

18 December 2020

General Manager
Georges River Council
Corner MacMahon and Dora Streets
Hurstville NSW 2220

Request for exception to building height development standard
Shop-top housing
108, 112 & 124 Forest Road and 1-3 Wright Street, Hurstville

A request is made to vary the maximum building height development standard in relation to a Development Application (DA) for 'shop top housing' at 108, 112 & 124 Forest Road and 1-3 Wright Street, Hurstville.

This request is made having regard to:

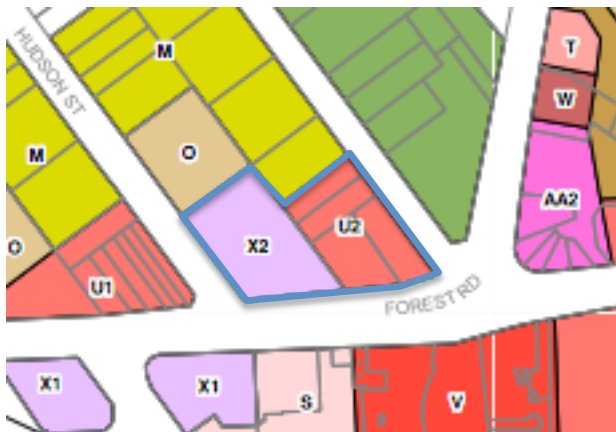
- The provisions of Clause 4.6 *Hurstville Local Environmental Plan 2012*; and
- *Varying development standards: A Guide (August 2011)* prepared by the Department of Planning and Infrastructure.

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 'shop top housing' is a permissible land use subject to Council consent.

The extract from the *Height of Buildings Map* below shows the subject site, outlined in blue, has maximum building height controls of 34.5m (U2) and 46.5m (X2).



The development proposes two (2) individual building tower elements to complement each building height limit identified for the subject site on the *Height of Buildings Map*.

The height of both tower elements on the site exceed the maximum building heights of 34.5m and 46.5m shown for the subject site on the *Height of Buildings Map*. While the maximum building heights for the principal built form is below the maximum building heights the requirement for an exception to the maximum building height standard is triggered by the height of the lift and stair overruns and plant enclosures for each tower being:

- approximately 1.2 metres (2.6%) above the 46.5m building height limit; and
- approximately 3.3 metres (9.6%) above the 34.5m building height limit.

2. Clause 4.6

The objectives of Clause 4.6 of *Hurstville Local Environmental Plan 2012* 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 Building Height standard

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

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

Strict compliance with this 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 built form character of the locality.

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. [Table 1](#) provides an assessment of the matters in the ‘five part test’.

Table 1 – Consistency with 5-part test

Five Part Test	Comments
<ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding non-compliance with the standard. 	<p>The relevant objectives of the Building Height standard are</p> <ul style="list-style-type: none"> (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 and public domain, including parks, streets and lanes, (c) to minimise the adverse impact of development on heritage items, (d) to nominate heights that will provide a transition in built form and land use intensity, (e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre, (f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation, (g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain. <p>The relevant objectives of the standard are achieved notwithstanding non-compliance with the standard because:</p> <ul style="list-style-type: none"> - the non-compliances are very minor and less than 10% (ie 2.6% and 9.6%). - The non-compliances only apply to lift over runs and plant enclosures located on the roof and do not apply to the principal built form that is generally perceived as the building height (ie number of storeys).

	<ul style="list-style-type: none"> - Because of the minor nature of the lift overrun in terms of size and location, any reduction in the height of the lift overrun will result in strict compliance with the Building height standard but will not impact on, or improve, the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views (ie unreasonable and unnecessary).
<ul style="list-style-type: none"> • The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary. 	N/A
<ul style="list-style-type: none"> • The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. 	N/A
<ul style="list-style-type: none"> • 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. 	N/A
<ul style="list-style-type: none"> • 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. 	N/A

3.2 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.

Notwithstanding the non-compliance with building height, the proposed development will:

1. achieve a high level of amenity for future occupants particularly in relation to providing equitable access to the rooftop common open space;
2. not result in additional impacts on both the natural and built environments;
3. not result in detrimental social or economic impacts; and
4. 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;

5. achieve an appropriate balance between development and management of the environment that will be ecologically sustainable, socially equitable and economically viable;
6. minimising adverse impacts of development;
7. protect and enhance the amenity of residents;
8. protect and enhance the natural and built environment; and
9. meet the future housing needs of the population of the LGA.

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', Table 1 confirms the proposed development will be in the public interest because it is consistent with the objectives of the Building 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 as detailed in [Table 2](#).

Table 2 – Consistency with objectives of B4 zone

Zone objective	Comments
To provide a mixture of compatible land uses.	<p>Proposal provides for a mix of residential and retail land uses as part of a shop top housing development.</p> <p>These uses are considered to be compatible and will make a significant contribution to the vitality of the Hurstville City Centre.</p>

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.	The proposed mixed use development is located in an area that is accessible to trains stations, shopping, schools and public open space that will encourage public transport patronage and encourage walking and cycling.
To allow for residential development in the Hurstville City Centre while maintaining active retail, business or other non-residential uses at street level.	Development provides for development of 219 residential apartments in the Hurstville City Centre while providing active retail spaces on the ground level.

