

**clause 4.6 exception
to development standard
height of building**



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height of building**



**26 - 28 lydbrook street
westmead**

**proposed in fill affordable rental housing (residential
flat building**

prepared for
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1 introduction

1.1 The Submission

This submission has been prepared for Nick Harutoonian to accompany a Development Application (DA) to Parramatta City Council, for a proposed development at 26-28 Lydbrook Street, Westmead. This submission seeks a variation of the development standard contained within Clause 4.3 of the Parramatta Local Environmental Plan 2011 (PLEP 2011) for height of buildings.

1.2 The Proposal

The DA proposes the amalgamation of two allotments, the demolition of the existing buildings on the Site and construction of a four storey residential flat building (RFB) containing 26 apartments. The proposal will include 13 of the apartments as *infill affordable housing* pursuant to the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH).

1.3 Background

This submission has been prepared in accordance with the NSW Department of Planning and Environment's publication "Varying development standards: A Guide" (August 2011).

It is noted that Clause 4.6 of the PLEP 2011 requires the concurrence of the Director-General to be obtained prior to granting of consent for development that contravenes a development standard. Given that the PLEP 2011 is a Standard Instrument, concurrence can be assumed in accordance with the Planning Circular PS 08-003 (dated May 2008).

2 this report

2.1 Case Law

There has been a considerable amount of debate surrounding the application of Clause 4.6 and what matters are required to be addressed. This Report has been prepared having regard to the latest authority on Clause 4.6, contained in the following guiding judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46.
- *Wehbe v Pittwater Council* [2007] NSWLEC 827.
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five No. 1).
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (Four2Five No. 2).
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (Four2Five No. 3).

In summary, the principles arising from the above matters are:

- The consent authority must satisfy itself that there are sufficient environmental planning grounds to justify a variation.
- That the environmental planning grounds must be particular to the circumstances of the proposed development and/or the site (at [60] in Four2Five No. 1).
- The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* remain relevant to satisfy Clause 4.6(3)(a).
- To illustrate *public interest*, it must be demonstrated that the design achieves the objective of the development standard to a greater degree than a development that complied with the standard, would serve.

2.2 Format of this Clause 4.6

This report addresses the provisions of Clause 4.6 as contained within the PLEP 2011 and the Standard Instrument – Principle Local Environmental Plan.

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards. Subclause 4.6(3)(a) and 4.6 (3)(b) of the PLEP 2011 state *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:*

4.6(3)(a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

4.6(3)(b) That there are sufficient environmental planning grounds to justify contravening the development standard.

Subclause 4.6(4) mandates that development consent must not be granted for a development that contravenes a development standard unless a Consent Authority is satisfied:

- (4) *Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or***
- (5) *Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.***

3 ground for objection

This section has been adapted from Appendix 3 of NSW Department of Planning and Environment's publication, *"Varying Development Standards: A Guide"* (August 2011).

3.1 What is the applicable Planning Instrument and Zoning?

The PLEP 2011 is the environmental planning instrument that applies to the Site. The Site is zoned R4 High Density Residential in accordance with the PLEP 2011.

3.2 What are the Zone Objectives?

The objectives of the R4 High Density Residential zone:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.*
- *To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood.*

3.3 What is the standard being varied?

The standard being varied is the building height development standard contained in Clause 4.3 of the PLEP 2011.

3.4 Is the standard to be varied a development standard?

Yes, the building height development standard is considered to be a development standard in accordance with the definition contained in Section 4 (1) of the EP&A Act and not a prohibition.

3.5 Is the development standard a performance based control?

No, the height of buildings development standard is a numerical control.

