

**PROPOSED CONSTRUCTION OF A RESIDENTIAL FLAT BUILDING PURSUANT TO  
CHAPTER 6 OF SEPP (HOUSING) 2021  
18-20 Victoria Parade, Manly**

**Clause 4.6 - Exceptions to development standards (Height of Building)**

This Clause 4.6 Submission is prepared in support of a Development Application which seeks approval for the demolition of the site's existing structures followed by the construction of a new six storey residential flat building consisting of eleven (11) apartments and one (1) level of basement car parking upon the subject land.

This variation is to be read in conjunction with the following documentation:

- Architectural Plans, Perspectives, Materials & Finishes Schedule, Shadow Diagrams, Solar Access Diagrams, EOTS and Height Plane prepared by DKO Architecture (NSW) Pty Ltd, Project No. 13904, Drawing No's. DA000 to DA800, Revision A and dated 31/07/2025.

A variation is sought in respect of compliance with Section 175 and Section 180 (2)(b) of the State Environmental Planning Policy (Housing) 2021.

Section 175 of SEPP (Housing) 2021 states:

- (1) This section applies to land in a low and mid rise housing inner area in Zone R3 Medium Density Residential or R4 High Density Residential.*
- (2) Development consent must not be granted for development for the purposes of residential flat buildings with a building height of up to 22m unless the consent authority is satisfied the building will have 6 storeys or fewer.*
- (3) Development consent must not be granted for development for the purposes of a building containing shop top housing with a building height of up to 24m unless the consent authority is satisfied the building will have 6 storeys or fewer.*
- (4) In this section, a storey does not include a basement within the meaning of the standard instrument.*

Section 180(2)(b) of SEPP Housing (2021) states:

*(2) The following non-discretionary development standards apply in relation to development on land in a low and mid rise housing inner area—*

*(b) for residential flat buildings—a maximum building height of 22m,*

Building height is defined under the LEP as meaning:

***building height (or height of building)*** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The proposal as detailed on the accompanying plans will result a six (6) storey residential flat building having a maximum building height of 23.5m and which exceeds the maximum 22m requirement.

The maximum non-compliance is 1.5m or 6.82%, with the area of non-compliance equating to 67.1m<sup>2</sup> or 14% of the overall building footprint area.

The proposed non-compliance relates to an area of covered roof top open space associated with the penthouse apartment (Level 5) and includes plant/equipment and services. The extent of non-compliance is illustrated on the accompanying height plane diagram (Dwg No. DA510) contained within the architectural plans. (extract below)



The following Clause 4.6 variation is provided in support of the proposed height of building non-compliance.

This Clause 4.6 variation has been prepared in accordance with the approach adopted by the Land & Environment Court of NSW in its recent Court decisions.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

**1. What are the objectives of Clause 4.6 and is the proposal consistent with them.**

The objectives of Clause 4.6(1) of the LEP are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

It is also considered in the circumstances, a flexible approach to the application is warranted.

**2. Is the standard to be varied a Development Standard to which Clause 4.6 applies.**

A “development standard” is defined in Section 4 of the Environmental Planning & Assessment Act as:

**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*

- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

Section 175 of SEPP (Housing) is titled Development Standards - Low and Mid rise Housing Inner Area. Section 180(2)(b) is titled Non-discretionary Development Standards - Residential Flat Buildings and Shop top Housing in Zone R3 or R4. It is also considered that the wording of the Section is consistent with previous decisions of the Land & Environment Court of NSW in relation to what matters constitute development standards.

It is also noted that Sections 175 and 180 do not contain a provision which specifically excludes the application of Clause 4.6 and vice a versa.

On this basis it is considered that Section 175 and Section 180(2)(b) are development standards for which Clause 4.6 applies.

### **3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.**

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under the Manly Local Environmental Plan 2013):

- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
  - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.

- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The first justification is applicable in this instance.

Whilst there are no stated objectives contained within Section 175 and Section 180 of SEPP (Housing) in relation to building height, it is my opinion that the underlying objective is to control height, bulk and scale of development.

