

27-29 North Avalon Road, Avalon Beach

Clause 4.6 – Building Height

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Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This written request for an exception to a development standard is submitted in respect of the development standard contained within Clause 40(4)(c) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The request relates to an application for demolition works, tree removal, site consolidation and the construction of ten self-contained dwellings for seniors or people with a disability with 15 car parking spaces at 27 and 29 North Avalon Road, Avalon Beach. The development relies on the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).

1.2 Clause 4.6 Exceptions to development standards

Pittwater Local Environmental Plan 2014 (PLEP) applies to the land. Pursuant to clause 4.6(2) of PLEP development consent may be granted for development even though the development would contravene a development standard imposed by the PLEP, or any other environmental planning instrument (emphasis added in underline).

However, clause 4.6(3) states 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the development standard at clause 40(4)(c) of SEPP HSPD be varied.

1.3 Development Standard to be varied

Clause 40(4) of SEPP HSPD is as follows:

(4) Height in zones where residential flat buildings are not permitted

If the development is proposed in a residential zone where residential flat buildings are not permitted:

- (a) the height of all buildings in the proposed development must be 8 metres or less, and

Note. Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

- (b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

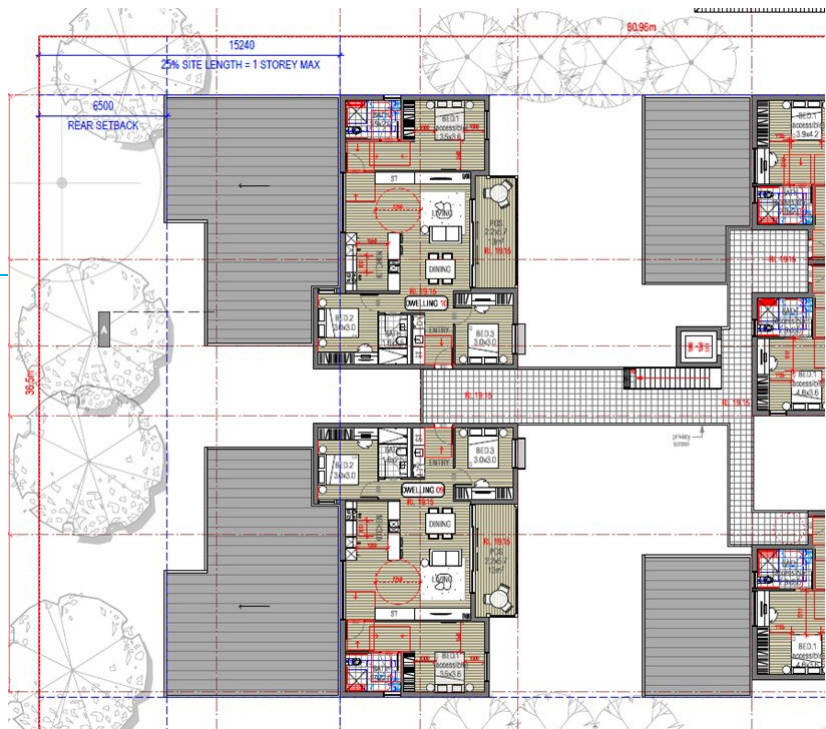
1.4 Extent of Variation to the Development Standard

Clause 40(4)(c) of SEPP HSPD provides that a building located in the rear 25% area of the site must not exceed 1 storey in height. As the site is rectangular and has a length of 60.96 metres, the rear 25% area of the site is that part of the site within 15.24 metres of the rear boundary.

The proposal complies with the standard of 40(4)(c) with the exception of Bedroom 2 of Dwellings 9 and 10 which both extend 1.4 metres into the 15.24 metre setback for a width of 4.2 metres (as shown on Drawing 102 prepared by Environa Studio). An extract of Drawing 102 is included as Figure 1. The non-complying element of the development is located at the centre of the site.

Figure 1:

Extract from Drawing 102 prepared by Environa Studio



1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with

the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five-part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

Clause 40 does not include a specific objective for the height requirement.

The aims of the Policy are set out in clause 2 of the SEPP. Clause 2 provides the following:

(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:

- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
- (b) make efficient use of existing infrastructure and services, and
- (c) be of good design.

(2) These aims will be achieved by:

- (a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
- (b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and
- (c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.

The proposed development is consistent with the aims of the SEPP in that the development increases the supply and diversity of residences that meet the needs of seniors or people with a disability by providing 10 self-contained dwellings that comply with the accessibility and usability standards of the SEPP for self-contained dwellings.

The site is in an existing low-density residential area and as such the necessary services and infrastructure are available to the two allotments. The development is able to make use of the existing infrastructure and services including local public transport services (being the local buses and the trial Keoride On-Demand Public Transport Service).

The development is of a good design as detailed in the accompanying Statement of Environment Effects. The Statement of Environmental Effects describes each aspect of the development and the proposal's compliance with all relevant planning provisions. The proposal's high level of compliance with the objectives and standards reflects the high quality of the design and its responsiveness to the local development context.

Part 4 'Impacts on Neighbours' of the Urban Design Guidelines for Infill Development set out the following objectives in relation to minimising impacts on neighbours. The Guidelines list the SEPP requirement for development in the rear 25% of the site to not exceed one storey as the relevant control for Part 4 of the guideline.

The objectives of Part 4 are:

- To minimise impacts on the privacy and amenity of existing neighbouring dwellings
- To minimise overshadowing of existing dwellings and private open space by new dwellings
- To retain neighbours views and outlook to existing mature planting and tree canopy
- To reduce the apparent bulk of development and its impact on neighbouring properties
- To provide adequate building separation.

