



Clause 4.6 Exception to Development Standard Request

Clause 4.3 Height of Buildings-Warringah Local Environmental Plan 2011

Demolition, construction of a new two storey dwelling with swimming pool.

-No.13 De Chair Road, Narraweena

March 2024

SECTION 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS

Applicant: GJ Gardner Homes-Sydney North

Site Address: No.13 De Chair Road, Narraweena

Proposal: Construction of new two (2) storey dwelling with swimming pool

Introduction

This request seeks a variation to Clause 4.3 of Warringah Local Environmental Plan 2011, which relates to a '*Height of Buildings*' development standard. The proposed maximum height of the development is 8.92m, whereas the maximum allowable is 8.5m. This results in a differential of 420mm, or 4.99%.

The submission has been prepared in support of a development application which proposes construction of a two (2) storey dwelling, with associated works on a site described as No.13 De Chair Road, Narraweena.

Clause 4.6 (Exceptions to Development Standards) of Warringah Local Environmental Plan 2011 is the mechanism available to applicants to seek a variation to a development standard.

This request to contravene the development standard for the height of building development standard has been prepared in accordance with the principles applied in relevant case law including:

1. Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79,
2. Wehbe v Pittwater Council (2007) 156 LGERA 446,
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009,
4. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,
5. Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170,
6. RebelMH Neutral Bay Pty Limited v North Sydney Council (2019) NSWCA 130, and
7. Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582

This Clause 4.6 request is set out in accordance with the relevant principles established by the Court including:

1. Is the development consistent with the objectives of the zone?
2. Is the proposed development consistent with the objectives of the development standard which is not met?
3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (cl 4.6(3)(a) and cl 4.6(4)(a)(i))
4. Are there sufficient environmental planning grounds to justify contravening the development standard and therefore the Applicant's written request to vary the development standard is well founded? (cl 4.6(3)(b) and 4.6(4)(a)(ii))
5. Is the proposed development in the public interest because it is consistent with the objectives of the standard and the zone? (cl 4.6(4)(a)(ii))

Matters required to be demonstrated under clause 4.6(3) of the LEP

Compliance with the development standard is unreasonable or unnecessary in this particular case

The focus of cl 4.6(3)(a) of the LEP which requires demonstration that compliance with the development standard is unreasonable or unnecessary is on whether the compliance with the specified control itself is unreasonable or unnecessary.

The departure from the specified control is minor and only 4.99% (0.42m) As acknowledged by the *Court of Appeal in Fastbucks v Byron Shire Council (1999) NSWCA 19*, a modest departure from a development standard is a basis upon which compliance with the standard can be seen to be unreasonable or unnecessary.

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered below:

The five ways outlined in *Wehbe* include:

Five (5) Part Test - *Wehbe v Pittwater*

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).

As indicated, this request seeks to vary the application of Clause 4.3 to the subject development. It is our opinion that the objectives of the height of buildings development standard are satisfied, notwithstanding the non-compliance. It is noted that a contributing factor to the exceedance occurs due to the natural topography of the allotment which slopes steeply to the rear boundary.

We have given consideration to the objectives of Clause 4.3 below.

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

The minor height exceedance of the dwelling is most prominently shown on Section D-D (sheet A09 Revision J) and localised along the side eastern elevation, where the land prominently descends. The first floor aspect of the dwelling on this eastern elevation has been recessed approximately 4.675m, so as to break up the appearance of the dwelling as seen from De Chair Road. The recession of the first floor aspect creates greater articulation in the design, as seen from the road, so as to reduce bulk and scale. Further to this, the proposed roofing has provided a pitch style that has been greatly reduced, so as to be as flat as possible yet still feasible for stormwater collection. This design choice has likewise reduced the bulk and scale of the development and reduced overall height non-compliance.

On the above basis we believe that the proposal will be compatible with the height and scale of neighbouring properties. We note that there are two storey dwellings of similar size adjoining the site, namely No. 15 & No. 11 De Chair Road.

The proposal has a maximum non-compliance of 0.42m (4.99%) along the side eastern elevation where the land slopes suddenly, when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582. The minimal non-compliance is not considered out of character

with the surrounding streetscape, nor does it make the proposal inconsistent in regard to bulk and scale with other two (2) storey dwellings in the road.

