

REQUEST PURSUANT TO CLAUSE 4.6, FOR EXCEPTION TO COMPLIANCE WITH CLAUSE 4.3(2) OF STRATHFIELD LOCAL ENVIRONMENTAL PLAN 2012

This Clause 4.6 Exception Submission has been prepared by the Slattery Planning Group on behalf of Jaycorp Pty Ltd (the Applicant), in relation to a Development Application for the property at No. 2 Eastbourne Road, Homebush West (the site).

This Submission is made to Strathfield Council in support of a Development Application (DA) for demolition of an existing multi-dwelling housing building and construction of a new residential flat building in its place. The proposed development incorporates provision of affordable housing, pursuant to Division 1 of State Environmental Planning Policy (Affordable Rental Housing) 2009.

1.0 CLAUSE 4.6 OF THE SLEP

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 of SLEP 2012 has the following objectives:

- (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.*

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that:

“development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument”.

Clause 4.6(3) specifies 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 circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.”*

The requirement in Clause 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 has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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.”*

Clause 4.6(5) specifies that 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, 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.”*

2.0 APPROACH TO CL 4.6

This request has been prepared having regard to:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248;
- NSW Department of Planning and Infrastructure’s *Varying Development Standards: A Guide* 2015;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
- *Moskovich v Waverley Council* [2016] NSWLEC 1015;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Hansimikali v Bayside Council* [2019] NSWLEC 1353; and
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and
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.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard.

As noted by Sheahan J in *Liberty Investments Pty Ltd v Blacktown City Council* [2009] NSWLEC 7, the considerations identified by Preston CJ in *Wehbe* are not intended to be exhaustive or applied as a code, and accordingly there may be other bases for considering that compliance with a development standard is unreasonable or unnecessary.

Preston CJ, in *Wehbe* states that "... development standards are not ends in themselves but means of achieving ends". Preston CJ goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

"As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard."

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and

3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council* [2016] NSWLEC 1015, considered a DA which involved a relatively substantial variation (65%) to the FSR control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and the zone, is not a requirement to “achieve” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a “better environmental planning outcome for the site” relative to a development that complies with the development standard.

Finally, in *Hansimikali v Bayside Council* [2019] NSWLEC 1353, Commissioner O’Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

The following assessment is undertaken pursuant to cl 4.6 and the above principles.

3.0 WHAT IS THE CLAUSE SOUGHT TO BE VARIED?

3.1 Clause 4.3(2) of Strathfield Local Environmental Plan (SLEP) 2012

Pursuant to Clause 4.3(2) of SLEP 2012, a maximum building height of 14m is permitted at the site.

3.2 What is the extent of the non-compliance?

The proposed development has a maximum height of 16.13m to the upper communal roof terrace balustrade.

The setback Fourth floor level has a height of 15.2m while the dominant Third floor level has a height varying between 11.745m at the centre of the site and 12.065m at the front of the site.

The proposal is therefore partly compliant. The proposed non-compliant elements exceed the development standard by between 1.2m (8.6%) and 2.13m (15.2%).

4.0 CLAUSE 4.6(3)(a) - IS COMPLIANCE WITH THE STANDARD UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

4.1 Clause 4.3 Objectives are achieved

The objectives of Clause 4.3 of SLEP 2012 are as follows:

- (a) *“to ensure that development is of a height that is generally compatible with or which improves the appearance of the existing area,*
- (b) *to encourage a consolidation pattern that leads to the optimum sustainable capacity height for the area,*
- (c) *to achieve a diversity of small and large development options.”*

(a) to ensure that development is of a height that is generally compatible with or which improves the appearance of the existing area

The proposed development will significantly improve the appearance of the existing area by replacing a dilapidated two (2) storey multi-dwelling unit development with an architecturally designed residential flat building which has been sensitively designed in order to provide an appropriate response to the context of the site.

The site is located within an area containing a mix of building styles and uses, including residential flat buildings and dwelling houses along with a place of public worship, to the north of the site on The Crescent.

