

Clause 4.6 Variation Request

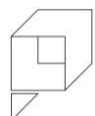
Clause 4.3(2) Height of Buildings

5 Belmore Street, Burwood





Submitted to Burwood Council on behalf of Australia International Properties Holdings Pty Ltd

February 2024



Document status

Revision	Date	Name	Signature
1	13/9/2023	Daniel Barber, Director B.Plan (Hons), M.ProDev, CPP MPIA	
2	23/2/2024	Daniel Barber, Director B.Plan (Hons), M.ProDev, CPP MPIA	

Contact Details

Item	Details
Company	Paro Consulting (Paro Planning Pty Ltd)
Office Address	Suite 1.02, 38 Waterloo Street, Surry Hills NSW 2010
Email	daniel@paroconsulting.com.au

Disclaimer

This clause 4.6 Variation Request has been prepared with reasonable effect made to ensure that this document is correct at the time of printing, Paro Consulting and its employees make no representation, undertake no duty and accepts no responsibility to any third party who use or rely upon this document or the information contained in it.



Contents

1. Executive Summary	4
2. Introduction	4
3. Standard to be Varied	5
4. Extent of Variation	7
5. Unreasonable and Unnecessary	8
5.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.	8
5.2 The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;	11
5.3 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or	11
5.4 The zoning of the land is unreasonable or inappropriate.	12
6. Sufficient environmental planning grounds	12
7. Public Interest	12
8. State or regional environmental planning	14
9. Conclusion	14



1. Executive Summary

This Clause 4.6 variation request has been prepared in relation to Clause 4.3(2) Height of Buildings of the Burwood Local Environmental Plan 2012 (Burwood LEP 2012) for a Development Application at 5 Belmore Street, Burwood (subject site). The development application relates to the demolition of the existing commercial building and construction of an eighteen (18) storey mixed use development containing 49 residential units, 9 serviced apartments, 9 commercial tenancies and 2 retail tenancies, with three (3) basement levels.

Clause 4.3(2) prescribes that the maximum height of a building on any land is not to exceed the height shown for the land on the Height of Buildings (HOB) Map. The HOB Map nominates a maximum height of 60m for development on the subject site. The proposal has a maximum height of 61.24m (RL 87.59 measured to the top of the crown), the non-compliance relates to an architectural roof feature which crowns the building and provides decorative louvres on the uppermost portion of a building to conceal rooftop plant. A 4.6 Variation Request has been submitted in relation to the architectural roof feature for abundant caution notwithstanding Clause 5.6 permitting architectural roof features to exceed the statutory height standard.

This height of building development standard is to be read in conjunction with Clause 4.3A of the Burwood LEP 2012 which provides exceptions to the height standard. Clause 4.3A explicitly states that despite the maximum building height outlined in Clause 4.3, the height of a building on the subject site is not to exceed the building height plane (BHP). In this case, the BHP is measured at an angle of 36 degree, from a height of 1m, generally from the eastern side of Shaftesbury Road. On this specific site, this provision allows a building height higher than what Clause 4.3 can provide on its own.

The design of the proposal is for a tall, slender tower which provides benefits for its future residents and neighbours (in relation to views, visual impact of bulk and scale, solar access, overshadowing, visual privacy) when compared to a shorter, but broader 'squat' building compliant with Clause 4.3 height standard.

2. Introduction

This is a formal written request prepared in accordance with Clause 4.6 of the Burwood LEP 2012. This request seeks a variation from the Height of Buildings development standard prescribed in Clause 4.3(2) of the Burwood LEP 2012. The variation request relates to a development application submitted to Burwood Council for the construction of an 18 storey mixed use development at 5 Belmore Street, Burwood.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011), which applied at the time of lodgement of the DA, and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to Preston J in Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018. This request also addresses the matters in Sections 4.6 (4) and (5) regarding which the consent authority and delegate of the Secretary must directly form their own opinion of satisfaction.



3. Standard to be Varied

The standard that is proposed to be varied is the height of buildings set out in Clause 4.3(2) of the Burwood LEP 2012.

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.

The height if building map identifies a 60m height of building standard for the site.



Figure 1: Extract of the Height of Buildings Map of the Burwood LEP 2012, site in yellow (Source: NSW Planning Portal)

Building height (or height of building) means under the standard instrument:

“(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

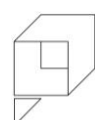
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like”.

ground level (existing) means under the standard instrument:

“The existing level of a site at any point”.

