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Northern Beaches Council  
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15 November 2019

**CLAUSE 4.6 VARIATION - HEIGHT OF BUILDING**  
**CLAUSE 4.3(2) WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011**  
**ALTERATIONS AND ADDITIONS – 10 LINCOLN AVENUE COLLAROY**

**BACKGROUND**

This Clause 4.6 variation is a written request to vary a development standard to support a development application for alterations and additions at **10 Lincoln Avenue Collaroy**.

The majority of the proposed building will have a building height of less than 8.5m which is the maximum building height prescribed under the Warringah Local Environmental Plan 2011 (WLEP) however a relatively small portion of the proposed first floor roof will exceed 8.5m due to the slope of the land beneath. The building height be 8.9m at the highest point. It is important to stress that the variation affects only a relatively small part of the first floor over the master bedroom and ensuite and bedroom 3 at the southern end of the building. (Refer to Figures 1 & 2).

Clause 4.3(2) of the LEP states:-

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 above numerical standard is identified as a development standard which requires a variation under Clause 4.6 of the LEP to enable the granting of consent to the development application.

Under this application the exceedance in building height measured at the highest point beneath the western gable is 0.4m or 4.7% when the variance is expressed as a percentage. This variance is therefore relatively minor and is the result of the site slop combined with the prior excavation of the site for the construction of the existing garage.

**PURPOSE OF CLAUSE 4.6**

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow the variation of development standards. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 variations should be assessed. These cases are taken into consideration in this request for variation.

## OBJECTIVES OF CLAUSE 4.6

The objectives of Clause 4.6 are as follows:-

- (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.*

## ONUS ON APPLICANT

Clause 4.6(3) provides that:-

*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.*

## JUSTIFICATION OF PROPOSED VARIANCE

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:-

*Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

### Precondition 1 - Consistency with zone objectives

The land is located in the R2 – Low Density Residential zone. The objectives of the R2 zone are articulated in the land use table in the WLEP:-

- 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.

**Comments**

The proposal is consistent with the zone objectives because the development will result in a dwelling that meets the housing needs of the community in a low density residential environment. This is achieved despite the requested minor variance to the building height.

The second objective is not relevant to the application.

The third objective is satisfied by the proposed development because the proposed development will have compliant landscaping upon completion. The landscaped setting will allow the dwelling to be in harmony with the surrounding natural and built environment.

**Precondition 2 - Consistency with the objectives of the standard**

The customary and accepted approach to sustaining variations to development standards is to assess the proposed variance against the relevant objectives of the particular development standard. In this case the objective of the height of buildings control is articulated at Clause 4.3(1) of the WLEP as follows:-

- (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 resultant development will be a two storey dwelling that is typical development in the R2 low density residential zone. As the building will contain only two storeys, it will be compatible with the height and scale of surrounding dwellings, thereby satisfying the first objective. Strict compliance with the numerical control does not of itself ensure compatibility.

As demonstrated in the application, the proposed dwelling will not cause unreasonable impacts on views, loss of privacy or solar access to an extent that would cause refusal. This is due to the fact that views are not obtained over the subject site and the favourable site orientation. The second objective is considered to be achieved.

With respect to the third objective, the resultant dwelling will have external materials and finishes that will be in harmony with the surrounding built environment. The resultant dwelling is not expected to have adverse impacts on the scenic quality of the surrounding environment. The dwelling will be relatively modest compared to larger dwellings located in the vicinity which are visible from the site. The third objective is considered to be achieved.

Lastly, in relation to the fourth objective, the altered dwelling will be viewed from Lincoln Avenue. The dwelling will not stand out amongst others as a result of the limited height variance. In physical terms, the variance affects the roof at the front which is a small portion of the whole of the new roof. The

roof design is not overbearing due to the double gabled design. The fourth objective is considered to be achieved.

Considering the terms of the stated objectives, we say in support of the variance:-

- The site is affected by a moderate slope from the north to the south. The differential across the site is 5m.
- The non-compliance is minor and inconsequential in the context of the whole of the roof. The non-compliance represents a departure of 0.4m above the 8.5m maximum building height.
- If strict compliance was required, the building would not maintain the architectural integrity of the design. We consider that a variance is justifiable and represents appropriate flexibility. The variance results in a better environmental planning outcome from the proposal and for the site.

For these reasons I conclude that the development meets the objectives of the building height standard and achieves a meritorious and supportable environmental planning outcome.

