

4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – Building Height Development Standard

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DEE WHY**

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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of building (HOB) development standard contained within Clause 16(3) of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).

The request relates to State Significant Development Application No. 68230714 (SSDA) for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing (Proposed Development) at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

As the Proposed Development satisfies the eligibility criteria at cl 16 of SEPP Housing, the development standard which the applicant is seeking to vary is cl 16(1) (and is not the standard FSR development control in the WLEP). This approach is consistent with *Pepper J's Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (AUF), which is detailed at Section 1.11 of this Clause 4.6 request.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument (including cl 16 of SEPP Housing).

However, clause 4.6(3) goes on to say that development consent must not be grant 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) of the WLEP the applicant of the SSDA requests that the FSR development standard at Clause 16(1) of SEPP Housing be varied.

This request has been prepared in accordance with the aims and objectives contained within cl 4.6 of the WLEP and the relevant Development Standard – cl 16(3) of the Housing SEPP

1.3 Development Standard to be varied

Clause 16 of SEPP Housing states:

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 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 land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1)

The Proposed Development provides 15% of the total floor space as affordable housing, and so Clause 16(3) of SEPP Housing is triggered and allows for an increase of 30% to the two height zones which apply to the site (being 16 metres for the majority of the site and 24 metres for a small portion adjacent to Pittwater Road, as illustrated in Figure 1 below). This results in a height of 20.8 metres for the majority of the site and a height of 31.2 metres adjacent to Pittwater Road.

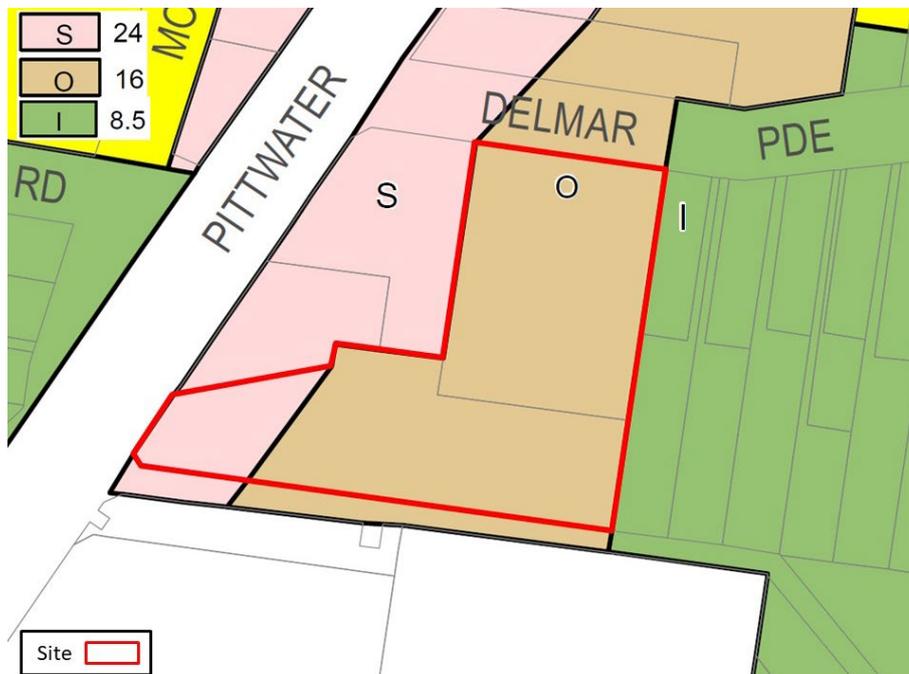


Figure 1

Extract from the WLEP Height of Buildings Map

1.4 Extent of Variation to the Development Standard

The proposal has the following maximum heights (in the two height areas) as a result of the 30% uplift in height available under SEPP Housing :

- 20.8 metre height zone: 25.1 metres or a 4.3 metre / 20.67% variation
- 31.2 metres height zone: 30.2 metres

The proposal results in some minor variations to the 20.8 metre height control as a result of a small area of roof on the northern end of the top floor of the Delmar Parade building due to the fall of the site, and also due to the lift overruns which provide access to the rooftop common open space.

