Clause 4.6 Variation Request Statement

Height of Buildings Development Standard (Clause 4.3(2) of the LEP)

28 - 42 Pacific Highway, St Leonards

Prepared by Paro Consulting for EDSGEAR PTY LTD

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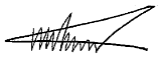
		Wilson Perdigao, Principal Planner B.Plan (Hons)	

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1. Introduction

This Clause 4.6 variation request statement has been prepared in relation to the development standard for building height contained within Part 4, Clause 4.3 'Height of buildings' of the *Lane Cove Local Environmental Plan 2009 (2010 EPI 49)* (Lane Cove LEP).

Clause 4.6 of the Lane Cove LEP enables a consent authority to grant consent for a development even though the development contravenes a development standard of the LEP or another environmental planning instrument, such as in this case, the Lane Cove LEP.

This variation request is to accompany a Development Application (DA) at 28 – 42 Pacific Highway, St Leonards (the site) for a Mixed-Use, Hotel development comprising; commercial tenancy, 99 hotel units, communal living and communal outdoor areas, basement parking and facilities and associated works (the proposal).

Clause 4.3(2) of the LEP prescribes that the maximum height of a building on any land is not to exceed the height shown for the land on the Height of Buildings (HOB) Map. The HOB Map nominates a maximum height of 38m for development on the subject site. The development is therefore subject to a maximum 38m height of building standard.

The proposed development includes a maximum overall building height of:

- 39.8m to the top of the roof (to RL 112.70) as measured from ground level (existing);
- 34.4m to the top of the roof (to RL 112.70) as measured from natural ground level via the extrapolation method.

The proposal, as measured from 'ground level (existing)', therefore exceeds the maximum permissible height by 1.8m (or a 4.7% variation) when considered against Clause 4.3(2). This Clause 4.6 Variation Request has been submitted for abundant caution in relation to the variation to the exceedance of the statutory height standard as measured from ground level (existing) due to previous excavation having altered the ground level of the site.

This written variation request has been prepared pursuant to Clause 4.6 of the Lane Cove Local Environmental Plan 2009 (Lane Cove LEP) and forms a written request that justifies the contravention of the Height development standard based upon specific circumstances of this proposal. It is submitted that permitting the proposed variation to Clause 4.3(2) of the Lane Cove LEP will allow for improved planning outcomes at the site.

This request has been prepared in accordance with Clause 35B of the *Environmental Planning and Assessment Regulation 2021* (the Regulation) which requires that a DA involving contravention of development standard must be accompanied by a document that sets out the grounds that demonstrates compliance with the development standard is unreasonable or unnecessary in the circumstances, and that there are sufficient environmental planning grounds to justify the contravention of the development standard.

This request has been prepared having regard to the Department of Planning and Environment's Guide to Varying Development Standards (November 2023) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3)(a) and (b) for which the consent authority must be satisfied has been demonstrated according to Preston CJ in Wehbe V Pittwater Council (2007) NSW LEC 827 ('Wehbe').

2. Relevant planning instrument, development standard and proposed variations

2.1 Environmental Planning Instrument to be varied

The Environmental Planning Instrument (EPI) to be varied is the Lane Cove Local Environmental Plan 2009 (Lane Cove LEP), *Clause 4.3 Height of Buildings* of the Lane Cove LEP applies to the site. Following the 2023 planning reforms, Clause 4.6 of the relevant Local Environmental Plan (LEP) - in this case, the Lane Cove LEP - must be used to vary development standards within Environmental Planning Instruments (EPIs). Which in this case is the Lane Cove LEP 2009. The request is seeking to vary the maximum Height standard as it applies to the site and proposal.

2.2 Development Standard to be Varied

The development standard that is proposed to be varied is the height of buildings set out in Clause 4.3(2) of the Lane Cove LEP 2009.

Clause 4.3 height of buildings of the Lane Cove LEP 2009 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 Buildings Map (**Figure 1** below) illustrates that a maximum building height of 38m applies to the land, as measured from ground level (existing). The development standard to be varied is not excluded from the operation of clause 4.6 of the Lane Cove LEP 2009.

Figure 1: Extract of the Height of Buildings Map of the Lane Cove LEP 2009 – the site is outlined in yellow *(Source: NSW Planning Portal Spatial Viewer)*

The development is therefore subject to a maximum *38m* height of building standard as per Clause 4.3(2) of the LEP.

