



Clause 4.6 Request to Vary Development Standard

Construction of a Residential Flat Building, and Lot Consolidation

24-28 Viccliffe Ave, Campsie

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Mono Constructions

Clause 4.6 Variation Request

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Client and Land Details

Client: Mono Constructions
Subject Site: 24-28 Viccliffe Ave, Campsie
Proposal: Construction of a Residential Flat Building and Lot Consolidation



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1 Introduction

The NSW planning system provides flexibility in planning controls by providing the ability for a Consent Authority to vary development standards in certain circumstances.

Stimson & Baker Planning has been engaged by Mono Constructions and Land and Housing Corporation (LAHC) to prepare a request to vary a development standard in respect of its proposed residential flat building at 24-28 Viccliffe Ave, Campsie. The proposal is to be assessed by Canterbury Bankstown City Council and this request accompanies plans and other documentation, including a Statement of Environmental Effects, submitted to Council. This variation is to be read in conjunction with that material.

The amended plans propose a breach in the *height of building* development standard and this submission aims to address that aspect of the application. The request is considered to be reasonable in the circumstances and argues why compliance with the standard is unnecessary on the grounds that:

- a) there are sufficient environmental planning grounds to justify the contravention of the development standards, namely the provision of more affordable housing in an accessible location consistent with the State Government's Future Directions for Social Housing and the Metropolitan Strategy;
- b) the proposed development is in the public interest because the proposed development achieves relevant objects of the *Environmental Planning & Assessment Act 1979* and is consistent with the relevant control objectives and development standards, despite the non-compliance;
- c) the FSR bonus allowed for in the Affordable Housing SEPP will inevitably cause conflicts with height controls in many cases. In this instance, the FSR bonus has been fully applied achieving the objects of that superseding environmental planning instrument while minimising potential impacts on adjoining properties;
- d) the contravention achieves better planning outcomes for and from the development without significant environmental impact by providing more affordable housing, optimum utilisation of well-located land and is consistent with the evolving character of the locality;
- e) the proposed breach in height is considered to be minor, with that breach arising as a result of the slope across the site and the 'placement' of the building within it;
- f) the proposed lift tower, located centrally on the rooftop and unable to readily viewed from the public domain, is technically some 2.1m above the height of the building control; and
- g) this variation request satisfies the tests established by the Land and Environment Court for the justification and assessment of variations to development standards.

This Clause 4.6 request superseded the document submitted with the original application. The proposed variation is slightly greater than that which was originally proposed, primarily because the design now accommodates all matters raised throughout the initial assessment of the application. Compliance is now achieved with the ADG and SEPP 65, and the development is consistent with the objectives of the LEP, the Height of Building Control and most importantly,

the Affordable Rental Housing SEPP. Collectively, it is considered there are sufficient environmental planning grounds to support the variation. These include the enormous public benefit arising out of this development through the provision of additional affordable housing. The relatively minor variation in building height will not negatively impact on nearby or adjoining sites, however it maximises the building envelope, representing the most efficient way to maximise the public benefit of future affordable housing stock in this area.

2 Variation Consideration

The NSW Land and Environment Court has resolved a number of matters that have guided the way in which requests to vary development standards are to be considered by the consent authority.

2.1 NSW Land and Environment Court: Case Law (tests)

The key elements are outlined below.

Winten v North Sydney Council

The decision in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated.

The questions that needed to be considered included:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)? and
- Is the objection well founded?

Wehbe v Pittwater [2007] NSW LEC 827

The decision in *Wehbe v Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established a five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it

applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- Whether there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs; and
- All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential

Moskovich v Waverley Council [2016] NSWLEC 1015

The court further reflected on the recent Four2Five decisions and noted:

- Clause 4.6(3)(a) is similar to clause 6 of SEPP 1 and the *Wehbe* ways of establishing compliance are equally appropriate. One of the most common ways is because the objectives of the development standard are achieved.
- Whereas clause 4.6(4)(a)(ii) is worded differently and is focused on consistency with objectives of a standard. Consequently, a consideration of consistency with the objectives of the standard required under clause 4.6(4)(a)(ii) to determine whether non-compliance with the standard would be in the public interest is different to consideration of achievement of the objectives of the standard under clause 4.6(3).
- The written request should address the considerations in the granting of concurrence under clause 4.6(5).

