



Revised

Clause 4.6 submission requesting variation of Development Standard.

Clause 4.3 – Maximum Height of Buildings Canterbury Local Environmental Plan 2012

Demolition of the existing buildings and construction of a six (6) storey mixed development building containing 170 residential apartments, ground level commercial/retail space and basement carparking.



717 – 727 Canterbury Road, Belmore
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Introduction

Clause 4.6 of Canterbury Local Environmental Plan 2012 (CLEP 2012) allows the consent authority to grant consent to a development even though the development contravenes a development standard imposed by the LEP.

The objectives of clause 4.6 are:

- 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.*

This submission is seeking a variation of the maximum height of building standard as specified in clause 4.3 of CLEP 2012 and associated “maximum height of buildings” maps and has been prepared having regard to the decision by Chief Justice Preston in *Wehbe v Pittwater Council (2007) NSWLEC 827* and the principles outlined in the latest authorities on Clause 4.6, contained in the following judgements:

- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (‘Four2Five No 3’)*
- *Moskovitch v Waverley Council [2016] NSWLEC 1015*

In summary, the principles arising from the above matters are:

- a) That the relevant objectives are those stated in the controls not unidentified underlying objectives;
- b) The environmental planning grounds relied upon need not necessarily be particular to the circumstances of the proposed development and/or the site; the relevant question is whether the decision maker is reasonably satisfied with the grounds on appropriate grounds; and
- c) Five methods of establishing that compliance is unreasonable or unnecessary are identified by Preston J in *Wehbe* and these remain relevant. And even though cl4.6(a)(ii) already encompasses a requirement that the development be consistent with the objectives of the standard and for development in the zone, that matter remains relevant (but not exclusively so) as grounds that may satisfy the test in cl4.6(4)(a)(i) in relation to matters referred to in cl4.6(3)(a)..

Earlier, in *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 7* Biscoe J noted that the consent authority's obligation is to be satisfied that the applicant's clause 4.6 submission has adequately addressed that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. He held that:

*“the Commissioner **did not have to be satisfied directly** that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, **but only indirectly by being satisfied** that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.”*

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

Canterbury Local Environmental Plan 2012 (CLEP 2012)

What is the development standard being varied?

The proposed development seeks to vary the maximum height of buildings standard as specified in clause 4.3 of CLEP 2012 and the associated “maximum height of buildings” maps which indicate that the maximum height of a building for the site is 18m.

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. landscaped area



The slope of the land which falls 5.0m – 6.0m from Canterbury Road towards the rear of the site and this results in the height of the proposed development varying across the site.

The height of the building along the Canterbury Road frontage to the roof parapet (RL 63.0) ranges from 18.67m to 19.57m in the south-west corner while the height to the lift overruns (RL63.7) ranges from 19.42m to 20.2m in the south-west corner.

The height of the building along the Burwood Road frontage to the roof parapet (RL 58.8) ranges from 17.55m to 21.1m in the north-west corner while the height to the lift overruns (RL59.5) ranges from 17.7m to 19.6m on the Burwood Road frontage.

What is the zoning of the land?

The site is zoned B2 – Local Centre

Justification for Contravention of Development Standard.

Clause 4.6(3) of CLEP 2012 states that:

“Development 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”*

Clause 4.6(4)(a) of CLEP 2012 states that the consent authority must not grant consent to a development which contravenes a development standard unless it is satisfied:

- (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*

These matters are address below.

That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston identified five examples of situations in which compliance with a development standard might be shown as unreasonable or unnecessary.

While *Wehbe* relates to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis remains of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; *Moskovitch v Waverley Council* [2016] NSWLEC 1015).

The five ways outlined in *Wehbe* include:

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 or 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.

Of particular relevance in this instance is the first method, that is: *"The objectives of the standard are achieved notwithstanding non-compliance with the standard"*.

What are the objectives of the zone?

The objectives of the zone are to:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To facilitate and support investment, economic growth and development for active, diverse and well-designed centres.*

It is considered that the development is of a form and scale that satisfies the objectives of the zone as:

- The development is of a form and scale that will provide the opportunity for a range of retail and business uses that will serve the needs of those who live in, work in and visit the area. The provision of over 2200sqm of commercial and retail space within the development provides ample opportunities for employment within an accessible location.
- The site is within the study area of the recently released "Sydenham - Bankstown Urban Renewal Corridor Strategy" prepared by the NSW Department of Planning and Environment which identifies the site as being suitable for 5/6 storey mixed use developments. It is within 800m of Belmore Railway Station and has access to a good bus service along Canterbury and Burwood Roads. The M5 is in close proximity and provides opportunities for connections to jobs and services throughout the region.
- The site and surrounding area has been 'up-zoned' to allow a transition from light industrial/commercial development to high density mixed residential/commercial in order to facilitate Council's vision for the revitalisation of the Canterbury Road and support local Town Centres along its route, such as Belmore. Accordingly, the proposed development facilitates and supports local economic growth and investment.