3.6 What is the underlying object or purpose of the standard?

The relevant objectives of Clause 4.3 are as follows:

- 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.*

3.7 What is the numeric values of the development standard in the environmental planning Instrument?

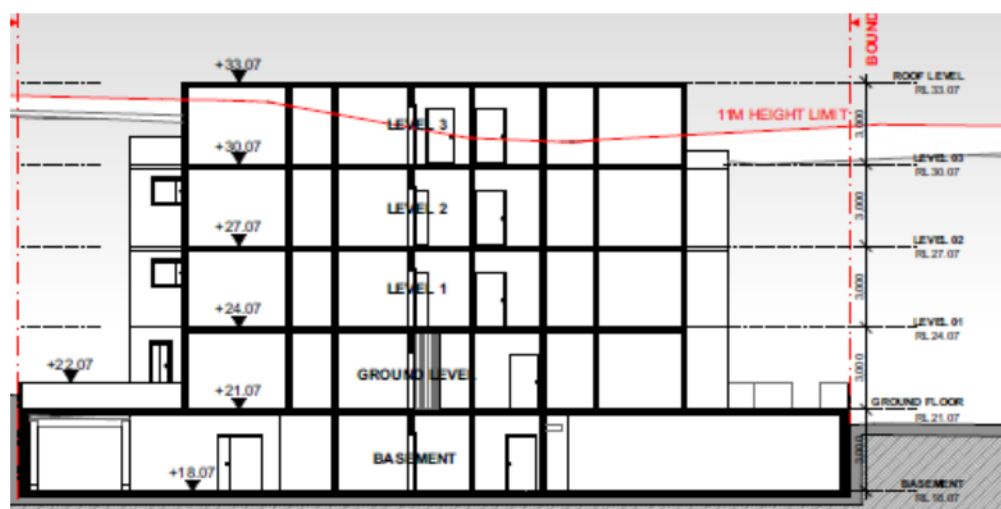
3.7 What is the numeric values of the development standard in the environmental planning Instrument?

Clause 4.3 of the PLEP 2011 establishes a maximum height of buildings as 11m, in accordance with Council's Height of Buildings Map for the Site.

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

The proposed variation to the development standard for height of buildings is 2.3m. The variation relates to the topography of the land, where the existing ground level ranges between RL19.77 – RL21.99. The streetscape analysis in Figure 3.1 below, shows change in topography from the northern boundary to the southern boundary. The extent of the variation is also indicated in Figure 3.1. These figures are extracts from the Architectural Plans, prepared by Ghazi Al Ali Architect Pty Ltd, accompanying the DA.

Figure 3.1 | Extract of Section B with the 11m height line



Source: Architectural plans prepared by Ghazi Al Ali Architect Pty Ltd

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

The maximum percentage of the variation in relation to the height limit applying to the Site is 20.9%.

4 assessment

This section provides an assessment of the proposed variation in relation to the key provisions of Clause 4.6, with reference to the principles established under the relevant case law.

4.1 **Is strict compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case**

The principles for establishing if compliance with a development standard is unreasonable or unnecessary have been established in *Wehbe V Pittwater* [2007] NSW LEC 827. In this instance, the proposal is unreasonable and unnecessary given that it archives the objectives of the zone and objectives of the development standard despite a numerical variation.

In this instance, the underlying objectives are relevant to the development and they would not be defeated or thwarted if compliance was required. Further, Council has not departed from the standard and the zoning of the land is reasonable. Hence, the key test, which applies to the proposal, has been addressed as follows below.

The proposal remains consistent with the relevant environmental or planning objectives for both the zone and the development standard for height of buildings. The objectives of the R4 High Density Residential zone, have been addressed as follows:

The relevant objectives of the zone are:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.*

The proposal provides 26 additional dwellings for the community within an area that is zoned for high density residential. The development will provide a mixture of one and two bedroom apartments with a variety of floor layouts. The proposal will include 13 dwellings that will be provided as affordable rental housing in accordance with the SEPP ARH.

The proposal is close to major services and facilities. The Site is within walking distance to the Western Sydney University Westmead Campus, as well as Westmead Hospital and Westmead Children's Hospital. Cumberland Hospital is also within close proximity to the Site. There are a number of primary and secondary schools within the locality, as well as a number of public recreational facilities in the form of parks and sporting stadiums.

