



WESTERN SYDNEY PLANNING

SPECIALIST PLANNING AND DEVELOPMENT ADVISORY CONSULTANCY

**CLAUSE 4.6 REQUEST TO VARY A
DEVELOPMENT STANDARD – HEIGHT OF
BUILDINGS**

**Proposed Roof Associated with an
Existing Residential Flat Building**

On behalf of
Antony Gold

May 2024

Introduction

This request to vary a development standard is made by Western Sydney Planning on behalf of Antony Gold to accompany the lodgement of a development application for alterations and additions to an existing residential flat building including a new roof at Unit 18/23b-27 Pine Avenue, Brookvale (**site**). This request is made pursuant to clause 4.6 of Warringah Local Environmental Plan 2011 (WLEP 2011) and with regard to relevant case law.

Standard to be varied

With a maximum building height of 11.15m, the proposed development is non-compliant with the 8.5m maximum height of buildings control prescribed by clause 4.3 of WLEP 2011. The maximum height of buildings is a development standard, as defined by the EP&A Act:

***development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...*

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...

Accordingly, the provisions of clause 4.6 of WLEP 2011 can be applied.

Pursuant to clause 4.6(2) of WLEP 2011, consent may be granted for development even though the proposal contravenes a development standard prescribed by an environmental planning instrument. Whilst this clause does not apply to those standards expressly excluded from this clause, the height of buildings development standard of clause 4.3 of WLEP 2011 is not expressly excluded and thus, the provisions of clause 4.6 can be applied in this instance.

Extent of the proposed variation

The proposed development seeks a building height of 11.15m, representative of a 2.65m or 31.2% variation to the 8.5m maximum building height development standard. The maximum encroachment occurs at the roof level. The encroachment is due to a new wall located on the eastern elevation, as shown in **Figure 1** below.

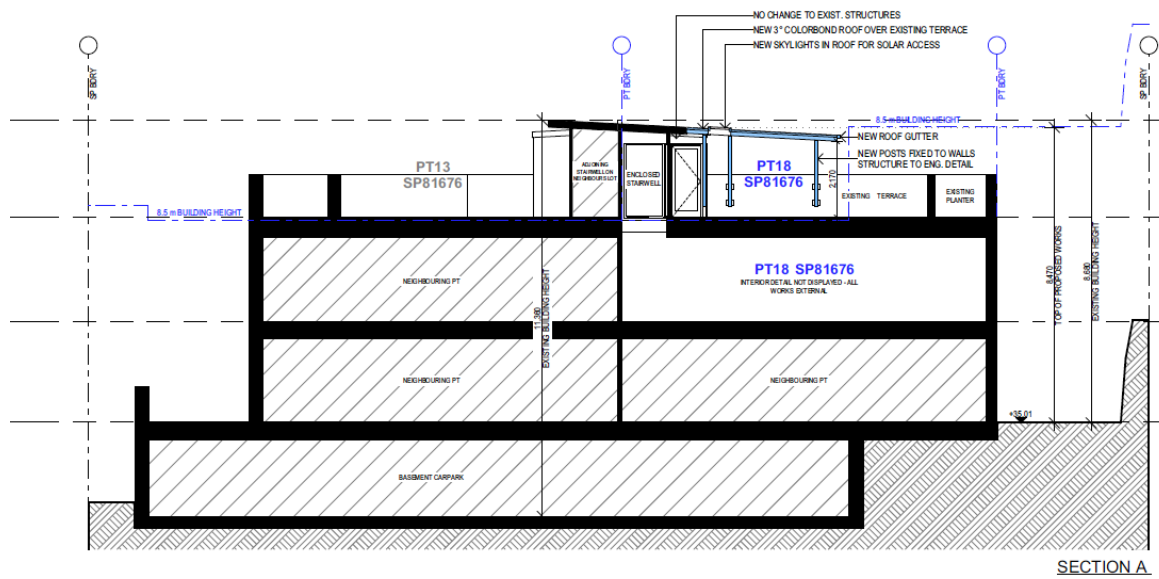


Figure 1 Section. Source: JJ Drafting

Unreasonable or unnecessary

Pursuant to clause 4.6(4) of WLEP 2011, consent can only be granted if the consent authority is satisfied that the applicant's written request to vary the development standard has addressed the criteria of clause 4.6(3) of WLEP 2011. Clause 4.6(3)(a) of WLEP 2011 requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In accordance with the decision of the NSW LEC in the matter of *Wehbe v Pittwater Council [2007] NSWLEC 827* and as confirmed in the matter of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, one way in which strict compliance with a development standard may be found to be unreasonable or unnecessary is if it can be demonstrated that the objectives of the standard and zone are achieved, despite non-compliance with the development standard.

The proposed development is consistent with the objectives of the height of buildings development standard, as prescribed by clause 4.3(1) of WLEP 2011, as follows:

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

Comment:

Notwithstanding the height exceedance, the proposal is located below the existing non-compliant building height and the maximum RL of 43.69m AHD. The site is located within an R3 Medium Density zone with the existing character comprising residential flat buildings of which many do not comply with the maximum 8.5m building height control. In this regard, the proposed roof can be considered compatible with the height and scale of surrounding and nearby medium density development.