2.3 Measuring Ground Level (Existing)

The maximum building height is to be measured in accordance with the definition contained in the Dictionary to the LEP.

Building height (or **height of building**) means under the LEP standard instrument:

> *"(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".*

ground level (existing) means under the LEP standard instrument:

> *"The existing level of a site at any point".*

The "ground level (existing)" is defined as "the existing level of a site at any point". It is essential, therefore, that an existing ground level is nominated in order to determine the height of the building. This is usually achieved by taking the lowest level on an existing site, directly beneath the highest part of the proposed development, to determine the maximum building height.

However, in circumstances where there is an existing building on the site that occupies the whole of the site area, such as this, this method cannot always be applied.

In these circumstances, the Land and Environment Court has determined that an alternate method for determining the existing ground level should be applied, known as the 'extrapolation approach'. The leading decision on this methodology is *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* (Bettar). In *Bettar*, Commissioner O'Neill held that where a site contains an existing building, the existing ground level should be determined based on "the level of the footpath at the boundary", as this "bears a relationship to the context and the overall topography" of the site (at [41]).

This decision of *Bettar* has been applied in several subsequent decisions of the Court, including *Stamford Property Services Pty Ltd v City of Sydney & Anor [2015] NSWLEC 1189* (Stamford), *Tony Legge v Council of the City of Sydney [2016] NSWLEC 1424* (Tony Legge) and Nicola v Waverley Council [2020] NSWLEC 1599. For example, in Stamford, Pearson C and Smithson AC, held that the extrapolation approach provides a "practical application" to the definition of "ground level (existing)" because it "places the building in its context, rather than relying on the present built form of an existing development on a site". This approach was reinforced in Tony Legge by Commissioner Dickson, in which she held that "it is appropriate to take the levels of the site as its interface with the public domain" (at [41]).

The existing ground level of the site has been determined using the 'literal' approach by adopting the existing levels at any point of the site. Notwithstanding, the 'extrapolation approach' remains good law and has been cited by the Court as recently as October 2024 (see *Yarranabbe Ventures v Council of the Municipality of Woollahra [2024] NSWLEC 1613*).

Bettar v Council of the City of Sydney [2014] NSWLEC 1070

The original and therefore leading decision on determining "ground level (existing)" on land that is sloping or completely excavated is the decision of Commissioner O'Neill in *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* ('Bettar'). In Bettar, consent was sought for amongst other things, a four and five storey residential flat building on a site where an existing building at ready occupied the entire site. Meaning there was no longer any "ground" for determining the existing ground level. In addition, there was an existing part basement excavated into one part of the site. Council's argument focused entirely on the existing building on the site and took the approach that the "ground level (existing)" should be calculated using the ground floor

level of the existing building and then dropping it down to the basement level in the part of the site where the existing basement was located.

The Commissioner determined that once the existing building is demolished the ground levels of that prior building would no longer be discernible or relevant as a starting point for measuring the height of any new building and that it would be conceivable that surrounding properties (with differing ground floor levels) could have starkly different height limits arising from the same development standard. The Commissioner held at paragraph [40a] that this would result in an *"absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be demolished and has no relationship to the context of the site."*

The Commissioner preferred the approach of the Applicant on this issue which was for the existing ground level of the site to be determined by extrapolating the ground levels found on the footpath (i e. — outside the site) across the entire site to measure the vertical distance to the highest point of the building. The Commissioner's reasoning for this, given at paragraph [41], was that *"the level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site and remains relevant once the existing building is demolished"*. In our experience. this has become known as the extrapolation method for determining "ground level existing".

Stamford Property Services Pty Ltd v City of Sydney [2015] NSWLEC 1189

Similar circumstances came before the Court once again in *Stamford Property Services Pty Ltd v City of Sydney [2015 NSWLEC 1189* ('Stamford') although this time on a much larger and more steeply sloping site than in Bettar. Consent was sought for amongst other things the partial retention of existing development on the site and the construction of a 19 storey tower building with basement parking on a Sydney CBD site. The context of the site was once again of paramount concern to Commissioner Pearson and Acting Commissioner Smithson, who found at paragraph [28] that *"The extent of excavation from site to site could lead to different height límits applying to adjoining buildings on redevelopment of any of those sites".*

Unlike the site in Bettar, which had two street frontages and vacant adjoining land from which levels could be measured, here the highly developed surrounds meant there were limited levels from which to even extrapolate a ground level (existing). Nevertheless. the Court noted that the availability of survey information necessary in order to be able to apply the Bettar extrapolation method may vary from site to site. but was still possible even with limited information and that there was sufficient actual and surveyed levels from the public domain in this case to arrive at a "ground level (existing)" figure for the (excavated) centre of the site being an average between two surveyed points. rather than a surveyed (and excavated) ground level.

