

ATTACHMENT A

Request to Vary the Building Height Control

INTRODUCTION

The subject site formally comprises Lots 10 and 11 in Deposited Plan 12609 and is commonly known as No's 2 – 4 Kent Street, Collaroy.

The site is located on the western side of Kent Street, at the junction with Anzac Avenue. The site comprises two (2) adjoining allotments with a combined area of 2,271.9m². The site is an irregular rectangle in shape with frontages of approximately 37 metres to Kent Street and 42 metres to Anzac Avenue.

The site is currently occupied by a 2-storey dwelling house above a partially excavated car parking level.

The lower ground floor level accommodates off-street car parking for two (2) vehicles and some ancillary storage space. The ground floor level accommodates a bedroom, playroom, study, amenities and the main living rooms. The first floor level accommodates the main bedroom and amenities.

The existing dwelling generally occupies the southern portion of the site, and the northern portion of the site accommodates a tennis court.

The topography of the site has been partially modified to accommodate the existing structures and generally falls downhill from the south-west to north-east, with a maximum level change from boundary to boundary of approximately 5 metres.

The existing vegetation on the site is typical of a heavily modified urban environment and comprises a scattering of trees, shrubs and groundcovers.

The site is zoned R2 – Low Density Residential pursuant to the Warringah Local Environmental Plan (LEP) 2011 and “dwelling houses” are permissible in the zone with the consent of Council.

The proposed development comprises alterations and additions to the dwelling house including internal reconfiguration of the ground floor level and extension towards the west, and reconfiguration and expansion of the first floor level towards the south and west.

Further, a passenger lift is proposed between the lower ground floor and first floor levels, and the existing terrace at the ground floor level is being extended towards the north.

The proposed works are generally intended to improve the layout and efficiency of the existing dwelling house, improve the relationship between indoor and outdoor spaces, maintain the overall architectural composition and character of the existing dwelling and maintain the spatial separation to the surrounding development by retaining the existing tennis court on the northern portion of the site.

Clause 4.3 of the LEP specifies a maximum building height of 8.5 metres. The existing dwelling extends to a maximum height of approximately 11.24 metres, and the proposed works increase the height of the existing building by 1.36 metres, representing a maximum building height of 12.604 metres.

In that regard, strict compliance with the building height control would require portions of the existing dwelling house to be demolished, unnecessarily restrict the proposed expansion of the first floor level, and otherwise require a modified roof form that would not be compatible with the architectural composition and character of the existing dwelling.

CLAUSE 4.6 OF THE WARRINGAH LEP 2011

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that *"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"*.

Clause 4.6(3) specifies that 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.*

The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

CONTEXT AND FORMAT

This “*written request*” has been prepared having regard to “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
- *Moskovich v Waverley Council* [2016] NSWLEC 1015;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Hansimikali v Bayside Council* [2019] NSWLEC 1353;
- *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161;
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243;
- *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583; and
- *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130.

"Varying development standards: A Guide" (August 2011) outlines the matters that need to be considered in DA's involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
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.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* states that "... *development standards are not ends in themselves but means of achieving ends*". Preston CJ, goes on to say that as the objectives of a development standard are likely to

have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council* [2016] NSWLEC 1015, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and the zone, is not a requirement to “achieve” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’. It means “something less onerous than ‘achievement’”.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a “better environmental planning outcome for the site” relative to a development that complies with the development standard.

In *Hansimikali v Bayside Council* [2019] NSWLEC 1353, Commissioner O’Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

In *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161, Commissioner O’Neill found that “The desired future character of an area cannot be determined by the applicable development standards for height and FSR alone”.

Further, Commissioner O'Neill found that *"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character"*.

Similarly, in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243, Commissioner O'Neill found that *"The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality* (SJD DB2 at [62]-[63]). *Development standards that determine building envelopes can only contribute to shaping the character of the locality* (SJD DB2 at [53]-[54] and [59]-[60])".

Finally, in *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583, Commissioner Gray found that the corner location of a site may be an environmental planning ground to support a variation to a development standard.

ASSESSMENT

Is the requirement a development standard?

The building height control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

What is the underlying object or purpose of the standard?

The objectives of the building height control are expressed 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.*

In relation to objective (a), the site is located within an established residential neighbourhood, characterised by a predominance of detached dwelling houses. The existing buildings extend across multiple development eras contributing to a diversity of building forms and architectural styles.

Further, the locality is progressively undergoing a renewal process, with many of the older style dwellings being expanded and/or replaced with larger and more contemporary style dwelling houses.

The proposed works are generally intended to improve the layout and efficiency of the existing dwelling house, improve the relationship between indoor and outdoor spaces, maintain the overall architectural composition and character of the existing dwelling and maintain the spatial separation to the surrounding development by retaining the existing tennis court on the northern portion of the site.

The proposed building includes extensive vertical and horizontal articulation, and there are no large expanses of continuous walls. The palette of external materials and finishes have been chosen to complement and maintain the architectural style and composition of the existing dwelling, visually break up the facades, and reduce the apparent building bulk.

The form of existing development in the locality has been influenced by topographical features. In particular, the surrounding development to the south is elevated above the subject site, and the site effectively forms part of a transition between the elevated topography to the south and the more level topography to the north.

Finally, the proposed development maintains generous setbacks to the adjoining residential properties to the north and west. The proposed development will improve the landscaped setting of the site, and substantially maintain the amenity of the surrounding properties in terms of the key considerations of privacy, overshadowing, views and visual bulk.



