

30 April 2020

**Clause 4.6 Variation to Development Standard**

**Property Description:** 157 Victor Road, Dee Why  
**Development:** Alterations to Existing Dwelling House  
**Development Standard:** Height of Buildings

**Introduction**

This is an amended clause 4.6 variation to support the 8.2 Review of Determination relating to DA2019/1179 for alterations and additions to the dwelling house at 157 Victor Road, Dee Why. This clause 4.6 variation seeks variation to the 8.5m building height development standard contained in clause 4.3 – Height of Buildings of the *Warringah Local Environmental Plan 2011*.

The height of buildings is measured from the existing ground level to the maximum height of the development. The subject site contains a rock outcrop running diagonally across the centre of the site, presenting a fall of 6m over the length of the existing building footprint from the west elevation to the eastern elevation of the building.

The variation to the height of buildings development standard is largely a result of the siting of the existing development on the subject site noting the existing development presents a height of 10.92m at the north eastern corner of roof form.

This amended clause 4.6 variation supports a reduced total building height resulting from the relocation of the proposed first floor level over the southern part of the roof of the existing dwelling and an increased setback of the study from the northern boundary.

The proposed first floor level presents a maximum height of 8.85m to the eastern edge of the first floor level roof at RL50.46 measured from RL41.61 at existing ground.

The proposed lower rear study element of the building presents a maximum height of 8.6m measured from the roof of the study at RL44.66 to the ground level at RL36.

The development proposal presents a maximum height of 10.53m to the north eastern corner of ground level roof at RL47.76 measured from RL37.23 at ground. The new ground floor level roof results in a decrease of 0.39m at this interface.

The proposed building height presents a maximum variation of 2.03 to the maximum height limit of 8.5m, being a variation of 23.8% to the height of buildings development standard.

It is noted the proposed first floor level presents a variation of 0.85m to the maximum height limit, being located over the southern part of the existing roof form.

The proposed heights of the dwelling are shown in the below eastern elevation.

The application to vary the development standard – height of buildings incorporates the relevant principles in the following judgements:

1. **Winten Property Group Limited v North Sydney Council** (2001) 130 LGERA 79;
2. **Wehbe v Pittwater Council** (2007) 156 LGERA 446 (“Wehbe”);
3. **Four2Five Pty Ltd v Ashfield Council** [2015] NSWLEC 1009; and
4. **Initial Action Pty Ltd v Woollahra Municipal Council** [2018] NSWLEC 118.

The recent judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

*“The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.” [88]*

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court. It is noted, it also reflects the further finding by Commissioner O’Neill for *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097 when the case was remitted back to the LEC as a Class 1 Appeal.

### **Matters required to be demonstrated under clause 4.6(3) of the LEP**

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the variation to the height of buildings development standard is acceptable in the circumstances of this case and compliance with the development standard is considered unreasonable and unnecessary because the proposed works to the dwelling house are consistent with the objectives of the R2 – Low Density Residential zone and the development meets the objectives of the height of buildings standard, notwithstanding non-compliance with the standard.

#### **• Objectives of the R2 – Low Density Residential Zone**

The objectives of the R2 – Low Density Residential zone are as follows:

- *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.*

The proposed alterations to the dwelling house meet the relevant objectives of the R2 – Low Density Residential zone regardless that the development results in a variation to the building height development standard based on the following assessment:

- The proposal provides for the housing needs of the owner of the property improving the amenity and functionality of the existing dwelling;
- The form and scale of the proposed development is consistent with building forms in the immediate locality. The proposed first floor level is located over the southern of the subject site minimising the variation to height resulting from the rock outcrop;
- The proposal maintains the sites landscape setting to the public domain;

- **Objectives of the Building Height Development Standard**

The objectives of the development standard are at clause 4.3(1) of the LEP 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 proposed alterations to the dwelling house meet the objectives of the height of buildings development standard (notwithstanding non-compliance with the standard) based on the following assessment:

**Objective (a)** - The proposed 2 storey form is consistent with the built form in the locality noting the topography restricting a large floorplate design.

