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Northern Beaches Council
PO Box 82
Manly NSW 1655

Clause 4.6 Variation to Development Standard Statement - Building Height **RE: Development Application for Alterations and Additions to the Existing Service Station at** **176 Warringah Road, Beacon Hill NSW 2100**

1 Introduction

The development to which this submission relates is for a development application for the site located at 176 Warringah Road in Beacon Hill.

The Development Application proposes:

The development application seeks approval for:

- 3 x new 55kL underground fuel tanks and associated fuel systems;
- 4 x new fuel dispensers;
- New oil/water separator puraceptor system;
- 4 x new grated drain pits;
- The installation of new facia cladding and signage on the existing building;
- Repainting existing building in a Woolworths colour scheme;
- Installation of a new canopy and Ampol canopy signage to cover a similar footprint the existing canopy; and
- Installation of new Ampol signage including:
 - **1 x pylon sign with fuel price board;**
 - 1 x fuel price board sign; and
 - 1 x promotional poster sign.

In summary, the proposal largely complies with the provisions of the Warringah LEP 2011 (LEP 2011), with the exception of an exceedance in height for the pylon sign. An assessment of the variation is provided in the following pages in accordance the requirements of Clause 4.6 of the LEP 2011. This variation has been prepared generally in accordance with the NSW Department of Planning and Infrastructure's publication "Varying Development Standards: A Guide" (August 2011), which identifies matters to be addressed in an application to vary a development standard.

2 Exception to Development Standards

The Department of Planning and Infrastructure's publication "Varying Development Standards: A Guide" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and
- State Environment Planning Policy No 1 – Development Standards (SEPP1).

In this instance, SEPP 1 does not apply as the LEP is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

2.1 Clause 4.6

Clause 4.6 of the LEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

(1) The objectives of this clause 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.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

The proposal seeks to vary the height standard applicable to the site in the subject development application and does not introduce new controls across an area.

2.2 Legal Context to Varying Development Standards

This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline 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)

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

(1) Is the planning control in question a development standard;

(2) What is the underlying object or purpose of the standard;

(3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;

(4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;

- (5) *Is a development which complies with the development standard unreasonable or unnecessary; and*
(6) *Is the objection well founded.*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision in that case Preston CJ noted:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development offers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Wehbe V Pittwater [2007] NSW LEC 827 also established the ‘five part test’ to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- (1) Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
- (3) Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- (4) Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
- (5) Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

Of particular relevance in this instance is Part 1, that *“the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives”*.

3 Development Standard to be Varied

What is the name of the environmental planning instrument that applies to the land?

Warringah Local Environment Plan 2011

What is the zoning of the land?

The land is zoned R2 Low Density Residential.

What are the objectives of the zone?

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

What are the development standards being varied?

The building height development standard contained in Clause 4.3

Are the standards to be varied a development standard?

Yes, the standards are considered to be a development standard in accordance with the definition contained in Section 4(1) of the Environmental Planning and Assessment Act 1979 and not a prohibition.

What are the objectives of the development standard?

The objectives of Clause 4.3 – Height of Buildings 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.

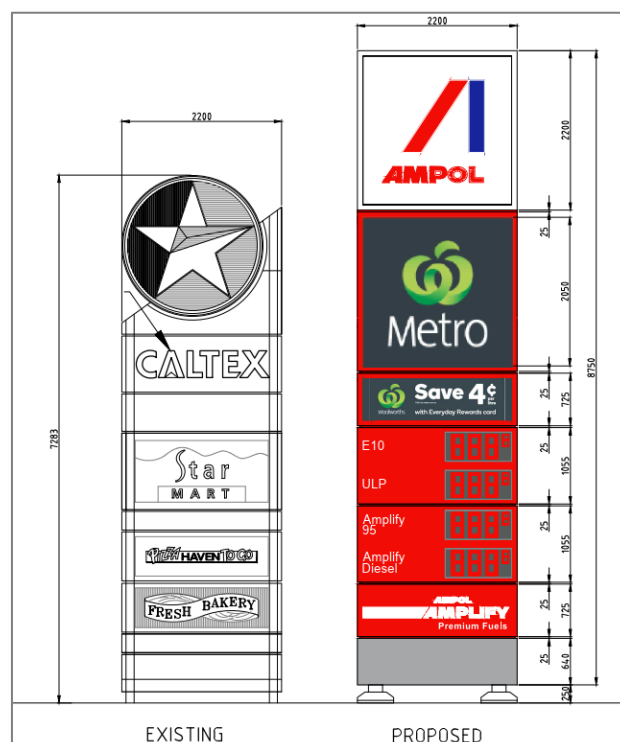
What is the numeric value of the development standard in the environmental planning instrument?

