

Applicant's Clause 4.6 variation request

CLAUSE 4.6 VARIATION STATEMENT – MAXIMUM HEIGHT (CLAUSE 4.3)

This Statement is prepared on behalf of the applicant for the proposed development and is a request, detailing the justification for variation to Clause 4.3(2) of Blacktown Local Environmental Plan 2015 (BLEP 2015) which relates to maximum building height. This Statement is prepared pursuant to Clause 4.6 of SSLEP 2015.

The subject development proposal is for demolition of existing structures and construction of a residential flat development at Nos. 2-10 George Street, Seven Hills.

Clause 4.3(2) of Blacktown LEP 2015 relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 20m.

Building height is defined as:

"building height (or height of building) means the vertical distance between ground level (existing) and 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."

Figure 1 provides a section (looking towards the south-west) with a blue dotted line showing a level 20m above the existing ground level. Figure 1 indicates that, due to the fall of the land in a north-westerly direction towards the rear of the site, there is a 3.17m non-compliance to the lift and stairs and a minor height non-compliance of 1.44m to the roof parapet. The non-compliance increases as the site falls away towards the rear. The building is compliant with the height requirements at the George Street frontage and for the majority of the portions of the building that are visible from George Street.

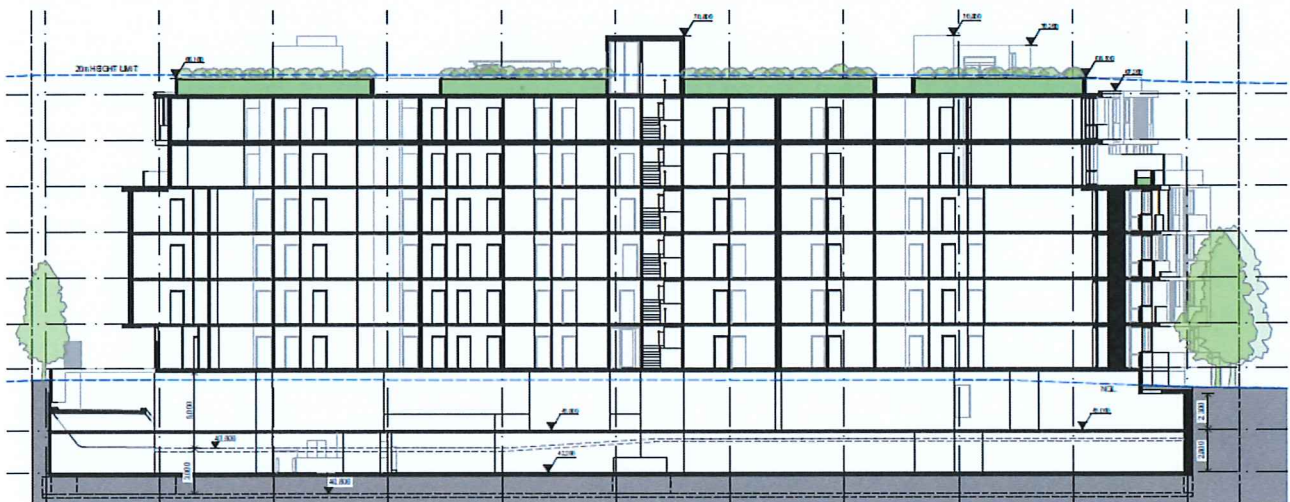


Figure 1 Section showing height non-compliance

To further demonstrate the degree of the height non-compliance, Figure 2 below illustrates the height non-compliance as viewed from the front (south-east) elevation. As can be seen, the height non-compliance is minor in the scheme of the proposed building overall and is predominantly isolated to the rear portion of the building as a result of the fall in the natural topography towards the rear boundary.