Tony Legge v Council of the City of Sydney [2010] NSWLEC 1424

Solidifying the application of the decision in Bettar and Stanford to sites that are wholly built out in Tony Legge v Council of the City of Sydney NSWLEC 1424 ('Tony Legge') the Commissioner found at paragraph [41] that *'it is appropriate to take the levels of the site at its interface with the public domain'*. Further and importantly, the decision in Tony Legge reinforces the importance of placing the proposed building in its context rather than relying on the present built form of any existing development on a site.

Overall, I see the courts consistently taking a more practical approach to measuring height, albeit that it tends to be very reminiscent of the old 'natural ground level' approach to measuring height in instances where ground level (existing) is no longer discernible. In other words. it takes a non-literal approach but rather a pragmatic and workable approach to determining 'ground level (existing)'.

2.4 Extent of Variation

The proposed development includes a maximum overall building height of:

- 39.8m to the top of the roof (to RL 112.70) as measured from ground level (existing);

- 34.4m to the top of the roof (to RL 112.70) as measured from natural ground level via the extrapolation method.

The proposal, as measured from 'ground level (existing)', therefore exceeds the maximum permissible height by 1.8m (or a 4.7% variation) when considered against Clause 4.3(2).

Notwithstanding the above, the development achieves a maximum overall building height of 34.4m to the top of the roof (to RL 112.70) as measured from natural ground level via the extrapolation method in compliance with Clause 4.3(2) of the LEP.

Figure 2 Short Section below illustrates the extent of the height non-compliance as measured from *ground level (existing)* (green line) and illustrates the proposed height compliance as per the *extrapolation method* – natural ground level (blue line)

