



INNER WEST COUNCIL

DEVELOPMENT ASSESSMENT REPORT

Application No.	DAREV/2018/10
Address	157 Nelson Street, ANNANDALE NSW 2038
Proposal	Review of Determination of D/2017/599 which was refused seeking change of use to a real estate office and associated works.
Date of Receipt	25 May 2018
Applicant	Turnbull Planning International
Owner	Mr J C S Payne and Mr R J Clarke
Number of Submissions	1 objection. Issues raised related to traffic and parking impacts are valid grounds of objection that warrant refusal of the DA
Value of works	\$4,000
Reason for determination at Planning Panel	Confirm original determination by way of refusal
Main Issues	Permissibility; FSR
Recommendation	Refusal



LOCALITY MAP

Subject Site		Objectors		↑ N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the application submitted to Council for a review of D/2017/599 which was refused in accordance with section 8.2 of the Environmental Planning and Assessment Act 1979. The application sought consent for change of use to a real estate office at 157 Nelson Street Annandale.

The application was notified to surrounding properties and one [1] submission was received.

The main issues that have arisen from the application include:

- Clause 6.10 – Use of existing buildings in Zone R1
- Consistency with objectives of R1 General Residential Zone
- Floor Space Ratio (FSR)
- Traffic and Parking

The proposal fails to satisfy Clause 6.10 of Leichhardt Local Environmental Plan (LLEP) 2013, which only permits business or office premises in the R1 General Residential zone if the development is a building that was constructed (wholly or partly) for a purpose other than residential accommodation and was erected before the commencement of the Plan. The proposal also results in adverse residential amenity and traffic and parking impacts, breaches the maximum FSR of 1:1, and is considered to be inconsistent with the objectives of the R1 General Residential zone to 'protect and enhance the amenity of existing and future residents and the neighbourhood'.

Therefore, given the proposal is not permitted under Clause 6.10 and the pre-conditions of Clause 4.6(4)(a)(ii) are not satisfied to enable a variation to the maximum FSR of 1:1, the application cannot be determined by granting of consent and is recommended for refusal.

2. Proposal

The application seeks a review of D/2017/599 for change of use to a real estate office and associated works, which was determined by way of refusal.

The original development involved minor alterations to provide an opening approximately 3.4m wide and the relocation of internal reception and meeting areas to accommodate 2 covered car spaces. The proposed hours of operation are 9am to 5:30pm Monday to Friday and 9am to 3pm on Saturdays. A total of 7 full time employees and 3 part-time employees are proposed.

The current proposal is generally unchanged from the original development with the exception of further minor alterations involving:

- increased external driveway width to a variable width of up to 5m,
- reduction of external bin room wall facing Nelson Street,
- widening of the garage opening from 3.4m to 5m,
- replacement of sliding glass doors with 5m wide glass panelled tilt-a-door for garage access, and
- 1.5m high obscure glazing to the first floor rear verandah and northern and eastern openings.

The existing building has a total gross floor area of 202.96sqm (or FSR of 1.38:1). Due to the provision of two car parking spaces that are required for the change of use, the proposal results in a technical net reduction of total gross floor area to 172.1sqm (or FSR of 1.18:1).

Based on a review of Council's records, the original warehouse building was wholly demolished as a part of the conversion to a dwelling under BA/1998/183 (dated 31 August

1999) given the existing walls and footings intended to be retained were identified as structurally unsound during construction. Therefore, the proposed change of use relates to a building that was wholly constructed as a dwelling and is not considered to be the use of an existing building that was constructed (wholly or partly) for a purpose other than residential accommodation before the commencement of the Leichhardt Local Environmental Plan (LLEP) 2013. Further, the proposed ingress and egress arrangements are considered to be unsatisfactory and as such, will result in adverse traffic and parking impacts. Accordingly, the proposed change of use does not satisfy the requirements of Clause 6.10 under LLEP 2013 and as such, development consent for the proposal cannot be granted.

Extracts of the original (refused) and proposed plans are shown in the figures below.

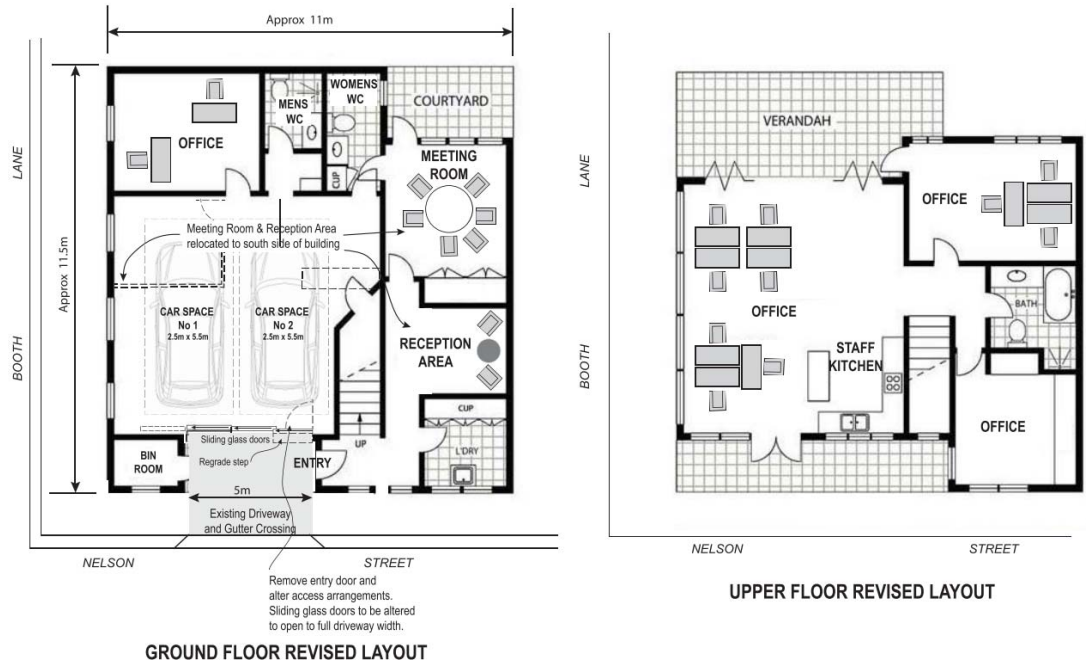


Figure 1: Original refused floor layouts at 157 Nelson Street.

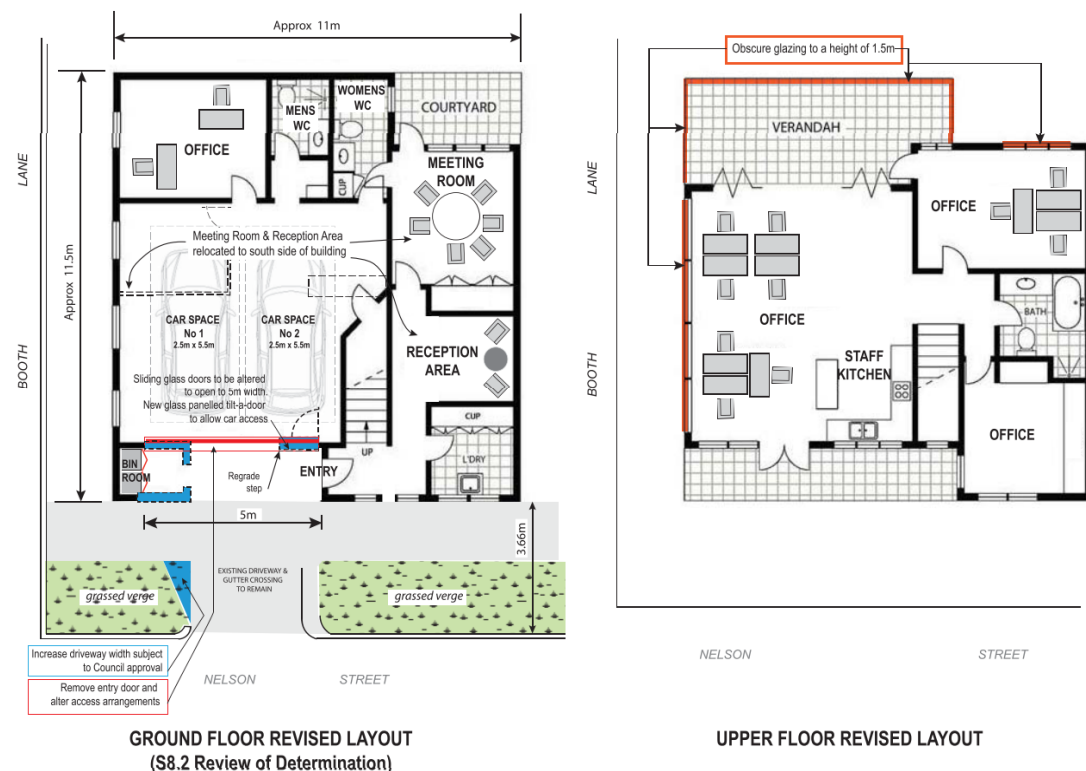


Figure 2: Proposed floor layouts at 157 Nelson Street.

