



48 – 56 Derby Street, Kingswood

Clause 4.6 Request-Building Height

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48 – 56 DERBY STREET, KINGSWOOD

Demolition of Existing Dwellings and Erection of
a 5 to 8 Storey Mixed Use Development
Comprising 3 Retail Tenancies, 2 Office
Tenancies and 191 Residential Apartments

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Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST HEIGHT OF BUILDINGS

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 4.3 and 7.11 of the Penrith Local Environmental Plan 2010 (PLEP 2010). The request relates to an application for demolition of existing structures at the site and the construction of a mixed use development comprising two levels of basement car parking for 284 vehicles and a 5 to 8 storey building above containing 3 retail tenancies, 2 office tenancies and 191 apartments at 48-56 Derby Street, Kingswood.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the PLEP 2010 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the PLEP 2010, or any other environmental planning instrument.

However, clause 4.6(3) 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.3 Development Standard to be varied

Clause 4.3 of the PLEP 2010 provides that the maximum height for a building on the site is not to exceed the height as shown for the land on the Height of Buildings Map. The site is within area 'P' on the Height of Building Map and accordingly a height of 18m applies.

However, Clause 7.11 of the PLEP 2010 applies to land identified within the Penrith Health and Education Precinct on Council's map and provides that development consent may be granted to development on land that exceeds the maximum height shown for that land on the Height of Buildings map by up to 20% if the floor to ceiling height of both the ground and first floors are equal to or greater than 3.5 metres.

The development proposes a floor to ceiling height of 3.5 metres for both ground and first floor of the building and as such is entitled to a 20% increase to the maximum allowable height shown on the height of buildings map of 18 metres resulting in a height control of 21.6 metres for the development

1.4 Extent of Variation to the Development Standard

The proposed development has a maximum height of 25.27 metres at the northern end (Derby Street) of the site resulting in a variation of 3.67 metres or a departure of 16.9% to the height control of 21.6 metres.

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has recently required additional ways of establishing that compliance is unreasonable or unnecessary beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1.5.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The specific objectives of the height of buildings development standard, as specified in clause 4.3 of the PLEP 2010 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

The proposed distribution of height across the site, with the front of the development being 3.67 metres (16.9%) over the height control and the rear of the development being 6.85 metres (31.7%) under the height control, achieves an improved visual transition from the lower 12 metre height control which applies to the southern adjacent sites to the higher scale evident within Derby Street. Whilst a compliant scheme (i.e. increased height at the rear) would achieve an acceptable transition to the future desired character on the southern adjacent site, the proposed arrangement of height across the site with a reduced height at the rear in exchange for increased height at the front achieves a more sensitive response to the existing character to the rear of the site which optimises compatibility with the varied context surrounding the site. This more sensitive approach also provides greater flexibility in the design for future development options on sites to the south by shortening shadows associated with the proposal.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The proposed distribution of height across the site, with the front of the site being 3.67 metres over the height control and the rear of the site 6.85 metres under the height control, has been specifically driven by a desire to minimise the visual impact, loss of solar access and loss of privacy to the southern adjacent sites. This is only possible through a redistribution of scale across the site from 5 storeys to 8 storeys, rather than a homogenous yet complying 21.6 metre development across the site.

c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

There are no heritage items or heritage conservation areas within the visual catchment of the site.

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity,

The proposed approach towards height for the subject site involves a large proportion of the development being significantly under the height control. The areas of the development that are under the height control are offset by a portion of the development adjacent to Derby Street which is marginally above the height control. The proposed alternative approach to height provides a more specific and considered response to the distribution of scale across the site, in preference to a homogenous 21.6 metre height which could be proposed across the entire site, which allows for a more integrated solution having regard to the existing character surrounding the site. This modulation in scale when combined with the proposed variation in architectural language will provide a fine grain, high quality urban form that will reduce the proposal's apparent mass when viewed from the south.

1.5.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

The underlying objectives and purpose of the height controls are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed heights are compatible with both the existing and emerging scale of development within the visual catchment of the site and will sit comfortably with the context of the site with no unreasonable impacts to adjacent properties.

1.5.3 The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the proposed development, it successfully achieves these objectives and will achieve a significantly improved interface with the southern adjacent site compared to a compliant height at the rear. However, strict compliance with the height control would likely lead to a less satisfactory outcome as it would require a redistribution of mass to the rear of the site which would result in an increased bulk for the development and increased shadow impacts to the southern adjacent site, noting that a compliant solar access could still be achieved for a mixed use development on the southern adjacent site consistent with the future desired character. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject and southern adjacent sites.

