



Clause 4.6 – Exceptions to Development Standards – Height of Buildings (Cl. 4.3)

Address: 50 Honeysuckle Drive, Newcastle

Proposal: Mixed use commercial/residential development.

1.0 Introduction

This is a written request to seek an exception to a development standard under Clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan (NLEP) 2012.

The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the NLEP.

This application has been prepared in accordance with the NSW Department of Planning and Environment (DP&E) guideline, *Varying Development Standards: A Guide*, August 2011, and has incorporated as relevant the latest authority on Clause 4.6, contained 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;* and
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7.*

The following sections of this written request demonstrate that the proposed development addresses the principles identified in the above judgements.

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 Newcastle Local Environmental Plan (NLEP) 2012.

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 B4 Mixed Use zone are as follows:

- 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; and
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

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 NLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in Subclause 4.3(1)(a) to (e), and are reproduced below:

- “(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
- (b) to allow reasonable daylight access to all developments and the public domain.”*

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

Clause 4.3(2) establishes a maximum height of buildings for the site. The site the subject of the variation request has a maximum permissible height of buildings of 14.0m to 24.0m for the site, in accordance with the Height of Buildings Map below in Figure 1.

Maximum Building Height (m)

I	8.5
K	10
L	11
M	12
N	14
P1	17
P2	18
P3	20
S	24
T	27
U	30
V	35
X	45
AA	60
AB	90

Maximum Building Height (RL)

	49.1
	54.5
	58.9

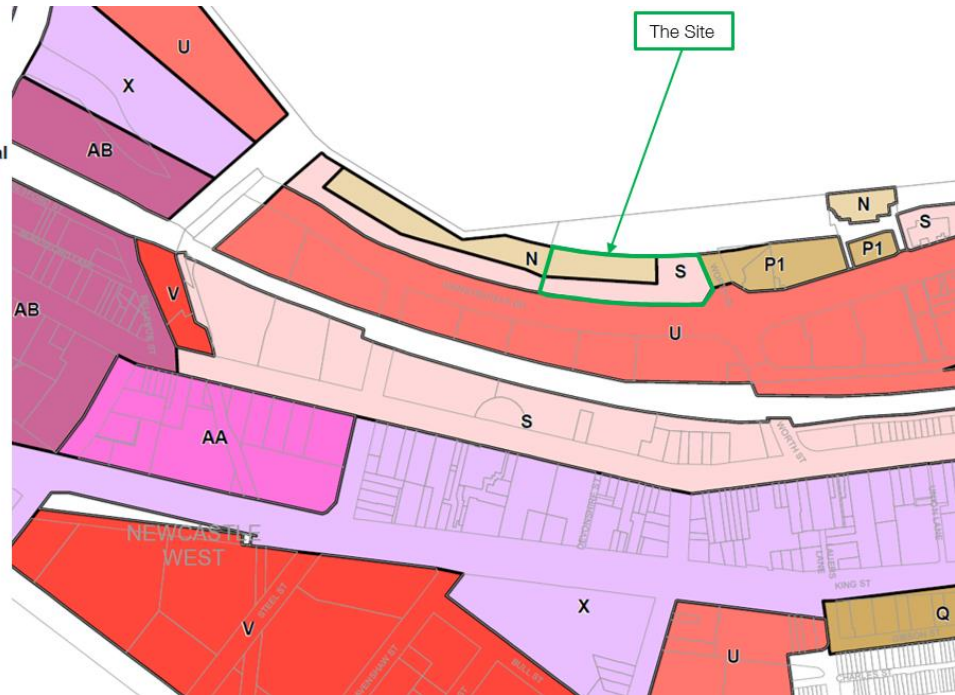


Figure1: Extract from Height of Buildings Map – NLEP 2012

2.9 What is the proposed numeric value of the development standard in the development application?

The amended development proposes the following heights:

Proposed Building	Control	Proposed Height	Compliance	Variation	% Varied
Building A (West)	14m	Terraces (Roof parapet – 7.4m / RL9.50)	Yes	N/A	N/A
		Apartments (Pergola main roof – 26.11m / RL28.38)	No	12.11m	86%
	24m	Apartments (Main roof – 22.5m/RL25.30)	Yes	N/A	N/A
		(Lift overrun – 26.98m / RL29.60)	No	2.98m	12%
Building B (Central)	14m	Terraces (Roof parapet – 7.4m/RL9.50)	Yes	N/A	N/A
		Apartments (Main roof – 22.5m/RL25.30)	No	8.5m	60%
	24m	Apartments (Main roof – 22.5m RL25.30)	Yes	N/A	N/A
		(Lift overrun – 25.91m / RL28.6)	Yes	1.91m	8%

