

26 April 2021

General Manager
Penrith City Council
PO Box 60
Penrith NSW 2751

Attention: Sandra Fagan (Senior Planner)

REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD

A request is made to vary the maximum building height development standard in relation to a Development Application (DA) for a hotel at 28-32 Somerset Street, Kingswood.

This request is made having regard to:

1. The provisions of Clause 4.6 *Penrith Local Environmental Plan (LEP) 2010*; and
2. *Varying development standards: A Guide (August 2011)* prepared by the Department of Planning and Infrastructure.

The Guide “contains details of the information applicants are required to submit to the council to assist council assess development applications and associated applications to vary a standard.” The following addresses the information detailed in the Guide.

1. BACKGROUND

The subject site is zoned B4 Mixed Use and is located in the Penrith Health and Education Precinct as identified in the *Clause Application Map* of PLEP 2010. Hotel is a permissible land use in the B4 zone subject to Council consent.

The maximum building height shown for the subject site on the *Height of Buildings Map* in PLEP 2010 is 18.0 metres. Pursuant to cl. 7.11 of PLEP 2010 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. The proposed development avails itself of the additional 20% height provision with

- a 3.5 metre floor to ceiling height on the ground floor; and
- a 3.0 metre floor to ceiling height on the first floor accompanied by a cl. 4.6 request for an exception to the minimum 3.5 metre floor to ceiling height development

standards. Confirmation has been received from Council (email dated 6 April 2021 that Clause 7.11 of PLEP 2010 is considered a development standard and consequently can be varied by way of cl. 4.6 request to vary a development standard.

Subsequently, the maximum permissible building height for the proposed development is 21.6 metres.

At its maximum height, the uppermost part of the building (excluding lift overrun) is 22.632 metres, or 1.032 metres (+ 4.7%) above the 21.6m maximum building height permissible. The lift overrun is 23.854 metres high, or 2.254 metres (+ 10.4%) above the maximum building height permissible. The non-compliance with the maximum building height standard triggers a second requirement for a cl. 4.6 request for an exception to the maximum building height development standard.

Both floor to ceiling and building height non-compliances are directly attributable to the addition of a roof top wellness centre and food and beverage facility that is over and above the standard requirements for the medi-hotel. The provision of this additional level of services does not increase the number of hotel keys in the development but instead is a response to discussions with Nepean Blue Mountains Local Health District that are formalised in correspondence provided at Appendix 1. By letter dated 7 September 2020 the CEO of the Nepean Blue Mountains Local Health District (refer Appendix 1 to the SEE) emphasises how these additional roof top facilities are

“much needed in the area adjacent to Nepean Hospital and will make a valuable contribution to the community generally”

and will

“support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff”.

Particular consideration has also been given to the supportive comments and suggestions provided by Council’s Urban Design Review Panel (UDRP) following their review of a preliminary concept plan. In particular, the UDRP commented:

“The roof top offering for a food and beverage premise has the potential to be a positive contribution to the precinct.....”

In summary, this application for a cl. 4.6 exception applies to the following development standards:

1. a minimum 3.5 metre floor to ceiling height on the first floor level; and
2. a maximum building height of 21.6 metres.

Because both non-compliances relate to height and are therefore interrelated, one comprehensive and integrated 4.6 written request is considered appropriate and for clarity, each non-compliance is addressed separately.

2. CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

The objectives of Clause 4.6 of *Penrith Local Environmental Plan 2010* are:

- (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.

Clause 4.6 imposes three (3) preconditions on Council in exercising the power to vary a development standard and grant consent to the proposed development.

The first precondition requires Council to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with Council finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).

The second requires Council to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with Council finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

The third requires Council to be 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 (cl 4.6(4)(a)(ii)).

3. JUSTIFICATION FOR EXCEPTION TO THE FLOOR TO CEILING HEIGHT DEVELOPMENT STANDRAD

The preconditions to vary the floor to ceiling height standard are addressed as follows:

3.1 Is the development standard unreasonable or unnecessary in the circumstances of the case?

Strict compliance with this diverse housing standard is considered unreasonable or unnecessary in the circumstances of this case because strict adherence to the standard will not result in a development that is anymore consistent with the desired future character of the locality and will not result in a better outcome.

