

**APPENDIX 1 – CLAUSE 4.6 VARIATION HEIGHT
VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM
BUILDING HEIGHT REQUIRED BY CLAUSE 4.3 OF THE WARRINGAH LOCAL
ENVIRONMENTAL PLAN 2011**

For: Proposed Dwelling Additions/Alterations
At: 50 Condoever Street, North Balgowlah
Applicant: Mr Rose

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

2.0 Background

Clause 4.3 restricts the height of a building and refers to the maximum building height noted within the “*Height of Buildings Map*.”

The maximum building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed new dwelling will provide a height of up to 8.9m which exceeds Council’s maximum building height by 400mm or 4.7% and therefore does not comply with this control.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

3.0 Purpose of Clause 4.6

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (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.*

The development will achieve a better outcome in this instance as the non-compliance relates directly to an eave overhang which is required to meet the BASIX requirements. Amendments to ensure strict compliance would leave northeast facing windows/openings unprotected.

The proposal will provide for the construction of additions to an existing dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum overall height, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed dwelling has been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the Samadi judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *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.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control (400mm), the proposed dwelling additions will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

- ***To provide for the housing needs of the community within a low density residential environment.***

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed improvements to an existing dwelling which will provide form an appropriate level of family accommodation and in a form which respect the predominant height and scale of the surrounding dwellings.

The development will see a minor noncompliance with the building height control of up to 400mm, with the non-compliance relating to a very small portion of an eave overhang. The contemporary building form with low pitch skillion roof and the appropriate external finishes considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade and building elevation, together with the increased side setbacks and recessive external finishes to the upper level will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and will not be a visually element in the area.

The compatible form and scale of the resultant dwelling will meet the housing needs of the community within a single dwelling house which is a permissible use in this low density residential zone.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

- ***To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.***

The proposal does not result in the removal of any significant vegetation, with an Arboricultural Report submitted as part of the application. The proposal provides for 41% of the site to be available for landscaping which complies with the DCP requirements. The proposal provides for landscaping adjacent to the driveway to ensure a landscaped streetscape. The rock outcrops and existing landscaping to the rear of the dwelling is to remain unchanged.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

(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.*

Comments

Despite the minor variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

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

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the surrounding and nearby development.

The surrounding area is predominantly characterised by two storey development, some located over basement garages given the topography of the area.

The proposal seeks to accommodate additions to the existing dwelling within a contemporary building form, with the slope of the site towards the street and previous excavation resulting in a portion of the roof being up to 8.9m in height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing appropriate boundary setbacks which demonstrated by compliance with Council's building envelope specified in the DCP.

The proposed external colour and materials palette utilises complimentary finishes to ensure that the building's visual height and scale is further minimised.

The additions step down the site with the front portion of the additions well within the Council controls.

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

Due to the slope of the site towards the street, the subject and surrounding properties enjoy views to the northeast over Condoover Reserve. The properties to the rear of the subject site, namely No. 17 Kimo Street, are elevated such that the proposal will not obstruct any views from this property. It is noted that the floor levels of 17 Kimo Street are above the maximum height of the proposed additions. With respect to the adjoining properties, No. 48 and 52 Condoover Street, the street setbacks provided to the proposed additions are such that the views from these adjoining properties will be unaffected by the proposal.

In relation to privacy, the proposed additions have been designed to ensure an appropriate level of privacy is maintained to the adjoining properties. This is discussed in detail in the Statement of Environmental Effects (in response to Clause D8 Privacy of the DCP). The appropriate design, orientation and setbacks ensures privacy is provided to the adjoining properties.

Shadow diagrams, have been prepared which depict both the existing and the proposed shadowing as well as elevational diagrams.

These diagrams depict that all adjoining properties will continue to receive at least 3 hours solar access to private open space and north facing living room windows on the winter solstice.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The proposal is not visible from any coastal waters or foreshore nor is it within a bush environment.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The proposal provides for a well articulated development that is provided with sufficient front setback and will not have any detrimental impact on Condoover Reserve.

Despite the variation to the building height control which occurs as a result of the sloping topography of the site and BASIX requirements, proposal is generally consistent with the height and scale of newer development in the locality.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the alterations and additions to an existing dwelling, which is constrained by the nature of the existing development on site and the sloping topography of the site.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m. As a result of the slope of the site towards the street and previous excavation, a very small portion of the roof overhang/eave will be up to 8.9m above ground level (as previously excavated). When measured from natural ground level, the proposal would have a maximum height of approximately 7.5m and comply with this control.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- The development will maintain a compatible scale relationship with the existing residential development in the area. Development within this portion of Condoover Street and surrounding properties has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.
- The proposed additions to the dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposal will maintain an appropriate area of soft landscaping which readily complies with Council's landscaping requirements, and the site will maintain an appropriate balance between the landscaping and the built form.

In the Wehbe judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

Comment: It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

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

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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: Whilst it is not suggested that Council has abandoned its control, variations to the maximum building height control have been granted in the immediate vicinity, where Council has considered it appropriate to do so for development that meets the objectives of the zone. In this instance it is considered that the proposed development appropriately addresses the zone objectives and is worthy of the support of Council.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 4.3 provide a maximum building height of 8.5m for the subject development.

The proposed new dwelling the dwelling will provide a height of 8.9m or a 400mm/4.7% variation to the control.

The development is justified in this instance for the following reasons:

- The works will present a minor variation to the building height control which occurs as a result of the site's sloping topography, previous excavation and the requirements of BASIX. The resultant dwelling is considered to be compatible with the form and nature of the surrounding development.
- The proposal is consistent with the character of development in the locality.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed development is considered to promote good sustainable design with the non-complying element relating to a roof overhang/eave which provides sun protection to northeast openings which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development.

That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the *Four2Five* decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The external form of the proposed dwelling is stepped to follow the sloping topography of the site and results in a dwelling which is compatible in scale to its surrounding neighbours, which promotes the orderly & economic use of the land.

- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Condoover Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.
- The proposal promotes ecologically sustainable development by retaining the existing dwelling and providing for an eave (non-complying component) to provide shading as required by BASIX to northeast openings.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposes a departure from the maximum building height control, with the proposed new dwelling to provide a maximum building height of 8.9m.

This variation occurs as a result of the siting of the sloping topography of the site.

This objection to the maximum building height control specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
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