

Written Request

Clause 4.6 Exception To Development Standards

State Environmental Planning Policy – Sydney Region Growth Centres 2006

Appendix 4

Alex Avenue and Riverstone Precincts

Clause 4.3 Height of Buildings Control

Construction of Two (2) Residential Flat Building's

138 Burdekin Road Schofield

1.0 Introduction

This written request has been prepared by Allan Caladine, Consultant Town Planner from Caladines Town Planning Pty Ltd on behalf of the applicant.

The written request seeks to provide justification to contravene a development standard that applies to a development application (DA) lodged with Blacktown City Council.

This written request is made pursuant to Clause 4.6 "Exceptions to Development Standards" contained within Alex Avenue Precinct of - State Environmental Planning Policy (Sydney Region Growth Centres) 2006.

This exception to the development standard accompanies a DA that proposes to demolish the existing structures on the site, carry out road construction works and construct two (2) five (5) storey RFB's containing 214 residential apartments over two (2) levels of underground car parking.

This written request seeks to demonstrate that compliance with the 16m building height standard referred to in this submission is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard.

The development as proposed in the accompanying development application contravenes the 16m Building Height development standard prescribed by Clause 4.3 'Height of Buildings' in the Alex Avenue precinct – SEPP Sydney Region Growth Centres 2006.

In this particular case, the exception seeks to vary Clause 4.3 to allow a minor increase in each RFB's building height over a small length of each building (approximately 10m).

Those parts of the proposed buildings that extend above the 16m height standard are set out below and clearly shown on the accompanying architectural drawings:

- Building A – 16.4m or 400mm above the standard (length of approximately 10m);
- Building B – 16.83m or 830mm above the standard (length of approximately 10m);

The building encroachments are a direct result of the topography of the land that falls away to the south.

As set out in detail in this written submission, the variation in this instance is warranted because the extra height does not generate any additional environmental impacts, (ie: overshadowing, overlooking, view loss or bulk and scale) to that generated by fully compliant 16m high buildings.

The proposal is consistent with the objectives of the building height standard, the zone objectives and seeks only to provide new RFB's in a transitional neighborhood that represent examples of good, modern architecture and therefore the proposal is in the public interest.

2.0 Definition of Development Standards

The definition of a development standard is set out as follows:

“Development Standards” has the following definition under Section 4(1) of the Environmental Planning & Assessment Act 1979:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

Comment

Clause 4.3 “Height of Buildings” is the relevant planning control contained within the Alex Avenue part of SEPP Sydney Region Growth Centres 2006, which is a statutory planning instrument and as such is a development standard that can be varied by the use of Clause 4.6.

3.0 Varying Development Standards: A Guide August 2011

In accordance with the notification given under Clause 12 of Circular B1 states that:

"As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small and in other cases it may be numerically large, but nevertheless be consistent with the purpose of the standard..."

In deciding whether to consent to a development application the Council should test whether the proposed development is consistent with the State regional or local planning objectives for the locality; and in particular the underlying objective of the standard. If the development is not only consistent with the underlying purposes of the standard, but also with the broader planning objectives of the locality, strict compliance with the standard would be unreasonable and unnecessary"

Director General's Concurrence

The Director-General has notified metropolitan Councils that arrangements for the Director-General's concurrence can be assumed in respect of any environmental planning instrument that adopts clause 4.6 of the Standard Instrument or a similar clause providing for exceptions to development standards. It is considered that Blacktown City Council, inclusive of the JRPP enjoys a similar delegation.

Planning Circular PS08 – 003 issued 9 May 2008 contains notification of assumed concurrence of the Director General pursuant to clause 64 of the Environmental Planning and Assessment Regulation 2000. A copy of this planning circular accompanies this written request.

On demonstrating that the development standard is unreasonable or unnecessary in the circumstances of the case, the consent authority may assume the Director-General's concurrence to the objection pursuant to the provisions contained within Clause 4.6 of Alex Avenue – SEPP Sydney Region Growth Centres 2006 in the circumstances of this case.

4.0 Development Standards Within Alex Avenue Precinct of State Environmental Planning Policy (Sydney Region Growth Centres) 2006

Comment

The development standard to which this objection relates is Clause 4.3 Height of Buildings. The objectives of the Height of Buildings standard are set out in full below and a part copy of the associated Building Height map is provided at **Figure 1**.