The proposal's front setback is consistent with the front setback of the neighbouring buildings, and provides a landscaped front yard, consistent with the prevailing character of Eastbourne Road in the vicinity. The proposed rear setback is also consistent with the adjoining building to the south.

The building has been designed with recessive upper levels and variations in colour and materiality assist in minimising the perception of bulk and scale and minimises the apparent height of the building.

While the height of the proposed building is greater than other buildings in the locality, it has been designed to have a streetscape appearance which is appropriate in the locality. Sightline diagrams show that the upper levels will not be readily apparent, such that the development has a four (4) storey scale as is envisaged for the site (and precinct) in Strathfield Comprehensive Development Control Plan 2005 (refer to **Figure 1** below).

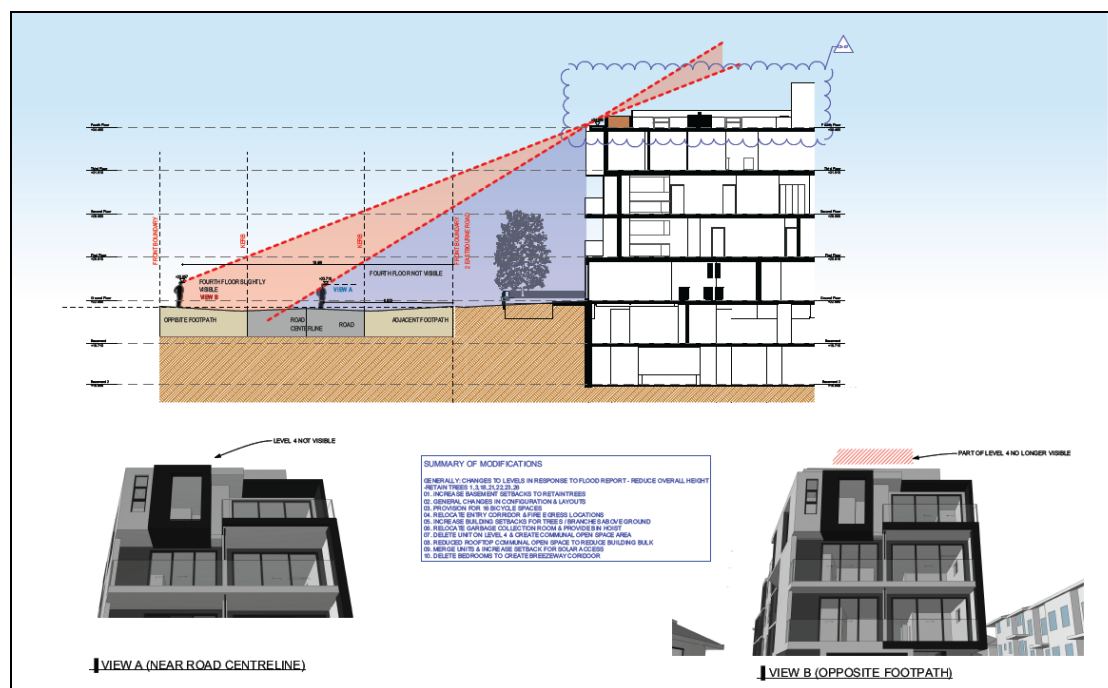


Figure 1: Sightline diagrams showing the lack of visibility of the upper levels (Source: Bechara Chan & Associates)

The proposed landscaped and open space areas will contribute significantly to the amenity and enjoyment of future occupants of the development while also providing a visually interesting aspect from the properties adjoining the site. Screen planting is proposed along the boundaries of the site, to provide a visual buffer between the site and the neighbouring properties.

The proposed development adopts a contemporary character and style, and achieves a bulk, scale and elevational character that complements the surrounding buildings in an infill form.

It is considered that the proposal sits comfortably within the existing streetscape whilst also adopting a presentation to the street which is not incompatible with the existing area.

Having regard to the context of the site, it is considered that the development is consistent with objective (a) despite the non-compliance with Clause 4.3(2).

(b) to encourage a consolidation pattern that leads to the optimum sustainable capacity height for the area

The site is not part of a consolidated allotment. Notwithstanding, the proposed built form achieves a suitable built form, in terms of setbacks, building separation, provision of landscaping and streetscape presentation, such that the additional height is acceptable regardless.