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

This most recent case has been considered in detail in Section 3 of this report.

2.2 The Proposed Development

The proposed development includes the construction of a new residential flat building comprising 14x1 units, and 14x2 bedroom units, as well as basement car parking.

The site is zoned *R4 High Density Residential* under *Canterbury Local Environmental Plan 2012* with the proposal being permissible with consent.

The maximum height of building control on the site is 11.5m. Minor variations of between 1400mm and 2150mm are proposed and are the subject of this variation request.

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

Canterbury Local Environmental Plan 2012.

2.4 What is the zoning of that land?

The subject site is zoned R4 High Density Residential.

2.5 What are the objectives of the zone?

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

The proposed development is consistent with the objectives in that:

- The proposal will contribute to the housing needs of the Campsie community within a high-density residential environment.
- The proposal provides an appropriate unit mix for the development type and expected occupant type.
- The subject site is within close proximity to the Campsie town centre responding to the day to day needs of the occupants.

2.6 What is the development standard being varied?

Height of Building.

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

Clause 4.3 Height of Building.

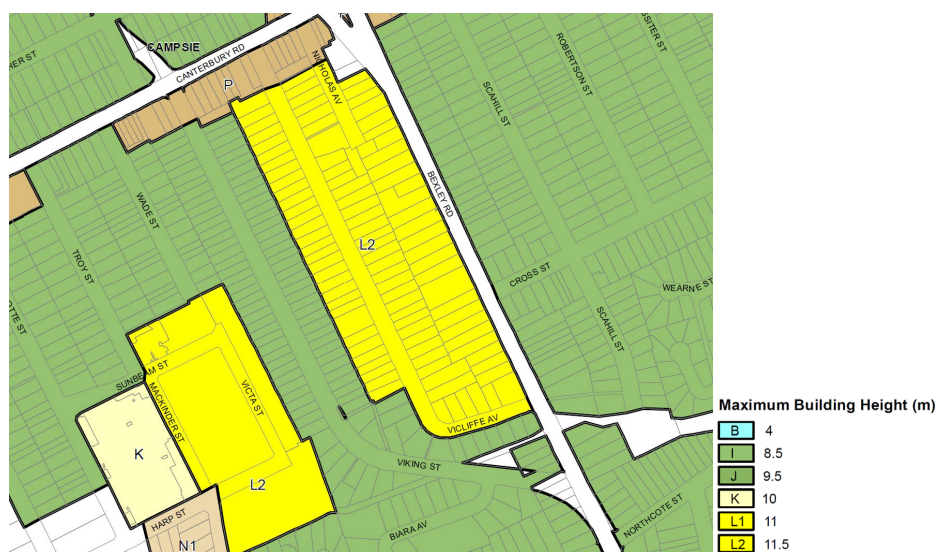


Figure 1 LEP Maximum Height of Building Control

2.8 What are the objectives of the development standard?

Clause 4.3 Height of Building objectives include:

- (a) to establish and maintain the desirable attributes and character of an area,
- (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,
- (c) to support building design that contributes positively to the streetscape and visual amenity of an area,
- (d) to reinforce important road frontages in specific localities.

Character of the area

The proposed development is consistent with the built form anticipated in the locality and is similar to other development that has been approved by Council and constructed. Namely, 55 Viccliffe Ave is a development in the vicinity of the subject site that was approved as a four storey structure. This development is representative of the built form envisaged in the location and the accepted interpretation of the applicable controls.



Figure 2 Approved and built 4 storey development at 55 Vicliffe Ave, Campsie

Overshadowing

The proposed variation will not contribute to any impacts on the property to the south above what is created by both existing buildings or a development with compliant height, as demonstrated in the Figures below. The shadow diagrams show that the solar access to the open space of the property to the south is preserved to an acceptable level, and that the height breach does not contribute to this aspect of the development.