The variation to height limit is the result of the existing site topography and the location of the existing built form on the subject site.

The roof ridge of the proposed first floor level meets the 8.5m building height limit, with the variation confined to the eastern part of the roof form, being the result of a rock outcrop.

**Objective (b)** - The dwelling presents to Victor Road as a two storey form, consistent with the intent of 8.5m height limit. The proposed first floor level is located over the southern portion of the site, stepping the location of the built form in accordance with the site constraints.

The variation to height over the northern part of the site is attributed to the existing built form on the site and the location of the rock outcrop on the site. The proposed roof form over this part of the building presents a reduction in height at this interface.

The proposed first floor level is located over the southern part of the site away from the existing rock outcrop, minimizing the variation to height at the rear of the development and maintaining a view corridor across the northern part of the site towards the Dee Why Lagoon.

**Objective (c)** - The development proposal complies with the 8.5m height of buildings development standard at the street frontage. The proposed works present a reduction in the existing height of buildings at the northern part of the built form noting the new roof line is lower than existing roof.

The proposed first floor level is located over the southern part of the built form away from the rock outcrop maximizing visual separation from development to the east and north noting the steep fall at the rear of the site.

**Objective (d)** - The height of the building is consistent with adjoining dwellings and will not present overbearing bulk and scale when viewed from dwellings and Prescott Road to the east. Further, the development proposal presents a reduction in maximum building height with the ground floor level roof form reduced in height.

The proposed first floor level is located over the southern portion of the site, providing visual separation from the adjoining dwelling to the north

There are sufficient environmental planning grounds to justify contravening the development standard

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation 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, there are sufficient environmental planning grounds to justify the variation to the height of buildings development standard because:

- The variation to the 8.5m height control is the result of site topography, noting rock outcrop positioned diagonally across the site. The development proposal complies with the height limit at the street frontage with the site falling towards the rear. Due

to site slope the existing dwelling historically presents a variation in height at the north eastern corner.

- The variation at the north eastern corner of the building is a result of the existing building varying the building height development standard at this point.
- The first floor level is located over the southern portion of the site in response to view assessment, maintaining a view corridor across the northern part of the site towards Dee Why Lagoon.
- The roof ridge of the first floor level complies with the 8.5m height of buildings development standard with the variation of the roof form at the first floor level the result of the rock outcrop at the rear of the building footprint.
- Strict compliance with the height control would not achieve a better environmental planning outcome noting the variation to height is a result of the rock outcrop on this site. The proposed first floor level has been located over the southern part of roof form, away from the rock outcrop minimizing the variation to height of this component and reducing the bulk and scale of the development when viewed from the adjoining property to the north.

**Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)**

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

**The proposed development is in the public interest**

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed development is in the public interest because it is consistent with the objectives of the applicable height of buildings standard and the objectives for development in the R2 - Low Density Residential zone in accordance with the planning assessment provided above, as follows:

| <b>Objective</b>   | <b>Consistency</b>   |
|--|--|
| <i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>                              | <p>The proposed 2 storey form is consistent with the built form in the locality noting the topography restricting a large floorplate design.</p> <p>The proposal has been located on site to minimise the bulk and scale when viewed from adjoining properties to the north and east.</p>  |
| <i>to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i>   | <p>The additional height will not result in additional view loss noting the additional height is at the rear of the building beneath the roof ridge and the dwelling presents to Victor Road as a two storey form, consistent with the intent of 8.5m height limit.</p> <p>The proposed first floor level is located over the southern part of the roof form, providing a view corridor across the northern part of the site towards Dee Why Lagoon.</p> <p>The additional building height at north eastern corner of the building is a result of the location of the existing building on site presenting a historical variation to height.</p> |
| <i>to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>                     | <p>The site features a fall from Victor Road, the primary street frontage. The development proposal complies with the 8.5m height of buildings development standard at the street frontage. The additional height is consistent with adjoining dwellings and the first floor level is located over the southern part of the site generally maintaining a two storey form across the bulk of the building footprint.</p>  |
| <i>to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i> | <p>The height of the building is consistent with adjoining dwellings and will not present overbearing bulk and scale when viewed from dwellings and Prescott Road to the east.</p> <p>The development proposal include a reduction in height at the north eastern corner of the building.</p> <p>The proposed first floor level is located over the southern part of the roof form, minimizing the variation to height resulting from the rock outcrop and providing increased visual separation from adjoining dwelling to the north.</p>   |

