



# Clause 4.6 Variation Request

## Building Height Development Standard

## Campbelltown Local Environmental Plan 2015

28 Cordeaux Street, Campbelltown

Submitted to Campbelltown City Council  
On Behalf of Campbelltown No. 1 Property Developments Pty Ltd

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## 1. Introduction

This report seeks an exemption to a development standard prescribed by the Campbelltown Local Environmental Plan 2015 (Campbelltown LEP 2015). The report relates to a Statement of Environmental Effects (SEE) and a Development Application (DA) proposing the demolition of the existing structures on the site and the construction of a “residential flat building” and “commercial premises”, at 28 Cordeaux Street, Campbelltown. The development comprises a ten (10) storey building, with retail/commercial premises at ground floor, one-hundred and five (105) apartments on Levels 1 to 9, and two (2) basement levels containing one-hundred and forty-six (146) car parking spaces.

The exception is sought pursuant to Clause 4.6 of the Campbelltown LEP 2015. An exception is sought in relation to the strict application of the height of building development standard which applies to the subject site, pursuant to Clause 4.3 of the Campbelltown LEP 2015. Specifically, a limited section of the proposal achieves a maximum building height of 34.09 metres, whereas the maximum height prescribed by Clause 4.3 is 32 metres.

It should be noted that the vast majority of the proposal complies with the maximum permitted building height, and the exception relates to a limited portion of the proposal, to provide for sufficient height for the lift over-runs, stairs and services at roof level. The lifts and stairs in this case provide access to/from a communal, roof top recreation area. The lifts, stairs and service facilities are screened, kept at a consistent height and form, set back from the roof edge, and will not be visible from adjacent street and properties.

The maximum building height development standard is also breached as a result of a proposed architectural roof feature. As has been demonstrated in the SEE accompanying the DA, the roof feature is proposed pursuant to, and in accordance with Clause 5.6 of the Campbelltown LEP 2015. This clause allows for height breaches arising from architectural roof features, without relying on Clause 4.6 of the Campbelltown LEP 2015.

This request has been prepared in accordance with the Department of Planning & Environment's (DP&E) Guideline for Varying Development Standards: A Guide, August 2011, and has incorporated as relevant principles identified in the following judgements:

1. *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
2. *Wehbe v Pittwater Council* [2007] NSWLEC 827
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
4. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
5. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
6. *Moskovich v Waverley Council* [2016] NSWLEC 1015

## 2. What is the environmental planning instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Campbelltown Local Environmental Plan 2015 (Campbelltown LEP 2015).

## 3. What is the zoning of the land?

The zoning of the land is 'B4 Mixed Use' and 'SP2 Infrastructure' pursuant to the Campbelltown LEP 2015, as shown on the following page.

