

clause 4.6 exception
for height of buildings



6 - 10 battley avenue
the entrance

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the entrance

construction of a residential flat building

prepared for
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prepared by

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a s s o c i a t e s

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1 introduction

This submission has been prepared for the Khosrow Chohaili to accompany a Development Application (DA) for 6-10 Battley Avenue, The Entrance (the Site) to Central Coast Council. It seeks a variation of the development standard pertaining to the height of buildings (HOB) contained in Clause 4.3 of the Wyong Local Environmental Plan 2013 (WLEP 2013).

The variation relates to a proposed affordable rental housing development in the form of a residential flat building at the Site. The proposal seeks approval for the demolition of existing buildings on the Site and the construction of a four storey residential building containing 29 units.

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

It is noted that Clause 4.6 of the WLEP 2013 also requires the concurrence of the Secretary to be obtained prior to granting of consent for development that contravenes a development standard unless concurrence from the Secretary to vary the development standard has been delegated to the Council.

2 context to varying a standard

This request has been prepared having regard to the principles and matters arising out of the following guideline judgements on Clause 4.6 variations:

- *Moskovich v Waverley Council* [2016] NSWLEC 1015
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 (and it's predecessor, *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386);
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46

It is noted that the judgments in *Moskovich* and *Micaul Holdings Pty Ltd* refer back to the following key principles:

- Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3);
- 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
- Concurrence to the variation by the Secretary.

3 objection to development standards

3.1 What is the applicable Planning Instrument and Zoning

The WLEP 2013 is the environmental planning instrument that applies to the Site.

The Site is within zone R3 Medium Density Residential Centre according to the WLEP 2013 and Zoning map LZN_015.

3.2 What are the Zone Objectives

The objectives of the zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain and enhance the residential amenity of the surrounding area.*
- *To encourage amalgamation of existing lots to facilitate well designed medium density development and to avoid unnecessary isolation of lots.*

A “residential flat building” is expressly permissible in the zone and is consistent with the relevant objectives of the R3 zone. The proposal will provide 29 new dwellings in a variety of layouts and orientations. The proposal will amalgamate three separate residential lots allowing for larger scale development without isolating adjoining lots.

3.3 What is the standard being varied?

The standard being varied is the Height of Building (HOB) development standard contained in Clause 4.3 of the WLEP 2013.

3.4 Is the standard to be varied a development standard?

Yes, the HOB 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 development standard is a numerical control.

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

The objectives of Clause 4.3 are as follows:



Figure 3.2 | Height Limit Breach in 3D provided by Ghazi Al Ali Architect.

4 assessment of proposed variation

4.1 Overview

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) 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) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

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

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

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).*
- (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.*

An assessment of the variation is provided below in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard.

4.2 What is the context of the variation?

The maximum variation in relation to the HOB development standard applying to the Site is 12m. The Site has a slope of 5.24m across the Site, from south east to north west . To the front boundary the proposal presents a compliant building, the variations occur internally within the Site.

Surrounding the Site are a mixture of built forms, with attached dual occupancies, detached dwellings and residential flat buildings.

The building height has been designed to provide a positive visual relationship and transition in line with existing developments in the locality and will be compatible with the desired future character of the locality. The proposed height, bulk and scale are commensurate to the Site's opportunities and are consistent from the streetscape.

Further the previously approved residential flat building was approved with a variation to the height limit in a similar, internal location to that of the currently proposed design. The proposal is generally in line with the previously approved design and presents a positive contribution to the public domain and will create visual interest and aesthetic façade presentation.

4.3 Is strict compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

In this instance, the strict numerical compliance with the development standard for HOB is unreasonable and unnecessary, in light of the following matters:

The proposal remains consistent with the relevant objectives of the R3 Medium Density Residential zone, despite the non-compliance with the HOB control as demonstrated in the assessment of the objectives below:

Objective: To provide for the housing needs of the community within a medium density residential environment.

The proposal will provide an additional 29 units to the community. The benefit of the scheme is the development will increase housing choice and provide low cost accommodation options.

Objective: To provide a variety of housing types within a medium density residential environment.

The proposal will provide a mix of one and two bedroom dwellings, with a range of floor plates and orientations. Additionally three units have been designed to be adaptable. Thus the proposal incorporates a variety of housing types.

Objective: To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal is purely a residential development so this objective is not considered applicable in this case.

Objective: To maintain and enhance the residential amenity of the surrounding area.

The proposal will maintain the existing amenity of the area, the new dwellings have been designed so as not to adversely impact on the surrounding dwellings in terms of overlooking overshadowing or view loss. The proposal will present a well designed residential flat building which will complement the existing and future character.

Any amenity impacts are considered to be within reasonable limits.

Objective: To encourage amalgamation of existing lots to facilitate well designed medium density development and to avoid unnecessary isolation of lots.

