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Via Email

Dear Sir/Madam

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Clause 4.6 Request to vary the Maximum Height of Buildings Control Clause 4.3(2FA) of Pittwater LEP 2014 – Secondary Dwelling at 15 Hudson Parade, Avalon

Introduction

This 4.6 variation is to be read in conjunction with the Statement of Environmental Effects for the proposed development at 15 Hudson Parade, Avalon.

In particular, the proposed secondary dwelling with carport below has a maximum height of 5.95m, resulting in a minor variation to the 5.5m height control which applies to secondary dwellings in the E4 zone as set out in Clause 4.3(2FA) of the Pittwater LEP 2014. The proposed secondary dwelling would not be highly visible from the street noting existing landscaping adjoining the front of the site is to be retained and screens this portion of the site from the street. The proposed variation is a result of the site topography which has a slope of approximately 3.6m from the rear of the secondary dwelling to the front portion. The elements of the development which exceeds the height control will not be perceptible from the public domain given the site circumstances and the variation will have no perceptible impact upon the surrounding locality.

This 4.6 variation seeks to vary the height provision applicable to this site by 450mm which represents a 8.1% variation to the standard of 5.5 metres.

This submission forms a request to grant an exception to the development standard Height in clause 4.3 of the PLEP 2014 under clause 4.6 “Exceptions to development standards” of the LEP. This application breaks down the considerations, justifications and demonstrations required by clause 4.6 in the following sections.

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 Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

(6) Development consent must not be granted under this clause for a subdivision N/A

(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,*
- (c) clause 5.4.*

Court Principles and Guidance around Application of 4.6 Exceptions

A number of court cases have assisted to guide expectations and facilitate appropriate application for and justification of the variations sought. Significant cases are cited below and will be drawn upon to assist with this application:

- I. In 2007, in the case *Wehbe v Pittwater Council* (CJ Preston) five (5) ways of establishing that compliance was unreasonable or unnecessary was discussed.
 1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*

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 (Fourth Method).*

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 (Fifth Method).*

II. In 2015, in the case *Four2Five Pty Ltd v Ashfield Council* (C Pearson) and later 2016 *Moskovitch v Waverley Council* (Tuor) it was established that written requests made under clause were required to demonstrate that:

a. that compliance was unreasonable or unnecessary in the circumstances of the case to be consistent with the objectives of the development standard (cl4.6 (3)(a), and

b. “sufficient environmental planning grounds (4.6(3)(b)) exist to support the variation.

In 2018, in the case *Initial Action Pty Ltd v Woollahra Municipal Council* (CJ Preston) it was established that Commissioner Smithson had misinterpreted and misapplied cl 4.6 of the Woollahra LEP 2014. In this case, the commissioner herself considered whether compliance was unreasonable or unnecessary rather than determining whether the written request had adequately addressed the matter. In summary, the court found that:

The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.

Further, the Commissioner had required that to be considered unreasonable or unnecessary, the non compliance with the standard needed to have a neutral or beneficial effect relative to a development that complied with the standard. CJ Preston said:

‘Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.... Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion.

With reference to sufficient environmental planning grounds CJ Preston further held:

Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.’

Development Standard to be Varied – Maximum Height

This clause 4.6 variation request relates to a departure from a numerical standard set out under clause 4.3(2FA) of the PLEP 2014 Height of 5.5m that applies to secondary dwellings in the E4 Environmental Living zone.

This development standard relates to the maximum permitted height of the development, clause 4.3(2FA) of the PLEP 2014 falls within a scope of a “development standard” as defined under section 4 of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).

Clause 4.3 of the PLEP 2014 contains objectives for the height of buildings development standard, with Clause 4.3(2FA) providing a 5.5m height standard for secondary dwelling’s separate from the principal dwelling in the E4 zone.

