

# INGHAM PLANNING Pty Ltd

---

## REQUEST TO BREACH HEIGHT CONTROL PURSUANT TO CLAUSE 4.6 OF THE LEP

The proposal has a maximum height of 24.8-27.45m. This 1.4-4.05m higher than the control which is 18m plus 30% bonus height permitted – a total of 23.4m. The variation is due to the sloping nature of the land. This is a 6-17% exceedance of the control. As the height exceeds the LEP limit, a request to contravene this control must be made under Clause 4.6 of the LEP.

The relevant parts of Clause 4.6 of Gosford 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. 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; relevant Land Environment Court judgements such as *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*.

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

Whilst it was prepared in relation SEPP 1, the Land and Environment Court judgment *Wehbe v Pittwater Council [2007] NSWLEC 827 (21 December 2007)*, remains relevant to

---

the consideration of concept of compliance being unreasonable or unnecessary. The DP&I Guide referred to above outlines the following 5 part test used in *Wehbe*:

- 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 object of 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.*

In regard to the issue here, it is considered that 1, 2 and 3 above are applicable to the various objectives of the height control contained in Clause 4.3 of the LEP.

*(a) to establish maximum height limits for buildings,*

Comment – the variation will not alter the maximum height limits that apply more broadly across Gosford.

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

Comment – it is considered that the proposed building heights will result in a higher quality urban form than if compliance was enforced. In this regard as indicated in the following figure, the controls allow a higher building than proposed at the southern end of the site where potential for impact is the greatest. Due to the location of the split in the height limit relative to the development parcel, adherence to the height control would result in a building of split height. The proposal represents a better outcome as the proposed gap between buildings is necessary as it is an overland flow path and it creates the opportunity to vary the height of the two buildings rather than having a single building with a significant 'step' in it.



**Building height relative to height controls**

*(c) to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,*

---

# INGHAM PLANNING Pty Ltd

---

Comment – the proposal represents a better outcome than complying height as having a higher building near the southern boundary (as is permitted) would have a greater level of overshadowing on the adjoining site and on the public domain than the proposed buildings.

*(d) to nominate heights that will provide an appropriate transition in built form and land use intensity,*

Comment - the proposal represents a better outcome than complying height as it allows a more gentle transition between the two height zones on the site than would otherwise occur.

*(e) to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,*

Comment – the proposed distribution of building heights will have no different impact on views that would occur from a height compliant scheme.

*(f) to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.*

Comment – as noted above the proposal will result in reduced overshadowing as it allows the southern-most part of the building to have a lesser height than is permitted. It will have no different impact on views as noted above.

Having regard to the above it is considered that it would be unreasonable and unnecessary to enforce compliance as a better outcome is achieved in relation to the objectives of the height control by not complying.

## **Clause (3)(b) - there are sufficient environmental planning grounds to justify contravening the development standard**

### Compliance would result in poorer planning outcomes

One of the objectives of Clause 4.6 is to allow better outcomes to be achieved. As detailed above, the proposed height of the buildings is considered to result in a superior planning outcome compared to the form that would result from a development which complied with the height controls.

### Lack of impact

As noted in the above discussion, despite the non-compliance, the amenity of surrounding properties will be maintained to the extent that is considered acceptable for a complying development. In this regard there is potential for additional overshadowing on the properties to the west however this is offset by the greater than complying setbacks provided to the western boundary. As the proposal complies with the permitted FSR, any floor space lost by enforcing compliance could be accommodated by reduce setbacks. Therefore the overall outcome could be the same or worse than that resulting from the proposal.

As noted above, there would be some adverse outcomes from enforcing compliance, in particular overshadowing of the adjoining property and public domain to the south of the site.

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

## **Other matter to be considered**

---

It is noted that apart from considering the written request, pursuant to subclauses (4) and (5), the consent authority must also satisfy itself that the development:

- Is consistent with the objectives of the relevant standard. In this regard the written request demonstrates that this is the case; and
- Is consistent with the objectives of the subject zone. In this regard the submitted SEE demonstrates that the proposal is consistent with the objectives of the R1 zone; and
- That concurrence has been obtained. In this regard it is also noted that Council has been delegated the concurrence role of the Secretary. In undertaking this role, Council must consider the matters noted in subclause (5). In this regard it is considered that concurrence can be granted as:
  - The contravention of the standard does not raise any matter of regional or State significance;
  - There is no public benefit in maintaining the standard. As discussed below the proposed outcome is preferable than a complying scheme in terms of direct impacts on the public domain but also in relation to providing better achievement of the relevant planning objectives.

## Conclusion

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

Brett Brown  
Ingham Planning Pty Ltd  
December 2015

---