Proposed Building	Control	Proposed Height	Compliance	Variation	% Varied
Building C (East)	24m	Terraces (Roof parapet – 7.4m / RL9.50)	Yes	N/A	N/A
		Apartments (Main roof – 23m RL25.70)	Yes	N/A	N/A
		(Lift overrun – 27.28m / RL29.60)	No	3.28m	14%

Table 1: Proposed heights for the development

Table 1 demonstrates the degree of non-compliance with the relevant height controls which, at the same time, identifies the degree that the proposal is below the height controls for other portions of the building. A visual representation of the above mentioned exceedance of the 14m and 24m maximum building height controls and wherer the building is below the height limit is demonstrated in Figure 2 below.

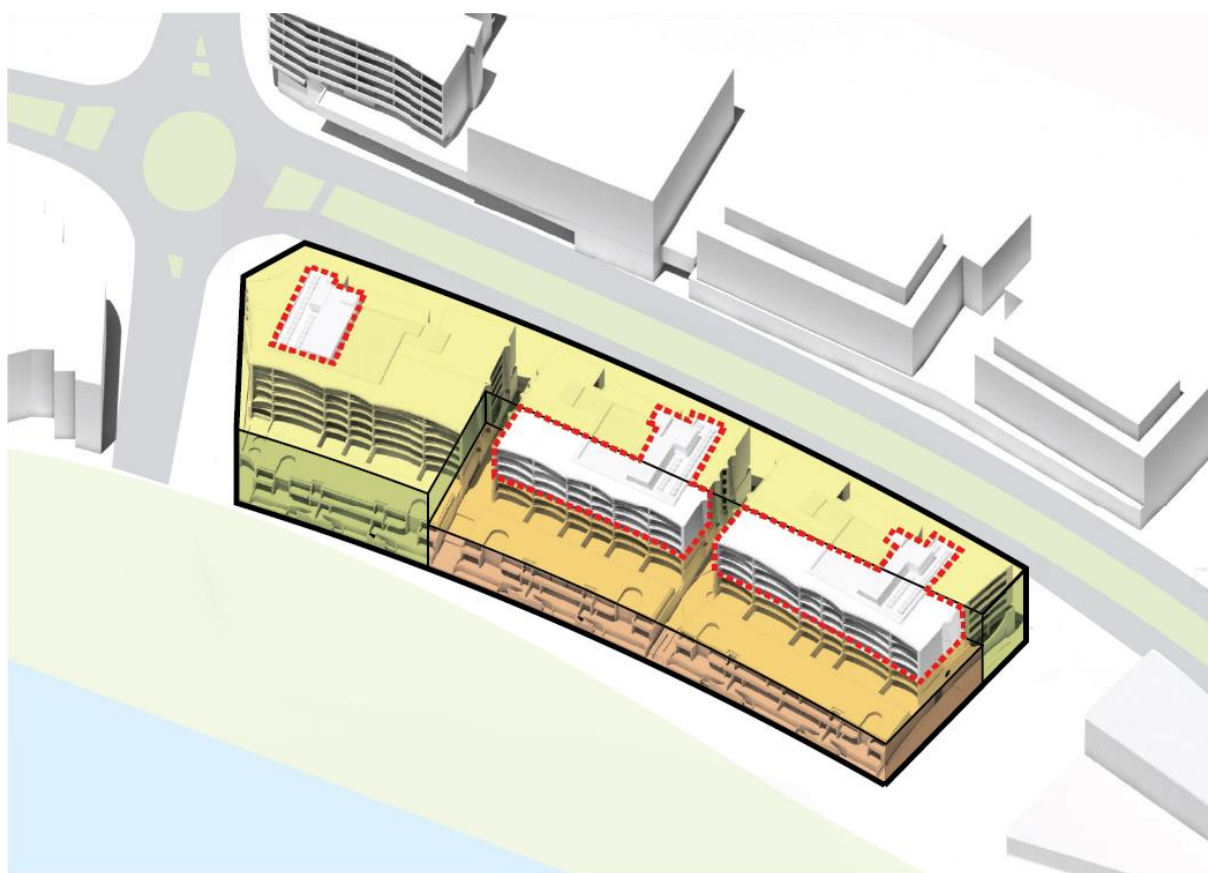


Figure 2: Diagram of height of building non-compliance to the 14m and 24m height controls outlined in red.

