



ANNEXURE C

CLAUSE 4.6 VARIATION REQUEST – BUILDING HEIGHT

CLAUSE 4.6 VARIATION STATEMENT 1-13 GLOUCESTER AVENUE AND 42-44 PARK ROAD, BURWOOD - MAXIMUM HEIGHT (CLAUSE 4.3)

Clause 4.3(2) of BLEP 2012 relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 15m (Figure 1). Building height is defined as:

“ **building height (or height of building)** means the vertical distance between ground level (existing) and 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.”

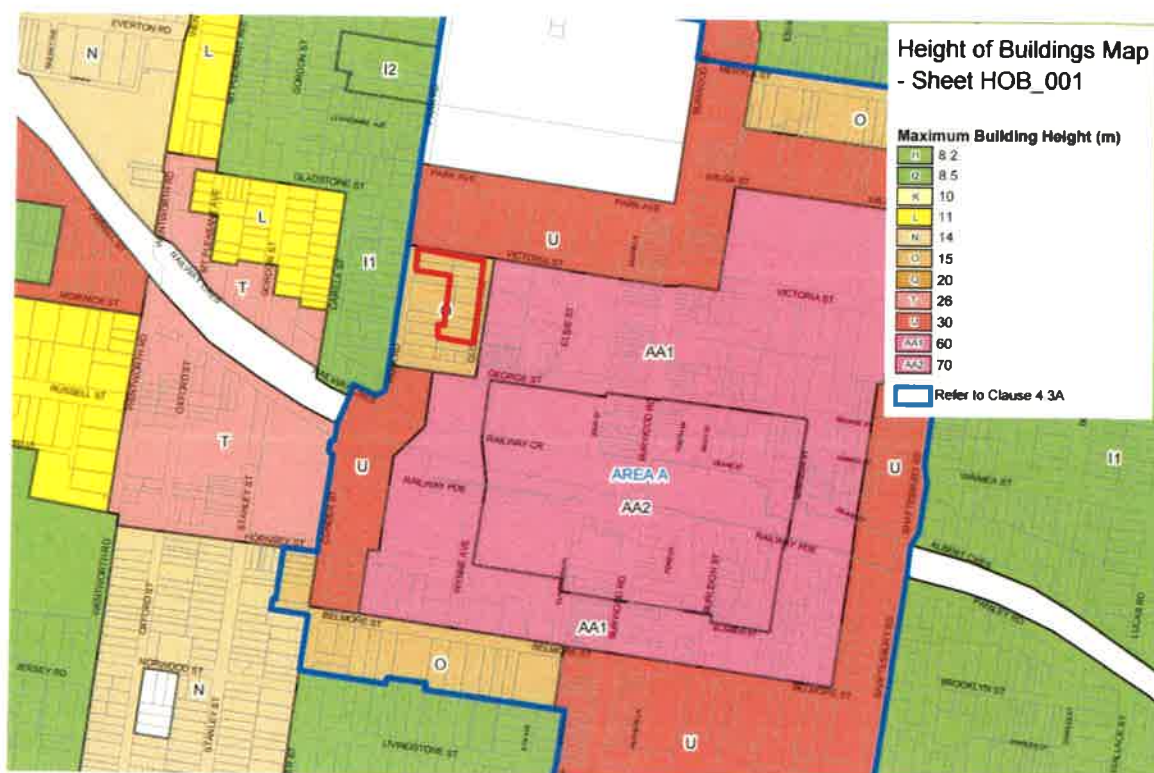


Figure 1: LEP Height of Buildings Maps

Background

The original application submitted to Council proposed 4 separate buildings, one of which was 5 storeys and the remaining 3 buildings were 6 storeys. Each of the buildings exceeded the maximum building height limit with the tallest buildings extending to a height of 23m above natural ground level.

It was considered that the 15m height limit translated to 5 storeys based on each storey being 3m from floor to ceiling height. Council in its letter dated 30 August 2016 indicated that the height of building variation could not be supported as the case had not been made as to why strict compliance with the development standard is unreasonable or unnecessary and how the non-complying development is a better environmental planning outcome than a complying development. It was also detailed in Council's letter that the height control permits 5 storey buildings based on each floor requiring a floor to ceiling height of 3.1m under the ADG. The letter also stated that the site is within the B4 mixed use zone and therefore commercial floor heights could require floor to floor heights of up to 3.6m at ground level.