In addition to the above reasons, the proposal is also in the public interest because:

- The proposed 2 storey form is consistent with the built form in the locality and the intent of 8.5m height limit. The additional height will not be read from the street frontage, being located at the rear of the site, and the location of the first floor level over the southern part of the site will not present overbearing bulk and scale when

viewed from dwellings to the east or north noting consistent form with adjoining dwellings.

- The development proposal includes the reduction in height of the existing roof form over the north eastern corner of the site.
- The location of the proposed first floor level over the south part of the roof form, minimizing the variation to height at the rear of this site resulting from this element and preserves a view corridor across the northern part of the site towards Dee Why Lagoon.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the R2 – Low Density Residential zone.

The proposal and does not undermine the intent and effectiveness of the maximum building height development standard in Clause 4.3 or the objectives of the height development standard and the zone for achieving positive outcomes on environmental planning grounds.

For these reasons, the proposal and the variation to height does not undermine the integrity of the building height development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

### **The concurrence of the Secretary**

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6 of the LEP, subject to the conditions in the table in the notice.

The matters in clause 4.6(5) of the LEP should be considered when exercising the power to grant development consent for development that contravenes a development standard (***Fast Buck\$ v Byron Shire Council*** (1999) 103 LGERA 94 at 100 and Wehbe at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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 Secretary before granting concurrence.*

The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed above the non-compliance with the building height standard is considered to be in the public interest because the proposed development is consistent with the objectives of the height standard and the objectives of the R2 - Low Density Residential zone.

The public benefit of maintaining the development standard is not considered significant because the building meets the 8.5m height standard – as viewed from Victor Road. The variation to height is a result of the site topography and the location of the existing building on the subject site. The proposed development is compatible with existing dwellings in the locality.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The exceedance of the standard will not result in adverse amenity impacts and is in the public interest.

### **Conclusion**

The development proposal has a variation to the 8.5m building height control contained in Clause 4.3(2) of the Warringah LEP 2011; notwithstanding, the proposal has been designed with a built form that is consistent with the intent of the height limit and height of adjacent dwellings.

The variation to the 8.5m height limit is the result of the existing site topography and location of the existing building on the subject site. The development proposal complies with the height limit at the street frontage with the rock outcrop running diagonally across the building footprint presenting a sharp fall from the front boundary to the rear of the allotment. The roof ridge of the first floor level meets the 8.5m height limit.

The dwelling historically presents a variation to building height at the north eastern corner of the building footprint. The proposed first floor level has been located over the southern part of the site, minimizing the variation to height from this element, and maintaining a view corridor across the northern part of the site towards Dee Why Lagoon.

Furthermore, the location of the first floor level over the southern part of the roof form does not result in unreasonable bulk and scale to adjoining properties or the public domain. The proposal complies with height at the street frontage and is visually separated from adjoining properties to the north and east of the site.

The variation to the building height standard does not attempt to affect the planning outcome for the locality, rather the variation is a result of the site topography and the location of the existing building footprint.

In my opinion the application to vary the building height development standard is well founded and as addressed the proposed height meets the objectives of the building height development standard and achieves an acceptable outcome for the subject site that is in the public interest. In accordance with the environmental planning grounds addressed in this clause 4.6 variation, the building height can be supported.

Chapman Planning Pty Ltd