Nominating the “ground level (existing)” is usually achieved by taking the lowest level directly and vertically beneath the highest part of the proposed development on a site (based on surveyed RLs) to determine a maximum building height dimension. However, where an existing building occupies the whole of the site area so that there is no longer any ‘ground’ as in soil/garden/paving around the building from which the existing ground level could be determined, this task is not so straightforward.

The issue is compounded where ‘below ground’ excavation has previously occurred on the site (for example below ground basements) and even more so where excavations have occurred only in parts or pockets of a site. In such a situation, if the lowest point of the existing development (i.e. the floor of the lowest basement) is taken to be ground level (existing) then development potential may be artificially and considerably limited and there may also be differing ‘existing levels’ on that land at multiple points.



Bettar v Council of the City of Sydney [2014] NSWLEC 1070

The original and therefore leading decision on determining “ground level (existing)” on land that is sloping or completely excavated is the decision of Commissioner O’Neill in Bettar v Council of the City of Sydney [2014] NSWLEC 1070 (‘Bettar’). In Bettar, consent was sought for amongst other things, a four and five storey residential flat building on a site where an existing building at ready occupied the entire site. Meaning there was no longer any “ground” for determining the existing ground level. In addition, there was an existing part basement excavated into one part of the site. Council’s argument focused entirely on the existing building on the site and took the approach that the “ground level (existing)” should be calculated using the ground floor level of the existing building and then dropping it down to the basement level in the part of the site where the existing basement was located.

The Commissioner determined that once the existing building is demolished the ground levels of that prior building would no longer be discernible or relevant as a starting point for measuring the height of any new building and that it would be conceivable that surrounding properties (with differing ground floor levels) could have starkly different height limits arising from the same development standard. The Commissioner held at paragraph [40a] that this would result in an *“absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be demolished and has no relationship to the context of the site.”*

The Commissioner preferred the approach of the Applicant on this issue which was for the existing ground level of the site to be determined by extrapolating the ground levels found on the footpath (i.e. — outside the site) across the entire site to measure the vertical distance to the highest point of the building. The Commissioner’s reasoning for this, given at paragraph [41], was that *“the level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site and remains relevant once the existing building is demolished”*. In our experience, this has become known as the extrapolation method for determining “ground level existing”.

Stamford Property Services Pty Ltd v City of Sydney [2015] NSWLEC 1189

Similar circumstances came before the Court once again in Stanford Property Services Pty Ltd v City of Sydney [2015] NSWLEC 1189 (‘Stamford’) although this time on a much larger and more steeply sloping site than in Bettar. Consent was sought for amongst other things the partial retention of existing development on the site and the construction of a 19 storey tower building with basement parking on a Sydney CBD site. The context of the site was once again of paramount concern to Commissioner Pearson and Acting Commissioner Smithson, who found at paragraph [28] that *“The extent of excavation from site to site could lead to different height limits applying to adjoining buildings on redevelopment of any of those sites”*.

Unlike the site in Bettar, which had two street frontages and vacant adjoining land from which levels could be measured, here the highly developed surrounds meant there were limited levels from which to even extrapolate a ground level (existing). Nevertheless, the Court noted that the availability of survey information necessary in order to be able to apply the Bettar extrapolation method may vary from site to site, but was still possible even with limited information and that there was sufficient actual and surveyed levels from the public domain in this case to arrive at a “ground level (existing)” figure for the (excavated) centre of the site being an average between two surveyed points, rather than a surveyed (and excavated) ground level.

Tony Legge v Council of the City of Sydney [2010] NSWLEC 1424

Solidifying the application of the decision in Bettar and Stanford to sites that are wholly built out in Tony Legge v Council of the City of Sydney NSWLEC 1424 (‘Tony Legge’) the Commissioner found at paragraph [41] that *‘it is appropriate to take the levels of the site at its interface with the public domain’*. Further and importantly, the decision in Tony Legge reinforces the importance of placing the proposed building in its context rather than relying on the present built form of any existing development on a site.



Overall, I see the courts consistently taking a more practical approach to measuring height, albeit that it tends to be very reminiscent of the old ‘natural ground level’ approach to measuring height in instances where ground level (existing) is no longer discernible. In other words, it takes a non-literal approach, but rather a pragmatic and workable approach to determining ‘ground level (existing)’.

