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Clause 4.6 Exceptions to Development Standards Written Request – Height of Buildings

Demolition of existing structures, earthworks, tree removal and construction of an industrial building with basement car parking

32 Orlando Road, Cromer NSW 2099
Lot 1 in Deposited Plan 120751

Prepared for: Mark Bennett
Project No: E574
Date: 30 November 2022

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Clause 4.6 Written Request to Vary a Development Standard
Warringah Local Environmental Plan 2011

Applicant's name	Mark Bennett
Site address	32 Orlando Road, Cromer (Lot 1 in DP 120751)
Proposal	Demolition of existing structures, earthworks, tree removal and construction of an industrial building with basement car parking
Environmental Planning Instrument	*Warringah Local Environmental Plan 2011* (WLEP 2011)
Development standard to be varied	Clause 4.3 – Height of Buildings

Creative Planning Solutions (CPS) has prepared this report on the behalf of Mark Bennett (client), as part of the submission of a Development Application (DA) to Northern Beaches Council (Council).

Contained within this report below is the written request relating to the proposed contravention to Clause 4.3 of *Warringah Local Environmental Plan 2011* (WLEP 2011) in accordance with the provisions of Clause 4.6 of WLEP 2011.

Details of development standard sought to be varied

Clause 4.3 of WLEP 2011 prescribes the maximum building height for land to which the plan applies. The relevant provisions of Clause 4.3 are reproduced below:

(1) The objectives of this clause are as follows—

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,
(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,
(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

(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.

(2A) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

Figure 1 - WLEP 2011 Height of Buildings Map extract, with subject site outlined in red
Source: https://www.legislation.nsw.gov.au

The Height of Buildings Map (***Figure 1***) prescribes a maximum building height of 11m to the subject site.

The proposed industrial development results in a maximum building height of 12.71m (15.5% variation) as outlined below:

Building Height	Existing Ground Level (EGL)	Proposed Height (m)	Variation (m)	Variation (%)
RL 41.150	RL 28.44	12.71	1.71	15.5

The statutory obligations of the applicant and Council

The authority established within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides 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 that which would be provided by a compliant development.

In light of this judgement, it is also necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant is required only to address the matters required by clause 4.6(3). Note however, for completeness and to assist Council in its assessment, this written request has addressed clause 4.6(3) and clause 4.6(4). Given the inevitable overlap between these matters, this request should be read in its entirety as generally fulfilling the applicant's obligations as they are prescribed by clause 4.6(3).

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

In *Wehbe V Pittwater Council (2007) NSW LEC 827*, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded.

1. ***The objectives of the standard are achieved notwithstanding non-compliance with the standard;***
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. ***The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;***
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;*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Emphasis added.

In addition to the above, the assessment of this building height contravention is also guided by the decision of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* whereby Justice Pain ratified the decision of Commissioner Preston.

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above points. In this instance points 1 and 3 emphasised above are investigated and considered well founded for the proposed development.

The assessment against the objectives of the height of buildings development standard under Clause 4.3 of the WLEP 2011 are provided below.

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

<u>CPS response:</u> The site is subject to a maximum building height of 11m under WLEP 2011. The proposal seeks to provide a three (3) storey industrial building upon the site which mostly falls within the 11m height plane, resulting in 89% of the development achieving compliance with the development standard. However, given the topography of the site slopes 6.11m from the northern front boundary (RL 34.30) down to the southern rear boundary (RL 28.19), the proposal will breach the maximum building height at the southern corner of the mezzanine for industrial unit 2, as demonstrated within Figure 2 and 3. The 1.71m or 15.5% exceedance to the development standard is considered minor and the scale or the development is compatible with the surrounding locality. ***Figures 2*** and ***3*** identify the minimal nature of the non-compliance, with the roof and upper aspect of the mezzanine for unit 2 extending above the 11m building height.

The development as viewed from the street therefore does not exceed the maximum building height and is compatible with the character of the locality. Further, as the breach to the building height is located at the rear of the site it will not be visible from the public domain.

