

**STATEMENT OF ENVIRONMENTAL EFFECTS**

**50 CONDOVER STREET, NORTH BALGOWLAH**

**DWELLING ALTERATIONS AND ADDITIONS**

**PREPARED ON BEHALF OF  
Mr Charles Rose**

**OCTOBER 2019**

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## 1. INTRODUCTION

This application seeks approval for the construction of alterations and additions to an existing dwelling upon land identified as Lot 4 in DP 30205 which is known as **No. 50 Condoover Street, North Balgowlah**.

In preparation of this development application consideration has been given to the following:

- Environmental Planning & Assessment Act, 1979.
- Warringah Local Environmental Plan 2011.
- Warringah Development Control Plan 2011.

The following details and documents have been relied upon in the preparation of this document:

- Survey Plan prepared by Total Surveying Solutions, Job No. 190990 and issued 09/05/19.
- Architectural Plans prepared by Duffy Regan Design, Job No. 639/19 and dated October 2019.
- BASIX Certificate #A359641\_04 and issued 30 September 2019.
- Geotechnical Investigation Report prepared by White Geotechnical Group, Ref No. J2371A and dated 24 September 2019.
- Arboricultural Impact Assessment Report prepared by Complete Arborcare and dated 28/09/19.
- Bushfire Assessment Report prepared by Bushfire Consultancy Australia, Report No. 50Con-01 and dated 29/08/2019.
- Waste Management Plan.

This Statement describes the subject site and the surrounding area, together with the relevant planning controls and policies relating to the site and the type of development proposed. It provides an assessment of the proposed development against the heads of consideration as set out in Section 4.15 of the Environmental Planning and Assessment Act 1979. As a result of that assessment it is concluded that the development of the site in the manner proposed is considered to be acceptable and is worthy of the support of the Council.

## 2. BACKGROUND

A Pre-lodgement meeting (PLM2019/0156) was held with Council on 13 August 2019 where the following issues were discussed:

- Side Boundary Setback / Side Boundary Envelope – The plans have been amended to comply with the side boundary envelope and setback. It is noted that the additions have been lowered to comply and the northern deck has been setback 0.9m to the northern boundary.
- Driveway long section and Off-street parking – A driveway long section has been provided to comply with the relevant Council controls.
- Removal and impact on canopy trees – An Arboricultural Report has been submitted with the application. In relation to the rock outcrops it is noted that the extensive rock outcrops in the rear yard remain unchanged. One rock is to be removed within the front setback and this is unavoidable in order to provide on site parking and driveway in accordance with Council controls.
- Classification of alterations and additions – In assessing whether a proposal is alterations/additions or a new dwelling reference is made to Coorey Municipality of Hunters Hill [2013] NSWLEC 1187. This case established a planning principle in this regard. The relevant issues raised in the Planning Principle are discussed below:
  - The proposed additions are located at the front of the existing dwelling due to the constraints of the site.
  - The proposal does not require the removal of any significant vegetation – refer to the Arboricultural Report submitted with the application. The proposal provides for 41% of the site to be available for landscaping which complies with the landscaping requirements of the DCP.
  - The ground floor of the existing dwelling will be retained, the small first floor study will be demolished. A demolition plan has been submitted.
  - In regard to the streetscape, the proposal has been designed to comply with the Council controls regarding front setback and building envelope. The proposal will present as a two storey dwelling that is compatible with the existing streetscape. The subject site is located towards the end of a cul-de-sac which is a no through road and does not experience much passing traffic. It is considered that the proposal provides for an appropriate streetscape presentation.
  - The proposal provides for a new driveway to replace the existing non-complying driveway. The driveway is located in the same location as the existing.
  - The existing dwelling enjoys an outlook to the northeast towards Condover Reserve. The proposed additions result in a dwelling that continues to enjoy this orientation.

- Whilst the proposal reduces existing site cover, the proposal continues to comply with the minimum landscaped area requirements of Council.
- The proposal complies with the LEP and DCP controls with the exception of a very small non-compliance with the height control. This non-compliance is a result of the existing fall of the land and the need to provide an eave to comply with BASIX. A Clause 4.6 variation has been prepared and submitted with the application in this regard.
- The proposal complies with the building envelope and boundary setbacks requirements of the DCP.
- The proposal provides for a new flat roof form to minimise height and bulk. Whilst this is a different roof form to that currently existing, given the slope of the site the change in roof form is not unreasonable.

