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## **Amended Clause 4.6 Exceptions to Development Standards Clause 4.3 Height of Buildings - Ryde Local Environmental Plan 2014**

### **Proposed Construction of a Part Four (4) Storey and Part Seven (7) Storey Mixed Use Development - No. 363 Victoria Road and No. 2A Westminster Road, Gladesville**

#### **1.0 Introduction**

This Amended Clause 4.6 Exceptions to Development Standards request has been prepared by Andrew Robinson Planning Services Pty Ltd on behalf of Frank Crotti, and accompanies a development application for a proposed part four (4) storey and part seven (7) storey mixed use development at No. 363 Victoria Road and No. 2A Westminster Road, Gladesville.

The Clause 4.6 Exceptions to Development Standards request relates to the height of buildings principal development standard prescribed under subclause 4.3(2) of *Ryde Local Environmental Plan 2014*. Subclause 4.3(2) states:

*The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Buildings Map indicates a maximum building height of 22m applies to the majority of the site (that part zoned B4 Mixed Use), with a 12m building height applying to that part of the site zoned B6 Enterprise Corridor (refer to **Figure 1**).

The original development application sought a breach to the 22m, but complied with the 12m height limit. However, following review by the Urban Design Review Panel (UDRP) and a preliminary assessment of the application, Council requested that the proposed development be amended in response to the issues raised by the UDRP and the preliminary assessment.

One issue raised by the UDRP related to the requirement under Section 3.1.5 (c) of Ryde DCP 2014 that the buildings frontage to Victoria Road could only be built to the side boundary for a maximum depth of 20m. A suggestion offered in the UDRP's comments was that the apartments in the (non-compliant) nil setback rear block could be redistributed to the rear of the building, having regard to the 9m rear setback required under the DCP.

As a result, the proposal has been redesigned and floor space redistributed to include an additional storey above the 3 storey component at the northern end of the building. However, as a consequence, the amended design now also proposes a breach to the 12m height limit as well.

When measured in accordance with the definition for building height under the LEP, the proposed amended development has a maximum height of 22.608m. This exceeds the 22m statutory maximum building height by 608mm. The proposal also breaches the 12m height limit by 1.355m.



**Figure 1:** Extract from Ryde LEP 2014 Height of Buildings Map showing the 22m (R2 = 22m) and the 12m (M1 = 12m) height limits for the site.



The following definition under Ryde Local Environmental Plan 2014 is important in considering the proposed variation:

**building height** (or height of building) means:

- (a) in relation to the height of a building in metres - the vertical distance from ground level (existing) to the highest point of the building,
- (b) in relation to the RL of a building – the vertical distance from the Australian Height Datum 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.

Having regard to the above definition, the maximum non-compliance to the 22m height of buildings principal development standard relates to the distance between the highest point of the building, at RL 73.9m AHD and the RL of the existing ground level immediately below, being RL 51.29m AHD. The non-compliance to the 12m development standard is between RL 65.35m AHD and RL 51.99m AHD immediately below (refer to **Figure 2**).

**Figure 2** – Extract and mark-up from the HOB South East (Drawing No. 505 D) indicating the extent of the Building Height breaches.



## 2.0 The Effect of Clause 4.6 Exceptions to development standards

Clause 4.6 of Ryde Local Environmental Plan 2014 states (in part):

- (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. 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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgements:

- *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 No 1')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2')

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386
- *Moskovich v Waverley Council* [2016] NSWLEC 1015

In summary, the principles arising from the above matters are:

- That the relevant objectives are those stated in the controls not unidentified underlying objectives - at [57] in Four2Five No. 1;
- That the environmental planning grounds must be particular to the circumstances of the proposed development and/or the site - at [60] in Four2Five No. 1;
- The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* remain relevant. However, in order to satisfy the unreasonable and unnecessary test in Clause 4.6(3)(a), you need something more than way 1 in *Wehbe*, because that test is now encompassed in Clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition;
- That the consent authority must be satisfied that the applicant's written 4.6 variation request has adequately addressed everything in 4.6(3), rather than the consent authority being 'directly satisfied' as to each of those matters – at [58] in *Micaul Holdings Pty Limited*.