4. Extent of Variation

Based on the findings of the above NSW LEC Court Decisions the height of building is calculated to be 60m as measured using the extrapolated method from the perimeter of the site (see red line in figures below). This measurement equates to a maximum height of building 61.24m which has been calculated using the extrapolated level interpreted in Section 1 to the screen to the roof, which translates to a maximum variation of 1.24m (2%) relating to an architectural roof feature concealing rooftop plant and lift over as illustrated in figures below.

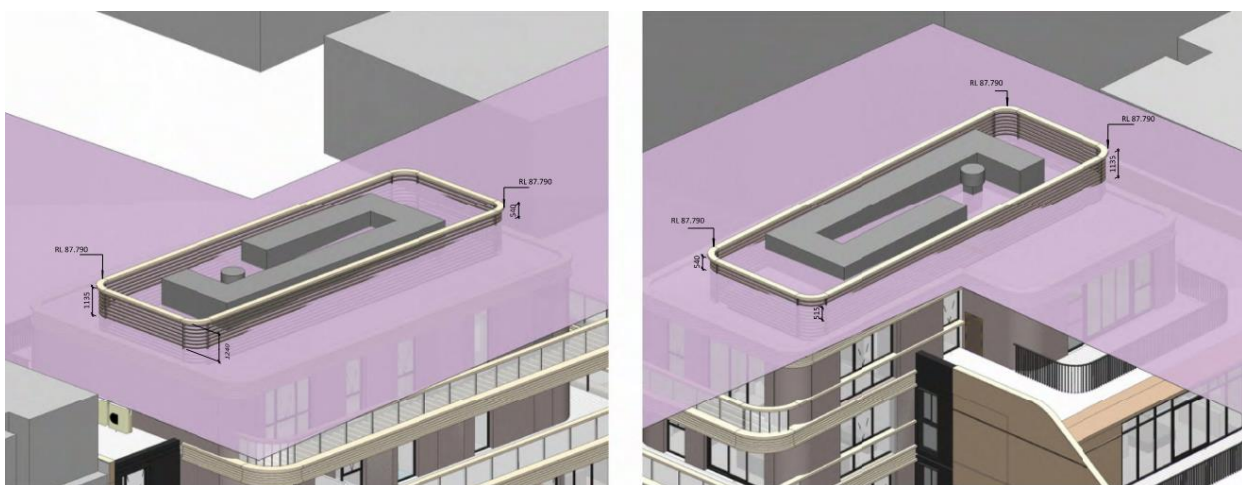


Figure 2: Exceedance of height from 60m height plane (Source: PTW)

The proposed development is below the BHP (refer to Figure 1).



Figure 3: Compliance of height from building height plane standard (Source: PTW)



5. Unreasonable and Unnecessary

In this Section, we demonstrate why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of Burwood LEP.

The Court has held that there are at least five different ways, and possibly more, in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC).

5.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

As demonstrated below the objectives of the height development standard are achieved notwithstanding the proposed variation.

“(a) to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood’s low-density character in other areas”

The height is considered consistent with the above objectives for the following reasons:

The proposed height standard variation is minor (2%) and just relates to an architectural roof feature which crowns the building and includes a screen which obscures the rooftop plant, solar and ventilation shaft which and will not be readily discernable from the public domain, with the exception of the decorative batten screen.

The architectural roof does not include advertising, does not include floor area space area, will result in minimal overshadowing as illustrated by the shadow diagrams prepared by PTW Architects. A 4.6 Variation Request has been submitted in relation to the architectural roof feature for abundant caution notwithstanding Clause 5.6 of the Burwood LEP permitting architectural roof features to exceed the statutory height standard.

The proposed screen is recessed from the edge of the roof to minimize its bulk and scale and ensure the 60m height standard will not appear to be eroded.

In the recent case of *Sioud v Canterbury-Bankstown Council* [2023] NSWLEC the definition of an architectural roof feature was given consideration by Senior Commissioner. In this case the Seniors Commissioner provided a practical approach of permitting a portion of the building exceeding the height standard being considered an architectural roof feature on the basis of the element being located to the upper portion of the roof and an decorative element and noted there is no definition of architectural roof feature in the standard instrument. Below is an extract of the portion of the building agreed to as a architectural roof feature.