In summary it is noted that the proposal retains the ground floor of the existing structure, with the upper level study to be demolished. Whilst the presentation is changed from the street, this is due to the topography and constraints of the site. The site is such that the only opportunity for additions is forward of the existing dwelling, otherwise extensive excavation and removal of rock outcrops would be required. The proposal generally complies with all of Council LEP and DCP controls with the exception of a very minor breach of the height control which is a result of an eave overhang required to meet the BASIX requirements. It is our opinion therefore that the proposal should be considered as alterations and additions.

- Height – A Clause 4.6 Variation is provided in Appendix 1 of this Report. The non-compliance relates only to the eave on the upper level and is a direct result of a previously excavated area of the site. Compliance could be achieved by removal of the roof form/eaves; however this element is required to achieve compliance with BASIX. The Clause 4.6 demonstrates that there is no detrimental impact as a result of this numerical non-compliance and that there are sufficient environmental grounds to support the non-compliance.

It is considered that the plans have been appropriately amended to address the issues raised by Council.

### 3. SITE DESCRIPTION AND LOCALITY

The subject site is identified as Lot 4 in DP 30205 which is known as 50 Condoever St, North Balgowlah. The site is located at the south-western side of Condoever Street opposite Condoever Reserve. The site is an irregular shaped allotment with an area of 847.2m<sup>2</sup>. The site has a frontage of 8.32m to Condoever Street with the property widening towards the rear, with the western boundary having a frontage of 13.715m to Kimo Street. The locality is depicted in the following map:



The site has a significant slope from the Kimo Street frontage towards Condoever Street. The site is currently occupied by a masonry and clad dwelling with storage under and small first floor level. A detached carport is located forward of the dwelling towards the north west side boundary. An existing paved driveway provides vehicular access from Condoever Street to the carport with a turning area adjacent. Due to the slope of the site there is no access from Kimo Street to the subject site. The dwelling is located centrally on site with large rock outcrop/escarpment immediately to the rear of the dwelling. There are some trees and shrubs located on the site and an Arboricultural Impact Assessment has been submitted with the application.

The site is depicted in the following photographs:





**View of Subject Site from Boundary Fronting Condover Street**

The existing surrounding development comprises a mix of one and two storey detached residential dwellings on varied allotment sizes. More recent development comprises larger two storey dwellings of modern appearance.

The subject site and existing surrounding development is depicted in the following aerial photograph:



**Aerial Photograph of Locality**



#### 4. THE DEVELOPMENT PROPOSAL

This proposal seeks approval for the construction of alterations and additions to an existing dwelling. The proposed additions are to be constructed of a mixture of rendered masonry and external cladding with low pitched metal roof.

The proposal provides for a new double garage at lower level to provide on site parking. The garage is to be setback 9.4m to the street frontage. The garage is provided with setbacks of at least 1.7m to the sites northern and southern side boundaries. A new concrete driveway and pedestrian stair will provide access to the site and garage. The dwelling entry is located at this level and provides for a stair within the garage.

Additions to the existing ground floor level provide for new living areas, kitchen and media room. These additions are located forward of the existing dwelling and maintain a minimum setback of 10.4m to the front boundary as measured from the wall of the dwelling. An attached deck along the front elevation is setback 7.4m from the street frontage. Setbacks of 1.2m and 1.7m are provided to the sites northern and southern side boundaries. Some internal alterations are proposed to the existing portion of the dwelling. A new deck is proposed to the northern side of the existing dwelling. This deck replaces an existing deck. The proposed deck is setback 0.9m to the northern boundary and provided with a 1.8m high privacy screen along the northern elevation.

The existing first floor of the dwelling is to be demolished with a new first proposed. The new first floor provides for two bedrooms each with own ensuite. This level is provided with setbacks of at least 3m to both the northern and southern side boundaries.

All collected stormwater will continue to discharge to the street gutter.

