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CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF
BUILDINGS DEVELOPMENT STANDARD

**PROPOSED APARTMENTS
16-24 HOPE ST, PENRITH**

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1.0 INTRODUCTION

This report seeks a variation to a development standard prescribed by the Penrith Local Environmental Plan (PLEP) 2012. The report relates to a Development Application (DA) seeking consent for the development of a Residential Flat Building at No. 16-24 Hope St, Penrith (the subject site).

The variation is sought pursuant to Clause 4.6 under the PLEP in relation to the maximum building height standard applicable to the subject development site.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline *Varying Development Standards: A Guide, August 2011* and has also incorporated the relevant principles identified in relevant NSW Land and Environment Court judgements.

2.0 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The Environmental Planning Instrument (EPI) to which this variation relates is the Penrith Local Environmental Plan 2010 (PLEP).

3.0 WHAT IS THE ZONING OF THE LAND?

In accordance with clause 2.2 of the PLEP the subject site is zoned **R4 High Density Residential**.

4.0 WHAT ARE THE OBJECTIVES OF THE ZONE?

The land use table under the FLEP provides the following objectives for the zone:

1 Objectives of zone

- *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.*
- *To ensure that a high level of residential amenity is achieved and maintained.*
- *To encourage the provision of affordable housing.*
- *To ensure that development reflects the desired future character and dwelling densities of the area.*

COMMENT:

The site is located within a precinct going through transition from single dwellings to high density residential development, with many adjacent sites either being developed or having receiving approvals for apartment type development.

The proposed development provides for the community's housing needs in an emerging high-density residential environment. It does through providing a mix of bedroom and apartment styles and arrangements inclusive of smaller units that will provides affordable housing options within the building

A high level of residential amenity is provided for in the design of the proposal through the provision of high architectural design, private courtyards, terraces and balconies and common open spaces.

Accordingly the development is considered to be consistent with the relevant zone objectives.

5.0 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

The development standard being varied is the maximum height of buildings.

6.0 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The development standard being varied is prescribed under clause 4.1 of PLEP.

7.0 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objectives of the relevant development standard are set out below:

4.3 Height of buildings

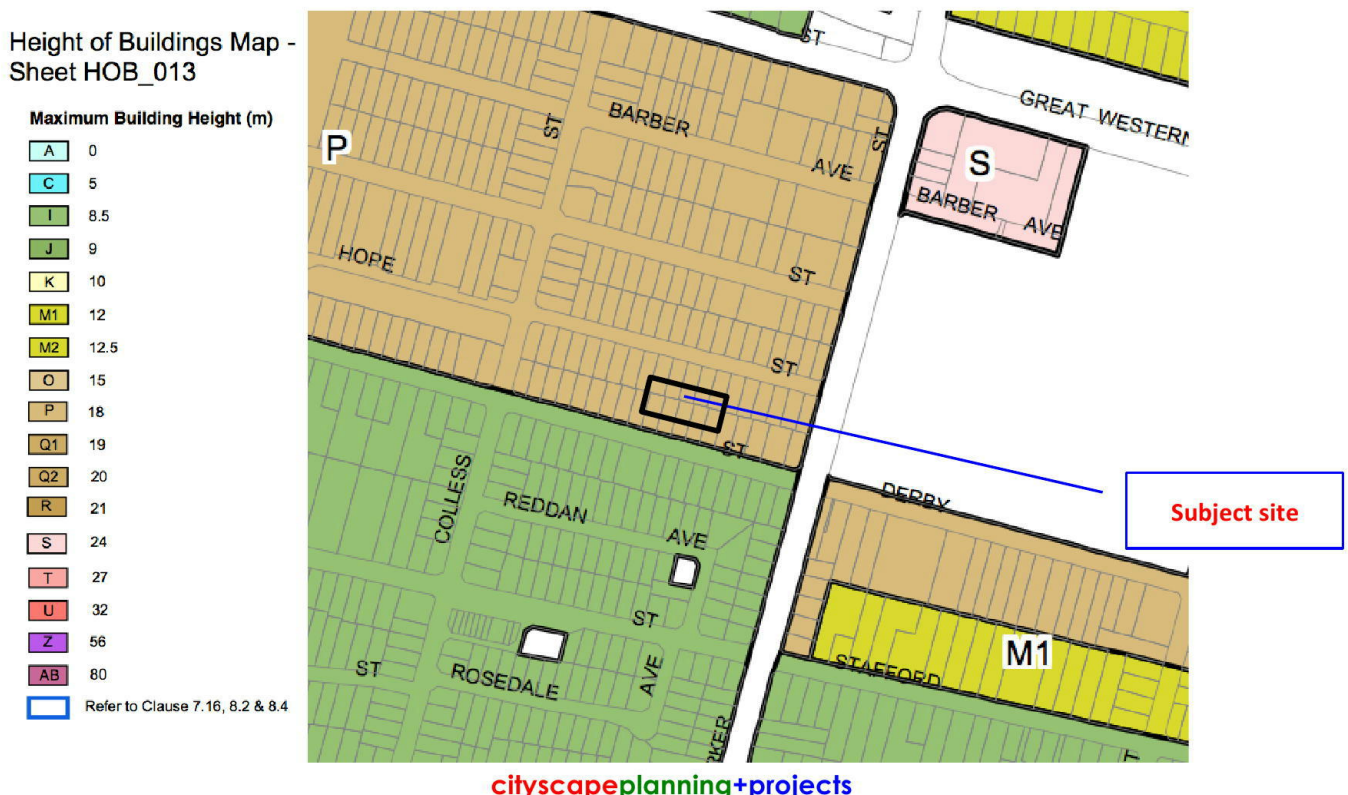
(1) The objectives of this clause are as follows:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
- (b) 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,
- (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,
- (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

