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# Clause 4.6 Exception to Development Standard – Height of Buildings

Development Application  
22-32 QUEEN STREET, CAMPBELLTOWN, NSW 2560

Prepared for Campbelltown 88 Development Pty Ltd

Submitted to Campbelltown City Council  
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# Clause 4.6 – Exceptions to Development Standards

## 1 Introduction

### 1.1 The variation being requested

Summary of Proposed Variation						
Address:		22-32 Queen Street, Campbelltown				
Proposal:		Mixed Use development				
EPI applicable:		Campbelltown Local Environmental Plan 2015				
Zoning:		B4 Mixed Use				
Standard(s) being varied:		<b>Height of buildings:</b> Clause 4.3				
Numeric measure of variation – Total max. height on site		Maximum allowed: 52m for Tower C Provided: 58m for Tower C (6.0m variation)				
Total max. variation on site		Tower A 6.5m or 15.47%				
Detailed calculation of variations:						
Tower	Max. HOB	Proposed HOB	Height Variance for HOB	Proposed Lift Overrun Height	Height Variance for Lift Overrun	
A	42m	44.5m	2.5m (5.96%)	48.5m	6.5m (15.47%)	
B	42m	44.0m	2.0m (4.76%)	48.0m	6.0m (14.28%)	
C	52m	54.0m	2.0m (3.84%)	58.0m	6.0m (11.54%)	
D	49m	50.0m	1.0m (2.04%)	54.0m	5.0m (10.20%)	
E	45m	46.0m	1.0m (2.22%)	50.0m	5.0m (11.11%)	

**Table 1:** Request overview

### 1.2 Executive Summary

This submission demonstrates that the proposed building forms on the site are consistent with the approved masterplan in terms of number of storeys. It shows that the overall massing throughout the site has been tailored to create appropriate separation from the heritage site to the north, and that the overall floor area is less than the allowable FSR for the site. This means the overall development intensity is less than what was envisioned for the site, and that any further reduction from strict compliance would compromise project viability and contribute less to the revitalization of Campbelltown. This would compromise the attainment of several zone objectives.

This submission shows how the LEP zone objectives support the development of this site in the manner proposed, given its large size, proximity to the heritage precinct, and key role in the revitalization of the city centre.

This justification steps through exactly *how* this proposed development ensures that the objectives supporting ‘intended scale’ and urban ‘compatibility’ are “achieved”, notwithstanding the non-compliance. It shows that compliance with the zone and LEP objectives is maintained and how this supports the attainment of the objectives for height.

The impact assessment within the Statement of Environmental Effects (SEE) confirms that this proposal is appropriate and consistent in character, and complies with the approved masterplan for the site.

The justification has been prepared in accordance with the NSW Department of Planning and Environment guidelines and directly addresses the relevant preconditions, principles and tests identified in relevant Land and Environment Court decisions.

Strict compliance with the standard is unreasonable and unnecessary in this instance.

### 1.3 Clause 4.6 Operation and relevant case law

The following principles have been considered in preparing this cl 4.6 request:

- The consent authority must “*be satisfied that:*”
  - The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
  - The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),
  - The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and
  - The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).”
  - (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], citing *Initial Action Pty Ltd v Woollahra Municipal Council* (2008) 236 LGERA 256).
- The consent authority must “in fact” be satisfied of the matters in the first two dot points above, in reliance only on matters set out in the relevant cl 4.6 request (*SJD DB2* at [32], citing *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130), but may satisfy itself as to the public interest matters in the last two dot points (*SJD DB2* at [34]).
- Cl 4.6(4)(b) requires the consent authority to be satisfied that the concurrence of the Planning Secretary has been obtained, which concurrence may be assumed pursuant to a written notice dated 21 February 2018 attached to Planning Circular PS18-003 (*SJD DB2* at [34] citing *Initial Action*).
- “*Development standards are not ends in themselves but means of achieving ends*” (*Wehbe v Pittwater Council* (2007) 156 LGERA 446 at [43])
- The common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary are:
  - (a) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
  - (b) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

- (c) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
  - (d) the development standard has been abandoned by the council;
  - (e) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers). (*SJD DB2* at [35], citing *Initial Action*)
- The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*SJD DB2* at [35] citing *Initial Action*).
  - Consistent means compatible or capable of existing together in harmony, or not antipathetic (*Moskovich v Waverley Council* [2016] NSWLEC 1015 at [53]).
  - A proposed development does not have to have zero impact or less impact, but rather achieve the intent of the relevant objective (*Initial Action* at [87]).

