

Attachment D

Clause 4.6 Variation Request

4.1.2 Height of Buildings - Exceptions to development standards

Pursuant to Clause 4.3 of SLEP 2012 the height of a building on the subject land is not to exceed 15 metres in height as depicted in Figure 12 below.



Figure 12 - SLEP 2012 height of buildings map extract

The applicable objectives of this control are as follows:

- a) *to ensure the height of development is appropriate to the condition of the site and its context,*
- b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- c) *to promote the sharing of views,*

Building height is defined as follows:

building height (or **height of building**) means the vertical distance between ground level (existing) and 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

In relation to the SLEP height of buildings map at Figure 12 we note that the standard for No. 175 McEvoy Street (Pet Barn site on the opposite side of Harley Street) and further east along McEvoy Street is 22 metres and for buildings on the opposite side of McEvoy Street and Euston Road (Bunnings site) 18m. The SLEP building height standard for buildings on the subject site and sites to the west of it along Euston Rd is 15 metres. The SLEP building height standard for buildings on the north side of Euston Lane is 12 metres. These anticipated building heights translate into a desired future character urban design outcome as depicted in Figure 13 below.



Figure 13 - Desired future character urban design outcome as anticipated by building height standard.

In relation to the calculation of building height, the leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In *Stamford Property Services*, the Court followed the reasoning adopted in *Bettar* and confirmed that “ground level (existing)” must relate to the levels of the site, and not to the building presently located on the site, or in this particularly case, not the artificially modified levels of the site as a result of excavation. In this regard, the Court preferred the Council’s method to determining the “ground floor (existing)” from which building height should be measured. Council’s approach required that the proposed height be measured from the ground level of the site where known and from the footpath level at the site boundaries extrapolated across the site, as this would reflect the sloping topography of the land, consistent with the approach adopted in *Bettar*.

In these proceedings, the Court was satisfied that even though there was limited survey information available for the site, there was enough information to determine the “ground level (existing)” for the site based on actual and surveyed levels in the public domain (footpaths), and unmodified levels around the perimeter of the property, which could be extrapolated across the site. In summary, the Court has confirmed that the definition of “ground level (existing)” from which building height should be measured:

- is not to be based on the floor levels of an existing building located on a site or artificially modified levels associated with excavation.
- is not to include the basement floor or the soil beneath the basement following construction of the building or pre-existing excavation works.
- is to be based on the existing surveyed surface of the ground. For sites where access to the ground surface is restricted by an existing building or pre-existing excavation, natural ground levels should be determined with regard to known boundary levels based on actual and surveyed levels in the public domain (footpaths) and unmodified levels around the perimeter of the property.

We confirm that all residential floor plates/ habitable floor space sits comfortably below the 15 metre height standard with the breaching elements limited to the roof terrace access stairs and lobbies, lift over-runs, and bedroom ventilation chimneys as depicted in Figures 14 and 15 over page. The southernmost lift overrun extends to a maximum height of 18.25 metres above ground level (existing) representing a maximum building height non-compliance of 3.25 metres or 21.6%. The extent of non-compliance is depicted on Sections AA and BB prepared by the project Architect extracts of which are in Figures 14 and 15 over page.

