

Clause 4.6 Variation: Building Height

DA-62/2015: MIXED USE DEVELOPMENT, 90 CARTWRIGHT AVENUE MILLER



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Consent Authority: Liverpool Council



90 Cartwright Ave, Miller

QUALITY ASSURANCE

PROJECT: Clause 4.6 Variation – Mixed Use Development
ARCHITECT: Architex
ADDRESS: 90 Cartwright Avenue, Miller
COUNCIL: Hornsby Council
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Date	Purpose of Issue	Rev	Reviewed	Authorised
1 March 2016	DA Lodgement Issue	Final	JW	AB

Clause 4.6 Exception to Development Standards

The Clause 4.6 variation request has been prepared to further address the recent judgement in *Four 2 Five v Ashfield* which has further refined the position in the consideration of Clause 4.6 variation requests. In particular the decision in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* indicates that merely showing that the development achieves the objectives of the development standard will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6.

The case further outlines that to justify that there are sufficient environmental planning grounds for the variation, may well require identification of grounds particular to the circumstances of the proposed development – as opposed merely to grounds that would apply to any similar development in the locality.

There are key particular circumstances associated with this site when having regard to the sites context and having regard to the Miller Town Centre Masterplan prepared by AECOM that sets out the desired future character of the Miller Town Centre. The study has regard to the current development proposal and nominated an 8-10 storey building height, with *'additional height on the corner of Woodward Crescent and Cartwright Avenue to create a gateway feature for the Town Centre'*.

An extract is provided below:

5.6 The Master Plan

An indicative master plan for the Miller Town Centre is shown below and a series of 3D artists perspectives provide a clearer picture of height and overshadowing.



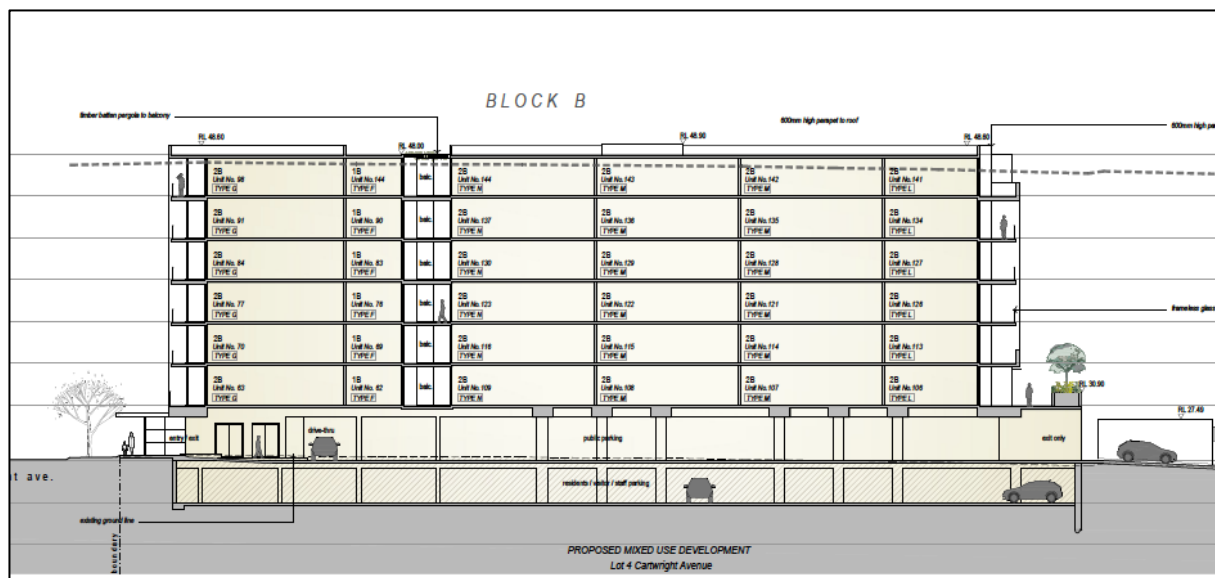
The proposal has a maximum height of 9 storeys on the corner that aligns with the height range envisaged- noting that there may be scope in the future to reconsider the corner height with a potential increase should the planning controls be revised.

