

13 CAROLYN AVENUE, BEACON HILL

For: Proposed alterations and additions to the existing two and three storey residence including a secondary dwelling conversion
At: 13 Carolyn Avenue, Beacon Hill
Applicant: Robyn Maiolo

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard, it is requested Council support a variation with respect to compliance with the Height of Buildings control as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

2.0 Background

Clause 4.3 restricts the height of a building in this locality to a maximum of 8.5m above ground level and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

Ground level (existing) means the '*existing level of a site at any point*' as defined in the Dictionary annexed to WLEP 2011.

As a result of proposed work for a secondary dwelling at existing lower ground floor the current floor level is to be lowered resulting in an overall internal height to the highest point of the roof of 9.1 metres. We note that externally the existing height of the dwelling will not change and that new structure outside the perimeter walls of the building will be maintained below the maximum building height.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979 and therefore the development as a whole inclusive of all structure above and below natural surface needs to be assessed in relation to current development controls.

3.0 Purpose of Clause 4.6

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP 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 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

4.0 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.*

The development will achieve a better outcome in this instance as the proposal will provide for alterations and additions including a modest secondary dwelling to an existing approved dwelling, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- 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 environments are characterised by landscape settings that are in harmony with the natural environment of Warringah.

As sought by the zone objectives, the proposal will provide for alterations and additions to an existing dwelling to provide for an increased amenity for its residents.

The proposed work at lower ground floor level will be contained entirely within the fabric of the existing building and will not result in any increase in the height of the existing building. We note that other work including an extension of existing first floor structure will also not result in an increase in the height of the existing building.

The proposed height from the lowest floor level to the highest roof level (existing) will be 9.1 metres which does not comply with the statutory height limit of 8.5 metres.

5.0 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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11 Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the Samadi 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 site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- 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 environments are characterised by landscape settings that are in harmony with the natural environment of Warringah.

Comments

It is considered that notwithstanding the technical non-compliance with the maximum building height control the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R2 Low Density Residential zone for the following reasons:

- ***To provide for the housing needs of the community within a low density residential environment.***

The proposal provides for alterations at lower ground floor to allow a space within the existing enclosing walls of the building to be converted into a modest secondary dwelling. At ground floor alterations will allow for an enlarged living space, new sewing room, relocated stairs and an extension to the existing covered balcony at the front of the residence.

At first floor an extension and reformatting of existing structure at this level will for three bedrooms, bathroom and living area.

The proposed works as described above are a compatible form of development within a Residential Low Density R2 Zone.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

Not applicable to this development.

- ***To ensure environments are characterised by landscape settings that are in harmony with the natural environment of Warringah.***

The proposed works do not require the removal of any significant areas of landscaping.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

(1) The objectives of this clause are 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.

Despite the variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

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

The height of the proposed development will remain the same as existing. The completed building will be compatible in bulk and scale to other recent developments in the surrounding area which capitalise on district and coastal views.

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

The proposed works particularly those at lower ground floor will have no significant impact on the views, privacy and solar access of adjoining development.

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

The subject property is in a typical residential environment and not in close proximity to any coastal or 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 property is only visible from Carolyn Avenue which is a no through road therefore limiting its visual presence within the surrounding area.

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

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the alterations and additions to an existing building, which is constrained by a

technical breach of the maximum building height which is not visible when viewed externally from the surrounding area.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- Externally new structure will not exceed the maximum building height and therefore the objectives of the control will be achieved.
- The development will not result in any unreasonable loss of amenity to adjoining development.
- The development will not result in any externalities that will impact on the character of the streetscape.

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: -

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

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' 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 standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

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

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level for the subject development.

The proposed alterations and additions to the dwelling inclusive of lower ground alterations will provide a maximum height of 9.1 metres above ground level ('existing level of a site at any point') from the lowest floor level of RL 121.50 to the highest part of the roof RL 130.6

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

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined 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", it 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 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, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be

sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The offending portion of structure that results in a technical breach of the the maximum building height is below ground level external to the building.
- Outside the enclosing walls of the building all structure both existing and new is maintained below the maximum building height.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposes a technical departure from the Height of Buildings control, with new lower ground floor structure below external natural surface level resulting in an internal building height of 9.1 metres which exceeds the maximum building height as defined in Clause 4.3 of Warringah LEP 2011.

The proposed works will not result in a change in the maximum height of the existing building.

This written request to vary the Height of Buildings control specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the Height of Buildings control would be unreasonable and unnecessary in the circumstances of this case.

John Wright
Building Designer