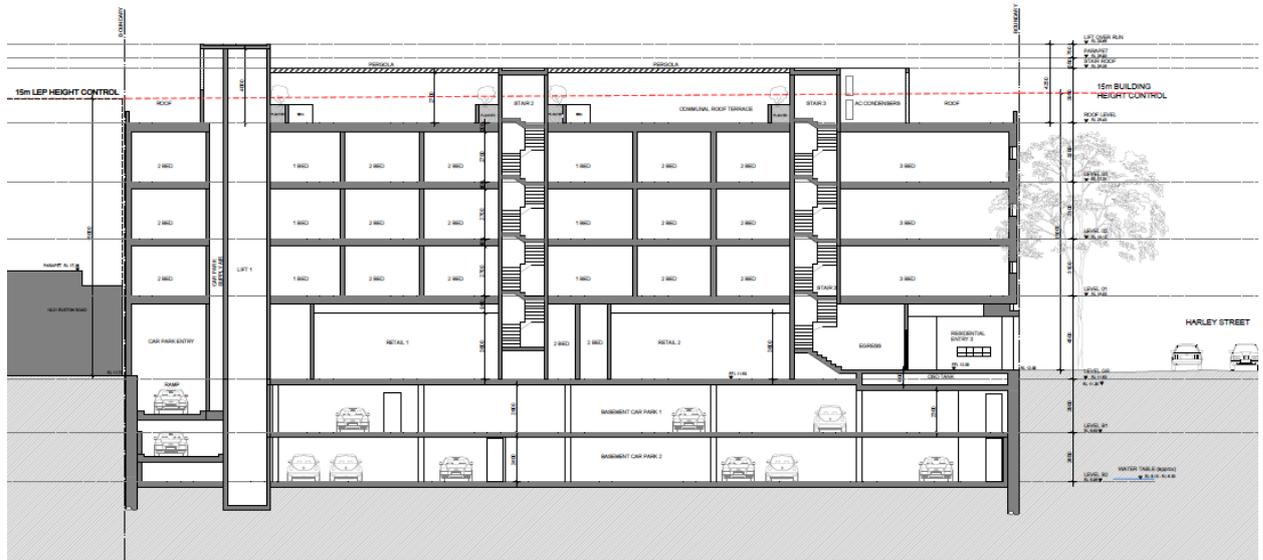


Figure 14 – Section AA plan extract showing extent of building height breach

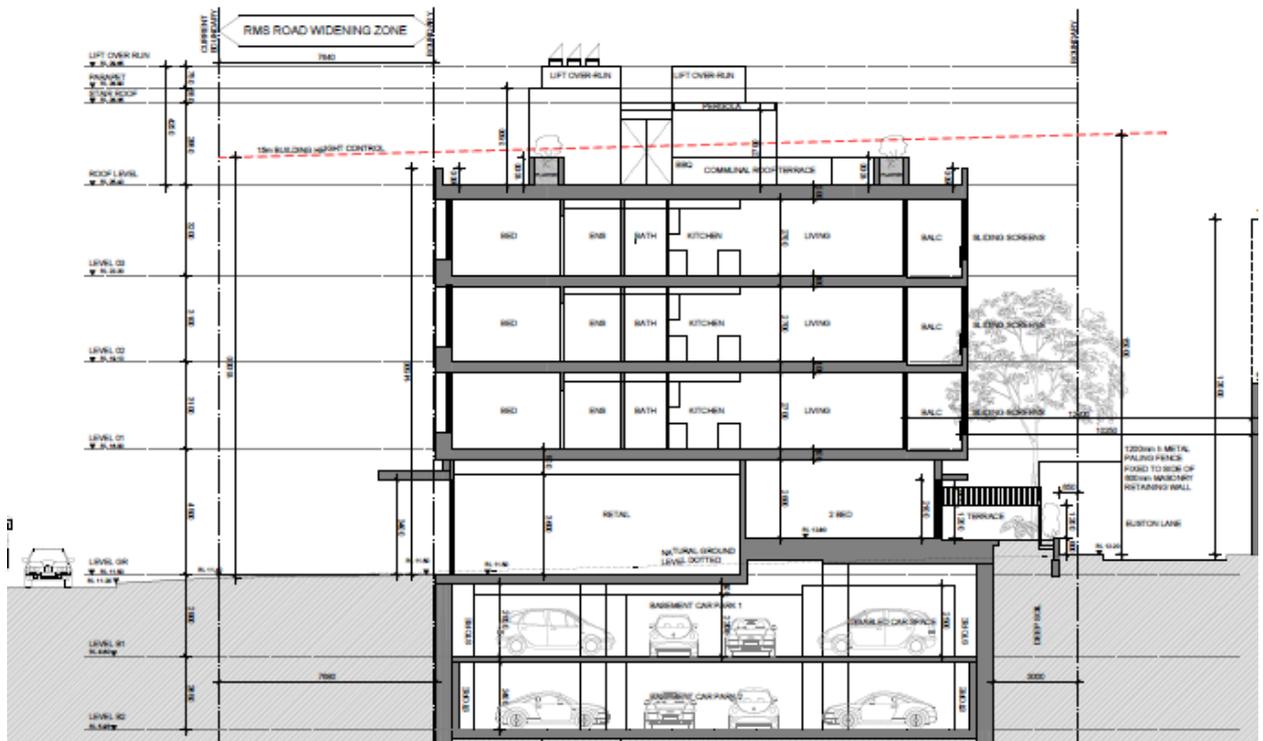


Figure 15 – Section BB plan extract showing extent of building height breach

Claim for Building Height Variation

Clause 4.6 provides a mechanism by which a development standard can be varied. The objectives of this clause are:

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

Pursuant to clause 4.6(2) 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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) states that 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.*

Clause 4.6(4) states 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 Director-General has been obtained.*

Clause 4.6(5) states that in deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Zone and Zone Objectives

As indicated in clause 4.1.1 of this report the proposed development is permissible with consent and consistent the applicable zone objectives. Accordingly, there is no zone or zone objective impediment to the granting of a variation.