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

The amended proposal in part exceeds the maximum height of building development standard of 14m by 86% to the central and western portions of the site resultant from the inclusion of communal roof terraces and associated pergola structures. In addition, the amended proposal in part exceeds the maximum height of building development standard of 24m by 60% to the central portion of Building B.

It is noted that the building has been designed to accommodate the flood planning level of RL3.40 for the site. Given the proposed stepping of the building from seven (7) to two (2) storeys from Honeysuckle Drive to Worth Place Park, the non-compliance with the 14m maximum building height control is predominantly restricted to the central and west portion of the site i.e. away from Honeysuckle Drive. Furthermore, the exceedance of the 24m height control through the central portion of the site is directly attributable to the provision of communal open space at main roof level.

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 and Environment (DP&E) guideline *Varying Development Standards: A Guide*, August 2011, 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;* and
- *Randwick City Council v Micaul Holdings Pty Ltd v [2016] NSWLEC 7.*

3.2 Is compliance with the development standard 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 building development standard of 14m is unreasonable or unnecessary in this circumstance for the following reasons:

- The non-conforming element of the amended proposal is located within the central portion of the site and facilitates the built form transition encouraged by the height of buildings development standard;
- The non-compliance to the building height development standard does not result in additional development potential rather facilitates the accommodation of the FSR on the site in a manner that achieves superior urban outcomes as well as superior amenity outcomes by facilitating the inclusion of communal open space at main roof level;
- The form and scale responds to the broader context of the site and the high density form that has emerged as the locality has transitioned from an industrial precinct to a mixed use residential commercial precinct;
- A strictly compliant development would fail to maximise the housing contribution of the site in a locality that has been specifically planned to accommodate housing to the density proposed and which is well served by public transport services in an easy walkable distance; and
- The numerical non-compliance is a result of the overriding imperative to seek consistency with the apartment amenity considerations required by the provisions of SEPP 65 Design Quality of Apartment Development which is a higher level Environmental Planning Instrument than the LEP which contains the height of buildings development standard.

A development that strictly complied would result in an impeded built form and a less articulated response to the site constraints. Specifically, a compliant design would not respond to as well to the foreshore setting of the site, and importantly would fail to achieve the level of residential amenity achieved by the amended proposal, which features communal open space at main roof level.

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

Compliance with the objectives of the 14m and 24m height of building standards would be thwarted if strict compliance with the standard was required, as this would then prevent the condition of the site being improved through the construction of a mixed use development comprising a communal open space via roof top terraces and associated lift access within the Honeysuckle Precinct.

A development that strictly complied with the standard would likely result in an inferior urban design response to the site. The amended proposal is considered superior to a compliant development design through the design response that seeks to vary the development standard to facilitate the inclusion of communal open space at main roof level. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Worth Place Park whilst providing articulation and through site links. Furthermore, exceedance of the height control would not be visible from Honeysuckle Drive frontage to the south.

As such, strict compliance with the 14m and 24m height controls would thwart the intention to ensure that the scale of development proposed makes a positive contribution towards the desired built form of the Honeysuckle Precinct and wider city centre.

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

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located immediately northward of 18 Honeysuckle Street (nine (9) storeys) and 22 Honeysuckle Street which have maximum building heights of nine (9) storeys and seven (7) storeys. As such, the proposed height of two (2) storeys to Worth Place Park West and seven (7) storeys to the rear of the site is a direct response to the higher buildings to the south and the foreshore setting to the north; whilst maintaining a desire to provide high levels of amenity for future occupants of the site by way of roof top open spaces including lift overruns and associated safety measures.

3.2.4 *Is the zoning of the land unreasonable or inappropriate?*

The zoning of the land is reasonable and appropriate given the sites location in the Honeysuckle Precinct, which is undergoing transition from an industrial area to a high density mixed use area.

3.3 *Are there sufficient environmental planning grounds to justify contravening the development standard?*

It is considered that there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts;
- As outlined in Section 3.2, a variation to the standard is required to support a viable development on the site. The proposal provides a high density apartment building that is appropriate for the sites location and current/future setting within a mixed use zone in the Honeysuckle Precinct;
- The proposal does not give rise to unacceptable impacts associated with an increased maximum building height, including greater intensity of development, traffic generation or bulk and scale; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Newcastle Development Control Plan (NDCP) 2012.