Furthermore, the proposal is close to major transport nodes as there are a number of public transport services within walking distance to the Site. The Site is serviced by regular bus routes from different locations within the area and trains from Wentworthville and Westmead Stations. In addition, the Site is close to the Parramatta CBD, which is the second largest CBD in Sydney and provides the Site with ample facilities and services that meet the day to day needs of the residents, in addition to significant employment opportunities.

The proposal remains consistent with the relevant objectives of *Clause 4.3 height of buildings*, despite the numerical non-compliance as demonstrated in **Table 4.1** below. Objectives (c), (e) and (f) are not relevant to the proposal and accordingly, have not been identified in Table 4.1.

Table 4.1 | Assessment of the proposal against the relevant objectives of Clause 4.3 of the PLEP 2011

Objective	Comment	Consistent
(a) <i>To nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan.</i>	<p>The maximum building height of the proposal has been determined having regard to the surrounding high density residential developments. The Site is one of the only properties in the locality that has not been redeveloped to suit the high density zoning. The Site is also on sloping land where the ground surface level falls some 3m from the north western section of the Site to the south eastern section.</p> <p>The numerical height limit has been considered in the design process and has been a contributing factor to the end design. There are no perceivable implications as the surrounding built forms are similar and therefore, there is no need to transition between height or zoning hence, the proposal is not in conflict with the objective.</p>	Yes
(b) <i>To minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</i>	<p>The proposal will result in a well-designed RFB, which is consistent with the design principles contained within SEPP 65 and the ADG. The proposal does not cause a loss of visual privacy or disruption of views.</p> <p>The proposal does not impact on the neighbouring properties, in relation to solar access, as the existing developments have all been redeveloped in accordance with the R4 High Density zoning. As demonstrated in the Solar Access and Shadow diagrams, there will be no unreasonable impact on the sunlight access or overshadowing to the</p>	Yes

Objective	Comment	Consistent
	<p>surrounding buildings or the public areas as a result of the height variation.</p> <p>In summary, the proposal does not have adverse amenity implications on the surrounding developments.</p>	
(d) <i>To ensure the preservation of historic views.</i>	<p>The proposal does not impact on historic views as the Site is not in any identified View Corridors, as per the Appendix to the PDCP 2011. In addition, the proposal does not impact the views of the existing developments, as they have all been redeveloped in accordance with the R4 High Density zoning. The surrounding properties all consist of three storey RFBs. The Site is one of the last properties within the immediate locality that has not been built up and therefore the proposed development will be less impacted on the surrounding large buildings.</p> <p>In summary, the proposal does not have adverse amenity implications on the surrounding developments and will not impact any historic views of the area.</p>	Yes

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

In defining the “environmental planning grounds”, consideration has been given to the findings of the LEC Judgement *Four2Five v Ashfield Council [2015] NSWLEC 1009*. This judgement established, under paragraph 60, that the environmental planning grounds must be *particular to the circumstances of this proposed development on this site*. In the case of this Site, the proposed variation to the height limit is acceptable on planning grounds given:

- The height variation is due to the variable topography of the land which is at odds with the need for level floorplates, causing a height variation up to 2.3m at the highest point.
- The variation will not be perceptible from the public domain as the upper level is generously setback to allow for the ground floor to be raised in order to level out the Site.
- There will be no adverse amenity impacts on the surrounding properties resulting from the variation.
- The building is located centrally within the Site and provides adequate building separations within the adjoining neighbours.

- The proposal remains consistent with the relevant objectives of the zone and the development standard, despite the variation and is consistent with the test for unreasonable or unnecessary.

For these reasons the proposed variation to the development standard has sufficient environmental planning grounds to justify the contravention in the circumstances specific to the case.

4.3 Is the variation well founded?

The proposed variation is well founded, as demonstrated in the preceding sections of this submission. Compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the EP&A Act, the development standard under the PLEP 2011 and R4 High Density Residential zone. A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result from by restricting the building to the height limit i.e. the extent of excavation required on the Site if the proposal was to have a compliant maximum building height would be significantly greater and might ultimately compromise on the access to sunlight of the ground level units.

