

Amended Clause 4.6 Variation to the Height Standard of the draft LEP Amendment to Lane Cove LEP 2009

This amended Clause 4.6 Variation Request has been provided as supplementary information to the Statement of Environmental Effects prepared in August 2015 for DA 222/2014 and follows a JRPP meeting of 2 March 2016 and subsequent revised rooftop design where roof elements have been reduced. The variation request has been prepared to address the total proposed building height, including the architectural blade elements and lift over runs on the rooftop of both Tower 1 and 2.

1.1 OVERVIEW

This addendum forms a variation request to the applicable height standard. It has been prepared with regard to the following considerations:

- Clause 4.6 of Lane Cove Local Environmental Plan 2009 (LLEP 2009).
- The objectives of Clause 4.3 of LLEP 2009, being the development standard to which a variation is sought.
- Relevant case law specifically addressing the considerations for assessing development standards set out by Preston CJ in *Wehbe v. Pittwater Council* [2007] NSWLEC 827, *Four2Five v Ashfield Council* [2015] NSWLEC 1009, *Randwick City Council v Micaul Holdings Pty Limited* [2016] NSWLEC 7 and *Moskovich v Waverley Council* [2016] NSWLEC 1015.
- “*Varying Development Standards: A Guide*” published by the Department of Planning and Infrastructure (August 2011).

The variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is also assessed in accordance with the principles set out in the Land & Environment Court judgements mentioned above.

1.2 THE DEVELOPMENT STANDARD

Clause 4.3(2) of LLEP 2009 specifies the following:

“(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.”

Building height is defined by LLEP 2009 as follows:

*“**building height (or height of building)** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.”*

The relevant Height of Buildings Map nominates a height limit of RL 204.46 for the western half of the site and RL180.46 for the eastern half of the site. When measured in accordance with the LEP definition of building height, the following heights are proposed:

	BUILDING HEIGHT STANDARD	TOP OF ROOF SLAB	MAXIMUM RL PROPOSED
Tower 1	RL 180.46	RL 180.70	RL 183.70 – top of Lift Over Run and Architectural Blade Elements
Tower 2	RL 204.46	RL 203.30	RL 206.30 – top of Architectural Blade Elements RL 209.30 – top of Lift Over Run

1.3 LLEP 2009 CLAUSE 4.6

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

- “(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...”*
- (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.”*

Accordingly, justification is set out below for the departure from the height control applicable under the LEP. The purpose of the information provided is to demonstrate that strict compliance with the height standard under the LEP is unreasonable or unnecessary in the circumstances of this particular case. It also provides justification for the departure from the height controls specified in the LEP.

1.4 RELEVANT CASE LAW

There are four Land and Environment Court judgements which provide guidance on the interpretation and application of Clause 4.6.

Wehbe v. Pittwater Council [2007] NSWLEC 827 established a number of ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that:

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.*

Whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6.

Four2Five v Ashfield Council [2015] NSWLEC 1009 established that Clause 4.6(3)(b) requires an applicant for development consent to show that environmental planning grounds exist particular to the circumstances of the proposed development on the subject site, to justify contravening the development standard. This finding was upheld by Pain, J in the subsequent appeal *Four2Five v Ashfield Council* [2015] NSWLEC 90. The decision of Pain J was subsequently appealed to the NSW Court of Appeal, however leave was not granted to hear the appeal.

Four2Five v Ashfield has had the effect of limiting the application of clause 4.6 in some cases. Since this judgement, two further court cases have established additional principles assisting in the interpretation of Clause 4.6. These have had the effect of reducing the rigidity in the application of Clause 4.6 that has been applied in recent times as a result of the *Four2Five* judgement. Details of these most recent judgements are outlined below.

Randwick City Council v Micaul Holdings Pty Limited [2016] NSWLEC 7 established that

1. The consent authority must be satisfied that the applicant's clause 4.6 variation request has adequately addressed everything necessary in clause 4.6(3) rather than the consent authority being satisfied directly as to each of these matters, and
2. That the consent authority must be personally satisfied that the development is consistent with the objectives of the zone and the objectives of the development standard.

