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CLAUSE 4.6 VARIATION REQUEST

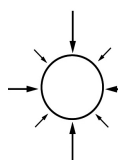
HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

BOARDING HOUSE

Nos.85-87 ANZAC AVENUE

WEST RYDE

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**NEXUS**

Environmental Planning Pty Ltd

## CLAUSE 4.6 VARIATION REQUEST

### HEIGHT OF BUILDINGS

Nos.85-87 ANZAC AVENUE

WEST RYDE

21 April 2022

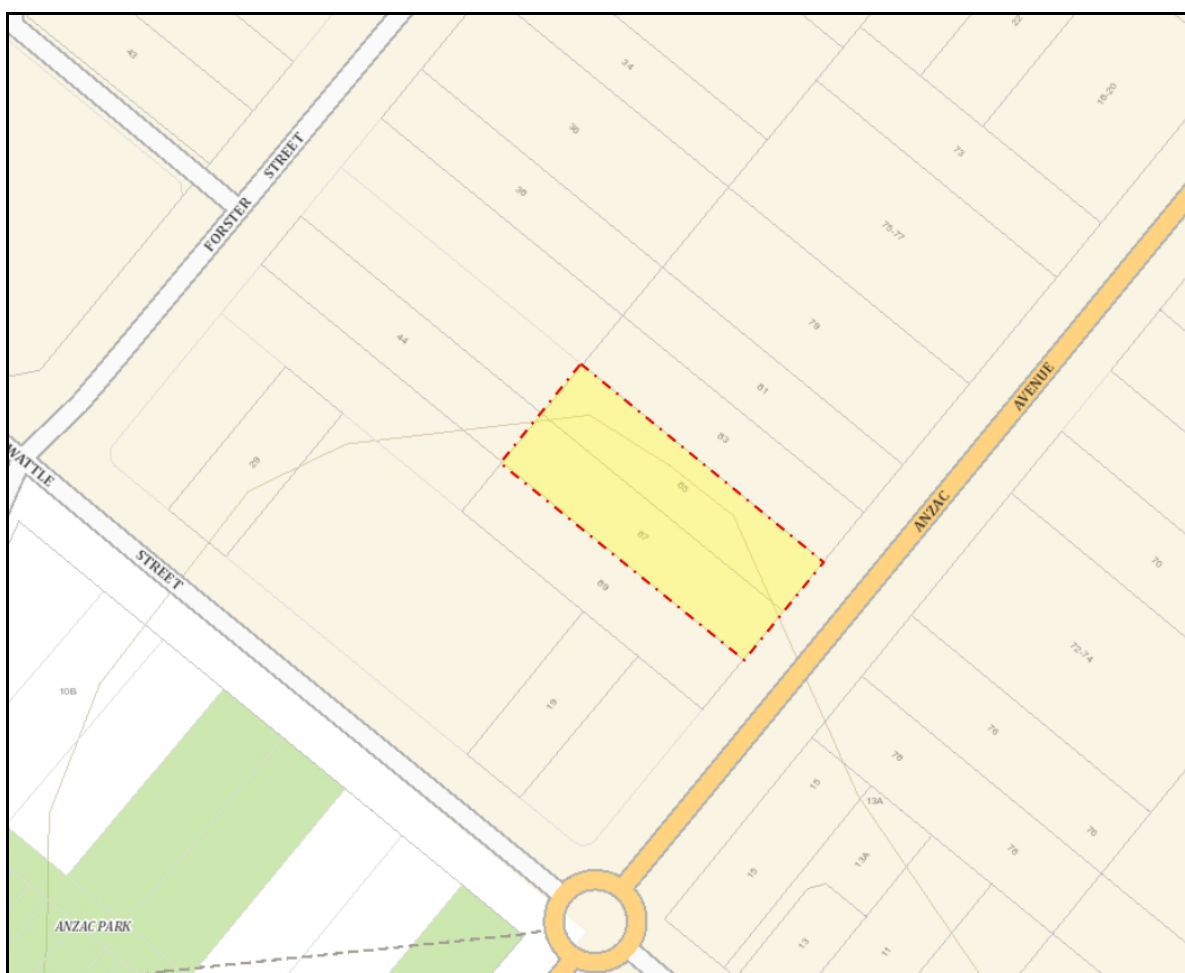
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## 1. Introduction

This objection to the Height of Buildings development standard of Ryde Local Environmental Plan 2014 (**LEP 2014**) has been prepared to accompany a development application to City of Ryde Council (**the Council**).