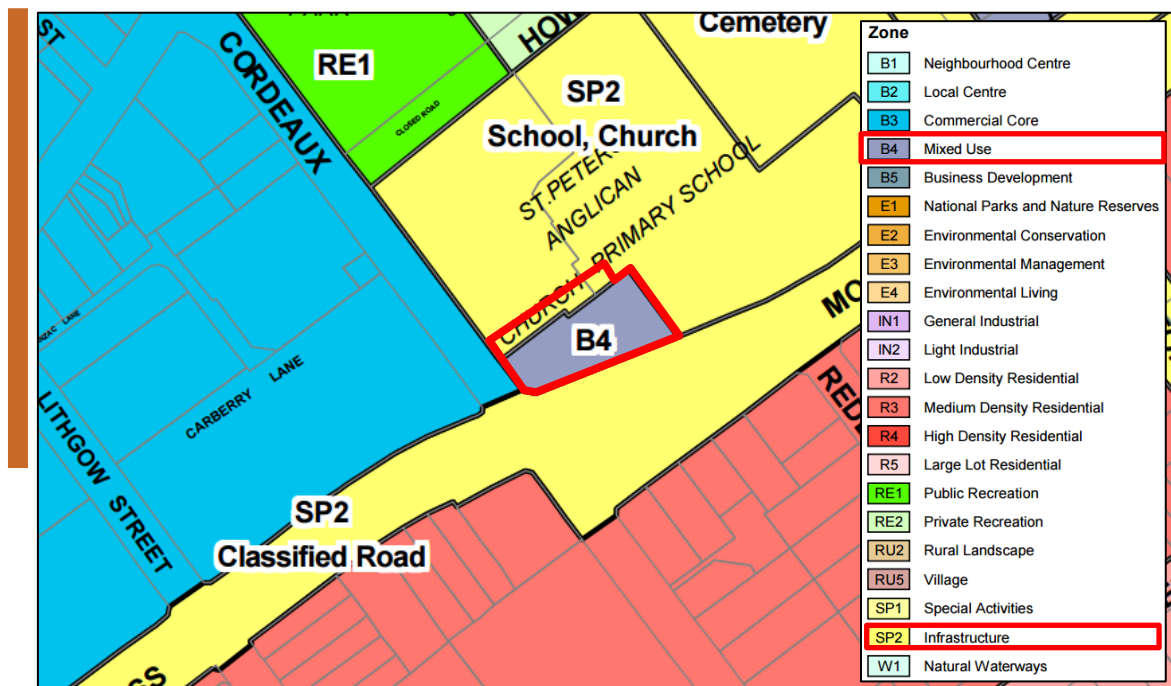


Figure 1: Extract of Land Zoning Map pursuant to CLEP (Source: NSW Legislation).

Approximately 10m of the proposal's footprint extends into the SP2 zone, as shown above. As demonstrated in the SEE, although "residential flat buildings" and/or "commercial premises" are prohibited in the SP2 zone, there are benefits in terms of building design, internal amenity and site accessibility by extending marginally within the SP2 zone. The DA relies on the land use flexibility provisions provided by Clause 5.3(4) of the Campbelltown LEP 2015, to facilitate the proposed development across these zones.

We note, that in the assessment of the proposed development's building height exceedance, more weight shall be given to an examination of the site within the B4 Mixed Use zoning rather than the SP2 zone, as the area that breaches the height control is contained within the B4 zone.

#### 4. What are the objectives of the zone?

The objectives of the B4 Mixed Use zone are as follows:

- "To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To encourage the timely renewal and revitalisation of centres that are undergoing growth or change.
- To create vibrant, active and safe communities and economically sustainable employment centres.

- *To provide a focal point for commercial investment, employment opportunities and centre-based living.*
- *To encourage the development of mixed-use buildings that accommodate a range of uses, including residential uses, and that have high residential amenity and active street frontages.*
- *To facilitate diverse and vibrant centres and neighbourhoods.*
- *To achieve an accessible, attractive and safe public domain.”*

The objectives of the SP2 Infrastructure zone are provided below:

- *“To provide for infrastructure and related uses.*
- *To prevent development that is not compatible with or that may detract from the provision of infrastructure.*
- *To encourage activities involving research and development.*
- *To optimise value-adding development opportunities, particularly those associated with research.*
- *To provide for the retention and creation of view corridors.*
- *To preserve bushland, wildlife corridors and natural habitat.*
- *To maintain the visual amenity of prominent ridgelines.”*

## **5. What is the development standard being varied?**

The development standard being varied is “height of buildings” standard.

## **6. Under what clause is the development standard listed in the EPI?**

The development standard being varied is prescribed under Clause 4.3(2) of the Campbelltown LEP 2015. An extract is provided on the following page.

#### “4.3 Height of buildings

(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](#).”

The height of buildings map extract is below noting that the site is prescribed with a maximum 32 metre height standard.

