

## Clause 4.6 Variation to the Building Height Standard – Botany LEP 2013 Supporting a Development Application for 32 Page Street, Banksmeadow

### 1 Introduction

This letter forms an objection under Clause 4.6 of the *Botany Local Environmental Plan 2013* to the building height standard applying to 32 Page Street, Banksmeadow. This objection should be read in conjunction with the statement of environmental effects prepared by Urbis and the architectural plans prepared by Elenberg Fraser Architects.

Clause 4.6(3) of the BLEP 2013 outlines the requirements of an objection, which must demonstrate:

- (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.*

Under Clause 4.6(4)(a) of the BLEP 2013, consent for a development that contravenes a development standard must not be granted unless, in addition to the issues in Subclause 4.6(3), the consent authority is satisfied that:

- (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.*

This objection has been prepared with regard to the following considerations:

- Clause 4.6 of BLEP 2013
- The considerations for assessing development standards set out by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- 'Varying development standards: A Guide', published by the Department of Planning and Infrastructure in August 2011.

This objection provides a brief assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* decision.

In summary, the proposal largely complies with the building height standard of BLEP 2013, with the exception of a projection at the southern part of the site which interfaces with the B7 Business Park uses. Such a variation is reasonable on the basis that a) the breach of the height control does not result in a breach in maximum floor space so there is no tangible nexus between the height variation and the overall intensity of site use (b) the characteristics of the site (e.g. very large site area/contamination/situated between detached housing and large scale industrial land uses) warrant an approach that properly considers and mitigates these factors beyond strict adherence to the LEP provisions, and (c) the proposed height variation is situated in a location which will not result in any demonstrable detrimental impact to any sensitive land uses (e.g. residential or open space) so the impact of the variation appears negligible.

## 2 The Development Standard

Clauses 4.3(2) and 4.3(2A) set out the building height standards which apply to the subject site. Under Clause 4.3(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 Height of Buildings Map indicates that a maximum building height of 10 metres applies to the site. However, Clause 4.3(2A) allows exemptions to this standard as follows:

*Despite subclause (2), if an area of land in Zone R3 Medium Density Residential or Zone R4 High Density Residential exceeds 2,000 square metres, the height of a building on that land may exceed the maximum height shown for the land on the Height of Buildings Map but must not exceed 22 metres.*

The subject site has an area of 18,908sqm which allows for a maximum height of up to 22 metres in accordance with Clause 4.3(2A).

## 3 The Proposed Variation

The proposed building height across the majority of the site is below the maximum building height standard of 22m (i.e. 21.3m excluding lift cores). However, a parapet height of 24.4m is sought at a small proportion of the southern part of the site, as shown on the proposed development plans.

## 4 Clause 4.6 Assessment

This section assesses the proposed variation to consider whether compliance with the building height standard can be considered unreasonable or unnecessary in this specific circumstance, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the three matters for consideration as phrased in the *Wehbe* decision:

- 1. The applicant must satisfy the consent authority that "the objection is well founded", and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- 2. The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979; and*
- 3. It is also important to consider:*
  - a. whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
  - b. the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

#### 4.1 THE OBJECTION IS WELL FOUNDED AND COMPLIANCE WITH THE STANDARD IS UNREASONABLE OR UNNECESSARY

In the *Wehbe* decision, Preston CJ set out five ways in which an objection to a development standard can be supported:

- 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. 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;*
- 5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

The first consideration, demonstrating that the objectives of the height standard can be achieved notwithstanding noncompliance, is most important to the assessment of this objection. The compliance of the proposed development and variation with the objectives of the height standard in Clause 4.3 of the BLEP 2013 is demonstrated below.

#### (A) TO ENSURE THAT THE BUILT FORM OF BOTANY BAY DEVELOPS IN A COORDINATED AND COHESIVE MANNER

The subject site was recently rezoned from industrial to R3 Medium Density Housing under BLEP 2013, reflecting a very comprehensive and coordinated strategic planning process which recognised the potential of achieving a defined scale and density on the site. Subsequently, DCP 2013 provides more detailed design guidance specifically in relation to how this scale and density would be arranged in a massing scenario for the site. Therefore, there is a reasonable expectation that future development on the site would have the ability to provide a commensurate building height and FSR that was consistent with the maximum standards provided in BLEP 2013.

