

CLAUSE 4.6 VARIATION REQUEST (HEIGHT OF BUILDING)

**Development Application for
Development Consent for Transport
Depot, Warehouse (cold storage) and
Distribution Centre and Signage**

35 Cassino Drive, Casino NSW 2470

Lot 50 DP1281364

April 2024

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1 Preliminary

1.1 Introduction

The following written Clause 4.6 Variation Request has been prepared in accordance with the provisions of Clause 4.6 - Exception to development standards of the *Richmond Valley Local Environmental Plan 2012* ('Richmond Valley LEP'). This Clause 4.6 Variation Request has been prepared to justify the contravention of the height of building ('HOB') development standard under Clause 4.3 of the Richmond Valley LEP. It specifically demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the request explains on what basis there are sufficient environmental planning grounds to justify contravening development standard.

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This Variation Request has been set out generally in accordance with the NSW Department of Planning and Environment *Guide to Varying Development Standards* (November 2023). The request also considers the current case law which further clarifies the approach to Clause 4.6 requests.

1.2 Site and Proposed Development

This request has been made in respect of a Development Application for Development Consent for Transport Depot, Warehouse (including cold storage) and Distribution Centre and Signage on land at 35 Cassino Drive, Casino NSW 2470 ('subject site'), described as Lot 50 on DP1281364.

1.3 Zone

The site is zoned E4 General Industrial (formerly Zone IN1 General Industrial) under the Richmond Valley LEP 2012, and the proposed uses are permitted with consent in the zone.

1.4 Clause 4.6 of the Richmond Valley LEP 2012

In accordance with Clause 4.6 of the Richmond Valley LEP 2012 a written request that seeks to justify a contravention to a development standard must demonstrate compliance with the tests set out in 4.6(3). The justification set out in section 3 below demonstrates that strict compliance with the standards would be both unreasonable and unnecessary in this instance and that there are also sufficient environmental planning grounds to justify the contravention.

Richmond Valley LEP 2012 – Clause 4.6(3)

- 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.*

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).*

2 Proposed Variation to Clause 4.3 (HOB)

2.1 Planning instrument, development standard and proposed variation

This section provides an overview of the environmental planning instrument and development standard subject to the variation request, as well as the proposed variation itself. The assessment in Table 1 below is structured in accordance with the *Guide to Varying Development Standards* (November 2023).

Details on Proposed Variation	Response
What is the environmental planning instrument/s you are seeking to vary?	The Richmond Valley LEP 2012.
Identify the development standard to be varied	<p>The proposal provides a variation to the height of building development standard (Clause 4.3) applying to the site per the Richmond Valley LEP 2012. The HOB development standard is extracted below:</p> <p><u>Clause 4.3 Height of Buildings:</u></p> <p>(1) <i>The objectives of this clause are as follows—</i></p> <ul style="list-style-type: none"> (a) <i>to establish the maximum height for buildings,</i> (b) <i>to ensure that the height of buildings complements the streetscape and character of the area in which the buildings are located,</i> (c) <i>to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</i> <p>(2) <i>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.</i></p>
Identify the type of development standard	The development standard is numerical as it relates to building height.
What is the numeric value of the development standard in the environmental planning instrument?	Clause 4.3 HOB: Maximum height of 8.5m
What is the difference between the existing and proposed numeric values? What is the percentage variation (between the proposal and the environmental planning instrument)?	The proposed maximum building height is 12.3m and exceeds the development standard by 3.8m, which is a percentage variation of 44.7%.
Visual representation of the proposed variation (if relevant)	Refer to Figure 1 overleaf for a graphical representation of the proposed variation.

Table 1: Planning instrument, development standard and proposed variation (Source: *Guide to Varying Development Standards*)

