



**WRITTEN REQUEST PREPARED PURSUANT TO
CLAUSE 4.6 OF BURWOOD LOCAL
ENVIRONMENTAL PLAN 2012 IN RELATION TO A
VARIATION WHICH IS SOUGHT TO THE MAXIMUM
BUILDING HEIGHT DEVELOPMENT STANDARD**

**Submitted in support of a development application
for alterations and additions to the Whelan's
Strathfield Hotel, creation of ground floor retail
tenancy, and construction of a new residential
apartment building at Nos 27-33 Everton Road,
Strathfield**

**Prepared for
Strathfield Hotel Pty Ltd**

**By
BBC Consulting Planners**

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55 MOUNTAIN STREET BROADWAY NSW ~ PO BOX 438 BROADWAY NSW 2007 ~ TELEPHONE [02] 9211 4099 FAX [02] 9211 2740

EMAIL: bbc@bbcplanners.com.au ~ WEB SITE: www.bbcplanners.com.au



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1. Introduction

1.1 The amended proposal

This written request has been prepared in support of an amended development application (“DA”) lodged on behalf of Strathfield Hotel Pty Ltd (“the Applicant”) for mixed use development at Nos 27-29, 31, and 33 Everton Road, Strathfield (“the site”). The DA seeks development consent for alterations and additions to the heritage listed Whelan’s Strathfield Hotel (“the Hotel”), a new retail tenancy, and a nine-storey residential apartment building to the rear of the site (“the proposal”). Works associated with the proposal include a basement car park, stormwater drainage, earthworks, landscaping, vehicular and pedestrian access, and other ancillary works.

The objectives of the proposal are:-

- to redevelop a strategically positioned site into a high-quality, well designed mixed use development as envisaged by the site’s B4 (Mixed Use) zoning;
- to refurbish and upgrade existing facilities and guest accommodation at the hotel and preserve the ongoing economic vitality and viability of the heritage listed hotel;
- to active the street level through new retail tenancies addressing Everton Road;
- to create 60 new residential units in a high quality residential apartment building;
- to provide a development that is compatible with the amenity of the site and with the desired future character of the Strathfield Town Centre;
- to deliver a contemporary mixed use building that exhibits urban design excellence and that has acceptable environmental impacts on its immediate surroundings; and
- to achieve established aims of urban consolidation and renewal.

1.2 Site zoning, Zone objectives and permissibility

The site is zoned B4 (Mixed Use) pursuant to the Burwood Local Environmental Plan 2012 (“LEP”).

The objectives for 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.”*

The proposal is consistent with the above objectives in that it will provide a mixture of compatible land uses (being a new retail tenancy, improved hotel and residential accommodation) that will integrate with an established business premises (being the Whelan’s Strathfield Hotel). Furthermore, the site is highly accessible given its proximity to Strathfield railway station; this will facilitate public transport patronage and encourage, walking and cycling.

The retail tenancy is permitted with consent as commercial premises. The hotel activities comprise a mix of hotel accommodation (a type of tourist and visitor accommodation) and

food and drink premises (a type of retail premises including a pub). These are and a residential flat building are all permitted with consent in the B4 zone.

1.3 The building height standard

Pursuant to the Height of Buildings Map referred to in Clause 4.3 ('Height of Buildings') of the Burwood Local Environmental Plan 2012 ("the LEP"), the site is subject to a maximum building height of 30 metres. As indicated on the architectural drawings prepared by ARC Architects Pty Ltd (accompanying the DA), the maximum height of the proposed building is 32.45 metres as measured from the highest point of the residential apartment building (being the lift motor-room at roof top level) at RL 50.43 metres (AHD). Accordingly, the proposal contravenes Clause 4.3 of the LEP in that the maximum building height exceeds the 30 metre limit by 2.45 metres.

Clause 4.6 ('Exceptions to development standards') of the LEP allows development consent to be granted to a development application where a proposal contravenes a development standard, in this instance the building height development standard pursuant to Clause 4.3.

The 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.”*

This written request addresses the requirements of Clause 4.6.

1.4 Topography and surrounding context

The gradient of the site is generally flat; however it rises marginally from the southwest corner at RL 16.62 metres (AHD) to the southeast corner along Everton Road at RL 17.77 metres (AHD). Similarly, the rear of the site to Cowdery Lane slopes marginally from the northwest corner at RL 17.6 metres (AHD) to the northeast corner at RL 18.8 metres (AHD).

