

6 November 2020

**Clause 4.6 Request to Contravene a Development Standard**

**Property Description:** 41-45 Bay Street and 4 Chapel Street, Rockdale

**Development:** Mixed Use Development

**Development Standard:** Height of Buildings

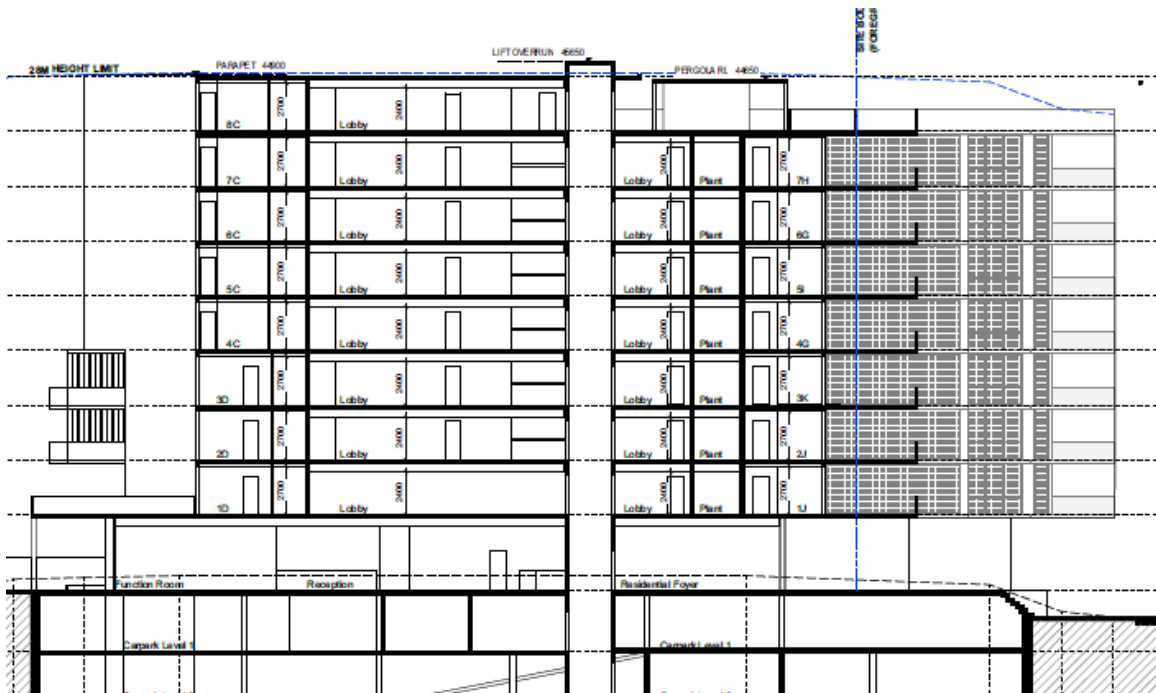
**Introduction**

This is a clause 4.6 variation supporting a development application for a mixed use development at 41-45 Bay Street and 4 Chapel Street, Rockdale. This clause 4.6 variation seeks variation to the 28m building height development standard contained in clause 4.3 – Height of Buildings of the Rockdale LEP 2011.

