

14 February 2023

The General Manager
North Beaches Council

**RE: 20 MARMORA STREET, FRESHWATER – REQUEST FOR EXCEPTION TO
HEIGHT OF BUILDING STANDARD – WARRINGAH LOCAL
ENVIRONMENTAL PLAN 2011**

I refer to the abovementioned matter and the attached development application regarding the same. The application seeks consent for the construction of a new two storey dwelling house upon the premise known as No. 20 Marmora Street Freshwater.

This submission seeks a variation to Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011), which prescribes a maximum height of building of 8.5m to the subject premise.

The proposed dwelling displays a maximum building height of 8.587 m. As such the proposal displays an exceedance to the maximum building height limit of the site by approximately 0.087m (1.02%).

Introduction

This submission is made under Clause 4.6 of the WLEP 2011 – Exceptions to development standards. Clause 4.6 states the following:

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 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.

- (4) Development consent must not be granted for development that contravenes a development standard unless—
 - (a) the consent authority is satisfied that—
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) 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, and
 - (b) the concurrence of the Planning Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.
- (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—

When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (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 Sites Map](#) as Site F, Site G, Site H or Site I,
 - (c) clause 5.4,
 - (caa) clause 5.5,
 - (d) clause 6.7, to the extent that it applies to land identified on the [Key Sites Map](#) as Site F or Site G.

- (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.

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority should be satisfied that all requirements of the Clause have been suitably addressed via the content in this formal request.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a Local Environmental Plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

(a) the consent authority is satisfied that:

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) 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, and*
- (iii) (b) the concurrence of the Secretary has been obtained.*

The Environmental Planning Instrument to which these variations relate to is the Warringah Local Environmental Plan 2011. The development standard to which this variation relates to is Clause 4.3 – Height of buildings, which reads as follows:

“Clause 4.3 Height of buildings

(1) The objectives of this clause are as follows:

- (a) to ensure that buildings are compatible with the height and scale of the surrounding 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.
- (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.
- (a) If the Height Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

A maximum Building Height of 8.5m applies to the subject site.

Written justification for the proposed variation to the height of buildings standard development standard in accordance with Clause 4.6 of the Warringah LEP 2011 is required.

Extent of Non-Compliance

As noted above, Clause 4.3 of the Warringah Local Environmental Plan 2011 states that the subject land is subject to a maximum building height of 8.5 metres.

Referring to the architectural plans incorporated to the DA package, it is noted that the maximum building height above natural ground level is displayed by the dwellings roof which is 8.587m at the highest point of the dwelling. The building height is noted as 8.587m, being approximately 87mm (approximately 1.02%) exceedance to the Development Standard.

We submit that the variation to the standard is minor. The proposed design seeks to provide a specific architectural form appropriate to the dwelling context. Essentially, the roof massing is a specific proportion to the dwelling façade scale. This is intrinsic to the architecture of the dwelling and achieves a balanced outcome.

The progression of the roof line forward results in an increased overall height due to the fall in topography towards the front of the site, as evident to the marked building height limit line on the development plans and elevations.

We note that the height remains entirely consistent to the predominant elevation displayed by building forms in the immediate surrounding context. Within that context, the development is entirely appropriate.

It is our submission that the breach will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the character of the area. As such, a degree of flexibility is considered reasonable in this instance and anticipate under the LEP where justification is made.

Is Compliance With the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

We note the decision of Commissioner Morris in *Randwick City Council versus Micaul Holdings Pty Ltd (2016) NSWLEC 7*. In that case, it was recognised that the Commissioner did not have to be directly satisfied that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicants written request has adequately addressed the matter that compliances with each development standard was unreasonable or unnecessary.

Further assistance on the approach to justifying a contravention was also taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
and
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015.

We submit the following analysis to the relevant measures in determining the unreasonableness of the standard in this particular circumstance.

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out on the following page:

First

The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.

Second

Another mechanism is to determine whether the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

Third

It may also be that the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

Fourth

The development standard may have 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.

Fifth

Another means is to establish that 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 following discussion is provided in response to each of the above:

First

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

The objectives supporting the height of buildings control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental planning impacts, would demonstrate that strict compliance with Clause 4.3 would be unreasonable in this instance.

