

Clause 4.6 Variation – Height of Buildings
326 Hume Hwy Bankstown

April 2016

1.1 Introduction

The Development Application (DA) for 326 Hume Hwy, Bankstown (subject site) proposes a part 4/ part 7 storey mixed use development incorporating two basement levels with 194 parking spaces, non-residential uses to the ground floor facing the Hume Hwy and residential accommodation above for 123 units. This Clause 4.6 variation to the Height of Building control in the Bankstown Local Environmental Plan 2015 (BLEP 2015) accompanies the DA.

1.2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the BLEP 2015 enables an exception to the height standard upon consideration of a written request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the BLEP reads as follows:

Clause 4.6 Exceptions to development standards

(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.

1.3 The Development Standard to be varied

The development standard to be varied is Clause 4.3 Height of Buildings in the BLEP 2015. As identified on the BLEP 2015 Height of Buildings Map, the subject site has two maximum building heights of 11m(L) and 23m (S) as shown in Figure 1 below.

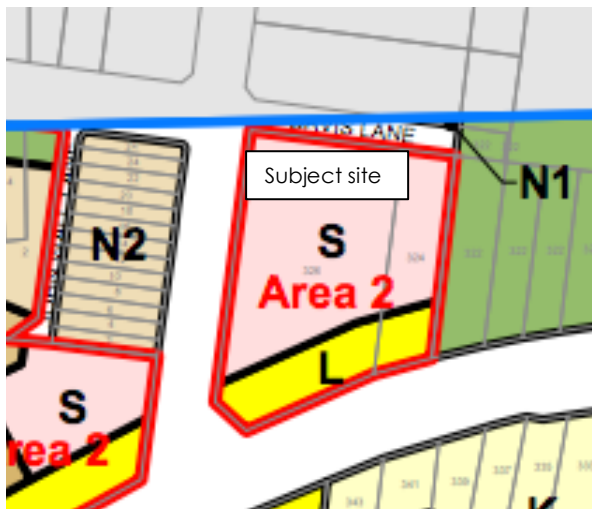


Figure 1 – Height of buildings map
Source: BLEP 2015

The Bankstown DCP demonstrates that the 11m (L) height limit extends for a distance of 20m from the Hume Hwy, before rising to 23m(S). Accordingly, the portion of land L is to be taken to be 20m in depth from the site boundary with the Hume Hwy.

The subject development is comprised of two components, which generally align to the Height of Buildings control. This is made up of a non-residential component fronting the Hume Highway, which is 8.5m in height, with a residential flat building located behind that rises to 15.2m (4-storey component) and 22.4m (7-storey component).

The proposed development complies with the maximum 23m height development standard for the rear of the site and generally complies with the maximum 11m height control for the front of the site, which has a maximum height of 8.5m for up to 13.5-15.5m in depth from the Hume Hwy frontage. Accordingly, the variation is for 4.5m – 6.5m in the L area.

From our interpretation of the intent of this control and from discussions with Council, we understand this setback to be a means of providing acoustic break from the Hume Highway. Our proposed design and openable windows maintain this setback and is therefore consistent with the intent of this control.

1.4 Extent of Variation to the Development Standard

The proposed development has two maximum heights that breach the 11m height control along the Hume Hwy frontage:

- The corner element at the corner of Rookwood Road and Hume Hwy extends to 22.4m, which is a non-compliance of 11.4m. However this non-compliance only extends for a depth of 4.5 metres;
- The eastern, 4-storey element reaches a maximum height of 15.2m, which is a variation of 4.2m for a depth of 6.5m.

