

# Appendix A

## Clause 4.6 Justification

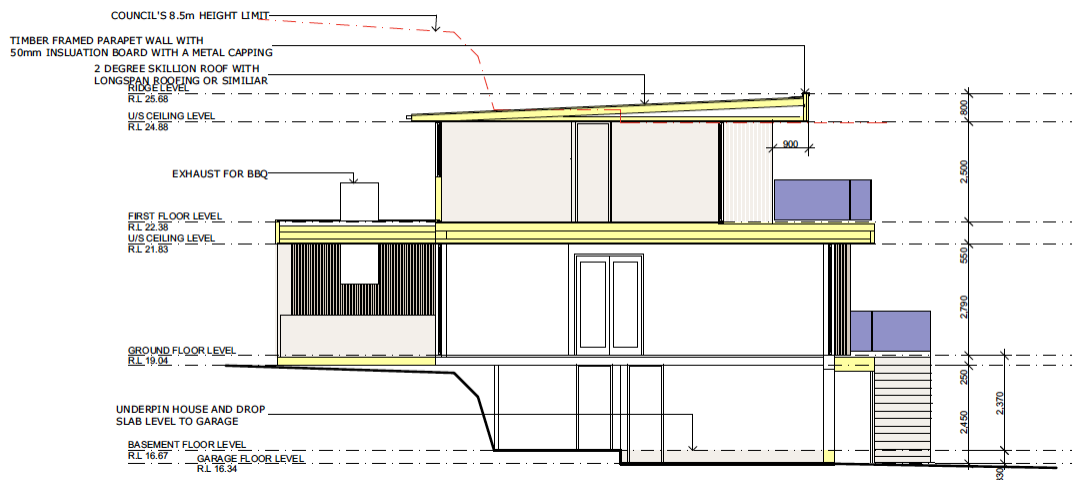
### No 44 Cumberland Avenue, Collaroy

#### Introduction - Content of the clause 4.6 request

Clause 4.3 of the Warringah LEP 2011 relates to Building height. The maximum permissible building height for the subject site is 8.5m.

The proposed development has a maximum technical building height of approximately 9.3m given that part of the proposed upper level is to be constructed over part of the lower-level excavated storage area. The extent of the variation is approximately 0.8m or 9.4%.

Given the above non-compliance with clause 4.3 of the LEP, consideration of the matter is given pursuant to the provisions of clause 4.6 of the LEP. The variation to the height control occurs primarily due to the overlap of floors and the existing ground level of the lower level within an excavated portion of the site.



The objectives of clause 4.6 of the LEP 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.

Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome.**

The proposed increase in building height occurs owing to the proposed construction of the upper level over part of an excavated lower level of the dwelling. A recent L&E Court case, *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* states that *the existing ground level on a brownfield site must be taken from the excavated ground level below the previous natural contours of the site.* Accordingly, an exaggerated building height eventuates.

A degree of flexibility to the application of the building height development standard is warranted in this instance.

It is significant to note that the variation does not result in excessive floor space ratio or development density. The variation does not manifest in an overdevelopment of the site. The existing dwelling is structurally sound and retains quality floor space worthy of retention. The location of the upper level as proposed is logical and appropriately relates to the street, rear yard and neighbouring dwelling circumstances. It is noted that only a small portion of the roof encroaches into the maximum permissible height limit. Typical the proposed upper level is compliant relative to external ground levels around the dwelling.

Clause 4.6 of the instrument provides flexibility when applying development standards.

The proposed development has been architecturally designed to provide a well composed building that provides good amenity for future occupants, which respects the amenity of existing and future neighbouring development and which is compatible with the emerging character and development pattern of the locality.

No adverse planning consequences (privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise from the variation with the proposed development sitting comfortably on-site within the required setbacks. Rather, in this case the variation facilitates a good design outcome in terms of amenity, streetscape and built form.

The proposed departure from the building height relates to the roof only, which is centrally located on-site.

For reasons expressed in this submission the ‘flexibility’ provided by clause 4.6 of the LEP facilitates design outcome that does not impact on any adjoining property despite the proposed variation to the building height standard.

*(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:

The height development standard is not expressly excluded from the operation of clause 4.6.

*(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

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

A written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard as identified within the *Environmental Planning and Assessment Regulation 2021*.

*(1) This section applies to a development application that proposes, in accordance with a relevant EPI provision, development that contravenes a development standard imposed by any environmental planning instrument.*

*(2) The development application must be accompanied by a document that sets out the grounds on which the applicant seeks to demonstrate that—*

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

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

### **Objectives of development standard**

The objectives of the height control development standard 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 subject site is zoned to accommodate low density residential development and the immediate precinct does contain dwellings built on similar sized lots which contain similarly scaled 2 and 3 level dwellings. The proposed dwelling is proportionate with its site boundaries and will be consistent in this regard.

