

REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

Cl 4.3, Marrickville LEP 2011: Height of Buildings



2-18 Station Street, Marrickville NSW

Demolition of Existing Structures and Construction of a Mixed Use
Development comprising a Boarding House and Commercial Premises

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1.0 INTRODUCTION

This request to contravene a development standard in respect of height of buildings under Clause 4.3 of Marrickville LEP 2011 is submitted to accompany a development application for:

demolition of existing structures and construction of a mixed use development comprising commercial premises and boarding house

at 2-18 Station Street, Marrickville NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

2.0 THE DEVELOPMENT STANDARD

2.1 The applicable planning instrument which specifies the development standard:

Marrickville Local Environmental Plan 2011 (MLEP 2011)

2.2 The number of the relevant clause:

Clause 4.3 – Height of buildings.

2.3 The provisions of the relevant clause:

Clause 4.3 – Height of buildings.

The development standard to which this request for contravention relates is Clause 4.3(2) of MLEP 2011 – Height of buildings, which specifies that:

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 nominated height on the map is 26m.

3.0 THE CONTRAVENTION SOUGHT:

3.1 Description of the contravention:

The proposed development would contravene the development standard as follows:

3.1.1 Maximum building height:

26m

3.1.2 Proposed height:

32.7m

3.1.3 Extent of proposed contravention:

6.7m (26%)



Figure 1: Illustration of contravention (north elevation).



Figure 2: Illustration of contravention (east and west elevations).



Figure 3: Illustration of contravention (south elevation).

3.1.4 Causes of the contravention:

The contravention would be associated with the provision of:

- an additional two storeys to the northern elevation facing Marrickville Station; and
- an additional one to two storeys along the western elevation facing Illawarra Road.

The height standard would not, however, be contravened by:

- The majority of the eastern elevation (with the exception of the element facing to the north); and
- The majority of the south elevation (with the exception of a small element facing to the west) .

4.0 PROVISIONS OF CLAUSE 4.6

4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. The objectives of Clause 4.6 are as follows:

Cl. 4.6(1) Objectives of Clause		
Clause	Control	Justification
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the standard which sets a maximum building height. It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances	The proposal would achieve better outcomes: <ul style="list-style-type: none"> • For the development: The contravention would permit: <ul style="list-style-type: none"> ○ An additional two storeys; ○ A more articulated built form. • From the development: The contravention would result in: <ul style="list-style-type: none"> ○ A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre; ○ A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing:

		<ul style="list-style-type: none"> ▪ An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it; ▪ A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and ▪ A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east. <ul style="list-style-type: none"> ○ An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies including the Architectus Peer Review, the Inner West Architectural Excellence Panel report and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys).
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4.2 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of MLEP 2011, the consent authority must consider a written request from the applicant that seeks to justify the contravention of the development standard. This justification is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	Control	Justification
4.6(3)	Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:	This written request addresses this clause.
4.6(3)(a)	That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>Compliance with the development standard is unnecessary given that:</p> <ul style="list-style-type: none"> • The objectives of the development standard are met (see below); and • The objectives of the zone are met; notwithstanding the non-compliance.
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	<p>The contravention would result in:</p> <ul style="list-style-type: none"> • A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre; • A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing: <ul style="list-style-type: none"> ▪ An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it; ▪ A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and ▪ A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east. • An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies

		<p>including the Architectus Peer Review, the Inner West Architectural Excellence Panel report and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys);</p> <ul style="list-style-type: none"> • A greater density of affordable rental housing adjacent a major transit node (Marrickville Railway Station) and the community and commercial facilities associated with Marrickville Town Centre to reinforce social equity with improved walkability and access to public transport; • Optimal activation of the street and an existing underutilised public square; • Reduced reliance upon private vehicles and associated pressure on the road network; and • More efficient utilisation of public transport due to the proximity to Marrickville Railway Station and major bus routes on Illawarra Road.
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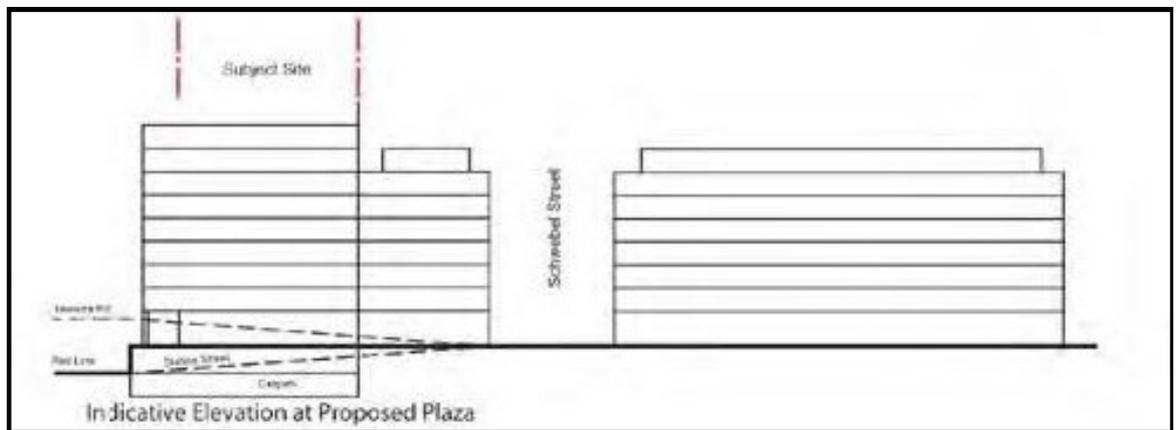