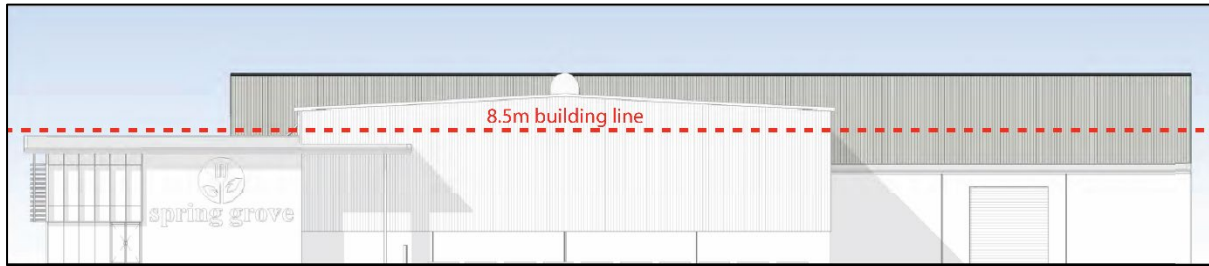


Figure 1: Extent of proposed building height variation

2.2 Justification for the proposed variation

This section of the written request addresses Clause 4.6(3)(a) and (b) of the Richmond Valley LEP. It specifically outlines how compliance with the development standard unreasonable or unnecessary in the circumstances of the case and the sufficient environmental planning grounds to justify contravening the development standard. Again, this section has been structured in accordance with the *Guide to Varying Development Standards* (November 2023).

2.2.1 Clause 4.6(3)(a) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Case law (in particular *Wehbe v Pittwater Council* (2007) 156 LGERA 446) sets out the five common ways for establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. Per the *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, these five ways are not exhaustive; they are merely the most commonly invoked ways. In addition, an applicant does not need to establish all the ways.

These five common ways from the *Wehbe v Pittwater Council* 156 LGERA 446 case are set out in section 2.5 of the *Guide to Varying Development Standards* (November 2023) and are reproduced below:

1. The objectives of the standard are met, notwithstanding non-compliance with the standard (*Wehbe v Pittwater Council* (2007) 156 LGERA 446 at [42] and [43]).
2. The underlying objectives or purpose of the development standard is not relevant to the development meaning that compliance is unnecessary (*Wehbe v Pittwater Council* at [45]).
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Wehbe v Pittwater Council* at [46]).
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard (*Wehbe v Pittwater Council* at [47]).
5. The zoning of the land on which the development is proposed to be carried out is unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary and compliance with the standard is therefore unreasonable or unnecessary (*Wehbe v Pittwater Council* at [48]).

In consideration of the above listed common ways, the proposal is considered to achieve item 1 above as the proposal would meet the objectives of the HOB development standard notwithstanding the non-compliance with the height limitation. This is demonstrated as follows:

Objectives of Development Standard	Response
(1) <i>The objectives of this clause are as follows—</i>	The proposal is located within an established industrial area and is surrounded by industrial

Objectives of Development Standard	Response
(a) to establish the maximum height for buildings,	developments of similar scale and is therefore considered to be consistent with the established character of the street and locality. The proposed height reflects tenant requirement for a modern industrial distribution facility incorporating an uninterrupted internal floor area with sufficient clearspan springing height. This is an important factor in the design of the building as the internal cold storage area and volume is necessary to meet the proponents projected food/goods storage demand and accommodate forklift manoeuvring requirements. The proposed height of the building is therefore appropriate for the site and intended use.
(b) to ensure that the height of buildings complements the streetscape and character of the area in which the buildings are located,	The proposal will reuse and regenerate existing dilapidated vacant land to develop a high standard contemporary industrial building, including generous landscaping, complementing the site and significantly enhancing the existing streetscape. Further, the proposed development provides large setbacks of 15m and 13.4m respectively, ensuring any perceived impacts associated with building height are minimised. overall, the proposed development complements the streetscape and character of the area and will significantly improve the existing streetscape.
(c) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.	The subject site is favourably positioned to ensure visual impacts are minimal, with street interfaces to the south and west. Similarly, there will be no unreasonable amenity impacts imparted on the northern and eastern adjoining land, which contain a sewer treatment plant and an industrial use which are not sensitive to height impacts. The proposal therefore does not give rise to any unreasonable visual impacts or impacts on views from the public domain given the industrial context of the site.

Table 2: Assessment against objectives of height of building development standard

In light of the above assessment against the objectives of the HOB development standard, compliance with the height limit is therefore considered both unreasonable and unnecessary in the circumstances of the case.

2.2.2 Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

Per section 2.6 of the *Guide to Varying Development Standards* and case law (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118), there is no definition of 'environmental planning grounds'. However, case law clarifies that 'environmental planning grounds' relate to the subject matter, scope, and purpose of the Act, including the objects in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). This provides a wide range of potential grounds.

