



## REQUEST UNDER CLAUSE 4.6 OF AUBURN LEP 2010

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Proposed Mixed Use Development,  
14-22 Mary Street, Auburn

## CONTACT INFORMATION

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## DOCUMENT INFORMATION

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## 1.0 The Proposal

This request is written in support of a development application (DA) that proposes a mixed-use development comprising commercial units, boarding house rooms and residential apartments and associated works at 14-22 Mary Street, Auburn.

This Clause 4.6 Request relates to a variation proposed to Council's Maximum Building Height control as prescribed by Auburn Local Environmental Plan (LEP) 2010.

### 1.1 Relevant Case Law

Clause 4.6 of the Auburn Local Environmental Plan (LEP) 2010 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

*(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.*

*Further Clause 4.6(4) provides that:*

*(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.*

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;
3. Randwick City Council V Micaul Holdings Pty Ltd [2016] NSWLEC 7;
4. Brigham v Canterbury-Bankstown Council [2018] NSWLEC 1406;
5. Initial Action v Woollahra Municipal Council [2018] NSWLEC 118; and
6. Turland v Wingecarribee Shire Council [2018] NSWLEC 1511.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard;
2. The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
3. Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
4. The development standard has been abandoned by the council; or
5. The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

## 1.2 Relevant Development Standard

The relevant development standard to which this objection relates to 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 a maximum height of buildings to enable appropriate development density to be achieved, and*
- (b) *to ensure that the height of buildings is compatible with the character of the locality.*

(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.*

**Comment:**

The applicable maximum building height for the site is 38m. The development proposes a portion of the building which exceeds the height control by a maximum of 3.1m.

### 1.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 1.4(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: ...*

*(a) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,...”*

**Comment:**

The maximum building height control under Clause 4.3 of the Auburn LEP 2010 is clearly a development standard.

## 2.0 The Contravention

The proposal results in the following variation to Council's Maximum Building Height Control as demonstrated in the table below:

Table 1: Variation to Council's Maximum Building Height Control		
	Control	Proposed
Maximum Building Height	38m	41.1m
Variation	-	3.1m
		8.15%

As described in the Statement of Environmental Effects (SEE) and identified on the Architectural Drawings prepared by Urban Link, the height of the proposed development will exceed the maximum building height of 38m by 3.1m, which equates to a variation of 8.15%. The proposed variation accommodates a minimal percentage of the total building volume proposed.

The principle reasons for the exceedance in maximum building height limit is the built form response to the flood planning level of the subject site and the provision of communal open space on the roof to ensure solar access and enhance the amenity to the residents. The area of exceedance does not contain any habitable residential space.

The proposed variation accommodates a minimal percentage of the total building volume proposed, as demonstrated in the 3D height Plane detailed in **Figure 1** below.



**Figure 1:** 3D Height plane detailing the portion of the development that exceeds the 38m height limit (Source: Urbanlink)

## 2.1 Impacts of the Contravention

There are no adverse impacts as a result of the proposed contravention. The proposed exceedance does not result in any visual impacts and is consistent with the desired future character of the Auburn Town Centre, as detailed below.

## Visual Impacts

From a visual perspective, an appropriate composition of building elements, material textures and colours have been utilised to reflect the buildings commercial and residential use character.

The external appearance of the building reflects consideration to various development controls and the articulation of the building along with its massing composition reflects the desired future character of the mixed-use area.

The massing of Mary Street and Park Road as well as the other elevations has been designed to achieve an aesthetic outcome to fit within a desired building envelope. Its facades are all designed with various architectural elements to provide articulation, depth, shade and a pleasing aesthetic.

The development is considered to represent a positive contribution to the streetscape and its siting design and location of car parking with a basement ensures the amenity of adjoining residents is not unduly compromised.

The height exceedance is deemed to be reasonable as it does not include habitable floor space will increase the amenity for occupants and is not visually prominent from the street.

## Amenity Impacts

A key consideration in the design of the proposal was the amenity of adjoining properties and the future context of the surrounding area. The proposed development has been sited and designed to ensure an appropriate level of solar access is maintained for adjoining properties and to ensure they can be redeveloped in line with the applicable development controls to achieve the desired future character of the Auburn Town Centre.

As detailed in the Shadow Analysis provided in the Architectural Plans (**Appendix A**) the proposed development does not adversely impact the existing solar access of adjoining properties and allows for the surrounding sites to be redeveloped in line with the controls.

### 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 site and its surroundings consist of a mix of residential and commercial uses. The site is identified as being located in the Auburn Town Centre, which is currently undergoing redevelopment. The proposed development is consistent with the future character of the Auburn Town Centre.

The following recently approved mixed use developments within close proximity to the subject site that have been approved with a height exceedance, due to their location as key sites within the Auburn Town Centre include:

Table 2: Recently Approved Mixed Use Developments in Close Proximity to the Subject Site that Varied Council's Maximum Building Height Control			
DA No & Address	Proposed	Comment	Approved
<b>DA92/2019</b> <b>13-19 Mary Street, Auburn</b>	Alterations and additions to approved 12 storey mixed use building referred to as Building A (DA-52/2017) at 13-19 Mary Street, Auburn including the construction of an additional 12 storey mixed use building component referred to as Building B at 9-11 Mary Street, Auburn which will accommodate a total of 157 residential units, 5 commercial suites, 1 office suite and part 4 part and 5 level basement for 285 vehicles.	The development exceeded the maximum building height by 3m (8%). The development was approved with the height variation as the elements that protrude beyond the height plane are only offering amenity to residents and the lift over runs are internal to the floor plate so would not be visible from street level.	3 September 2019
<b>DA382/2017</b> <b>1A &amp; 1B Queen Street, Auburn</b>	Demolition of structures and construction of 12 residential apartment buildings, being part 3, part 6 and part 8 storey buildings containing 595 residential apartments including basement parking, landscaping, stormwater, public domain works and subdivision	The development exceeded the maximum building height by 4.31m (21.5%). The development was approved with the variation as the development provides for an appropriate level of amenity for future residents and addresses impacts on the amenity of neighbouring properties.	16 August 2018
<b>DA48/2017</b> <b>93-105 Auburn</b>	Construction of three (3) additional storeys on top of the approved 14 storey Auburn Road tower, and two (2)	The development exceeded the maximum building height by 18.71m (51.9%). The application was approved by the Land and Environment Court as a 60m maximum height for the site is more appropriate and The	29 August 2017



Table 2: Recently Approved Mixed Use Developments in Close Proximity to the Subject Site that Varied Council's Maximum Building Height Control			
DA No & Address	Proposed	Comment	Approved
Road, Auburn	additional storeys to the approved 14 storey Harrow Road Tower, resulting in 17 and 16 storey towers respectively	proposed building height of 53.7m will provide a transition between the 60m high future development to the north and the 45m future development to the south of the site.	

### 3.2 Public Interest

Clause 4.6(4)(a)(ii) of Auburn LEP 2010 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 the maximum building height development standard, the proposal is considered in the public interest as it satisfies the objectives of the zone and the objectives of the development standard.

### 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 Auburn Town Centre. It proposes a high density residential and commercial development designed to contribute to the vitality of the town centre by providing affordable rental housing and commercial floor space in an accessible location.

- ***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 density mixed-use development in an accessible location that maximises public transport patronage and encourages non-vehicular transport.

- ***To encourage high density residential development***

The proposal consists of a high-density mixed-use development that is consistent with the future character of the area, whilst providing for the housing needs of the wider community.

- ***To encourage appropriate businesses that contribute to economic growth***

The proposed development will generate demand and opportunities for businesses to service the area and contribute to the economic growth of the area. The commercial tenancies within the development will provide additional floor space for businesses in the growing Auburn Town Centre.

- ***To achieve an accessible, attractive and safe public domain***

The proposed development contributes to creating an accessible, attractive and safe public domain. The development will provide opportunities for passive surveillance and create a vibrant street.

### **3.4 Consistency with Objectives of the Building Height 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 to enable appropriate development density to be achieved***

The proposal consists of a high-density mixed-use development that meets the desired future character of the area. The height exceedance is due to the built form responding to the natural characteristics of the site and the provision of a high amenity communal open space that allows the development to provide a high-density development whilst providing appropriate amenity to residents. The area of exceedance does not contain any habitable residential space and the area of exceedance has been designed to ensure it is not visually prominent or readily apparent from the public domain.

- ***To ensure that the height of buildings is compatible with the character of the locality***

The height of the proposed development is consistent with the changing character and desired future character of the Auburn Town Centre. The proposed development provides a unique opportunity to provide a development that occupies the majority of the street block and will provide an activated and integrated streetscape that is consistent with the desired future character of the area.

### **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 Auburn LEP 2010 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**

As detailed in the section above, the proposal maintains the future higher density-built form that is at a scale comparative to recent approvals within the Auburn Town Centre. The numeric increase in building height for the proposed development is approximately 3.1m which is a result of designing the development to respond to the natural characteristics of the site and the provision of a high amenity communal open space on the rooftop. This increase is considered reasonable in the context of the site and its ability to result in no adverse impacts on adjoining neighbours.

The proposed development, including the proposed building elements that exceed the height limits, will continue to achieve the objectives of the standard. It is therefore considered that the objectives of the development standard are met notwithstanding the breach of the height of buildings standard.

#### **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 Auburn LEP 2010 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 building height standard in this instance. These are as follows:

- The proposed development is consistent with the objectives of the zone and the objectives of the building height control.
- The proposal does not result in any adverse impact from adjoining properties.
- The height variation equates to a maximum 3.1m for a minor portion of the building and is not visually prominent.
- The area of exceedance is for the provision of a lift overrun and communal open space, not containing any habitable floor space.

It is considered the objectives of the LEP height standard are achieved in this instance where the proposal produces a high quality-built form that ensures a high level of amenity for residents. In addition, the proposed materials and finishes and landscaping strategy further reinforces how the development will integrate with the Auburn Town Centre.

Whilst the built form exceeds the building height control applicable to the site, it is considered that the proposed design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment as demonstrated in Architectural Plans prepared by Urbanlink.

Strict compliance with the building height development standard would require the deletion of the communal open space on the roof which would significantly reduce the site's potential to facilitate higher density residential development whilst ensuring an appropriate level of amenity.

## 6.0 Conclusion

The proposed contravention of the 38m maximum building height is based on the reasons outlined in this request that are summarised as follows:

- 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 proposed development will not create an undesirable precedent.
- The proposed development is consistent with the objectives of Clause 4.3 and Clause 4.6 of Auburn LEP 2010 and therefore is in the public interest pursuant to clause 4.6(4).

In view of the above, it is considered that this written request has adequately addressed the matters required by Clause 4.6(3) of the Auburn LEP 2010 and Council's support to contravene the maximum building height development standard of Clause 4.3 is therefore sought.

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