

Rowland Village 301-305 Galston Road, Galston

Clause 4.6 variation to Height of Buildings

On behalf of
RSL LifeCare

March 2022



1 Introduction

The Development Application (DA) for Rowland Village 301-305 Galston Road, Galston (the site) seeks approval for addition of a lift to an existing senior living building at the subject site. The development application proposes an exceedance of the maximum height of building development standard applicable to the site under the Hornsby Local Environmental Plan 2013 (HLEP 2013). As such, this document forms a written request seeking to justify the contravention of this development standard in the circumstances. It is considered that a variation to the development standard will allow for an enhanced planning outcome at the site.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the HLEP 2013 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. Clause 4.6 enables a variation to the height standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

The consent authority's satisfaction as to those matters must be informed by the objectives of clause 4.6, which are:

- 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.

When considering a variation to a development standard under clause 4.6 of the LEP, a consent authority is required to be satisfied that the contravention of the respective development standard is justifiable based on the following:

- the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard;
- 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 Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* through the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (**Wehbe**).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**) which was upheld

by Pain J on appeal. A further recent judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

"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." [88]

How these tests and considerations are applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments has most recently been confirmed in the judgement of Justice Preston, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118.

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of the HLEP reads 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 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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning 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 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.

Note—

When this Plan was made it did not include of these zones.

(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,

(c) clause 5.4,

(caa) clause 5.5.

(8A) This clause does not allow development consent to be granted for development that would contravene clause 4.4 for a building on land in Zone B2 Local Centre within the Epping Town Centre, identified as "Area 9" on the Floor Space Ratio Map for the following purposes—

(a) boarding houses,

(b) group homes,

(c) hostels,

(d) shop top housing,

(e) tourist and visitor accommodation,

(f) a mixed use development comprising a combination of uses specified in paragraphs (a)–(e).

(8B) Subclause (8A) and this subclause are repealed at the beginning of 31 July 2024.

3 The Development Standard to be varied

The development standard seeking to be varied is Clause 4.3 Height of Buildings (HOB) in the HLEP 2013. As identified on the HLEP 2013 Height of Buildings Map, the subject site has a maximum building height limit of 10.5 metres. The objectives of Clause 4.3 are provided below:

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

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

(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.

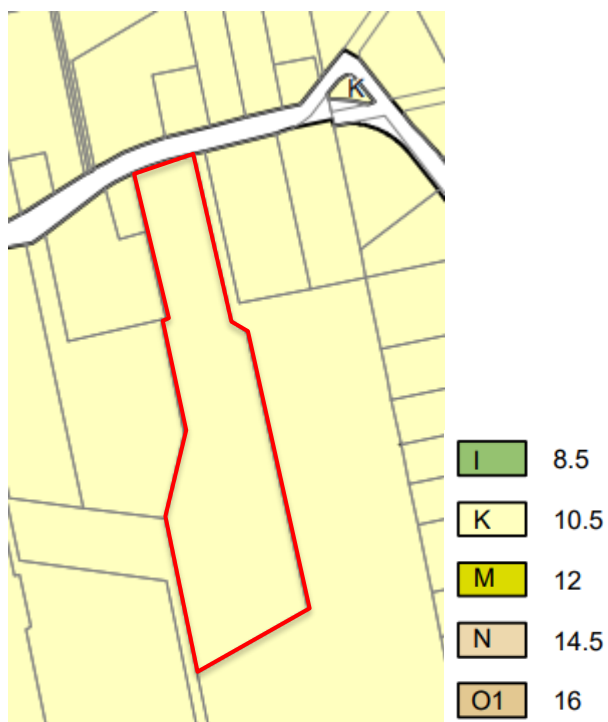


Figure 1 Height of Buildings LEP Map

Source: HLEP 2013 (site identified in red)

4 Extent of Variation to the Development Standard

The proposed lift proposes a maximum height of 11.7m, resulting in a 1.2m exceedance or 11.4% variation when expressed as a percentage in relation to the HOB control.