The proposed development is for a residential flat building with all levels to be fitted out for residential apartments. A residential flat building is permissible in the zone and there is no planning control requiring ground level commercial floor space.

The applicant is of the view that commercial/retail floor space would not perform economically in this location given that it is on the periphery of the Burwood Town Centre and located within the transition area. It is of no benefit to provide 3.6m floor to floor heights within the ground floor level of the proposed residential building and consequently 2.7m floor to ceiling heights are proposed.

As identified in Council's DCP "*residential development is expected to predominate in these areas as it is not restricted*". It is therefore not necessary to impose increased floor to ceiling heights at ground floor level. The minimum required both under the ADG and the BCA is 2.7m for habitable rooms and is considered reasonable for all levels within the proposed building.

Based on floor to ceiling heights of 2.7m and an overall height limit of 15m, the provision of a 5 storey building is completely consistent. We maintain that the provision of a 5 storey building form is within the height anticipated by the controls and is not inconsistent with the scale and form of development to the west.

The building has now been amended and while a variation to the height of building standard is still proposed for part of the building, many of the issues previously raised in Council's letter have been addressed, particularly those concerns relating to residential amenity and its impact on the listed building to the rear (as discussed in the attached cover letter revising the Statement of Environmental Effects).

The building design now proposes one continuous building form with no gaps between each block. The apartments are now orientated towards the street or the rear of the site providing for improved solar access. The building has a predominantly 15m height, other than at the intersection of Gloucester Avenue and Victoria Street where the building height increases to 8 storeys (26.8m) and where lift overruns and stair access extends above the building to provide access to the expansive communal roof terraces.

The proposed building results in some non-compliance with the building height development standard, however, the proposed built form allows for a compliant density and the scale to be accommodated at the site is in a form that will achieve a superior urban outcome. The proposed building height also achieves a transition in form between higher density and taller buildings in the town centre to the east and lower density, lower buildings to the west.

Council recently commissioned the Burwood Town Centre Urban Design Study as part of the recently proposed LEP amendment that provides bonus density for developments providing public benefits. Amongst other things the Study concluded:

" *The current BLEP, in conjunction with the BDCP provisions, presents mismatches between the FSR and height development standards. Development generally reaches the maximum FSR well before reaching the height limit. This would result in lower and bulkier buildings that do not display good design and have greater impacts on the streetscape and the amenity of adjoining properties than the taller and slender buildings.*"

This conclusion is consistent with the amended design exercise undertaken by the project architect, whereby flexibility to the height limit in this instance is required to provide an appropriate urban form. A feature of the amended design is the increased height at the corner of Gloucester Avenue and Victoria Street which articulates the building and provides an appropriate transition to the scale and form of existing and future buildings. Along the opposite sides of the Gloucester Avenue and Victoria Street

building heights of between 30-60m are permissible (see Figure 1). The proposed building height change within the site reduces in a manner consistent with the change in building height controls away from the corner.

Aside from the built form benefits that arise from promoting a smaller building footprint and taller buildings to achieve the intended FSR, the site is located within the Burwood Town Centre and will provide a height that is appropriate to the surrounding properties. Figure 1 above indicates the building height requirements at the site and that of the adjoining properties. To the east of the site on the opposite side of Gloucester Avenue, buildings are permitted to extend to a height of 60m. To the north of the site, on the opposite side of Victoria Street, height limits of 30m apply. Further to the south of the site on the opposite side of George Street, the 60m height limit applies. Therefore, the site is located within a street block that is surrounded on two sides by properties that, when developed, will conceivably contain 19 storey buildings. In addition, properties to the north, on the opposite side of Victoria Street will contain 9 storey buildings.

Provided at Figure 2 is an analysis of the permitted building height on the adjacent properties and the subject site. There is a significant drop in the permitted building heights at the subject site. The site is located in a transition area of the Burwood Town Centre, however, the building height permitted for the site, in combination with the permitted FSR, facilitates a building mass that will provide an inferior transitional form of development when compared to the proposal. The proposal is characterised by a dominant corner element (which contributes to articulating and emphasising the corner) with a lower built form along each street frontage that will transition to the lower residential densities to the west.

