

CLAUSE 4.6 VARIATION REQUEST

124 Island Point Road, St Georges Basin
Proposed Re-Development of the Cooe Hotel

Ref: JB008

DATE: 30th January 2023

Amended 16th October 2023

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INTRODUCTION

A development application has been lodged with Shoalhaven City Council for the redevelopment of the cooee hotel. For full details of the proposal, readers of this report are directed to the submitted Statement of Environmental Effects prepared by Jervis Bay Town Planning.

The proposal is for the demolition of the existing buildings on the property and then the construction of a new pub and a new accommodation building.

Parts of the new building as proposed will exceed the 8m height limit applicable to the land.

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Clause 4.6 sets out provisions that enable certain development standards within the SLEP 2014 to be varied.

Clause 4.6 reads as follows:

4.6 Exceptions to development standards

(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.
- (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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (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,
 - (ba) clause 4.1E, to the extent that it applies to land in a rural or environment protection zone,
 - (bb) clause 4.2B,
 - (c) clause 5.4,
 - (ca) clause 6.1 or 6.2,
 - (cb) clause 7.25.

The following information is provided to Council in support of the proposal and to justify the request made for this application to be approved pursuant to Clause 4.6 of the SLEP 2014. The written request made below aims to demonstrate that:

- (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.

STANDARD TO BE VARIED

The development standard proposed to be varied is Clause 4.3 of SLEP 2014 which

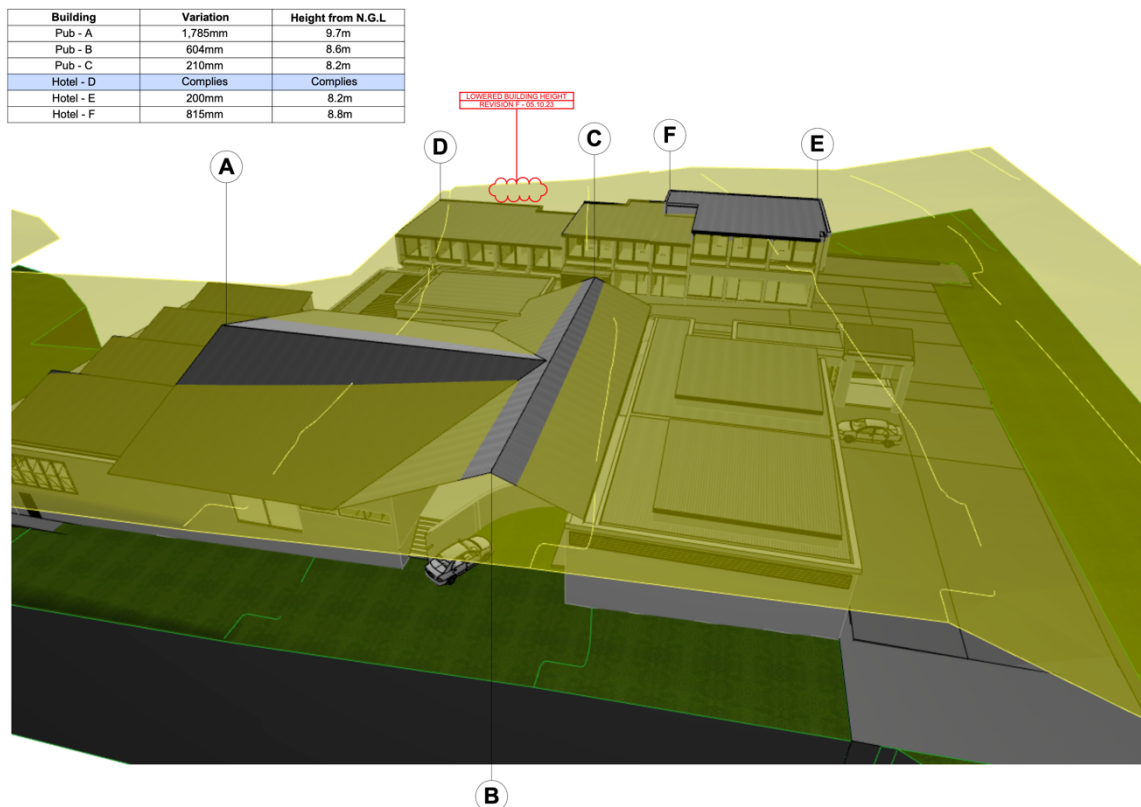
establishes the maximum height of buildings for the site – in this instance, 8m.

EXTENT OF THE VARIATION

The development proposed exceeds the 8m height limit.

The hotel accommodation building exceeds the height limit by no more than 815mm (point F). Only a minor variation of 200mm is proposed at its eastern end (point E).

