

Assessment of request under Clause 4.6 to vary the Height of Building Development Standard

A written request was submitted with the development application in accordance with the provisions of Clause 4.6 - Exceptions to Development Standards of the North Sydney Local Environmental Plan 2013 (NSLEP 2013). The request seeks a variation to the Height of Building standard, adopted under clause 4.3 of NSLEP 2013.

The Height of Building Map sets a height of building standard of RL 140 for the site.

The height of the proposal is RL 146.7 to the top of the plant screen parapet and RL 144.1 to the top of the uppermost level of residential accommodation on Level 21. Level 21 comprises communal open space and six apartments and the uppermost level comprises roof plant equipment and lift overrun and motor room. Accordingly, only part of one storey of residential floorspace is proposed above the height standard.

The proposed scale and visual impact of the proposal is acceptable in the locality and provides an appropriate contextual fit between the buildings fronting Miller Street. The shadow cast by the proposed building envelope is generally consistent with the previous approval.

The height variation is attributed to the redistribution of floorspace from the lower levels to the uppermost level where there is an additional 3m side setback along the northern boundary to permit a pedestrian through-site link from Miller Street which is required under the DCP.

Clause 4.6 of the NLEP 2013 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development.

NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

WINTEN V NORTH SYDNEY COUNCIL The decision of Justice Lloyd in Winten v North Sydney Council established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded

WEHBE V PITTWATER [2007] NSW LEC 827 The decision of Justice Preston in Wehbe V Pittwater [2007] NSW LEC 827 expanded on the findings in Winten v North Sydney Council and established the five part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that departs from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the "zoning of particular /and" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

FOUR2FIVE PTY LTD V ASHFIELD COUNCIL [2015] NSW LEC More recently in the matter of Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of Wehbe V Pittwater [2007] NSW LEC 827 and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of clause 4.6 the LEP; and
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD

The planning control in question is clause 4.3 of the NSLEP 2013. Clause 4.3 nominates a maximum Height of Buildings of RL 140 for the site. The planning control specifies requirements or fixes standards in respect of the development and falls within the definition of a "development standard" such that it is capable of being varied under clause 4.6 of NSLEP 2013.

CONSISTENCY WITH OBJECTIVES OF THE ZONE

The proposed variation to the Height of Building development standard will be in the public interest because it does not prevent the satisfaction of the B4 Mixed Use zone objectives.

WHAT IS THE UNDERLYING OBJECTIVE OF THE STANDARD

The proposed development will be in the public interest because it is considered to be consistent with the relevant objectives of the height control

The objectives of this clause are as follows:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,
- (b) to promote the retention and, if appropriate, sharing of existing views,
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,
- (e) to ensure compatibility between development, particularly at zone boundaries,
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.

IS COMPLIANCE WITH THE DEVELOPMENT STANDARD CONSISTENT WITH THE AIMS OF THE POLICY AND IN PARTICULAR DOES COMPLIANCE WITH THE DEVELOPMENT STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTIVES SPECIFIED IN SECTION 5(A)(i) AND (ii) OF THE EP&A ACT

The aims and objectives of clause 4.6 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.

The objects set down in section 5(a)(i) and (ii) are as follows:

"(a) to encourage

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.

(ii) the promotion and co-ordination of the orderly and economic use and development of land..."

The development is generally consistent with the objectives of the EP&A Act, due to:

- The site is located within an established urban and high density environment.
- The redevelopment of the site for retail, serviced apartment and residential uses contributes to urban consolidation and may contribute to reducing demand to develop more environmentally sensitive lands.
- The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.
- The through site link and dedication of the access way to Council promotes and enables Council to coordinate the orderly use of the land by enabling future pedestrian and vehicular connections and preventing site isolation.

IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard.

- The height of building standard, was developed by the North Sydney CBD Composite Shadow Line (Composite Shadow Line) that existed under the North Sydney Local Environmental Plan 2001 (NSLEP 2001). The proposal complies with the Composite Shadow Line which suggests the breach of the standard is not unreasonable or unnecessary.
- The proposed variation is similar to the scope of the variation approved at 231 Miller Street, exceeding the height standard of RL 130 by up to 6.22m.
- The development proposes a maximum height of RL 144.1 to the roof of Level 21 (being the upmost level of residential accommodation/common open space) , RL 146.7 to the top of the plant room, exceeding the height standard by 4.1m and 6.7m, but not for the whole level
- The proposal incorporates a through site link and rear set back, which allows for clear sightlines from Miller Street to the rear and vice versa. floorspace lost as a result of the dual height through site link has been partially redistributed to the upper levels.
- Level 21, which exceeds the height standard comprises part communal open space, which will be available for all residents of the building.
- There are no significant solar access impacts on residential properties when compared to the previous approval or a height compliant development.
- The proposal complies with Clause 6.3 of the NLEP 2013 in that there will be no net increase of the Miller Street (special area) between 12 noon and 2pm.
- The visual impacts associated with the additional height are negligible.
- Clause 6.3(3) states that Development consent for development on land to which this Division applies may be granted for development that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm is not likely to reduce the amenity of any dwelling located on land to which this Division does not apply. This is the case.

IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL

No. The development standard is not a performance based control.

ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The environmental planning grounds are sufficient to justify the contravening development. These include:

- The proposed height is visually acceptable when viewed from the surrounding locality
- The height of the new tower is in context with neighbouring sites as it will be less than the height of a future tower on the neighbouring site to the south, which is provided with a building height standard of RL of 150.
- The proposal is consistent with the requirement to step down towards the residential area to the north.
- The through site link will provide a safe public benefit
- The communal open space on the upper level will be higher than the northern neighbour allowing for full solar access and views that will benefit residents on lower levels with lesser amenity.

