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444 - 446 Princes Highway
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Dear Pascal,

CLAUSE 4.6 REQUEST TO VARY A DEVELOPMENT STANDARD: CLAUSE 4.3 (HEIGHT OF BUILDINGS) ROCKDALE LEP 2011

This Clause 4.6 Variation Request has been provided to accompany the amended development application, prepared over land at 398-412 Princes Highway, Rockdale (DA-2016/343).

The variation request has been prepared to address the proposed variation to the height of building development standard contained within the Rockdale Local Environmental Plan 2011 (RLEP 2011).

1.1 OVERVIEW

This clause 4.6 request forms a variation request to the applicable building height standard. It has been prepared with regard to the following considerations:

- Clause 4.6 of RLEP 2011;
- The objectives of Clause 4.3, being the development standard to which a variation is sought;
- Relevant case law specifically addressing the considerations for assessing development standards set out by Preston CJ in *Wehbe v. Pittwater Council* [2007] NSWLEC 827 and *Four2Five v Ashfield Council* [2015] NSWLEC 1009; and
- “*Varying Development Standards: A Guide*” published by the Department of Planning and Infrastructure (August 2011).

The variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* and *Four2Five* judgments.

1.2 THE DEVELOPMENT STANDARD

Clause 4.3(2) of RLEP 2011 specifies the following:

“(2) 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.”

Building height is defined by RLEP 2011 as follows:

*“**building height** (or **height of building**) means*

- a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or,*
- b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.”

1.3 EXTENT OF VARIATION TO DEVELOPMENT STANDARD

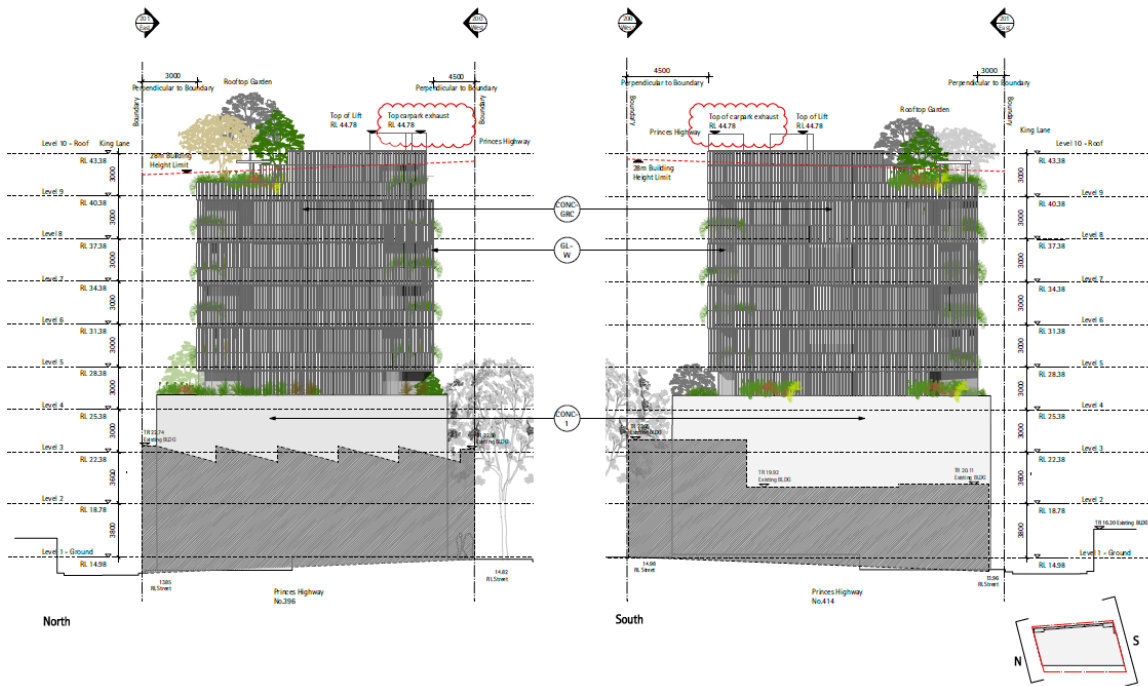
The relevant Height of Buildings Map nominates a height limit of 28m for the site.