What are the objectives of the development standard?

The objectives of the maximum height of buildings standard contained within clause 4.3 are as follows:

- (a) *to establish and maintain the desirable attributes and character of an area,*
- (b) *to minimise overshadowing and ensure there is a desired level of solar access and public open space,*
- (c) *to support building design that contributes positively to the streetscape and visual amenity of an area,*
- (d) *to reinforce important road frontages in specific localities.*

Despite not complying with the height standard specified in clause 4.3 of CLEP 2012, it is considered that the proposed development satisfies the objectives of the standard as:



- The subject site and surrounding area has been 'up-zoned' to allow a transition from light industrial/commercial development to high density mixed residential/commercial in order to facilitate Council's vision for the revitalisation of the Canterbury Road and support local Town Centres along its route, such as Belmore. The proposed development adopts setbacks to Canterbury Road that are in accordance with the requirements of CDCP 2012 (as varied by cl 3.2.6(iv) for corner sites) and allow the development to be consistent with the character of development occurring whilst achieving the desired public domain vision.
- Belmore Town Centre is in close proximity to the site and the proposed development seeks to maximise residential density in easy walking distance to Belmore Railway Station, in a built form that is consistent with the built form on surrounding sites and development occurring along Canterbury Road. In addition, the proposal seeks to provide residential accommodation in proximity to public transport, shops and services, which is considered to be a desirable planning outcome.
- The proposed development is a high quality mixed use building that is well articulated using architectural elements, varied setbacks and materials to ensure that the development contributes positively to the streetscape and when viewed from surrounding lands and the public domain.
- The proposed development has a height that acknowledges the site's location on the corner of two (2) important road frontages (Canterbury Road & Burwood Road) as these streets are significant east-west and north-south arteries through the city. The most significant non-compliance is at the north-west corner of the Canterbury Road building and the height of the building emphasises the corner and creates a significant landmark which defines the entry to the Belmore Town Centre.
- The corner location of the site, its orientation and the separation to surrounding properties ensures that the proposed development has no significant adverse amenity impacts, in terms of privacy, overshadowing, view loss or visual intrusion onto adjoining properties as a result of non-compliance with the standard. The building observes a substantial 10m setback to its northern boundary that allows for significant landscaping, including canopy tree planting that will allow the proposal to suitably integrate with the future development of adjoining lands.
- As the 5th floor of the building fronting Burwood Road has been removed, the extent of non-compliance to the parapet has been significantly reduced to range from 17.55m to a maximum of 21.1m adjacent to the existing substation and 20.19m at the north-west corner of the building. Given the fall of the land the reduced scale of the building is not inconsistent with the adjoining five (5) storey mixed development building that is nearing completion. The Burwood Road elevation is well articulated using architectural elements, varied setbacks and materials to ensure that the development contributes positively to the streetscape and when viewed from the public domain

Further, it is considered that the density proposed is sustainable and appropriate given that the site is located within an identified urban renewal corridor in the NSW Government's recently released A Plan for Growing Sydney, and is in close proximity to public transport (both train and buses) and the facilities and services available in the Belmore Town Centre.

In view of the above, the requirement to strictly adhere to the numerical development standard for building height is considered to be unreasonable and unnecessary in this instance as the proposed development achieves and is consistent with the objectives of the standard.

That there are sufficient environmental planning grounds to justify contravening the development standard

Based on the discussion above, it is considered that there are also sufficient environmental planning grounds to justify contravening the development standard for building height for the proposed development as:

- a) The site is within 800m of Belmore Railway Station and has been identified by the Department of Planning and Environment as within the Sydenham to Bankstown Urban Renewal Corridor. This strategy has nominated the site and adjoining lands for redevelopment as mixed uses enterprise corridor with developments of 5 – 6 storeys in height. The proposed development is of a form and scale that is consistent with the future planning strategy for the Sydenham to Bankstown Urban Renewal Corridor and is sustainable given its proximity to public transport (both train and buses) and the facilities and services available in the Belmore Town Centre.



