

**CLAUSE 4.6 REQUEST FOR VARIATION OF HEIGHT OF BUILDINGS
STANDARD UNDER CLAUSE 4.3 OF WARRINGAH LOCAL
ENVIRONMENTAL PLAN 2011**

PROPERTY: 1 PHYLLIS STREET, NORTH CURL CURL

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1.0 INTRODUCTION

This Clause 4.6 Request is made pursuant to the provisions of Clause 4.6 of *Warringah Local Environmental Plan 2011 (LEP 2011)*.

Variation under Clause 4.6 of LEP 2011 is requested in relation to Clause 4.3 of LEP 2011 entitled the Height of Buildings (**HoB Development Standard**) in support of a Development Application (**DA**) seeking approval of Northern Beaches Council (Council) for the *“Proposed Alterations and Additions to an Existing Dwelling House”* on a property known as 1 Phyllis Street, North Curl Curl (subject 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 and the accompanying Statement of Environmental Effects (SEE), I consider that variation of the HoB Development Standard in the circumstances of this current DA would achieve a better planning outcome rather than requiring strict adherence to the development standard.

Clause 4.6 of LEP 2011 allows a Consent Authority to grant a variation to a development standard as stated below.

Clause 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 for 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.*
- (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.** *This Plan does not include 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 Stie Map as Site F, Site G, Site H or Site I,

(c) clause 5.4.

(caa) clause 5.5.

(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.

In the case of *Al Maha Pty Ltd v Strathfield Council* [2017] NSWLEC 1083 (Al Maha), 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 WLEP 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 2 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)) (Repealed since date of judgement)~~*
- (2) are satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(3)(a))*
- (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))*

- (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))*

In addition to the above mentioned Court judgments, there are other relevant Court judgements relating to the application of a Clause 4.6 Request including, but not limited to, *Winten Property Group v North Sydney Council* [2001] NSWLEC 46, *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Moskovich v Waverley Council* [2016] NSWLEC 1015, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

This Clause 4.6 Request seeks to address the matters raised in (2) - (4) in *Al Maha* at [64] and the provisions of Clause 4.6 of LEP 2011.

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

I also note the accompanying Statement of Environmental Effects (SEE) prepared in support of the proposed development.

2.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

Clause 4.3 – Height of Buildings

Objectives

(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:

A maximum Height of Buildings Standard of 8.5m (I) applies to the subject site.

According to the calculations of the Architects, the proposed development breaches the Height of Buildings Standard by 0.48m or 5.66%, which is a numerically minor breach of the Height of Buildings Standard.

The above breach is a numerically minor breach and is very reasonable for the following reasons: -

- The proposed breach is a result of the sloping nature of the subject site from the western boundary down to the eastern boundary.
- Apart from the breaching portion, the proposed building is below the Height of Buildings Standard. I particularly wish to note that the proposed skillion roof has been designed to fall with the slope of subject site. This is one of the Positive Outcomes of the proposed development.
- Further to the above, I wish to note that the proposed breach under the current DA is less than the proposed breach under the current approved development

which was approved by Council. On this point, the current approved development breached the Height of Buildings Standard by 1m or 11.8%.

- The current DA will reduce the View Loss compared to the current approved development due to the removal of the previously proposed pitched roofs and their replacement by a low-profile skillion roof.
- In accordance with the Shadow Diagrams prepared by Lawrence Consulting Group, Architects, the proposed development will maintain adequate solar access to surrounding existing buildings and open space. The only existing dwelling that will be impacted by the proposed development will be the existing dwelling downslope and to the east, but this dwelling will retain its northern sunlight on part of its northern facade.
- Lastly, the breaching portion of the proposed development will not result in any additional Overlooking Impact onto adjoining properties compared to the current approved development.

For the reasons referred to above and within the accompanying SEE, I consider the proposed breach of the Height of Buildings Standard is entirely reasonable.

