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**REQUEST UNDER CLAUSE 4.6 OF PARRAMATTA LOCAL ENVIRONMENTAL PLAN 2011
DEVELOPMENT STANDARD - CLAUSE 4.3 – HEIGHT OF BUILDINGS
PROPOSED SITE CONSOLIDATION, DEMOLITION OF EXISTING BUILDINGS AND THE CONSTRUCTION
OF A VEHICLE SALES PREMISES AND VEHICLE SERVICE CENTRE
574-584 CHURCH STREET NORTH PARRAMATTA**

1. BACKGROUND

This written request is made pursuant to Clause 4.6(3) of the Parramatta Local Environmental Plan 2011 (the LEP) to provide justification to vary the development standard for building height as it relates to the blade wall of the new building proposed under the accompanying development application.

The LEP prescribes a maximum building height for the subject site of 12m. While the height of the building falls below the prescribed height at 10.5m, an architectural feature, being the blade wall in the front facade extends to a height of 13.5m.

Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied as to the matters under Clause 4.6(4) of the LEP. It is the onus of the applicant to address the matters under Clause 4.6(3) of the LEP which are addressed through this written request.

The maximum building height applicable to the site is 12m. The new building has a compliant maximum height of 10.5m except for an architectural feature, being the blade wall in the front façade which has a height of 13.5m. This is 1.5m above the prescribed maximum building height or 12.5% if expressed as a percentage.

This is identified as a development standard which requires a variation under Clause 4.6 of the Parramatta Local Environmental Plan 2011 to enable the granting of consent to the development application. The physical extent of the variance is moderate however the numerical variation requires referral to the City of Parramatta Local Planning Panel.

Environmental Planning Grounds Relied Upon

The environmental planning grounds supporting variation are on the basis of:-

- Architectural merit and consistency with the architectural typology associated with a vehicle sales premises.
- Achievement of an appropriate and supportable architectural result for the building,
- Compatibility with the established local character in the B6 Enterprise Corridor zone.

The request will now further expand on the identified environmental planning grounds.



Figure 1: Existing premises at No. 584 Church Street.



Figure 2: Visualisation of proposed development, noting the proposed blade wall.



Figure 3: Visualisation of the proposed development, noting the blade wall.

2. IS THE STANDARD A DEVELOPMENT STANDARD?

Subject to Clause 4.3 of the Parramatta Local Environmental Plan 2011 (the LEP), Clause 4.3(2) provides:-

- 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.

A development standard is defined in Section 1.4 of the Environmental Planning and Assessment Act 1979 ("EPA Act") to mean:

"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.”

The height of buildings control falls under subsection (c); therefore the control is a development standard and Clause 4.6 of the Parramatta Local Environmental Plan 2011 is applicable.

3. CLAUSE 4.6 OF THE PARRAMATTA LOCAL ENVIRONMENTAL PLAN 2011

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow the variation of development standards. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) and case law suggests a similar approach to SEPP 1 may be taken in part.

There is abundant judicial guidance on how variations under Clause 4.6 variations should be assessed. Some of these cases are taken into consideration in this request for variation. While it is not necessary to refer to case law, we do so as it has become customary in sustaining requests under Clause 4.6.

4. THE ONUS ON THE APPLICANT

Under Clause 4.6(3)(a), it is the onus of the applicant to demonstrate:-

- 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.

In the case of *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:-

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The

fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The land is located in the B6 – Enterprise Corridor zone with minor encroachment of the SP2 – Infrastructure zone. As no work is proposed within the SP2 zone, analysis will focus upon the B6 zone. The objectives of the B6 zone are:-

- *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.*

Comments

The zone objectives are broad in nature but nonetheless, the development will be consistent with the zone objectives for the following reasons:-

- The redevelopment of the site will promote business along the main road as it maintains a frontage to Church Street, an arterial road.
- The proposed development will provide for a mix of uses and a range of employment as both a vehicle sales premises and a vehicle service centre are proposed.
- Because the development is for the sales and servicing of motor vehicles, it will not dilute the economic activity of nearby centres. On the other hand, it will reinforce the economic strength of the B6 zone.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clauses 4.3(1):-

- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,
- (c) to require the height of future buildings to have regard to heritage sites and their settings,
- (d) to ensure the preservation of historic views,
- (e) to reinforce and respect the existing character and scale of low density residential areas,
- (f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

Comments - Objective (a). This objective is relevant to the development. Other than for the non-compliant blade wall, the building height is compliant with the development standard.

