

# **CLAUSE 4.6 REQUEST FOR VARIATION**

**Clause 4.3(2B)(c)(ii)  
Height of Buildings**

**Bankstown LEP 2015**

**144-146 Boronia Road  
Greenacre**

***‘Boarding house development’***

**November 2018**

## 1.0 INTRODUCTION

- 1.1 This is an objection under Clause 4.6 of Bankstown Local Environmental Plan 2015 (RLEP 2012) to Clause 4.3(2B)(c)(ii) (Height of Building) of BLEP 2015. The relevant subclause requires the maximum building height for all other dwellings (ie not facing the street) to be a maximum of 6 metres high with a maximum wall height of 3 metres. This Height of Building control is a *development standard* for the purposes of the *EP&A Act 1979*. An applicant is able to submit a written request as part of a development application demonstrating why strict application of the standard is unreasonable and unnecessary in the circumstances of the case. The case law sets a benchmark confirming height variations are discretionary.
- 1.2 This objection has considered the Land and Environment Court case law, (including *Four 2 Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90). Two more recent cases *Moskovich v Waverley Council* and *Randwick City Council v Micaul Holdings Pty Ltd* confirm that there is no specific limitation on the consent authority's discretion under clause 4.6(4) and the threshold may vary from case to case, depending on the views of the consent authority.
- 1.3 In *Moskovich* it was submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. *Moskovich* further submitted that there were "sufficient environmental planning grounds" to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes. Ultimately the decision was made to uphold the Appeal and hence a more merit based clause 4.6 application was now identified in the Court.
- 1.4 A recent decision in the Court in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 confirmed once again that flexibility can be applied to allow variations of numerical development standards and the consent authority (Council in the case of the subject application) has the power and discretion to allow a variation of one or all standards if it so wishes. *Micaul* is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 (RLEP 2012) to vary development standards relating to the height and FSR of a building. Council contended that the Commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The Council also claimed that the Commissioner failed to consider a requirement of a Development Control Plan. Council's position was that the bar had been set too low for the clause 4.6 variation request. The Court dismissed the Appeal as it held that the Commissioner had set out an appropriate test under clause 4.6. The Commissioner stated that she was satisfied that the proposal satisfied those tests.
- 1.5 What is clear from the decisions is that the degree of satisfaction required under clause 4.6(4) is a matter for the Commissioner (and in this case Bankstown Council) and on this basis, it is open to the consent authority to satisfy itself. It is our submission that Council can be satisfied that the development is in the public interest because it achieves the zone and height objectives and there are sufficient environmental planning grounds to justify this particular variation.
- 1.6 The intent of clause 4.6 is to provide flexibility in the application of development standards and better outcomes in the circumstances by allowing variations to numerical standards. We demonstrate below that the variation of the subclause Height of Building control as it applies to boarding house development and this site in particular, allows for a sound planning outcome in terms of the following:

- Ability to satisfy the zone and height objectives of BLEP 2015;
- No significant adverse impacts arising from the height departure and it is apparent that it was not the intent of the control to limit the 6m to say the first 6m of a building fronting the street in boarding house applications;
- The clause was drafted to deal more with an infill multi dwelling scenario and not a boarding house typology.
- The effect of strict compliance would not lead to an appropriate planning outcome as it would require removal of all the two storey dwellings in the front building behind the front most dwelling. The scale would be significantly less than a dwelling that occurs as a result of the BDCP or a CDC. This is not a desirable built form outcome;
- The overall height and scale of the front building (i.e. A and B) is appropriate for the context and is 2 storeys.
- Strict application of the subclause height limit would require more than 80% of the length of Lot 4 to be single storey.
- The proposal as one departing from the standard provides a built form that is equal to a BDCP compliant dwelling and a CDC dwelling.
- The departing scheme is one which achieves the overarching objectives of the *EP&A Act 1979* and allows for the orderly and economic use of the land.