The proposed development requires variation from the HOB control to allow the lift to reach all four floors whilst remaining below the roof height for the existing approved building on site.

5 Objectives of the Standard

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

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

(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.

6 Objectives of the Zone

The objectives of the RU4 Primary Production Small Lots are as follows:

- To enable sustainable primary industry and other compatible land uses.
- To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage land uses that support primary production, including low-scale and low-intensity tourist and visitor accommodation and the provision of farm produce direct to the public.
- To ensure that development does not unreasonably increase the demand for public infrastructure, services or facilities.

7 Assessment

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

It is considered that strict compliance with the Height of Building control is unreasonable and unnecessary given the following circumstances of this case.

As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* tests 1, as described in *Williams*, are relevant for the subject site:

- **Wehbe Test 1** - the objectives of the standard are achieved notwithstanding non-compliance with the standard;

This is considered further below in relation to the height of buildings clause and relevant objectives provided in HLEP 2013.

4.3 Height of Buildings

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

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

Applicant Response

The exceedance in height proposed at the subject site will not restrict the ability of the area to deliver development which transitions in height and land use intensity

appropriately. This is based on the following:

- The proposed lift will not change the current use of the site for the use of a 'health service facility' and 'seniors housing'.
- The proposed lift does not increase the height of the building and remains below the highest point of the building.
- The proposed lift will not limit the development of adjoining sites.

Such uplift being considered indicates that the additional height proposed would be in keeping with any transition in building height in the future.

(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.

Applicant Response

The exceedance in height will not result in any adverse visual impacts, disrupt views, result in a loss of privacy or solar access. This assessment is based on the following:

- The distance from the site to adjacent roads and developments, and
- The proposed lift does not increase the height of the building and remains below the buildings highest point.

The proposed development is located over 350m setback from Galston Road, where no changes are proposed to the existing setbacks of the building on site. The significant distance of the proposal from other roads or developments in the environment is considered to not generate visual impacts, disrupt views, loss of privacy or solar access.

(c) to require the height of future buildings to have regard to heritage sites and their settings,

Applicant Response

The proposed development will not impact any heritage items nor their surrounds. The closest heritage items to the site are local 'houses' at 295 Galston Road, Galston and 2 Crosslands Road, Galston, are located over 450m northeast of the proposed site of works. The building will generally maintain the same built and form from that previously approved.

(d) to ensure the preservation of historic views,

Applicant Response

The proposed development will largely be obscured from public view and will not have any impact on historic view corridors identified within the HDCP 2013.

(e) to reinforce and respect the existing character and scale of low-density residential areas,

Applicant Response

The site is zoned RU4 Primary Production Small Lots and over 600m far from any low density zoned land. As such, the proposal is not expected to have any impacts on the amenity of R2 zoned land.

(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.

Applicant Response

As discussed above, the site will have no impact on commercial development noting mixed use zones are located over 600m from the site.

The request to vary the development standard is consistent with Part 1 of the 'five part test' established in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which provides that a development standard is unreasonable or unnecessary where the objectives of the standard are achieved notwithstanding non-compliance with the standard. Given the proposed development achieves the objectives of Clause 4.3 height of buildings it is considered that the non-compliance is justified and therefore acceptable in the circumstances of the case.

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

As discussed above, Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed. On appeal, Leeming JA in *Four2Five vs Ashfield Council* [2015] NSWCA 248 acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

"matters of consistency with objectives of development standards remain relevant, but not exclusively so."

Further recent findings by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 also found that:

"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." [88]

There are sufficient environmental planning grounds to justify contravening the development standard as the proposed development allows for the promotion and co-ordination of the orderly and economic use and development of the land in the following ways:

- The proposed new lift does not increase the height of the building and remains below the buildings highest point.
- The proposed new lift will provide improve the use of the land as 'seniors housing' with greater access for residents and staff.

