

27 July 2023

**Clause 4.6 Variation to Development Standard**

**Property Description:** 27 Redman Road, Dee Why  
**Development:** Residential Flat Building development  
**Development Standard:** Clause 4.3(2) Height of Buildings – *Warringah LEP 2011*

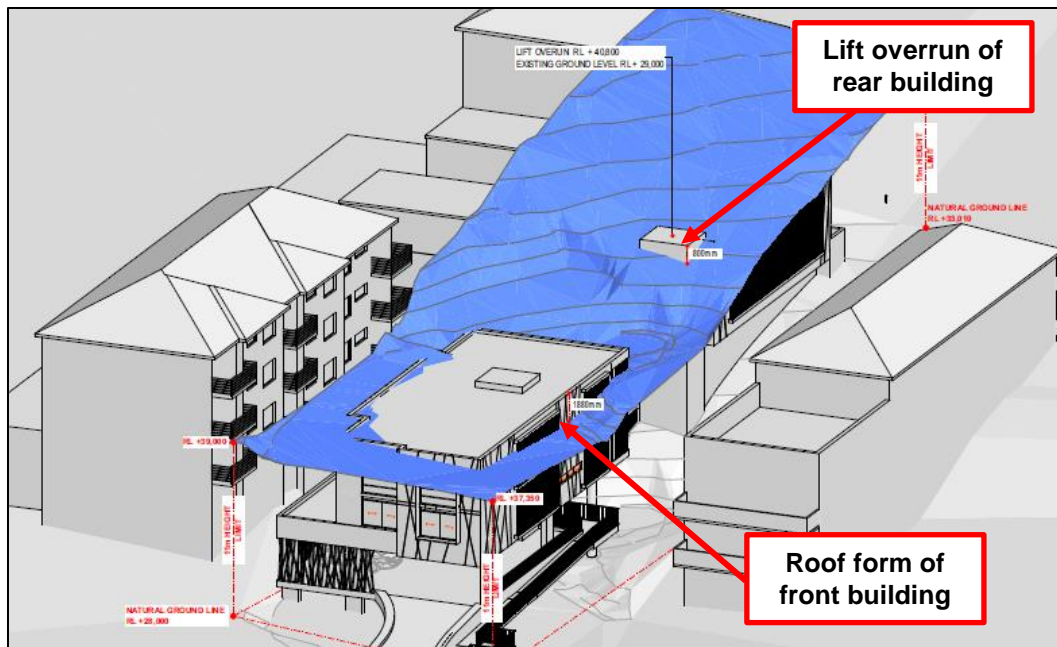
**Introduction**

This is a clause 4.6 written request to support the development proposal for a residential flat building development containing 4 x 3 bedroom units at 27 Redman Road, Dee Why.

The development has been designed across two built forms in response to a riparian corridor – stormwater channel located centrally to the site, with a communal connecting pathway linking the lobby of each building above the riparian corridor.

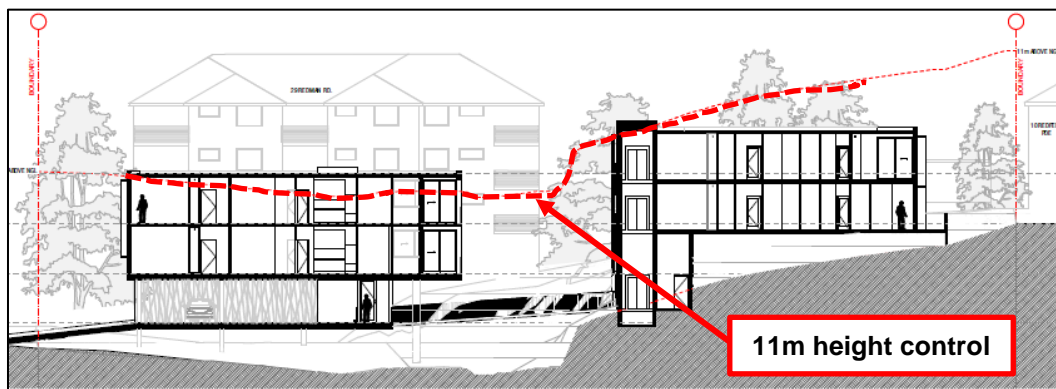
The *Warringah Local Environmental Plan 2011* applies a maximum permissible building height of 11m to the subject site. The development presents a maximum height of 12.88m measured to the roof parapet – eastern elevation of the proposed front building and 11.8m to the lift overrun of the rear building, with the proposed variation being a result of the topography and affectations of the site, having a fall of approximately 9.1m from the rear boundary to the street frontage, and a cross fall of 4.95m from the central-west portion of the site to the central-east portion. The site also contains a stormwater channel that runs centrally across the allotment and is burdened by flood planning levels which have set the minimum finished floor levels.

