

Clause 4.6 Variation to Maximum Building Height Standard

This request has been prepared to provide written justification for the proposed variation to the Maximum Building Height standard applicable to the Penrith Health and Education Precinct, as stipulated in Clause 4.3 - Height of Buildings of the *Penrith Local Environmental Plan 2010* (Penrith LEP 2010). In considering this request, it is also relevant to reference Clause 7.11- Penrith Health and Education Precinct.

A variation to the strict application of the maximum building height standard is considered appropriate for the following reasons:

- The objectives of the Penrith LEP 2010 B4 Mixed Use zone are achieved notwithstanding the technical non-compliance.
- The objectives of the Penrith LEP 2010 height of buildings clause is achieved notwithstanding the technical non-compliance.
- The objectives of the Penrith LEP 2010 Penrith Health and Education Precinct clause is achieved notwithstanding the technical non-compliance.
- There are sufficient environmental planning grounds to support the proposed variation.

Details of the above are provided in the following sections.

1- CLAUSE 4.6 CONSIDERATIONS

As this proposal involves a departure from the Clause 4.3 - Height of Building control under the Penrith LEP 2010, a formal variation to this development standard is sought under *Clause 4.6- Exceptions to Development Standards*. Clause 4.6 allows consent to be granted for a development even though it would contravene a development standard imposed by this or any other environmental planning instrument.

As provided under Clause 4.6 of the Penrith LEP 2010, we request that Council take a flexible approach to the application of the height control to the proposed development. The following section addresses the local provisions of Clause 4.6 of Penrith LEP together with established case law including the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

The following considerations are addressed below in respect of this request to vary the strict application of Clause 4.3 of the Penrith LEP 2010. These considerations are summarised as follows:

- That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; Cl 4.6 (3)(a)
- That there is sufficient environmental planning grounds to justify contravening the development standard; Cl. 4.6 (3)(b)
- 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; Cl. 4.6 (4)(a)(ii)

- The public benefit of maintain the development standard; and Cl. 4.6 (5)(b)
- Any matters required to be taken into consideration by the Director- General before granting concurrence. Cl. 4.6 (5)(c)
- Considerations particular to the site.

2- THE PROPOSED VARIATION

2.1 THE DEVELOPMENT STANDARD

This variation seeks to vary the Height of Buildings (Clause 4.3) development standard, as it relates to the site. Clause 4.3(2) states that:

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The Height of Building Map sets out a maximum height control of **18 metres** to the subject site.

2.2 FURTHER RELEVANT STANDARD

Clause 7.11- Penrith Health and Education of the Penrith LEP 2010. Clause 7.11(3) states:

(3) Despite clause 4.3, development consent may be granted to development on land that exceeds the maximum height shown for that land on the Height of Buildings Map by up to 20% if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres.

Application of Clause 7.11(3) enables development on the site to achieve a maximum height of **21.6 metres**.

The proposed development seeks to implement a building height of 21.6 metres however, the proposal does not provide floor to ceiling heights, at ground and first floors, equal to or greater than 3.5 metres.

2.3 THE SUBJECT PROPOSAL

The subject proposal seeks consent to the following building heights. (**Note:** a range of height measurements is referenced due to the slope of the site):

	PROPOSED BUILDING HEIGHT (RANGE)	RANGE OF EXCEEDANCE OF 18M LIMIT	RANGE OF EXCEEDANCE OF 21.6M LIMIT
Level 6 Roof	18.8 - 20.8 m	0.8 - 2.9 m	0
Plant Room Roof	20.4 - 21.6 m	2.4 - 3.6 m	0
Lift Overrun	20.5 - 22.5 m	2.5 - 4.5 m	0 - 0.9 m

3- OBJECTIVES OF THE ZONE AND THE STANDARD

Clause 4.6(4)(a)(ii) states a request for exemption from a development standard must establish that the proposed contravention is consistent with both objectives of the standard and the zone.