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

The five common methods of establishing that strict compliance are unreasonable or unnecessary, were outlined in Section 1.3. This justification relies on method 1 and method 3, specifically asserting that; (1) the standard's objectives are achieved despite the variation and (3) that one of the zone objectives would be thwarted if strict compliance was required.

### 2.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of Clause 4.3 are:

- (a) *to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,*
- (b) *to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,*
- (c) *to provide for built form that is compatible with the hierarchy and role of centres,*
- (d) *to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.*

#### The context for assessment:

While dealing with a different development standard, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61 noted that the objective of the FSR control was to “*regulate the density of development*” (among other things). In this Campbelltown case, the underlying driver behind these building height objectives is similar, in that it intends to regulate development *intensity* by ensuring appropriate built-form, suitable scale and compatible hierarchy.

The Court held (at [49]) that the regulation of density, or the achievement of a planned density, in this case, is not and should not be treated as, an end in itself. Regulation of density, or setting a planned density to be achieved, is what the clause does, however this is not the “end” that the clause intends to achieve. Rather, it is a *means* to achieve other goals.

In Baron, it was held that those goals were the other expressed-objectives of the control. Essentially, Baron found there was work required to locate the specific goals that the objective of “planned density” intends to achieve.

In this case, the four height objectives also lack tangible detail (other than a maximum height), meaning there is still work to be done to determine exactly what the specific goals are to “regulate” an appropriate building-form, suitable scale and desirable development intensity. This justification must be understood within this context and legal framework.

The height objectives actually so provide clear performance-based objectives which must be achieved in order to demonstrate that the objectives of the height control have been achieved. Such performance cannot solely rely on a single numeric control, but it must also include design, massing, scale and setbacks.

In Campbelltown, the height objectives speak to development intensity, building scale and form, meaning they regulate *how* the desired density for the zone, is expressed on the subject site. In this way the objectives for the development standard and the zone cannot be separated, in terms of how they seek to express an appropriate density.

Detailed Justification:

The consistency of the proposed development with the zone objectives is discussed in Section 4. It will be demonstrated that the proposed development is consistent with, and in fact achieves, the objectives of the zone, particularly in respect to:

- timely renewal and revitalisation of centres,
- a focal point for investment and centre-based living,
- active street frontages and
- mixed-use buildings with high residential amenity.

Accordingly, as determined in Baron, consistency with zone objectives further demonstrates the satisfactory achievement of the underlying objectives of the building height control.

Firstly, here is a review the height objectives.

- (a) *to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,*

The site is subject to a planning proposal which reflects the new controls that are emerging in the Campbelltown Centre, and the opportunity to provide a ‘gateway’ style development at the entry to the city centre. It is also noted that centre-wide increases in height and density are being considered which will reflect the future hierarchy of sites, enabling a suitable transition of building forms.

Furthermore, the site FSR is well below the permissible amount, due to the space created between the heritage item to the north. This shows that the desired “*land use intensity*” is achieved notwithstanding the height breaches. This objective is supported.

- (b) *to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,*

The proposed heights are consistent with the number of storeys envisioned by the new controls in the planning proposal, and reflected in the masterplan for the site. These heights have been designed in consultation with a heritage consultant and peer-review consultant, having regard to the significance of lands to the north. The intended scale has been confirmed on the site as part of the rezoning process. The minor variations by the roof structures, and parts of the building in some areas, are not of a magnitude that will alter the perceived scale of buildings. This objective is supported.



(c) *to provide for built form that is compatible with the hierarchy and role of centres,*

The form and scale of buildings, in terms of levels, is as intended by the current height and FSR controls for the site. The development of this site is a significant opportunity to create an appropriate environment that connects the main town centre with the heritage precinct to the north. With the context of significant revitalization, this objective is supported.

