

**REQUEST TO BREACH THE HEIGHT CONTROL PURSUANT TO CLAUSE 4.6 OF PITTWATER LEP 2014
– March 2023**

Clause 4.3 of the LEP and the relevant map indicates that the site is subject to a height control of 11m. The proposal achieves a maximum height of 14.08m (3.08m above the control) which relates to a masonry box element that provides an architectural corner expression to the building. It is noted that the mast element that sits on top of this box is not included in the calculation of building height as per the following LEP definition:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.*

Other elements above the height control include the lift overrun (around 2.17m higher) and a skylight element that provides solar penetration through the central part of the building (around 2.84m higher). The main building parapet sits generally 1.2-1.4m above the height control.

In light of the above, a request to breach this control must be submitted in accordance with Clause 4.6 of the LEP.

The relevant parts of Clause 4.6 of Pittwater LEP 2014 are:

(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.

(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.
- (5) In deciding whether to grant concurrence, the Secretary must consider:
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The purpose of this written request is to satisfy (3)(a) and (b) above and to demonstrate that (4)(a)(ii) and 5(a) and (b) can be satisfied. In preparing this request, regard has been had to the document: “Varying development standards: A Guide (August 2011)” prepared by the NSW Department of Planning & Infrastructure, and to relevant Land Environment Court judgements including the recent judgements of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, by Chief Judge Preston CJ in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118 and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* and, most recently, the decision of Chief Justice Preston in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

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

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*) at [42]-[51] and repeated in *Initial Action* at [17]-[21]:

1. the objectives of the standard are achieved notwithstanding noncompliance 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 objective 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 compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* at [22]).

In regard to the issue here, it is considered that 1 and 3 above are applicable.

Test 1 - relating to the objectives of the height standard

The LEP provides the following objectives for the height of buildings in Clause 4.3(1).

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Comment – The 11m height limit generally equates to 3 storey development within this industrially zoned area. However the area is affected by flooding and as such, Council requires a minimum floor level for development. The consequence of this is that to achieve 3 storey development consistent with the desired future character, buildings need to be higher than the 11m limit. This is evident in the recently approved storage building to the south of the site at 4-8 Tengah Crescent which is 3 storeys and attains a height of around 1.4m above the height control. Although not 3 storeys, the adjacent Mitre 10 building also attains a similar, non-compliant building height.

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

Comment – as noted above and can be seen in **Figure 1** below, the proposal is compatible with the scale of surrounding development. Whilst the buildings in the residential zone opposite in Bassett Street are lower, the height transition is appropriate as the building is provided with a generous setback to the street and presents a two storey façade at the frontage. The building height here is only around 9.4m, well below the permitted height and the top level is setback around 10-14.5m from the street.

- (c) *to minimise any overshadowing of neighbouring properties,*

Comment – as indicated on the submitted shadow diagrams there is no unreasonable overshadowing as a result of the proposal, including the elements that are above the height limit.



Figure 1 – development viewed from NE showing height of approved development to the south

(d) to allow for the reasonable sharing of views,

Comment – the proposal will not result in the loss of any views.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

Comment – the land is not sloping to the extent that necessitates the stepping of the building and the flood affectation makes this unachievable in any event. However the proposal is designed to ensure that the building height creates visual interest with the provision of elements of varying heights. The corner of the site is emphasised through the different building treatment and colour and also by the mast element that forms the highest part of the building (see **Figure 1**).

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items

Comment – there are no areas around the site that are particularly visually sensitive. The proposed building represents a significant improvement to the visual quality of this industrial area. In addition to the design elements discussed above, the visual impact of the proposal is also mitigated by the introduction of significant additional planting, including new street trees along the street frontages.

Test 3 – The underlying objective or purpose would be defeated or thwarted if compliance was required

Requiring compliance with the control would thwart achieving the objectives of the height control. As noted above the 11m height limit seeks to permit 3 storey industrial development, thus establishing the desired future character of the area. If compliance was enforced the whole top level would need to be deleted. This would be a poor urban design outcome for a corner lot and even more so considering the height adjoining development to the south which is not a corner allotment.