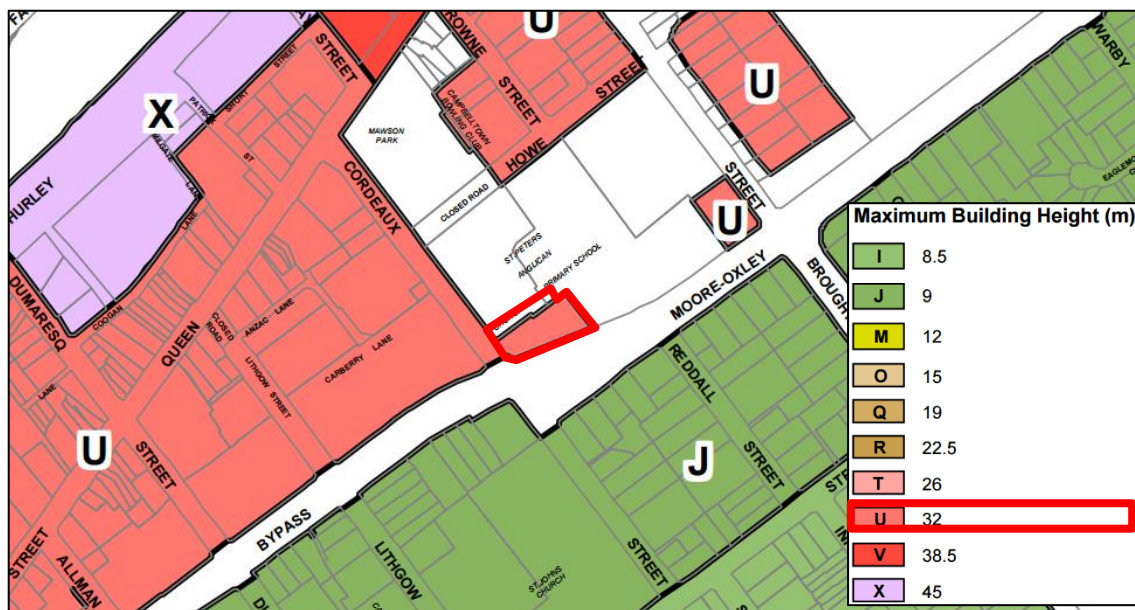


Figure 2: Extract of Height of Buildings Map pursuant to CLEP (Source: NSW Legislation).

#### 7. What are the objectives of the development standard?

The objectives of the standard are set out below:

#### “4.3 Height of Buildings

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

(a) to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,

(b) to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,

(c) to provide for built form that is compatible with the hierarchy and role of centres,

(d) to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.”

## 8. What is the numeric value of the development standard in the EPI?

The subject site has a maximum allowable building height of 32 metres when measured from existing ground level.

## 9. What is the proposed numeric value of the development standard in the DA and the variation proposed?

The proposal adopts a maximum RL of 113.94. This equates to a maximum, non-compliant proposed building height of 34.09 metres. The proposed numerical variation to the maximum allowable height is 2.09 metres (i.e. a 6.53% variation of the standard is sought). However, as can be seen in the architectural plans, extracts of which are below, the vast majority of the proposal is within the maximum 32m building height. Further, the non-compliance is limited to the lift over-runs, stairs and services at roof level.

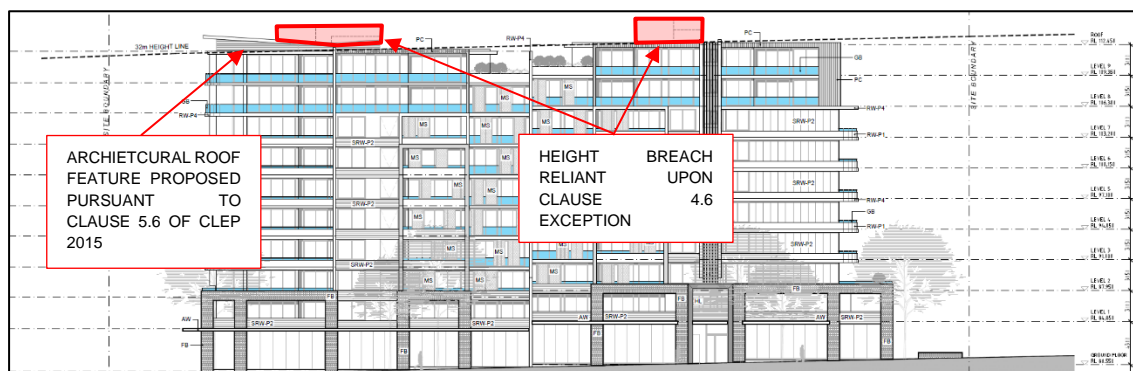


Figure 3: South Elevation of the proposed development indicating the exceedance of the height limit with seeks an exception pursuant to Clause 4.6 of the Campbelltown LEP 2015 (outlined in red).