(d) *to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.*

Considerable work has been done in this regard by the heritage consultant. This impact and overall juxtaposition with heritage lands has also been peer reviewed. The street presentation and building separation distances have been carefully designed to ensure appropriate impact in the context of the emerging regional centre. View lines to and from the site towards the north have been carefully considered. Solar access and privacy have also been considered in the overall site design and final building designs. This objective is supported.

On the basis of the justification above (and the justification provided in Section 4), the objectives of the development standard have been satisfactorily achieved by this proposal.

## **2.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.**

The standard's purpose and objectives remain relevant.

## **2.3 The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.**

The underlying purposes of the objective relates to the timely renewal and revitalisation of the city centre, and providing a focal point for investment and centre-based living. In this case, the massing on the site has been configured having regard to the heritage site to the north.

The proposed number of storeys is consistent with the masterplan for the site, however the floor space ratio is below what is allowed. Strict compliance with the height would result in a dramatic reduction in FSR, further below where it already is. This would hamper viability and therefore, investment. This overall investment into the city centre is particularly relevant at this location given that the heritage precinct to the north is unlikely to be substantially developed.

In this case, strict compliance would thwart the achievement of the underlying purpose of certain zone objectives (discussed in Section 4.2).

**2.4 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.**

The standard has not been abandoned

**2.5 The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.**

The zoning is appropriate.

### 3 Are there sufficient environmental grounds to justify contravening the development standard? (Clause 4.6(3)(b))

#### 3.1 The nature of the variation of the control

The variation in height is shown on the height plane (refer to Appendix A). Specific details are shown below:

	Max. HOB	Proposed HOB	Height Variance	Proposed Lift Overrun Height
Tower A	42m	44.5m	2.5m	48.5m
Tower B	42m	44m	2m	48m
Tower C	52m	54m	2m	58m
Tower D	49m	50m	1m	54m
Tower E	45m	46m	1m	50m

#### 3.2 The environmental context

The site is within an emerging regional centre. Heritage lands to the north of the site have their own character, meaning that this proposed development acts as a northern gateway to Campbelltown City Centre.

The subject site makes a significant presentation to Queen Street, which has a moderate level of traffic.

#### 3.3 Justification

Sufficient environmental grounds exist to justify contravening the development standard, in this case. In relation to the extent of non-compliance and the form of development it is noted that:

1. The variation is minor and primarily relates to roof structures, with minor exceptions, as noted on the plans and height plane diagram.
2. The FSR is below the allowance, due to open space being provided around the heritage land. A minor height increase within this context is not unreasonable, particularly as no additional storeys are proposed, as compared to the approved masterplan.
3. Furthermore, the site is within a precinct earmarked for more significant densities.
4. This site design performs in all other aspects, in terms of overall amenity.

A development proposal that was forced to be compliant with the standard fails to recognise that:

- The variation will be imperceptible to any passer-by and the form and scale of the building is consistent with the established masterplan for the site;
- The overall site yield remains less than what is permissible; and

- There are no significant environmental benefits that would result from strict compliance.

### 3.3 Consistency with the Act

The Environmental Planning Grounds must, by their nature, be grounds that relate to the subject matter, scope and purpose of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act)(including section 1.3 of the EPA Act);

As set out in Section 1.3, the objectives of the Act are: -

"(a) to encourage:

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*
- (iii) *the protection, provision and co-ordination of communication and utility services,*
- (iv) *the provision of land for public purposes,*
- (v) *the provision and co-ordination of community services and facilities, and*
- (vi) *the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and*
- (vii) *ecologically sustainable development, and*
- (viii) *the provision and maintenance of affordable housing, and..."*

The proposed variation satisfies the above stated objectives of the Act:

- It is an orderly and economic use of the site. It adopts a building footprint that complies with all primary setback controls and floor space controls and is comparable with the vision for new developments in Campbelltown.
- It is very close to transport and supports the revitalisation of the centre.

This proposed variation to the standard will not hinder the objects of the Act.

The 'grounds' put forward as justification for the requested variation are within the subject matter, scope and purpose of the Act.

## 4 The proposed development be in the public interest

As set out in *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712, the proposed development will be in the public interest if 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.

### 4.1 Objectives of the standard

Discussed in detail, in Section 2.1 of this report.