In relation to (iii) above, Method 1 in *Wehbe* requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

However, as a result of Four2Five, it is now necessary to demonstrate something *more* than simply achieving the objective of the standard. In this regard, a proposed development that contravenes the development standard, but as a result, achieves the objective of the development standard to a greater degree than a development that complied with the standard, would suffice.

### 3.0 Justification for Variation

#### *What is the context of the variation?*

Part 4.6 of Ryde Development Control Plan 2014 relates to the Gladesville Town Centre and Victoria Road Corridor, providing a vision and development controls for the long term redevelopment of the Town Centre and Victoria Road Corridor. The intent of the DCP is to facilitate *the revitalisation of the Gladesville Town Centre as a vibrant, attractive and safe urban environment with a diverse mix of retail, commercial, residential and leisure opportunities*.

The Gladesville Town Centre serves Hunters Hill and the southern part of the Ryde local government area and will provide its local communities with a wide range of retail, commercial, community, entertainment, religious, residential and other uses appropriate to a vibrant and growing town centre.

The site at No. 363 Victoria Road and No. 2A Westminster Road is identified in the DCP as being within the North Gladesville Precinct, where the anticipated built form and land use is for multi storey mixed use buildings with active commercial/retail uses on the ground floor frontage to Victoria Road, with residential apartments above.

The Vision Statement for the North Gladesville Precinct is reproduced below:

*The North Gladesville precinct between Pittwater Road and Monash Road is to be transformed from a visually cluttered commercial strip into a cohesive built form corridor of mixed retail, commercial and residential uses. The existing poorly defined spaces and visual clutter will be replaced with buildings which address the road with major façades. Large canopy street trees will be planted in building setbacks, and footpaths widened, to create a landscaped setting leading to the town centre precinct.*

The proposed redevelopment of the site at No. 363 Victoria Road and No. 2A Westminster Road, replacing the existing two storey commercial premises and former substation with a multi-storey mixed use building is commensurate with this vision and will make a significant contribution to the revitalisation of this section of the Victoria Road Corridor.

***Strict Compliance is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the development standard.***

The overall building height of 22.608m exceeds the 22m maximum building height by 608mm, representing a variation of 2.7% above the numerical development standard. In respect of the 12m height limit, the 1.335m breach represents a variation of 11.12%. In numerical terms these represent relatively minor variations to the principal development standards. Further, as demonstrated in the recent NSW LEC decisions in *Micaul Holdings Pty Limited v Randwick City Council* and *Moskovich v Waverley Council* there should be no artificial conservatism about the use of Clause 4.6 based on the numerical extent of the variation being sought, given that the purpose of Clause 4.6 is to allow flexibility and to achieve better outcomes for a site by allowing developments to exceed height and/or FSR where there are justifiable circumstances.

An important finding in *Micaul Holdings Pty Limited* was that while the judgement did not directly overturn the *Four2Five v Ashfield* decision, the Chief Judge indicated that one of the obligations of a consent authority is to be satisfied that the applicant's written request has adequately addressed the matters in Clause 4.6(3), namely.....*that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.....and that there are sufficient environmental planning grounds to justify contravening the development standard.*

In this particular instance, it is considered that compliance with the 22m and 12m building height development standards is unreasonable and unnecessary and that there is sufficient environmental planning merit to justify the proposed non-compliance, as described below:

The objectives of the height of buildings principal development standard are:

- (a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*
- (b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*
- (c) *to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*
- (d) *to minimise the impact of development on the amenity of surrounding properties,*
- (e) *to emphasis road frontages along road corridors.*

