

Northern Development Assessment

CLAUSE 4.6 REQUEST FOR VARIATION OF THE HEIGHT OF BUILDINGS STANDARD UNDER CLAUSE 4.3(2) OF WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

**TO ACCOMPANY
DEVELOPMENT APPLICATION**

**FOR
PROPOSED ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING**

**AT
106 VICTOR ROAD, NARRAWEENA
LOT 2 DP 26148**

Prepared By

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Clause 4.6 Request – Height: 106 Victor Road, Narraweena

1.0 INTRODUCTION

This request is made under the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011 (LEP 2011).

This Clause 4.6 Request has been prepared in relation to the Height of Buildings Standard under Clause 4.3 of LEP 2011 in support of a Development Application (DA) seeking approval for alterations and additions to an existing residential dwelling on land described as Lot 2 DP 26148, 106 Victor Road, Narraweena (The site).

The Objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes arising from a proposed development.

For the reasons referred to in this Clause 4.6 Request, I consider that variation of the Height of Buildings Standard in the circumstances of this DA would achieve a better planning outcome, rather than requiring strict adherence to the height of Buildings Standard.

Clause 4.6 of LEP 2011 allows a Consent Authority to grant a variation to a Development Standard as prescribed below.

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

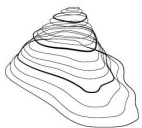
- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(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.

(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.*

Note—



Clause 4.6 Request – Height: 106 Victor Road, Narraween

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(ba) clause 4.4, to the extent that it applies to land identified on the Key Sites Map as Site F, Site G, Site H or Site I,

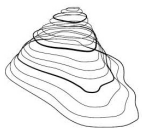
(c) clause 5.4,

(caa) clause 5.5.

(d) (Repealed)

(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the Height of Buildings Map on land shown on the Centres Map as the Dee Why Town Centre.

(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the Height of Buildings Map if the maximum height is allowable under clause 7.14.



Clause 4.6 Request – Height: 106 Victor Road, Narraween

In the case of *Al Maha Pty Ltd v Strathfield Council* [2017] NSWLEC 1083, Presiding Commissioner C Dickson of the Land and Environment Court (Court) held that:

“[63] It is clear from a reading of cl 4.6 of LEP 2012 that the onus is on the applicant to meet the tests of cl 4.6 in seeking flexibility to the Height or FSR standards by demonstrating that the breaches of the two development standards are justified. Ms Ogg provided a written request under cl 4.6(3) which seeks to justify the contravention of the FSR Standard (FSR Request).

[64] In Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7, Preston CJ outlines that Commissioners on appeal exercising the functions of the consent authority have power to grant consent to developments that contravene the building height standard, or the FSR standard (cl 4.6(2)). However, they cannot grant such a development consent unless they:

- (1) are satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii))*
- (2) are satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii))*
- (3) have considered a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with they are satisfied that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6 (4)(a)(i)).*
- (4) have considered 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)).”*

In addition to the abovementioned Court judgments, there are other relevant Court judgements relating to the application of a Clause 4.6 Request including, but not limited to, *Winton Property Group v North Sydney Council* [2001] NSW LEC 46, *Wehbe v Pittwater Council* [2007] NSW LEC 827, *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90, and *Moskovich v Waverley Council* [2016] NSW LEC 1015.

Given the above judgment of his Honour, Chief Judge Preston, which was followed by Presiding Commissioner C Dickson, this Clause 4.6 Request seeks to address the matters raised in (1) - (4) above and the provisions of Clause 4.6 of LEP 2011.

Clause 4.6 Request – Height: 106 Victor Road, Narraweena

I note that the Height of Buildings Development Standard is not specifically excluded from the operation of Clause 4.6 of LEP 2011.

2.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

4.3 Height of buildings

(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.*

Comment:

Clause 4.3 entitled “*Height of Buildings*” applies to the proposed development.

The Height of Buildings Standard applicable to the proposed development on the subject site is 8.5m under LEP 2011, pursuant to Clause 4.3(2).