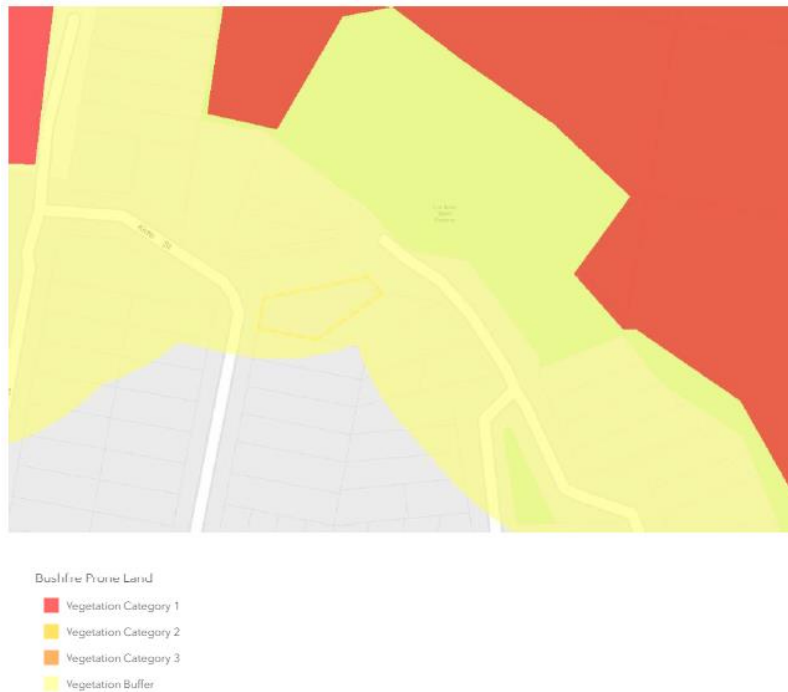
The proposal will result in the following numerical indices:

<b>Site Area:</b>	847.2m <sup>2</sup>
<b>Proposed Landscaped Area:</b>	352.6m <sup>2</sup> or 41%

## 5. ZONING & DEVELOPMENT CONTROLS

The proposed development is identified as development requiring the consent of the Council under the provisions of the Environmental Planning and Assessment Act 1979, as amended. The following is an assessment of the proposal against the relevant provisions of the Act and all of the relevant planning instruments and policies of Warringah Council.

### 5.1 Planning for Bushfire Protection 2006



**Extract of Bushfire Map**

The subject site is identified as bushfire prone land on Council's Bushfire Prone Land Map and therefore the provisions of Planning for Bushfire Protection 2018 apply. A Bushfire Assessment Report has been prepared by Bushfire Consultancy Australia which in summary provides:

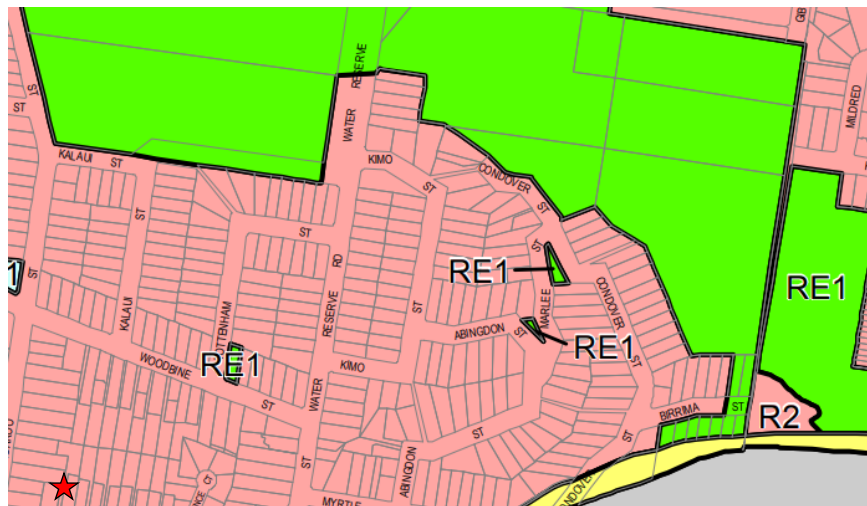
*The report concludes that the proposed development is on designated bushfire prone land and the legislative requirements for development of bushfire prone areas are applicable. The proposed development will be constructed to the minimum standard required in accordance with the guidelines of Planning for Bushfire Protection 2018 and AS 3959-2009 Construction of buildings in bushfire prone areas.*

*This report has considered all of the elements of bushfire attack and provided the proposed development is constructed in accordance with the recommendations of Section 11 of this report, it is my considered opinion that the development satisfies the Objectives and Performance requirements of the Building Code of Australia, Planning for bushfire Protection 2018 and Australian Standard AS3959, 2009.*

There is no further information required in this regard.

