



## **CLAUSE 4.6 VARIATION TO CLAUSE 4.3-HEIGHT OF BUILDINGS**

**Demolition of existing dwelling & construction of new part three storey dwelling**

**No. 23 Dobroyd Road, Balgowlah Heights**

**May 2023**

**CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS-(Clause 4.3-Height of Buildings)**

**Applicant:** GJ Gardner Homes-Sydney North

**Site Address:** No.23 Dobroyd Road, Balgowlah Heights

**Proposal:** Demolition of existing dwelling and construction of new part three (3) storey dwelling

**Introduction**

This request seeks a variation to Clause 4.3 of Manly Local Environmental Plan 2013, which relates to a 'Height of Buildings' development standard.

The submission has been prepared in support of a development application which proposes demolition of an existing dwelling and construction of a new part three (3) storey dwelling on a site described as No.23 Dobroyd Road, Balgowlah Heights.

This request to contravene the height of buildings 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, and
6. *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130

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))

Clause 4.6 (Exceptions to Development Standards) of Manly Local Environmental Plan 2013 is the mechanism available to applicants to seek a variation to a development standard.

**Planning Instrument**

The Environmental Planning Instrument to which this variation relates is the Manly Local Environmental Plan 2013, as amended.

The subject site is zoned R2 Low Density Residential under the MLEP 2013.

## Development Standard

The requirements of Clause 4.3-‘*Height of Buildings*’ is as follows:

### 4.3 Height of buildings

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The site is mapped with a maximum height of buildings requirement of 8.5m under Clause 4.3 of MLEP 2013. The proposed dwelling has a maximum height of 8.732m which is 0.232m (2.7%) higher than the required height of 8.5m.

## Justification for Variation of the Standard

Justification for the variation of the ‘height of buildings’ development standard contained under Clause 4.3 is established against the provisions of Clause 4.6, as follows:

### 1) *The objectives of this clause are:*

- a. To provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- b. To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

It is noted that the objectives of Clause 4.6 seek to recognise that in particular circumstances, strict application of development standards may be unreasonable or unnecessary. The clause provides a means by which a variation to the standard can be achieved.

Strict compliance would prove unreasonable in this case as the non-compliance with the height of buildings standard will not generate unreasonable bulk or scale that will adversely impact the streetscape or amenity of adjoining properties. Therefore, it is in our opinion, that the minor extent of the variation is appropriate in this instance.

In our opinion, given the above-mentioned reasons, the proposal is not likely to result in significant impacts on the surrounding area and flexibility with the development standard is considered reasonable.

- 2) 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.*

The exception is sought under subclause (2) to the mapped ‘height of buildings’ requirement of 8.5m under Clause 4.3 of Manly Local Environmental Plan 2013. Clause 4.3 is not excluded from the operation of this clause.

- 3) 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.*

This submission forms the written request to Northern Beaches Council which justifies the contravention of the development standard for a maximum height of buildings requirement of 8.5m on the mapped site that the subject land falls within under Clause 4.3. Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the mapped 'Height of Buildings' requirement is unnecessary and unreasonable in the particular circumstances of the case.

We have considered *Wehbe v Pittwater Council* (2007) NSWLEC 827, *Preston CJ* which established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. The Court's recent decision in *Four2Five Pty Limited v Ashfield Council* [2015] NSWLEC 90 has altered the way the five tests ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone. That is, more than one of those five grounds is now arguably required to be made out.

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason the development standard is unreasonable and unnecessary in this instance.

The relevant tests are considered below:

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

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 building development standard are satisfied, notwithstanding the non-compliance. In considering the variation, we have given consideration to the objectives of Clause 4.3.

***(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,***

The proposal presents as a conventional part three (3) storey dwelling with a pitch roof design when viewed from the street and is consistent with the established and desired character of the area. We note that the amended roof pitch has been reduced along with ceiling heights. The slight height exceedance is largely as a result of the site topography which slopes away more noticeably from the street in the front section of the site. The minor exceedance (2.7%) does not contribute excessive bulk and scale to the streetscape.

It is also noted that the upper first floor level has been significantly recessed inwards on both sides to minimise adverse amenity impacts upon adjoining properties in regard to bulk and scale, privacy and overshadowing.