Moskovich v Waverley Council [2016] NSWLEC 1015 established that

1. The requirement that the consent authority be personally satisfied that the proposed variation is in the public interest by being 'consistent' with the objectives of the standard and the zone is not a requirement to achieve those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'.
2. Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant

objectives of the standard are achieved by the proposal (Wehbe ‘test’ 1). Other methods are available.

3. It is always best, when pursuing a clause 4.6 variation request, to demonstrate how the proposal achieves a better outcome than a complying scheme.

1.5 CLAUSE 4.6 ASSESSMENT

Clause 4.6 of Lane Cove LEP 2009 requires an assessment as to whether compliance with the height standard can be considered unreasonable or unnecessary in this particular case, 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 identified in the Wehbe Land and Environment Court judgment:

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 maintain the planning controls adopted by the environmental planning instrument.”*

In addressing Clause 4.6(3)(a), this assessment demonstrates how the first principle established in *Micaul Holdings Pty Ltd* and the second principle established in *Moskovich* are satisfied.

In addressing Clause 4.6(3)(b), this assessment demonstrates how the first principle established in *Micaul Holdings Pty Ltd* is satisfied. The assessment also identifies the *environmental planning grounds particular to the circumstances of the site* as established in the *Four2Five* judgement.

In addressing Clause 4.6(4), this assessment demonstrates how the second principle established in *Micaul Holdings Pty Ltd* and the remaining principles of *Moskovich* are satisfied

1.5.1 COMPLIANCE IS UNREASONABLE OR UNNECESSARY AND THE OBJECTION IS WELL FOUNDED

Clause 4.6(3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In the *Wehbe* judgement Preston CJ set out five ways in which a strict application of a development standard can be deemed unreasonable or unnecessary, as listed in 1.4 above.

In this instance the first of the means identified by his Honour if of relevance, that is it can be demonstrated that *the objectives of the height standard can be achieved notwithstanding non-compliance*. The compliance of the proposed development and building height variation with the objectives of the height standard in Clause 4.3 of the LEP is demonstrated below.

The objectives of Clause 4.3 are as follows:

- (a) to minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet, and*
- (b) to maximise sunlight for the public domain, and*
- (c) to relate development to topography.*

Those portions of the buildings exceeding the maximum building height, being the architectural blade elements and ancillary plant/lift over run on Tower 1 and Tower 2, have been designed as a considered integrated design response to the upper elements of each building. The additional building height above the building height standard will not cause any material impact to neighbouring land. The integrated design of lift overruns, ancillary roof plant and architectural blade elements will result in a considered tidy rooftop appearance that will be visually subservient and unobtrusive when viewed from above. Importantly the minor exceedances in height for the blade walls and LOR's do not affect maximum permissible GFA.

The proposed height exceedance is caused by the lift over run and architectural blade elements that have been designed to visually and physically integrate with each building. The protrusion above the height limit will not materially increase the extent of shadow cast by the buildings themselves. Further, these non-habitable structures will cause no privacy or visual impact issues to existing neighbouring properties given their location on the roof of the buildings well above the sight lines from these neighbouring properties.

No material reduction in solar access to the public domain south of the site will result from the architectural blade elements or lift over run areas. This has been established in the shadow assessment included as part of the Development Application.

With respect to the subject site, its design was premised on maximising sunlight to the ground floor plaza public domain. This was a key element of the Planning Proposal stage and has been maintained by the development proposal. The proposed height exceedance does not diminish the maximisation of sunlight to the new public domain.

The additional height of the proposed roof elements will not be readily perceptible from public domain spaces in the immediate locale. The rooftop elements will only be visible from the public domain at a significant distance such that the additional height would be imperceptible. The features will, however, improve the appearance of the buildings when viewed from afar as they provide a contextual architectural termination to the towers. The extent of the variation is small enough such that there will be no impact on the building's visual relationship with site topography.

Despite the technical departure from the relevant height standard the proposed development achieves the objectives of Clause 4.3 of LLEP 2009 and therefore it is demonstrated that strict compliance with the height standard in this instance is unreasonable and unnecessary and the objection can be considered to be well founded.

