



Hawes & Swan

Town Planning Consultants

**REQUEST UNDER
CLAUSE 4.6 OF
AUBURN LEP
2010**

Proposed Apartment Building and
Commercial Premises, 4-14 Mark Street,
Lidcombe



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Clause 4.6 Variation Request

4-14 Mark Street, Lidcombe

CONTACT INFORMATION

Hawes & Swan Planning Pty Ltd
ABN 27 605 344 045

Suite 4, Level 4,
35 Buckingham Street,
Surry Hills New South Wales 2010

www.hawesandswan.com.au

Author(s):

Lachlan Rodgers
Town Planner

Approved by:

Mairead Hawes
Director

Project Name ____ **4 – 14 Mark Street,
Lidcombe**

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1.0 The Proposal

This request is written in support of a development that proposes a ten storey mixed use development and associated site works at 4-14 Mark Street, Lidcombe.

Clause 4.6 of within the Auburn Local Environmental Plan (LEP) 2010 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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 consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control. The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winter Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

An additional principle in relation to Clause 4.6 was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal.

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the Auburn LEP 2010 Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

1.1 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 establish a maximum height of buildings to enable appropriate development density to be achieved, and
- (b) to ensure that the height of buildings is compatible with the character of the locality.

- (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 applicable height control for the site is 32m. The development proposes a minor portion, consisting of a pergola for the communal open space and lift overruns, of the building which exceeds the building height by a maximum of 2m. The area of exceedance does not contain any habitable residential space.

1.2 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 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: ...

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

The maximum building height control under Clause 4.3 of the Auburn LEP 2010 is clearly a development standard.

2.0 The Contravention

As described in the Statement of Environmental Effects (SEE) and illustrated on the Architectural Drawings prepared by Zhinar Architects submitted separately, the height of the proposed development will exceed the maximum building height of 32m by a maximum 2m which equates to a maximum 6.25% 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 the need to provide communal open space on the roof to ensure solar access and to provide amenity to residents. The lift overruns also exceed the height limit. The area of exceedance does not contain any habitable residential space.

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 residential and commercial uses. The site is identified as being located in the Lidcombe Town Centre, which is currently undergoing redevelopment. Approximately 150m to the east of the site is 21-23 James Street where an approved ten-storey residential flat building. The proposed development is consistent with the future character of the Lidcombe Town Centre.

3.2 Public Interest

Clause 4.6(4)(a)(ii) of Auburn LEP 2010 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 B4 Mixed Use 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 B4 Mixed Use Zone

The consistency of the proposal against the objectives of the B4 Mixed Use zone is outlined below.

To provide a mixture of compatible land uses

The proposed development provides a compatible land use that is consistent with the future character of the Lidcombe Town Centre. It proposes a mix of residential units and commercial space designed to contribute to a compatible built form.

To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling

The proposed development provides high density mixed use development in an accessible location that maximises public transport patronage and encourages non-vehicular transport.

To encourage high density residential development

The proposal consists of a high density residential development that is consistent with the future character of the area.

To encourage appropriate businesses that contribute to economic growth

The proposed development will generate demand and opportunities for businesses to service the area and contribute to the economic growth of the area. The commercial tenancies will provide floor space for businesses in the growing Lidcombe Town Centre.

To achieve an accessible, attractive and safe public domain

The proposed development contributes to creating an accessible, attractive and safe public domain. The development will provide opportunities for passive surveillance and create a vibrant street.

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 establish a maximum height of buildings to enable appropriate development density to be achieved

The proposal consists of a high density mixed use development that meets the desired future character of the area. The height exceedance is due to the provision of a high amenity communal open space that allows the development to provide a high-density development whilst providing appropriate amenity to residents. The area of exceedance does not contain any habitable residential space and the area of exceedance will not be visually prominent.

To ensure that the height of buildings is compatible with the character of the locality

The height of the proposed development is consistent with the changing character and desired future character of the Lidcombe Town Centre. The proposed development is consistent with the recently approved residential flat building to the east of the site at 21-23 James Street.

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 Auburn LEP 2010 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

As detailed in the section above, the proposal maintains the future higher density built form that is at a scale comparative to the site's location within the Lidcombe Town Centre. The numeric increase in building height for the proposed development is approximately 2m which is a result of providing communal open space on the roof to increase the amenity of the development for residents. This increase 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 Auburn LEP 2010 requires the departure from the development standard to be justified by demonstrating:

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

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 impact from adjoining properties.

- The height variation equates to a maximum 2m for a minor portion of the building and is not visually prominent.
- The area of exceedance is for communal open space and does not contain any habitable space.

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 Zhinar Architects.

Strict compliance with the building height development standard would require the deletion of the communal open space on the roof which would significantly reduce the site's potential to facilitate higher density residential development whilst ensuring an appropriate level of amenity.

6.0 Conclusion

The proposed contravention of the 32m maximum building height is based on the reasons outlined in this request.

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 Auburn LEP 2010 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 Auburn LEP 2010 and Council's support to contravene the maximum building height development standard of Clause 4.3 is therefore sought.