These variations to the height control are illustrated in Height Plane Diagram prepared by Rothelowman Architects which accompanies this application and also as illustrated in Figure 2 below. This figure illustrates that there is a balancing of elements which are both below and above the building height control.

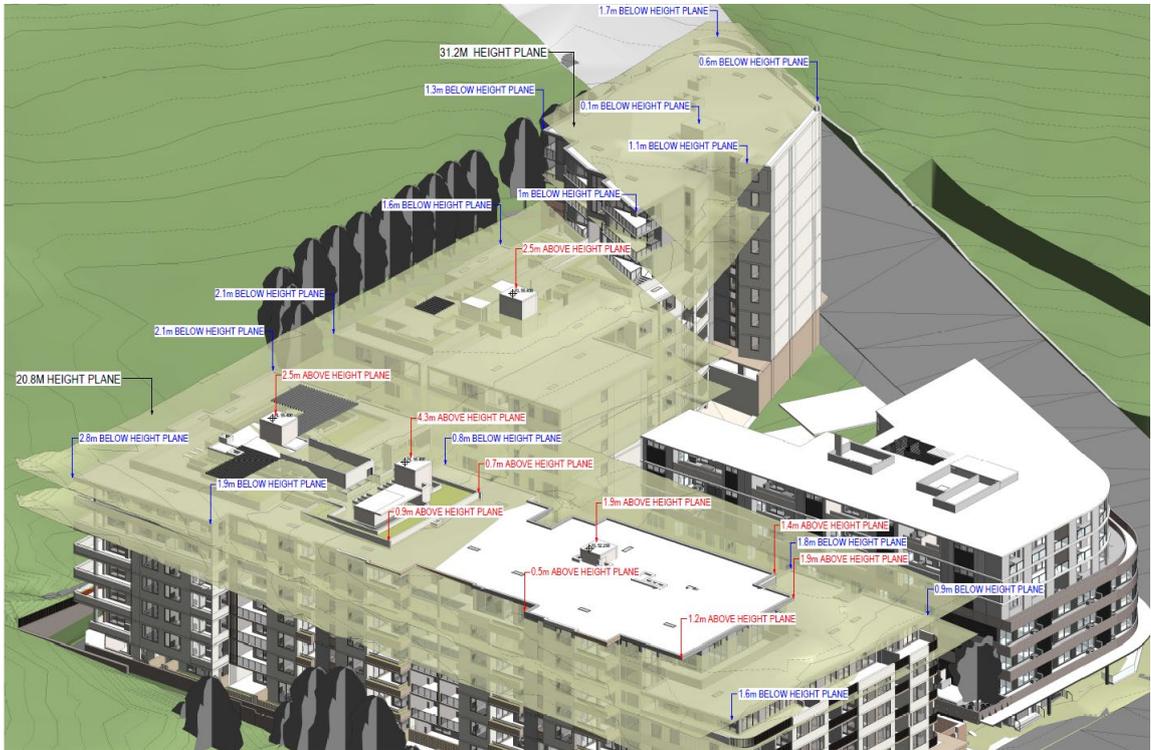


Figure 2:
3D Height Plane

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

There are no stated objectives associated with the control or Clause 16 in general. However, there is an objective for the entire Division at Clause 15A which is addressed below:

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.

Due to the fall of the site, the southern end of the Delmar Parade building is below the height control, whilst the northern end of the building is marginally above the height control. In addition, there are some height variations as a result of the lift overruns and associated building elements which provide access to rooftop communal open space for the benefit of residents.

The total proposed floor space is below the maximum achievable for the site.

The proposed variations to the height control support a balanced approach to the fall of the land and ensure that the development is able to maximise the delivery of housing supply and in particular the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Therefore, the proposed minor variations to the height control are consistent with the objectives for Part 2, Division 1 of the Housing SEPP for in-fill affordable housing (which include, the incentivised height control)

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height control is relevant to the proposed development.

As such, whilst the Site is subject to a specified numerical control for height (cl 16(3)), the objectives and underlying purpose (at cl 15A SEPP Housing) behind this development standard are equally important.

