

Amended Clause 4.6 Variation Request **Nos. 180-186 Burwood Road, Burwood** **Clause 4.3 – Height of buildings**

1. Height of buildings control

Clause 4.3 (2) of Burwood Local Environmental Plan 2012 (BLEP 2012) relates to maximum permitted building height for a site and refers to the *Height of Buildings Map*. The relevant map identifies the building height controls that apply to the site as shown in the extract of the map in Figure 1 (with the subject site outlined in red). A maximum building height of 70m applies to the site.

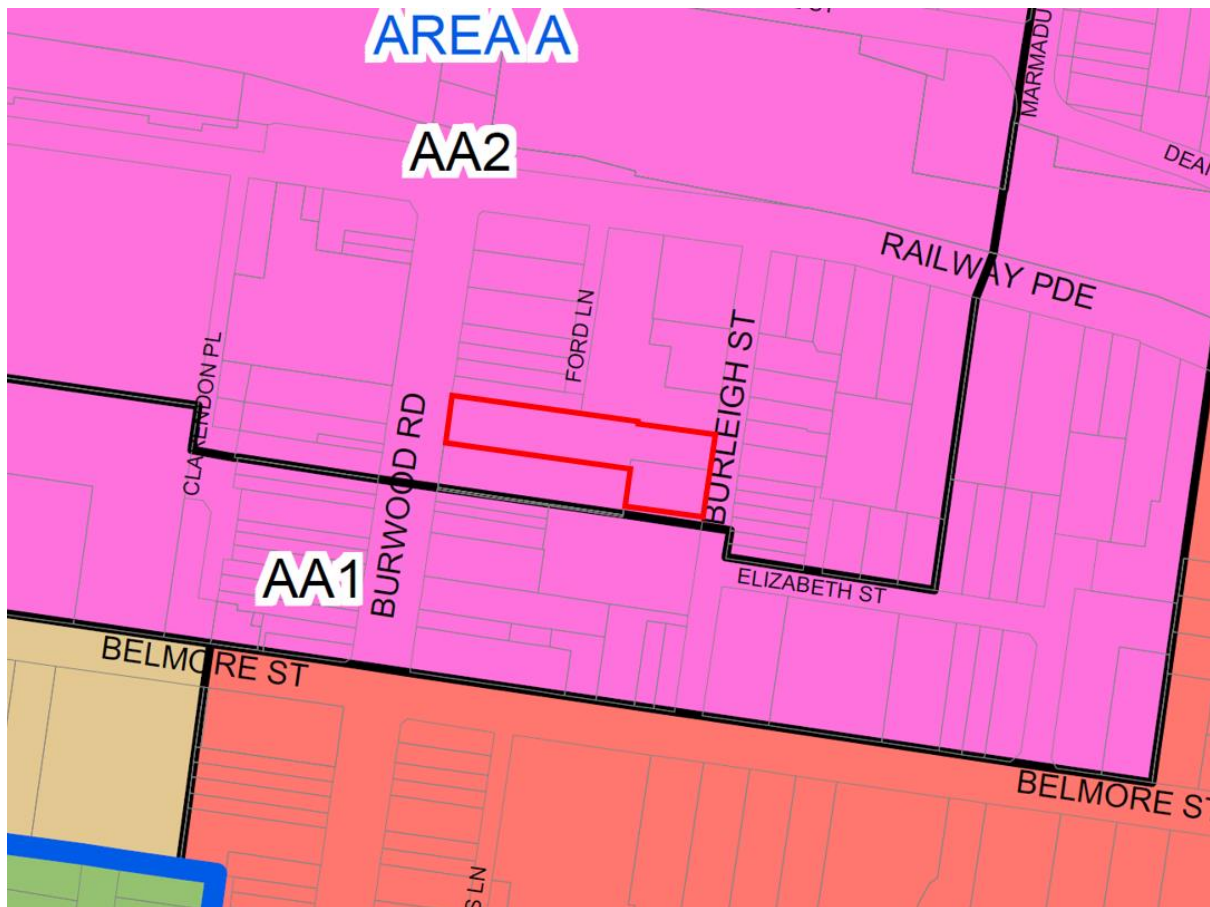


Figure 1: Extract from Building Height Map to BLEP 2012 (AA2 = 70m)

Building height is defined in BLEP 2012 as:

“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.”

The floor space ratio control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the LEP.

2. Proposed variation to height of building requirement

The maximum height of the commercial tower is 78.4m (maximum RL 107.23 over existing ground level of RL 28.83) and therefore exceeds the maximum building height control by 8.4m which equates to a percentage variation of 12%. The maximum height of the residential tower is 78.2m and therefore exceeds the maximum building height control by 8.2m (maximum RL 106.03 over existing ground level of RL 27.83) which equates to a percentage variation of 11.7%.

3. Clause 4.6 to BLEP 2012

The objectives and provisions of clause 4.6 to BLEP 2012 are as follows:

“4.6 Exceptions to development standards

(1) *The objectives of this clause are as follows:*

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) *Development consent must not be granted for development that contravenes a development standard unless:*

- (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the 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.

