



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

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**Height Restrictions for Certain Residential Accommodation  
Fern Avenue, Bradbury**

## CONTACT INFORMATION

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## DOCUMENT INFORMATION

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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 item and construction of a residential development at 74 Fern Avenue, Bradbury.

This Clause 4.6 statement relates to a variation proposed to Council's Height Restrictions for certain residential accommodation 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. *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406;
5. *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118; and
6. *Turland v Wingecarribee 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 4.3A Height Restrictions for Certain Residential Accommodation. Clause 4.3A sets out the following:

- 1) *The objectives of this clause is to limit the number of storeys of certain types of residential development*
- 2) *The following forms of residential accommodation must not be higher than 2 storeys –*
  - (a) *An Attached dwelling,*

- (b) A dual occupancy,
- (c) A Dwelling house,
- (d) A Dwelling that forms part of multi-dwelling housing,
- (e) A semi-detached dwelling,
- (f) A dwelling contained within a residential flat building,
- (g) A dwelling that form part of shop-top housing.

**Comment:**

The applicable control relates to height restrictions for certain residential accommodation. The proposed development includes 3 buildings that have 3 stories with 4 dwellings within them.

### 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 height restrictions for certain residential accommodation under Clause 4.3A of the Campbelltown LEP 2015 is clearly a development standard.

## 2.0 The Contravention

The proposal results in the following variation to Council’s Height restrictions for certain residential accommodation in the form of 3 buildings that have 3 stories, and a total of 4 dwellings within those 3 buildings. These dwellings are identified on the following plans in red.





**Figure 1: Ground Floor Plan Identifying in Red Dwellings that are 3 Storey in Height with 4 dwellings within them (Source: IDS)**



**Figure 2: East Elevation Identifying in Red Dwelling that is 3 Storey in Height (Source: IDS)**



**Figure 3: North Elevation Identifying in Red Dwellings that are 3 Storey in Height (Source: IDS)**

### 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. The proposed development is consistent with the character of the area and has been designed to best respond to the existing development onsite and in the surrounding area.

#### 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, 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 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 and medium density residential environment that is consistent and reflective of the existing character of the area.

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

The proposed development will provide additional housing supply that will enable other land uses that provide facilities or services to meet the day to day needs of residents.

- ***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 consists of residential development that is not considered inconsistent with this objective.

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

The proposed development ensures a desired level of solar access to all properties. It is noted that the 3 storey built form is lower than other 2 storey built form.

- ***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 Objective of the Height Restrictions for Certain Residential Accommodation**

The objective of this clause is to limit the number of storeys of certain types of residential accommodation.

As viewed in both Figure 2 and 3 the 3 storey buildings are no higher and are in fact lower than adjoining 2 storey buildings and provides modulation in built form which is a positive outcome for the proposed development.

### **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 contravention of the control is considered reasonable in the context of the site, the layout of the proposed development and its ability to result in no adverse impacts on adjoining neighbours.

The proposed development 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 restriction for certain residential accommodation.



## 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 standard in this instance. These are as follows:

- The proposed development is consistent with the objectives of the zone.
- The proposal does not result in any adverse impacts on adjoining properties.
- The variation is only to 3 buildings that have 3 stories with 4 dwellings within them.
- The buildings that are 3 storey are lower than other 2 storey built form and provides variable modulation across the site.

In addition, the proposed materials and finishes and landscaping strategy further reinforces how the development harmonizes with surrounding area.

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 height restriction for certain residential accommodation 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 4.1C 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 height restriction for certain residential accommodation development standard of Clause 4.3A is therefore sought.

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