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

Based on Clause 4.3 of LEP 2011, the Objectives of the HoB Development Standard are as follows:

Objectives of Clause 4.3

(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:

Notwithstanding the aforementioned breach, I consider that the proposed development height will achieve the objectives of the HoB Development Standard, particularly noting the following points: -

- In relation to Objective (a), I consider the proposed development is entirely compatible with the height, bulk and scale of surrounding and nearby developments, particularly noting that the current approved development is of a greater height and scale than the current DA.
- In relation to Objective (b), as previously advised, the proposed development will reduce the View Loss compared to the current approved development due to the removal of the previously proposed pitched roofs and their replacement by a low-profile skillion roof.
- In relation to Objective (c), I consider the proposed development minimises adverse impact on the scenic quality of Warringah's coastal and bush environments for the following reasons: -

- i. The quality and area of proposed landscaping on the subject site under the proposed development represents a significant improvement compared to the existing landscaping.
 - ii. Furthermore, the proposed development involves additional landscaping on the public verge on Ian Avenue.
 - iii. The replacement of the approved pitched roofs with a slight raised skillion roof will reduce the height, bulk and scale of the current approved development when viewed from adjoining properties and the public domain.
- In relation to Objective (d), please refer to my previous comments in relation to Objective (b).

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

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

I wish to particularly note that compliance with the Objectives of the HoB Development Standard under LEP 2011 has been achieved by the proposed development, notwithstanding the proposed breach of the HoB Development Standard.

Furthermore, for reasons discussed under Section 5.0 of this Clause 4.6 Request, I consider that there is a range of positive Environmental Planning Grounds that further justify the variation of the HoB Development Standard.

For the reasons discussed throughout this Clause 4.6 Request, I consider that strict compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development.

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

For the reasons outlined in this Clause 4.6 Request and the accompanying SEE, I consider that there are strong Environmental Planning Grounds to justify variation of the HoB Development 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 1979 (the Act), including the Objects in Section 1.3 of the Act.

The Environmental Planning Grounds which justify a contravention of the HoB Development Standard are expressed in this Clause 4.6 Request and accompanying SEE. I wish to particularly note the following points: -

- The proposed development has the benefit of a BASIX Certificate.
Furthermore, the proposed development provides positive ESD elements comprising the following: -
 - i. Photovoltaic Solar Panels.
 - ii. Significant increase in the quality and area of landscaping on the subject site, compared to the existing landscaping, including on the proposed elevated balconies.
 - iii. Proposed landscaping works on the public verge on Ian Avenue.
- As previously advised, the quality and area of proposed landscaping on the subject site under the current proposed development represents a significant improvement compared to the existing landscaping.
- The replacement of the approved pitched roofs with a slight raised skillion roof will reduce the height, bulk and scale of the approved development when viewed from adjoining properties and the public domain. In particular, I consider that there will be a reduced View Loss generated by the proposed development compared to the current approved development.
- The proposed front fences will be highly articulated and there will be a significant improvement in the quality and area of landscaping within the front setback compared to the existing landscaping.

- The proposed dwelling is also highly articulated.
- The proposed balconies/verandah and proposed windows will increase passive surveillance of the streets.
- The proposed skillion roof has been designed to fall with the slope of the subject site.

I wish to note that the above Environmental Planning Grounds are generated by the current proposed development compared to the current approved development. In other words, I consider that the current proposed development is an improvement upon the Council approved development.

Thus, for the reasons referred to above, I consider that there are sufficient Environmental Planning Grounds which justify the contravention of the HoB Development Standard.

6.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL FOUNDED?

I consider that this objection to the Development Standard is well founded for the reasons outlined in this Clause 4.6 Request and the accompanying SEE.

I consider that the proposed development will not have an adverse impact on adjoining properties or the public domain and will achieve the Objectives of the HoB Development Standard.

I also consider that the proposed development will produce a range of Positive Outcomes for the reasons referred to within this Clause 4.6 Request and the accompanying SEE.

7.0 CONCLUSION

Notwithstanding the breach of the HoB Development Standard, I consider that this request for variation of the development standard is well founded for the reasons referred to in this Clause 4.6 Request.

I also consider that the proposed development will satisfy the Objectives of the HoB Development Standard and will not generate unreasonable adverse impacts on the public domain or adjoining private properties.

Furthermore, I consider that the proposed development will result in a range of Positive Outcomes.

For the reasons outlined in this Clause 4.6 Request, I fully support variation of the HoB Development Standard.

A handwritten signature in dark ink, reading "Tony Moody". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

TONY MOODY

BTP(UNSW), LL.B (UTS)(Hons.), MPIA

Dated: 6 May 2025