The proposal is consistent with the objective of the standard as identified in the Infill Guidelines in that:

- The non-complying element of the building is setback 12.8 metres from both the eastern and western boundaries and 13.84 metres from the rear boundary. The non-complying element of the building is setback significantly further from the side boundaries than the minimum required setback. The setbacks of the non-complying element of the development ensure that the development will not result in an adverse visual impact nor will the development appear excessively bulky despite the proposed variation.
 - The wall of the ground level is setback 8.987 metres from the rear boundary. The roof over each deck to the rear of the site is setback 6.5 metres from the rear boundary. The ground level setback significantly exceeds the minimum required by the DCP for residential flat buildings and multi-dwelling housing (3 metres) and single dwellings (6.5 metres). The benefit of providing a greater rear setback on the ground level is that it enables mature trees and shrubs to be planted in the rear setback area which are capable of screening the development. The landscape design prepared by John Lock and Associates incorporates a mix of Eucalyptus Trees, Lilly Pillies and a range of other trees and shrubs to provide a layered and dense landscape screen between the development and the surrounding properties.
 - Adequate building separation is proposed to mitigate potential visual and privacy impacts.
 - The non-complying component of the development is only a small proportion of the rear elevation and a small proportion of the overall width of the site. Each of the two non-complying elements has a length of 4.2 metres and projects only 1.4 metres into the rear 25% of the site. The entire rear boundary has a length of 36.5 metres. As such, the variation does not result in an unreasonable or excessive visual impact.
 - The non-complying element of the building will not result in any excessive or unreasonable impacts on the solar access available to the neighbouring properties having regard to the limited size of the area of the non-complying component of the development and the significant setbacks of these elements from the side and rear boundaries. The adjoining properties will maintain over 3 hours of solar access to the main living rooms and private open spaces as shown on the shadow diagrams prepared by Environa Studio (Drawing 910).
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective of the standard is relevant to the development application.

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

The underlying objectives and purpose of the standard are relevant to the proposed development.

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 development standard has not been virtually abandoned.

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.**

The zoning of land is appropriate.

Strict compliance with the development standard is unnecessary or unreasonable in the circumstance of this site as discussed below:

- The proposal is consistent with the underlying objectives of the standard as detailed in this clause 4.6 request despite the minor variation to the development standard.
- Strict compliance in this instance would reduce the articulation of the rear elevation without any necessary improvement to the solar access, privacy or visual amenity available to the surrounding properties.
- Compliance is unnecessary as the development reduces the impacts of the development (and the proposed variation) on the surrounding properties by providing a greater rear setback than required on the ground floor.

1.6 [Clause 4.6\(3\)\(b\) Are there are sufficient environmental planning grounds to justify contravening the development standard?](#)

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

There are sufficient environmental planning grounds to vary the standard in that:

- Whilst a variation is proposed to the standard at clause 40(4)(c) of SEPP HSPD the development provides a significantly greater rear setback on the ground floor than required by P21DCP (8.987 metres instead

of 3 metres for a residential flat building/multi-dwelling housing development or 6.5 metres for a single dwelling) which allows for a generous landscaped buffer to be provided along the rear boundary whilst also providing sufficient space for outdoor entertaining areas to be provided for residents. The additional setback ensures that an appropriate landscaped setting is proposed for the development, consistent with the character of the area and minimises the potential visual impact of the development when viewed from the surrounding properties. The additional setback proposed for the ground floor results in a better outcome than a development that both fully complies with the rear setback provisions of the DCP and the height development standard.

- The variation allows for the articulation of the rear wall of Level 2 which assists in minimising the visual bulk of the rear elevation.
- The variation occurs at the centre of the site and is setback around 13 metres from both the side and rear boundaries. As such the non-complying element of the building does not result in any non-complying impact on the solar access to the surrounding properties. All surrounding properties maintain over 3 hours of solar access to the private open spaces and the development does not impact on any living room windows.
- The variation does not result in any adverse privacy impacts on the surrounding development having regard to the 12.8 metre setback of the non-complying element of the building from both the eastern and western boundaries and the 13.84 metre setback to the rear boundary.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R2 Low Density Residential zone.

The objectives of the R2 Low Density Residential zone 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 provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.

The proposed development increases the supply and diversity of housing for seniors and people with a disability in an accessible location.

The design of the development has been based on a thorough analysis of the site and surrounding area. The scale, setbacks, quantum of landscaping, internal layout and materials and finishes of the development are compatible with or responsive to the particular features of the adjoining sites and surrounding development.

In this regard the development is appropriate within the low-density residential environment in which it is located and is consistent with the objectives of the R2 zone.

1.9 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

As demonstrated above the proposal is consistent with the objectives of the zone and the underlying objectives of Clause 40(4)(c) notwithstanding the proposed variation to the standard.

Requiring strict compliance with the standard would reduce the modulation of the rear elevation and would not result in any real benefits to the surrounding properties in terms of reduced solar access, improved privacy or reduced visual impact. Requiring strict compliance would not recognise the benefits of the proposal's provision of a greater rear setback than required.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(b) of Clause 4.6 in that allowing flexibility in relation to the development standard and will achieve a better outcome in this instance.

1.10 Conclusion

Strict compliance with the minimum height of buildings development standard contained within clause 40(4)(c) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient

environmental planning grounds to justify the variation. Finally, the proposed variation is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the standard to the extent proposed.