- 1.7 The height non-compliance is occurs due to a technical application of the LEP clause, not from the development itself. The front blocks (Block A & Block B) facing Boronia Road comprise two sets of boarding rooms – one behind the other and both within a two storey building that fronts Boronia Road. Council, in adopting the strict interpretation of what constitutes a ‘dwelling’ requires that only one dwelling or in this case, one boarding room facing Boronia Road, be located in a building which is over 6m high. The boarding rooms behind these front facing rooms are interpreted as being required to be within in a single storey building. While considered an anomaly due to the size of the individual boarding rooms (less than 25sqm gross floor area), they are provided with their own facilities and are capable of separate occupancy. The clause it seems was not intended to apply to boarding house typologies where internal facilities are provided. The clause would not apply to a boarding house with no facilities in the room as this would not constitute a dwelling. Its arguable the clause has not work to do as the building is readily and legally categorized as a boarding house and not a dwelling.
- 1.8 The applicant has provided a site context plan (Appendix 1 of this statement) depicting the approved Detached Dual Occupancy (two storeys, side by side) adjoining the subject site (No. 148 Boronia Rd) and potential two storey building zone for the adjacent properties. Each development is permissible under BLEP standards and BDCP provisions. This assists in demonstrating that, in this case, the depth of the two storey component of this development, as it fronts and presents to Boronia Road, is similar to the depth of a two storey development on each of the adjoining properties that could occur under the BDCP provisions or CDC for that matter. Council staff have requested a variation in order to be able to vary the standard.
- 1.9 The submitted plan serves to demonstrate that the depth of the proposed two storey buildings (Blocks A & B) do not significantly add to the scale, bulk or visual appearance of potential future development along Boronia Road and therefore the likely future character of this area. This is the only area of non-compliance with the height controls for this site. The front dwellings facing Boronia Road comply and the rear blocks (Blocks C, D, E and F) are single storey, thereby complying with the LEP standard. The depth of building that the non-compliance applies to approximately 18-19m only. These boarding rooms sit behind the front rooms and are therefore only visible as a side view. The extent of the wall length at single storey is greater than the wall length at 2 storey when considered over the entire site.

- 1.10 As the bulk and scale of both Block A and Block B is acceptable in terms of site context, potential adjoining development, overshadowing, visual and acoustic privacy impacts, access, parking and materials and finishes, the variation is also able to be supported as the variation does not result in any unreasonable environmental impacts.
- 1.11 This 4.6 objection demonstrates that despite the breach of the relevant development standards the proposal is in the public interest within the meaning of cl4.6(4)(a)(ii) as it is consistent with the objectives of the particular standard and the objectives for development within the zone. The clause 4.6 has adopted the test in Whebe in order to address the requirements of clause 4.6 (3)(a).

## 2.0 RELEVANT CLAUSE TO BE VARIED

The relevant clause of Bankstown LEP 2015 to be varied is Clause 4.3(2B)(c)(ii)– Height of Buildings. Clause 4.3 relevantly provides:

### 4.3 Height of buildings

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

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,
- (b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,
- (c) to provide appropriate height transitions between development, particularly at zone boundaries,
- (d) to define focal points by way of nominating greater building heights in certain locations.

(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.

(2A) Despite subclause (2):

- (a) for land in Zone B2 Local Centre—if a lot is in “Area 1” as identified on the Height of Buildings Map and has a width of less than 20 metres at the road frontage, the maximum building height is 17 metres, and
- (b) for land in Zone B6 Enterprise Corridor—if a lot is in “Area 2” as identified on the Height of Buildings Map and has an area less than 5,000 square metres, the maximum building height is 11 metres.

**(2B) Despite subclause (2), the following restrictions apply to development on land in Zone R2 Low Density Residential:**

- (a) for a secondary dwelling that is separate from the principal dwelling—the maximum building height is 6 metres and the maximum wall height is 3 metres,
- (b) for a dwelling house or a dual occupancy—the maximum wall height is 7 metres,
- (c) for multi dwelling housing and boarding houses:
  - (i) the maximum building height for a dwelling facing a road is 9 metres and the maximum wall height is 7 metres, and
  - (ii) the maximum building height for all other dwellings at the rear of the lot is 6 metres and the maximum wall height is 3 metres.**

(2C) In this clause, wall height means the vertical distance between ground level (existing) and the underside of the eaves at the wall line or the top of the parapet or the flat roof (whichever is the highest).

The relevant clause is shown bolded above. Generally, the subject site is shown on LEP Map as having a maximum height limit of 9m. The requirement for the 6m height limit and 3m wall height limit is contained in the subclause, not via the LEP HOB mapping.



### 3.0 CLAUSE 4.6 OF BLEP 2015

Clause 4.6 of BLEP 2015 is the relevant clause which allows a variation to the development standard. Clause 4.6 relevantly provides:

#### 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 4.4, to the extent that it applies to land in Zone B4 Mixed Use that has a maximum floor space ratio of 3:1,

(cb) clause 4.4A.