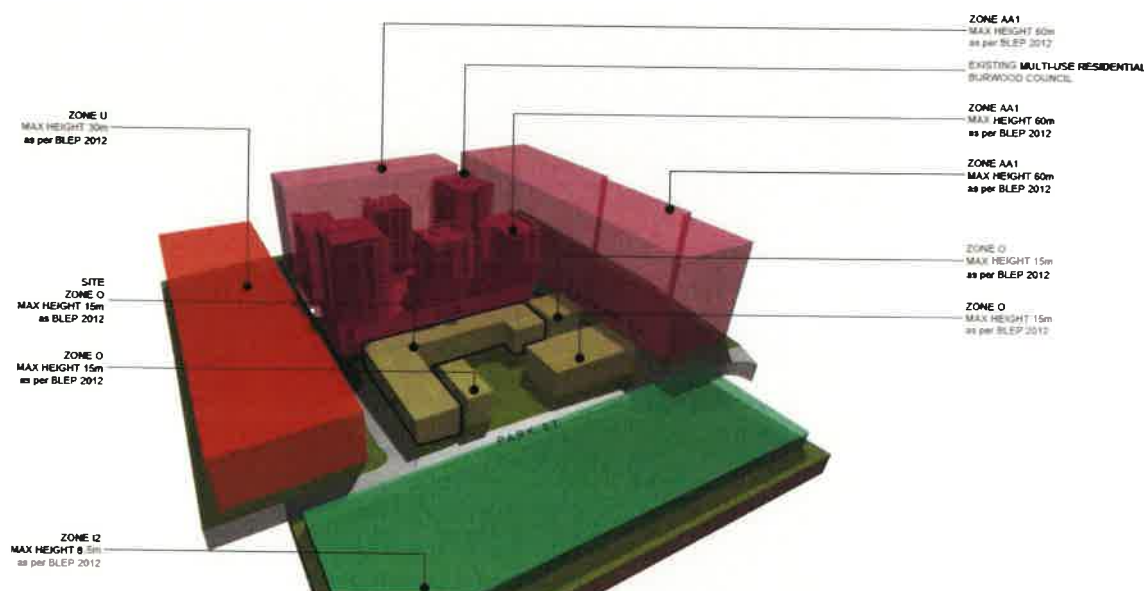


Figure 2: Urban form analysis under the applicable building height limits

Maximum building height control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

The objectives and provisions of clause 4.6 are as follows:

- (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 Secretary has been obtained.
- (5) 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 development standard, and
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Note.** When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (ca) clause 4.3A (2)."

The development standards in clause 4.3 are not "expressly excluded" from the operation of clause 4.6. Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

4.3 Height of buildings

- "
- (1) *The objectives of this clause are as follows:*
 - (a) *to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,*
 - (b) *to control the potentially adverse impacts of building height on adjoining areas.*
 - (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.*"

The *Height of Buildings Map* nominates a maximum height of 15m for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum height of 28.4m to the top of the lift overrun and 25.6m to the top of the north eastern corner building being the two highest elements of the amended proposal.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 are addressed in turn below.

Objective (a):

Objective (a) seeks to establish maximum building heights to encourage appropriate building heights within either medium density or low density areas. Although the term *medium density* generally relates to multi dwelling housing, in the context of this objective *medium density* development is taken to be properties that are located in the Burwood and Strathfield Town Centres and the properties that front Liverpool Road. All other properties within the Burwood Local Government Area could reasonably be viewed as the lower density areas.

Objective (a) has the overall intention of distinguishing between the low and medium density areas within the LGA. The subject site is located within the Burwood Town Centre and is therefore within a medium density area. As discussed below and above, the proposal is an appropriate form of development within the Town Centre that is consistent with the anticipated future streetscapes of Park Road and Gloucester Avenue. Medium density redevelopment of the site in the manner proposed will deliver additional dwellings within the Burwood Town Centre without compromising the low density character of dwellings outside the town centre thereby ensuring that the transition from this medium density site and the adjoining low density properties is consistent with both public expectations and the intent of the control.

It is considered that the proposal will maintain a suitable medium density outcome in the context of the locality and will not in any way impact on the low density residential properties to the west. Rather, the development will allow for a suitable transition in building form between the Middle Ring Area of Burwood Town Centre and the residential dwellings located on the western side of Park Road.

