

Attachment 3 - Applicant's Clause 4.6 Variation Request

**Written Request under Clause 4.6 Exceptions
to Development Standards of Campbelltown
Local Environmental Plan 2015 - DA
4204/2016/DA-RS - Addendum**

**Lots 1-11 SP 63212, No 11 Dumaresq Street,
Campbelltown**

Prepared For:
Saxon Developments
Prepared By:



September 2018

Contents

1. INTRODUCTION	3
1.1 BACKGROUND.....	3
FIGURE 1 – HEIGHT MAP	3
1.2 THE SUBJECT LAND	3
1.3 PROPOSED DEVELOPMENT.....	3
2 PROPOSED VARIATION TO HEIGHT OF BUILDINGS STANDARD	4
FIGURE 2 – EXTRACT OF SECTION.....	4
2.1 CLAUSE 4.6	4
3 OBJECTIVES OF DEVELOPMENT STANDARDS	6
3.1 CLAUSE 4.3	6
4 OBJECTIVES OF THE ZONE.....	8
5 COMPLIANCE WITH THE STANDARD IS UNREASONABLE AND UNNECESSARY.....	8
6 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS	9
7 CONCLUSION	10

1. Introduction

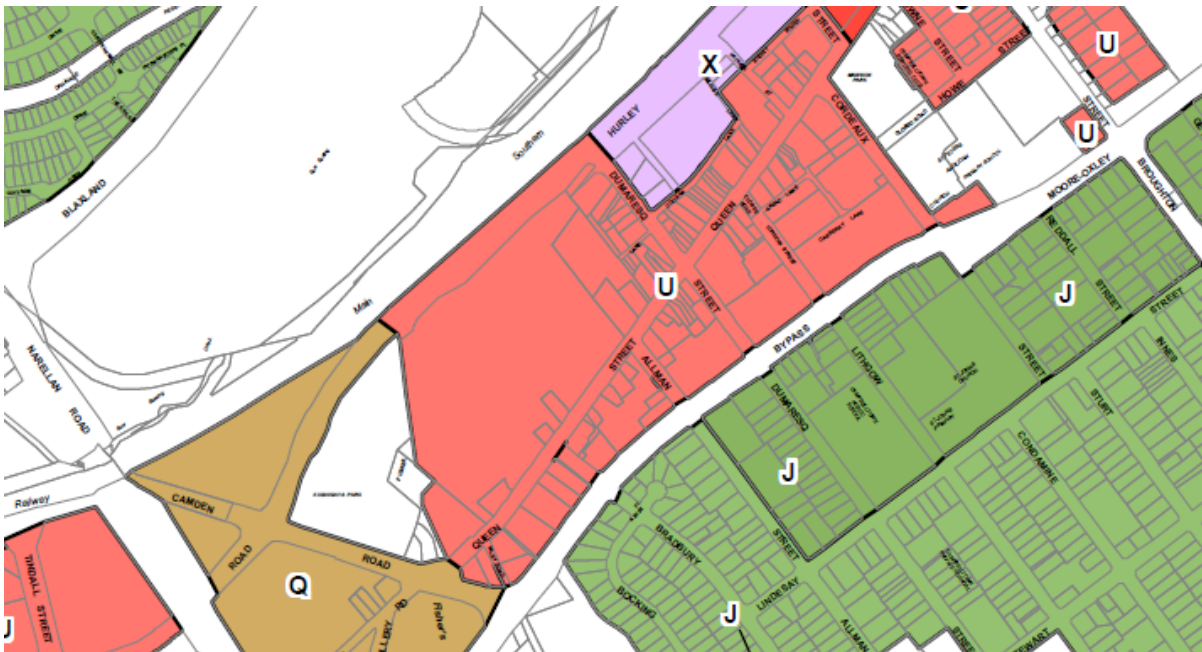
1.1 BACKGROUND

This report comprises a written request from the Applicant under Clause 4.6 of Campbelltown Local Environmental Plan 2015 ("CLEP 2015") that seeks to justify the contravention by the new building in the Proposed Development of the development standard for height of buildings in Clause 4.3(2) of CLEP 2015.

This report has been prepared to support a variation to the development standards of Clause 4.3(2) of *Campbelltown Local Environmental Plan 2015* (CLEP 2015), in respect of building height. The submission should be read in conjunction with the Statement of Environmental Effects (SoEE) prepared by this firm and amended architectural plans prepared by Marchese Partners.