The proposed alterations and additions incorporate a first floor addition, which results in a breach of the Height of Buildings Standard due to the measurement being taken from the existing excavated garage area and the minor level of overlapping with the eastern extent of the first floor roof form. I note that the remainder of the proposed development, not located over the existing excavated garage, remains well below the Maximum Height of Buildings Standard of 8.5m.

The maximum height of the proposed development will be 10.28m relating to the proposed first floor roof form located over the existing excavated garage area. This results in a 21% breach of the Height of Buildings Standard. Despite this breach, I consider that variation is reasonable. I should note that the Land and Environment Court has held on previous occasions that the degree of the breach is not the ultimate determining factor in the deciding whether to support a request for variation of a Development Standard.

I consider that the breach of the Height of Buildings Standard does not contribute to an unreasonable perceived bulk, scale and height of the proposed development. I note the judgement by Commissioner O’Neill of the Court in *Bettar v Council of the City of Sydney [2014] NSWLEC 1070 (Bettar)*. In the *Bettar* judgement, there was a sunken basement level with the

Clause 4.6 Request – Height: 106 Victor Road, Narraweena

public footpath at a higher level. Commissioner O’Neill adopted the level of the “*footpath at the boundary*” because it “*bears a relationship to the context and overall topography*”.

A similar scenario was considered by Acting Commissioner Bindon in *Nicola v Waverley Council* [2020] NSWLEC 1599 (*Nicola*).

The decision in *Nicola* is an example of where the *Betta* method was applied to levels contained within the subject site which are the subject of the development application.

In this case, applying *Betta* and *Nicola*, if one views the subject site from adjoining properties to the south (104 Victor Road), the perceivable breach is significantly reduced. The proposed built form would be perceived as having a maximum building height of 4.92m to the top of wall and 7.92m to the maximum ridge level (which is limited to the length of 13m for the first floor addition).

When viewed from the north (112 Victor Road, noting that this property is separated from the subject site by a number of access handles providing an approximate 12 metres of separation distance between the 2 boundaries), the proposed built form would be perceived as having a maximum building height of 8.5m at its highest point. I note that the northern presentation incorporates significant façade modulation and substantial increased setbacks at each level.

This Clause 4.6 Request seeks to demonstrate that compliance with the Height of Buildings Development Standard is unreasonable or unnecessary by reference to the first test in *Wehbe*, that is that the objectives of the standard are achieved notwithstanding the non-compliance with the Height of Buildings Development Standard.

3.0 PROPOSAL WILL BE IN PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE DEVELOPMENT STANDARD

The proposed development will be in the public interest because it is consistent with both the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out. The subject site is located within the R2 Low Density Residential Zone.

The objectives of the R2 Low Density Residential Zone are as follows:

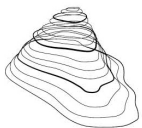
- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment:

The proposed development involves alterations and additions to an existing approved residential dwelling which is permitted with consent in the R2 Low Density Residential zone under Warringah LEP 2011.

I consider that the proposed development satisfies the Objectives of the R2 zone for the following reasons: -

- The proposed alterations and additions will provide for the housing needs of the community within a low density residential environment, maintaining the current residential use of the subject site, whilst providing improved facilities, areas of private open space and amenity for current and future occupants. I note that these improvements to the subject site do not result in unreasonable amenity impacts to adjoining properties or the public domain.
- The proposed alterations and additions will not impact on the ability of other land uses to provide facilities or services to meet the day to day needs of residents. I consider that the scale of the proposed development achieves the desired future character of the neighbourhood.
- The proposed design ensures that compliant level of Landscaped Area and Open Space is maintained ensuring that the low-density residential environment remains characterised by landscaped settings that are in harmony with the natural environment of Warringah. Furthermore, the proposed development does not incorporate the



Clause 4.6 Request – Height: 106 Victor Road, Narraweena

removal of any significant trees and vegetation. It is noted in the Arborist report accompanying the DA that 2 Trees identified as Priority Weeds and an Exempt Species are to be removed and replaced with species that are suitable for the location, such as *Elaeocarpus reticulatus* or *Buckinghamia celsissima*.

