



Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.3 – Height of Buildings

Address: 71-75 Victoria Road, Drummoyne (the site)

Proposal: Shop Top Housing development comprising 31 dwellings and two commercial premises

Date: 18th August 2022

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of Canada Bay Local Environmental Plan (CLEP) 2013. The development standard for which the variation is sought is clause 4.3 Height of Buildings under CLEP.

2.0 Description of the planning instrument, development standard and proposed variation

2.1 *What is the name of the environmental planning instrument that applies to the land?*

The Canada Bay Local Environmental Plan (CLEP) 2013.

2.2 *What is the zoning of the land?*

The land is zoned B4 Mixed Use.

2.3 *What are the Objectives of the zone?*

The objectives of the 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.

2.4 *What is the development standard being varied?*

The development standard being varied is the height of buildings development standard.

2.5 *Is the development standard a performance based control? Give details.*

No, the height of buildings development standard is a numerical control.

2.6 *Under what clause is the development standard listed in the environmental planning instrument?*

The development standard is listed under Clause 4.3 of CLEP.

2.7 What are the objectives of the development standard?

The objectives of Clause 4.3 are:

- “(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*
- (b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—*
 - (i) visual and acoustic privacy, and*
 - (ii) solar access and view sharing,*
- (c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*
- (d) to ensure that buildings respond to the natural topography of the area.*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 establishes a maximum height of buildings control for the site of 20.0m

2.9 What is the proposed height in the development application?

The proposed maximum building height proposed is 24.477m to the lift over run

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposal exceeds the maximum height of buildings development standard of 20m by 4.47m, a variation of 22.385% to the lift overrun.

Table 1 below details the proposed numeric breaches of various elements of the overall roof and the percentage of variation to the development standard.

Element	Compliance	Variation	% Variation
Main Parapet (RL46.6m) <ul style="list-style-type: none">18.1m (north corner)20.06m (east corner)20.42m (south corner)18.04m (west corner)	Yes No No Yes	Nil 0.06m 0.42m Nil	 0.3% 2.1%
Recessed roof planters (RL47.6m) <ul style="list-style-type: none">19.02m (north corner)21.16m (east corner)21.29m (south corner)21.27m (west corner)	Yes No No No	Nil 1.16m 1.29m 2.27m)	 5.8% 6.45% 6.35%)
Roof to communal open space (RL49.8m) <ul style="list-style-type: none">23.47m	No	3.74m	17.35%
Lift over run (RL50.8m) <ul style="list-style-type: none">24.477m	No	4.477m	22.385%

Table 1: Description of the variations to the building height standard

A visual representation of the existing and proposed building heights in relation to the 20m height control is shown in Figure 1.



Figure 1: Proposed building heights non-compliance – 20.0m height standard shown in green

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) are as follows:

- “(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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

“(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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

3.2 Clause 4.6 (3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the height of buildings standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposal is consistent with the objectives of the building height standard and the objectives of the B4 Mixed Use zone as outlined in section 3.4 below;
- The instance on a numerally complying development would diminish the superior amenity outcome of a roof top communal open space with universal access
- The proposed development despite the numerical non-compliance is compatible with the built form context of neighbouring development and anticipated development in the locality
- The allocation and positioning of built form on the site successfully recognises and responds to the interface with the low rise residential development in Formosa Street; and

- No environmental planning benefit would be achieved in the circumstance by insisting upon a strict numerical compliance; and
- A strictly numerical compliant scheme could have adverse impacts upon the low rise Formosa Street development that have been avoided by the proposed design.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

Not contested.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

Not contested.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

Not contested, as the zoning of the land is considered to be both reasonable and appropriate.

3.3 *Clause 4.6 (3)(b) requires demonstration that are there sufficient environmental planning grounds to justify contravening the development standard*

As identified the proposed provision of a communal roof terrace with associated planting, balustrading, stairs, lift and amenities results in the non-compliance with the Height of Buildings development standard.

There is no additional GFA accommodated on the site as a result on the height non-compliance, noting that the FSR development standard is complied with.

The removal of a communal amenity could result in numerical compliance however this would be a negative outcome pursued for numerical compliance sake without consideration of the superior outcome of the proposal accommodating a beneficial communal amenity.

The parapet could be made to comply; however, this would require further lowering of the ground level slab, which is already partly below existing ground level, or reducing the proposed floor to ceiling heights. Neither of these options is considered appropriate as they would result in amenity losses.

Deletion of the proposed communal roof terrace is considered to be undesirable, as it offers significant amenity to the future residents of the complex, in terms of opportunities for passive recreation, views and socialisation with other residents. The proposed roof terrace is located centrally and will not be readily visible from the public domain in the immediate vicinity of the site. It is also noted that the roof top communal open space will have less use restrictions than the podium level communal open space area which while providing a further amenity to the residents will be required to be limited in the times it is able to be used to ensure acoustic amenity levels for proposed and surrounding residents are satisfied. The roof top open space is not subject to such limitations due to its location avoiding potential acoustic impacts on proposed and surrounding residents.

