

## Clause 4.6 – Request to Vary a Development Standard

CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS – CLAUSE 4.3 OF APPENDIX 4 OF STATE ENVIRONMENTAL PLANNING POLICY (SYDNEY REGION GROWTH CENTRES) 2006 – HEIGHT OF BUILDINGS

### 1 Introduction

This written request has been prepared in accordance with the provisions of Clause 4.6 – Exceptions to Development Standards contained within Appendix 4 *Alex Avenue and Riverstone Precinct Plan 2010* of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (the SEPP).

This request seeks a variation to the Height of Building development standard adopted under clause 4.3 of Appendix 4 of the above SEPP.

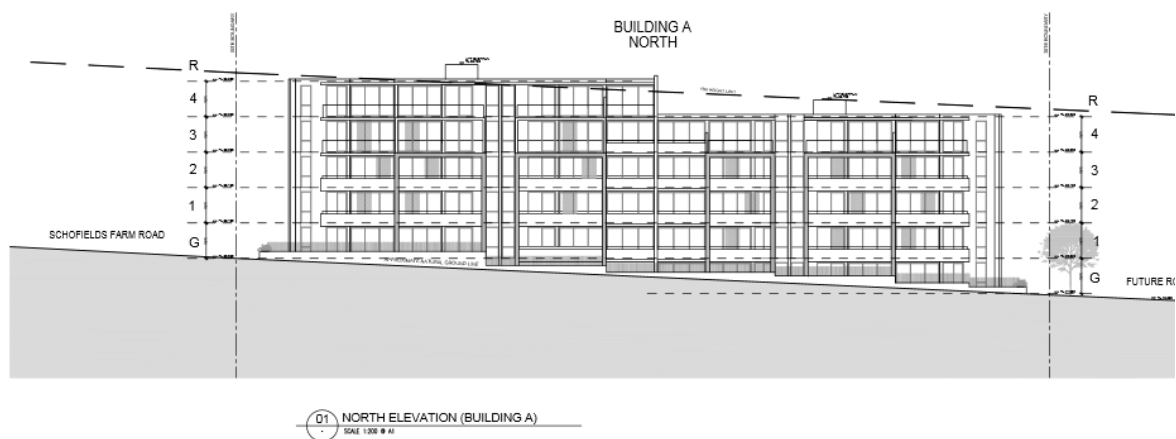
The Height of Buildings Map sets a maximum height standard of 16m for the site.