4.3 Height of buildings

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

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,;*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,;*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

(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.*

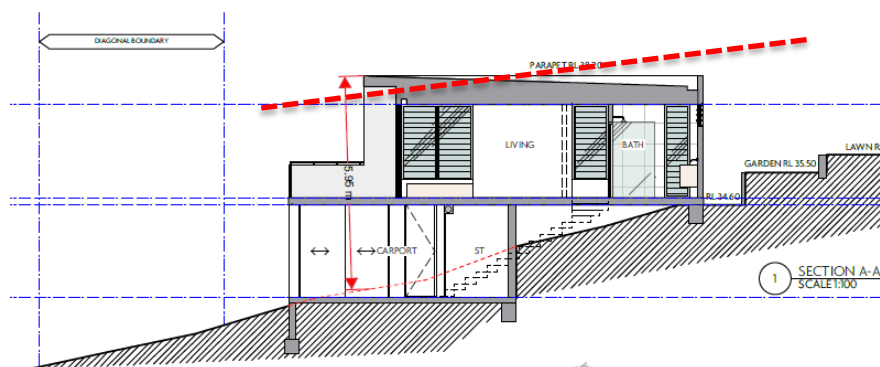
(2FA) Despite subclause (2), the maximum height for a secondary dwelling or a rural worker’s dwelling in Zone E4 Environmental Living or Zone RU2 Rural Landscape is 5.5 metres if the secondary dwelling or rural worker’s dwelling is separate from the principal dwelling.

Height Statistics

Under clause 4.3(2FA) the proposal has a prescribed maximum height of 5.5m being for a detached secondary dwelling with carport below.

- The proposed maximum height is 5.95m (450mm variation).
- This represents an 8.1% variation to the height standard.
- The over height component of works comprises only the front uppermost portion of the roof of the secondary dwelling and does not contain any windows or floor area, noting the majority of the building sits comfortably within the height control.

Figure 1 below depicts the maximum height of the building, with the 5.5m height line approximated.



Assessment of the Provisions of Clause 4.6 Exceptions to development standards

Clause 4.6 of the PLEP 2014 allows for flexibility to be applied to development standards where objectives can be obtained notwithstanding the variation. The mechanics of the clause, the objectives of the height of buildings standard and a response are all outlined below; however, the main opportunities and justifications for the building height variation are presented here:

- The front boundary of the site adjoins heavy vegetation/landscaping which screens the carport and secondary dwelling of the site, and the proposed variation being at the front upper portion of the development will not be highly visible from the public domain or significantly perceptible from adjoining properties.
- The over height component is confined to the front portion of the contemporary flat roof form and will not add significant bulk to the subject site.
- The vast majority of the building sits below the height control.
- The proposal provides an FSR that comfortably sits within that permissible on the site, demonstrating that the proposal is not an overdevelopment of the site.
- The proposal does not result in unacceptable solar impacts or other amenity impacts noting the adjoining properties are industrial land uses.

The site and the surrounding locality can support the increased height, as the primary controls for setbacks and FSR are maintained, and the proposal would not unreasonably overshadow or present a bulk and scale impact or view loss upon adjoining properties or the public domain.

Clause 4.6.3 (a)(b) - Unreasonable or Unnecessary / Environmental Planning Grounds

Commentary provided below to address the requirements of this clause.

Table 1 Request to vary development standard 4.3(2FA) Building Height

Objective	Comment
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>The proposed development will generally comply with the 5.5m height control.</p> <p>The proposed height variation is a result of the upper portion of the roof form, with the variation containing the front portion of the contemporary roof form of the secondary dwelling. The variation represents only 8.1%.</p> <p>The proposal is screened by an existing heavily vegetated strip of land adjoining the front setback of the site noting the variation will not be highly visible from the public domain or significantly perceptible from adjoining properties.</p> <p>The proposal is consistent with the objectives of the E4 Environmental Living zone in that the proposal is a low-impact residential development and would not impact upon the natural environment.</p>
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.	<p>The proposed variation is limited to the upper portion of the development – front of contemporary roof form.</p> <p>The primary environmental planning grounds to justify the variation to the 5.5m height control is the topography of the site, which has a slope of approximately 3.6m from the rear of the secondary</p>

Objective	Comment
	<p>dwelling to the front portion, directly resulting in the variation being confined to the front portion of the roof form.</p> <p>Further, the proposed development will not be highly visible from the public domain. Due to the significant setback from any public space or street and existing vegetation screening the location of the proposal.</p> <p>The proposed development is not excessive in size, with generally compliant setbacks, landscape and an FSR that sits comfortably within the maximum permissible under the PLEP 2014. The proposed variation will not impact upon the adjoining land uses.</p> <p>On balance it is considered that the proposal meets the objectives of the zone and meeting the height requirement is unnecessary in this instance.</p>

4.6.4 (i) (ii) - Achieving Consistency with the Objectives of the Standards

4.6 Exceptions to development standards

(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 Secretary has been obtained.

