

**Property:** No. 39-47 Belmore Street, 6-14 Conder Street and 11-19 Wynne Avenue, Burwood

**DA No:** 31/2013

**Proposal:** Demolition of all existing structures, construction of mixed use development with 3 basement levels, retail floor space totalling 2,185m<sup>2</sup> and 3 residential towers (Building A containing 90 Serviced Apartments, Buildings B and C containing 332 residential units in total)

**Owner:** Kapau Holdings Pty Limited

**Applicant:** Kapau Holdings Pty Limited

## **ADDENDUM REPORT (II)**

This report forms a further addendum to the Development Assessment Report in relation to DA 31/2013 for mixed use development at No. 39-47 Belmore Street, 6-14 Conder Street and 11-19 Wynne Avenue, Burwood, prepared by Planning Ingenuity, consultant town planners. It contains further assessment of proposed variations to development standards, namely height and floor space ratio, in accordance with Clause 4.6 of BLEP 2012. Each non-compliance is addressed separately.

### **Clause 4.4 – Floor Space Ratio**

Clause 4.4 to Burwood LEP 2012 applies a floor space ratio development standard to the subject site, with the western portion of the site (in the "Perimeter Area") having a floor space ratio of 3:1 and the eastern part (in the "Middle Ring Area") of the site having a maximum floor space ratio of 4.5:1. The proposal provides for an FSR of 3.62:1 on the western part of the site and 4.29:1 on the eastern part of the site. Overall, the proposal provides an FSR that complies with the maximum floor space applied across the total site.

Clause 4.6 to Burwood LEP is intended to provide an appropriate degree of flexibility in the application of certain development standards to achieve better outcomes for and from development. The variations and the environmental planning outcomes of those variations are examined below.

**Subclause (3)** to Clause 4.6 requires the consent authority to consider a written request from the applicant where that request seeks to justify the contravention of the 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 applicant included a request for variation to Clause 4.4 in accordance with Clause 4.6 to Burwood LEP 2012 in the Statement of Environmental Effects submitted with the development application.

Essentially, the applicant argues that viewed as a consolidated site, the proposal complies with the FSR requirements of the LEP. It is submitted by the applicant that the distribution of floor space on the site results in a better urban design outcome with no resultant significant adverse amenity impacts.

Applying the tests established by Chief Justice Preston in *Wehbe v Pittwater Council [2007] NSWLEC 827*, the applicant submits that strict compliance is unreasonable and unnecessary in that "the objectives of the standard are achieved notwithstanding noncompliance with the Standard". The applicant submits that in light of satisfying the objectives of the control and the zone, there are sufficient grounds to justify contravening the development standard. Discussion of the proposed variation in the context of the objectives of the controls is outlined below.

**Subclause (4)** to Clause 4.6 requires the consent authority to be satisfied that:

- "(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (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"*

As indicated above, the applicant has submitted a written request as required by subclause 4(i).

In relation to consistency with objectives of the development standard, the objective of Clause 4.4 is stated as follows:

- (1) The objectives of this clause are as follows:*
  - (a) to enable development density and intensity of land use to achieve an appropriate urban form,*
  - (b) to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.*

The proposal complies with the floor space allocation across the subject site however provides an additional 1,603m<sup>2</sup> of floor area on the western part of the site and offsets that against a reduction of 1,588m<sup>2</sup> on the eastern part of the site. The applicant submits that the massing of urban form has been driven by a holistic approach to the consolidated site. Shadow analysis has been submitted and confirms that the shadow increase on the western part of the site is minimal and allows for a reduction in shadow cast from the higher building forms on the eastern part of the site were they to be developed to the maximum 4.5:1 FSR that applies to that part of the site.

It is agreed that the proposal meets the objectives of the FSR controls. The proposal clearly responds to the objective of transitioning density from the Middle Ring to the Perimeter Area and the variation to FSR on the western part of the site is considered to be a subtle increase in building mass that results in minimal bulk impacts or amenity impacts on surrounding development. The "off-set" of density to this part of the site allows for increased setbacks to the easternmost tower which has benefits in terms of building bulk and overshadowing on that part of the site. The differentiation in FSR controls that apply to the site follow former cadastral boundaries to the rear of properties that front Conder Street and accommodated for the

potential of the site to be developed in a more fragmented pattern if necessary. However, the subject site has since been consolidated and therefore this boundary distinction no longer exists.