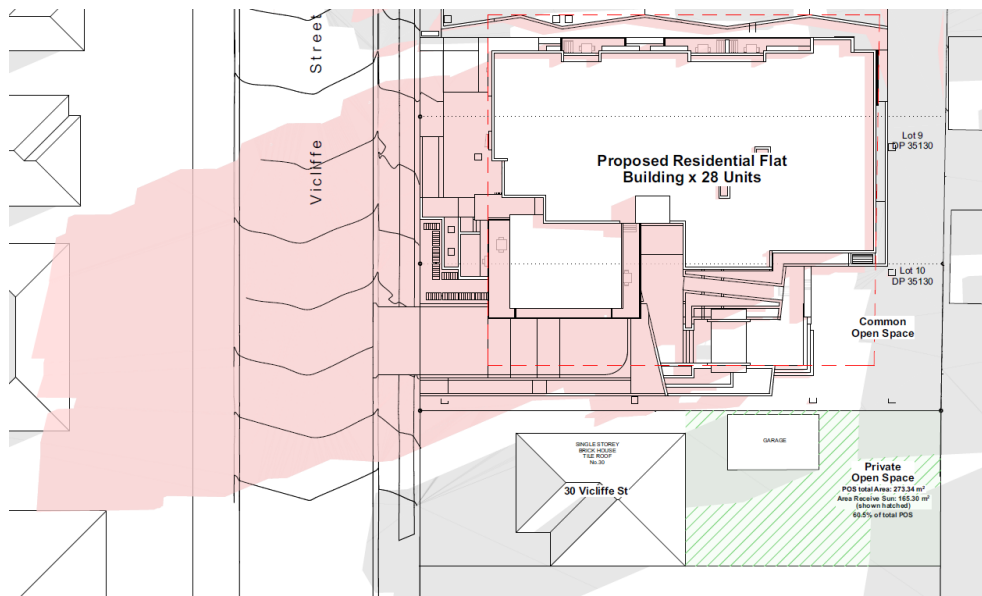


Figure 3 9am shadow

Figure 4 shows a minor additional shadow cast from the proposal. However, the main impacts occur over the front yard and the building itself.

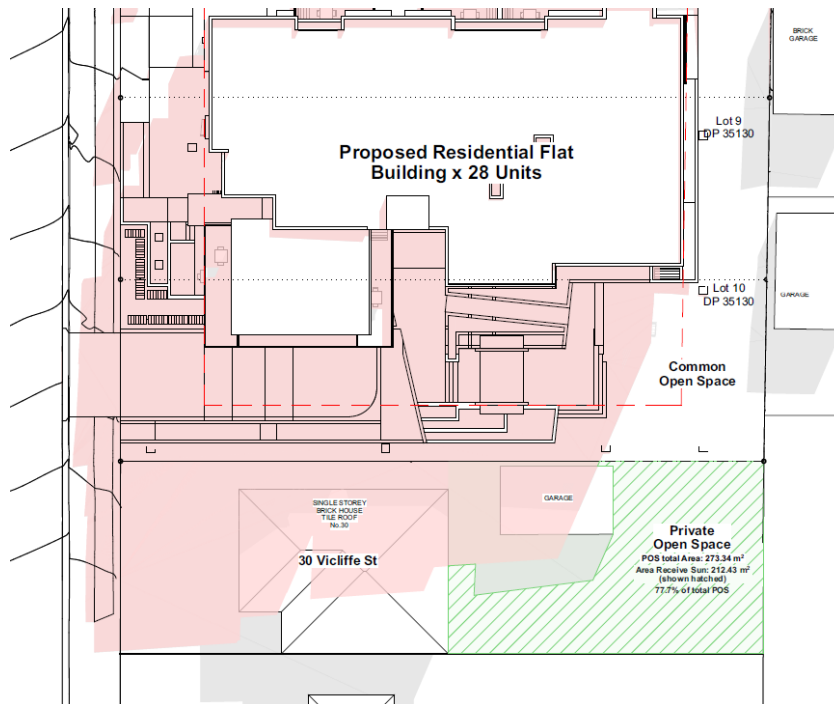


Figure 4 12pm shadow

Figure 5 shows the potential 3pm shadow impacts.