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 Building Development standard outlined in Subclause 4.3(1) despite the non-compliance. This is demonstrated in the assessment of the objectives relating to the Height of Buildings:

“(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,”

The proposed configuration responds to the environmental and planning objectives whilst considering and adapting to the context; specifically, the seven (7) to nine (9) storey buildings to the southern side of Honeysuckle Drive; the 24m maximum height control to the rear of the site and the foreshore setting to the north. The proposed development's built form steps down from seven (7) storeys to two (2) storeys from the rear towards Worth Place Park West to provide an appropriate transition to the streetscape.

The configuration of the proposed development has allowed for the provision of three (3) buildings with narrower floor plates. This facilitates the delivery of two (2) through-site links whilst providing for greater amenity for future residents under SEPP 65 and maintaining key view corridors to the Hunter River foreshore. The non-compliance to the 24m height control predominantly relates to the provision of roof terraces and associated lift / stair access and safety requirements and the recessed siting of the roof additions ensures an appropriate level of view sharing is maintained. As such, it is considered the proposed development which has been subject to exhaustive urban analysis would make a positive contribution to the existing built environment by providing a transition in building heights appropriate for the existing planning controls and existing buildings within the locality.

“(b) to allow reasonable daylight access to all developments and the public domain.”

The solar access analysis has demonstrated that the proposed building, including the portions of the building that are non-compliant with the height control, do not result in adverse solar access impacts on surrounding existing or potential future development. The building orientation and layout ensures that the Worth Place Park West and future potential development to the west will have excellent access to daylight and sunshine. Development to the west of the site will be separated by a future new access link to the Foreshore.

The proposed building and resulting building height does not result in adverse impacts upon the amenity, sky exposure or daylight access to key public domain areas or public open space areas.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use Zone despite the non-compliance with the 14m and 24m height of buildings development standard. This is demonstrated in the assessment of the zone objectives below:

“To provide a mixture of compatible land uses.”

- The proposed development will feature commercial/retail units at ground floor level accessed directly from Honeysuckle Drive and Worth Place. In addition, the proposal increases the supply of residential accommodation in an area of mixed uses that affords the diverse range of opportunities for business, entertainment and community uses within the Honeysuckle Precinct.

“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 proposed development proposed for commercial/retail and residential development in a highly accessible location noting the sites proximity to existing pedestrian and cycle links, bus stops and the future light rail infrastructure within Newcastle City Centre.

“To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.”

- The development site is located within easy walking distance of established and emerging business development within the Honeysuckle Precinct and the wider Newcastle City Centre. The proposed mixed use development is considered to support the viability of the commercial centre given the inclusion of a significant residential component.

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

The contravention of the development standard in this case does not raise any issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objectives set down in Section 5(a)(i) and (ii) are as follows:

“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 coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally, and in that sense, it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally, maintains the scale and density of recently approved buildings.

The development as proposed is consistent with the provisions of orderly and economic development, and strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.7 Is there public benefit in maintaining the development standard?

In the circumstances, there is public benefit in maintaining standards; however, there is also a public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height of buildings development standard applying to the site would preclude the delivery of high amenity apartments as required by SEPP 65. The design proposed achieves a public benefit for the future residents in providing high quality residential amenity and to the broader public through the efficient use of quality urban land that is well served by public transport and the resulting positive contribution to the public domain.

A strictly numerically complying development would result in a less interesting urban response to the locality and a less articulated building. Importantly, a numerically compliant building would achieve a poorer residential amenity outcome and would forgo the opportunity to maximise the housing opportunity for the site taking advantage of the superior urban attributes of the site and locality.

3.8 Is the objection well founded?

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance, and that granting an exception to the development can be supported in the circumstances of the case.

The development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and the development will satisfy the B4 Mixed Use Zone objectives and the objectives of the Clause 4.3 Height of Buildings development standard.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result for the locality by restricting building height to 14m and 24m within the central and western portion of the site. It has been demonstrated that the proposal will promote the social and economic welfare of the community and will have positive outcomes for the environment.

4.0 Conclusion

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

The amended proposal will not result in unacceptable impacts with regard to the amenity of surrounding properties. The overall aesthetic appearance and scale of the development is that of a mixed use form that is compatible with the typologies in the surrounding area.

The amended proposal accords with the stated objectives for the B4 Mixed Use zone and the Clause 4.3 Height of Buildings development standard. The additional height does not contribute to significant adverse amenity impacts by way of overshadowing or privacy impacts and does not result in a building that is out of proportion or scale with surrounding existing and anticipated development.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses but would detrimentally impact upon the amenity of the proposed development. 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 City of Newcastle local government area given the site considerations and surrounding pattern of development including flood levels for habitable floors.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.