The proposed development ensures the residential development remains sympathetic to the existing streetscape and the low density residential environment. These design elements ensure that the proposed development, when viewed from the street, remains in keeping and complements the identified streetscape.

Based on Clause 4.3 of LEP 2011, the relevant Objectives of the Height of Buildings Standard for buildings in Zone R2 – Low Density Residential Zone are as follows:

(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.*

Comment:

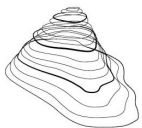
The Height of Buildings Standard applicable to the subject site is 8.5m pursuant to Clause 4.3 under LEP 2011.

Despite the breach of the Height of Buildings Development Standard, I consider that the proposed development complies with the following relevant objectives of this clause;

- The proposed alterations and additions will provide for a building height and roof form that is consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality.
- The degree of breach of the Height of Buildings Standard is significantly contributed to by the topographic landscape and the existing excavated garage slab. I note that the proposed alterations and additions incorporate significant setback modulation to assist in breaking up the built form.
 - The proposed alterations and additions do not result in unreasonable amenity impacts in the form of Visual Impact, Disruption of Views, Loss of Privacy and Solar Access.

Clause 4.6 Request – Height: 106 Victor Road, Narraweena

- In relation to potential visual Impact, I note that the proposed built form when viewed from the south will be perceived as 4.92m to the top of wall and 7.92m to the maximum ridge level of the roof form, noting that this roof form is limited to the first floor addition and does not run for the full extent of the southern elevation. The first floor addition provides significant setbacks from both the front and rear boundary compared to the proposed Ground Floor. As previously noted, when viewed from the north, the proposed northern façade incorporates significant façade modulation and setbacks, assisting in softening the proposed built form.
- In relation to the disruption of views, I note adjoining properties are orientated to the east/west and that there are district views available to the north-east. The adjoining property to the south, at 104 Victor Road, sits upslope of the subject site, furthermore, the proposed first floor level has been setback 6.35m from the proposed ground floor, ensuring the reasonable retention of any views obtained by 104 Victor Road across the side boundary. The adjoining properties to the rear, being 108A and 108B Victor Road also sit upslope of the subject site and are orientated to the north/south.
- In relation to potential Loss of Privacy, I note that the southern elevation limits windows to the Ground Floor Only and that out of these 5 windows, 3 relate to a laundry, bathroom and hallway.
- It is acknowledged that the northern elevation incorporates significant windows and terraces, however, at ground floor, the proposal extends from these existing elements. At the proposed first floor level, the addition is setback 5.5m from the northern boundary, incorporates a green roof running along the extent of the northern elevation and ensures that the east and west facing terraces incorporate privacy walls for the full extent and height of the northern elevation. Furthermore, there is the significant separation distance provided between the northern boundary of 106 Victor Road and the southern boundary of 112 Victor Road which is approximately 12m, resulting in a separation distance between the 2 dwellings of approximately 20m.
- As evidenced by the Shadow Diagrams accompanying this DA, the proposed alterations and additions will not result in any unreasonable overshadowing to adjoining properties.
- In relation to minimising the potential for adverse impact on the scenic quality of Warringah's coastal and bush environments, as previously noted, the proposed design ensures that compliant levels of Landscaped Area and Open Space are maintained. Furthermore, the proposed development does not incorporate the removal of any significant trees and vegetation.
- The location of the subject site and the proposed built form ensure there is no unreasonable visual impact when viewed from public places such as parks and reserves, roads and community facilities.



4.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

For the reasons outlined in this Clause 4.6 Request and the accompanying SEE, I consider that the compliance with the Height of Buildings Standard under LEP 2011 is unreasonable and unnecessary in the circumstances of the proposed development.

