

Attachment B

Clause 4.6 Variation Request – Height of Buildings

23 December 2020

Clause 4.6 Variation to Development Standard

Property Description: 22-32 Botany Road, Alexandria

Development: Mixed-use development – Retail premises & Boarding House

Development Standard: Height of Buildings

Introduction

This is a clause 4.6 variation to support the development proposal for a 5 storey mixed-use development – retail premises and boarding house at 22-32 Botany Road, Alexandria.

The application is made under SEPP – Affordable Rental Housing, with Clause 29(2)(a) of the SEPP applying to building height. Clause 29 is a standard that cannot be used to refuse consent. Clause 29(4) states that “a consent authority may consent to development to which this Division applies whether or not the development complies with the standards set out in subclause (1) or (2)”.

Pursuant to clause 29(4) of the SEPP a clause 4.6 variation request is not required for a variation to the building height control in the LEP. This is consistent with paragraph 48 of the Land and Environment Court judgement *193 Liverpool Road Pty Ltd v Inner West Council* [2017] NSWLEC 13. Notwithstanding, this clause 4.6 variation request is submitted without prejudice.

This clause 4.6 request seeks to contravene the 15m building height development standard contained in clause 4.3 – Height of Buildings of the *Sydney Local Environmental Plan 2012*.

The fundamental role of clause 4.6 in any local environmental plan is reflected in the recent decision of Commissioner Clay in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112. In particular, Commissioner Clay notes at [73] of his decision that:

“First, it should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome.”

The objectives of clause 4.6 facilitate the flexible application of development standards to particular development in order to achieve an improved environmental planning outcome.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the Land and Environment Court and Court of Appeal of NSW.

The development proposal results in a 5 storey form to the Botany Road and Spencer Lane frontages of the subject site. The variation to the height is measured from natural ground level to top of lift overrun with a maximum height of 17.4m, and to the top of rooftop communal open space pergola with a maximum height of 17.2m.

The proposed roof parapet generally sits within the 15m height control at the street frontages – Botany Road and Spencer Lane, with the portions of the building above 15m measured from natural ground levels being confined to lift overrun, rooftop open space and pergola, and part of the upper-level boarding rooms. These elements of the building will not be visually discernible from the public domain.

The maximum height measured to the lift overrun is 17.4m measured from natural ground level. The numerical variation is 2.4m being a variation of 16%.

The extent of the variation is shown on the section below.

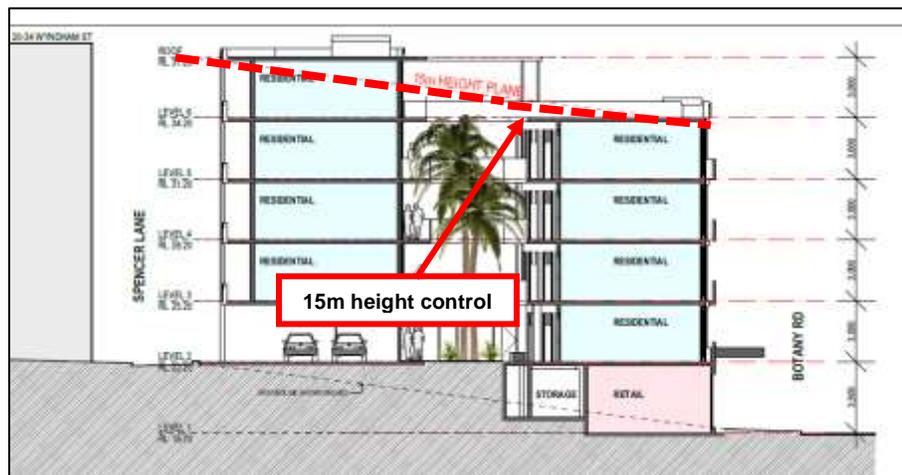


Figure 1: Section drawing indicating maximum extent of variation (Source: Platino Properties)

The request to contravene the development standard for the building height has been prepared in accordance with the principles applied in relevant case law including:

1. *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79;
2. *Wehbe v Pittwater Council* (2007) 156 LGERA 446;
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
4. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; and
6. *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130

This Clause 4.6 variation request is set out in accordance with the relevant principles established by the Court including:

1. Is the development consistent with the objectives of the zone?
2. Is the proposed development consistent with the objectives of the development standard which is not met?
3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (cl 4.6(3)(a) and cl 4.6(4)(a)(i))
4. Are there sufficient environmental planning grounds to justify contravening the development standard and therefore the Applicant's written request to vary the development standard is well founded? ? (cl 4.6(3)(b) and 4.6(4)(a)(ii))

Is the proposed development in the public interest because it is consistent with the objectives of the standard and the zone? (cl 4.6(4)(a)(ii))

Matters required to be demonstrated under clause 4.6(3) of the LEP

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the variation to the height of buildings development standard is acceptable in the circumstances of this case and compliance with the development standard is considered unreasonable and unnecessary because the proposed mixed-use development is consistent with the objectives of the height of buildings standard, notwithstanding non-compliance with the standard.