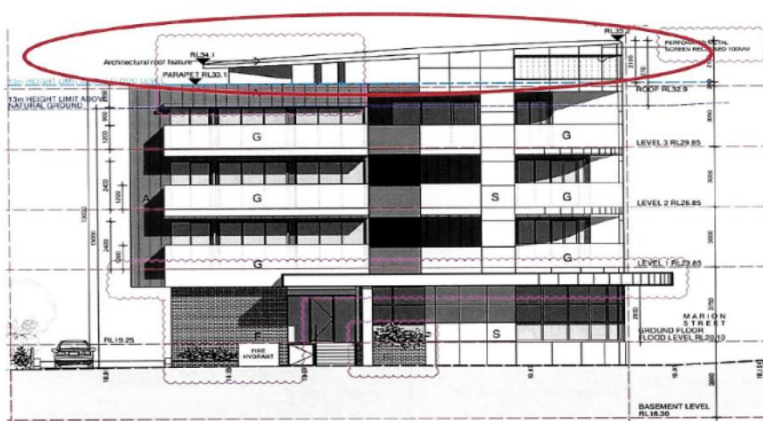


Figure 4. *Sioud v Canterbury-Bankstown Council* [2023] NSWLEC. Source: Canterbury-Bankstown Council



Notwithstanding whether the portion of the building which exceeds the height standard is an architectural roof feature, a Clause 4.6 Variation Request has been provided with the amended DA and height standard variation is considered to be justified.

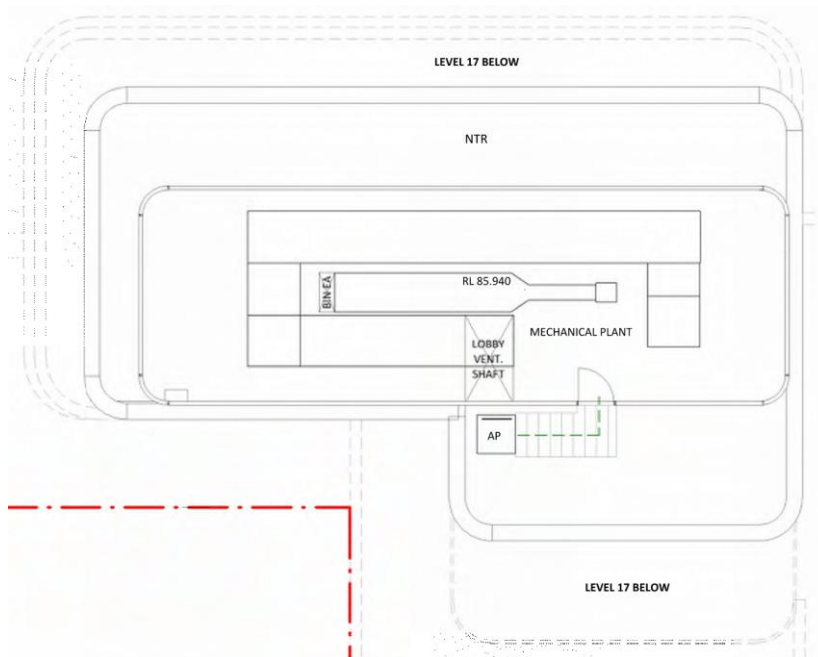


Figure 5. Rooftop Plan (Source: PTW)

The proposal is compatible with existing tower development in the Burwood Town Centre and will be consistent with the anticipated character given the recent approvals granted for similar style developments throughout the town centre including adjoining the site at 4 Railway Parade, with the rooftop screening not readily discernable (refer to Figure 6-7).



Figure 6. CGI as viewed from Belmore Street (Source: PTW)





Figure 7. CGI as viewed from Elizabeth Street (Source: PTW)

“(b) to control the potentially adverse impacts of building height on adjoining areas”.

The height is considered consistent with the above objectives for the following reasons:

- The form of the proposal incorporates a tall, slender tower which is designed to reduce the bulk and associated visual impact to Elizabeth Street and reduces overshadowing to the north and west facing habitable room windows of the apartments at 3 Belmore Street, as compared to a shorter more 'squat' building which may comply with the height standard and permitted floor space ratio (FSR);
- The minor element which exceeds the statutory height standard does not result in any additional overshadowing to either habitable room windows or private open space areas of nearby apartment compared to that of a compliant building envelope as identified in the overshadowing analysis prepared by PTW Architects;
- The potential adverse impacts of the proposed height are controlled through the following design features:
 - The screen to the roof includes a height of 1.24m above the height of the building and from the edge of the roof which reduces its bulk, scale and visual impact and presence within the skyline; and
 - The proposed screen reads an architectural expression of the building and considered to be integrated within the building form which incorporates significant articulation, suitable composition and high-quality finishes such that it is visually interesting.
- The proposed tower's slender nature creates shadows that are narrow which enables shadows to 'move' quickly, ensuring shadows do not concentrate on particular neighbouring lots nor on areas outside the town centre;
- The slender nature of the building maximises preservation of views from adjacent buildings and the appearance of tower bulkiness;
- The use of a taller tower form creates enhanced separation between buildings, providing high quality amenity through visual and acoustic privacy and outlook for both proposed and existing apartments;



