

Our Ref: Project 227
Your Ref: JJRP- 14 - 1593

14 January 2015

Ms Melissa Parnis
Assistant Team Leader, Planning Approvals (North)
BLACKTOWN CITY COUNCIL

(By email: Melissa.Parnis@blacktown.nsw.gov.au)

Dear Ms Parnis

Clause 4.6 Justification – Contravention of HOB

Re: JJRP- 14 - 1593 - 828 Windsor Road Rouse Hill
Property: 828 Windsor Road, Rouse Hill

This is a supplementary Clause 4.6 submission addressing amended plans lodged to address Council's concerns. The buildings have been lowered and the plans amended to show the ground levels and the level of compliance with HOB at each corner of each building relative to existing ground levels.

Clause 4.6 of Appendix 6, Area 20 Precinct Plan, of *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, provides that the consent authority can consider a written request from the applicant that seeks to justify the contravention of a development standard.

"4.6 Exceptions to development standards

(1) The objectives of this clause are as follows:

- (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.*

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development 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.*

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is 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

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Precinct Plan was made it did not include any of these zones other than Zone E2 Environmental Conservation.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4."

1.1 Clause 4.6 Summary

This submission justifies a contravention to the development standard relating to the maximum height of Building (HOB), in circumstances where strict compliance with HOB would, in this particular case, be unreasonable or unnecessary and tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the *Environmental Planning and Assessment Act 1979* (EPA Act).

The proposal will not effect planning change that ought reasonably occur under Part 3 of the EPA Act given the minor nature of the variation sought and the achievement of the relevant objectives of the EPA Act and SRGC SEPP.

1.2 The Site

The site is as identified by clause 2 of the SEE.

1.3 Proposed Development

The proposal is as detailed by clause **Error! Reference source not found.** of the SEE and the architectural plans.

1.4 Methodology

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 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 (clause 4.6 equivalent) 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 an area such as are contemplated by the plan making procedures set out in Part 3 of the *Environmental Planning and Assessment Act 1979*.

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.

1.5 Department of Planning and Infrastructure Guidelines

This Cause 4.6 submission applies the guidelines under SEPP 1 and Clause 4.6 of the Standard Instrument LEP, *"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?
2. What is the zoning of the land?
3. What are the objectives of the zone?
4. What is the development standard being varied? e.g. FSR, height, lot size
5. Under what clause is the development standard listed in the environmental planning instrument?
6. What are the objectives of the development standard?
7. What is the numeric value of the development standard in the environmental planning instrument?
8. What is proposed numeric value of the development standard in your development application?
9. What is the percentage variation (between your proposal and the environmental planning instrument)?
10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?
11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act. Note: If more than one development standard is varied, an application will be needed for each variation (eg FSR and height).
12. Is the development standard a performance based control? Give details.
13. Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?

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

1.6 Justification

1.6.1 Name of the environmental planning instrument

State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (SRGC SEPP)

1.6.2 Zone

The current zone is R3 under SRGC SEPP.

1.6.3 Zone Objectives

The zone objectives under the LEP are:

- "• To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment."

Note: Diverse housing means development that provides a range of dwelling sizes that increases the supply and choice of housing in the local government area.

1.6.4 Development Standards

The development standards, proposed to be varied is 4.3 Height of buildings.

1.6.5 Objectives of Development Standards

HOB Objective:

- (a) to establish the maximum height of buildings on land within the Area 20 Precinct,
- (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
- (c) to facilitate higher density development in and around commercial centres and major transport routes."

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

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-SEPP_SRGC_NW_HOB_009_020_20131128. The development standard is "M", 12m.

