

# Appendix M





# Appendix M – Clause 4.6 Variation to Height of Buildings

## 1. Introduction

A variation pursuant to *clause 4.6 Exceptions to development standards* of Hurstville Local Environmental Plan, (HELP) 2012 is provided to justify the variation to the HOB development standard. This written request seeks a variation to a development standard under *clause 4.3 Height of Buildings*. Clause 4.3 is replicated below:

(1) *The objectives of this clause are as follows:*

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas and public domain, including parks, streets and lanes,*
- (c) *to minimise the adverse impact of development on heritage items,*
- (d) *to nominate heights that will provide a transition in built form and land use intensity,*
- (e) *to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,*
- (f) *to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,*
- (g) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.*

2. *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

In accordance with the Height of Buildings Map, the site has a maximum height limit of 10m. This is illustrated in Figure 1.



Figure 1. Height of Buildings

## 2. The Proposed Variation

The proposed variation to the development standard is in relation to Clause 4.3 Height of Buildings of the Hurstville LEP 2012. The variation is summarised below.

**Table 1: - Proposed Variation**

Hurstville LEP 2012 clause	Hurstville LEP 2012 Development Standard	Existing Height	Proposed Height	Proposed Variation from development standard
Clause 4.3 Height of Buildings	10 m	14.5 m	14.5 m	4.5 m

The site comprises an existing resource recovery facility. The existing buildings on the site have a maximum height of 14.5 metres as measured from existing ground level to the highest point of the proposed building. The proposed development replicates the height of the existing building and will have a maximum height of 10.4 metres to the ceiling and 14.5 metres to the pitch of the roof from the existing ground level (refer to Figure 2).

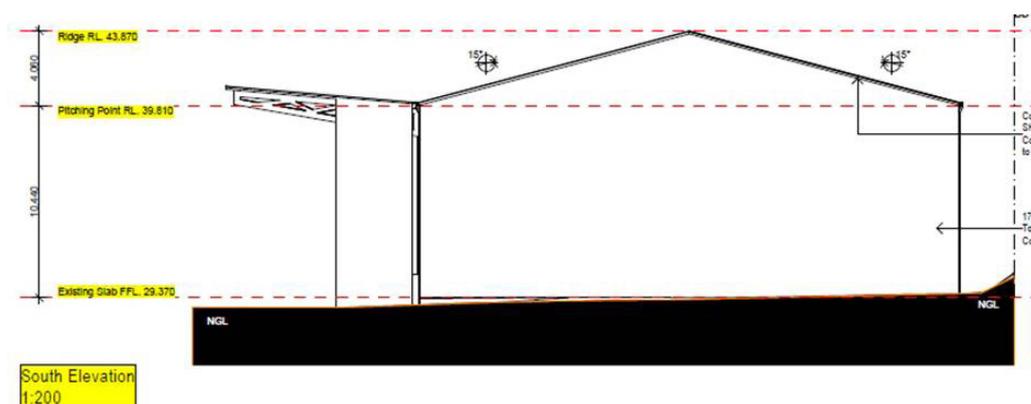


Figure 2. Section showing height of proposed development

## 3. Principles of Exceptions to Development Standards

Clause 4.6 of the Hurstville LEP, 2012 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be shown that flexibility in particular circumstances achieve better outcomes for and from development. It replaces SEPP 1. Subclauses (3), (4), (5) and (8) from clause 4.6 are extracted below:

- (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:*

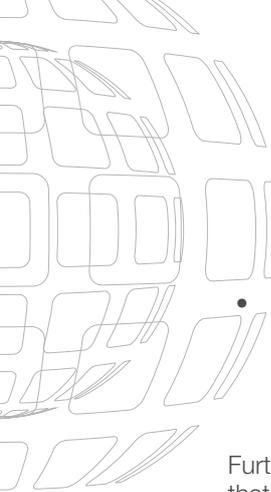
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- (a) *the consent authority is satisfied that:*
- (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) *the proposed development will be in the public interest because 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.*
- (5) *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.*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) *a development standard for complying development,*
  - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
  - (c) *clause 5.4.*

The NSW Government guidelines for varying development standards advises that clause 4.6 was modelled along the lines of State Environmental Planning Policy – Development Standards (SEPP 1). As such the principles for assessment and determination of applications to vary development standards are relevant. In this regard the decision of *Justice Lloyd in Winten v North Sydney Council* identifies the principles for which a SEPP 1 objection must be made. These are:

- *Is the planning control in question a development standard;*
- *What is the underlying object or purpose of the standard;*
- *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act;*
- *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- *Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and*
- *Is the objection well founded?*

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* has since expanded the considerations of a SEPP 1 objection and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- *Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;*
- *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
- *Would the underlying objective or purpose would be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- *Has Council by its own actions, abandoned or destroyed the development standard, by*



*granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*

- *Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.*

Further, the decision in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* indicates that showing that the development achieves the objectives of the development standard will be insufficient to justify that a development standard is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6, (and 4.6(3)(a) in particular) and the requirement in cl4.6(3)(b) to justify that there are sufficient environmental planning grounds for the variation, may require identification of grounds particular to the circumstances of the proposed development.