Figure 4: Proposed height limits adjacent Marrickville Railway Station (Peer Review of Planning Proposal, 2-18 Station Street and 1 Leofrene Avenue, Marrickville, Architectus, 30 December 2013).

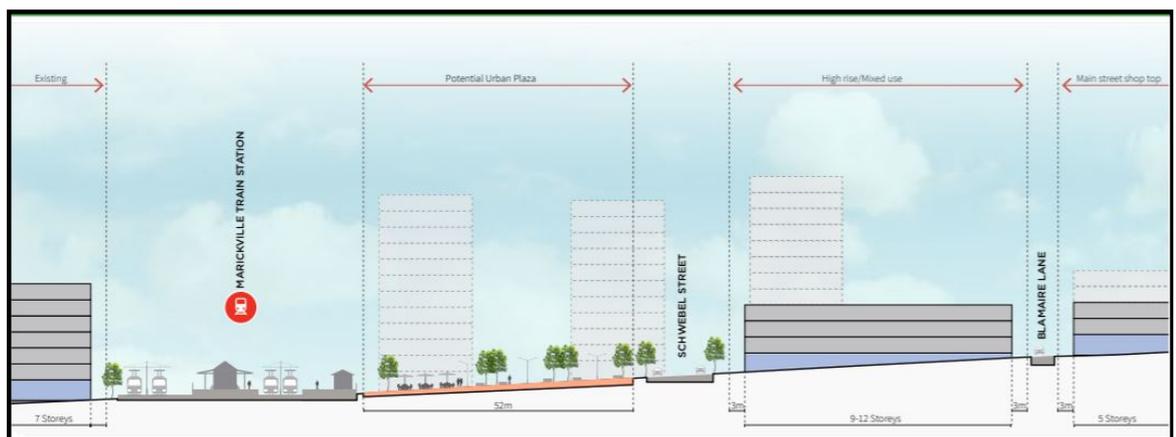


Figure 5: Proposed heights for the precinct (Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy, 2017).

4.3 Cl. 4.6(4)(a): Objectives of the Zone & Development Standard

Under the provisions of clause 4.6(4) – Exceptions to development standards of MLEP 2011, the consent authority must be satisfied that contraventions of development standards are consistent with the objectives of both the development standard itself and the zone in which the development is proposed. This assessment is summarised in the table below:

Cl. 4.6(4): Justification of contravention against development standard and zone objectives		
Clause	Objectives	Justification
4.3(2)	Height	
(a)	to establish the maximum height of buildings	The proposal seeks to vary the maximum height.
(b)	to ensure building height is consistent with the desired future character of an area,	<p>The proposal for a building of 8 to 10 storeys is consistent with the desired future character of the site and locality as articulated by:</p> <ul style="list-style-type: none"> • Architectus peer review which supports a 12 storey building on the site (Report dated 30.12.2013); • Inner West Design Excellence Panel which supports a 12 building on the site (Report dated 9.8.2016); and • Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which supports 14 storeys on the sites fronting Marrickville Station from the south (2017). <p>Further, it is broadly consistent with the built form relationships articulated in the relevant development standards and controls for the locality in that it presents a carefully articulated envelope which provides:</p> <ul style="list-style-type: none"> ▪ An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it; ▪ A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and ▪ A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.
(c)	to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,	Due to the site location and orientation, the proposal would be inclined to cast shadow generally upon the roof tops and blank northern walls of the adjacent buildings to the south and consequently have negligible adverse overshadowing impacts. The public area located to the north the site would have unimpaired solar access while that located to the west would only be overshadowed in the mornings and to no greater extent than from a complying development.
(d)	to nominate heights that will provide an appropriate transition in built form and land use intensity.	<p>The site is in a highly prominent key location adjacent a major railway station and fronting onto a public plaza to its north and west and within the town centre. Given this location, the Inner West Architectural Excellence Panel considers that ‘it should have the highest heights in the immediate area’ (Report 9.8.2016).</p> <p>Further, as discussed above, the form of the proposal has been modelled to provide:</p> <ul style="list-style-type: none"> • An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it; • A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and