The proposed development is consistent with the objective at cl 15A on the basis that the variation to the height control will facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Furthermore, the Proposed Development will remain compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective and purpose of the standard is relevant to determine the appropriateness of the proposed variation.

relates to aims to incentivise and facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households. This objective would be thwarted by strict compliance because it would simply result in the loss of housing supply and in particular affordable housing, without any public benefit.

Strict compliance with the height control would not meaningfully reduce the impact of the development on the streetscape or neighbouring properties and would provide reduced amenity to occupants of the development. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the incentivised height control because it would encourage a less desirable outcome for the site.

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;**

The development standard has not been virtually abandoned.

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.**

Key facts that support the above reasons why strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The site has a depth of 100.75 metres from north to south with a fall of approximately 4.5 metres from the rear of the site to the front of the site at Delmar Parade which is the equivalent of slightly more than one storey. Due to this fall of the site, the roof at the southern end of the Delmar Parade building is below the height control, whilst the roof at the northern end is marginally above the height control. The proposal adopts a balanced approach to the fall of the site which actually reduces shadow when compared with a strictly compliant height as the roof at the southern end of the building is below the height control.
- The remainder of the breaches in height due to the desire to optimise the amenity within the development by providing multiple roof top common open space areas. The lift overruns to access these areas and the rooftop facilities are centrally located and not readily visible from the public domain. The roof top communal open space areas provide a very high level of amenity for residents that could not be achieved where the communal open space areas limited to the ground floor.
- The scale of the development as proposed is compatible with the desired future scale and character for the locality which envisages high density residential development within a town centre setting.
- The Visual Impact Assessment at **Appendix 31** demonstrates that the roof top facilities do not result in any discernible visual difference for the proposed development.
- A solar analysis prepared by Rothelowman architects accompanies the subject application and demonstrates that the proposed areas of non-compliance do not result in any meaningful difference compared to a compliant height in relation to solar access to Stony Range Reserve to the south. Similarly, the Flora and Fauna Assessment prepared by Aquila Ecological Surveys at **Appendix 19** demonstrates that the shadow cast by the proposed areas of height variation will not result in any unacceptable ecological impacts to the Reserve.
- The non-compliances with the height control ultimately improves the overall functionality and amenity of the development, as well as facilitating the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve a better outcome than a complying development.
- There are no other impacts to adjacent sites resulting from the proposed variation to the height control which would warrant strict compliance.
- The proposed variation allows for the most efficient and economic use of the land.

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, it is our expert opinion that most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. 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 at [60].

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 found that is not necessary to demonstrate that a development will result in a “better environmental planning outcome for the site” relative to a development that complies with the height development standard. However, in relation to this objective the consent authority must be satisfied there is a ‘preservation’ of amenity. I

In this case, the environmental amenity of the neighbouring properties is preserved by ensuring that the height variation does not generate any additional shadow impacts beyond a compliant height. This is illustrated in the Figures 3 to 5 below.



Figure 3:

21 June - 9am shadow. The proposed shadow (green + red) is less than the compliant height (dotted orange line)



Figure 4:

21 June - 12pm shadow. The proposed shadow (green + red) is less than the compliant height (dotted orange line)



Figure 5:

21 June - 3pm shadow. The proposed shadow (green + red) is less than the compliant height (dotted orange line)

The proposed distribution of built form and massing across the site is the result of a considered analysis of the known site constraints, understanding of the context and the desire to deliver a positive urban design outcome.

The Proposed Development has been specifically designed as a robust architectural solution for the site which will result in a high quality building in a landscaped setting that will sit comfortably within the streetscapes of Delmar Parade and Pittwater Road and be compatible with the emerging character of development within the vicinity of the site.

In particular, the proposal has been designed to respond to the significant fall north to south of approximately 4.5 metres with the competing needs of providing a high level of amenity, appropriate ground floor plane, and maximising the delivery of affordable housing. Due to this fall of the site, the roof at the southern end of the Delmar Parade building is below the height control, whilst the roof at the northern end is marginally above the height control. The proposal adopts a balanced approach to the fall of the site which actually reduces shadow when compared with a strictly compliant height as the roof at the southern end of the building is below the height control.