Therefore, it is our opinion that the minor height non-compliance is not likely to have an unreasonable impact on the neighbouring properties.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

The proposal has been assessed in detail in relation to view loss, privacy, and overshadowing as addressed within the Statement of Environmental Effects Report. The eastern elevation to which the height exceedance occurs does not propose living rooms, and instead includes two (2) bedrooms with an ensuite. Given the orientation of the allotment, both the subject and adjoining premises shall comfortably receive sufficient daylight access.

It has been concluded that the proposal meets the Council objective in minimising impacts in this regard and therefore meets this objective.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The proposed dwelling is of a high architectural standard, of rendered brick veneer, colorbond eaves and roofing and cladding. The proposed construction materials will make a positive addition to the natural scenic qualities of the area.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The proposal has been assessed in relation to existing views achieved in the locality and it has been concluded that there will be no significant impact on the views obtained from any public open spaces or roads. In our opinion, the proposal is consistent with this objective.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).

This exception to development standards request does not rely on this reason.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).

This exception to development standards request does not rely on this reason.

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 (Fourth Way).

This exception to development standards request does not rely on this reason.

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 (Fifth

Way).

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe. Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

Clause 4.6(3)(b) - Sufficient Environmental Planning Grounds

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the height of buildings development standard because:

- The variation permits a height of development that is commensurate with other residential development in the Narraweena locality. The general locality is characterised predominately by large two storey dwellings which respond to the unique topography of the area. The variation permits a two storey dwelling that is suited to the sloping topography of the site and is not excessively high yet allows a high level of internal and external amenity to future residents.
- The proposed dwelling is compatible with surrounding development and will make a positive contribution to the streetscape. The dwelling's visual bulk and architectural scale is consistent with other dwellings on nearby properties & does not visually dominate the street. As viewed from De Chair Road, the proposed dwelling will have a compliant height well under the 8.5m maximum. The proposed dwelling is well articulated through the use of the recessed first floor, flattened roof style, varied setbacks and variation in material selection.
- The site is constrained by a moderate slope, from the front boundary to the rear, of approximately 4.42m which contributes to the height exceedance.
- The proposed development will provide high quality housing in close proximity to facilities and public open spaces.
- The additional height of the development is without amenity impacts, in terms of preserving privacy, overshadowing or disrupting views. The resulting development provides a generous amount of landscaping and deep soil areas which will facilitate an appealing landscape setting.

S 1.3 Objects of Act

The proposed development and in particular the variation to the height of buildings Standard would further the following objectives of the Act specified in s.1.3. The objects of this Act are as follows—

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) *to promote the orderly and economic use and development of land,*
- (d) *to promote the delivery and maintenance of affordable housing,*
- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*

- (g) *to promote good design and amenity of the built environment,*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) *to provide increased opportunity for community participation in environmental planning and assessment.*

The development meets the above objectives in the following manners:

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*

Comment: The proposed development will provide high quality housing in the Narraweena locality in close proximity to existing services. The additional height allows for a dwelling to be constructed to accommodate a future family in the area without adversely impacting any natural or other resources. No significant impact to the State's natural or other resources are foreseen as a result of the height exceedance.

- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*

Comment: The development has facilitated the relevant economic, environmental and social considerations during the design stage of the dwelling house, as well as the accompanying Statement of Environmental Effects which details the impacts and considerations of the proposal.

The proposal shall provide for economic stimulation to the locality in the form of construction industry employment, no significant environmental constraints afflict the site and no significant impact is foreseen in this regard. The social benefit to the locality is seen to be satisfied by facilitating increased housing supply in the form of a larger home with additional bedrooms.

- (c) *to promote the orderly and economic use and development of land,*

Comment: The provision of quality housing in the Narraweena locality represents the orderly and economic use and development of land. The provision of a modestly sized dwelling is commensurate with modern development in the locality and does not set a negative precedent. The ancillary works to the proposal (swimming pool) are not unorderly.

- (d) *to promote the delivery and maintenance of affordable housing,*

Comment: N/A.

- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*

Comment: No tree removal is required for this application, nor is the site identified as containing threatened or other species of animals and plants, ecological communities or their habitats. The proposed dwelling is therefore not foreseen to negatively impact the environment, including

threatened or other species of native flora and fauna, ecological communities and their associated habitats.

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

Comment: The site is not situated on a parcel of land that is noted as having any built or cultural heritage.

(g) to promote good design and amenity of the built environment,

Comment: The development has been designed to be compatible to both the existing character and desired low density residential character.

The development is considered to be satisfactory in terms of visual and acoustic privacy, noting dwelling setbacks and orientation of windows and living rooms towards the front and rear where practical. Likewise given the orientation of the site, no significant overshadowing shall occur to the principle private open space or living room windows of adjoining properties.

In this regard the development is considered to maintain a high level of amenity to future occupants that will not adversely affect amenity levels on adjoining properties.

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

Comment: The proposed development will be constructed to Australian Standards with the supervision of a suitably accredited Certifier and as such will protect the health and safety of future occupants.

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

Comment: Not applicable to this form of development.

(j) to provide increased opportunity for community participation in environmental planning and assessment.

Comment: It is noted that the development and associated clause 4.6 variation request may be notified to adjoining properties for comment.

Clause 4.6(4) Zone Objectives & The Public Interest

The subject property is zoned R2 – Low Density Residential pursuant to the Warringah LEP 2011. The non-compliance with the development standard will not be inconsistent with any planning objectives for the locality. The proposed development is a permissible use in the R2 Low Density Residential zone with consent and is also consistent with the objectives of the R2 Low Density Residential zone which are stated, inter alia:

- *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.*

Based on the objectives of the zone, it is in our opinion that the underlying purpose of the development standard is to present a building that is of a low density character, which preserves the natural features of the locality and is compatible with the height, context and character of the neighbouring properties. As discussed in this report and the accompanying SEE, the proposal has been designed to maintain the amenity and desired future character of the area and be sympathetic to the natural features of the area. The contemporary residential development will contribute to the surrounding built form and is in keeping with the existing dwellings that adjoin De Chair Road and surrounding streets.

The dwelling has been carefully designed to accommodate the site's sloping topography and achieve a dwelling that presents a height which is complementary to the streetscape. Therefore, it is considered unreasonable to adhere to strict compliance for this part of the building.

The development provides the subject site with a dwelling of high quality architectural design that will provide occupants with well-designed internal and external spaces in a desirable locality. The non-compliance with the height will not thwart the proposal's ability to meet the relevant zone objectives. Rather, it is considered that adhering to strict compliance would reduce the proposal from maximising the potential of the site and thus reduce the amenity of the dwelling. Strict compliance would not take into consideration the circumstances of the case, being the slope in topography towards the rear boundary and thus the small numerical non-compliance. Accordingly, it is in our opinion that the non-compliance will not result in inconsistency with existing and future planning objectives for the locality.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the height of building control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal.

Conclusion

The development proposal has a variation of 0.42m (4.99%) to the required 8.5m maximum building height development standard contained within clause 4.3 of the Warringah LEP 2011. Notwithstanding, the proposal demonstrates that the property can accommodate a two storey dwelling, presenting a built form that is consistent with the objectives of the standard and suitable for the subject site.

The dwelling does not result in unreasonable amenity impacts to the adjoining properties regarding overshadowing, visual and acoustic privacy or visual bulk and scale. The development achieves a high level of residential amenity. The proposal is likewise not out of character with the surrounding dwelling form or streetscape character of De Chair Road.

It is unreasonable and unnecessary to apply strict compliance with the development standard noting the non-compliance is relatively minor, the natural constraints of the site being a sloping property and the precedent for variations to Clause 4.3 in the locality. The dwelling is compatible with the envisaged low-density residential character of Narrabeena.

The variation does not result in any unreasonable impacts in regard to view loss, loss of privacy or increase in shadowing for neighbouring properties and will result in a development of a similar scale development to surrounding properties.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6. The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.

In accordance with the environmental planning grounds addressed in this Clause 4.6 variation, the variation to the height of building development standard for the construction of the two storey dwelling (with associated works) should be upheld.



John McKee

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