



# CLAUSE 4.6 VARIATION REQUEST

62 MYOORA ROAD,  
TERREY HILLS

25 August 2023

Amended 1 April 2024

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## 1.0 INTRODUCTION

- 1.1 This amended Clause 4.6 request supports the variation to the Height development standard pursuant to Clause 4.3 of Warringah LEP 2011.
- 1.2 The subject site is zoned RU4 Primary Production Small Lots under Warringah LEP 2011.
- 1.3 Clause 4.3 of the LEP relates to height. The accompanying map specifies a maximum height of 8.5 metres.
- 1.4 Clause 4.6 allows for the contravention of a development standard with approval of the consent authority.
- 1.5 The request is structured to address the requirements of Clause 4.6 and in reference to the following Land and Environment Court judgements:
  - *Wehbe V Pittwater Council NSW [2007] LEC 82*
  - *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
  - *Randwick City Council v Micaul Holdings [2016] NSWLEC 7*
  - *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018*

## 2.0 CLAUSE 4.6 VARIATION REQUEST

### Standard to be varied

- 2.1 Clause 4.3 of the LEP relates to height. The accompanying map specifies a maximum height of 8.5 metres.

### Extent of Variation

- 2.2 As amended, the extent of variation has been reduced from the original DA submission. As amended the proposed buildings seek to vary the height control as follows:

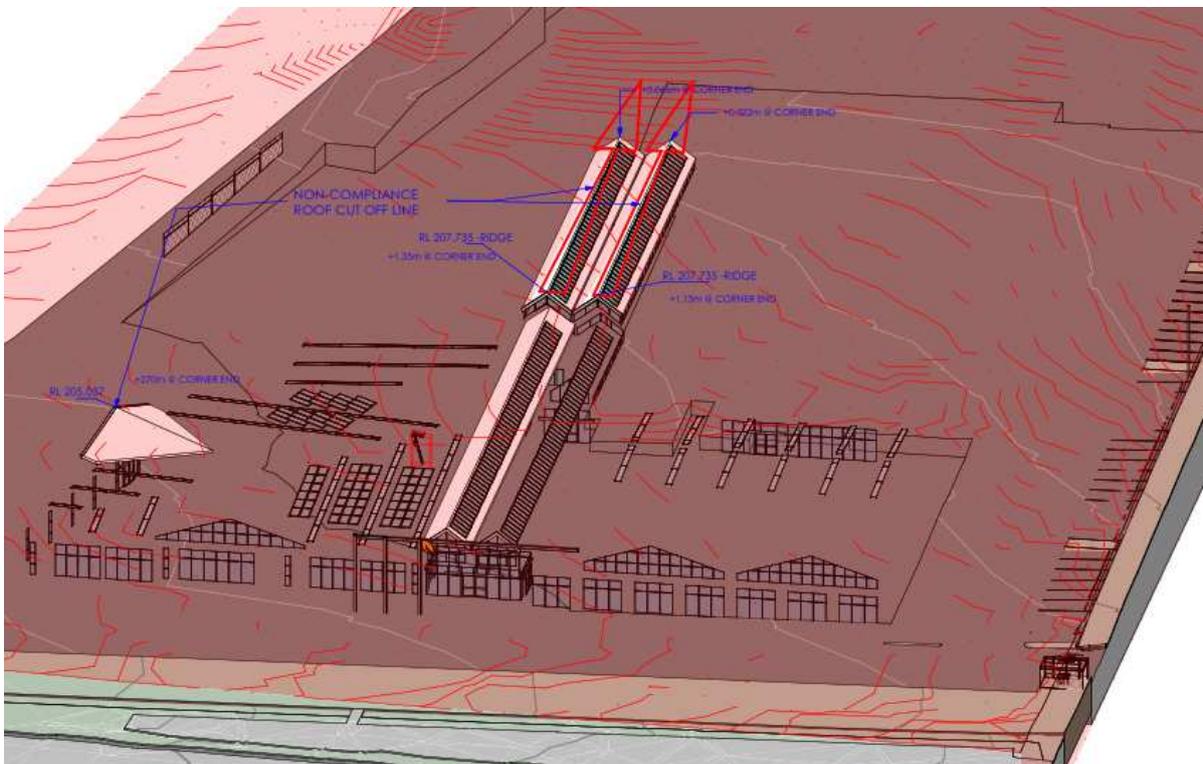
#### Central Building Western Ridge (above café and outdoor seating)

- Maximum variation of 1.35m to the eastern end of the ridge gable end, reducing to full compliance at the western end.