The Whelan's Strathfield Hotel occupies a prominent street front position on Everton Road, within Strathfield Town Centre. Everton Road is an established retail and commercial parade that contains a variety of small businesses including hair salons, takeaway restaurants, local convenience stores, and dry cleaners. These premises are generally characterised by ground floor retail and business activity, with upper floor residential accommodation. The parade forms the most northerly extent of Strathfield Town Centre and is considered a highly accessible location given its proximity to the Strathfield railway station. Surrounding development comprises a broad variety of building styles in terms of age, form and scale.

The close proximity to major public transport, facilities and services has resulted in the site and surrounding area being zoned B4 (Mixed Use) pursuant to Burwood LEP 2012. The site is a highly urbanised environment in which the desired future character will be typified by high density residential, commercial and retail activity.

Several shops and business premises are located to the west continuing around the corner in Mosley Street. To the east of the site is a 9 storey mixed use building currently under construction. To the north of the site on the northern side of Cowdery Lane is a nine storey

residential apartment building. To the south is the main western rail line and Strathfield Station on the other side of Everton Street.

1.5 Principles and relevant authorities

The principles and relevant authorities which have been considered in the preparation of this replacement Clause 4.6 variation request are those found in:-

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;
- Wehbe v Pittwater Council [2007] NSWLEC 827 (“Wehbe”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (“Four2Five No 1”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (“Four2Five No 2”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 (“Four2Five No 3”);
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118; and
- Al Maha Pty Ltd v Huajun Investments Pty Ltd.

2. Relevant Development Standard

Pursuant to Clause 4.3 ('Height of buildings') of the LEP, the site is subject to a maximum building height of 30 metres.

'Building height' (or 'height of buildings') is relevantly defined in the LEP to mean:-

the vertical distance from ground level (existing) 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."

"Ground level (existing)" is defined to mean:-

"the existing level of the site at any point".

Measured in accordance with this definition, the proposal has a maximum building height of 32.45 metres. This is calculated as the vertical distance from the existing ground level to the highest point of the residential apartment building (being the lift motor-room at roof top level) at RL 50.43 metres (AHD). Accordingly, the proposal exceeds the maximum building height development standard by 2.45 metres. The stair enclosure also exceeds height limit being at RL 49.62 metres (AHD).

Notwithstanding, as illustrated on the amended architectural drawings, the parapet level of the roof top terrace does not exceed the 30 metre maximum building height.

3. Exceptions to Development Standards (Clause 4.6)

The objectives of Clause 4.6 ('Exceptions to development standards') of the LEP 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.”*

Clause 4.6 provides for development consent to be granted to development in circumstances where the subject development contravenes a development standard imposed by the LEP.

Clause 4.6 of the LEP states (as relevant):-

“(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.

(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 Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

Accordingly, the provisions of Clause 4.6 can be used to vary (to the extent required) the maximum building height development standard which applies to the site.

4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case and are there sufficient planning grounds to justify contravening the standard?

4.1 Extent of non-compliance

As shown on the elevation drawings accompanying the DA the top of the proposed lift overrun is at RL 50.43m AHD whereas the existing ground level below that point, as shown on the site survey, is around R17.98m AHD, giving a maximum height of 32.45m and a maximum non-compliance of 2.45m. There is also a non-compliance with the stair enclosure of 1.65m.

Notwithstanding, as illustrated on the amended architectural drawings, the parapet level of the roof top terrace does not exceed the 30 metre maximum building height.

4.2 What is the purpose/object of the height standard?

The objectives of the height controls are set out as follows in Clause 4.3(1) of the LEP.

(a) to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,

(b) to control the potentially adverse impacts of building height on adjoining areas.

The proposal is consistent with these objectives (see below).

4.3 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The proposal is consistent with the intent of the standard

The amended proposal is consistent with the objectives of the height standard as set out in Section 4.2 above for the following reasons.