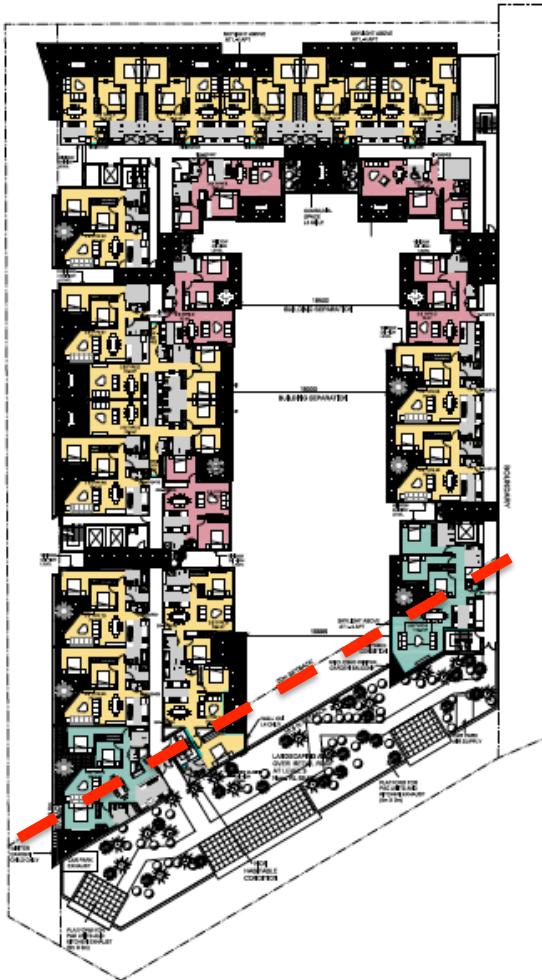


Figure 2: Level 3 and 4 of drawing showing non-compliance with 11m height control
Source: KTA Architects

1.5

Objective of the Standard

The objectives of the Clause 4.3 Height of Buildings are as follows:

- (1) The objectives of this clause are as follows:
 - a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,
 - b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,
 - c) to provide appropriate height transitions between development, particularly at zone boundaries,

- d) *to define focal points by way of nominating greater building heights in certain locations.*

1.6 Objectives of the Zone

The objectives of the B6 Enterprise Corridor zone are as follows:

- *To promote businesses along main roads and to encourage a mix of compatible uses.*
- *To provide a range of employment uses (including business, office, retail and light industrial uses).*
- *To maintain the economic strength of centres by limiting retailing activity.*
- *To provide for residential uses, but only as part of a mixed use development.*

1.7 Assessment

Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the height standard is unreasonable and unnecessary given the following circumstances of this case:

- The proposal only varies from the 11m height control for a depth of between 4.5m (western edge) and 6.5m (eastern edge) – upon which the height control increases to 23m and the proposal is compliant. This variation is for a small portion of the site – as shown in Figure 2 above;
- The intent of the 11m height control (combined with the residential prohibition in this area) is to provide an acoustic and air quality control for residents facing the Hume Hwy. The design of the development retains these principles by orienting all operable entries and windows away from the Hume Hwy if they are within the 20m setback area. This ensures that the air quality and acoustic amenity of these units is maintained meeting the objective of the control. The applicant has provided air quality and acoustic assessments, which demonstrate that adequate amenity can be provided to the units facing Hume Hwy. Importantly both these assessments show that there is no material benefit in an additional setback of 20m over the proposed 13.5 - 15.5m setback;
- As shown in Figure 3 below, apartments within the 20m setback area have a blank façade facing Hume Hwy with windows for habitable rooms oriented either towards the internal courtyard or Rookwood Road in order to provide adequate acoustic and air quality treatment. Where balconies are within the setback area, they have a blank wall to Hume Hwy or are enclosed as winter gardens to provide adequate amenity to these units;