#### Corner ridge of Pet Shop

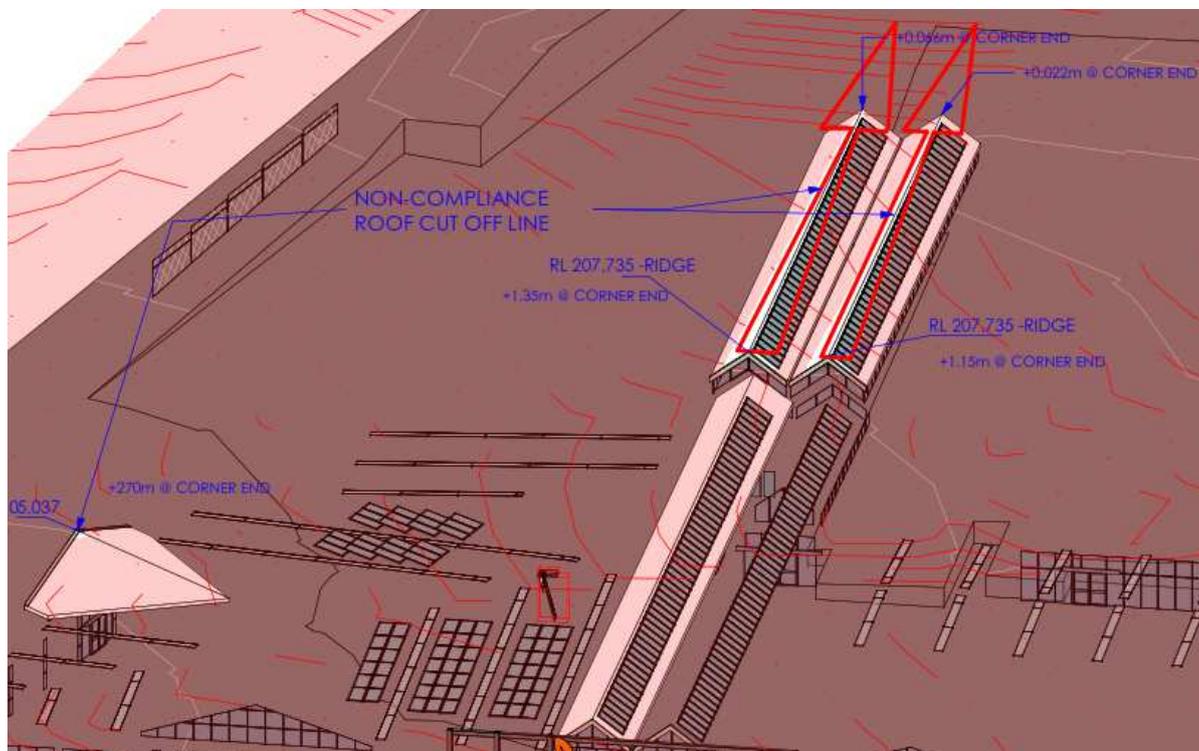
- Maximum variation of 270mm to the ridged gable end. The remainder of the roof complies.

- 2.3 Majority of the buildings will comply with and be significantly lower than the 8.5m height maximum, the height controls are shown below. (Exceedance shown in white and highlighted in red outline):



Source: Leffler Simes Architects – Drawing No. DA19 Rev. G

- 2.4 The following extract provides a larger scale of the non-compliant areas shown in white above (height is shown as either + or – relative to the height control of 8.5m):



Source: Leffler Simes Architects – Drawing No. DA19 Rev. G

- 2.5 As shown above, the majority of the site will be below the 8.5m LEP height maximum, with height exceedances towards the ridgeline of the central building, being setback significantly from the three street frontages. The minor variation to the pet shop is negligible.

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

- 2.6 The proposed variation to the height control is assessed with consideration to the principles established by the Land and Environment Court in *Wehbe V Pittwater Council [2007] NSW LEC 82*. His Honour Preston CJ set out 5 ways of establishing that compliance with the standard is unreasonable or unnecessary. The 5 parameters were further tested in *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC 90* where Justice Pain found that meeting the objectives of the standard was not sufficient to demonstrate that compliance was unreasonable or unnecessary.
- 2.7 In *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSW LEC 7*, it was held that *'establishing that the development would not cause environmental harm and is consistent with the objectives of the development standard is an established means of demonstrating compliance with the development standard is unreasonable or unnecessary'*.
- 2.8 In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSW LEC 2018* Preston CJ held that *'an applicant does not need to establish all of the ways. It may be sufficient to establish only*

one way, although if more are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way’

- 2.9 Accordingly, clause 4.6(3) of the LEP can be satisfied if a development satisfies one or more of the 5 ways which are addressed in detail below:

**(a) The proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard.**

- 2.10 Yes, the proposal meets the objectives of the standard as demonstrated below.