In demonstrating that *the objectives of the height standard can be achieved notwithstanding non-compliance*, the second principle of Moskovich has been addressed.

In thoroughly addressing clause 4.6(3)(a), the first principle of *Micaul Holdings Pty Ltd* is, in part, addressed.

1.5.2 ADEQUATE ENVIRONMENTAL PLANNING GROUNDS FOR CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. *Four2Five* requires that the applicant demonstrate this in light of *environmental planning grounds particular to the circumstances of the site*.

In this instance the following environmental planning grounds particular to the site support of the height variation:

- The proposed building design has been the subject of an extensive and detailed urban design response that has been required to address the unique conditions of the site and its location. These characteristics were identified by Council and their consultants as part of the Planning Proposal stage. The design was required to;
 - Promote a view corridor width across the site to benefit views from the public domain;
 - Promote a view corridor width across the site to provide view retention from the Abode building to the north;
 - Provide a significant predominantly due north ground floor open space public plaza (which accounts for greater than 25% of the site area), linking into and enhancing the usability of the neighbouring Friedlander Place;
 - In conjunction with the future building at 500-504 Pacific Highway, result in a high quality building form that will enable the wider Friedlander Precinct to be perceived as the visual high point of St Leonards.
- These specific issues have driven the design of the building as follows:
 - As part of the design development that informed the Planning Proposal and subject site's rezoning, numerous site studies and building envelope options were tested by the project architect, Council and independent consultants working for both the project architect and Council. These options ranged from a complying commercial scheme under the LLEP 2009 to residential buildings with larger and more regular shaped footprints compared to the proposed taller more slender triangular towers. Whilst larger, more regular tower footprints could have been pursued, these options did not respond in the best way to maximise sunlight to public plaza spaces and view sharing across the site from both the public and private domain – being the continuation of the view axis from Mitchell Street, sky vista from eye level within Friedlander Place and, the proposed ground floor plaza, and view corridor from residents of Abode across all levels of that building. The taller slimmer triangular tower forms enable an opening through the site to optimise a ground floor public plaza, sunlight to this plaza and the quality of views and sky vistas.
 - The lower levels of the residential towers have been designed to comply with the site specific planning controls i.e. 22m separation. Under SEPP 65, lower levels could have been designed with a narrower separation to accommodate more floor space, however the principle of meeting the site specific controls at this location was considered imperative as it provides the majority of view from the public domain within both Mitchell Street and the proposed ground floor plaza. It also facilitates view lines from the residents within the lower levels of Abode, effectively increasing their view amenity where it would not be provided if a commercial building was developed under the 2009 LLEP. Narrowing the building separation at these levels would reduce the extent of view provision from the public domain and these dwellings.

- The upper levels of the building have been designed with a balcony to balcony separation that exceeds the 24m SEPP 65 requirement. This is a specific response to ensure good levels of solar amenity are provided to the residents of these upper level apartments. Again, these floor plates could have been increased in size, however the GFA has been reduced to realise an improved amenity outcome specific to the site.
 - Council required the design response to accommodate a large area of public open space at the ground plane, to integrate with Friedlander Place and create a high quality 'place' for future residents, site visitors and the community. This requirement significantly reduced the quantum of floor space available at the podium level of the building. Greater than 25% of the site area is provided as public open space that could otherwise have been GFA within the podium.
 - The zero building setbacks provided to Friedlander Place and Nicholson Street result from the imperative to maximise building separation through the central view corridor. There is no opportunity to vary these to accommodate additional floor space without impacting on the quality of the view corridor.
- The reasons presented above have very strongly informed the building design response, however this is also balanced by the imperative to optimise the site's potential and provision of gross floor area for the proposal. In this instance, all proposed GFA is contained within the maximum height limit. This has resulted in the scheme falling below realisation of the maximum 12:1 FSR, achieving only 11.6:1. The maximum 12:1 FSR could have been achieved on the site, however this would have come at the cost of providing the ground level open space (by increasing the commercial podium space) and view corridors (by decreasing the lower residential level building setbacks and upper level balcony to balcony separation) that were required by the Council as part of the Planning Proposal phase and are considered to be a significant benefit to the community and neighbouring residents.
 - The only portion of the buildings that exceed the height limit are the architectural blade elements and lift over runs. The architectural response has ensured that these elements are contained towards the centre of the site, and there is no habitable floor space above the maximum height limit.
 - The impacts resulting from the proposed height breach will be negligible. The architectural blade elements and lift over runs have been designed and located in such a way that no material impact will result to neighbouring properties over and above that which would result from a complying scheme.
 - In this instance, it is considered that removal of the upper floor level/s to achieve strict compliance would not result in an improved planning outcome – the uppermost floor level/s does not cause any material impact in terms of privacy, view loss or overshadowing.
 - Locating the architectural roof elements and lift over run above the maximum height limit allows a considered site specific design response which aims to optimise the site's potential and realisation of GFA on the site, in a manner that is consistent with the Objectives of the EP&A Act, whilst addressing the site specific conditions. This results in the provision of significant public open space that will enhance the public experience in conjunction with the future redevelopment of Friedlander Place, and provides for the maximisation of view corridors to the south from both the adjoining private and public domain.

