height limit. This upper level of the building is recessed in so that the

top of the building will be less visually prominent when viewed from the street level and the height protrusion will not be visible from the adjoining properties which aligns with the intent of the planning controls contained within Holroyd LEP 2013.

- The subject site is affected by the 1% AEP meaning that minimum floor levels for both non habitable and habitable rooms are set as a minimum above the flood level. This results in the building being pushed higher than it would otherwise, meaning the overall building height is pushed slightly above the maximum permitted under the LEP. Ensuring the flood levels are complied with protects the safety of residents from future flooding events.
- If the additional floorspace permitted under the LEP was to be provided at ground level then minimum setbacks to adjoining properties may not be able to be achieved and the resulting impact on adjoining properties would be greater. Providing more floorspace at ground level is far more undesirable than providing a modest recessed upper level of the building. The potential impact on flooding levels may also be exacerbated if additional built form were to be provided at ground level, this would also be a less desirable outcome than providing a small component of the building on the fifth level which is significantly recessed in from the lower levels to ensure the impact of the development is minimised.
- The portion of the building that exceeds the height control is not intended to gain additional floorspace as the application demonstrates, the proposal is compliant with the maximum floorspace ratio of 1.73:1. The additional building height is merely a response to the site's flooding constraints in that the building needed to be lifted to provide a floor level compliant with the Council's flooding controls.
- It is also noted that the proposal will not obstruct existing view corridors as compared to a compliant built form.
- The fifth storey of the building is recessed from the front setback 8m and more than 9m from both side setbacks. This enables there to be a fifth level or useable floorspace as permitted by the maximum floorspace ratio under the LEP while at the same time minimising the visual impact of this level of the building. The upper level will be barely detectable from the street level ensuring the development has no negative impact on this residential streetscape.
- The extent of variation does not contribute to any increase in overshadowing (hence the extent of impact is as per the impact generated by the permitted building envelope).
- The minor non-compliance to the height control has no unacceptable impact on the setting of any items of environmental heritage or view corridors.

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 minor departure from the control.

The unique circumstances of the case that warrant support of the departure are:

- The need to appropriately accommodate minimum required finished floor levels to establish compliance with Council's minimum flood levels. This has been achieved without exceeding the maximum floorspace ratio.
- The non-compliance stems from the provision of 12 affordable dwellings that allows the development to exceed the FSR of 1.2:1 and 1.5:1 for the site contained in LEP 2013. Council's Building envelope controls of height, FSR and setbacks are designed to accommodate a residential flat building with an FSR of 1.5:1. This development has an allowable FSR of 1.73:1 under the ARHSEPP and the additional floor space can only be appropriately accommodated by breaching the building envelope controls
- The breaching of the height plane in order to comply with the flooding requirements ensures that the safety of future occupants is managed in the unlikely event of a flood.

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 R4 Zone, being:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal ensures that the high density nature of the zone is retained and there is not a significant change to the character of the locality. In addition, the proposal complements and enhances the local streetscape by virtue of the careful siting of the development.

It is understood that the concurrence of the Secretary can be assumed in the current circumstances.

Clause 4.6(5)

As addressed it is understood the concurrence of the Secretary may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its particular 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 proposal will not have any adverse effect on the surrounding locality, which has been earmarked for future high density development by virtue of its R4 Zoning. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.