3. Site Description

The subject site is located on the eastern side of Nelson Street, between Booth Lane and Booth Street. The site consists of one allotment and is generally rectangular with a total area of 146.2sqm and is legally described as Lot 3 DP 1004918.

The site has a frontage to Nelson Street of 12 metres and a secondary frontage of approximately 12.19 metres to Booth Lane.

The site presently accommodates a two-storey dwelling being used as an unauthorised real estate office. The adjoining properties consist of one and two storey dwellings and mixed use development.

The site is located within the distinctive neighbourhood of Booth Street, Annandale.

The subject site is not a heritage item, but is located within a conservation area.

4. Background

4(a) Site history

The following table outlines the development history of the subject site.

Date	Application No	Application Details	Outcome
27/04/2018	D/2017/599	Proposed change of use to real estate office.	Refused
20/10/2017	DAREV/2017/27	Review of Determination of D/2017/195 which was refused, seeking consent for change of use to real estate office.	Withdrawn
26/07/2017	D/2017/195	Proposed change of use to real estate office.	Refused
29/03/2017	PREDA/2017/19	Use Premises as a Real Estate Office	Advice Issued
09/03/2017	EPA/2017/38	Order to cease the use of the premises as a real estate office	Pending
29/01/2001	M/2000/245	Modification to BA/1998/183 for part demolition of existing single storey rear addition and rebuild to create new bathroom, kitchen and living area.	Approved
31/08/1999	DA/183/1998	Alterations and additions to single storey warehouse to provide 2 storey residential accommodation comprising 3 bedrooms, 2 bathrooms, combined kitchen, dining, living room, outdoor terraces and garage for 2 vehicles.	Approved
21.12.1977	D.A.5719	To use for storage and maintenance of washing machines.	Approved
12/07/1977	D.A.5613	To use premises for storage and bulk canned foodstuff.	Approved
27/10/1975	D.A.5306	To use premises for mechanical repair of cars and components from heavier vehicles.	Approved
19/11/1974	D.A.5058	To use premises for fabrication of steel and timber gates, stairs balustrades.	Approved

Surrounding History31 Booth Street

Date	Application No	Application Details	Outcome
28/4/2006	D/2005/37	Amended Plans: Alterations and additions to the existing dwelling including a new first floor and construction of a new garage and rooftop garden at the rear of the site.	Approved

33 Booth Street

Date	Application No	Application Details	Outcome
31/1/2012	D/2011/518	Alterations and additions to an existing commercial premises including stairs and deck to the rear and internal layout changes. SEPP 1 Objection Floor Space Ratio.	Approved
1/11/2010	D/2010/348	Use of first floor of existing building as an office.	Approved

35 Booth Street

Date	Application No	Application Details	Outcome
28/4/2009	D/2008/377	Alterations and additions to existing mixed use building including three storey addition to result in one (1) shop and three (3) residential units.	Approved
27/4/2007	PreDA/2007/39	Construction of 2 apartments	Advice letter issued
6/4/2005	D/2004/499	Construction of a three storey building located at the rear of the site, comprising of two units with rooftop terraces over a garage and extension of first floor balcony at the rear of the existing building.	Refused

4(b) Application history

Not applicable.

5. 8.2 Review

Division 8.2 of the Environmental Planning and Assessment Act, 1979 allows an applicant to request Council to review the determination of an application. The review is to be carried out in accordance with the following.

A review of a determination cannot be carried out on a complying development certificate, or a determination in respect of designated development, or a determination made by the council under section 4.33 in respect of an application by the Crown.

The subject application was not complying development, designated development or an application made by the Crown.

A determination cannot be reviewed after the time limit for making of an appeal under Section 8.7 expires, being 6 months from the original determination.

The subject application was determined on 27 April 2018. The request for review was received by Council on 25 May 2018.

In requesting a review, the applicant may make amendments to the development described in the original application, provided that Council is satisfied that the development, as amended, is substantially the same as the development described in the original application.

The proposal for change of use to a real estate office and associated works (as amended) is substantially the same as the original development. Minor changes to the originally refused development involve a widening of the external driveway and opening for the covered parking, replacement of sliding glass doors with 5m wide glass panelled tilt-a-door for garage access, and 1.5m high obscure glazing to the first floor rear verandah and northern and eastern openings.

The review of determination has been notified in accordance with the regulations, if the regulations so require, or a development control plan, if the council has made a development control plan that requires the notification or advertising of requests for the review of its determinations.

The application was advertised for a period of 14 days. The advertising period was between 7th June 2018 to 21st June 2018.

One objection was received during the advertising period. The issues raised in the objection are discussed later in this report.

Consideration of any submissions made concerning the request for review within any period prescribed by the regulations or provided by the development control plan.

Refer to discussion under Section 6 of this Report.

As a consequence of a review, Council may confirm or change the determination.

After reviewing the determination of the application, it is recommended that the Inner West Local Planning Panel confirm the original determination of the application which was refusal.

The review must not be made by the person who determined the original but is to be made by another delegate of the council who is not subordinate to the delegate who made the determination. If the original determination was made by the Council then the review is also to be considered by the Council.

A delegate of Council carried out the decision. The review must be carried out by the Local Planning Panel given Council staff do not have any delegation to confirm the original determination.

REASONS FOR REFUSAL

The original development application was refused on 27 April 2018. The reasons for refusal and discussion on how the proposed amendments address these reasons as follows.

1. *The proposal does not satisfy State Environmental Planning Policy No.64 – Advertising and Signage, pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979.*

Comment: It is noted that the existing unauthorised use contains business identification signage. However, this application does not seek approval for signage and as such, the provisions of SEPP 64 are not applicable to the assessment of the proposal. Any necessary approval for business identification signage will be the subject of a full and proper assessment under a separate development application.

2. *The proposal does not satisfy the following Clauses of the Leichhardt Local Environmental Plan 2013, pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979:*
- a) *Clause 1.2 – Aims of Plan*
 - b) *Clause 2.3 – Zone objectives and Land Use Table*
 - c) *Part 3 – Exempt and Complying Development*
 - d) *Clause 4.4 – Floor Space Ratio*
 - e) *Clause 4.6 – Exceptions to Development Standards*
 - f) *Clause 5.10 – Heritage Conservation*
 - g) *Clause 6.8 – Development in areas subject to aircraft noise*
 - h) *Clause 6.10 – Use of existing buildings in Zone R1*

Comment: Refer to discussion under Section 6(a)(i) of this Report. The proposal fails to satisfy Clause 6.10 of Leichhardt Local Environmental Plan (LLEP) 2013, which only permits business premises in the R1 General Residential zone if the development is a building that was constructed (wholly or partly) for a purpose other than residential accommodation and was erected before the commencement of the Plan. Further, the proposal breaches the maximum FSR of 1:1, results in adverse traffic and parking impacts, and is considered to be inconsistent with the objectives of the R1 General Residential zone to 'protect and enhance the amenity of existing and future residents and the neighbourhood'. Therefore, given the proposal is not permitted under Clause 6.10 and the pre-conditions of Clause 4.6(4)(a)(ii) are not satisfied to enable a variation to the maximum FSR of 1:1, the application cannot be determined by granting of consent.

