



northern
beaches
council

MEMORANDUM

DATE: 20 April 2023

TO: Northern Beaches Local Planning Panel (NBLPP)

CC: Peter Robinson - Acting Director, Planning and Place

FROM: Max Duncan – Principal Planner, Development Assessment

SUBJECT: Item No. 4.1 – DA2022/0469 – 1102 Barrenjoey Road, Palm Beach – Construction of Shop Top Housing

TRIM REFERENCE:

Dear Panel,

The purpose of this memo is to advise the Panel that an updated clause 4.6 for the Height of Buildings non-compliance has been lodged by the applicant.

Assessment

Detailed Assessment

4.6 Exceptions to development standards

Description of non-compliance:

Development standard:	Height of buildings
Requirement:	8.5m
Proposed:	11.01m (maximum)
Percentage variation to requirement:	29.53%

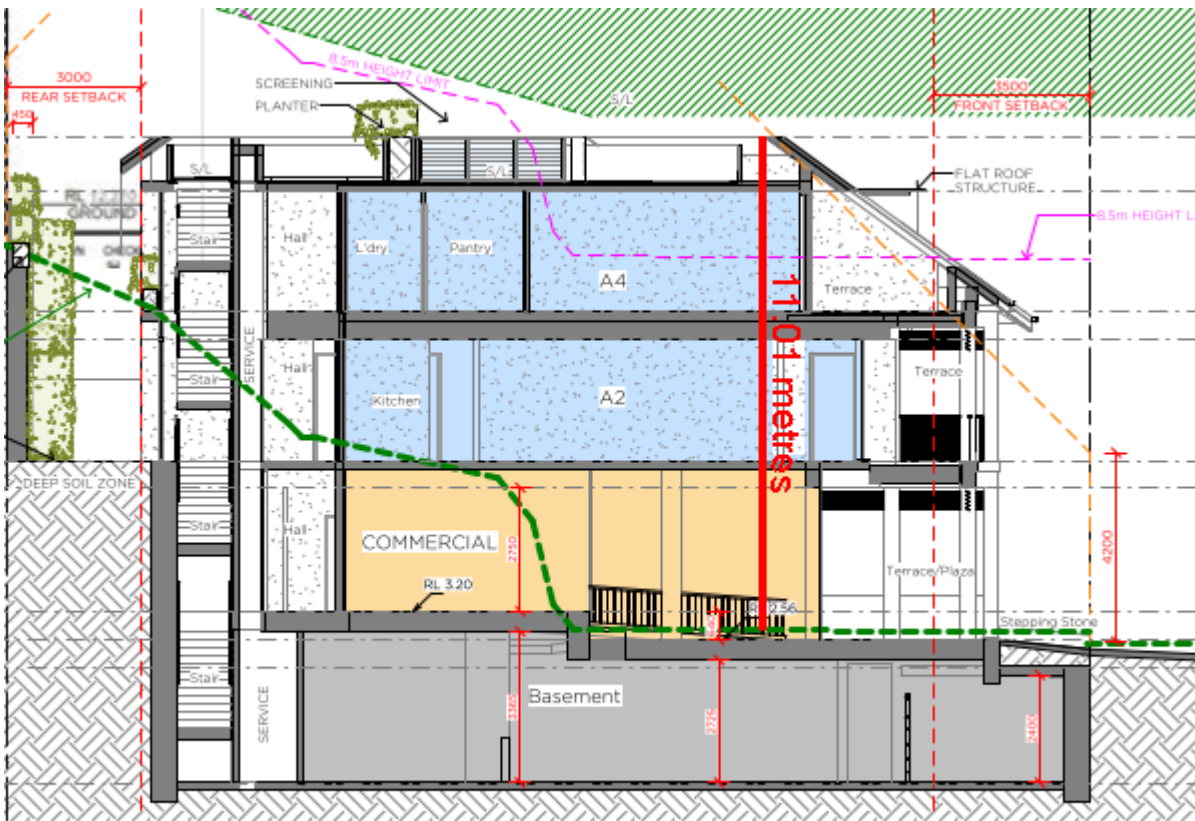


Image 1 – Amended Plan Height Calculation

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.3 - Height of Buildings development standard, has taken into consideration the recent judgement 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] NSWLEC 61*, 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 4.3 - Height of Buildings 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:

- (a) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (b) 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:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(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 objectives of the development standard are achieved, 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 - Better environmental planning, urban design, heritage conservation and public benefit outcomes

Approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. In forming this opinion, I note that approval of the development will facilitate the following environment, urban design, heritage conservation and public benefit outcomes

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the "seaside village" character anticipated by the Palm Beach Locality Statement.*
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.*
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.*
- The provision of additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.*
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.*

Ground 2 – Flooding

The ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640mm above the ground level at the front of the property. This

has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding contributes to making strict compliance with the building height standard more difficult to achieve and to that extent is an environmental planning ground put forward in support of the extent of the building height breach proposed.

Ground 3 – Prior excavation of the site distorts extent of building height breach

The prior excavation of the site within the footprint of the existing building distorts the height of buildings development standard plane overlaid above the site when compared to the natural undisturbed topography of the land. When the original undisturbed levels of the site are interpolated across the building footprint the extent of building height breach, particularly beyond the proposed street facing building parapet, would be significantly reduced as depicted in Figure 2.