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

Comment:

The supporting solar analysis by JJ Drafting confirms that the area above the height standard will not impact on adjoining development to the south or any other nearby property. The area of work above the height standard maintains the existing building alignment, providing sufficient building separation in turn minimising impact on the amenity of surrounding properties.

The variation will not give rise to any adverse impact to adjoining properties, while preserving the environmental amenity of neighbouring properties and public place. The area of non-compliance is minimal and will not result in the loss of any views.

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

Comment:

The site is not located nearby to any coastal and bush environment.

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

Comment:

The scope of works consisting of a minor roof structure above an existing outdoor terrace is located such that it will not result in an unreasonable visual impact when viewed from public places such as

parks and reserves, roads and community facilities.

The height and envelope are compatible with these buildings and the area's desired future character as per the Court judgment of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

In this judgment Clay AC notes at [69]:

The desired future character in my opinion must take into account the form of the buildings to the east which the Council approved under effectively the same controls as present. Those buildings exceed the height and floor space ratio controls. As the Applicant pointed out in submissions, this is not a case where there is an adjacent development approved and constructed many years ago which sits as an anomaly in the street. The developments under construction represent the recently expressed attitude of the Respondent to the controls and what is desired in this part of Cross Street.

This approach was confirmed in the appeal of this case by Preston CJ that the desired future character should be informed by the nearby and future development and not limited by development standards. Pine Avenue and nearby streets are characterised by residential flat buildings, many of which are likely exceed the 8.5m building height standard.

The proposal will remain contextually compatible within the streetscape. As desired by objective (a) the building is compatible with the bulk, scale streetscape and existing character of this specific section of Pine Avenue.

The proposed development is consistent with the existing character of the area as it remains similar in height and massing to nearby buildings in the medium density zone.

Strict compliance with the development standard is unreasonable and unnecessary as Pine Avenue comprises large residential flat buildings and the overall building height of the proposed development is compatible with the prevalent built form and scale quality of the streetscape.

As such, strict compliance with the maximum height of buildings development standard is unreasonable and unnecessary in the circumstances of this case.

Consistent with the objectives for zone

The following is an assessment of the development against the objectives of the Zone.

- *To provide for the housing needs of the community within a medium density residential environment.*

Comment:

The proposal will provide well-designed housing that meets the needs of Sydney's growing population by improving the quality of the existing building and dwelling to meet the changing population.

The proposed height is not responsible for any inconsistency with the zone objectives as the proposed provides for a high-quality building design and dwelling, which significantly improves upon the amenity of the existing building at the roof level.

The preservation of amenity to a reasonable extent to neighbouring properties either side and to the rear also confirms that the proposal satisfies the objectives of the low-density residential zone notwithstanding a variation to the building height standard.

- *To provide a variety of housing types within a medium density residential environment.*

Comment:

The proposed use maintains a residential flat building on site that is compatible with the surrounding residential land uses and provides for the continued use of the site as a residential allotment.

The scale of the development and its typology is considered to be appropriate for the site and the surrounding area and meets the needs of the local residents and the wider Sydney metropolitan area.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment:

The proposal will continue to meet the day to day needs of the residents by promoting a high-quality private open space for the enjoyment of the residents.

- *To ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah*

Comment:

The minor extent of the proposed roof will not adversely impact on the landscape setting and natural environment of Warringah. The roof is located within the existing building envelope with the roof being imperceptible from within the site and wider area. The proposal remains consistent with the medium density residential environment and its landscaped setting.

- *To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.*

Comment:

The proposed roof will not be readily discernible within the streetscape and wider area due to its location within the existing building envelope and separation to the boundaries.

Sufficient environmental planning grounds

Clause 4.6(3)(b) of WLEP 2011 requires the applicant to demonstrate that there are sufficient environmental planning grounds to justify contravention of the standard. The specific environmental planning grounds to justify the proposed contravention of the height of buildings standard are as follows:

Desired future character

The roof over the existing private open space of unit 18 positively contributes to the residential amenity of the unit and is consistent with the existing character of the building and is a similar scale to both existing and desired future developments in the area. The proposal maintains the appearance of the existing development when viewed from Pine Avenue.

While the development has a breach in the maximum height of buildings development standard, the encroachment is in large part due to the existing development including the existing basement level. It is noted that the roof remains below the existing non-compliant building height, and as such, the proposal maintains consistency with the existing building height, despite the proposed works.

The proposed roof achieves an appropriate built form comprising a low-profile roof form that will not be visually intrusive from adjoining land including the public domain, while also maintaining the character of the streetscape, along with providing good internal amenity and outlook.

The non-compliant roof is sufficiently setback from nearby properties with the non-compliance being imperceptible from the public domain. It does not result in any adverse impacts upon neighbouring properties with regard to solar access, visual privacy or view loss.

Lack of impact

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSWLEC 1242, the absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Furthermore, allowing for a variation to the building height that is consistent with the height and scale of nearby future development promotes the orderly and economic development of the land, consistent with objective (c) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravention of the maximum height development standard.

Conclusion

Overall, the consent authority can be satisfied that this written request has adequately addressed all relevant matters and that the provisions of clause 4.6 of WLEP 2011 have been met. As such, there is no jurisdictional impediment to the granting of consent in relation to the proposed breach of the height of buildings development standard.