



CLAUSE 4.6 VARIATION TO CLAUSE 4.3 - HEIGHT OF BUILDINGS

**Demolition of existing dwelling & construction of
dual occupancy (attached) with associated works**

No. 41 Ferguson Street, Forestville

December 2024

CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS-(Clause 4.3-Height of Buildings)

Applicant: BDT Design

Site Address: No.41 Ferguson Street, Forestville

Proposal: Construction of a new dual-occupancy (attached) with associated works (landscaping, driveway works and swimming pools).

Introduction

This request seeks a variation to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP2011), which relates to a *'Height of Buildings'* development standard.

The submission has been prepared in support of a development application which proposes the construction of a new dual-occupancy (attached) with associated works on a site described as No.41 Ferguson Street, Forestville.

This request to contravene the height of buildings development standard has been prepared in accordance with the principles applied in relevant case law including:

1. *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79,
2. *Wehbe v Pittwater Council* (2007) 156 LGERA 446,
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009,
4. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118,
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170, and
6. *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130

This Clause 4.6 request is set out in accordance with the relevant principles established by the Court including:

1. Is the development consistent with the objectives of the zone?
2. Is the proposed development consistent with the objectives of the development standard which is not met?
3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (cl 4.6(3)(a) and cl 4.6(4)(a)(i))
4. Are there sufficient environmental planning grounds to justify contravening the development standard and therefore the Applicant's written request to vary the development standard is well founded? (cl 4.6(3)(b) and 4.6(4)(a)(ii))
5. Is the proposed development in the public interest because it is consistent with the objectives of the standard and the zone? (cl 4.6(4)(a)(ii))

Clause 4.6 (Exceptions to Development Standards) of WLEP2011 is the mechanism available to applicants to seek a variation to a development standard.

Planning Instrument

The Environmental Planning Instrument to which this variation relates is the Warringah Local Environmental Plan 2011, as amended.

The subject site is zoned R2 Low Density Residential under WLEP 2011.

Development Standard

The requirements of Clause 4.3-‘*Height of Buildings*’ is as follows:

4.3 Height of buildings

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The site is mapped with a maximum height of buildings requirement of 8.5m under Clause 4.3 of WLEP 2011.

Due to the sloping topography of the site, the maximum height of the development varies. The majority of the footprint is located within the 8.5m maximum allowable height limit, however there is a portion of the development (as shown on the North and Western elevations) which exceeds the allowable 8.5m maximum. The minor point exceedance occurs where the unit 2 balcony roof exceeds the 8.5m height limit.

The proposed development (Unit 2) has a maximum height of 8.85m and is 350mm higher than the required height of 8.5m. The proposed difference represents a non-compliance of approximately 4.12%.

Justification for Variation of the Standard

Justification for the variation of the ‘height of buildings’ development standard contained under Clause 4.3 is established against the provisions of Clause 4.6, as follows:

1) *The objectives of this clause 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 noted that the objectives of Clause 4.6 seek to recognise that in particular circumstances, strict application of development standards may be unreasonable or unnecessary. The clause provides a means by which a variation to the standard can be achieved.

Strict compliance would prove unreasonable in this case as the non-compliance with the height of buildings standard will not generate unreasonable bulk or scale that will adversely impact the streetscape or amenity of adjoining properties. Therefore, it is in our opinion that the minor extent of the variation is appropriate in this instance.

In our opinion, given the above-mentioned reasons, the proposal is not likely to result in significant impacts on the surrounding area and flexibility with the development standard is considered reasonable.

- 2) *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.***

The exception is sought under subclause (2) to the mapped 'height of buildings' requirement of 8.5m under Clause 4.3 of Warringah Local Environmental Plan 2011. Clause 4.3 is not excluded from the operation of this clause.

- 3) ***Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:***
 - a. ***That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and***
 - b. ***That there are sufficient environmental planning grounds to justify contravening the development standard.***

This submission forms the written request to Northern Beaches Council which justifies the contravention of the development standard for a maximum height of buildings requirement of 8.5m on the mapped site that the subject land falls within under Clause 4.3.

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the mapped 'Height of Buildings' requirement is unnecessary and unreasonable in the particular circumstances of the case.

We have considered *Wehbe v Pittwater Council* (2007) NSWLEC 827, Preston CJ which established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. The Court's recent decision in *Four2Five Pty Limited v Ashfield Council* [2015] NSWLEC 90 has altered the way the five tests ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone. That is, more than one of those five grounds is now arguably required to be made out.

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason the development standard is unreasonable and unnecessary in this instance.

The relevant tests are considered below:

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard

As indicated, this request seeks to vary the application of Clause 4.3 to the subject development. It is our opinion that the objectives of the height of building development standard are satisfied, notwithstanding the non-compliance. In considering the variation, we have given consideration to the objectives of Clause 4.3.

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

Comment: The minor height exceedance is applicable to Unit 2 only and is apparent on the Northern and Western elevations, where the topography drops steeply towards the street. Specifically, the Unit 2 balcony roof will have a ridge line of RL109.85 with the lowest natural ground level below being RL101.00. This will result in a maximum height of 8.85m which exceeds the maximum allowable by 350mm or 4.12%.

