

**APPENDIX ONE  
CLAUSE 4.6 VARIATION  
VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM  
BUILDING HEIGHT REQUIRED BY CLAUSE 4.3 OF THE WARRINGAH LOCAL  
ENVIRONMENTAL PLAN 2011**

**For:** Proposed New Dwelling  
**At:** 139 Headland Road, North Curl Curl  
**Applicant:** Lewis and Wells

---

## **Introduction**

This Clause 4.6 variation is a written request to vary a development standard to support a development application for construction of a new dwelling at **139 Headland Road, North Curl Curl**.

The specified maximum building height under Clause 4.3 (1) of the Warringah Local Environmental Plan 2011 (the LEP) is 8.5m. The development proposes a departure from this numerical standard and proposes a maximum height of 9.6m. It is noted that this height is measured to the top of the chimney with the actual building complying with the height controls.

This building height requirement is identified as a development standard which requires a variation under Clause 4.6 of the Warringah Local Environmental Plan 2011 (the LEP) to enable the granting of consent to the development application.

## **Background**

Clause 4.3 restricts the height of a building within this and refers to the maximum height noted within the “Height of Buildings Map.”

The relevant building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposal incorporates a chimney pipe which extends above the roof height of the dwelling to a maximum of approximately 9.6m in height. The non-compliance relates only to the chimney with the building complying with the height controls.

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

### **Purpose of Clause 4.6**

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

### **Objectives of Clause 4.6**

The objectives of Clause 4.6 are as follows:

- (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.*

The non-compliance relates only to the chimney with the remainder of the dwelling complying with the height controls, as defined. The chimney is required to extend beyond the roof form. It is considered that this design achieves a better outcome and that flexibility is required in this instance.

Further the proposal achieves the objectives of the R2 Zone which are:

- 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.*

As sought by the zone objectives, the proposal will provide for a new detached dwelling house which will retain the low-density residential environment. The proposal will provide for an appropriate landscape setting which has been achieved by ensuring compliance with the landscape controls and providing appropriate landscaping.

The non-compliance is towards the rear of the dwelling and will not be visible from the public domain.

Notwithstanding the non-compliance with the maximum height control, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

### **Onus on Applicant**

Clause 4.6(3) provides that:

*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 has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

### **Justification of Proposed Variation**

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2011] NSWLEC 1199.

Paragraph 27 of the Samadi judgement states:

*Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and*

*with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider 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)).*

### **Precondition 1 - Consistency with zone objectives**

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *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.*

### **Comments**

It is considered that the proposed development will be consistent with the zone objectives for the following reasons:

- The proposal provides for a single detached dwelling which retains the low density residential environment.
- The proposal does not require the removal of any significant vegetation and there is sufficient area on site for additional landscaping. It is noted that the site complies with the minimum landscaped controls of the Warringah DCP.

Accordingly, it is considered that the site may be developed with a minor variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

### **Precondition 2 - Consistency with the objectives of the standard**

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

- (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.*

## **Comments**

The proposal results in a dwelling that is compatible in terms of height and bulk with the existing surrounding development. The dwelling structure complies with the maximum height control, with only the chimney extending beyond the 8.5m height limit. The chimney is not visible from the street or public domain. The dwelling will present as a part single and part two storey dwelling when viewed from Headland Road. The dwelling is well articulated on facades to minimize bulk and scale. The resultant dwelling is of comparable height and bulk, particularly when compared to the more recent development in Headland Road and the adjoining dwelling No. 141 Headland Road which has a ridge height of RL50.19. The proposal is consistent with objective 1(a).

The proposal has been designed to ensure appropriate view sharing and maintain solar access and privacy. This has been discussed extensively in the main body of the Statement of Environmental Effects. View sharing has been accommodated by stepping the dwelling down the site and providing for a low pitched roof form. This will ensure that views from the upper level of No. 141 Headland Road can be gained over the rear of the proposed dwelling. Given the orientation of the allotment, the proposal will not result in unreasonable overshadowing, with the majority of shadow cast over the rear yard of the subject site. Privacy has been ensured to the adjoining properties by the appropriate orientation of rooms and the location and design of windows and privacy screens. The proposal achieves objective 1(b).

The proposed development will not be prominent from any bushland or coastal areas. The site is well separated from any foreshore or bushland area. The proposal achieves objective 1(c).

When viewed from the public domain, the proposal will present as a part one and part two storey dwelling. This is compatible with the existing surrounding development. The dwelling is well articulated on the front façade and includes modulation and an appropriate selection of external finishes. The proposal achieves objective 1(d).

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the construction of a new dwelling which predominantly complies with the maximum building height. The only area of non-compliance is the chimney which is required to extend above the roof form. The non-compliance is very minor and is only a chimney structure which is not visible from the street.

The chimney does not result in any overshadowing nor impact on bulk or the amenity of the adjoining properties. Further the chimney does not obstruct any existing views. Given the minor non-compliance being only a chimney structure it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

Council's controls in Clause 4.3 provide a maximum overall height of 8.5m for the subject development.

The dwelling house built form complies with the height controls, it is just the chimney structure that extends beyond the maximum height. In this regard the chimney which has a width of only 300mm extends to a height of approximately 9.6m in height.

The development is justified in this instance for the following reasons:

- The dwelling structure complies with the height controls, it is only the chimney that exceeds the development standard.
- The chimney is ancillary required structure. It has a width of only 300mm and is not visible from the street. Further the chimney does not result in any loss of views, solar access or privacy of the adjoining properties.
- The non-complying chimney does not result in any unreasonable bulk or scale.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity comprises a mix of original housing stock and more prominent large two and three storey dwellings.

- The extent of the proposed new works where they are not compliant with Council's maximum height control do not present any significant impacts in terms of view loss for neighbours, loss of solar access or unreasonable bulk and scale.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*



Accordingly, in regard to the proposed development at 139 Headland Road, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The chimney is required to extend above the roof form.
- The variation to the height control is inconsequential as it will not result in any unreasonable impact to the streetscape and the amenity of neighbouring properties.
- The non-compliance relates only to a chimney which is an ancillary structure with a width of only 300mm.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

In the *Wehbe* judgment (*Wehbe v Warringah Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

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

**Comment:** Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

**Comment:** It is considered that the purpose of the standard is relevant but the purpose is satisfied.

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

**Comment:** Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*



**Comment:** Not applicable.

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.*

**Comment:** The development standard is applicable to and appropriate to the zone.

## **Conclusion**

This development proposed a departure from the maximum building height development standard, with the proposed dwelling complies with the height control with the chimney exceeding the development standard with a maximum overall height of approximately 9.6m.

This variation occurs as a result of requiring a chimney to extend beyond the roof form.

This objection to the maximum building height specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan

Grad Dip (Urban & Regional Planning) Ba App Sci (Env Health)

**Nolan Planning Consultants**

October 2019