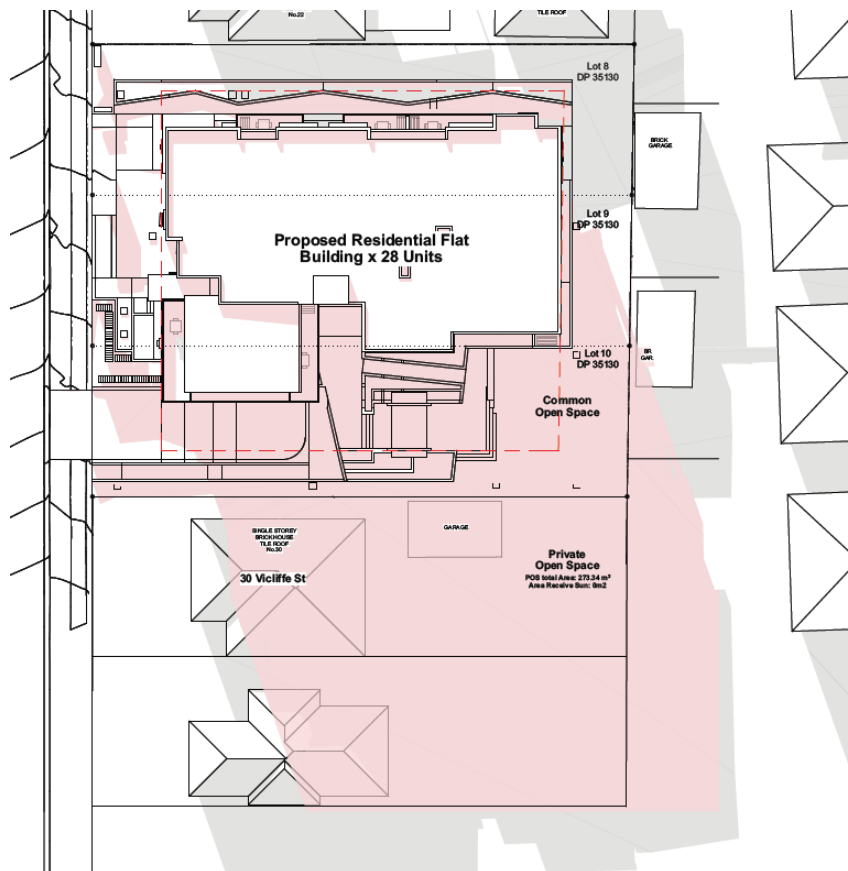


Figure 5 3pm shadow

In summary, the minor height breach does not create any unacceptable shadowing impacts through mid-winter and certainly none in addition to those created by a development compliant in height. The proposed development has no adverse impacts to the amenity of neighbouring properties.

Character and Streetscape Amenity

The perspectives below demonstrate a significantly positive contribution to the streetscape would be made as a result of this development. Its scale and bulk are consistent with the controls that apply to the zone, and with development that has already been constructed in the locality.



Figure 6 Viccliffe Avenue perspective



Figure 7 Viccliffe Avenue perspective

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

The maximum building height is 11.5m.

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

The proposal exceeds the building height at varying points across the building to accommodate the design, account for the slope of the land, and to fully utilise the building envelope.

Minor variations of between 1400mm and 2150mm are proposed,

The following height plane diagram highlights the minor nature of the variation sought.

