



REQUEST UNDER CLAUSE 4.6 OF FAIRFIELD LEP 2013

**Construction of a 3-Storey Boarding House & Associated Works
3 William Street, Fairfield**

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1.0 The Proposal

This request is written in support of a development that proposes the repair and restoration works to an existing fire station and the construction of a 3-storey boarding house development at 3 William Street, Fairfield (The Site).

This development proposes a maximum building height of 11.0m that results in a non-compliance with Council's Height of Buildings control (Clause 4.3).

1.1 Background

This 4.6 height variation request follows amendments to development application DA 413.1/2018. On 24 July 2019, Council issued a request for additional information for DA 413.1/2018 at 3 William Street, Fairfield. As a result, the proposed development has been amended a number of times in response to Council's requests and presents a scaled back built form that better complies with the Fairfield Local Environmental Plan 2013 (**FLEP 2013**) and the heritage item present within the subject site.

As per the final plans, the number of storeys proposed has been reduced from 4 to 3, which means that the proposed maximum building height has been reduced from 14.1 to 11 metres, which is a reduction in 3.1 metres. As a result, the proposed height variation is 2 metres or 12.2%. This results in better compliance with the Building Height Development Standard pursuant to the FLEP 2013.

1.2 Clause 4.6 and Relevant Case Law

Clause 4.6 of within the **FLEP 2013** allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

Clause 4.6 (3) of the LEP provides:

(3) 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.*

Further Clause 4.6(4) provides that:

(4) 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 Director-General has been obtained.*

The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (the Court) and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; and
3. *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7.

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis is of assistance to variations made under Clause 4.6 where subclause 4.6(3)(a) uses the same language as Clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the LEP is the same as the language used in Clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this Clause 4.6 Variation Request.

The five ways outlined in *Wehbe* include:

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 or 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

In the *Macaul Holdings* case cited above, Preston CJ at [34], in dealing with the question of whether compliance was unreasonable or unnecessary in the context of Clause 4.6, held that it was appropriate to take into account the precise wording of the objectives of the standard.

Accordingly, in dealing with the objectives relating to Clause 4. Under the LLEP an specifically objective (1)(c), it is only necessary to establish the minimising of adverse environmental effects of the use or enjoyment of adjoining properties and the public domain and not the higher test of no environmental harm which applied in Micaul Holdings because of the specific wording of Clause 4.4(1) of Randwick LEP 2012.

1.3 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 the maximum height for buildings,
 - (b) to ensure that the height of buildings complements the streetscape and character of the area in which the buildings are located,
 - (c) to minimise the visual impact, disruption of views, loss of privacy and loss of solar access to existing development.
- (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 9m. The development proposes a building height of 11m which exceeds the building height by a maximum of 2m.

1.4 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...”

Comment:

As defined above, maximum building height control under Clause 4.3 of the Fairfield LEP 2013 is clearly identifiable as a development standard.

2.0 The Contravention

The proposal results in the following variation to Council's Floor Space Ratio Control as demonstrated in the table below:

Table 1: Variation to Council's Maximum Building Height Control		
3 William Street, Fairfield	Control	Proposed
Height of Lift Overrun	9m	11m
Height of Parapet	9m	10m
Variation of Lift Overrun	-	2m 12.2%
Variation of Parapet	-	1m 11.1%

Comment:

The principle reason for the exceedance of Council's height control is based on the two key physical constraints on site, being the presence of an existing local heritage item along with the flood affectation the site is affected by.

In order to generate sufficient revenue to undertake the repair/restoration and ongoing maintenance works to the heritage item, the size and scale of the development proposed is required. The development proposed also needs to ensure that its siting continues to allow for sufficient demarcation and separation between the existing heritage item on site and the new built form proposed. This has resulted in the relocation of GFA from the eastern portion of the new built form and its relocation to the western portion of the site. It is further noted that the proposed development sits well under the applicable FSR control.

In addition to this, the site is flood affected and the ARI100 level is 9.3m AHD and therefore requires the development to be raised by 1.0m above natural ground level.

It should also be noted that the 2m height variation is isolated to the lift-overrun and is therefore limited to a small portion of the proposed development and is not visually dominant. This is detailed in **Figure 1** below.

