

## CLAUSE OBJECTIVES AND EXCLUSIONS

### Clause 4.6 – Exceptions to Development Standards

#### Clause 4.6(1) – Clause Objectives

Clause 4.6 provides a mechanism to vary development standards prescribed within Port Stephens Local Environmental Plan (PSLEP) 2013.

The objectives of the clause are as follows:

- a) *To provide an appropriate degree of flexibility 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(2) – Exclusions to the operation of clause 4.6

Development consent may be granted even though the development would contravene a development standard imposed by the PSLEP, unless the development standard is expressly excluded under Clause 4.6(8). Clause 4.3 is not excluded from the operation of Clause 4.6, and therefore the proposed variation has been considered below.

## PROPOSED VARIATION REQUEST

The development application includes a written request to vary a development standard(s) in the PSLEP 2013. The written request is made in accordance with Section 35B of the Environmental Planning and Assessment regulation 2021.

The relevant development standard(s) and the extent of the proposed variation(s) is:

Development Standard	Proposed Variation	Extent of Variation (%)
Clause 4.3 of the PLSEP – 9m	0.75m	8.33%

## ASSESSMENT

### Clause 4.6(3) – Request to vary development standards

#### Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary

Clause 4.6(3)(a) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances.

In *Wehbe v Pittwater Council* (2007) LEC 827 (*Wehbe*), Chief Justice Preston identified five ways in which a request to vary a development standard may be determined to be well founded. These reasons include:

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard,*
2. *The underlying objective or purpose of the development standard is not relevant to the development,*
3. *The objective or purpose of the development standard would be defeated or thwarted if compliance was required,*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard, and*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary as applied to the land.*

Whilst the Clause 4.6 request does not specifically reference the *Wehbe* case, it makes reference to Reason 1.

The applicant's Clause 4.6 Variation request asserts that compliance with Clause 4.3 is unreasonable or unnecessary as the objectives of the standard are achieved notwithstanding non-compliance with the standard. In demonstrating this, the applicant assessed the proposal against each objective of Clause 4.3. The objectives of Clause 4.3 are:

- (1) *The objectives of this clause are as follows—*
  - (a) *to ensure the height of buildings is appropriate for the context and character of the area,*
  - (b) *to ensure building heights reflect the hierarchy of centres and land use structure.*

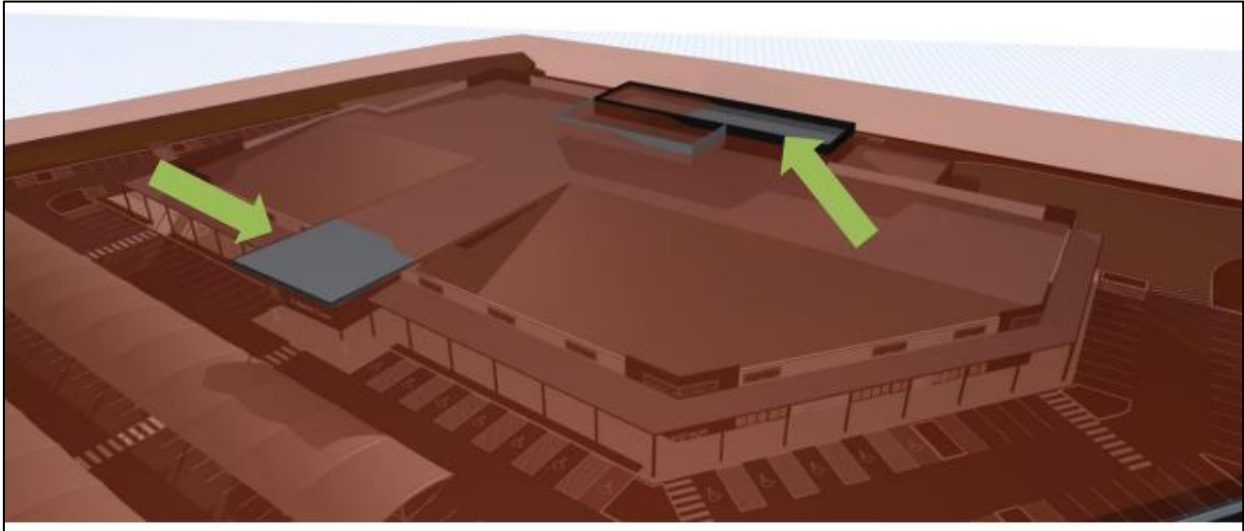
A summary of the applicant's assessment against each of the two objectives is provided below.