The following section addresses the local provisions of clause 4.6 of HLEP, 2012 together with principles of *Winten v North Sydney Council* and the relevant principles of the expanded 5 part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and the need to identify grounds particular to the circumstances of the proposed development as established in *Four2Five Pty Ltd v Ashfield Council*.

### 3.1 Is the Planning Control in question a development standard?

The planning control is a development standard affecting the height of buildings under clause 4.1 of the HLEP 2012. Council may consider the variation to the HOB as the site is not excluded from consideration under clause 4.6 (8).

### 3.2 What is the underlying objective of the Standard?

The objectives for the HOB development standard under HLEP, 2012 state the following:

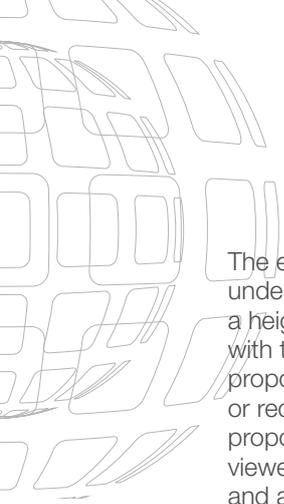
#### **Clause 4.3 Height of Buildings**

*(1) The objectives of this clause are as follows:*

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas and public domain, including parks, streets and lanes,*
- (c) to minimise the adverse impact of development on heritage items,*
- (d) to nominate heights that will provide a transition in built form and land use intensity,*
- (e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,*
- (f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,*
- (g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.*

The proposal is considered consistent with the objectives of Clause 4.3 for the following reasons:

- a. *to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties.*



The existing facility has been in operation for over 10 years and the existing structures are understood to predate the commencement of this use. The existing structures on the site have a height of 14.5 metres. The proposed development does not result in an increase in height, with the proposed new building having the same maximum building height as existing. The proposed development will not result in any additional visual impact, increase in overshadowing or reduction in solar access of adjoining industrial properties (i.e. there will be no change). The proposed development is consistent with other industrial uses within the precinct and will be viewed from Hearne Street against the backdrop of other industrial buildings of a similar scale and appearance.

*b. to ensure development is consistent with the landform.*

The proposal is thought to be consistent with the landform of the site. As the development seeks to utilise the existing building footprint the site layout has been designed in response to the landform within the site. This will allow for the most efficient use of the site.

In the context of the wider landform, the proposal will not be more prominent or intrude into the skyline in such a way which would suggest an inconsistency with the existing landform.

*c. to provide appropriate scales and intensities of development through height controls.*

The site is currently used as a resource recovery facility. As discussed above, the proposed development has an appropriate scale, matching that of existing structures on the site and consistent with the heights of other industrial buildings within the established precinct. Whilst the proposal seeks in part to increase the quantum of waste that can be processed at the facility, the proposal is not an over-intensification of the site and thereby requiring additional height to accommodate a larger facility. The proposed structure on the site is the same height of existing structures on the site and is set as a result of the size and dimensions of standard equipment to be used within the resource recovery facility.

*d. to nominate heights that will provide a transition in built form and land use intensity,*

The proposal is located at the centre of an existing industrial area. It is not in a transitional location where land use intensity or built form changes or are predicted to change. The proposal will remain consistent with the existing built form within the site and immediate locality. In this way the proposed variation remains consistent with this objective.

*e. to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,*

The proposal is not situated within or near the Hurstville City Centre and will have no impact on the desired urban form of this centre.

*f. to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,*

The proposal is located at the centre of an existing industrial area. It is not in a transitional location where land use intensity or built form changes. The proposal will remain consistent with the existing built form within the site and immediate locality. In this way the proposed variation remains consistent with this objective.

