



Clause 4.6 – Exceptions to Development Standards – Height of Buildings (Cl.4.3)

Address: 62-82 Harrow Road, Bexley – Proposed Seniors Housing Development

Proposal: The Development Application seeks the redevelopment of 62-82 Harrow Road, Bexley (“the site”) for a seniors housing development.

1.0 Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Rockdale Local Environmental Plan 2011 (LEP 2011). The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the LEP 2011.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline Varying development standards: A Guide, August 2011, and has incorporated as relevant the latest principles on Clause 4.6, contained in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (‘Four2Five No 1’)*
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (‘Four2Five No 2’)*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 (‘Four2Five No 3’)*
6. *Micaul Holdings Pty Limited v Randwick City Council (2015) NSWLEC 1386*
7. *Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC7*

2.0 Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Rockdale Local Environmental Plan 2011 (LEP 2011).

2.2 What is the zoning of the land?

The zoning of the land is R2 Low Density Residential zone.

2.3 What are the Objectives of the zone?

The objectives of the R2 Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents*

- *To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area*

2.4 What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

2.5 Is the development standard a performance based control?

No. The height of buildings development standard is a numerical control.

2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 (2B) of the LEP 2011.

2.7 What are the objectives of the development standard?

The objectives of clause 4.3 are as follows:

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

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 (2B) establishes a maximum building height control of 14.5 metres—if the building is within 38 metres of Harrow Road, and 9.5 metres—if the building is not within 38 metres of Harrow Road if the building subject of the development is used only for the purpose of seniors housing.

2.9 What is the proposed numeric value of the development standard in the development application?

The front element of the proposed building, within 38m of Harrow Road is no higher than 14.5m above the existing ground level and complies with the development control.

The rear section of the proposed building, being the part of the building that is not within 38 metres of Harrow Road, contains elements that are higher than 9.5m. Specifically the proposal includes the following elements above the 9.5m height control:

- The proposed lifts, lift overruns and associated lift lobbies which provide access to the proposed landscaped rooftops – top height of RL46.72, which is a 4.17m variation.
- Sections of the balustrade which surrounds the landscaped rooftop areas of the southern wing. The balustrade will read as a parapet wall and is recessed back from the building edge. There are two elements to the balustrade, being a metal cladding component and a painted wall component. The two elements have a top height of RL43.82 and RL43.42 respectively and are approximately 1.1m to 870mm above the 9.5m height limit (note that the level of exceedence varies due to the variable existing ground level).

- Elements of the roof slab. The height of the roof slab is RL42.82 and the variation is approximately 270mm and varies due to the variable existing ground level.
- The proposed roof top pergola. The top height is RL45.62 and the variation is 2.8m.

The protrusions above the 9.5m height control are demonstrated in the amended elevation drawings and section drawings (refer to Figures 1 to 3) where the red dotted line represents the height control.



Figure 1: Extract from amended North Elevation drawing



Figure 2: Extract from amended South Elevation drawing



Figure 3: Extract from amended Section B drawing

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposed development exceeds the maximum building height control by the following values:

- The southern-most lift: 44% (or 4.17m)
- The balustrade on the landscaped rooftop areas of the southern wing: 9% (or 870mm)
- Elements of the roof slab where it is sitting above an existing sunken pathway: 3% (or 280mm)
- The proposed roof top pergola: 38.5% (or 3.66m).

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- (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.*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- (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*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.*

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the height of building standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposal is generally compliant with the standard apart from several elements that mostly relate to the access and use of the proposed roof top communal open space.
- The subject site contains bowling greens associated with the former use of the site. Consequently there is considerable variation in the existing ground levels such that there exists a 'sunken' pathway around one bowling green which is half a metre lower than the level of the adjacent bowling green. Additionally the topography of the site falls away significantly along the southern edge. As such the variable topography of the site contributes to the degree of variation in the height control.
- Development at the site is subject to a flood planning level and as such the finished ground level of the building is required to be set higher than it otherwise would. This contributes to the degree of non-compliance with the height control.
- The non-compliant elements are considered relatively minor in terms of any visual impacts they may have. The lifts, which represent the main variation, are centred over the site and will sit behind the 14.5m four storey element of the building. They are setback from the building edge and the site boundaries. The lifts will not result in significant visual massing and will not result in adverse visual impacts when viewed from surrounding locations.
- The lifts are required to provide equitable access to the proposed rooftop landscaped communal open space which is considered a feature of the proposal and recognised as a desirable element by the Design Review Panel (DRP). The rooftop landscaped area will provide considerable amenity to the future residents of the seniors housing development and will also provide a pleasant and visually interesting finish to the building.
- The pergola is a light weight structure and is appropriately arranged on the roof so that it will not result in adverse visual impacts.
- The proposed non-compliant elements do not result in additional floor space being realised at the site and the proposal (but for additional basement car spaces) is compliant with the density envisaged for the site. Specifically, the above ground floor space achieved in the proposal is less than the 1.25:1 FSR allowable for seniors living developments at the site.
- It is considered that the non-compliant elements, being the balustrade, pergola and lifts, have been arranged and designed in a manner that will not result in any discernible adverse impacts on the overall bulk and scale of the development, but will provide significant benefit to the future residents of the development.
- The non-compliant elements will not result in additional adverse overshadowing of adjacent properties, view loss or privacy issues.
- The rooftop landscaped communal open space could be deleted from the proposal in order to achieve numerical compliance with the building height control, however this would, on balance, result in an inferior development outcome and no discernible public benefit would be gained.
- There is negligible difference in the impacts between a building that strictly complies with the building height control including:
 - Visual and acoustic privacy impacts: The arrangement of the building on the site will not generate significant privacy impacts or impacts that would be reasonably expected within the residential context. In particular the rooftop communal open space is to be set well back from the building edge as well as the site boundaries. It will also be provided with planters for vegetation, providing privacy screening. Consequently the rooftop communal open space will not result in adverse visual privacy impacts. The deletion of the non-compliant elements from the roof top communal open space to achieve compliance with the control would therefore have no effect on the privacy impacts associated with the development.
 - Visual impacts: The deletion of the non-compliant elements to comply with the building height control would have negligible effect on the visual massing and the bulk and scale of the proposal. The elements are minimal and do not alter the overall bulk of the building. Indeed the