3. *The proposal does not satisfy the following Parts of the Leichhardt Development Control Plan 2013, pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979:*
- a) *Part C – Section 1 – C1.0 – General Provisions*
 - b) *Part C – Section 1 – C1.1 – Site and Context Analysis*
 - c) *Part C – Section 1 – C1.4 – Heritage Conservation Areas and Heritage Items*
 - d) *Part C – Section 1 – C1.7 – Site Facilities*
 - e) *Part C – Section 1 – C1.10 – Equity of Access and Mobility*
 - f) *Part C – Section 1 – C1.11 – Parking*
 - g) *Part C – Section 1 – C1.15 – Signs and Outdoor Advertising*
 - h) *Part C – Section 2 - C2.12.1.4 – Booth Street Distinctive Neighbourhood*
 - i) *Part C – Section 3 – C3.1 – Residential General Provisions*
 - j) *Part C – Section 3 – C3.11 – Visual Privacy*
 - k) *Part C – Section 3 – C3.12 – Acoustic Privacy*
 - l) *Part C – Section 4 – C4.5 – Interface Amenity*
 - m) *Part D – Section 2 – Resource Recovery and Waste Management*
 - n) *Part D – D2.1 – General Requirements*
 - o) *Part D – D2.2 – Demolition and Construction of All Development*
 - p) *Part D – D2.4 – Non-Residential Development*

Comment: Refer to discussion under Section 6(a)(iii) of this Report. Whilst the proposal involves minor additional changes to facilitate access and parking and mitigate potential visual privacy impacts, the proposed ingress and egress arrangements are considered inadequate for the required two car spaces.

4. *The proposal is not considered to satisfy the Environmental Planning and Assessment Act Regulation 2000 pursuant to Section 4.15(1)(a)(iv) of the Environmental Planning and Assessment Act 1979.*

Comment: Refer to discussion under Section 6 of this Report.

5. *The proposal is considered to result in adverse environmental impacts on the built environment and social impacts in the locality pursuant to Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979.*

Comment: Refer to discussion under Section 6 of this Report.

6. *The proposal is not considered suitable for the site pursuant to Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979.*

Comment: Refer to discussion under Section 6 of this Report.

7. *The proposal is not considered to be in the public interest pursuant to Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979.*

Comment: Refer to discussion under Section 6 of this Report.

6. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the Environmental Planning and Assessment Act 1979.

6(a) Environmental Planning Instruments

The application has been assessed against the relevant Environmental Planning Instruments listed below:

- State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017
- State Environmental Planning Policy (Coastal Management) 2018
- Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
- Leichhardt Local Environmental Plan 2013

The following provides further discussion of the relevant issues:

5(a)(i) State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017

The proposal does not involve any tree removal.

5(a)(ii) State Environmental Planning Policy (Coastal Management) 2018

The subject site is not located within the coastal zone and as such, these provisions are not applicable.

5(a)(iii) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

The subject site is not within the Foreshores and Waterways Area.

5(a)(iv) Leichhardt Local Environment Plan 2013 (LLEP 2013)

The application was assessed against the following relevant clauses of the Leichhardt Local Environmental Plan 2013:

- Clause 1.2 – Aims of the Plan
- Clause 2.3 – Zone objectives and Land Use Table
- Clause 4.4 – Floor Space Ratio
- Clause 4.5 – Calculation of floor space ratio and site area
- Clause 5.10 – Heritage Conservation

- Clause 6.8 – Development in areas subject to aircraft noise
- Clause 6.10 – Use of existing buildings in Zone R1

The following table provides an assessment of the application against the development standards:

Standard	Proposal	% of non compliance	Compliance
Floor Space Ratio Required: 1:1 (146.2sqm)	1.18:1 (172.1sqm)	18%	No

The following provides further discussion of the relevant issues:

Clause 1.2 Aims of Plan

By virtue of the adverse parking and traffic impacts and intensification of use from residential to business purposes, the proposal is considered to be inconsistent with the following aims of the Plan:

- (b) *to minimise land use conflict and the negative impact of urban development on the natural, social, economic, physical and historical environment, and*
- (e) *to protect and enhance the amenity, vitality and viability of Leichhardt for existing and future residents, and people who work in and visit Leichhardt,*

Therefore, the site is not considered suitable for the proposed use given its inability to satisfactorily provide off-street car parking for the development and reliance on public on-street parking for its servicing. This is not considered ‘best practice’ planning, particularly for a non-residential use in a residential zone with there being no ‘just cause’ that this use should not provide the appropriate level of servicing, similar to any other use.

Clause 2.3 Zone objectives and Land Use Table

The proposal is considered to be inconsistent with the objectives of the R1 General Residential zoning to ‘protect and enhance the amenity of existing and future residents and the neighbourhood’ for the following reasons:

- The proposal fails to satisfactorily accommodate the required ingress and egress arrangements to enable the use of two off-street car parking spaces.
- As a result, the proposal creates adverse traffic and parking impacts to the surrounding road network and reduces the availability of on-street parking necessary for adjoining residential properties within the R1 General Residential zone.
- The proposed business use represents an intensification that is more suited to the B2 Local Centre zone. The proposal is not in keeping with the scale of non-residential land uses envisaged within the R1 zone providing facilities or services to meet the day to day needs of residents and the associated impacts on residential amenity levels and demand for local infrastructure such as roads and on-street parking.
- Whilst business premises are permissible in the R1 zone, Clause 6.10 operates to restrict the extent of non-residential uses such as business premises in the R1 zone to only existing buildings constructed for non-residential purposes before the commencement of the LEP. The benefit of the use of existing buildings for purposes other than residential accommodation reflects a specific strategic planning objective to limit such uses within the R1 zone and preserve a predominantly residential character to ‘protect and enhance residential amenity’. The reincarnation of historical non-residential uses for a building wholly reconstructed for residential purposes before the commencement of the LEP is contrary to this strategic planning objective.

- Comparisons to the nature and scale of existing commercial and mixed use developments along Booth Street are not considered to be representative of the nature and scale of non-residential development that could be reasonably expected within the R1 General Residential zone along this section of Nelson Street.

Clause 4.6 Exceptions to Development Standards

As outlined in the table above, the proposal results in a breach of the following development standard/s:

- Clause 4.4 – Floor Space Ratio

Clause 4.6(2) specifies that Development consent may be granted for development even though the development would contravene a development standard.

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 be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument.*

Comment: As discussed below in subclauses (3) and (4), it is considered that the contravention to the development standard is acceptable in this instance.

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.*

Comment: The 'key' reasons submitted by the applicant as justification to the contravention of the standards are:

The subject site has an area of 146.2sqm and the proposed development seeks to provide a total FSR of 1.18:1 (or gross floor area of 172.1sqm), equating to a variation of 18% or 25.9sqm. Notwithstanding numerical non-compliance, the applicant contends that the proposed building satisfies the stated objectives given that:

- *The subject non-residential development will have minimal, if any, environmental impact given that there are virtually no proposed building works or proposed changes to the existing building structure.*
- *In addition, the activities conducted within the building (as business premises) are likely to be of minimal impact in terms of local amenity.*
- *In our view, the particular use is well suited to the existing environment that forms an interface between more intense retail [sic] uses in the shopping centre and lower scale commercial offices.*
- *In short, the development is compatible with the desired future character of the area in relation to building bulk, form and scale.*
- *We observe also that the existing building bulk form and scale is not proposed to be altered by virtue of this proposal.*

- *The proposed development is consistent with such of the aims of the LEP as are of relevance to the development. The proposed development is of a high standard of urban design (cf clause 1.2(2)(d)), enhances the viability of Leichhardt for existing and future residents, and people who work in and visit Leichhardt (cf clause 1.2(2)(e)), and is compatible with the character, style, orientation and pattern of surrounding buildings, streetscape, works and landscaping and the desired future character of the area (cf clause 1.2(2)(f)).*
 - *Another good environmental planning ground justifying a contravention of the FSR development standard in this instance is that there is no demonstrable public benefit in maintaining the development standard (cf cl 4.6(5)(b)) in this instance for to do would not result in any public benefit in this situation.*
 - *To strictly enforce the standard in this instance would prevent the carrying out of an otherwise well-designed and attractive development which is eminently suited for the site, the precinct and which would result in demonstrable public benefits to the area.*
 - *In addition, as previously stated, the development proposal involves a 'change of use', no building works are proposed, other than very minimal and incidental works relating to the alteration of a door at the front of the premises, and the FSR of the existing building will be maintained except as regards the provision of 2 parking spaces resulting in a reduction in 'useable' floor space. In other words, there is no practical utility in enforcing strict compliance with the development standard.*
 - *We wish to point out that many of the existing retail shops on Booth Street, facing the roundabout and to the east of the roundabout, would have an FSR similar to the FSR of the development the subject of the development application. These properties would also very likely breach the current FSR development standard. This is likely to be attributable, in large measure, to the early history and evolution of the development of the precinct. The subject building is an example of this evolution. In our respectful submission, the development standard does not reflect the situation with current commercial development in this area which extends across the roundabout east west. The Ray White premises located at No 33 Booth Street is a case in point as are the premises immediately to the rear of the site.*
- (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 Secretary has been obtained.*

