

REQUEST FOR AN EXCEPTION TO THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 4.3 of the Parramatta Local Environmental Plan 2011. The request relates to an application for the erection of a residential development at Lot 5, 158-164 Hawkesbury Road and 2A Darcy Road, Westmead.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Parramatta Local Environmental Plan 2011 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Parramatta Local Environmental Plan 2011, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

Clause 4.6 requires a qualitative merit assessment based on evaluative questions that are specific to each particular development application, and which must be assessed against the context of that particular site. It advocates an entirely performance-based approach to the assessment of each application, based upon the “the circumstances of the case”, and whether compliance is subjectively considered by the consent authority to be “unreasonable or unnecessary” in the particular circumstances.

Clause 4.6 does not provide any quantitative or numerical limitation to cap the extent of non-compliance that may be approved. This conclusion has been confirmed by the Courts on a number of occasions such as the Court upheld decision of North Sydney Council to approve a building where the applicable FSR control was 3.5:1 and the approved FSR was 15:1 and the applicable height control was five storeys whereas the approved height was 17 storeys: *Legal and General Life v North Sydney MC*. (1989) 68 LGRA 192. Similarly, in another matter the Court approved an FSR of 5:1 on a site where the allowable FSR was 1:1: *Hosking Munro Pty Limited v City of Sydney Council* [2008] NSWLEC 1485.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause 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,
 - (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,
 - (f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.
- (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.

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point 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.

There are three height controls applicable to the subject site being 31 metres (Zone U1) in the eastern portion of the site, 40 metres (Zone W) in the north-western portion of the site and 48 metres (Zone X) for the south western portion of the site.

Extent of Variation to the Development Standard

A comparison of the proposed heights against the development standard applicable to the site is illustrated below:

Element	Proposed Height	Variation to 31m control	Variation to 40m control	Variation to 48m control
Building A1	34.6m – parapet 39.6m - top of plant	+8.6m (27.7% over)	-0.4m (1% under)	-8.4m (17.5% under)
Building A2	13.5m – parapet	-17.5m (56.4% under)	N/A	-34.5m (71.8% under)
Building B1	47.6m – parapet 51.6m - top of plant	+20.6m (66.4% over)	N/A	+3.6m (7.5% over)
Building B2	26.4m – parapet 30.4m - top of plant	N/A	N/A	-17.6m (36.6% under)
Building B3	79.1m – parapet 83.1m - top of plant	N/A	N/A	+35.1m (73.1% over)

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

The Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has recently required additional ways of establishing that compliance is unreasonable or unnecessary beyond consistency with the standard and zone objectives to be established. For completeness, this request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the building height development standard, as specified in clause 4.3 of the Parramatta Local Environmental Plan 2011 are identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,

The proposed distribution of height across the site is to provide sufficient capacity to accommodate the floor space within slimmer buildings with much greater separation as well as providing an appropriate curtilage to the heritage buildings located to the east of Lot 5. The highest component of the proposed development (the 24 storey tower) is located on the south western portion of the site and is consistent with the intent of the LEP in terms of the distribution of height across the overall site. The proposal incorporates lower building heights on the northern and eastern portions of the site, and accordingly provides an appropriate transition in built form and land use intensity within the area.

- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

There are no adverse impacts in terms of view, visual and acoustic privacy impacts resulting from the proposed variation to the height of buildings development standard which would warrant strict compliance. The solar analysis prepared by Turner Architects that accompanies the subject application demonstrates that the proposal does not result in a significant adverse impact to the surrounding properties.

- (c) to require the height of future buildings to have regard to heritage sites and their settings,

The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome that will provide an appropriate curtilage to the heritage significant buildings located to the east. The height of the buildings increase away from the heritage significant buildings and are at their highest at the furthestmost point from these buildings. The proposed materials and finishes have been chosen to compliment the St Vincent's Building with face brickwork proposed for the part of the development in close proximity to the heritage building. The proposed development will have an acceptable impact on views to and from heritage items. Overall the proposal will have an acceptable impact on the heritage significance of nearby heritage items and their settings.

(d) to ensure the preservation of historic views,

The proposed development will not have any meaningful impact on historic views.

(e) to reinforce and respect the existing character and scale of low density residential areas,

Low density residential development is located to the south of the site on the opposite side of the railway corridor and with frontage to Alexandra Avenue. Lot 5 is visually isolated from the low density residential development with frontage to Alexandra Avenue given the width of the railway corridor and the dense landscaping that surrounds the railway corridor. The level of separation between the subject site and nearby low density residential development will ensure that the character of these areas are respected and not unreasonably compromised by the proposed development.