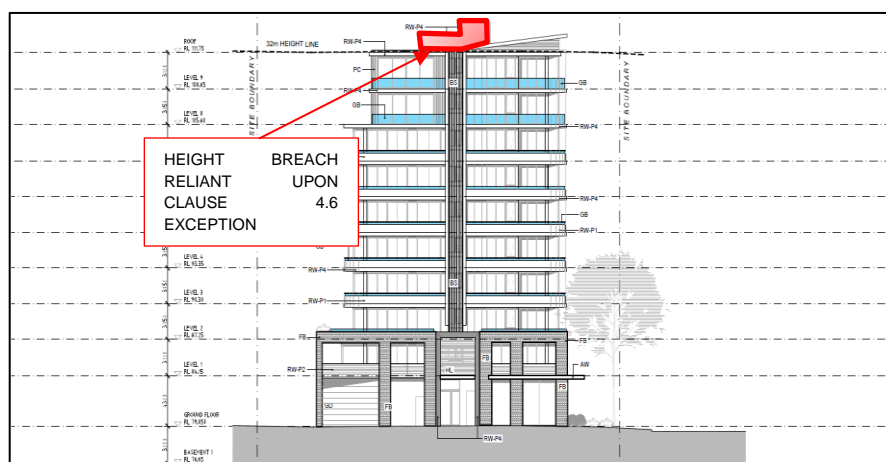


Figure 2: South Elevation of the proposed development indicating the exceedance of the height limit with seeks an exception pursuant to Clause 4.6 of the Campbelltown LEP 2015 (outlined in red).

## 10. Matters to be considered under Clause 4.6 of the relevant EPI

The following table provides a summary of the key matters for consideration under Clause 4.6 of the Campbelltown LEP 2015 and a response as to where each is addressed in this written request:

**TABLE 1: KEY MATERS FOR CONSIDERATION UNDER CLAUSE 4.6 OF CAMPBELLTOWN LEP 2015**

Requirement/Subclause of Clause 4.6	Response/Comment
<p>(1) The objectives of this clause are as follows:</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing a better planning outcome ensues.</p>
<p>(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.</p>	<p>The maximum building height development standard under clause 4.3(2)) is not expressly excluded from operation of this clause.</p>
<p>(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:</p> <p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>This written request seeks to justify the variation by demonstrating (a) is achieved (refer to <b>Section 11</b> below), and (b) is achieved (refer to <b>Section 12</b> below).</p>
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Director-General has been obtained.</p>	<p>This written request addresses all requirements of subclause (3).</p> <p>As set out in <b>Section 13</b> of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone. Concurrence is assumed but is a matter to be determined by the consent authority.</p>
<p>(5) In deciding whether to grant concurrence, the Director-General must consider:</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p> <p>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.</p>	<p>Potential matters of significance for State or regional environmental planning are addressed in <b>Section 14</b> below.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in <b>Section 13</b>.</p>
<p>(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.....</p>	<p>Does not apply.</p>
<p>(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).</p>	<p>This is a matter for the determining authority.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following....</p>	<p>Does not apply to the site/proposed variation.</p> <p>It is noted that subclause (8)(ca) ceased to take effect on 31 December 2015 pursuant to clause 4.6(8A).</p>

The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of a number of criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact is of considerable merit.

The proposed exception to the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, we believe that it is useful to apply in the consideration of a request under Clause 4.6 of the Campbelltown LEP 2015, as confirmed in *Four2Five*.

#### **11. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?**

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the non-compliance. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).

The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

The objectives of the standard are set out in Section 7 of this report, and repeated below. A response to each of the objectives is provided below:

*a) To nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,*

The subject site is located within the Campbelltown CBD and at the periphery of the CBD's commercial core. Building height development standards throughout this particular portion of the CBD range from 45m (for land in close proximity to the Campbelltown railway station), 38.5m (also for land in close proximity to the Campbelltown railway station), reducing to 32m and 22.5m for land along the southern periphery of the CBD (refer to extract of Campbelltown LEP 2015 Maximum Building Heights map on the following page).

In effect, the development standards achieve transition in built form and land use intensity, with each graduating downward (i.e. less intense) from land in the vicinity of the Campbelltown train station, to land at periphery of the CBD.

Given the proposal's breach is minor (i.e. only 2.09m), it would not compromise the built form and land use intensity transitioning effect as sought by the Maximum Building Heights map. As such, this particular objective is satisfied by the proposal, despite the numerical non-compliance.

