

# 44 High Street, Parramatta

Clause 4.6 Variation Statement – August 2024



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## INTRODUCTION

### Overview

This Clause 4.6 Variation request has been prepared pursuant to Clause 4.6 of Parramatta Local Environmental Plan 2023 (**PLEP 2023**) in support of the development application for the new car wash structure at 44 High Street, Parramatta (**the site**).

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Parramatta LEP 2023 (PLEP 20123) which has the following aims and objectives:

- 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.*

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Height of Buildings of the PLEP 2023. In summary the following variations are proposed:

| <b>Parramatta LEP 2023 Clause</b> | <b>PLEP 2023 Development Standard</b> | <b>Proposed Development Non-Compliance</b> |
|-----------------------------------|---------------------------------------|--------------------------------------------|
| Clause 4.3 Height of Buildings    | Maximum 0m                            | 4m                                         |

In accordance with Clause 4.6 of the PLEP 2023 Council is required to consider the following:

*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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

This variation request demonstrates that:

- The variation to the development standard is in the public interest because it is consistent with the objectives for the zone and the development standard itself.
- Compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.



## RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development, including the aims and objectives, maximum building height control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgements issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

### Parramatta Local Environmental Plan 2023

Clause 4.6 of PLEP 2023 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the PLEP as:

*(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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
  - There are sufficient environmental planning grounds to justify contravening the development standard.
- Furthermore, the Consent Authority must be satisfied that 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, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
2. The public benefit of maintaining the development standard, and
3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: Concurrence is to be assumed as per the applicable planning circular, discussed further below.]

This document forms a Clause 4.6 written request to justify the contravention of the Building Height development standard in Clause 4.3. Also forming part of this request are the architectural drawings that have been submitted in connection with the amended development application. The assessment of the proposed variations has been undertaken in accordance with the requirements of the PLEP 2023, Clause 4.6 Exceptions to Development Standards.

## NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the maximum building height in accordance with Clause 4.6 of PLEP 2023. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
  - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

*"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..."* [15]

- On the grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

*"The 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..."* [22]

- That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

*"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"* [26]

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

*"Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard will have a better environmental planning outcome than a development that complies with the development standard."* [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

## THE EXTENT OF VARIATION

### Relevant Development Standards

The development standards being requested to be varied are Clause 4.3 Height of Buildings of the PLEP 2023.

#### 1.1 The Height Standard

Clause 4.3 (2) of the PLEP 2023 states:

*(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.*

The Height of Building Map sets a height standard of 0m for the site. The 0m building height standard has been measured in accordance with the PLEP 2023 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.*

#### 1.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Building Height of the PLEP 2023. In summary the following variations to development standards are proposed:

| Parramatta LEP 2023 Clause     | PLEP 2023 Development Standard | Proposed Development Non-Compliance |
|--------------------------------|--------------------------------|-------------------------------------|
| Clause 4.3 Height of Buildings | Maximum 0m                     | 4m                                  |

## CLAUSE 4.6(4)(A)(II) – WILL THE PROPOSED DEVELOPMENT BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

### 2. Overview

The proposed development will be in the public interest because it is consistent with the objectives of the height control standard and the zone objectives.

#### 2.1 The Proposal Achieves the Objectives of the Height Standard

The objectives of the building height control as listed within Clause 4.3 of the PLEP 2023 have been achieved as demonstrated below.

The objectives of Clause 4.3 are as follows:

- (a) to provide appropriate height transitions between buildings,*
- (b) to ensure the height of buildings is compatible with the height of existing and desired future development in the surrounding area,*
- (c) to require the height of future buildings to be appropriate in relation to heritage sites and their settings,*
- (d) to reinforce and respect the existing character and scale of low density residential areas,*
- (e) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (f) to preserve historic views,*
- (g) to maintain satisfactory sky exposure and daylight to—*
  - (i) existing buildings in commercial centres, and*
  - (ii) the sides and rear of tower forms, and*
  - (iii) key areas of the public domain, including parks, streets and lanes.*

Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives:

The objectives of Clause 4.3 are as follows:

- (a) to provide appropriate height transitions between buildings,*

The proposed car wash structure is only single storey to a height of 4m and is an appropriate transition to surrounding buildings and structures.

- (b) to ensure the height of buildings is compatible with the height of existing and desired future development in the surrounding area,*



The site is surrounded by development with a mix of existing and potential future heights. The single storey structure on a small portion of the site would not compromise the desired future development character of the area.

*(c) to require the height of future buildings to be appropriate in relation to heritage sites and their settings,*

The site is located adjacent a heritage item. The single storey height and minimal massing and bulk of the car wash is appropriate to the heritage significance and setting of the adjoining site.