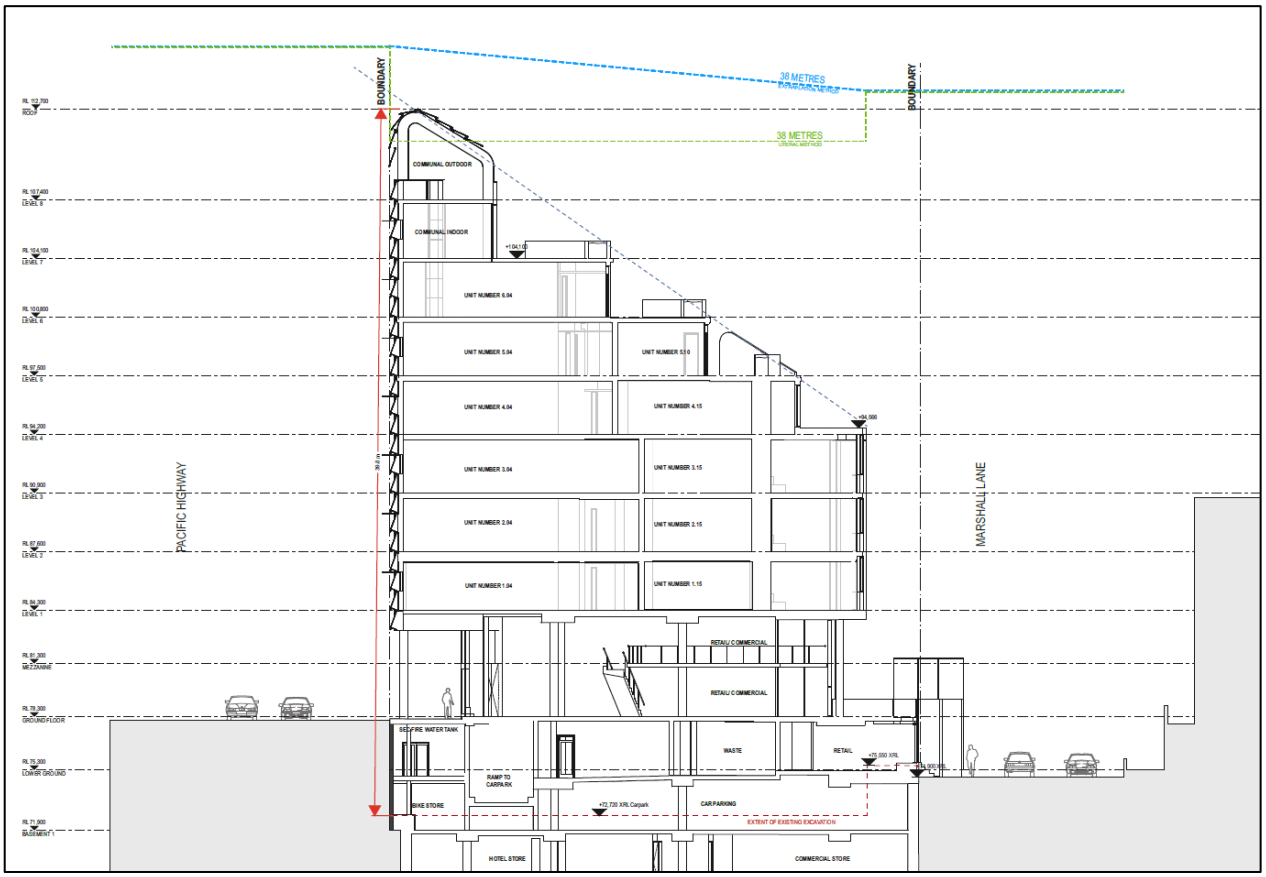
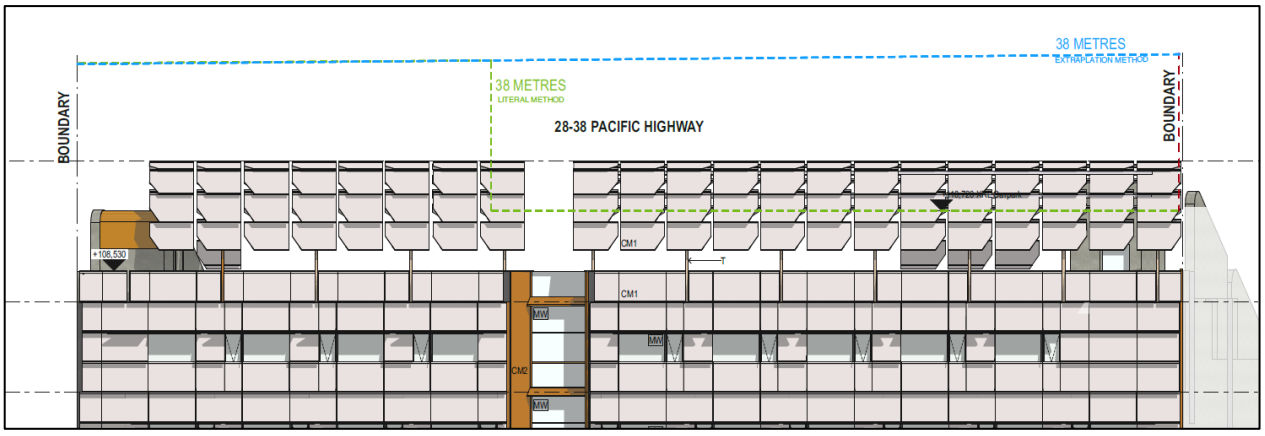


Figure 3 North Elevation below illustrates the extent of the height non-compliance as measured from *ground level (existing)* (green line) and illustrates the proposed height compliance as per the *extrapolation method* – natural ground level (blue line):



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3. Objectives and Provisions of Clause 4.6

The objectives and provisions of Clause 4.6 of the Lane Cove LEP 2009, are as follows:

(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note— *The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 4.1A,

(cb) Part 7, except clauses 7.1(4)(e) and 7.2.

It is noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6 in the Lane Cove LEP 2009.

4. Key questions

Is the Planning Control a Development Standard?

The standards to be varied is a Development Standard to which Clause 4.6 applies. Clause 4.3 of the Lane Cove LEP 2009 is contained within Part 4 which is titled Development Standards to be complied with and is a numeric development standard capable of being varied under clause 4.6 of LEP.