		<ul style="list-style-type: none"> • A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.
2.3	Zone B2 – Local Centre	
	To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.	<p>The proposal would provide extensive commercial areas at ground level which would:</p> <ul style="list-style-type: none"> • Support the pedestrian traffic generated by Marrickville Railway Station; • Activate the existing poorly utilised public plaza between the site and the station; • Provide passive surveillance to the surrounding public domain and consequently a safer environment; and • Support the future residents of the boarding house.
	To encourage employment opportunities in accessible locations.	The commercial spaces would provide employment opportunities directly adjacent a major transit node and pedestrian thoroughfare.
	To maximise public transport patronage and encourage walking and cycling.	The provision of a high density of residential population adjacent to both Marrickville Railway Station and the town centre, along with the provision of ample bicycle storage, would maximise use of public transport, cycling and walking.
	To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.	The proposal would provide affordable housing associated with ground floor non-residential uses.
	To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.	The proposal includes ground floor commercial uses with extensive glazed shopfronts which would activate not only the primary north and west frontages but also the presently unactivated eastern frontage which has been conceived as a pedestrian link but is currently poorly observed and of questionable safety.
	To constrain parking and reduce car use.	The provision of high density residential accommodation on the site in close proximity to the railway station and town centre would minimise reliance on private vehicles and, as a result, car parking.

4.4 cl. 4.6(4)(b): Concurrence

Under the provisions of clause 4.6(4)(b) – Exceptions to development standards of MLEP 2011, the consent authority must be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained before it can exercise the power to grant development consent for development that contravenes the development standard.

Under cl 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 cl 4.6, subject to the conditions in the table in the notice.

4.5 Cl. 4.6(5): Criteria for Concurrence

Under the provisions of clause 4.6(5) – Exceptions to development standards of MLEP 2011, the Council or the Secretary, as the concurrence authority, is required to consider the following matters:

Cl. 4.6(5) Criteria for Concurrence		
Clause	Control	Justification
(a)	whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention is not of an extent which would raise regional or State environmental planning issues. It is noted, however, that it is broadly consistent with the subregional strategic planning policies for the locality.

(b)	the public benefit of maintaining the development standard, and	There would be no public benefit achieved by maintaining the development standard given that the objectives of the standard would be better served by the more nuanced built form proposed.
(c)	any other matters required to be taken into consideration by the Secretary before granting concurrence.	The matters requiring consideration are addressed above.

5.0 THE FIVE PART TEST

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

The Five Part Test: (in accordance with Preston CJ in <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827)		
Part	Test	Discussion
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 3(c) above.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard are achieved more satisfactorily than maintaining the standard.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	Underlying object (b) of the development standard would be thwarted if compliance were required given that the standard is not consistent with the desired future character of an area.
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 previously abandoned its height of buildings development standard as follows: <ul style="list-style-type: none"> 429-449 New Canterbury Road Dulwich Hill (DA2014/477): 17m to 21.6m; 66 Constitution Road Dulwich Hill (DA 2016 00079): 17m-19.5m. These, and various other departures, suggest that Council has abandoned its development standard.
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.	Not applicable. The zoning of the land is considered appropriate.

6.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.3 – Height of buildings of Marrickville LEP 2011 should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

- a) The development meets the stated objectives of clause 4.3, specifically:
 - a) to establish the maximum height of buildings,
 - b) to ensure building height is consistent with the desired future character of an area,
 - c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,
 - d) to nominate heights that will provide an appropriate transition in built form and land use intensity.
- b) The development meets the zone objectives of the B2 Local centre zone, specifically:
 - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.
 - To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.
 - To constrain parking and reduce car use.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, specifically that the proposed contravention would result in:
 - A more effective urban place marker for Marrickville Railway Station in the broader context of Marrickville Town Centre;
 - A carefully modelled built form consistent with the considered desired future urban design character of the precinct providing:
 - An assertive northern elevation of 10 storeys fronting Marrickville Railway Station and providing a design dialogue with it;
 - A reduction in scale from 10 storeys on the northern side to 8 storeys on the southern side to provide a transition to the lower height limit of the adjacent sites to the south; and
 - A lower (and compliant) height of 8 storeys on the eastern elevation to create a transition to the adjacent 9.5m height limit low density residential zone to the east.
 - An overall height and built form consistent with the considered future urban design character of the precinct (as articulated in multiple expert studies including the Architectus Peer Review, the Inner West Architectural Excellence Panel report and the Revised Draft Sydenham to Bankstown Urban Renewal Corridor Strategy which all support a height of 12 or more storeys);
 - A greater density of affordable rental housing adjacent a major transit node (Marrickville Railway Station) and the community and commercial facilities associated with Marrickville Town Centre to reinforce social equity with improved walkability and access to public transport;
 - Optimal activation of the street and an existing underutilised public square;
 - Reduced reliance upon private vehicles and associated pressure on the road network; and
 - More efficient utilisation of public transport due to the proximity to Marrickville Railway Station and major bus routes on Illawarra Road.

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of height of buildings in clause 4.3 of MLEP 2011.