The remainder of the breaches in height are due to the desire to optimise the amenity within the development by providing multiple roof top common open space areas. The lift overruns to access these areas and the rooftop facilities are centrally located and not readily visible from the public domain. The roof top communal open space areas provide a very high level of amenity for residents that could not be achieved where the communal open space areas limited to the ground floor.

The Visual Impact Assessment at Appendix 31 demonstrates that the roof top facilities do not result in any discernible visual difference for the proposed development, and that the scale of the development as proposed is compatible with the desired future scale and character for the locality which envisages high density residential development within a town centre setting.

As illustrated in the solar analysis prepared by Rothelowman architects which accompanies the subject application (and shown in Figures xx above) the proposed areas of non-compliance do not result in any shadow beyond a compliant height in relation to Stony Range Reserve to the south. In fact, the proposal has less shadow when compared with a compliant height. Similarly, the Flora and Fauna Assessment prepared by Aquila Ecological Surveys at Appendix 19 demonstrates that the shadow cast by the proposed areas of height variation will not result in any unacceptable ecological impacts to the Reserve.

The non-compliances with the height control ultimately improves the overall functionality and amenity of the development, as well as facilitating the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve a better outcome than a complying development.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the incentivised height control as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any significant adverse impact to adjacent sites.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council [2019] NSWCA 130*).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* at [15].

These matters are comprehensively addressed above in this written request.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states 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.

Objective of the Development Standard

The proposal’s consistency with the objectives of the development standard (cl 16 of SEPP Housing) have been addressed in detail at Section 1.5 in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- 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.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The Proposed Development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains approximately the same provision of commercial floor space as previously approved under Development Consent DA2022/0145.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposed Development is in the public interest notwithstanding the proposed variation to the building height development standard, because it is consistent with the in-fill affordable housing objectives in Chapter 2, Part 2, Division 1 of SEPP Housing and the objectives for development within the MU1 zone under the WLEP in which the development is proposed to be carried out

Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are set out in subclause (1) as follows:

(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.

The architectural package prepared by Rothelowman architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high quality outcome for the site which will result in the delivery of a residential development which is compatible with the emerging character of high density residential development in the Dee Why Town Centre.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form by forcing the building lower into the site and eliminating a large consolidated area of common open space on the rooftop, that would contextually be essentially no different from the proposed development and would not result in any benefit to the streetscape or the amenity of adjoining properties. Alternatively, if the proposed levels are retained, strict compliance would simply result in a loss of much needed housing supply and in particular affordable housing.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the height of buildings development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.11 Legal Interpretation

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);

- There is no requirement for a clause 4.6 request to show that the proposed development would have a ‘better environmental planning outcome for the site’ relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]. That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

At [90] of Initial Action the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1) (a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

“It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome”.

More recently in the case of *Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (*AUF*), Pepper J considered whether the exceedance of both the height control in clause 4.3 of the Penrith LEP and the bonus height control under clause 7.11 of the LEP were properly dealt with under clause 4.6. In this case **the development application exceeded the standard height control at cl 4.3 of the LEP and the alternative (bonus) height control at cl 7.11** (which only eligible developments were able to benefit from). In summary, Pepper J ultimately held at [103]-[106] that you cannot vary the underlying development standard, but must instead seek to vary the incentive (bonus) standard – which in *AUF* was cl 7.11 of the Penrith LEP. In other words, clause 7.11 in *AUF* was held to be a development standard in its own right, capable of being varied subject to a cl 4.6 request.

In compliance with Pepper J’s decision in *AUF*, as the SSDA satisfies the eligibility criteria at cl 16 of the Housing SEPP, *this written requests seeks to vary the development standard at 16(3)*.

1.12 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the height of buildings development standard contained within clause 16 of SEPP Housing is unreasonable and unnecessary in the circumstances of the case and as such, there are sufficient environmental planning grounds to justify the proposed variation.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.