NSW Land and Environment Court cases dealing with applications to vary development standards resulted in the Court setting out a 'five part test' for consent authorities to consider when assessing an application to vary a standard and to determine whether the objection to the development standard is well founded and compliance is unreasonable or unnecessary. Particular attention has also been given to *Brigham v Canterbury Bankstown Council* [2018] NSWLEC 1406 and the comments by Senior Commissioner Dixon including "you do not need to list all five tests from *Wehbe* if the first test is relied upon and said to be satisfied".

The following provides an assessment of the first test in the 'five part test' (identified in bold and italic) that is relied upon and satisfied.

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

The objectives of the floor to ceiling heights standard are identified below and comment is provided on the proposal's consistency with each objective.

Objective #1

to encourage a built form that is suitable for both residential and health services facilities

Comment

The provision of a 3.5 metre and 3.0 metre floor to ceiling height on the ground and first level respectively are sufficient to provide for residential or health services facilities. The Australasian Health Facility Guidelines (March 2016) recommend a minimum ceiling height of 2700mm for treatment and activity areas e.g. therapy rooms, conference rooms, Intensive Care (open plan), kitchens, etc. and 3m floor to ceiling heights for mental health units. Equipment used in health services facilities can be selected to avoid increasing existing ceiling heights or affecting overhead services e.g. air conditioning ducts and hydraulics, where possible.

Objective #2

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.

Comment

If the hotel use were to cease in the future, it most likely would become residential in nature and would be well served by the proposed floor to ceiling heights. It is considered a 3m floor to ceiling height on the first level is a better balance between the need to provide flexibility and adaptability, and being able to reduce the overall height of the building.

3.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to justify contravening the Floor to Ceiling height development standard.

The SEE accompanying the development application demonstrates how the proposal, will:

- provide a valuable contribution to the community generally and will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff;
- not result in additional impacts on both the natural and built environments, particularly from overshadowing, overlooking and noise;

- not result in detrimental social or economic impacts; and
- be in the public interest because it will improve the general amenity of development in the locality.

Approval of the non-compliance will not impact on the proposals ability to;

- achieve an appropriate balance between development and management of the environment that will be ecologically sustainable, socially equitable and economically viable;
- minimising adverse impacts of development;
- protect and enhance the amenity of occupants and neighbours;
- protect and enhance the natural and built environment; and
- meet the future needs of the growing hospital precinct.

3.3 Will the proposed development 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?

Assessment of the first matter in the 'five part test', (s3.1 of this application) confirms the proposed development will be in the public interest because it is consistent with the objectives of the floor to ceiling height standard.

In assessing a development's consistency with the zone objectives, Commissioner Brown in *Antoniades Architects Pty Ltd v Canada Bay City Council* [2014] NSWLEC 1019, took the following approach:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.

With this in mind, the proposed development is considered to be consistent with the relevant B4 zone objectives. Objectives for the B4 zone are identified below and comment is provided on the proposal's consistency with each objective.

Objective #1

To provide a mixture of compatible land uses.

Comment

Penrith Council "encourages development that would support the operation of the hospital, such as medical offices, pharmacies, short-term accommodation, convenience stores and other forms of retail that will meet the needs of visitors and people using the medical services offered within the precinct". The proposed development will provide short-term accommodation, conference facilities, Wellness centre, food and beverage facilities that

supports the operation of the Nepean Hospital.

Objective #2

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.

Comment

The subject site is very well located in relation to public transport and the hospital so as to encourage use of public transport, walking and cycling. Refer to the Traffic Report that accompanies the DA for further detail on the public transport options identified in the locality.

Objective #3

To minimise conflict between land uses within the zone and land uses within adjoining zones.

Comment

The proposed hotel land use is compatible with the desired future character and medically related land uses for the locality. Preliminary discussions indicate the development of a private hospital on the adjoining land to the rear and this will increase demand on the services of the hotel and in particular, the roof top amenities.

Objective #4

To create opportunities to improve public amenity.

Comment

The public amenity along Somerset Street in particular will be improved with the development of a hotel that exhibits a high level of design excellence. The arbour treatment to the front building facade will create a unique ambience along the Somerset streetscape as highlighted in the image below.





Public amenity will also be significantly boosted by the addition of a roof top food and beverage facility (refer image below) that is currently not being provided in the locality. This area will also boast district views to the Blue Mountains.



Objective #5

To provide a wide range of retail, business, office, residential, community and other suitable land uses.

Comment

The proposed hotel use will add to the wide range of land uses that are currently and proposed to be developed that support the operation of the medical precinct.