## 5.2 Warringah Local Environmental 2011

The Warringah Local Environmental Plan 2011 (LEP 2011) came into effect on Friday 9 December 2011.



Extract of Zoning Map

The site is zoned R2 Low Density Residential. Development for the purposes of alterations and additions to an existing dwelling house are permissible in this zone with the consent of Council. The following Development Standards specified in the LEP are relevant to the proposed development:

Clause	Development Standard	Proposal	Compliance
4.3 Height	8.5m	8.9m	See Appendix 1 for Clause 4.6 Variation

The following provisions are also relevant:

### Clause 6.4 Development on Sloping Land

The site is classified as Class B on Council's Landslip Map. A Geotechnical Investigation Report has been prepared White Geotechnical Group which in summary provides:

*The proposed development is suitable for the site. No geotechnical hazards will be created by the completion of the proposed development provided it is carried out in accordance with the requirements of this report and good engineering and building practice.*

There are no other provisions of the Warringah Local Environmental Plan 2011 that apply to the proposed development.

### 5.3 Warringah Development Control Plan 2011

The Warringah Development Control Plan (DCP) has been prepared by Council and was due to come into effect upon the gazettal of the LEP 2011. The new DCP contains detailed planning controls that support LEP 2011.

The following table provides a summary of the relevant controls of the DCP:

Clause	Requirement	Compliance
B1 – Wall heights	7.2m	Yes Proposed wall height is approximately 7m
B2 – Number of storeys	Not Applicable	Not Applicable
B3 - Side Boundary Envelope	Building envelope 45 degrees from 4m. Eaves up to 675mm are an allowable encroachment	Yes (eaves are an allowable encroachment)
B4 – Site Coverage	Not Applicable	Not Applicable
B5 - Side Boundary setbacks	Minimum: 0.9m	Yes Proposed additions are setback at least 900mm (deck) to northern boundary and 1.7m to southern boundary.

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
B7 – Front Boundary Setbacks	Minimum 6.5m	Yes The proposed additions are setback 7.4m from the deck to the front. The wall of the proposed additions are setback 9.4m from the street frontage.
B9- Rear Boundary Setbacks & B10 Merit Assessment of Rear Setbacks	6.0m	Yes The proposed additions are provided with ample setback to the rear boundary.
B11 – Foreshore Building Setback	Not applicable	Not Applicable
B12 – National Parks Setback	Not applicable	Not Applicable
B13 – Coastal Cliffs Setback	Not applicable	Not Applicable
B14 – Main Roads Setback	Not applicable	Not Applicable
B15 – Minimum Floor to Ceiling Height	Not applicable	Not Applicable
C2 – Traffic, Access and Safety	Vehicular crossing to be provided in accordance with Council's Vehicle Crossing Policy	Yes A new vehicular crossing is provided to ensure compliance with Council's policy. The current driveway is non-compliant.
C3 – Parking Facilities	Garages not to visually dominate façade Parking to be in accordance with AS/NZS 2890.1	Yes The proposal provides for a new double garage. The garage is located behind the required front building line, being setback 9.4m to the street frontage. This setback is comparable to the two immediately adjoining properties.



Clause	Requirement	Compliance
		Further the garage is located beneath a deck which reduces its dominance. The proposal complies with this clause.
C4 - Stormwater	To be provided in accordance with Council's Stormwater Drainage Design Guidelines for Minor Developments & Minor Works Specification.	Yes All collected stormwater will continue to discharge to the existing stormwater system which disperses to the street gutter.
C5 – Erosion and Sedimentation	Soil and Water Management required	Yes A Soil Erosion Management Plan has been prepared and forms part of the submission to Council.
C6 - Building over or adjacent to Constructed Council Drainage Easements	Not Applicable	Not Applicable
C7 - Excavation and Landfill	Site stability to be maintained	Yes The proposal requires some excavation to accommodate the garage. The existing garage is inaccessible due to the slope of the site and head height and the existing driveway servicing the carport is non-compliant with Council controls. To provide a new garage on site, excavation is required to achieve the gradients required by Council's policy.

