

10 November 2014

Dr John Roseth
Chair – Sydney East JRPP
Joint Regional Planning Panels
Regional Panels Secretariat
23-33 Bridge Street
Sydney NSW 2000

Dear Dr Roseth,

Re: Clause 4.6 Objection to Clause 4.3 of Rockdale LEP 2011 (LEP)
The Site: 40-50 Arncliffe Street, Wolli Creek

I have been instructed by the Applicant to seek an exception to clause 4.3 of the LEP pursuant to clause 4.6 of the LEP on the basis of some conjecture that clause 5.6 may not apply. This is a precautionary clause 4.6. The exception sought relates to butterfly roofs, fire stairs and lifts servicing the roof top common open space of Building A and Building B.

I rely upon:

1. [PS 08-003 - Department of Planning](#)
2. [Varying Development Standards: A Guide August 2001 - NSW Department of Planning & Infrastructure](#).

The Site

The site is 40-50 Arncliffe Street, Wolli Creek.



Figure 1 - Regional Context

Real Property Descriptions and Principal Development Standards

The site consists of 1 lot, Lot X in DP 381082.

Table 1 - Real Property Description & Principal Development Standards

Lot	Section	DP	Site Area	Zone	HOB	FSR	Max GFA
X		381082	5,108m ²	B4	28m	2.85:1	14,557.8 m ²



Figure 2 - Lot X in DP 381082

Submission

It has been established by a series of decisions in the Land and Environment Court that generally in order to maintain an objection that compliance with a development standard is unreasonable or unnecessary, it is first necessary to discern the underlying object or purpose of the standard.

To found an objection it is then necessary to be satisfied that compliance with the standard is unnecessary or unreasonable in the circumstances of the case. Although the court has urged a generous application of SEPP No. 1 and has repeatedly declined to attempt exhaustively to define the limits of the dispensing power and, in particular, what is embraced by the expression "circumstances of the case", it is now established that it is not sufficient merely to point to what is described as an absence of environmental harm to found an objection (cf *Wehbe v Pittwater*, *Memel Holdings* etc.).

Furthermore, the objection is not advanced by an opinion that the development standard is inappropriate in respect of a particular zoning. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ is very clear where he says:

"An objection would not be well founded by an opinion that the development standard is inappropriate in respect of a particular zoning (the consent authority must assume that standard has a purpose)."

Therefore, it is now established that although the discretion conferred by SEPP No. 1 is not to be given a restricted meaning and its application is not to be confined to those limits set by other tribunals in respect of other legislation, it is not to be used as a means to effect general planning changes throughout a municipality such as are contemplated by the plan making procedures set out in Part III of the *Environmental Planning and Assessment Act 1979*. These principles may be reasonably applied to clause 4.6 of the Standard Instrument LEP.

Again Preston CJ confirms this when he states in *Wehbe* that:

"The dispensing power under SEPP 1 also is not a general planning power to be used as an alternative to the plan making power under Part 3 of the Act."

See also *Hooker Corporation Pty Limited v Hornsby Shire Council* (NSWLEC, 2 June 1986, unreported).

Objections must therefore justify the departure from a development standard having regard to the above principles. In *Winton Property Group Limited v North Sydney Council* (2001) NSW LEC 46 (6 April 2001) it was established that in order to apply the principles of the Hooker case five (5) questions should be asked. These questions form the basis of this process.

This objection under clause 4.6 of the LEP applies the "[Varying development standards: a guide](#)", published by the NSW Department of Planning and Infrastructure (DoPI) dated August 2011.

The DoPI guidelines require that the following questions be answered:

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

Rockdale Local Environmental Plan 2011 (LEP)

2. What is the zoning of the land?

B4 – Mixed Use

3. What are the objectives of the zone?

1 Objectives of zone

- *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.*

4. What is the development standard being varied?
Height of Building (HOB).
5. Under what clause is the development standard listed in the environmental planning instrument?
Clause 4.3
6. What are the objectives of the development standard?
 - (a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,
 - (b) to permit building heights that encourage high quality urban form,
 - (c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,
 - (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.
7. What is the numeric value of the development standard in the environmental planning instrument?
28m.
8. What is proposed numeric value of the development standard in your development application?
30.2m at maximum HOB
9. What is the percentage variation (between the proposal and the environmental planning instrument)?
7.857%
10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Building A provides 474m² and Building B provides 534.5m² of high amenity roof top common open space (COS), including landscape settings and amenities. Equitable access is provided to this COS via lifts and fire egress is also required to service the COS.

The design identified the need to address need to controls wind effects and to provide a decent amount of shade to encourage the activation of the COS and social between interaction of future residents.

The butterfly roof, if not accepted as an architectural roof feature under clause 5.6 of the LEP, and lift access and fire egress stairs for both Building A

and B, are reasonably required to deliver a better environmental outcomes for future occupants.