The maximum height shown for the Site on the Height of Buildings Map referred to in Clause 4.3(2) of LEP 2015 is 45 metres as shown on the extract of Height of Buildings Map - Sheet HOB_008 below in **Figure 1**.

FIGURE 1 - HEIGHT MAP



The building proposes a height greater than that provided by Clause 4.3 (i.e. 49.5m). As such a variation is sought under 'Clause 4.6 - Exceptions to development standards' under CLEP 2015.

1.2 THE SUBJECT LAND

The land the subject of this objection is known as No 8, Lots 1-11 SP 63212 Dumaresq Street, Campbelltown.

1.3 PROPOSED DEVELOPMENT

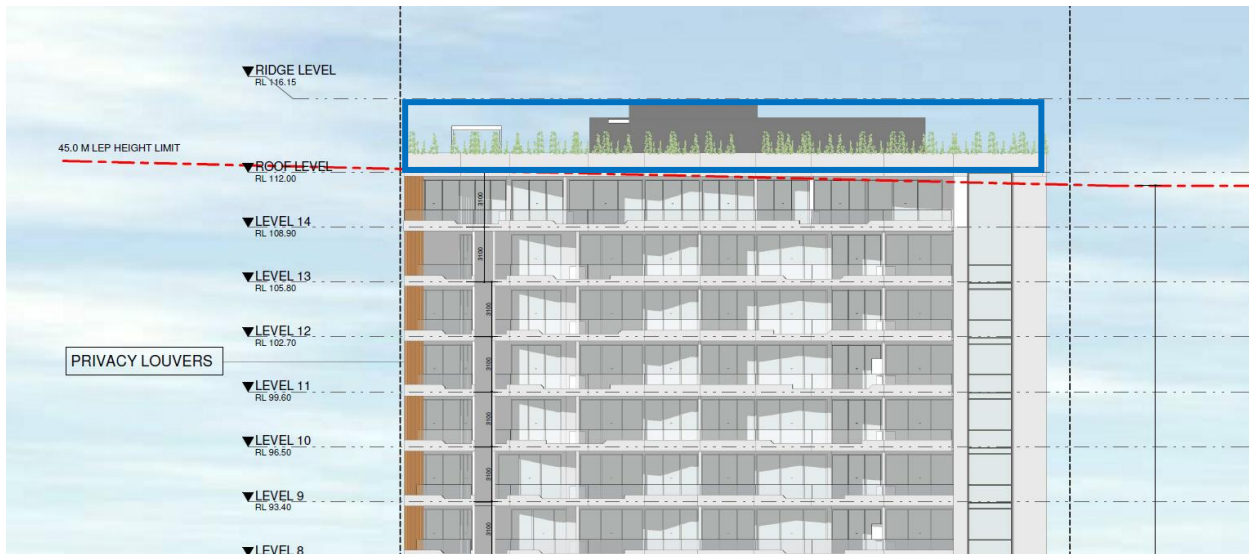
The proposal seeks consent for demolition of the existing commercial building and the erection of a new mixed use building on the site, including aboveground carparking and landscaping of the land.

2 Proposed Variation to Height of Buildings Standard

The maximum extent of non-compliance occurs towards the middle of the tower and relates to the lift overrun, plant rooms and recreation room. The maximum building height is 49.5m when measured to the top of the lift overrun of the upper level. This equates to a maximum numerical variation of 4.5m and a percentage variation of 10%.

An extract of a section has been provided at **Figure 2** to illustrate the extent of non-compliance.

FIGURE 2 – EXTRACT OF SECTION



2.1 CLAUSE 4.6

The objectives of clause 4.6(1) are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
 - (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 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.
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation or Zone E3 Environmental Management.
- (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).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (ba) clause 4.1D, 4.2A, 4.2B or 4.2C,
 - (c) clause 5.4,
 - (ca) clause 6.1 or 6.2.

It is noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6 and it is therefore open to the consent authority to grant development consent to the development pursuant to this Clause, despite the proposed variation to Clause 4.3.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

Objective 1(b) of Clause 4.6 is addressed later in this request.

As described at Section 2 of this written request, the proposal has a maximum building height of 49.5m. It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 49m which equates to a numerical variation of 4.5m and a percentage variation of 10%.

