



93 -107 Cecil Avenue and 9-10 Roger Avenue, Castle Hill

Clause 4.6 – Clause 7.18
Development Standard

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**93 -107 CECIL AVENUE AND 9-10 ROGER
AVENUE, CASTLE HILL**

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Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST – CLAUSE 7.12

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 7.18(2) of The Hills Local Environmental Plan 2019 (THLEP), being a cap of 460 dwellings for the subject site.

The request relates to State Significant Development Application No. 78156221 (SSDA) for the purposes of a mixed use development comprising 8,025 square metres of commercial premises and 615 apartments (including 169 affordable housing apartments) at 93-107 Cecil Avenue and 9-10 Roger Avenue, Castle Hill. (the site).

1.2 Background

The site has been the subject of a Planning Proposal with Gateway Determination granted on 2 November 2016 and gazettal on 17 July 2020 to facilitate a mixed use, multi-storey development on the subject site comprising 460 dwellings and at least 8,025m² of commercial floor space.

The key amendments to The Hills Local Environmental Plan 2012 were:

- Rezoning the site from R3 Medium Density Residential and R1 General Residential to B4 Mixed Use;
- Removing the maximum building height applicable to the site;
- Applying a 'base' floor space ratio of 1:1 across the entire site and an 'incentivised' floor space ratio of 3.5:1 across the entire site.
- Maximum of 460 dwellings.
- A minimum of 8,025 square metres of commercial floor space.

The Planning Proposal also culminated in a site specific Part D Section 21 of The Hills Development Control Plan which establishes land use and built form controls for the site.

Finally, the site is subject to an executed Voluntarily Planning Agreement to secure the provision of additional local infrastructure to support the proposed residential yield on this land. The core elements of the Voluntary Planning Agreement are:

- grant a public right of way easement for the benefit of the Council over the Land connecting Cecil Avenue to Roger Avenue and public plaza to Cecil Avenue; and
- provision of works embellishing the easement.

1.3 Proposal

The proposed development the subject of this SSD application provides a stepped built form which reflects the site specific DCP site layout and building envelopes, as well as the NSW State Government incentivisation for the delivery of affordable housing under SEPP Housing, and is for the following works:

- Demolition of existing buildings.
- The staged construction of four, mixed use buildings above two levels of basement car parking.
- The development has a height of 25 and 20 storeys facing Cecil Avenue. The scale of the development gradually reduces to 12-13 storeys to Roger Avenue. A 6-storey building is located on the western side of the site, adjacent to the site of a heritage item. A 5-storey building is located on the eastern side of the site to provide a transition in scale to the lower density residential development to the south-east along Cecil Avenue.

- The development incorporates 8,025 square metres of non-residential uses on the ground floor, upper ground, Level 1 and Level 2. The non-residential uses include retail premises and office premises.
- A total of 615 apartments are proposed, including 169 (15%) affordable apartments. The proposed unit mix and sizes of the entire development will comply with the requirements of clause 7.11 of THLEP.
- The vehicular entry for residential, visitor, commercial parking and service vehicle parking is from Cecil Avenue.
- The proposal includes a through site link to connect Cecil Avenue with Roger Avenue.
- The built form incorporates extensive landscaping on the ground floor plane within each street setback, within the through site link and on roof tops. The landscaping is designed to soften the building form, create a green outlook for apartments and a higher level of amenity for residents, provide quality communal spaces, connect the built form with the surrounding natural environment, and improve the environmental performance of the building.

1.4 Objectives of the development

The objectives of the development are:

- Deliver a development which balances the vision for the site as established through the Planning Proposal process, whilst taking up the NSW State Government incentivisation for the delivery of affordable housing in a manner that minimises impact to surrounding properties.
- Deliver a significant number of affordable housing dwellings on the site to assist in relieving the shortfall of affordable dwellings in the local government area. The quantum of affordable housing floor space proposed is consistent with the percentage of affordable housing that is incentivised by the provisions of Chapter 2, Part 2, Division 1 of SEPP (Housing) 2021. The SEPP permits additional floor space of up to 30%, where 15% of the total floor space is provided as affordable housing. Approximately 15% of the total floor area or 169 apartments will be affordable housing, managed by a registered community housing provided for at least 15 years.
- Deliver a significant component of commercial floor space to contribute to the diversity of uses within the Castle Hill Strategic Centre and to provide employment opportunities in the area surrounding the commercial core.
- Deliver a vibrant high density residential development within an accessible area in Castle Hill.
- Maximise the supply and diversity of higher density housing close to transport, education, employment, recreation space and entertainment facilities.
- Achieve design excellence with a high-quality built form outcome that will contribute positively to the emerging character of the precinct and maximise the amenity for residents.
- Deliver a unit mix that meets local demand and responds to the local demographics and consistent with Clause 7.11 of THLEP.

1.5 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the THLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the THLEP, or any other environmental planning instrument.