Comment: Whilst the applicant has adequately addressed the matters required under Clause 4.6(3), the proposal will result in a detrimental impact on the public interest given it is inconsistent with the objective of the R1 General Residential zoning to 'protect and enhance the amenity of existing and future residents and the neighbourhood' for the following reasons:

- The proposal fails to satisfactorily accommodate the required ingress and egress arrangements to enable the use of two off-street car parking spaces.
- As a result, the proposal creates adverse traffic and parking impacts to the surrounding road network and reduces the availability of on-street parking necessary for adjoining residential properties within the R1 General Residential zone.
- The proposed business use represents an intensification that is more suited to the B2 Local Centre zone. The proposal is not in keeping with the scale of non-residential land uses envisaged within the R1 zone providing facilities or services to meet the day

to day needs of residents and the associated impacts on residential amenity levels and demand for local infrastructure such as roads and on-street parking.

- Whilst business premises are permissible in the R1 zone, Clause 6.10 operates to restrict the extent of non-residential uses such as business premises in the R1 zone to only existing buildings constructed for non-residential purposes before the commencement of the LEP. The benefit of the use of existing buildings for purposes other than residential accommodation reflects a specific strategic planning objective to limit such uses within the R1 zone and preserve a predominantly residential character to 'protect and enhance residential amenity'. The reincarnation of historical non-residential uses for a building wholly reconstructed for residential purposes before the commencement of the LEP is contrary to this strategic planning objective.
- Comparisons to the nature and scale of existing commercial and mixed use developments along Booth Street are not considered to be representative of the nature and scale of non-residential development that could be reasonably expected within the R1 General Residential zone along this section of Nelson Street.

Clause 5.10 – Heritage Conservation

The site is located in a Heritage Conservation Area. The subject building is a modern dwelling that does not contribute to the heritage values of the conservation area and as such, the proposal will not result in any adverse heritage impacts.

Clause 6.8 – Development in areas subject to aircraft noise

The site is located in the ANEF Contour 20-25. Clause 6.8(2)(c)(v) applies to the change of any part of a building on land that is in an ANEF contour of 25 or greater to a business premises.

Based on Table 2.1 (Building Site Acceptability Based on ANEF Zones) in AS 2021-2015, commercial buildings are acceptable where less than 25 ANEF and conditionally acceptable in ANEF 25 to 35.

Clause 6.10 Use of existing buildings in Zone R1

Clause 6.10(3) states that development consent must not be granted for the purposes of business premises on land within the R1 General Residential Zone unless the consent authority is satisfied that:

- (a) *the development is a building that was constructed (wholly or partly) for a purpose other than residential accommodation and was erected before the commencement of this Plan, and*
- (b) *the consent authority is satisfied that:*
 - (i) *the development will not adversely affect the amenity of the surrounding area, and*
 - (ii) *the development will retain the form and fabric of any architectural features of the existing building, and*
 - (iii) *the building is suitable for adaptive reuse, and*
 - (iv) *any modification of the footprint and facade of the building will be minimal, and*
 - (v) *the gross floor area of any part of the building used for the purpose of a restaurant or cafe or take away food and drink premises will be less than 80 square metres.*

It is acknowledged that a previous warehouse building once existed on the site.

The applicant contends that the building now situated on the subject land was constructed partly for a purpose other than residential accommodation given the approval for conversion to a dwelling under BA/1998/183 (dated 31 August 1999) entailed the retention of part of the original structure.

However, based on a review of Council's records, the original warehouse building was, in fact, wholly demolished as a part of the conversion to a dwelling under BA/1998/183 (dated 31 August 1999) given the existing walls and footings intended to be retained were identified as structurally unsound. In this regard, structural engineering advice provided by Bienvenuti S.C. Pty Ltd, dated 2 February 1999, specifically recommended the demolition of the entire structure and re-construction given the external walls to be retained and made good were unstable and in danger of collapse during demolition and construction. In light of the structural engineering advice, a letter from the owner and builder at the time, Ian Reynolds, received by Council on 3 February 1999, confirmed the intention to demolish and re-build the existing walls originally intended to be retained and made good. All other walls, slabs, footings and roof structures were newly constructed.

Therefore, the proposed change of use relates to a building that was wholly constructed as a dwelling and is not considered to be the use of an existing building that was constructed (wholly or partly) for a purpose other than residential accommodation before the commencement of the Leichhardt Local Environmental Plan (LLEP) 2013. Further, as noted previously, the proposed ingress and egress arrangements are considered to be unsatisfactory and as such, will result in adverse traffic and parking impacts indicating that the building is not suitable for adaptive reuse.

Accordingly, the proposed change of use does not satisfy the requirements of Clause 6.10(3)(a), (b)(i) and (b)(ii) under LLEP 2013 and as such, development consent for the proposal cannot be granted.

5(b) Draft Environmental Planning Instruments

Draft State Environmental Planning Policy (Environment) 2018

The NSW government has been working towards developing a new State Environmental Planning Policy (SEPP) for the protection and management of our natural environment. The Explanation of Intended Effect (EIE) for the Environment SEPP was on exhibition from 31 October 2017 until 31 January 2018. The EIE outlines changes to occur, implementation details, and the intended outcome. It considers the existing SEPPs proposed to be repealed and explains why certain provisions will be transferred directly to the new SEPP, amended and transferred, or repealed due to overlaps with other areas of the NSW planning system.

This consolidated SEPP proposes to simplify the planning rules for a number of water catchments, waterways, urban bushland and Willandra Lakes World Heritage Property. Changes proposed include consolidating seven existing SEPPs including Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005. The proposed development would be consistent with the intended requirements within the Draft Environment SEPP.

5(c) Development Control Plans

The application has been assessed and the following provides a summary of the relevant provisions of Leichhardt Development Control Plan 2013.

Part	Compliance
Part A: Introductions	
Section 3 – Notification of Applications	Yes
Part B: Connections	
B1.1 Connections – Objectives	Yes
B3.1 Social Impact Assessment	Yes

Part C	
C1.0 General Provisions	No – Discussion below
C1.1 Site and Context Analysis	No – Discussion below
C1.2 Demolition	Yes
C1.4 Heritage Conservation Areas and Heritage Items	Yes
C1.7 Site Facilities	No – Discussion below
C1.8 Contamination	Yes
C1.9 Safety by Design	Yes
C1.10 Equity of Access and Mobility	No – Discussion below
C1.11 Parking	No – Discussion below
C1.15 Signs and Outdoor Advertising	N/A – as noted previously, the application does not seek approval for signage.
Part C: Place – Section 2 Urban Character	
C2.12.1.4 Booth Street Distinctive Neighbourhood	No – Discussion below
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	N/A – the proposal relates to non-residential development
C3.2 Site Layout and Building Design	No – Discussion below
C3.3 Elevation and Materials	Yes
C3.4 Dormer Windows	N/A
C3.5 Front Gardens and Dwelling Entries	N/A
C3.6 Fences	N/A
C3.7 Environmental Performance	N/A
C3.8 Private Open Space	N/A
C3.9 Solar Access	N/A
C3.10 Views	N/A
C3.11 Visual Privacy	N/A – the proposal relates to non-residential development – refer to discussion under C4.5
C3.12 Acoustic Privacy	N/A – the proposal relates to non-residential development – refer to discussion under C4.5
Part C: Place – Section 4 – Non-Residential Provisions	
C4.5 Interface Amenity	No – Whilst strictly not applicable to development in the residential zone, an assessment of interface amenity is considered appropriate for the proposed change of use. Discussion below.

