

Clause 4.6 – Exceptions to Development Standards – Building Height (Cl 4.3)

Address: 87-99 Oxford Street and 16-22 Spring Street, Bondi Junction

Prepared by BTG Planning Nov 2017 and subsequently amended June 2018.

1.0 Introduction

This is a written request to seek a variation to a development standard under clause 4.6 – Exceptions to Development Standards of the Waverley Local Environmental Plan (WLEP) 2012. Council has before it DA 498/2017 which has now been amended but not in any material manner that affects its overall proposed building Height. The development standard for which the variation is sought is Clause 4.3 Height of Buildings.

This application has been prepared in the manner informed by the 2011 NSW Department of Planning and Infrastructure (DP&I) guideline Varying Development Standards: A Guide, and the relevant principles identified in a number of NSW Land and Environment Court cases.

The format, structure and some content of this variation request is based on a similar and very recent variation request prepared by SJB Planning for property known as 362-374 Oxford Street, Bondi Junction. That particular development also had a variation of 15% GFA and an extra two floors.

2.0 Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Waverley Local Environmental Plan (WLEP) 2012.

2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

2.3 What are the Objectives of the zone?

The objectives of the B4 Mixed Use zone are:

- *To provide a mixture of compatible land uses.*
- *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.*
- *To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core."*

2.4 What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

2.5 Is the development standard a performance based control? Give details.

No. The height of buildings development standard is a numerical control.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of WLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of Clause 4.3 are as follows:

- “(a) to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties,*
- (b) to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,*
- (c) to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide an appropriate transition in building heights surrounding that land,*
- (d) to ensure that buildings are compatible with the height, bulk and scale of the existing character of the locality and positively complement and contribute to the physical definition of the street network and public space.”*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) establishes a maximum height of building control for the site. The site has multiple maximum permissible heights of 20m, 28m and 38m, in accordance with the Height of Buildings Map (refer to Figure below). Note: Only the 38m height control is breached.



2.9 What is the proposed numeric value of the development standard in the development application?

The amended proposal has a maximum height of 49.850m to the top of the lift overrun and 47.82m to the top of the parapet wall above the existing ground level on Oxford Street. The overall maximum building height is therefore 49.85m and not 38m.

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The height of the lift overrun above the maximum height is **11.85m**. This equates to a **31%** exceedance.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards, establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- “(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*
 - (i) 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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.”*

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the 38m height standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The additional height, (above the height allowed under the control) is positioned on the site in a manner that is unlikely to result in significant adverse impacts upon adjacent properties or the public domain by way of overshadowing, visual massing, view loss and privacy impacts;
- There are minimal differences in the impacts between a building that strictly complies with maximum building height control and the proposed development in that:
 - Visual and acoustic privacy impacts: The top two (2) levels and the lift overrun of the building numerically represent the component of the building which is non-compliant. The floor layout, orientation of living spaces and private open space and general arrangement and setbacks of the upper levels is such that the additional height will not generate any significant privacy impacts for adjoining development particularly as the Waverley to the west and The Quest Apartments to the east are lower buildings;
 - Visual impacts: The emerging character of this locality is one of tall buildings and high density development. The development will be positioned in the midst of other existing and approved tall buildings of similar height and density. The building design exhibits a high degree of visual articulation, differentiation in materials and textures, responds to the existing and emerging character of the locality, will result in a visually pleasing addition to the streetscape, public domain and skyline. The proposed building will not result in adverse visual impacts when compared to a complying building.
 - Overshadowing impacts: The difference in shadow impacts on adjacent sites between a compliant building compared to the proposed building are relatively minor due to the fact that a large part of the building volume is positioned as far to the north on the site as possible and this also reflects the LEP height controls for the site which are aimed at achieving certain solar access outcomes for sites to its south. The resulting shadows are considered acceptable within the context of the high density B4 zone and the emerging character of the Bondi Junction Town Centre
 - View loss impacts: The additional two floors do not adversely affect the views from any existing apartments in the locality. See visual analysis in the SEE by BTG Nov 2017.
- The development will result in a better urban design outcome compared to a compliant development. The building will be better differentiated from adjacent buildings and will provide a well-considered visually interesting addition to the Bondi Junction Town Centre; and
- The development satisfies the objectives of the zone and the development standard.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

