

APPENDIX B – Clause 4.6 Variation Request: Height of Buildings

1. Site and Proposal

Address – 20 Molong Street, North Curl Curl. D.P. 881696, Lot 15.

Proposal – Alterations and additions to an existing dwelling house including the construction of an operable louvre awning to the first floor balcony.

Site description - The site is roughly rectilinear with a total site area of approximately 731m² per DP.

The site falls from the south-west corner to the south-east corner on Molong Street by around 1m, with stormwater connected to the street gutter.

The site currently accommodates a three-storey detached dwelling of rendered brick construction with a flat roof, enclosed garage area and hardstand parking to the south-eastern part of the street frontage.

Context – The surrounding streetscape is consistent with a mixture of single detached dwelling houses and ancillary structures such as garages, car ports and swimming pools. The majority of dwellings have first floor balconies, many located on the front/street side to capture prevailing ocean views.

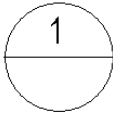
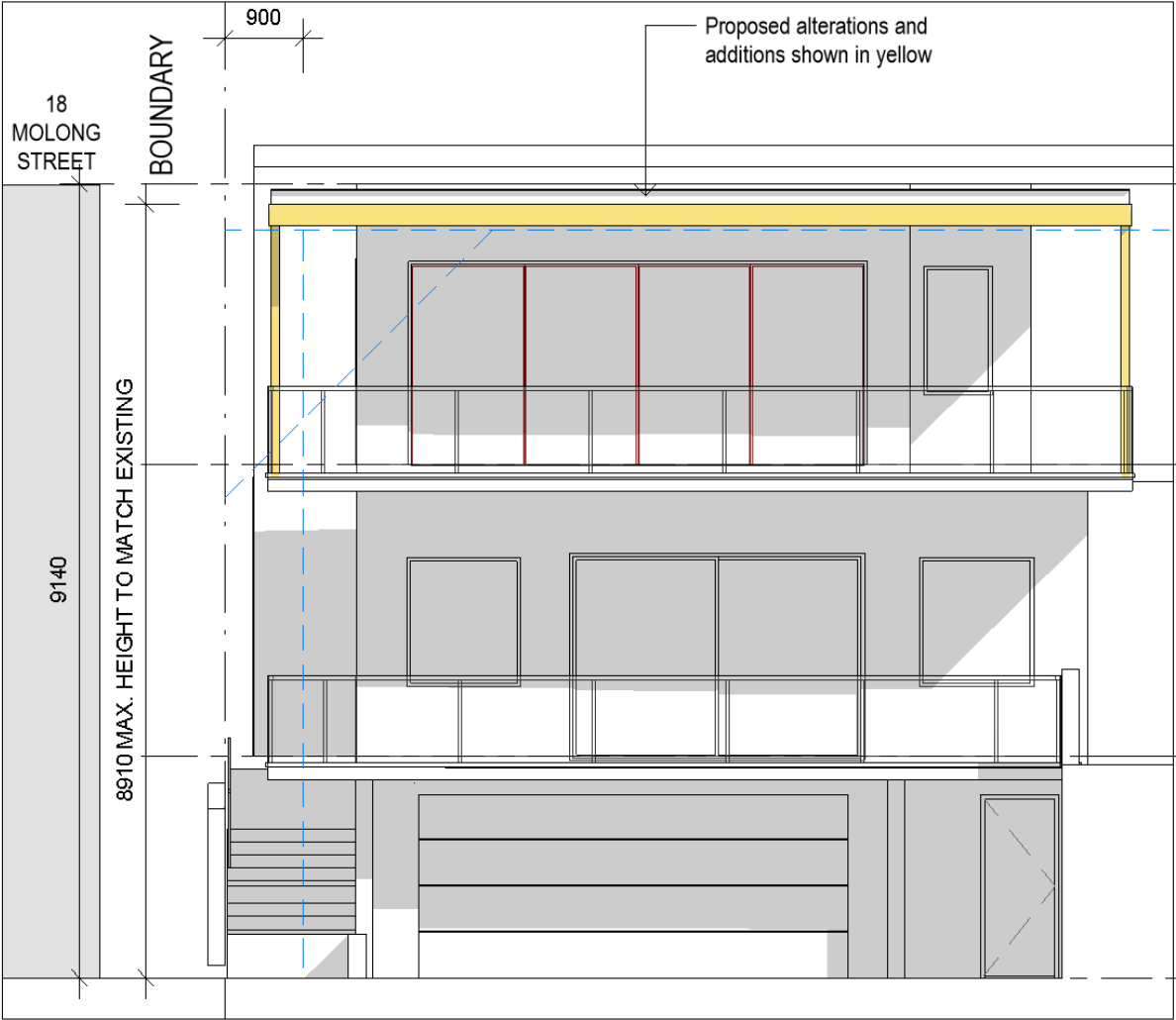
Assessment – the proposal has been assessed against the provisions of the Warringah LEP 2011 and Warringah DCP 2011 in the Statement of Environmental Effects.

The maximum height of buildings is outlined by WLEP clause 4.3, with the objectives outlined below. The maximum height for the subject site is 8.5m. The proposed awning seeks a maximum height of 8.91m. This is above the maximum height and results in a non-compliance of 0.41m or 4.8%. The existing roof has a maximum height of 9m.