This written request addresses the proposed variation to the height of buildings development standard contained in the *Warringah LEP 2011*. The elements of the proposed development located above the height control are depicted in the plan extract – height plane diagram below:



Source: MAI

The below section plan depicts the topography of the subject site and resulting height variation as a result of the slope of the land and riparian corridor located central to the site:



The development proposal therefore has a maximum height of 12.88m measured to the roof parapet – eastern elevation of the proposed front building and 11.8m to the lift overrun of the rear building being a variation of 800mm & 7.2% – 1.88m & 17.9% from the maximum permissible height pursuant to Clause 4.3 of the *Warringah LEP 2011*.

The fundamental role of clause 4.6 in any local environmental plan is reflected in the recent decision of Commissioner Clay in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112. In particular, Commissioner Clay notes at [73] of his decision that:

*“First, it should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome.”*

The objectives of clause 4.6 facilitate the flexible application of development standards to particular development in order to achieve an improved environmental planning outcome.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the Land and Environment Court and Court of Appeal of NSW.

The request to contravene the Height of Buildings development standard has been prepared in accordance with the principles applied in relevant case law including:

1. *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79;
2. *Wehbe v Pittwater Council* (2007) 156 LGERA 446;
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
4. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; and
6. *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130
7. *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065

This Clause 4.6 variation request is set out in accordance with the relevant principles established by the Court including:

1. Is the development consistent with the objectives of the zone?
2. Is the proposed development consistent with the objectives of the development standard which is not met?
3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (cl 4.6(3)(a) and cl 4.6(4)(a)(i))
4. Are there sufficient environmental planning grounds to justify contravening the development standard and therefore the Applicant's written request to vary the development standard is well founded? (cl 4.6(3)(b) and 4.6(4)(a)(ii))
5. Is the proposed development in the public interest because it is consistent with the objectives of the standard and the zone? (cl 4.6(4)(a)(ii))

#### **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), the variation to the height of buildings is acceptable in the circumstances of this case and compliance with the development standard is considered unreasonable and unnecessary because the proposed development is consistent with the objectives of the development standard, notwithstanding non-compliance with the standard.

#### **• Objective of the height of buildings development standard**

The objectives of the development standard at Clause 4.3 of the *Warringah LEP 2011* are:

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

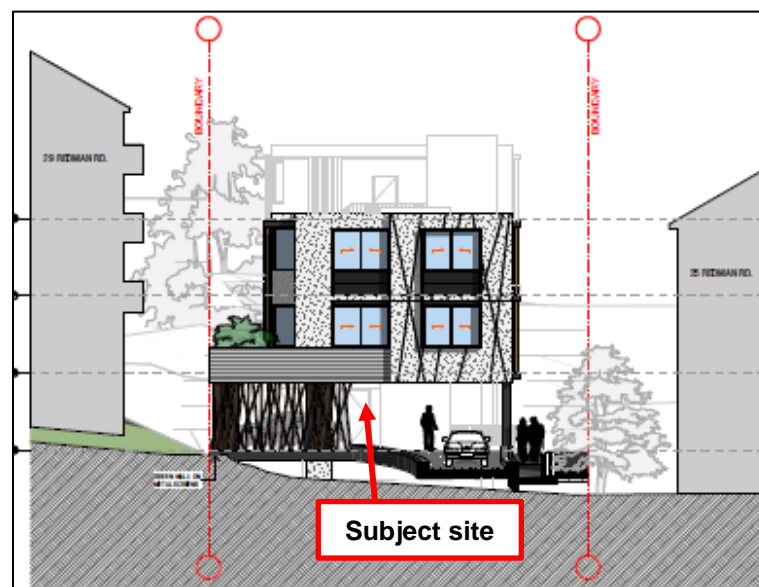
*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

*(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 development meets the objectives of the standard based on the following:

- **Objective (a):** The proposed development has been designed in a three storey form that is consistent with the form and scale of the adjoining residential flat buildings to the east and west at 29 and 25 Redman Road, Dee Why, noting the proposal is lower in height than the adjoining buildings and will comfortably sit within the streetscape as depicted in the elevation plan extract below:



Notwithstanding the proposed numerical variation to the maximum permissible building height, the development has been designed with a three storey form that is appropriate for the site, noting the development has been designed with undercroft areas and ground level car parking to minimise excavation and to integrate with the natural features of the land. The overall scale of the development is compatible with the broader streetscape which includes 3-4 storey residential flat buildings.