The proposal seeks to vary the maximum 28m building height standard applicable to the subject site by between 0.70m (2.5%) and 2.2m (7.9%). The variations to height relate primarily to the lift overrun and carpark exhaust vent, however a part of the residential building fronting Princes Highway and the pergolas for the rear communal terrace also exceed the maximum building height as shown as detailed below:

- (i) Height of building – proposed between 28.7m and 29.35m (a variation of between 0.7m - 1.35m);
- (ii) Top of pergola structures for communal open space = 28.3m (a variation of 0.3m); and,
- (iii) Top of lift overrun & Carpark Exhaust Vent = 30.2m (a variation of 2.2m).

The extent of the variation is illustrated in Figure 1 on the following page.

Figure 1 – North-South Elevation



Source: Collins and Turner

1.4 PRINCIPLES OF EXCEPTION TO DEVELOPMENT STANDARDS

1.4.1 Clause 4.6 Exceptions to Development Standards

Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure. Clause 4.6 states the following:

“(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...”

(3) 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."*

Accordingly, justification is set out in following assessment for the departure from the height control applicable under the LEP. The purpose of the information provided is to demonstrate that strict compliance with the height standard under the LEP is unreasonable or unnecessary in the circumstances of this particular case. It also provides justification for the departure from the height controls specified in the LEP.

1.4.2 NSW Land and Environment Court: Case Law

There are two Land and Environment Court judgements which provide guidance on the interpretation and application of Clause 4.6.

Wehbe v. Pittwater Council [2007] NSWLEC 827 establishes a number of ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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.*
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.*

Whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6.

Four2Five v Ashfield Council [2015] NSWLEC 1009 established that Clause 4.6(3)(b) requires an applicant for development consent to show that environmental planning grounds exist particular to the circumstances of the proposed development on the subject site, to justify contravening the development standard. This finding was upheld by Pain, J in the subsequent appeal *Four2Five v Ashfield Council* [2015] NSWLEC 90. The decision of Pain J was subsequently appealed to the NSW Court of Appeal, however leave was not granted to hear the appeal.

1.5 ASSESSMENT

Clause 4.6 of Rockdale Local Environmental Plan 2011 requires an assessment as to whether compliance with the height standard can be considered unreasonable or unnecessary in this particular case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

The assessment is structured in accordance with the three matters for consideration identified in the *Wehbe* Land and Environment Court judgment:

1. *“The applicant must satisfy the consent authority that “the objection is well founded,” and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
2. *The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(a)i() and (ii) of the Environmental Planning & Assessment Act 1979; and*
3. *It is also important to consider:*
 - a. *Whether non-compliance with the development standard raises any matter of significance for State or regional planning; and*
 - b. *The public benefit of maintain the planning controls adopted by the environmental planning instrument.”*

In addressing Clause 4.6(3)(b), this assessment also identifies the *environmental planning grounds particular to the circumstances of the site* as established in the *Four2Five* judgement.

1.5.1 Compliance is unreasonable or unnecessary and the objection is well founded

Clause 4.6(3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In the *Wehbe* judgement Preston CJ set out five ways in which a strict application of a development standard can be deemed unreasonable or unnecessary, as listed in 1.5.2 above.

In this instance the first of the means identified by his Honour if of relevance, that is it can be demonstrated that *the objectives of the height standard can be achieved notwithstanding non-compliance*. The compliance of the proposed development and building height variation with the objectives of the height standard in Clause 4.3 of the LEP is demonstrated below.

The objectives of Clause 4.3 Height of Building are as follows:

- a) *to establish the maximum limit within which buildings can be designed and floor space can be achieved,*
- b) *to permit building heights that encourage high quality urban form,*
- c) *to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,*
- d) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The subject site has a varied topography where ground level at its highest is RL 14.98 fronting Princes Highway and at its lowest is RL 13.98 fronting King Lane. As a result, of this natural slope, the built form fronting Princes Highway is measured 1m higher than its actual built form. Therefore the development has been designed to achieve the objectives of Clause 4.3, by providing a high quality urban form, that maintains sky exposure and daylight to the future residents and public domain, and nominates heights that will provide an appropriate transition in built form relative to the surrounding area.