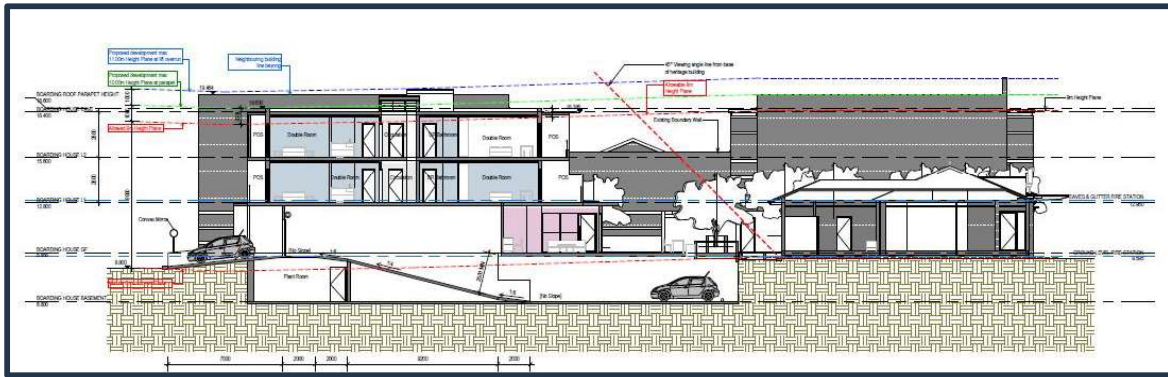


Figure 1: Section detailing Area of Height Exceedance and FFL for Ground level (Source: Mode).

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 subject site is located on the southern end of William Street in close proximity to the intersection of Hamilton Road and The Crescent, Fairfield. The site is located within land identified as being within the Fairfield City Centre and is zoned B4: Mixed Use under the provisions of Fairfield Local Environmental Plan 2013. The site is located 350m west of Fairfield train station and bus interchange.

This site is envisaged for future mixed-use residential development under the provisions of Fairfield Development Control Plan 2013. The surrounding lands directly to the west have a maximum building height of 20m, lands to the north have a maximum building height of 17m and land directly to the east has a maximum building height of 29m.

Furthermore, the neighbouring building located at 5 William Street, Fairfield is positioned higher than the proposed development and as a result means that the minor height variation is consistent and more compliant with the existing built form within the area.

Therefore, the proposed height variation is consistent with the existing and future built form within the Fairfield City Centre.

3.2 Public Interest

Clause 4.6(4)(a)(ii) of FLEP 2013 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 Council's height control, the proposal is considered in the public interest as it satisfies the objectives of the zone and the objectives of the development standard.

It allows for the repair/restoration and ongoing maintenance of a local heritage item and its use as a commercial space to allow public to gain access to that item which is also considered to be in the public interest. The minor height variation does not

Furthermore, the proposed development provides additional supply of low cost housing in an area where demand is high given its proximity to the Fairfield train station, bus interchange and a range of services and facilities.

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 mixed-use zone. It proposes a mix of boarding rooms as well as a commercial space which has been designed to respond to the existing and proposed bulk and scale of the area as well as uses that are compatible.

- ***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 quality mixed use development in an accessible location that maximizes public transport patronage and encourages non-vehicular transport given it sits within 350m of the Fairfield train station and bus interchange.

- ***To support the development of Prairiewood, Fairfield and Cabramatta as the principal locations for specialist cultural, retail, business, tourist and entertainment facilities and services***

As noted, the development proposes a boarding house and commercial space which will assist Fairfield in the provision of additional retail/commercial space.

3.4 Consistency with Objectives of the Height of Buildings 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***

The height standard applicable to the site is 9m. Whilst 9m building height has been established for the site, it is deemed unreasonable in this instance given its lack of impacts on the existing built form on site (heritage site) as well as lack of impacts on adjoining and surrounding developments based on the siting, design of the development proposed.