4.3 Height of buildings

- (1) The objectives of this clause are as follows:
 - (a) to establish the maximum height of buildings for development on land within the Alex Avenue and Riverstone Precincts,
 - (b) to protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
 - (c) to facilitate higher density development in and around the local centre, the neighbourhood centres and major transport routes while minimising impacts on adjacent residential, commercial and open space areas,
 - (d) to provide for a range of building heights in appropriate locations that provide a high quality urban form.
- (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.



Planning

**State Environmental Planning
Policy (Sydney Region Growth
Centres) 2006**

**North West Growth Centre
Height of Buildings Map
sheet HOB_005**

LEGEND

Maximum Building Height (m)

J	9.0
O	16.0
P	18
P1	17
P2	17.5
P3	18.5
R	21
T	26



Subject Site

Figure 1

Source: SEPP – Sydney Region Growth Centres 2006

Comment

Clause 4.3 refers to Building Height Standards and in this particular case the development site is afforded a permissible building height of 16m as shown in **Figure 1**.

The exception seeks to vary Clause 4.3 to allow a minor increase in each RFB's building height over a building length of approximately 10m. Each building and the proposed heights above the 16m standard are set out below and shown on the accompanying architectural drawings:

- Building A – 16.4m or 400mm above the standard;
- Building B – 16.83m or 830mm above the standard;

As set out in detail in this submission, the variation in this instance is warranted because the extra height does not generate any adverse environmental impacts, such as overshadowing, overlooking, view loss or bulk and scale to that generated by fully compliant 16m high building heights.

Alex Avenue of SEPP Sydney Region Growth Centres 2006 has been identified by the Department of Planning and Environment as having substantial development opportunities in terms of the sites close proximity to employment, retail, public transport, public amenities, schools, open space and other forms of amenities as well as the desired future building bulk, scale, density and new character to meet Council's environmental capacity for new development in this neighbourhood precinct.

There are no heritage items in this precinct that would be impacted upon by the additional building height now proposed.

There are no historic views or vistas in this neighbourhood precinct that are required or should be preserved nor are there any other adverse environmental impacts that would rise as a result of the increase in building height.

5.0 Clause 4.6 Exceptions to Development Standards of Alex Avenue and Riverstone Precinct Plan - State Environmental Planning Policy (Sydney Region Growth Centres) 2006.

Clause 4.6 is set out below:

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) *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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State 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 Director-General 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 Precinct Plan was made it did not include any of these zones other than Zone E2 Environmental Conservation.

- (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.

Comment

Clause 4.6 contained within SEPP Sydney Region Growth Centres 2006 – Alex Avenue replaces *State Environmental Planning Policy 1* (SEPP 1) in the Blacktown local government area. This State Planning Policy previously gave the decision maker jurisdiction to grant development consent to a DA notwithstanding contravention of the development standard contained in an environmental planning instrument.

SEPP No 1 no longer applies to the land and Clause 4.6 now confers a similar planning discretion upon the consent authority.

The provisions of SEPP 1 differ from the provisions of clause 4.6. The decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 now confirms that the decision of Preston CJ in *Wehbe v. Pittwater Council* [2007] NSWLEC 827 is only of indirect assistance in determining ways of establishing that compliance with a development standard in an environmental planning instrument might be seen as unreasonable or unnecessary. In *Wehbe* [42] [46] Preston CJ did say however that a way of proving a well-founded objection under SEPP 1 is to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting development consents departing from the standard and hence compliance with the standard is unnecessary or unreasonable in the circumstances of the case. The principle applies to Cl. 4.6 of the Alex Avenue and Riverstone Precinct Plan of SEPP Sydney Region Growth Centres 2006.

The Chief Judge referred to the decision in *North Shore Gas Company v North Sydney Municipal Council* (Land and Environment Court, New South Wales, 15 September 1986, unreported) in which Stein J similarly held that compliance with a development standard was not required where the standard had been virtually abandoned or destroyed by Council's own action.

In addressing the relevant objectives in Clause 4.6(3) and 4.6(4), to achieve a variation to the Building Height standard, the following specific clauses must be met:

- *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- *there are sufficient environmental planning grounds to justify contravening the development standard;*
- *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.*

The objectives contained in Alex Avenue and Riverstone Precinct Plan of SEPP (Sydney Region Growth Centres) 2006 relating to the building height standards are to:

- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) to require the height of future buildings to have regard to heritage sites and their settings,*
- (d) to ensure the preservation of historic views,*
- (e) to reinforce and respect the existing character and scale of low density residential areas.*

The requirement for consideration and justification of Clause 4.6 - Exception to Development Standard necessitates an assessment of a number of criteria.