Building Height Objectives

As previously indicated, having regard to the constraints and opportunities identified as a consequence of detailed site, context and precinct analysis, and assessment of the developments performance when assessed against the objectives of the height control, it is considered that strict compliance is both unreasonable and unnecessary for the following reasons:

- Despite the variation proposed to the building height standard the proposed 4 storey building will sit comfortably within the established and desired future streetscape with the additional building height facilitating well designed roof level communal open space.
- We rely on the urban design justification contained within the accompanying Architectural Design Statement which includes the following:

This site is located where differing building height controls converge. The proposed building is 5 storeys and slightly over the 15m height control such that the form acts as a transition in the streetscape between the 22m height control on one side of the site and the 15m height control on the other.



Above: Euston Road (south) elevation - LEP height control transition from 22m to 15m along Euston Road

The building is divided horizontally into a classical tri-partite form with a distinct base, middle and top. The roof terrace lifts and stairs are set back from the lower levels and provides a lighter appearance to the top to the building helping to break down the mass and scale of the building. The roof elements do not have a detrimental effect on the streetscape and do not cause any overshadowing of neighbouring building windows or outdoor space.



Above: Classic tri-partite form consisting of distinct base, middle and top breaks down scale horizontally

Additionally, the mass and scale of the long Euston Road façade is broken down in its length with the adoption of subtle curved indentations which serve to divide the façade into three elements corresponding to the three separate residential lift cores within the building.



Above: Length of building mass divided into three smaller elements with subtle indentations in facade

On the north side of the building facing Euston Lane and the Heritage Conservation Area the massing and scale of the proposed building is divided up into a smaller and more delicate elements with individual north facing balconies.

Landscaping and a row of trees at ground floor level softens the laneway façade.



Above: North (Euston Lane) façade dividing into smaller scale elements with balconies.



Above: Ground floor gardens and trees soften the façade in the lane



Above: Ground floor gardens and trees screen the façade facing the lane

- Such analysis demonstrates that the building heights proposed provide an appropriate height transition between development on the subject site and surrounding development including the adjacent Copper Estate Conservation Area (C2).
- The non-compliance is limited to relatively minor integrated roof access and communal open space shade elements with the vast majority of the building and associated habitable floor space sitting comfortably below the standard.
- Detailed site and design analysis has ensured that the additional height does not result in any adverse impacts on the amenity of the adjoining or adjacent properties in terms of solar access, visual bulk, privacy or views. The proposal will not give rise to any adverse public view affectation.
- Reference is made to the perspectives prepared in support of the proposal and the desired future character urban design outcome as anticipated by the building height standard. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment. Accordingly it can be reasonably concluded that the proposal is compatible with its surroundings as depicted in Figure 13 over page.



Figure 16 – Perspective depicting the proposed complimentary and compatible building form

- Having regard to the matter of *Veloshin v Randwick City Council* [2007] NSWLEC 428 this is not a case where the difference between compliance and non-compliance is the difference between good and bad design.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance.

Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.

He held that the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, it is considered that there are sufficient environmental planning grounds to justify the variation sought with the proposed building sitting comfortably within the established and desired future streetscape and the additional building height contributing to a robust building form of exceptional design quality on this prominent corner site. Further, the extent of non-compliance can be attributed, to a certain extent, to the slight fall that exists across the site and the desirability of providing roof to communal open space for a development of this nature in this location.

The ability to satisfy the underlying objectives and general paucity of adverse residential amenity, heritage conservation and streetscape impacts are also relevant matters for consideration in terms of planning justification.

Conclusions

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the site specific and contextually responsive development is consistent with the zone objectives, and
- (b) that the site specific and contextually responsive development is consistent with the objectives of the building height standard, and
- (c) that there are sufficient environmental planning and site specific urban design grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the design quality of the development, the sites prominent location and context and the developments ability to comply with the

zone and building height standard objectives that approval would not be antipathetic to the public interest, and

- (f) that contravention of the development standard does not raise any matter of significance for State or Regional environmental planning.

As such, we have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a building height variation in this instance.