### **Comment**

The applicant requests a variation under Clause 4.6 to the 6m maximum height of building standard under Clause 4.3(2B)(c)(ii) of BLEP 2015. Any variation request must justify the need to vary the particular development standard by considering the requirements of clause 4.6(3)(a)(i) and 4.6(3)(a)(ii). Our analysis in relation to each of these heads of consideration is provided below:

### **Clause 4.6(3)(a) and (b)**

The applicant's clause 4.6 request is to adequately address the following matters required to be demonstrated by sub-clause 4.6(3):

- *that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, and*
- *that there are sufficient environmental planning grounds to justify contravening the development standard.*

### **Unreasonable or unnecessary (clause 4.6(3)(a))**

In dealing with the unreasonable and unnecessary test we adopt a previous test established under Whebe and Pittwater Council. The relevant matters are identified and a comment is provided to those matters as they relate to the subject application:



Relevant Objective established in Whebe v Pittwater	Comment
<i>(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard</i>	<p>The subject proposal with the requested cl. 4.6(2) objection to height satisfies the objectives of the standard (see further discussion within this statement)</p> <p>On this basis the Council has the power to exercise its discretion and allow for the height variation.</p>
<i>(ii) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i>	<p>The objectives of the standard remain relevant and following a review of the specific height objectives the proposal satisfies those objectives.</p> <p>Having regard to the above Council has the power to exercise its discretion and allow for the height variation.</p>
<i>(iii) the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	<p>The consequence of strict application of the control would lead to a built form that steps down by one storey after a depth of one boarding room or approx. 12 m from the front boundary. This is significantly less than a two storey single dwelling that would be permissible and less than the potential redevelopment of adjoining and adjacent properties. Further, the length of Lot 4 (75m) lends itself to a longer two storey built form. If the LEP provision is applied less than 20% of the length of Lot 4 would be able to be two storey in this case. In these circumstances compliance is unreasonable and unnecessary and the built form appearance would be adversely affected by strict compliance when considered in this context having regard to the potential for new infill development.</p> <p>Having regard to the planning principles in Project Ventures Constructions v Pittwater Council the subject proposal is deemed to be compatible with the likely future bulk and scale of dwellings fronting Boronia Road. In our opinion the proposal would be more in keeping with the strategic planning outcomes envisaged for this area than a proposal that strictly complied with the height control.</p> <p>The future development potential of adjoining sites remains a relevant consideration in the overall strategic planning and urban design outcomes. The proposal offers a sound opportunity</p>

	<p>to fulfill the objectives and strategic vision that is not true for all development proposals. As articulated the proposal offers a similar two storey building depth of potential new single dwellings along Boronia Road.</p> <p>Having regard to the above Council has the power to exercise its discretion and allow for the height variation.</p>
<i>(iv) 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; and</i>	Whilst we have not reviewed Councils register of variations this clause is not relied upon at this time to justify the variation.
<i>(v) 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	The zoning is appropriate and this objective is not relied upon to justify the variation.

Strict application of the height of building maximum for boarding house 'dwellings at the rear of the site' is considered to be unreasonable in the circumstances of this case.

#### **Clause 4.6(3)(b) - Relevant Environmental Planning Grounds**

The proponent has reviewed the relevant Boronia Road neighbourhood characteristics and designed the proposal to satisfy the local planning controls (apart from the technical non-compliance to height subject of this variation request) and achieve the long-term viability and economic opportunity of redeveloping such an under-developed site in line with the State Government housing initiatives and local government planning policies.

The proposal has been designed to minimise impacts on the existing adjoining properties where possible. The development offers a significant upgrade of the current building stock. Having regard to the above, strict application of the development standard is unreasonable when considered in the context of this particular site, the proposed design, the layout and built form and having regard to relevant planning principles. Consideration is given to the likely future character of the area that will arrive as a result of the SEPP ARH, SEPP (Exempt and Complying Development) and/or BDCP provisions for this neighbourhood. This is already evidenced by the approval of a two storey detached dual occupancy directly adjoining the subject site (No. 148 Boronia Rd). The drawing package shows the relevant streetscape comparison of the known developments facing Boronia Road. It should be noted that the potential depth of two storey development on adjoining and adjacent sites is considerably greater than the proposal.

Clause 4.6 requires there to be sufficient environmental planning grounds to justify contravening the development standard. Further to the above the following summary is provided in support of the applicant's submission that sufficient environmental planning grounds exist to support the variation:



- The development satisfies the R2 Low Density Residential zone objectives;
- The development satisfies the height of building objectives;
- Relevant clause 4.6 objectives are satisfied;
- The development provides for the orderly development of the site;
- The design and layout of the development has considered the ongoing amenity and function of the adjoining properties and minimises impacts to the extent necessary across the site;
- The landuse mix that is evolving along Boronia Road provides a social benefit by offering future affordable housing to the local community thus achieving the strategic housing initiatives of the State Government;
- The development provides equitable access and variety of residential accommodation in an area that is accessible to services, employment and public transport;
- The subclause HOB departure does not in itself create any significant adverse impact by way of privacy loss or bulk and scale;
- The variation does not unduly impose on any adjoining property, result in reduced development potential on adjoining sites or result in significant adverse amenity loss.
- The built form that is proposed better relates to the built form context now and in the future than a development which strictly complied with the control.