Having regard to the first method in *Wehbe*, it is considered that the proposed development achieves the objectives of the standard to a greater degree than a development that complied with the standard for the following reasons:

- As illustrated in **Figure 2**, the parts of the building which exceed the 22m height limit are limited to small portions of the roof and lift overruns at the uppermost floor level and are essentially a consequence of the slope of the land away from Victoria Road. The non-compliant portion of the building allows continuity in the overall building height from the higher levels at the Victoria Road boundary and provides an appropriate top of the building.
- Similarly, the part of the building which exceeds the 12m height limit is limited to the parapet surrounding the communal open space area at the northern end of the Fourth Level. The parapet provides an 'edge' and top to the northern end of the building, above the residential apartments. The parapet does not significantly add to the extent of the shadows cast by this element of the building.
- It is considered that the building height and density as proposed is sustainable and



appropriate given that the site is located within an identified urban renewal investigation corridor in the NSW Government's recently released *A Plan for Growing Sydney*, and is in close proximity to public transport (buses) and the facilities and services available in the Gladesville Town Centre.

- The proposal seeks to provide additional residential accommodation in proximity to public transport, shops and services, which is considered to be a desirable planning outcome.
- As illustrated in the Shadow Diagrams provided at **Appendix A**, although there will be a minor increase in the extent of overshadowing due to the non-compliant height, the proposed building height will not cause unacceptable overshadowing or a loss of sky exposure to the adjoining properties or surrounding public domain.
- Despite a small portion of the building exceeding the height of buildings principal development standard, the overall bulk and scale of the building is considered to be acceptable in terms of the streetscape character and built form and the relationship of the building to the adjoining development and is commensurate with the anticipated future 'built environment' and desired character of the area;
- The visual impact when the building is viewed from the surrounding streets will be negligible;
- No substantive public benefit would be realised by maintaining the development standard. Reducing the height of the building to strictly comply with the 22m and 12m height limits would not alter the overall design approach or outcome for the site and would not realise a substantial improvement to the relationship between the site, the adjoining buildings and the surrounding area.
- The proposed building represents a high quality urban form. The architectural detailing and proposed materials and finishes will realise a building of distinction that will make a significant contribution to the quality of the urban streetscape character and appearance. Further, the internal amenity for residents will be of a high standard, with the levels of solar access and natural ventilation exceeding the design criteria under the Apartment Design Guide; and
- Despite exceeding the statutory maximum building heights, the proposed redevelopment of the site will facilitate the orderly and economic redevelopment of the site for the purposes of a residential flat building development that will positively contribute to the achievement of the vision and strategic objectives of *A Plan for Growing Sydney* and *Ryde Local Environmental Plan 2014*.

In light of the above, the requirement to strictly adhere to the numerical development standards for building height is considered to be unreasonable and unnecessary in this instance.

Further, it is considered that there are sufficient environmental planning grounds to justify contravening the development standards. Key environmental planning grounds to support the variation include:

- Despite exceeding the height of buildings principal development standard, the overall bulk and scale of the building is considered to be acceptable in terms of the streetscape character and built form and the relationship of the building to the adjoining (anticipated) development;
- Despite the non-compliant heights, the locations of the height exceedances are such that they do not result in any unreasonable impacts on adjoining sites in terms of overshadowing or visual or aural privacy; and
- The non-compliant heights do not translate to a wholesale departure by reading as an extra storey or significant additional bulk. As such, the non-compliances do not substantially add to the overall bulk and scale of the building and do not cast an unreasonable degree of shadows over the adjoining properties. The Shadow Diagrams provided at **Appendix A** provide a comparison of the shadows cast by a compliant building versus the proposed scheme. This illustrates that although the shadows cast by the building (as proposed) over the grounds of

Our Lady Queen of Peace Church and Primary School between midday and 3pm in mid-winter, the additional shadows are minor and will have a negligible additional impact. It is also noted that in December, the shadows do not impact upon the Church or school properties.