*(d) to reinforce and respect the existing character and scale of low density residential areas,*

The site is located in a mixed use setting and will respect any surrounding low density residential areas nearby.

*(e) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*

No amenity impacts including to surrounding views, privacy or solar access will occur from the proposed car wash structure.

*(f) to preserve historic views,*

Views to the adjacent heritage site will be maintained and preserved.

*(g) to maintain satisfactory sky exposure and daylight to—*

- i) existing buildings in commercial centres, and*
- ii) the sides and rear of tower forms, and*
- iii) key areas of the public domain, including parks, streets and lanes.*

Sky exposure and daylight will be maintained to adjacent buildings and public domain areas as a result of the new car wash structure.



## 2.2 The Proposal Achieves the Objectives of the Zone

The site is currently zoned MU1 Mixed Use under the Parramatta LEP 2023.

The proposed new development is consistent with the MU1 zone objectives in that:

*To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*

- The proposal gives provision of carwash that will both promote employment. The use will promote employment associated with the adjacent vehicles sales premises a 10-12 Church Street.

*To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

- The commercial premises will add to an active street frontage at ground floor level.
- The proposed use will provide natural surveillance to the public domain to the benefit of public safety.

*To minimise conflict between land uses within this zone and land uses within adjoining zones.*

- No land use conflicts are to occur from the proposal.

*To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

- The ground floor of surrounding buildings is made up of business/retail uses.
- This mix of uses is consistent with the current uses for the site and the surrounding streetscape.

*To create opportunities to improve the public domain and pedestrian links.*

- No improvements are likely to occur to the public domain and pedestrian links as a result of the car wash facility.

*To protect and enhance the unique qualities and character of special character areas in Parramatta City Centre.*

- The quality and character of the Auto Alley Area will be maintained.

## CLAUSE 4.6(3)A – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard **is** unreasonable or unnecessary in the circumstances of the case.

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *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.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 2.1 and 2.2, the proposed development is consistent with the underlying objectives of the standard for Building Height and the MU1 zone of PLEP 2023.

As addressed previously the proposal has demonstrated compliance with the relevant objectives of Clause 4.3 of the Parramatta LEP 2023.

### Undermining objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) says that it is an objective of the legislation:

*to promote the orderly and economic use and development of land*



Requiring strict compliance with the height control would undermine the achievement of this objective of the legislation. This is because orderly and economic use and development of land is encouraged/supported by permitting development in accordance with the relevant development standards.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

Disproportionate burden on the community

The severity of the burden placed on members of the community (by requiring strict compliance) would be disproportionate to the consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 (at [15])).

The adverse consequences by requiring strict compliance have already been outlined. In brief terms, they are:

- an unnecessary reduction in housing supply and housing choice.

It is unreasonable to expect the community to bear these adverse consequences in circumstances where there are no significant adverse impacts from allowing the height contravention.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.



## CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed development demonstrates that there are sufficient environmental planning grounds in support of the contravention for the following reasons:

- The proposed car wash structure is only single storey to a height of 4m and is an appropriate transition to surrounding buildings and structures.
- The site is surrounded by development with a mix of existing and potential future heights. The single storey structure on a small portion of the site would not compromise the desired future development character of the area.
- The site is located adjacent a heritage item. The single storey height and minimal massing and bulk of the car wash is appropriate to the heritage significance and setting of the adjoining site.
- The site is located in a mixed use setting and will respect any surrounding low density residential areas nearby.
- No amenity impacts including to surrounding views, privacy or solar access will occur from the proposed car wash structure.
- Views to the adjacent heritage site will be maintained and preserved.
- Sky exposure and daylight will be maintained to adjacent buildings and public domain areas as a result of the new car wash structure.
- The proposal gives provision of carwash that will both promote employment. The use will promote employment associated with the adjacent vehicles sales premises at 10-12 Church Street.
- The commercial premises will add to an active street frontage at ground floor level.
- The proposed use will provide natural surveillance to the public domain to the benefit of public safety.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- No land use conflicts are to occur from the proposal.
- The quality and character of the Auto Alley Area will be maintained.



#### CLAUSE 4.6(5)(A) – WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The proposed non-compliance with the maximum height of building development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?

Overall it is considered that the strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality residential development and housing stock which achieves the strategic objectives of Council.

#### CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?

The Planning Circular PS 20-002, issued on 5 May 2020 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The PLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council.



## CONCLUSION

It is requested that council supports the proposed variation to Clause 4.3 of the PLEP 2023 for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of improved residential accommodation, for family housing.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.