

CLAUSE 4.6 VARIATION (V2)

CLAUSE 4.3 - HEIGHT OF BUILDINGS

ROCKDALE LEP 2011



Proposed Mixed Use Development,

648 – 652 Princes Highway

&

1 – 3 Ashton Street,

Rockdale

10 August, 2018

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1. INTRODUCTION

This report has been prepared to support Development Application (DA 2017/211) lodged with the Rockdale City Council now Bayside Council. The proposal seeks approval for a mixed - use (retail and residential) development at 648 - 652 Princes Highway & 1 – 3 Ashton Street, Rockdale.

The application proposes to demolish the existing structure on the site and construct a new building containing *2 retail and 1 office tenancies* and *64 units* including a component of *“Affordable Housing” (32 units)* under *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

Under *Clause 4.3* of the *LEP* the site is subject to a maximum building height limit of 22 metres (m). As lodged, both buildings breached the height limit, by less than 1m, being up to 860mm for building A and 700mm for building B.

As now proposed the variations are as follows:

- *The lift overrun on building A, at an RL of 31.95 breaches the applicable 22m height limit by 200mm. There are no other height variations on that building.*
- *The parapet of building B, along its western and southern edges, at RL 32.50 breaches the applicable 22m height limit by 500mm.*
- *The overrun of the building B lift, at RL 33.50 breaches the applicable 22m height limit by 860mm.*

Figures 1 and 2 on the following page show the original and amended southern elevation

Figure 1 – Southern Elevation (As lodged)



Figure 2 – Southern Elevation (Amended)



This matter was addressed under **Clause 4.6** of the **LEP** within the original Statement of Environmental Effects (SEE) as lodged with the DA. The non – compliances were justified in terms of their minor nature and on the basis that compliance would necessitate the removal of part if not whole levels within the building. Such a reduction would impact on the viability of the project to a level not commensurate with the minor nature of the proposed variation.

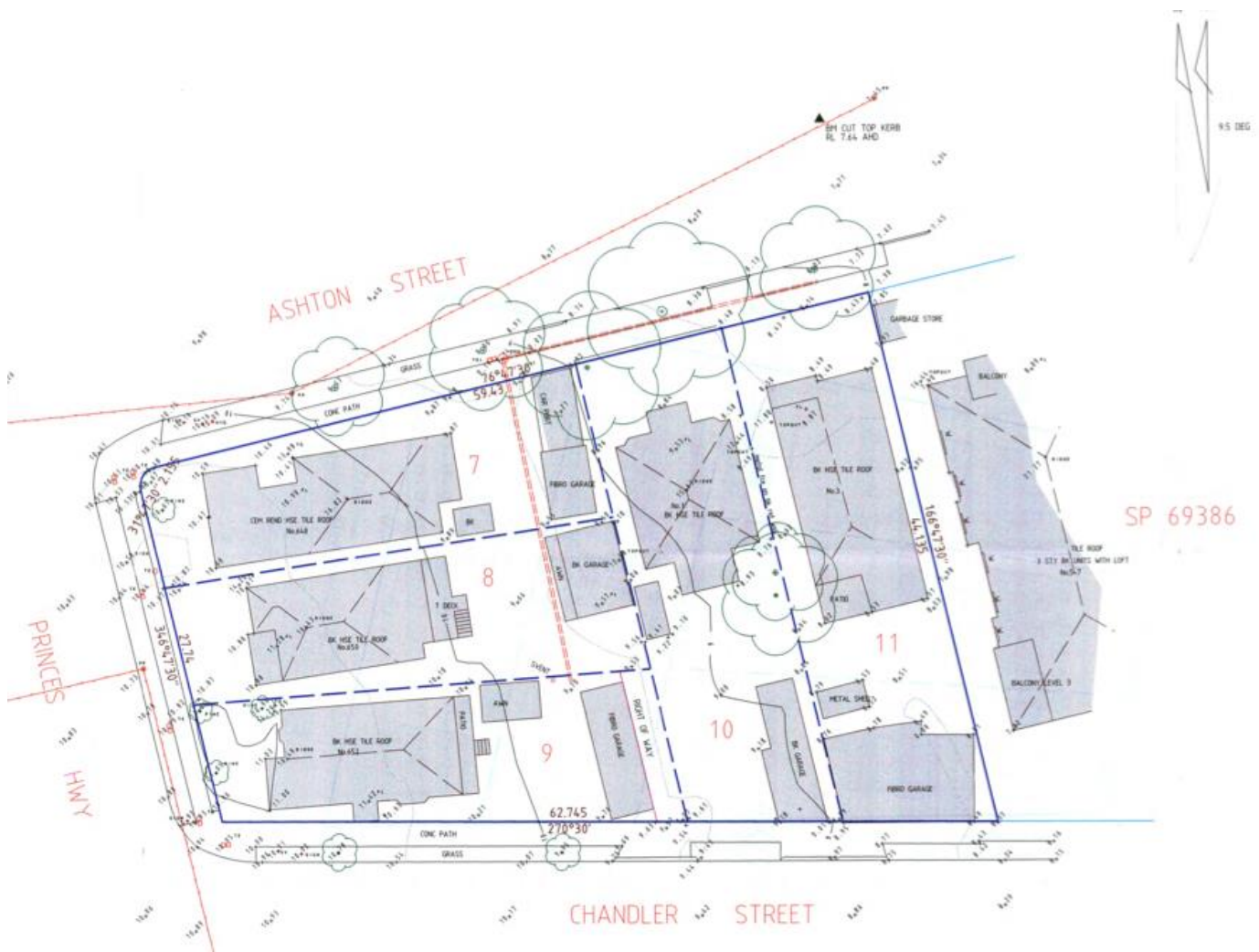
Accordingly, a request to vary the building height standard under **clause 4.6** of the **LEP** needs to be prepared. That is the purpose of this report.