4. Conclusion

Clause 4.6 of *Hurstville Local Environmental Plan 2012* 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 that there are sufficient environmental planning grounds to justify contravening the development standard.

The development is considered to be in keeping with the desired future character of the zone and to provide a mixed-use development in a very accessible location. The objectives for the provision of mixed-use development are best served with development proposals that have substantial scale to provide diversity that better reflects community needs.

In conclusion, the request is well founded and granting consent is considered consistent with the requirements of Clause 4.6 of *Hurstville Local Environmental Plan 2012*.

Regards



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Director

18 December 2020

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Corner MacMahon and Dora Streets
Hurstville NSW 2220

Request for exception to non-residential floor space ratios standard
Shop-top housing
108, 112 & 124 Forest Road and 1-3 Wright Street, Hurstville

A request is made to vary the minimum non-residential floor space ratio development standard in relation to a Development Application (DA) for 'shop top housing' at 108, 112 & 124 Forest Road and 1-3 Wright Street, Hurstville.

This request is made having regard to:

- The provisions of Clause 4.6 *Hurstville Local Environmental Plan 2012*; and
- *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 'shop top housing' is a permissible land use subject to Council consent.

The development proposes non-residential floor space ratio of 0.43:1 (or 2,350m²). The non-residential FSR does not comply with the minimum requirement of 0.5:1 as prescribed in cl. 4.4A(1B) of *Hurstville Local Environmental Plan 2012*.

2. Clause 4.6

The objectives of Clause 4.6 of *Hurstville Local Environmental Plan 2012* 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 non-residential FSR standard

The preconditions to vary the non-residential floor space ratio standard development standard are addressed as follows:

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

Strict compliance with this 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 built form character of the locality.

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. Table 1 provides an assessment of the matters in the 'five part test'.

Table 1 – Consistency with 5-part test

Five Part Test	Comments
<ul style="list-style-type: none">The objectives of the standard are achieved notwithstanding non-compliance with the standard.	<p>The objective of the non-residential floor space ratios clause "is to encourage an appropriate mix of residential and non-residential uses in order to ensure a suitable level of non-residential floor space is provided to promote employment and reflect the hierarchy of the business zones".</p> <p>All attempts have been made to achieve the minimum non-residential floor space ratio but there are a number of constraints that have impacted on the 'physical' ability to provide retail space at ground level. In particular:</p> <ul style="list-style-type: none">Provision of through site links, including a wider pedestrian link off Forest Road to accommodate an "eat street" type passageway;Provision of communal open space in the

	<p>centre of the development;</p> <ul style="list-style-type: none"> • Providing a 6m deep soil setback from the interface with adjoining residential development; • Provision of separate vehicular entry points for residential, retail and loading/unloading vehicles; • Provision of separate residential entry points and foyers for the residential towers; and • Provision of 2m wide strip of land fronting Forest Road for road widening purposes. <p>Notwithstanding the complexity of dealing with the constraints limiting the useable ground floor area (some of which are in response to requests from Council) the proposal is still able to achieve sufficient non-residential floor space to promote employment and promote a vibrant and active CBD.</p>
<ul style="list-style-type: none"> • The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary. 	N/A
<ul style="list-style-type: none"> • The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. 	N/A
<ul style="list-style-type: none"> • 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. 	N/A
<ul style="list-style-type: none"> • 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. 	N/A

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

There are sufficient environmental planning grounds to justify contravening the non-residential floor space ratios development standard.

Notwithstanding the non-compliance, the proposed development will:

- Provide an appropriate mix of retail and residential development that is compatible with the hierarchy of similar existing and proposed developments in the immediate locality;
- Provide for activation of the area at street level and make a significant contribution to the vitality of the CBD.;
- not result in detrimental social or economic impacts; and
- be in the public interest because it will provide jobs and generally improve public amenity with
 - through pedestrian links; and
 - communal open space/courtyard with facilities to promote community interaction.

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 residents;
- protect and enhance the natural and built environment; and
- meet the future housing needs of the population of the LGA.

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', Table 1 confirms the proposed development will be in the public interest because it is consistent with the objectives of the non-residential floor space ratios 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 as detailed in Table 2.

Table 2 – Consistency with objectives of B4 zone

Zone objective	Comments
To provide a mixture of compatible land uses.	Proposal provides for a mix of residential and retail land uses as part of a shop top housing development. These uses are considered to be compatible and will make a significant contribution to the vitality of the Hurstville City Centre.
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.	The proposed mixed use development is located in an area that is accessible to trains stations, shopping, schools and public open space that will encourage public transport patronage and encourage walking and cycling.
To allow for residential development in the Hurstville City Centre while maintaining active retail, business or other non-residential uses at street level.	Development provides for development of 219 residential apartments in the Hurstville City Centre while providing 2,350m ² of active retail spaces on the ground level.

4. Conclusion

Clause 4.6 of *Hurstville Local Environmental Plan 2012* 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 that there are sufficient environmental planning grounds to justify contravening the development standard.

The development is considered to be in keeping with the desired future character of the zone and to provide a mixed-use development in a very accessible location.

The development is still able to achieve sufficient non-residential floor space to promote employment and promote a vibrant and active CBD.

In conclusion, the request is well founded and granting consent is considered consistent with the requirements of Clause 4.6 of *Hurstville Local Environmental Plan 2012*.

Regards



Anthony Polvere
Director