



Attachment 3 to Item 2.1.2.

Clause 4.6 Request

Date of meeting: 18 July 2024
Location: Council Chambers or audio-visual link
Time: 10am

REQUEST FOR VARIATION OF DEVELOPMENT STANDARD
FOR
RESIDENTIAL FLAT BUILDING

AT

173-175 MARCH STREET

RICHMOND

REQUEST TO VARY HEIGHT OF BUILDING (CL.4.3)
HAWKESBURY LOCAL ENVIRONMENTAL PLAN 2012



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1.0 INTRODUCTION.

The application seeks a variation to Clause 4.3 Height of Buildings as prescribed by Hawkesbury Local Environmental Plan 2012.

This application to vary development standard provides the written request and justification for seeking a 9% variation to the maximum building height of 10m as required by clause 4.3.

Clause 4.3 of the Hawkesbury Local Environmental Plan 2012 (HLEP) and the relevant map indicate that the site is subject to an 10m height control. The proposal achieves a maximum height of RL 10m at the roof ridge level, however the lift overrun exceeds the 10m height by 900mm.

The lift overrun relates to an extremely small portion of the development and as a result of the building height, siting and arrangement, view of the overrun from public spaces will be insignificant. Further, the lift overrun does not result in overshadowing or negative impacts to privacy of neighbouring occupants. Visual details of the overrun are shown below.



South Elevation

Notwithstanding the above, a request to breach the control must be submitted in accordance with Clause 4.6 of the LEP. The relevant parts of Clause 4.6 of Hawkesbury LEP 2012 are:

1. *The objectives of this clause are as follows:*
 - a. *to provide an appropriate degree of flexibility in applying certain development standards to development,*
 - b. *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

2. Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

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:

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.

4. Development consent must not be granted for development that contravenes a development standard unless:

. 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

a. the concurrence of the Secretary has been obtained.

5. In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The purpose of this written request is to satisfy (3)(a) and (b) above and to demonstrate that (4)(a)(ii) and 5(a) and (b) can be satisfied. In preparing this request, regard has been had to the document: "Varying development standards: A Guide (August 2011)" prepared by the NSW Department of Planning & Infrastructure, and to relevant Land Environment Court judgements including the recent judgements of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, by Chief Judge Preston CJ in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118 and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *Rebel MH Neutral Bay*

Pty Ltd v North Sydney Council. And, most recently, the decision of Chief Justice Preston in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

Clause (3)(a) - whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Whilst it was prepared in relation SEPP 1, the Land and Environment Court judgment *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007), is referred to in the Four2Five judgment and remains relevant to the consideration of concept of compliance being unreasonable or unnecessary. The DP#1 Guide referred to above outlines the following 5 part test used in *Wehbe*:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard.
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the parcel of land. That is, the parcel of land should not have been included in the zone.

It should be noted that the Courts have reiterated that it is only necessary to satisfy **one of** these 5 paths, although in some instances more than one may be relevant and achieved.

In regard to the issue identified above, it is considered that Tests 1 and 5 are applicable and satisfied.

Test 1

Strict compliance with the development standard for building height in clause 4.3 of the LEP would be unreasonable and unnecessary because the proposal achieves the stated objectives of the height control:

(1) The objectives of this clause are as follows—

(a) to protect privacy and the use of private open space in new development and on adjoining land,

The development has been designed to achieve the boundary setbacks as required by SEPP 66 Design Guidelines which have been implemented to afford and maintain privacy to neighbouring sites. Elevated balconies address the front and rear boundaries as opposed to the neighbouring sites.

Additionally, the accompanying shadow diagrams confirm the development will not impact on solar access of private open spaces at the winter solstice.

(b) to ensure that the bulk of development is not excessive and relates well to the local context,

The non-compliance relates to an extremely minor portion of the proposal only and will not result in excessive bulk or scale. The development is considered compatible with recent additions to the Richmond precinct including the 3 storey seniors development located at 122 March St which also sought an exemption to the building height in relation to a lift overrun.

(c) to nominate heights that will provide a transition in built form and land use intensity,

A 10m building height applies to all development in the immediate locality. The building itself will comply with this development standard, however the lift overrun exceeds the 10m height by 9% (0.9m). The lift overrun is a minor portion of the development and is setback from the street frontage limiting visibility from public spaces.

(d) to ensure an appropriate height transition between new buildings and heritage items.

The closest heritage item is separated by both existing development and March St itself. The proposal will not result in a negative transition to heritage listed developments.

Comment – In relation to development potential, the proposal almost fully complies with the relevant development standards except for the building height relative to the lift overrun only.

In relation to infrastructure capacity, as the development potential of the site does not exceed that which can be expected, the proposal will be within existing and planned increases to infrastructure capacity.

In view of the above, having regard to Tests 1 of Wehbe enforcing compliance in the circumstances is considered to be unreasonable and unnecessary. Flexibility should be applied, consistent with objective (a) of clause 4.6 of the LEP.

The proposal has a public benefit, providing additional housing stock in a time of housing crisis in NSW, particularly Sydney metropolitan areas.

Test 5

compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the parcel of land. That is, the parcel of land should not have been included in the zone.