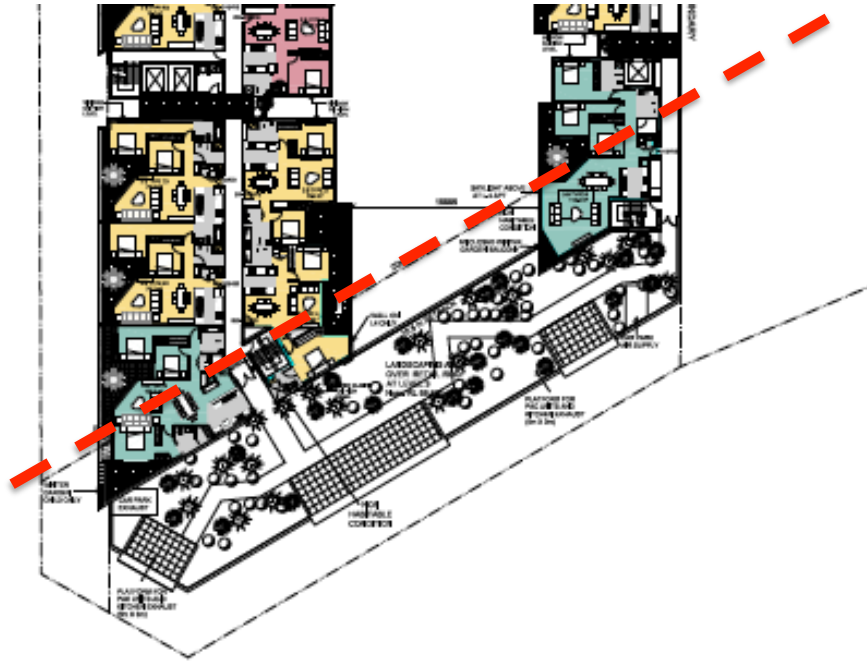


Figure 3: Apartment layout within 20m setback area
Source: KTA Architects

- The variation to the height within this small portion of the site still results in an application with a compliant FSR, which protects the density of the development;
- Full compliance with the height control for the full 20m setback area would result in a poor urban design outcome as the site is a corner site and requires an urban design treatment that strengthens the development at the corner of Rookwood Road and the Hume Hwy. The proposed design and reduced setback at the corner ensures a design that exhibits design excellence by providing an appropriate corner treatment to the development as shown in Figure 4 below;



Figure 4: Corner treatment of development
Source: KTA Architects

- Strict compliance with the height control for a full setback of 20m, having regard to multiple existing residential dwellings on the opposite side of Hume Hwy with a setback less than 20m would be unreasonable and unnecessary;
- The proposed development is nevertheless consistent with the objectives of the height standard and B6 Enterprise Corridor Zone as described below;
- The proposed development has overall environmental planning merit as demonstrated in Sections 4 and 5 of the SEE.
- The contravention of the height standard does not raise any matter of State or regional planning significance; and
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

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

There are sufficient environmental planning grounds for the contravention to the height standard as follows:

- The Land and Environment Court in its recent decisions in *Four2Five vs Ashfield Council* has ruled that a clause 4.6 variation must do **more than** demonstrate that the development meets the objectives of the development standard and the zone, a test commonly referred to as the Wehbe Test #1 (which are matters dealt with further below). The clause 4.6 objection must **also** demonstrate some other environmental planning grounds that justify contravening the development standard, preferably some that are specific to the site, although that is not essential, according to the Court of Appeal decision in *Four2Five vs Ashfield Council*;
- In this instance Wehbe test # 3 also applies, that is, that strict compliance would tend to hinder the attainment of the objects of the Act. That is because a compliant envelope, with the taller building set-back the full 20 metres would result in a poorer urban design outcome in terms of the a strong corner treatment that should be provided for an important corner site. The additional height in this instance provides a better urban design outcome for a corner site by providing a strong corner massing and treatment. The proposed design provides a better treatment for the corner site by emphasising the gateway as it gives visual prominence to parts of the building façade and actively addresses both street frontages. The setback of the 4-storey element has been aligned with the corner treatment to provide for appropriate symmetry within the design. An increased setback would reduce the effectiveness of these treatments.
- It can readily be seen that this is "a better outcome" (one of the objectives of clause 4.6) than a compliant envelope. As such, strict compliance with the development standard would tend to hinder the attainment of the objects of the Act, for example 'the orderly and economic use and development of land'. This means that Wehbe test # 3 is satisfied, as is *Four2Five vs Ashfield Council*. We note that the Court accepted a similar approach in *Panarea Investments v Manly Council* (2015) where a taller building which exceeded the height control via a clause 4.6 variation was held to provide a better planning outcome than a strictly compliant scheme which would have had greater impacts;
- The proposal demonstrates that an alternative approach to mitigating the impacts of noise and air quality is achievable. The applicant has provided air quality and acoustic

assessments, which demonstrate that adequate amenity can be provided to the units facing Hume Hwy through design solutions. Importantly both these assessments show that there is no material benefit in an additional setback of 20m over the proposed 15.5m. By designing the unit orientation to face away from the Hume Hwy the scheme achieves a better solution at 13.5 - 15.5m than a scheme that oriented towards the Hume Hwy at 20m;