Objective (b):

Objective (b) seeks to control the potentially adverse impacts of building height on the adjoining areas. The objective does not go so far as to state what the adverse impacts might be however for the purposes of this exercise, overshadowing, view loss and streetscape presentation are considered.

The impacts of the amended proposal in terms of overshadowing are considered at Section 4.3.6 of the SEE and are an improvement on the originally submitted scheme. Shadow diagrams submitted with the application indicate that there will be increased shadow as a result of the proposed development.

However, given the scale and density permitted by the LEP on the subject site, overshadowing to some degree is anticipated and largely unavoidable.

Shadow diagrams indicate that each affected neighbouring property will retain sunlight to a portion of the property for at least 3 hours between 9.00am and 3.00pm during mid-winter, despite the non-compliant building height. Therefore, the extent of overshadowing that will occur as a result of the proposal, including the shadow attributable to the non-compliant portion of the building, is acceptable and compliant with the DCP requirements.

In relation to view loss, the proposal will not preclude any existing primary views of iconic landmarks or significant natural features from existing residential properties.

In relation to urban form and streetscape presentation, the amended proposal seeks to emphasise the north east corner of the building and reduces building height as the built form transitions to the lower density area to the west. The arrangement also allows for an increased deep soil landscaped area to the west fronting Park Road and also contributes to a more consistent built form within the streetscape. The height of the proposed building is considered to be compatible with both the existing and likely future scale of development in the area and affords an appropriate transition in built form between the Burwood Town Centre and lower density development to the west.

It is considered that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

“ 22 There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

In relation to the built form context of the site, the proposal presents to Park Road, Victoria Street and Gloucester Avenue and is located in a transitional area whereby the building mass at the site is to be appropriately tiered back from the inner and middle ring areas of Burwood Centre to the low density properties that are located on the western side of Park Road. The building height and massing of the development on the site in the context of the surrounding maximum height limits is indicated below at Figure 3.

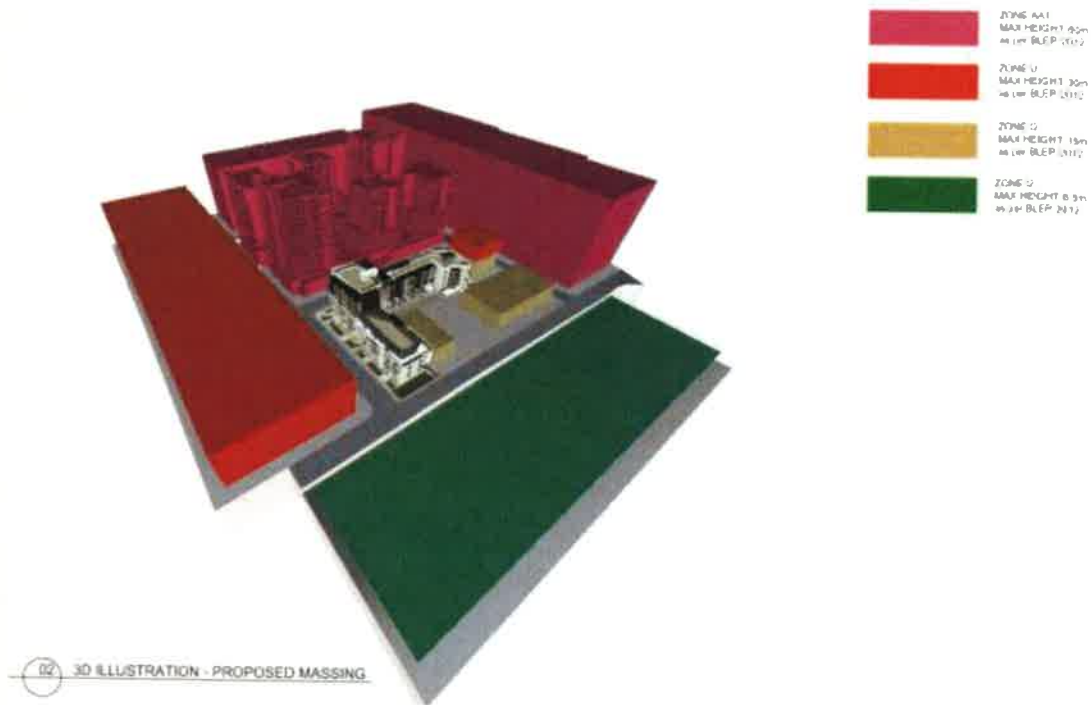


Figure 3: Proposed development within the context of the LEP maximum height limits

As demonstrated in Figure 3, the building represents an appropriate transitional form in the context of the likely future built form context. The proposed building transitions down to a form that is generally compliant at the sensitive low density interface of Park Road.