The pub building, due to the design of the roof structure exceeds by 1.7m (point A) at its western end, and by 210mm in the centre of the building (point C).



With respect to the hotel building, the primary reason for the variation to the height limit relates to the need to provide disabled access to it and to appropriately manage stormwater. The slope of the land has made this difficult to achieve. Absent the issue of needing to provide disabled access to the hotel building, the same quantity of hotel rooms could have been achieved. Exceeding the height limit is not the result of attempting to increase yield.

The pub building exceeds the height limit due to the requirements for sub floor storage for plant and equipment as well as needing to provide a floor plan for the building that is accessible for disabled persons. The pitch of the roof of the bistro portion of the building is the offending part of the structure here. The goal of the architects was to have the roof height of the bistro set higher than the front terrace for aesthetic reasons and for an improved streetscape presentation. Again, these features of the design do not result in additional floor space, or a larger building. It has no impact on yield.

COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

The way in which compliance with a development standard is established as unreasonable or unnecessary is by demonstrating that the underlying objectives of the development standard are met despite the non-compliance. However, in *Wehbe v Pittwater Council (2007) NSWLEC 827*, Preston J identified to four (4) other ways to establish that compliance with a development standard is unreasonable or unnecessary as follows:

- (1) establish that the *"underlying objective or purpose is not relevant to the development"* and consequently compliance is unnecessary;

Comment: The purpose of the development standard (height limit) is relevant to the development in this instance.

- (2) establish that the *"underlying objective or purpose would be defeated or thwarted if compliance was required"*, and therefore compliance is unreasonable;

Comment: This is not applicable as the objectives of the Development Standard remain relevant to the proposal.

- (3) establish that the *"development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard"*, therefore compliance is both unreasonable and unnecessary; or

Comment: This is not applicable.

- (4) 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 therefore compliance with the standard is unreasonable and unnecessary.*

Comment: This is not applicable.

In accordance with the principle established in *Wehbe*, one of the ways to determine whether a Clause 4.6 variation request has demonstrated the achievement of the matters in Clause 4.6(3)(a) is to show that it is unreasonable or unnecessary to strictly apply the development standard as the development achieves the objectives of the development standard, notwithstanding the contravention of the development standard.

Demonstrating that the development achieves the objectives of the development standard involves:

1. identification of what the objectives of the development standard are; and
2. establishing that those objectives are, in fact, achieved.

The objectives of the height of building development (Clause 4.3 of SLEP 2014) and explanations of how these objectives are met are outlined in the table below:

Objective	Consistency
to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,	Height – Existing character
	Commercial building heights in area are 6 – 7m in height and generally read as two storey buildings.
	The new pub and hotel building will each read as two storey buildings at their respective street frontages. Despite the difference in height, the new buildings proposed will complement existing buildings in the area and adhere to the established two storey theme.
	Height – Future Desired Character
	The commercial area of St Georges Basin is unfortunately tired. It lacks a strong identity, and it needs renewal. The lack of an identity is due to a shortage of buildings featuring good design, architectural quality or prominence.
	It can be reasonably expected therefore that commercial property in the area will be redeveloped soon. This is especially the case due to large subdivisions featuring land with a mixed-use business zone capable of accommodating multi-unit housing developments and residential apartment buildings being completed at present.
	The future character of the area with respect to height can be expected therefore to be generally two storeys for

	<p>commercial development fronting Island Point Road. It should however be acknowledged that the majority of land to the east (behind the subject site) has an 11m height limit. The desired future character for the broader locality would therefore include a mixture of 2 and 3 storey buildings.</p> <p>The pub has been designed to be a new focal point for the community. A building and place where local families & friends can meet. It is a place to accommodate live music, family gatherings, birthday celebrations and a meeting place for local sporting organisations and for other special interest groups. In this respect, the proposed buildings, being slightly more prominent than what others may be (and keeping to a two storey building format) is fitting.</p> <p>Given the two storey format of the building, there is no reason to believe that the future desired character of the area with respect to height will be impacted upon in any negative way.</p> <p>The additional height of the pub building is within the centre of the property and well away from both street frontages. It will be imperceptible from public vantage points.</p> <p>The hotel building will present as a two storey building to its street frontage. Land beyond this frontage (east of the subject land) has an 11m height limit.</p> <p>Bulk and Scale – Existing Character</p> <p>The new buildings will be compatible with the bulk and scale of existing development which form the current character of the area. There is a large, enclosed shopping centre within the vicinity of the site. Other buildings include large steel industrial style sheds and older two storey commercial buildings with little architectural quality.</p> <p>Bulk and Scale – Future Desired Character</p> <p>It is a reasonable expectation to see other commercial sites in the area be consolidated to accommodate larger replacement buildings together with associated parking in the future.</p> <p>The impact the new buildings will have on the future desired character of the area with respect to bulk and scale is favourable. The two storey prevailing character has been adhered to.</p>
to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,	<p>Visual Impacts</p> <p>The new buildings will have a positive impact on the visual qualities of the built environment.</p> <p>There is no doubt that the local streetscape will be significantly enhanced by the development.</p>