The height exceedance results primarily from the overall steep and sloping topography of the site, which slopes from the southern corner (RL104.65) to the northern junction of Ferguson Street and Ashton Avenue (RL100.50) by a difference of approximately 4.15m.

Despite the provided basement garages, the proposal will present as conventional two-storey dwellings when viewed from both frontages, being Ferguson Street and Ashton Avenue. The development is not inconsistent with newer developments within the immediate vicinity and seeks to make use of an appropriate corner-allotment to expand and diversify housing opportunities.

To mitigate the bulk and scale of the development, the design has provided a compliant front setback from Ferguson Street, with recessed and articulated features (balcony and porch entry) as well as landscaped planter boxes. Further to this, a flat parapet style roof has been provided. This contemporary design will provide articulation and will limit any additional overshadowing resulting from the non-complying height. The ensuing design, as seen from Ferguson Street, will minimise any additional bulk and scale imposed by the 4.12% variation.

It is also noted that the upper first floor level has been designed so as to provide elevated living areas to the front and rear of the property where possible, with no excessive windows to minimise adverse amenity impacts upon adjoining properties. The majority of the living room areas have been located at the ground floor, with the first floor balcony orientated towards the front setback and Ferguson Street.

The development will be compatible with the bulk and scale of other two storey dwellings in the immediate vicinity of the site. It is also noted that older established single storey houses in the neighbourhood will progressively be re-developed with more modern contemporary 2 storey houses with similar heights and bulk and scale. It is considered therefore that the proposed development is within the desired future character of the locality.

On the above basis, we believe that the proposal will be compatible with the height and scale of neighbouring properties. We note that there are two storey dwellings of similar size nearby to the site.

Therefore, it is in our opinion that the minor height non-compliance is not likely to have any unreasonable impact on the neighbouring properties.

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

The proposal has been assessed in detail in relation to view loss, privacy, and overshadowing as addressed within the accompanying Statement of Environmental Effects Report. The northern and western elevations to which the height exceedance occurs does not propose any internal high-use living rooms, and instead includes a master bedroom with ensuite. Given the orientation of the allotment, both the subject and adjoining premises shall comfortably receive sufficient daylight access.

It has been concluded that the proposal meets the Council objective in minimising impacts in this regard and therefore meets this objective.

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

It is noted that the site is not located within close proximity to coastal or bush environments. The proposed development is of a high architectural standard. The proposed construction materials will make a positive addition to the natural scenic qualities of the area.

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

The development is considered to be conducive to the streetscape of Ferguson Street & Ashton Avenue and has been designed to meet the natural topography and constraints of the lot, reducing the overall visual impact on the streetscape. The proposal has been assessed in relation to existing views achieved in the locality and it has been concluded there will be no significant impact on the views obtained from any public open spaces or roads. In our opinion, the proposal is consistent with this objective.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).

This exception to development standards request does not rely on this reason.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).

This exception to development standards request does not rely on this reason.

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 (Fourth Way).

This exception to development standards request does not rely on this reason.

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 (Fifth Way).

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe. Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

Clause 4.6(3)(b) - Sufficient Environmental Planning Grounds

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the height of buildings development standard because:

- The variation permits a height of development that is commensurate with other two storey residential development in the Forestville locality. The general locality is characterised by a number of large two storey dwellings which respond to the unique topography of the area. The variation permits a dual-occupancy development that is suited to the sloping topography of the site and is not excessively high yet allows a high level of internal and external amenity to future residents.

- The proposed resultant dwelling (Unit 2) is compatible with surrounding development and will make a positive contribution to the streetscape. The dwelling's (Unit 2) visual bulk and architectural scale is consistent with other dwellings on nearby properties & does not visually dominate the street. As viewed from Ferguson Street, the 350mm of non-compliant height will be largely be undiscernible for the proposed dwelling (Unit 2). The proposed dwelling is well articulated through the use of the recessed first floor, compliant front setbacks, flattened roof style, landscaping elements and variation in material selection.
- The site contains a moderate cross-fall slope which contributes to the height exceedance. Despite this, effort has been made to ensure that the majority of the proposal complies with the 8.5m maximum. It is just an isolated point encroachment where just the Unit 2 balcony roof exceeds the 8.5m maximum height limit.
- The additional height of the development will not result in significant amenity impacts to adjoining properties, in terms of visual and acoustic privacy, overshadowing or disrupting views. The resulting development provides a generous amount of landscaping and deep soil areas which can facilitate tree plantings and provides an appealing landscaped setting.
- The proposed development will provide high quality housing in close proximity to facilities and public open spaces.

S 1.3 Objects of Act

The proposed development and in particular the variation to the height of buildings Standard would further the following objectives of the Act specified in s.1.3. The objects of this Act are 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 development meets the above objectives in the following manners:

- (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,*

Comment: The proposed development will provide high quality housing in the Forestville locality in close proximity to existing services. The additional height allows for two dwellings to be constructed to accommodate two future families in the area without adversely impacting any natural or other resources. No significant impact to the State's natural or other resources are foreseen as a result of the height exceedance.

