

Amended Clause 4.6 Exceptions to Development Standards

Clause 4.3 Height of Buildings - Canterbury Local Environmental Plan 2012

Proposed Demolition of the Existing Structures and Construction of a Ten (10) Storey Residential Flat Building - No. 10B Charles Street, Canterbury

1.0 Introduction

This Clause 4.6 Exceptions to Development Standards request has been prepared by Andrew Robinson Planning Services Pty Ltd on behalf of Charles Development Pty Ltd to accompany a development application for a proposed ten (10) storey residential flat building at No. 10B Charles Street, Canterbury.

The Clause 4.6 Exceptions to Development Standards request relates to the height of buildings principal development standard prescribed under subclause 4.3(2) of *Canterbury Local Environmental Plan 2012*, namely:

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 a maximum building height of 27m applies to the site. However, when measured in accordance with the definition for building height under the LEP, the development has a maximum height of 29.0m. This exceeds the 27m statutory maximum by 2m.

Figure 1: Extract from Canterbury LEP 2012 Height of Buildings Map showing the 27m height limit for the site (T = 27m)



The following definition under *Canterbury Local Environmental Plan 2012* is important in considering the proposed variation:

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 excludes communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

It should be noted that the non-compliance to the height of buildings principal development standard only affects the upper floor level of the building to varying degrees between 760mm and 2m. The remainder of the building is below the 27m maximum building height. Based on the various ground levels across the site, the 27m height limit is breached between a minimum of 760mm (south-eastern corner of Level 9) and maximum of 2m (top of the lift overrun). Details of the height breaches are illustrated on the elevations provided in the architectural drawing package.

As such, the non-compliances do not translate to a wholesale departure by reading as an extra storey or significant additional bulk when viewed from the surrounding area.

2.0 The Effect of Clause 4.6 Exceptions to development standards

Clause 4.6 of *Canterbury Local Environmental Plan 2012* states (in part):

- (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) *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.*
- (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 or regional 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.*

In accordance with subclauses 4.6(3) & (4), this submission seeks to demonstrate:

- That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (in accordance with Clause 4.6(3)(a));
- That there are sufficient environmental planning grounds to justify contravening the development standard (in accordance with Clause 4.6(3)(b)); and
- That the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development in the zone (in accordance with Clause 4.6(4)(a)(ii)).

This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')

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

- (i) That the relevant objectives are those stated in the controls not unidentified underlying objectives at [57] in Four2Five No. 1;
- (ii) That the environmental planning grounds must be particular to the circumstances of the proposed development and/or the site at [60] in Four2Five No. 1; and
- (iii) The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* remain relevant. However, in order to satisfy the unreasonable and unnecessary test in Clause 4.6(3)(a), you need something more than way 1 in *Wehbe*, *because* that test is now encompassed in Clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.

In relation to (iii) above, Method 1 in *Wehbe* requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

However, as a result of Four2Five, it is now necessary to demonstrate something *more* than simply achieving the objective of the standard. In this regard, a proposed development that contravenes the development standard, but as a result, achieves the objective of the development standard to a greater degree than a development that complied with the standard, would suffice.

3.0 Justification for Variation

Strict Compliance is unreasonable or unnecessary in the circumstances of the case.

The objectives of the height of buildings principal development standard are:

- (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 locations.*

Having regard to the first method in *Wehbe*, it is considered that the proposed development achieves the objectives of the standard to a greater degree than a development that complied with the standard for the following reasons:

- The subject site and surrounding area has been ‘up-zoned’ from its former light industrial zoning to high density residential in order to facilitate Council’s vision for the revitalisation of the Canterbury Town Centre, which in part, seeks *to redevelop the riverfront district into an attractive, vital and vibrant mixed-use environment via a rich network of publicly accessible spaces and places.*
- As an urban core, the Canterbury Town Centre has the highest density character along Canterbury Road. The proposed development maximises residential density in easy walking distance to Canterbury Station, in a built form that is consistent with the built form on surrounding sites. In addition, the proposal seeks to provide additional residential accommodation in proximity to public transport, shops and services, which is considered to be a desirable planning outcome.
- The overall maximum building height of 29m exceeds the building height standard by 2m, representing a variation of 7.4% above the numerical development standard. Notwithstanding, the maximum extent of the non-compliance relates only to a small element of the overall building. The other portions of the building that exceed the height control protrude between 760mm and 910mm above the statutory building height limit. Accordingly, despite the height of the building exceeding the statutory height limit, the proposed variation does not add significantly to the overall building height.
- Council has already accepted development that exceeds the building height and/or floor space ratio principal development standards as being appropriate scale and built form in this locality – e.g. 2A Charles Street; 15-15A & 18 Charles Street. In doing so, the development standard has effectively been abandoned or destroyed through the granting of consents for development on other sites that also do not strictly comply with the development standard.
- 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 Canterbury Town Centre.

In light 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.

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

Based on the discussion above, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard. Key environmental planning grounds to support the variation include:

- The proposed maximum height of the building represents a 7.4% (2m) departure from the principal development standard prescribed under *Canterbury Local Environmental Plan 2012* and relates to a minor part of the overall building structure. As such, the non-compliance is considered to be relatively minor;
- Despite the building exceeding the height of buildings principal development standard, the overall bulk and scale of the building is considered to be acceptable in terms of the streetscape character and built form and the relationship of the building to the adjoining development.
- The non-compliance does not translate to a wholesale departure by reading as an extra storey or significant additional bulk. As such, the non-compliance does not substantially add to the overall bulk and scale of the building and does not cast any shadows over adjoining properties; and
- The visual impact when the building is viewed from the surrounding streets will be negligible.

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.

The Table below demonstrates that the proposed development will be in the public interest because it will be consistent with both the height of buildings principal development standard objectives and the R4 High Density Residential zone objectives of the LEP.

LEP Clause	Objective	Proposal
Clause 4.3 Height of Buildings	a) <i>To establish and maintain the desirable attributes and character of an area,</i>	Despite the non-compliance, the scale and form of the building is consistent with the intended redevelopment potential of the land.
	b) <i>To minimise overshadowing and ensure there is a desired level of solar access and public open space,</i>	The proposed building represents a high quality urban form and the protrusion of certain parts of the building up to 2m above the 27m statutory height limit does not compromise the design quality or urban form of the building. Despite the non-compliance, the height and form of the building is consistent with the desired future character of the locality, with the majority of the building being below the statutory building height limit.
	c) <i>To support building design that contributes positively to the streetscape and visual amenity of an area,</i>	As noted above, the breach to the height limit does not cause increased overshadowing or a loss of sky exposure to the adjoining properties or surrounding public domain.
	d) <i>To reinforce important road frontages in specific localities.</i>	The 27m height limit has been nominated as providing an appropriate built for this emerging high density residential zone and despite the non-compliance, the proposed building height is considered to be appropriate in this context.

R4 High Density Residential Zoning Objectives	<i>To provide for the housing needs of the community within a high density residential environment.</i>	The proposed development will provide an additional 91 high quality residential units within the Canterbury Town Centre precinct. The variety of unit types provides for housing choice within Canterbury.
	<i>To provide a variety of housing types within a high density residential environment.</i>	As above, the variety of 1, 2 & 3 bedroom units in proximity to the Canterbury Town Centre (commercial precinct) provides a mix of additional housing choice in proximity to public transport options, as well as local shops and services. The sites proximity to the Canterbury commercial precinct, railway station, bus stops and cycle paths will encourage walking and cycling.
	<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	Noted. Residents will have access to facilities and services to meet their daily needs within close proximity to the site.

4.0 Director General's Concurrence

Clause 4.6(4)(b) requires the concurrence of the Director-General to be obtained prior to granting consent to a development that contravenes a development standard. However, as advised in Planning Circular PS 08-003, the Director-General's concurrence can be assumed in respect of any environmental planning instrument that adopts Clause 4.6 of the Standard Template LEP.

Accordingly, as *Canterbury Local Environmental Plan 2012* adopts Clause 4.6 of the Standard Template LEP concurrence can be assumed in this instance.