• Objectives of the Height of Buildings Development Standard

The objectives of the development standard are at clause 4.3(1) of the LEP 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,*
- (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) *in respect of Green Square—*
 - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

The proposed development achieves the objectives of Clause 4.3 of the LEP based on the following assessment:

Objective (a) – The development proposal presents a 5 storey built form to the public domain with the street elevations generally complying with the 15m height control.

The immediate locality contains a diversity of building forms including 2-3 storey commercial buildings and 5 storey mixed use buildings. The development proposal being a 5 storey form will reflect the form and scale of the adjacent 5 storey mixed use building at 8 Boundary Street, Alexandria, with the upper-most level being recessed from Botany Road and not visible from the street level. Further, the proposed height at the Spencer Lane frontage is consistent with the height of the mixed use development at 20-34 Wyndham Street, Alexandria west of the site.

The building form has been designed to present a compliant building height at the street elevations with the number of storeys proposed being appropriate for the subject site. The overall scale of the proposal is compatible with the built form of existing development and the form and scale of mixed use buildings in the locality, presenting a consistent building height with adjacent developments to the north and west.

Objective (b) – The subject site is not a heritage item and does not adjoin a heritage item or heritage conservation area. The bulk, scale, and height of the proposed development is consistent with that of the neighbouring buildings, is appropriate within the Regent Street/Botany Road Locality and compatible with the 15m height standard planned for the site.

Objective (c) – The proposal will not result in a significant adverse impact upon views/outlook from surrounding properties beyond that envisioned within the zone. The elements of the proposal which result in a variation to the height control –lift overrun, rooftop pergola and portion of the upper level central to the building will not obstruct any sightlines towards significant icons and would not impact views towards heritage items.

Objective (d) – The 5 storey form proposed at both the Botany Road and Spencer Lane frontages is consistent with the overall scale of development in the locality and presents a suitable transition in building height along Botany Road from the high-rise developments within the vicinity of Redfern Railway Station to the north.

Objective (e) – The subject site is not located within Green Square.

It is unnecessary to require compliance with the height of buildings development standard due to the following reasons:

- The variation to the 15m height standard is confined to the lift overrun, rooftop pergola and portion of the upper level central to the building. These elements will not result in any significant adverse visual impacts upon adjacent properties or the public domain, with the 5-storey form being suitable within the context of the subject site.
- The proposed building height is a result of the provision of lift access and pergola above a communal open space at the roof level, which is a suitable design outcome for a high-density development in the mixed-use zone. These elements above the height control do not contain any floor space and do not present an unreasonable

increase in development density beyond that envisioned for development in the zone. These elements are not highly visible from the public domain – Botany Road.

- The height is suitable for the subject site and compatible with the planning objectives and intended outcomes for the site and the objectives of the B4 – Mixed Use zone.

In line with the decisions in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, it is clear that compliance with a development standard is unreasonable or unnecessary if the objectives are met.

There are sufficient environmental planning grounds to justify contravening the development standard

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Preston CJ noted in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under clause 4.6, the aspect of the development that contravenes the development standard should be the focus (as opposed to the development as a whole) of any analysis.

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the height of buildings development standard because:

- The variation to the 15m height standard pursuant to the *Sydney Local Environmental Plan 2012* is a result of the topography of the subject site which has a fall from the rear – Spencer Lane (RL22.20) to the front boundary – Botany Road (RL 18.70) being a fall of 3.5m across the depth of the site. The elements varying the height control are located central to the site directly above the sloping portion of the natural ground level, with the development otherwise designed so that the built form generally sits within the 15m height control at the street elevations – Botany Road and Spencer Lane.
- The portion of the building exceeding the height standard will not be visually discernible from the public domain being central to the roof level, and in this case, the building form is suitable for the subject site and compatible with the planning objectives and intended outcomes of the objectives of the B4 – Mixed Use zone.
- The variation to the height limit confined to the lift overrun, rooftop pergola, and portion of the upper level central to the roof level does not contribute to additional bulk and scale at the street level noting the proposed works are central to the building footprint. The additional elements will not result in unreasonable privacy impacts, overshadowing, or the loss of views/outlook from the adjoining properties.

- The variation in height is consistent with the following relevant aims of the *Sydney LEP 2012* found at clause 1.2(2):
 - 2(e) – the proposed variation (lift overrun, rooftop pergola, upper portion of boarding house) will service a 72 x room boarding house development which contributes to the provision of affordable rental housing within close proximity to employment and services,
 - 2(g) – the variation will allow for a development that is located within close proximity to transport services and promotes active transportation including cycling and walking,
 - 2(h) – the variation being confined to lift overrun, rooftop pergola, and upper portion of the boarding house contributes to a high level of amenity and quality of life by providing equitable access to a rooftop communal open space area, and offers shade protection at this area.
 - 2(j) – the variation contributes to a high quality contemporary form within the streetscape that reflects the desired future character of the locality. Further, the proposed variation is consistent with the stepped built form of the adjacent property at 8 Boundary Street, Alexandria and reflects the existing character of this building, thus the variation is suitable for the locality,
 - 2(k) – the variation will not have an adverse impact upon any heritage item or heritage conservation area.
 - 2(l) – the variation will not detract from the enjoyment of the natural environment with respect to overlooking, overshadowing or visual bulk and scale impacts noting the varying elements are central to the roof level.