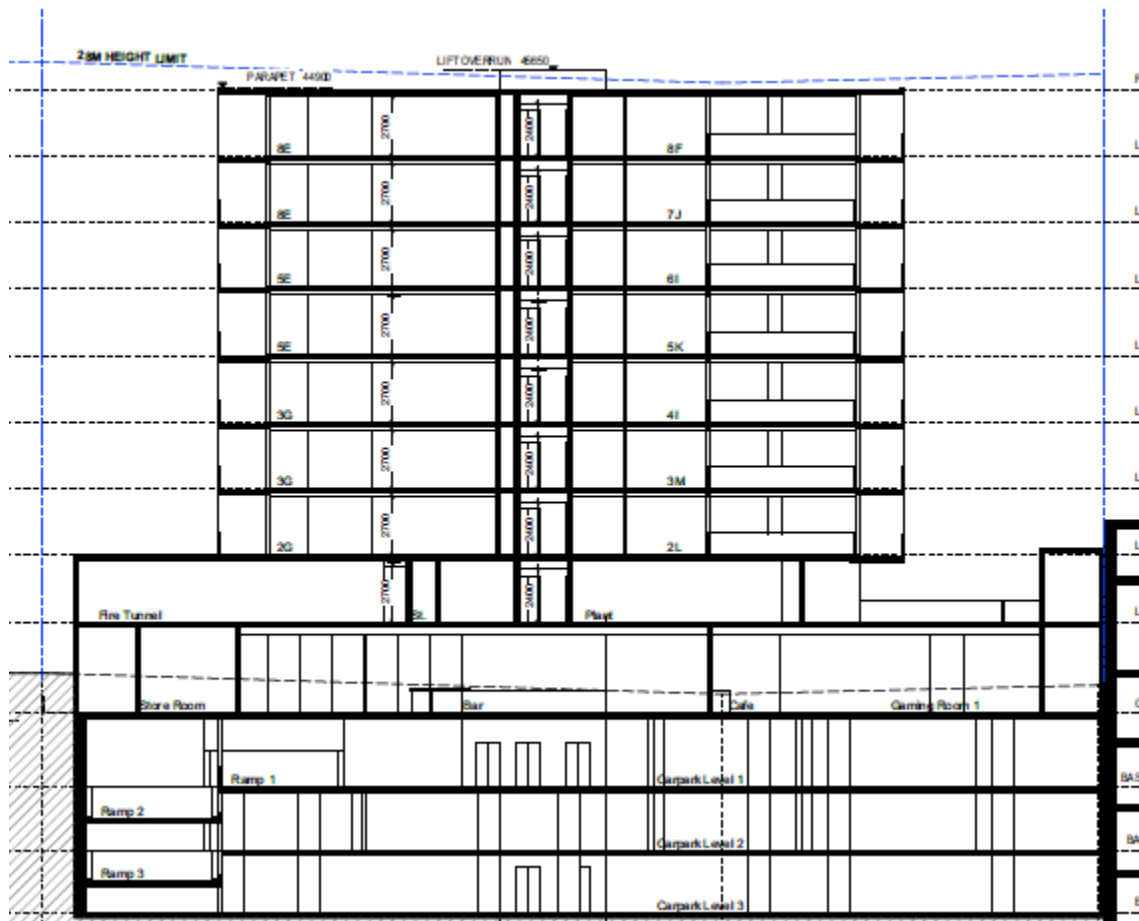
The proposed building presents a 9 storey form and has a maximum height of 27.9m when measured to the building parapet and meets the height control at this point of the building. The proposed variation to the 28m height development standard is confined to the lift overrun being a maximum height of 28.65m. The lift overrun is located central to the built form.

The proposed building height presents a minor variation of 650mm being a numerical variation of 2.3%.

The portion of the lift overrun exceeding the 28m height control is shown in the following section diagrams:



Source: AE Design Partnership– Section AA



Source: AE Design Partnership– Section BB

The judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 requests, including that:

*“The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.” [88]*

Accordingly, this Clause 4.6 request is set out using the relevant principles established by the Court.

### **Matters required to be demonstrated under clause 4.6(3) of the LEP**

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the contravention of the height of buildings development standard is acceptable in the circumstances of this case and compliance with the development standard is considered both unreasonable and unnecessary because the proposed residential flat building development is consistent with the objectives of the height of buildings standard, notwithstanding non-compliance with the standard.

The objectives of the development standard are at clause 4.3(1) of the Rockdale LEP 2011 as follows:

- (a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,*
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The proposed building height achieves the objectives of the height of buildings development standard based on the following assessment:

- **Objective (a)** The development has been designed with a 9 storey form meeting the 28m height standard to the building parapet. The portion of the building exceeding the 28m height development standard – lift overrun, does not contain any floor area and is located central to the building, not visible from the public domain.