- **Objective (b):** The elements of the development which are located above the 11m height control do not present a significant visual impact upon the surrounding locality, noting the variation is largely the result of the topography of the site – slope and the proposal will sit below the maximum height of the adjoining properties to

the east and west when viewed from the public domain. The development will not result in any disruption of views or loss of privacy beyond that anticipated by the envisioned form of development within the R3 Medium Density Residential zone.

The non-compliant elements of the proposal do not result in any significant solar access impacts. As detailed within the submitted Statement of Environmental Effects, the proposed development will have an acceptable overshadowing impact upon the adjoining residential flat buildings which will retain reasonable solar access in midwinter to private open space – balconies and side elevation windows.

- **Objective (c):** The development will not have an adverse impact upon the scenic quality of Warringah's coastal environments. The proposal is well-integrated with the natural environmental features of the site, having been designed in response to the central riparian corridor on the site with a landscape treatment proposed which will provide native canopy tree plantings on the site. The development will therefore be viewed within a landscaped setting and will not have an adverse impact upon the bush environments of the locality.
- **Objective (d):** The development sits comfortably within the Redman Road streetscape, and will not have an adverse visual impact when viewed from the public domain. The development has been designed within a three storey form which is consistent with the adjoining residential flat buildings to the east and west, and is of a form that is suitable for an infill development of a remnant site in the R3 Medium Density Residential zone. Landscaping is proposed along the front, side and rear setbacks of the site which ensure the development will be viewed within a landscaped setting.

It is unreasonable and unnecessary to require compliance with the Height of Buildings development standard contained in the *Warringah LEP 2011* due to the following reasons:

- It is unreasonable to require compliance with the height of buildings standard as the variation is a result of an environmental constraint specific to the site – topography of the land and natural features, noting the site has a fall of approximately 9.1m from the rear boundary to the street frontage, and a cross fall of 4.95m from the central-west portion of the site to the central-east portion. The application seeks consent for a permissible form of development within the zone that is consistent with the envisioned form of development within the 11m height control which applies to the site. It is submitted that the variation to the height standard is a result of providing an appropriate built form – three storeys that is compatible with the 11m height control and surrounding development, whilst responding to the topography of the land.
- It is unnecessary to require compliance with the height control as the overall form and scale of the development is consistent with that anticipated by the *Warringah LEP 2011* for development within the R3 Medium Density Residential zone. Beyond the topography of the site, the variation is also measured to lift overruns which provide access to the upper levels of the proposal. The variation therefore partly results from the provision of equitable access to all levels of the development.
- It is unnecessary to require compliance with the height standard within the site context, as the proposed variation will not result in significant bulk and scale impacts and will

not set a precedent for future increased densities within the locality noting the variation is directly the result of environmental planning grounds specific to the subject site.

In line with the decisions in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, it is clear that compliance with a development standard is unreasonable or unnecessary if the objectives are met.

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.

Preston CJ noted in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under clause 4.6, the aspect of the development that contravenes the development standard should be the focus (as opposed to the development as a whole) of any analysis.

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 is a result of an environmental constraint specific to the site – topography of the land and natural features, noting the site has a fall of approximately 9.1m from the rear boundary to the street frontage, and a cross fall of 4.95m from the central-west portion of the site to the central-east portion. The application seeks consent for a permissible form of development within the zone that is consistent with the envisioned form of development within the 11m height control which applies to the site – three storeys. It is submitted that the variation to the height standard is a result of providing an appropriate built form – three storeys that is compatible with surrounding development, whilst responding to the topography of the land.
- The variation to the maximum permissible building height results from the roof form and eastern roof parapet of the front building and lift overrun of the rear building on the site. These elements do not result in any material environmental impacts beyond that of a compliant development. Dickson C confirmed in *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* (Paragraph 78) that the avoidance of impacts is an environmental planning ground as it promotes ‘good design and amenity of the built environment’ being an objective of the EPA Act.

In this instance, the variation is the result of building elements which are located above the lowest sloping portions of the site including a riparian corridor, noting a three storey form would otherwise be able to be contained within an 11m height plane on a flat site. The variation to the height limit does not contribute to additional bulk and scale noting the lift overrun and roof form of the central building sit below

the maximum height of the adjoining properties and will not visually dominate the surrounding development or the streetscape.