It is considered that in light of consolidation of the subject site as one land parcel and that land parcel being developed as a whole (rather than setting aside any part of the site for future development), a more flexible approach to massing is available that has in fact resulted in a superior urban form outcome. In terms of intensity of development, as a consolidated site, population density, traffic movements and general impacts of development will not be different from a compliant built form and may in fact be more efficient and effective than fragmented development of the site.

Despite the proposed variation, the proposal maintains a focus on *"higher development density and intensity of land use in the inner part of the Burwood Town Centre"* and provides *"a transition in development density and intensity of land use towards the edge of the Burwood Town Centre"*.

Furthermore, in urban design terms, concern was raised during the development assessment process by GMU Design as to the bulk in building mass on the eastern part of the site. The proposed distribution of density assists in providing relief at the eastern part of the site and reallocating that density to the western part of the site in a location that has minimal bulk impacts or impacts on surrounding properties (being the area close to Hornsey Lane).

In relation to consistency with zone objectives, the B4 Mixed Use zone states the following two objectives:

*"To provide a mixture of compatible land uses.*

*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 proposal achieves the objectives for the zone in that it proposes a mixture of commercial and residential uses in a layout that provides for compatibility between the different uses. Whilst the use mix provides a skew of density beyond the FSR control on the western part of the site, this part of the site remains highly accessible to Burwood Railway Station, local bus stops and the surrounding pedestrian network. Therefore the proposal provides for an integrated mix of uses in a highly accessible location.

As required by subclause (4)(iii) Burwood Council has delegation with respect to concurrence and can determine this application without seeking separate concurrence from the Director-General.

Accordingly, it is considered that the applicant has adequately addressed the provisions of Clause 4.6, particularly sub-clauses 3 and 4.

**Subclause (5)** to Clause 4.6 relates to concurrence granted by the Director-General. Separate concurrence is not required in this case.

**Subclause (6)** was not adopted in Burwood LEP 2012.

**Subclause (7)** requires Council to keep a record of assessments in accordance with Clause 4.6 after each application is determined. This application will be added to Council's records once it is determined.

**Subclause (8)** to Clause 4.6 clarifies that a consent cannot be granted for development which requires a variation to a development standard for complying development, a development standard required for BASIX compliance or controls under Clause 5.4. The development standard for use mix is not a standard specified in subclause (8).

#### **Clause 4.4A – Maximum Residential Floor Space Ratio**

The eastern part of the site which is part of the Middle Ring area of the Burwood Town Centre is within "Area 2" on the Floor Space Ratio map. In Area 2, Clause 4.4A limits the ratio of the gross floor area of any part of a building used for the purpose of residential accommodation to the site area to a maximum of 3.0:1. The development proposes a residential FSR of 4.03:1 on the eastern part of the site, exceeding the permissible residential FSR. However, as an overall development site, the proposal provides for a use mix of 3.0:1 Residential and 1.5:1 Non-Residential.

Clause 4.6 to Burwood LEP is intended to provide an appropriate degree of flexibility in the application of certain development standards to achieve better outcomes for and from development. The variations and the environmental planning outcomes of those variations are examined below.

**Subclause (3)** to Clause 4.6 requires the consent authority to consider a written request from the applicant where that request seeks to justify the contravention of the 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 applicant included a request for variation to Clause 4.4A in accordance with Clause 4.6 to Burwood LEP 2012 in the Statement of Environmental Effects submitted with the development application. Essentially, the applicant argues that viewed as a consolidated site, the proposal complies with the use allocation requirements of the LEP.

Applying the tests established by Chief Justice Preston in *Wehbe v Pittwater Council [2007] NSWLEC 827*, the applicant submits that strict compliance is unreasonable and unnecessary in that "the objectives of the standard are achieved notwithstanding noncompliance with the Standard". The applicant submits that in light of satisfying the objectives of the control and the zone, there are sufficient grounds to justify contravening the development standard. Discussion of the proposed variation in the context of the objectives of the controls is outlined below.

**Subclause (4)** to Clause 4.6 requires the consent authority to be satisfied that:

*"(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and  
(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"*

As indicated above, the applicant has submitted a written request as required by subclause 4(i).

