

# Clause 4.6 Justification

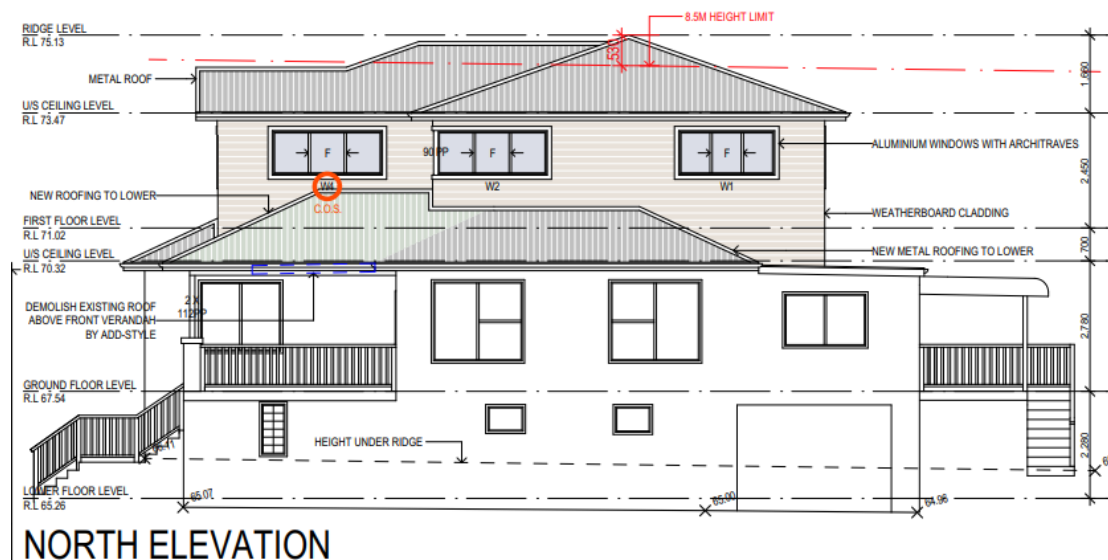
## No 29 McDonald Street, Freshwater

### Introduction - Content of the clause 4.6 request

Clause 4.3 of the Warringah LEP 2011 relates to Building height. The maximum building height applicable to the subject site is 8.5m.

The proposed development has a non-compliant building height for portion of the roof ridge by a maximum of approximately 530mm. Accordingly the proposal gives rise to a maximum building height of 9.03m being a departure of approximately 6.23%.

Given the above non-compliance with clause 4.3 of the LEP, consideration of the matter is given pursuant to the provisions of clause 4.6 of the LEP. The departure from the building height standard can be attributed primarily to the cross fall in the land from south to north and the existing under building and garage area which established a finished floor level below ground level external of the dwelling.



The objectives of clause 4.6 of the LEP 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.

Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome.**

The proposed building height is essentially exaggerated by the circumstances of the site given the existing of an excavated lower level of the building. A recent L&E Court case, *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* states that *the existing ground level on a brownfield site must be taken from the excavated ground level below the previous natural contours of the site.* Accordingly, an exaggerated building height eventuates.

A degree of flexibility to the application of the building height development standard is warranted in this instance.

The proposed upper level maintains a standard roof profile to provide visual interest. Of note is that the breach of the building height is centred on-site and contained well away from adjoining dwellings.

The existing dwelling is structurally sound and retains quality lower-level floor space worthy of retention. The location of the upper level as proposed is logical and appropriately relates to the street, rear yard, neighbouring dwelling circumstances and the slope of the land down. A site-specific design has been generated.

The proposed upper level has been sited centrally and partially to the southern side of the lower level to minimise the appearance of bulk when viewed from the front of the site and to capture distant views. The subject proposal refines the proportions of the existing upper level within a conventional design that includes a co-ordinated roof line over the entire dwelling.

Clause 4.6 of the instrument provides flexibility when applying development standards.

The proposed development has been architecturally designed to provide a well composed building that provides improved amenity for future occupants, while respecting the amenity of existing neighbouring properties.

The proposal is consistent with the built form in the locality, which includes some large dwellings maximising distant viewing opportunities.

No adverse planning consequences (privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise from the variation with the proposed development sitting comfortably on-site within the required setbacks. Rather, in this case the variation facilitates a good design outcome in terms of amenity, streetscape and built form.

The provision of a flat roof profile can be provided to achieve near numerical compliance however such would appear disjointed and lack architectural expression. A compliant roof profile with the relevant Australian Standard has been applied in this instance.

The proposed departure from the building height relates to a small portion of the roof ridgeline only and is suitably centred on-site.

For reasons expressed in this submission the ‘flexibility’ provided by clause 4.6 of the LEP facilitates design outcome that does not impact on any adjoining property despite the proposed variation to the building height standard.

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Comment:

The height development standard is not expressly excluded from the operation of clause 4.6.