Notably, the western part of the building as it presents to Park Road is compliant with the 15m building height control providing an improved transition to the dwellings on the opposite side of Park Road. This improved relationship and compliant height is shown in Figure 4 below.

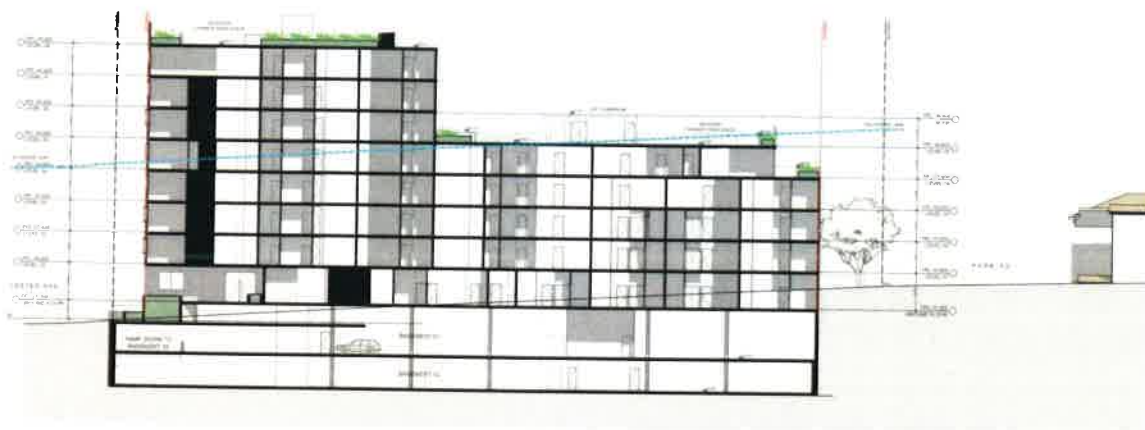


Figure 4: Victoria Street section indicating non-compliant building elements

As the building extends eastwards along the Victoria Road frontage towards Gloucester Avenue the building height increases and there are elements above the roof line that contravene the 15m height limit. These elements include the lift overrun and some hard landscape elements as visible in Figure 4 above.

The height non-compliance becomes more significant at the eastern portion of the building where the scale and form of the building seeks to define the corner and make a strong architectural statement. While exceeding the 15m height limit, the increased building height at the corner will relate to the scale and form of buildings to the north and east and will result in a better streetscape and urban structure outcome once the permissible heights and densities are realised within the Burwood Town Centre. The scale of the building within the Victoria Street streetscape will be entirely appropriate to the existing and likely future streetscape character as the building height control on the opposite side of Victoria Street is 30m.

The proposal is also of a density (FSR) that is compliant with the maximum allowed under the LEP and consequently the built form will result in a massing that is entirely consistent with the likely future character.

Along Gloucester Avenue the building has also been reduced in comparison to the original scheme providing for a predominantly 15m high building. As shown in Figure 5 the Gloucester Avenue elevation is largely compliant with the 15m height limit other than elements of the roof terrace and lift overrun which exceed the maximum building height. For the most part, these elements can be considered architectural roof features as they are decorative elements, are not advertising structures, do not include floor space area and will cause minimal overshadowing. Some flexibility in building height limits can be applied where architectural roof features result in minor encroachments, which is the case for the amended proposal.