- b) As the site is a large parcel of land (7458sqm) with two street frontages it has the capacity to accommodate increased height without having an adverse impact on the streetscape or amenity of adjoining properties. The height proposed allows for an appropriate and sustainable density to be achieved with a smaller building footprint on the ground which facilitates greater separation between apartment buildings both on site and to the future development to the north that results in all apartments achieving a higher level of amenity.
- c) Specifically, by having the apartments on the 5th floor of the Canterbury Road building and 4th floor of the Burwood Road building in contravention of the height standard as opposed to having a compliant built form along the north-eastern boundary a higher level of amenity to the communal open space and apartments is achieved:
- The internal separation between balconies & habitable rooms on the 4th - 5th floors ranges from 27.6m to 31.5m which exceeds the 18m requirement specified within the Apartment Design Guide. This separation allows for the apartments to achieve a high level of privacy between apartments being maintained and the internal north facing apartments receiving the required amount of sunlight in mid-winter. In addition, the internal apartments have the opportunity to overlook the substantial communal open space centrally provided.
 - The provision of a high quality internal communal open space area that has a minimum width of 31.8m which represents a substantial portion of the site. When this space is landscaped it will represent a green oasis and focal point within the development. It has an area of 1960sqm (26%) of the site, is centrally located and promotes social interaction amongst residents & visitors. The space is easily accessible and its size allows for the provision of a BBQ area, children's play area, seating, lawn areas and landscaping that enables all residents the opportunity to enjoy the space without detracting from the amenity of the apartments
 - A compliant built form along the north-eastern boundary which would "close- in" the communal open space would restrict the communal open space and internal apartments having access to the desirable north-easterly breezes.
 - The setback of 10m to the properties to the north exceeds the separation requirement of 9m specified within the Apartment Design Guide. In any case, Council has approved a 5/6 storey mixed use development on the adjoining land which has a blank wall and nil boundary setback to the proposed development. Therefore, with the introduction of the deep soil planting zone along this boundary an acceptable level of privacy and solar access is maintained to the redevelopment of the properties to the north.
 - The 6m – 10m setback provide along the northern and eastern boundaries at the rear of the site allows for the provision of a substantial deep soil area that is capable of accommodating significant landscaping including, the introduction of trees to enhance the tree canopy which allows the development to make a positive contribution to the streetscape and urban environment. The north-eastern corner of the site has an area of 571sqm which represents 22.5% of the open space area of the site.
- d) Strict compliance with the development standard would not improve the building's relationship to its surroundings. The proposed design solution is considered to represent the best possible development outcome for the site, whilst ensuring the amenity of both existing development and future residents is preserved.

The heights proposed allow for an appropriate and sustainable density to be achieved with a smaller building footprint which:

- Allows for a substantial 10m landscaped setback to be provided to the property to the north, on which Council has approved a 5/6 storey development with a blank wall and nil boundary setback. The setback allows for an improved building relationship to be provided given their separation, a better amenity to the apartments with increased solar access and a landscaped outlook.
- Creates a substantial separation between the buildings on the site well in excess of the requirements of the Apartment Design Guide that facilitates the provision of a large high quality communal open space area centrally located and accessible to all residents & visitors.



- The greater separation between the apartment buildings on site results in the apartments achieving a higher level of amenity to the apartments in terms of privacy, solar access and ventilation.
- The U- shaped built form of the proposed development represents a better outcome than a development that is height compliant but provides an additional built form along the north-eastern boundary which would result in the communal open space area being enclosed. A compliant built form along the north-eastern boundary would reduce the amenity of the apartments and quality of the communal open space as it would reduce access to sunlight, reduce privacy between apartments and interfere with natural ventilation through the development from north-easterly breezes.

Conclusion

Having regard to the discussion above, it is considered that compliance with the landscape area standard as specified in clause 4.3 CLEP 2012 is both unreasonable and unnecessary in this particular case and it has been demonstrated that there are sufficient environmental grounds to justify contravening the standard.

In addition, it is considered that the proposed development will not be contrary to the public interest cl 4.6(a)(ii)) as it is consistent with the objectives of the standard and the objectives of the zone in which the development will be carried out.

A handwritten signature in black ink, appearing to read 'Matthew Devlin', with a long horizontal line extending to the right.

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14 October 2016