Part D: Energy	Yes
Part E: Water	Yes
Part F: Food	N/A
Part G: Site Specific Controls	N/A

C1.0 – General Provisions

Given the inadequate ingress and egress arrangements to enable the safe use of the required car spaces and main pedestrian entry, the proposal is not considered to satisfy the following objectives:

- *O2 Accessible: places and spaces can be accessed by the community via safe, convenient and efficient movement systems.*

C1.1 – Site and Context Analysis

The proposal is not considered to adequately address impacts of the use to surrounding residential properties including in relation to on-street parking impacts. Accordingly the proposal does not satisfy the following objectives:

- *O1 To encourage property owners to ensure that the planning and design of their development takes into account:*
 - a. existing site conditions on the site and adjacent and nearby properties;*
 - b. the development potential of adjoining and nearby sites and the likely impacts on the site itself and its neighbours if those properties are developed to their maximum potential;*

C1.7 – Site Facilities

The proposal does not demonstrate that the reduced bin room is adequate for the use and therefore does not satisfy the following objectives:

- *O1 Site facilities are provided that:*
 - a. are functional;*
 - d. are adequate given the size of the dwelling or building;*

C1.10 Equity of Access and Mobility

The submitted plans do not adequately demonstrate satisfactory equity of access and mobility. Therefore, the proposal is not considered to satisfy the following objectives:

- O3b with respect to facilitating equity of access to changes to existing buildings or their uses as there is a step into the front entrance and the entrance is across a driveway;
- O5 with respect to relevant disability requirements;
- O6 and O7 with respect to providing dignified and equitable access to all persons and safe access and egress of all persons; and
- O10 with respect to provision of accessible car parking.

The proposal is also not considered to satisfy:

- Control C1 with regard to the development being fully compliant with disability requirements; and
- Control C3 with respect to providing a continuous accessible path of travel.

C1.11 – Parking

In accordance with Control C1.11.1, the proposal generates a minimum car parking requirement of two car spaces. Whilst the proposal indicates the provision of 2 parking spaces onsite, the proposed vehicular access to the property from Nelson Street is not

supported on safety grounds as it is located within a prohibited location adjacent an intersection as per Figure 3.1 AS/NZS 2890.1-2004 *Parking Facilities: Off-street car parking*.

Furthermore, the existing vehicle crossing would need to be widened to suit the proposed vehicular entry and would require the relocation of Council existing stormwater pit and the power pole. Controls C2, C3, C4 and C6, seek to restrict parking and driveways on primary street frontages in residential areas to single width driveways away from the front of buildings particularly where secondary laneway frontages are available. Therefore, the proposed vehicular access and parking arrangements are not supported.

C2.2.1.4 Booth Street Distinctive Neighbourhood and

Given the inadequate ingress and egress arrangements to enable the safe use of the required car spaces and main pedestrian entry, the proposal is not considered to provide a compatible commercial use that will protect and enhance the residential amenity of dwellings in and adjoining the neighbourhood in accordance with Controls C4, C6 and C7. Further, the required widening to the existing garage and driveway to enable double car space access is contrary to Control C19 that seeks to minimise existing driveways particularly where secondary laneway frontages are available.

C3.2 Site Layout and Building Design

The proposal fails to satisfy Control C1, which requires the site to “have sufficient capacity to accommodate development, including... access, manoeuvring and parking, having regard to site characteristics such as existing extent of development, desired future character and site area, road frontage, width and depth.

C4.5 Interface Amenity

Whilst the proposal incorporates obscure glazing on the first floor to mitigate potential visual privacy impacts, the proposed use as a real estate office with the majority of staff located at first floor is considered to result in acoustic amenity impacts particularly given the large extent of glazed openings and first floor rear verandah. The site is adjacent and opposite residential uses. Accordingly, the proposed change of use is not considered to satisfy Objective O1a and Controls C2a and b, C5, and C6.

5(d) The Likely Impacts

The assessment of the application demonstrates that the proposal will have an adverse impact on the locality in terms of traffic and parking.

5(e) The suitability of the site for the development

The site is zoned R1 General Residential and pursuant to Clause 6.10 of the Leichhardt LEP the proposed business use of the building is not permitted. It is considered that the proposal will have an adverse amenity impact on the adjoining properties and therefore it is considered that the site is unsuitable to accommodate the proposed development.

5(f) Any submissions

The application was notified for a period of 14 days between 7 June 2018 and 21 June 2018. A total of one objection was received during the notification period.

The following issues raised in submissions have been discussed in this report:

- Consistency with objectives of R1 General Residential zone - Scale of proposed use is inappropriate in this part of the street being a residential area
- Traffic and Parking

The other matters can be summarised as follows -

Retrospectivity

Applicant's comment: *The comment made that consent cannot be granted retrospectively is wrong in law. While consent cannot be granted for the erection of a building after it, it is the case in law that development consent can still be sought and granted in respect of the future (that is, **prospective**) use of that building. In addition, consent can be granted to alterations and additions to, and rebuilding, of unapproved building work. Further, a modification of a development consent may be approved in relation to development which has already been carried out; any such modification is prospective in its operation and does not render lawful any past illegality in respect of the building. Finally, a building information certificate (which has both a retroactive and proactive effect) can be sought, and must ordinarily be granted, in respect of unapproved building work. We have addressed this issue before. In short, the fact that occupation commenced without consent is **NOT** a legal impediment to the granting of consent.*

Officer comment: Notwithstanding the existing unauthorised use, the proposed change of use requires development consent. This entails a full and proper assessment under a development application.

Illumination of the sign.

Applicant's comment: *Illumination of the sign has ceased some considerable time ago. The lighting of the sign is **not** being used. Any initial use as such has ceased.*

Officer comment: As noted previously, the application does not seek approval for signage. Any necessary approval for business identification signage will be the subject of a full and proper assessment under a separate development application.

5(g) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

The proposal is contrary to the public interest given it would result in adverse traffic and parking impacts and residential amenity impacts and is not consistent with the objectives of the R1 General Residential zone.

6 Referrals

6(a) Internal

The application was referred to the Council's Development Engineer and the access and parking issues raised in the engineering referral have been discussed in section 5 above.

6(b) External

The application was not referred to any external bodies.

7. Section 7.11 Contributions

Section 7.11 contributions are not payable for the proposed change of use if the proposal is determined by grant of consent.

8. Conclusion

This application has been assessed under Section 8.2 of the Environmental Planning and Assessment Act, 1979 and is considered to be unsatisfactory. The proposal fails on key threshold issues and does not comply with the aims, objectives and design parameters contained in Leichhardt Local Environmental Plan 2013 and Leichhardt Development Control Plan 2013. The development will result in adverse impacts in terms of traffic and parking and residential amenity. The application is considered unsupportable and in view of the circumstances, conditions are not provided and refusal of the application is recommended.

9. Recommendation

That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority pursuant to s4.16 of the Environmental Planning and Assessment Act 1979, confirm the original determination, being the refusal of Development Application No. D/2017/599 for change of use to a real estate office and associated works at 157 Nelson Street Annandale, for the following reasons:

1. The proposed development is inconsistent and / or has not demonstrated compliance with the Leichhardt Local Environmental Plan 2013, pursuant to Section 4.15 (1)(a)(i) of the Environmental Planning and Assessment Act 1979:
 - a) Clause 1.2 – Aims of the Plan;
 - b) Clause 2.3 - Zone objectives and Land use Table;
 - c) Clause 4.4 – Floor Space Ratio;
 - d) Clause 4.6 – Exceptions to development standards; and
 - e) Clause 6.10 – Use of existing buildings in Zone R1.
2. The proposed development cannot be approved as it breaches the maximum FSR of 1:1 by 18% and the Clause 4.6 request to vary this standard is not considered to be in the public interest as the proposal is not consistent with the aims of the Plan or objectives of the R1 General Residential zone under Leichhardt Local Environmental Plan 2013.
3. The proposed development cannot be approved as it fails to achieve the preconditions of Clause 6.10(3)(a), (b)(i) and (b)(iii) under Leichhardt Local Environmental Plan 2013 to enable the grant of consent for business purposes in the R1 General Residential zone. It does not relate to a building that was constructed (wholly or partly) for a purpose other than residential accommodation and was erected before the commencement of the Plan contrary 6.10(3)(a), and would adversely affect the amenity of the surrounding area and is not a building suitable for adaptive reuse contrary to Clause 6.10(3)(b)(i) and (b)(iii).
4. The proposed development is inconsistent and / or has not demonstrated compliance with the following provisions of Leichhardt Development Control Plan 2013, pursuant to Section 4.15 (1)(a)(iii) of the Environmental Planning and Assessment Act 1979:
 - a) Clause C1.0 – General Provisions;
 - b) Clause C1.1 – Site and Context Analysis;
 - c) Clause C1.7 – Site Facilities;
 - d) Clause C1.10 – Equity of Access and Mobility;

