

Attachment 1

Clause 4.6 variation request – Height of buildings

10.12.24

Proposed Light Industrial Development 35-39 Carter Road, Brookvale

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control 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.*

Building height is defined as follows:

building height (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

ground level (existing) means the existing level of a site at any point.

I note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 where at paragraphs 73 and 74 O'Neill C found:

73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

The Carter Road facing building façade is compliant with the building height standard at its northern end and 12.1 metres in height at its southern end representing a variation of 1.1 metres or 10%. The West Street facing building façade is compliant with the building height standard. The southern building façade breaches the building height standard at its eastern and western edges by between 1.023 metres (9.3%) and 1.1 metres (10%). The extent of building height breach is depicted in the following plan extracts.



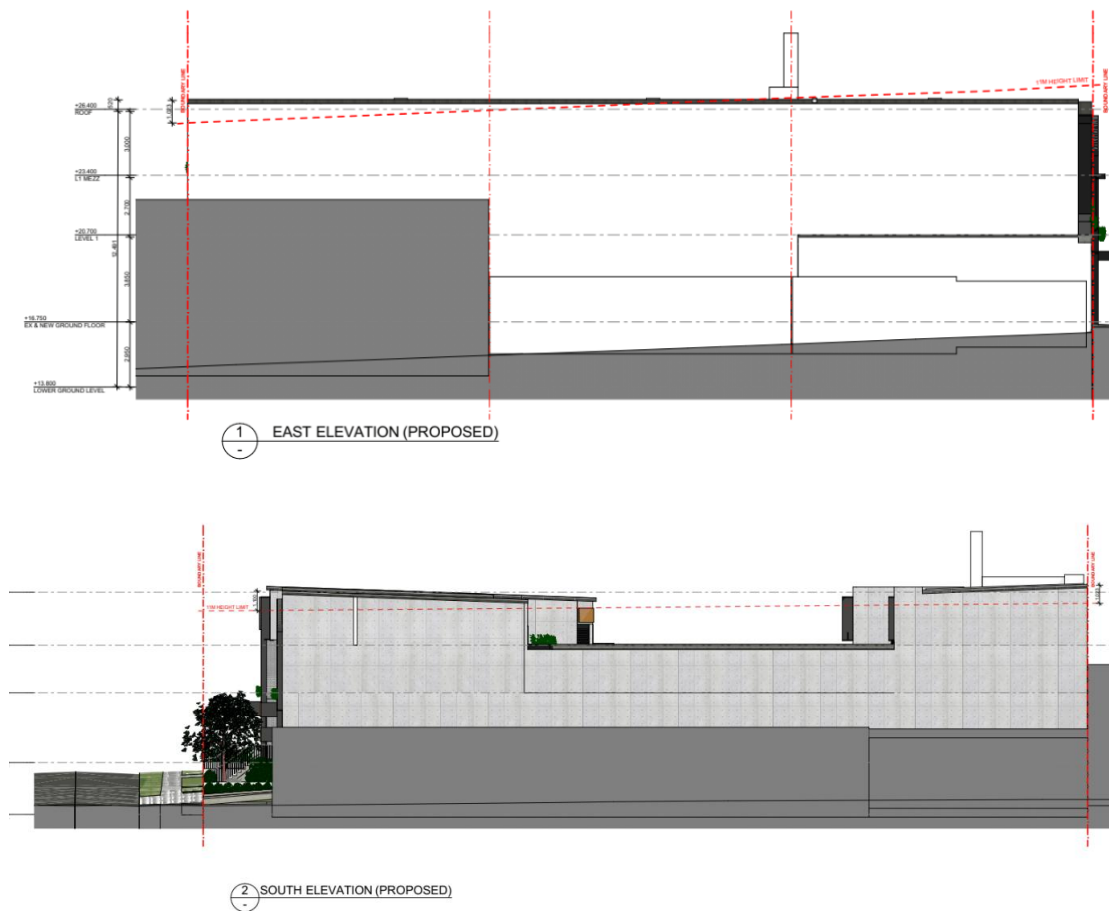


Figure 1 - Plan extract showing extent of building height breach with the red line showing the 11 metre height standard measured above ground level (existing)

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

- (1) *The objectives of this clause are:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

- (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.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

- (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.*

The proposed development does not comply with the height of buildings provision at 4.3 of WLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].*

*However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 4.3 of WLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 WLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 WLEP is a development standard.

4.2(a) Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Response: This objection seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development rather than ensuring that buildings are compatible with the desired future height and scale of surrounding and nearby development.

I note that the desired future height of surrounding and nearby development as anticipated by the recently endorsed BSP and draft LEP is 18 metres within the Brookvale industrial precinct. To the extent that compatibility in an urban context requires consideration to be given to not only the existing character of an area but also the desired future or emerging character I am satisfied that the height and scale of the proposal, notwithstanding the building height non-compliant elements, with the height and scale of surrounding and nearby development anticipated by the recently endorsed BSP and draft LEP.

Although the draft LEP has not been publicly exhibited I consider the outcome of the draft LEP as it relates to building height within the Brookvale E4 General Industrial zone to have a heightened level of certainty given that such building height has now been endorsed by the elected Council during the BSP and draft LEP processes which have involved informal public exhibition/ consultation and extensive consideration by Council staff and elected Councillors.

