

11-17 Second Avenue, Blacktown

## Clause 4.6 – Building Height Development Standard

SUTHERLAND & ASSOCIATES PLANNING

ABN 14 118 321 793 ACN 144 979 564

## Clause 4.6 – Building Height Development Standard

11-17 SECOND AVENUE, BLACKTOWN

November 2022

Prepared under instructions from  
[Landmark Group](#)

by

[Aaron Sutherland](#)  
B Town Planning UNSW

[aaron@sutherlandplanning.com.au](mailto:aaron@sutherlandplanning.com.au)  
Tel: 0410 452 371  
PO BOX 814 BOWRAL NSW 2576

NOTE: This document is Copyright. Apart from any fair dealings for the purposes of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced in whole or in part, without the written permission of Sutherland & Associates Planning, PO Box 814, Bowral NSW 2576

## CONTENTS

### 1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT 4 1.1

Introduction 4 1.2 Clause 4.6 Exceptions to development standards 5 1.3 Development Standard to be varied 5 1.4 Extent of Variation to the Development Standard 6 1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary

in the circumstances of the case? 7  
1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard? 11

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) 13

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives 13

1.9 Clause 4.6(5) Secretary Considerations	14
1.10 Objectives of Clause 4.6	14
1.11 Conclusion	15

## 1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

## 1.1 Introduction

On 26 July 2018, development consent was granted to JRRP-16-03305 for Staged demolition of existing structures and staged construction of 2 mixed used buildings at 9-17 Second Avenue, Blacktown. Stage 1 at 11-17 Second Avenue comprises of the construction of an 18 storey mixed use building including ground floor retail, 1 level of serviced apartments and 16 levels of residential apartments on top consisting of 227 units, 4 basement car parking levels and associated stormwater drainage works and landscaping. Stage 2 at 9 Second Avenue comprises of ground floor retail, commercial premises on the first and second floors and 15 levels of residential apartments on top consisting of 59 units as well as 5 basement car parking levels and associated stormwater drainage works and landscaping.

The approved development involved a building height variation of 7.2 % or 4 metres which was considered acceptable by Council on the following grounds:

- The variations relate only to encroachments of lift overrun, stairs and plant rooms and no element of a habitable floor or room is located above the height limit.
- The portions of the roof structures which exceed the height limit do not result in excessive bulk and scale and do not result in adverse shadow and amenity impacts on surrounding properties.
- The additional height does not result in any additional yield and does not result in an additional residential storey.
- The additional height will result in a better designed building by providing access to rooftop common open space.
- The variation will not have unreasonable impacts on the neighbouring properties or the character of the area.
- The proposed is consistent with the objectives of the development standards and the B4 Mixed Use zone.

Landmark Group have recently acquired the subject site and intends to develop the property and retain a portion of this project. Landmark Group has reviewed the approved development and has identified that there are a range of areas where the proposal can be improved.

In addition, since the approval there have been some changes to the planning controls including removal of the FSR development standard and an increase to the height control from 56 metres to 64 metres.

The proposed alterations and additions to the approved development reflect the outcome of this review including:

- Reconfiguration of typical floorplate to increase internal separation between the wings by extending the eastern and western wings to the north



- Refinement to ground floor level including an increase in active frontage to Second Avenue and improvement the configuration of the common open space area
- Additional lift to the eastern lift core to provide three lifts
- Additional basement level
- Additional 3 floors
- Refinement to the facades and architectural expression of the building
- Various changes to the layout and arrangement of apartments

The proposed alterations and additions to the approved development JPPP-16-03305 are detailed on architectural plans prepared by DKO Architects which accompany this application

## 1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the BLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the BLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard.
- In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

## 1.3 Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows—
  - (a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,
  - (b) to ensure that buildings are compatible with the height, bulk and scale

of the surrounding residential localities and commercial centres within the City of Blacktown,

(c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities,

(d) to ensure that sufficient space is available for development for retail, commercial and residential uses,

(e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.

(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.