Further the height of the proposed development sits comfortably and below the level of the adjacent Tempo development and provides a bookend to the block between Day and Church Streets.

The proposed development could be amended to comply with the development standard however this would result in no discernible change to the form and scale of the proposed development and given the amenity benefits derived from the additional height and the lack of adverse amenity impacts in relation to nearby development, this is not considered desirable.

The building, despite the numerical non-compliance remains consistent with the existing and anticipated context of development in the locality and will sit in harmony with the adjoining Tempo building which will remain as a taller building than the proposed building.

The proposed departure from the standard does not create any unreasonable adverse amenity or streetscape impacts, as discussed herein. Furthermore, the proposal is considered to meet the public interest, as it results in sensitively designed shop top housing development in a manner which does not have any discernible streetscape impacts and which will not adversely impact on the amenity of nearby properties. The proposal enables improvements to the visual amenity of the site, to the benefit of the streetscape and community.

Having regard to the acceptable environmental impacts, and the merits of the proposed development, it is considered that the public interest is being met by the proposed development, despite the non-compliance.

3.4 *Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?*

3.4.1 Objectives of the Height of Building standard

The proposal remains consistent with the objectives of the height of buildings standard outlined in Clause 4.3 despite the non-compliance, as demonstrated below:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*

The area in the vicinity of the site, fronting onto Victoria Road generally has a 20m height limit. The proposed development has been designed to generally comply with this limit, so as to respond to the planning regime which applies. It is noted that the site on the opposite side of Day Street is permitted a height of 20m while the Tempo development to the north of the site has a maximum height of 21.11m adjoining the site (Source: Council/JRPP assessment report in relation to DA-2015/0105).

To this end, the proposed development has been designed to achieve a consistency in form with the adjoining Tempo development, while providing a suitable response to the public domain interface of the ground floor level tenancies, given the sloping nature of the site.

The ground floor slab level to Victoria Road has been derived having regard to achieving a level transition at the corner of Victoria Road and Day Street for accessibility and streetscape purposes. This has resulted in the northern part of the retail tenancy having a floor level which is below the level of the footpath – planting is proposed along the footpath in order to achieve a suitable public domain interface at this location.

The proposed development incorporates a 4.6m floor to floor height at ground floor level, so as to accommodate slab thicknesses, ducting and other services while maintaining sufficient clearance for a future retail use. The residential levels above all have 3.1m floor to floor height, so as to accommodate slab thickness, ducting and services, while achieving a minimum 2.7m floor to ceiling height, as required by SEPP 65.

The height of the proposal has been minimised as far as is possible, while achieving a suitable relationship with the public domain and the adjoining Tempo development to the north.

The areas of non-compliance are located on the communal roof terrace level and occur as a result of the desire to provide a communal area with superior amenity, in terms of solar access and opportunity for view and ensuring universal access is provided to this area.

These elements will not be readily apparent from the public domain in the vicinity of the site, as they are located centrally within the roof of the proposed six (6) storey building, for visual amenity purposes.

The proposed development incorporates a form which is generally consistent with that envisaged for the site by Canada Bay Development Control Plan (CBDPC) in terms of a six (6) storey development to Victoria Road, stepping down to a single podium level fronting the low rise development opposite the site in Formosa Street.

Having regard to the preceding discussion, it is considered that the proposal is consistent with objective (a) despite the non-compliance with Clause 4.3(2) of CBLEP 2013.

- (b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—*
 - (i) visual and acoustic privacy, and*
 - (ii) solar access and view sharing,*

Visual and acoustic privacy

The proposed development is considered acceptable with regard to the visual privacy of adjoining properties, due to window placement, the siting of the proposed development and separation distances.

The proposed communal roof terrace is located centrally, away from the perimeter of the main building which is distant from other nearby residential properties. This distance, coupled with the provision of perimeter planter beds will minimise opportunities for privacy impacts.

The proposed loading dock is located internally within the building and noise from service activities and vehicles will be contained within the site itself. On this basis, the proposed development is considered to have an acceptable impact in relation to visual and acoustic privacy.

Solar access

The nearest residential property comprising potentially affected private open space is No. 28 Day Street, which is located opposite the site, on the corner of Formosa and Day Streets. The private open space of the dwelling is located on the Formosa Street boundary of the property, to the rear of the site. There are no other residential properties in the immediate vicinity of the site which would potentially be affected by overshadowing. PBD Architects has prepared detailed shadow diagrams which provide a comparison between the existing and proposed shadow impacts. The diagrams show that there will be no additional overshadowing impacts in relation the private open space or living room of No. 28 Day Street on 28 June.