- Further, there is significant variation between landuses and built forms in the vicinity of the subject site. This includes single and two storey dwellings on the opposite side of the Hume Highway with 7m to 8m landscaped setbacks, two storey school buildings with 8m to 10m landscaped setbacks, and a two storey pub with a zero setback. The subject development appears to be higher than any surrounding development, and would be unable to provide any consistency with surrounding landuses in terms of massing and setbacks. Whilst it is acknowledged that some level of transition is required from the Hume Hwy to the rear of the site, the taller residential flat building component being setback generally at 13.5 - 15.5m rather than 20m does not result in any additional overshadowing or bulk and scale impacts. The proposed height transition also provides an improved height transition across the site without creating any additional amenity and accordingly strict compliance with the 11m height limit for the full depth of 20m would not create an improved environmental outcome.
- Given the above strict compliance with the height controls would hinder the attainment of the objects of the Act, and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a)(ii) - Is the proposed development 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

In the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) the objectives of the particular standard, and*
- b) the objectives for development within the zone in which the development is proposed to be carried out.*

The objectives of the development standard and the zone are addressed below under the relevant headings:

a) the objectives of the particular standard

The particular development standard is Clause 4.3 Height of Buildings of the BLEP2015 and the relevant objectives are addressed below:

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*

The height of the development will be compatible with the character, amenity and landform of the area in which a mix of uses and built forms exist. The development will present a height of 8.5m to the Hume Highway for a depth of up to 13.5 - 15.5m, which is consistent with the adjoining land uses, and provides amenity and human scale. The proposed height and massing is

generally consistent with the desired future character of the area as envisaged by the current controls and the exhibited LAP for the site in accordance with objective a).

- (b) *to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,*

Not applicable

- (c) *to provide appropriate height transitions between development, particularly at zone boundaries,*

Appropriate height transition is provided between adjoining uses, the Hume Highway, the commercial building component, and the residential flat building component in accordance with objective c). A 13.5 - 15.5m setback for the 8.5m high commercial building still provides a smooth transition to the 4 storey and 7 storey residential components, whilst demonstrating compatibility with nearby landuses with lesser overall heights.

- (d) *to define focal points by way of nominating greater building heights in certain locations.*

The development site is located at a key location in the Rookwood Road Corridor Precinct, at the intersection of two major transport arteries and the entrance to the Bankstown CBD. The encroachment of the residential flat building into the 11m height limit at the corner of these two roads assists in defining the corner and providing an improved urban design outcome for the site in accordance with objective d).

- c) *the objectives for development within the zone in which the development is proposed to be carried out.*

The falls within the B6 Enterprise Corridor Zone and the relevant objectives are addressed below:

- *To promote businesses along main roads and to encourage a mix of compatible uses.*

The development promotes business along main roads, providing 478m² of retail floor space along a 50m street frontage, which is directly accessible and visible from the Hume Highway;

- *To provide a range of employment uses (including business, office, retail and light industrial uses).*

The development assists in achieving the objectives of the zone to provide for a range of employment use by providing an area of double height floor space, which will be able to be used for a variety of commercial activities;

- *To maintain the economic strength of centres by limiting retailing activity.*

The economic strength of centres will be maintained. Though the development does encourage economic growth in the corridor, the floor space is not significant enough so as to detract from surrounding centres; To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.

- *To provide for residential uses, but only as part of a mixed use development.*

Residential uses are provided for within a mixed use development.

As discussed above the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the B6 Enterprise Corridor Zone.

Furthermore, there is no significant benefit in maintaining the height standard as the proposed encroachment of the building into the 11m height control for 4.5m -6.5m is a relatively minor contravention of the height standard, which facilitates a significantly better planning outcome with an improved urban design for a corner site and no significant adverse environmental or amenity impacts.

1.8 Any matters of significance for State or regional environmental planning

The contravention of the height standard does not raise any matter of State or regional planning significance.

1.9 Conclusion to variation to height standard

This written request for an exception to the height standard under clause 4.6 of the BLEP2015 for the 15.2m and 22.4m residential flat development to encroach into the 11m height control along Hume Hwy for a depth of 4.5m – 6.5m. It justifies the contravention to the height standard in the terms required under clause 4.6 of the LEP, and in particular demonstrates that the proposal provides a significantly better planning and urban design outcome with no significant adverse amenity or environmental impacts, and therefore in the circumstances of the case:

- Compliance with the height standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention given that a compliant building envelope would create a worse urban design outcome for an important corner site;
- It is in the public interest in being consistent with the objectives of the height standard and zone; and
- There are no matters of State or regional planning significance and no public benefits in maintaining the height standard in this case.