4. JUSTIFICATION FOR EXCEPTION TO THE BUILDING HEIGHT DEVELOPMENT STANDARD

The preconditions to vary the Building Height development standard are addressed as follows:

4.1 Is the development standard unreasonable or unnecessary in the circumstances of the case?

Strict compliance with the building height standard is considered unreasonable or unnecessary in the circumstances of this case because strict adherence to the standard will not result in a development that is anymore consistent with the desired future character of the locality and will not result in a better outcome.

NSW Land and Environment Court cases dealing with applications to vary development standards resulted in the Court setting out a 'five part test' for consent authorities to consider when assessing an application to vary a standard and to determine whether the objection to the development standard is well founded and compliance is unreasonable or unnecessary. The following provides an assessment of the matters in the 'five part test' (identified in bold and italic).

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

The objectives of the building heights standard are identified below and comment is provided on the proposal's consistency with each objective.

Objective #1

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

Comment

The height, bulk and scale of the desired future character of the locality is best described by the built form that comprises a significant part of the immediate visual catchment (i.e. context) of the subject site. The perspective of the subject site and immediate locality below highlights the built form and context of:

1. Proposed development
2. 6-storey Somerset Specialist Centre
3. Nepean Hospital Car Park
4. 14-storey Nepean Hospital Redevelopment – Stage 1
5. Private hospital (being proposed).



Source: Rothelowman Architects

Just out of the frame in the top right corner of the built form perspective is the 8-storey residential flat building developed at 48-56 Derby Street, Kingswood.

The proposed development is considered to be consistent with this objective because:

- the perceived size and scale of development is 6-storeys with the roof top amenity, that part of the building in excess of the building height, being set back from each boundary so that it is not clearly visible from the public domain and reduces the visual impact;
- The proposed development maintains a complying Floor Space Ratio; and
- the proposed building is compatible with the bulk and scale of nearby developments and provides a suitable transition in scale from the significantly higher built form in the Nepean Hospital to the medical mixed-use precinct to the east and the residential precinct further east.
- The non-compliance is not a result of excessive floor space with the maximum permissible FSR for the subject site not being achieved.

Objective # 2

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

Comment

The detailed assessment in the Statement of Environmental Effects and reports that accompany the DA for the subject site provide supporting information on how the development has been designed to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas.

The architectural plans accompanying the DA provide a very comprehensive analysis of the shadow impacts from the proposed development in comparison to the previously approved scheme on the subject site and a complying development scheme on the subject site. This assessment shows there is a minimal/insignificant shadow impact from a scheme that is exceeding the building height limit as proposed and there would not be any improved benefits from a scheme that was compliant with the building height.

The Acoustic Report accompanying the DA outlines management and building controls that will ensure acceptable management of noise impacts from dining and bar areas located on the rooftop. In particular recommendations are made in relation to hours of operation, no background music, a 1.8m high continuous glazed/solid balustrade to be constructed around the entire perimeter of the outdoor dining/bar area and the number of people that can be reasonably accommodated in each space.

The roof top bar and dining area is also setback from the edge of the predominant built form below and there is landscape screening proposed to the outer edges of the outdoor rooftop areas that will ensure there are no overlooking or privacy issues.

Generally there are no potential views that can be disrupted by the proposed development or by the addition of the roof top amenities.

Objective # 3

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

Comment

There are no heritage items, conservation area and areas of scenic or visual importance identified that could be impacted by the proposed development.

Objective # 4

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

Comment

The building heights for the proposed development is only a 4.7% variation on the maximum building heights nominated by council notwithstanding the further non-compliance of the lift overrun that has minimal impact.

The proposed hotel displays design excellence and is strategically located in an area that is best suited to provide a transition in built form and land use intensity from the development in the Nepean Hospital to the supporting development in the surrounding mixed use zone. The subject site is located on Somerset Street and directly opposite key entries into the Nepean Hospital precinct and the new 14-storey redevelopment site. In short, if there is anywhere best suited to accommodate additional building height it is the subject site i.e. along Somerset Street and directly opposite the Nepean Hospital.

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

The underlying objective or purpose of the standard remains relevant to the development and the commentary above provides detail on how the proposed development achieves compliance with the objectives notwithstanding non-compliance with the numerical standard.

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

Compliance with the underlying object of purpose is unreasonable because it would only result in the loss of the rooftop Wellness centre and food and beverage facility that will primarily benefit the general staff, nurses, doctors etc. associated with the Nepean Hospital. As previously discussed, the CEO of the Nepean Blue Mountains Local Health District has emphasised how much these facilities are needed in the area and will make a valuable contribution to the community generally and in particular how much they will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff.