(c) to achieve a diversity of small and large development options

The proposal adds to the diversity of development options by proposing a new residential flat building containing 35 apartments, 16 of which are identified as affordable housing, at the site.

4.2 R3 Medium Density Zone Objectives are achieved

The site is located within the R3 Medium Density Residential zone pursuant to SLEP 2012. The objectives of the R3 zone are as follows:

- *“To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.”*

To provide for the housing needs of the community within a medium density residential environment.

The proposal provides for the housing needs of the community by providing 35 new residential apartments, 16 of which are proposed to be affordable housing pursuant to Division 1 of State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARHSEPP). The proposed residential flat building is permitted in the zone.

It is commonly accepted in caselaw that the additional GFA permitted under the ARHSEPP, or part thereof, requires some form of variation to the built form envelope. In this instance, it has been accommodated by increasing the height of the proposed development rather than encroaching further into setbacks in order to mitigate amenity impacts from additional GFA.

The proposal will satisfy the objectives of the development standard, despite the numerical non-compliance, as outlined above.

The proposed development complies with the ARHSEPP and will present a well-considered modern design for the site. Furthermore, the FSR bonus permitted by the ARHSEPP can only ever have effect by pushing a building "up" or "out" beyond Council's building envelope controls.

In this case, the proposal includes a height non-compliance and follows the precedent established by the Land and Environment Court in Abdul Rahman v Strathfield Council. In that decision, Fakes C permitted a height non-compliance in order to give effect to the FSR bonus of the ARH SEPP. Front and side setback controls will maintain Council's intended street character of the area and allows for adequate landscaping to soften the appearance of the built form. The height non-compliance is caused by a portion of the Fourth Floor external wall/roof and the communal roof terrace and balustrade at roof level.

The non-compliant elements will be setback from the front elevation and will, therefore, have minimal impact on the streetscape as can be seen in **Figure 1** above.

On this basis, it is considered that the scale and form of the building maintains a medium density environment and furthermore, the proposal provides for the housing needs of the community.

As such, the proposal is consistent with the first objective.

To provide a variety of housing types within a medium density residential environment.

The proposal will provide a variety of housing types within the site itself, including a variety of one (1), two (2) and three (3) bedroom apartments. Six (6) of the proposed apartments are adaptable and as discussed previously, 16 of the 35 units are provided as affordable housing, providing further variety.

Furthermore, the proposal will contribute to a variety of housing types within the local medium density residential environment, by replacing the existing two (2) storey multi-dwelling housing development with a new residential flat building. The diversity of the area will continue to be maintained, with a range of dwelling houses, residential flat buildings and multi-dwelling housing buildings evident.

As such, the proposal is consistent with the second objective.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The third objective is not applicable to this DA.

4.3 Would the underlying object or purpose of the standard be defeated or thwarted if compliance was required, such that compliance is unreasonable or unnecessary?

It is not considered that the underlying objective of the Standards is irrelevant to the proposal, however, as demonstrated herein, it is submitted that the proposal is able to achieve consistency with the intent of the Standard, despite the non-compliance.

4.4 Has the development standard 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?

It is not considered that the Standard has been virtually abandoned or destroyed by Council's actions, however, having regard to the particulars of this Application, and the internal amenity gains resulting from the non-compliance, it is considered that flexibility in the application of the Standard is warranted.

5.0 CLAUSE 4.6(3)(b) - ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

5.1 What is the aspect or feature of the development that contravenes the development standard?

As discussed previously, the height non-compliance is caused by a small section of the top of the proposed Fourth Floor level along with the upper communal roof terrace and associated balustrade. The fact that the site is flood affected and requires the proposed ground floor level to be elevated contributes to the extent of the non-compliance.

5.2 Why is contravention of the development standard acceptable?

The bonus FSR provisions in the ARHSEPP are beneficial and facultative and designed to permit additional FSR over and above that ordinarily permitted, in order to provide for the affordable housing needs of the community. The site must be able to be used in a way so as to give proper effect to the bonus FSR, and to not deprive the owner of the right to develop the land in a manner, and to an extent, suitable for and appropriate to the permitted purpose.

