Minto Planning Services

Town Planning Consultants

PROPOSED DWELLING ALTERATIONS AND ADDITIONS (NEW DWELLING)
92 NARRABEEN PARK PARADE, WARRIEWOOD

Clause 4.6 – Exceptions to development standards (Height of Buildings)

This Clause 4.6 Submission is prepared in support of a Development Application which seeks approval for the modification of the existing consent which was approved via DA2023/0049, so as to seek modifications to the approved dwelling alterations & additions to a dwelling house and swimming pool upon land identified as Lot 25 in DP 23008 and which is known as 92 Narrabeen Park Parade, Warriewood.

By way of background, it is advised that DA2023/0049 was approved by the Council on the 16th June 2023. The consent granted approval for a*lterations and additions to a dwelling house including a swimming pool* subject to conditions. It is advised that demolition works associated with the construction of the dwelling alterations and additions have been physically commenced.

The demolition works identified a series of structural issues with the existing building which will require the demolition of the existing building fabric. Once demolished it is proposed to re-build the dwelling so as to have a similar appearance and configuration as to that previously approved by the Council via DA2023/0049. It is noted that there are further modifications proposed by this application.

It is acknowledged that the above works would not constitute dwelling alterations and additions and would not result in substantially the same development. Accordingly, S4.55 of the Act dos not apply and a new DA which seeks to modify the existing consent is proposed.

This application is made consistent with the decision of the Court in *Waverley Council v CM Hairis Architects* (2002) NSWLEC 180 where it was established that a later development consent can "amend" an earlier development consent on the same property without the need for the earlier consent to be the subject of a modification application pursuant to section 4.55 of the Act. This is particularly the case where the subsequent consent does not satisfy the substantially the same test.

There is no statutory or other legal constraint upon the number of development applications that a person can make in respect of the same land. There can be more than one valid and operating consent in existence at any one time and it is possible to undertake works pursuant to more than one consent at a time, per *Waverley Council v CM Hairis Architects*.

This variation has been prepared based upon the following documentation:

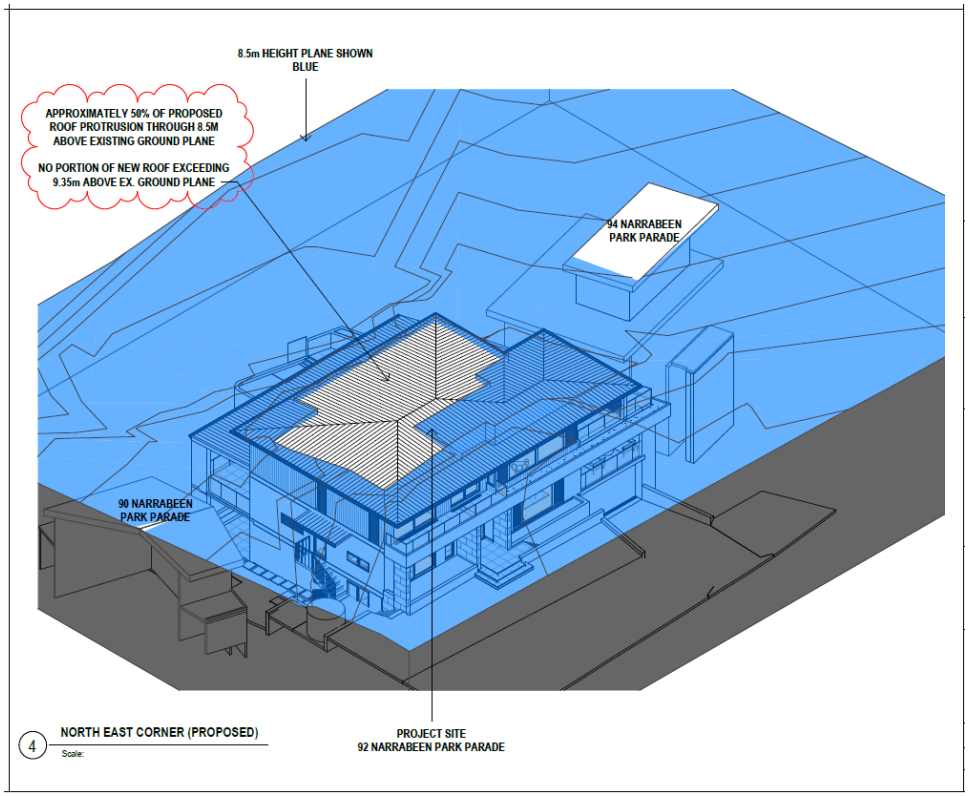
- Amended Architectural Plans prepared by ID\Studios, Project No. 2210 and dated 16/4/25.