landscaped communal open space on the rooftop is considered to provide additional articulation to the building and visual interest.

- Overshadowing impacts: Due to the form and siting of the development and the location of adjacent residential dwellings, the building as it is proposed will have minimal overshadowing impacts and complies with Council's solar access controls. The deletion of the non-compliant elements within the rooftop communal open space to comply with the building height control would have no effect on the shadows cast by the development onto adjacent land.
- The proposal satisfies the objectives of the development standard (refer to Section 3.4.1 below).
- The proposal, inclusive of the building height variation, better satisfies the objectives of the zone and the development standard.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

No, a development that strictly complied with the standard would compromise the outcome of the development without discernible benefit given the non-compliance does not have significant adverse amenity or environmental impacts and the proposal remains consistent with the objectives of the standard.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

It cannot be said that the building height development standard has been abandoned, however Council has previously displayed an appropriate degree of flexibility in the application of the RLEP 2011 building height control. The proposed variation does not increase the intensity of the development in such a way that it will give rise to any additional environmental impacts such as bulk, scale or overshadowing. It can therefore be said that the proposed development is consistent with previous variations to the building height standard.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is appropriate for the site.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard.

The variable topography of the site contributes to the degree of non-compliance. The level of a sunken path in one instance results in a 500mm drop in the existing ground level. In that instance, it is unreasonable to require the building design to respond to such an anomaly in the existing ground level.

Additionally the site is affected by a flood planning level and as such the finished floor level of the ground floor is higher than it otherwise would have been.

Notwithstanding the above environmental circumstances, the crux of the non-compliant building height of the development relates to elements associated with the proposed rooftop communal open space.

Specifically the lifts, the pergola and the rooftop balustrade are elements which form or provide access to the communal open space.

The communal open space is considered a feature of the proposal and recognised as a desirable element by the Design Review Panel (DRP). The rooftop landscaped area will provide considerable amenity to the future residents of the seniors housing development and will also provide a pleasant and visually interesting finish to the building.

The rooftop open space does not result in the realisation of additional floor space and its deletion would have a negative effect upon the external appearance of the building and its contribution and relationship to the streetscape as it would delete a visually interesting element of the roof design.

The deletion of the communal open space would not alter the impacts of the proposal with respect to overshadowing, visual massing, bulk and scale, visual privacy or view loss.

Importantly the rooftop open space will result in a considerable positive benefit to the future senior residents at the site. It will also provide a visually interest design element to the roof of the proposal when viewed from adjacent public spaces and residential properties.

The non-compliance is unlikely to result in adverse amenity impacts to the neighbouring properties and the proposed development complies with the objectives of the R2 zone and Clause 4.3 of the LEP.

In summary, complying with the building height control will provide no additional benefit and would result in a poorer planning outcome for the site.

Council would not be setting a precedent by varying the height control as proposed and the development as proposed is consistent with the provisions of orderly and economic development.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the building height standard

The proposal remains consistent with the objectives of the building height standard outlined in subclause 4.3(1) despite the non-compliance demonstrated below:

- *to establish the maximum limit within which buildings can be designed and floor space can be achieved,*

The above ground floor area of the proposed development complies with the FSR standard applicable to seniors housing development at the site and the proposed built form is of a scale, density, building footprint and density that is reasonable envisaged by the applicable statutory controls and relevant policies.

The majority of the proposal complies with the building height control and the non-compliant elements are minimal and do not contribute to an increase in the bulk and scale of the building in any discernible way above that which would generally be expected for a compliant development.

The scale of the development is generally consistent with the scale envisaged under the relevant controls for seniors housing at the site.

- *to permit building heights that encourage high quality urban form,*

The non-compliant elements relate to a feature of the development being the rooftop landscaped communal open space. This space will provide significant amenity to the future senior residents of the facility and will also provide visually interesting, architectural resolution to the design of the roof of the 3 storey element of the proposal.

