



CLAUSE 4.6 ASSESSMENT

MIXED USE DEVELOPMENT

**38 HANNELL STREET, 2-4 BISHOPSGATE STREET AND
13 DANGAR STREET, WICKHAM**

Clause 4.6 Assessment

This Report was prepared by:-

Monteath & Powys Pty Ltd
Suite 13 Tonella Commercial Centre
125 Bull Street
NEWCASTLE WEST NSW 2302

PO Box 2270
DANGAR NSW 2309

Telephone: (02) 4926 1388
Facsimile: (02) 4929 3475
Web: www.monteathpowys.com.au

PROJECT: Mixed use, multi storey development comprising 174 residential units, 3 retail/commercial units, basement car parking and associated landscaping – 38 Hannell Street 2-4 Bishopsgate Street and 13 Dangar Street, Wickham

CLIENT: Thirdi 38 Hannell St Pty Ltd

OUR REFERENCE: 17/0328

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AUTHOR: Konrad Grinlaubs
Senior Planner
M.P.I.A.

CERTIFICATION: I hereby certify that this Report has been prepared in accordance with the requirement of the *Environmental Planning and Assessment Act 1979* and its associated Regulations. I certify that to the best of my knowledge the information contained within this Report is neither false nor misleading.

SIGNATURE



CHECKED BY: Darren Holloway
B.Sci. (Hons), MBEnv
Registered Planner



SIGNATURE:

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1. INTRODUCTION

This submission seeks a variation to Clause 4.3 of the Newcastle Local Environmental Plan 2012 (NLEP12), which relates to the building height.

This submission has been prepared with regards to a development application for a mixed use, multi storey development comprising approximately 174 residential units, 3 retail/commercial units, car parking and associated facilities at 38 Hannell Street, 2-4 Bishopsgate Street and 13 Dangar Street, Wickham.

The proposed development meets the requirements prescribed under Clause 4.6 of the NLEP12, as detailed in this written request for a variation to maximum building height control. Clause 4.6 states the following:

“4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:*
 - (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.*
- (2) Development consent may, subject to this clause, be granted for a 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.*
- (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) Development 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.*
- (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:*
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include any of these Zones.*
- (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).*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4*
 - (ca) clause 2.8, 6.1 or 6.2"*

Clause 4.6 – Exceptions to development standards, establishes the framework for varying development standards applying under a LEP. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

*“4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.”*

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

*“(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”*

The Environmental Planning Instrument to which these variations relate to is the Newcastle Local Environmental Plan 2012. The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which 9.6 reads as follows:

“4.3 Height of buildings

- (1) The objectives of this clause are as follows:
(a) to ensure the height of buildings are appropriate for their location,
(b) to permit building heights that encourage high quality urban form.*
- (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 site is zoned B3 Commercial Centre under the NLEP12. The building height on the site is not to exceed the maximum shown on the building height map, which for this site is 45m. Refer to Figure 1 below.

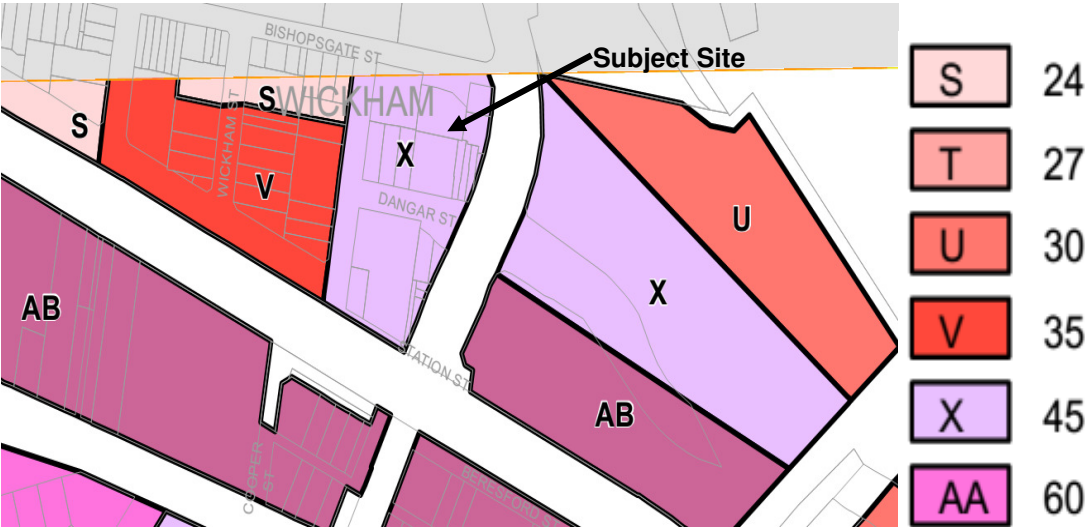


Figure 1: Building Height Map (NLEP 2012)

The proposed development exceeds the standard, seeking a maximum building height of 46.6m. The variation is equivalent to 1.6m or a 3.5% increase.

A written justification is therefore required for the proposed variation to the maximum building height development standard, in accordance with Clause 4.6 of the NLEP12.

2. EXTENT OF NON-COMPLIANCE

As noted above Clause 4.3 of the NLEP12 states that the maximum building height for the site is 45m. The current proposal seeks a building height of 46.6m. The proposal therefore exceeds the standard by 1.6m.

It is our submission that the breach to the building height control, will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the architecture of the building or the bulk and scale of the development or the character of the area. As such a degree of flexibility is considered reasonable in this instance and anticipate under the LEP where justification is made.

3. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827. In the matter, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

It is therefore our submission that the *Wehbe* test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary in the circumstances of the case and it is evident, the above test is relevant.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

- First –** The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.
- Second –** A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
- Third –** A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that

compliance is unreasonable.