Building height (or height of building) is defined in the dictionary of BLEP as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The maximum height shown for the site is 64 metres (Zone AA) as shown in Figure 1.



**Figure 1:**  
Extract from the  
SSLEP Height of  
Buildings Map

1.4 Extent of Variation to the Development Standard

A variation is proposed to the height of buildings standard for the lift overruns, an architectural roof feature at the corner of the building, and part of the roof due to the cross fall of the site. The architectural roof feature is a positive element which accentuates the verticality of the building, whilst the lift overruns have limited (if any) visibility from the public domain. The proposed development results in the following variations to the height

control:

Architectural roof feature	68.46m-68.98m	4.46m to 4.98m (max 7.78%)
Lift overruns	66.3m-67.75m	2.3m-3.75m (max 5.85%)
Roof	64.5 metres	0.5 metres (max 0.78%)

The extent of variation to the height control is illustrated in the 3D height plane as shown in Figure 2 below:

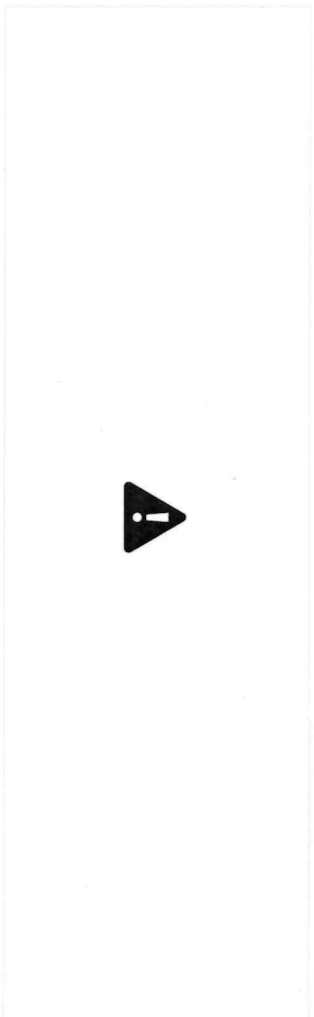


Figure  
2:  
3D Height plane

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

This was recently re-affirmed in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

Whilst it is only necessary to address the first method of the five part test described in *Wehbe v Pittwater Council*.

[2007] NSWLEC 827, which alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement, all five tests are addressed below followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 4.3 of the BLEP are identified below. A comment on the proposal's



consistency with each objective is also provided.

- (a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings—

The proposed height variations are relatively minor and to enhance the architectural merit with the corner roof features and also to improve the residential amenity of the Stage 1 component of the

height variation  
perceptible from  
sual impact as a  
as the areas of  
eight compliant,  
adjacent Stage



Figure 3:

the envisaged height and scale for development within the context of the site, and remains consistent with the desired scale and character of the street and locality notwithstanding the height variations.

(c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities.

The proposed height variations are minor having regard to the 64 metre height limit and do not comprise the achievement of focal points for denser development in locations that are well served by public transport, retail and commercial activities. In fact, the subject site is located within the northern part of the Blacktown CBD and is in an area intended to be focal point for height within the broader Blacktown

local government area.

(d) to ensure that sufficient space is available for development for retail, commercial and residential uses.

Strict compliance with the height control would unnecessarily require the removal of the architectural roof feature, the roof top common open space, and the top floor of the development notwithstanding that the majority of the top floor is compliant with the height control, which would diminish the optimisation of residential space within an ideal location within the Blacktown CBD and the demonstrated environmental capacity of the site.

(e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.

The subject site is not at the interface with a lower density zone and is surrounded by a high density precinct within the Blacktown CBD. Therefore, this objective is not relevant to the subject site and proposed development.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height control are relevant to the proposed development.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives and purpose of the standard relates to compatibility and impact and are relevant to the proposed development, as well as ensuring that there is sufficient space available for development for retail, commercial and residential uses. The underlying objective and purpose would in this instance be compromised by a compliant proposal which would undermine objective (d) in particular as it would inhibit the ability to deliver a quantum of residential floor space within the demonstrated environmental capacity of the site.