We also note that the Council's flood level advice dated 15 January 2014 also raised the ground floor level and this has meant that to achieve the desired future character and desired FSR outcomes, the building has been raised.

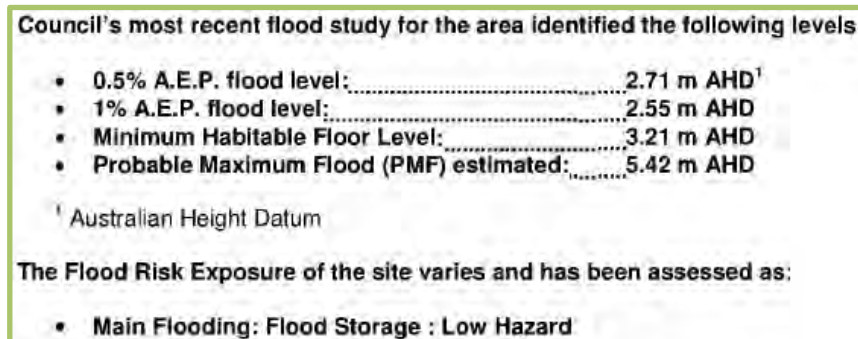


Figure 3 - Flood Levels Advice 15 January 2014

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

The objects of this Act are:

(a) to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, 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 co-ordination of the orderly and economic use and development of land,

Strict compliance would result in the refusal of a development, that through the design process, pre-DA advisory process, the application process including review by the Design Review Panel, demonstrates design excellence including demonstration of very high amenity roof top common open spaces and facilities (refer to the Landscape Plan).

Through further detailed design refinements required by the Design Review Panel it exhibits design excellence consistent with the objects of the Act, SEPP 65, RFDC, LEP and DCP.

Compliance in the circumstances of this case would produce a worse outcome in that high amenity COS would not be delivered whilst the HOB is otherwise predominantly below the 28m HOB height plane as demonstrated by the north elevation and the potential 28m built form to the west.

Figure 4 below demonstrates the only elements that exceed the 28m are the butterfly roof elements that provide shade and wind mitigation, lift access and fire egress.

The highest point above the 28m HOB is 2.2m being a point encroachment to 30.2m.



Figure 4 - North Elevation 28m HOB line

12. Is the development standard a performance-based control?

The development standard IS NOT performance based. The development standard however, contains specific objectives and the objectives are achieved on a performance basis despite the numeric non-compliance.

13. Would strict compliance with the standard, in this particular case, be unreasonable or unnecessary? Why?

Applying [Wehbe v Pittwater Council \[2007\] NSWLEC 827](#), one or more of the following tests adequately justify why it is unreasonable and unnecessary to strictly comply with HOB development standards in the circumstances of this case:

- a. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Submission: A better environmental outcome is achieved in terms of architectural form, appearance and in terms of amenity created by the equitable access of future residents to very large elevated COS, that is shaded and which acts to mitigate wind impacts (See: Windtech Consultants Pty Ltd Report WB898-01F02)) with no adverse environmental effects upon any neighbours.

- b. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Submission: the objectives are relevant and are predominantly achieved with the bulk of Building A and Building B proposed below the 28m HOB. To the extent that the HOB is exceeding this is limited to the butterfly roof, which provides shade and wind mitigation to the roof top COS. Not

withstanding the numeric non-compliance with clause 4.3 the objectives are achieved. This is addressed in detail under clause 10 above.

- c. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Submission: Clause 4.3 objectives are to ensure bulk is presented, as measured by FSR, to encourage high quality urban form, maintain solar access, and where there is a transition between HOB maintain a transitional height.

The objectives would be defeated and thwarted by requiring compliance as the most desirable outcome is delivery by the predominant built form being below 28m HOB as proposed whilst delivering a high amenity outcome for future residents.

The exception to the development standard is to be applied to limited roof top elements. The butterfly roof has not been accepted under clause 5.6 of the LEP as architectural roof features. Nevertheless, the roof top feature does better articulate the building at the top storey, provides wind mitigation and provides shade. Therefore, compliance is unreasonable.

- d. 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;

Submission: There has been no detailed analysis of compliance or otherwise with the development standard as it applies to Wolli Creek precinct. It is noted however, that the height, shape bulk and external configuration of the proposal has been established through compliance with the maximum FSR, achievement of flood levels as set by Council within the design process. The proposal is compatible with the neighbouring developments, and will meet the desired future character as articulated by the LEP and DCP (See the SEE for more detail).

Council staff will be able to inform the JRPP of other sites in the locality that have been subject to SEPP 1 or clause 4.6 submissions that have attained development consent. This application stands upon its merits.

- e. 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.

Submission: This is not applicable. The zone is B4 and this development is permissible and appropriate to the land and neighbouring land similarly zoned. The desired future character of this locality will only be achieved by development of the site being of the bulk and scale (noting that the building complies with the maximum FSR) set by the LEP.