The steps to considering in assessing whether compliance with the height of Buildings Development Standard is unreasonable or unnecessary were confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**) and are summarised below:

1. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved, notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**) at [42] and [43].
2. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe* at [45].
3. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe* at [46].
4. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe* at [47].
5. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
6. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are

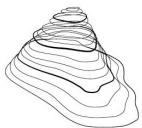
Clause 4.6 Request – Height: 106 Victor Road, Narraween

merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

For the purposes of this request, it is my opinion that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved, notwithstanding non-compliance with the standard, consistent with the “first way” as set out in Step 3 above.

I wish to particularly note the following points: -

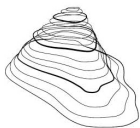
- The proposed development is consistent with the relevant objectives of the Height of Buildings development standard expressed by clauses 4.3 LEP 2011.
- The proposed development achieves the relevant Objectives of the R2 Low Density Residential Zone.
- The proposed development will not result in any unreasonable environmental impacts upon the amenity of neighbouring properties in terms of visual bulk, privacy, overshadowing and view sharing.
- The proposed development satisfies the relevant tests established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446.
- The proposed development will be consistent with the surrounding residential character of the area and will maintain the variety of housing and help meet demand for housing in the locality.
- The overall bulk, scale and streetscape elements of the proposed development remain compatible with the existing and desired future character of the locality.
- The underlying objective would be thwarted if strict compliance with the Height of Buildings development standard was applied as the development satisfies the objectives or purpose of the standard, despite the non-compliance. The development maintains the efficient use of land and provides improved amenity within the existing development, maintaining the variety and availability of housing types in the area.
- For the reasons outlined in the accompanying SEE and this Clause 4.6 Request, I consider that the proposed development results in a range of Positive Outcomes relating to the breaching element:
 - i. The proposed development is permissible within the R2 Low Density Residential Zone and is consistent with the relevant zone objectives. It



Clause 4.6 Request – Height: 106 Victor Road, Narraweena

retains the existing residential use of the site and provides an improved dwelling that is consistent with the density objective for the zone.

- ii. The proposed alterations and additions are generally below or significantly below the Height of Buildings Standard under LEP 2011.
- iii. The proposed development is contextually appropriate to the area and is considered to result in a positive contribution to the streetscape and character of the area in terms of massing and architectural expression.
- iv. The breaching portion of the proposed development complies with Council's Front, Side and rear Setback Controls. In fact, the proposed development provides significantly greater than required setbacks to all boundaries at all aspects of the proposed development.
- v. The proposed alterations and additions do not result in any unreasonable amenity impacts to adjoining properties or the public domain.
- vi. The proposed development results in an improvement in passive surveillance of Victor Road by way of the proposed alterations and additions.
- vii. The proposed development is of a high standard of architectural design, incorporating attractive colours and materials.



5.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

For the reasons outlined in this Clause 4.6 Request and the SEE, I consider that there are strong environmental planning grounds to justify variation of the Height of Buildings Standard.

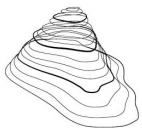
The adjectival phrase “*environmental planning grounds*” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the Environmental Planning and Assessment Act (the Act), including the Objects in Section 1.3 of the Act.

Clause 4.6(3)(b) requires the Applicant to demonstrate that there are sufficient Environmental Planning Grounds to contravene the development standard.

In *Initial Action* the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “*environmental planning grounds*” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “*environmental planning*” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
24. The environmental planning grounds relied on in the written request under cl 4.6 must be “*sufficient*”. There are two respects in which the written request needs to be “*sufficient*”. First, the environmental planning grounds advanced in the written request must be sufficient “*to justify contravening the development standard*”. 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.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, 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)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

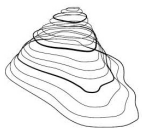


Clause 4.6 Request – Height: 106 Victor Road, Narraween

For the reasons outlined in this Clause 4.6 Request, I consider that the compliance with the Height of Buildings Standard under LEP 2011 is unreasonable and unnecessary in the circumstances of the proposed development.