1.5.4 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;

The height control is relatively new and as such there is a limited history of variation to the control. Whilst the height control has not been abandoned or destroyed, Council have directed the final design of the proposal and understands that in certain circumstances where the merit for the variation can be demonstrated that strict compliance is unnecessary. This approach is a hall mark of the Penrith Council which does not merely undertake a tickbox approach to development assessment, but rather concerns itself with a comprehensive assessment process to achieve high quality urban design outcomes.

1.5.5 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.

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposed development results in a considerably lower density with an FSR of 2.75:1 when compared to the permissible density of 3.5:1 for the site.
- The proposed variation to the height control at the front of the site adjacent to Derby Street allows for a significant reduction in height at the rear of the site. In fact, the proposed height variation at the front of the site is only 3.67 metres or 16.9%, whilst the building is actually 6.85 metres or 31.7% under the height control at the rear of the site.
- The distribution of scale across the site decreases from north to south to provide a transition to the lower 12 metre height control which applies to the sites immediately to the south. The introduction of significant modulation in scale of the building in response to its interface to the north and the south achieves optimal environmental performance, and when combined with the variation in architectural language for building, will provide a fine grain for the development which will reduce the apparent mass of the development.
- A contextual analysis prepared by Robertson + Marks Architects accompanies the subject application and illustrates the relationship of the proposed building within the context of Derby Street which illustrates that the scale of the development is compatible with the emerging scale of development in Derby Street and will properly integrate with the desired future character for the precinct.
- The offset of height from the southern end of the site to the northern end of the site results in a reduced shadow impact to the southern adjacent sites as illustrated in the architectural 'comparison' package submitted with the DA.
- The non-compliance with the height control ultimately improves the overall residential amenity within the site and the southern adjacent sites and will achieve a better outcome than a complying development.

1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The recently amended planning controls for the “Penrith Health and Education Precinct” under the PLEP 2010 provide an in built transition in scale from south to north with a 12 metre height control on the southern site (capable of being increased to 14.4 metres under Clause 7.11 of the PLEP 2010) and an 18 metre height control on the subject site (capable of being increased to 21.6 metres under Clause 7.11 of the PLEP 2010). This transition in scale is appropriate and will achieve a high quality built form and appropriate relationship between developments once the future desired character for the area is realised.

However, in the intervening period until this future desired character is realised, there will inevitably be a disparity in scale between the existing, or former, character of the area and the new compliant development which represents the future desired character of the area.

Whilst it is recognised that a compliant height scheme on the subject site is possible, Council staff have in this instance suggested an alternative approach towards height for the site in an effort to achieve a more sensitive outcome having regard to the existing character of the 2 storey townhouse development to the south of the site. The principle behind the alternative approach to height suggested by Council is to reduce the visual impact of the development when viewed from the existing southern adjacent sites by providing a transition in scale from a permissible 7 storeys on the subject site to the existing 2 storey townhouses on the southern site. The suggested reduction in height at the rear was also intended to reduce overshadowing to the southern adjacent sites when compared to a compliant scheme.

The proposal has been amended to provide a rear form which is actually 6.85 metres or 31.7% under the height control at the rear of the site, with the mass which has been removed from the rear of the site relocated to the front of the site. It is noted that the development is below the 21.6 metre height control at the rear by twice the distance that the development is above the 21.6 metre height control at the front of the site.

The architectural package which accompanies this correspondence includes a shadow analysis which illustrates that the reduction in height at the rear is not necessary to achieve 70% solar access to a future residential apartment development on the southern adjacent site because a compliant height on the subject site would still allow for 79% solar access on the rear site. However, in relation to the *existing* southern adjacent development the proposed reduction in height to the rear in exchange for the variation to the height control at the front of the site does in fact result in a significant and meaningful reduction in relation to overshadowing of the existing southern adjacent sites.

The increased scale to the front of the development is also demonstrated in the contextual analysis prepared by Robertson + Marks Architects to achieve an appropriate response to the emerging scale evident within Derby Street and will properly integrate with the desired future character for the precinct.