The dwelling will be compatible with the bulk and scale of other two and three storey dwellings in the immediate vicinity of the site. It is also noted that older established single storey houses in the neighbourhood will progressively be re-developed with more modern contemporary 2 and 3 storey houses with similar heights and bulk and scale.

We note that the Council approved Development Application No. 2021.2166 on 7 January 2022 for alterations and additions to the existing dwelling with a higher height compared to what is being sought



by the current proposal which will have a more significant impact.

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

***(b) to control the bulk and scale of buildings,***

**Comment:** The proposed development presents as a conventional part three (3) storey dwelling to the street and does not contribute excessive massing or bulk and scale impacts to the streetscape. The facades of the dwelling are also suitably articulated utilising architectural elements such as recessing of the upper first floor level and variation in external materials that assist to minimise bulk and scale impacts.

It is considered that the proposed dwelling will make a positive contribution to the streetscape and is in keeping with the low density residential character of the area.

***(c) to minimise disruption to the following—***

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),***
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),***
- (iii) views between public spaces (including the harbour and foreshores),***

The proposal has been assessed in relation to view loss within the Statement of Environmental Effects Report. It has been concluded that the proposal meets the Council objectives in minimizing view impacts in this regard and therefore meets this objective.

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

***(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,***

The proposal is supported by overshadowing diagrams which illustrate the impact of the proposed development in terms of overshadowing at 9am, 12 noon and 3pm for the winter solstice (June 21).

The overshadowing diagrams effectively indicate that no significant additional shadow is cast upon adjoining dwellings and can maintain the required sunlight access to living areas and principle open space as required under MDCP2013.

***(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.***

Non applicable. The site is not located in a recreation or environmental protection zone.

**Test 2 - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

In our opinion, the underlying purpose of the development standard is to present a building that is compatible with the height, context and character of the locality, whilst preserving the amenity of adjoining properties.

In our opinion, the requirement to comply with the height of buildings development standard is unnecessary in this circumstance of the case, as the height, bulk, scale and massing is compatible with surrounding dwellings in the immediate area and envisaged future dwellings. On this basis, it will not result in any significant adverse amenity impacts on neighbouring properties.

**Test 3 - The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

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.*

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 and is compatible with the bulk and scale, context and character of the neighbouring low density residential properties. As discussed in this report and the accompanying SEE, the proposal has been designed to maintain the amenity and desired low density character of the area. The contemporary residential development will contribute positively to the surrounding built form, maintaining two and three storey presentations to Dobroyd Road.

The dwelling has been carefully designed to accommodate the site's sloping topography and achieve a dwelling that 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 of buildings requirement 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. Accordingly, it is in our opinion that the non-compliance will not result in inconsistency with existing and future planning objectives for the locality.

On this basis, we consider that to apply the development standard would thwart the underlying standard.

**Test 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;**

The standard has not been virtually abandoned or destroyed, and we are aware of other similar cases on sloping sites within Northern Beaches Council LGA boundaries where the development standard has been varied.

It is recognised that each proposal is assessed on its own merits and each site has different characteristics. However, it is a relevant consideration to understand if the Council has accepted breaches to the mapped 'height of buildings' standard in the past and under what circumstances the breach was supported and if indeed there are any comparable principles to the subject DA.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard.

In our opinion, the proposal satisfies the requirements of the 'unreasonable and unnecessary' tests established by the Court in *Wehbe*.

### Environmental Planning Grounds

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

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

- The proposed dwelling is in keeping with the existing and desired future character for development in the low-density residential zone. Refer Plates 1 to 5 below that show surrounding 3 storey dwellings in the street.
- The proposed dwelling has a highly articulated façade with a variety of design elements that reflects the existing and desired architectural features of the low-density locality.
- The proposed dwelling has regard to the relevant planning controls, including wall height, setbacks, private open space, and landscape controls within the LEP and DCP.
- When calculating the maximum building height, the existing ground level is distorted and further exaggerated by the excavation of the existing garage within the building footprint area and does not represent the true existing land level either side of the dwelling.
- The dwelling provides sufficient area around the proposed built form that contributes to the landscape setting.
- The proposed dwelling will not result in unreasonable amenity impacts to adjoining properties or the public domain regarding overshadowing, visual privacy, acoustic privacy, visual bulk and scale.