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.

While it cannot be said the building height standard has been abandoned or destroyed by Council's own actions there is at least one (1) case where the Council has departed from the maximum building height standard. The nearby residential development at 48-56 Derby Street, Kingswood has been built with an approved maximum height of 25.35 metres (8 storeys) that equates to a 17.7% variance to the maximum building height standard. There is precedence for Council to consider a variation in building height if it is perceived to result in a better urban outcome and/or provide a significant community benefit.

The provision of the roof top amenity does not improve the yield of the hotel in the number of rooms that can be made available. The roof top amenity provides a much needed community benefit that will significantly help activate the local area and provide a significant boost to the Nepean health precinct.

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.

The subject site is appropriately zoned and this matter raises no further issues.

4.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to justify contravening the Building Height development standard.

The SEE accompanying the development application demonstrates how the proposal, and in particular the additional roof top area, will:

- provide a valuable contribution to the community generally and will support the Nepean health precinct and enhance the total care experience for patients, their families, friends, carers and medical staff;
- not result in additional impacts on both the natural and built environments, particularly from overshadowing, overlooking and noise;
- not result in detrimental social or economic impacts; and
- be in the public interest because it will improve the general amenity of development in the locality.

Approval of the non-compliance will not impact on the proposals ability to;

- achieve an appropriate balance between development and management of the environment that will be ecologically sustainable, socially equitable and economically viable;
- minimising adverse impacts of development;
- protect and enhance the amenity of occupants and neighbours;
- protect and enhance the natural and built environment; and
- meet the future needs of the growing hospital precinct.

The amended Architectural Plans include shadow diagrams from 9am to 3pm for the proposed development with and without the roof top level offering food and beverage premise. A comparison analysis of the shadow diagrams clearly shows how the addition of the roof top food and beverage premises that is directly responsible for the breach in building height does not increase the impact from overshadowing of neighbouring properties.

Furthermore, the visual impact of the rooftop food and beverage premises from neighbouring properties is moderated significantly by

- a combination of increased setbacks and the provision of parapets and planter boxes in the design of the roof terrace; and

- the proposed development of a private hospital on the adjoining land to the east between Hargrave Street and Orth Street.

4.3 Will the proposed development 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?

Assessment of the first matter in the 'five part test', Table 1 confirms the proposed development will be in the public interest because it is consistent with the objectives of the Building Height standard.

Assessment of the development's consistency with the zone objectives is provided in s3.3 of this application.

5. PROPOSED AMENDMENTS TO CLAUSE 4.6

The department has exhibited an Explanation of Intended Effect (EIE) that sought feedback on proposed amendments to clause 4.6 of the Standard Instrument LEP. The public exhibition closes on 12 May 2021.

The proposed changes aim to clarify the requirements for varying development standards but have only been explained in the EIE. There are no draft clauses in the EIE that might provide some degree of certainty of what the new legislation might look like.

Given the degree of uncertainty with if, how and/or when the legislation might be changed and how the potential changes might look like, it would be premature to provide any further comment on how the proposed changes might impact on the proposed development.

6. CONCLUSION

Clause 4.6 of Penrith Local Environmental Plan 2010 aims to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes by allowing flexibility in particular circumstances. The proposed development warrants favourable consideration under this clause because it has been demonstrated

1. the development standard is unreasonable or unnecessary in the circumstances of the case;
2. there are sufficient environmental planning grounds to justify contravening the development standard; and,
3. development will be in the public interest.

The development is considered to be in keeping with the desired future character of the zone and provide much needed community benefit in the shape of a Wellness centre and food and beverage facility on the rooftop. The non-compliance floor to ceiling heights and building height can be directly attributed to the provision of roof top amenities.

The CEO of Nepean Hospital as indicated how much this roof top facility is needed in the area and how it will make a valuable contribution to the community generally and how much it will support the Nepean health precinct and enhance the total care experience for all involved.

Strict compliance with the building height standard and floor to ceiling height standard is considered unreasonable and unnecessary in the particular circumstances of this case because it will only result in the loss of a much needed community benefit. Conversely, applying a reasonable degree of flexibility in applying the standards will achieve a better planning outcome.

In conclusion, the request is well founded and granting consent is considered consistent with the requirements of Clause 4.6 of Penrith Local Environmental Plan 2010.

Regards

A handwritten signature in black ink, appearing to read 'Anthony Polvere', with a horizontal line extending to the right.

Anthony Polvere
Director