Strict compliance with the development standard could be achieved by relocating height from the front of the development to the rear, however, this approach is less desirable because it compromises the capacity to achieve a more sensitive response to the existing character of the southern adjacent sites in the intervening period until these sites are redeveloped in accordance with the uplifted scale and density recently provided by Council.

Strict compliance with the development standard would therefore result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding

properties or the general public and there are sufficient environmental planning grounds in this particular circumstance to warrant the proposed variation to the 21.6 metre height control in this instance.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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 development within the zone in which the development is proposed to be carried out.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii)

Objective of the Development Standard

The specific objectives of the height of buildings development standard, as specified in clause 4.3 of the PLEP 2010 are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

The proposed distribution of height across the site, with the front of the development being 3.67 metres (16.9%) over the height control and the rear of the development being 6.85 metres (31.7%) under the height control, achieves an improved visual transition from the lower 12 metre height control which applies to the southern adjacent sites to the higher scale evident within Derby Street. Whilst a compliant scheme (i.e. increased height at the rear) would achieve an acceptable transition to the future desired character on the southern adjacent site, the proposed arrangement of height across the site with a reduced height at the rear in exchange for increased height at the front achieves a more sensitive response to the existing character to the rear of the site which optimises compatibility with the

varied context surrounding the site. This more sensitive approach also provides greater flexibility in the design for future development options on sites to the south by shortening shadows associated with the proposal.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The proposed distribution of height across the site, with the front of the site being 3.67 metres over the height control and the rear of the site 6.85 metres under the height control, has been specifically driven by a desire to minimise the visual impact, loss of solar access and loss of privacy to the southern adjacent sites. This is only possible through a redistribution of scale across the site from 5 storeys to 8 storeys, rather than a homogenous yet complying 21.6 metre development across the site.

c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

There are no heritage items or heritage conservation areas within the visual catchment of the site.

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity,

The proposed approach towards height for the subject site involves a large proportion of the development being significantly under the height control. The areas of the development that are under the height control are offset by a portion of the development adjacent to Derby Street which is marginally above the height control. The proposed alternative approach to height provides a more specific and considered response to the distribution of scale across the site, in preference to a homogenous 21.6 metre height which could be proposed across the entire site, which allows for a more integrated solution having regard to the existing character surrounding the site. This modulation in scale when combined with the proposed variation in architectural language will provide a fine grain, high quality urban form that will reduce the proposal's apparent mass when viewed from the south.

Objective of the Zone

The site is located within the B4 Mixed Use zone and the objectives of the zone are:

- 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 minimise conflict between land uses within the zone and land uses within adjoining zones;
- To create opportunities to improve public amenity; and,
- To provide a wide range of retail, business, office, residential, community and other suitable land uses.

The proposed mixed use development is considered to be compatible with the emerging character of Derby Street. The proposed commercial and retail components of the development have been designed to provide an active street edge to Derby Street as well as being capable of accommodating health related commercial activities. The proposal has also been designed with half of the ground floor

for non-residential purposes, and the remainder of the ground and first floor have higher floor to ceiling heights and the necessary adaptability to be capable of being used for health related commercial activities in the future.

The residential component of the development is properly separated from the commercial component and serves to provide much needed housing in a location which is within walking distance to local employment opportunities and public transport options. Further, the development will result in greater patronage to local businesses and increased passive surveillance and pedestrian activity around the local health precinct and residential areas and pedestrian pathways to Kingswood Station. For the reasons given the proposal is considered to be consistent with the objectives of the B4 zone

1.9 Objectives of Clause 4.6

The specific 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.

The contextual analysis prepared by Robertson + Marks Architects which accompanies the subject application illustrates the relationship of the proposed building within the Precinct and also the integration of the proposed development with the desired future character for the adjacent sites. It demonstrates a high quality outcome for the site which will result in the delivery of a building which has been specifically designed to respond not only to the future desired character of the precinct, but also to the existing character to the south of the site in the intervening period until the vision for the area is realised.

This approach is only possible with a variation to the height control for the front part of the building which is offset by the rear of the building which is twice the distance below the height control.

The development application has therefore demonstrated that it is appropriate in this circumstance to provide flexibility in the application of the building height development standard because this will achieve a significantly better urban design outcome in this instance in accordance with objective 1(b).

1.10 Conclusion

The proposed variation to the height of buildings development standard contained within clause 4.3 and 7.11 of the PLEP 2010 has been found to be reasonable in the circumstances of the case and achieves a better outcome than that which can be achieved with strict compliance. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.