2. THE SITE AND LOCATION

The site that is the subject of this report comprises Lots 7 - 11 in DP 12023, is known as 648 - 652 Princes Highway & 1 - 3 Ashton Street, Rockdale and has an overall area of 2236m².

The land is located on the eastern side of Princes Highway, between its intersections with Ashton and Chandler Streets. It is shaped as a parallelogram (see survey in [figure 3](#) below) and has an east / west orientation. The site enjoys a frontage of 27.74 metres (m) to Princes Highway, 59.43 to Ashton Street (northern boundary), 62.745m to Chandler Street (southern boundary) and a rear (eastern boundary) length of 44.135m.

Figure 3 – Site Survey



The site falls by approximately 3m from the south west corner (Princes Highway and Chandler Street) to its north - eastern corner as shown on the site survey. Each of the existing allotments is occupied by a single dwelling and associated outbuildings and are used for residential purposes.

The surrounding area contains has been used for a mixture of commercial and residential purposes over many years with the built form exhibiting an eclectic range of style, size and form. The Rockdale Plaza with its retail facilities and multi level residential flat buildings is located to the north of the site on the other side of Ashton Street.

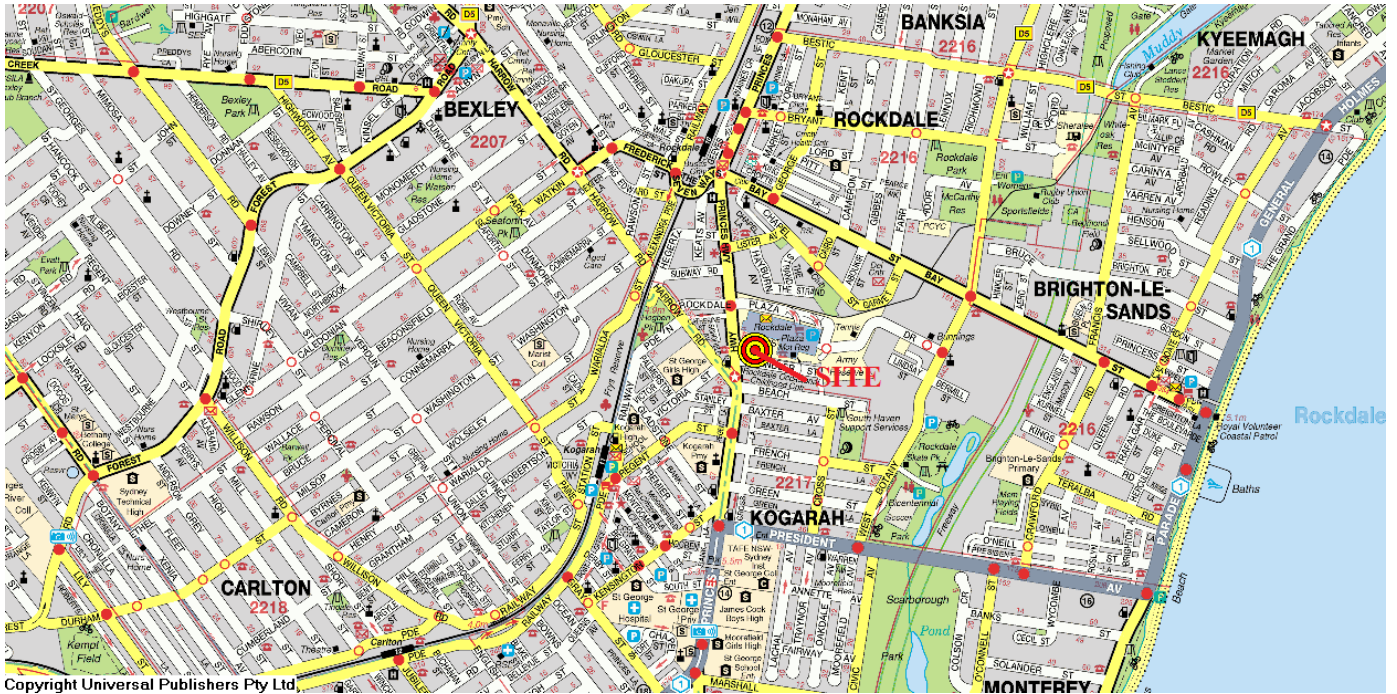
The buildings on the opposite side of the Princes Highway are of a mixed height and use, with the occasional single dwelling remaining on some properties. On the southern side of Chandler Street, the properties primarily contain single dwellings, with this land retaining its *R2 Low Density Residential* zoning under *Rockdale Local Environmental Plan (LEP) 2011*. In this mixed density and land use context, the proposed building will sit well in its surroundings.

The site is located on the periphery of the commercial centre of Rockdale, which includes rail services and major bus links (some of which service the local area), as well as comprehensive retail and business facilities. There are a number of recreation areas and facilities nearby including Rockdale Park, McCarthy Reserve and a number of licensed premises, clubs and restaurants. Kingsford Smith Airport is approximately one kilometre to the east.