- e) Clause C1.11 – Parking;
 - f) Clause C2.2.1.4 – Booth Street Distinctive Neighbourhood;
 - g) Clause C3.2 – Site Layout and Building Design; and
 - h) Clause C4.5 – Interface Amenity.
5. The proposed development is inconsistent and / or has not demonstrated compliance with the Regulations given a valid application has not been made in the absence of clear and accurate scaled drawings in accordance with Clause 50 of the Regulations, pursuant to Section 4.15 (1)(a)(iv) of the Environmental Planning and Assessment Act 1979.
 6. The proposal will result in adverse environmental impacts in the locality, pursuant to Section 4.15 (1)(b) of the Environmental Planning and Assessment Act 1979.
 7. The adverse environmental impacts of the proposal mean that the site is not considered to be suitable for the development as proposed, pursuant to Section 4.15 (1)(c) of the Environmental Planning and Assessment Act 1979.
 8. The public submissions raised valid grounds of objection and approval of this application is considered contrary to the public interest, pursuant to Section 4.15 (1)(d) and (e) of the Environmental Planning and Assessment Act 1979.

Attachment B – Clause 4.6 Exceptions to Development Standards



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13 November 2017

The General Manager
Inner West Council
7-15 Wetherill Street
LEICHHARDT NSW 2040

Attention: Denise Bengler – Senior Assessments Officer

Dear General Manager

**PREMISES: 157 NELSON STREET ANNANDALE
DEVELOPMENT APPLICATION: USE OF PREMISES AS REAL ESTATE OFFICE
CLAUSE 4.6 VARIATION**

As you are aware, we act for Belle Property Annandale ('our client') of No 157 Nelson Street, Annandale (the 'site') and are the applicant as respects a development application, which was received by Council on 30 October 2017, seeking development consent for the use of the premises on the site as a real estate office (the 'development application').

This present document is a variation request submitted under clause 4.6 of *Leichardt Local Environmental Plan 2013* ('the LEP') in connection with the resubmitted development application.

1.0 Introduction and General Background

On 2 November 2017 Council wrote to our firm advising that Council was returning and had 'rejected' the development application.

Council's letter made it clear that it was open to resubmit the application along with certain 'required information'. As respects the latter, by letter dated 9 November 2017 we wrote to Council stating, among other things, that:

- many of the documents purportedly required were not so required in the previous development proposal No: D/2017/195, which was refused by Council by way of notice of determination dated 26 July 2017;
- the fresh development application that was purportedly rejected by Council was and is identical to the earlier application except as respects the provision of car parking, a reduction in useable floorspace for the proposed purpose, and a re-arrangement of furniture to take account of the space to be occupied by two (2) on-site parking spaces and alteration of a door;

- as respects the issue of floor space ratio ('FSR') and clause 4.6 of the LEP:
 - the issue FSR had not been raised by Council in our extensive dealings with its officers during the entire course of this year;
 - the development proposal involves a 'change of use';
 - no building works are proposed, other than very minimal and incidental works relating to the alteration of a door at the front of the premises; and
 - the FSR of the existing building will be maintained except as regards the provision of 2 parking spaces resulting in a reduction in useable floor space.

Whilst we are of the view that a clause 4.6 variation request in the current circumstances has no practical utility, and is not technically required as a matter of law, we have decided, if only for more abundant precaution, to accede to Council's request to submit a clause 4.6 request as respects the issue of FSR.

2.0 Request to Vary a Development Standard

This variation request under clause 4.6 of *Leichardt Local Environmental Plan 2013* has been prepared by Turnbull Planning International Pty Limited on behalf of our client.

It is submitted to Council in connection with, and in support of, the resubmitted development application seeking consent for the use of the premises on the site as a real estate office.

This variation request made under clause 4.6 has been prepared in light of all communications received from Council including but not limited to Council's letters of 29 March 2017 (pre-development application advice) and 2 November 2017.

Clause 4.6 of the LEP allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case;
- that the applicant has adequately demonstrated that there are **sufficient environmental planning grounds** to justify contravening the development standard; 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's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

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*).

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments.

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

More recently, the NSW Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 has had some very important things to say about the use and construction of clause 4.6. That case, and some others, are discussed in section 5.2 of this document.

This clause 4.6 variation request should be read in conjunction with the statement of environmental effects ('SEE') prepared by our firm and dated October 2017. (Note. The SEE is to be read in conjunction with our letter of 9 November 2017 which, as stated in that letter, forms a supplement to the earlier submitted SEE. The SEE deals with the impacts of the proposal in detail and indicates measures to mitigate those impacts. The SEE also provides full details relating to the relevantly applicable statutory planning regime and compliance with the relevant planning controls and objectives.)

3.0 Standard to be Varied

Clause 4.4 ('Floor space ratio') of the LEP establishes the maximum FSR permitted for all development.

The relevantly applicable FSR in respect of the site is 0.6:1.

The FSR in respect of the subject development is 1.18:1.

On its face, and looked at solely in numerical terms, the departure from the FSR development standard is a large one. However, for the reasons, and on the grounds, set out in this document, the numerical departure should not in and of itself a good reason for requiring strict compliance with the standard.

Furthermore, we submit that this written request justifies the contravention of the standard by demonstrating, firstly, that compliance with the development standard

is unreasonable or unnecessary in the circumstances of the case and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard.

Additionally, the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the R1 General Residential zone in which the development is to be carried out.

4.0 Is the Planning Control in Question a Development Standard?

Development Standard is defined under section 4(1) of the EPA Act as follows:

development standards means 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:

...
(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work..

The FSR standard prescribed under 4.4 of the LEP is clearly, demonstrably and unambiguously a development standard, being relevantly a provision of an environmental planning instrument (viz the LEP) in relation to the carrying out of development, being a provision by which a requirement is specified in respect of an aspect of that development, the aspect being the 'area' of the land upon which the development is proposed to be carried out.

An essential condition of the definition of development standard is that the requirements specified or standards fixed in respect of any aspect of the development must be requirements or standards which, *ex hypothesi*, are **external** to the aspect(s) of that development: see *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 at 269-270 per McHugh JA. That is the case here.

5.0 Justification for Contravention of the Development Standard

5.1 Clause 4.6 of the LEP and applicable case law

Clause 4.6(3) and (4) of the LEP are as follows:

- (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 Secretary has been obtained.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in *Wehbe* and *Four2Five*.

The relevant matters contained in clause 4.6 of the LEP, with respect to clause 4.4 of the LEP, are each addressed below, including with regard to these decisions.

5.2 Relevant Case Law on Clause 4.6

***Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248**

This landmark decision of the NSW Court of Appeal was an appeal from a decision of a judge of the NSW Land and Environment Court's decision, the latter having been an appeal from a commissioner of that Court.

The case upheld Commissioner Pearson's original decision in regard to clause 4.6 but the Court of Appeal interpreted the approach taken by the commissioner differently to that of Pain J in the land and Environment Court. In doing so, the decision largely confined Commissioner Pearson's decision to the particular facts of that case and the particular exercise of discretion by the Commissioner.

In the original decision Commissioner Pearson had refused the request to vary the standard, principally on the basis that:

- the claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds as required by clause 4.6(3)(b) because they were *not particular to the site*; and
- the obligation on the applicant to demonstrate that *compliance with the standard was unreasonable or unnecessary* had to be fulfilled separately (i.e. in addition to) to the obligation to demonstrate that the proposed was consistency with the objectives of the standard, which Four2Five had failed to do.