### 4.2 Meeting the Objectives of the zone

The objectives of the B4 zone are:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To encourage the timely renewal and revitalisation of centres that are undergoing growth or change.*
- *To create vibrant, active and safe communities and economically sustainable employment centres.*
- *To provide a focal point for commercial investment, employment opportunities and centre-based living.*
- *To encourage the development of mixed-use buildings that accommodate a range of uses, including residential uses, and that have high residential amenity and active street frontages.*
- *To facilitate diverse and vibrant centres and neighbourhoods.*
- *To achieve an accessible, attractive and safe public domain.*
- *To provide healthy, attractive, vibrant and safe mixed use areas.*

#### Comments:

- **To provide a mixture of compatible land uses.**

Achieved. Ground level commercial uses activate the street level and pedestrian ways within the site, providing shops and employment uses for local residents.

- **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.**

Achieved at ground level. These uses have good pedestrian linkages to public transport and to other complementary uses within Campbelltown City.

- **To encourage the timely renewal and revitalisation of centres that are undergoing growth or change.**

This opportunity provides for a significant development at the northern edge of Campbelltown City Centre, and is designed to be sympathetic to the heritage lands to the north. In concert with the broader rezoning study taking place for Campbelltown, this proposal will be a catalyst for the City's revitalisation in a timely manner, as people seek to locate closer to jobs and reduce commuting distances.

- **To create vibrant, active and safe communities and economically sustainable employment centres.**

Employment uses are located at ground level. This creates natural surveillance and a desirable 'edge' to the common open space areas and pedestrian ways within the site. It also creates an attractive presentation to Queen Street.

- **To provide a focal point for commercial investment, employment opportunities and centre-based living.**

Achieved. Substantial ground floor employment uses exist and a large supply of residential units are available above. This provides for commercial investment, local employment and centre-based living. The proximity to the heritage precinct also provides unique investment, employment and tourist possibilities.

- **To encourage the development of mixed-use buildings that accommodate a range of uses, including residential uses, and that have high residential amenity and active street frontages.**

Achieved and evident in design. An active frontage to Queen Street has been a key component of the overall site design, along with active thoroughfares within the site. The proposed mix and scale of the development supports this objective.

- **To facilitate diverse and vibrant centres and neighbourhoods.**

The proposed mix of uses and its location ensures this outcome is achieved. Residential living within Campbelltown City will invigorate business at night and encourage restaurants and cafes, which are indicators of vibrancy. The proposal facilitates these outcomes as other factors are introduced, such as new planning controls, commercial investments, increased population within the centre, and upgraded infrastructure.

- **To achieve an accessible, attractive and safe public domain.**

Significant time has been spent on ensuring design excellence and an appropriate street presentation. This interaction between the private and public domain is a large contributor to overall safety, particularly as pedestrian traffic increases in the city.

- **To provide healthy, attractive, vibrant and safe mixed use areas**

Refer to above comments. The presence of a large common open space area at the north-east of the site encourage passive and active recreation and enable residents and visitors to have exposure to sunlight. The proposed uses and the easy access to the city centre provide for a vibrant experience for residents.

The zone objectives are supported by this proposed variation.

### 4.3 Meeting the Objectives of the LEP

The objectives of the LEP are:

- (aa) to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts,*
- (a) to provide a comprehensive planning framework for the sustainable development of all land in Campbelltown,*
- (b) to facilitate Campbelltown's development as the compact, vibrant primary business centre for the Macarthur Region, with distinct limits to urban growth and a clearly defined separation between urban and non-urban areas,*
- (c) to protect rural land, its agricultural potential and prevent its fragmentation,*
- (d) to ensure that diverse housing opportunities are provided, including those that accord with urban consolidation principles for all existing and future residents of Campbelltown in all stages of their lives,*
- (e) to reinforce a hierarchy of centres and strengthen the role of the Campbelltown-Macarthur Regional City Centre as the primary business centre for the Macarthur Region,*
- (f) to optimise the integration of land use and transport and encourage safe, diverse and efficient means of transport throughout Campbelltown,*
- (g) to encourage high-quality, well-designed development, that is of an appropriate design and scale to complement its setting and that enhances and encourages a safe and healthy environment,*
- (h) to ensure the adequate provision of infrastructure and services to support both existing and future development,*
- (i) to ensure high quality development that is sustainable and does not unreasonably increase the demand for public facilities, amenities and services,*
- (j) to identify, conserve and protect the Aboriginal, cultural and natural heritage of Campbelltown and to minimise any adverse impacts of development on heritage items and conservation areas,*
- (k) to facilitate diverse economic growth and employment opportunities,*
- (l) to conserve and enhance the environmental, scenic and landscape values of land in Campbelltown,*
- (m) to maintain, protect and improve the natural environment including biodiversity and water resources,*
- (n) to minimise land use conflict and the impact of development on adjoining land and on land subject to environmental hazards, particularly bush fire, flooding and salinity,*
- (o) to achieve development outcomes that are commensurate with the capability and suitability of the land,*
- (p) to provide for the social, cultural and recreational needs of existing and future communities,*
- (q) to foster environmental, economic, social and physical well-being so that Campbelltown develops as an integrated, balanced and sustainable city,*
- (r) to protect and promote the health and well-being of current and future residents of Campbelltown.*

