

**PROPOSED RESIDENTIAL FLAT BUILDING
142 OCEAN STREET, NARRABEEN**

**Clause 4.6 - Exceptions to development Standards
Variation to Clause 4.3 - Height of Building**

The proposed development will result in a built form which has a height in excess of the maximum 8.5m height of building control as required by Clause 4.3 of the Warringah Local Environmental Plan 2011.

The proposal will result in a maximum building height of 8.623m measured to the top of the proposed planter box associated with the provision of a green roof as part of the proposed development. The provision of a green roof is in response to Council's Request for Information letter dated 27th October 2021 and wherein it was requested under the headings of "Sustainability" and Landscaped Area" that:

Green roofs should be used wherever possible. An exceedance of building height to accommodate a rooftop garden (not useable space) can be supported in principle).

It is advised that the height non-compliance is wholly related to the provision of the proposed roof top garden.

The proposed height non-compliance equals 123mm or 1.44% of the maximum permitted height of building control.

Given that the proposal does not comply with the maximum height control of 8.5m as required by Clause 4.3 of the Warringah LEP 2011 and in order for consent to be granted to the proposal a variation pursuant to Clause 4.6 of the LEP is required.

This Clause 4.6 variation has been prepared having regard to the recent decisions of the Land & Environment Court.

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 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 as flexibility is required in order to improve the sustainability of the development and to provide a green roof in accordance with the request of the Council.

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

Clause 4.3 is contained within Part 4 of the LEP 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 matters which 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.

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.

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

- 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.

It is my opinion relevant to this matter that compliance with the requirements of Clause 4.3 is both unreasonable and unnecessary in the circumstances of this case for the reason that the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In addition to the above it is noted that the non-compliance is related to the provision of a green roof and which has been requested by the council in circumstances where the council have stated that *An exceedance of building height to accommodate a rooftop garden (not useable space) can be supported in principle*).

The proposal in my opinion will not result in any unreasonable impacts upon either adjoining properties or the streetscape as a result of the non-compliance.

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.

It is considered that a contravention of the development standard is justified on environmental planning grounds given that the non-compliance is related to the provision of a green roof and which has been requested by the Council in circumstances where the council have stated that *An exceedance of building height to accommodate a rooftop garden (not useable space) can be supported in principle*).

5. Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed development is in my opinion in the public interest because it is associated with the provision of a high quality residential flat building upon the site and which seeks to incorporate sustainable building practices including a green roof and which will make a positive contribution to the built form character of the locality in a manner which is otherwise compliant with the requirements of the LEP, the applicable zone objectives and the objectives of the particular standard.

In this regard, it is submitted that in relation to the objectives for the R3 - Medium Density Residential zone that:

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

The proposal seeks to provide for four apartments upon the site as part of a residential flat building which otherwise complies with the requirements of the Council.

- *To provide a variety of housing types within a medium density residential environment.*

The proposed development includes apartments having differing levels of accommodation and ancillary features.

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

Not applicable.

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

The proposal is considered to provide for a landscape outcome for the site that is 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.*

It is my opinion that the proposal will make a positive contribution to the character of the locality and includes a high quality design.

The proposal is also considered to be consistent with the objectives of Clause 4.3 - Height of Buildings in that:

1. The proposed development is considered to result in a development which is compatible with the height of surrounding and nearby development.
2. The proposal will not in my opinion result in any unreasonable visual impact, disruption of views, loss of privacy and loss of solar access.
3. The proposal will not in my opinion result in any adverse impact of development on the scenic quality of Warringah's coastal and bush environments.
4. The proposal will not visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.

It is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning.

7. What is the public benefit of maintaining the development standard.

It is my opinion that there is no public benefit in maintaining the development standard in this instance given the high quality of the proposal including the sustainability measures proposed and the absence of any unreasonable detrimental impacts.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the height requirements of Clause 4.3 of the Warringah LEP 2011 is appropriate in this instance.

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