Four2Five then appealed the commissioner's decision to a judge of the Land and Environment Court (Pain J), essentially arguing that the commissioner set the bar for a well-founded clause 4.6 variation request too high. However, Pain J dismissed Four2Five's appeal and endorsed the commissioner's approach to clause 4.6.

On the first ground of appeal Pain J held that the commissioner had a broad discretion under clause 4.6(4)(a)(i) and that there was no specific limitation on that discretion. The commissioner was entitled to require the variation request to identify circumstances particular to the site.

On the second ground of appeal, Pain J held that commissioner was correct in requiring the variation request to demonstrate consistency with the objectives of the standard *in addition to* consistency with the objectives of the standard and zone.

The matter then went on appeal to the NSW Court of Appeal.

Firstly, Leeming JA in the Court of Appeal:

- did not agree that the commissioner's decision in *Four2Five* proceeded on the basis that establishing that compliance with a standard is '*unreasonable or unnecessary*' in clause 4.6(3)(a) must necessarily exclude consideration of consistency with the objectives of the development standard and the objectives for development in the zone; and
- considered that Commissioner Pearson's decision was that '*consistency with objectives remained relevant, but not exclusively so*' (at [16]).

Secondly, while Leeming JA found no error in the approach taken by the Commissioner in relation to her dissatisfaction with the environmental planning grounds relied upon, that was a matter for the Commissioner *on the facts of the particular case and not a general principle*. Leeming JA said (at [16]):

It is sufficient to state that no error, and certainly no error of law, is disclosed..It is clear that the Commissioner approached the question of power posed by subclause [4.6] (3)(b) on the basis that merely pointing to the benefits from additional housing and employment opportunities delivered by the development was not sufficient to constitute environmental planning grounds to justify contravening the development standards *in this case ...*

Moskovich v Waverley Council [2016] NSWLEC 1015

In *Moskovich* a commissioner of the Land and Environment Court applied the Court of Appeal's approach in *Four2Five*, apparently confirming a greater flexibility as respects the availability and use of the facility afforded by clause 4.6.

The case concerned an application to demolish two existing residential flat buildings and construct a single residential flat building on a site within zone R3 Medium Density Residential under Waverley LEP 2012. The application sought to vary the floor space ratio ('FSR') applying to the site.

Moskovich submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development.

Moskovich further submitted that there were 'sufficient environmental planning grounds' to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes.

The Court approved the application and in doing so agreed with Moskovich's justification for the FSR variation. Consistent with the decision in *Four2Five* the Court agreed that the public interest test (in cl 4.6(4)(a)(ii)) is different to the 'unreasonable or unnecessary in the circumstances of the case' test (in cl 4.6(3)(a)).

The Court said that 'the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]'. The Court found that additional reasons applied in this case.

In *Moskovich* the Court adopted the high threshold endorsed by the Court in *Four2Five* and found that Moskovich's variation request met that standard.

***Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7**

Micaul is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building. The council claimed that the commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The Council also claimed that the commissioner failed to consider a requirement of a Development Control Plan. Essentially the Council argued that the commissioner set the bar too low for the clause 4.6 variation request.

The Court dismissed the appeal and in doing so endorsed the commissioner's approach to clause 4.6. The Court held that the commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgement that she was satisfied the proposal satisfied those tests.

The degree of satisfaction required under clause 4.6(4) was essentially a matter for the commissioner. The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the *Standard Instrument* does not require the consent authority 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 those matters.

The Court's decision in *Micaul* lessens the force of the Court's earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone. Furthermore, the decision is an example of discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the commissioner was satisfied that the variation was justified. This is by no means a criticism of the commissioner's reasons, but an example of how the satisfaction threshold may vary from one decision maker to another.

5.3 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe* Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to SEPP 1, the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 and this was accepted by the Court in the *Four2Five* case.

As the language used in subclause 4.6(3)(a) of the Auburn LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five ways (or methods) outlined in *Wehbe* are as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore 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 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.

It is important to emphasise that *Wehbe* makes it unambiguously clear that an objection submitted – in this case, the present clause 4.6 written request – does not necessarily need to satisfy all of the tests referred to above. It is a common misconception that all 5 ways or methods must be satisfied. That is **not** the case at all. One way will suffice.

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the first method, namely, that the objectives of the standard are still achieved notwithstanding non-compliance with the standard. That is the method used in this request.

In paragraph 3 of Circular B1 from the former Department of Planning, the Department stated:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying

purpose of the standard as much as one which complies. In many cases the variation will be numerically small **in others it may be numerically large**, but nevertheless be consistent with the purpose of the standard. *[Emphasis added]*

We respectfully submit that the words of the Department quoted above are especially relevant to the numerical departure in this case. In this case, the departure is 'numerically large' but, in and of itself, that is not a good reason, in planning terms or law, for rejecting a clause 4.6 written request.

Now, there is a common view abroad, namely, that any variation of a development standard greater than 10% cannot be approved under SEPP No 1 or clause 4.6. This view is not generally correct, although it does apply in respect of that category of clause 4.6 variation where subdivision into 2 or more lots is proposed in certain zones (refer clause 4.6(6) of the LEP).

The '10% opinion' is also said to arise from the then Department of Planning and Infrastructure Circular PS 08-14 of November 2008, in which it was stated that all development applications with **SEPP 1 variations** [sic] greater than 10% must be determined by full council rather than by the General Manager or staff members. This was a response to the findings of an ICAC investigation into corruption allegations affecting Wollongong City Council. As is clear from a proper reading of the Circular, it mostly affects the process for approval of non-compliant development applications rather than the nature of SEPP No 1 objections that may be agreed to by a council or the Court on appeal.

In accordance with the provisions of clause 4.6 of the LEP and the decision in *Wehbe*, this written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, that there are sufficient environmental planning grounds to justify contravening the development standard, 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.

5.3.1 The underlying objectives or purposes of the development standard

Clause 4.4(1) of the LEP is as follows:

- (1) The objectives of this clause are as follows:
 - (a) to ensure that residential accommodation:
 - (i) is compatible with the desired future character of the area in relation to building bulk, form and scale, and
 - (ii) provides a suitable balance between landscaped areas and the built form, and
 - (iii) minimises the impact of the bulk and scale of buildings,
 - (b) to ensure that non-residential development is compatible with the desired future character of the area in relation to building bulk, form and scale.

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

The objectives specified in clause 4.4(1) will be addressed *seriatim*.

Objective (1) (a)(i):

This objective seeks to ensure that residential accommodation is compatible with the desired future character of the area in relation to building bulk, form and scale.

Comment: This objective is not relevantly applicable to the subject development. The development application seeks consent to the use of the premises on the site as a real estate office. Such a use is permissible with consent in the R1 General Residential zone as 'business premises', subject to compliance with clause 6.10 of the LEP. As respects the lastmentioned matter, see section 5.1.3 of the SEE.

Objective (1)(a)(ii):

This objective seeks to ensure that residential accommodation provides a suitable balance between landscaped areas and the built form.

Comment: Once again, this objective is not relevantly applicable to the subject development.

Objective (1)(a)(iii):

This objective seeks to ensure that residential accommodation minimises the impact of the bulk and scale of buildings.

Comment: Once again, this objective is not relevantly applicable to the subject development.

Objective (1)(b):

This objective seeks to ensure that non-residential development is compatible with the desired future character of the area in relation to building bulk, form and scale.

Comment: The subject non-residential development will have minimal, if any, environmental impact given that there are virtually no proposed building works or proposed changes to the existing building structure. In addition, the activities conducted within the building (as business premises) are likely to be of minimal impact in terms of local amenity. In our view, the particular use is well suited to the existing environment that forms an interface between more intense retail uses in the shopping centre and lower scale commercial offices. In short, the development is compatible with the desired future character of the area in relation to building bulk, form and scale. We observe also that the existing building bulk form and scale is not proposed to be altered by virtue of this proposal.

Concluding comments

In short, the development is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application.

5.3.3 Consistency with aims of the LEP

Compliance with the FSR development standard is also considered to be unreasonable in these circumstances given that the proposed development supports the achievement of a number of the LEP aims.

The LEP aims to make local environmental planning provisions for land in the former local government area of Leichhardt in accordance with the relevant standard environmental planning instrument under section 33A of the *Environmental Planning and Assessment Act 1979* (NSW): see cl 1.2(1).