#### Comments:

This justification has been underpinned by detailed evidence that also support the objectives of the LEP. Given the amount of overlap, and to avoid repetition, this justification is only briefly summarised below:

- It provides a housing product that meets the needs of current and future local residents.
- The mixed-use site allows for ground level commercial opportunities which serve residents on site and the contribute to the revitalisation of Campbelltown, supporting its vibrancy and cultural diversity.
- The proposal is sustainable in terms of containing Sydney’s urban footprint and providing housing and employment uses in proximity to rail transport.
- The minor variation will not result in any impact to the heritage context and allows for buildings with the number of levels set out in the masterplan.
- The overall FSR on the site is less than the allowance, and the proposed variation will ensure that the site yield is not further diminished, thereby enabling an appropriate housing yield in proximity to services and infrastructure.
- The variation will not result in any impact on the natural environment or bring undue environmental impact.
- The envisaged character and amenity of the city-precinct is supported by this proposal. The minor variation in height is not legible to such a degree that it impacts negatively on these matters.

This proposal supports the objectives of the LEP.



## 5 Other Concurrence Considerations

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and sub-clause (5) outlines the required considerations.

### 5.1 Whether contravention of the development standard raises any matter of significance for State or regional environmental planning?

The contravention of the development standard in this case will not raise an issue of State or regional planning significance as it relates to local and contextual conditions.

### 5.2 Is there public benefit in maintaining the development standard?

There is no benefit in maintaining strict compliance with the standard.

This justification has demonstrated that it is consistent with the desired character of the city-precinct and it provides an affordable housing product in line with market demand, while supporting city living. It also demonstrated that it will create an appropriate juxtaposition with the heritage precinct to the north, which is an appropriate planning outcome.

As also noted in Section 3.3, there are no compelling environmental reasons or matters of public benefit to warrant strict compliance

## 6 Conclusion

Clause 4.6(4) establishes preconditions that a Consent Authority must be satisfied of, before it can grant a variation to a development standard. This written request has addressed all of these required matters:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances; and
2. Sufficient environmental planning grounds to justify contravening the development standard; and
3. The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the zone;

This submission has addressed each precondition for considering any variation. It has been structured so that all relevant tests established by Land & Environment Court judgments have been addressed and the application can be determined.

The objectives of clause 4.6 are —

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The proposal supports Objective (b) by providing commercial uses and housing on a capable site, which directly meets the market need, while contributing to Campbelltown’s revitalised urban character. There are no *additional* impacts to any neighbouring site that would exceed those arising from a compliant building as the majority of variations are from roof structures.

The proposed yield on the site is below the permissible FSR due to building separations from the heritage site. Ensuring no further reduction in yield is an appropriate outcome in the context of viable revitalisation and urban renewal.

This justification has demonstrated *how* this proposed development has jumped the necessary hurdles required to ensure “achievement” of the height objectives and compliance with the zone and LEP objectives.

Strict compliance with the development standard is unreasonable and unnecessary in this instance and it would thwart the “better outcomes” noted in support Objective (b) of Clause 4.6 (noted above).

The use of the flexibility provided by the objectives of Clause 4.6 is available to the consent authority in this instance.

## Appendix A – Height plane