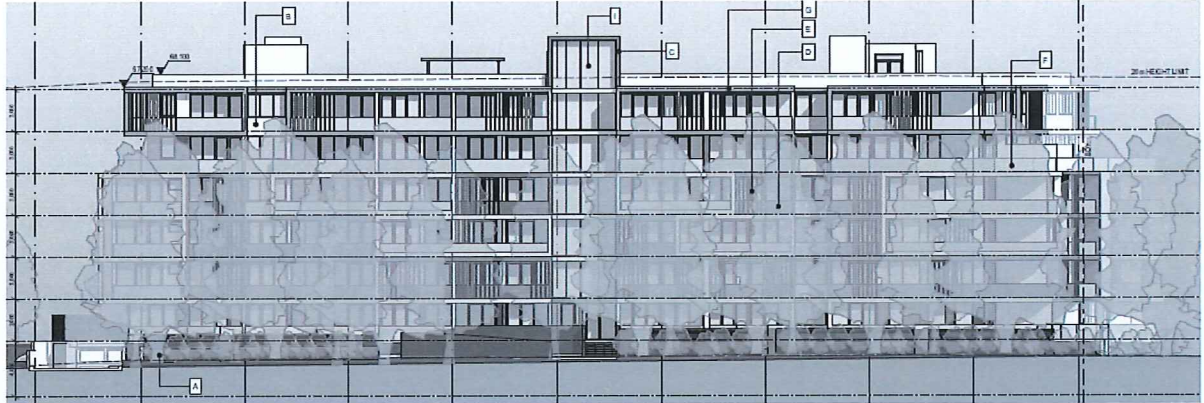


Figure 2 South East elevation

As indicated in Figures 1 and 2 the height non-compliance is generally limited to the rear of the building. The uppermost storey has been designed to comply with the height requirement at the George Street frontage and results in a building that is consistent with the scale of development expected at the site and within the streetscape.

Application of Clause 4.6 of the SSLEP 2015

Clause 4.3 in relation to maximum building height is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

The objectives and provisions of Clause 4.6 are as follows:

" 4.6 Exceptions to development standards

(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 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 all of these zones.

(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,

(c) clause 5.4,

(ca) clause 6.1 or 6.2."

The development standards in Clause 4.3 are not "expressly excluded" from the operation of clause 4.6.

This request will be divided into the following sections, each dealing with the nominated aspect of Clause 4.6 to SSLEP 2015:

- consistency with the development standard objectives and the zone objectives (Clause 4.6(4)(a)(ii));
- sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)); and

- compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a)).

Consistency with the development standard objectives and the zone objectives (clause 4.6(4)(a)(ii))

Development Standard Objectives

The objectives and relevant provisions of Clause 4.3 are as follows:

4.3 Height of buildings

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

(a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,

(b) to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown,

(c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities,

(d) to ensure that sufficient space is available for development for retail, commercial and residential uses,

(e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.

(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."

The *Height of Buildings Map* nominates a maximum building height of 20m for the site. It is hereby requested that an exception to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum height of 23.17m.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 are addressed in turn as follows.

Objective (a):

Objective (a) seeks to limit building height to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain. As detailed at Section 4.3.6 of the Statement, the proposal has been designed to minimise loss of privacy and is of a contemporary aesthetic that will not give rise to negative visual impacts. The portions of the building that result in the most significant projections above the maximum building height control are the lift and stair overruns and a small portion of the roof of the building predominantly where the site falls away. These parts of the building are not readily visible from George Street and the neighbouring dwellings to the rear, these neighbouring properties will not experience any unreasonable privacy or amenity impacts as a result of the minor variation to building height. Further, the areas of non-compliance are not habitable and provide access to and landscaping around the roof top communal open space.

In relation to overshadowing, as detailed at Section 4.3.6 of the Statement, the impacts of overshadowing are entirely acceptable given the orientation and aspect of the site and the future redevelopment expected to the south of the site and that which is under construction to its immediate north.

Objective (b):

Objective (b) seeks to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities within the City of Blacktown. In our view, "compatible" does not promote "sameness" in built form but rather

requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:

22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

In relation to the built form context, the majority of buildings in the vicinity of the site are detached residential dwellings that will be redeveloped in the near future to realise the development potential afforded to them under the BLEP 2015. The site and surrounding properties are identified as being able to accommodate a building height of 20m.

The proposal is compliant at the George Street frontage and consequently the building's relationship to the adjoining sites is as anticipated by the current planning provisions. Due to the minor non-compliances being limited to the lift and stair overruns and the rear portion of the building where the site falls away, the development is generally indistinguishable from a fully compliant scheme when viewed from the primary street frontage. As such, it cannot be said that the proposal by virtue of the minor height exceedance (up to 3.17m) is incompatible with the desired future character of the surrounding properties.

In light of the above, the proposal will exist in harmony with the desired future character of development in the area and is therefore consistent with objective (b).

Objective (c):

Objective (c) seeks to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities. This objective is satisfied by the hierarchy of height limits that are established on the height of buildings maps. Notably, the subject site is located within the centre of an area identified to accommodate high density development with a building height of 20m. As outlined in the SEE there are a number of current development consents and recent proposals that will see a change in the character of the immediate area with both increased densities and building height. The subject site will form part of this denser development in this highly suitable location. Therefore, the minor height exceedances identified above are not antipathetic to this objective.

Objective (d):

This objective seeks to ensure that sufficient space is available for development for retail, commercial and residential uses. The proposed development makes efficient use of the site and the applicable height limit to provide residential accommodation in a location that is both highly desirable and suitable for such a level of density. Therefore, the proposal is consistent with this objective as the maximum height control is used to efficiently allocate appropriate residential floor space at the site within the minimum allowable floor to ceiling heights. The height exceedance is limited and to insist on strict compliance would result in the loss of part of the upper level of the south eastern portion of the development with no demonstrable built form advantages.

