

Clause 4.6, Exceptions to development standards, states:

- (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, and*
 - (b) *to achieve better planning 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) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard [and]*
- (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.*

Clauses 4.3 Building Height is a development standard that is not subject to any of the specified exclusions from the operation of clause 4.6.

In accordance with the guidelines provided by decisions of the Land and Environment Court and in particular the judgments in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386 and *Moskovich v Waverley Council* [2016] NSWLEC 1015, the submission addresses the requirements of clause 4.6 in turn.

BUILDING HEIGHT

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

The judgment in *Wehbe v Pittwater Council* [2007] NSWLEC 827 identified five ways of establishing under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) that compliance is unreasonable or unnecessary. The subsequent cases referred to above have confirmed that these ways are equally applicable under the clause 4.6 regime.

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard.* As set out below, the proposed development will achieve objectives (a-d) of the standard notwithstanding numerical non-compliance

The objectives of the building standard are set out in clause 4.3:

To establish and maintain the desirable attributes and character of an area: Not applicable.

Minimise overshadowing and ensure there is a desired level of solar access and public open space: This objective is not well written. It is understood that the objective means to minimise overshadowing and to ensure there is a desired level of solar access to public open space rather than ensuring a desired level of public open space because building height has no relevance with respect providing a desired level of open space.

The architect has prepared shadow diagrams for the proposal. The site is located on the north-east corner of Graham Road and Karne Street. It is also located on the southern side Robert Gardner Reserve. Subsequently, the proposal cannot result in any unreasonable shading of the north side public open space. The majority of shadow cast from the proposal is cast over Graham Road and Karne Street in the morning and then in the afternoon and therefore shading of public open space.

Alternatively, should the objective relate to providing solar access to the dwellings within the development, the architect has demonstrated that the proposal exceeds the 70% solar access requirement to dwellings within the development.

To support building design that contributes positively to the streetscape and visual amenity of an area: Although the proposal exceeds the standard by approximately 1 storey, the storey that does not comply has been setback from the front wall of the building i.e. the top floor has a greater setback from the boundaries than the floors immediately below. Although not complying it is a visually recessive floor and will not result in any unreasonable visual scale and bulk.

The floor that exceeds the standard is considered to provide a superior design outcome than providing this floor space at ground level which would result in a building with greater site coverage, reduced boundary setbacks and thereby significantly reducing the opportunity to provide landscaped area and deep soil for the site and detrimentally affecting the residential amenity of the dwellings within the development. A building of this form could be regarded to be excessive in terms of visual scale and bulk because it has effectively a larger footprint.

A building exceeding the height standard is a better planning outcome than building not complying with the setbacks to boundaries, site coverage and landscaped area requirements in order to achieve compliance with the FSR allowed through the SEPP. The proposal in this form provides a high standard of residential amenity for the future occupants in a landscape setting with no unreasonable impacts on adjoining properties and as a result provides a building that will provided a positive contribution to the streetscape and the visual amenity of the area.

To reinforce important road frontages in specific localities: This objective is not considered to be relevant as it is understood that the site's road/street frontages are not important frontages.

2. *The objective is not relevant to the development.* This criteria is not applicable to the proposal other than the last objective (d).

3. *The objective would be defeated or thwarted if compliance was required.* This criteria is not applicable to the proposal.

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard.* This criteria is not applicable to the proposal.

5. *The zoning of the land is unreasonable or inappropriate.* This criteria is not applicable to the proposal.