As an architectural feature, the height of the blade wall has a negligible impact on the transition of built form as the location of the wall faces Church Street rather than a zone boundary. The intent of the objective is considered to be achieved.

Comments - Objective (b). This objective is relevant to the development. Having regard to the architectural design of the building, the blade wall is a vertical element that disrupts the horizontal plane, lessening the visual impact of the building. The proposed development achieves a satisfactory visual outcome that is in character with the nature of the proposed use. There is no resulting adverse impact on surrounding properties or the streetscape as the presentation of the building is consistent with land uses and the desired character of the B6 zone.

View loss and privacy are not of concern as there are no views of significance and the adjoining properties are not residential in nature.

In terms of solar access, the blade wall has no impact on the solar access achieved by neighbouring properties. The accompanying shadow diagrams within the architectural plan set illustrate this.

Comments – Objective (c). This objective is not relevant to the development. No heritage item or heritage conservation area falls within proximity to the site. As such it is considered that this objective is not of relevance to this request.

Comments – Objective (d). This objective is not relevant to the development. The proposed development does not share any sight lines to or from a heritage item or heritage conservation area. As such it is considered that this objective is not of relevance to this request.

Comments – Objective (e). This objective is not relevant to the development. The subject site falls within the B6 Enterprise Corridor zone, not within a residential zone.

Comments – Objective (f). As the blade wall is reserved to a small section of the development facing Church Street, there is no impact in the form of inhibited sky exposure or daylight arising from the encroachment upon any areas of public domain, parks or roads.

For the above reasons, it is our opinion that the development will satisfy the objectives of the height of buildings development standard. Consequently, I conclude that strict compliance with the development standard is unreasonable and unnecessary.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Council must form an opinion that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. It is unreasonable and unnecessary to require strict compliance with the development standard in this case as the application is otherwise highly compliant with Council's controls and results in an acceptable design outcome within the immediate setting. Deviation from the standard arises from an architectural feature, being the blade wall. Such a feature is consistent with other vehicle showrooms within the Parramatta area.

Given that the development satisfies the objectives of the zone and the development standard, numerical compliance is considered unreasonable and unnecessary in the circumstances of the case.

Precondition 4 – To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the

Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

According to recent caselaw, Council is required to be indirectly satisfied that there are sufficient environmental planning grounds to support a variation to a development standard. Satisfaction as to sufficient environmental planning grounds is a matter for the Council to determine and need not be site specific. The term ‘environmental planning grounds’ is not defined and may be interpreted with wide scope. In this regard I provide the additional following comments:-

- The design of the proposed development is reasonable and supportable as it is consistent with other vehicle showrooms within the Parramatta local government area. A compliant height (which could be achieved through the removal or lowering of the blade wall) would result in an inferior architectural outcome and one not consistent with the character of the proposed use.
- The proposed height variation does not result in any other adverse environmental impacts to neighbouring properties such as shadow or visual impact.

For the above reasons, it is considered there are sufficient environmental planning grounds to justify a variation to the building height development standard.

In the ‘Four2Five’ judgement (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), Pearson C, outlined in her judgement that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner’s decision on that point (that she was not “satisfied” because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are “sufficient environmental planning grounds to justify contravening the development standard” is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The more recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant’s written document itself, and in the Commissioner’s assessment of it). In February 2017, the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner’s approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority’s obligation is to be satisfied that “the applicant’s written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.” He held that this means (*emphasis added*):

“the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary”.