The maximum height under the LEP 2011 is 8.5 metres.

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

The structure extends to 9m at its highest point representing a 5.88% variation. The Architectural Plans attached at Appendix A identifies these measurements. Specific extracts from the Architectural Plans are provided in Figure 1 below.

Figure 1 Plans for Main Site ID Pylon sign



4 Justification for the Contravention

This section addresses Section (3) and (4) of Clause 4.6 and justifies the contravention from development standard 4.3.

(3) 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 circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(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

(b) the concurrence of the Secretary has been obtained.

4.1 Compliance is Unreasonable or Unnecessary

As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the numerical standard.

The proposed development achieves the objectives of Clause 4.3 as detailed below:

(a) to ensure the height of buildings are appropriate for their location,

The height of the buildings are appropriate for the location, especially with its frontage to a main road, and being a 70km/h zone. Although it does exceed the maximum building height in the R2 zone, it is by a minimal amount of 5.88% at its highest point and will therefore not have a negative impact on the surrounding buildings.

Taking into account the above, the strict application of the development standard for maximum height is unreasonable and unnecessary and would not achieve a greater planning or urban design outcome.

(b) to permit building heights that encourage high quality urban form.

The variation sought will not adversely affect the residential neighbours to the north, west and east. The replacement pylon sign is 9m, which is minimally (only 0.5m) larger than the prescribed 8.5m maximum height of building.

Overall, it is submitted that the development is considered reasonable on the basis that:

- The proposed development meets the underlying intent of the controls and is a compatible form of development that does not result in unreasonable environmental amenity impacts;
- The projection of the sign above the height limit will not result in an overbearing visual impact, as the exceedance only pertains to a small portion of the Main ID Pylon Sign;
- The excess height resulting from non-compliance will not result in any undue impacts on adjoining properties particularly with respect to overshadowing, loss of privacy and loss of views;
- The application satisfies other numerical standards of the SEPP 64 – Advertising and Signage, and Council’s DCP ensuring a high-quality development.

Therefore, the proposed development within this context demonstrates the numerical height non-compliance is acceptable.

4.2 Sufficient Environmental Planning Grounds to Justify Contravention

This assessment demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3, there would be no additional benefit to the streetscape, neighbouring properties and the local area. The objectives of Clause 4.3 have been met within the proposed development. In light of this, there is sufficient environmental planning grounds to justify contravening the development standard.

4.3 Secretary’s Concurrence

It is understood that the Secretary’s concurrence under clause 4.6(4)(b) of LEP 2011 has been delegated to Council.

5 Conclusion

This Clause 4.6 Variation to Development Standard has been prepared in response to the numerical non-compliance against the standards of Clause 4.3 – Height of Buildings of the Warringah LEP 2011.

The proposed development meets the underlying intent of the control and is a compatible form of development for the area. The minor excess in height resulting from the partial non-compliance will not result in any undue impacts on adjoining properties particularly with respect to overshadowing, loss of privacy and loss of views. Further, the proposal will not result in any unreasonable amenity or environmental impacts.

Council can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standard, as detailed within this Statement.

Yours sincerely,



Theo Klok
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