



CLAUSE 4.6 VARIATION REQUEST

62 MYOORA ROAD,
TERREY HILLS

2 July 2025



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1.0 INTRODUCTION

- 1.1 This 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*

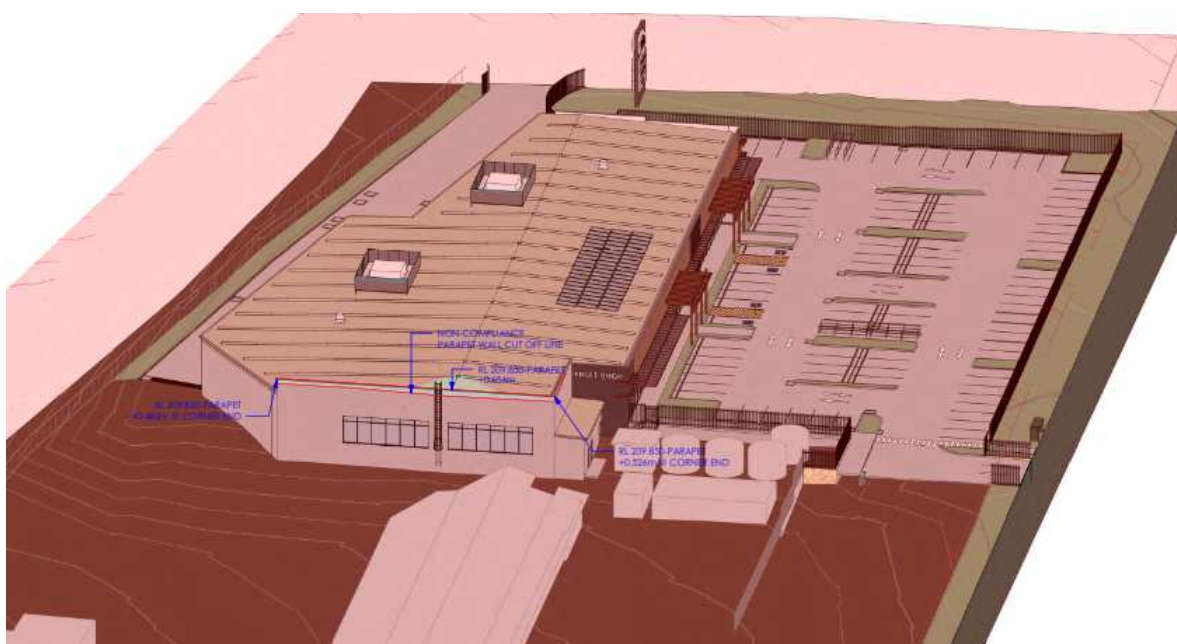
2.0 CLAUSE 4.6 VARIATION REQUEST

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 The proposed buildings seek to vary the height control in a small section of the parapet to the new building. The variation is to the parapet and ranges from 480mm to 654mm above the 8.5 height control. The extent of non-compliance is shown in the following height plane diagram:



Source: Leffler Simes Architects – Drawing No. DA19 Rev. C dated 30 June 2025

- 2.3 The remainder of the new building and the proposed pylon sign are below the 8.5m height control.

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

- 2.4 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] NSWLEC 90 where Justice Pain found that meeting the objectives of the standard was not sufficient to demonstrate that compliance was unreasonable or unnecessary.
- 2.5 In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 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’.

2.6 In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 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*’

2.7 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.

2.8 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,

2.9 The new building is a single storey structure which 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 building is compatible as it is located centrally within the site with generous landscaped setbacks to soften the building form when viewed from the public domain. The overall quality design of the new building will ensure it is compatible with the surrounding area.

2.10 As the majority of the new building is well below the height control, the height and scale of the building is appropriate and compatible.

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

2.11 The new building will have no adverse impact on views, loss of privacy or solar access.

2.12 The accompanying 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 the shared boundary and will not be impacted. Given this physical separation there will be adverse impact on the privacy of the dwelling.