In view of the above, enforcing compliance in the circumstances is considered to be unreasonable and unnecessary as it has been demonstrated that the objectives of the Height control can be met despite the non-compliance and that the height objectives would be thwarted if compliance was enforced.

Clause (3)(b) – whether there are sufficient environmental planning grounds to justify contravening the development standard

The grounds relied on by the applicants in the written request under cl 4.6 must be “environmental planning grounds” by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

The environmental planning grounds that justify the contravention are discussed below.

Lack of impact

As noted in *Initial Action*, Preston J confirmed that ‘lack of impact’ is an appropriate environmental planning ground to justify contravening the standard. As discussed in detail in the submitted SEE, the proposal does not have any direct adverse impacts on surrounding development in relation to loss of views, loss of solar access, loss of privacy or any other amenity impact. In relation to the visual impact, as noted above, the proposal is highly compatible with the existing and desired future character of the area and will result in a significant improvement to the visual quality of the area.

Existing height character

As noted, there are a number of existing/approved non-compliant buildings on adjoining or adjacent land that already form part of the existing character of the area. The proposal attains a comparable height and is consistent with this character.

Flood impacts

As noted in the submitted Flood Report, the proposed ground floor level is required to be at a minimum of RL3.92m. This is up to 1.43m above the existing ground levels and so this adds to the height of the building that would otherwise not have to be provided. This height is commensurate with the degree of non-compliance of the main building parapet.

Nature of the height breach

Whilst the overall building is above the height control due to the flood levels, the higher elements are isolated in nature and either have minimal impact due to their location, ie the skylight element, or are limited in size and designed to add visual interest at the corner of the building. These features, rather than having a negative impact, have positive impacts through improving sustainability (the skylight reduces the need for artificial lighting) or a superior urban design outcome.

Better environmental outcome

Whilst the relevant LEC judgments make it clear that 'a better planning outcome' is not a requirement of clause 4.6, it is part of one of its objectives:

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

As noted above, the height objective relating to the character of the areas will be better achieved by permitting the proposed height breaches. Without these areas, the building could only be two storeys which would result in an incongruous element having regard to the desired future character and the existing more recently constructed and approved buildings.

In view of the above it is considered that there are sufficient environmental planning grounds, specifically related to the subject site and proposal, that warrant contravention of the height standard.

Clause (4)(a)(ii) – whether 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

The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

As noted above the proposal will be consistent with the objectives of the height standard. In relation to the objectives of the subject E4 General industrial zoning the following comments indicate consistency. The proposal:

- Provides an appropriate and compatible land use;
- Provides an efficient and viable land use;
- Minimises adverse effects on other land uses by facing activity and signage generally away from the adjoining residential area;
- Encourages employment opportunities;
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area (ie the take away coffee shop);
- Accommodates a use that is not appropriate to locate in other zones;
- Supports the provision of a healthy, attractive, functional and safe light industrial area.

In view of the above it is considered that the proposal suitably achieves the objectives of the E4 zone.

Clause 5(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning

No, the variation of the height standard is a minor matter and not uncommon as noted above. It does not raise any issues at a regional or state level.

Clause 5 (b) the public benefit of maintaining the development standard

For the reasons outlined above there is no public benefit in maintaining the standard. In fact, there will be public benefits in allowing a variation as a better planning outcome will be achieved by the proposal compared to the existing development.



Conclusion

Having regard to the above it is considered that this written request satisfies the requirements of Clause 4.6 and that the consent authority can be satisfied that the proposal also meets the other requirements of Clause 4.6.

The proposed contravention of the height standard will meet the objectives of Clause 4.6 as it achieves *“better outcomes for and from development by allowing flexibility in particular circumstances”*.

It is considered that the proposal represents a high quality planning outcome for the site.

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