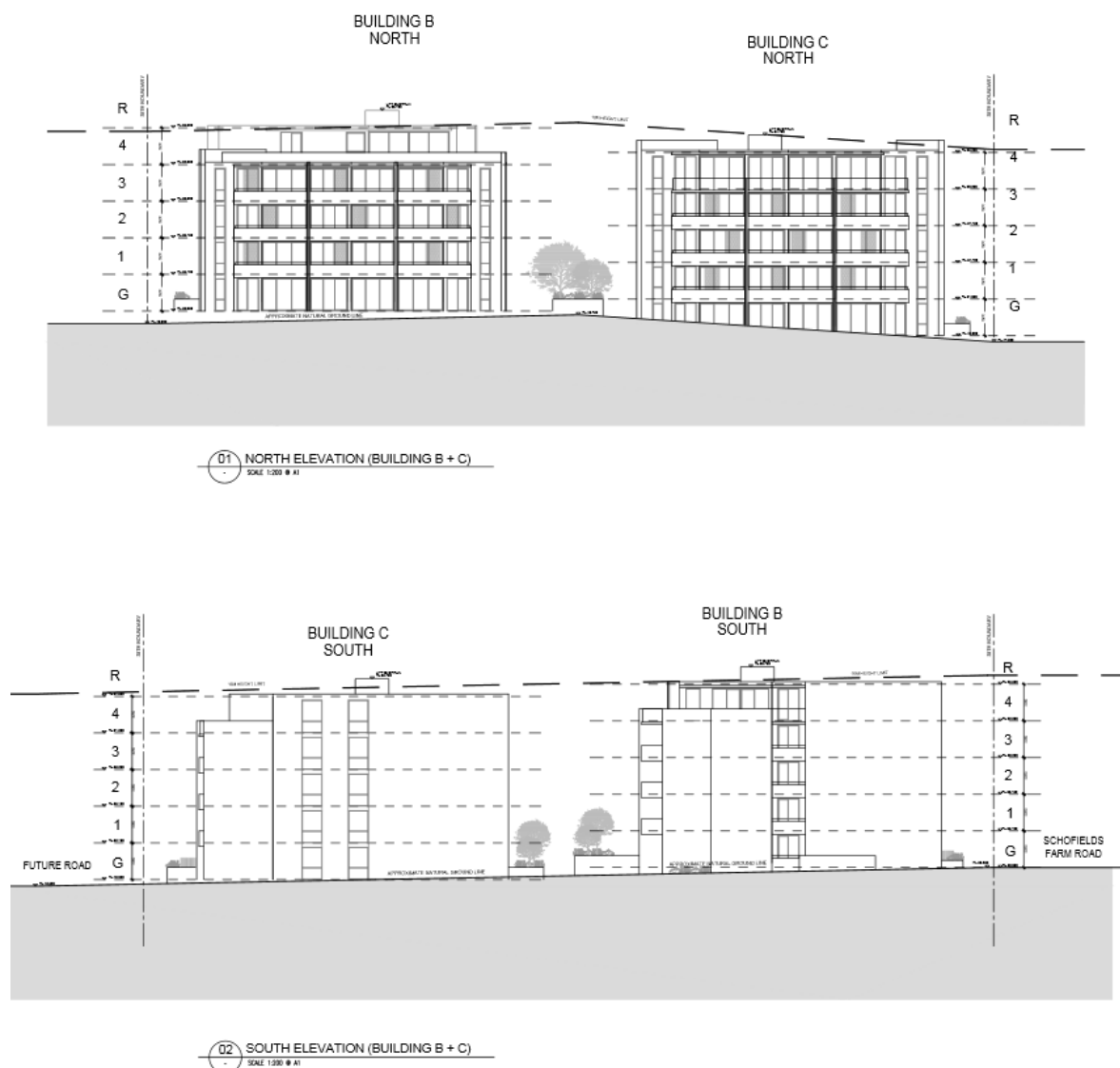
### 2 Proposed Development

The proposed development will result in a maximum height of 16.7m to 16.2m from several localised areas, associated with the lift overruns, parapets and parts of the uppermost floor. This height exceedance equates to 1.6m to 0.2m above the height limit. All other parts of the building remain in compliance with and below the development standard as illustrated in the images.

Refer to the full set of architectural plans submitted that identify the maximum building height superimposed on all elevations and sections.

FIGURE 1 – EXAMPLES OF ELEVATIONS AND SECTIONS WHERE MAXIMUM BUILDING HEIGHT IS EXCEEDED





### 3 Principles of Exceptions to Development Standards

#### 3.1 ENVIRONMENTAL PLANNING INSTRUMENT PROVISIONS - CLAUSE 4.6

Clause 4.6 of Appendix 4 *Alex Avenue and Riverstone Precinct Plan 2010* of the SEPP provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development. Subclauses (3), (4), and (5) from clause 4.6 are extracted below:

- (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) *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 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 Director-General before granting concurrence.*

### 3.2 NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters are outlined in the following discussion.

#### 3.2.1 WINTEN V NORTH SYDNEY COUNCIL

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the *Standard Instrument templates*.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- 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 EP&A Act;

- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded.

### 3.2.2 *WEHBE V PITTWATER [2007] NSW LEC 827*

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- 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
- 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.

### 3.2.3 *FOUR2FIVE PTY LTD V ASHFIELD COUNCIL [2015] NSW LEC*

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity); and
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

## 4 Consideration of Planning Particulars

The following section addresses the provisions of clause 4.6 of Appendix 4 of the SEPP together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

### 4.1 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The planning control in question is clause 4.6 of Appendix 4 of the SEPP which provides a maximum height of 16m for the site. The planning control as a numerical control is a development standard capable of being varied under the provisions of clause 4.6.

### 4.2 WHAT IS THE UNDERLYING OBJECTIVE OF THE STANDARD?

The relevant objectives for the height development standard provided at subclause 4.3 (1) of of Appendix 4 of the SEPP state the following:

(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 land and 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.*

The proposed development is considered consistent with the relevant objectives of the control for the reasons outlined in **Table 1**.

