



Clause 4.6 Variation Request
Building Height Development Standard:
Waverley Local Environmental Plan 2012.

552-568 Oxford Street, Bondi Junction

Submitted to Waverley Municipal Council On behalf of Denscen Pty Ltd

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This document is preliminary unless approved by a Director of City Plan Strategy & Development

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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1. Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 of the *Waverley Local Environmental Plan 2012*. It has been prepared in support a development application submitted to Waverley Municipal Council for the construction of a shop-top-housing development comprising of, in summary, nineteen (19) storeys, ninety (90) dwellings, three (3) commercial units and four (4) levels of basement car parking, at 552-568 Oxford Street, Bondi Junction.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

The development standard that this request seeks approval to vary is the height of buildings control in Clause 4.3(2) of the *Waverley Local Environmental Plan 2012* (WLEP).

The numeric value of the height of buildings control development standard is 60m. The proposal includes a maximum building height of 61.5m when measured from the northern (Grafton Lane) frontage. Due to the site's 4.5m south - north gradient, the proposal's height is, in fact, compliant when measured from the southern boundary (Oxford Street), and only marginally non-compliant when measured from the eastern and western (side) boundaries.

The development standard is not specifically excluded from the operation of Clause 4.6 of the LEP.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal⁷.

In **Sections 3** and **4** of this request, we have explained how flexibility is justified in this case in terms of the matters explicitly required by clause 4.6 to be addressed in a written request from the applicant. In **Sections 4**, **5**, **6** and **7** we address, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

As indicated earlier, any development of the subject site will be influenced by the 4.5m north - south gradient which traverses the subject site. Due to the site's relatively limited depth, it would be onerous to require 'stepping' throughout the floor plan, or even the roof plan, in order to achieve compliance. To do so would result in an impractical floor plan, and an awkward resolution to any envelopes at the top of the proposed tower.

It should also be noted that the proposal does not seek to achieve additional habitable storeys above the maximum permitted building height. Rather, the height exceedance relates mainly to services such as lift over runs, as well as the top most portion of the northern, eastern, and western façade. Further, as the height non-compliance is limited primarily to the northern elevation, it does not result in any amenity related impacts to existing surrounding shop-top-housing developments, such as view loss, overshadowing or solar access.

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¹ Relevant decisions include: Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46; Wehbe v Pittwater Council [2007] NSWLEC 827; Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009; Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248; and Moskovich v Waverley Council [2016] NSWLEC 1015.

Extent of variation

The subject site has a maximum allowable building height of **60 metres**, as shown in the WLEP Building Height Map in **Figure 1**.

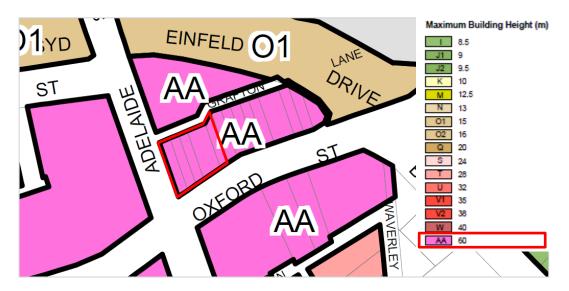


Figure 1 - Extract of the Height of Buildings Map, site outlined in red (Source: HOB_001)

As demonstrated on **Figure 2** below, the site reaches a maximum height of RL 143.80 AHD, translating to a maximum height of 61.5m to the top of the lift overrun when measured from the southern (Grafton Lane) boundary. The proposal's height is, in fact, compliant when measured from the southern boundary (Oxford Street), and only marginally noncompliant when measured from the eastern and western (side) boundaries.



Figure 2 - Extract of proposed North Elevation, contravention of height standard shown in red (Source: UP Architects/Kann Finch)



Figure 3: Extract of proposed Western Elevation, contravention of height standard shown in red (Source: UP Architects/Kann Finch)

As indicated earlier, the height non-compliance is a result of the 4.5m north - south gradient traversing the subject site. Enforcing compliance would compromise the architectural integrity of the roof.

As illustrated in **Figure 2** above, and **Figure 4** below, the vast majority of the exceedance is the result of the rooftop services equipment, including the lift overrun and hot water plant. We do note that these building elements are located below the maximum building height when measured from the southern (Oxford Street) boundary. Therefore, the building presents as a compliant building envelope when viewed from the primary public vantage point, being Oxford Street.

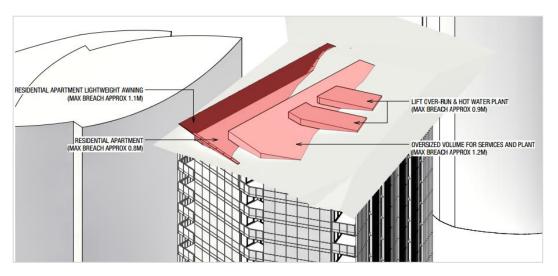


Figure 4: Demonstration of non-compliant building volume (in red) above maximum building height plane (Source: UP Architects/Kann Finch)

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. [cl. 4.6(3)(a)]

Achieves the objectives of the standard

Compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard².