Clause	Requirement	Compliance
		Notwithstanding this excavation is appropriately setback from the boundaries of the site and will not have any detrimental impacts on significant vegetation. Further a Geotechnical Investigation Report has been prepared by White Geotechnical in support of the proposal.
C8 – Demolition and Construction	Waste management plan required	Yes Waste Management Plan submitted.
C9 – Waste Management	Waste storage area to be provided	Yes There is sufficient area on site and behind the front building line for waste and recycling bins.
D1 – Landscaped Open Space and Bushland	Min 40% Landscaped Area to be maintained	Yes The proposal provides for a landscaped area of 41% of the site which complies with this clause.
D2 - Private Open Space	Dwelling houses with three or more bedrooms Min 60m <sup>2</sup> with min dimension 5m	Yes Proposal improves private open space through the provision of a new deck on the front elevation and replacement of an existing deck on the northern side elevation. These areas are directly accessible from the internal living areas.
D3 - Noise	Mechanical noise is to be attenuated to maintain adjoin unit amenity.	Not Applicable

Clause	Requirement	Compliance
	Compliance with NSW Industrial Noise Policy Requirements	
D4 – Electromagnetic Radiation	Not Applicable	Not Applicable
D5 – Orientation and Energy Efficiency	Dwellings to be orientated to receive northern sun Appropriate construction to enhance thermal properties and ventilation/natural cooling Compliance with SEPP (BASIX) requirements	Yes The proposed additions will receive good solar access throughout the year. A BASIX certificate has been issued and forms part of the submission to Council.
D6 – Access to sunlight	The controls require that sunlight to at least 50% of the private open space of both the subject and adjoining properties' private open space receives not less than three hours sunlight between 9am – 3pm on 21 June winter solstice.	Yes Shadow diagrams, have been prepared which depict both the existing and the proposed shadowing as well as elevational diagrams. These diagrams depict that all adjoining properties will continue to receive at least 3 hours solar access to private open space and north facing living room windows on the winter solstice.

Clause	Requirement	Compliance
D7 - Views	View sharing to be maintained	<p>Yes</p> <p>The subject site and surrounding properties currently enjoy an outlook towards Condover Reserve. The proposal given the site slope and setbacks provided will ensure existing outlooks from surrounding properties is maintained.</p>
D8 - Privacy	This clause specifies that development is not to cause unreasonable overlooking of habitable rooms and principle private open space of adjoining properties.	<p>Yes</p> <p>The additions have been designed to ensure privacy of the adjoining properties is maintained. The proposal provides for a new first floor which comprises only bedrooms and bathrooms with all the high use living areas maintained on the ground floor level.</p> <p>The proposal provides for new decks as follows:</p> <p><i>Ground floor deck on front façade</i> – this deck provides views of the street and dwelling approach as well as Condover Reserve. As this deck is located on the front façade it does not allow views into the private open space of the adjoining properties. A privacy screen is proposed along the southern elevation of this deck to ensure privacy is maintained to the adjoining property.</p>

Clause	Requirement	Compliance
		<p><i>Ground floor deck on northern elevation</i> – This deck replaces an existing paved patio in the same location. The deck is slightly raised (approx. 400mm) to ensure level access from the dwelling. However the new deck will be setback 900mm from the side boundary and a privacy screen provided which in conjunction with the boundary fence will ensure that there is no loss of privacy to the adjoining property.</p> <p><i>First floor deck</i> – The proposal provides for a deck along the front façade of the first floor. This deck is provided with privacy screens along both the side elevations thereby directing views to the street and towards Condoover Reserve. This deck had a depth of only 2.1m and serves bedrooms and as such is not conducive to outdoor entertaining. It is considered that the setbacks and privacy screen provided in conjunction with the limited depth will ensure that privacy to the adjoining properties is maintained.</p>



Clause	Requirement	Compliance
D9 – Building Bulk	This clause requires buildings to have a visual bulk and architectural scale that is consistent with structures on nearby properties & not to visually dominate the street.	Yes The proposal results in a two storey dwelling which has been designed to step down the site. The dwelling is well articulated on all facades through the use of varied setback, decks and a variety of external finishes. It is considered that the resultant dwelling complements the streetscape and is compatible with the surrounding dwellings.
D10 – Building Colours and materials	External finishes and colours sympathetic to the natural and built environment	Yes External finishes selected to be compatible with the existing surrounding development and the natural environment.
D11 - Roofs	The LEP requires that roofs should not dominate the local skyline.	Yes The proposal provides for a low pitched roof form which is compatible with the variety of roof forms in the locality and minimises height and bulk.
D12 – Glare and Reflection	Glare impacts from artificial illumination minimised. Reflective building materials to be minimized.	Yes The proposal will not result in unreasonable glare or reflection.