3.1 OBJECTIVES OF THE B4 MIXED USE ZONE

The proposed variation to the maximum building height standard does not prevent the satisfaction of the B4 Mixed Use zone objectives, and is consistent with those objectives. The proposal addresses each of the B4 Mixed Use zone objectives as follows:

ZONE OBJECTIVE	RESPONSE
To provide a mixture of compatible land uses.	<ul style="list-style-type: none"> ▪ The proposed mixed use development is compatible with the health facilities (Nepean Hospital) to the east of the site, and the residential neighbourhood to the north, south and east of the site. ▪ The proposal provides a mix of land uses including a commercial tenancy and residential apartments. ▪ The commercial space at ground level will enhance activation onto Somerset Street. ▪ The residential uses provide a range of one, two and three bedroom apartments, which increases the residential capacity of the site to 54 dwellings.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	<ul style="list-style-type: none"> ▪ The proposed mixed use development integrates residential apartments and a commercial tenancy. ▪ It is in an accessible location within proximity to a number of bus stops and Kingswood Railway Station. Bicycle parking will be provided onsite.
To minimise conflict between land uses within the zone and land uses within adjoining zones.	<ul style="list-style-type: none"> ▪ The proposed development is consistent and compatible with land uses within the zone, both existing and expected future development facilitated by the rezoning of the precinct to B4 Mixed Use. The design has also appropriately responded to the proximity of the hospital development.
To create opportunities to improve public amenity.	<ul style="list-style-type: none"> ▪ The proposed architectural response is considered to be of high quality, effectively integrating the interface of the built form with the public realm through generous landscaped planters and boundary planting and direct street access to ground floor apartments. ▪ The protection of existing street trees and the planting of additional street trees will also enhance public amenity.

ZONE OBJECTIVE	RESPONSE
To provide a wide range of retail, business, office, residential, community and other suitable land uses.	<ul style="list-style-type: none"> The proposal development incorporates both commercial and residential land uses suitable within the locality.

In summary, the proposed development is highly consistent with the objectives of the B4 zone.

3.3 OBJECTIVES OF THE PENRITH HEALTH AND EDUCATION PRECINCT (CLAUSE 7.11)

It is highly relevant to consider the provisions of Clause 7.11 of the Penrith LEP 2011. Clause 7.11(3) enables the consent authority to grant development consent to a building which exceeds the maximum building height applying to the land by up to 20% if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres. On the subject site, this would result in an alternate maximum building height of 21.6 metres rather than 18 metres.

While the proposed development will not technically trigger Clause 7.11(3) due to the proposed ceiling heights not satisfying the 3.5m minimum (which, notably, is itself a development standard), it is nevertheless relevant to have regard to Clause 7.11 because it clearly establishes an alternate building height for the Penrith Health and Education Precinct.

The proposed variation to the building height standard is consistent with the relevant objectives of Clause 7.11 as outlined in the table below:

PENRITH HEALTH AND EDUCATION PRECINCT OBJECTIVES	RESPONSE
To encourage a built form that is suitable for both residential and health services facilities.	<ul style="list-style-type: none"> The proposed commercial tenancy at ground floor has been designed to appropriately accommodate a health services facility (for example, medical consulting suites). A 3.1m floor to ceiling height is adequate for this use.
To encourage adaptive reuse of residential buildings for health services facilities in the Penrith Health and Education Precinct where the residential use within the building ceases in the future.	<ul style="list-style-type: none"> Apart from a 184sqm commercial tenancy, which may be used for health services facilities, the proposed development will accommodate predominantly residential uses. Despite this, residential apartments at ground level have the ability to be converted into non-residential uses in the future, due to their generous (3.1m) floor to ceiling heights, and separate entries from Somerset Street. This would require future development consent and be subject to satisfaction of relevant BCA, access and operational considerations should this be proposed in the future.

In summary, the proposed development is consistent with the objectives of Clause 7.11.

3.2 OBJECTIVES OF THE HEIGHT OF BUILDINGS STANDARD (CLAUSE 4.3)

The proposed variation to the maximum building height standard does not prevent inconsistency with the relevant objectives of the Height of Buildings standard as outlined in the table below.