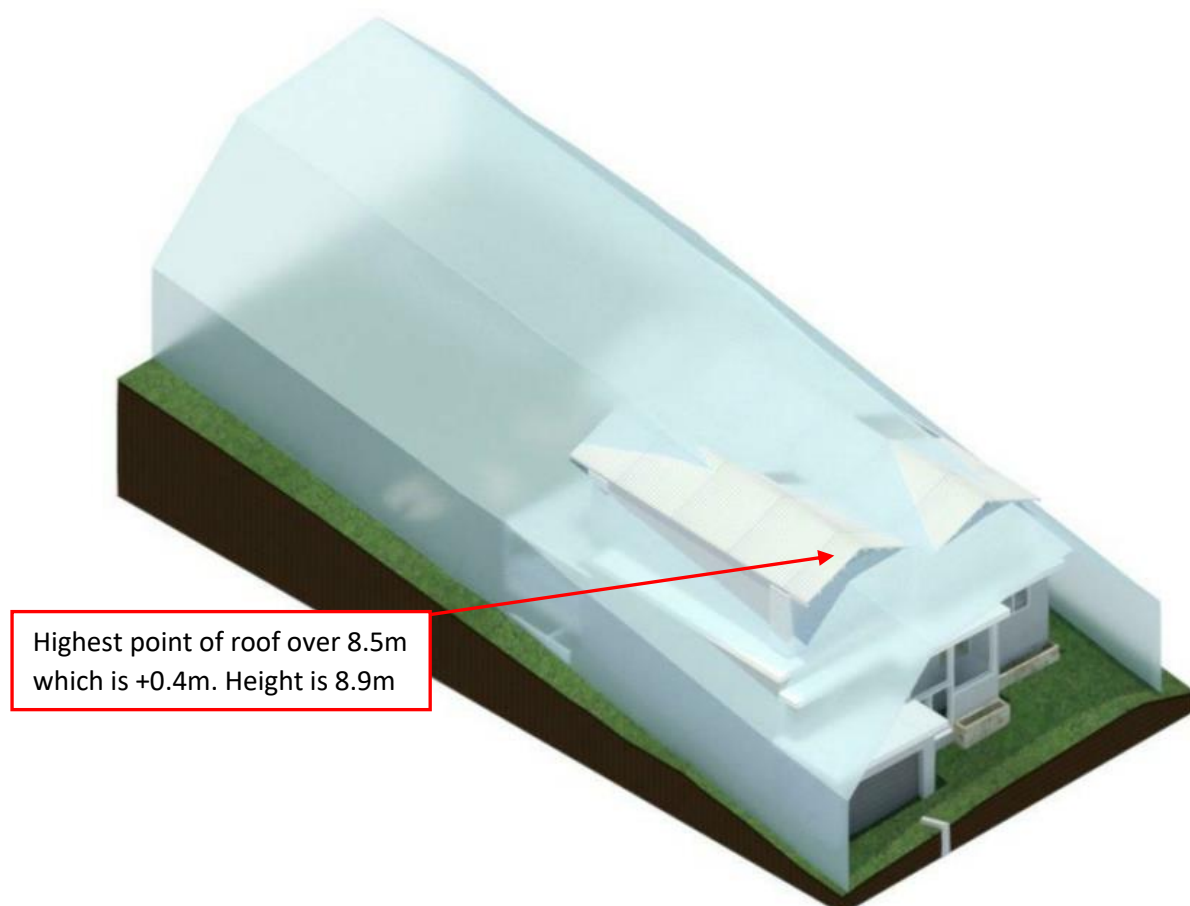


Figure 1: 3D diagram of the height plane noting the extent of the roof above 8.5m height.

