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CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

ALTERATIONS AND ADDITIONS TO EXISTING INDUSTRIAL DEVELOPMENT

134-140 OLD BATHURST RD, EMU PLAINS

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1.0 INTRODUCTION

This report seeks a variation to a development standard prescribed by the Penrith Local Environmental Plan (PLEP) 2010. The report relates to a Development Application (DA) seeking consent for the development of alterations and additions to an existing industrial building at 134-140 Old Bathurst Rd, Emu Plains (the subject site).

The variation is sought pursuant to Clause 4.6 under the PLEP in relation to the maximum building height standard applicable to the subject development site.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline *Varying Development Standards: A Guide, August 2011* and has also incorporated the relevant principles identified in relevant NSW Land and Environment Court judgements.

2.0 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The Environmental Planning Instrument (EPI) to which this variation relates is the Penrith Local Environmental Plan 2010 (PLEP).

3.0 WHAT IS THE ZONING OF THE LAND?

In accordance with clause 2.2 of the PLEP the subject site is zoned **IN1 General Industrial**.

4.0 WHAT ARE THE OBJECTIVES OF THE ZONE?

The land use table under the PLEP provides the following objectives for the zone:

1 Objectives of zone

- *To provide a wide range of industrial and warehouse land uses.*
- *To encourage employment opportunities.*
- *To minimise any adverse effect of industry on other land uses.*
- *To support and protect industrial land for industrial uses.*
- *To promote development that makes efficient use of industrial land.*
- *To permit facilities that serve the daily recreation and convenience needs of the people who work in the surrounding industrial area.*

COMMENT:

The development provides a relatively small and modest alteration to a large industrial building type building that will allow for ongoing use and expansion of an existing industrial activity that will provide new local employment opportunities.

The site does not possess any significant natural environmental features and all stormwaters can be managed as part of the development without adverse impact upon the local environment.

The site is also located in close proximity to residential uses, however is able to be managed in a manner that ensures that all

activities on site cause no significant adverse amenity impacts to those adjacent residents.

The development therefore causes no inconsistency with the zone objectives.

5.0 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

The development standard being varied is the maximum height of buildings.

6.0 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The development standard being varied is prescribed under clause 4.3 of PLEP.

7.0 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objectives of the relevant development standard are set out below:

4.3 Height of buildings

(1) The objectives of this clause are as follows:

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

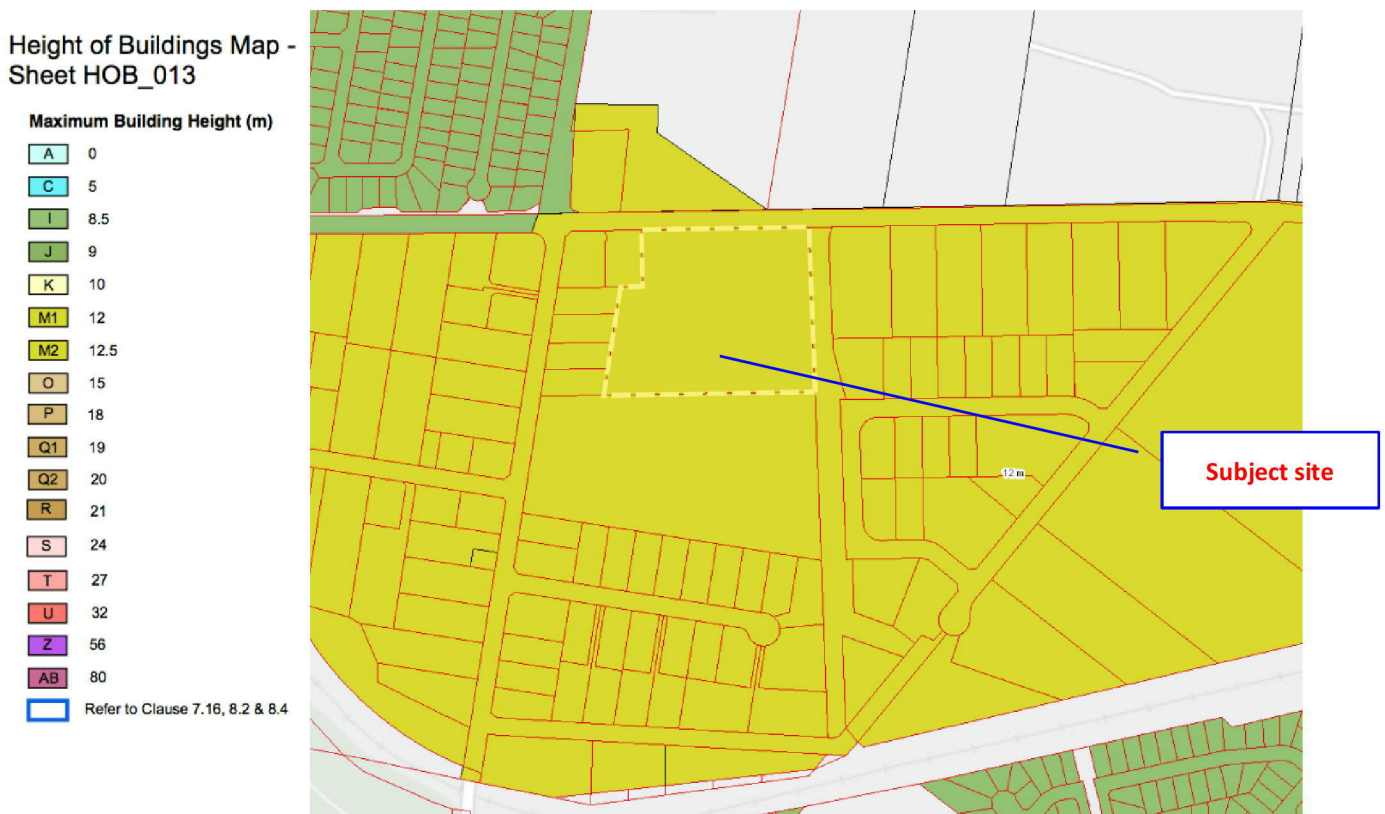
(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