However, clause 4.6(3) goes on to say that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant of the SSDA requests that the development standard at cl 7.18(2) of the THLEP relating to a cap of 460 dwellings be varied.

1.6 Development Standard to be varied

Clause 7.18 Provisions, states:

- (1) This clause applies to land at 93-107 Cecil Avenue and 9 and 10 Roger Avenue, Castle Hill (the **subject land**), being—
 - (a) Lots 20 and 27, DP 15399,
 - (b) Lots 1 and 4, DP 531559,
 - (c) Lots 1 and 2, DP 547897,
 - (d) Lots 1-4, DP 581293,
 - (e) Lots 1 and 2, DP 591676,
 - (f) Lots 5 and 6, DP 705913,
 - (g) Lots 21 and 22, DP 778595,
 - (h) Lots 5 and 6, DP 29141.
- (2) Development consent must not be granted to development that results in more than 460 dwellings on the subject land.
- (3) Development consent must not be granted to development that results in less than 8,025 square metres of commercial floor space on the subject land.

The provision in Clause 7.18(2) is considered to be a development standard and not a prohibition in accordance with the two step test as set out in the judgment of *Strathfield Municipal Council v Poynting* [2001] NSWCA 270 (Poynting). In particular, the two step test is:

- (a) Firstly, a consideration of whether the proposed development is prohibited under any circumstances — when it is read both in context of the THLEP and as a whole.
- (b) Secondly, if it is not so prohibited, a consideration of whether clause 7.18(2) of THLEP specifies a requirement — or fixes a standard — in relation to an aspect of the proposed development.

In relation to the first test, in considering cl 7.18(2) of the THLEP “as a part of the environmental planning instrument as a whole” (Poynting at [94]), there is no complete prohibition of a development with dwellings. Accordingly, the Proposed Development with additional dwellings passes the ‘first step’ in the Poynting two-step test. In relation to the second test, clause 7.18(2) of THLEP does fix a standard being a cap of 460 dwellings on the subject site. Accordingly, the requirement of clause 7.18(2) of the THLEP is a development standard.

1.7 Extent of Variation to the Development Standard

The proposal seeks to take up the incentivised increase in FSR provided by Clause 16 of SEPP Housing in exchange for the provision of 15% of the floor space as affordable housing and accordingly provides 615 apartments which exceeds the 460 apartments by 155 or 33.69%

1.8 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 **which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.**

In addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

There are no objectives for Clause 7.18 of the THLEP.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

There is no expressed underlying objective or purpose of the 460 dwelling cap for the site. However, it can be reasonably assumed that the underlying objective was to reflect the density of development of 3.5:1 FSR provided in the Planning Proposal.

However, the incentive provisions within SEPP Housing came into effect on 15 November 2023 which was after the introduction of Clause 7.18 into THLEP on 17 July 2020. Therefore, the dwelling cap was introduced at a time when it was not possible to anticipate the bonus FSR permitted by SEPP Housing.

The incentivised FSR provided by Clause 16 of SEPP Housing is 4.55:1.

As SEPP Housing effectively provides a different FSR for the site, the underlying objective of the 460 dwelling cap (to reflect an FSR of 3.5:1) is not considered to be relevant to the proposed development, which seeks to take up the incentivised FSR of 4.55:1 in exchange for the provision of 15% of the floor space of the development as affordable housing.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives and purpose of the standard, to reflect the density of development of 3.5:1 FSR provided in the Planning Proposal, would not be thwarted by the development.

Rather, as discussed above, the underlying objective and purpose of the standard is not relevant to the proposed development.

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;**

The development standard has not been abandoned on the subject site.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The zoning of the land is appropriate because it permits residential flat development as well as shop-top housing and commercial development.

Key facts that support the above reasons why strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- SEPP Housing includes specific provisions for increased density in exchange for the inclusion of affordable housing, precisely to incentivise the delivery of additional market and affordable housing. In this instance, all of the additional apartments (and some of the 460 cap) are affordable housing apartments. Strict application of the 460 dwelling development standard would profoundly constrain the application of SEPP Housing and the incentive for providing affordable housing on the site, which result in the direct loss of 169 affordable housing apartments on the site.
- The incentive provisions within SEPP Housing came into effect on 15 November 2023 which was after the introduction of Clause 7.18 into THLEP on 17 July 2020. Therefore, the dwelling cap was introduced at a time when it was not possible to anticipate the bonus GFA permitted by SEPP Housing.
- The site is within close proximity to the Castle Hill Metro Station and the Castle Hill centre and therefore is ideally located to accommodate additional dwellings.
- The site has been demonstrated to have the environmental capacity to absorb the additional density resulting from the departure from the dwelling cap. In particular, the additional density does not result in any unacceptable traffic impact, and the development has been carefully designed to minimise adverse impacts to the adjacent sites by maintaining the same scale at the eastern and western site interfaces. The shadow impact is acceptable with surrounding properties still enjoying at least 3 hours solar access in mid winter.
- The development achieves an appropriate contextual fit which is compatible with the future adjoining development and the future streetscape, notwithstanding the dwelling non-compliance