However, as discussed in Section 6 of the SEE, by providing an elevated car park/landscape solution (by effectively raising the ground floor plane) and provision of larger apartment sizes and parking space requirements under DCP 2013 this has meant that spatially the site cannot achieve a commensurate density/FSR intended for the site. Preliminary design options meant that a six-storey scheme could only achieve an FSR of 1.36:1 (i.e. circa 20% less than the permitted FSR of 1.65:1).

Therefore, an additional part-level, setback above the building envelopes (24.4m to parapet and 25.5m to top of lift core) on the southern part of the site was explored on the basis that this part of the site could accommodate additional scale without giving rise to unreasonable impacts on surrounding uses (i.e. less sensitive industrial uses).

This exercise demonstrated that a relatively minor increase in building height at an appropriate part of the site achieved a more consistent density (albeit still below the standard at 1.59:1) with no unreasonable impacts on surrounding properties. It also demonstrated that there is no tangible nexus between the height variation and the overall intensity of site use.

On this basis, the proposed height variation is reasonable and is not encouraging uncoordinated or non-cohesive development in the LGA.

(B) TO ENSURE THAT TALLER BUILDINGS ARE APPROPRIATELY LOCATED

Clause 4.3(2A) of BLEP 2013 provides that sites which exceed 2,000m<sup>2</sup> in area may allow for building heights up to a maximum of 22 metres. The intent of the clause is that larger sites generally have the critical mass and capability to allow applicants to provide appropriate building massing and appropriate design measures to respond to achieve a scale of approximately 6 storeys in an R3 zone.

While this policy applies throughout the Botany LGA, site-specific guidance within DCP 2013 reinforces the opportunity for taller buildings on the subject site by providing very precise massing guidance, which states:

*“Encourage maximum of two (2) storeys with attic development fronting Page and Holloway Streets and a maximum of six (6) storeys at the rear of the site adjacent to the existing industrial development fronting Green Street”*

This guidance provides that taller buildings are appropriate within the site’s immediate context on the basis that a smaller scale is provided on the street frontages along Page and Holloway Streets. Indeed, while a maximum of 6 storeys is encouraged (and predominantly provided in the proposal), the addition of a part 7 storey element does not fundamentally change the site’s ability to accommodate taller buildings, but rather ensure that the impacts of such height is appropriate with regard to the surrounding context.

In particular, the proposed height element which exceeds the 22 metre height standard is located on the southern portion of the site which is adjacent to the light-industrial uses which is significantly setback from the Page and Holloway streets, and which is not sensitive to shadows which fall generally to the south.

Therefore, the proposal ensures that taller built form elements are appropriately located within the site and in relation to the surrounding built form context.

(C) TO ENSURE THAT BUILDING HEIGHT IS CONSISTENT WITH THE DESIRED FUTURE CHARACTER OF AN AREA

The desired future character of the area is articulated within the site-specific ‘character precinct’ statements in DCP 2013 and more broadly the zone objectives of the R3 Medium Density Housing zone.

Both these policy documents reinforce that residential development of a ‘medium density’ scale should be encouraged which provide a variety of dwelling typologies. In addition, enhancement of the public domain and open spaces is a key objective of the character precinct statements, as well as promotion of neighbourhood amenity and enhanced pedestrian comfort.

BLEP 2013 permits a maximum building height of 22 metres on the site. DCP 2013 provides more detailed design guidance which encourages a lower scale (2-3 storeys) adjacent to surrounding lower scale uses along Page and Holloway Street, with taller elements setback beyond this which interfaces with adjacent light-industrial uses.

The proposal provides a massing arrangement which responds positively to this policy framework, with attached terrace style dwellings (2-3 storeys) along Page and Holloway Streets, and two residential flat buildings setback beyond this which are predominantly 6 storeys. A part 7 storey element (to which this variation relates) is proposed at the southern boundary of the site, which is not inconsistent with the intent or objectives of BLEP 2013 or DCP 2013.