In terms of Clause 4.6 (4)(a)(i) this submission is the written request that addresses the matters contained required to be considered in subclause (3).

Table 2 Clause 4.6(4) ii assessment

Objectives for Consideration	Comment
<p>Zone E4 – Environmental Living Objectives</p> <ul style="list-style-type: none"> • To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values. • To ensure that residential development does not have an adverse effect on those values. • To provide for residential development of a low density and scale integrated with the landform and landscape. • To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors. 	<ul style="list-style-type: none"> • The proposal maintains low impact residential development through the amalgamating a secondary dwelling with a carport structure to tie in with the main dwelling's character. • The proposal will not adversely impact upon environmental values. • The proposed variation will sit comfortably within the front setback of the site noting the landscaped buffer adjoining the front boundary of the site will screen the proposal from the street. Further, the proposed secondary dwelling largely complies with the 5.5m height

Objectives for Consideration	Comment
	<p>control and conforms to the slope of the land.</p> <ul style="list-style-type: none"> The proposal will not impact upon riparian and foreshore vegetation.
<p>The relevant objectives of the height standard include:</p> <p>(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,</p> <p>(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</p> <p>(c) to minimise any overshadowing of neighbouring properties,</p> <p>(d) to allow for the reasonable sharing of views,</p> <p>(e) to encourage buildings that are designed to respond sensitively to the natural topography,</p> <p>(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.</p>	<ul style="list-style-type: none"> The scale of the building is consistent with the desired scale of development in the zone, noting it is not highly visible from the public domain. The proposal is consistent with the desired character of the Avalon Beach locality. The secondary dwelling will be in keeping with the low-density residential area. It is noted there are other examples of garage structures in the front setback within the streetscape including the adjoining property 17 Hudson Parade The proposal will not unreasonably impact upon the solar access of adjoining properties. The proposal will not result in view loss. The proposal has been designed to conform to the topography of the site with the majority of the building sitting comfortably within the 5.5m height control, and the variation being confined to the upper portion of the front roof form where a dip in the ground level of the site sits below. The proposed variation will not have an adverse visual impact upon the natural environment or heritage items.

Clause 4.6(5) Considerations

4.6 Exceptions to development standards

(5) *In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

The matters for consideration in clause 4.6(5) have been addressed in Table 2

Table 2 Clause 4.6(5) assessment

Matters of Consideration	Comment
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention does not raise any matters of state or regional significance.
(b) the public benefit of maintaining the development standard, and	<p>There is no public benefit in maintaining the standard.</p> <p>The proposal will not be highly visible from the public domain and the minor element above the</p>

Matters of Consideration	Comment
	height control will not be significantly perceptible from adjoining properties.
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.	N/A

Conclusion

The proposed application remains consistent with the objects of Part 1.3 and requirements of Part 4 of The Act. The proposed use is permissible with consent and uses the subject site to its full potential. The proposal will create a development that:

- Does not interfere with the existing streetscape.
- Is comparable in scale to existing buildings and recently approved buildings in the locality.
- Does not unduly impact the natural environment.
- Does not impact views or privacy.
- Promotes the orderly and economic use and development of the land.
- Promotes good design and amenity of the built environment.

The proposal responds to the character and nature of the locality and the minor variation proposed is a direct result of the site topography noting the majority of the proposed secondary dwelling complies with the 5.5m height control. The proposed non-compliance with the height requirement would not result in any significant adverse impacts.

Yours Faithfully,



Nicole Lennon

Director

Planik Pty Ltd