

## APPENDIX 1

### Clause 4.6 Exception to Development Standard – Maximum Building Height

Proposed residential flat building containing 124 residential units and 90sq.m of ground floor commercial space for a neighbourhood shop.

2-10 Oxford Street & 68-72 Railway Parade,  
Burwood.

April 2018

## CLAUSE 4.6 - EXCEPTIONS TO DEVELOPMENT STANDARDS

### 1. INTRODUCTION

Standard to be varied:	Hight of Buildings – Clause 4.3
Address:	2-10 Oxford Street & 68-72 Railway Parade, Burwood
Proposal:	Proposed residential flat building containing 124 apartments and 90sq.m of ground floor commercial space for a neighbourhood shop.

This is a written request to seek an exception to a development standard under Clause 4.6 – Exceptions to Development Standards within the Burwood Local Environmental Plan (LEP) 2012. The development standard for which the variation is sought is Clause 4.3 (Height of Buildings) pursuant to the LEP. The Map prescribes a maximum building height of 26 metres.

This application has been prepared in accordance with the NSW Department of Planning and Environment guidelines and has incorporated relevant principles identified in the following recent Land and Environment Court decisions.

- *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] NSWLEC 90*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248*
- *Moskovich v Waverley Council [2016] NSWLEC 1015*
- *Randwick City Council v Micaul Holdings Ltd [2016] NSWLEC 7*
- *Mount Annan 88 Pty Ltd v Camden Council [2016] NSWLEC 1072*

This request is made on the basis that:

- a) compliance with the development standard is unreasonable and unnecessary in the circumstances of the case,
- b) that there are sufficient environmental planning grounds to justify contravening the development standard,
- c) it is consistent with the objectives of the SEPP, the particular standard and the zone in which the development is proposed to be carried out, and
- d) it is in the public interest to allow a departure from the numerical standard in this case.

## 2. DESCRIPTION OF PLANNING INSTRUMENT, DEVELOPMENT STANDARD AND PROPOSED VARIATION

Summary of Legal Context and Proposed Variation	
EPI applicable:	Burwood Local Environmental Plan 2012
Zoning:	R1 – General Residential
Standard being varied:	Height of Buildings (Clause 4.3)
Numeric measure of variation:	Allowed: 26 metres Proposed: 34.5 metres (24.6%)

A building has already been approved on part of the subject site for eight (8) levels. DA 74/2015 was approved on 4 December 2015 and included 68 – 72 Railway Parade and 2-2A Oxford Street. The DA sought the construction of an 8 storey residential flat building that included a total of 87 residential apartments.

Since this approval the site has been amalgamated with adjoining land completing the existing residential block. The current design provides for an additional 2 storeys or 8.5 metres above the maximum building height (to a maximum of 10 storeys) along Railway Parade and part of Oxford Street. The rear of the site that immediately adjoins the existing school is however reduced by 2 storeys (to 6 storeys) providing a better transition to existing lower density development and reducing the visual impact to land to the south.

## 3. OVERVIEW OF PROVISIONS

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards.

The Objectives of Clause 4.6 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that 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.*

Clause 4.6(4) require that 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.*

Clause 4.6(5) requires that the 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.*

Sub-clause 4.3(1) outlines the objectives in relation to the height of buildings control. They are as follows:

- (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.*

## 4. ASSESSMENT OF PROPOSED VARIATION

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

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

This request for variation argues that the breach in the maximum building height by 8.5 metres to a small part of the site is supportable on the basis of the better built form outcome achieved. The benefit outweighs the impact and on this basis it would be unreasonable to strictly enforce the height control.

An 8 storey building has already been approved across the majority of the site. The remaining isolated allotments have now been amalgamated extending the 8 storey building in accordance with the LEP controls. The benefit of an amalgamated site is that no isolated lots remain completing development in this location.

To satisfactorily examine whether the height is too high, it is relevant to look at the presentation of that building and the impacts of that building.

To create a more varied building form in height across the development footprint, density has been relocated from the south of the development where it adjoins the more sensitive edge to the school to the north-western corner of the development along the corner of Railway Parade and Oxford Street. This involves increasing the building height from 8 storeys to 10 storeys (or 34.5 metres) to an area of 660sq.m of the overall development, but also creates a reduction in height along the southern portion adjoining the school. The remaining part of the building to the east of the development remains at 8 storeys creating a diversity in building height across the site.

Overshadowing has been tested and has a better outcome for the school playground throughout the day by decreasing the height at southern part of the site. Compliance would result in an 8 storey building across the site, whereas the proposed built outcome creates a variety of building height that are not excessive or unreasonable for this location, nearby both Burwood and Strathfield town centres and within a Priority Precinct identified for growth by the State Government.

A development which strictly complies with the standard is unreasonable and unnecessary in this case because it would not support the appropriate urban design outcome which responds to the site's context adjoining a school and to create a more interesting and varied built form.

**4.1.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?**

The objectives (noted earlier in Section 3) specifically relate to bulk and scale as well as compatibility with the town centre context.

This building is representative of the desired vision for the town and is an attractive response to the site and its surroundings.

The proposal therefore will not compromise any of these objectives.

**4.1.3 Has the development standard been virtually abandoned or destroyed by Council's own actions departing from the standard?**

No.

**4.1.4 Is the zoning of the land unreasonable or inappropriate?**

The zoning of the land is appropriate.

**4.2 Are there sufficient environmental grounds to justify contravening the development standard?**

Yes. A good test of justification relates to understanding any benefit when weighed against any impacts.