*(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

- 2.11 The main building that varies the height control is a single storey structure with a double gable roof form to maximise the internal height and light within the internal areas. It is compatible with the predominant scale of surrounding dwellings that are mostly single storey with some two storey dwellings also present in the streetscape. The height and scale of the buildings are compatible as they are located with generous landscaped setbacks to soften the building form when viewed from the public domain. The overall quality design of the site will ensure the buildings are compatible with the surrounding area.

- 2.12 The building forms have also been modulated to reduce their height but still provide architecturally designed buildings that will result in improved building form. As the majority of the buildings are well below the height control, the height and scale of the garden centre is appropriate and compatible.

*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

- 2.13 The redevelopment will have no adverse impact on views, loss of privacy or solar access.

- 2.14 The submitted shadow diagrams ensure that there is no adverse overshadowing to the adjoining property at 279 Mona Vale Road. The dwelling on this property is positioned approximately 41 metres to the south of shared boundary and will not be impacted. Given this physical separation there will be adverse impact on the privacy of the dwelling.

- 2.15 The garden centre is designed as inward facing and screened to all street frontages by generous landscaped setbacks. This layout will ensure that surrounding residential / rural properties retain their privacy.

- 2.16 Visually, the new works will create an improvement to the existing site with the removal of weed trees along the street frontages and replacement with new landscaping that will enhance the view of the garden centre.

- 2.17 The generous landscaped setbacks will enable an improved visual outcome along each street frontage, where the landscape setback is not dominated with pedestrian paths or entry points. The setbacks will be heavily landscaped providing an appropriate rural setting.

- 2.18 The garden centre will not result in the disruption of views and solar access is maintained to all surrounding properties due to the single storey height of buildings and stepping the site to reduce the heights on the southern side.

(c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

2.19 The development is not located near a coastal environment and will have no effect on the scenic qualities of the coastal and bush environments. All street frontages will be heavily landscaped.

(d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

2.20 The garden centre site is not visible from parks and reserves. The garden centre will be visible from the surrounding street network.

2.21 As noted above, the design of the garden centre provides a landscaped interface to the surrounding road network that will ensure a positive contribution to the visual amenity of the area.

2.22 In particular, the garden centre will maintain a single storey form that will step down the site to minimise bulk and scale.

2.23 For the reasons discussed above, the variation to the height control will still achieve the building height objectives.

***(b) The underlying objective or purpose is not relevant to the development;***

2.24 The expressed objectives for height are still relevant.

***(c) The underlying objective or purpose would be defeated or thwarted if compliance was required with the standard;***

2.25 The expressed objective or purpose of the height control would not be defeated or thwarted if strict compliance was required.

***(d) The development standard has been virtually abandoned or destroyed by Council's own actions.***

2.26 Council has not abandoned the height controls.

***(e) The zoning of the 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 and unnecessary.***

2.27 The zoning of the land RU4 Primary Production Small Lots is appropriate. It is noted that the use is permitted on the site under Schedule 1 (Clause 18) as an additional permitted use. The clause states the following:

***18 Use of certain land in the vicinity of Mona Vale and Myoora Roads, Terrey Hills***

(1) *This clause applies to land in the vicinity of Mona Vale and Myoora Roads, Terrey Hills, shown as "Area 18" on the Additional Permitted Uses Map.*

(2) *Development for the purposes of educational establishments, garden centres, hospitals, hotel or motel accommodation, places of public worship, recreation areas, recreation facilities (indoor), recreation facilities (outdoor), registered clubs and restaurants or cafes is permitted with consent.*

2.28 It is envisaged that a development of this scale or potentially larger could be developed on this site by virtue of the Schedule 1 Clause 18 above. The garden centre proposal is compatible with nearby land uses and maintains a single storey structure.

#### **Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?**

2.29 In the judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018* it was established that a Clause 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with a compliant development. Further, the environmental planning grounds relied upon must be “sufficient”. There are two respects in which the request needs to be “sufficient”

1. The environmental planning grounds advanced in the written request must be sufficient “to justify the contravening of the standard”. The focus is on the aspect or element of the development that contravenes the development standard, not the development as a whole.
2. The request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

2.30 This written request focuses on the elements of the development that breach the height control. This is limited to minor sections of the central roof only, that is positioned towards the centre of the site, being a significant setback from the street frontages.