HEIGHT OF BUILDINGS OBJECTIVES	RESPONSE
<p>To ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality.</p>	<ul style="list-style-type: none"> ▪ The proposal represents a departure from the existing scale and character of the locality, and in this respect is designed with specific regard to the desired future character of development within the Penrith Health and Education Precinct arising from the rezoning and uplift of the site and adjacent properties. ▪ Despite a breach of the 18m height control, the height of the proposed development falls within the Penrith Health and Education precinct alternate height control of 21.6 metres and therefore is consistent with the height of the desired future character of the precinct. ▪ The proposed floor space ratio is well below (around 20% less than) the maximum standard applying the site, and hence is compatible with desired future character of the locality in terms of bulk and scale.
<p>To minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes.</p>	<ul style="list-style-type: none"> ▪ The proposed development does not disrupt significant public views. ▪ Privacy measures including glazing, and deep balconies from apartments orientated towards common boundaries seek to address privacy for adjacent dwellings. ▪ Shadow diagrams provided indicate that minimal overshadowing impacts are created as a result of the development, particularly mid-winter. The level of shadow impact is consistent with that envisaged by the planning controls which allow for buildings of up to 21.6m under Clause 7.11(3).
<p>To minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance.</p>	<ul style="list-style-type: none"> ▪ Not applicable.
<p>To nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use integrity.</p>	<ul style="list-style-type: none"> ▪ The proposed building height is consistent with the building heights envisaged for the Penrith Health and Education Precinct, of between 18m and 21.6m. Adjacent land is subject to the same controls and hence the same .

In summary, the proposed development is consistent with the objectives of the development standard.

4- THE DEVELOPMENT STANDARD IS UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Clause 4.6 (3)(a) of the Penrith LEP 2010 states that a proposed variation to the development standard must demonstrate that compliance with the development standard is *'unreasonable or unnecessary in the circumstances of the case'*.

In ***Wehbe v Pittwater Council [2007] NSWLEC 827*** Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *the development standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
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.*

As outlined in Section 3, the proposed development is **consistent with the underlying objectives** of the building height standard, particularly when understood in conjunction with Clause 7.11 relating to alternate building heights in the Penrith Health and Education precinct, and therefore satisfies the first test.

Compliance with the 18m building height standard is considered **unreasonable and unnecessary** for the following reasons:

- Clause 7.11 enables buildings to achieve an alternate height of up to 21.6 metres, if internal floor to ceiling height requirements are satisfied on the ground and first floor.
- The building envelope including the plant level is entirely within the 21.6 metre height limit under Clause 7.11, with the exception of a small portion of lift overrun.
- There is no benefit in providing 3.5 metre floor to ceiling heights for the ground and first floor merely to trigger the 20% height bonus, in circumstances where:
 - the site is relatively narrow and constrained, and unable to accommodate significant non-residential uses;
 - as such, Council officers have endorsed in principle the approach of providing a single commercial tenancy at the ground floor;
 - providing 3.5 metre floor to ceiling heights at both ground and first level would therefore be futile;

- providing 3.5 metre floor to ceiling heights at both ground and first level would unnecessarily further increase the height of the development;
 - the proposed 3.1 metre floor to ceiling height at ground floor (3.5m floor to floor) is adequate to accommodate a wide range of non-residential uses; and
 - apartments on ground level will still have the potential to be converted to non-residential uses as they have been designed to incorporate private entries to Somerset Street and have 3.1m floor to ceiling heights.
- The bulk and scale impacts associated with the additional height are considered acceptable given that the adopted controls for the Penrith Health and Education precinct envisage that 21.6m height limits are acceptable and do not cause significant overshadowing of the surrounding area, importantly to adjacent properties.
 - The proposed floor space ratio of the development equates to 2.8:1, which is well below the FSR standard of 3.5:1. The proposal is unable to achieve the maximum FSR permitted on the site even with the proposed exceedance. The additional height will ensure that the proposed development is aligned and more compatible with Council's density controls and objectives for the precinct.

Given the above, it is considered that compliance with the height control, as it relates to the site, is unreasonable and unnecessary.