It is considered that these environmental planning grounds are particular to the circumstances of the site and support the proposed variation to the height standard.

1.5.3 IN THOROUGHLY ADDRESSING CLAUSE 4.6(3)(B), THE FIRST PRINCIPLE OF *MICAUL HOLDINGS PTY LTD* IS, IN PART, ADDRESSED. THE PUBLIC INTEREST

Clause 4.6(4)(a)(ii) requires that the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone in which the development is proposed to be carried out.

It is considered that the proposed height variation will not be contrary to the public interest. Section 1.5.1 above demonstrates that the proposal is consistent with the objectives of the building height standard.

There will be no material impact resulting to neighbouring buildings resulting from the location of the architectural blade feature or lift over run above the height standard. These structures will improve the appearance of the building when viewed from the public domain, integrating roof elements, and will not reduce privacy, increase overshadowing or present visual impact to surrounding properties. The solar studies accompanying the application demonstrate that appropriate solar access will be retained to the surrounding public spaces, especially parks and green spaces.

All gross floor area is located below the maximum height limit, and despite the minor height exceedance the proposal does not achieve the maximum 12:1 FSR development standard applying to the site.

The proposal aims to realise an optimal yield, with all GFA contained below the maximum height limit in building forms that were informed by a recent rezoning and that respond well to the specific site context, topography and urban interface.

Further, it is considered that the proposal will remain consistent with the objectives of the B4 zone, being:

- *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 urban design maximising attractive public domain and adequate circulation space for current and future users.*
- *To maximise sunlight for surrounding properties and the public domain.*

The location of the architectural blade elements and lift overrun above the applicable height standards will not detract from the first three objectives. They will also not materially reduce sunlight to surrounding properties or the public domain from that which would be caused by a complying scheme, as demonstrated in the shadow analysis included as part of the Development Application. Given the scale of the development, the proposed non-compliance will be unperceivable from the public domain.

The second principle established in *Micaul Holdings* requires that the consent authority must be personally satisfied that the development is consistent with the objectives of the zone and the objectives of the development standard. In addition, the first principle of *Moskovich* requires that in determining whether the variation is in the public interest, only 'consistency' with the relevant objectives is required to be demonstrated. Strict achievement of those objectives is not necessary.

1.5.4 AS OUTLINED ABOVE IN THIS SECTION AND IN SECTION 1.5.1, THE PROPOSAL IS CONSISTENT WITH THE OBJECTIVES OF THE HEIGHT STANDARD AND THE B4 ZONE, AND AS SUCH THE CONSENT AUTHORITY CAN BE SATISFIED THAT THE PROPOSAL MEETS THE PRINCIPLES ESTABLISHED IN *MICAUL HOLDINGS* AND *MOSKOVICH*. CONCURRENCE OF THE SECRETARY

Clause 4.6(4)(b) requires that the concurrence of the Secretary has been obtained.