2.31 There are sufficient environmental planning grounds to justify the variation as outlined in this request and summarised as follows:

- The minor breach is due to the architectural design of the roof, being a double gable roof form. Given the nature of the use, a garden centre, it is important to achieve an internally open feel with high ceilings which bring in natural light. It is the pitched roof that creates the breach. The majority of the central roof is compliant, it is only due to changing existing ground levels that results in the minor breach.
- The areas of roof that are non-compliant do not result in any additional adverse shadow to adjoining properties and or the public domain beyond what would be expected by a compliant scheme. Any additional shadow is absorbed within the site and compliant solar access levels will be maintained to the property at 279 Mona Vale Road.
- The minor breach to part of the roof to the two buildings will not be noticeable from the public domain given its setback and central location within the site. It will have no adverse impact but will create an improved internal amenity with natural light penetration.
- There are no views that will be affected by the non-compliant components.
- The proposed development achieves the objectives the RU4 Primary Production Small Lots zone.

- The proposed development meets the objectives of the development standard notwithstanding the breach of the height control.

2.32 Based on the above, there are sufficient planning grounds to justify the variation.

#### **Clause 4.6(4)(a)(i) – Has the request addressed the matters in 4.6(3)**

2.33 The matters required in 4.6(3) have been addressed in detail above.

#### **Clause 4.6(4)(a)(ii) – Is the development in the Public Interest?**

2.34 In the judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 2018*, Preston CJ indicated that a consent authority must consider if the development is *in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed. It is the developments consistency with the objectives of the development standard that make the proposed development in the public interest.*

2.35 The zoning of the land is RU4 Primary Small Production Lots.

2.36 The proposal meets the objectives of the RU4 – Primary Production Small Lots zone as demonstrated below.

- *To enable sustainable primary industry and other compatible land uses.*

2.37 The proposed garden centre is and will continue to be compatible with the surrounding land uses.

- *To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.*

2.38 The garden centre, including café, pet shop and fruit shop will generate approximately 75 staff. This increase will provide employment opportunities for the local community.

- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*

2.39 The proposed hours of operation of the development will be between 7:00am to 7:00pm, 7 days a week, with the garden centre hours reducing to between 7:00am and 5:30pm during winter months. These hours are appropriate and will not adversely impact the school to the west nor residential properties located to the north, west and south.

2.40 In addition, truck movements to and from the site are expected to be evenly distributed between normal working hours Monday to Friday. Consideration has been given to the proximity to Terry Hills Public and the peak periods for drop and pick up. The garden centre will restrict truck movements during these times to prioritise pedestrian safety.

2.41 The submitted Traffic Report demonstrates that the proposed uses will not adversely affect the local traffic network and adequate on-site car parking and loading facilities are provided on site.

- 2.42 The accompanying acoustic report has demonstrated that the use can operate without adversely affecting surrounding uses.
- *To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushland.*
  - *To maintain and enhance the natural landscape including landform and vegetation.*
- 2.43 The redevelopment as amended maintains a single storey form across the site, with the minor breaches the result of small areas of the roof. The single storey presentation is retain from all aspects and the public domain. The development will enhance the landscape setting along the street frontages.
- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*
- 2.44 The proposed development will continue the current use of the site, which is suitable for the locality.
- *To maintain the rural and scenic character of the land.*
- 2.45 The low scale nature of the development and dense landscaping will present an aesthetically pleasing streetscape that will complement the character of the area.
- 2.46 It is therefore considered that the development, notwithstanding the variation to the development standard, achieves the objectives of the RU4 Primary Production Small Lots zone.

#### **Clause 4.6(5) – Secretary to consider**

- 2.47 In deciding whether to grant concurrent, the Secretary must consider:
- a) Whether contravening the development standard raises any matter of significance for state or regional environmental planning, and
  - b) The public benefit of maintaining the standard; and
  - c) Any other matters required to be taken into consideration by the Secretary before granting consent:
- 2.48 The variation to the height control does not raise any matters or state or regional significance. Further as the Local Planning Panel is the consent authority, concurrence is assumed.
- 2.49 Furthermore, there is no material benefit of maintaining strict compliance with the standard for the reasons explored in this Clause 4.6 request.



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