The development application relates to demolition of the existing structures and the erection of a Boarding House at Nos.85-87 Anzac Avenue, West Ryde (**the Site**). **Figure 1** shows the location of the Site.



**Figure 1:** Location map with the Site highlighted in yellow. © SIX Maps

## 2. Relevant Development Standard

Building height is defined in LEP 2014 as:

**building height** (or **height of building**) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

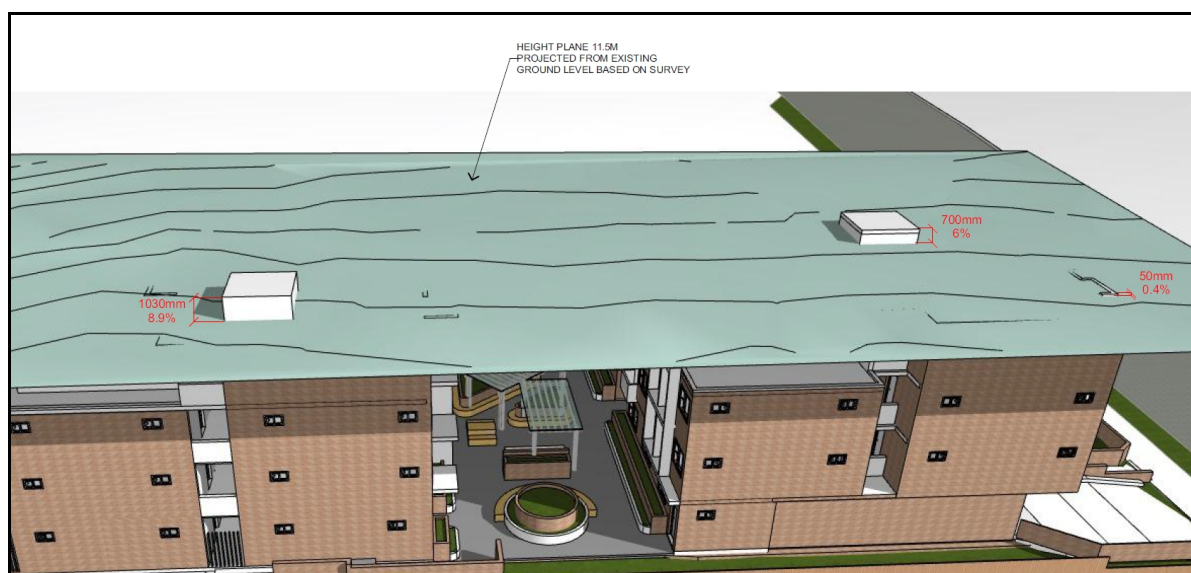
*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

**Sub-clause 4.3** of LEP 2014 states:

#### **4.3 Height of buildings**

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*
  - (b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*
  - (c) *to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*
  - (d) *to minimise the impact of development on the amenity of surrounding properties,*
  - (e) *to emphasise road frontages along road corridors.*
- (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 maximum height of buildings development standard is 11.5 metres. **Figure 2** is an extract from the 3D height plane diagram which indicates which part of the proposed development exceeds the 11.5m Height of Buildings development standard.



**Figure 2:** Extract from the building height plane diagram showing the minor non-compliance with the Height of Buildings development standard.

### 3. Objection to the Height of Buildings Development Standard

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**Sub-clauses 4.6(1) & (2)** of LEP 2014 state:

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

**Sub-clause 4.6(3)** of LEP 2014 provides for variation to development standards as follows:

- (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:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The non-compliance with the height of buildings development standard is confined to a 1030mm section of rear lift overrun, a 700mm breach at front lift overrun and a very minor 50mm breach at the corner of the front building as shown in **Figure 2**.

For the reasons set out below, the merits of the application should properly be considered in the context of **sub-clause 4.6(3)**.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 Preston CJ outlined that Commissioners on appeal exercising the functions of the consent authority have power to grant consent to developments which contravene the building height standard (cl 4.6(2)), however, they cannot grant such a development consent unless they:

- Are satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)).
- Are satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).

- Have considered a written request which demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and they are satisfied that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).
- Have considered a written request which demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

### 3.1 Objectives of the Zone

The objectives of the R4 High Density Residential zone are:

- *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.*

The proposed development would:

- provide for the housing needs of the community including the affordable rental housing needs of the community,
- assist in the provision of a variety of housing with access to services and facilities,
- enhance the amenity of the neighbourhood, and
- ensure that a high level of residential amenity is achieved and maintained.