The standard instrument defines a 'development standard' as:

> ***"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—*
>
> *(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
>
> *(b) the proportion or percentage of the area of a site which a building or work may occupy,*
>
> *(c) the character, location, siting, bulk, scale, shape, size, **height,** density, design or external appearance of a building or work,*
>
> *(d) the cubic content or floor space of a building,*
>
> *(e) the intensity or density of the use of any land, building or work,*
>
> *(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
>
> *(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
>
> *(h) the volume, nature and type of traffic generated by the development,*
>
> *(i) road patterns,*
>
> *(j) drainage,*
>
> *(k) the carrying out of earthworks,*
>
> *(l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
>
> *(m) the provision of services, facilities and amenities demanded by development,*
>
> *(n) the emission of pollution and means for its prevention or control or mitigation, and*
>
> *(o) such other matters as may be prescribed."*

Based on the above definition, and with previous decisions of the Land & Environment Court in relation to matters which constitute development standards it is considered that the wording of the maximum building height standard constitutes a "development standard" as it is described as a numeric measure of building height– so it is a numeric development standard capable of being varied under clause 4.6 of the LEP.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6 as it is not listed within clause 4.6(6) or clause 4.6(8) of Lane Cove LEP 2009. It is also noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6 in Lane Cove LEP 2009. It is also noted that these clauses do not contain a provision which specifically excludes the application of clause 4.6.

On this basis it is considered that these clauses are development standards for which clause 4.6 applies.

4.1 Unreasonable and Unnecessary (Clause 4.6(3)(a))

In this Section, we demonstrate why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of Lane Cove LEP 2009.

Clause 4.6(3)(a) of the Lane Cove LEP 2009, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating that:

> *"compliance with the development standard is unreasonable or unnecessary in the circumstances"*

In *Wehbe V Pittwater Council (2007)* NSW LEC 827 ('Wehbe') Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

> *"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to 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."*

The judgement goes on to state that:

> *"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

In Wehbe, Preston CJ identified five ways in which it could be shown that application of a development standard was unreasonable or unnecessary. However, His Honour said that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways. The five methods outlined in Wehbe are as follows (with our emphasis placed on the ***First Method*** and ***Third Method*** for the purposes of this Clause 4.6 variation statement):

> ***"1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).***
>
> *2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
>
> ***3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).***

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 (Fourth Method).

5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method). Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method".

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to Wehbe and states:

"…Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

TEST 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The first test of Wehbe requires demonstration that the objectives of a development standard can be achieved notwithstanding non-compliance with that particular standard.

The Objectives of Clause 4.3 Height of Buildings of the Lane Cove LEP are as follows:

"(a) to ensure development allows for reasonable solar access to existing buildings and public areas,

(b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,

(c) to seek alternative design solutions in order to maximise the potential sunlight for the public domain,

(d) to relate development to topography."

In order to address the requirements of sub-clause 4.6(3)(a) of the LEP, the objectives of clause 4.3 are addressed below.

Objective (a): *"to ensure development allows for reasonable solar access to existing buildings and public areas,"*

The proposal maintains acceptable solar access to adjoining residential properties to the south. The minor exceedance in height is the result of the Court interpretation of "ground level (existing)" and does not generate any additional overshadowing compared to a compliant scheme measured from natural ground level.

The TOD does not specify a 32° sloping height plane control. Instead, it includes objectives for solar access that override the Lane Cove DCP's Figure 14: Section AA of Block A. The proposal at 38 Pacific Highway has elected to maintain a stepped form down to the Marshall Lane side of the building to preserve solar access to Southern neighbours. While the lift overrun sits above the notional 32° plane, the overall building adopts a stepped form to the south, specifically to preserve amenity for neighbouring properties.

Detailed shadow studies demonstrate that the extent of additional shadow cast onto habitable spaces of residential uses is acceptable with no additional shadowing of key places as identified in the Crows Nest TOD Precinct Guidelines. As per the Shadow Diagrams submitted with this DA, most additional shadows cast are as result of a permissible building envelope. The proposal provides a site-specific response by positioning the majority of the building bulk towards the northern side of the site with a cascade down towards the southern boundary minimising solar impact to neighbouring residential properties.

The proposal is therefore considered to ensure that reasonable solar access to existing buildings and public areas is retained, thereby satisfying objective (a).