1.9 [Clause 4.6\(3\)\(b\) Are there are sufficient environmental planning grounds to justify contravening the development standard?](#)

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance allows for an additional 155 apartments, all of which are affordable housing. The environmental planning grounds that justify the non compliance to the control at 7.18(2) of the THLEP are the same as those provided above in relation to demonstrating that strict compliance is unreasonable and unnecessary. For completeness, they are provided below:

- The underlying objective and purpose of the standard, to reflect the density of development of 3.5:1 FSR provided in the Planning Proposal, is not relevant to the proposed development because it seeks to take up the incentive to provide affordable housing within the development as provided by Clause 16 of SEPP Housing.
- SEPP Housing includes specific provisions for increased density in exchange for the inclusion of affordable housing, precisely to incentivise the delivery of additional market and affordable housing. In this instance, all of the additional apartments (and some of the 460 cap) are affordable housing apartments. Strict application of the 460 dwelling development standard would profoundly constrain the application of SEPP Housing and the incentive for providing affordable housing on the site, which result in the direct loss of 169 affordable housing apartments on the site.
- The incentive provisions within SEPP Housing came into effect on 15 November 2023 which was after the introduction of Clause 7.18 into THLEP on 17 July 2020. Therefore, the dwelling cap was introduced at a time when it was not possible to anticipate the bonus GFA permitted by SEPP Housing.
- The site is within close proximity to the Castle Hill Metro Station and the Castle Hill centre and therefore is ideally located to accommodate additional dwellings.
- The site has been demonstrated to have the environmental capacity to absorb the additional density resulting from the departure from the dwelling cap. In particular, the additional density does not result in any unacceptable traffic impact, and the development has been carefully designed to minimise adverse impacts to the adjacent sites by maintaining the same scale at the eastern and western site interfaces. The shadow impact is acceptable with all surrounding properties still enjoying at least 3 hours solar access in mid winter.
- The development achieves an appropriate contextual fit which is compatible with the future adjoining development and the future streetscape, notwithstanding the dwelling non-compliance.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed variation in this instance

1.10 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council [2019] NSWCA 130*).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* at [15].

These matters are comprehensively addressed above in this written request.

1.11 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Objective of the Development Standard

There is no objective for the development standard.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To encourage leisure and entertainment facilities in the major centres that generate activity throughout the day and evening.
- To provide for high density housing that is integrated with civic spaces.

The proposed development provides a mixture of compatible uses comprising commercial and residential apartments above and will contribute to the vibrancy of the area. The current site circumstance does not contribute positively to the location and the proposed development will deliver a new facility for commercial activity and employment. The additional residential density on the site will also contribute positively to patronage and success of the commercial tenancies on the subject and the nearby Castle Hill centre.

The nature of the future commercial uses on the site are unlikely to result in any adverse impact to the operation of existing surrounding uses, the amenity of nearby residents, and will not have an unacceptable impact to the performance and operation of the surrounding road network.

The architecture of the development with buildings addressing the street frontages and the through site link, combined with ground floor commercial tenancies will result in activated and vibrant places that are used both during the day and evening, increasing safety. For the reasons given the proposal is considered to be consistent with the objectives of the MU1 Mixed Use zone

The above discussion demonstrates that the Proposed Development will be in the public interest notwithstanding the proposed variation to the development standard in Clause 7.18(2), because it is consistent with the objectives for development within the zone in which the development is proposed to be carried out. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component. In fact, there is a profound public benefit in varying the development standard because it facilitates the delivery of 169 affordable housing apartments on the subject site.

1.12 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) of the standard instrument local environmental plan are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The Proposed Development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

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

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

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.13 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

As demonstrated above the proposal is consistent with the objectives of the zone notwithstanding the proposed variation to the development standard.

Requiring strict compliance with the development standard on the subject site would merely result in a significant loss of affordable housing which has been demonstrated to be within the environmental capacity of the site.

Allowing the flexible application of the development standard in this instance is not only reasonable but also desirable as it will facilitate the delivery of additional housing choice in an ideal location..

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the development standard will support a better social outcome in this instance in accordance with objective 1(b).

1.14 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the development standard contained within clause 7.18(2) of the THLEP is unreasonable and unnecessary in the circumstances of the case and as such, there are sufficient environmental planning grounds to justify the variation.

Finally, the proposed development is in the public interest because it is consistent with the objectives for development within the zone.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the THLEP as:

- The underlying objective and purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- Consistency with the objectives of the zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard and on the contrary there is a significant public benefit as a result of the proposed variation.

In this regard it is reasonable and appropriate to vary the development standard to the extent proposed.