

Clause 4.6 variation statement – maximum height (clause 4.3)

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 19 below provides a sectional diagram indicating that due to the provision of lift overruns and an architectural roof feature the building height exceeds the maximum permissible for the site. As indicated in the section a significant amount of the building is located within the maximum height limit and the projecting elements are mostly limited to the two lift overruns, the architectural feature above the roof top communal open space and its supporting structure. In addition, the building is fully compliant with the height requirements at the street frontage to both Newton Road and Carinya Street.

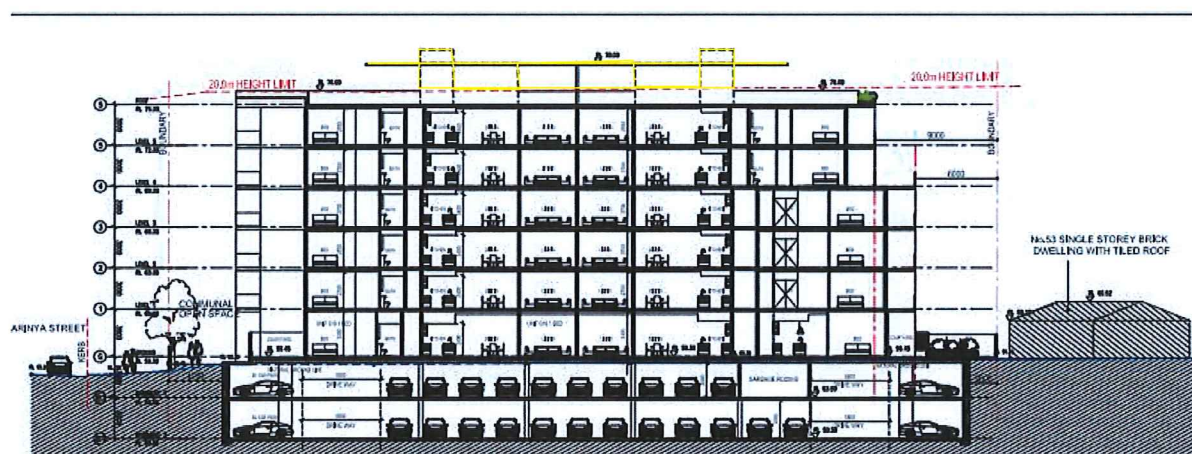


Figure 19 Height non-compliance as viewed from Newton Road

As indicated in Figure 19 the height non-compliance is generally limited to the centre of the building where access to the roof top terrace is achieved and shade protection is provided to the communal open space. The upper level has been designed to comply with the height requirement at the street edge and results in a building that is consistent with the scale of development expected at the site. Maximum height control 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.

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 Council 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.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

"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 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 21.5m (RL78) to the top of the architectural roof feature over the communal open space and a maximum height of 22.5m (RL79) for the lift overruns of the proposed building.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.4 are addressed in turn below.

Objective (a):

Objective (a) seeks to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings. As detailed at Section 4.3.6 of the Statement of Environmental Effects, the proposal has been designed to minimise loss of privacy and is of a contemporary aesthetic that will not give rise to visual impact. The portions of the building that result in the most significant projections are the two lift overruns and the centrally located roof structure over the communal open space. These parts of the building are not readily visible from surrounding residential properties or the road. The proposal is fully compliant with the building height requirements for the remainder of the building and where it fronts Newton Road the building appears to be of a scale that is expected at the site.

In relation to overshadowing, as detailed at Section 4.3.6 of the SEE the impacts of overshadowing are entirely acceptable given the favourable orientation of the site with most of the shadow falling over the road or the front yards of the dwellings located on the southern side of Newton Road. The proposal results in minor overshadowing of front yards and therefore does not impact on buildings or private open space. The additional shadow impacts of the non-compliant portions of the building are negligible in relation to the shadow that is cast from the compliant elements of the building. As such, the height non-compliance will not give rise to any significant shadow impacts.

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 Blacktown LEP 2015. The site and surrounding properties on the northern, western and eastern side of Newton Road are identified as being able to accommodate a height of 20m.