The subject site shown in red (source: Google Maps)

The proposed east/street elevation:



EAST ELEVATION

2. Requirement of a clause 4.6 variation request

Clause 4.6(1) of MLEP states:

(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.

In *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118 at [90]:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

As such, clause 4.6(1) is not an operational provision, so the remaining clauses of clause 4.6 outline the operational provisions.

Clause 4.6(2) of WLEP states:

(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.

Clause 4.3, the Height of Buildings development standard, is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of WLEP.

Clause 4.6(3) of WLEP states:

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that -

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
(b) there are sufficient environmental planning grounds to justify contravention of the development standard.

The proposed development does not comply with the height of buildings development standard of clause 4.3 of WLEP. The standard outlines a maximum building height of 8.5m, however as will be discussed in detail below, strict compliance is considered to be unreasonable or unnecessary in the proposal and it will be demonstrated there are sufficient environmental planning grounds to justify the non-compliance with the development standard.

3. The Nature and Extent of the Variation

Clause 4.3 outlines a maximum building height of 8.5m. The existing dwelling has a maximum height of 9m and the proposed awning will have a maximum height of 8.91m. The non-compliance equates to 0.41m, which is a variation of 4.8%.

4. Zone R2 – Low Density Residential

Clause 2.3 and the Land Zoning Map provide that the subject site is zoned R2 – Low Density Residential and the Land Use Table in Part 2 of WLEP specifies the following objectives for the R2 zone:

- *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*

The proposed alterations and additions are to an existing dwelling house, which is a permissible use in the R2 zone. The proposal provides for an additional awning to an existing balcony that suits the landscaped settings of the natural environment and serves to improve the day-to-day amenity of the inhabitants of the house.

It is considered the proposal satisfies the objectives of clause 2.3.

5. Warringah Local Environmental Plan 2013 – Clause 4.3 Height of Buildings

Clause 4.3 of WLEP outlines the height of buildings development standard 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 Height of Buildings Map specifies a maximum building height for the land of 8.5m.

The proposal satisfies the relevant objectives of clause 4.3 as outlined below:

Objective (a)

The existing dwelling has a maximum height of 9m, and the existing awning which the proposed awning is to connect to has a maximum height of 8.91m. As the proposed awning is to match the existing awning, it is therefore compatible with the height and scale of the surrounding and nearby development.

Furthermore, the adjacent dwelling at 18 Molong St has a similar awning to the top floor balcony, the height and scale of which the proposal will be compatible with. See Appendix A photos for reference.

Objective (b)

Further to above, the proposed awning is minor in scale and will minimise visual impact, disruption of views, loss of privacy and loss of solar access, due to the natural siting of the subject site and adjacent dwelling at 18 Molong. See shadow diagrams for reference.

Objective (c)

The proposal will have no impact on the scenic quality of Warringah's coastal and bush environments as it is not readily visible from or related to any nearby public coastal or bush areas.

Objective (d)

The proposal will have no visual impact when viewed from public places as it is not readily visible from or related to any nearby public places.

It is considered the proposal satisfies the objectives of clause 4.3.

6. Is compliance with clause 4.3 unreasonable or unnecessary?

This variation request relies on the statement by Preston CJ in *Wehbe*, paragraph 17:

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

The objectives of the height of buildings standard and why they are considered to have been met are outlined below and in section 5 of this report:

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

The existing dwelling has a maximum height of 9m, and the existing awning which the proposed awning is to connect to has a maximum height of 8.91m. As the proposed awning is to match the existing awning, it is therefore compatible with the height and scale of the surrounding and nearby development.

Furthermore, the adjacent dwelling at 18 Molong St has a similar awning to the top floor balcony, the height and scale of which the proposal will be compatible with.

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

Further to above, the proposed awning is minor in scale and will minimise visual impact, disruption of views, loss of privacy and loss of solar access, due to the natural siting of the subject site and adjacent dwelling at 18 Molong.

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

The proposal will have no impact on the scenic quality of Warringah's coastal and bush environments as it is not readily visible from or related to any nearby public coastal or bush areas.

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

The proposal will have no visual impact when viewed from public places as it is not readily visible from or related to any nearby public places.

Notwithstanding non-compliance with the strict numerical controls of the development standard, the objectives of the development standard are met, as the proposal matches existing heights and has no adverse impact on adjacent dwellings or the public domains.

7. Are there sufficient environmental planning grounds to justify contravening the development standard?

The assessment of the proposal outlined in detail in this clause 4.6 variation request and in detail in the Statement of Environmental Effects, clearly demonstrates sufficient environmental planning ground to justify the contravention of the development standard. In addition, the stated non-compliance of 3.5% is minor.

8. Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R1 General Residential zone?

The assessment of the proposal against the objectives of clause 4.3 of WLEP and the objectives of the R2 zone in which the site is located, demonstrates that the proposal is in public interest. The public interest is addressed as the proposal would have minimal adverse environmental impacts on its locality whilst also meeting the objectives outlined above. Furthermore, the proposal would provide improved amenity for the occupants, whilst the reducing solar heat gain and thus improving energy efficiency within the existing dwelling.