The site and other land zoned R3 Medium Density Residential within this Alex Avenue Precinct is about to undergo substantial change, with previously zoned and used rural land changing to promote high rise residential development, where in this instance the proposal consists of 214 residential apartments over basement car parking, promoting the revitalization of land for urban purposes as strategically envisioned by Blacktown City Council and the Department of Planning and Environment in the making of SEPP Sydney Region Growth Centres 2006.

In regards to ensuring the proposed development is compatible with the desired future bulk, scale and character of development in the streetscape and changing context, the following is noted:

- Each proposed RFB marginally encroaches above the permissible building height for a length of approximately 10m;
- The desired future building bulk, scale form and height of the proposed development and future development within the visual catchment of the site has been considered and from a planning perspective, the proposal will have no adverse impact upon these buildings or the desired future character mooted by the Alex Avenue planning controls.
- That part of the site that encroaches above the height standard is located on the interface with a proposed drainage reserve;
- The design of the proposed development, notwithstanding a minor increase in building height will offer visual interest in the transitional streetscape;

- The proposed buildings achieve the objectives and Design Guidance controls outlined in the Apartment Design Guide (ADG) so as to afford future residents in the proposed RFB's and those future RFB's adjoining the site with a level of amenity suitable for the scale of the development proposed;
- The designs also ensure there will be no adverse impact on any view loss from nearby properties;

The proposed development has been designed to enable sunlight access to future streets and private and public domains, drainage infrastructure, open space and nearby properties can be adequately maintained by the provisions and objectives in the ADG has been considered where solar access should achieve the following:

"Living rooms and private open spaces for at least 70 percent of apartments in a development should receive a minimum of 2 hours direct sunlight between 9 am and 3 pm at midwinter in the Sydney Metropolitan Area."

The shadow diagrams prepared demonstrate the development can achieve a minimum of 2 hours of direct solar access between 9am and 3pm in midwinter for approximately 152 units or 71% of the 214 apartments within the development. As such, the design of the proposed development inclusive of the breach in height is consistent with this objective in that the development has been designed to ensure sunlight access to surrounding properties is also to be adequately maintained.

R3 Medium Density Residential Zone

1 Objectives of R3 Medium Density Residential Zone

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.*

The proposal provides for a mix of unit types and sizes, including 22 adaptable apartments with associated car parking spaces. In this respect there are 49 x 1 bedroom units and 162 x 2 bedroom units and 3 x 3 bedroom units, which vary in size and design, thus their price to the housing market will reflect affordability, allowing some younger buyers to enter the housing market while others may have to find smaller apartments that meet their social and economic demands.

Views to and from the site will not be interrupted because of the additional height because the site is large in size (8981m²) and buildings are well separated from others, inclusive of new roads and a drainage reserve.

The filling in of this site with the proposed RFB's will promote a new, transitional character mooted by strategic studies prepared to support the governing statutory environmental planning instruments and policy documents.

The proposed development is within a short walk of excellent public transport along Railway Terrace to the Schofields Railway Station, shops, schools and public open space.

The site is within a short walk of the Schofields neighbourhood business centre, that provides fundamental amenities for local residents, such as restaurants, supermarket, take way food services etc.

All of the above amenities, creates a suitable, vibrant neighbourhood that offers a safe and secure environment through passive surveillance over the public and private domains.

The variation to the height control is therefore consistent with the R3 Medium Density Residential zone objectives.

6.0 Land and Environment Courts Assessment

Winten Property Group Ltd v North Sydney Council (2001) NSWLEC 24

Justice Lloyd's Questions - Winten Property Group v North Sydney Council 2001

Justice Lloyd raised in this case, five questions that must be considered in the assessment of a SEPP 1 Objection, in the subject application, it relates to Clause 4.6 of Alex Avenue - SEPP (Sydney Region Growth Centres) 2006 because SEPP 1 does not apply to this new planning instrument.

Question 1

Is the Planning Control in Question a Development Standard?

Environmental Planning Instrument

Clause 4.3 Height of Buildings is contained within an Environmental Planning Instrument that was prepared in accordance with the provisions contained within the Environmental Planning & Assessment Act 1979 and therefore is a development standard that controls building height.

Question 2

What is the Underlying Object or Purpose of The Standard?

As mentioned in clause 3.0 above, the Department of Planning Circular B1, numerical requirements may be departed from, if the purpose behind the control is achieved and the locality objectives of the relevant planning instruments are satisfied.

Comment on the relevant objectives behind Clause 4.3 are set out as follows:

- The standard is contained within an Environmental Planning Instrument that was prepared in accordance with the provisions contained within the Environmental Planning & Assessment Act 1979 and therefore the control is a development standard that controls building height and flow on amenity impacts such as over shadowing, overlooking, view loss and general loss of amenity.