(f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

The proposed variation to the height control allows the proposed floor space within the development to be accommodated within slimmer buildings which ensures that nearby properties and public domain areas are not disadvantaged in terms of exposure to sky and daylight.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height control is relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height will facilitate an appropriate scale of development having regard to the location of Lot 5 within the overall site the subject of the Stage 1 Concept Plan as well as the Westmead precinct generally. The development will sit comfortably with the context of the site with no significant adverse impacts to surrounding properties.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the proposed development, it successfully achieves these objectives. Strict compliance with the height control would lead to a less satisfactory outcome as it would require a redistribution of mass across the site and result in a bulkier built form. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site and surrounding area.

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;

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved and has indicated a

willingness to consider redistribution of height in such circumstances where this facilitates an improved urban design outcome.

The height controls for the site were derived from the ARUP masterplan which informed the Planning Proposal for the site. However, this masterplan has more recently been considered by Council to be “suboptimal” and Council has approved a substantially different site layout and suggested arrangement of buildings under Stage 1 Concept Plan (DA/571/2014) which relied upon a Clause 4.6 request in relation to height. As a result, the height controls and boundaries no longer correspond with the approved site arrangement and configuration as illustrated in Figure 1 below such that Council has effectively abandoned the height controls for the site. Notwithstanding this, the broad principles reflected by the height controls, with increasing height to the west and the south, are considered to remain relevant and the proposed development adheres to these principles with the tallest buildings along the southern end of the site



Figure 1:

Site layout approved under the Stage 1 Concept Plan (DA/571/2014) with overlay of the PLEP height controls

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.

The proposed zoning of the land is considered to be reasonable and appropriate.

The proposed variation to the building height development standard is reasonable and necessary in the circumstances of the case in that:

- The height controls for the site were derived from the ARUP masterplan which informed the Planning Proposal for the site. However, this masterplan has more recently been considered by Council to be “suboptimal” and Council has approved a substantially different site layout and suggested arrangement of buildings under Stage 1 Concept Plan (DA/571/2014) which relied upon a Clause 4.6 request in relation to height. As a result, the height controls and boundaries no longer correspond with the approved site arrangement and configuration such that Council has effectively abandoned the height controls for the site. Notwithstanding this, the broad principles reflected by the height controls, with increasing height to the west and the south, are considered to remain relevant and the proposed development adheres to these principles with the tallest buildings along the southern end of the site.
- The proposal provides a high quality architectural solution that is responsive to the location of the site on the southern edge of the Westmead precinct and will provide a clearly defined entry into Westmead from the south.
- The proposed massing of the development results in a high level of modulation with the building height decreasing toward the north and east to provide a transition in scale to the heritage significant buildings to the east and the open space areas to the north such that the proposed arrangement of heights is appropriate for the site and its context.
- The proposed variation to the height controls allows the floor area of the development to be accommodated within slimmer buildings with much greater separation as well as providing an appropriate curtilage to the heritage buildings located to the east of Lot 5. The proposed variation also facilitates a greater level of modulation in scale between the various buildings within the development as well as improved environmental performance within the development, reduced impacts on surrounding properties, and a much higher level of visual permeability throughout the site.
- The desired future character outlined for the subject site within section 4.3.4.1 of the PDCP indicates that the future built form on the site shall include taller, slender “statement” buildings located along the railway line to enable a strong visual relationship between the precinct and the CBD. The proposal appropriately responds to the desired future character, providing two towers adjacent to the railway corridor which are 15 and 24 storey in height. The two towers are proposed to be separated by an 8 storey building component, satisfying the requirement that tall slender statement buildings be provided to enable a visual connection between the Westmead precinct and the Parramatta CBD located to the east.
- The design of the proposal involves a dynamic architectural language and a façade treatment with a high level of materiality that will compliment and improve the character of the area.
- A solar analysis prepared by Turner Architects accompanies the subject application and demonstrates that the proposal does not result in a significant adverse impact to the surrounding properties.
- There are no adverse impacts in terms of overshadowing, views, visual and acoustic privacy impacts to adjacent sites resulting from the proposed variation to the height development standard which would warrant strict compliance.
- Apartments within the development are provided with a high level of amenity. The proposal provides for open space and deep soil in accordance with the relevant requirements.
- The proposed variation allows for the most efficient and economic use of the land.

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

As the proposal is consistent with the objectives of the height of buildings control, strict compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the desired future character of the site and the Westmead precinct generally and the desire to deliver a positive urban design outcome.

The location and scale of the buildings have been specifically designed as a robust architectural solution for the site which optimises solar access both within the site and for adjacent sites as well as providing a high level of modulation to the skyline. The proposed arrangement of buildings across the site will facilitate the achievement of the identified floor space for the site whilst achieving compliant building separation, solar access and cross ventilation for the development. The proposed arrangement of buildings heights across the site will allow for an appropriate curtilage to the heritage significant buildings located to the east. In addition, the scale of each individual building within the overall development is also modulated which further assists in creating opportunities for differing architectural language and visual interest.

The scale of the proposed development does not result in any unreasonable impacts on the surrounding properties in terms of views, loss of privacy or visual impact. The architectural package includes a solar access analysis which demonstrates that the proposed scale of the development will not unreasonably overshadow development on surrounding properties.

