



**REQUEST UNDER CLAUSE 4.6
OF CAMPBELLTOWN LEP 2015**

**Height
Fern Avenue, Bradbury**

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1.0 The Proposal

This request is written in support of an application that proposes the restoration and use of an existing heritage and construction of a residential development at 74 Fern Avenue, Bradbury.

This Clause 4.6 statement relates to a variation proposed to Council's Maximum Building Height control as prescribed by Campbelltown Local Environmental Plan (LEP) 2015.

1.1 Clause 4.6 and Relevant Case Law

Clause 4.6 of the Campbelltown Local Environmental Plan (LEP) 2015 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

Clause 4.6 (3) of the LEP provides:

(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.

Further Clause 4.6(4) provides that:

(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.

The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (the Court) and the NSW Court of Appeal in:

1. Wehbe v Pittwater Council [2007] NSW LEC 827;
2. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;

3. Randwick City Council V Micaul Holdings Pty Ltd [2016] NSWLEC 7;
4. Bringham v Canterbury-Bankstown Council [2018] NSWLEC 1406;
5. Initial Action v Woollahra Municipal Council [2018] NSWLEC 118; and
6. Turland v Wingercarribee Shire Council [2018] NSWLEC 1511.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard;
2. The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
3. Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
4. The development standard has been abandoned by the council; or
5. The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

1.2 Relevant Development Standard

The development standard to which this objection relates is Clause 4.3 Height of Buildings. Clause 4.3 Height of Buildings sets out the following:

- 1) *The objectives of this clause are as follows:*
 - 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. 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.*

- 2) 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.

Comment:

The applicable height control for the site is 8.5m. The development proposes a portion of the proposed development that exceeds the building height by a maximum of 1850mm.

1.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 1.4(1) of the EP&A Act as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(a) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,...”

Comment:

The maximum building height control under Clause 4.3 of the Campbelltown LEP 2015 is clearly a development standard.

2.0 The Contravention

The proposal results in the following variation to Council’s Maximum Building Height Control as demonstrated in the table below:

Table 1: Variation to Council’s Maximum Building Height Control		
	Control	Proposed
Maximum Building Height	8.5m	10.35m
Variation	-	1850mm 21%

As illustrated on the Architectural Drawings prepared by Integrated Design Group submitted separately, the height of the proposed development will exceed the maximum building height of 8.5m by a maximum 1850mm which equates to a maximum 21% variation. The proposed variation accommodates a minimal percentage of the total building volume proposed.

The principle reason for the exceedance of the maximum building height limit is designing the development to best respond to the topography of the site and the existing heritage item on site. The 3D Height Plane provided in **Figure 1** below demonstrates the portion of the proposed built form and existing heritage item that exceeds the maximum building height control.

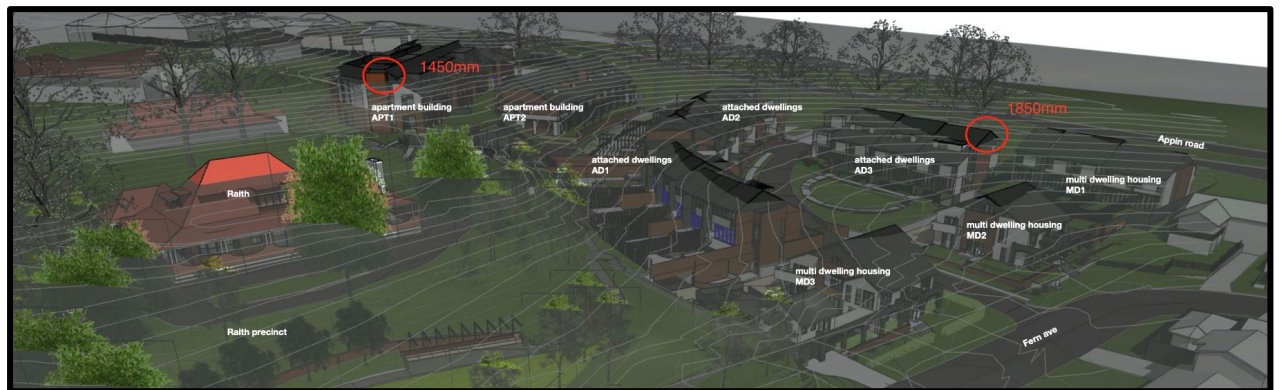


Figure 1: 3D Height Plane demonstrating the proposed exceedance of the building height control (Source: Integrated Design Group)

Despite the proposal's non-compliance with the height control the development does not result in any unnecessary bulk or visual impacts on adjoining properties. The development has been designed to ensure it minimises impacts on adjoining properties and maintains a high level of residential amenity and privacy.

3.0 Justification of the Contravention

3.1 The Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site and its surrounds as existing are a mix of low and medium density residential land uses with varying heights.