**Clause 4.6(4)(a)(i)**

A written request is made and contained within this report. The clause is reasonably satisfied and Council is able to exercise its discretion.

**Clause 4.6(4)(a)(ii)**

Clause 4.6(4)(a)(ii) requires the applicant to demonstrate that the development is in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone. In order to demonstrate that this is indeed the case we provide a review below of the relevant objectives of the standard and the objectives of the zone.

The relevant objectives are as follows and a comment is provided in relation to each objective demonstrating the adequacy of the proposal based on the requested variation:

**Clause 4.3 Height of Buildings**

*The objectives of clause 4.3 are as follows:*

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*

Comment: Planning principles have established that in order for a development to be compatible it does not necessarily need to be the same (Project Ventures v Pittwater Council). The proposal is, in our opinion, compatible by virtue of its scale, form, design and layout. There is no potential for this development to have a jarring effect on the streetscape. Instead the built form achieves the likely future built form direction for this area and provides a balanced streetscape along Boronia Road.

Overall, the development with the depth of building variation that creates the technical non-compliance with subclause 4.3(2B)(c)(ii) height departure provides an appropriate response based on the sites opportunity and constraints. The benefits described above also demonstrate that compliance with the development standard is unreasonable and unnecessary when considered in the context of site.

*(b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,*

Comment: The development is a maximum of two storeys. This objective is achieved.

*(c) to provide appropriate height transitions between development, particularly at zone boundaries,*

Comment: The site is not located near a zone boundary. The development is a maximum of two storeys – no higher than permissible dual occupancy development or exempt and complying development, including two storey single dwellings. The depth of the two Blocks at the front of the site are not longer than anticipated for the future development of adjoining and adjacent sites in the area.

*(d) to define focal points by way of nominating greater building heights in certain locations.*

Comment: The development does not seek any greater building height than is permissible in the R2 zone in this area. The overall height of the development is considerably less than the maximum permissible. The rear blocks are single storey, complying with the BLEP development subclause. It is only the rear boarding rooms of Blocks A & B that are technically non-compliant.

#### **4.3 Enquiry into Zone Objectives**

An enquiry is now made in relation to the ability of the proposal, as one departing from the HOB standard, to reasonably satisfy the stated objectives of the zone.

##### **Objectives of zone**

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.*
- *To allow for the development of low density housing that has regard to local amenity.*
- *To require landscape as a key characteristic in the low density residential environment.*

The proposal achieves the objectives given that:

- The development is a permissible use in the R2 zone and is therefore anticipated within that zone;
- The development is a maximum of two storeys with single storey blocks at the rear;
- The building length dedicated to single storey is greater than 2 storey and single storey built form is located to the rear of the site in separate pavilions
- The non-compliance is a technicality as the depth of Blocks A & B have been designed to be no longer than similar two storey low density development that can be achieved on adjoining and adjacent properties;
- Provides a mix of dwellings which achieves housing diversity;
- The site and the immediate area are accessible to regular bus services.
- The development has been designed to minimise impacts and considered to fit with the likely future rhythm of development in the area;

- The design, security, separation of entry points and accessways all seek to provide a safe and secure environment within and around the development site.
- The bulk and scale of the front building A and B would be less than a CDC dwelling if strict compliance was pursued. In any event the variation is essentially required for the east side block given that the northern block is already stepped and is more in compliance with the control.

Overall, the above reasons demonstrate that the proposal achieves the R2 Low Density Residential Zone objectives.

#### **4.0 SUMMARY**

The following confirms that the development satisfies the sufficient environmental planning grounds test and is therefore in the public interest because:

- The development satisfies the zone objectives;
- The development satisfies the height objectives;
- The development provides for the orderly and economic use of the site;
- The proposal does not affect the development potential of adjoining sites;
- The development provides equitable access to a variety of dwelling types in an area that is accessible to services, employment and public transport;
- The HOB departure does not in itself create any significant adverse impact by way of privacy, bulk and scale;
- The bulk, scale and presentation of the proposal is appropriate in this context having regard to the existing and likely future built form in the locality