CLAUSE 4.6 VARIATION

Accordingly, in regard to the proposed variation to the building height, it is considered that this Clause 4.6 request has demonstrated sufficient environmental planning grounds for Council to be satisfied that the request is adequate and to allow appropriate flexibility.

There is also no requirement under Clause 4.6 or case law that a non-compliant development must demonstrate a better planning outcome. (*Initial Action Pty Ltd v Woollahra Municipal Council (2018)*). Refer also to Section 5 below.

Additionally, under (*Initial Action Pty Ltd v Woollahra Municipal Council (2018)*) at [24], the Chief Judge stated that “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”. It is considered that this request is consistent with this aspect of the judgment as it does not rely on promotion of the benefits of the development.

According to the relevant case law, there are other common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised in *Wehbe v Pittwater Council (2007)*.

The five tests under *Wehbe* are tabulated below. Only one of the tests needs to be satisfied. Consideration of a variation is not limited to these tests – they are simply the most common ways invoked in considering whether compliance is unreasonable or unnecessary.

TESTS UNDER WEHBE	COMMENTS
1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.	<p>The objectives of the development standard are satisfied. Refer to discussion under Precondition 2.</p> <p>The objectives of the standard are concerned with the achievement of heights that will provide a transition in built form and land use intensity compatible with the area covered by the LEP. The development is compliant with the height standard other than for the blade wall. We conclude that variations caused by the blade wall is appropriate as it results in a built form that is compatible with the local context.</p> <p>The resulting development will achieve an appropriate and supportable architectural result of an acceptable visual impact. The showroom and service centre will have a compatible contextual relationship with the site and neighbouring buildings.</p> <p>The application demonstrates that objectives of the standard are achieved through the qualitative design outcomes rather than a strict numerical approach.</p>
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;	The objective of the development standard is considered to be relevant to the development however the objective is achieved and strict compliance is unreasonable and unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;	The objective of the standard would not be defeated or thwarted if compliance was required however the achievement of an otherwise meritorious development of compatible architectural form would be hindered by strict compliance which would be unreasonable.

4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;	The development standard has not been abandoned.
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.	The zoning of the land is appropriate for the development standard.

5. THE ONUS ON THE CONSENT AUTHORITY

Pursuant to Cl.4.6(4)(a), the Council must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by Clause 4.6(3)(a) and (b) and that 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.

The consent authority does not have to directly form the opinion of satisfaction but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in Clause 4.6(3)(a) and (b) have been adequately addressed in the written request in order to enable the consent authority to form the requisite opinion of satisfaction. (*Initial Action Pty Ltd v Woollahra Municipal Council (2018)*).

In assisting the consent authority in forming its opinion of satisfaction as to the public interest test under Cl.4.6(4)(a)(ii), I refer to the discussion concerning objectives for development within the zone in which the development is proposed to be carried out. Refer to comments under Precondition 2.

Further, the proposal is in harmony with the zone objectives. The resulting development continues to promote business along the main road and provide for a mix of uses and a range of employment in a built form that is compatible with the local context.

We maintain that the variation to the building height does not result in development that is incompatible with the environmental character of the locality. The proposal demonstrates compatibility with the relevant zone objectives, the objectives of the standard and satisfies the public interest test.

6. CONCLUSION

The purpose of the application is to allow for the reasonable development of the site through site consolidation, the demolition of existing buildings and the construction of a vehicle sales premises and vehicle service centre.

Development standards tend to be strictly numerical in nature and fail to take into consideration the nature of the development, any site constraints, or qualitative aspects of the development or of the particular circumstances of the case. Clause 4.6 of the standard instrument LEP allows such an analysis to be carried out.

It has been demonstrated in this request that strict compliance with the development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to allow Council to indirectly form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl.4.6(3)(a) and (b).

Therefore, I request that council support the variation on the basis that this Clause 4.6 variation demonstrates that strict compliance with the development standard is unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.



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