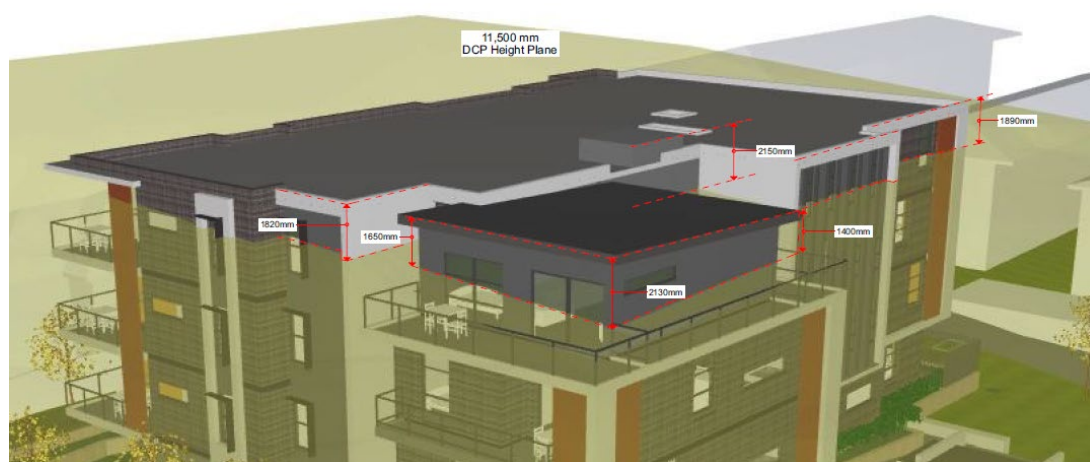


Figure 8 Height Plane Diagram

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

The variations range from between 10% and 18%, although these occur primarily because of the sloping nature of the land, and in areas that are set well back from property boundaries.

2.12 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The proposal meets the general intent of clause 4.3 *Height of Buildings* and complies with the objectives of this development standard and more generally the zone as follows:

- The proposal is compatible with the height, bulk and scale of the emerging and desired future character of the locality and with the surrounding development. This was demonstrated within the plans originally submitted with Council, showing the breach in height would not create any impacts, particularly in respect of overshadowing, on nearby or adjoining properties.
- The proposal does not impact on the visual amenity, reduce views or minimise loss of privacy or solar access.
- There is no heritage item on the site.

- The proposal provides a high-quality urban form and provides a building that can contribute to a varying skyline given the uniform height limit in this locality.
- It is unreasonable to apply the height limit across the site in this case as the proposal does not impact on the visual amenity nor does it significantly reduce views, privacy or solar access. The orientation of the building, the stepping of the building and façade treatment minimises shadow impacts with the majority of the shadow falling outside of private open space.
- The proposed development meets the objectives of the zone and the height of building clause, it contributes to the provision of necessary land uses within Canterbury Bankstown in locations in close proximity to services and facilities.

We also note there is an increased setback on the southern side which is where the height breach is located. This setback assists in minimising any potential overshadowing of adjoining properties.

Given the spatial context of the building, the proposed encroachment will not present as a perceptible element. It is considered that the proposal is in the public interest and strict compliance with the standard in this instance is both unreasonable and unnecessary.

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

Section 1.3 of the *Environmental Planning and Assessment Act 1979* details its objectives:

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- (c) to promote the orderly and economic use and development of land,
- (d) to promote the delivery and maintenance of affordable housing,
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- (g) to promote good design and amenity of the built environment,
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- (j) to provide increased opportunity for community participation in environmental planning and assessment.

It is submitted that the height encroachment still maintains an appropriate bulk and scale, and also maintains the objectives of the clauses within the LEP that relate to the zone and the

height of building. The objects of the Act are not hindered through the proposed variation being supported.

Complying with the height will not alter the outcome in relation to visual bulk, scale, amenity and solar access and it is considered the proposal provides a good planning outcome. To require compliance with the height limit, an entire level of apartments would need to be deleted.

It is against the objects of the Act and not in the public interest to comply with the 11.5m height limit as the resultant development would not represent the orderly and economic use of the land and it would limit the provision of affordable housing in close proximity to services and facilities. The height encroachment is considered to be imperceptible in the context of the overall development and surrounding locality.

2.14 Is the development standard a performance-based control?

No, it is prescriptive.

2.15 Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary?