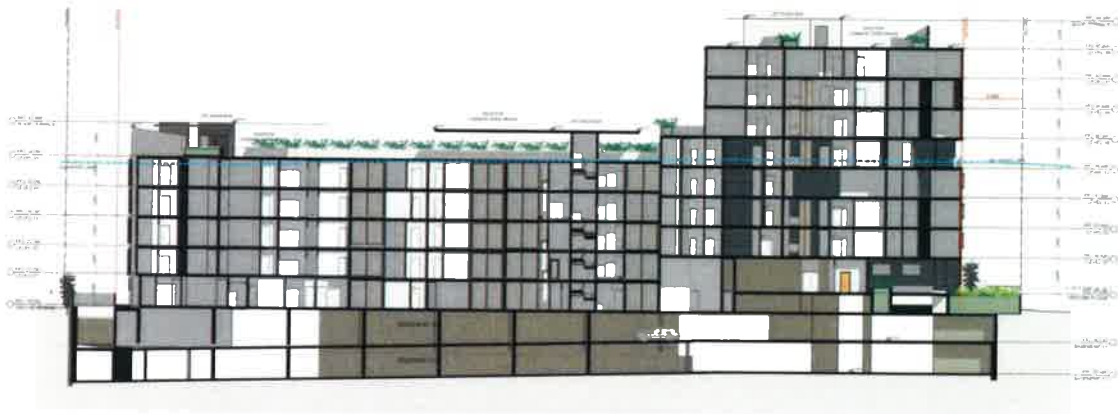


Figure 5: Gloucester Avenue elevation indicating non-compliant building elements

In addition to providing a contextually appropriate form that responds to the likely future scale of development in the area, the proposal will be compatible with the existing built form context as demonstrated at Figure 6, noting the relationship in Victoria Street and Park Road.



Figure 6: Proposed development within the existing built form context

In light of the above, the proposed development is consistent with the objectives relating to the maximum building height standard, despite the numeric non-compliance.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the *B4 – Mixed Use* zone are as follows:

- “
- 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 proposal will provide a residential flat building that will deliver residential accommodation which is compatible with the mix of uses in the Burwood Town Centre and is located within a highly accessible area that has convenient access to services and public transport. The proposal is therefore consistent with the objectives of the B4 Mixed Use zone.

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as detailed throughout the Statement of Environmental Effects, there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties. The separation to neighbouring properties is increased in comparison to the original scheme which will result in improvements to visual and acoustic privacy and increased solar access to and through the site.

In the absence of significant impacts resulting from a contextually appropriate scale of development that provides the intended residential density at the site, the proposal represents the orderly and economic

development of the site, is consistent with the objects of the Environmental Planning and Assessment Act, 1979 and is in the public interest.

Furthermore, on “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve “a better outcome for and from development”, it is clear that the circumstances of this particular site warrant flexibility to the height control to achieve an improved outcome. As mentioned previously, the 15m height limit that applies to the site, in combination with the permitted FSR, encourages inferior building envelopes which are bulkier and less compatible with achieving a transition at the edge of the town centre. The amended proposal seeks to achieve predominantly compliant building heights to Park Road, Gloucester Avenue and Victoria Street. The increased height at the intersection of Victoria Street and Gloucester Avenue is expected to provide an architectural focus and allowing the new building to achieve the density permitted at the site.

In the case of the proposed development, the FSR is compliant with the LEP and the additional height is merely a product of adopting a superior and contextually responsive distribution of building mass which addresses the street corner and makes a positive architectural statement which would not be achieved with a consistent building height of 15m for the entire building envelope.

The height of the building allows for an appropriate and transitional form of development from the properties that are adjacent to the site which contain height limits of between 60m and 30m. The development achieves the balance of providing a compliant form at the sensitive and transitional interface of Park Road and massing the permitted floor area within building elements that achieve high quality urban outcomes.

Solar access within and through the site, separation and privacy to neighbouring properties and deep soil planting capacity are also improved by the revised scheme.

Therefore, there are clear site specific aspects of the revised scheme that support an appropriate degree of flexibility to the maximum building height control as proposed. These relate to the superior urban outcome achieved by increasing building heights at the corner and the height limits that apply to adjoining properties, whereby the proposal will provide a superior transition from the centre to the edge of the Burwood Town Centre.

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is our opinion that strict compliance with the maximum height development standard for the entire building is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives.

Furthermore, the height non-compliance seeks to allocate floor space which is compliant with that permitted by the LEP within a superior urban form. The proposal will not bring about planning change or circumvent Part 3 of the Environmental Planning and Assessment Act, 1979 as the scale and intensity of development at the site is commensurate with the permitted density and level of intensity at the site.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the statutory tests set out in clause 4.6 of Burwood LEP are satisfied and Council should have comfort in applying an appropriate degree of flexibility as requested.