



northern  
beaches  
council

# MEMORANDUM

**DATE:** 2 August 2023  
**TO:** Northern Beaches Local Planning Panel (NBLPP)  
**CC:** Adam Richardson, A/Executive Manager Development Assessment  
**FROM:** Maxwell Duncan, Principal Planner  
**SUBJECT:** Item No. 5.1 – DA2022/2181 – 69 Melwood Avenue, Forestville

**TRIM REFERENCE:** 2023/485101

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The purpose of this memo is to provide a response in relation to compliance with Clause 84(2)(c)(iii) 'Building Plane' of *State Environmental Planning Policy (Housing) 2021* (SEPP (Housing)) 2021.

The applicant has provided an additional envelope plan which reveals that a variation to this clause to the front of the site (Apartment U301) on both the northern and southern side of the site. In response to this, the applicant has provided a written clause 4.6 request (Attached to this memo as an addendum) to vary this development standard.

An assessment of the variation to Clause 84(2)(c)(iii) 'Building Plane' SEPP (Housing) 2021 is provided below.

## 4.6 Exceptions to development standards

### Description of non-compliance:

Development standard:	Clause 84(2)(c)(iii) 'Building Plane' of <i>State Environmental Planning Policy (Housing) 2021</i>
Requirement:	Storeys above 2 storeys are to be setback within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.
Proposed:	Northern side and southern

	side setback encroachment to apartment 301.
Percentage variation to requirement:	N/A

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 84(2)(c)(iii) of State Environmental Planning Policy (Housing) 2021, has taken into consideration the judgements contained within *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC61*, and *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

Clause 4.6 Exceptions to development standards:

*(1) The objectives of this clause 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.*

*(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:

Clause 84(2)(c)(iii) 'Building envelope' of State Environmental Planning Policy (Housing) 2021 development standard is not expressly excluded from the operation of this clause.

*(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.*

*(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 Secretary has been obtained.*

**Clause 4.6 (4)(a)(i) (Justification) assessment:**

The Applicant's written request has demonstrated that the underlying objective or purpose of the development standard is not relevant to the development with the consequence that compliance is unnecessary, notwithstanding the non-compliance with the development standard.

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

Comment:

The Applicant's written request has demonstrated that the underlying objective or purpose of the development standard is not relevant to the development with the consequence that compliance is unnecessary, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

*'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'*

s 1.3 of the EPA Act reads as follows:

*1.3 Objects of Act (cf previous s*

*5) 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 applicants written request argues, in part:

**"Ground 1 – Topography**

*The site experiences a fall of approximately 7.8m from the upper front boundary down towards the rear. Whilst the proposed development has been designed to present to Melwood Avenue as a 2 storey building form the topography of the land results in the eastern portion of the upper floor being 3 storeys as defined and non-compliance with the building plane notwithstanding the*

*contextually appropriate side boundary setbacks proposed.*

*Allowing for the height breach in response to the topography of the site ensures a contextually appropriate 2 storey built form presentation to Melwood Avenue and sufficient floor space at the uppermost level of the development to accommodate a three bedroom apartment. Such variation facilitates the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.*

**Ground 2 – Appropriate distribution of massing**

*Clause 84(2) of SEPP Housing prescribes that the any development above two stories in height is to be maintained within a building plane projected at 45 degrees from ground level at the side and rear boundaries. However, the building envelope control of WDCP 2011 provides that development must be maintained within an envelope projected at 45 degrees from a height of 4m above side boundaries.*

*Whilst the proposed development involves minor protrusions beyond the building plane prescribed by SEPP Housing, the proposed development is maintained well below the building envelope prescribed by WDCP 2011, with the proposed development providing far superior setbacks compared to what would be anticipated if the site was developed in accordance with WDCP 2011.*

*WDCP 2011 also prescribes a minimum setback of 900mm from side boundaries. The noncompliant building plane elements have setbacks of between 3.025 metres to the northern boundary and 6.705 metres to the southern boundary of the property, well in excess of the minimum side setbacks prescribed. These side setbacks accommodate deep soil planting zones along both side boundaries, with meaningful landscaping to screen and soften the visual impact of the proposed development.*