A development that strictly complied with the standard would likely result in a lesser urban design outcome. A development that strictly complied with the standard would likely result in a building lower in height and density than adjacent development, resulting in a building that is inconsistent with the bulk and scale of buildings to the north and also of recently approved surrounding buildings, which does not reflect or respond to the site's urban context.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

It cannot be said that the building height development standard has been abandoned, however there are numerous examples of approved development that exceed the building height development standard within the vicinity of the site and elsewhere in the suburb and LGA.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is appropriate for the site.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

The particular circumstances of this site that distinguish it from others is its relatively large consolidated site area with two primary street frontages and three different site height controls aimed at achieving certain solar access outcomes to an adjacent heritage site.

Development of this site must be considered in the context not only of the current urban built form but also several recent approvals for major redevelopment of nearby sites.

In these circumstances, there are sufficient planning grounds particularly relevant to the site to justify contravening the development standard being:

- The proposed non-compliance with the Height control will result in a better urban design outcome at the site.
- The visual catchment of Oxford Street and Spring Streets contain a number of buildings which have been approved that will present a scale that will set the future character of the locality. The proposed development will not be determinative in respect of the character of the locality, rather it will be complementary to the intended character of the precinct.
- The site is capable of accommodating the proposed density and the development is of an intensity and scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality. Overall, the increased FSR and Height of the development will result in a better urban design outcome compared to a compliant development;
- The proposed variation to the Height standard is in part a function of compliance with the ADG requirements for solar access, such that due to overshadowing from approved taller buildings to the north, the height of the development has been arranged so that direct sunlight can be achieved to 70.6% of the proposed residential apartments;
- The development will provide additional residential accommodation in an area with excellent access to public transport services, an aim of the strategic planning vision for this locality;
- The proposal will not set a precedent in terms of density or height for development in the vicinity;

- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the Height standard, and the proposed height is considered appropriate within the strategic planning context of the B4 Mixed Use zone in the Bondi Junction Town Centre.
- The non-compliance with the standard does not contribute to significant adverse environmental impacts in terms of overshadowing, visual impacts or view loss;
- The development will result in significant public benefit through the inclusion of a VPA which will provide Council with the opportunity to deliver public infrastructure and affordable housing, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council's S94A Contributions Plan; and
- The development as proposed is consistent with the provisions of orderly and economic development.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the building height standard

The proposal remains consistent with the objectives of the building height standard outlined in subclause 4.3(1) despite the non-compliance demonstrated below:

“(a) to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties,”

The design of the building represents a well considered response to the location of the site within one of the main streets of the Bondi Junction Town Centre and will provide a high quality urban design outcome particularly for the general public and pedestrians using the centre.

The design (i.e. that which is above the height limit) is executed in a manner that is unlikely to significantly compromise the amenity of surrounding properties.

The proposed building is well articulated and achieves adequate separation between existing and future buildings on adjacent sites. The building form is unlikely to result in significant adverse visual massing and bulk and scale impacts above the impacts that could be reasonably expected from a compliant development.

The SEE submitted with the DA demonstrates that the proposal is unlikely to result in significant adverse impacts by way of overshadowing, visual and acoustic privacy, view loss and visual massing to adjoining properties and the public domain.

“(b) to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,”

The proposed development seeks to create a mixed use building which will incorporate high quality retail and commercial tenancies and residential apartments with excellent amenity. Each of the proposed uses will assist in meeting the varied current and future needs of the Bondi Junction Town Centre.