- The overall height and scale of the development is consistent with that anticipated by the planning controls for the site, and the proposed building scale – three storeys does not result in a building appearance that is incompatible with the development context of the site or the locality. The resultant building form is suitable for the subject site based on what is envisioned by the *Warringah LEP 2011* in providing a *residential flat building* in a medium density zone, and is also compatible with the planning objectives and intended outcomes of the objectives of the R3 Medium Density Residential zone.
- The variation is partly the result of a lift overrun which is required to provide equitable access to all levels of the development. As such, the height variation measured to the lift overruns is a result of the function of the use – *residential flat building* being a permissible land use within the zone.
- The development is for a residential flat building development containing 4 x dwellings and achieves the relevant aims of the *Warringah LEP 2011* as follows:
  - 1.2.2(b) & (c) – The proposed variation allows for a development which will contribute to a range of housing to meet the needs of the residents of Dee Why. The proposed 3 bedroom and 3 bedroom + study units will contribute to unit stock within the vicinity of the Dee Why Local Centre and will serve to meet the housing needs of varying demographics within the area.
  - 1.2.2(d) – The proposed development will enhance the residential use of the R3 Medium Density Residential zone through the infill development of a remnant lot within the zone that is within close proximity to public transport and nearby employment centres. The proposal is compatible with neighbouring properties with respect to bulk, scale and appearance and will contribute to a historically underrepresented housing stock within unit development – 3 bedroom apartments.
  - 1.2.2(f) – The development has been designed in response to the environmental features of the land – riparian corridor and site topography and will not have a significant adverse impact upon the environmental quality of the locality.

**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 pursuant to 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 *Randwick Council v Micaul Holding Pty Ltd and Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in Clause 4.6(3)(a) and (b), but indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)(a) and (b).

The relevant items in Clause 4.6(3) of the LEP have been adequately addressed above in order to enable the consent authority and the Court to form the requisite opinion of satisfaction.

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

In relation to clause 4.6(4)(a)(ii), the proposed residential flat building is in the public interest because it is consistent with the objectives of the height of buildings standard (addressed above) and the objectives for development in the R3 Medium Density Residential zone. The development proposal is consistent with the objectives of the zone as follows:

#### **• Objectives of the R3 Medium Density Residential Zone**

The objectives of the R3 Medium Density Residential zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium 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 medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*
- *To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.*

The development proposal meets the applicable objective of the zone based on the following assessment:

- The proposal provides for additional housing consistent with the medium density residential environment within a built form that is suitable for the site and compatible with the character of the streetscape;
- The proposal contributes to a variety of dwelling types to contribute to the housing needs of the community within the medium density zone, and includes 3 x bedroom and 3 x bedroom + study units;
- The development has been designed to respond to the site context – natural features of the land and has been designed across two built forms within a



landscaped setting that incorporates native canopy tree plantings to ensure the development is viewed within a landscaped setting;

- The development proposal presents an articulated built form to Redman Road being consistent with the bulk and scale of adjoining development, and is of a high visual quality.

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

- The development proposal presents a three storey form to the streetscape with the resultant built form being compatible with the adjoining properties. The development will not present unreasonable bulk and scale impacts to the public domain or adjoining properties.
- The building is an articulated/contemporary built form that is a suitable built form – height for this site that responds appropriately to the topography and environmental features of the land.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with, and achieves the objectives of the development standard and the R3 Medium Density Residential zone.

For these reasons, the proposal does not undermine the integrity of the height of buildings 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.

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.*

- a) 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 R3 Medium Density Residential zone.
- b) The public benefit of maintaining the development standard is not considered significant because the proposed development has been designed in a form and

scale that is appropriate for the subject site when considering the surrounding development context.

- c) 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 11m maximum building height applicable to the development pursuant to Clause 4.3 of the *Warringah LEP 2011*. Notwithstanding, the proposal has been designed with a built form that is consistent with the intent of the height standard and anticipated form of development for development within the R3 Medium Density Residential zone.

The variation to the building height standard is a direct result of an environmental planning ground specific to the site – topography, and does not attempt to affect the planning outcome for the broader locality; rather the proposed variation and overall development is consistent with the scale and form of development planned for the locality.

The elements of the development which vary the control do not result in an overbearing built form, rather the proposal has been designed within a three storey form that is compatible with the adjoining residential flat building development to the east and west. The proposal will not adversely impact upon the public domain or adjoining properties and will not generate unreasonable overshadowing or amenity impacts.

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

Chapman Planning Pty Ltd  
Member PIA