

DREW ROBERTS CONSULTING

4.6 VARIATION WRITTEN REQUEST

Alterations & Additions to Existing Child-Care Centre

CLIENT: SUNRAI DESIGNS

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PROJECT: 2023/39

ABN 87650161139

6 Amos Crescent, Sylvania NSW 2224

drew.roberts.consultant@gmail.com

Clause 4.6 Variation – Active Street Frontage

Introduction

The proposal is for the alterations and additions to an existing child-care facility at 2 Lovejoy Street, Mudgee.

The subject site is identified as requiring an ‘*active street frontage*’ under clause 6.7 of Mid-Western Regional Local Environmental Plan 2012 (MWRLEP 2012) and as shown on the Active Street Frontage Map.

The alterations and additions proposed present a variation to this requirement due to the new portion of building being located on the ground floor, facing the street but not incorporating a *business premises* or *retail premises*.

Clause 4.6 of the Mid-Western Regional LEP 2012, Exceptions to development standards provides opportunity for Council to vary the controls where the concurrence of the Secretary has been obtained and the written request adequately addresses the following four items:

- **Strict compliance is unreasonable and unnecessary:** The request must demonstrate that strict compliance with a development standard is unreasonable or unnecessary in the circumstances of the case;
- **Environmental planning grounds:** The request must show that there are sufficient environmental planning grounds to justify contravening the development standard;
- **Public interest:** The variation must demonstrate that the proposal would be in the public interest; and
- **Other matters:** The variation must address whether or not the contravention of the development standard raises any matters of significance for state or regional planning.

This document is a formal request for a variation to the active street frontage development standard under MWRLEP 2012. It has been prepared in accordance with the principles outlined in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).

Strict Compliance Unreasonable and Unnecessary

Under Clause 4.6(3)(a) of MWRLEP 2012 “*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”.

The Initial Action case is referable to the judgement of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) which sets out five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Randwick Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 have confirmed that adopting the ‘*Wehbe*’ principles when assessing a clause 4.6 submission in respect of clause 4.6(3)(a) is an appropriate approach. It is necessary that the proposal meets one or more of the *Wehbe* principles (although the *Wehbe* principles are not the only basis upon which ‘unreasonable or unnecessary may be demonstrated).

Five ways from the *Wehbe* judgement of demonstrating that compliance with a development standard is unreasonable or unnecessary are:

1. “if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)”
2. “the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary”
3. “the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is 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”
5. “the zoning of particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary”

For the purpose of this variation request, only the second of the *Wehbe* principles is relevant.

Despite the breach of the active street frontage control, the proposal achieves the objective for active street frontages in Clause 6.7 as outlined below.

“The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages on land in Zone B3 Commercial Core.”

Comment: The proposal will not hinder other sites within the B3 zone from providing an active street frontage. The site does not generally relate to the accepted primary pedestrian routes through the Mudgee CBD that are of importance. This is as a result of

the isolated and disjointed nature of the site from the CBD and the existing non-commercial use upon the site.

Despite the active street frontage breach the proposal also satisfies the B3 zone objectives as noted below:

1. *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*

Comment: The proposed alterations and additions will allow the site to continue to be used for the purposes of a child-care centre serving the needs of the surrounding area.

2. *To encourage appropriate employment opportunities in accessible locations.*

Comment: The proposed alterations and additions will allow the site to continue to be used for the purposes of a child-care centre and therefore generating employment.

3. *To maximise public transport patronage and encourage walking and cycling.*

Comment: The proposed alterations and additions will allow the site to continue to be used for the purposes of a child-care centre within the downtown area, which is accessible for walking, cycling etc.

4. *To promote the central business district of Mudgee as the major focus for retail and commercial activity in Mid-Western Regional.*

Comment: The proposal will not impact on the ability of the downtown area of Mudgee to continue to be the focus for retail and commercial activity. The site will continue to be used for the purpose of a child-care centre, which performs an important supportive role in the function of the downtown area and the various businesses and employees that rely upon it.

5. *To consolidate business development in the Mudgee town centre and avoid unnecessary or inappropriate expansion of business-related land uses into surrounding residential neighbourhoods.*

Comment: The proposal is an upgrade of an existing child care facility, which is permissible with consent. Subsequently, the proposal will not create additional risk to pushing other businesses outside of the town centre area.

6. *To ensure that new development is compatible with the historic architectural character and streetscapes of the Mudgee commercial core area.*

Comment: The proposal is sympathetic to the surrounding streetscape with regards to heritage related elements and in particular Robertson Park. This is addressed further in this SEE.

7. *To ensure that the form and layout of new development is designed to encourage free pedestrian movement and connectivity within the commercial core.*

Comment: The proposal will not interfere with any existing pedestrian movements throughout the commercial core, with the area already enclosed for the purposes of the child-care centre use.

Environmental Planning Grounds

Under Clause 4.6(3)(b) of MWRLEP 2012 “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:(b) that there are sufficient environmental planning grounds to justify contravening the development standard”.

It is considered that there are sufficient environmental planning grounds to justify breaching the active street frontage standard in this instance because:

- **The proposed variation allows for improved functionality and amenity for the existing use of the site into the future.** The existing child-care centre will benefit from the upgrade by modernising the layout and facilities to reflect the current and future needs of the children and staff including additional internal areas for additional learning and development.
- **The alternative to the variation proposed would result in a lesser planning outcome.** Alterations and additions afford the opportunity to improve a range of aspects of the facility. The alternative to the proposed variation would be to locate the works to another part of the site to the west whereby the active street frontage clause would not likely be triggered (although this is not clear). The proposed addition has been intentionally positioned in the current location to ensure the childrens play areas are orientated in a way that they are internalised to the site thereby ensuring privacy and amenity can still be afforded to the maximum potential possible for the site.