The proposal is able to satisfy the objectives of this control.

Question 3

Is compliance with the development standard consistent with the aims of the policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979.

Comment

Section 5(a)(i) and (ii) is set out as follows:

5 Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, 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 co-ordination of the orderly and economic use and development of land,

This issue in itself would hinder the attainment of the Environmental Planning & Assessment Act 1979 objective, which seeks to promote the orderly and economic use and development of land. The reasons why the proposed RFB's would achieve the objects of the Act are:

- The proposal for the reasons set out above, is in keeping with the objectives of the R3 Medium Density Residential zone;
- The increased bulk and scale of the proposed RFB development does not increase shadow to that cast by fully compliant 16m high RFB with most shadow being cast over a compliant building envelope shadow;
- The design of the proposed building is responsive to desired future character expressed by the governing planning controls for new development in this neighbourhood precinct;
- The design responds to its transitional context in that the proposed design is responsive to its location and will not impact upon the amenity of existing or future residents in this precinct, in terms of overlooking and overshadowing of private and communal open space areas;
- The proposal will have no adverse impacts upon the new character when viewed from the proposed built and natural environments;
- The proposal is considered to be in the public interest as the new building form will enhance the strategic neighbourhood context.

Question 4: Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Comment

Compliance with the development standard is deemed to be both unreasonable and unnecessary under the circumstances because the departure sought does not create any impacts upon the built and natural environments;

The proposed development provides for a high quality, environmentally and ecologically sustainable form of development that will make a positive contribution to the visual amenity and envisaged character that will slowly emerge;

The application before Council clearly demonstrates that the proposed building can readily fit within a neighbourhood that is about to undergo substantial change in character and density.

Question 5: Is the objection well founded?

In the decision (*Wehbe v Pittwater Council* [2007] NSW LEC 827) Chief Justice Preston 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. These are:

- 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 or 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; or*
- 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.*

We are of the view that the objection is well founded because:

Clause 4.6 of the PLEP 2011 replaces *State Environmental Planning Policy 1* (SEPP 1) in the Blacktown LGA. The State Policy previously gave the decision maker jurisdiction to grant development consent to a development application notwithstanding contravention of the development standard contained in an environmental planning instrument.

It is for the reasons set out in this written submission, the proposed increase in Building Height that forms part of this DA is not unreasonable or unnecessary because:

- Clause 4.6 allows flexibility in the application of the building height standard in the circumstances of this case as set out previously in this written request;
- The proposal is consistent with the objectives of both the Building Height standard and the R3 Medium Density Residential zone;
- The increase in building height is over a length of approximately 10m and is a direct result of the change in levels to accommodate the proposed development;
- Those parts of each RFB that exceed the building height standard are on the interface with a new road and future drainage reserve;
- That there are sufficient environmental planning grounds (bulk, scale, form, overlooking, compliance with density and FSR controls, overshadowing, view loss) to warrant the variation to the building height standard;
- The proposal is in the public interest as it allows for architecturally sound RFB's;

- Will not set an undesirable precinct as the proposed design is in keeping with the desired future character of this neighbourhood and;
- The objection as submitted is, in our view well founded.

6.0 Conclusion

- It is considered that it has been demonstrated that the objection to the strict application of the building height development standard is unreasonable or unnecessary in the circumstances of the case;
- The departures proposed are minor in the context of the development, with the merits for departing from the standard being met, with the building height and R3 zone objectives met, and no unreasonable environmental impacts arising and is in the public benefit as it will allow more appropriate development to be introduced into a neighbourhood that is about to undergo substantial change;
- The departures sought will not set an undesirable precedent in this precinct as the proposed development is consistent with the objectives of the governing planning instrument;
- The flexible application of clause 4.6 will enable a better planning outcome to be achieved without any tangible impacts.
- The increase in Building Height satisfies the Land and Environment Court's test judgments for a well-founded objection to vary a development standard;
- The JRPP have allowed variations to the height control in the Alex Avenue Precinct in the past;
- The change to the Building Height control in the manner sought does not undermine the objects contained in Section 5 (a) (i) & (ii) of the Environmental Planning & Assessment Act 1979:

The development standard is a local planning matter because it is contained within a statutory environmental planning instrument and the variation of such building height standard will have no adverse environmental impacts upon any regional or State matters.

Accordingly, the JRPP as the consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6 (3) of the governing environmental planning instrument and 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 development within the zone in which the development is proposed to be carried out and there are sufficient environmental planning grounds to allow the variation sought.