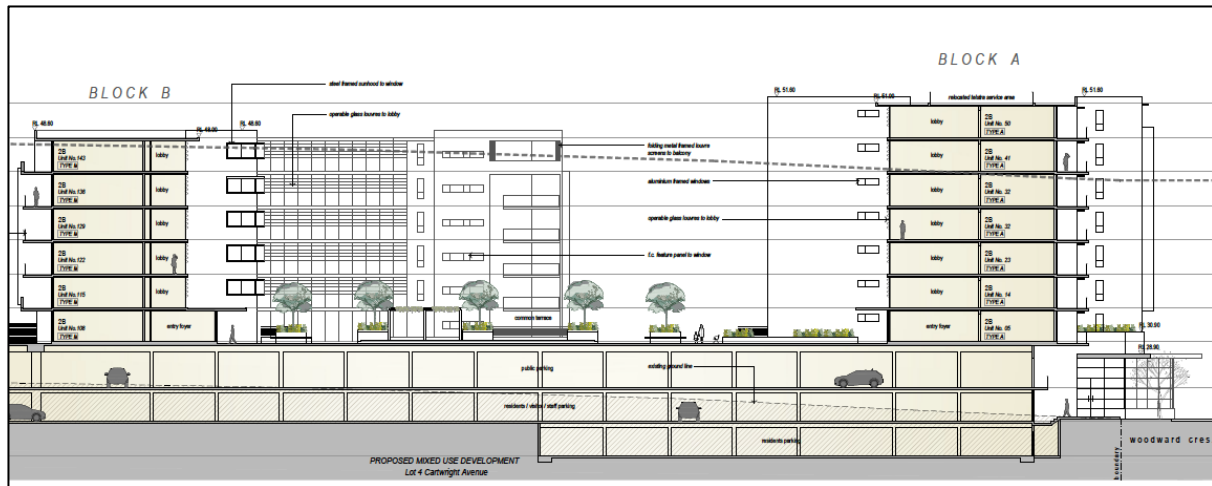
The DA embodies the Urban Design thinking of AECOM in that it provides for a pop up on the corner to mark the entry to the Local Centre.

Given the context of the Urban Design report and future planning direction for the Miller Town Centre the additional height as part of this development proposal is clearly desirable and confirms that there are sufficient environmental planning grounds unique to the site that satisfy the relevant test in *Four 2 Five v Ashfield*. A detailed discussion against the relevant provisions of Clause 4.6 are provided below.

As addressed previously within this statement and as evident in the section extract below and the architectural plans submitted with the application, the proposed development will comprise a 7-9 storey mixed use building with 2 x ground floor retail units, at-grade and basement parking and 2 x shop top housing blocks over a podium level communal open space with a roof height that exceeds the maximum permitted 21m building height allowance under the provisions of the LLEP 2008. As noted above the heights desired in the Masterplan document suggest 8-10 storeys with additional height on the corner of Cartwright and Woodward Crescent and the development proposal aligns with this.

The below section extracts show the extent of the departure to the height control.





The extent of non-compliance equates to 8.1m or 38.5% of the control for Block A and 2.6m or 12.3% for Block B (at the worst affected points). The proposed non-compliance occurs as a result of the proposal being designed to deliver a development that will accentuate the prominent corner and strategic gateway location of the subject site within the heart of the Miller Town Centre. This is clearly reflected in the AECOM Miller Town Centre Master Plan.

As such, the proposal will deliver a scale of development that will take advantage of the permitted 1.7:1 FSR and that will help to revitalise the existing town centre core. It is noted that strict compliance could be achieving by 'squashing' the unit numbers into the lower levels these will reduce amenity, and not present an appropriate urban design outcome on the site commensurate with the gateway role that the site plays. The emphasis of height on the corner is a long standing Urban Design principle and the variations are focused at the corner- with the variation to Block B being a function of topography and providing for increased floor to ceiling heights to the commercial space and parking areas.

The proposed design concept and building heights are regarded as being appropriate for the subject area noting the strategic location of the site within the Miller Town Centre and that the area is tasked with supporting both the function and growth of the town centre as per the LDCP.

As such, the proposed mixed use development will clearly establish and identify the importance of the B2 zoned Local Centre lands and the strategic location of the subject site at the eastern focal of the Miller Town Centre with local bus stops within close proximity. Furthermore, the proposed development will comply with the permitted FSR control with a total FSR of 0.98:1, which ensures that the scale of the development is appropriate considering the size of the overall landholding.

Clause 4.6 of the Liverpool Local Environmental Plan 2008 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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.**

Each of these provisions are addressed individually below.