The proposal results in a six (6) storey residential flat building with habitable areas fully contained within the maximum 22m building height. The portion of the building exceeding 22m results from a covered outdoor space associated with the Level 5 apartment and will provide for increased amenity to the occupants.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

#### **4. Are there sufficient environmental planning grounds to justify contravening the development standard.**

Consistent with the findings of the Court in *Initial Action P/L v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC an applicant is required to demonstrate in writing that there are sufficient environmental planning grounds to justify the variation.

In *Initial Action* at [24], Preston CJ stated, that the

*“... focus of cl. 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds”.*

Further he stated,

*“... the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl. 4.6(4)(i) that the written request has adequately addressed this matter”.*

In order to determine environmental planning grounds relevant to the non-compliance it is often accepted to relate the departure to the objects of the Act as set out at Section 1.3 - Objects of the Act.

The following objects of the Act are considered to be relevant to the proposal.

- (a) .....,
- (b) .....,
- (c) *to promote the orderly and economic use and development of land,*
- (d) .....,
- (e) .....,
- (f) .....,
- (g) *to promote good design and amenity of the built environment,*
- (h) .....,
- (i) .....,
- (j) .....

Relevant to the proposal the following submission is provided in relation to the question as to whether there are sufficient environmental planning grounds to justify the non-compliance.

*What is the aspect or element of the development that contravenes the development standard*

The proposal as detailed on the accompanying plans will result a six (6) storey residential flat building having a maximum building height of 23.5m and which exceeds the maximum 22m requirement.

The maximum non-compliance is 1.5m or 6.82%, with the area of non-compliance equating to 67.1m<sup>2</sup> or 14% of the overall building footprint area.

The proposed non-compliance relates to an area of covered roof top open space associated with the penthouse apartment (Level 5) and includes plant/equipment and services. The extent of non-compliance is illustrated on the accompanying height plane diagram (Dwg No. DA510) contained within the architectural plans. (extract below)



*What are the environmental grounds associated with the departure*

It is my opinion the environmental planning grounds associated with the proposed departure primarily relate to:

1. The subject site is located within the low and mid rise housing inner area in Zone R3 - Medium Density Residential. Development for the purpose of a residential flat building is permitted a maximum building height of 22m.
2. The proposal as detailed on the accompanying plans will result in a maximum building height of 23.5m and which exceeds the maximum 22m requirement.
3. The maximum non-compliance is 1.5m or 6.82%, with the area of non-compliance equating to 67.1m<sup>2</sup> or 14% of the overall building footprint area.
4. The proposed height non-compliance is associated with the provision of a covered area of roof top open space together plant/equipment and services.
5. The open space will ensure that residents of the Level 5 apartment will have access to an outdoor area with high levels of amenity and solar access.
6. The proposal will result in a built form which is generally consistent with the existing and desired future height of development located within the surrounding locality.
7. The proposed design is such that all of the habitable floor area is contained within the 22m height control.
8. The proposal provides for a six storey residential flat building consistent with the requirements of SEPP (Housing).



9. The proposal complies with the maximum FSR requirements of the SEPP (Housing). It is also noted that there is no FSR associated with the portion of the building which exceeds the maximum 22m building height development standard.
10. The non-compliant height is located upon the roof in a location whereby it will not be visible when viewed from a number of vantage points within the street, as demonstrated by the below perspective.



A perspective of the proposal

*Are the environmental planning grounds sufficient to justify contravening the development standard*

It is my opinion for the reasons as set out within this submission and which primarily relate to the provision of an area of roof top open space and having high levels of amenity together with plant/equipment and services, are sufficient environmental planning grounds to justify contravening the development standard.

It is my opinion based upon the above that the proposed non-compliance will:

1. *promote the orderly and economic use and development of land,*
2. *promote good design and amenity of the built environment.*

It is therefore my opinion based upon the above that this submission has demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by Section 175 and Section 180(2)(b) of the SEPP (Housing).



## Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the maximum height of building control as required by Section 175 and Section 180(2)(b) of the SEPP (Housing) is appropriate in this instance.



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