The proposal is designed to enhance the ongoing re development and vitality of the surrounding area by the provision of a modern development containing a variety of unit layouts with improved on site communal open space, private recreational spaces per unit and an improved amenity incorporating water and district views.

The general location of the site and the surrounding built form are shown on *figures 4 and 5* on the following page.

Figure 4 – Location Map



Map reproduced with permission of UBD. Copyright Universal Publishers Pty Ltd. DG 05/058

Figure 5 – Aerial Photo



Source: © DEPARTMENT OF LANDS SIX Portal www.lands.nsw.gov.au

3. CLAUSE 4.6 VARIATION

Clause 4.6 of the LEP outlines the matters to be considered by Council where a proposal seeks to vary a numerical standard contained within the LEP. The subject development seeks to vary the Height of Building standard currently contained within *clause 4.3* of the LEP and therefore an assessment under *clause 4.6* is required.

As proposed the development is generally compliant with the exception of part of the parapet and lift overrun of building A and the lift overrun for building B. It is worth noting that the buildings remain compliant with the maximum number of stories permissible under the DCP. The variation in the height of each building is shown in *Figure 6* below.

Figure 6 – Building Height Plane



As detailed on the height plane above the detailed variations are as follows:

- *The lift overrun on building A, at an RL of 31.95 breaches the applicable 22m height limit by 200mm. There are no other height variations on that building.*
- *The parapet of building B, along its western and southern edges, at RL 32.50 breaches the applicable 22m height limit by 500mm.*
- *The overrun of the building B lift, at RL 33.50 breaches the applicable 22m height limit by 860mm.*

All of these structures are located well into the site and will not be readily visible from the public domain. To correct them would result in the loss of part or all of the upper level, which is considered excessive bearing in mind that each variation is less than a metre and does not relate to any additional habitable floor area.

In this context this outcome is considered to be acceptable.