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
D13 - Front Fences and Front Walls	Front fences to be generally to a maximum of 1200mm, of an open style to complement the streetscape and not to encroach onto street.	Not Applicable Fence/gate proposed behind front building line.
D14 – Site Facilities	Garbage storage areas and mailboxes to have minimal visual impact to the street Landscaping to be provided to reduce the view of the site facilities.	Yes Existing facilities retained.
D15 – Side and Rear Fences	Side and rear fences to be maximum 1.8m and have regard for Dividing Fences Act 1991.	Not Applicable
D16 – Swimming Pools and Spa Pools	Pool not to be located in front yard or where site has two frontages, pool not to be located in primary frontage. Siting to have regard for neighbouring trees.	Not Applicable
D17 – Tennis Courts	N/A	Not Applicable
D18 - Accessibility	Safe and secure access for persons with a disability to be provided where required.	Not Applicable
D19 – Site Consolidation in the R3 and IN1 Zone	Not Applicable	Not Applicable
D20 – Safety and Security	Buildings to enhance the security of the community.	Yes The dwelling will continue to provide a good outlook of dwelling approach and street.

Clause	Requirement	Compliance
	Buildings are to provide for casual surveillance of the street.	
D21 – Provision and Location of Utility Services	Utility services to be provided.	Yes Existing facilities on site.
D22 – Conservation of Energy and Water	A BASIX Certificate is required.	Yes
D23 - Signs	Building identification signage to be appropriate for proposed use and not to impact on amenity of surrounding locality. Signs not to obscure views or potentially hazardous road features or traffic control devices.	Not Applicable
E1 – Private Property Tree Management	Arboricultural report to be provided to support development where impacts to trees are presented.	Yes An Arboricultural Report has been submitted with this application.
E2 – Prescribed Vegetation	Not identified on map	Not Applicable
E3 – Threatened species, populations, ecological communities	Not identified on map	Not Applicable
E4 – Wildlife Corridors	Not identified on map	Not Applicable
E5 – Native Vegetation	Not identified on map	Not Applicable
E6 - Retaining unique environmental features	Unique or distinctive features within a site to be retained	Yes The proposal retains the extensive rock outcrops in the rear yard.

Clause	Requirement	Compliance
E7 – Development on land adjoining public open space	N/A – not identified on map	Not Applicable
E8 – Waterways and Riparian Lands	Not identified on map	Not Applicable
E9 – Coastline Hazard	Not identified on map	Not Applicable
E10 – Landslip Risk	Identified on map as B	Yes Geotechnical report submitted.
E11 – Flood Prone Land	Not Applicable	Not Applicable

There are no other provisions of the DCP that apply to the proposed development.

## **6. EP & A ACT - SECTION 41.5**

### **The Provisions of any Environmental Planning Instruments**

The proposal is subject to the provisions of the Warringah Local Environmental Plan 2011. The site is zoned R2 Low Density Residential under the provisions of the LEP. Construction of alterations and additions to an existing dwelling house is permissible with the consent of Council in this zone. It is considered that the provisions of this document have been satisfactorily addressed within this report and that the proposal complies with the relevant provisions.

There are no other environmental planning instruments applying to the site.

### **The Likely Impacts of the Development**

It is considered that the development will provide for alterations and additions to an existing dwelling without any detrimental impact on the environment, social and economic status of the locality.

### **The Suitability of the Site for the Development**

The subject site is zoned R2 Low Density Residential and the construction of alterations and additions to an existing dwelling house in this zone is permissible with the consent of Council. The resultant dwelling is of a bulk and scale that is consistent with the existing surrounding development.

For these reasons it is considered that the site is suitable for the proposed development.

### **The Public Interest**

It is considered that the proposal is in the public interest in that it will provide alterations and additions to an existing dwelling that is consistent with other development in this locality without impacting the amenity of the adjoining properties or the public domain.