Objective (b) ***"to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable"***

The building incorporates horizontal and vertical articulation, a varied façade treatment, and landscaping to soften the appearance when viewed from surrounding properties. The minor exceedance in height is the result of the Court interpretation of "ground level (existing)" and does not generate any additional privacy or visual impacts when compared to a compliant scheme measured from natural ground level.

Setbacks at upper levels, particularly along Marshall Lane, minimise visual bulk and reduce direct overlooking to residential properties.

The proposal is therefore considered to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable, thereby satisfying objective (b).

Objective (c) ***"to seek alternative design solutions in order to maximise the potential sunlight for the public domain"***

The building form steps down towards Marshall Lane, and upper levels are recessed to allow increased sunlight penetration to the laneway and surrounding pedestrian areas. The minor exceedance in height is the result of the Court interpretation of "ground level (existing)" and does not generate any additional overshadowing compared to a compliant scheme measured from natural ground level.

The design integrates awnings, colonnades, and a mix of active street frontages to encourage use of sunlit public spaces adjacent to the development.

Any overshadowing of the public domain is minimal and comparable to that of a height-compliant scheme.

The proposal is therefore considered to maximise the potential sunlight to public domain, thereby satisfying objective (c).

Objective (d) ***"to relate development to topography."***

The proposed built form responds sensitively to the site's fall from Pacific Highway to Marshall Lane.

The podium and massing arrangement follow the slope of the land, reducing perceived height and bulk when viewed from lower rear elevations. Basement levels are fully contained within the building envelope and are not visible from the public domain, ensuring the development integrates seamlessly with the existing topography.

The proposal is therefore considered to relate development to topography, thereby satisfying objective (d).

For the above reasons, I am of the view that the variation requested, and the resultant development is consistent with the objectives of the development standard and an appropriate degree of flexibility is warranted. Consequently, I conclude that strict compliance with the development standard is unreasonable and unnecessary.

In accordance with the decision in *Wehbe*, compliance with a development standard is demonstrated to be unreasonable or unnecessary in this one way alone. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

Notwithstanding the above, compliance with a development standard is also demonstrated to be unreasonable or unnecessary in another way being *Test 3* of Wehbe, outlined below:

TEST 3: ***The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable***

Strict compliance with the numerical maximum buidling height standard would undermine the underlying objective and purpose of the development standard in the following ways:

- Requiring strict compliance with a height control would result in underutilisation of the permissible built form envelope
- The proposed built form respects the intended massing outcome of the control in that it complies with the 38m height limit under Clause 4.3(2) of the LEP when measured from natural ground level.
- It is contended that the proposal achieves the visual and environmental objectives the height limit is intended to support noting that the basements contribute to building height under the strict definition, even where these levels are largely subterranean and do not impact the perceived scale or bulk of the proposed development.
- Requiring compliance would constrain site-responsive and well-designed proposal that meet height, bulk, and amenity objectives without yielding any public benefit.

The consequence is that requiring strict compliance would thwart the underlying objectives and purpose of achieving appropriate built form, aligned with the overarching strategic planning objectives of the Crows Nest Transport Oriented Development (TOD) Precinct.

Summary

In accordance with the decision in *Wehbe*, compliance with a development standard is demonstrated to be unreasonable or unnecessary in two ways (*Test 1* and *Test 3*). On this basis, the requirements of Clause 4.6(3)(a) are satisfied. Notably, under Clause 4.6(3)(b) a consent authority must now be satisfied that there are sufficient planning grounds for the contravention of a development standard. Clause 4.6(3)(b) is addressed in the Section below.

4.2 Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))

In this Section, we demonstrate there are sufficient environmental planning grounds to justify contravening the height development standard as required by clause 4.6(3)(b) of the LEP. In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

Clause 4.6(3)(b) of the Lane Cove LEP 2009, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating that:

> *"there are sufficient environmental planning grounds to justify contravening the development standard".*

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (Initial Action) (paragraph 24) states:

> *"The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].*
>
> *Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that*

the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].”

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. 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 summarised in Initial Action.