(D) TO MINIMISE VISUAL IMPACT, DISRUPTION OF VIEWS, LOSS OF PRIVACY AND LOSS OF SOLAR ACCESS TO EXISTING DEVELOPMENT

The proposed height variation is situated in a location which will not result in any demonstrable detrimental impact to any sensitive land uses (e.g. residential or open space). In particular, the part 7 storey height element is strategically located in the southern part of the site which interfaces with the industrial (B7) which adjoins Green Street. This provides the following positive response with regard to potential impacts:

- Visual impact – The additional height subject to this variation is generously setback from Page and Holloway Streets to ensure that the relationship with surrounding lower-scale residential properties (in particular their amenity) is respected.
- Disruption of views – There are no significant views that are affected by the proposal.
- Loss of privacy – The proposal provides high levels of visual privacy to surrounding residents and incoming residents by provision of appropriate setbacks, building separation and use of landscaping. In addition, use of materials and privacy screening at the detailed design stage will further enhance these proposed privacy measures. The closest interface with surrounding residential properties is at the south-western corner of the site (19 Page Street). This property contains a garage along a large part of the north-eastern property boundary, as well as a very large fence which projects above the windows of the dwelling. The proposal provides landscape embellishments and deep soil planting zones adjacent to this interface which will provide for increased privacy and a higher level of amenity to what currently exists.
- Loss of solar access – As indicated on the shadow diagrams prepared by Elenberg Fraser the shadows of the proposed development fall predominantly within the light industrial properties to the south of the subject site which are not sensitive to overshadowing. This shadow analysis demonstrates that surrounding residential properties along Page Street will enjoy generous solar access from 10am until the late afternoon, well in excess of the minimum guidance contained in DCP 2013.

(E) TO ENSURE THAT BUILDINGS DO NOT ADVERSELY AFFECT THE STREETSCAPE, SKYLINE OR LANDSCAPE WHEN VIEWED FROM ADJOINING ROADS AND OTHER PUBLIC PLACES SUCH AS PARKS, AND COMMUNITY FACILITIES

The subject site is a current void in the streetscape, which presents an opportunity for a positive response to this surrounding context.

The current streetscape along Page and Holloway Streets in the immediate vicinity of the site is inconsistent in terms of setbacks and street address, but is generally low scale around these street frontages. Taller elements include the industrial development which fronts Green Street to the south and east of the site.

When viewed from adjoining roads and other public places, the proposed development will read as a contiguous, low scale, attached residential street which relates to the adjacent low-scale dwellings along Page Street. Setback significantly beyond this finer grain street edge will be the taller 6 storey element which is consistent with the massing controls in DCP 2013. The part 7 storey element (to which this variation relates) is setback further beyond this 6 storey element which would be less visible from Page and Holloway Street.

The proposed landscape strategy for the site will significantly enhance the streetscape, public domain and amenity of the local area and will play an important role in softening the visual impact of the proposal.

On this basis, the proposed height variation will not give rise to any adverse impacts on the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.

#### 4.2 NONCOMPLIANCE DOES NOT HINDER THE ATTAINMENT OF THE OBJECTS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

The *Wehbe* decision identifies consideration of Objects (a)(i) and (a)(ii) in Section 5 of the *Environmental Planning and Assessment Act 1979* as necessary in assessing a variation to a development standard. These are:

*(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*

The proposed variation will not contravene these Objects of the Act. Management of the existing urban environment to achieve better social and community outcomes will be improved by providing a design solution which better addresses the public domain. Strict compliance with the standard would inhibit this outcome and would not result in the orderly and economic use and development of land.

#### 4.3 THE PUBLIC BENEFIT AND MATTERS OF STATE OR REGIONAL PLANNING

The proposed variation is the result of a design process for the site which recognises the unique characteristics of 32 Page Street. It will allow an improved design response to both street frontages, and will not result in unreasonable amenity and environmental impacts to neighbours. Given these unusual considerations, variation to the standard will not undermine the legitimacy or future standing of the LEP 2013's controls. There are no matters of State or regional planning which would be affected by the variation.

## 5 Conclusion

The location and layout of the site is unique and need to be considered in the design analysis of the site. For the following reasons, compliance with the FSR standard of the 2012 LEP is considered unnecessary:

- The objectives of the height standard are achieved despite noncompliance with the standard itself;
- The development, despite the noncompliance, still contributes to achieving the Objects of the *Environmental Planning and Assessment Act 1979*; and
- Noncompliance will not undermine the public benefit and legitimacy of the standard, and no matters of State or regional planning would be affected by varying the standard.

For these reasons, variation to the standard should be supported as part of the assessment of the proposed development.