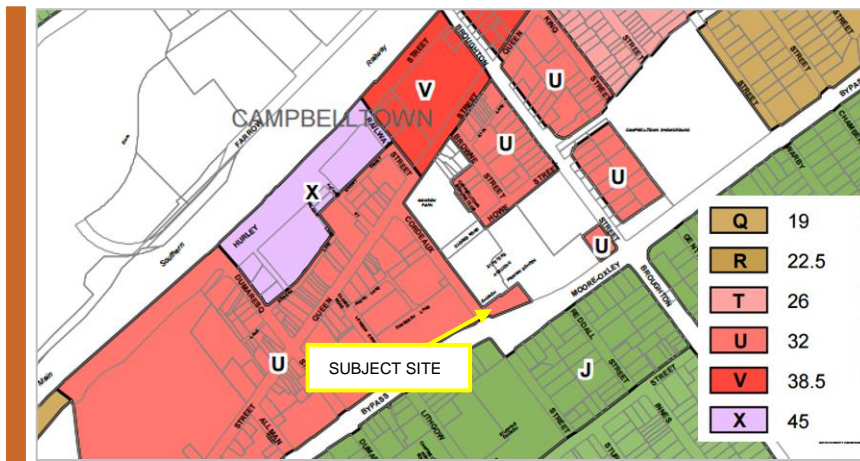


Figure 3: Extract of Campbelltown LEP 2015 Maximum Height of Buildings map (Source: Campbelltown LEP 2015)

If the non-compliance was substantially greater, rendering the proposal much similar in height to permitted building envelopes in proximity to the railway station for example (i.e. 45m), then arguably the proposal may be deemed inconsistent with the transitioning effect sought by the local environmental planning framework.

Whilst the non-compliant element's role in the proposal is minor, the proposal's overall contribution is of a high standard. In particular, it adequately defines and articulates the subject corner site. In so doing, the proposal reinforces the site's important role as a gateway to the Campbelltown CBD.

The proposed bulk and scale will relate appropriately to that permitted on the opposing council owned car park site, given it is substantially compliant with most applicable development standards. Further, it has been determined that the proposal's relationship to the adjoining heritage item is acceptable (refer to heritage impact statement provided at **Appendix 15** of the accompanying SEE).

In light of the above, it is provided that this particular objective would be satisfied by the proposal, despite the non-compliance.

*(b) to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,*

The subject site is located within the Campbelltown CBD and at the periphery of the CBD's commercial core. Building height development standards throughout this particular portion of the CBD range from 45m (for land in close proximity to the Campbelltown railway station), 38.5m (also for land in close proximity to the Campbelltown railway station), reducing to 32m and 22.5m for land along the southern periphery of the CBD (refer to extract of Maximum Building Heights map provided above).

Given the proposal's breach is minor (i.e. only 2.09m), it would not affect the hierarchy of permitted building heights throughout the CBD. As such, this particular objective is satisfied by the proposal, despite the numerical non-compliance.

If the non-compliance was substantially greater, rendering the proposal much similar in height to permitted building envelopes in proximity to the railway station for example (i.e. 45m), then arguably the proposal may be deemed inconsistent with the intended scale of development, as determined by the current local environmental planning framework.

*(c) to provide for built form that is compatible with the hierarchy and role of centres,*

The extent of the non-compliance is minor (i.e. only 2.09m above the maximum permitted building height and constrained towards the centre of the proposal's roof). Further, the vast majority of the proposal is compliant with other relevant development standards or prescriptive controls such as those within the Campbelltown (Sustainable City) Development Control Plan 2015. As such, this request provides that the non-compliance cannot be incompatible with the hierarchy and role of the Campbelltown CBD, as has been determined by the local environmental planning framework. Similarly, it would not be incompatible with the hierarchy and role of other centres in the Campbelltown Local Government Area (LGA).

If the non-compliance was substantially greater, or similar to higher permitted building heights in the Campbelltown CBD, then arguably any such proposal would be incompatible with the established hierarchy and role of centres.

*(d) to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.*

The extent of the non-compliance is minor, being only 2.09m above the 32m permitted building height, and constrained to a limited portion of the overall proposed building envelope. The non-compliant elements are also recessed back from the perimeter of the building.

The minor nature of the non-compliance, combined with its location towards the centre of the roof ensure it is not highly visible from any public or private domain. It also ensures any shadows cast by the non-compliant element do not result in any unreasonable public or private amenity impacts. This is largely a result of the site's northerly orientation and subsequent shadows being cast over Oxley/Moore Street which benefits from a wide road corridor.

The non-compliant elements do not include any habitable floor space. More specifically, they would only be accessible for servicing related purposes. As such, they would not allow for any privacy related impacts. All of the proposal's habitable floor space, or any other floor space that would be typically accessible on a daily basis (such as the roof top communal recreation area), is located below the 32m maximum building height plane.

In light of the above, this request provides that the non-compliant height satisfies the objective in question.

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

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

The exception request does not rely on this reason.