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;

Council has consistently varied the height control as a result of (a) cross fall on a site, and (b) the desire to provide roof top common open space. Indeed, the approved development on the subject site JRP 16-03305 which is proposed to be amended by the subject application, involved a 4 metre height variation to the 56 metre height control which applied to the site at the time.

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.

The zoning of the land is not considered to be unreasonable or inappropriate.

Strict compliance with the maximum 64 metre height of buildings development standard is considered to be unnecessary and unreasonable in the circumstance of this site as discussed below:

- The currently approved development on the site, which is proposed to be amended by the subject application, includes a 4 metre height variation and strict compliance would diminish the outcome intended by the recently gazetted Blacktown CBD Planning Proposal by penalising the project by 4 metres.

- The development presents with a scale to all streets in accordance with the envisaged scale of development for the site by the planning controls.

- The areas of variation for the corners of the building and lift overruns are only relatively minor and the roof

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives and purpose of the standard relates to compatibility and impact and are relevant to the proposed development, as well as ensuring that there is sufficient space available for development for retail, commercial and residential uses. The underlying objective and purpose would in this instance be compromised by a compliant proposal which would undermine objective (d) in particular as it would inhibit the ability to deliver a quantum of residential floor space within the demonstrated environmental capacity of the site.

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;

Council has consistently varied the height control as a result of (a) cross fall on a site, and (b) the desire to provide roof top common open space. Indeed, the approved development on the subject site JRPP 16-03305 which is proposed to be amended by the subject application, involved a 4 metre height variation to the 56 metre height control which applied to the site at the time.

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.

The zoning of the land is not considered to be unreasonable or inappropriate.

Strict compliance with the maximum 64 metre height of buildings development standard is considered to be unnecessary and unreasonable in the circumstance of this site as discussed below:

- The currently approved development on the site, which is proposed to be amended by the subject application, includes a 4 metre height variation and strict compliance would diminish the outcome intended by the recently gazetted Blacktown CBD Planning Proposal by penalising the project by 4 metres.

- The development presents with a scale to all streets in accordance with the envisaged scale of development for the site by the planning controls.

- The areas of variation for the corners of the building and lift overruns are only relatively minor and the roof



levels are predominantly below the 64 metre height control. There is parity between the areas of parapet which are below the height plane and above the height plane.

- The plant areas and lift overruns are located centrally within the buildings such that they will not be readily visible from the public domain.

- The proposed variation for the lift overruns and other roof top features are associated with the desire to deliver a roof top common open space area which adds considerably to the residential amenity of the development.

- The proposed variation for the architectural roof feature is a particularly positive design outcome which accentuates the verticality of the building and modulates the skyline of the development. The roof feature contributes to design excellence and is being retained from the previous design to honour this commitment and to ensure that the development as amended responds positively and appropriately to the corner status of the building.

- The proposed areas of variation do not result in any adverse impact to adjacent properties.

- The non-compliance with the height control ultimately improves the urban form of the development as it allows a consistent scale of development across the entire site and facilitates an efficient form of development for the site which responds appropriately to the topography of the site.
- The proposed variation allows for the most efficient and economic use of the land.
- Council has consistently allowed minor variations to the height control within the precinct, particularly for lift overruns, including for the subject site under JRPP-16-03305.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the



[development standard?](#)

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development
- as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The environmental planning grounds to support the proposed height variation are detailed below.

The approved development of the site JRPP-16-03305 included a 4 metre or 7.2% variation to the height control that applied to the site at the time. Since approval of the application, a new height control of 64 metres has been implemented for the site and the FSR control has been removed. These amendments to the BLEP were the result of a Blacktown CBD Planning Proposal that sought to encourage and stimulate development within the Blacktown CBD in recognition of its status as a strategic centre and to assist in the creation of a strong and vibrant mixed use centre. Strict compliance with the height control in the proposed development application for alterations and additions to JRPP-16-03305 would serve to diminish the objectives for the Blacktown CBD Planning Proposal and it is important that the height variation is carried through to this new development application to maintain consistency and continuity with the previously supported application of the height control to the subject site. Strict compliance in this application would actually rob the proposal of 4 metres height variation previously granted.