8.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The relevant map pertaining to clause 4.3(2) of the PLEP provides a maximum building height of 18m. An extract of that map is provided at Figure 1 below:

FIGURE 1: EXTRACT OF BUILDING HEIGHT MAP



9.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?

The roof provides a RL of 66.586 over an existing ground level of RL 46.55m and therefore provides a maximum building height of 20.04m.

However, *Clause 5.6 Architectural roof features* of Penrith LEP 2010 allows for non-compliances with building height and as such this technically does not represent a non-compliance.

Alternatively the western lift overrun provides a RL of 66.570m over an existing ground level of 47.69m, which results in a building height of 18.87m.

10.0 WHAT IS THE PERCENTAGE VARIATION?

The roof feature as described above provides a building height that exceeds the development standard by 11.3%. However, if this non-compliance is allowed by *Clause 5.6 Architectural roof features* of Penrith LEP 2010, then the lift overrun represents the primary non-compliance and provides only a 4.8% variation to the building height standard.

11.0 MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the FLEP and a response as to where each is addressed in this written request:

TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6

Requirements/Sub-clause 4.6	Response/Comment
<p>(1) The objectives of this clause are as follows:</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.</p>
<p>(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.</p>	<p>The maximum building height development standard is not expressly excluded from the operation of this clause.</p>
<p>(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:</p> <p>(a) that compliance with the development standard is</p>	<p>This written request justifies the variation by demonstrating (a) is achieved in Section 12, and (b) is achieved in Section 16.</p>

<p>unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Secretary has been obtained.</p>	<p>This written request addresses all requirements of sub-clause (3).</p> <p>As set out in Section 4 and 12 of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.</p> <p>Concurrence is assumed. Due to the extent of the variation, the application is required to be determined by the relevant consent authority.</p>
<p>(5) In deciding whether to grant concurrence, the Secretary must</p>	

<p>consider:</p> <ul style="list-style-type: none">(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.	<p>There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.</p> <p>Pursuant to <i>Ex Gratia P/L v Dungog Council</i> (NSWLEC 148), the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.</p> <p>There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are only minor public disadvantages.</p> <p>The public advantage of the development is that it facilitates urban renewal of the site in a manner that is consistent with both local and metropolitan strategic planning objectives.</p> <p>We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.</p>
<p>(6) Development consent must not</p>	<p>Not relevant to the proposed</p>

<p>be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:</p> <p>(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or</p> <p>(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.</p>	<p>development or the subject site.</p>
<p>(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).</p>	<p>This is a matter for the consent authority.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the</p>	<p>This does not apply to the subject site or its proposed development.</p>

following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4.

12.0 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, we believe that it is still useful these considerations and this too has been confirmed by more recent judgements inclusive of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90.

The five part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

The relevant LEP clause objectives together with an assessment of the development against them is provided below:

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

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

The desired future character of the area provides for development with a 18m building height. The development provides a building that sits largely within that height limit, other than sections of the upper floor.

The parts of the building that are above the height standard have been setback from the building edges, with the maximum variation (i.e. lift over-run) located centrally on the site. Therefore, these elements do not contribute to perceivable bulk as viewed from the surrounding area and public domain, and the proposal maintains a scale as anticipated for a high density zoned residential areas.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(b) 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,

The development is not located in an area that enjoys key views to any important scenic or landscape features. Nevertheless, the broader locality does enjoy views to the Blue Mountains, particularly from elevated view points such as the upper floor areas of this and adjacent development.

There is no existing adjacent development that will have any visibility of the upper floor area so it cannot cause any disruption of views. The adjacent lands have had development approvals for similar scaled development, however these development also orientate to the north and south and therefore ensure that there is limited scope for the non-complying element of the subject development to cause loss of privacy.