The site has the benefit of existing use rights and therefore, whilst compliance with the 10m building height has been achieved, a small portion relative to the lift overrun is above the 10m building height. Given the existing use right and the principals and assessment methods applied to the existing use rights of 122 March St for which a similar exemption was granted, approval in the current circumstances is not creating a precedent nor does it result development which is inappropriate to the Richmond township.

Clause (3)(b) – whether there are sufficient environmental planning grounds to justify contravening the development standard

In addition to the above the following comments are made.

Compliance would result in poorer planning outcomes

As noted above the proposal has been specifically designed to provide a superior planning outcome, consistent with the objective of Clause 4.6 to “*achieve better outcomes for and from development by allowing flexibility in particular circumstances*”. As detailed above the site benefits from existing use rights, and redevelopment of the site is proposed to afford greater opportunities for and availability of accommodation in the Hawkesbury area. This is particularly in response to the Housing crisis being experienced throughout NSW. The minor encroachment of the lift overrun is not considered detrimental to the planning outcomes or objectives and is considered appropriate given

the application of s.4.65 of the Environmental Planning and Assessment Act 1979

Lack of impact

As detailed above and in the submitted SEE, the proposal has very minimal impact on surrounding properties and the level of impact arising from the non-compliance is negligible. This is because the height breach is limited to the lift overrun only and not the building itself. Further, compliant and appropriate boundary setbacks have been provided. The minimal encroachment does not add significantly to the overall bulk and scale of the building. It is also setback from neighbours to reduce visual and overshadowing impacts.

In view of the above it is considered that there are sufficient environmental planning grounds, specifically related to the subject site, that warrant contravention of the height standard.

As determined in *Randwick City Council v Micaul Holdings Pty Ltd*, and supported by Preston CJ in Initial Action, lack of impact is a sufficient ground for allowing a breach of a development standard pursuant to Clause 4.6.

Clause (4)(a)(ii) – whether 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

As noted above the proposal will be consistent with the relevant objectives of the height standard. In relation to the objectives of the subject R2 zoning the following comments are made:

- *To provide for the housing needs of the community within a low density residential environment*

The proposal seeks to afford this zone objective by providing for the housing needs of the community. Media reports across Australia, and particularly Sydney, highlight the expanding rental crisis which has impacted NSW. The proposal seeks to, albeit on a minor scale, assist in creating opportunities for additional housing stock in the Hawkesbury area.

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

The proposal seeks to retain and increase the current site usage for residential purposes.

- *To protect the character of traditional residential development and streetscapes.*

Recent developments in the locality vary in height and scale, from single storey dwellings and granny flats, to two storey multi-unit developments and boarding houses and a 3 storey seniors housing development. These developments contribute positively to the character of the area, and have replaced a number of older, unmaintained or unattractive developments. The prevalent theme with recent proposals and approvals is for a modern design which is responsive to existing developments, but is readily identifiable as pertaining to a new emerging future character of the area.

The design of the building includes extensive articulation, thus reducing visual bulk and scale, whilst the use of composite light-weight materials ensures the built form will provide an attractive addition to the streetscape.

- *To ensure that new development retains and enhances that character.*

The design of the building includes extensive articulation, thus reducing visual bulk and scale, whilst the use of composite light-weight materials ensures the built form will provide an attractive addition to the streetscape.

- *To ensure that development is sympathetic to the natural environment and ecological processes of the area.*

The site is not classified as being flood affected or subject to bushfire controls, however the site is located within the 20-25 ANEF contour, whereby residential development is “conditionally acceptable” in accordance with AS2021. An acoustic assessment has been undertaken to address this constraint.

- *To enable development for purposes other than residential only if it is compatible with the character of the living area and has a domestic scale.*

The site is currently utilised for residential purposes. No changes to the residential use are proposed.

- *To ensure that development does not create unreasonable demands for the provision or extension of public amenities or services.*

The site is located in an established, serviced residential precinct with all essential services currently available to the property.

The proposal is considered consistent with the objectives of the low-density residential zone.

Clauses 4.6(4)(b) and 4.6(5)

Clause 4.6(4)(b) – SECRETARY’S CONCURRENCE

In *Initial Action*, Preston CJ noted at [28-29] that:

“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.”

It is therefore noted that concurrence is to be assumed, but the relevant matters for consideration are assessed below for completeness.

Clause 5(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning

No, the variation of the height standard relative to the lift overrun only is a minor matter and not uncommon. It does not raise any issues at a regional or state level.

Clause 5 (b) the public benefit of maintaining the development standard

For the reasons outlined above there is no public benefit in maintaining the standard. In fact, there will be public benefits in allowing a variation as a better planning outcome will be achieved. The development will increase housing stock in the Richmond precinct in response to the housing crisis which is currently being experienced throughout NSW.

Conclusion

Having regard to the above it is considered that this written request satisfies the requirements of Clause 4.6 and that the consent authority can be satisfied that the proposal also meets the other

requirements of Clause 4.6. The proposed contravention of the standard will meet the objectives of Clause 4.6 as it achieves “*better outcomes for and from development by allowing flexibility in particular circumstances*”.

It is considered that the proposal represents a high-quality planning outcome for the site.