

1. INTRODUCTION

Clause 4.6 of Botany Bay Local Environmental Plan 2013 (LEP) provides the framework for consideration of proposed variations to development standards.

This Clause 4.6 variation request forms part of the Statement of Environmental Effects supporting documentation for the proposed Development Application DA 2016/150/1.

The proposed development seeks approval for a mixed use development with residential apartments, retail space and a child care centre.

The details of the proposal are included in Section 4 of the Statement of Environmental Effects report prepared by Meriton and reflected on the amended plans prepared by Crone.

2. PROPOSED VARIATION

The proposal seeks variation to Clause 4.3(2) of the LEP, which states:

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 Building Height Map nominates a maximum Building height of 44 metres for the site. Building Height is defined in the LEP as follows:

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.

The table below provides an overview of the proposal and its comparison with the height development standard. The variations are shown bold and underlined in red - the extent of variation in percentage is also shown.

	TOP OF BUILDING	HEIGHT METRES	TOP OF PLANT	HEIGHT METRES
BUILDING A	RL 51.0	<u>45.1</u> 2.5% variation	RL 51.0	<u>45.1</u> 2.5% variation
BUILDING B	RL 50.7	<u>44.8</u> 1.8% variation	RL 51.0	<u>45.1</u> 2.5% variation
BUILDING C	RL 50.5	<u>45.8</u> 4.1% variation	RL 51.0	<u>46.3</u> 5.2% variation
BUILDING D	RL 50.5	<u>45.2</u> 2.7% variation	RL 51.0	<u>45.8</u> 4.1% variation

3. MATTERS FOR CONSIDERATION

a) Is the requirement a development standard?

The variation sought relates to the Building Height of the proposal. The Building Height control is a development standard, as it provides a numerical restriction to a particular aspect of the development, rather than a prohibition.

b) Is the development standard excluded from the operation of this clause?

Clause 4.6(8) outlines the exclusions of the operation of Clause 4.6, which are:

- Complying Development;
- Statement Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
- Clause 4.3(2A) – Height controls for certain sites on land in Zone R3 Medium Density Residential or Zone R4 High Density Residential.
- Clause 4.4B(3) – Exceptions to floor space ratio in Zone R3 and Zone R4.
- Clause 5.4 - Controls relating to miscellaneous permissible uses.

As the proposal does not relate to any of these types of developments, the variation to the Clause 4.3(2) Building Height control sought is not excluded from the operation of Clause 4.6.

c) What is the underlying objective or purpose of the standard?

The objectives of the height control in clause 4.3 are as follows:

- (a) to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,*
- (b) to ensure that taller buildings are appropriately located,*
- (c) to ensure that building height is consistent with the desired future character of an area,*
- (d) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (e) to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities.*

The proposal is consistent with the above objectives, in that:

- a) The proposed development has been designed to coordinate with the approved heights of the developments on other sites in the area;
- b) The buildings have been designed with setbacks that are compliant with Council's DCP and the SEPP 65 Apartment Design Guide, which will ensure bulk and scale are appropriate and minimised;
- c) The proposed height of the development will match the heights being approved in the surrounding area;

- d) The proposal will have no adverse impacts in relation to visual impact, loss of views, loss of privacy or solar access, which is largely a result of compliance with Council's DCP and the SEPP 65 Apartment Design Guide;
 - e) The buildings are situated on the site in accordance with the Council's DCP and provide compliant setbacks that will minimise impacts of the development when viewed from the public domain.
- d) Is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?**

In *Wehbe v Pittwater Council (2007) NSWLEC 827* Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

- 1) *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development are achieved notwithstanding noncompliance with the standard.*
- 2) *Establish that the underlying objective or purpose is not relevant to the development with the consequences that compliance is unnecessary.*
- 3) *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required that the consequences that compliance is unreasonable.*
- 4) *Establish that 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 unreasonable and unnecessary.*
- 5) *Establish that 'the zoning of particular land' was 'unreasonable or unnecessary' so that 'a development standard for that zoning was also unreasonable or unnecessary as it was applied to that land' and that compliance with the standard in that case would also be unreasonable and unnecessary.*

In applying the test in *Wehbe v Pittwater Council*, only one of the ways of establishing the development standard is unreasonable and unnecessary needs to be demonstrated. As outlined in Section 3(c) above, the proposed development is able to achieve the objectives of the height development standard, even though the development results in a non-compliance with the numerical standard. On this basis, the development is able to demonstrate that the development is unreasonable and unnecessary in accordance with the first way Preston CJ outlines in *Wehbe v Pittwater Council*.