The proposal will amalgamate three sites to allow for a medium density development. The adjoining sites are not isolated and will also be able to develop in the future to a medium density as required.

The proposal remains consistent with the objectives of the HOB standard outlined in Clause 4.3, despite the non-compliance, as demonstrated below:

Objective: To establish the maximum height limit for buildings to enable the achievement of appropriate development density.

The proposed density is acceptable and appropriate within the context of the Site. The proposal satisfies the floor space ratio, including the bonus floor space applicable under the State Environmental Planning Policy (Affordable Rental Housing) 2009 .

To the street the development presents a compliant development, presenting an appropriate development scale, form and density. The height variation will not visually present an inconsistent built form in comparison with surrounding development.

Objective: to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality.

The proposal presents as a compatible building envelope when viewed from the street. The modern design, with distinct building features, a mixture of treatments and articulation for all facades will be consistent with the form and scale of similar RFB's in the area. The proposal is consistent with the objectives of the zone and consistent with the emerging character of the medium density development

The setbacks are appropriate to the context, the proposed building minimises its visual impact when viewed from adjoining properties. The proposal is therefore considered a responsive built form element in terms of its compatibility with the character of the locality.

Objective: to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.

The siting and layout of adjoining properties has been considered in the design. The proposal will not adversely affect the adjoining properties in terms of overshadowing, privacy or visual bulk. The shadow diagrams indicate that the adjoining properties maintain adequate levels of sunlight. Appropriate building separation distances have been adopted and highlight or fixed obscured glass windows have been incorporated where possible to protect the privacy of adjoining properties. The proposal adopts a compliant height to the boundaries and will not impact on any view corridors across the Site.

4.4 Would strict compliance 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:

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 proposed non-compliance with the development standard would not hinder the attainment of the objects of section 5(a)(i) and (ii) of the EP&A Act. These objects are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

In this instance, strict compliance with the development standard would not result in any discernible benefits to the amenity of adjoining sites or the public domain. Furthermore, the proposal satisfies the underlying objectives of both the zone and the development standard, and provides a transition in scale of development compatible with the existing development in the locality. The proposal is also consistent with the desired future character of the area and will provide 29 dwellings to the area.

It therefore stands that the environmental planning grounds and outcomes that are particular to this development and this Site are such, that a departure from the development standard in that context would promote the proper and orderly development of land.

The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objectives.

4.5 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the HOB control is unreasonable and unnecessary in this circumstance for the following reasons:

- Strict compliance would lead to a development that would provide a development that is not utilising the full extent of the Site and therefore, the Site will be underdeveloped. This would not have any tangible visual or amenity benefits.
- The difference in the extent of impact between a development that achieves strict numerical compliance would not alter the overshadowing, privacy or visual impacts on adjoining properties. These impacts have been demonstrated to be negligible.
- With the setbacks being adequate, the Site is of a sufficient size to allow for increased internal amenity without adversely impacting the adjoining neighbours.
- The variation is predominantly internally within the Site as a result of the slope of the Site. The rest of the building complies with the maximum prescribed building height and is therefore viewed as a compliant envelope from the street.

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

Yes. In the circumstances of the case, there are sufficient planning grounds to justify the variation of the development standard, namely:

- The proposal satisfies the relevant objectives of the R3 Medium Density Residential zone and the objectives of the HOB development standard as described above.
- The non-compliance with the development standard does not contribute to any adverse environmental impacts in terms of overshadowing, visual, privacy or acoustic impacts.
- The proposed non-compliances with the control allows for a standard building form and scale, notwithstanding the slope of the Site.
- The non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development, nor will it be incompatible with the desired future character of the locality.
- The non-compliance in HOB will not be discernible from any public space. The variation is setback and recessed so from the street it will not be visible.
- The built form is articulated and configured in a manner that appropriate levels of internal amenity are achieved. Therefore, a better planning outcome is achieved through addressing the constraints and opportunities of the Site, while continuing to maintain a high level of internal amenity.
- The development as proposed is consistent with the provisions of orderly and economic development, as required by the EP&A Act.

4.7 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 unnecessary as the development does not contravene the objects specified within 5(a)(i) and (ii) of the EP&A Act, the R3 Medium Density Residential zone nor the HOB development standard.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the land use based on HOB.

The proposal is also consistent with the desired future character of the area and provides a greater level of internal amenity. Through addressing the constraints of the Site, a better planning outcome and built form has been achieved.

The proposed non-compliance is minor in nature and is in the greater public interest as the development is fulfilling a social need and providing some low cost accommodation.

5 conclusion

This submission satisfies the provisions of 4.6(3)(a) and (b) and 4.6(4)(a)(i) of the Wyong Local Environmental Plan 2013. It has been demonstrated that compliance with the height of buildings development standard is both unnecessary and unreasonable in the circumstances of this case and there are sufficient planning grounds to justify contravening the standard.