Clause 4.6(3)

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the Height development standard are stated as:

- (1) The objectives of this clause are as follows:
 - (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
 - (b) to permit building heights that encourage high quality urban form,*
 - (c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
 - (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.**

The current development proposal is designed to be consistent with the comments received from Council's Design Review Panel during the Pre-Lodgement Process, however the proposal remains consistent with the objectives based on the following:

- Councils Design Review Panel have asked that the proponent explore increasing the scale and floor area of Block A so that it appropriately accentuates the prominent corner and gateway location of the site at the eastern corner of the 'heart' of Miller's Town Centre. This is the approach taken by the development concept to align with these comments and the proposal aligns with the AECOM Master Plan;
- The overall site is permitted a 1.7:1 FSR and currently the site is underutilising the permitted FSR and does not deliver on its strategic location at the heart of Miller. Therefore, therefore the increased height permits additional units to be delivered on site that will aim to deliver a critical mass/population density in the area that is commensurate with the site's strategic location and that will serve to revitalise the area. Across the entire site the development remains well below the maximum FSR and redevelopment of the existing shopping centre is unlikely to occur in the near future and as such it is appropriate to transfer the anticipated density to the corner through the increased height;
- The higher population density aligns with the principles of urban consolidation noting the proximity of bus stops and the level of services to the Miller shopping centre and even the centre itself. The increased population in the area will help to sustain local businesses and the enhanced viability may even see the upgrading/improvement of the existing retail/commercial services and the opening of new services.
- It is also acknowledged that amenity impacts do not typically apply to commercial developments and the mid-winter use of the hotel's outdoor areas is likely to be limited with shadow impacts to surrounding development being limited and ensuring that they retain 3 hours of solar access at mid-winter;
- Upper floor levels are designed as penthouse verandas that will moderate the scale of the proposal by providing a recessive appearance giving a defined base middle and top to the building as reflected in the photomontage;
- The proposed buildings will present an appropriate bulk and scale on the site with a podium element design and slender tower above that will deliver a complying overall FSR of less than 1:1. The additional height does not generate any additional amenity impacts given the location of the site and the surrounding site context;
- The proposed additional floor levels will ensure that the area is provided with a high density of residential development to support the growth of Miller and to align with the principles of urban consolidation that seek to ensure the efficient use of community infrastructure by providing higher density residential development at strategic locations,

- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors - noting that as the site is an 'island' there are limited privacy impacts to other development as they are separated by roads,

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in these unique circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition the proposal is consistent with the objectives of the B2 zone, being:

- *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 allow for residential and other accommodation while maintaining active retail, business or other non-residential uses at street level.*
- *To facilitate a high standard of urban design and a unique character that contributes to achieving a sense of place for the local community.*

The proposal will provide a high quality mixed use development in a strategic location within the 'heart' of the Miller Town Centre, along the 'main street' and within close proximity to local bus stops/interchange to maximise public transport patronage and to encourage walking and cycling. The scale of the development will help to revitalise the area with the proposed ground level, street facing retail units and street tree plantings enabling the activation of Cartwright Avenue. As a result, the development will contribute towards creating a vibrant and sustainable neighbourhood that will support both the function and growth of the Miller Town Centre to appropriately service the needs of the surrounding and established residential areas.

The proposal is designed to set the tone and scale for comparable future developments within the locality whilst adhering to high quality design principles. Furthermore, the proposal will complement and enhance the local streetscape by virtue of the strong articulated podium building line and upper level residential blocks and will provide clear legibility for both pedestrians and motorists on approach from Cartwright Avenue and Woodward Crescent.

It is understood that the concurrence of the Director-General can be assumed in the current circumstances.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining property to the north west and south east.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Land and Environment Court Case Law

The Land and Environment Court, through case law, provides guidelines for the consideration of clause 4.6 departures.

Two cases that it is appropriate to discuss are:

- Wehbe v Pittwater Council (2007) NSWLEC 872; and
- Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 2009.

Wehbe v Pittwater Council

Wehbe v Pittwater related to a SEPP 1 objection and outlines that there are five (5) methods to establish that the application of a development standard is unreasonable or unnecessary in the circumstances of the case.

1. The development achieves the objectives of the development standard;
2. The underlying objective or purpose of the development standard is not relevant to the development with the consequence that compliance is unnecessary;
3. the underlying objective or purpose of the development standard would be defeated or thwarted if compliance was required with the consequence that 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; and
5. The zoning of particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.

The case law indicates that if **any** of these methods are satisfied then the departure to the standard can be supported.

In respect of this site, it is considered that the proposal satisfies method 1 for the reason outlined above.

Four2Five Pty Ltd v Ashfield Council

Four2Five Pty Ltd v Ashfield Council relates to a consideration of a clause 4.6 departure to a building height development standard.

The court indicated that merely showing that the development achieves the objectives of the development standard will be **insufficient** to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6, (and 4.6(3)(a) in particular). The previous discussion clearly confirms that the objectives of the development standard are achieved.