- **Objective (b)** The mixed use development has been designed with a 9 storey built form consistent with the intent of the 28m height limit. The building parapet of the 9<sup>th</sup> storey is located within the height limit and the variation to building height accommodates a lift overrun, providing access to rooftop communal open space. The communal open space has an outlook to the southeast, contributing to the residential amenity of the development.
- **Objective (c)** The lift overrun provides access to rooftop communal open space obtaining uninterrupted solar access at mid winter, improving solar access for this development within the B4 – Mixed use zone.

The additional height does not result in additional amenity impacts to adjoining properties with no additional overshadowing generated by the additional height noting the additional height is restricted to the lift overrun located central to the built form.

- **Objective (d)** The lift overrun does not create additional bulk and scale and will not be visually dominant when viewed from the public domain noting the variation is confined to a lift overrun and is located central to the building footprint.

The proposed development is viewed as a 9 storey building from the public domain and creates a suitable transition in building height between the approved 11 storey building adjoining the western boundary (15 - 21A Bay Street, 1 - 11 Chapel Street, 1 - 3 Chapel Lane and 6A - 12 Lister Avenue, Rockdale) and the existing residential flat building to the east of the site.

It is unreasonable to require compliance with the development standard noting the non compliance is a maximum of 650mm measured to the top of the lift overrun located centrally to the built form and the building parapet – 9<sup>th</sup> storey meets the 28m height limit. The 650mm variation is 2.3% and will not be noticeable from the public domain. Permitting this contravention will facilitate equitable access to all levels of this mixed use development and notably access to rooftop communal open space, providing residents access to uninterrupted solar access at mid winter.

Further, compliance with the development standard is unnecessary noting the proposed variation would not result in any amenity impacts upon adjoining properties with respect to overshadowing, views or outlook and the proposal continues to meet the objectives of the standard notwithstanding the contravention to the standard. The lift overrun is located central to the roof form and will not be highly perceptible from adjoining properties, or visible from the public domain.

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

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 request must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pursuant to clause 4.6(3)(b) of the LEP, the environmental planning grounds contained in this application are sufficient to justify the non-compliance with the height of buildings development standard because:

- The development proposal has been designed with a 9 storey form consistent with the intent of the 28m height limit and the portion of the building which contravenes the development standard is confined to the lift overrun which provides access to all 9 storeys of the development.
- The subject site is impacted from overshadowing by the approved 11 storey building adjoining the western boundary (15 - 21A Bay Street, 1 - 11 Chapel Street, 1 - 3 Chapel Lane and 6A - 12 Lister Avenue, Rockdale). The contravention to the height of buildings development standard facilitates a lift overrun which provides access to rooftop communal open space which receives uninterrupted solar access.
- The 9 storey built form with rooftop communal open space is consistent with the form and scale of development in the precinct and the 9 storey building form presets a suitable transition in height when compared to the approved 11 storey building adjoining the western boundary.
- Despite the contravention to the height of buildings standard, the proposal is consistent with the following aims of the Rockdale LEP 2011 found at clause 1.2(2):
  - 1.2(2)(a) – The proposed mixed use development contributes to the uplift of Rockdale through the release of new residential accommodation within the Mixed Use zone.
  - 1.2(2)(c) – The contravention to the development standard facilitates access to rooftop communal open space with uninterrupted solar access and an outlook/view to the south east, contributing to residential amenity.

- 1.2(2)(g) The development proposal provides residential accommodation in proximity to transport within the Rockdale Town Centre.
- Despite the contravention to the height of buildings standard, the proposal is consistent with the following objects of the Environmental Planning and Assessment Act 1979 as follows:
  - 1.3(c) - The proposal is an orderly and economic use of the site and the development is consistent with the objectives of the height of buildings standard with a built form that is compatible with the desired future character of the locality, on an allotment that is capable of accommodating a mixed use development,
  - 1.3(g) - The design of the proposal is a good design outcome for the site and will provide a high level of residential amenity for the future residents of the development, whilst preserving the amenity of the broader locality.

**Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)**

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in clause 4.6(3) of the LEP by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the consent authority under clause 4.6(4)(a)(i) need only be satisfied that the written request addresses clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in its opinion whether the request satisfies the requirements of clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in clause 4.6(3) have been demonstrated above.