Objective (e):

Objective (e) seeks to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces. As discussed, the site is located within the centre of a high density area and there are no immediately adjoining low density residential zones or public spaces. The proposal complies with the height limit at the south-eastern façade (George Street) and once the neighbouring sites are redeveloped, the proposal will provide an appropriate building scale in relation to adjoining properties. The site has no interface with public open space or adjoining centres and therefore is entirely consistent with the intention of this objective.

The proposed development is therefore consistent with the objectives for maximum building height, despite the numeric non-compliance.

Zone Objectives

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the *R4 – High Density Residential* zone are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To enable certain activities to be carried out within the zone that do not adversely affect the amenity of the neighbourhood*
- *To permit residential flat buildings in locations close to public transport hubs and centres.*

The proposal will provide a high density residential development that provides a range of accommodation types, orientations, internal living arrangements as well as the required number of adaptable dwellings. The proposal is a well-designed and sited residential flat building that offers high levels of residential amenity and is entirely consistent with the intentions of the zone.

Sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))

The requirement in Clause 4.6(3)(b) seeks to justify that there are sufficient environmental planning grounds for the variation, and these may well require identification of grounds particular to the circumstances of the proposed development, as opposed merely to grounds that would apply to any similar development on the site or in the vicinity.

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that there is an absence of significant impacts resulting from the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties.

On "planning grounds" and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances will achieve "*a better outcome for and from development*" in this case, the height non-compliance is almost entirely attributed to the fall in the land and the desire to achieve a consistent pattern in floor and ceiling heights throughout the site. Any greater step in the building platform would undermine the accessibility requirements through the site and would restrict access to the communal open space at the rear of the site.

The desire to retain accessible common circulation areas throughout the site and to the communal open space provides equitable amenity benefits for the residents of the development. For Council to insist on strict compliance in this instance would require a lowering of the ground floor level at the rear of the site which would in turn require steps and changes in levels to the common open space and circulation areas. Alternatively, compliance with the height control would require deletion of part of the uppermost level at the rear of the building with no demonstrable environmental or amenity benefits in comparison to the proposed scheme. Either option to achieve strict compliance would result in an unreasonable burden on the development for no qualitative benefits.

Compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a))

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 judgment 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).”

The analysis in *Wehbe* with respect to what is unreasonable or unnecessary is comparable to the reasoning that is to be applied to the consideration of a request made pursuant to Clause 4.6(3)(a).

However, in *Four2Five v Ashfield Council* [2015] NSWLEC 90 the Land and Environment Court said that whether something was ‘unreasonable or unnecessary’ is now addressed specifically in Clause 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary beyond the objectives of the development standard and zone objectives.

Accordingly, while the objectives of the standard are achieved despite numeric non-compliance with the standard, this request goes further. It seeks to demonstrate that requiring strict adherence to the standard would be ‘unreasonable or unnecessary’ for reasons **that are additional** to mere consistency with the development standard.

Preston CJ in *Wehbe* expressed the view that there are five ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. The remaining 4 identified ways, in addition to establishing the objectives of the standard are achieved notwithstanding non-compliance with the standard, are as follows:

1. ...
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.*

Additionally, in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308, Court of Appeal said that a requirement may be unreasonable when ‘the severity of the burden placed on the applicant is disproportionate to the consequences attributable to the proposed development’ (at paragraph 15).

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives.

Therefore, insistence upon strict compliance with that maximum building height development standard in this instance is unreasonable and on the basis of the above, the statutory tests set out in Clause 4.6 of Blacktown LEP are satisfied.

Clause 4.6(3) summary

The proposal is also found to not only to be consistent with the zone objectives, but also consistent with the objects of the EP&A Act. Therefore, there are sufficient environmental planning grounds to support our position that compliance is unreasonable and unnecessary because there is no planning benefit to enforcing compliance and no detriment from granting the non-compliance.

The development proposal will provide a residential flat development with superior amenity and streetscape presentation. This is achieved by well-planned and functional built form compliance with the height control would require deletion of part of the uppermost level at the rear of the building with no demonstrable environmental or amenity benefits in comparison to the proposed scheme. The alternative design approach to achieving strict compliance would result in an unreasonable burden on the development for no qualitative benefits.

Therefore, insistence upon strict compliance with the height of buildings standard would be unreasonable and on this basis, the requirements of subclause 4.6(3) are satisfied.

In our view Council can be satisfied that:

- this Statement has adequately addressed the matters required to be demonstrated by subclause 4.6(3), and
- the proposed development will be in the public interest because it is not inconsistent with the planning purpose of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Further, the Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is facilitated by Department of Planning Circular PS 08-003 '*Variations to development standards*', dated 9 May 2008. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

Therefore Council should exercise its discretion to grant development consent for the proposed development at Nos. 2-10 George Street, Seven Hills. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.