***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.***

The Table below demonstrates that the proposed development will be in the public interest because it will be consistent with both the height of buildings principal development standard objectives and the B4 Mixed Use zone objectives of the LEP.

LEP Clause	Objective	Proposal
<b>Clause 4.3</b> <b>Height of Buildings</b>	a) <i>To ensure that street frontages of development are in proportion with and in keeping with the character of nearby development.</i>	Despite the non-compliances, the scale and form of the building is consistent with the intended built form and character of the locality, providing an active street frontage at ground level and integrating an appropriate mix of residential accommodation above.
	b) <i>To minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area.</i>	<p>The proposed building height will not cause unacceptable overshadowing or a loss of sky exposure to the adjoining properties or surrounding public domain.</p> <p>The proposed building represents a high quality urban form. The architectural detailing and proposed materials and finishes will realise a building of distinction that will make a significant contribution to the quality of the urban streetscape character and appearance. Further, the internal amenity for residents will be of a high standard, with the levels of solar access and natural ventilation exceeding the design criteria under the ADG.</p> <p>Despite the non-compliances, the height and form of the building is consistent with the desired future character of the locality.</p> <p>Accordingly, it is considered that the redevelopment of the site will realise an appropriate urban outcome.</p>
	c) <i>To encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure.</i>	The proposed redevelopment of the site represents an appropriate consolidation pattern that will realise a modern and attractive mixed use development on a major transport thoroughfare, with direct access to public transport infrastructure, with a bus stop for south-bound services located outside the site.
	d) <i>To minimise the impact of development on the amenity of surrounding properties.</i>	As noted earlier, the proposed development will not cause unacceptable overshadowing or a loss of sky exposure to the adjoining properties or surrounding public domain. Further, the design and configuration will realise minimal impacts on adjoining properties in terms of overlooking, visual and aural privacy.
	e) <i>To emphasise road frontages along road corridors.</i>	The proposed development will achieve the desired active street frontage to the Victoria Road Corridor, with vehicular access to the site being obtained from Westminster Road.

		The commercial tenancies effectively extend across the full site frontage to both Victoria Road and Westminster Road. This will retain the existing building alignment and together with the proposed awning and public domain improvements, will strengthen the urban character and identity of the town centre and promote pedestrian safety and amenity.
<b>B4 Mixed Use</b>  <b>Zoning Objectives<sup>1</sup></b>	<i>To provide a mixture of compatible land uses.</i>	<p>The proposed development will provide an appropriate mix of commercial floorspace at ground level and residential accommodation in different sizes and configurations, compatible with the anticipated densities in the surrounding area.</p> <p>The commercial tenancies will provide for additional businesses/offices that will serve the needs of the community and potentially provide employment opportunities. The residential apartments will provide additional housing stock and choice for Gladesville on a major public transport route.</p>
	<i>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.</i>	As above, the commercial tenancies have the potential to provide employment opportunities at the northern end of the Gladesville Town Centre and the residential apartments will provide additional housing stock in proximity to public transport options, as well as local shops and services. The sites proximity to the shops and services in the Gladesville Town Centre and bus stops will encourage public transport patronage, walking and cycling.

#### 4.0 Director General's Concurrence

Clause 4.6(4)(b) requires the concurrence of the Director-General to be obtained prior to granting consent to a development that contravenes a development standard. However, as advised in Planning Circular PS 08-003, the Director-General's concurrence can be assumed in respect of any environmental planning instrument that adopts Clause 4.6 of the Standard Template LEP.

Accordingly, as *Ryde Local Environmental Plan 2014* adopts Clause 4.6 of the Standard Template LEP concurrence can be assumed in this instance.