Clause 4.6(5) provides that, in deciding whether to grant concurrence, the Secretary must consider:

- (a) *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *The public benefit of maintaining the standard*
- (c) *Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Consideration of the above also addresses matters 2 and 3 of the Wehbe judgement.

Matters of State or Regional Planning Significance

The proposed variation to the height standard results from the location an architectural roof element and lift over run structure on the roof of each building. The height variation results from a design response that seeks to optimise the site's potential within an envelope that has been designed to maximise public amenity, sunlight and provision of view corridors through the site. It does not result from the provision of habitable space or GFA above the building height limit. Therefore the non-compliance will not raise any matter of State or Regional planning significance.

Public Benefit of Maintaining the Standard

The building has been the subject of detailed design studies to ensure maximisation of public benefit. Whilst the proposal results in a variation to the height standard, it is considered that strict compliance with the standard would not itself result in a public benefit.

Reducing the number of levels to enforce strict compliance with the standard will not result in an improved planning outcome. The uppermost floors do not create any material shadow, privacy or existing view loss impact. As such, there will be no discernible public benefit by maintaining the standard.

1.6 SUMMARY

In view of the development and site context strict compliance with Clause 4.3 of the LEP is considered to be unreasonable in this case. The proposed variation to the building height standard, and the proposed development, is justified on the following grounds:

- The proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of the LEP despite a non-compliance with the standard itself. The proposed development does not conflict with the intent of Clause 4.3 which is to prevent additional overshadowing, minimise view loss, safeguard the amenity of existing nearby dwellings and to maintain the visual character of the area. The proposed development achieves this outcome. Strict application of the standard is therefore considered unreasonable and unnecessary.
- While the height standard is breached by the inclusion of the architectural blade elements and lift over run areas, there is no departure from the FSR standard applicable to the site. The non-compliance is restricted to the portion of the structure above the slab level of the roof. There are no residential uses that exceed the height limit – all GFA is within the height limit. Indeed, the

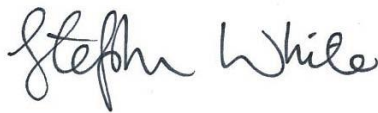
proposed FSR is well within the allowable FSR limits for the site (11.6:1 proposed compared to an allowable FSR of 12:1).

- The proposed height breach results from a detailed urban design response to the conditions specific to the site. These conditions require the maximisation of view lines and permeability across the property from both the public and private domain, and the provision of considerable public open space at the ground level that integrates with the neighbouring Friedlander Place to create a future urban plaza for the benefit of the wider community. It provides a high quality urban domain response that addresses the specific site constraints and results in a form that best responds to its context. In order to appropriately address these site specific considerations, the proposal aims to optimise its GFA below the maximum height standard. It is noted that the maximum 12:1 FSR is not achieved by the proposal.

The architectural roof elements and lift over runs are located above the maximum height limit as a result of the design scheme seeking to optimise the site's potential whilst closely responding to the site specific conditions following a tested design and rezoning process. It is considered that reducing a number of levels in order to achieve strict compliance with the height standard will have no material benefit or reduction in impact on neighbouring properties or the public domain.

- The proposal variation will not result in loss of views from existing neighbouring properties, nor will it result in adverse amenity impacts.
- The proposed development, despite the very minor non-compliance, contributes to achieving the objects of the EP&A Act.
- The non-compliance will not undermine the public benefit and legitimacy of the standard and no matters of State or regional planning would be affected by the proposed variation.
- This clause 4.6 variation adequately addresses all matters for consideration under clause 4.6(3) and demonstrates that it meets the principles established in *Wehbe v. Pittwater Council* [2007] NSWLEC 827, *Four2Five v Ashfield Council* [2015] NSWLEC 1009, *Randwick City Council v Micaul Holdings Pty Limited* [2016] NSWLEC 7 and *Moskovich v Waverley Council* [2016] NSWLEC 1015.

For these reasons, the proposed variation to the height standard in order to accommodate architectural blade elements and integration of lift motor rooms and associated ancillary plant on each of the buildings should be supported as part of the assessment of this DA.



Director