Those portions of the building exceeding the maximum building height, are generally elements of the top of the pergola in the communal open space, lift overrun and car park exhaust vent, and a small portion of habitable space associated with the residential units on Level 9, have been designed as a considered integrated design response to the upper elements of the building. The additional building height above the building height incorporates negligible gross floor area associated with units on Level 9 fronting Princes Highway. The integrated design of Level 9 is to provide residential units fronting Princes Highway and a communal garden and pergola structure, which contributes to the both the provision of and usability of the open space for residents. The lift overrun and plant located on the roof ensures will have limited access for building maintenance.

The design and limitation of habitable floor space above the height limit is strictly orientated to Princes Highway, and is located on the area of the site with a naturally 1m higher topography. Due to the minor extent of this variation, the potential impacts are mitigated by the proposed design treatment. The additional bulk will not be perceivable from the public domain, Princes Highway (which is naturally elevated) and King Lane which is shielded by landscaping associated with the Level 9 roof garden. Given the site's location with the Rockdale Town Centre and proximity to the railway, the minor variation of habitable floor space on Level 9 and lift overrun as a result of varied site topography is considered critically important.

The design of the King Lane Level 9 frontage as a communal garden will provide a desirable architectural expression, that will be visually subservient and unobtrusive when viewed surrounding areas. The utilisation of the Level 9 to provide a communal garden positively contributes to the overall outcome of the development to provide high quality urban form that integrates landscaping features with the building facades and streetscape to integrate with the RLEP 2011's Green Gateway. Given the limited open space in the Rockdale Town Centre, the provision of high quality communal open space is considered critically important in this case.

The additional height of the proposed roof elements, communal garden and habitable apartments will not be readily perceptible from public domain spaces in the immediate locale, thus providing an appropriate transition in built form and land use intensity. The rooftop elements will only be visible from the public domain at a significant distance such that the additional height would be imperceptible. The features will, however, improve the appearance of the buildings when viewed from afar as they will complement the building façade and the Green Gateway. The extent of the variation is small enough such that there will be no impact on the building's visual relationship with site topography.

The proposed height exceedance generally maintains satisfactory sky exposure and daylight to surrounding developments and the Princes Highway public domain. The shadow impact assessment prepared by Collins and Turner as part of the Development Application, demonstrates that the proposed exceedance has an insignificant impact on the extent of the compliant shadow.

Moreover, it is noted that Council by its own actions, have been willing to vary its building height development standard on other comparable sites. Recent development applications over land at 433-439 Princes Highway, Rockdale (DA/2015/322) and 17-37 Wollongong Road, Arncliffe, have been awarded development consent, despite departure from the building height standard. Notably, these developments requested a similar minor variation to the building height standard, being an additional one storey, though incorporating gross floor area, dissimilar to the proposed development.

The site is located within a 28 metre building height control context. While the existing street character has lower buildings, over time they will be built to similar scale. If other developments have a fully compliant height, they may appear marginally lower in street height, however, this proposal will not undermine the intent of the objective to encourage a transition in height character. Specifically, a lower 14.5 metre form outside the main centre, stepping up to a 28 metre form in the northern part of the centre (including our site), and stepping up to 40 metre for properties in the core of the town centre (provided they meet minimum site area requirements). Moreover, the amended design provides an appropriate response to the low-density built form fronting Kings Lanes, where the height control is only exceeded by elements of the communal roof garden. Within this context, the proposal is not in conflict with Council's building height transition objective.

Despite the technical departure from the relevant height standard the proposed development achieves the objectives of Clause 4.3 of RLEP 2011 and therefore it is demonstrated that strict compliance with the height standard in this instance is unreasonable and unnecessary and the objection can be considered to be well founded.

1.5.2 Adequate Environmental Planning Grounds for Contravening the Development Standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard. *Four2Five* requires that the applicant demonstrate this in light of *environmental planning grounds particular to the circumstances of the site*.