8.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The relevant map pertaining to clause 4.3(2) of the PLEP provides a maximum building height of 12m. An extract of that map is provided at Figure 1 below:

FIGURE 1: EXTRACT OF BUILDING HEIGHT MAP



9.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?

The building height is plotted on the elevation diagram and shows that the new plant element provides a maximum building height of 13.18m. The proposal therefore development therefore does not comply with this development standard.

10.0 WHAT IS THE PERCENTAGE VARIATION?

The roof plant element as described above provides a building height that exceeds the development standard by 9.83%.

11.0 MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the PLEP and a response as to where each is addressed in this written request:

TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6

Requirements/Sub-clause 4.6	Response/Comment
(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	It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

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.	The maximum building height development standard is not 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.	This written request justifies the variation by demonstrating (a) is achieved in Section 12, and (b) is achieved in Section 16.
(4) Development consent must not be granted for development that	This written request addresses all requirements of sub-clause (3).

<p>contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Secretary has been obtained.</p>	<p>As set out in Section 4 and 12 of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.</p> <p>Concurrence is assumed. Due to the extent of the variation, the application is required to be determined by the relevant consent authority.</p>
<p>(5) In deciding whether to grant concurrence, the Secretary must consider:</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p>	<p>There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.</p> <p>Pursuant to <i>Ex Gratia P/L v Dungog Council</i> (NSWLEC 148), the question that needs to be answered is "whether</p>

<p>(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.</p>	<p>the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.</p> <p>There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are only minor public disadvantages.</p> <p>The public advantage of the development is that it facilitates urban renewal of the site in a manner that is consistent with both local and metropolitan strategic planning objectives.</p> <p>We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.</p>
<p>(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</p>	<p>Not relevant to the proposed development or the subject site.</p>

<p>E3 Environmental Management or Zone E4 Environmental Living if:</p> <ul style="list-style-type: none">(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.	
<p>(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).</p>	<p>This is a matter for the consent authority.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following:</p> <ul style="list-style-type: none">(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	<p>This does not apply to the subject site or its proposed development.</p>

Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
(c) clause 5.4.

12.0 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*. Whilst the principle applied to SEPP 1, we believe that it is still useful these considerations and this too has been confirmed by more recent judgements inclusive of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*.