Clause 4.6 Objection Summary

This Clause 4.6 submission represents a very robust justification for the contravention of the development standard in the context of the outcomes already acknowledged by the staff assessment report.

The objectives of clause 4.3 are specifically addressed by the SEE and supporting information as detailed above.

The Court has established on numerous occasions that it is insufficient merely to point to an absence of environmental harm in order to sustain an Objection under SEPP No.1 *Gergely & Pinter v Woollahra Municipal Council* (1984); *Hooker Corporation Pty Ltd v Hornsby Shire Council* (1986) *Winten Property Group Ltd v North Sydney Council* (2001) and *Memel Holdings Pty Ltd v Pittwater Council* (2001) and *Wehbe v Pittwater Council* [2007].

Rather, it is necessary to demonstrate that the strict application of the development standard in question would actually hinder the attainments of the objects of the Act. In other words, would the application of the development standard result in a more optimal environmental or ecologically sustainable outcome than would occur in circumstances where the departure from the standard were permitted using the dispensing power of SEPP No. 1. (Equivalent to clause 4.6 of the LEP).

The submissions under questions above, in tandem with the Statement of Environmental Effects, DRP comments and supporting documents, establish that the application will better attain the objects of the Act, SEPP 65-RFDC and the LEP, with specifically with respect to the objectives of clause 4.3 of the LEP to provide to permit building heights that encourage high quality urban form whilst also providing exceptionally well appointed and accessible roof top COS.

It must be demonstrated, that there is a positive environmental or community outcome that arises directly out of the non-compliance. This clause 4.6 justification to the development standard and the staff report demonstrate a better outcome.

In particular the, equitable access, wind mitigation and shade to the COS as will result in a better environmental outcome.

Once it has been established that there is a positive outcome associated with the area of non-compliance, and that compliance with the standard would hinder the attainment of that outcome then it is necessary to establish the impact of the non-compliance. This should be done by clearly and accurately determining the extent of non-compliance.

There are no adverse environmental impacts.

The impacts of the proposal beyond the site are driven by the complying hight and FSR outcomes.

This assessment is not a merit assessment of the entire development, but rather an assessment of the specific impacts that may arise from the non-compliance (cf Winton Properties/Memel Holdings), on the basis that clause 5.6 is not enlivened by the design before the JRPP for its consideration.

Turning one's mind to the merits of the applicant's case for objecting to the development standard (not the absence of any environmental harm) it is submitted that the impacts of the contravention will deliver a better environmental outcome, that the Council and the JRPP should accept the clause 4.6 objection and apply its mind to the pure merits of the proposal.

This clause 4.6 submission should prevail to the extent that it allows a merit assessment.

Assumed Concurrence From The Director General of the Department of Planning

Clause 7 of SEPP 1 states that:

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in Clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

In March 1989, Circular B1 advised councils that they may assume the Director-General of Planning & Infrastructure's concurrence under SEPP 1 in relation to all development applications, with the following exceptions:

- a. To erect a dwelling on an allotment of land zoned rural or non-urban or within the zones listed in Schedule A to Circular B1 (the WLEP does not contain any of the zones specified);
- b. To subdivide land which is zoned rural or non-urban or within the zones listed in Schedule A to this Circular B1 (again, the WLEP does not contain any of the zones specified).

Councils may assume the Director-General's concurrence under SEPP 1 in relation to these applications but only if;

- i. Only one allotment does not comply with the minimum area; and
- ii. That allotment has an area equal to or greater than 90 percent of the minimum area specified in the development standard.

Circular PS 08-003 Variations to development standards, dated May 2008, confirmed those arrangements;

"To avoid any doubt, this notification does not vary existing notifications to councils for assumed concurrence of the Director-General in respect of applications under SEPP 1. "

There is tension between Circular PS 08-003, and PS08-014 - Reporting Variations to Development Standards dated 14 November 2008.

PS08-014 states under 'further requirements' that provided that any development application which involve a SEPP 1 related to a departure greater than 10% from a development standard should be determined by Council.

On the face of the planning circular (PS-08-014), it is accepted that the requirement for any application seeking a variation greater than 10% in standards under SEPP 1 is a suggestion for 'good practice'. It is our view that this is not a fetter on Council or JRPP's assumed concurrence under clause 64 of the *Environment Planning and Assessment Regulation 2000* ("the Regulation") because PS 08-03 explicitly confers assumed concurrence.

The applicant would request the JRPP in addressing the above submission defer determination if any additional information or design change is required to enable concurrence to be given.

The Department's intention that substantive departures (i.e. those which exceed 10%) from a development standard are determined in an open and transparent forum, are supported by the Applicant and the JRPP is capable of delivering this outcome.

Conclusion

A better environmental outcome is achieved by the proposal in terms of the amenity outcomes to future residents with the desired future character objectives being achieved.

Yours faithfully,



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