*(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.*

### **Objectives of development standard**

The objectives of the height control development standard are:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The subject site is zoned to accommodate low density residential development, and the immediate precinct contains dwellings built on similar sized lots which contain similarly scaled 2 and 3 level dwellings. The proposed dwelling is proportionate with its site boundaries and will be consistent in this regard.

There will be no additional disruption of views, loss of privacy or significant loss of solar access given the site context and the design initiatives that have been incorporated into the upper level.

There will be no erosion of bushland or scenic quality.

### **Compliance unnecessary**

The proposed development proffers an alternative means of achieving the objective of the minimum building height standard. The surrounding precinct maintains sloping land and regular detached dwellings in the zone. Pitched roofs are common in the precinct.

The proposed development achieves the desired residential character without comprising the amenity of the surrounding dwellings in terms of visual impacts and solar access. A low-pitched roof is proposed in this instance to further assist in minimising the building height encroachment.

The minor exceedance of the building height standard does not result in a building that is excessively bulky. When viewed from the street, a conventional façade is generated.

The containment of the proposed addition within the footprint of the dwelling is preferred as there is no capacity to extend the dwelling at ground level given the built upon nature of the site.

The non-compliance will not give rise to adverse impacts, which would affect neighbouring dwellings.

As the development proffers alternative means of achieving the objectives of clause 4.3 based on the site context, strict compliance is unnecessary.

### **Compliance unreasonable**

There would be no purpose served if strict compliance was required by the consent authority.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (shadowing and privacy). There are no adverse ‘flow on’ non compliances or adverse environmental impacts arising from the variation in this instance.

A compliant development (building height) would have a similar performance regarding overshadowing and bulk/scale. A flat roof profile could be provided to achieve near compliance with the standard. Such would appear disjointed with the lower roof profile and is not the preferred outcome from an architectural perspective.

Despite the building height variation, a standard floor space ratio is achieved facilitating the orderly and economic development of the land.

No particular benefit would be derived from the application of the standard in this instance (rather compliance would result in negative urban design outcomes); strict compliance is therefore unreasonable.

### **Environmental planning grounds**

A written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).

The term “environmental planning grounds” is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts : Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd*

*v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

*Such grounds include matters that ‘relate to (the) subject matter, scope and purpose of the Act, including the objects in s 1.3.’<sup>[14]</sup> This leaves developers with a wide range of grounds on which they can rely to justify a 4.6 request, including, for example, that the variation will promote good design and amenity, will allow for the orderly and economic development of land or that it will promote ecologically sustainable development by integrating relevant economic, environmental and social considerations.*

In this case the variation to the building height control does not impact on the ability of the proposal to accord with all other development standards and design controls.

Strict compliance with the building height control in this instance would not achieve any additional architectural integrity or urban design merit of the development, as previously discussed.

Indeed, a lower roof pitch would result in an inferior design. The proposal represents the orderly and economic development of the land and does not give rise to adverse amenity issues to neighbours.

The ground and lower level of the dwelling is benched to address the fall in the land. The extent of the building height non-compliance is minor relative to external ground levels.

The variation will promote good design and internal amenity by providing a conventional finish to the front elevation. There are no adverse economic, environmental or social impacts arising.

Having regard to the above there are well founded environmental planning grounds to vary the development standard in this instance.

*(4) Development consent must not be granted for development that contravenes a development standard unless—*

*(a) the consent authority is satisfied that—*

*(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Planning Secretary has been obtained.*

The objectives of the R2 low density zone are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment:

The matters required to be demonstrated by subclause (3) have been adequately addressed.

The proposed development will be in the public interest because it is consistent with the objective of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed development is consistent with the objectives as follows:

The proposed development provides for the construction of a standard and well-proportioned upper-level addition. The proposed development has been site specifically designed and will positively contribute to the streetscape relative to the existing built form on the site. A general upgrade of the existing built form and landscape will also occur.

The proposed development is consistent with the desired future character for the locality. The proposed development is well contained on-site and will not result in significant adverse amenity impacts on adjoining properties.

The proposed development provides an appropriate low-density infill development and contemporary construction.

The proposed height variation is of no consequence in respect of this objective. Approval of the proposed development will have no adverse impact on any other nearby development opportunities.

The proposed height encroachment does not result in any significant view loss, loss of privacy or overshadowing in the context of the site.

There is no adverse heritage impacts associated with the proposed development. The height and scale of the development is typical within the residential context.

Standard floor to ceiling height is proposed over two levels inclusive of a standard roof pitch. Having regard to the above the proposal is consistent with the objectives of the height control and the objectives of the zone.

The proposed variation does not raise any matter of significance for State or regional environmental planning.

There is no public benefit that would be achieved by maintaining the development standard or compromised by approving the building as proposed.

### **Conclusion**

No adverse matters arise in respect of the above considerations.

In view of the above, the proposed variation from the development standard is reasonable in this instance. A typical pitched roof profile is proposed maintaining a consistent built form with other dwellings in the vicinity and appropriately addressing site circumstances.

A handwritten signature in black ink, appearing to read 'Nigel White', with a stylized flourish at the end.

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