- The overshadowing associated with the height above the RL 140 standard has a negligible impact on surrounding properties and maintains a compliant level of solar access to residential properties.

IS THE OBJECTION WELL FOUNDED

The proposed development does not result in any unreasonable or significant adverse environmental impacts. The variation does not affect the redevelopment potential or amenity of any adjoining land. The objection is well founded.

IS THERE A PUBLIC BENEFIT OF MAINTAINING THE PLANNING CONTROL STANDARD?

Under Clause 4.6 (5)(b) there must be consideration of the public benefit associated with maintaining the development standard.

If the standard was maintained, then the public benefit of the through site link and dedication of the lane to Council for the future public benefits may not occur.

The variation attributed to Levels 21 and the screened roof plant equipment is due in part to the provision of 3m side setbacks to the podium levels. This setback has several urban design benefits, including enhanced amenity to the through site link and improvements to building separation at the lower podium levels.

Clause 6.3(3) of the LEP states:

Development consent for development on land to which this Division applies may be granted for development that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm is not likely to reduce the amenity of any dwelling located on land to which this Division does not apply.

This clause allows for flexibility in height within the CBD.

The proposed height above the RL 140 height standard will not adversely impact the amenity of surrounding properties and results in a similar level of overshadowing to what has been previously approved on the site.

Geoff Mossemeneer
Executive Planner
North Sydney Council

Assessment of request under Clause 4.6 to vary the Height of Building Development Standard (Clause 6.4(2) of NSLEP 2013)

A request was submitted with the development application seeks an exemption to the Miller Street setback standard with regard to an awning applying to the site under the North Sydney Local Environmental Plan 2013 (NSLEP 2013).

Development consent may, subject to Clause 4.6 of the NLEP 2013 be granted for development even though the development would vary a development standard imposed under NSLEP 2013.

Clause 6.4 (2) of NSLEP 2013 states:

"(2) Development consent must not be granted for the erection of a building on land identified as "Miller Street Setback" on the North Sydney Centre Map unless;

(a) the building height will be less than 1.5 metres, and

(b) the part of the building that will be on that land is used only for access to the building or landscaping purposes "

The North Sydney Centre Map requires a setback of 5m, as measured from the Miller Street site boundary. The building has been setback a minimum of 5m from Miller Street and complies with the standard. An exception is sought to accommodate the glazed awning. With a building height of 3.1m to 3.5m, this is setback between 3.2m and 4m from Miller Street. It therefore encroaches into the 5m setback area with a height greater than 1.5m.

OBJECTIVES OF THE ZONE AND THE STANDARD

Clause 4.6 (4)(a)(ii) requires that a request for exemption from a development standard must establish that the proposed contravention is consistent with both the objectives of the standard and the zone.

Objectives of the B4 Mixed Use Zone

The proposed variation to the Miller Street setback development standard does not prevent the satisfaction of the B4 Mixed Use zone objectives.

Objectives of the Height of Building Development Standard

While the proposal seeks a minor variation to the numerical Miller Street setback standard, it is consistent with the objective of the control (Clause 6.4(1) of the NSLEP 2013) as outlined below:

a) The objective of this clause is to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren Street and Mount Street.

The proposal will not compromise the objective from being satisfied given the building has been setback a minimum of 5m from Miller Street in accordance with the standard. The setback area comprises landscape features, including high quality paving, seating, trees and ground cover plantings.

The awning is sufficiently setback from the existing streets trees and has been designed so that it will not compromise the canopy of the proposed trees or the open landscaped quality that is intended along the Miller Street frontage.

THE DEVELOPMENT STANDARD IS UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Clause 4.6(3)(a) of the NSLEP 2013 requires that a proposed variation to the development standard must demonstrate that compliance with the development standard is 'unreasonable and unnecessary in the circumstances of the case'.

The proposed development is consistent with the objective of the Miller Street setback standard. The awning will not obstruct pedestrian movements or reduce the provision of landscaping.

The strict application of the Miller Street setback standard would compromise the façade design and reduce weather protection.

SUFFICIENT ENVIRONMENTAL PLANNING JUSTIFICATION

Clause 4.6(3)(b) of the NSLEP 2013 requires that a proposed variation to a development standard must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed awning comprises glass, permitting solar access and natural light to penetrate the ground floor. The awning provides for modulation to the façade and comprises high quality materials as well as weather protection.

THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Under Clause 4.6(5)(b) the consent authority must consider if there is public benefit associated with maintaining the development standard.

The proposal provides for an active ground floor and through site link and weather protected outdoor seating to help activate the Miller Street frontage, there would be no public benefit in applying the control strictly. The provision of an awning is considered to be in the public interest.

ANY OTHER MATTERS

Under clause 4.6 (5)(c) there are no other matters to consider

The provision of an awning will improve the environmental amenity of the public domain, encourage pedestrians and patrons to utilise this space and result in an appropriate urban design outcome.

The proposal will not compromise the provision of landscaping or access within the setback area and therefore satisfies the objective of the standard.

The proposal meets the intent of the standard and in accordance with Clause 4.6, demonstrates that strict compliance with the Miller Street setback standard is unreasonable and unnecessary in this case. The request is considered to be well founded.

Geoff Mossemeneer
Executive Planner
North Sydney Council