3 Objectives of Development Standards

3.1 CLAUSE 4.3

- (a) *to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,*
- (b) *to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,*
- (c) *to provide for built form that is compatible with the hierarchy and role of centres.*
- (d) *To assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.3 are addressed in turn below.

Objective (a): “to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones”

This objective articulates the ultimate function of the height of buildings development standard. The maximum height for buildings on land within the Campbelltown Local Government Area is identified on the Height of Buildings Map. As previously described, the maximum building height permitted on the subject site is 45m and the maximum height of the proposal is 49m. The proposal varies the standard, which has prompted the preparation of this written variation request.

Despite the nature and scale of development proposed by this Development Application, Clause 4.3 achieves the objective of nominating a range of maximum building heights across land use zones, using the Height of Buildings Map as a mechanism to do so. This written request identifies the extent of variation proposed and explains why the variation is acceptable in the circumstances.

As discussed in the context of the other objectives below, the proposal will not conflict with the underlying aims for built form and land use intensity in the zone or the site’s relationship to the “hierarchy” of height limits for surrounding land.

Objective (b): “to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities”

As described at Section 2 of this variation request, the proposed maximum building height is 49m whereas the maximum established by the Height of Buildings Map is 45m. The height variation relates to a lift overrun, plant and equipment rooms, and a recreation space, which have been centrally located at the upper level.

Despite the proposed variation, it is submitted that the development reflects the intended scale of development at the site, in that the variation is minor and the scale of the proposal is not substantially different to that of a compliant scheme, particularly when perceived from the street. It is clear that the planning instruments envisage a greater scale of development in this particular location, due to proximity to public transport. In this sense, it is logical that a variation to building scale is more appropriate at this site than it may be elsewhere in the town centre, for example at the edges of the town centre. It is considered that the requirement for strict compliance with the control would be counterproductive to achieving the aims to support the primary business centre of the LGA with an injection of residents and maximising the use of existing transport infrastructure, particularly when the scale of development will not be perceptibly different to a strictly compliant proposal.

Objective (c): “to provide for built form that is compatible with the hierarchy and role of centres”

As mentioned previously, the site has been identified as a location that is suitable for high density development, given its location in the town centre and proximity to public transport services, including Campbelltown Railway Station. In terms of the hierarchy of centres, Campbelltown is obviously at the ‘top tier’ of centres within the Campbelltown Local Government Area, and the desired pattern of development reflects this. The proposed scale of development relates to the built form envisaged by the planning controls, specifically building height, despite the relatively minor numerical departure from the height of buildings development standard. The proposed non-compliance will better achieve the aims of promoting the centre through an injection of residential population than would a scheme that strictly complied through the reduction of residential yield and consequently, resident population in the centre.

Objective (d): “to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain”

Although the proposed development projects marginally beyond the maximum building height plane, it is submitted that there will be no adverse impact as follows:

- Visual impact: The non-compliant element is situated at the centre of the upper most level, setback from the edges of the floor plate below, and will not be readily perceived from the street or nearby locations. The parapet edge of the level below the uppermost level is also slightly non-compliant, and again, the difference between the proposal and a compliant scheme is not visually substantive. The parapet arguably constitutes an architectural roof feature and therefore should not be included as a non-compliant part of the building,
- View loss: The extent of variation is numerically minor and the non-compliant element is not likely to impinge on any significant regional views. It is noted that the maximum permitted building height on land adjoining the site is less than 45m, therefore the additional building height proposed will not obscure views from the upper levels of potential future development.
- Privacy: The structures at the uppermost level and situated beyond the maximum building height plane are either non-habitable or are appropriately located and configured to mitigate cross-views and overlooking from these spaces. Specifically, the

habitable spaces are setback from the edges of the level below, preventing overlooking from these spaces, and raised planters are to be provided at the edges of the level to limit the trafficable space, also preventing overlooking from the communal open space areas.

- Solar access: A comparative shadow analysis has been prepared to demonstrate the extent of overshadowing associated with the non-compliant element as distinct from the height compliant component of the building. The comparative analysis demonstrates that the shadow cast by the non-compliant element is not substantive and will not significantly reduce solar access to existing or potential future development.

As described above, the additional building height will not result in any significant amenity impacts on neighbouring properties, or visual impacts in terms of how the building presents to the street. The proposal aligns with this objective, despite non-compliance.