The development as proposed will be in the public interest as it is consistent with the objectives of the development standard (being Clause 4.3), which are as follows:

(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.

The maximum height proposed is 8.587m, resulting in a numerical breach of approximately 87mm (1.02%).

The design of the structure is considered and appropriate in terms of its architectural form. Building orientation and placement utilise geographical features and will present a high quality/high amenity outcome. We submit that in view of these matters, the design provides a high quality urban form. The minor breach in height will not result in adverse impact to adjoining properties access to sunlight and views.

The immediate surrounding residential development display predominantly two storey elevations, with some progressing to three storeys as a result of topography of the land. Roof forms to the street elevation are varied, but generally display limited visual mass as a proportion of the façade scale.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard through adherence to the objectives of the development standard. As demonstrated, the objectives of the standard have been achieved.

Second

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

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined above. Therefore this provision is not applicable.

Third

The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective or purpose would not be defeated or thwarted if compliance was required. However, on balance the proposed development provides a better outcome.

Restricting development forms via the development standard may be overly restrictive and could result in architectural outcomes that are both inappropriate to the locality and lesser or poor architectural quality. The proposal has not disregarded the development standard, however looks for a level of flexibility tailored to the specific to unique setting.

As noted earlier, the roof massing is a specific proportion to the dwelling façade scale. This is intrinsic to the architecture of the dwelling and achieves a balanced outcome. The locality displays excessive sloping topography and as a function of that topography, elevation of building forms are readily evident.

The progression of the roof line forward results in an increased overall height due to the fall in topography towards the front of the site, as evident to the marked building height limit line on the development plans and elevations.

We note that the height remains entirely consistent to the predominant elevation displayed by building forms in the immediate surrounding context. Within that context, the development is entirely appropriate.

Fourth

The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard hence compliance with the standard is unnecessary and unreasonable; and

This particular aspect is not applicable in this instance.

Fifth

The zoning of the 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.

Not applicable as the zoning of the site is appropriate.

Are there Sufficient Environmental Planning Grounds?

The assessment above and shown throughout the Statement of Environmental Effects demonstrates that the resultant environmental impacts of the proposal will be satisfactory. The proposal addresses the site constraints and relevant objectives of both the standards and the zone.

The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the submitted reports. The proposed variation to the development standard is approximately 87mm. Notwithstanding the variation, the proposed works represent a well-considered development that addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal will maintain high levels of amenity within the development and to the surrounding context. The proposal seeks to make a positive contribution to the existing streetscape.

The proposal enables a better environmental planning outcome as the development responds to the site setting, whilst achieving a quality architectural outcome within the built form context. A compliant outcome would display limited or lesser architectural qualities.

In this case, we submit that the proposal displays sufficient environmental planning grounds to warrant variation to the development standard.

Is the Variation in the Public Interest?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Warringah LEP 2011 in that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standard;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted generally aligns with Council's Development Control Plan.

Based on the above, the variation is considered to be well founded.

Public Benefit of Maintaining the Standard

It is considered that there is no benefit to the public or the community in maintaining the development standard. The proposed development will allow for the creation of a high quality residential development which as stated above meets the desired objectives of the standard.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from Clause 4.3 within the Warringah LEP 2011 still allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Warringah LEP 2011 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (Height of Building) and objectives of the R2 Low Density Residential zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted aligns with the development expectations for the surrounding area.

Based on the above, the proposed variation is considered well founded.

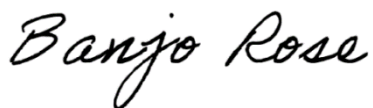
Conclusion

The proposal does not comply with the building height control prescribed by Clause 4.3 of the Warringah Local Environmental Plan 2011. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Warringah LEP 2011 are satisfied as the breach to the height of buildings does not create any adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this instance and use of Clause 4.6 of the Warringah LEP 2011 to vary this development control is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum Building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.

Yours faithfully
Montgomery Homes



Banjo Rose
Planner
(02) 4945 4000
planning@montgomeryhomes.com.au