On the above basis, the following environmental planning grounds are submitted to justify contravening the maximum building height:

1. Technical breach due to altered ground level

a) The exceedance results solely from the interpretation of “ground level (existing)” and the presence of existing basement levels having altered the ground level on site. The existing ground level of the site has been determined using the ‘literal’ approach by adopting the existing levels at any point of the site. In these circumstances, the Land and Environment Court has determined that an alternate method for determining the existing ground level should be applied, known as the ‘extrapolation approach’. The leading decision on this methodology is Bettar v Council of the City of Sydney [2014] NSWLEC 1070 (Bettar). In Bettar, Commissioner O’Neill held that where a site contains an existing building, the existing ground level should be determined based on “the level of the footpath at the boundary”, as this “bears a relationship to the context and the overall topography” of the site (at [41]). This decision of Bettar has been applied in several subsequent decisions of the Court, including Stamford Property Services Pty Ltd v City of Sydney & Anor [2015] NSWLEC 1189 (Stamford), Tony Legge v Council of the City of Sydney [2016] NSWLEC 1424 (Tony Legge) and Nicola v Waverley Council [2020] NSWLEC 1599. For example, in Stamford, Pearson C and Smithson AC, held that the extrapolation approach provides a “practical application” to the definition of “ground level (existing)” because it “places the building in its context, rather than relying on the present built form of an existing development on a site”. This approach was reinforced in Tony Legge by Commissioner Dickson, in which she held that “it is appropriate to take the levels of the site as its interface with the public domain” (at [41]). Notwithstanding, the ‘extrapolation approach’ remains good law and has been cited by the Court as recently as October 2024 (see Yarranabbe Ventures v Council of the Municipality of Woollahra [2024] NSWLEC 1613).

2. Consistent Streetscape and Built Form Outcome

a) The building height is compatible with the evolving character of the Crows Nest Transit-Oriented Development Precinct and aligns with the intended urban form under the Lane Cove LEP 2009 and Crows Nest TOD Design Guide.

b) The additional height does not create an abrupt visual transition, overshadow neighbouring properties beyond reasonable limits, or present unacceptable visual bulk when viewed from Pacific Highway or Marshall Lane.

c) The proposal achieves the visual and environmental objectives the height limit is intended to support noting that basements contribute to building height under the strict definition, even where these levels are largely subterranean and do not impact the perceived scale or bulk of the proposed development.

d) The proposed development envelope, scale, and impact remains consistent with the intent of the height control that is to provide for a maximum of 38m above natural ground level.

e) The proposed design features a functional and high quality development, with high levels of amenity.

3. Compatibility with Desired Future Character

a) The St Leonards centre is generally characterised by a range of built forms reflecting a mix of building types and scale with no specific period reflected in the built form. The immediate locality along Pacific Highway comprises a mix of subpar commercial development of various forms and densities. Despite this, with its placement in the Crows Nest TOD Precinct, the immediate area can be described experiencing rapid urban renewal, with high-rise mixed-use

developments replacing older structures and increasing overall density. The proposed development is consistent with the vision of the precinct and the building will make a positive contribution to the character of Pacific Highway and Marshall Lane through its effective built form, sympathetic design materials and compatibility with emerging development.

4. Topographic Response

a) The form steps down in response to the site's fall from Pacific Highway to Marshall Lane, mitigating perceived height from lower ground elevations.

b) Basement parking is fully contained within the building footprint, minimising excavation impacts visible from the street.

5. The non-compliance will have no material impacts on surrounding development

a) It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:

- The design supports functional environments for future occupants,
- The height breach does not result in additional overshadowing, privacy or view loss impacts to adjoining development when considered against the backdrop of a compliant buidling envelope formulated by the 38m height limit above the natural ground level.
- The proposed development envelope, scale, and impact remains consistent with the intent of the height control that is to provide for a maximum 38m building above the natural ground level.
- The built form respects the intended massing outcome and achieves the visual and environmental objectives the height limit is intended to support.

6. The proposal meets aims and objectives of key planning documents

a) The proposed development meets the objectives of the development standard and meets the objectives of the E2 Commercial Centre zone (detailed in the accompanying Statement of Environmental Effects);

b) The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land through the proposed works provide short-term accommodation that better meet the needs and significantly improve the amenity opportunities of the future users and occupants of the hotel (1.3(c));
- The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development.

Insistence on compliance with the buidling height development standard will result in the proposal failing to meet the development of a built form outcome envisaged by the overarching Crows Nest TOD Precinct planning framework.

It is noted that in Initial Action, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *86. The second way is in an error because it finds no basis in cl 4.6. 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. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual*

intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). 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 have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome compared to a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

5. Conclusion

Having regard to all of the above, it is our opinion that this Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application and insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied, and the variation is worthy of support.

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