By increasing the building height above that permitted at the north west corner and reducing the height at the south, the building form is greatly enhanced, and the overshadowing impacts are improved. In all, the overshadowing is reasonable given the minimal impact on the school play grounds at key times of the day. Setbacks to the adjoining residential zone meet the requirements and the proposed variation in building heights create a more interesting transition to existing development.

There is no addition in floor space and the proposal complies with the FSR control. The height breach is the product of a relocation in density to create a built form transition and variation. The additional height is in the north western portion applying to 660sqm or 19.3% of the site area.

With the absence of impact and benefit to adjoining built form and properties, there are sufficient environmental grounds to justify contravening the development standard.

### **4.3 Will the proposed development 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?**

#### **4.3.1 Objectives of the standard**

Sub-clause 4.3(1) outlines the objectives in relation to the building height controls. Comments supporting the proposal's consistency with each of the objectives of the standard are addressed below:

- (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,

The proposed form is generally in keeping with those intended for this location as shown by current approvals on the site. The northern boundary adjoins a main route connecting Burwood and Strathfield and also borders the western railway line. This is the appropriate location for an increase in height because this also facilitates a decrease in height adjoining the school.

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

Overshadowing have been discussed and the proposed development has minor overshadowing impacts particularly on the school grounds and play areas at key parts of the day.

The bulk of the building is increased slightly but it is towards the street corner and this shapes the building in an appropriate way allowing for a transition in height across the site and a more interesting urban outcome. The form is not inappropriate.

There are no loss of views or privacy to any adjoining dwellings.

The impact has been well understood and well controlled. The proposed development is consistent with the objectives of the standard.

#### **4.3.2 Objectives of the Zone**

The objectives of the R1 General Residential zone are as follows:

- *To provide for the housing needs of the community*
- *To provide for a variety of housing types and densities*
- *To enable other land uses that provide facilities or services to meet the day to day*

*needs of residents*

The proposed development demonstrates consistency with the zone objectives by:

- Locating appropriate housing density near a bus transport node and walking distance to Burwood station;
- Developing a quality building that will commence the revitalisation of this part of the town centre;
- By creation some small shop/ retail suites for appropriate local businesses that will meet the day to day needs of residents.

The proposal is generally consistent with the zone objectives.

#### **4.3.3 Objectives of the LEP**

The aims of the Burwood LEP 2012 are as follows:

- (a) to create a land use framework that allows detailed provisions to be made,*
- (b) to encourage or restrict development of land according to its suitability for various purposes,*
- (c) to encourage provision of a range of housing types,*
- (d) to encourage growth in business and employment development.*

The proposal generally supports the relevant LEP objectives and does not undermine those that relate more to the natural environment.

It supports local housing needs and the orderly development of the town centre and encourages appropriately scaled retail uses.

#### **4.4 Whether contravention of the development standard raises any matter of significance for State or regional environmental planning?**

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The flexibility with Clause 4.6 allows for Council to make decisions *without* the need to use the Planning Proposal processes under the Act.

Further, the site is within walking distance to two train stations and town centres and supports state planning principles of transit orientated development. While there is no increase in density above that of the FSR control, the increase is not out of context with nearby urban form and the desired future character of the area and the Burwood Strathfield Homebush Priority Precinct.

## **4.5 Would the contravention raise any significant matter or hinder the attainment of the objects of the Act?**

The objects specified in Section 5(a)(i) and (ii) of the Act are as follows:

*“to encourage*

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

The proposed development is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

## **4.6 Is there public benefit in maintaining the development standard?**

Maintaining the standard would simply result in the removal of the roof terrace light-weight structures and may result in the loss of retail space on the ground floor which is intended to activate Railway Parade and provide outdoor café and seating space within the generous setbacks and its light-weight structures. This would reduce the residential amenity of the site.

Given the absence of significant impact, no considerable public benefit would result from strict compliance with the standard in this instance.

# **5 CONCLUSION**

## **5.1 Is the objection well founded?**

An objection that is well founded will clearly look at the benefits versus any impacts. This submission has examined compliance with all relevant objectives of the standard, the zone, the LEP and the Act. The granting of an exception to the development standard can be supported in the circumstances of this case, as there are no obvious reasons to refuse it. Refusal would have to be based on the desire for numeric compliance just for the sake of compliance and would limit an attractive redevelopment project for no obvious reason. This application suggests that some flexibility is required to build good town centres and support communities.

The proposal seeks an increase of 8.5 metres to 19% of the site area. This facilitates an increase of 2 storeys to create a 10 storey building element and a decrease in building height to 6 storeys to the south of the site adjoining the school play areas. The increase in

height and breach of the building height control creates a more interesting built form and transition to adjoining land. The increase in height of the corner element defines the development and creates a Gateway identity on the approach to the Burwood town centre from the west. The development outcome will not have any adverse impacts associated with the appearance of an increase in bulk or scale.

This application is therefore well founded.

## **5.2 Final remarks**

The proposed development will be compatible with the surrounding land uses and desired future character of the area.

Recent case law (Moskovich and Micaul) has clearly established that the consent authority has a broad discretion under clause 4.6(4) as to the degree of satisfaction required by that clause. It is unnecessary in this case to amend the LEP or enforce strict compliance just to get this building approved when it complies with all other controls. Clause 4.6 is the appropriate tool to approve this variation.

Strict compliance would serve no environmental ground and make no meaningful improvement to any planning issue.

Indeed, given the minimal impact, the only reason that could be given for refusal is that numeric compliance simply **MUST** be adhered to. This view however, contravenes the very intent of flexible planning provisions and fails to acknowledge the benefit that a variation like this one brings to future residents.

For this reason, strict compliance with the development standard is unreasonable and unnecessary and the use of Clause 4.6 is available in this instance.