Notwithstanding, provided below is a discussion on the matters under subclause 4.6(5) that the Director-General must consider in deciding whether to grant concurrence:

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

The variation to the height of buildings principal development standard under *Canterbury Local Environmental Plan 2012* will not give rise to any environmental planning matter which could be deemed to have either State or Regional significance. The variation to the development standard being sought will not have any effects outside the immediate area of the site.

The public benefit of maintaining the development standard.

No substantive public benefit would be realised by maintaining the development standard. Reducing the height of the building to strictly comply with the 27m height limit would not alter the overall design approach or outcome for the site and would not realise a substantial improvement to the relationship between the site, the adjoining buildings and the surrounding area.

Any other matters required to be taken into consideration by the Director-General before granting concurrence.

The proposed variation will facilitate the orderly and economic redevelopment of the site for the purposes of a residential flat building that will positively contribute to the achievement of the vision and housing strategic objectives of the NSW Government's *A Plan for Growing Sydney* and the intent under *Canterbury Local Environmental Plan 2012*, for this site and the surrounding sites to be redeveloped from the former light industrial uses to a new high density residential precinct adjacent to public transport nodes and shops and services.

5.0 Conclusion

This proposed variation is based on the reasons contained within this written request for an exception to the height of buildings principal development standard under Clause 4.3(2) of *Canterbury Local Environmental Plan 2012*.

Having regard to the discussion provided above, it can be concluded that:

- strict compliance with the height of buildings principal development standard under *Canterbury Local Environmental Plan 2012* is unreasonable or unnecessary in the circumstances of the case, where the non-compliance varies between 760mm and 2m across the building.
- the proposed design solution is considered to represent an appropriate development outcome for the site, whilst ensuring the amenity of both existing and future residents is preserved;
- there are sufficient environmental planning grounds having regard to the Court matter *Four2Five v Ashfield Council* to justify the minor contravention to the development standard as the building has been designed to a high quality and amenity for future residents will be to a high standard;
- the non-compliance does not directly result in any adverse environmental impacts in terms of the building being out of context with the prevailing bulk and scale of development in the locality;
- the proposal will provide a high quality residential flat development that is in keeping with the desired future character of the area and will provide a variety of housing choice in a high density residential environment, in proximity to public transport, facilities and services;; and
- the scale and nature of the non-compliance does not give rise to any matter of State or Regional significance, nor does it adversely affect the public interest.

Having regard to the circumstances of this case where:

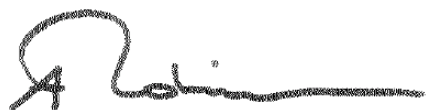
- the overall style, scale and built form of the building will be commensurate with the anticipated future 'built environment' and desired character of the area;
- the non-compliant height will have negligible impact on the streetscape appearance and character of the locality;
- the proposal is generally consistent with the aims and objectives of *Canterbury Local Environmental Plan 2012*;
- 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 Canterbury Town Centre.
- Council has already accepted development that exceeds the building height and/or floor space ratio principal development standards as being appropriate scale and built form in this locality – e.g. 2A Charles Street; 15-15A & 18 Charles Street. In doing so, the development standard has effectively been abandoned or destroyed through the granting of consents for development on other sites that also do not strictly comply with the development standard; and
- the proposal is generally consistent with the objects of the *Environmental Planning &*

Assessment Act 1979, in particular, the orderly and economic use and development of land and ecologically sustainable development,

it is submitted that this Clause 4.6 Exceptions to Development Standards request is well founded. As such, strict compliance with the height of buildings principal development standard prescribed in Clause 4.3 of *Canterbury Local Environmental Plan 2012* is unreasonable and unnecessary having regard to the circumstances of the case. Accordingly, having regard to the assessment contained in this Clause 4.6 Exceptions to Development Standards submission, it is requested that Council and the Joint Regional Planning Panel (JRPP) support the proposed variation and the development in its proposed form.

Dated: 26 October 2015

Andrew Robinson Planning Services Pty Ltd

A handwritten signature in black ink, appearing to read 'A. Robinson', with a long horizontal flourish extending to the right.

Andrew Robinson MPIA CPP
Director