- The lift will provide greater assistance to staff with the movement of residents, linen, food, and waste. The building currently has no existing lift which services the southern wing of the building. With the addition of a new lift, staff and residents will be able to move more efficiently between levels in the southern wing.
- The proposed height breach, resulting from the need to address the bespoke user needs of the facility, is not expected to cause any adverse environmental impacts.
- The development will not impact upon any heritage or significant view corridors given its location and the low-lying industrial peninsula.
- The design provides for a contemporary design mitigating potential visual impacts.
- Furthermore, the lift will not increase the current height of the building and therefore no unreasonable overshadowing of surrounding properties is anticipated.
- The height of the proposed development provides a built form within the locality which is consistent with the objectives and requirements outlined within HLEP 2013 and HDCP 2013 for residential land.
- Given the proposed lift is setback over 350m from Galston Road and no increase to the current building height is proposed, the relatively minor height breach is considered acceptable and in keeping with the height, bulk and scale of the desired future character of the locality.
- Strict compliance with height controls would result in the objectives of the HLEP 2013 being neglected and would not result in the orderly and economic use and development of land.

The preconditions that must be satisfied in the opinion of the Consent Authority before consent can be given are detailed in Clause 4.6(4).

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance (Wehbe Test 1).
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Commissioner Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether

the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

Clause 4.6(4)(a)(ii) - Is the proposed development 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 proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings:

The objectives of the particular standard

In previous sections of this request, the development has been proven to be consistent with the objectives of the Clause 4.3 Height of Building clause within the HLEP. It has been demonstrated elsewhere in this report that the development achieves the objectives of Clause 4.3 Height of buildings within the HLEP notwithstanding the non-compliance with the standard.

The objectives for development within the zone in which the development is proposed to be carried out.

The site falls within the RU4 Primary Production Small Lots zone. As outlined below the proposed development is in the public interest because it is consistent with the objectives of the RU4 Primary Production Small Lots zone as demonstrated in the table below.

Zone Objective(s)	Statement of Consistency
<i>To enable sustainable primary industry and other compatible land uses.</i>	The proposed development is suitably located within in a rural zone.
<i>To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.</i>	The proposed development will support both direct and indirect employment opportunities.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The development will not result in any adverse impacts or exacerbate the impact of surrounding land uses.
<i>To encourage land uses that support primary production, including low-scale and low-intensity tourist and visitor accommodation and the provision of farm produce direct to the public.</i>	The development is a type of residential land use as existing on the site.

Zone Objective(s)	Statement of Consistency
To ensure that development does not unreasonably increase the demand for public infrastructure, services or facilities.	The proposed development will increase the access and efficiency of the current land use providing critical infrastructure.

Taking into consideration the above the proposed development serves the public interest as it is consistent with the objectives of the development standard and the RU4 Primary Production Small Lots zone. Furthermore, there is no significant benefit in enforcing strict compliance given the circumstances of the case. The proposed height exceedance facilitates a significantly better planning outcome. The contravention results in no significant adverse environmental impacts but rather a better planning outcome to what is currently approved.

8 Any matters of significance for State or regional environmental planning

There are no matters of significance identified.

9 Conclusion to variation to height standard

This is a written request for an exception to the building height under Clause 4.6 of the HLEP 2013. It justifies the contravention to the height under Clause 4.3 of the HLEP 2013, and in particular demonstrates that the proposal provides a significantly better planning outcome, with no significant adverse environmental impacts resulting, and therefore in the circumstances of the case:

- Full compliance with the 10.5m building height control is unreasonable and unnecessary;
- The proposed development has been demonstrated not to have adverse environmental impacts on surrounding development and is supportable on environmental planning grounds;
- It is in the public interest in being consistent with the objectives of the standard and the objectives of the zone; and
- The proposed exceedance of the height standard will result in an enhanced planning outcome at the site.

Yours sincerely,



Adam Coburn
State Director – NSW