In relation to consistency with objectives of the development standard, the objective of Clause 4.4A is stated as follows:

*"(1) The objective of this clause is to limit the density of residential development in certain business zones to ensure it does not dominate non-residential development in those zones."*

As indicated, the eastern part of the site which is part of the Middle Ring area of the Burwood Town Centre is within "Area 2" on the Floor Space Ratio map. In Area 2, Clause 4.4A limits the ratio of the gross floor area of any part of a building used for the purpose of residential accommodation to the site area to a maximum of 3.0:1. The development proposes a residential FSR of 4.03:1 on the eastern part of the site, exceeding the permissible residential FSR. However, as an overall development site, the proposal provides for a use mix of 3.0:1 Residential and 1.5:1 Non-Residential. The use mix requirement applying to the eastern part of the site was defined by a former cadastral boundary following the rear of properties that front Conder Street. However, the subject site has since been consolidated and therefore this boundary distinction no longer exists.

It is considered that in light of consolidation of the subject site as one land parcel and that land parcel being developed as a whole (rather than setting aside any part of the site for future development), compliance with the use mix requirements across the entire site is acceptable. The proposed development essentially opts for a "horizontal" mix of uses on the site rather than a "vertical mix". That is, rather than the mix of uses being achieved in a vertical sense within the towers on the eastern part of the site, a higher proportion of this mix is allocated to the western part of the site. In terms of centre hierarchy and proximity of employment generating uses to public transport and the commercial core, it is considered that the proposed design choices are acceptable. The ground level interface of commercial uses with the public domain is provided across the site and the economic imperatives of the use mix control are met albeit in a slightly varied spatial sense. As indicated the development site has been consolidated and the applicant does not seek staging of the development under this development application. Therefore, viewed as a total site or as a street block, the proposal will not dominate non-residential development.

Whilst the proposal is skewed towards providing a higher proportion of non-residential uses on the western part of the site, the fact that the non-residential component is largely in the form of serviced apartments, means that the transition from commercial to residential uses in the adjacent "transition area" is achieved. In any case, the applicant submits that the western part of the site is adjacent to commercial office uses on Conder Street and the non-residential former Council Chambers site and therefore is not a conflicting land use.

Furthermore, in urban design terms, concern was raised during the development assessment process by GMU Design as to the bulk in building mass on the eastern part of the site. Given the inclusion of a higher proportion of residential use in the eastern buildings, this has assisted with breaking down building mass of the higher and larger building forms on the site as opposed to a scenario where a greater proportion of the towers were dedicated to commercial use. Whilst not in itself a justification for the proposed variation, it is considered another environmental planning ground that is supported by the proposed distribution of use mix.

The control for the distribution of land use mix must anticipate a variety of future development scenarios including the potential for the site to be developed in fragmented parcels over time (as was possible under

the previous pattern of subdivision and land ownership). Under the circumstances proposed by this development application, the full development potential of the site can be realised in a single process and applying the use mix ratio over the entire site still achieves the overall intention of the control to establish relative proportions of residential and commercial land uses in proximity to Burwood Town Centre. In practical terms, the proposal has the potential to contribute a mix of land uses of an intensity, density and built form which is consistent with Council's intention to achieve a transition within the Town Centre.

In relation to consistency with zone objectives, the B4 Mixed Use zone states the following two objectives:

*"To provide a mixture of compatible land uses.*

*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 proposal achieves the objectives for the zone in that it proposes a mixture of commercial and residential uses. Furthermore the commercial floor space includes serviced apartments, retail premises of various sizes and new office space (within the restored former Masonic Temple). The layout of the uses within the site ensures that the commercial premises are readily accessible.

As required by subclause (4)(iii) Burwood Council has delegation with respect to concurrence and can determine this application without seeking separate concurrence from the Director-General.

Accordingly, it is considered that the applicant has adequately addressed the provisions of Clause 4.6, particularly sub-clauses 3 and 4.

**Subclause (5)** to Clause 4.6 relates to concurrence granted by the Director-General. Separate concurrence is not required in this case.

**Subclause (6)** was not adopted in Burwood LEP 2012.

**Subclause (7)** requires Council to keep a record of assessments in accordance with Clause 4.6 after each application is determined. This application will be added to Council's records once it is determined.

**Subclause (8)** to Clause 4.6 clarifies that a consent cannot be granted for development which requires a variation to a development standard for complying development, a development standard required for BASIX compliance or controls under Clause 5.4. The development standard for use mix is not a standard specified in subclause (8).

### **Clause 4.3 – Height of Buildings and Clause 4.3A Exceptions to Height of Buildings**

Clauses 4.3 and 4.3A to Burwood LEP 2012 and the Height of Buildings map define the building height controls for the site. The western part of the site in the Perimeter Area has a height limit of 30m and the eastern side of the site in the Middle Ring area is subject to a height limit of 60m. The proposal results in minor breaches of the height requirements as shown in Figures 1, 2 and 3. The height lines applied to Buildings A, B and C are shown in Figures 1, 2 and 3 respectively as highlighted with a dashed red line. The variations include the upper part of upper levels, some plant and lift overruns.