	The breach to the 8m height limit will have minimal visual impacts. The buildings for the most part sit below the 8m height limit at each respective street frontage.
	Disruption of Views Those parts of the buildings that breach the 8m height limit are not expected to impact on the ability of other property owners to retain views. Land behind the development site is in the process of being subdivided and developed by way of single storey dwellings. None of the approved dwellings nearest to the site would have a view towards the waters of St Georges Basin.
	Loss of Privacy There are no residential properties to either side of the subject land. The nearest land capable of being developed by way of residential development is separated by a public road. The land uses immediately adjoining the subject land are used for commercial purposes and are not sensitive to privacy issues.
	Loss of Solar Access Shadow diagrams have been prepared and these demonstrate that impacts on adjoining property is satisfactory on 21 st of June.
to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.	There are no heritage items on or within the vicinity of the site.

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For reasons outlined in the above table, is it considered that the proposal meets the objectives of Clause 4.3 of the SLEP 2014.

ENVIRONMENTAL PLANNING GROUNDS

This section of the report demonstrates that there are sufficient environmental planning grounds to justify contravening the height of building development standard the SLEP 2014.

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, not on the development as a whole.

It is up to the consent authority to consider whether the environmental planning grounds relied on are relevant to the particular circumstances of the case.

In this instance, there are sufficient environmental planning grounds to warrant a flexible approach to the application of the height of building control as it applies to the site. These environmental planning grounds are demonstrated below:

Objects of the Environmental Planning and Assessment Act 1979 (as amended) are Satisfied

The relevant objects of the Act are addressed as follows:

to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

The social welfare of the community, through provision of fully compliant disabled access to all hotel rooms and all areas of the new pub has had a large impact on the ability for the new buildings to comply with the 8m height limit. Absent the issue of needing to provide disabled access to the hotel building, the same quantity of hotel rooms could have been achieved. Exceeding the height limit is not the result of attempting to increase yield and is a pure product of providing universal access to the new tourist facility.

The floor level of the pub building has been set so that disabled access is available from the main car parking area to the entry of the building. The roof structure extends westward from the main car parking area at the rear of the site where the ground level falls by over 3m for the length of the building. The elevated ground floor of the pub building at the street frontage has enabled the installation of a lift to facilitate disabled access from both car parking areas.

Granted the height of the roof structure for the bistro portion of the building could be reduced to meet the 8m height limit. The breach of the height limit here is in the middle of the site away from street frontages. The height of the roof for this portion of the building has been designed to give the building a more attractive appearance and to enable more light and ventilation through it.

to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

The proposed development is considered to be suitable for the subject site and will result in positive social and economic impacts in the locality as follows:

- New employment and recreation opportunities will be provided to the community.
- New up market hotel accommodation is proposed which will go towards a reduction in demand for short term residential accommodation which has been supplementing the well documented shortfall in professionally operated hotel accommodation for years. This has had an impact on the availability of permanent residential rental accommodation.
- No additional floor space or yield has been obtained as a result of the height exceedances. The same number could have been proposed, however, disabled access wouldn't be available to them.
- Section 7.11 contributions payable in respect of the proposed development will contribute to the introduction of new infrastructure.
- The proposal will stimulate the local economy through the capital investment spending on the project.

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

The proposal is representative of orderly and economic use and development of the land.

The land is intended to be used for purposes that the relevant zone permits.

Those parts of the building that exceed the height limit do not transform the development or proposed use of the land into something that wouldn't reasonably be expected for the area.

The format of the buildings, with respect to the number of storeys, bulk and scale are representative of existing and future desired streetscape characteristics.

The quantity of floor space proposed is not excessive and the height limit breach has not resulted in any undue increases to this.

The development is merely seeking to develop the land in an economical way whilst complying with relevant disabled access requirements. There may be other ways to achieve compliance here in relation to the provision of disabled access, however this would likely render the development uneconomical.

to promote the delivery and maintenance of affordable housing,

Not applicable.

to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

The proposed development will not result in impacts to threatened flora and fauna, ecological communities or their habitats. The additional height proposed over and above the LEP height control does not affect these matters.

to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

The site is not heritage listed nor is it situated within the proximity of any heritage listed item of conservation area.

to promote good design and amenity of the built environment,

The proposed development exhibits good design. The rooftop elements of the development are well thought out and have been successfully integrated into the overall design of the buildings.