The grounds must be sufficient to justify the development and should relate to the aspect of the proposed development that contravenes the development standard and not simply promote the benefits of the development (*Guide to Varying Development Standards* and *Initial Action Pty Ltd v Woollahra Municipal Council*).

Taking into the above case law and guidance, the below environmental planning grounds provide substantive justification for the proposed variation to the HOB development standard, as follows:

- The proposal is located within an established industrial area and is surrounded by industrial developments of similar scale and is therefore considered to be consistent with the established character of the street and locality. The proposal would therefore not give rise to any unreasonable visual impacts or impacts on views from the public domain given the industrial context of the site.
- The proposed height reflects tenant requirement for a modern industrial distribution facility incorporating an uninterrupted internal floor area with sufficient clearspan springing height. This is an important factor in the design of the building as the internal cold storage area and volume is necessary to meet the proponents projected food/goods storage demand and accommodate forklift manoeuvring requirements. Adhering to the height limit of 8.5m would reduce internal cold storage volumes substantially and as a result unreasonably and unnecessarily restrict the viability of the proposal and be counter-productive to the objectives of the E4 Zone. The increased height of the warehouse would therefore enable the orderly and economic use of industrial zoned land in accordance with objective (c) of section 1.3 of the EP&A Act.
- Section 9.2.3. Building Height of the draft *Richmond Valley RJP Structure Plan* which is proposed over the Cassino Drive industrial estate confirms that the maximum permissible 8.5m height limit is limiting and that typically building heights in general industrial areas regional areas are often unlimited or generally permitted a maximum building height of 11m or greater. It also advises that based on historical approvals, the maximum building height in this estate has proven to be insufficient to accommodate industrial development, resulting in reliance on variations sought via Clause 4.6 (as is the case in this instance). This draft Structure Plan recommends that the building height limits be removed for this industrial estate under the Richmond Valley LEP and that DCP controls be established to facilitate an appropriate height transition in proximity to residential areas. Whilst not yet adopted, the Structure Plan and corresponding draft masterplan are material because they propose to remove barriers created by height of building provisions that unnecessarily restrict development outcomes in areas where building height will not significantly impact adjoining areas.
- Given the context of the surrounding industrial land uses and the zoning of the land, the proposed building reflects an appropriate height for a modern industrial facility and will not negatively impact upon adjoining uses. The subject site is favourably positioned to ensure visual impacts are minimal, with street interfaces to the south and west. Large building setbacks of 15m and 13.4m respectively are provided to these frontages. There will be no unreasonable amenity impacts imparted on the northern and eastern adjoining land, which contain a sewer treatment plant and an industrial use which are not sensitive to height impacts. The proposed height increase will therefore protect the amenity of the built environment in accordance with objective (g) of section 1.3 of the EP&A Act.
- The built form includes substantial roof plane and height variation to further minimise any perceived impacts associated with the additional height. The proposed design, glazing, varied material treatment and mixed colour palette provide appropriate façade articulation and variation to break up the visual bulk of the proposal. The attractive façade articulation is

considered to mitigate any perceived building height impacts and provide appropriate visual outcomes for the zone.

For the reasons outlined above, it is considered that there are sufficient environmental planning grounds to justify the proposed variation to the HOB development standard under Clause 4.3. The proposed height variation is therefore considered to be well founded and is worthy of support having regard to the matters listed within Clause 4.6 under Richmond Valley LEP 2012.

3 Conclusion

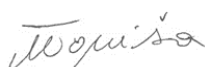
The proposal does not strictly comply with the maximum building height controls as prescribed by Clause 4.3 of the Richmond Valley LEP 2012. Therefore, this written request has been prepared to justify the proposed variation to the development standard in accordance with the tests set out in clause 4.6(3).

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Having evaluated the likely affects arising from this height non-compliance, we are satisfied that the proposal achieves the objectives of Clause 4.3 of the Richmond Valley LEP 2012. Therefore, strict compliance with the maximum height parameters specified in the HOB development standard is unreasonable and unnecessary in this particular instance in accordance with Clause 4.6(3)(a). Furthermore, for the reasons set out herein, and this request demonstrates that there are sufficient environmental planning grounds for supporting the proposed development despite the departure from the numerical HOB development standard.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

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