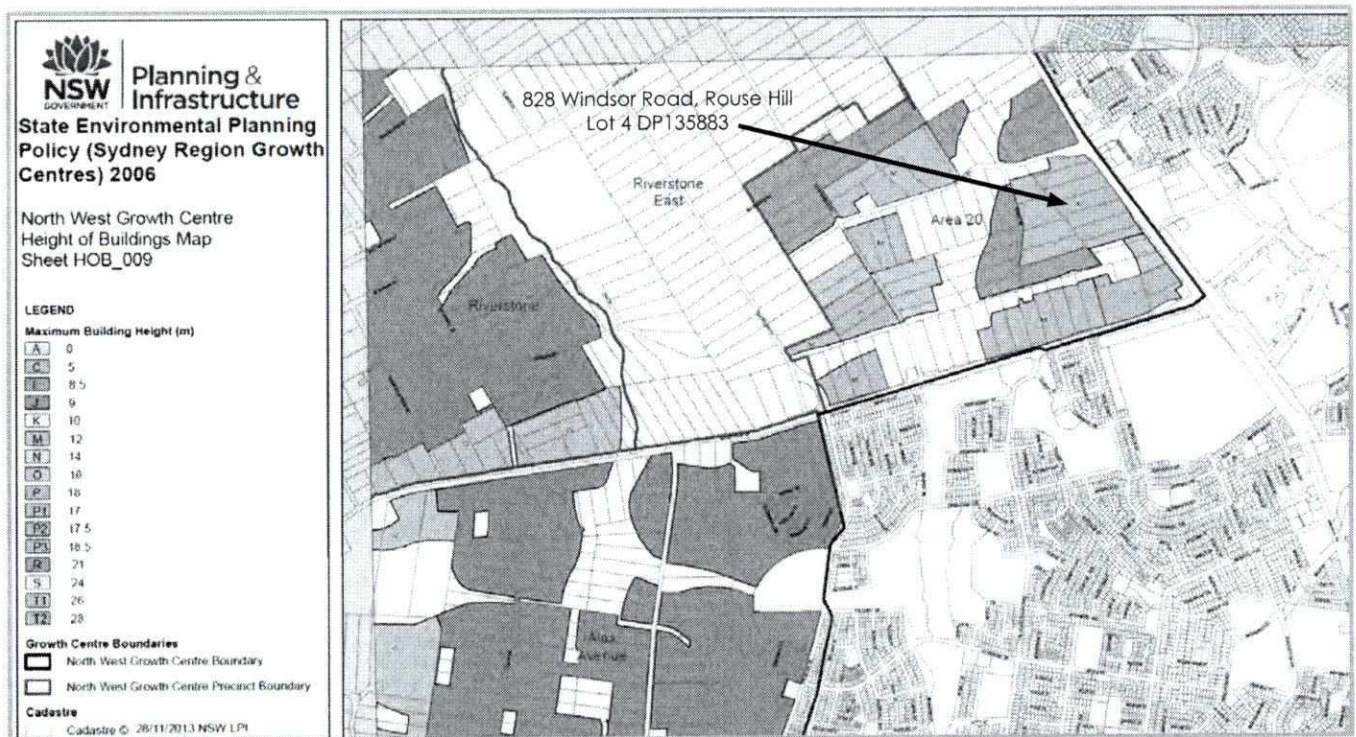


Figure 1 - Height of Buildings Map - SEPP_SRGC NW HOB_009_020_20131128

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

The maximum HOB is 12.6m, as shown on Drawing Number 13-074 Site Analysis Sheet 00 Issue E Buildings B & C.

Other maximum HOB is lower at any other point and varies between slightly below and slightly above maximum HOB as detailed by the plans.

The development is predominantly compliant with the 12m maximum HOB.

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

The maximum variation is 5% at the north-western corners of Buildings B & C.

The other areas protruding above the maximum HOB are all less than 5%. We note that 10% is often seen as reasonably argued as a level of variation that staff may support and determine under delegated authority, being the threshold arising at Recommendation 1 of the ICAC's report dealing with the use of SEPP 1¹. We also note in this case that the JRPP will oversight the process consistent with the Recommendation 6 of the ICAC's recommendations².

It is submitted that the point encroachment of the building at 5% variation, with the other identified encroachments being predominantly below 5%, that the Clause 4.6 justification can be favourably considered in the context of this large site, separated from neighbours by new roads and occasioning no adverse internal or external amenity impacts (a specific HOB objective).

¹ <http://www.icac.nsw.gov.au/investigations/past-investigations/article/2475>

² <http://www.icac.nsw.gov.au/investigations/past-investigations/article/2475>

1.6.9 Objectives - Section 5(a)(i) and (ii) of the Act.

The objects in s 5(a)(i) and (ii) of the Act are to encourage:

"(1) 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,

(2) the promotion and coordination of the orderly and economic use of developed land."

The proposal achieves the objectives:

- It is zoned to permit medium density residential development
- It meets the broader public interest in housing supply.
- It creates diverse housing as defined by the SRGC SEPP.
- It contributes to diverse range of housing and to ensure the orderly and economic use and development of residential land.

1.6.10 Performance based development standards

The development standard, proposed to be varied, is not a performance-based controls it is a numerical standard.

