

ATTACHMENT 3 – CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARD STATEMENT

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5.1.6 Clause 4.6 Variation Statement – Height of Buildings

Requirements of Clause 4.6

Subclause 4.6(1) of the LEP states the objectives of the clause as follows:

- "(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."*

Our response to these provisions is contained within this submission.

Subclause 4.6(2) provides that:

- "(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 Height of Buildings development standard is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted.

Subclause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- "(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 development standard pursuant to clause 4.3 of LEP 2009 however, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as justified in this written request.

Subclause 4.6(4) provides that 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."*

The remainder of this written request for exception to the development standard addresses the matters required under subclauses 4.6(4) of the LEP.

Subclause 4.6(5) provides that 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."*

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The proposed non-compliance does not raise any matter of significance for State or regional environmental planning and is peculiar to the design of the proposed development on this particular Site and it is considered that there would be no significant public benefit of maintaining the development standard in this instance.

Furthermore, this amended DA represents a reduction in the overall building height as the building has been shifted to a more northerly position on the site, which results in a lower overall building height.

It is considered that there are no other matters of relevance that need to be taken into consideration by the Secretary.

The Nature of the Variation

Subclause 4.3(2) of LEP 2009 sets out the Height of Buildings as follows:

"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 Buildings Map designates a maximum Height of Buildings of 11 metres for the Site.

The LEP defines *building height* (or *height of building*) as:

"... 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."

The proposed hardware and building supplies building has a maximum height of 16.6 metres at the ridge to the main pedestrian entrance on the southern elevation (see Figure 4). Elsewhere, the height ranges from approximately 10.3 -15.8 metres in height.

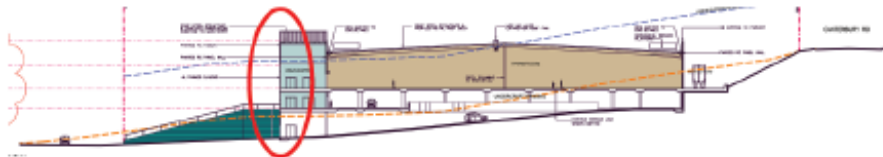


Figure 4 Extract from the Architectural Section showing the location of the maximum building height of 16.6 metres

The following provides a more detailed appreciation of the extent to which the proposed building exceeds the 11 metre height limit and this should be read in conjunction with the architectural elevations and sections at Index 3:

- Between 0-4.6 metres along the eastern elevation;
- Between 3.0-5.6 metres along the southern elevation, with the majority of this being the entry feature which is 23m wide, comprising approximately 10% of the southern facade;
- Between 0-4.6 metres along the western elevation; and
- Between 0-3.6 metres along the northern elevation;

The sloping topography of the Site and the need to provide a large level floorplate are major contributors to the height non-compliances as well as the provision of undercroft car parking instead of providing large surface car parking areas around the building. The proposed design therefore provides for significant landscaped setbacks, reduction in excavation and avoidance of exporting excessive amounts of spoil from the Site. The amended proposal is also lower than the original DA as a result of shifting the building north to a flatter part of the site, to allow adequate land for the roundabout on Northcliffe Drive.

Justification for the Variation ('5-Part Test')

The proposed variation to the development standard has been considered in light of the abovementioned objectives, potential environmental impacts and the '5-part test' established

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by the NSW Land & Environment Court and strict compliance is considered to be unreasonable and unnecessary for the reasons expressed hereunder.

The Land and Environment Court of NSW, through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001], established a '5-part test' for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. This 5-part test was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of the policy.

Whilst these Judgments related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to clause 4.6 and accordingly, we have applied this methodology to the assessment below.

- **Is the planning control a development standard?**

Yes, the Height of Buildings control in clause 4.6 of LEP 2009 is a development standard, defined in section 4 of the EP&A Act as follows:

"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

- **What is the underlying object or purpose of the standard?**

Subclause 4.3(1) of the LEP states the objectives of Height of Buildings development standard as follows:

- "(a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight."*

The proposal is consistent with the objectives of the Height of Buildings development standard for the following reasons:

- Notwithstanding the non-compliance with the maximum building height, the proposed development complies with the FSR applicable to the Site and provides for significant setbacks and soft landscaping opportunities around the perimeter of the building. The proposed soft landscaping for proposed Lot 102 (i.e. the Bunnings building) constitutes 31% of the site area which vastly exceeds the DCP requirement of 10%, being 7,413m² of additional landscaping than required;
- The proposed warehouse and building supplies building is considered to be of high quality urban form for a development of this nature which is atypical of more traditional forms of development permissible in the B6 Zone such as office buildings but not entirely dissimilar to other forms of permissible development in the B6 Zone such as light industry;
- Notwithstanding the non-compliance with the maximum building height, the proposed warehouse and building supplies building will not result in significant adverse impacts in terms of views of the sky from public areas or exposure of public or private spaces to sunlight. The latter is clearly demonstrated in the

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shadow analysis prepared by JRB (see Figure 5 and Index 3) which shows that whilst the proposed building will overshadow a small part of the expansive road reservation of Northcliffe Drive at 9am at midwinter, this will dissipate to no overshadowing of the road reservation at midday at midwinter. Furthermore, only a small area of the German Club land at 636a Northcliffe Drive will be overshadowed in the late afternoon at midwinter and no surrounding residential development will be overshadowed.