In relation to Objective (a), the proposal, including the nine-storey residential apartment building, is contextually appropriate for the site in the context of the B4 Zone and its location within the Strathfield Town Centre. The nine-storey building is compatible with the desired future character of the Town Centre as envisaged by the 30 metre building height standard which generally facilitates development nine-storeys in height. In the circumstances of the proposal, the additional height is intrinsically linked to improved building amenity (i.e. achieving compliant ceiling height for the habitable rooms of the residential apartments and providing a communal roof top terrace with high amenity value). The form of urban development proposed and the height of the building satisfy the intent and purpose of the high density B4 Zone, notwithstanding the minor non-compliant height at roof top level.

In relation to Objective (b), the proposal will not result in any adverse or unreasonable amenity impacts in relation to overshadowing, overlooking, obstruction of light or air, obstruction of views, or any other such impacts on adjoining properties or land uses. The residential apartment building is orientated towards the front and rear boundaries in order to

minimise privacy concerns. The building addresses the established built form of adjoining uses and the setbacks of the approved development the east (being the mixed use development at Nos 19-25 Everton Road; this ensures that suitable visual privacy is afforded to residents of the proposed apartments and also future residents of the approved building.

The marginal non-compliance with the 30 metre building height standard is associated with the lift motor-room and stair enclosures at roof top level. These are setback from the building facades and would not generally result in any additional shadows cast by the building. By virtue of its location with the centre of the roof top terrace, the lift motor-room will not result in any additional shadows cast by the building and will not be visible from the public domain (i.e. from Everton Road or Cowdery Lane).

It is considered that the development is consistent with the objectives of the standards.

The extent of the non-compliance is acceptable and reasonable

Compliance with the maximum building height development standard is acceptable and reasonable in the circumstances of this DA for the following reasons:-

- The non-compliance with the maximum building height development standard results from the provision of plant and access structures (being the lift motor-room and stair enclosures) that provide resident access to the communal roof top terrace. The terrace comprises a generous communal open space which provides high amenity for future residents of the residential apartment building. The purpose of the terrace is to provide residents with a range of amenity uses, including general socialising, quiet reflection, and veggie garden plantings. The terrace is uninhibited by overshadowing and exceeds the 50% minimum direct sunlight requirements of the Apartment Design Guide (ADG). The provision of communal open space is encouraged by the ADG.
- The proposed development is within Strathfield Town Centre and thus, pursuant to the site's B4 (Mixed Use) Zoning and relevant development standards, the site is an appropriate location for a building marginally higher than that permitted by the control.
- Notwithstanding the variation which is sought, the proposed nine-storey building is compatible with the desired future character of the area (as envisaged by the 30 metre building height standard which will generally facilitate a nine-storey building);
- The proposal is consistent with the desired future character and objectives of the Strathfield Town Centre as established in the LEP and Burwood DCP 2013;
- The lift motor-room and stair enclosures are setback from the rear boundary (Cowdery Lane), the front setback (to Everton Road), and the side boundaries (east and west elevations);
- By virtue of its positioning with the centre of the roof top terrace, the lift motor-room and stair enclosures will not result in any additional shadows cast by the building and will not be generally visible from the public domain (i.e. from Everton Road or Cowdery Lane);
- The lift motor-room and stair enclosures do not impact on the heritage significance or context setting of the Whelan's Strathfield Hotel in that it is generally not visible from the Hotel; and

- As described below, the objectives of the maximum building height development standard are achieved notwithstanding minor non-compliance with that standard (less than 10%).

The non-compliance results in a better planning outcome

Yes for the reasons outlined above.

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

The contravention of the maximum building height development standard is justified on environmental planning grounds specific to this development for the reasons set out above and in the Statement of Environmental Effects that accompanied the development application. The non-compliance with the maximum building height control does not result in any significant additional detrimental impact on the urban form of the site or the amenity of adjoining properties.

The marginal non-compliance with the maximum building height development standard (2.45 metres) results from the provision of plant and access structures (being the lift motor-room) that provide resident access to the communal roof top terrace. The terrace comprises a generous communal open space which provides high amenity for future residents of the residential apartment building. The purpose of the terrace is to provide residents with a range of amenity functions and uses; these include general socialising, quiet reflection, and veggie garden plantings. The roof top terrace is uninhibited by overshadowing and exceeds the 50% minimum direct sunlight requirements of the Apartment Design Guide (AGD).