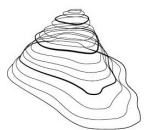
I note the following environmental grounds or, in other words, the Positive Outcomes arising from the proposed development and the breach of the Height of Buildings Standard:

- The proposed development is consistent with the relevant objectives of the Height of Buildings development standard expressed by clauses 4.3 LEP 2011.
- The proposed development achieves the relevant Objectives of the R2 Low Density Residential Zone.
- The proposed development will not result in any unreasonable environmental impacts upon the amenity of neighbouring properties in terms of visual bulk, privacy, overshadowing and view sharing.
- The proposed development satisfies the relevant tests established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446.
- The proposed development will be consistent with the surrounding residential character of the area and will maintain the variety of housing and help meet demand for housing in the locality.
- The overall bulk, scale and streetscape elements of the proposed development remain compatible with the existing and desired future character of the locality.
- The underlying objective would be thwarted if strict compliance with the Height of Buildings development standard was applied as the development satisfies the objectives or purpose of the standard, despite the non-compliance. The development maintains the efficient use of land and provides improved amenity within the existing development, maintaining the variety and availability of housing types in the area.
- For the reasons outlined in the accompanying SEE and this Clause 4.6 Request, I consider that the proposed development results in a range of Positive Outcomes relating to the breaching element:
 - i. The proposed development is permissible within the R2 Low Density Residential Zone and is consistent with the relevant zone objectives. It retains the existing residential use of the site and provides an improved dwelling that is consistent with the density objective for the zone.
 - ii. The proposed alterations and additions are generally below or significantly below the Height of Buildings Standard under LEP 2011.
 - iii. The proposed development is contextually appropriate to the area and is considered to result in a positive contribution to the streetscape and character of the area in terms of massing and architectural expression.



Clause 4.6 Request – Height: 106 Victor Road, Narraweena

- iv. The breaching portion of the proposed development complies with Council's Front, Side and rear Setback Controls. In fact, the proposed development provides significantly greater than required setbacks to all boundaries at all aspects of the proposed development.
- v. The proposed alterations and additions do not result in any unreasonable amenity impacts to adjoining properties or the public domain.
- vi. The proposed development results in an improvement in passive surveillance of Victor Road by way of the proposed alterations and additions.
- vii. The proposed development is of a high standard of architectural design, incorporating attractive colours and materials.



6.0 STATE OR REGIONAL ENVIRONMENTAL PLANNING SIGNIFICANCE AND THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Clause 4.6 (5) relates to matters for consideration by the Secretary as to “*whether contravention of the Development Standard raises any matter of significance for State or regional environmental planning.*”

In deciding whether to grant concurrence, the Planning Secretary must consider—

- (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 Planning Secretary before granting concurrence.

Would non-compliance raise any matter of significance for State or regional planning?

The non-compliance does not raise any other matter of significance for State or regional planning.

Is there a public benefit of maintaining the development standard?

I consider that there is no public benefit associated with maintaining strict compliance with the development standard;

- The proposed development results in a range of positive outcomes as outlined in this Clause 4.6 Request and accompanying SEE.
- The proposed alterations and additions are of an attractive palate of colours and materials.
- I consider that, when viewed from the street, the proposed alterations and additions will result in a significant improvement in the visual aesthetics of the existing building.

Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

The contravention of the Height of Buildings Standard in the circumstances of this application does not raise any matter of significance for State or regional environmental planning.

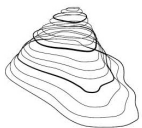
7.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL FOUNDED?

This Clause 4.6 Request has demonstrated and justified that:

- The proposed development satisfies the relevant objectives of the Height of Buildings development standard and Objectives of the R2 Low Density Residential Zone; and
- Sufficient environmental planning grounds have been established to justify the non-compliance, given the range of positive outcomes and the absence of adverse environmental impacts upon neighbouring properties and the public domain, relative to the Height of Buildings non-compliance.