The proposed height variation essentially arises as a result of an architectural roof feature to accentuate the verticality of the building, the lift overruns to provide access to the roof top communal open space, and the cross

fall across the site which sees some components of the roof being below the height control, and other components being above the height control. It is observed that there is a greater proportion of components below the height plane than above it. Whilst there is sufficient common open space on the ground floor of the

development to satisfy the minimum area requirement of the Apartment Design Guide, this area will be overshadowed in the future and the roof top common open space will enjoy outlook and excellence solar access.

The proposed height variation is capable of support for the following reasons:

- The approved development involved a building height variation of 7.2 % or 4 metres which was considered acceptable by Council and the proposed alterations and additions to the approved development involves a similar extent of variation to the new height control.
- The variations relate only to encroachments of an architectural roof feature, lift overruns, stairs and plant rooms and no element of a habitable floor or room is located above the height limit.
- The portions of the roof structures which exceed the height limit do not result in excessive bulk and scale and do not result in adverse shadow and amenity impacts on surrounding properties.
- The majority of the height exceedance results from the architectural roof feature. This element is a particularly positive design outcome which accentuates the verticality of the building and modulates the skyline of the development. The roof feature contributes to design excellence and is being retained from the previous design to honour this commitment and to ensure that the development as amended responds positively and appropriately to the corner status of the building.
- The additional height does not result in any additional yield and does not result in an additional residential storey.
- The additional height will result in a better designed building by providing access to rooftop common open space as well as a superior architectural outcome by accentuating the verticality of the building and providing modulation to the skyline.
- The variation will not have unreasonable impacts on the neighbouring properties or the character of the area.
- The proposed is consistent with the objectives of the development standards and the B4 Mixed Use zone.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

to encourage:

- i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose

of promoting the social and economic welfare of the community and a better environment,

ii) the promotion and co-ordination of the orderly and economic use and development of land...'

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any significant additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance would require a prevent the achievement of a high quality architectural outcome for the site including an architectural roof feature and roof top common open space.
- The proposed variation allows for the most efficient and economic use of the land.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pitwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives



Clause 4.6(4)(a)(ii) states 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.

#### Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

#### Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the

#### B4 Mixed Use zone.

The objectives of the B4 Mixed Use zone are:

- To provide a mixture of compatible land uses.
- 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 vision for the site has been for a transit-oriented development that intensifies and diversifies activity around public transport infrastructure allowing for multiple activities and services, local employment and diverse housing options. The site is extremely well located in terms of access to public transport infrastructure. The amended proposal will deliver additional housing choice within a regionally significant strategic centre that is in close proximity to a range of recreational opportunities and services and facilities and will maximise public transport patronage, cycling and walking.

The amended proposal exhibits a high level of environmental performance, provides a high level of amenity and an attractive contemporary architectural expression.

For the reasons given the amended proposal remains consistent with the objectives of the B4 Mixed Use

zone.

The proposal has been demonstrated to be consistent with both the objectives of the building height development standard as well as the objectives of the zone and therefore the consent authority can be satisfied that the proposal is in the public interest. Furthermore, the public interest is appropriately served by providing an improved urban design outcome, within the identified environmental capacity of the site.

#### 1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the

development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

#### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause

4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would likely result in the removal of the architectural roof feature and the roof top common open space.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the context of the site and desire to deliver a positive result for the site which will provide a positive urban design outcome within the north Blacktown CBD precinct.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the maximum height of buildings development standard and will achieve an acceptable and better urban design outcome in this instance in accordance with objective 1(b).

#### 1.11 Conclusion

Strict compliance with the maximum height of buildings development standard contained within clause 4.3 of the Blacktown Local Environmental Plan 2015 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the variation. Finally, the proposed development and height variation is in the public interest because it facilitates a development which is consistent with the objectives of the standard and the zone and which delivers the design intent as anticipated by the recently increased building height development standard. In this regard it is reasonable and appropriate to vary the building height development standard to the extent proposed.

