



29 March 2017

Ms Sandra Mccarry
Senior Town Planner
City of Ryde Council
1 Pope Street
Ryde NSW 2112

Dear Sandra,

CLAUSE 4.6 VARIATION | LDA2016/524 | 80 WATERLOO ROAD, MACQUARIE PARK

This letter has been prepared to seek a variation to the maximum height of building controls which apply to 80 Waterloo Road and 16 Byfield Street, Macquarie Park (the subject site). The request is made pursuant to Clause 4.6 of the *Ryde Local Environmental Plan 2014* (RLEP 2014). It seeks to vary the development standards listed under under Clause 4.3 of the RLEP 2014.

1. BACKGROUND

A development application (LDA2016/524) has been lodged with the City of Ryde for the redevelopment of the site for a mixed use development including ground floor retail and residential apartments. The architectural drawings were prepared to fully comply with RLEP 2014 including the maximum height of building and floor space ratio controls.

However, the NSW Roads and Maritime Service (RMS) subsequently advised that it is proposed to resume part of the site for transport improvements along Waterloo Road and at the Waterloo Road/Byfield Street intersection. The proposed resumption would reduce the existing site area by 568sqm and impact upon the developable area, as well as the siting of the mixed-use development proposed within the current DA.

The Proponent met with Council on 15 March 2017 to discuss the proposed resumption and its implications for the proposed development. A series of design alternatives were presented by the project architect which sought to vary the existing building mass to accommodate the proposed land resumption, while maintaining the planned development yield for the site.

Council undertook a detailed review of each of the potential options and prepared emailed correspondence dated 17 March 2017 which advised

Council has review the options put forward by you, being:

- 1. Shift the whole building (Tower A) north west thereby reducing the setback/building separation with 82 Waterloo Road.*
- 2. Zero setback along the new boundary to Byfield street, with a smaller building footprint. To compensate for the smaller footprint – GFA to be redistributed. GFA area will result in one additional level on the building. Will be over the height limit by 1 storey.*
- 3. A – Building setback off the boundary along Byfield Street. To compensate for the smaller footprint one additional storey to be added to Buildings A and B.*

B – Building setback off the boundary along Byfield Street and two (2) storeys to be added to Building A only.

*The above options were discussed with Strategic Planning and Management and **Option 3B** is the preferred design. However, the following criteria should be adhered to:*

- *The setback along Byfield Street should be sufficient to allow sufficient landscaping and buffer between the public domain, a minimum of 2.5 to 3m (ideally 3m) setback should be provided.*
- *Ensure that the additional floor area (proposed storeys) is equivalent to only what was lost by the redesign due to the acquisition. The current proposal complies with the floor space ratio - no additional floor space beyond what will be lost from the redesign will be permitted.*
- *Clause 4.6 to be submitted for the height variation.*

Further detailed design work was undertaken by Turner Architects including massing and articulation studies to respond to the above matters and appropriately relocate the floor space affected by the RMS resumption. These studies focussed on:

- Providing an adequate setback to Byfield Street.
- Maintaining the curved architectural character of the original design.
- Providing an equivalent floorspace to the development yield originally envisaged within the Herring Road Urban Activation Precinct and updates to RLEP 2014.

The studies concluded that an additional storey was required on Building 2 if the preferred setbacks and building design is to be delivered, while maintaining the original development yield. Council reviewed this amended proposed and advised ‘*the proposal of two extra storeys on Building 1 and one additional storey on Building 2 is acceptable*’.

This Clause 4.6 variation request accompanies the amended architectural package which reflects the agreement to include an additional two levels on Building 1 and one additional level on Building 2.

2. PROPOSED VARIATION

The site is affected by a maximum height of building control of 65 metres in accordance with Clause 4.3 of RLEP 2014. The amended architectural drawings seek to vary from the Clause 4.3 provisions as follows:

- Building 1 (Waterloo Road building): 72.9 metres (RL118.9m)
- Building 2 (Byfield Street building): 69.88 metres (RL111.35m)

The amended proposal has addressed the criteria prescribed by Council as it:

- Provides a curved façade to Byfield Street to maintain the architectural character of the proposed built form. The proposal generally maintains a three metre setback to Byfield Street, with minor variations to accommodate the curved façade.
- The total amended GFA is 30,552sqm as shown on the updated yield schedule submitted. This is equivalent to the GFA that was originally submitted – there is no additional floorspace.
- A Clause 4.6 request has been prepared to vary the maximum building height control development standard.

The Clause 4.6 request is provided within the following section of this correspondence.