It is also important to note that any overshadowing as a result of the height breach is negligible when compared to the shadows generated from the lower 5 levels of the proposed built forms. This is because the entire development across all levels achieves the rear setback requirements of the ADG's.

Similarly, the development does not have any close proximity to any parks or key public domain features that could experience any undue loss of solar access by the proposed height variation.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

Not relevant as the site is not located within any proximity to heritage items, conservation areas or areas of scenic or visual importance.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

The development generally achieves the building height, other than sections of upper floor. This area is setback and recessed from the lower floors and as such will not contribute to perceivable bulk as viewed from the surrounding area and public domain, and the proposal maintains a scale as anticipated for a high density zoned residential areas.

The development is also not located near different zoned lands or lands that have a lower building height standard therefore the minor non-compliance will not cause any disruption to any planned transition in height and density.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

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

We do not rely on this reason. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

We do not rely on this reason.

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;

We do not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

We do not rely on this reason.

13.0 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN THE ACT.

Section 1.3 of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The subject site accommodates limited features of natural or ecological significance and the accompanying SEE report has demonstrated that the development will cause no significantly adverse impact to the natural environment.

Further, the proposed development seeks to make the most efficient use of existing infrastructure and services in an area undergoing substantial urban renewal.

As such the development represents orderly and economic development of the land and therefore can be considered to be consistent with the objects of the Act.

14.0 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is clearly a numerical standard.

15.0 WOULD STRICT COMPLIANCE WITH THE STANDARD BE UNREASONABLE OR UNNECESSARY?

Strict compliance with the development standard would demand that an alternate development proposal be advanced that reduces the building height.

However, the proposed non-compliance with the building height is relatively limited in terms of proposed building volume.

Further, the 18m height limit could be reasonably be expected to deliver 5 storey developments and the proposed development does not exceed this expected building scale.

In the context of these factors, it is considered that strict compliance with the development standard is both unreasonable and unnecessary in the circumstances of the case.

In this context, it is considered both unreasonable and unnecessary to demand strict compliance with the relevant development standard.

16.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. There is robust justification throughout the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

Some additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- The development has been able to consolidate five (5) land holdings that has in turn allowed for a better urban planning outcome that would otherwise be achieved by the urban renewal or redevelopment of the site as part of separate or distinct development proposals. The slight height variation at the upper floor forms part of this better planning response for the site and its broader precinct.

- The development of a slightly taller form that the LEP would otherwise allow has in turn reduced the building footprint and allowed for large areas of the site to be provided as landscaped area inclusive of larger deep soil landscaping areas. In this regard the Penrith DCP seeks high density zoned parcels to achieve 35% landscaped area and the ADG's required 7% of deep soil landscaping. The subject development actually provides 36% landscaped area (as represented at Figure 2) and 9% deep soil landscaping and therefore clearly represents a better planning outcome.
- The landscape plan that accompanies the development application also provides for extensive large canopy tree planting and therefore provides a better landscape outcome than both the existing site and a height compliant development with a larger building footprint.
- The use of a narrower, yet taller built form also allows for better environmental performance in terms of solar access and natural ventilation. In this regard the development proposal exceeds the ADG requirements for solar access and also significantly exceeds the number of apartments (87%) apartments that will achieve the cross ventilation requirement.
- This better environmental outcome is also reflected in the accompanying BASIX certificate which exceeds the energy efficiency targets (achieves 29% reduction) required under that planning instrument.
- Significant components of the non-compliance form part of a skillion type roof, which represent an architectural roof feature pursuant to clause 5.6 *Architectural Roof Features* of Penrith LEP 2010. As such, pursuant to clause 5.6 this element does not actually represent a non-compliance with development standard as that clause allows for buildings to exceed the height

standard, as a means of achieving improved architectural quality of development.

- Much of the area that exceeds the development standard is not discernible as viewed from the public domain as it has been setback from the edges of the building, and the lift over-run and fire stairs have been located more centrally on the roof. The proposed elements that breach the height standard does not contribute to distinguishable bulk, scale or density of the building;
- There will be no adverse amenity impacts to the surrounding properties or the public domain areas as a result of the proposed variation.
- The proposal does not result in any unacceptable overshadowing impacts to adjoining properties other than what is anticipated by Council's controls.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the development is consistent with the objectives of the development standard and the objectives of the R4 High Density Residential Zone, notwithstanding the variation

The above points are environmental planning grounds that warrant the non-compliance. They are not "generic" grounds, but rather, specific to the site and circumstances of the development.

In that context, there is considered to be sufficient environmental and planning grounds to justify a contravention of the development standard.

FIGURE 2: SITE LANDSCAPED AREA



17.0 CONCLUSION

Given the circumstances of the case, as outlined in the preceding sections of this report, strict compliance with the standard would be unreasonable or unnecessary.

Further, this report has also demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.