In the recent decision of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* Pain J upheld the decision of Pearson C which indicated that a variation must be justified on sufficient environmental planning grounds particular to the circumstances of the proposed development and development site rather than grounds that would apply to a similar development on the site or a development in the vicinity.

However, in a the more recent case of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* Preston CJ stated that the consent authority did not have to be satisfied directly that compliance with each development standard was unreasonable and unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request adequately addressed the matter in Clause 4.6(3)(a) that compliance with each development standard was unreasonable and unnecessary. This decision indicates a move away from the more prescriptive approach to consideration of Clause 4.6 variation requests taken in *Four2Five v Ashfield Council*.

Applying Preston's CJ decision in *Randwick City Council v Micaul*, the proposed development is able to demonstrate that strict compliance with the numerical Building Height development standard is unnecessary in the particular circumstances of the proposal, as the development is able to:

- Meet the objectives of the development standard as outlined in Section 3(c);
- Meet other built form development standards;
- Satisfactorily address all relevant planning considerations as detailed in section 3(e).

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

There are sufficient planning grounds to justify the proposed variation. These reasons are set out below:

- The proposed buildings have been designed to match the heights of the approved developments on the surrounding sites (14 storeys and maximum RL51.00).
- The proposed height seeks no more than a 5.2% variation above the maximum 44-metre height. This is negligible and is within the generally recognised 10% rule for variations.
- The height is consistent with the height of other buildings approved by CASA in the locality.
- The site is affected by flooding. The Flood Planning Levels necessitate the ground floor level being set slightly above the existing ground level.
- The development displays minimal bulk and scale characteristics. The visual bulk is greatly reduced by the fine grain character of the buildings and the well-designed roof profile that encloses the rooftop plant.
- The proposal will result in no adverse impacts such as unreasonable overlooking and overshadowing.
- The proposal is entirely consistent with the objectives of the land use zone and the height development standard, which is addressed below.

f) Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone in which the development is proposed to be carried out?

As outlined throughout the SEE and this Clause 4.6 Variation Statement, the proposal is consistent with the objectives of the Building Height development standard and objectives of the B4 zone.

The principle aim of the proposal is to provide new residential apartments complemented by a new childcare centre and retail space. The provision of a new public park is also proposed.

The proposed variation to the height control does not result in the unacceptable loss of amenity to the neighbouring properties as a result of overshadowing or loss of privacy and the proposed height is therefore considered to be acceptable particularly when balanced against the benefits of the project which are:

- Provision of new housing and employment opportunities on land zoned for this purpose within the short term.
- Development of an under-utilised site (being currently occupied by industrial warehouses) identified for future mixed use development (being zoned B4 Mixed Uses).
- Contribution to the delivery of key infrastructure through the payment of the relevant Section 94 contributions.
- The proposal will provide positive social outcomes through the provision of on-site housing, child care facilities and a new public park.

g) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

The proposed variation to the Building Height development standard does not conflict with any matters of State or regional environmental planning significance, nor does it conflict with any State Planning Policies or Ministerial directives. The significance of the non-compliance is acceptable in the context of the overall development of the Mascot area and the broader Bayside Council area.

h) The public benefit of maintaining the development standard.

It is considered that due to the absence of any demonstrable adverse impacts arising from the proposed development, adherence to the subject development standards would hinder the attainment of the objectives of the Act. Further, the proposed development is consistent with the objectives of the development standard. Therefore, such adherence would not be in the public interest in this instance.

4. CONCLUSION

The proposal seeks variation to the Building Height development standard. The proposal will have no adverse impacts and will have no conflict with any matters of State or regional environmental planning significance. Nor does it conflict with any State Planning Policies or Ministerial directives.

On the basis of the above, support should be given to the proposed variation to the Building Height development standard under the provisions of clause 4.6 of the LEP.