



TOWN PLANNING REPORT

69 Evans Street Freshwater

Clause 4.6 variation Report

Building above 8.5m

Introduction

Clause 4.6 of WLEP 2011 provides Council with the flexibility to vary development standards contained within gazetted environmental planning instruments, when it can be demonstrated that compliance with the development standard, in the particular circumstances of an individual development application, is unreasonable or unnecessary.

Although there are minor differences in the approach applied by State Environmental Planning Policy (SEPP1) and that of Clause 4.6, the tests to be applied to a variation under Clause 4.6, are similar to those articulated in relation to SEPP 1.

However Clause 4.6 has the added requirement which is detailed in Clause 4.6(3), which states as follows:

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.*

Having regard to the above, and dealing first with issue of whether the standard is *unreasonable and unnecessary*, it is noted that the tests applied to a SEPP 1 objection were set out by Lloyd J in *Winton Property Group Limited v North Sydney Council* [2001] NSWLEC 46, where his Honour set out five questions that need to be addressed.

The first is, “*Is the planning control a development standard?*”

The second raises the underlying objectives or purposes of the standard.

The third and fourth deal with the questions of consistency with the aims of the policy and the objects in 5(a)(i) and (ii) of the Act and whether or not compliance is unreasonable or unnecessary.

According to Lloyd it conventionally being the fact that if application of the standard is held to be unreasonable or unnecessary in the circumstances of the case, that the objection is likely to be well-founded (thus satisfying the fifth Winton test).

The following assessment has been undertaken having regard to this judgement, and identifies the applicable planning instruments, zoning and applicable standard applying to the subject land, and considers the implications of the variation to the height of the proposed dormers sought, having regard to the objectives of the zoning and standard, as well as the relevant objectives of the Environmental Planning and Assessment Act.

This assessment concludes that compliance with the applicable standard, having regard to the particular circumstances of this application, would in this instance, be unreasonable and unnecessary, and therefore should be approved.

Applicable environmental planning instrument

Warringah Local Environmental Plan 2011

Identification of the development standard to which the SEPP 1 objection applies

Clause 4.4 of WLEP 2011 refers to the maximum height standard, and the Height control Map, which provides height controls for the locality.

In accordance with the Height control Map, the maximum height of building permitted on the subject site is 8.5 metres.

Variation sought

The height of the proposed privacy screens when installed will be located above the allowable 8.5m. The existing building having a Level 11 soffit RL of 41.26 or a 29.2m building height. This building height is 20.70m above the allowable 8.5m for this zone.

A variation in accordance with Clause 4.6 of MLEP is therefore sought to permit the height of the privacy screens under the existing usage rights. This being that at time of the building being constructed, the building height was allowable.

Objectives of the applicable zone

The subject site is zoned **R2 Low Density Residential** in accordance with WLEP 2013. The relevant **Objectives** of this zone are:

- *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.*

COMMENT

The building was built when a multi residential building was permitted on the site and as such the variation is sort as an existing building rights. The privacy screens are located within the existing balcony foot print.

Objectives of applicable standard

- (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.

(2) 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](#).

(2A) If the [Height of Buildings Map](#) specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

COMMENT

It is considered that the variation to be addressed under the existing building rights is consistent with the standard in relation to the privacy screens. It is considered that the variations to the applicable standard in relation to the proposed privacy screens satisfies the objectives of this Clause, as the bulk and scale of the existing apartment building will not change as a result of the privacy screens being installed, enhancing the architectural appearance of the building.

As discussed previously in this report, there will be no adverse environmental impacts in relation to the use or enjoyment of adjoining land and the public domain.

Further to the above, and as also indicated previously in the report, the character of the locality will not be adversely impacted by the proposed privacy screen design, and there are no existing vegetation, topography, public views and natural features of land, including the foreshore, which would limit the height of the privacy screen, as proposed in this application.

Similarly the compatibility of the building form to the size of the land will continue to be maintained.

The potential impacts on solar access, privacy, and overshadowing have all been addressed previously in this report, and it can be concluded that the variation of the height of the new privacy screen in this instance will have no adverse impacts on adjoining properties.

It can therefore be concluded that the variation in the height of the privacy screen, continues to acknowledge the environmental constraints of the site, and will not inhibit the contextual relationship between the subject land and that of adjoining residential development. Further more adjoining properties existing and in the future will benefit from the screens visually screening services and reducing privacy impacts.

In terms of the relevant objectives of the Environmental Planning and Assessment Act, it is considered that the variation in the height standard to accommodate the privacy screen, will not have any adverse impact on the environmental constraints of the site, as addressed in this planning report, and in fact will contribute towards maintaining and enhancing the residential character of the locality.

It can therefore be concluded that the variation to the height standard, is consistent with the relevant objects of the Act, which are as follows;

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

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

Further to the above, Preston J has expressed the view that there are five different ways in which an objection may be well founded. These are addressed as follows:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;

Comment

As indicated above, it is considered that the objectives of the standard are achieved notwithstanding the variation to height standard.

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

Comment

Not applicable. Objectives of the standard have been identified in WLEP 2011, and have been addressed above.

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

Comment

Not applicable

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 compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone

Comment

Strict application of the standard is considered to be unreasonable and unnecessary in the current circumstance for the following reasons:

- The proposed technical variation to the height standard in respect of the privacy screen, does not result in any unreasonable impacts on the amenity of adjoining residential properties in terms of overshadowing, privacy, loss of views or loss of daylight;
- The proposed variation continue to recognise the existing environmental constraints of the site and retain the contextual relationship with other buildings in this locality;

- The proposed variation does not result in any material impacts in terms of privacy, views, solar access, separation distances, light and ventilation on any adjoining development in the immediate vicinity of the proposal or surrounds;
- The proposal will facilitate the enhancement of the existing building form to create a building or enhanced architectural merit, consistent with the desired future strategic vision for this locality.

For these reasons it is considered that strict application of this standard is unreasonable and unnecessary having regard for the particular circumstances of this case.

Further to the above it is considered that the proposed variation does not raise any matter of significance in relation to State or regional planning, and it is not anticipated that the variation will undermine the standard itself and lead to any potential adverse precedent.

The reason for this conclusion is that the proposed variation is very site specific and related to a specialised use of the subject site, which is a very low intensity use.

In addition the technical variation to the height standard, will not change the contextual relationship currently experienced in relation to the existing dwelling on the site.

Finally it is considered that there does not appear to be any public benefit in maintaining the existing height standard, adopted by the planning instrument in this instance.

The public benefit is to be found in the provision of the development of the site for the alterations and additions to an existing dwelling, designed to enhance the general amenity of the locality, as well as the residents who will inhabit the proposed dwelling.

For the reasons referred to above it is considered that the variation to the maximum height standard as sought in this application, is reasonable and necessary, having regard to the circumstances of the case, and as such should be approved.

In relation to Clause 4.6(3) (b) however, it is noted, that the proposed development is consistent with the objectives of the standard, particularly those related to the bulk and scale of development, the density control, and the visual relationship between the new development and the existing character and landscape of the area.

It is noted in particular, that the streetscape is transitioning to a contemporary modernisation, the height and shape of the privacy screen will assist with the articulation of the building elevations.

Accordingly it can also be concluded that the proposed development satisfies the requirements of Clause 4.6 of Warringah Local Environmental Plan under the existing usage rights.