*The minor upper floor protrusions of the building plane are offset by the considerable spatial separation afforded at the lower levels, with the proposal presenting a distribution of floor space that is appropriate in the context of the subject site. The proposed development provides a superior outcome compared to a compliant scheme and promotes the orderly and economic development of the land and good design and amenity, consistent with Objectives 1.3(c) and (g) of the EP&A Act.*

*Overall, there are sufficient environmental planning grounds to justify contravening the development standard".*

**Planner Comment:**

The applicant has satisfactorily demonstrated that the works are consistent with the objects of the EP&A Act, specifically the following objects of the EP&A Act:

- It is agreed that that the variation is a result of the significant slope of the site and the contributing factor to the variation. It is also acknowledged that despite the variation the building when viewed from the street (Melwood Avenue) presents as a 2 storey building and therefore achieves objective (C) *promote the orderly and economic use and development of land.*
- The development promotes good design and amenity of the built environment. Having

regard to the element that breaches the building envelope (the upper storey to the front of the site) it has been demonstrated that the breaching element does not have any unreasonable impacts on the surrounding properties with regards to privacy, solar access or view impacts. The way the upper level has been designed to limit amenity impacts achieves objective (g) *to promote good design and amenity of the built environment* EP&A Act 1979.

In this regard, the applicant's written request has demonstrated that the proposed development is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cl 1.3 g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6(3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

**Clause 4.6 (4)(a)(ii) (Public Interest) assessment:**

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

*(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*

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the 'Building Plane' development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

**Objectives of development standard**

Clause 84(2)(c)(iii) of State Environmental Planning Policy (Housing) 2021 does not express any objectives. In this circumstance, the principles of the SEPP are addressed as follows:

(1) The objectives of this clause are as follows:

*a) enabling the development of diverse housing types, including purpose-built rental housing,*

Comment:

The proposed development allows for a seniors housing development which is a medium density housing development within a low-density area without unreasonably compromising adjoining properties or the streetscape.

*b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*

Comment:

The proposed development is exclusively for seniors. Conditions have been imposed to ensure this is maintained for the life of the development.

*c) ensuring new housing development provides residents with a reasonable level of amenity,*

Comment:

Flexibility is provided in this situation to allow for a reasonable level of amenity for each dwelling.

*d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*

Comment:

The proposed development demonstrates the efficient use of existing infrastructure and services by way of its location.

*e) minimising adverse climate and environmental impacts of new housing development,*

Comment:

The site is not impacted by any environmental constraints.

*f) reinforcing the importance of designing housing in a way that reflects and enhances its locality,*

Comment:

As detailed throughout this report, the proposed development does not result in any unreasonable impacts in relation to noise, privacy, solar access, views, or other factors contributing to the amenity of the subject site and adjacent sites. The proposal does not impact upon the low density nature of the locality.

*g) supporting short-term rental accommodation as a home-sharing activity and contributing to local economies, while managing the social and environmental impacts from this use,*

Comment:

N/A. This objective related to the affordable housing part of the SEPP.

*d) mitigating the loss of existing affordable rental housing.*

Comment:

N/A. This objective related to the affordable housing part of the SEPP.

## **Zone objectives**

The underlying objectives of the R2 Low Density Residential zone are:

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

Comment:

The proposed development retains the residential use of the site. It is considered that the development satisfies this objective.

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

Comment:

The proposed is for a new multi dwelling seniors housing development. The proposed development will provide for housing for the elderly in a convenient location, being close to retail and other commercial services.

It is considered that the development satisfies this objective.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment:

The development is consistent with the desired landscape setting, retaining landscaping to the front and rear of the building.

It is considered that the development satisfies this objective.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone.

**Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:**

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning & Infrastructure, advises that the concurrence of the Director-General may be assumed for exceptions to development standards under environment planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the 'Building Envelope' Development Standard is assumed by the Local Planning Panel.

**Recommendation**

That the Northern Beaches Local Planning Panel approve the application in accordance with the recommendation of the Officers assessment report for DA2022/2181.