In this instance the following environmental planning grounds particular to the site support of the building height variation:

- Despite the additional height, the scale of development along Princes Highway (proposed or currently under construction) will be comparable, thus creating a unified new scale in this part of the town centre;
- In this instance, it is considered that removal of the upper floor level/s to achieve strict compliance would not result in an improved planning outcome – the uppermost floor level/s does not cause any material impact in terms of privacy or view loss to neighbouring residential areas, or adverse overshadowing to residential properties or the public domain.
- The site's topography and other constraints presented above have very strongly informed the building design response. In this instance, only a minor area of proposed gross floor area is contained within the maximum height limit as a result of the site's topography;
- The only portions of the building that exceeds the height limit is the communal rooftop garden, plant and lift over run, and a small portion of airspace of habitable areas of Level 9 apartments. The architectural response of these elements has been designed in such a way that no material impact will result to neighbouring properties over and above that which would result from a complying scheme. Notably, the building parapet provides a comparable height response to a compliant scheme when viewed from the respective streetscapes; and
- Locating the communal rooftop garden elements, lift over run and small gross floor area of Level 9 apartments above the maximum height limit is a considered site specific design response which aims to optimise the site's development potential, in a manner that is consistent with the building height objectives to encourage a high quality built form, and respond to the dual street frontage. This results in the provision of significant communal open space that will enhance the amenity for residents of the development and provides for an enhanced level of amenity required for a town centre transitioning into a more residential focused place.

It is considered that these environmental planning grounds are particular to the circumstances of the site and support the proposed variation to the height standard.

1.5.3 The Public Interest

Clause 4.6(4)(a)(ii) requires that the consent authority to be 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 the zone in which the development is proposed to be carried out.

It is considered that the proposed height variation will not be contrary to the public interest. Section 1.8 above demonstrates that the proposal is consistent with the objectives of the building height standard.

There will be no material offsite impact resulting to neighbouring buildings resulting from the location of the communal roof garden feature, lift over run and Level 9 apartments above the height standard. These structures will improve the appearance of the building when viewed from the public domain, integrating roof elements with the Green Gateway and façade treatments. The inclusion of habitable floor space varying the height control fronting Princes Lane, and only roof garden elements varying the height control fronting King Lane, the variations will not reduce privacy, increase overshadowing or present visual impact to surrounding properties. The solar studies accompanying the application demonstrate that appropriate solar access will be retained to the surrounding public spaces, especially parks and green spaces.

The proposal aims to realise an optimal yield, with all gross floor area contained below the maximum height limit in building forms that respond well to the specific site context, topography and urban interface.

Further, it is considered that the proposal will remain consistent with the objectives of the B4 Mixed Use zone, being:

- *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.*

The location of the communal garden roof elements, Level 9 apartments fronting Princes Highway and lift overrun above the applicable height standards will not detract from the objectives. Given the scale of the development, the proposed non-compliance will be unperceivable from the public domain and not adversely impact amenity. Given the site's constraints the proposed development is an optimal design for integrating a mix of office, residential and retail uses capable of benefitting from the site's accessibility.

1.5.4 Concurrence of the Secretary

Clause 4.6(4)(b) requires that the concurrence of the Secretary has been obtained.

Clause 4.6(5) provides that, in deciding whether to grant concurrence, the Secretary 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 standard*
- (c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Consideration of the above also addresses matters 2 and 3 of the Wehbe judgement.

Matters of State or Regional Planning Significance

The proposed variation to the height standard results from the location an communal roof garden elements and lift over run structure on the roof. The height variation results from a design response



that seeks to optimise the site's potential within an envelope that has been designed to maximise public amenity, communal open space, sunlight and provision of view corridors through the site. It does not result from the provision of habitable space or gross floor area above the building height limit. Therefore the non-compliance will not raise any matter of State or Regional planning significance.

Public Benefit of Maintaining the Standard

Whilst the proposal results in a variation to the height standard, it is considered that strict compliance with the standard would not itself result in a public benefit.

Reducing the number of levels to enforce strict compliance with the standard will not result in an improved planning outcome. The uppermost floors do not create any material shadow, privacy or existing view loss impact. As such, there will be no discernible public benefit by maintaining the standard.

1.6 CONCLUSION

A variation to the strict application of Council's Height of Building development standard is considered appropriate for the subject site at 398 - 412 Princes Highway, Rockdale.

The proposed height results in an optimum outcome for the site and is considered to have negligible impacts above those caused by a compliant height and exhibits design excellence.

The proposal meets the intent of Council's Height of Building control and in accordance with Clause 4.6, demonstrates that the development standard is unreasonable and unnecessary in this case. As such, the proposed variation should be supported as part of the assessment of this development application.

If you have any questions please don't hesitate to contact me on 8233 7657.

Yours sincerely,

A handwritten signature in black ink that reads "Stephen White".

Stephen White
Director