As illustrated on the amended architectural drawings, the parapet level of the roof top terrace does not exceed the 30 metre maximum building height. Measured to the main parapet level at RL 47.23 metres (AHD), the highest existing ground level point is RL 18.68 metres (AHD) and the lowest existing ground level point is RL 17.60 metres (AHD). Accordingly, the parapet level at its highest vertical distance does not exceed 30 metres.

Notwithstanding the marginal non-compliance with the maximum building height control, the proposal is consistent with the objectives and requirements of relevant planning instruments and controls and will not result in significant adverse environmental impacts. The inherent characteristics of the site and heritage listed Hotel (including its size, configuration, and use) make the proposal eminently suitable and justifiable on statutory planning grounds.

There is an absence of significant environmental harm associated with the non-compliance of the proposal with the maximum building height development standard.

4.5 Has this written requested adequately addressed the matters required to be demonstrated by sub-clause (3)?

It is considered that the proposed development adequately addresses the matters set out in Clause 4.6(3) as required by Clause 4.6(4)(a)(i).

5. Is the development in the public interest because it is consistent with the objectives of the height standard and the objectives for development within the zone in which the development is proposed to be carried out?

Clause 4.6(4)(a)(ii) specifies that a development will be in the public interest if it is consistent with the objectives of the particular development standard and with the objectives for development within the zone in which the development is proposed to be carried out.

It is considered that the development will be in the public interest for the following reasons.

5.1 Consistency with the objectives of the standards

The proposal is consistent with the objectives of the height standard for the reasons set out in Section 4.3 above and having regard to all other relevant considerations is therefore in the public interest.

5.2 Consistency with the objectives of the zone

The site is within Zone B4 (Mixed Use) under Burwood LEP. The objectives of the zone are:-

- *“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.”*

Notwithstanding the minor non-compliance with the maximum building height development standard, the proposal is entirely consistent with the objectives of the B4 Zone in that:-

- it will provide a mixture of compatible land uses (being business premises, retail premises, hotel accommodation, and private residential accommodation); and
- the proposal integrates the proposed new uses (being the retail tenancy and residential apartment building) within the existing listed heritage Hotel and in a highly accessible location given its proximity to Strathfield railway station (this will maximise public transport patronage and encourage, walking and cycling).

The proposal is consistent with the objectives of the B4 (Mixed Use) Zone.

6. The 'Five Part Test'

In addition to the above requirements, a consent authority may choose to not only use the principles of Clause 4.6 but also the 'five part test' established by the Land and Environment Court. (See *Wehbe v Pittwater Council* [2007] NSWLEC 827)

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded. The 'five part test' is outlined as follows:-

- "1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 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;*
- 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."*

In relation to point (1):-

The test is satisfied for the reasons set out in Section 4.3 above.

In relation to point (2):-

No reliance is placed on this point. When assessed against the underlying objective of the standard, the amended proposal satisfies the intent in terms of suitability in relation to desired future character, and limited and acceptable visual impacts, privacy impacts and overshadowing impacts

In relation to point (3):-

If strict compliance was to be required with the height standard then the building would not be sufficiently responsive to the site context as detailed above in Section 4.3.

In relation to point (4):-

No reliance is placed on this point.

In relation to point (5):-

In the subject case, ground level (existing) varies across the site and contributes to a minor extent to the non-compliance.

7. Conclusion

Based on the above, compliance of the amended proposal with the maximum building height development standard in Clause 4.3 of Burwood Local Environmental Plan 2012 is both unreasonable and unnecessary in the circumstances of the proposal for mixed use development at the Whelan's Strathfield Hotel.

The non-compliance with the maximum building height development standard results from the provision of the lift motor-room and stair enclosures that facilitates resident access to the communal roof top terrace. This terrace comprises a generous communal open space which provides amenity for residents. The terrace functions for a range of uses, including general socialising, quiet reflection, and garden plantings. It is uninhibited by overshadowing and exceeds the 50% minimum direct sunlight requirements of the ADG.

There are sufficient environmental planning grounds to justify the minor non-compliant component of the proposed building, and the proposal is in the public interest because it is consistent with the objectives of the building height development standard, the B4 (Mixed Use) Zone, and generally the provisions and development objectives of the Burwood LEP.

In terms of consistency with the objectives of Clause 4.3, it is considered that strict adherence to the building height development standard to this particular development is not warranted and relaxing the standard would result in a better form of development that achieves high levels of amenity for future residents of the building and adjoining properties.