Strict compliance with the standard in this particular case is unreasonable and unnecessary as the variation sought as part of this development application is considered appropriate in the context and setting of the site. Additionally, it is considered that:

- The FSR bonus in the ARH SEPP will inevitably result in conflict with height controls in LEP's in most cases.
- The proposed development has no significant non-compliances when considered against the ADG and SEPP.
- The FSR bonus has not been fully exploited in the proposed development.
- The extent of overshadowing to neighbouring property does not result in non-compliant solar access, this is demonstrated in the new shadow diagrams provided.

The proposed development meets the objectives of the zone, it meets the objectives of the height of buildings clause and it is considered that the objectives of the Act would not be undermined by supporting the variation.

It is submitted that the development standard is unnecessary given the negligible resultant environmental impacts arising from the proposal and is unreasonable given the numerous benefits that the development as proposed would bring to Campsie, over a strictly compliant development.

In supporting the variation, it is noted that the public interest is retained in that some key objectives of the planning controls have been achieved as a result of the development. Those include:

- Building Alignment to existing context.
- Extensive landscaping throughout
- Minimal shadow impacts.

- Positioning of that part of the building above the height limit centrally within the floor plate.

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

There are a number of positive environmental planning grounds that arise as a result of this development, and specifically the breach in the height limit, including:

- The proposed variation of the height standard allows for the provision of additional affordable housing stock over and above that of a strictly compliant development.
- The height variation allows for optimisation of the site's development potential as a transport-accessible site and provision of much needed affordable housing in the Canterbury Bankstown Local Government Area which in turn would assist in Council achieving the goals of its housing strategy and the NSW Government's *A Plan for Growing Sydney, Future Directions for Social Housing* and the *Metropolitan Strategy*.
- The proposal represents the orderly and economic development of the land, and provides for affordable housing, both two objectives of the Environmental Planning and Assessment Act 1979.
- The proposed height variation makes for efficient, economic and optimal use of the subject site, taking advantage of the local topography, and surrounding context, increasing the provision of affordable housing units with minimal environmental impact. The proposed development has been designed giving regard to the natural contours of the site, with the tallest sections of each building being sited in the lower parts of the site to reduce their visual impact.
- The non-compliant height will not give rise to any material streetscape or amenity impacts compared to a compliant development, by virtue of the proposed siting, massing, setbacks, design of the building, and site characteristics. The proposed development reflects a built form that is consistent with the controls and development that has been already constructed in the locality (55 Viccliffe Avenue).
- The proposed development satisfies the objectives of the height control and zone objectives, despite the non-compliance.
- Compliance is achieved with all other development standards that apply to the development.
- Design excellence has been demonstrated through the general satisfaction of the ADG controls and SEPP 65 design principles.
- The provision of affordable housing (provided in perpetuity) results in an enormous public benefit. Limiting the development through the numerical compliance with this control, particularly when no unacceptable impacts would arise from that variation, is both unnecessary and unreasonable.

The environmental planning grounds cited above are considered to be sufficient as the benefits arising from contravention of the development standards, namely, the provision of additional affordable housing stock in a very accessible location with major physical and social

infrastructure does not result in significant adverse environmental impacts such visual bulk, privacy and overshadowing, which have been reasonably ameliorated by the proposed site layout and building design.

3 Specific consideration of Cl.4.6(4) of Canterbury LEP 2012

A recent decision of the NSW Land and Environment Court (*Initial Action Pty Ltd v Woollahra Municipal Council*) further clarified the correct approach to the consideration of Clause 4.6 requests. This included clarifying that the Clause does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not.

Clause 4.6 of a standard instrument LEP permits a consent authority to grant development consent for development that would contravene a development standard where the consent authority is satisfied that:

- cl4.6(4)(a)(i): a written request from the applicant adequately demonstrates that compliance with the development standard is unreasonable or unnecessary (cl4.6(3)(a)), and that there are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)), and
- cl4.6(4)(a)(ii): the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development within the relevant zone.