3.2 Public Interest

Clause 4.6(4)(a)(ii) of Campbelltown LEP 2015 requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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 proposed development has been assessed against the objectives for the R2 Low Density Residential zone below. Despite the proposed variation to the maximum building height development standard, the proposal is considered in the public interest as it satisfies the objectives of the zone and the objectives of the development standard.

3.3 Consistency with R2 Low Density Residential Zone

The consistency of the proposal against the objectives of the R2 Low Density Residential zone is outlined below.

- ***To provide for the housing needs of the community within a low density residential environment.***

The proposed development provides for the housing needs of the community in a low density residential environment. The proposed development has been sensitively designed having regard to the heritage listed Raith and has an FSR which complies with the low density zone.

The housing proposed has been arranged to protect the curtilage of Raith whilst providing a density consistent with the low density zoning utilising a range of building typologies that have high architectural merit.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

The proposed development is not inconsistent with this objective.

- ***To enable development for purposes other than residential only if that development is compatible with the character of the living area and is of a domestic scale.***

The proposed development is not inconsistent with this objective. It is noted that only residential uses are proposed.

- ***To minimise overshadowing and ensure a desired level of solar access to all properties.***

The proposed development ensures the desired level of solar access to all properties.

- ***To facilitate diverse and sustainable means of access and movement.***

The proposed development facilitates diverse and sustainable means of access and movement through the site and provides a high level of connectivity between all proposed uses within the site.

3.4 Consistency with Objectives of the Building Height Development Standard

The consistency of the proposal against the objectives of the maximum building height standard is outlined below.

- ***to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones***

The proposed building height is compatible with the site and built form proposed and provides a transition in built form and land use across the zone and surrounding area.

- ***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***

The height of the proposed development reflects the intended scale of development for the site and is compatible and reflective of the existing character of the area. The proposed height is considered to be appropriate for the locality and the site's proximity to business centres and transport facilities.

- ***to provide for built form that is compatible with the hierarchy and role of centres***

The proposed development is not inconsistent with this objective.

- ***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.***

The proposed development has been sited and designed to minimise the opportunity for undesirable visual impact, disruption of views, loss of privacy or loss of solar access for existing and future development and the public domain. The proposed built form is sited to maintain existing views and vistas to the heritage item onsite and the higher density development is proposed to the confines of the centre of the site to achieve greater separation from adjoining properties.

4.0 Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))?

Clause 4.6(3)(a) of Campbelltown LEP 2015 requires the departure from the development standard to be justified by demonstrating:

- ***Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

Comment

As detailed in the section above, the proposal provides residential built form that is compatible and reflective of the existing character of the area and complements the heritage item on site. The exceedance

of the maximum building height control is considered reasonable in the context of the site and its ability to result in no adverse impacts on adjoining neighbours.

The proposed development, including the proposed building elements that exceed the height limits, will continue to achieve the objectives of the standard. It is therefore considered that the objectives of the development standard are met notwithstanding the breach of the height of buildings standard.

5.0 Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard (Clause 4.6(3)(b))?

Clause 4.6(3)(b) of Campbelltown LEP 2015 requires the departure from the development standard to be justified by demonstrating:

- ***There are sufficient environmental planning grounds to justify contravening the development standard***

Comment

It is our opinion that there are sufficient environmental planning grounds to justify contravening the building height standard in this instance. These are as follows:

- The proposed development is consistent with the objectives of the zone and the objectives of the building height control.
- The proposal does not result in any adverse impacts on adjoining properties.
- The height variation equates to a maximum 1850mm for a minor portion of the development and does not result in undesirable visual bulk of the building.
- The development achieves a better planning outcome by grouping dwellings where they have least impact whilst providing more space / curtilage around Raith.

It is considered the objectives of the LEP height standard are achieved in this instance where the proposal produces a high quality-built form that ensures a high level of amenity for residents. In addition, the proposed materials and finishes and landscaping strategy further reinforces how the development harmonizes with surrounding area.

Whilst the built form exceeds the building height control applicable to the site, it is considered the proposed design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment as demonstrated in Architectural Plans prepared by Integrated Design Group.

6.0 Conclusion

The proposed contravention of the 8.5m maximum building height is based on the reasons outlined in this request that are summarised as follows:

- It is considered that this proposal represents an individual circumstance in which Clause 4.6 was intended and to be available to set aside compliance with unreasonable or unnecessary development standards.
- The proposed development will not create an undesirable precedent.
- The proposed development is consistent with the objectives of Clause 4.3 and Clause 4.6 of Campbelltown LEP 2015 and therefore is in the public interest pursuant to clause 4.6(4).

In view of all of the above, it is considered that this written request has adequately addressed the matters required by Clause 4.6(3) of Campbelltown LEP 2015 and Council's support to contravene the maximum building height development standard of Clause 4.3 is therefore sought.

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