The proposal would be consistent with the objectives of the R4 High Density Residential zone.

### 3.2 Objectives of the development standard

The underlying objectives of the height of buildings development standard contained in **Clause 4.3** of LEP 2012 are:

- (a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*
- (b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*



- (c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,
- (d) to minimise the impact of development on the amenity of surrounding properties,
- (e) to emphasise road frontages along road corridors.

Notwithstanding the breach of the development standard, the proposed development would:

- Facilitate the use of the Site for high density residential development which is generally compatible with the appearance of the existing area in Anzac Avenue and the desired future character,
- Minimise overshadowing of the adjoining residential development which would provide for the desired level of solar access to all properties adjoining the Site,
- Minimise the visual impact of the built form within the existing high density residential development of the locality, and
- Provide a building height and form which is consistent and compatible with the desired character of residential development in the vicinity of the Site.

The proposed development would be consistent with the objectives of the height of buildings development standard.

### 3.3 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ comprehensively examines a number of ways of establishing that compliance with a development standard is unreasonable or unnecessary, and states:

*The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard...*

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).*

The non-compliance with the height of buildings development standard is confined to a 1030mm section of rear lift overrun, a 700mm breach at the front lift overrun and a 50mm breach at the front corner of the front building.

The proposal is consistent with the scale of development envisaged for the Site under the current planning controls in LEP 2014 and those of *State Environmental Planning Policy (Affordable Rental Housing) 2009* which envisage a bonus Floor Space Ratio for the Site which, in this case, results in a minor non-compliance with the development standard. The proposed development provides for a significant increase in affordable housing and a better planning outcome than would otherwise be the case if one level of each building was removed.

Maintaining the standard would result in an inferior outcome with commensurate reduction in the amount affordable rental housing.

The element of the built form above the height limit has a small footprint and is significantly setback from the property boundaries, therefore, will not be perceived from Anzac Avenue or adjoining development.

On balance, maintaining the 11.5 metre Height of Buildings development standard in this case would result in a significantly reduced number of affordable housing rooms. It is, therefore, unreasonable and unnecessary to require strict compliance with the standard in this case and there are sufficient environmental planning reasons identified to justify contravening the development standard.

Maintaining and enforcing the development standard in this case would unreasonably prevent the orderly and economic development of the Site and would unnecessarily encumber the various community benefits this development brings which include:

- A development which is compatible with the desired future character of the locality.
- A development of high quality design which results in improvement to the streetscape of Anzac Avenue.
- The ability to provide affordable residential development in the form of a new generation boarding house.

It is a better planning outcome to promote and co-ordinate the orderly and economic use and development of the Site through facilitating a development with a breach of the height of buildings development standard than proposing a smaller development form which would not lead to the optimum sustainable capacity of development envisaged by LEP 2014 and *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

### 3.4 Are there sufficient environmental planning grounds to justify contravention of the development standard?

The proposed development is within the R4 High Density Residential zone and would be consistent with the objectives of the zone in that it would:

- provide for the affordable housing needs of the community,
- assist in the provision of a variety of housing with access to services and facilities,
- enhance the amenity of the neighbourhood, and



- ensure that a high level of residential amenity is achieved and maintained.

The section of the proposed development which breaches the height of buildings development standard results from the bonus floor space provided for in *State Environmental Planning Policy (Affordable Rental Housing) 2009*. It is a better planning outcome to provide for affordable housing with a minor breach of the development standard than to reduce the number of boarding rooms such that the light overruns meet the 11.5m development standard. A suitable development is proposed for the Site notwithstanding the minor non-compliance with 11.5 metre height of buildings development standard.

In the circumstance of this development application, the objection to the development standard is well founded and should be supported as it has adequately addressed the matters required to be demonstrated by **Clause 4.6(3)** of LEP 2012.

The development would be in the public interest because it would provide a planning outcome consistent with the objectives of the development standard, the objectives of the R4 High Density Residential zone and *State Environmental Planning Policy (Affordable Rental Housing) 2009* which seeks, among other things:

- (a) to provide a consistent planning regime for the provision of affordable rental housing,
- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,

To limit the development to the 11.5m Height of Buildings development standard would limit the potential of the Site and, as such, would not reach the capacity for high density residential development of the area as envisaged by the relevant planning instruments.