The five part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

The relevant LEP clause objectives together with an assessment of the development against them is provided below:

(1) The objectives of this clause are as follows:

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

The desired future character of the area provides for development with a 12m building height. The development provides a building that sits well below that building height. Just one small section of roof plant is proposed to be located above that maximum height and as such has limited potential to adversely impact upon the existing or future character of the locality.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The development is located in an area that has the potential to be viewed from the Blue Mountains escarpment, however the non-complying building height element has a built volume of just 96.36m³ and will be located centrally within a building footprint of approx. 5000m². Accordingly, the new roof plant will be illegible from the escarpment area.

Similarly, the roof plant will cast a very small shadow that will be contained entirely within the existing roof space area and

therefore cause no loss of solar access to adjacent development or public domain areas.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

The site is not located within any proximity to heritage items, and a detailed visual impact assessment undertaken as part of the accompanying Statement of Environmental Effects (SEE) has demonstrated that the development will cause no adverse visual impact from the identified areas of scenic landscape importance.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

The development generally achieves the building height, other than a very small section of roof plant. This non-complying element is located centrally within the roof area which diminishes its potential to be viewed from the street or adjacent sites.

Its limited scale also means that it will not contribute to perceivable bulk as viewed from the surrounding area and public domain.

The development is also not located near different zoned lands or lands that have a lower building height standard therefore the minor non-compliance will not cause any disruption to any planned transition in height and density.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

We do not rely on this reason. The underlying objective or purpose of the standard is relevant to the development and is achieved.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

We do not rely on this reason.

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;

We do not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land

and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

We do not rely on this reason.

13.0 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN THE ACT.

Section 1.3 of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are as follows:

- (a) 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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The subject site accommodates limited features of natural or ecological significance and the accompanying SEE report has demonstrated that the development will cause no significantly adverse impact to the natural environment.

Further, the proposed development seeks to make the most efficient economic use of existing built forms, infrastructure and services on an industrial site by allowing for significant increase in manufacturing production capacity.

As such the development represents orderly and economic development of the land and therefore can be considered to be consistent with the objects of the Act.

14.0 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is clearly a numerical standard.

15.0 WOULD STRICT COMPLIANCE WITH THE STANDARD BE UNREASONABLE OR UNNECESSARY?

The location of the subject plant element on the roof of the building allows for a duplication of the production line capacity within the existing building. This is because locating that key manufacturing element on the roof allows, provides greater floor space within the building that allows the rest of the production line to be located on the factory floor.

Strict compliance with the development standard would demand that an alternate development proposal be advanced that reduces the building height, which in turn would require that plant element to be located on the factory floor. Under such a scenario the duplication of the production line would require an expansion of the floor space and building footprint of that existing built form.

This alternate scenario would require significant alteration to existing manufacturing plant such as silos and delivery and loading areas, which together with the increase in building footprint would potentially have a far greater impact upon the built form, character and visibility of the site and its development.

The proposed non-compliance with the building height is very limited in terms of proposed building volume and its proportional relationship with the scale of existing building volume both on site and in the broader industrial precinct.

In the context of these factors, it is considered that strict compliance with the development standard is both unreasonable and unnecessary in the circumstances of the case.

In this context, it is considered both unreasonable and unnecessary to demand strict compliance with the relevant development standard.

16.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. There is robust justification throughout the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

Some additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- Water Sensitive Urban Design (WSUD) implemented as part of the development which will improve the quality of stormwater generated and leaving the site, which in turn results in improved local and regional water quality of the broader catchment.
- A decreased building footprint as would otherwise be required by a development with a complying building height.
- Improved parking layout and supply which full caters for the existing and proposed parking demand of the site and its development
- Additional tree planning and landscaping provided to the eastern boundary and edge of the car park are which will provide additional visual screening of the site whilst also assist in mitigating impacts from the urban heat island effect
- The development actually produces WSUD stormwater management devices for use throughout Australia that will assists other urban development achieve improved water quality outcomes

The above points are environmental planning grounds that warrant the non-compliance. They are not "generic" grounds, but rather, specific to the site and circumstances of the development.

In that context, there is considered to be sufficient environmental and planning grounds to justify a contravention of the development standard.

17.0 CONCLUSION

Given the circumstances of the case, as outlined in the preceding sections of this report, strict compliance with the standard would be unreasonable or unnecessary.

Further, this report has also demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.