The commercial properties on the opposite side of Day Street will continue to receive more than three (3) hours of solar access on 21 June.

Having regard to the preceding discussion, it is considered that the proposal is consistent with objective (b) despite the non-compliance with Clause 4.3(2) of CBLEP 2013.

- (c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*

The proposed development has been designed having regard to the site-specific building envelope specified in Canada Bay Development Control Plan, in order to complement the streetscape and to relate to the adjoining Tempo complex to the north.

The proposed building wraps around the corner of Victoria and Day Streets and provides active retail frontages to both streets. A podium service level is disguised to the Formosa Street frontage with terraced landscaping. This treatment provides a low rise presentation to Formosa Street and the lower-density residential properties to the south and west of the site.

The Victoria Road façade is broken into four (4) vertical blade elements, defined by balconies and sun/privacy screens.

The envelope of the six (6) storey element includes modulation and setbacks from the adjoining Tempo building to enable light and ventilation.

Having regard to the preceding discussion, it is considered that the proposal is consistent with objective (c) despite the non-compliance with Clause 4.3(2) of CBLEP 2013.

(d) to ensure that buildings respond to the natural topography of the area.

As identified previously, the ground floor slab level to Victoria Road has been derived having regard to achieving a level transition at the corner of Victoria Road and Day Street for accessibility and streetscape purposes.

This has resulted in the northern part of the retail tenancy having a floor level which is below the level of the footpath.

This ensures an appropriate relationship with the natural topography of the area and ensures a single level ground floor level slab, which is important for retail uses.

The proposed development incorporates a 4.6m floor to floor height at ground floor level, so as to accommodate slab thicknesses, ducting and other services while maintaining sufficient clearance for a future retail use. The residential levels above all have 3.1m floor to floor height, so as to accommodate slab thickness, ducting and services, while achieving a minimum 2.7m floor to ceiling height, as required by SEPP 65.

To this end, the height of the proposal has been minimised as far as is possible, while achieving a suitable relationship with the public domain and the adjoining Tempo development to the north.

Having regard to the preceding discussion, it is considered that the proposal is consistent with objective (d) despite the non-compliance with Clause 4.3(2) of CBLEP 2013.

3.4.2 Objectives of the zone

The objectives of the B4 Mixed use 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.

The proposal will result in a shop top housing development that is permissible in the zone providing a variety of housing options that complies with Councils dwelling mix development standards as well as commercial premises floor area. The proposal avoids potential land use conflicts with the low density residential area to the west of the site, ensuring the land uses are compatible as is the proposed built form.

The range of uses and residential accommodation is in a location well serviced by public transport and modes of travel other than by private vehicle.

The proposal is consistent with the objectives of the zone.

3.5 *Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?*

The contravention is a local matter and does not raise any matter of state or regional significance. Council can assume the Secretary's concurrence under Planning Circular PS 18-003 issued on 21 February 2018.

3.6 *Is there public benefit in maintaining the development standard?*

Generally, there is public benefit in maintaining standards. However, there is also public benefit in maintaining a degree of flexibility in specific circumstances.

In this case, no public benefit would accrue in the circumstances of requiring strict numerical compliance with the Height of Buildings development standard when it has been demonstrated that, despite the numerical non-compliance, the proposed development will achieve consistency with the zone and height of buildings development standard objectives and afford a high quality communal open space amenity to future residents of the development.

3.7 *Is the objection well founded?*

Yes, the proposal is consistent with the objectives of the B4 Mixed Use zone and the Height of Buildings development standard.

It is considered that the objection is well founded in this instance and that granting an exception to the development standard can be supported in the circumstances of the case.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the Height of Buildings development standard.

The proposal accords with the stated objectives for the B4 Mixed Use zone and Clause 4.3 Height of Buildings development standard. The proposal is consistent with the scale and configuration of adjoining mixed use development and provides an appropriate transition to the low scale residential development to the west of the site. The overall development will have a positive outcome for the urban and landscape aesthetic of the locality. As such, it is considered that the proposal is consistent with the planning purposes for the area.

The proposal maintains an appropriate built form on the site and does not result in a building that is out of proportion or scale with surrounding existing and anticipated development. As demonstrated at Section 3.3 of this Statement, the proposal is consistent with the bulk and scale of surrounding development.

The resulting building height and form maintains existing privacy, solar access, and view sharing conditions for neighbouring properties.

It has been demonstrated that the proposal is of positive social and economic impact. The proposed building will provide housing and commercial premises in a well serviced location and consistent with the planning intent for the area.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses. In the context of the locality, it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader LGA, given the site circumstances and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the Height of Buildings development standard to be enforced. It is concluded that the variation to the Height of Buildings development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.