As such the bonus FSR provisions of the ARHSEPP would be expected to result in development at a higher FSR, and hence higher building than for a standard residential flat building in the R3 zone, justify a contravention of the standard.

That the contravention is justified is emphasized by the lack of any unreasonable adverse impact arising from the contravention.

The fact that the site is flood affected and requires the proposed ground floor level to be elevated contributes to the extent of the non-compliance. The additional height is setback from the front of the building where it will have minimal impact on streetscape or appreciation of the locality (see **Figure** above).

The proposal has been designed to respect the visual and acoustic amenity of the properties in the vicinity of the site. The proposed roof terraces are well setback from the perimeter of the respective levels with planter boxes around the area at Fourth Floor to minimise the potential for overlooking. Privacy devices, window location, window proportions, building separation and landscaping provide further privacy protection (refer to Privacy Diagrams prepared by Bechara Chan & Associates).

The adjoining residential flat building to the south will receive more than two (2) hours of solar access to all of its north-facing living rooms and private open spaces on 21 June, in compliance with the requirements of the Apartment Design Guide.

Contravention of the development standard is also considered acceptable as the non-compliance allows provision of additional dwellings which will add to the stock of affordable rental accommodation available at the site, to the benefit of the locality, along with communal roof terraces, which will provide significant amenity benefits to the future occupants of the building.

5.3 The Proposed development is in the public interest because it is consistent with the objectives of the particular standard and the zone objectives (cl4.6(4)(a)(ii))

Having regard to the acceptable environmental impacts, and the merits of the proposed development, it is considered that the public interest is being met by the proposed development, despite the non-compliance.

The proposed departure from the standard does not create any unreasonable adverse amenity or streetscape impacts, as discussed herein. Furthermore, the proposal is considered to meet the public interest, as it results in sensitively designed residential flat building containing 16 affordable apartments, in a manner which does not have any discernible streetscape impacts and which will not unreasonably adversely impact on the amenity of nearby properties.

5.4 Objectives of the Standard

The objectives of the standard and the consistency of the proposal with those objectives are considered in detail above.

5.5 Zone objectives

The objectives of the zone and the consistency of the proposal with those objectives are considered in detail above.

6.0 REQUIREMENTS FOR PLANNING SECRETARY'S CONCURRENCE

The Planning Secretary's concurrence may be assumed pursuant to Planning Circular PS18_003 issued 21 Feb 2018. Nevertheless the proposal is considered against the matters to which the Secretary is required to have regard below.

6.1 Clause 4.6(5)(A) - Matters of State or Regional Environmental Planning

The proposed contravention of the Standard does not raise any matter of significance for State or regional environmental planning.

6.2 Clause 4.6(5)(B) - The Public benefit of maintaining the standard

For all of the reasons outlined above, in particular the bonus FSR permitted by the ARHSEPP and the underlying implications of permitting additional FSR within a site with a height limit, and the absence of unreasonable environmental harm, there is greater public benefit in permitting the contravention than in maintaining the standard.

6.3 Clause 4.6(5)(C) – Any Other Matters Required to Be Considered

There are no other known matters required to be taken into consideration by the Director-General before granting concurrence.

As can be seen from the discussion herein, the proposed development is consistent with the objectives of the development standard and R3 Medium Density Residential zone pursuant to SLEP 2012 despite the non-compliance with the Building Height development standard.

It is considered that the proposal has adequately addressed the matters outlined in Section 4.6(3) – (5) of SLEP 2012.

7.0 CONCLUSION

Having regard to the discussion contained herein, it is considered that the matters required to be addressed, pursuant to Clause 4.6 of SLEP 2012, the five-part test established in the Land and Environment Court and the Varying Development Standards: A Guide, have been fully canvassed herein.

Having regard to the particulars of the proposal, as outlined above, it is considered that there would be no material benefit to requiring the proposal to comply with Clause 4.3(2) of SLEP 2012 and on this basis, an exception to Clause 4.3(2) of SLEP 2012 is considered well-founded, and worthy of Council's support.