2.13 There are no openings to the new building that will impact the privacy to the neighbouring rural dwelling.

2.14 Visually, the new building and associated landscaped setbacks 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.

2.15 The generous landscaped setbacks will enable an improved visual outcome along the western end of Cooyong and the Myoora Road frontages, where the landscape setback is not dominated with pedestrian paths or entry points. The setbacks will be heavily landscaped providing an appropriate rural setting.

2.16 The new building will not result in the disruption of views and solar access is maintained to all surrounding properties due to the single storey height of the building.

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

- 2.17 The development is not located near a coastal environment and will have no effect on the scenic qualities of the coastal and bush environments. The street frontages adjacent to the proposed works 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.

- 2.18 The new building is not visible from parks and reserves. The new building will be visible from the surrounding street network, however the generous setbacks (43m to Cooyong, 22m to Myoora and in excess of 140m to Mona Vale Rad) will ensure the new building sits comfortably on the site and retain an appropriate visual impact given the nature of the use.

- 2.19 The landscaped interface to the surrounding road network that will ensure a positive contribution to the visual amenity of the area.

- 2.20 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;

- 2.21 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;

- 2.22 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.

- 2.23 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.

- 2.24 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.*

- 2.25 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 new building to form part of the garden centre 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?

- 2.26 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.

- 2.27 This written request focuses on the elements of the development that breach the height control. This is limited to minor section to the parapet of the new building that is positioned towards the centre of the site, being a significant setback from the street frontages.

- 2.28 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 change in levels across the site. The new building and carpark are located at the western end of the site. They are aligned generally consistent with the existing ground levels. The site slopes towards the east and the new building maintains a proposed floor level of RL 203.250. Centrally as the site falls away, the breach occurs to the parapet at the eastern end of the building. The majority of the building is compliant, it is only due to changing existing ground levels that results in the minor breach.
- The area of the parapet that is non-compliant does not result in any additional adverse shadow to adjoining properties and or the public. 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 the parapet 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 by maintaining a level retail space to achieve disabled access.
- There are no views that will be affected by the non-compliant component.
- 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 minor breach of the height control.

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

Is the development in the Public Interest under Section 4.15(1)(e) of the EPA Act

- 2.30 The former Clause 4.6 included a requirement that the consent authority be satisfied that the proposed development was in the public interest because it is consistent with the objectives of the standard and the zone in which the development is carried out. This test has been removed. Notwithstanding, Clause 4.15(1)(e) of the Environmental Planning and Assessment Act requires consideration of the public interest.
- 2.31 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.*
- 2.32 The zoning of the land is RU4 Primary Small Production Lots.
- 2.33 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.*
- 2.34 The existing garden centre and the new uses 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.*
- 2.35 The additional uses will provide further employment opportunities on the site which will provide employment opportunities for the local community.
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- 2.36 The proposed hours of operation for the new uses will be consistent with the existing garden centre which is 7:00am to 7:00pm, 7 days a week. These hours are appropriate and will not adversely impact the school to the west nor residential properties located to the north, west and south. The small scale form of the new retail buildings and generous landscaped setbacks will minimise bulk and scale impacts.
- 2.37 In addition, truck movements to and from the site are expected to be evenly distributed between normal working hours Monday to Friday.
- 2.38 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.

2.39 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.*

2.40 The new buildings retain a single storey form and are substantially setback from all street frontages. Given the location of the buildings they will not adversely impact on any views or existing landform and vegetation.

- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*

2.41 The proposed development will continue the current use of the site, which is suitable for the locality. The introduction of a pet shop and fruit shop will provide additional services for the local community.

- *To maintain the rural and scenic character of the land.*

2.42 The single storey form of the building contained at the rear of the site which is bordered by dense landscaping will present an aesthetically pleasing streetscape that will complement the character of the area. The buildings are setback 43m from the boundary to Cooyong Road and 22m from the Myoora road boundary.

2.43 The low scale nature of the development and dense landscaping will present an aesthetically pleasing streetscape that will complement the character of the area.

2.44 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.



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