Notwithstanding, provided below is a discussion on the matters under subclause 4.6(5) that the Director-General must consider in deciding whether to grant concurrence:

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

The variations to the height of buildings principal development standards under *Ryde Local Environmental Plan 2014* will not give rise to any environmental planning matter which could be deemed to have either State or Regional significance. The variations to the development standards being sought will not have any effects outside the immediate area of the site.

<sup>1</sup> The other two stated Objectives for the B4 zone relate to the Macquarie University campus and are not relevant to this site.



***The public benefit of maintaining the development standard.***

No substantive public benefit would be realised by maintaining the development standards. Reducing the height of the building to strictly comply with the 22m and 12m height limits would not alter the overall design approach or outcome for the site and would not realise an improvement to the relationship between the site, the adjoining buildings and the surrounding area. The building, as proposed, provides a distinct 'base', 'middle' and 'top' consistent with the Apartment Design Guide.

Further, it is considered that there would not be a visual improvement to the streetscape in the circumstances where the building height would be capped at 22m and 12m.

***Any other matters required to be taken into consideration by the Director-General before granting concurrence.***

Despite exceeding the statutory maximum building height, the proposed redevelopment of the site will facilitate the orderly and economic redevelopment of the site for the purposes of a shop top housing development that will positively contribute to the achievement of the vision and strategic objectives of A Plan for Growing Sydney, the NSW State Plan, *Ryde Local Environmental Plan 2014* and the vision for the Gladesville Town Centre and Victoria Road Corridor set out in Ryde Development Control Plan 2014.

**5.0 Conclusion**

Based on the discussion provided above, it can be concluded that:

- strict compliance with the height of buildings principal development standards under *Ryde Local Environmental Plan 2014* is unreasonable or unnecessary in the circumstances of the case, where the design and configuration will realise minimal impacts on adjoining properties in terms of overlooking, visual and aural privacy as a consequence of the non-compliant height;
- despite the non-compliances to the height standards, the proposed development is consistent with the objectives of both the height of buildings development standard and the B4 Mixed Use zone;
- the proposed design solution is considered to represent an appropriate development outcome for the site, displaying a design of high quality and appearance, whilst ensuring that a high standard of amenity for future residents will be achieved;
- there are sufficient environmental planning grounds having regard to the Court matters *Four2Five v Ashfield Council* and *Wehbe v Pittwater Council* to justify the contravention to the development standard as the building has been designed to a high quality and the amenity for future residents will be to a high standard;
- the non-compliances do not directly result in any adverse environmental impacts in terms of the building being out of context with the anticipated bulk and scale of development in the locality;
- the proposal will provide a high quality shop top housing development that is in keeping with the desired future character of the area; and
- the scale and nature of the non-compliance does not give rise to any matter of State or Regional significance, nor does it adversely affect the public interest.

Having regard to the circumstances of this case where:

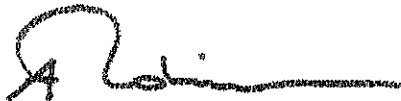
- the overall style, scale and built form of the building will be commensurate with the likely future 'built environment' and desired character of the area;

- the proposal is generally consistent with the aims and objectives of *Ryde Local Environmental Plan 2014*; and
- the proposal is generally consistent with the objects of the *Environmental Planning & Assessment Act 1979*, in particular, the orderly and economic use and development of land and ecologically sustainable development,

it is submitted that this Clause 4.6 Exceptions to Development Standards request is well founded. As such, strict compliance with the height of buildings principal development standards prescribed in Clause 4.3 of *Ryde Local Environmental Plan 2014* is unreasonable and unnecessary having regard to the circumstances of the case. Accordingly, having regard to the assessment contained in this Clause 4.6 Exceptions to Development Standards submission, it is requested that Council support the proposed variations and the development in its proposed form.

Dated: 26 October 2017

**Andrew Robinson Planning Services Pty Ltd**

A handwritten signature in black ink, appearing to read 'Andrew Robinson', with a stylized flourish at the end.

Andrew Robinson MPiA CPP  
Director