Table 1 - Achievement of Development Standard Objectives

Objective	Discussion
(a) to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties	As the Statement of Environmental Effects (SEE) which accompanies the development application (DA) establishes, the proposal preserves the amenity of neighbouring properties in accordance with the intent of the relevant environmental planning framework. Specifically, the SEE, design verification statement from UP Architects, independent solar access and ventilation assessments from Steve King, independent urban design review from Architectus, as well as the wind and glazing assessments from Windtech, all conclude that acceptable amenity will be afforded to neighbouring properties. The maximum height of the building is 61.5m. This is a 2.5% increase to the development standard, less than a 10% variation. Arguably, it cannot be concluded that a variation of such minor nature would not preserve environmental amenity.
(b) to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,	The proposal provides for three (3) commercial tenancies on the Lower Ground and Ground Level floors, oriented towards the public domain and providing active frontages along the Adelaide Street and Oxford Street. The new tenancies adopt contemporary expectations in terms of layout and finishes. They will, therefore, assist with accommodating future retail and commercial floor space demand in Bondi Junction, despite the height non-compliance.
(c) to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide	The site is in proximity to land zoned B3 Commercial Core. Due to the site's separation from land zoned B3, as a result of the Adelaide Street road reserve or building setbacks, the ability to accommodate taller buildings on land zoned B3 is not compromised by the proposal, despite its non-compliant height.
an appropriate transition in building	As potential development on land zoned B3 can accommodate taller buildings, a transition in building height to surrounding land, inclusive of

² In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to

establish that compliance with a development standard is diffeasionable of diffecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in Wehbe are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

heights surrounding that land.

the subject site can be achieved. The proposal's height non-compliance is not sufficient to undermine the desired transition effect.

(d) to ensure that buildings are compatible with the height, bulk and scale of the existing character of the locality and positively complement and contribute to the physical definition of the street network and public space.

The DA demonstrates that the proposal is substantially compliant with the height and floor space ratio (FSR) development standards of the WLEP 2012. The variations to each are minor and justified with relevant requests. Given the proposal is substantially compliant with these development standards, arguably the proposal's bulk and scale is acceptable.

Further, the northern end of Oxford Street contains numerous shop-top-housing developments of a similar scale and character to the proposal, as shown in the following photograph. They include 'Aqua Apartments', 'Capitol Apartments, 'The Vue', and 'The Eclipse'.



Figure 5: Existing development at the northern end of Oxford Street (Source: CPSD)

The proposal includes a mostly six (6) storey podium built to all of the site's boundaries. This will assist with defining the adjacent public space. In addition, the podium includes glazed commercial tenancies at the lower ground and ground floor which overlook Oxford Street and Adelaide Street. This will assist with activating, and thereby positively complementing the street network and public space.

The variation sought will be imperceptible and thus not affect the compatibility of the development in the streetscape.

A better planning outcome

In Moskovich v Waverly Council [2016] NSWLEC 1015 the Court accepted that compliance with the development 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 circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development.

It has been demonstrated earlier that the proposal achieves the objectives of the standard and respective land use zone, despite non-compliance. It has also been demonstrated that the proposal achieves a 'better planning outcome'. Specifically, the additional height, albeit minor, allows for a well resolved roof and ideal overall building proportions.

4. There are sufficient environmental planning grounds to justify contravening the standard. [cl. 4.6(3)(b)]

The height breach is an inevitable design response to the 4.5 metre south - north gradient traversing the site. Due to the site's relatively limited depth, it would be onerous to require 'stepping' throughout the floor plan, or even the roof plan, in order to achieve compliance. To do so would result in an impractical floor plan, and would affect the architectural integrity of the roof.

It should also be noted that the proposal does not seek to achieve additional habitable storeys above the maximum permitted building height. Rather, the height exceedance relates mainly to services such as lift over runs, as well as the top most portion of the northern, eastern, and western façade. Further, as the height non-compliance is limited primarily to the northern elevation, it does not result in any amenity related impacts to existing surrounding shop-top-housing developments, such as view loss, overshadowing or solar access. Therefore, whilst absence of environmental impact does not, by itself, represent sufficient environmental planning grounds to justify contravening a development standard, it is a notable reference in this case.

In light of the above, this request provides that there are sufficient environmental planning grounds to justify the contravention

5. The proposal will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone. [cl. 4.6(4)(a)(ii)]

In **Section 2** (above), it was demonstrated that the proposal is consistent³ with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in **Table 2** (below).

Table 2 - Consistency with Zone Objectives

Objective	Discussion
To provide a mixture of compatible land uses.	The proposal provides for a mixed-use development, comprising ground floor commercial and residential land uses above. The contravention of the development 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 mixed-use development is situated adjoining the Bondi Junction Commercial Core, approximately 350m walk from Bondi Junction Railway Station. The proposal therefore provides a high-density development in an appropriate location well connected to public transport and encourages an active lifestyle. The contravention of the development standard will not affect consistency with this objective.
To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core.	The subject site does not include any heritage items. The proposal does not restrict items of heritage significance in Bondi Junction from being occupied for commercial purposes.

As can be seen from **Table 2**, the proposal is consistent with the objectives of the standard and the objectives of the zone, and is therefore in the public interest.

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³ In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'.

6. Contravention of the development standard does not raise any matter of significance for State or regional environmental planning. [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. In particular, the minor nature of the exceedance (i.e. 1.5m) would not raise any matters of state or regional planning significance.

7. There is no public benefit of maintaining the standard [cl. 4.6(5)(b)]

There is no public benefit⁴ in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum building height control and, hence, there are no public disadvantages.

Conversely, compliance could be achieved by 'stepping' the floor plan and/or the roof treatment. However, this would result in an impractical floorplan, and would compromise the architectural integrity of the roof.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

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⁴ Ex Gratia P/L v Dungog Council (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

8. Conclusion

The proposal to exercise the flexibility afforded by Clause 4.6 of the *Waverley Local Environmental Plan 2012* results in a better outcome, being an appropriate built form massing for the site.

This variation request demonstrates, as required by Clause 4.6 of the *Waverley Local Environmental Plan 2012*, 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 the objectives of the development standard and is consistent with the objectives of the B4 Mixed Use Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.