Figure 1: Building height line applied to Building A

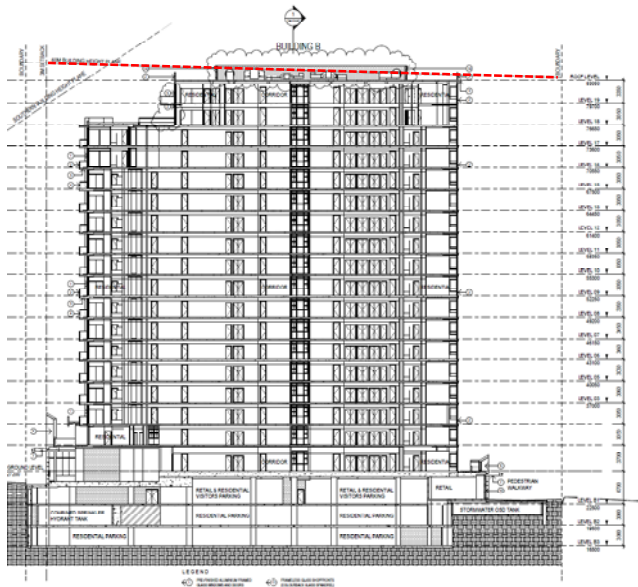


Figure 2: Building height line applied to Building B

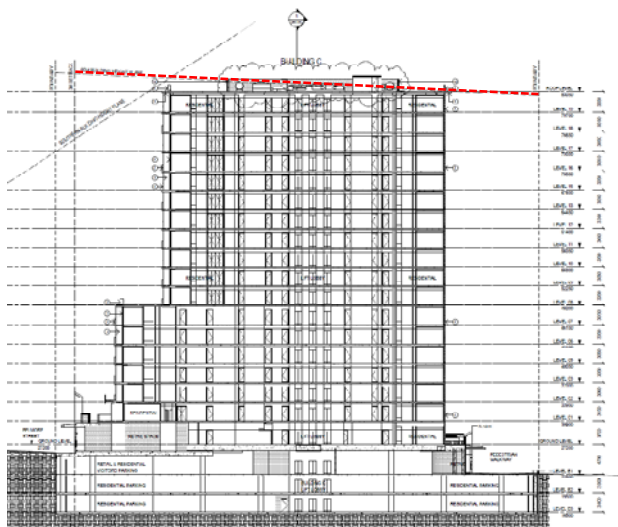


Figure 3: Building height line applied to Building C

Clause 4.6 to Burwood LEP is intended to provide an appropriate degree of flexibility in the application of certain development standards to achieve better outcomes for and from development. The variations and the environmental planning outcomes of those variations are examined below.

**Subclause (3)** to Clause 4.6 requires the consent authority to consider a written request from the applicant where that request seeks to justify the contravention of the 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 applicant included a request for variation to the development standard for building height in accordance with Clause 4.6 to Burwood LEP 2012 in the Statement of Environmental Effects submitted with the development application. Specifically the applicant seeks a variation with the following justification:

*"Building A (Site A) exceeds the 30m height plane (measured along Conder Street) by between 0.9 and 1.6m measured to the top of the roof slab. In addition, Building B and C (Site B) are below the 60m height (measured along Belmore Street). However, it is noted that a small section of the northern end of both buildings and part of the lift motor rooms exceed the maximum permissible height (measured along Wynne Avenue) by less than one metre. The building heights have been developed and modelled based on an analysis of the most effective built form outcome for the Town Centre utilising opportunities offered by the large consolidated site. It is noted that while the proposed design includes minor height non-compliances the overall design has been modelled to eliminate any adverse impacts in relation to the additional height. In particular, it is noted that the shadow profile of the proposed building is less than that generated by the permissible building envelope for the site.*

*Due to the minor nature and locations of the proposed height variations the potential impacts are minimal .. The sections indicate that the proposed buildings are well within and thus comply with the height plane controls."*

The applicant presents a case that the environmental planning grounds justifying a variation to building height are the advantages of a consolidated site which allows siting and massing of buildings that does not strictly match Council's envelope parameters but achieves a reduction in overshadowing of nearby properties and further that minor non-compliant building features are integrated with the architectural design and finishes of the buildings and are not perceptible in the overall external appearance of the development.