(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 request addresses the requirements of subclauses 4.6(3) and 4.6(4) in order to demonstrate to the consent authority 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 of clause 4.3 height of buildings are as follows, inter alia:

"(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."

As previously noted, the *Height of Buildings Map* nominates a maximum building height of 70m 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 building height of 78.4m, as described in Section 2.

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

Objective (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"

The subject site is within the Burwood Commercial Core and the core planning controls for height of buildings and floor space ratio encourage high density development. Objective (a) refers specifically to medium and low density development and as such is not relevant to the subject site.

Objective (b): “to control the potentially adverse impacts of building height on adjoining areas.”

Despite non-compliance with the numeric standard, the proposed building height will have no significant adverse impact on adjoining areas within the Commercial Core or Middle Ring Areas of Burwood, as described below:

- The proposed height of the commercial tower equates to an additional three levels above the height control but is below the building height plane. The proposed height of the residential tower also equates to an additional three levels above the height control, however is also below the building height plane. The external walls of the upper most level of both the towers are recessed from levels below, and as such will be visually recessive when viewed from neighbouring properties. It is submitted that there is no substantive difference between a compliant scheme and the proposed scheme in terms of scale and streetscape presentation.
- The Burwood LEP employs a secondary height control referred to as the building height plane. The objectives of the building height plane are to focus greater building height in the inner part of the Burwood Town Centre and to facilitate adequate solar access to land adjoining the Burwood Town Centre. The proposed scheme is compliant with the building height plane, despite non-compliance with building height. This implies that the degree of overshadowing associated with the proposal is acceptable and anticipated by the building height plane.
- The overshadowing impact of the proposed residential tower has been mitigated by providing a setback to the southern property boundary, thus increasing the separation distance between the tower and the existing residential flat building at No.11-17 Burleigh Street.
- There are no significant views obtained through the site from adjoining properties that are likely to be obscured by the non-compliant element of the building. The impact of the additional levels of the commercial and residential towers on potential views from adjoining land are, to some degree, anticipated by the building height plane standard and the emerging high density built form within the Burwood Commercial Core.

As described above, despite minor non-compliance with the height of buildings development standard, the proposal is consistent with the relevant objectives for building height. The proposed top two levels of the commercial tower will have no adverse impacts on adjoining areas in the Burwood Town Centre. Accordingly, the proposal satisfies Objective (b) of the height of buildings standard.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of Zone B4 Mixed use 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 proposed development is demonstrably consistent with the relevant zone objectives in that:

- The proposal replaces a large disused warehouse space and dated multi-storey function centre with a significant mixed-use development comprising high quality residential apartments and a large proportion of commercial floor space suitable for a range of office, business and retail uses and is therefore consistent with the zone objective to provide a mixture of compatible land uses.

- The site is well located in relation to public transport services being within 100m of Burwood Railway Station, less than 100m to high frequency bus stops and within the commercial core of the Burwood Commercial Centre. The site is therefore highly suitable for the proposed mixed-use development with access to public transport and walking opportunities potentially benefitting commercial tenants and customers as well as residents and their visitors.

For these reasons the development proposal meets the objectives for development in Zone B4.

4. Sufficient environmental planning grounds

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 discussed above it is considered that, despite non-compliance with the height of buildings standard, the proposed scale and form of the development is compatible with the emerging character of the locality and is also consistent with the desired transitional arrangement of development in the Burwood Town Centre.

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 considered that:

- The floor space proposed within that part of the building that breaches the height limit could be distributed elsewhere on site however this would necessitate building upon part of the central courtyard area. This courtyard area is considered to be a highly desirable feature of the proposal in terms of its functionality and amenity value. Furthermore, the proposed built form (i.e. towers at the edges of the site with central courtyard) serves to reduce impacts on neighbouring properties associated with overshadowing and visual bulk. A pair of slim line towers with relatively minor height breaches is considered to be a superior massing arrangement when compared to an alternative massing arrangement with no height breach.
- The proposal has been adjusted to incorporate a setback to the southern property boundary, thus improving the solar access and outlook outcomes for the existing residential flat building at Nos.11-17 Burleigh Street. The floor space taken from the southern elevation has been provided as additional building levels and this is considered to be an appropriate distribution of the proposed floor space. The earlier iteration of the development proposed a nil side setback for the residential tower, and this was considered to be consistent with desired urban form and massing, though it is evident that the setback now proposed will result in some benefits for existing development to the south.
- The building height breach is associated with additional floor space proposed as part of voluntary planning agreement in accordance with the Council’s VPA Policy whereby additional floor space may be permitted subject to a monetary contribution to the Council which is put towards the delivery of public infrastructure. There is a clear and tangible public benefit associated with the monetary contribution provided as a result of the development.

For the reasons listed above, it is considered that there are sufficient environmental planning grounds to support a variation to the height of buildings standard, particularly when one considers that breach is directly associated with the ‘bonus’ floor space permitted under Council’s VPA Policy and the proposed distribution of floor space is the most appropriate means of managing bulk and scale and impacts on adjoining areas, and improving amenity outcomes for neighbouring land.

5. **Insistence on compliance is unreasonable and unnecessary**

In regards 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 compliance with the height of buildings development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied and Council has the power to grant variation to the FSR development standard.