- The variation in height is consistent with the following objects of the Environmental Planning and Assessment Act, 1979 as follows:
 - 1.3(c) – the proposal is an orderly and economic use of the site and the development is largely consistent with the height standard with a contemporary built form that is compatible with the desired future character of the locality, and the variation will not result in unreasonable amenity impacts,
 - 1.3(d) – the proposed variation services a 72 x room boarding house development which contributes to the provision of affordable rental housing within close proximity to employment and services,
 - 1.3(f) – the variation is consistent with surrounding development and will not have a significant adverse impact upon any heritage items or heritage conservation areas,
 - 1.3(g) – the proposed variation and height of building presents a suitable design outcome for the subject site being a 5 storey form that sits comfortably within the streetscape, and is consistent with adjacent recent developments – 8 Boundary Street, Alexandria,
 - 1.3(g) – the proposed variation allows for the provision of equitable lift access to an area of rooftop communal open space for future residents of the development, which will provide sun protection for part of the communal open space, and allows for the upper-level boarding rooms to be of the maximum allowed size (16m²) thereby maximising their internal amenity.

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

The proposed development is in the public interest

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed mixed-use development is in the public interest because it is consistent with the objectives of the applicable height of buildings standard and the objectives for development in the B4 Mixed Use zone in accordance with the planning assessment provided as follows:

Objective	Consistency
<i>To provide a mixture of compatible land uses.</i>	The proposal includes ground floor retail premises providing for a compatible low-scale retail component within the development that is compatible with the boarding house proposed above.
<i>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.</i>	The proposal integrates commercial and residential land uses and is located within close proximity to public transport being 500m walking distance from Redfern Railway Station, encouraging active transport.
<i>To ensure uses support the viability of centres.</i>	The proposal will contribute to the viability of the Regent Street / Botany Road locality.

In addition to the above reasons, the proposal is also in the public interest because:

- The development proposal presents a 5 storey form to the streetscape and the proposed built form will not present unreasonable bulk and scale impacts to the public domain or adjoining properties,
- The building is an articulated/contemporary built form that is a suitable built form – height for this site that is consistent with the context and scale of other development in the locality including the adjacent 5 storey mixed use building to the north – 8 Boundary Street, Alexandria,
- The majority of the development is within the 15m height standard being a suitable form and scale of development to both Botany Road and Spencer Lane that is consistent with the envisioned character of development within the B4 – Mixed Use zone, and
- The variation to the height standard is a result of providing lift access/equitable access to the communal open space on the roof level of the building. Further, the proposal has been designed to generally comply with the 15m height control at the street elevations to ensure the proposal is consistent with the building height standard as viewed from the street.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the B4 – Mixed Use zone under the *Sydney Local Environmental Plan 2012*.

The variation to the 15m building height standard is confined to the lift overrun, rooftop pergola, and upper portion of the building central to the roof level. The proposal does not attempt to affect the intended planning outcome for the locality, rather the works are consistent with the envisioned scale and form of development planned for the site.

For these reasons, the proposal and the variation does not undermine the integrity of the building height development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

The concurrence of the Secretary

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed above the variation is consistent with the 15m

height standard pursuant to the *Sydney Local Environmental Plan 2012*. The proposal is considered to be in the public interest because the proposed development is consistent with the objectives of the height standard and the objectives of the B4 – Mixed Use zone.

The public benefit of maintaining the development standard is not considered significant because the building is consistent with the 15m height standard contained in *Sydney Local Environmental Plan 2012*.

The lift overrun, rooftop pergola and open space, and upper portion of the boarding house exceeding the height control will not be visually discernible or generate unreasonable additional overshadowing or amenity impacts upon adjoining properties.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The exceedance of the standard will not result in adverse amenity impacts and is in the public interest.

Conclusion

The development proposal has a variation to the 15m building height control contained in Clause 4.3 of the *Sydney LEP 2012*; notwithstanding, the proposal has been designed with a built form that is consistent with the intent of the height standard and is suitable for the subject site.

The variation to the building height standard does not attempt to affect the planning outcome for the broader locality; rather the proposed variation and overall development is consistent with the scale and form of development planned for the locality, including recent approved development to the north – 8 Boundary Street, Alexandria.

The lift overrun, rooftop pergola and communal open space, and upper portion of the boarding house will not be visually dominant at the street level, and the variation is a result of the topography of the subject site. The proposal will not impact upon the public domain or adjoining properties and will not generate unreasonable overshadowing or amenity impacts.

The application to vary the 15m building height development standard pursuant to *Sydney Local Environmental Plan 2012* is well founded and, as addressed above, the proposed height meets the objectives of the building height development standard. The proposal achieves an acceptable design that does not result in unreasonable visual and amenity impacts upon surrounding properties and is a desirable outcome in terms of built form for the site and locality.

In accordance with the environmental planning grounds addressed in this clause 4.6 variation, the building height can be supported.

Chapman Planning Pty Ltd