The stated particular aims of the LEP are as follows (see cl 1.2(2)):

- (a) to ensure that development applies the principles of ecologically sustainable development,
- (b) to minimise land use conflict and the negative impact of urban development on the natural, social, economic, physical and historical environment,
- (c) to identify, protect, conserve and enhance the environmental and cultural heritage of Leichhardt,
- (d) to promote a high standard of urban design in the public and private domains,
- (e) to protect and enhance the amenity, vitality and viability of Leichhardt for existing and future residents, and people who work in and visit Leichhardt,
- (f) to maintain and enhance Leichhardt's urban environment,
- (g) to ensure that land use zones are appropriately located to maximise access to sustainable transport, community services, employment and economic opportunities, public open space, recreation facilities and the waterfront,
- (h) to promote accessible and diverse housing types, including the provision and retention of:
 - (i) housing for seniors or people with a disability, and
 - (ii) affordable housing,
- (i) to provide for development that promotes road safety for all users, walkable neighbourhoods and accessibility, reduces car dependency and increases the use of active transport through walking, cycling and the use of public transport,
- (j) to ensure an adequate supply of land and housing to facilitate:
 - (i) employment and economic opportunities, and
 - (ii) the provision of goods and services that meet the needs of the local and subregional population,
- (k) to protect and enhance:
 - (i) views and vistas of Sydney Harbour, Parramatta River, Callan Park and Leichhardt and Balmain civic precincts from roads and public vantage points, and
 - (ii) views and view sharing from and between private dwellings,
- (l) to ensure that development is compatible with the character, style, orientation and pattern of surrounding buildings, streetscape, works and landscaping and the desired future character of the area,
- (m) to ensure that development provides high quality landscaped areas in residential developments,
- (n) to protect, conserve and enhance the character and identity of the suburbs, places and landscapes of Leichhardt, including the natural, scientific and

- cultural attributes of the Sydney Harbour foreshore and its creeks and waterways, and of surface rock, remnant bushland, ridgelines and skylines,
- (o) to prevent undesirable incremental change, including demolition, that reduces the heritage significance of places, conservation areas and heritage items,
 - (p) to provide for effective community participation and consultation for planning and development,
 - (q) to promote opportunities for equitable and inclusive social, cultural and community activities,
 - (r) to promote the health and well being of residents, business operators, workers and visitors,
 - (s) to ensure that development applies the principles of crime prevention through design to promote safer places and spaces,
 - (t) to ensure that development responds to, conserves, protects and enhances the natural environment, including terrestrial, aquatic and riparian habitats, bushland, biodiversity, wildlife habitat corridors and ecologically sensitive land,
 - (u) to promote energy conservation, water cycle management (incorporating water conservation, water reuse, catchment management, stormwater pollution control and flood risk management) and water sensitive urban design,
 - (v) to ensure that existing landforms and natural drainage systems are protected,
 - (w) to ensure that the risk to the community in areas subject to environmental hazards is minimised,
 - (x) to ensure that the impacts of climate change are mitigated and adapted to.

The proposed development is of a high standard of urban design (cf clause 1.2(2)(d)), enhances the viability of Leichhardt for existing and future residents, and people who work in and visit Leichhardt (cf clause 1.2(2)(e)), and is compatible with the character, style, orientation and pattern of surrounding buildings, streetscape, works and landscaping and the desired future character of the area (cf clause 1.2(2)(l)).

In our opinion, the proposed development is consistent with such of the aims of the LEP as are of relevance to the development.

5.4 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

At the risk of repeating ourselves, the proposed development is consistent with such of the aims of the LEP as are of relevance to the development: see section 5.3.3. of this document. That, in and of itself, constitutes a good environmental planning ground justifying a contravention of the minimum FSR development standard.

Another good environmental planning ground justifying a contravention of the FSR development standard in this instance is that there is no demonstrable public benefit in maintaining the development standard (cf cl 4.6(5)(b)) in this instance for to do would not result in any public benefit in this situation.

To strictly enforce the standard in this instance would prevent the carrying out of an otherwise well-designed and attractive development which is eminently suited for the site, the precinct and which would result in demonstrable public benefits to the area.

In addition, as previously stated, the development proposal involves a 'change of use', no building works are proposed, other than very minimal and incidental works relating to the alteration of a door at the front of the premises, and the FSR of the

existing building will be maintained except as regards the provision of 2 parking spaces resulting in a reduction in 'useable' floor space. In other words, there is no practical utility in enforcing strict compliance with the development standard.

We wish to point out that many of the existing retail shops on Booth Street, facing the roundabout and to the east of the roundabout, would have an FSR similar to the FSR of the development the subject of the development application. These properties would also very likely breach the current FSR development standard. This is likely to be attributable, in large measure, to the early history and evolution of the development of the precinct. The subject building is an example of this evolution. In our respectful submission, the development standard does not reflect the situation with current commercial development in this area which extends across the roundabout east west. The Ray White premises located at No 33 Booth Street is a case in point as are the premises immediately to the rear of the site.

In our opinion, all of the above constitute good environmental planning grounds to justify contravening the FSR development standard in this particular instance.

5.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

5.5.1 Consistency with objectives of the development standard

Please refer to section 5.3.2 of this document.

5.5.2 Consistency with objectives of the zone

The objectives of the R1 General Residential zone are as follows:

1. To provide for the housing needs of the community.
2. To provide for a variety of housing types and densities.
3. To enable other land uses that provide facilities or services to meet the day to day needs of residents.
4. To improve opportunities to work from home.
5. To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.
6. To provide landscaped areas for the use and enjoyment of existing and future residents.
7. To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.
8. To protect and enhance the amenity of existing and future residents and the neighbourhood.

Objective 1:

This objective is not relevant to the subject development.

Objective 2:

Once again, this objective is not relevant to the subject development.

Objective 3:

The subject development is a land use that provides services to meet the day to day needs of residents. As such, the development is consistent with this stated objective.

Objective 4:

This objective is not relevant to the subject development.

Objective 5:

Once again, this objective is not relevant to the subject development.

Objective 6:

Once again, this objective is not relevant to the subject development.

Objective 7:

Once again, this objective is not relevant to the subject development.

Objective 8:

The subject development is of a bulk and scale commensurate with existing surrounding development and on that basis protects and enhances the amenity of existing and future residents and the neighbourhood. As such, the development is consistent with this stated objective.

5.6 Director-General's Concurrence

It is understood that the Director-General's concurrence under clause 4.6(5) of the LEP has been delegated to Council.

The following section provides a response to those matters set out in clause 4.6(5) which must be considered by Council under its delegated authority:

Whether contravention of the development standard raises any matter of significance for the State or Regional environmental planning (cf cl 4.6(5)(a))

This written request under clause 4.6 of the LEP demonstrates that a variation to the FSR development standard is acceptable in terms of significance for State and Regional planning matters.

The variance of the development standards will not contravene any overarching State or regional objectives or standards, or have any effect outside the sites immediate area.

The public benefit of maintaining the development standard (cf cl 4.6(5)(b))

Maintaining strict numerical compliance with the FSR development standard would not, in our opinion, result in any public benefit in this situation. To maintain, that is, strictly enforce and apply, the standard in this instance would prevent the carrying out of an otherwise well-designed and attractive low-key commercial development which is eminently suited for the site.

Further, the development as a whole will deliver public benefits to the area including the provision of real estate services to meet the day to day needs of residents.

Any other matters required to be taken into consideration by the Director-General before granting concurrence (cf cl 4.6(5)(c))

In our opinion, no other matters require consideration by the Director-General.

6.0 Conclusion

This clause 4.6 written request has been prepared in response to Council's letter of 2 November 2017.

We respectfully submit that the written request justifies the contravention of the FSR development standard by demonstrating that:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

Further, the written request shows that the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the R1 General Residential zone in which the development is to be carried out.

Accordingly, we respectfully submit that the written request is well founded as the variation sought allows for the orderly and economic use of the land in an appropriate manner while also allowing for a better outcome in planning terms.

As such, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the LEP.

On behalf of our client, we respectfully submit that a grant of development consent is eminently appropriate in this instance.

Yours faithfully



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