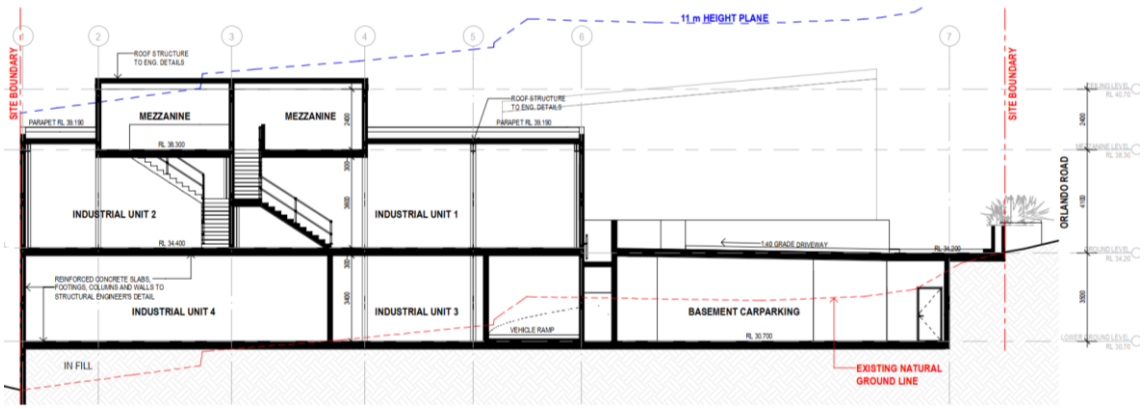

Figure 2 – Extract of Section 2 in the plans identifying the building height non-compliance
Source: ADG Architects

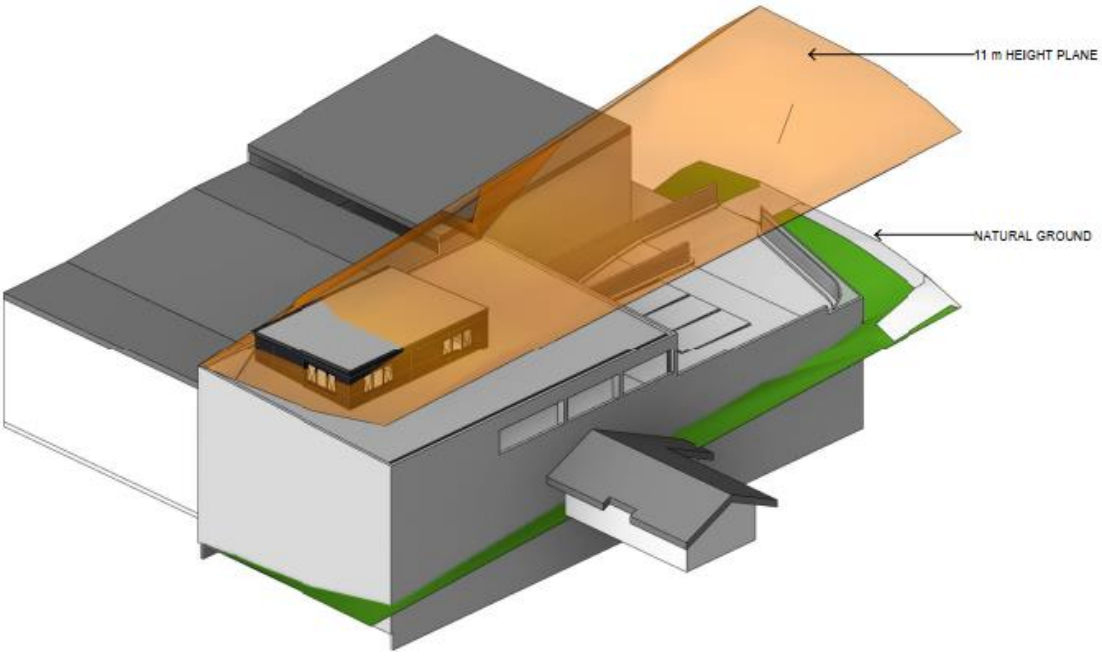

Figure 3 – Height Plane Diagram 1 identifying the building height non-compliance
Source: ADG Architects

The height and scale of surrounding and nearby development is characterised by industrial / warehouse buildings comprising ground level work/storage areas with upper level ancillary offices. Other nearby development comprises industrial / warehouse units located over a number of levels. It should also be noted that the neighbouring development located at 34 Orlando Road also breaches the building height limit, providing a three storey industrial building with a height of 12.1m.

The proposal will have a similar height and scale as the developments shown in the photographs below (***Figures 4 – 6***). It's scale is reduced when viewed from the street because it is on the low side of the street and so has a lesser scale when compared to the recently approved development at 34 Orlando Road. The scale of the proposal is not discordant or jarring when viewed in comparison with other industrial and warehouse development near the site and is considered to be compatible with that development. This minor breach to the standard therefore will not have a significant impact on the environmental amenity of the neighbouring properties and public spaces, or the sharing of views.

Figure 4 – 17 Orlando Road, three-storey industrial development, located approximately 40m north-west of the subject site.
Source: Google Street View, November 2021

Figure 5 – 21 Orlando Road, three-storey industrial development, located approximately 100m north-west of the subject site.
Source: Google Street View, November 2021

Figure 6 – 4 – 7 Villers Place, part two-storey part three-storey industrial park development, located approximately 130m north of the subject site.
Source: Google Street View, November 2021

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

CPS response: The subject site lies within the IN1 General Industrial zone under WLEP 2021, although, it is acknowledged that to the east of the site, the land is zoned R2 general residential. The proposed development has been designed and located on the site to respect the neighbouring residential development to the east of the site.