“(c) to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide an appropriate transition in building heights surrounding that land,”

The design of the building responds to the constraints of the site and its urban context. The height and density of the building responds to the sites relatively prominent location within one of the main roads of the Bondi Junction Centre and the size and orientation of the site and this is reflected by the lack of adverse impacts that will result from the development and the fact that appropriate building separation will be achieved.

The scale of the development provides a suitable transition to development in the Zone B3 Commercial Core.

“(d) to ensure that buildings are compatible with the height, bulk and scale of the existing character of the locality and positively complement and contribute to the physical definition of the street network and public space.”

The building is of a similar height to (or in some instances lower than) approved and existing development.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the FSR standard. The objectives are:

- *To provide a mixture of compatible land uses.*
- *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.*
- *To encourage commercial uses within existing heritage buildings and within other existing buildings surrounding the land zoned B3 Commercial Core.”*

The proposal includes retail and commercial premises and residential apartments which are all forms of land uses envisaged for the zone. The combination of the proposed uses is arranged in a configuration where all three uses can coexist, and in a location already characterized by mixed use development.

The site has excellent access to public transport and is in a highly accessible location. It is close proximity to a train station and bus routes.

The site is highly accessible to high frequency public transport in the form of trains and buses. A large range of services and amenities are within easy walking distance. The development includes bicycle storage facilities in locations and of a capacity that is consistent with Council's requirements.

3.5 Whether contravention of the development standard raises any matter of significance for the State or Regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones and are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

“to encourage

- The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- The promotion and coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally maintains the scale and density of recently approved buildings.

The development as proposed is consistent with the provisions of orderly and economic development and strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the FSR would result in a poorer urban design and public domain outcome and to its relationship with other recently approved buildings within the Bondi Junction Town Centre that are of a similar density and height as the proposed development. There is therefore no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site. The proposed VPA will give effect to the proposed public domain benefits and additional public infrastructure and affordable housing in the locality.

Therefore, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site.

3.8 Is the objection well founded?

Yes. For reasons outlined in the preceding sections of this submission, the variation to the FSR control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act nor the objectives of the B4 Mixed Use zone of WLEP 2012. A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the building to absolute numerical compliance.

Clause 4.6(5) states:

“(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.”*

The requested variation to the FSR Standard does not raise any matter of significance for State or regional environmental planning. The consideration of the variation is a purely local matter relating to the distribution and accommodation of building volume on the site in a manner that skilfully integrates the building into its context and the overall Town Centre.

4.0 Conclusion

The building height is considered appropriate to the context and circumstances of the site, and does not result in a scale of development that is out of character with the surrounding development and emerging character of the locality.

Contextually, the proposal will provide a development of a height, form and density that appropriately responds to the sites' prominent location within the Bondi Junction Town Centre. On an urban design basis, the outcome will be entirely appropriate to the locality and will result in a building that will display architectural excellence.

The proposal does not represent an overdevelopment of the site and the height and proposed intensity (density) is consistent with the locality's desired future character and its evolving urban context.

The site is within a locality that is of a geographical position and which has appropriate service capacity to readily accommodate development of the height and density proposed and has excellent access to a full range of services and public transport. The site is within a location that is ideally situated to maximise development opportunities. The proposed variation to the maximum height control is consistent with the identified strategic outcomes for the locality and the sites physical capacities.

The proposal will result in considerable public benefit through the provision of new arcade and plaza, and associated retail and commercial floor space and residential apartments. The agreement to a VPA will also result in additional public infrastructure and affordable housing for the locality.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b), 4.6(4)(a)(i) and 4.6(a)(ii) of WLEP 2012 as it has been demonstrated that compliance with the maximum building height development standard is both unnecessary and unreasonable in the circumstances of this case, there are sufficient planning grounds to justify contravening the standard, the development will be in the public interest and it is consistent with the objectives of the development standard and the objectives for development within the B4 Mixed Use zone.

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