Photograph 1: Surrounding Dwelling to the South (No. 72 Anzac Avenue)



Photograph 2: Surrounding Dwellings to the South (No's 74 and 76 Anzac Avenue)



Photograph 3: Surrounding Dwelling to the South (No. 78 Anzac Avenue)



Photograph 4: Surrounding Dwelling to the South (No. 80 Anzac Avenue)

In relation to objective (b), the proposed development will have no significant or adverse impacts on any existing public or private views. The proposed development will have no significant or adverse impacts on the privacy of any surrounding property. The shadows cast by the proposed development will substantially fall within the shadows cast by existing structures and will have no impact on the private open space of any surrounding property between 9am and 3pm on 21 June.

In relation to objective (c), the proposed development will maintain the architectural style and composition of the existing dwelling and improve the landscaped setting of the site.

In relation to objective (d), the proposed building includes extensive vertical and horizontal articulation, and there are no large expanses of continuous walls. The palette of external materials and finishes have been chosen to complement and maintain the architectural style and composition of the existing dwelling, visually break up the facades, and reduce the apparent building bulk.

In summary, the proposed development achieves the objectives of the building height control, notwithstanding the numerical variation.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published *"Varying development standards: A Guide"* (August 2011), to outline the matters that need to be

considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

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

The proposed development achieves the objectives of the building height control, notwithstanding the numerical variation.

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

The objectives and purpose of the building height control remain relevant, and the proposed development achieves the objectives of the building height control, notwithstanding the numerical variation.

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

The proposed development achieves the objectives of the building height control, notwithstanding the numerical variation.

Further, strict compliance with the building height control would require portions of the existing dwelling house to be demolished, unnecessarily restrict the proposed expansion of the first floor level, and otherwise require a modified roof form that would not be compatible with the architectural composition and character of the existing dwelling.

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;*

The building height control has not specifically been abandoned or destroyed by the Council's actions. Irrespective, the Council has adopted an orderly but very flexible approach to the implementation of development standards (including the building height control).

In that regard, a review of the Council's register of Variations to Development Standards reveals Development Consent has been granted to approximately 189 DA's involving numerical variations to the building height control in the Warringah LEP 2011 for residential development during the recorded period of January 2020 to September 2023.

Further, the objectives of Clause 4.6 of the LEP includes to provide "*an appropriate degree of flexibility in applying certain development standards to particular development*".

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The zoning of the land remains relevant and appropriate. Irrespective, strict compliance with the building height control would require portions of the existing dwelling house to be demolished, unnecessarily restrict the proposed expansion of the first floor level, and otherwise require a modified roof form that would not be compatible with the architectural composition and character of the existing dwelling.

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

The adjectival phrase "*environmental planning*" is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the *Environmental Planning and Assessment Act 1979*, including the objects set out in Section 1.3 (Initial at 23).

The objects of the Act are expressed as follows:

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) *to promote the orderly and economic use and development of land,*
- (d) *to promote the delivery and maintenance of affordable housing,*

- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) *to promote good design and amenity of the built environment,*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) *to provide increased opportunity for community participation in environmental planning and assessment.*

The numerical variation to the building height control is reasonable and appropriate in the particular circumstances on the basis that:

- the increase in the height of the existing building height is relatively minor and limited to a maximum of 1.36 metres;
- the variation to the building height control primarily relates to the building height being calculated from the excavated lower ground floor level, and the design objective to maintain the architectural composition and character of the existing dwelling by preserving the pitched roof form;
- the portion of the building that extends above the building height control maintains generous setbacks from all of the property boundaries;
- the proposed building includes extensive vertical and horizontal articulation, and there are no large expanses of continuous walls;
- the retention of the existing tennis court on the northern portion of the site maintains substantial spatial separation with the surrounding properties;
- the site occupies a corner location where additional building bulk and scale can typically be best accommodated whilst achieving an appropriate built form marker and minimising the impacts on the surrounding properties;
- the surrounding development to the south is elevated above the subject site, and the site effectively forms part of a transition between the elevated topography to the south and the more level topography to the north;

- the amended development will remain compatible with the existing and likely future character of the locality, and will not be perceived as offensive, jarring or unsympathetic to the existing and likely future character;
- the palette of external materials and finishes have been chosen to complement and maintain the architectural style and composition of the existing dwelling, visually break up the facades, and reduce the apparent building bulk;
- the proposed development will improve the landscaped setting of the site, and substantially maintain the amenity of the surrounding properties in terms of the key considerations of privacy, overshadowing, views and visual bulk;
- strict compliance with the building height control would require portions of the existing dwelling house to be demolished, unnecessarily restrict the proposed expansion of the first floor level, and otherwise require a modified roof form that would not be compatible with the architectural composition and character of the existing dwelling;
- the proposed development will promote good design and the amenity of the built environment which is a recently incorporated object of the Act: *“(g) to promote good design and amenity of the built environment”*;
- the Council has adopted an orderly but very flexible approach to the implementation of development standards (including the building height control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations;
- a review of the Council's register of Variations to Development Standards reveals Development Consent has been granted to approximately 189 DA's involving numerical variations to the building height control in the Warringah LEP 2011 for residential development during the recorded period of January 2020 to September 2023;
- the proposed development achieves the relevant objectives of the R2 – Low Density Residential zone; and
- the proposed development achieves the objectives of the building height control, notwithstanding the numerical variation.

CONCLUSION

The purpose of this submission is to formally request a variation in relation to the building height control in Clause 4.3 of the Warringah LEP 2011.

In general terms, strict compliance with the building height control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation.