

Clause 4.6 – Exceptions to Development Standards

Address: 93-105 Auburn Road, Auburn

Clause 4.6 – Exceptions to Development Standards – Clause 4.3 – Height of Buildings (as identified on the Height of Buildings Map)

1. Introduction

This is an application to vary a development standard under Clause 4.6 – Exceptions to Development Standards, of the Auburn Local Environmental Plan 2010 (ALEP 2010). The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the ALEP 2010.

The variation relates to a proposed mixed use development located at 93-105 Auburn Road, Auburn. The development provides for the development of a mixed use development comprising two 14 storey towers over basement parking. The proposal will accommodate 220 dwellings and 1,126m² of retail space. The 14 storey tower has a maximum height above existing ground level of 44.55m. The proposal has a total GFA of 19,561m² which equates to an FSR of 4.03:1, well below the applicable 5:1 development standard.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011.

It is noted that Clause 4.6 also requires the concurrence of the Director-General to be obtained prior to the granting of consent for development that contravenes a development standard unless, concurrence from the Director-General to vary the development standard has been delegated to the Council.

2. Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Auburn Local Environmental Plan 2010 (ALEP 2010).

2.2 What is the zoning of the land?

The zoning of the land is B4 Mixed Use.

2.3 What are the Objectives of the zone?

The objectives of the B4 zone are:

- 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;
- To encourage high density residential development;

- *To encourage appropriate businesses that contribute to economic growth; and*
- *To achieve an accessible, attractive and safe public domain; and*
- *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.*

2.4 What is the development standard being varied?

The development standard being varied is the building height development standard.

2.5 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the ALEP 2010.

2.6 What are the objectives of the development standard?

The objectives of clause 4.3 are as follows:

- (a) To establish a maximum height of buildings to enable appropriate development density to be achieved; and*
- (b) To ensure that the height of buildings is compatible with the character of the locality.*

2.7 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 establishes a maximum height control of 36.0m for the site.

2.8 What is the proposed numeric value of the development standard in the development application?

The proposed development involves the construction of two (2) towers above a podium. The tallest building will be 44.55m above existing ground level.

2.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation for each of the 36.0m height control at the highest points above existing ground level is 8.55m or 23.75%.

3. Assessment of the Proposed Variation

3.1 Overview

An assessment of the building height variation is provided below in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard.

The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* outlined below:

1. Is the planning control in question a development standard;
2. What is the underlying object or purpose of the standard;
3. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the *EP&A Act 1979*;

4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
5. Is a development which complies with the development standard unreasonable or unnecessary; and
6. Is the objection is well founded.

In accordance with the Guideline, the assessment also addresses the ‘five part test’ established by the NSW Land and Environment Court. The five part test was established in the decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

1. Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;
2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
5. Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

3.2 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In the circumstances of the case, the provision of strict numerical compliance would be unreasonable due to the following:

1. An urban design study was undertaken on behalf of Council in September 2012. The urban design study investigated a number of local centres, including the Auburn Town Centre. The investigation was undertaken to consider the impact of increased FSR controls on the town centres and to recommend appropriate controls and strategies. This has led to the amendment of the height controls on surrounding land being 38.0m, but did not lead to the implementation of heights recommended in the study.

The Urban Design Study did not recommend varied height controls for the land in the vicinity of the site. The difference in height controls between the subject site and adjoining sites is that the amendments to Auburn LEP increased height and FSR on these sites but only FSR on the subject site. A more appropriate benchmark for the emerging character for the locality is the LEP height limit of 38.0m for the adjoining B4 Mixed Use zoned land. It is again noted that the AECOM report recommended increases in height and FSR. The recommended heights were to 43.0m. Council has recently resolved to prepare a Planning Proposal to review the height controls in the LEP to more satisfactorily relate to the FSR controls and permit taller more slender building forms.

The detailed design consideration of the subject application has pursued a design approach of taller more slender building forms.

The alternate approach is to avoid a visually bulky development within the height limit, or to reduce the height of the towers and provide a larger east-west profile of the towers. This has been determined to lead to a poorer urban outcome as:

- The separation between the towers is reduced;

- The amenity of the through site link and village square is reduced due to the greater sense of enclosure;
 - The number of south-facing apartments would increase; and
 - The profile of the towers to Harrow Road and Auburn Road would increase, losing the more slender silhouette proposed.
2. The site is subject to a FSR of 5.0:1. The proposal achieves an FSR of 4.16:1, well below the permitted building density.
 3. The site having a dual frontage and large site area of 4,849m² has been able to position the towers on the site in a manner that presents low-rise podiums to the street frontages, with narrow towers above.
 4. The design approach delivers public benefits of a through-site link and public plaza area.
 5. The variation of the height control allows for the provision of FSR in a manner consistent with the emerging character of the area to:
 - Enable high density residential and mixed use development that contribute to housing targets;
 - Maximise the use of public transport, walking and cycling in areas of high accessibility; and
 - Ensure development in Auburn supports the centre's hierarchy of the Metropolitan Plan for Sydney 2036.
 6. The proposed building height, even though numerically non-compliant, does not result in adverse solar access impacts upon residential properties to the west and south-west of the site.

The preceding discussion clearly confirms that despite the numerical non-compliance with the height development standard the application still achieves consistency with the objectives of the standard. Specifically:

- The development density proposed is appropriate given the application is substantially under the FSR development standard, being the control which most directly influences development density; and
- The height of development proposed is consistent with the future character of the locality as demonstrated by the strategies exhibited by Council reviewing the height controls for the locality and the existing height control applying to the surrounding land at 38.0m.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard, and is compatible with adjoining development.

3.3 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

"to encourage

- (i) *The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) *The promotion and coordination of the orderly and economic use and development of land..."*

Compliance with the standard would not hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the

community and a better environment, and to promote and coordinate orderly and economic use and development of land.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard, and is compatible with the intended future scale of development in the locality. The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.4 Is the development standard a performance based control? Give details.

No. The building height development standard is a numerical control.

3.5 Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

As outlined in Section 3.2, the proposal does not conflict with the zone and development standard objectives. Therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

Strict compliance would result in an inflexible application of policy. It does not serve any purpose that is outweighed by the positive outcomes of the development and therefore a better planning outcome overall is achieved in a built form of less bulk and which is well below the FSR permitted on the site.

3.6 Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the B4 mixed use zone and the objectives of the building height standards as described in Section 3.2 above.
- Non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss.
- The scale of the proposed development is consistent with the scale of the surrounding development and streetscape along Auburn Road, with the towers set back and presenting a slender profile.
- The proposal has a maximum FSR of 4.16:1 which readily complies with the proposed maximum FSR development standard of 5.0:1 which applies to the site.
- The proposed development is generally consistent with the controls and the intent of the controls, contained in the Auburn Development Control Plan 2010.

3.7 Is the variation/objection well founded?

Yes. For reasons outlined in the preceding sections of this submission, the variation to the height control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and B4 Mixed Use zone.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result for adjoining properties or streetscape, by restricting heights to 36.0m.

4. Conclusion

The proposal provides two towers of a building height of 13 storeys in height. This height is complementary to the likely future and existing scale of development. The non-compliance with the 36.0m height control has no adverse impact on the locality.

The building height is considered appropriate to the context and circumstances of the site, being located in the emerging Auburn Town Centre.

A development strictly complying with the numerical standard would not discernibly alter the scale of the building or improve the amenity of surrounding development or public domain.

As demonstrated in this submission, it would be unreasonable for strict compliance with the height control to be enforced. It is concluded that the variation to the height development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.