

Supplementary Memo



CENTRAL COAST COUNCIL

13 March 2024

Development and Rezoning

6 Storey Shop Top Housing

DA No: DA/1809/2022

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Addendum to Local Planning Panel Report: Clause 4.6 assessment

Clause 4.6 provides flexibility in applying certain development standards. The proposed development seeks consent for an overall building height of 23.9m for the lift shaft and 23.1m for the stairs which exceed the maximum permitted building height of 23m for the subject site. This is a 900mm and 100mm encroachment which translate to 4% and 0.04% of the overall permitted building height, respectively.

The exception to the development standard for building height under Clause 4.3 of the CCLEP 2022 is less than 10% and concurrence may be assumed in accordance with the assumed concurrence requirements as discussed below.

Clause 4.6(3) identifies matters to be demonstrated by the applicant in a written clause 4.6 request. These matters are:

- *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

An established way to demonstrate that compliance with the standard is unreasonable or unnecessary is to use one or more of the five justifications identified in *Wehbe v Pittwater Council* [2007]. The Applicant has submitted a clause 4.6 written request that provides the Applicant's reasons why strict compliance with the floor space ratio standard is unnecessary and unreasonable.

The Applicant submits that *'the six-storey building predominantly complies with the 23m height control except for the small portion of the staircase and lift shaft.*

The maximum extent of departure is 900mm and is limited to the staircase and lift overrun only. This is provided to provide suitable and convenient access to the rooftop communal open space areas to ensure that this communal open space can be used by all residents- including those who may have mobility issues.

It is noted that these departures are a function of providing suitable access to the rooftop COS area, noting if these elements were removed (and only a stair access provided with a platform

lift) then the proposal would be fully compliant with the height limit- however this would lead to an inferior access arrangement to the rooftop common open space than that currently proposed.

It would erode ease of access to the space noting the rooftop communal open space is a preferred planning outcome to enable high quality communal open space areas that receive excellent solar access and a series of functional and useable spaces for residents.

The provision of lift access to this area is fundamental to ensuring suitable access to the space by all residents.

Further, the Applicant states the proposal is consistent with the objectives of the standard because:

- *The development proposal is consistent with the intent of the maximum height control and will provide an attractive 6 storey building that addresses the site's frontage to Coral Street, Torrens Avenue and Farrell Lane.*
- *The non-compliance is minor in nature with only a small portion of the staircase and lift shaft encroaching upon the prescribed height control and as such its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level.*
- *The departure is of a minor nature and will not unreasonably impact on privacy, view or the solar access of adjoining properties or the public areas in the vicinity of the site which satisfies objective (c).*
- *Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard, it is noted:*
 - *The variation will be visually unnoticeable and will have no adverse impact on the physical bulk, height, or scale of the development.*
 - *The variation will not lead to a reduction in solar penetration on site or to adjoining properties now will it lead to sunlight loss or overshadowing.*
 - *The proposed variation will not lead to view loss or interrupt views to and from the site.*
 - *The proposed variation will not lead to a reduction in privacy afforded to existing residents or future residents of the proposal.*
- *The proposal has been designed to ensure that privacy impacts are mitigated that the proposal will not obstruct existing view corridors.*

- *The proposed development will permit the site to develop to its full zoning potential whilst complementing the future vision envisioned for the site by providing an attractive mixed-use building that provides good address to the street frontage and complying with key planning controls applying to the proposal.*
- *The proposal is not located within a low-density area and the proposal represents an appropriate built form on the site.*

The minor numerical non-compliance is considered acceptable in this instance as it will complement the existing and surrounding, approved development whilst not unreasonably contributing to building scale or adverse impacts to the streetscape or surrounding properties. The non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties.

Full numerical compliance would result in a poor planning outcome, reducing the ability for suitable access to the rooftop in terms of convenience for its users, ensuring accessibility and avoids the need for a platform lift to be affixed to the stairs. The provision of lift access increases the usability and functionality of the rooftop communal open space area consistent with Object (g) of the *Environmental Planning and Assessment Act 1979*, 'to promote good design and amenity of the built environment'.

The written request has identified, and adequately justified, sufficient environmental planning grounds, and the reasons provided have demonstrated circumstances which relate to the specific contravention of building heights and how the objectives of the standard can be achieved even though it will not be a wholly compliant development (*Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245). The written request has also satisfied the consent authority that it is unreasonable to comply with the development standard in this instance. Accordingly, the consent authority is satisfied as to those matters stated in clause 4(3) of CCLEP 2022 (*RebellIMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130).

Clause 4.6(4)(a) identifies matters of satisfaction for the consent authority to grant development. These are:

- *That the written request has adequately addressed the above requirements of the written request contained at 4.6(3). Refer to discussion above.*

The consent authority is satisfied the written request has adequately addressed the provisions of cl.4.6(3).

- *That the proposed development is 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*

As identified in the above body of this report, the proposal is found to be consistent with the stated objectives of the development standard as it ensures the bulk and scale resulting from the minor, numerical non-compliance is commensurate with the existing streetscape and character whilst minimising adverse environmental effects on the use or enjoyment of

adjoining properties and public domain. The proposed development is also considered to be consistent with the zone objectives as it further encourages investment and local employment opportunities in an accessible location.

Having regard for the decision in *Wehbe v Pittwater Council* [2007] NSWLEC827 and repeated in *Initial Action Ltd v Woollahra Municipal Council* [2008] NSWLEC118, it is considered the objectives of the standard are achieved notwithstanding numerical non-compliance with the standard. Council is satisfied that the variation to the maximum permitted building height is in the public interest because it is consistent with the objectives of the development standard, the existing and desired future character of development in The Entrance, and the zone in which it is located.

- *The concurrence of the Planning Secretary has been obtained.*

Clause 4.6(4) states that consent must not be granted without the concurrence of the Planning Secretary. Council has been notified in the 'Variations to development standards' Planning Circular PS20-002 dated 5 May 2020, that it may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the Standard Instrument, in accordance with s.55 of the *Environmental Planning and Assessment Regulation 2021* (then clause 64 of the EP&A Regulation 2000) if the variation is less than 10%. In this instance, the proposed variation results in a maximum 4% variation to the building height development standard and can be considered under delegated authority accordingly.

Clause 4.6(5) identifies that in granting concurrence, the Planning Secretary must consider whether there are any matters of state or regional significance and the public benefit of maintaining the standard.

- *Any State or regional significant planning matters raised by contravening the standard.*

There are no state or regional matters that arise because of the contravention of the standard.

- *The public benefit of maintaining the standard.*

In this instance, and considering strategic outcomes for the area, the variation would not contravene the public benefit if the standard were not maintained in this instance.

Clauses 4.6(6) and 4.6(8) provide circumstances under which the provisions of clause 4.6 cannot be utilised. These circumstances do not arise within this development application.

Having regard for the written request provided by the applicant and the above assessment, the proposed development is considered to satisfy the requirements of clause 4.6, achieving a better outcome for and from the development within the circumstances.