The proposal is fully compliant at the Newton Road and Carinya Street frontages and consequently the building's relationship to the adjoining lower density land is to be expected. Due to the minor non-compliances being limited to the lift overruns and the small portion of the roof structure over the communal open space, the development is generally indistinguishable from a fully compliant scheme when viewed from the public domain and the lower density residential zone on the opposite side of Newton Road. As such, it cannot be said that the proposal by virtue of the minor height exceedances is incompatible with the desired future character of the surrounding properties.

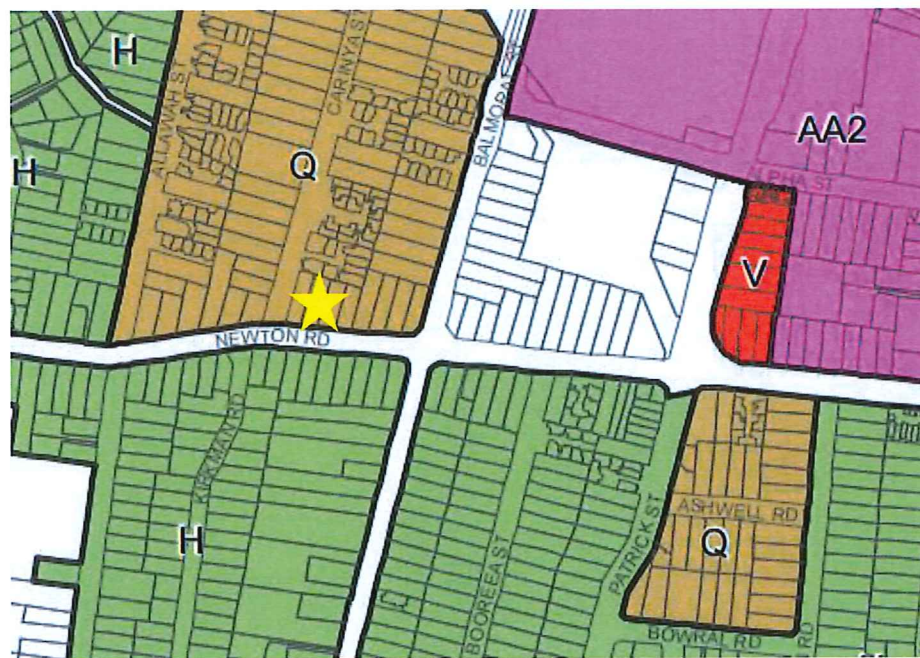


Figure 20 Extract Blacktown LEP - Height of buildings map

In light of the above, the proposal will exist in harmony with the desired future character of development in the area and is 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 in relatively close proximity of nearby sites that have height limits of 38m (V) and 72m (AA2) that will form a back drop to the subject site. 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 limit is used to efficiently allocate appropriate levels of residential accommodation at the site within the preferred allowable ceiling heights of 3m. The height exceedance is limited to a small portion of the lift overruns and the architectural roof feature which help shade the communal open space and to insist on strict compliance would result in the loss of amenity to the upper level open space with no demonstrable built form outcome.

Objective (e):

Finally, this objective seeks to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces. As discussed, the site is located at the interface of the high density area and an adjoining low density residential zone. The proposal complies with the height limit at the southern façade and therefore provides a transition to the adjoining low density residential zone. The site has no interface with public open space or adjoining centres and therefore is entirely consistent with the intention of the control.

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

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 and livable 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.

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, the assessment of this numerical non-compliance is guided by the recent decision of the *NSW LEC Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* whereby Justice Pain ratified the decision of commissioner Pearson.

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 of this development will achieve “a better outcome for and from development” in this particular case, the height non-compliance is almost entirely attributed to the desire to achieve a usable and functional roof terrace that is accessible by all occupants and visitors to the site.

The desire to achieve unimpeded access throughout the site and to the communal open space provides clear amenity benefits for the residents of the development.

For Council to insist on strict compliance in this instance would require a reduction of the floor to ceiling heights throughout the building and a reduction in the overall number of units to accommodate the lift overruns within the 20m height limit. This would result in an unreasonable burden on the development that is to be balanced with the impacts, or lack thereof, resulting from the non-compliance.

Returning to 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 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 [our underline]):

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 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.