#### Compliance with 4.3(1)(a)

- The proposal is appropriate for the context and character by virtue of the Planning Proposal being approved and subsequent site rezoning which allowed for the use of the site for commercial premises.
- The proposal complies with the maximum allowable ground floor area (GFA) imposed under Clause 7.24 of the PSLEP.
- The extent of the variation is limited to the forecourt area, plant room and condenser deck, as shown in **Figure 1**. The applicant considers the areas exceeding the height limit are architectural roof features and therefore should otherwise be assessed against Clause 5.6 of the PSLEP without the need for a Clause 4.6 variation. The request acknowledges this approach was not supported by Council or the HCCRPP hence the lodgement of a Clause 4.6 variation request.
- The development footprint is contained within the middle portions of the site, has two road frontages and is surrounded by zone C2 Environmental Conservation and therefore does directly adjoin sensitive land uses.

## Compliance with 4.3(1)(b)

- The proposal is for commercial development which aligns with the zoning and the Planning Proposal which rezoned the land therefore reflecting the strategically informed land use structure.



**Figure 1.** Plan showing areas of height exceedance

## Council Assessment

The first of objective of Clause 4.3 is to *to ensure the height of buildings is appropriate for the context and character of the area*. The site is surrounded by a mixture of land uses including residential and rural land uses. The site is the only commercially zoned land within the immediate surrounds and therefore the development would be the only commercial development within the sites vicinity. It is noted however, that the site is the only lot subject to a height limit within the immediate surrounds. Notwithstanding, surrounding development is generally characterised to single and two storey developments.

It is considered that the development has been designed to ensure that the building height is appropriate for the context and character of the area, with the building itself being significantly setback from all boundaries particularly the Fullerton Cove Road frontage, which will be the most visible aspect from the public domain due to the retained vegetation along other boundaries. The areas of the building where the height is exceeded are located towards the middle of the building and orientated towards the sites side boundaries reducing visibility from the public domain.

In addition to the large setbacks provided, landscaping is proposed along the boundary with Fullerton Cove Road which will soften the hardstand space, complement the built form and ensure the development is generally consistent with the existing character of the area.

The second objective of Clause 4.3 is to *to ensure building heights reflect the hierarchy of centres and land use structure*. During the Planning Proposal for the site, the land was identified as being appropriate for commercial development due to its proximity to residential development, appropriate

infrastructure and due to the area being identified as being underserved by commercial development. The development's proposed height and built form is considered appropriate in reflecting its desired use as the commercial centre for the area supported by a strategic policy framework.

Based on the above, it is considered that the proposal satisfies clause 4.6(3)(a).

## **Clause 4.6(3)(b) – Sufficient environmental planning grounds**

Clause 4.6(3)(b) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the development standard.

The applicant's Clause 4.6 request notes that there is sufficient environmental planning grounds to contravene the development standard as:

- The proposal is not inconsistent with the objectives of Clause 4.3.
- The surrounding area provides appropriate infrastructure to support the development.
- The proposed building height does not unduly impact the amenity of the locality.
- The proposal is consistent with the maximum allowable GFA under the PSLEP.
- The height does not significantly increase impacts relating to solar access, over shadowing and ventilation compared to that of a compliant building.
- The proposal is consistent with strategic policies.

The applicant contends that the potential environmental planning benefits justify the contravention of the development standard.

### Council Assessment

It is considered that the applicant's assessment of the height breach demonstrates that there are sufficient environmental planning grounds to justify the contravention of the development standard. Notwithstanding, the following is also noted:

- The proposed height exceedance does not result in a building that is not consistent with the desired streetscape character compared to that of a compliant development.
- The height exceedance is localised to small sections of the building.
- A compliant building height would not result in a significantly different scale development and therefore impacts would likely remain the same or similar.
- The proposed height exceedance does not result in additional adverse amenity impacts relating to noise, visual impact and overshadowing.
- The proposal will have both positive social and economic impacts through the creation of jobs in the area and provision of a commercial use in a locality that is underserved.
- The proposed scale of the development is consistent with the Fern Bay and North Stockton Strategy.



## CONCLUSION

The proposed development is considered to be consistent with the objectives of Clause 4.6 given it will achieve better outcomes for and from the development in these particular circumstances as the objectives of the height development standard are achieved, notwithstanding the non-compliance and there is sufficient environmental planning grounds to justify the contravention.