The proposal is also consistent with the desired future character of the area and provides a greater level of residential amenity. The surrounding properties have all been recently redeveloped into three storey RFBs and the existing single storey dwelling houses on the Site are the last of that built form left. Through addressing the constraints of the Site, a better planning outcome and built form has been achieved. This has been achieved by raising the ground floor level to allow for less excavation in the basement, as opposed to additional excavation to bring the ground floor down to a lower RL to ensure the height is compliant.

Further, given that the variation to the height is due to the topography of the land, the development has been raised within the north western corner of the Site to allow for the ground floor to be levelled across the whole Site. As a result of this, the building footprint responds to the adverse environmental impacts of the existing ground level. In addition, issues related to overshadowing, additional visual massing and privacy impacts have been addressed in detail. Hence, given that the variation does not result in any adverse impact but improves the overall design of the proposal, it is well justified.

In consideration of the above, Council's attention is also drawn to the Department of Planning and Environment's publication "*Varying development standards: A Guide*" (August 2011), which outlines the matters that must be considered when varying a development standard. The Guide essentially adopts the views expressed by the Court in *Wehbe v Pittwater Council (2001) NSW LEC 827* to the extent that there are five different ways in which compliance with a development standard can be considered unreasonable or unnecessary, namely:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*

The assessment provided above demonstrates that the proposal is generally consistent with, or at least is not antipathetic to the objectives of the building height standard, notwithstanding the numerical variation. The proposed built form will provide a greater level of internal amenity to residents as it provides the future residents with ample private open space on the ground floor, adequate front setbacks that provide a transition from the Site to the north and the Site to the south and ADG compliant building separation to the adjoining neighbours.

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*

The objectives of the building height standard remain relevant and the assessment provided, above, demonstrates that the proposal is generally consistent with, or at least is not antipathetic to the objectives of the building height standard, notwithstanding the numerical variation.

- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.*

The proposal is generally consistent with, or at least is not antipathetic to, the objectives of the building height standard. The compliant level of internal amenity created by the proposal in terms of sunlight access and natural ventilation demonstrates that the proposal is not contrary to the underlying purpose of the standard.

- *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.*

The building height standard has not been abandoned by Council, remains relevant and again, the assessment provided above demonstrates that the proposal is generally consistent with, or at least is not antipathetic to the objectives of the building height standard, notwithstanding the numerical variation.

The proposal seeks approval for a residential flat building which is permissible in the zone. As demonstrated above, the proposal is not seeking approval for a development of such a magnitude and is considered to have satisfied the objectives of the building height standard and results in a significantly better level of internal amenity.

4.4 Is the proposal in the public interest?

The proposal is in the public interest and will better achieve the objectives of the standard given the following:

- The provisions of additional affordable housing.
- The reduction in the extent of excavation required on the Site, which will mean less material will need to be taken off-site to be used as landfill;
- Less excavation means that the overall level of internal amenity will be better as the units on the ground floor are not excavated into the ground, which translates into a better level of solar access and hence, internal amenity.
- The provision of 26 additional dwellings in an area, which are accessible and located close to major transport nodes, services and facilities that meet the day to day needs of the residents and increased employment opportunities.
- No additional amenity impacts on adjoining properties as a result of the variation to that of a complaint scenario.
- The proposed section of the building, which will vary the height limit, responds to the potential adverse environmental impacts by levelling the Site with the highest existing RL, which results in a significant reduction in excavation.

5 conclusion

This submission satisfies the provisions of 4.6 (3)(a) and (b) and 4.6 (4)(a)(i) of Parramatta Local Environmental Plan 2011. It has been demonstrated that compliance with the height of buildings development standard under Clause 4.3, is both unnecessary and unreasonable in the circumstances of this case and there are sufficient planning grounds to justify contravening the standard. In addition, the proposed variation has sound environmental planning grounds, will result in a better planning outcome than what a compliant solution might have in the particular circumstances of the Site and will be in the public interest. The proposed variation to Clause 4.3 provides less environmental implications to that of the Site and will not compromise the integrity of the development as a whole. Accordingly, Council's support to vary the height of buildings standard is sought.