***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;***

The exception request does not rely on this reason.

***5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.***

The zoning of the land is appropriate for the site. The exception request does not rely on this reason.

In addition to demonstrating that *Wehbe* way “1” is satisfied, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of this case for the following additional reasons:

- In the case of *Moskovich v Waverley Council*, the LEC accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. For the subject application, the proposed development which seeks to vary the height standard, achieves a better response to the objectives (f) of the subject B4 – Mixed Zone in that it provides a high level of amenity, particularly recreational amenity. That is, a generous roof top communal open space area is provided, accessible mainly as a result of the lift over runs the subject of this exception request.

On the basis of the above, compliance with the standard is considered to be unnecessary and would be unreasonable.

## **12. Sufficient environmental planning grounds to justify the contravention**

This request provides that there is sufficient environmental planning ground to justify the contravention. Such grounds include:

- It has been demonstrated that the proposal and its height breach remains consistent with the objectives of the subject B4 – Mixed Use zone as well as Clause 4.3 and 4.6 of the Campbelltown LEP 2015, despite the numerical non-compliance.
- The proposal would not compromise the land use intensity and built form transitioning effect sought by the local environmental planning framework.
- The non-compliant height does not result in any unreasonable visual impacts.
- The non-compliant height does not result in any unreasonable overshadowing impacts, largely because shadows from the proposal are almost entirely situated over the substantially wide Oxley/Moore Street road corridor.
- The height non-compliance assists with providing improved amenity for the proposal's residents. Specifically, it assists with providing access to a communal, roof top recreation area.

## **13. Is the variation in the public interest?**

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

The objectives of the standard have been addressed in **Section 11** above and are demonstrated to be satisfied.

The objectives of the **B4 Mixed Use** zone are addressed below:

- *To provide a mixture of compatible land uses.*

The proposal allows for commercial and residential land uses, both of which are generally regarded as being compatible within suburban centres.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The site is located within close proximity to public transport (600m walking distance from the Campbelltown train station), services and employment opportunities. This will encourage walking and cycling for the residents.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To encourage the timely renewal and revitalisation of centres that are undergoing growth or change.*

The development creates an opportunity for renewal and revitalisation of Campbelltown town centre.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To create vibrant, active and safe communities and economically sustainable employment centres.*

The development contributes towards creating a vibrant, active and safe community through the activation of the Oxley/Moore Street frontage with the provision of ground floor commercial/retail premises, and the considered design and articulation of the building. The development will also contribute towards enhancing an economically sustainable employment centre within the Campbelltown area through the creation of jobs with the operation of the ground floor retail/commercial tenancies.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To provide a focal point for commercial investment, employment opportunities and centre-based living.*

The development provides for commercial investment and employment opportunities with the provision of jobs through the construction and operation phases. The development also encourages centre-based living with the provision of high-density residential accommodation in close proximity to shops, services and public transport.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To encourage the development of mixed-use buildings that accommodate a range of uses, including residential uses, and that have high residential amenity and active street frontages.*

The proposed development comprises a residential component that demonstrates a high level of residential amenity, and retail/commercial premises at ground floor that will activate the site's street frontages, particularly along Moore Street.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To facilitate diverse and vibrant centres and neighbourhoods.*

The proposed development allows for the redevelopment of the land which will improve the presentation of the site by creating an interesting and vibrant building.

The proposed exceedance of the height standard does not affect consistency with this objective.

- *To achieve an accessible, attractive and safe public domain.*

Not applicable to this application.

With regard to addressing the objectives of the **SP2 Infrastructure** zone, the proposal will not detract from the provision of infrastructure and the future operation of the adjoining church and school.

The objectives of the zones, as demonstrated above, as well as the objectives for the standard have been satisfied. Therefore, the variation to the height standard is in the public interest.

#### **14. Matters of state or regional significance (cl. 4.6(5)(a))**

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

#### **15. The public benefit of maintaining the standard (cl. 4.6(5)(b))**

Pursuant to case law of *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standard.

Moreover, there are public benefits in providing equitable access to the roof top communal open space; which practically can only be delivered with this height exception request.

This request therefore provides that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

#### **16. Is the variation well founded?**

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the Campbelltown LEP 2015, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves and is consistent with the objectives of the development standard and the objectives of the B4 zone and SP2 zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The contravention does not raise any matter of State or Regional Significance.

The variation is therefore considered well founded.