1.6.11 Strict compliance with the development standard is unreasonable or unnecessary

In the circumstance of this case, as demonstrated by the plans:

- the proposal is:
 - 1,997.95m² below the maximum GFA.
 - has a site coverage of 40%, 10% less than the maximum 50%.
 - Provides a landscape area that is 2,271.1m² or 14% more than required
 - Provides 744.05m² or 5% more open space is provided than is required.
 - of a bulk and scale that is distributed to limit the footprint achieving amenity, landscape, POS and COS objectives.
- will have minimal visual impact and the amenity of adjoining development and land in terms of solar access to buildings and open space is considered to be preserved. (HOB Objective).

The application of the pure numerical developments standards is unreasonable and unnecessary in the circumstance of this case. The 5 part test has been applied below.

There are sufficient environmental planning grounds to justify contravening the development standard.

In (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;

Submission: The HOB development standard seeks to encourage higher building and this work in concert with the FSR development standard to deliver housing supply. The proposal will deliver the housing supply envisaged for this precinct close to two new railway stations achieving these two objectives. Critically there will be minimal visual impact and the amenity of adjoining development and land in terms of solar access to buildings and open space will be protected specifically achieving the most relevant HOB objective above. We also note that the internal amenity of the development is SEPP 65 and RFDC compliant.

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

Submission: the standard is relevant to the development and the extent of the variation sought to the maximum height is considered de minimis in the context of the whole of the development.

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

Submission: Lowering the height would defeat and thwart the Act, SRGC SEPP and the zone objectives in that forcing the building to be lowered further or for the FSR compliant bulk to be redistributed resulting in an increased footprint would create a worse ESD outcome for the site. Lowering the building would reduce the ability for supply air to access basement parking and increasing the footprint, thus reducing deep soil and other landscaped areas would be highly undesirable.

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;

Submission: This proposal does not seek to rely upon this circumstance and no research has been undertaken at this date to review Council consent or Consents of the Land and Environment Court that may have abandoned the HOB development standard. The applicant believes that it only needs to demonstrate that one of the 5 tests is satisfied and believes this submission achieves that outcome. Nevertheless, if the Council or the JRPP do not concur this research will be undertaken.

5. 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.

Submission: this is not applicable as the Area 20 precinct is in a state of transition from Semi Rural or Medium and High Density Development driven by the need to ensure the highest and best use of land adjoining the North West railway Line. It is submitted that the zoning is appropriate and that the proposal supports the zone objectives.

1.6.12 Clause 4.6 Justification Summary

It is submitted that:

1. The objection is well in that:
 - a. the objectives of the Act, SRGC SEPP (specifically zone and HOB objectives, and the DCP will be achieved.
 - b. the lower FSR contained with the form proposed results in a better environmental outcome in terms of landscape area, COS, POS, and with no privacy, loss of solar access or any other negative amenity outcomes.
2. Granting of consent to that development application is consistent with the aims of section 5(a)(i) and (ii) of the EPA Act, in that the proposal will contribute to a diverse range of new housing supply as identified to be a key strategic planning objective with the NWRL corridor and specifically Area 20 under the SRGC SEPP.
3. The non-compliance does not raise any matter of State or regional significance.
4. There is no public benefit maintaining the developments standards in the circumstances of this case.

Upholding the clause 4.6 justification is a precondition which must be satisfied before the proposed development can be consideration of the merits: *Winten Property Group Ltd v North Sydney Council* (2001) 130 LGERA 79 at 87-88 [19], 90 [29], 92 [44]-93 [45].

The Council and JRPP should uphold the Clause 4.6 submission and proceed to a consideration of the application upon the merits.

1.6.13 Assumed Concurrence From The Director General of the Department of Planning

In March 1989, Planning 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;
- b. To subdivide land which is zoned rural or non-urban or within the zones listed in Schedule A to this Circular B1.

Council's may assume the Director-General's concurrence under SEPP 1/clause 4.6 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, confirm those arrangements, which stated;

"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 (Clause 4.6). "

There is tension between Circular PS 08-0033, 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 my opinion that the requirement for any application seeking a variation in standards under SEPP 1 is a suggestion for 'good practice'. It is our view that this is not a fetter on Council's 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 JRPP take a conservative approach in addressing the above-confused circumstance, but nevertheless have found in numerous assessments that the concurrence exists.

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. The determination at arms length from Council is supported by the Applicant and the JRPP is highlighted by the ICAC as capable of delivering this outcome.

1.6.14 Conclusion

In the context of the design and urban design outcomes achieved, the objectives of the development standard have been achieved such that Council and the JRPP may consider the proposal upon its merit.

Please don't hesitate to contact me on 0408 463 714 or by email brett@daintry.com.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Brett Daintry', with a stylized flourish extending from the end.

Brett Daintry, MPiA, MAIBS, MEHA
Director