Applying the tests established by Chief Justice Preston in *Wehbe v Pittwater Council [2007] NSWLEC 827*, the applicant submits that strict compliance is unreasonable and unnecessary in that *"the objectives of the standard are achieved notwithstanding noncompliance with the Standard"*. Discussion of the proposed variation in the context of the objectives of the controls is outlined below.

**Subclause (4)** to Clause 4.6 requires the consent authority to be satisfied that:

*"(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and  
(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  
(iii) the concurrence of the Director-General has been obtained."*



With respect to Subclause (4)(i) the applicant's request adequately addresses Subclause (3). The request for variation to Council's building height standards seeks to demonstrate that compliance is unreasonable and unnecessary because the three-dimensional form of the buildings will have less impact on nearby properties through overshadowing and that a transition in building height is achieved in a manner consistent with the change in height limits across the site.

In accordance with Subclause (4)(ii) the following is an examination of the proposal in terms of potential compliance with the objectives of the building height standard and the objectives of the zone.

#### Objectives of Clauses 4.3 and 4.3A

The objectives which support the building height standard in Clause 4.3 to Burwood LEP 2012 are as follows:

*"(a) to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,  
(b) to control the potentially adverse impacts of building height on adjoining areas."*

The objectives of Clause 4.3A are:

*"(a) to focus greater building height in the inner part of the Burwood Town Centre and to provide a transition in heights towards the edge of the Burwood Town Centre,  
(b) to mitigate any adverse effects on the amenity of existing and future residents living adjacent to the Burwood Town Centre,  
(c) to limit building heights to facilitate adequate solar access to land adjoining the Burwood Town Centre."*

In terms of Objective (a), the proposal adheres to the notion of transition in height from the "inner part" of the Town Centre to the outer edge despite non-compliance. The proposal is consistent with the remaining objectives in that the height of the proposed buildings has been controlled in a manner which requires only minor variations to the overall height standard. The impacts on adjoining areas are controlled with overshadowing which is not unreasonable given the Council's aim to redevelop the site to higher densities and the setbacks and building separation are satisfactory in accordance with the urban design assessment. The height of Buildings A, B and C achieve a transition with height increasing towards the Town Centre.

#### Objectives of Zone B4 – Mixed Use

The objectives for Zone B4 are as follows:

*"To provide a mixture of compatible land uses.*

*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 proposal achieves the objectives for the zone in that it proposes a mixture of commercial and residential uses. Furthermore the commercial floor space includes serviced apartments, retail premises of various sizes and new office space (within the restored former Masonic Temple). The layout of the uses within the site ensures that the commercial premises are readily accessible from all street frontages and activate the street while the residential uses are suitably separated from by integrated with the other uses on the site to achieve privacy and amenity as well as ease of accessibility.

In conclusion the development will be in the public interest because the development achieves the relevant objectives despite the numeric non-compliance with the building height standard.

The proposal complies with the objective of providing development of dimensions consistent with that nominated by Council's planning controls for higher density redevelopment. The impact of overshadowing of nearby properties has been reasonably controlled. In addition, the buildings comply with the relevant guidelines for separation and maintenance of privacy and amenity within the site and for adjoining and surrounding development. The visual impact on the streetscape has been reviewed by GMU and determined to be satisfactory. There are some elements on the rooftop of each building which are not architectural roof features (lift overruns in particular). These elements extend above the building height limit on the northern end of each building. They are proposed to be appropriately screened by parapets and fixed louvres and will not be readily visible from surrounding private and public places. These features do not significantly contribute to overshadowing and will not be detrimental to the amenity of residents or the scenic quality of the locality in general.

As required by subclause (4)(iii) Burwood Council has delegation with respect to concurrence and can determine this application without seeking separate concurrence from the Director-General.

**Subclause (5)** to Clause 4.6 relates to concurrence granted by the Director-General. Separate concurrence is not required in this case.

**Subclause (6)** was not adopted in Burwood LEP 2012.

**Subclause (7)** requires Council to keep a record of assessments in accordance with Clause 4.6 after each application is determined. This application will be added to Council's records once it is determined.

**Subclause (8)** to Clause 4.6 clarifies that a consent cannot be granted for development which requires a variation to a development standard for complying development, a development standard required for BASIX compliance or controls under Clause 5.4. The development standard for building height is not a standard specified in subclause (8).