Fourth – A fourth way is to establish that 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.

Fifth – A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.

The following discussion is provided in response to each of the above:

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

The objectives supporting the maximum building height control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

With respect to the building height objective, we need to acknowledge that the subject site is located within part of the Wickham area which is a renewal and active development precinct. Development within the immediately vicinity of the subject site, have a height commensurate with the height proposed. With the development complying with the FSR provisions within the LEP, a better understanding of scale, use intensity and dominance is achieved with the built form and appropriate for the area.

In view of the sites prominent central location of the site, the position, its relationship to the block and immediate locality. Supplementary considerations are the availability of local infrastructure and current public transport services and future light rail all play a part in the consideration. The proposed building height would reinforce the position of the subject site creating a development that reinforces the urban design considerations of the area. It is therefore considered the proposal is in keeping with the locational attributes, consistent and in keeping with the surrounding established character of the area.

In response to objective (1)(b), the proposed development is of a high quality urban form and responds to the constraints of the site.

The proposed development provides for two free standing buildings to reflect the size and nature of the site. The proposal provides for consistent setbacks to the side and front boundaries enabling a clearly definable, modern form that acts as an exemplar exhibition of built form to the area.

As demonstrated in the perspectives provided, the development promotes an attractive and active street frontage. Large commercial spaces and glazed shopfronts addressing both the Hannell Street and Bishopsgate Street frontages. The residential lobbies are clearly defined and the form is reinforced through a strong vertical elements.

The upper residential levels, include additional setbacks and will be broken up by glass balustrading and balconies and cladding features providing for visual interest and creating a visual balance to the development.

In response to the abovementioned supplementary considerations, the proposal will result in some additional overshadowing to the adjoining buildings, though it is considered that this is a consequence of both the orientation of the site and not the higher built form.

The subject site currently has access to electricity, reticulated water and sewer, stormwater and telecommunications. Service connection and any capacity augmentation will be determined through application to the relevant service providers (Hunter Water, Ausgrid, Jemena, Telstra, NBN etc).

The subject site is within 50 metres of several major bus stop routes bus stops (see map below). Public transport is provided by government and private bus companies. Newcastle Buses provides several routes to various local centres, town centres, to the north, south and west.



Figure 2: Major Transport Routes and Bus Stops

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard. As demonstrated, the objectives of these standards have been achieved.

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

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above. Therefore, this clause is not applicable.

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

The underlying objective or purpose would not be defeated or thwarted if compliance was required. However, on balance the proposed development provides a better outcome.

iv. 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; and

While the standard has not been abandoned or destroyed, Newcastle Council has varied LEP

standards in the past. As demonstrated in this letter, the proposal will not result in any significant adverse environmental impacts and will result in a high quality mixed use development consistent with the surrounding character and commensurate with the development expectations for the site.

- v. **the zoning of the 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.**

Not applicable as the zoning of the site is appropriate.

4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

The assessment above and shown throughout the Statement of Environmental Effects demonstrates that the resultant environmental impacts of the proposal will be satisfactory. The proposal addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the submitted reports.

As detailed within this submission, the subject site is located within the Wickham Master Plan renewal area at 38 Hannell Street, 2-4 Bishopsgate Street and 13 Dangar Street, Wickham. Development located in the immediate area and opposite the subject site is of a similar height. The bulk and scale of development within the area will also be of a consistent density although the LEP.

We submit that the prominent location of the subject site, its locational context within the surrounding area, the availability of local infrastructure and its position to public transport services all support the development outcomes sought. The proposed building height would be consistent with development to the south and the north and would reinforce the missing middle of the block. The subject site development will create a landmark development which contextually unites and visually integrates into the surrounding built form and character of the locality. Furthermore, the proposal will contribute towards, and espouse the ongoing reputation as a preeminent precinct.

In this case, strict compliance with the development standard for building height in the Newcastle LEP 2012 is unnecessary and unreasonable.

5. IS THE VARIATION IN THE PUBLIC INTEREST?

Clause 4.6 states that the 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 to be carried out.

It is considered that this submission in conjunction with the Statement of Environmental Effects provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3 and the zone by providing a mixture of compatible land uses and integrate uses by enabling maximisation of public transport. The proposal will furthermore, complement and enhance the core functions of the area creating jobs and residential density and precinct activation.

The proposal before Council provides for a well-considered development that responds to the context of the site and its surrounds. In terms of ADG provisions, the development is compliant with respect to solar access, ventilation, common open space provisions requirements.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

6. PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standards. The proposed development will allow for the creation of a high quality mixed use development which as stated above meets the desired objectives of the standard and zone objectives.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from the building height control within the Newcastle LEP 2012 allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

7. IS THE VARIATION WELL FOUNDED?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Newcastle LEP 2012 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (building height) and objectives of the B3 Commercial Centre zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted aligns with the development expectations for the surrounding area.

Based on the above, the proposed variation is considered well founded.

8. GENERAL

Clause 4.6 also states that:

- “(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:*
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note. When this Plan was made it did not include any of these Zones.*
- (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).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) a development standard for complying development,*
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) clause 5.4*
 - (ca) clause 2.8, 6.1 or 6.2”*

This variation does not relate to the subdivision of land. The variation sought is thus not contrary to subclause (6). Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission. A BASIX certificate was provided for the development.

Clause 2.8, 5.4, 6.1 or 6.2 of the Newcastle Local Environmental Plan does not apply to the proposal.

9. CONCLUSION

The proposal does not strictly comply with the maximum building height control as prescribed by Clause 4.3 of the Newcastle Local Environmental Plan 2012. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Newcastle LEP 2012 are satisfied as the breach to the controls does not create any adverse environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance, and that the use of Clause 4.6 of the Newcastle LEP 2012 to vary this development controls is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.