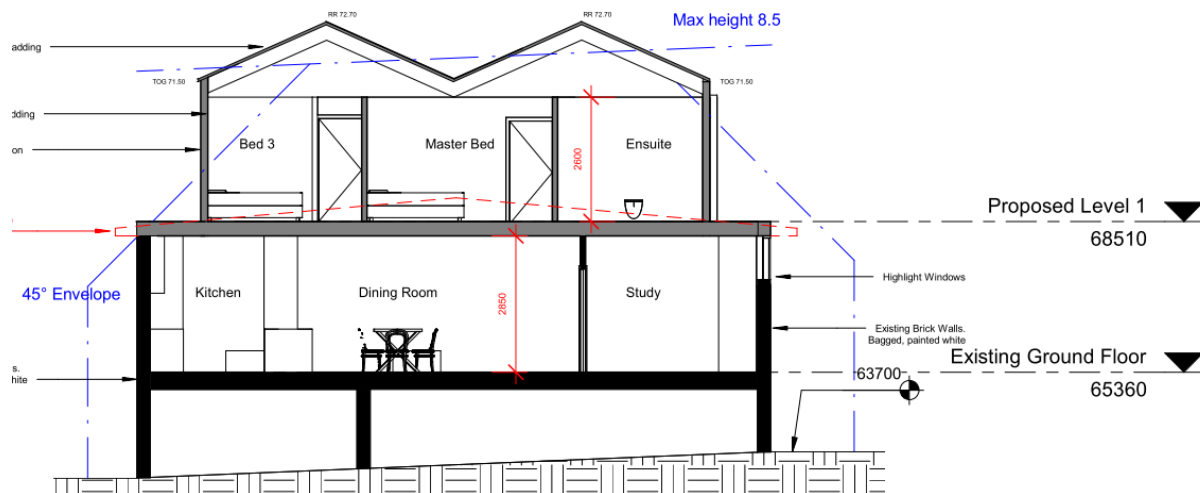


Figure 2: Cross sectional view of extent of building exceeding 8.5m.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

Compliance with the development standard for building height is unreasonable as the site is affected by a moderate slope and the resulting design achieves the objectives of the control and the objectives of the zone as demonstrated. Since the development satisfies these objectives, numerical compliance is unnecessary. For the above reasons compliance is unreasonable and unnecessary.

**Precondition 4 – To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

The primary issue in this development application is whether there are sufficient environmental planning grounds to allow the variation to the development standard.

In this regard I note the following comments in addition to comments previously made:-

- The proposal is for alterations and additions to a dwelling which is otherwise highly compliant with Council's controls for dwelling houses. Bulk and scale are ameliorated through the design of the building with excellent articulation and modulation of the facades and roof.
- The site is affected by a moderate downslope and prior garage level excavation which results in a variation to the 8.5m building height development standard to only a small portion of the building.
- The variation has no material adverse impact on the streetscape or adjoining properties. The variation would not be discernible by the casual observer.

For the above reasons, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined in her judgement that a Clause 4.6 variation requires identification of grounds that are

particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the *Four2Five* decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard" is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have 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 the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, with respect to the proposed development at 10 Lincoln Avenue Collaroy, the following environmental planning grounds are considered to be sufficient to allow Council to be indirectly satisfied that a variation to the development standard can be supported:-

- The site is affected by a moderate slope and prior garage level excavation which influences compliance with the building height control.
- The proposal is meritorious in that it is highly compliant with Council's controls and the variance is minor in the context of the whole design. Refer to Figures 1 and 2.
- In order to retain the aesthetic qualities and integrity of the intended architectural design, a variation is needed but the variation will produce a better environmental planning outcome than for example, a flat roofed design.
- Conversely, a compliant proposal would force an inferior architectural design outcome as the roof would have to be lowered or redesigned with a flat roof of lesser visual interest.
- The variation to the building height is inconsequential as it is of minor impact to the streetscape and the amenity of neighbouring properties.

The above are the environmental planning grounds which are circumstances which are particular to the development which warrant a variation to the development standard.

The interaction of the site slope and the desired architectural outcome combine to produce a meritorious development despite the minor numerical variation to the building height standard.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations. Only one of these tests needs to be satisfied:-

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

**Comment:** Yes. Refer to comments under 'Justification' above which discusses the achievement of the objectives of the standard.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

**Comment:** It is considered that the purpose of the standard is relevant but the purpose is satisfied.

3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

**Comment:** Compliance does not defeat the underlying object of the control however compliance would prevent the approval of an otherwise supportable development. Development standards are not intended to be applied in an absolute manner.

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;

**Comment:** Not applicable.

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.

**Comment:** The development standard is applicable to and appropriate to the zone.


## CONCLUSION

The proposal produces an appropriate development outcome deserving of the exercise of an appropriate level of flexibility under Clause 4.6. The variation to the height control is attributable to the slope of the site and prior garage level excavation towards the south. The new roof over this area causes the overall height to exceed 8.5m. The extent of variation sought equates to 0.4m or 4.7%.

This level of variation would be non-discernible to the casual observer having regard to the twin gabled design of the roof. The overall design is of good architectural quality and the development satisfies the zone objectives and the objectives of the development standard.

As there is no material impact on adjoining properties or the public domain arising from the variation to the building height development standard and the objectives of the control are satisfied, it is considered that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Therefore, we request that council support the variation on the basis that there are sufficient environmental planning grounds to justify a variance to the development standard.



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***Reviewed by:-***



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