In this respect the proposed variation to the height control will contribute to the realisation of a building of high quality urban form.

- *to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,*

The proposed non-compliant elements will have no impact upon the sky exposure and daylight access to any adjacent building, key area or the public domain.

- *to nominate heights that will provide an appropriate transition in built form and land use intensity*

The amended development has been designed to respond to the mixed scale residential nature of the locality. The design responds to the busy nature of Harrow Road and the higher scale of development along that road. The proposed building transitions down in scale at the rear towards the east and residential development in Frederick Street. The proposal provides considerable architectural articulation to the southern and northern facades and appropriate building separation to the one and two storey scale dwellings in Goyen Avenue and Bowlers Avenue.

The proposed building has been arranged to avoid significant adverse impacts upon adjacent residential properties in terms of visual massing, overshadowing, view loss and privacy impacts.

While the development may be higher than some adjacent single dwellings, the development is nonetheless generally consistent with the scale of the development envisaged by the recently amended height controls for the site and is responsive to the varied scale of one to four storey development in the locality.

The proposal for seniors housing represents an important land use which will make an important contribution to the residential accommodation needs of the community. The intensity of the proposed land use is also generally consistent with the density envisaged for seniors living developments at the site.

3.4.2 Objectives of the zone

The subject site is zoned R2. The objectives of the zone are:

- *To provide for the housing needs of the community within a low density residential environment*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents*
- *To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area*

The proposal is consistent with the objectives for the following reasons:

- Seniors housing is a critical component of the housing needs of the community. The proposal seeks to provide a significant contribution and increase in the supply of seniors housing accommodation within the local community and the wider LGA.
- The proposal is generally compliant with the applicable built form controls, and where it is not, only relatively minor variations are proposed. The minor variations will allow for the realisation of a high amenity facility without any associated adverse impacts.
- The locality is comprised of a mixture of building forms and building scales, and while the development may be higher than some adjacent single dwellings, the development is nonetheless consistent with the scale of the development envisaged by the relevant height controls for the site and is responsive to the varied scale of one to four storey development in the locality. The amended proposal provides an appropriate transition to development to the east, north and south of the site.
- The proposal for seniors housing represents an important land use which will make an important contribution to the residential accommodation needs of the community. Additionally, the associated

ancillary facilities proposed at the site will provide the future residents with services and facilities which will assist in meeting their day to day needs.

- The amended development has been designed to respond to the mixed scale residential nature of the locality. The design responds to the busy nature of Harrow Road and the higher scale of development along that road. The proposed building transitions down in scale at the rear towards the east and residential development in Fredericka Street. The proposal provides considerable architectural articulation to the southern and northern facades and appropriate building separation to the one and two storey scale dwellings in Goyen Avenue and Bowlers Avenue. Finally, the proposal has been arranged to avoid significant adverse impacts upon adjacent residential properties in terms of visual massing, overshadowing, view loss and privacy impacts.

The proposal as amended is consistent with the objectives of the R2 Low Density Residential zone.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional environmental planning?

The contravention of the development standard in this case does not raise an issue of State or Regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones and are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

“to encourage

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer planning response and development outcome to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally maintains the scale and density envisaged for seniors housing development at the site.

The development as proposed is consistent with the provisions of orderly and economic development and strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is also a public benefit in maintaining a degree of flexibility in specific circumstances.

In the current case, strict compliance with the building height control would result in a poorer planning outcome.

Strict compliance with the standard would result in a development that would likely result in reduced amenity for future residents of the site compared to the proposed development.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site and the locality.

3.8 Is the objection well founded?

For the reasons outlined in the previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

The development does not hinder the attainment of the objects specified within clause 5(a)(i) and (ii) of the Act.

4.0 Conclusion

The proposed building height variation is considered appropriate to the context and circumstances of the site, and does not result in a scale or type of development that is inconsistent with the scale and character of development envisaged for the site within the applicable statutory provisions and strategic planning documents.

Contextually, the proposal will provide a development of a scale, form and density that appropriately responds to the site's location and the purpose of the seniors housing development. On an urban design basis, the outcome will be appropriate to the locality.

The proposal does not represent an overdevelopment of the site and the height and proposed intensity (density) is generally consistent with the site's desired future character.

The proposal could be made to numerically comply with the building height standard by deleting the rooftop communal open space (and the associated elements of that space such as the pergola and balustrading) but this would not result in any discernible changes to the bulk and scale of the development, nor would it result in any discernible difference to the overshadowing, view loss and privacy outcomes associated with the development.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b), 4.6(4)(a)(i) and 4.6(a)(ii) of the LEP 2011 as it has been demonstrated that compliance with the building height development standard is both unnecessary and unreasonable in the circumstances of this case, there is sufficient planning grounds to justify contravening the standard, the development will be in the public interest and it is consistent with the objectives of the standard and the objectives for development within the R2 Low Density Residential zone.