I consider that this objection is well founded for the reasons outlined in this Clause 4.6 Request and the accompanying SEE. I again note the range of positive outcomes which are listed below:

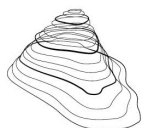
- The proposed development is consistent with the relevant objectives of the Height of Buildings development standard expressed by clauses 4.3 LEP 2011.
- The proposed development achieves the relevant Objectives of the R2 Low Density Residential Zone.
- The proposed development will not result in any unreasonable environmental impacts upon the amenity of neighbouring properties in terms of visual bulk, privacy, overshadowing and view sharing.
- The proposed development satisfies the relevant tests established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446.
- The proposed development will be consistent with the surrounding residential character of the area and will maintain the variety of housing and help meet demand for housing in the locality.
- The overall bulk, scale and streetscape elements of the proposed development remain compatible with the existing and desired future character of the locality.
- The underlying objective would be thwarted if strict compliance with the Height of Buildings development standard was applied as the development satisfies the objectives or purpose of the standard, despite the non-compliance. The development maintains the efficient use of land and provides improved amenity within the existing development, maintaining the variety and availability of housing types in the area.
- For the reasons outlined in the accompanying SEE and this Clause 4.6 Request, I consider that the proposed development results in a range of Positive Outcomes relating to the breaching element:
 - viii. The proposed development is permissible within the R2 Low Density Residential Zone and is consistent with the relevant zone objectives. It



Clause 4.6 Request – Height: 106 Victor Road, Narraween

retains the existing residential use of the site and provides an improved dwelling that is consistent with the density objective for the zone.

- ix. The proposed alterations and additions are generally below or significantly below the Height of Buildings Standard under LEP 2011.
- x. The proposed development is contextually appropriate to the area and is considered to result in a positive contribution to the streetscape and character of the area in terms of massing and architectural expression.
- xi. The breaching portion of the proposed development complies with Council's Front, Side and rear Setback Controls. In fact, the proposed development provides significantly greater than required setbacks to all boundaries at all aspects of the proposed development.
- xii. The proposed alterations and additions do not result in any unreasonable amenity impacts to adjoining properties or the public domain.
- xiii. The proposed development results in an improvement in passive surveillance of Victor Road by way of the proposed alterations and additions.
- xiv. The proposed development is of a high standard of architectural design, incorporating attractive colours and materials.



8.0 CONCURRENCE OF DIRECTOR GENERAL

(4) Development consent must not be granted for development that contravenes a development standard unless—

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(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 Planning Secretary before granting concurrence.

Comment:

The Department issued Planning Circular No. PS18-003 (dated 21st February 2018) which notified Council of arrangements “...where the Director General’s concurrence may be assumed for exceptions to development standards under environmental planning instruments which adopt clause 4.6...of the Standard Instrument...”

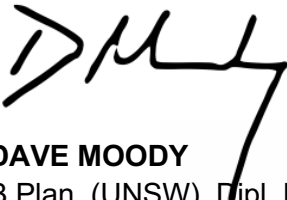
Clause 64 of the EPA Regulations provide that Council may assume the Director General’s [Secretary’s] concurrence for exceptions to Development Standards, thus satisfying the terms of this provision.

9.0 CONCLUSION

Notwithstanding the breach of the Height of Buildings Standard, I consider that this request for variation of the Height of Buildings Standard is well founded.

I consider that the proposed development, notwithstanding the breach of the Height of Buildings Standard, will not have an unreasonable adverse impact on adjoining properties or the public domain and will result in a range of Positive Outcomes outlined in this Clause 4.6 Request and the accompanying SEE.

For the reasons provided within this Clause 4.6 request and accompanying SEE, variation of the Height of Buildings is supported. The Clause 4.6 request has adequately addressed the matters required under clause 4.6 of LEP 2011. Furthermore, it has been established that the proposed development would be in the public interest as it is consistent with the objectives of the Height of Buildings Development Standard and the Objectives of the R2 Low Density Residential Zone.



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