4. THE TERMS OF CLAUSE 4.6

Development consent may still be granted to the proposed development (despite the non-compliance with the maximum height) if a variation to the relevant control is approved under clause 4.6 of the LEP. Clause 4.6 states as follows:

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 development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. ...

(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. ...*

*(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). **(some bold added)** ...*

This document provides a written request from the applicant seeking to justify the contravention of the Building Height standard in accordance with clause 4.6.

Clause 4.6 continues to be an appropriate and frequently applied mechanism to ensure that planning rules have appropriate levels of flexibility, when the circumstances warrant it. Some recent examples of the application of clause 4.6 by the Land and Environment Court are as follows:

- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 the Land and Environment Court approved a residential flat building in Randwick with a 55 per cent exceedance of the height limit (at its highest point) and a 20 per cent exceedance of the floor space ratio control.

The Court was satisfied that the clause 4.6 request by the applicant's town planner was comprehensive and had addressed all of the prerequisites. The Court was also persuaded that the site was 'unusual in terms of its location at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation'. Those features, when taken together with other benefits of the proposal such as its design excellence and internal amenity, provided sufficient environmental planning grounds to justify approval via clause 4.6.

- In *Moskovich v Waverley Council* [2016] NSWLEC 1015 the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. The variation was around 65 per cent. The Court's decision set out a detailed analysis of the decision of the Court in *Four2Five v Ashfield Council*, which concluded that the large numerical exceedance of the FSR control could be supported.
- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Court granted a development consent for a three-storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.

5. ENVIRONMENTAL PLANNING GROUNDS

There are sufficient environmental planning grounds to justify contravening the building height standard.

The development in the main meets the objectives and controls of the relevant Environmental Planning Instruments and DCP. It acknowledges the site's location by maintaining a consistent height with nearby existing and potential redevelopments and being generally in compliance with the relevant height control, ensuring that any impacts such as solar access to adjoining properties is as envisaged in the Planning Framework.

A better planning outcome can also be considered in terms of the potential impact of the proposal from the increased height on the public domain and in an urban design sense. Any assessment of these issues must consider the proposal in terms of the context of the site, its built form, the need for mixed - use development in the locality and the design parameters of Rockdale DCP. These matters are discussed within the Statement of Environmental Effects submitted with the DA, with the proposal performing well in regard thereto.

It may be suggested in certain submissions that all of the above benefits could be achieved by a smaller compliant development. However, to ensure that the lift overruns and part parapet meet the LEP height standard would necessitate a reduction of at least a part if not a full level within both the buildings reducing the yield of the development.

Such a reduction would impact on the viability of the project to a level not commensurate with the minor nature of the proposed variations. The location of the lift cores and errant parapet in the middle of the buildings will ensure that the associated additional height is unlikely to impact and or be readily perceived from the public domain. In each case the variation is less than 1m and does not include any habitable space.

It is also worth noting that notwithstanding the minor breaches of the building height the FSR of the whole development at 2.47:1 is less than the maximum permissible 2.5:1.

In the circumstances of this proposal a better outcome is also achieved by varying the relevant height standard through:

- The re invigoration of a low use site with a new vibrant modern building, that although marginally greater in height, respects its surroundings and reduces its impact on nearby residential properties.
- The increased height does not result in any breach of the site's available FSR or provide any additional habitable floor area. It does not create impacts on the amenity of adjoining properties thus ensuring the desired future character of the area expected under the relevant planning framework is maintained.
- When viewed in the round the majority of the whole of the visible portion of the structure is below the height limit and will therefore not dominate the streetscapes of the Princes Highway, Ashton Street or any surrounding streets.
- The provision of a development that maximises the opportunity for people to work within the community where they live and therefore reduce the impact on both private and public transport services.

In this context if the additional height is not approved:

- The orderly and economic use of the land (as promoted by the objects of the EP&A Act, 1979) would be suboptimal; and
- The site's capacity to provide increased commercial and residential variety and opportunities within the locality would not be fully utilised.

Furthermore, no significant adverse impacts arise from the non-compliance. The only potential adverse impact from an increased height could arise if there was an increased shadow impact on adjoining land. However, bearing in mind the location on the site of the structures breaching the height limits, any shadow would fall within the roof plane of the building or the site itself.