There will be no disruption of views, loss of privacy or significant loss of solar access given the site context and the design initiatives that have been incorporated into the upper level.

There will be no erosion of bushland or scenic quality.

### **Compliance unnecessary**

The proposed development proffers an alternative means of achieving the objective of the minimum building height standard. The surrounding precinct maintains sloping land and regular detached dwellings in the zone.

The proposed development achieves the desired residential character without comprising the amenity of the surrounding area in terms of visual impacts and solar access. A skillion roof is proposed in this instance and considered necessary due to the existing slope of the site.

The minor exceedance of the building height standard does not result in a building that is excessively bulky. The dwelling is well recessed on the site and the proposed upper level will not be obvious from the street.

The containment of the proposed addition mostly within the footprint of the dwelling also retains substantial landscaped area on-site.

The non-compliance will not give rise to adverse impacts, which would affect neighbouring dwellings.

As the development proffers alternative means of achieving the objectives of clause 4.3 based on the site context, strict compliance is unnecessary.

### **Compliance unreasonable**

There would be no purpose served if strict compliance was required by the consent authority.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (shadowing and privacy). There are no adverse ‘flow on’ non compliances or adverse environmental impacts arising from the variation in this instance.

A compliant development (building height) would have a similar performance regarding overshadowing and bulk/scale.

Despite the building height variation, a standard two storey building is achieved facilitating the orderly and economic development of the land.

No particular benefit would be derived from the application of the standard in this instance (rather compliance would result in negative urban design outcomes); strict compliance is therefore unreasonable.

### **Environmental planning grounds**

The term “environmental planning grounds” is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts: Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

*Such grounds include matters that ‘relate to (the) subject matter, scope and purpose of the Act, including the objects in s 1.3.’<sup>[14]</sup> This leaves developers with a wide range of grounds on which they can rely to justify a 4.6 request, including, for example, that the variation will promote good design and amenity, will allow for the orderly and economic development of land or*

*that it will promote ecologically sustainable development by integrating relevant economic, environmental and social considerations.*

In this case the variation to the building height control does not impact on the ability of the proposal to accord with all other development standards and controls.

Compliance with the building height control in this instance would not achieve any additional architectural integrity or urban design merit of the development, as previously discussed.

The proposal represents the orderly and economic development of the land and does not give rise to adverse amenity issues to neighbours.

The ground level of the dwelling is elevated to address the fall in the land. The extent of the building height non-compliance is minor given the dwelling is well setback on-site and will be consistent in scale to other existing dwellings nearby and the evolving character of the site.

The variation will promote good design and internal amenity by providing a conventional finish to the rear elevation. The variation will allow for the orderly and economic development of land and will promote ecologically sustainable development by integrating the built form within the immediate locality. There are no adverse economic, environmental, or social impacts arising.

The proposed development is consistent with the objectives of the R2 low density zone, which 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.*

The proposed development is consistent with the objectives as follows:

The proposed development provides for the construction of a standard and well-proportioned upper-level addition. The development has been site specifically designed and will positively contribute to the streetscape. A

general upgrade of the existing built form will also occur which is a positive planning outcome.

The proposed development assists in establishing the desired future character for the locality. The proposed development is well contained on-site and will not result in significant adverse amenity impacts on adjoining properties.

The proposed development provides an appropriate low-density infill development and contemporary construction.

There has been a progressive change in the built character of the locality with a few older style dwellings being replaced with new contemporary two and three level dwellings. The height mass and scale of the development is compatible with that of other development in the locality.

The design solution respects the development pattern of the locality (the spatial arrangement of buildings having regard to side, rear and street building setbacks) maintaining the rhythm of the street.

The proposed height variation is of no consequence in respect of this objective. Approval of the proposed development will have no adverse impact on any other nearby development opportunities.

The proposed height encroachment does not result in any significant view loss, loss of privacy or overshadowing in the context of the site.

There are no adverse heritage impacts associated with the proposed development. The height and scale of the development is typical within the residential context.

Standard floor to ceiling height is proposed over two levels inclusive of a standard roof pitch. Having regard to the above the proposal is consistent with the objectives of the height control and the objectives of the zone.

Having regard to the above there are well founded environmental planning grounds to vary the development standard in this instance.

## Conclusion

No adverse matters arise in respect of the above considerations.

In view of the above, the proposed variation from the development standard is reasonable in this instance. A low pitched roof profile is proposed establishing a contemporary built form which best addresses site circumstances.

The variation from the development standard is therefore well founded and approval of the application is recommended.

A handwritten signature in black ink that reads "Nigel White". The signature is written in a cursive style with a large, looping initial 'N' and a stylized 'W'.

Prepared by: Nigel White  
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April 2024