3. CLAUSE 4.6 VARIATION REQUEST

3.1. ASSESSMENT FRAMEWORK

Clause 4.6 of the RLEP 2014 provides flexibility in the application of development standards. The objectives of Clause 4.6 are listed within the LEP as:

- (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.*

The Clause 4.6 provisions enable development consent to be granted for a proposal that contravenes a development standard within the LEP. The consent authority is required to consider a written request from the applicant that justifies 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.*

The consent authority must be satisfied that the written request has adequately addresses the relevant provisions and that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone. The concurrence of the Secretary is also required to have been obtained.

The relevant matters of consideration for the Secretary in granting concurrence are as follows:

- (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.*

3.2. NSW LAND AND ENVIRONMENT COURT CASE LAW

Planning principles and judgements issued by the Land and Environment Court (NSW LEC) have refined the way in which variations to development standards are addressed within the DA assessment process. The key findings and directions arising from relevant cases are briefly outlined below.

Winten Property Group Limited v North Sydney Council [2001] NSWLEC46

The decision by Justice Lloyd established the following principles for the assessment and determination of applications to vary development standards:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?

- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?
- Is the objection well founded?

Wehbe v Pittwater [2007] NSWLEC 827

The decision by Justice Preston expanded on the findings in *Winten v North Sydney Council* and established a five part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives?
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary?
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable?
- Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land? Consequently, compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC

Initially heard by Commissioner Pearson and upheld on appeal by Justice Pain, it was found that an application to vary a development standard must go beyond the five part test of *Wehbe v Pittwater* and demonstrate:

- Compliance with the requirements of Clause 4.6 and particularly subclauses (3) and (4).
- There are sufficient environment planning grounds particular to the circumstances of the proposed development, as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity.
- Maintenance of the development standard is unreasonable and unnecessary based on planning merit beyond the consistency with the objectives of the development standard and/or the land use zone.
- All three elements of Clause 4.6 are met, preferably with different reasons for each though not essential.

3.3. ASSESSMENT OF PROPOSED VARIATION

This section of our correspondence provides a comprehensive assessment of the request to vary the development standards relating to building height. Detailed consideration has been given to *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated

August 2011 and relevant planning principles and judgements issued by the Land and Environment Court. The following sections of the report provides detailed responses to the key questions required to be addressed within these documents.

Is the Planning Control in question a development standard?

Clause 4.3 of RLEP 2014 is a development standard capable of being varied under the provisions of Clause 4.6 of the LEP.

What is the underlying objective of the Standard?

The objectives for the height of buildings development standard provided at subclause 4.3(1) of the LEP are addressed below.

- ***(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,***

The site is a landmark site at the eastern entry to the former Herring Road Urban Activation Precinct. The proposed building height will be generally in proportion with the planned height of nearby development, including the proposed development at 82-84 Waterloo Road. The updated perspective images prepared by Turner Architects demonstrate that the amended proposal remains consistent with the existing and future character of Waterloo Road and Byfield Street.

- ***(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,***

The proposed built form has been modulated to minimise the potential impact of shadows on the amenity of the surrounding land. Particular consideration has been given to the proposed height variation to ensure that it will not result in any additional unreasonable impacts on shadows or the appearance of the site and the streetscape.

Elevational solar studies have been prepared to demonstrate that the adjoining properties, as well as the proposed development, will achieve satisfactory levels of solar access. Both the adjoining hotel, the apartments within Building 2 and 50% of the communal open space will achieve at least two hours of direct sunlight on 21 June.

The proposed development achieves 73.3% solar access for living rooms in accordance with the Apartment Design Guide (ADG), which is an improvement from the 70.9% achieved under the original DA.

- ***(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,***

The proposed variation to the building height control will not have any effect on the integration of land use and transport. The proposed floor space within the amended plans is equivalent to the original proposal.

- ***(d) to minimise the impact of development on the amenity of surrounding properties,***

The proposed height variation will not result in any additional impacts to the amenity of the surrounding properties. It has been demonstrated that the solar access requirements will be achieved and the built form quality of the proposed design will be maintained.

The amended design retains the activated streetscape along Waterloo Road and a landscaped setback along Byfield Street. The proposed buildings will make a positive contribution to the streetscape and the quality of development within the locality.

- **(e) to emphasise road frontages along road corridors.**

The built form and design of Building 1 reinforces and emphasises the importance of the Waterloo Road and Byfield Street intersection. The additional two storeys on Building 1 and one storey on Building 2 does limit the achievement of this objective.

Overall, the proposal is consistent with the objectives of the maximum height of buildings development standard.

Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?

The amended development is consistent with the aims of RLEP 2014 as it will:

- Encourage a mixed-use development including an activate retail frontage and a range of residential apartments that are consistent with adjoining and future development and will meet the needs of existing and future residents of Ryde.
- The environmental, economic and social impacts of the proposed development have been assessed in detail and are considered acceptable.
- The proposal will maintain the original floorspace to provide for well-designed development in walking distance of the railway station and existing services.