A variation is sought in respect of compliance with Clause 4.3 – Height of Buildings of the Pittwater LEP 2014.

The site is subject to a maximum building height of 8.5m.

The proposal provides for a maximum building height of 9.35m resulting in a non-compliance with this clause.

The proposed non-compliance equates to 850mm or a 10% variation.



The following Clause 4.6 variation is provided in support of the proposed Height of Building non-compliance.

This Clause 4.6 variation has been prepared in accordance with the approach adopted by the Land & Environment Court of NSW in its recent Court decisions.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

1. **What are the objectives of Clause 4.6 and is the proposal consistent with them.**

The objectives of Clause 4.6(1) of the LEP are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

It is also considered in the circumstances, a flexible approach to the application is warranted.

2. **Is the standard to be varied a Development Standard to which Clause 4.6 applies.**

A "development standard" is defined in Section 4 of the Environmental Planning & Assessment Act as:

> ***development standards*** *means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*
> *(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
> *(b) the proportion or percentage of the area of a site which a building or work may occupy,*
> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
> *(d) the cubic content or floor space of a building,*
> *(e) the intensity or density of the use of any land, building or work,*
> *(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
> *(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
> *(h) the volume, nature and type of traffic generated by the development,*
> *(i) road patterns,*
> *(j) drainage,*
> *(k) the carrying out of earthworks,*
> *(l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
> *(m) the provision of services, facilities and amenities demanded by development,*
> *(n) the emission of pollution and means for its prevention or control or mitigation, and*
> *(o) such other matters as may be prescribed.*

Clause 4.3 is contained within Part 4 of the Pittwater LEP 2014 and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to what matters constitute development standards.

It is also noted that Clause 4.3 does not contain a provision which specifically excludes the application of Clause 4.6 and vice a versa.

On this basis it is considered that Clause 4.3 is a development standard for which Clause 4.6 applies.

3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under the Pittwater Local Environmental Plan 2014):

> *(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.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The first justification is applicable in this instance.

The following assessment of the proposal is provided against the objectives of Clause 4.3 of the Pittwater LEP 2014.

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

It is my opinion that the proposal will result in development that, by virtue of its height and scale, is consistent with the desired character of the locality.

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

It is my opinion that the proposal will result in a building which is compatible with the height and scale of surrounding and nearby development.

It is submitted that the proposed non-compliance is of a technical nature whereby the non-compliance occurs as a result of an existing excavation which occurs upon the site and is related to the existing lower ground floor level.

It is noted that were the height of building to be measured from the original ground level (estimated) that the proposal would comply with the 8.5m height of building control.

(c) to minimise any overshadowing of neighbouring properties,

It is my opinion that the proposal will not result in any unreasonable overshadowing of adjoining properties.

(d) to allow for the reasonable sharing of views,

It is my opinion that the proposal will not result in any unreasonable view impacts.

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

The proposal has been designed so as to positively respond to the existing ground levels and site conditions.

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

It is my opinion that the proposal and the proposed breach will not result in any unreasonable adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

4. Are there sufficient environmental planning grounds to justify contravening the development standard.

Consistent with the findings of the Court in *Initial Action P/L v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC* an applicant is required to demonstrate in writing that there are sufficient environmental planning grounds to justify the variation.

In Initial Action at [24], Preston CJ stated, that the

"… focus of cl. 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds".

Further he stated,

"… the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl. 4.6(4)(i) that the written request has adequately addressed this matter".

In order to determine environmental planning grounds relevant to the non-compliance it is often accepted to relate the departure to the objects of the Act as set out at Section 1.3 – Objects of the Act.

Relevant to the proposal the following submission is provided in relation to the question as to whether there are sufficient environmental planning grounds to justify the non-compliance.