Compliance with the development standard is unreasonable or unnecessary in the circumstances for the reasons set out in 1 above demonstrate that the proposed development will achieve the underlying intention and purpose of the development standard and strict compliance with the development standard is therefore unnecessary and unreasonable

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

The cases referred to above have established that the environmental planning grounds must be particular to the circumstances of the proposed development on its site. The following environmental planning grounds are relevant:

- The proposal provides significant and valuable low rental affordable rental housing in accordance with the SEPP.
- The proposal exceeds the standard by approximately 1 storey, however, the storey that does not comply has been setback from the front wall of the building i.e. the top floor has a greater setback from the boundaries than the floors immediately below. Although not complying it is visually recessive and will not result in any unreasonable visual scale and bulk. The floor that exceeds the height standard is considered to provide a superior design outcome than providing this floor space at ground level which would result in a building with greater site coverage, reduced boundary setbacks and thereby significantly reducing the opportunity to provide landscaped area and deep soil for the site and detrimentally affecting the residential amenity of the dwellings within the development. A building in this form

could be regarded to be excessive in terms of visual scale and bulk because it has effectively a larger footprint.

- The proposed building although exceeding the height standard is a better planning outcome than a building not complying with the setbacks to boundaries, site coverage and landscaped area requirements in order to achieve compliance with the FSR allowed through the SEPP. The proposal in this form provides a high standard of residential amenity for the future occupants in a landscape setting with no unreasonable impacts on adjoining properties and as a result provides a building that will provided a positive contribution to the streetscape and the visual amenity of the area
- The proposal does not result in any unreasonable amenity impacts on adjoining and nearby residential property.

Will the proposed development be in the public interest because it is consistent with the objectives of the development standard?

In my opinion, the proposal is consistent with the objectives of the development standard for reasons outlined earlier and is therefore considered to be in the public interest.

Will the proposed development be in the public interest because it is consistent with the objectives of the zone?

The objectives of the R4 zone are:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposal provides for the housing needs of the community within a high density residential environment as a result 46 additional dwellings on the land. In addition, it provides 21 dwellings, which will be secured as affordable housing for 10 years following the issue of an occupation certificate.

- *To provide a variety of housing types within a high density residential environment.*

The proposal provides a mixture of 1, 2 and 3 bedroom dwellings as affordable housing 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.*

This objective is not relevant to the proposal.

Concurrence of the Director-General

The concurrence of the Director-General may be assumed by Council. The implications of a development not complying with a development standard of the Canterbury LEP are local in scope and raise no matters of significance for State or regional environmental planning.

The circumstances of the case should be balanced against the usual presumption of public benefit in maintaining a development standard. The building height of the proposed

development is justified as set out above. The variation sought will have no material adverse impacts on neighbouring properties or the public domain.

Conclusion

The submission in this Statement shows that, in the circumstances of the case, compliance with the development standard is unreasonable or unnecessary, 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 development standards and with those of the R4 High Density Residential zone.

Clause 5.6 provides a control for architectural roof features. The objectives of the clause are:

- (a) *to ensure that architectural roof features to which this clause applies are decorative elements only, and*
- (b) *to ensure that the majority of the roof features are contained within the prescribed building height.*

The proposal does not include architectural roof features and the clause is not applicable.

There are no other relevant development standards applicable to the proposal.

4.3 State Environmental Planning Policy 65 - Design Quality of Residential Flat Development

The policy was first gazetted 17th July 2002. The SEPP as amended requires consideration of the SEPP 65 Residential Flat Design Code when considering development applications. The aim, objectives of the policy are:

- (1) *This Policy aims to improve the design quality of residential flat development in New South Wales.*
- (2) *This Policy recognises that the design quality of residential flat development is of significance for environmental planning for the State due to the economic, environmental, cultural and social benefits of high quality design.*
- (3) *Improving the design quality of residential flat development aims:*
 - (a) *to ensure that it contributes to the sustainable development of New South Wales:*
 - (i) *by providing sustainable housing in social and environmental terms, and*
 - (ii) *by being a long-term asset to its neighbourhood, and*
 - (iii) *by achieving the urban planning policies for its regional and local contexts, and*
 - (b) *to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define, and*
 - (c) *to better satisfy the increasing demand, the changing social and demographic profile of the community, and the needs of the wide range of people from childhood to old age, including those with disabilities, and*