4 Objectives of the Zone

The objectives of Zone B3 are as follows:

- To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.
- To encourage appropriate employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To accommodate the redevelopment, enhancement and vitality of centres by facilitating mixed use development.

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The proposed development is consistent with the objectives of Zone B3 in that it will provide a combination of compatible land uses, including retail and commercial floor space, and residential accommodation, which will complement the existing development composition on adjoining and nearby sites. The site is proximate to Campbelltown Railway Station and is within Campbelltown Town Centre and is therefore highly accessible. The development will create employment opportunities in an accessible location and residents and staff will be inclined to opt for more sustainable methods of transport given the close proximity of the site to the Railway Station and Town Centre.

For these reasons the development proposal meets the objectives for development in Zone B3, despite non-compliance with the building height development standard.

5 Compliance with the Standard is Unreasonable and Unnecessary

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case.

In *Wehbe v Pittwater Council* (2007) NSW LEC 827, Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, *inter alia*:

An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The judgement goes on to state that:

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows [with emphasis placed on number 1 for the purposes of this Clause 4.6 variation]:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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 compliance with the standard is unnecessary and unreasonable;*
- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Having regard to all of the above, it is our opinion that compliance with the height of buildings development standard is unnecessary in the circumstances of the case as the development meets the objectives of that standard and the zone objectives, as described at Part 4 and 5 of this written variation request, respectively. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

6 Sufficient Environmental Planning Grounds

Clause 4.6(3)(b) requires that the written request to vary a development standard demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard. In order to demonstrate that there are sufficient environmental planning grounds to justify varying the development standard and to satisfy objective (1)(b) of Clause 4.6 by demonstrating that the proposed variation allows for a better outcome for and from the development, the following discussion is provided:

- The site is subject to flooding affectation and therefore the finished level of the ground floor is raised 900mm above where it might otherwise have been located to comply with the flood planning levels imposed by the consent authority. A portion of the non-compliance can be attributed to a site specific constraint.

- The departure allows for the utilisation of a roof top area which would otherwise be underutilised space. It is proposed to provide a communal open space area and recreation room at the uppermost level thus enhancing the range of facilities available to residents, enhancing resident amenity and enjoyment. These facilities would not be provided if strict compliance with the building height standard were insisted upon. As there is no streetscape or amenity impacts associated with incorporating these facilities at roof top level, the benefits of permitting these facilities is considered to constitute sufficient environmental planning grounds to support the variation.
- The notion of concentrating residential accommodation (and thereby increasing population densities) around transport hubs and locations with access to places of employment, services and facilities, aligns with contemporary planning theory. The proposed building height variation allows for a greater number of dwellings to be provided in a well-connected location, thus encouraging patronage of public transport, reducing travel times for occupants of those dwellings and subsequently enhancing quality of life. In this regard, the proposal is considered to be superior to a building height compliant development in that a greater number of residents will enjoy the benefits of well-located accommodation.
- The discussion provided throughout this variation request demonstrates that the additional building height will not result in any adverse environmental impacts, in terms of amenity impacts on existing and potential future neighbouring development, nor will there be any adverse streetscape impacts given the relatively minor nature of the departure. It is submitted that there are sufficient environmental planning grounds to support the variation on the basis that there are tangible public benefits associated with the additional height (i.e. a greater number of dwellings in a highly accessible location), and an absence of significant environmental impacts.
- The subject location is continually referred to in Metropolitan planning documents as being suitable for increased density and development activity. The current proposal will be consistent with the likely development outcomes from these planning documents.

As per the above, there are considered to be sufficient environmental grounds to justify varying the development standard. In particular, the site has unique qualities relating to its highly accessible location, and the proposed massing arrangement results in a site responsive building form without any consequent impacts on the amenity of neighbouring sites.

7 Conclusion

This written request has been prepared in relation to the proposed variation to the height of buildings development standard contained in CLEP 2015. The request identifies that the maximum building height is 49.5m which equates to a numerical variation of 4.5m and percentage variation of 10%. The request explains that, despite the proposed variation, the development satisfies the objectives of the standard and the objectives of Zone B3, and it is therefore unreasonable and unnecessary to required strict compliance with the height of buildings development standard. In addition, the request demonstrates that there are sufficient site specific environmental planning grounds to justify the variation, and therefore the proposal is considered to be in the public interest.