- g. to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

As the surrounding land uses are predominantly of a light industrial nature where the use of the land is unlikely to be affected by the height of the adjoining building, the proposed variation would not result in any change or increase in adverse environmental effects on adjoining properties. Furthermore, as the height of the proposed building remains consistent with the existing built form, the variation in height will not have any effect on the use or enjoyment of the public domain.

### Summary

Based on the above discussion it is evident that development would remain consistent with the relevant objectives of Clause 4.3 and consequently the underlying objective of the standard.

As such the proposed development is held to be consistent with the planning and environmental objectives of the development standard.

### 3.3 What is the numeric value of the development standard in the environmental planning instrument? What is proposed numeric value of the development standard in the development application? What is the percentage variation (between the proposal and the environmental planning instrument)?

The numerical value of the development standard and proposed numeric value is provided in Table 1 of this submission and represents a 45% variation to the development standard.

### 3.4 Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act

The objects set down in section 5(a) (i) and (ii) are as follows:

“(a) to encourage

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, 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...”

The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within an established urban environment and is presently used for industrial purposes. The proposed development involves a resource recovery facility which will, by nature of the use:
  - o assist in the proper management of urban land through accepting and processing a range of waste types;
  - o assist in reducing the footprint of urban areas through reducing demand for land to be used for land fill;
  - o reduce demand for natural resources such as water; soil, timber and hard rock;
- The development reflects orderly and economic use of the land insofar as that the proposed exception does not contribute to an unreasonable or quantifiable loss of amenity to adjacent land. The provision of a more efficient resource recovery facility capable of processing additional quantities of waste without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.



### **3.5 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

The proposed development will not result in any significant adverse environmental impacts to surrounding area. The proposed height of the development is generally consistent with the scale and nature of existing development within the site and is in keeping with development found within the surrounding industrial precinct. Strict compliance with the HOB development standard would not result in any real planning gain, would make no difference in terms of the proposal's environmental impacts (overshadowing, views or privacy) of which the proposed development does not raise any significant issue.

Based on the insignificant nature of impacts arising from the proposed variation, numerical compliance would not contribute to an improved outcome. As such it is considered that compliance with the development standards is neither reasonable nor necessary in the circumstances.

### **3.6 Is the development standard a performance based control?**

The development standard under Clause 4.3 is not a performance based control.

### **3.7 Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.**

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- The variation does not result in adverse amenity impacts on adjacent land;
- The variation would not result in a change in the height from the existing improvements within the site;
- The variation does not diminish the development potential of adjacent land;
- The variation does not impact on the function and usability of any public domain elements (public open space);
- The variation does not diminish the ability of adjoining land to function in a manner consistent with its intended purpose (light industrial).

### **3.8 Is the variation request well founded?**

The proposed exception to the HOB development standard will, in part, facilitate the delivery of a more efficient resource recovery facility. This presents a positive environmental planning outcome and indicates that the variation request is well founded.

As outlined in section 3.2, the development is consistent with the objectives of the development standard. Moreover, the proposal is consistent with the aims of the policy in allowing flexibility in the application of development standards where to require compliance would hinder the objectives. Compliance under these circumstances would not improve the outcome. Rather it would likely result in a reduction in the processing efficiency and capacity of the facility resulting in an underutilisation of the land.

### **3.9 Would non-compliance raise any matter of significance for State or Regional Planning?**

The non-compliance will not raise any matter of State or Regional Significance. Supporting the proposed variation will assist in the delivery of a resource recovery facility that will play role in meeting waste reduction targets across metropolitan Sydney, and will ultimately support the



objectives of A Plan For Growing Sydney,

### **3.10 Is there a public benefit of maintaining the planning control standard?**

The proposed exception to the HOB development standard will, in part, facilitate the delivery of an efficient resource recovery facility with increased operating capacity. As articulated in the EIS such facilities are becoming critical to meeting waste reduction requirements across metropolitan Sydney.

The development is considered to offer a positive environmental outcome (social, economic or biophysical). In particular the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Based on the above and the matters outlined in this written request there is considered to be no public benefit in maintaining the planning control standard.

#### **4. Conclusion**

The development exceeds the permissible HOB by 4.5 metres (45%). The proposed height of the development, remains consistent with the height of existing improvements within the site and thus is not considered to be out of keeping with established industrial development found in the immediate locality. 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, as the height and scale of the proposed development is compatible with surrounding existing and likely future development. Furthermore the development, as demonstrated in the EIS, is consistent with Council's key development objectives for the IN2 – Light Industrial Zone and the overarching objectives of the NSW Waste Avoidance and Resource Recovery Strategy.

On the basis of reasons provided within this written request it is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.