To clearly consider this case and its applicability to the proposed development, the clauses have been tabulated below, and considered against the above Court case, the proposal, and this very submission.

| Canterbury Local Environmental Plan 2012 | 24-28 Viccliffe Avenue, Campsie |
|---|---|
| (4) <i>Development consent must not be granted for development that contravenes a development standard unless:</i> | |
| (a) <i>the consent authority is satisfied that:</i> | |
| (i) <i>the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i> | Subclause (3) requires the following to be demonstrated for the purposes of this consideration: |
| | (a) <i>that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</i> |
| | (b) <i>that there are sufficient environmental planning grounds to justify contravening the development standard.</i> |
| | In respect of the height of building variation, the reasons why compliance is unreasonable or unnecessary are provided in Section 2. |
| | We also note that the objectives of the standards have been achieved notwithstanding the non-compliance with those standards (<i>Wehbe v Pittwater Council</i>) as follows: |
| | Height of Building |
| | <ul style="list-style-type: none"> • The height, bulk and scale of the proposal is consistent with that of the desired future character |

| | |
|---|--|
| | <p>of the locality, as demonstrated in the accompanying architectural plans.</p> <ul style="list-style-type: none"> • There will be no loss of views to or from public areas, nor any loss of solar access. • The height proposed is considered to result in a building that will present as a high-quality architectural element in this locality, represents a scale and bulk generally consistent with the desired future character. <p>The objective of each of the development standards can be satisfied through this development as proposed.</p> <p>It follows that this aspect of Clause 4.6 has been satisfied.</p> <p>As to there being 'sufficient environmental planning' grounds to justify the variation, the focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. In this context the following is submitted in relation to the building height development standard.</p> <p><u>Height of Building</u></p> <p>The position we submit has been (we believe) adequately presented earlier in this submission. In summary, strict compliance of the development standard would limit the amount of residential development envisaged for this precinct. The benefits outweigh the non-compliance, noting the non-compliance is limited to small areas of the building's roof, and there being no perceptible impacts arising as a result. We believe that we have adequately addressed this matter.</p> |
| <p>(ii) <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</i></p> | <p>The proposed development is consistent with both the development standards that are proposed to be varied, as well as the objectives of development in the zone. The development is therefore in the public interest (see para 27 of the judgement).</p> |

Given the assessment above, it is considered the Clause 4.6 is well founded and can be supported in the context of this most recent court case.

4 Conclusion

Compliance with the building height development standard is considered to be unreasonable and unnecessary in the circumstances of the case, as noted by the following:

- The FSR bonus in the ARH SEPP will inevitably result in conflict with LEP height controls in some cases.
- The proposed development has no significant non-compliances when considered against the ADG and SEPP.
- The FSR bonus has not been fully exploited in the proposed development.
- The extent of overshadowing to neighbouring property does not result in non-compliant solar access, this is demonstrated in the new shadow diagrams provided.

It is considered that the bonus offered under the SEPP, contributes to satisfying the objectives of same. Achieving the objectives of the ARH SEPP, given it prevails over LEP and DCP provisions to the extent of any inconsistency, may in some cases result in some controls being set to the side. In this instance, the proposed development, whilst not achieving strict compliance, will not result in any negative impacts on adjoining properties.

The request to vary the development standards is considered to be well-founded on the grounds that the non-compliance with the building height development standard, *inter alia*:

- enables provision for additional affordable housing stock in a transport-accessible location;
- assists in the provision of affordable housing in the Canterbury Bankstown Local Government Area consistent with State government policy;
- allows for the efficient and economic development of a site that is capable of accommodating, and suitable for, the additional height proposed;
- enables a development that reflects the changing character of the locality without significant impact on the use and enjoyment of adjoining land;
- does not fetter consistency of the development with the objectives of the building height and FSR development standards, or the objectives of the zone;
- achieves relevant objects of the *Environmental Planning & Assessment Act 1979*, in particular, the provision of affordable housing, in the public interest; and
- does not raise any issues of State or regional planning significance.

This variation request addresses the matters required to be considered in Clause 4.6 of the Canterbury LEP 2012. Council is requested to exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the building height standard.