Additionally, the location of the new addition is the most logical in terms of integrating with the rest of the built form of the facility. An imperative design outcome is the close connectivity to the western classroom and allowance for clear visibility over the rest of the site.

- **The non-compliant elements of the proposal satisfy the relevant matters outlined in section 1.3 of the Environmental Planning and Assessment Act 1979.** This is outlined below:

- *“(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,”* **Comment:** The proposed building has been designed with regard to ecologically sustainable design measures, with the variation not preventing compliance with other legislative requirements and allowing for improved functionality and amenity for occupants into the future.

- *“(c) to promote the orderly and economic use and development of land,”* **Comment:** The design of the addition has been carefully considered and the issue of non compliance will be not be perceptible as a non compliance as viewed from the street and surrounding development given the isolation of the site from the rest of the primary pedestrian routes throughout the Mudgee CBD. The non compliant area promotes the orderly use of land in that it will have no unreasonable environmental impacts on adjoining properties in terms of visual bulk and scale, views, overshadowing or loss of sunlight.

- *“(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,”* **Comment:** The proposed building use has no adverse implications with regard to protecting native vegetation or habitats.

- *“(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),”* **Comment:** The site is not known to contain any items of cultural heritage, and none are anticipated to be encountered given the location of the development and that the site has been previously cleared and developed. The impacts with regards to the built environment are well considered and discussed within the SEE lodged with the development application.

- *“(g) to promote good design and amenity of the built environment”* **Comment:** Despite the ASF breach the proposed alterations and additions are of high architectural merit. They have been sensitively designed and incorporate high-quality finishes. The proposed design is considerate in ensuring compatibility with adjacent and surrounding buildings and is presented appropriately when viewed from the street and parkland area. The appropriate design ensures no unreasonable adverse environmental impacts will result from the proposed works, including in terms of privacy, view sharing, visual intrusion and overshadowing. Given that it will not result in any adverse impacts and will result in a building form that is visually appropriate for its location it will satisfy this object of the Act.

- **The ASF breach has no implications for compliance with other key MWRLEP 2012 requirements:** The proposal is consistent with all other key MWRLEP 2012 requirements. Building height compliance is ensured, and a low

footprint is maintained on site. Overall, the design has been refined and considered in striving to achieve compatibility with both the existing streetscape and the future desired built form of the area. It is also noted that the proposal overall is consistent with the objectives of the B3 zone.

Public Interest

Under Clause 4.6(4) of MWRLEP 2012 “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.”

This Clause 4.6 variation request is in the public interest because it has been shown to be consistent with the objectives of the ASF development standard and the B3 zone. It is understood that concurrence of the Secretary has been obtained.

Other Considerations

Under Clause 4.6 (5) of MWRLEP 2012 “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.”

There is considered to be no public benefit in refusing the application (for the reasons stated above) so as to ensure that full compliance with the ASF control is achieved, as discussed above. The variation to the development standard does not raise any matters of state or regional significance.

It is understood that concurrence of the Secretary has been obtained.

Conclusion

This submission demonstrates that strict compliance with Clause 6.7 of MWRLEP 2012 is unreasonable or unnecessary in the circumstances of the case because the proposal achieves both the objectives of the ASF clause and the objectives of the B3 zone. This submission also demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard. Additionally, the proposal is considered to be in the public interest in that it achieves the objectives of the B3 zone

and continues to allow the rest of the Mudgee CBD to be the primary and logical retail focus.

A summary of the key arguments in support of the clause 4.6 variation is as follows:

- The proposed design is complementary to the surrounding streetscape in the commercial precinct and achieves:
 - the relevant objectives of clause 1.3 of the Environmental Planning and Assessment Act 1979;
 - the objectives for active street frontages in clause 6.7 of the LEP; and
 - the objectives of the B3 zone.
- The variation is to ensure that the non-commercial use of the site can continue in a logical manner, considering that no business activity has existed upon the site;
- The proposed variation allows for improved functionality and amenity for the child-care centre use on the site with the location of the proposed addition sited in the most appropriate location;
- The alternative to the variation proposed would result in a lesser planning outcome;
- The proposed variation does not create adverse visual impact including as viewed from the street, surrounding properties and Robertson Park; and
- The ASF variation has no implications for compliance with other key MWRLEP 2012 and MWRDCP 2013 requirements.

It is notable that this submission demonstrates that both the objectives of the ASF and the zone objectives are achieved. Achieving these objectives is a higher level of satisfaction than that required in Clause 4.6(4)(ii), which only requires 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 *Moskovich v Waverley Council* [2016] NSWLEC 1015, Commissioner Tuor makes the distinction between the different requirements between clauses 4.6(3) and 4.6(4) and notes the higher standard as being able to demonstrate the objectives of the standard and zone are *“achieved”*.

Accordingly, in light of the above written request it is submitted that the Council will be satisfied that in this instance the development standard can be varied because this written request has addressed all of the necessary matters contained in clause 4.6(4) of the MWRLEP 2012. Relevantly, compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and sufficient environmental planning grounds exist to justify a contravention of the development standard; and the proposed development will be in the public interest as it is consistent with the development standards and the zone.