The proposal is comparable to nearby industrial buildings and as such does not impact upon the visual amenity in the locality or loss of privacy and solar assess. The overshadowing cast from the exceedance of the building height plane will be wholly contained within the subject site (refer to ***Figure 7***) and will not result in undue solar access or privacy impacts to the neighbouring residential dwelling at 30 Orlando Road.

Figure 7 – Extract of shadow diagram at 3pm winter solstice, of shadow cast from the breach to the building height outlined in red.
Source: ADG Architects

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

CPS response: The site is not located in proximity to the coastal and bush environments and the proposed development will not have a perceptible impact on the scenic quality of those environments.

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

CPS response: The site is located on the lower side of Orlando Road, reducing the visual impact of the building. The non-compliant element of the building is located at the rear of the site and is not visible from the road or any public place. The proposal has a visual impact consistent with that which is to be expected from industrial or warehouse development on land zoned IN1 General Industrial, whilst being commemorative to the neighbouring residential zoned land.

The proposed variation will not impact upon loss of solar access to the neighbouring properties, in particular, 30 Orlando Road, as the overshadowing cast from the breach to the building height relates to the southern aspect of the building. The shadows cast from this aspect of the building will be wholly contained within the site as demonstrated within the shadow diagrams provided with the DA and at *Figure 7*.

Clause 4.6(3)(b) There are sufficient environmental planning grounds to justify contravening the development standard

In addition to those already described above, there are numerous and substantive environmental planning grounds to justify contravention of the development standard. These are detailed as follows:

1. No significant or unreasonable impacts on surrounding public areas

As demonstrated both by this and other points below, in addition to the plans and Statement of Environmental Effects that form part of this DA package, the proposed variation to the maximum building height standard will have no adverse or unreasonable impacts on the amenity of the public domain.

The additional height proposed is minor and is only located in areas towards the rear of the property. The rear of the building (which is affected by the height variation) is well setback from the neighbouring sites, to ensure no undue environmental impacts result from the proposed development. The variation will not be perceptible in comparison to the large scale industrial development in the surrounding local.

2. No significant or unreasonable impacts on surrounding residences

As demonstrated both above and by submitted information, the variation in height will not significantly nor unreasonably affect adjoining and nearby residences to the east of the subject site in terms of visual privacy, overshadowing and visual amenity.

Clause 4.6(a)(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,

In the recent judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii) and a response has been provided to the relevant objectives.

The objectives of the IN1 General Industrial zone under WLEP 2011 are as follows:

- ***To provide a wide range of industrial and warehouse land uses.***

CPS Response: The proposal will provide four (4) individual industrial units for the site, which expands upon the current use of the site which can only accommodate one (1) tenancy.

- ***To encourage employment opportunities.***

CPS Response: The proposed building will provide employment opportunities, during the construction of the development and through the ongoing use of the individual industrial tenancies.

- *To minimise any adverse effect of industry on other land uses.*

CPS Response: The building has been designed to consider the surrounding neighbouring properties to ensure no undue burden results from the site in terms of noise and odour.

- *To support and protect industrial land for industrial uses.*

CPS Response: The development supports industrial uses and does not prevent other industrial land from supporting industrial uses.

- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

CPS Response: The proposal will not prevent other land uses from providing facilities to meet the day to day needs of workers in the area.

- *To enable a range of compatible community and leisure uses.*

CPS Response: The proposal is for an industrial purpose only.

- *To maintain the industrial character of the land in landscaped settings.*

CPS Response: Within the surrounding streetscape, industrial development has little to no landscape setting, with front setbacks characterised by expansive hardstand area. The proposal is consistent with the locality and will provide a landscape planter bed at the Orlando Road frontage.

- <u>Conclusion</u>

The proposed variation to Clause 4.3 of WLEP 2011 results in a 1.71m or 15.5% variation to the development standard. The exceedance to the standard is not visible from the street and is consistent with the building height of neighbouring properties.

This assessment confirms that the proposal is both in harmony and compatible with the existing and desired future character surrounding development, and will not result in significant or unreasonable physical impacts to surrounding sites; the proposal is therefore considered to be acceptable.

Aside from presenting a suitable appearance to surrounding areas that is compatible with the existing and desired character of the area, the proposed development will enable better utilisation of the site for industrial purposes, without causing any significant nor unreasonable impacts on surrounding sites and the public domain, in terms of visual privacy, solar access and/or visual amenity.

As a result, compliance with the maximum building height development standard is unreasonable and unnecessary in the specific circumstances of this proposal, and there are sufficient environmental planning grounds to justify contravention of the height development standard. With regards to the reasons given in *Wehbe*:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Given the above, the applicant's statutory requirements pursuant to clause 4.6 of WLEP 2011 are satisfied, and the variation to the maximum building height development standard can be approved under delegated assessment.