These facts, taken together, constitute environmental planning grounds sufficient to justify contravening the development standard.

6. CONSISTENCY WITH THE STANDARD & ZONE OBJECTIVES

The proposed development will be in the public interest because it is consistent with the objectives of both the LEP Height of Building standard and relevant land use zone. The reasons why are set out below.

Clause 4.3 of the LEP contains objectives that clearly indicate the purpose of the height control. Those objectives are listed below together with comments on the proposal's performance against them.

- (c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.

(a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,

Comment: This is a factual statement only to create the numerical standard.

(b) to permit building heights that encourage high quality urban form,

Comment: The proposal represents a well designed building that sits well in its surroundings and is of style that once completed will complement the character of the nearby locality.

The minor variations in height as proposed will not detract from this objective in any manner.

(c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,

Comment: Bearing in mind that the majority of the building is compliant with the maximum height available under the LEP, the minor variations proposed will have no impact on sky exposure or daylight available to the subject buildings, other buildings, key areas and the public domain.

(d) to nominate heights that will provide an appropriate transition in built form and land use intensity.

Comment: Bearing in mind that the majority of the building is compliant with the maximum height available under the LEP and as no additional habitable space is created by the variations, the minor variations proposed will have no impact on the transition of the proposal's built form or its land use intensity.

The objectives of the applicable **B4** 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 satisfies these objectives in a number of aspects:

- The proposal provides for retail / commercial tenancies fronting the Princes Highway with the proposed residential units separated from the commercial uses by height or by being within a different building, ensuring that the varied land uses are sufficiently separated to ensure compatibility and acceptable amenity.
- The proposed five retail / commercial tenancies are of varied size and capacity to accommodate a range of specific uses to serve the local community.
- The proposal will increase housing choice and opportunity to reside close to the commercial centre providing improved trade base and additional residential users of local services and facilities

- The majority use of the land for residential purposes integrates with other sites within the locality used for non - residential land uses and its proximity to public transport maximises its modal split options.

7. COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. There are three reasons why this is so.

Firstly, there are no adverse consequences attributable to the proposed non-compliant aspect of the development. To ensure absolute compliance with the height standard would necessitate the removal of the top habitable floor of both buildings with the loss of those units. The burden placed on the landowner via such a requirement would be disproportionate to any adverse consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 [15]).

Secondly, requiring strict compliance (and refusing the development application) will *thwart* achievement of a number of the objectives of the height standard as discussed earlier in this report

Finally, requiring strict compliance (and reducing the height the proposal) will undermine achievement of the zone objectives, as discussed above.

The proposed development achieves a balanced development outcome between an acceptable built form within the *B4* zone and the surrounding mixed density neighbourhood. The built form outcome will be one of quality, with care taken in the design phase to ensure that any adverse impacts to surrounding properties and the public domain are minimised. Finally, the location of the site, promotes walking and public transport use and meets the criteria for “accessible area” under the *SEPP (Affordable Rental Housing) 2009*.

In view of all of the above, compliance with the numerical LEP standard for building height is considered to be unreasonable and unnecessary in the circumstances. If approved, the proposal

(when built) will not be out of place with, nor detrimental to the amenity of its surroundings and will fit within the desired future character of the area as envisaged in the relevant planning framework. The proposed development represents a good fit with the aims of the LEP, the objectives of the height standard and the objectives of the zone.

Approval of the non-compliant building height allows for a development that provides added community benefit and an improved planning outcome, from both a functional precinct layout perspective and transport outcome. The proposal development will continue to contribute to the improved overall supply of commercial / retail spaces and housing stock in the area, bettering both housing choice and affordability, in accordance with the Council's desired future character of the Rockdale Town Centre.

8. CONCURRENCE OF THE SECRETARY

In accordance with the recent Planning Circular (PS 18 – 003) dated 21 February, 2018 the concurrence of the Secretary (of Department of Planning and Environment) can now be assumed for the proposed height variation. This Circular is a notice under *Clause 64(1)* of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

9. CONCLUSION

An assessment undertaken against the relevant planning framework indicates that the proposal is an acceptable one. It will not impact negatively on the amenity of nearby residents. The variation to the building height standard contained within the LEP is a matter that any reasonable Authority properly exercising its planning powers could agree to.

David Furlong - Director

BTP, MPIA