- The proposed design increases residential amenity, as the smaller floorplates achieve superior solar access and ventilation compared to a shorter/squat scheme; and
- The proposal and adjoining sites benefit from a generous 32.75m setback to Belmore Street. This assists with reducing visual bulk, adequate privacy and visual separation, as well as solar access to the apartments at 4 Railway Parade.

It is therefore considered that the proposal's design attributes mitigate potentially adverse impacts on adjoining lands, as sought by the objective compared to a compliant building envelope as demonstrated in the figure below.

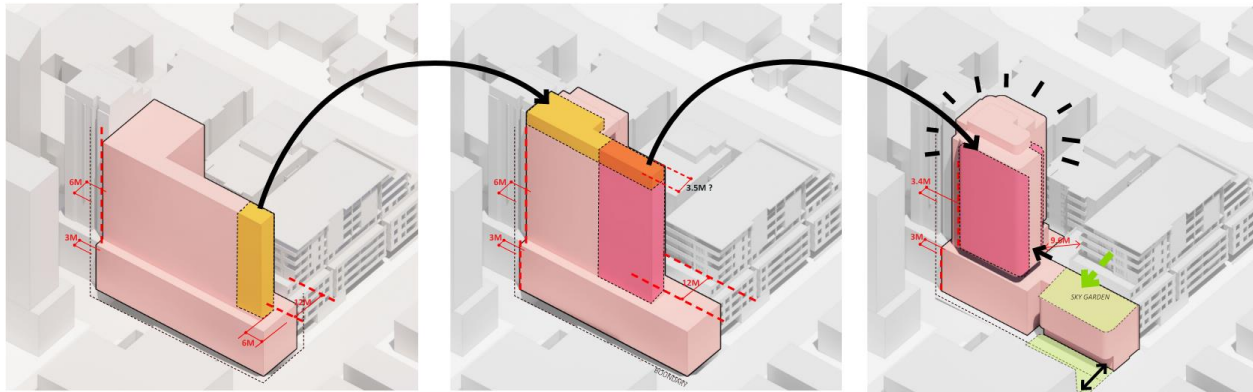


Figure 8. Comparison of compliant (left) and proposed building envelope (right) (Source: PTW)

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC, compliance with a development standard is demonstrated to be unreasonable or unnecessary in this one way alone. However, for the sake of completeness, we consider the other recognised means of demonstrating the standard is unreasonable or unnecessary as follows.

5.2 The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

Not applicable.

5.3 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

The following development applications obtained approval for a Clause 4.6 Variation Request to the statutory height standard in the Burwood Town Centre and extent of the variation was much greater. Given the below, arguably the height standard prescribed by Clause 4.3(2) has been abandoned.

- A Clause 4.6 exception request was supported by the Sydney Eastern City Planning Panel on 25 February 2019 on similar grounds, for development at the 'Burwood RSL site'. The Burwood RSL site is bounded by Deane Street, George Street, Shaftesbury Road and Marmaduke Street and is approximately 200m south east of the subject site. DA 85/2017 was lodged on 29 June 2017 and proposed a "RSL Club, hotel, entertainment and recreation facilities, over basement car parking." The proposal had a maximum building height of 94.6m and an FSR of 4:1.
- A Clause 4.6 exception request was supported by Burwood Council on 16 August 2018 on similar grounds, for development at 23-27 George Street, immediately south of the subject site. DA 82016/179 was lodged on 16 December 2016 and proposed a 21-storey mixed use commercial/ residential development, over basement car parking. The proposal had a maximum building height of 70.15m and an FSR of 4.95:1.



- The Sydney Eastern City Planning Panel issued Development Consent 2019/091 for a proposal which breached Clause 4.3(2) at 28 Victoria Street on 11 August 2020 on similar grounds. The height standard in this case was 60m, however, consent was issued for a height up to 100.98m in accordance with Clause 4.6 and Clause 4.3A.
- The Sydney Eastern City Planning Panel issued Development Consent 2020/110 for a proposal which breached Clause 4.3(2) at 17 George Street, Burwood on 12 April 2022 on similar grounds. The height standard in this case was 60m, however, consent was issued for a height up to 94.6m in accordance with Clause 4.6 and Clause 4.3A.