The issue of compatibility was dealt with in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* where at paragraph 23 Senior Commissioner Roseth states:

- 23 *It should be noted that compatibility between proposed and existing is not always desirable. There are situations where extreme differences in scale and appearance produce great urban design involving landmark buildings. There are situations where the planning controls envisage a change of character, in which case compatibility with the future character is more appropriate than with the existing.*

In this instance, the Council endorsed desired future building height control/ standard envisages a change of character and accordingly I consider the proposed building height and scale to be compatible with the desired future character of surrounding and nearby development as a consequence of the building height breaching elements proposed. I am also satisfied that the relatively minor building height breaching elements will provide an appropriate level of compatibility having regard to the existing built form characteristics within immediate proximity of the site.

The proposal is not antipathetic to this objective having regard to the above circumstances.

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

Response: The building is within an established industrial area with no immediate residential uses. Having inspected the site and its immediate surrounds I am satisfied that the non-compliant building height breaching elements will not give rise to unacceptable or non-compliant impacts in relation to views, overshadowing or privacy. The exceptional design quality of the development will ensure that visual impacts are minimised.

This objective is satisfied notwithstanding the building height breaching elements.

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

Response: The subject property is located within an established industrial precinct where the building height breaching elements will have no adverse impact on the scenic quality of Warringah's coastal and bush environments.

This objective is satisfied notwithstanding the building height breaching elements.

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

Response: For the reasons outlined in response to objective (a) I am satisfied that the visual presentation of the development when viewed from public places such as parks and reserves, roads and community facilities will be consistent with the desired future character of the area as anticipated by the recently endorsed BSP and draft LEP. In any event, the exceptional design quality of the overall development, including the building height breaching elements, will ensure that any actual or perceived visual impact associated with the proposed development has been appropriately managed to the extent that the building will not be perceived as inappropriate or jarring in a streetscape or broader urban context.

This objective is satisfied notwithstanding the building height breaching elements.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

4.2(b) Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”.*

The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.
25. *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds

Ground 1 – Consistency with Priority 24 - Brookvale as an employment and innovation centre and Priority 28 - Safeguard employment lands of the Northern Beaches Local Strategic Planning Statement (LSPS)

Strict compliance would be inconsistent with Priority 24 - Brookvale as an employment and innovation centre and Priority 28 - Safeguard employment lands identified within the Northern Beaches Local Strategic Planning Statement (LSPS) as it relates to the provision of additional employment floor space/ opportunities within the Brookvale industrial precinct.

These priorities are reflected in the proposed increase in building height within the Brookvale industrial precinct from 11 metres to 18 metres as anticipated by the recently endorsed BSP and draft LEP. In this regard the BSP contains the following commentary:

For land zoned E4 General Industrial a recommended future height of buildings map maximum building height of 18 metres (up to 4 storeys depending on floor-to-ceiling heights) is recommended. This responds to the State Government's intention to increase the height of single-level industrial buildings to 18m via a complying development pathway. This increase will allow industries to grow and evolve and potentially incorporate contemporary technologies which require large bay warehouses such as robotics, automation, new and more powerful sprinkler systems, solar, plant and equipment.

The Strict compliance would thwart Council's desire to provide for a building height and land use outcome on the land consistent with the LSPS, BSP and draft LEP and accordingly would not represent the orderly and economic use and development of the land.

Ground 2 - Consistency with the building height anticipated by the recently endorsed BSP and draft LEP

In circumstances where the desired future height of surrounding and nearby development as anticipated by the recently endorsed BSP and draft LEP is 18 metres within the Brookvale industrial precinct compliance with this objective would appear to thwart an opportunity to achieve a built form outcome on this site more consistent with the desired future character for the area.

To the extent that compatibility in an urban context requires consideration to be given to not only the existing character of an area but also the desired future or emerging character I am satisfied that the height and scale of the proposal, notwithstanding the building height non-compliant elements, with the height and scale of surrounding and nearby development anticipated by the recently endorsed BSP and draft LEP.

I am also satisfied that the relatively minor building height breaching elements will provide an appropriate level of compatibility having regard to the existing built form characteristics within immediate proximity of the site.

Although the draft LEP has not been publicly exhibited I consider the outcome of the draft LEP as it relates to building height within the Brookvale E4 General Industrial zone to have a heightened level of certainty given that such building height has now been endorsed by the elected Council during the BSP and draft LEP processes which have involved informal public exhibition/ consultation and extensive consideration by Council staff and elected Councillors.

In this instance, the Council endorsed desired future building height control/ standard envisages a change of character and accordingly I consider the proposed building height and scale to be compatible with the existing and desired future character of surrounding and nearby development as a consequence of the building height breaching elements proposed.

Under such circumstances, strict compliance would result in a poor planning and urban design outcome being a form inconsistent with the building height anticipated by the recently endorsed BSP and draft LEP.

Ground 3 - Minor nature of breaching elements and absence of impact

The building height breaching elements proposed are considered to be minor with this request demonstrating the absence of unacceptable streetscape, residential amenity and environmental impacts associated with the breaching elements.

Ground 4 - Consistency with objectives of the Act

The proposal promotes the orderly and economic use and development of land (1.3(c)). In this regard, strict compliance would require a lowering of the floor and ceiling heights and in doing so compromise the utility of the light industrial tenancies.

Such outcome would be inconsistent with the following objectives of the E4 General Industrial zone and would therefore not represent the orderly and economic use and development of the land as anticipated by the endorsed BSP and draft LEP:

- *To provide a range of industrial, warehouse, logistics and related land uses.*
- *To ensure the efficient and viable use of land for industrial uses.*
- *To minimise any adverse effect of industry on other land uses.*
- *To encourage employment opportunities.*

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Yours Sincerely



Greg Boston
Boston Blyth Fleming Pty Ltd
Director