TABLE 1 – CONSISTENCY OF THE PROPOSED DEVELOPMENT WITH THE HEIGHT OBJECTIVES

| HEIGHT OF BUILDING OBJECTIVES                                                                                                    | ASSESSMENT                                                                                                                                                                                                                                                                    |
|----------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>(a) to establish the maximum height of buildings for development on land within the Alex Avenue and Riverstone Precincts,</i> | <ul style="list-style-type: none"> <li>The proposed additional height is minimal and will not materially affect the height of the approved building which is compatible with the future character of the locality.</li> </ul>                                                 |
| <i>(b) to protect the amenity of adjoining land and in terms of solar access to buildings and open space,</i>                    | <ul style="list-style-type: none"> <li>The areas of the buildings that exceed the height limit are located in isolated areas, generally the central area of the rooftops and will not contribute towards solar access loss to adjacent development and open space.</li> </ul> |

| HEIGHT OF BUILDING OBJECTIVES                                                                                                                                                                                               | ASSESSMENT                                                                                                                                                                                                                                                                                                                                                |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>(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,</i> | <ul style="list-style-type: none"> <li>As provided above, the areas of the buildings that exceed the height limit will not impact on adjacent planned residential developments or open space areas.</li> </ul>                                                                                                                                            |
| <i>(d) to provide for a range of building heights in appropriate locations that provide a high quality urban form.</i>                                                                                                      | <ul style="list-style-type: none"> <li>The proposed additional height is minimal does not materially contribute to the bulk and scale of the proposed development. The development has been designed as a high quality contemporary urban form comprised of several buildings that are designed to appropriately address all street frontages.</li> </ul> |

The development despite the non-compliance with the development standard is consistent with the planning and environmental objectives of the control.

#### 4.3 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 EP&A ACT

The aims and objectives of SEPP No.1 are as follows:

*“To provide flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or necessary or tend to 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:

*“(a) 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 co-ordination of the orderly and economic use and development of land...”*

The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within the Riverstone Precinct priority growth area under the SEPP and the development will provide 651 dwellings that will contribute towards the economic use of the land as sought under the SEPP and the land use zone.

#### 4.4 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 (1) of Appendix 4 of the SEPP. Refer to discussion in section 4.2 above.
- The exceedance in height is marginal and limited to 1.6m to 0.2m in several isolated areas the rooftop. The majority of the building remains within the development standard.
- The visual impact and shadow impacts associated with the additional height is negligible.
- The non-complying area relates to several localised areas associated with the lift overruns, parapets and parts of the uppermost floor. Neither of these elements is associated with significant adverse environmental or amenity impacts.
- The potential environmental impacts of the variation have been documented and detailed in the submitted Statement of Environmental Effects. It is our view that compliance in this instance would not contravene the environment planning objectives.

Taking into account the above, the particular circumstances of this application it is neither, reasonable or necessary to require compliance with the standard.

#### 4.5 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is not a performance based control.

#### 4.6 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? GIVE DETAILS.

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- There are no shadow impacts to public spaces or adjacent future developments.
- The visual impacts associated with the portions of the building that exceed the height limit are negligible.
- The variation does not result in unreasonable adverse sunlight or privacy amenity impacts on adjacent land.

#### 4.7 IS THE OBJECTION WELL FOUNDED?

The proposed exception to the height development standard will facilitate achieve a more appropriate stepped building form relative to the site's topography and to achieve a most balanced cut and fill approach relative to the site's natural ground level. The proposed variation to the height limit does not result in unreasonable or significant adverse environmental (social, economic or biophysical) impacts having regards the expected future built form.

#### 4.8 WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The non-compliance will not raise any matter of State or Regional Significance.

#### 4.9 IS THERE A PUBLIC BENEFIT OF MAINTAINING THE PLANNING CONTROL STANDARD?

The proposed development is not contrary to the public interest and accordingly there can be no quantifiable or perceived public benefit in maintaining the standard. Given the nature of the proposed variation, there would be no public benefit in applying the control strictly. Appropriate built form design elements, visual analysis and consistency with the broader controls supports this.

## 5 Conclusion

The height of the proposal results in a negligible exceedance in building height limit by 1.6m to 0.2m of the 16m height limit and is limited to localised areas of the upper roof levels.

Taking into account the particular circumstances of this development, strict compliance with the numerical standard in this instance is both unreasonable and unnecessary owing to the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 (1) of Appendix 4 of the SEPP.
- The visual impact of the additional height is negligible.
- The sunlight loss attributed by the additional height is negligible.
- The SEE demonstrates that there are no significant impacts associated with the proposed development, particularly since there is no solar access or privacy impacts on nearby properties or the public domain as a result of the height variation.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.