#### **Clause 4.6(4)(a)(ii) - The proposed development is in the public interest**

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed shop top housing development is in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives for development in the B4 – Mixed Use zone in accordance with the planning assessment provided as follows:

The objectives of the B4 – Mixed use zone are as follows:

<b>Objective</b>	<b>Consistency</b>
<i>To provide a mixture of compatible land uses.</i>	The development proposal retains the approved use- registered club at ground floor level and includes a residential flat building at podium level and the building height – storeys is consistent with the planning controls for the locality.
<i>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.</i>	The development proposal provides residential accommodation in proximity to transport within the Rockdale Town Centre.

In addition to the above reasons the proposal is also in the public interest because:

- The resulting built form is consistent with the intent of the development standard noting the 9 storey form generally sits comfortably within the 28m height standard notwithstanding the lift overrun, with the proposal presenting a 9 storey form to the public domain. Further, the additional height will not result in unreasonable amenity impacts to the locality.
- The additional height facilitates lift access to functional open space at the roof terrace with solar access.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the B4 – Mixed Use Zone under the Rockdale Local Environmental Plan 2011.

The request for a numerical variation to the height development standard is specific to the subject site and the application of Clause 4.3 of the LEP. The proposal does not undermine the intent and effectiveness of the maximum building

height development standard in Clause 4.3 or the objectives of the height development standard and the zone for achieving positive outcomes on environmental planning grounds.

For these reasons, the proposal and the numerical variation does not undermine the integrity of the building height development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

### **The concurrence of the Secretary**

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6 of the LEP, subject to the conditions in the table in the notice. On appeal, the Court has the power under clause 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in clause 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under clause 4.6(4)(b), by reason of section 39(6) of the Land and Environment Court Act 1979.

Nevertheless, the matters in clause 4.6(5) of the LEP should still be considered when exercising the power to grant development consent for development that contravenes a development standard (**Fast Buck\$ v Byron Shire Council** (1999) 103 LGERA 94 at 100 and **Wehbe v Pittwater Council** [2007] NSWLEC 827 at [41]).

In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed above the non-compliance with the height of buildings standard is considered to be in the public interest because the



proposed development is consistent with the objectives of the standard and the objectives of the B4 Mixed Use zone.

The proposed non-compliance with the development standard would not undermine the public benefit of maintaining the development standard. The proposal development largely complies with the 28m height standard applicable to the site, and the contravention of the standard as a result of a minor portion of the lift overrun does not result in a built form that is inconsistent with the objectives of the Mixed Use zone. The request for flexibility in the application of the development standard will facilitate a mixed use development on the subject site that is consistent with the character of recent contemporary redevelopment within the locality, as well as the envisioned built form for the site pursuant to the Rockdale LEP and DCP.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The contravention of the standard will not result in adverse amenity impacts and is in the public interest.

### **Conclusion**

The development proposal has a non-compliance with the height of buildings development standard of 28m contained within clause 4.3 of the Rockdale LEP 2011. Notwithstanding, the proposal has been designed with a built form that is compatible with scale and height of the surrounding development and consistent with the intent of the B4 – Mixed Use zone.

The numerical variation to the height of buildings standard does not attempt to affect the planning outcomes for the broader locality; rather the contravention allows for an orderly and economic development of the subject site in accordance with the desire future character expressed within the planning controls.

The portion of the building exceeding the height control is suitable for the site context and locality, and will not be visually dominant from the public domain. The proposed 9 storey building ensures a suitable transition in height is achieved between the 11 storey building adjoining the western boundary, 9 storey building on the subject site and to existing built form adjoining the eastern boundary. Further, the building height is consistent with the planning regime for the precinct and the high density environment at the eastern edge of the Rockdale Town centre.

Further, the contravention to the 28m height will not generate unreasonable additional overshadowing or contribute to unreasonable amenity impacts to the adjoining properties.

In my opinion the application to vary the building height development standard is well founded and as addressed the proposed height meets the objectives of the

building height development standard and achieves an acceptable outcome for the subject site that is in the public interest. In accordance with the environmental planning grounds addressed in this clause 4.6 request, the building height can be supported.

Chapman Planning Pty Ltd  
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