5- SUFFICIENT ENVIRONMENTAL PLANNING JUSTIFICATION

Clause 4.6 (3)(b) of the Penrith LEP 2010 states that a proposed variation to a development standard must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. The following outlines the key reasons the proposed development is appropriate for the site and a departure from the strict application of the development standard is reasonable:

- The bulk and scale of the proposed development positively and appropriately responds to the desired future character of the Penrith Health and Education Precinct, without significant impacts on solar access, traffic, view loss and privacy.
- The bulk and scale impacts associated with the additional height are considered acceptable given that the adopted controls for the Penrith Health and Education precinct envisage that 21.6m height limits are acceptable. and do not cause significant overshadowing of the surrounding area, importantly to adjacent properties.
- The proposal incorporates contemporary design elements which positively contribute to the amenity and streetscape of both Somerset and Hargrave Streets. Vertical and horizontal elements within the design of the façade, break up the massing, and therefore minimise the visual scale of the additional built form, and generous landscaping is incorporated.
- The proposed floor space ratio of the development equates to 2.8:1, which is well below the FSR standard of 3.5:1. The proposal is unable to achieve the maximum FSR permitted on the site even with the proposed exceedance. The additional height will ensure that the proposed development is aligned and more compatible with Council's density controls and objectives for the precinct.
- The proposal will deliver positive social and economic outcomes for the local area providing residential housing and commercial opportunities. The proposal will improve street amenity and activation at ground level, with active frontages and passive surveillance. The proposal provides high quality apartments, which exceed minimum size requirements.

Given the above, and the justification of minimal impacts provided, the proposal is considered appropriate given its context, warranting the support of Council.

6- DEVELOPMENT IN THE PUBLIC INTEREST BEING CONSISTENT WITH THE PARTICULAR STANDARD AND ZONE OBJECTIVES

The proposed development aligns with the objectives of Clause 4.3 Height of Buildings, Clause 7.11 Penrith Health and Education Precinct, and B4 Mixed Use zone objectives as outlined in Section 3. The proposed development is therefore in the public interest in accordance with Clause 4.6(4)(a)(ii).

7- THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Under Clause 4.6 (5B) of the Penrith LEP 2010, the consent authority must consider if there is public benefit associated with maintaining the development standard. Given the nature of the proposed variation and the justification of the impacts provided, there would be no public benefit in applying the standard strictly.

The proposed variation arises from the vision of the Penrith Health and Education Precinct, and the applicable controls for the site. The proposed development has been designed to support this vision, realising the height potential of the site as envisaged by Clause 7.11, and maximising the floor space potential within the constraints of the site. As noted earlier and within the Statement of Environmental Effects, the proposed variation does not rise to any adverse environmental impacts.

Further, the proposal is considered to offer the following additional public benefits:

- The proposal provides 54 generously sized and high quality apartments in an accessible location, close to jobs and within proximity of Penrith City Centre. This is consistent with both State, Metropolitan and local planning policies.
- The proposal integrates commercial uses into the development, linking the development to the Nepean Hospital and thus the Penrith Health and Education Precinct.
- The proposal will create significant amounts of jobs during the construction phase.
- The proposal will replace aged dwellings and vacant sites, accommodating a development which supports the future of the Penrith Health and Education Precinct.

8- ANY OTHER MATTERS

Under Clause 4.6 (5)(c) the consent authority must consider if the proposal raises any other matters for consideration. There are no other matters for consideration.

9- CONCLUSION

Overall, it is considered that compliance with the height of building standard of the Penrith LEP 2010 is considered unreasonable and unnecessary.

The proposed development is entirely consistent with the vision of the precinct, future redevelopment of adjacent sites, will not result in any perceptible environmental effects, and is consistent with the

underlying planning objectives. Strict compliance with the standard is unnecessary and unreasonable in that it would not result in a better planning outcome.

Based on the reasons outlined, it is concluded that the request is well founded and there are sufficient environmental planning grounds particular to the circumstances of the proposed development to warrant flexibility in the application of the development standard.