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

Comment: The development has facilitated the relevant economic, environmental and social considerations during the design stage of the dual-occupancy, as well as the accompanying Statement of Environmental Effects which details the impacts and considerations of the proposal.

The proposal shall provide for economic stimulation to the locality in the form of construction industry employment, no significant environmental constraints afflict the site and no significant impact is foreseen in this regard. The social benefit to the locality is seen to be satisfied by facilitating increased housing supply.

(c) to promote the orderly and economic use and development of land,

Comment: The provision of quality housing in the Forestville locality represents the orderly and economic use and development of land. The ancillary works to the proposal (landscaping, swimming pool) are not unorderedly.

(d) to promote the delivery and maintenance of affordable housing,

Comment: N/A.

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

Comment: The site is not identified as containing threatened or other species of animals and plants, ecological communities or their habitats. The proposed dual-occupancy is therefore not foreseen to negatively impact the environment, including threatened or other species of native flora and fauna, ecological communities and their associated habitats.

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

Comment: The site is not situated on a parcel of land that is noted as having any built or cultural heritage.

(g) to promote good design and amenity of the built environment,

Comment: The development has been designed to be compatible to both the existing character and desired low density residential character.

The development is considered to be satisfactory in terms of visual and acoustic privacy, noting dwelling setbacks and orientation of windows and living rooms towards the front and rear where practical. The elevated first floor balconies have been orientated to both Ferguson Street & Ashton Avenue and away from adjoining properties. Likewise given the orientation of the site, no significant overshadowing shall occur to the principle private open space or living room windows of adjoining properties.

In this regard the development is considered to maintain a high level of amenity to future occupants that will not adversely affect amenity levels on adjoining properties.

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

Comment: The proposed development will be constructed to Australian Standards with the supervision of a suitably accredited Certifier and as such will protect the health and safety of future occupants.

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

Comment: Not applicable to this form of development.

(j) to provide increased opportunity for community participation in environmental planning and assessment.

Comment: It is noted that the development and associated clause 4.6 variation request may be notified to adjoining properties for comment.

R2 Low Density Residential Zone Objectives

The subject property is zoned R2 – Low Density Residential pursuant to the Warringah LEP 2011. The non-compliance with the development standard will not be inconsistent with any planning objectives for the locality.

It is noted that the WLEP2011 does not permit dual-occupancy developments within R2 low density zones, however approval of this application is sought under Clause 141C of the Housing SEPP 2021, as detailed in the accompanying SOEE. Despite the non-permissibility of dual-occupancies under the WLEP2011, we believe that the development still meets the objectives of the R2 Low Density zone. These 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.*

Based on the objectives of the zone, it is in our opinion that the underlying purpose of the development standard is to present dwellings that are of a low density character, which preserves the natural features of the locality and is compatible with the height, context and character of the neighbouring properties.

As discussed in this report and the accompanying SOEE, the proposal has been designed to maintain the amenity and desired future character of the area and be sympathetic to the natural features of the area. The contemporary residential development will contribute to the surrounding built form and is in keeping with the existing dwellings that adjoin Ferguson Street, Ashton Avenue and surrounding streets.

The development has been carefully designed to accommodate the site's sloping topography and achieve resultant dwellings that presents a height which is complementary to the Ferguson & Ashton streetscapes. Therefore, it is considered unreasonable to adhere to strict compliance for this part of the building.

The development provides the subject site with two dwellings of high quality architectural design that will provide occupants with well-designed internal and external spaces in a desirable locality. The non-compliance with the height will not thwart the proposal's ability to meet the relevant zone objectives. Rather, it is considered that adhering to strict compliance would reduce the proposal from maximising the housing potential of the site and thus reduce the amenity of the future occupants.

Strict compliance would not take into consideration the circumstances of the case, being the slope in topography towards the street and thus the small numerical noncompliance (4.12%). Accordingly, it is in our opinion that the non-compliance will not result in inconsistency with existing and future planning objectives for the locality.

Conclusion

The development proposal has a variation of 350mm (4.12%) to the required 8.5m maximum building height development standard contained within clause 4.3 of the Warringah LEP 2011. Notwithstanding, the proposal demonstrates that the property can accommodate an attached dual-occupancy development, whilst still providing sufficient setbacks, landscaped area, FSR and the amenity of adjoining properties. The resulting dual-occupancy will present a built form that is consistent with the objectives of the standard and suitable for the subject site.

The development does not result in unreasonable amenity impacts to the adjoining properties regarding overshadowing, visual and acoustic privacy or visual bulk and scale. The development achieves a high level of residential amenity. The proposal is likewise not out of character with the surrounding dwelling form or streetscape character of Ferguson Street or Ashton Avenue.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6. The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.

In accordance with the environmental planning grounds addressed in this Clause 4.6 variation, the variation to the height of building development standard for the construction of the new dual-occupancy (with associated works) should be upheld.