Plate 1-View of existing dwelling at No. 11 Dobroyd Road



Plate 2-View of existing dwelling at No.8 Dobroyd Road



Plate 3-View of existing dwelling at No.9 Dobroyd Road.



Plate 4-View of existing dwelling at No.21 Dobroyd Road





**Plate 5-View of existing dwelling at No. 13 Dobroyd Road**

**4) 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 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**

The applicant submits that the consent authority can and should be satisfied of each of these requirements for Clause 4.6(4), for all of the reasons set out in this request, and also having regard to the context of this particular site.

It is noted that there are a number of two and three storey dwellings in proximity of the site that are of a consistent bulk and scale to the proposed dwelling. On this basis, the development maintains consistency with development currently in the streetscape and the desired future character of the locality. The proposal provides Dobroyd Road with a contemporary building of high quality architectural design.

As indicated, it is in our opinion that the proposal is in the public interest. In accordance with Test 1 in Wehbe and Clause 4.6(4)(a)(ii) an assessment of the proposal against both the objectives of the standard and the zone is undertaken. The consideration of the objectives of the standard is set out in this submission and in our opinion, the proposal is consistent. A more detailed assessment of the proposal against the objectives of the zone is undertaken in the submitted SEE.

**5) In deciding whether to grant concurrence, the Director-General must consider:**

- a. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and**
- b. The public benefit of maintaining the development standard, and**

- c. Any other matters required to be taken into consideration by the Director – General before granting concurrence.***

It is considered that the variation sought raises no matter of significance for State or regional environmental planning.

In our opinion, the proposal is appropriate for the locality and strict compliance would unnecessarily complicate orderly and economic development of the land in accordance with the intentions of the zoning and the objectives of the Environmental Planning and Assessment Act 1979.

For the reasons contained in the SEE and this submission, in our opinion, there are sufficient environmental planning grounds to justify varying the development standard. It is considered that there is no benefit to the public or the community in maintaining the development standard. The proposed dwelling achieves a high level of amenity and meets the desired objectives of the standard.

- 6) Consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:***
- a. The subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or***
  - b. The subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.***

Non-applicable. On this basis the variation sought is not contrary to subclause (6).

- 7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).***

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

- 8) This clause does not allow consent to be granted for development that would contravene any of the following:***
- a. A development standard for complying development,***
  - b. A development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,***
  - c. Clause 5.4. ca. Clause 6.4, 6.5, 6.6, 6.7, 7.22, 7.23, 7.24, 7.25, 7.26, 7.27, 7.28, 7.29, or 7.36."***

This proposed development is not complying development.

The proposal is supported by a BASIX Certificate.

The development is not affected by clauses 6.4, 6.4, 6.5, 6.6, 7.22, 7.23, 7.24, 7.25, 7.26, 7.27, 7.28, 7.29 or 7.30.

## **Conclusion**

In summary, it is our opinion that the variation request hereby submitted should be supported and the height of buildings development standard under Clause 4.3 of MLEP 2013 varied, as the proposed development is consistent with the objectives of the 'height of buildings' development standard.

Further, the development will result in no detrimental impacts upon the natural environment or amenity of adjoining properties.

We have considered the proposal in accordance with the various tests established in *Wehbe v Pittwater Council* (2007) NSWLEC 827, *Preston CJ* and have demonstrated that maintaining the development standard is unreasonable and unnecessary in the circumstances.

It is our opinion that the variation to the standard prescribed by Manly Local Environmental Plan 2013, as amended, has been shown to be consistent with the aims of Clause 4.6 and is consistent with the objectives of the standard. As such, strict adherence to the standard is unreasonable and unnecessary in the circumstances of the case.

In addition, we note that the Council approved Development Application No. 2021.2166 on 7 January 2022 for alterations and additions to the existing dwelling with a higher height to what is being sought by the current proposal.

For these reasons it is in our opinion that the variation is appropriate, consistent with the intent of Clause 4.6 and should be supported.