5.4 The zoning of the land is unreasonable or inappropriate.

Not applicable.

6. Sufficient environmental planning grounds

In this Section, we demonstrate there are sufficient environmental planning grounds to justify contravening the height development standard as required by clause 4.6(3)(b) of the LEP. In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

Triggering Clause 4.3A(2) of the Burwood LEP 2012, in conjunction with the floor space ratio permitted by Clause 4.4(5)(A), encourages a notably different envelope compared to any envelope allowed by 4.3(2). That is, it results in a taller and more slender building envelope. An envelope strictly compliant with Clause 4.3(2) is likely to be wider and bulkier resulting in less communal open space to the podium. As a result, amenity impacts to immediately adjoining dwellings would be potentially worse, particularly in relation to overshadowing, overlooking and general outlook. Further, a bulkier envelope also compromises amenity for residents on the subject site as it results in decreased solar access.

In this case, Clause 4.3(A)(2) and the resultant contravention to Clause 4.3(2) achieves good design and amenity in the built environment, which are objectives of the EP&A Act. The additional height also achieves the economic use of the land and assists with the delivery of affordable housing, which are also objects of the EP&A Act. Further, as mentioned above, arguably the standard in Clause 4.3(2) has been abandoned.

7. Public Interest

In this Section, we explain how 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 as required of the consent authority by Clause 4.6(4)(a)(ii) of the LEP. In Section 5, it was demonstrated that the objectives of the development standard are achieved notwithstanding the variation of the development standard. A summary below considers whether the proposal is also consistent with the objectives of the MU1 Mixed Use land use zone.

“• To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities”

The proposal is for a mixed-use development and provides a mix of commercial, retail and residential uses.



The commercial/retail and serviced apartment uses are located on the podium floors of the development. There are no residential uses located on the same floor as commercial uses. This reduces the impacts of visual and acoustic privacy within the building, as well as adjoining developments, thereby rendering such uses compatible.

The Burwood Town Centre has a mixture of commercial, retail and café/ restaurant uses and the proposed development is compatible with the existing and expected land uses in the Burwood Town Centre and the B4 Mixed Use zone.

The proposal achieves the requirement to provide no more than 70% of GFA for residential uses as required by Clause 4.4A(5). The variation in height does not impact on compliance with this development standard.

“• To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces”.

The proposed mixed-use development provides a mix of retail, commercial, serviced apartment and residential uses. The layout of the commercial floors above ground floor retail and restaurants/cafes and serviced apartments transitioning into the remainder of the building above with residential apartments, is logical.

The proposal is also located in a highly accessible area of Burwood and Greater Sydney which encourages public transport usage. The site is located within the Burwood Town Centre approximately 200m to the east of Burwood Road and 250m to the south-east of Burwood railway station, an interchange station on the T1 Western Line, T2 Inner West and Leppington Line and T9 Northern Line.

Burwood is an interchange for numerous bus services which link the site with Parramatta, Ryde, Bankstown, Campsie and the Inner West. Further, the site is located south of the Burwood Westfield shopping centre and 400m from Burwood Plaza, both of which, along with Burwood Road shops, contain a range of retail offerings. As such, the proposal encourages the integration of commercial, retail and residential uses in an accessible area, as sought by the objective.

Further, the proposal provides for bicycle parking in compliance with the requirements for the proposed apartments and non-residential uses.

The variation to the height maintains this objective. It allows for suitable commercial and residential uses in an accessible location which will encourage the use of public transport and walking and cycling.

“• To minimise conflict between land uses within this zone and land uses within adjoining zones”.

The site only adjoins land zoned MU1 Mixed use and therefore there is no other different adjoining land use zones.



Figure 9. Land Use Zone, site highlighted in yellow (Source: Planning Portal)



“• To encourage business, retail, community and other non-residential land uses on the ground floor of buildings”.

The proposal includes retail shop and restaurant/café at the ground level including the entry foyer of serviced apartments, residential apartments and commercial floor area fronting Elizabeth Street. No non-residential uses are proposed on the ground level.

As demonstrated above, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. State or regional environmental planning

In this Section, we consider whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by Clause 4.6(5). There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting the concurrence of the Secretary required by Clause 4.6(4)(b).

9. Conclusion

This Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the MU1 Mixed Use zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.