- ***To ensure that the height of buildings complements the streetscape and character of the area in which the buildings are located***

The height of the proposed development is consistent with the changing character and desired future character of the wider street block. Firstly, the maximum building height of the neighbouring dwelling is higher than the proposed variation. Secondly, the surrounding lands directly to the west have a maximum building height of 20m, lands to the north have a maximum building height of 17m and land directly to the east has a maximum building height of 29m.

- ***To minimise the visual impact, disruption of views, loss of privacy and loss of solar access to existing development.***

The development has been sited and designed to minimise its visual impacts when viewed from William Street, it does not result in loss of any substantial views from the site and does not cause any adverse overshadowing on adjoining sites. The development as proposed achieves solar access compliance to all 30 rooms proposed.

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 FLEP 2013 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.***

Comment

Visual Impact

The proposed built form seeks to respond to the constraints of the site as well as the built form within surrounding developments. The development when viewed from William Street will not appear visually prominent or dominant given the siting of the new built form and the separation it provides from that street interface (in excess of 30m).

In addition, the development on the north eastern boundary maintains a zero setback to the subject site and is a three storey mixed use building that also maintains no setback to William Street. Figure 2 below details this built form.



Figure 2: Proposed Perspective at William Street Frontage (Source: Mode)

Heritage

A comprehensive and heritage impact assessment and schedule of conservation works has been prepared and supports the additional height through carefully designed, high quality architecture, that does not mimic the Fairfield Fire Station but respects the building and its curtilage within the development. Furthermore, the setback between the proposed boarding house and the existing heritage item is 11m and results in a built form that acknowledges the heritage significance of the heritage item through increasing the predominance of the heritage item when viewed from the street. This is detailed in **Figure 2** above and demonstrates a sympathetic built form that complements the existing heritage item.

Residential Amenity

The proposal complies with the key residential amenity controls contained within the applicable planning controls and does not result in any adverse amenity impacts on adjoining properties.

The additional height is well contained towards the rear of the site and any impact will be mitigated by the topology and landscape.



Figure 3: Proposed Internal Perspective (Source: Mode)



Figure 4: Proposed Perspective from Harris lane (Source: Mode)

The development, as proposed, will continue to achieve the objectives of the height control development standard of FLEP 2013. Therefore, the objectives of the development standard are met notwithstanding the breach of Council's height control.

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 FLEP 2013 requires the departure from the development standard to be justified by demonstrating:

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

Comment

It is our opinion that there are sufficient environmental planning grounds to justify contravening the height of buildings standard in this instance. These are as follows:

- The proposed development is consistent with the objectives of the zone, the objectives for development in the Fairfield City Centre and the objectives of the height of buildings control.
- The proposal does not result in any adverse impact on adjoining properties in relation to overshadowing and privacy.
- The proposal does not result in any adverse impact on the significance of the existing heritage item on site, the Fairfield Fire Station.
- The principle reason for the exceedance of Council's height control is based on the two key physical constraints on site, being the presence of an existing local heritage item along with the flood affectation present within the site.
- Despite those constraints, a built form has been developed to ensure sufficient revenue is generated to ensure the upkeep of the heritage item whilst ensuring no adverse impacts occur as a result.

It is considered the objectives of the FLEP 2013 height of buildings standard are achieved in this instance where the proposal results in the provision of a high-quality development with no adverse impacts on the existing built form on site or surrounding developments.

In addition, the proposed materials and finishes and landscaping further reinforces how the development harmonizes with the existing heritage item on site as well as recent developments in the surrounding area.

Strict compliance with the building height development standard would require the deletion of the lift overrun which would significantly reduce the feasibility of the project, which in turn would reduce the revenue generated on site which is to be used for the repair, restoration and ongoing maintenance of the existing local heritage item on site.

6.0 Conclusion

The proposed contravention of the height of buildings of 2m is based on the reasons outlined in this request. The additional height results from the need to manage the separation required of the existing

heritage building on site, provide a development that generates sufficient revenue to ensure the viability of the existing heritage item and the flood affection, in which constrains the development on the site.

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 proposal will not result in the setting of an undesirable development precedent and does not detrimentally impact on the heritage significance of the Fairfield Fire Station.

As demonstrated throughout this statement, it is evident that:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

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 FLEP 2013 and Council's support to contravene the height of buildings development standard of Clause 4.3 is therefore sought.

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