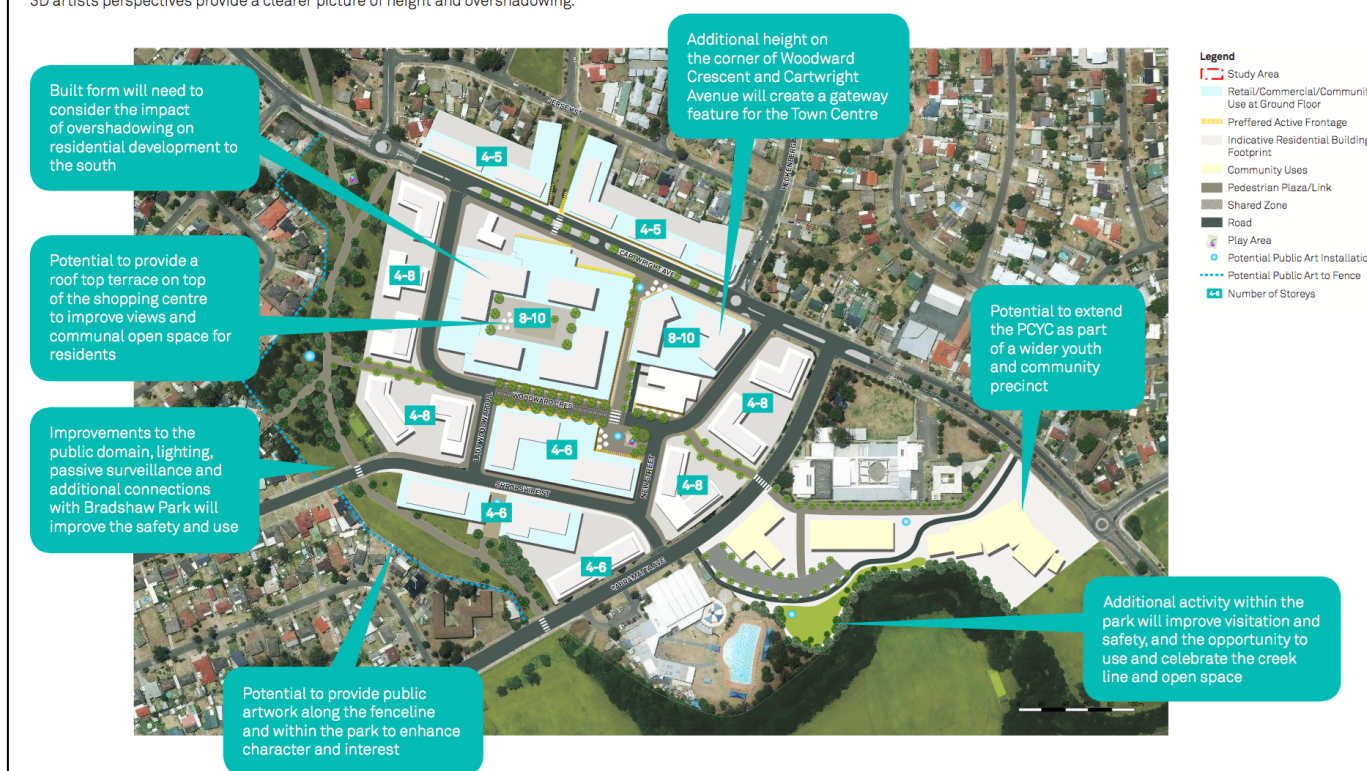
Further, the requirement in cl4.6(3)(b) to justify that there are sufficient environmental planning grounds for the variation, may well require identification of grounds particular to the circumstances of the proposed development – as opposed merely to grounds that would apply to any similar development on the site or in the vicinity.

There are key particular circumstances associated with this site when having regard to the sites context and having regard to the Miller Town Centre Masterplan prepared by AECOM that sets out the desired future character of the Miller Town Centre. The study has regard to the current development proposal and nominated an 8-10 storey building height, with *‘additional height on the corner of Woodward Crescent and Cartwright Avenue to create a gateway feature for the Town Centre’*.

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The proposal has a maximum height of 9 storeys on the corner that aligns with the height range envisaged- noting that there may be scope in the future to reconsider the corner height with a potential increase should the planning controls be revised to discernibly increase the height control. The DA embodies the Urban Design thinking of AECOM in that it provides for a pop up on the corner to mark the entry to the Local Centre.

Given the context of the Urban Design report and future planning direction for the Miller Town Centre the additional height as part of this development proposal is clearly desirable and confirms that there are sufficient environmental planning grounds unique to the site that satisfy the relevant test in *Four 2 Five v Ashfield*.

Therefore, the current proposal is a preferable outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design response on the site. Therefore the departure to the height control satisfies the test set down under *Four 2 Five v Ashfield*.