Consistent with the finding of O’Neill C at paragraph 73 of Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582 such circumstance can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014 as it relates to the extent of building height breach proposed.

Ground 4 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use and development of the land through achieving superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14.

Strict compliance would require the deletion of the entire upper level of the development, representing 2 Apartments, with such outcome neither orderly nor economic have regard to the development consent already physically commenced on the site. Strict compliance would likely result in the previously approved development being completed and occupied which, given the detailing of the previous approval, would result in inferior environmental outcomes to and from development and not represent the orderly development of land.

Approval of the building height variation will promote the achievement of this objective.

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

For the reasons outlined in this submission, approval of the variation to the building height standard will promote superior heritage conservation outcomes having regard to the development’s immediate built form relationship with the heritage listed Barrenjoey House.

Approval of the building height variation will promote the achievement of this objective.

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

For the reasons outlined in this submission, approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14.

In this regard, I note that the extent of building height non-compliance is increased through the provision of characteristically pitched roof forms with the variation able to be significantly reduced through the adoption of a flat roof form consistent with that previously approved pursuant to Development Consent N0119/14. Such outcome would not, in my opinion, represent good design nor promote the amenity of the built environment.

Approval of the building height variation will promote the achievement of this objective.

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

As previously indicated, the ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640 mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding constraint contributes to making strict compliance with the building height standard more difficult to achieve. The floor levels adopted provide for the protection of the health and safety of their occupants.

Approval of the building height variation will promote the achievement of this objective.

Council's Comment on Planning Grounds

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

- The development promotes good design and amenity of the built environment, noting that the development will not have any unreasonable impacts on the amenity of the surrounding properties with regards to privacy, solar access or view impacts. The proposal achieves objective (g) *to promote good design and amenity of the built environment* of the EP&A Act 1979.
- It is agreed that the flood constraints of the site, ensures that any development would need to be raised above flood planning levels. It is agreed that complying with both the flood and building height requirement will compromise the opportunity for a reasonably sized development to be provided on the site. The proposal achieves objective (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants* of the EP&A Act 1979.
- It is agreed that current design provides a superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. It is considered that the proposal is designed having regard to the adjoining heritage item Barrenjoey House through an appropriate architectural response including using a pitched roof which contributes to a better outcome when considered against a flat roof design, compliant with the building height control. The proposal achieves objective (c) *to promote the orderly and economic use and development of land*, of the EP&A Act 1979.

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 Height of Buildings development standard and the objectives of the B1 Neighbourhood Centre zone. An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.3 – ‘Height of buildings’ of the PLEP 2014 are:

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

a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

Comment:

Whilst the bulk and scale of the development is greater than that of surrounding development, it has been reasonably minimised considering the type of development that is proposed and that which is anticipated on the site. The height of the upper roof form is generally consistent with that of shop top housing within the locality. The proposed development has a high level of façade modulation, and the proposed colours and materials that will complement the character of the Palm Beach locality.

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

Comment:

The overall bulk and scale of the proposal has been effectively controlled by way of effective building setbacks, building separation, building articulation and manipulation of building elements and through the use of appropriate materials and finishes. The proposed building height will not result in unreasonable building bulk or scale and does not result in any unreasonable physical or visual impacts on surrounding lands.

In terms of compatibility, there are examples of similar scale development to the south of the site within the Palm Beach locality. These shop-top housing development were subject to similar built form controls and site constraints.

c) to minimise any overshadowing of neighbouring properties,

Comment:

The proposed development is considered to be designed and sited in a manner that adequately mitigates solar access impacts to adjacent properties.

d) to allow for the reasonable sharing of views,

Comment:

The proposal has been assessed against the view loss provisions of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 when considering the impacts on the views of adjoining properties in this report. In summary, the proposed development does not cause unreasonable view loss to and from public and private open spaces.

e) to encourage buildings that are designed to respond sensitively to the natural topography,

Comment:

The site has generally been compromised by the existing excavation and development on site. Further, excavation to allow for a basement level and reasonably scaled development is not unreasonable in this instance, noting the existing site conditions. The level of excavation is deemed to be acceptable.

f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items,

Comment:

As discussed in detail throughout the assessment report, the proposed development ensures a suitable compromise in terms of design in addressing the heritage significance of the site and development potential. Both the heritage expert and DSAP, found the development to be of a good design through the incorporation of the pitched roof and articulated design.

Zone objectives

The underlying objectives of the B1 Neighbourhood Centre zone are:

- ***To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.***

Comment: The proposed use of the site as shop top housing, includes a food and drink premises at ground floor level. This supports the needs of the people who live in, work in, and visit the local area.

- ***To provide healthy, attractive, vibrant and safe neighbourhood centres.***

Comment: The presentation of the commercial ground floor level to the street is engaging and will enhance the activation of the B1 Zone. The proposal will allow for passive surveillance of the street.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the B1 Neighbourhood Centre 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, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental 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 Height of buildings Development Standard is assumed by the Local Planning Panel.

Conclusion:

Council considers that the amended design further improves the overall suitability of the proposal. Council's recommendation is that the amended proposal be approved, subject to the conditions outlined within the assessment report and supplementary memo dated 13 April 2023 and having regard to the updated clause 4.6 request.

Recommendation:

That the Northern Beaches Local Planning Panel approve the application, subject to the conditions outlined within the Assessment Report and amended by the memo put forth to the panel dated 13 April 2023.