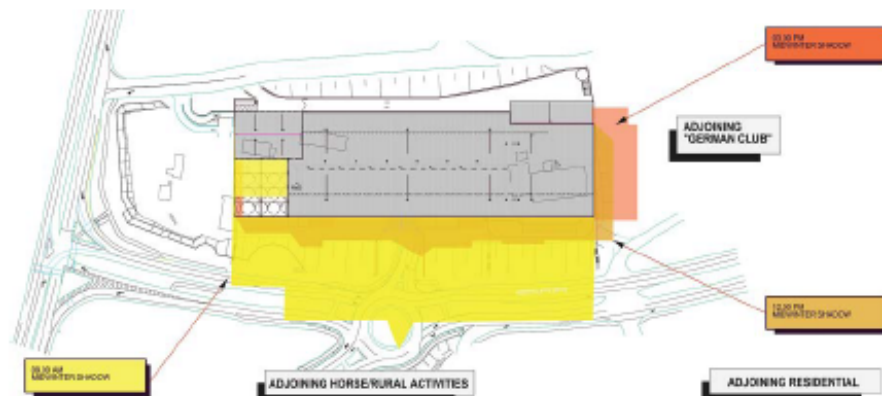


Figure 5 Extract of Solar Analysis by JRB

It is also relevant to consider the objectives of the B6 Enterprise Corridor Zone expressed in the Land Use Table to Clause 2.3 of LEP 2009 as follows:

- To promote businesses along main roads and to encourage a mix of compatible uses.
- To provide a range of employment uses (including business, office, retail and light industrial uses).
- To maintain the economic strength of centres by limiting retailing activity.
- To encourage activities which will contribute to the economic and employment growth of Wollongong.
- To allow some diversity of activities that will not:
 - (a) significantly detract from the operation of existing or proposed development, or
 - (b) significantly detract from the amenity of nearby residents, or
 - (c) have an adverse impact upon the efficient operation of the surrounding road system.

The proposal is consistent with the objectives of the B6 Zone for the following reasons:

- The proposed development will provide for a mix of compatible and permissible land uses on land bounded by two major arterial roads where only several small scale businesses and vacant land currently exist. This context will ultimately change as a consequence of changes to the arterial road network including the roundabout on Northcliffe Drive and the future road 'flyover' to the West Dapto urban release area to the west. Accordingly, the height of the proposed building needs to be considered in the context of this expansive road reservation and the contribution of the building to that future streetscape will be positive rather than overbearing or excessive;
- The proposed development will provide for a hardware and building supplies land use which will be a major employment generator in this locality whilst also providing scope for a future bulky goods premises and residue land for similar or other permissible land uses which will also generate employment;

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- The proposed development does not contain traditional retail land uses such as speciality shops or supermarkets which are prohibited in the zone and thus will protect the economic strength of retail centres in the LGA;
 - The proposed hardware and building supplies building and potential for future bulky goods and similar land uses will generate employment and contribute to the economic growth of Wollongong;
 - The Site is bounded to the north and west by arterial roads, with industrial development to the north-east, private recreational and business uses to the south and semi-rural and residential development a significant distance to the south-west. Accordingly, the proposed development will not significantly detract from the operation of existing or proposed development in the locality;
 - The above assessment of shadow impact and the acoustic assessment by Wilkinson Murray (see **Index 10**) demonstrate that the proposed development will not significantly detract from the amenity of residents on the south-western side of Northcliffe Drive or farther afield in terms of solar access or noise; and
 - The traffic assessment by TTPA (see **Index 5 and Section 5.2.4**) demonstrates that the proposed development will not have an adverse impact upon the efficient operation of the surrounding road system.
- *Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979?*

The non-compliance with the development standard allows for an orderly use of the land, which, notwithstanding its sloping topography, has the capacity to accommodate the proposed form of development with variations to the height control in some parts of the building, whilst other parts of the building are well within the height limit provided for by the LEP. This enables the proposal to provide for undercroft car parking instead of vast areas of surface car parking, thereby increasing the quantum of landscaped setbacks well in excess of the DCP requirement whilst minimising excess spoil associated with cut and fill.

It should be noted that this amended DA, including shifting the building to a flatter part of the site, reduces the extent of the building height non-compliance. The original DA had a maximum building height of 18.2 metres whereas the amended proposal includes a maximum building height of 16.6 metres. Therefore, the maximum building height has been reduced by 1.6 metres.

Alternative designs for a hardware and building supplies development would entail relocating car parking around the periphery of the building thereby reducing setbacks and landscaping opportunities or excavating further into the Site thereby resulting in significant exporting of spoil. The proposal is considered to be a better planning outcome for this Site than these alternatives.

Accordingly, requiring strict compliance with the development standard would be inconsistent with the objectives of clause 4.6 which are to provide flexibility in the application of the standard and to achieve better outcomes for and from development through such flexibility.

Furthermore, it is considered that the relevant Objects of the Act are satisfied as the proposed non-compliance with the Height of Buildings development standard:

- will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment. Indeed the proposal will facilitate social and economic

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welfare by activating the Site for an employment generating land use in the locality;
and

- will promote the orderly and economic use and development of the Site in a manner which achieves the objectives of the relevant planning controls.

Accordingly, strict compliance with the development standard is considered to hinder the promotion and co-ordination of the orderly and economic use and development of land comprising the Site.

- *Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?*

For the reasons expressed in this clause 4.6 variation request, strict compliance with the development standard is considered to be unnecessary and unreasonable in the circumstances of this particular case.

- *Is the objection well founded?*

This variation request relies upon the first 'way' expressed by Chief Justice Preston in *Wehbe v Pittwater Council [2007]* as follows:

- "1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*"

As discussed above, notwithstanding the non-compliance the proposed development achieves the objectives of the development standard and the B6 Zone, is considered to have positive outcomes for the Site and surrounding locality and will not adversely impact on the natural or built environment and therefore, the objection is considered to be well founded.