The scale of the buildings will not be perceived as jarring or antipathetic in the future streetscape and urban design context which will develop in the area.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the current height controls as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any significant adverse impact to adjacent sites.

Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Whilst the objectives of the development standard have already been addressed previously in this written request, for the purpose of completeness these objectives are again considered below in specific reference to Clause 4.6(4)(a)(ii)

Objective of the Development Standard

The specific objectives of the building height development standard, as specified in clause 4.3 of the Parramatta Local Environmental Plan 2011 are identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,

The proposed distribution of height across the site is to provide sufficient capacity to accommodate the floor space within slimmer buildings with much greater separation as well as providing an appropriate curtilage to the heritage buildings located to the east of Lot 5. The highest component of the proposed development (the 24 storey tower) is located on the south western portion of the site and is consistent with the intent of the LEP in terms of the distribution of height across the overall site. The proposal incorporates lower building heights on the northern and eastern portions of the site, and accordingly provides an appropriate transition in built form and land use intensity within the area.

- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

There are no adverse impacts in terms of view, visual and acoustic privacy impacts resulting from the proposed variation to the height of buildings development standard which would warrant strict compliance. The solar analysis prepared by Turner Architects that accompanies the subject application demonstrates that the proposal does not result in a significant adverse impact to the surrounding properties.

- (c) to require the height of future buildings to have regard to heritage sites and their settings,

The proposed distribution of built form and massing of the buildings across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome that will provide an appropriate curtilage to the heritage significant buildings located to the east. The

height of the buildings increase away from the heritage significant buildings and are at their highest at the furthestmost point from these buildings. The proposed materials and finishes have been chosen to compliment the St Vincent's Building with face brickwork proposed for the part of the development in close proximity to the heritage building. The proposed development will have an acceptable impact on views to and from heritage items. Overall the proposal will have an acceptable impact on the heritage significance of nearby heritage items and their settings.

(d) to ensure the preservation of historic views,

The proposed development will have any meaningful impact on historic views.

(e) to reinforce and respect the existing character and scale of low density residential areas,

Low density residential development is located to the south of the site on the opposite side of the railway corridor and with frontage to Alexandra Avenue. Lot 5 is visually isolated from the low density residential development with frontage to Alexandra Avenue given the width of the railway corridor and the dense landscaping that surrounds the railway corridor. The level of separation between the subject site and nearby low density residential development will ensure that the character of these areas are respected and not unreasonably compromised by the proposed development.

(f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

The proposed variation to the height control allows the proposed floor space within the development to be accommodated within slimmer buildings which ensures that nearby properties and public domain areas are not disadvantaged in terms of exposure to sky and daylight.

Objective of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone pursuant to the Parramatta Local Environmental Plan 2011 (PLEP) which has the following objectives:

- 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.
- To encourage development that contributes to an active, vibrant and sustainable neighbourhood.
- To create opportunities to improve the public domain and pedestrian links.
- To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.
- To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre.

The vision for the overall site as outlined in the Master Plan that accompanied the Stage 1 development application has been for a transit-oriented development that intensifies and diversifies activity around public transport infrastructure allowing for multiple activities and services, local employment and diverse

housing options. The site is extremely well located in terms of access to public transport infrastructure with the T-Way and Westmead railway station located in close proximity. The proposed residential development on Lot 5 will deliver additional housing choice within a regionally significant health and education hub that is in close proximity to a range of recreational opportunities and services and facilities and will maximise public transport patronage, cycling and walking.

The architecture of the development with buildings orientated where possible to the street and toward an internal common landscaped open space, combined with the development being set within a high quality public domain will result in activated and vibrant places that are used at all times of the day, increasing safety.

The redevelopment of the overall site has been designed to provide a high level of pedestrian permeability and creates new linkages between the railway station and nearby schools and hospitals and a high level of connectivity with the existing urban fabric. The proposal exhibits a high level of environmental performance, provides a high level of amenity and an attractive contemporary architectural expression.

For the reasons given the proposal is considered to be consistent with the objectives of the B4 Mixed Use zone.

Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

The architectural package prepared by Turner Architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high quality outcome for the site which will result in the delivery of an integrated community of buildings with significant separation set around a central open space area which collectively will contribute significantly to the amenity afforded to the general public and future occupants alike.

The Urban Design Report prepared by Turner Architects also demonstrates a possible built form outcome which would occur with the achievement of the identified floor space for the site if strict compliance with the height control was required and demonstrates that the proposed development results in profoundly improved outcome for the site. This outcome is only possible with a variation to the height controls.

The development application has therefore demonstrated that it is appropriate in this circumstance to provide flexibility in the application of the building height development standard because this will achieve a significantly better urban design outcome in this instance.

Conclusion

The proposed variation to the height of buildings development standard contained within clause 4.3 of the Parramatta Local Environmental Plan 2011 has been found to be reasonable and necessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the

variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed in this circumstance.