The elements of the buildings that breach the height limit are located away from the relevant street frontages and will not unduly impact on adjoining lands or the built environment at large.

Despite the height limit breaches, the buildings will read as two storey buildings and integrate with existing development.

to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

The design of the building meets this objective.

to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

Not applicable.

to provide increased opportunity for community participation in environmental planning and assessment

Council will consider submissions at the close of the exhibition period.

Aims of the Shoalhaven Local Environmental Plan 2014 are Satisfied

The proposal is consistent with relevant aims of the Shoalhaven Local Environmental Plan 2014 as demonstrated below.

Aim	Comment
to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts,	The development will facilitate this objective. The premises will be used for live music and other performance arts.
to facilitate the social and economic wellbeing of the community,	The social welfare of the community, through provision of fully compliant disabled access to all hotel rooms and all areas of the new pub has had a large impact on the ability for the new buildings to comply with the 8m height limit. Absent the issue of needing to provide disabled access to the hotel building, the same quantity of hotel rooms could have been achieved. Exceeding the height limit is not the result of attempting to increase yield and is a pure product of providing universal access to the new tourist facility.
to ensure that suitable land for beneficial and appropriate uses is made available as required,	The land is clearly suitable for the development proposed with specific reference to its height for reasons outlined within this report and the development application submission at large.

The Shoalhaven DCP 2014 is Satisfied

The proposal is consistent (where required to be so) with all relevant provisions of the Shoalhaven DCP 2014 despite the height of the development.

No Unreasonable Impacts

A review of the submitted plans reveal that the extent of the encroachment is reasonable, and the nature of the development isn't altered as a result of the height limit breach. In this regard, there are no additional impacts resulting from the additional height on adjoining properties with respect to overshadowing.

The physical form of the building is well designed, and the selection of building materials proposed to be used in construction will enhance the streetscape qualities of the area despite the encroachment made to the 8m height limit.

The structures will not be visually prominent from any important public places. The height of the structure will be compatible with the existing and future desired built environment despite the exceedance.

PUBLIC INTEREST

When a proposal does not comply with a development standard the consent authority must be satisfied that, despite the non-compliance, the proposal will be in the public interest. The way in which it is considered appropriate to demonstrate this is to prove consistency with the objectives of the development standard and the objectives of the applicable land use zone.

The proposal if approved will not set an undesirable precedence for reasons outlined detailed within this report. The extent of the encroachment is generally as a result of the grade of the site, provision of safe and practical pedestrian access to the buildings and to ensure the building can be constructed in accordance with the National Construction Code.

Objectives of the development standard

In relation to the objectives of the development standard, it has been demonstrated earlier in this statement that the proposal is consistent with these.

Objectives of the zone

Pursuant to the provisions of the SLEP 2014, the land is zoned B4 – Mixed Use. The objectives of this zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposal is consistent with these objectives for the following reasons:

- 1) The land uses proposed are permissible within the B4 zone and are entirely compatible with adjoining property.
- 2) The site is within the St Georges Basin Village centre with good access to services.
- 3) The hotel accommodation and pub, with improved facilities will compliment other business in the area.

OTHER CONSIDERATIONS

In deciding whether or not to grant concurrence to a proposal that contravenes a development standard, the Director-General of Planning is to consider whether the contravention of the particular development standard raises any matters of State or regional planning significance. Further to this, the public benefit of maintaining the development standard.

State and Regional Planning Matters

The contravention of the 8m height limit as proposed does not trigger any State or Regional planning matters. The proposal is consistent with all relevant State Environmental Planning Policies and regional strategies.

Public Benefit

It is considered that, having regard to the circumstances of the case, there is no public benefit to be gained by insisting upon strict compliance with the 8m height limit. The extent of the variation when the specific circumstances of the case are considered is reasonable and this statement provides sound justification for the approval of the exceedance to the height limit.

The provision of the new commercial facilities on the land, which is suitable for the development, will be of public benefit.

CONCLUSION

The variation to the 8m height limit has been carefully reviewed with proper regard to clause 4.6 of SLEP 2014.

Accordingly, it is considered that the proposal will remain consistent with the objectives of the development standard (Clause 4.3) and the objectives of the B4 zone.

Strict compliance with the 8m height limit is considered unreasonable and unnecessary in this instance. The underlying objectives of the development standard will be achieved by the development proposal despite the exceedance of the 8m height limit. Further to this, a series of environmental planning grounds to support the variation have been outlined.

The proposal is not inconsistent with State or Regional planning matters and the public interest is being maintained due to the minor nature of the exceedance.

For the reasons outlined in this statement, the variation is recommended for

support.

Jervis Bay Town Planning.