The proposal also addresses each of the land use objectives for Zone B4 Mixed Use as summarised below:

- The proposal provides a mix of apartment types and land uses of which are compatible with the vision for the site and locality.
- The site is located in proximity to Macquarie University Station and surrounding bus stops. As such the site is highly accessible by public transport and patronage will be maximised.
- The proposed retail tenancies will provide additional commercial opportunities and retail options along the Macquarie Park corridor.

The development is consistent with the objects of the Act, in respect to the following:

- The variation to the building height will achieve a better urban design outcome for the site by maintaining adequate setbacks and the architectural character of the original design.
- The redevelopment of the site for higher density residential and neighbourhood scale retail uses contributes to urban consolidation.
- The delivery of new housing and jobs within an established urban environment, located near public transport options, without significant or unreasonable environmental impact comprises both orderly and economic use of urban land.

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

Compliance with the development standard is considered unreasonable or unnecessary having regard to the circumstances of the case. The original development application was designed to fully comply with each of the relevant requirements contained within RLEP 2014, including the land use zoning and

built form controls. The proposed resumption of land by the RMS was only raised once the development application had been significantly progressed and in the absence of any controls, such as a rezoning or land acquisition control.

The proposed variation to the building height is solely related to the proposed land resumption. The amended plans seek only to accommodate the floorspace that has been lost as a result of the reduction to the developable area at the ground plane. It is considered important to maintain the planned floorspace for the site to enable its contribution to the planned development within the locality, including achieving the relevant housing targets that were established in the amendment of the original built form controls.

The amended proposal will result in a public benefit as it will enable the RMS to deliver planned transport improvements within the locality. Further, it has been demonstrated that the proposed variation to the building height will not result in any unreasonable impacts to the surrounding land or the amenity of the locality. Satisfactory levels of solar access will be available for both the subject site and the surrounding land. The streetscape will be enhanced by the quality built form design and the perceived visual impact will be negligible, particularly from the immediately surrounding public domain.

Overall, it is concluded that the particular circumstances of this application warrant a variation of the development standard. It is considered that strict compliance with the relevant controls would be neither reasonable or necessary in circumstances of the case.

Is the development standard a performance based control?

The development standard is not a performance based control.

Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

There are sufficient environmental planning grounds to justify the contravening development as outlined below:

- The proposed land resumption will result in a broader public benefit for the locality, allowing the RMS to deliver planned public transport and improvements to the local road network.
- The proposal seeks to maintain the existing floorspace which complies with the relevant floor space ratio controls and the intended development yield for the site.
- The proposed variation to the building height does not result in unreasonable adverse amenity impacts on adjacent land, with adequate solar access, negligible visual impacts and an improved streetscape.

Is the objection well founded?

The request to vary from the development standards has been prepared in accordance with each of the relevant requirements listed within Clause 4.6 and is considered to be well-founded.

There is a clear public benefit associated with the proposed variation to the development standard and it has been demonstrated that strict compliance would be unreasonable. It has also been demonstrated that the proposed variation would not result in any unacceptable impacts and strict compliance would be unnecessary.

Would non-compliance raise any matter of significance for State or Regional Planning?

The non-compliance will not raise any matter of State or Regional Planning. The proposed variation has been driven by a unique set of circumstances and it is considered entirely appropriate to vary from the development standard in this instance.

Is there a public benefit of maintaining the planning control standard?

As outlined above, the proposed variation is based on circumstances that are specific to this site and this proposal. It is considered unlikely that the proposed variation would create an undesirable precedent and as such, there is no public benefit in maintaining the planning control standard in this particular circumstance.

4. CONCLUSION

This request is made pursuant to Clause 4.6 of KLEP 2015 and seeks to vary the maximum building height development standard prescribed under Clause 4.3 of RLEP 2014. It has been demonstrated that strict compliance with the numerical standard in this circumstance is both unreasonable and unnecessary for the following reasons:

- The proposed variation ensures the planned floor space targets for Macquarie Park are achieved.
- The proposed variation has been carefully developed in response to the constraints of the site, surrounding developments and the RMS land resumption.
- The additional height will result in minimal adverse amenity impacts (overshadowing, views or privacy) to surrounding development when compared to a complying design. Nor will the extent of the non-compliance result in any adverse visual impact on the locality.
- The GFA is equivalent to what was originally submitted.
- The non-compliance will not hinder the development's ability to satisfy the objectives of the B4 Mixed Use zone.

Based on the reasons outlined, it is concluded the request is well founded and the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "R Macindoe".

Ryan Macindoe
Consultant