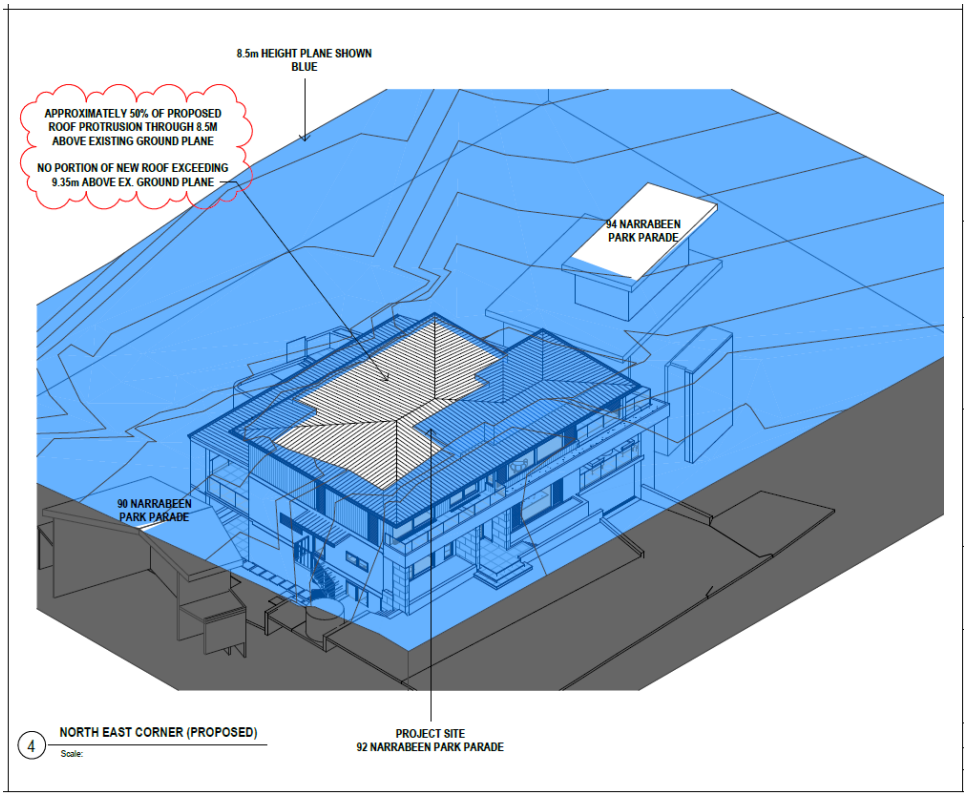
<u>What is the aspect or element of the development that contravenes the development standard</u>

The site is subject to a maximum building height of 8.5m.

The proposal provides for a maximum building height of 9.35m resulting in a non-compliance with this clause.

The proposed non-compliance equates to 850mm or a 10% variation.

The variation applies to approximately 50% of the overall roof form as detailed by the image below.



What are the environmental grounds associated with the departure

It is my opinion the environmental planning grounds associated with the proposed departure are:

1. It is submitted that the proposed non-compliance is of a technical nature whereby the non-compliance occurs as a result of an existing excavation which occurs upon the site and is related to the existing lower ground floor level.

2. It is noted that were the height of building to be measured from the original ground level (estimated) that the proposal would comply with the 8.5m height of building control.

3. The proposal only results in a marginal increase in the height of the existing building and arises as a result of the need to reconstruct the existing structurally unsound roof so as to comply with applicable standards.

4. The proposed non-compliance will not result in any unreasonable impacts upon the amenity of adjoining properties.

5. The proposed non-compliance will not result in any unreasonable impacts upon the streetscape, public domain or character of the surrounding locality.

It is my opinion based upon the above that the departure does promote good design and amenity of the built environment consistent with 1.3(g) of the Act.

Are the environmental planning grounds sufficient to justify contravening the development standard

It is my opinion that the environmental planning grounds associated with the proposed non-compliance sufficient to justify contravening the development standard as required by Clause 4.6(3)(b) of the LEP.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the maximum height of building control as required by Clause 4.3 of the Pittwater LEP 2014 is appropriate in this instance.

Andrew Minto
Graduate Diploma (Urban & Regional Planning), Associate Diploma (Health & Building Surveying). MPIA.
MINTO PLANNING SERVICES PTY LTD
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