## 7. CONCLUSION

This application seeks approval for the construction of alterations and additions to an existing dwelling and associated works. As demonstrated in this report the proposal is consistent with the aims and objectives of the Warringah Local Environmental Plan 2011. The proposed dwelling does not have any detrimental impact on the amenity of the adjoining properties or the character of the locality.

It is therefore considered that the proposed construction of alterations and additions to an existing dwelling and new swimming pool at **No. 50 Condoover Street, North Balgowlah** is worthy of the consent of Council.

Natalie Nolan  
Grad Dip (Urban & Regional Planning) Ba App Sci (Env Health)  
**Nolan Planning Consultants**  
October 2019

**APPENDIX 1 – CLAUSE 4.6 VARIATION HEIGHT  
VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM  
BUILDING HEIGHT REQUIRED BY CLAUSE 4.3 OF THE WARRINGAH LOCAL  
ENVIRONMENTAL PLAN 2011**

**For:** Proposed Dwelling Additions/Alterations  
**At:** 50 Condoever Street, North Balgowlah  
**Applicant:** Mr Rose

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## **1.0 Introduction**

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

## **2.0 Background**

Clause 4.3 restricts the height of a building and refers to the maximum building height noted within the “*Height of Buildings Map*.”

The maximum building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed new dwelling will provide a height of up to 8.9m which exceeds Council’s maximum building height by 400mm or 4.7% and therefore does not comply with this control.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

## **3.0 Purpose of Clause 4.6**

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

#### **4.0 Objectives of Clause 4.6**

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the non-compliance relates directly to an eave overhang which is required to meet the BASIX requirements. Amendments to ensure strict compliance would leave northeast facing windows/openings unprotected.

The proposal will provide for the construction of additions to an existing dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum overall height, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed dwelling has been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing.

## 5.0 Onus on Applicant

Clause 4.6(3) provides that:

*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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

## 6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the Samadi judgement states:

*Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

### Precondition 1 - Consistency with zone objectives

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *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.*

## Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control (400mm), the proposed dwelling additions will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

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

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed improvements to an existing dwelling which will provide form an appropriate level of family accommodation and in a form which respect the predominant height and scale of the surrounding dwellings.

The development will see a minor noncompliance with the building height control of up to 400mm, with the non-compliance relating to a very small portion of an eave overhang. The contemporary building form with low pitch skillion roof and the appropriate external finishes considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade and building elevation, together with the increased side setbacks and recessive external finishes to the upper level will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and will not be a visually element in the area.

The compatible form and scale of the resultant dwelling will meet the housing needs of the community within a single dwelling house which is a permissible use in this low density residential zone.

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

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

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

The proposal does not result in the removal of any significant vegetation, with an Arboricultural Report submitted as part of the application. The proposal provides for 41% of the site to be available for landscaping which complies with the DCP requirements. The proposal provides for landscaping adjacent to the driveway to ensure a landscaped streetscape. The rock outcrops and existing landscaping to the rear of the dwelling is to remain unchanged.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

## **Precondition 2 - Consistency with the objectives of the standard**

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

*(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.*

## **Comments**

Despite the minor variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

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

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the surrounding and nearby development.

The surrounding area is predominantly characterised by two storey development, some located over basement garages given the topography of the area.

The proposal seeks to accommodate additions to the existing dwelling within a contemporary building form, with the slope of the site towards the street and previous excavation resulting in a portion of the roof being up to 8.9m in height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing appropriate boundary setbacks which demonstrated by compliance with Council's building envelope specified in the DCP.

The proposed external colour and materials palette utilises complimentary finishes to ensure that the building's visual height and scale is further minimised.

The additions step down the site with the front portion of the additions well within the Council controls.

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

Due to the slope of the site towards the street, the subject and surrounding properties enjoy views to the northeast over Condoover Reserve. The properties to the rear of the subject site, namely No. 17 Kimo Street, are elevated such that the proposal will not obstruct any views from this property. It is noted that the floor levels of 17 Kimo Street are above the maximum height of the proposed additions. With respect to the adjoining properties, No. 48 and 52 Condoover Street, the street setbacks provided to the proposed additions are such that the views from these adjoining properties will be unaffected by the proposal.

In relation to privacy, the proposed additions have been designed to ensure an appropriate level of privacy is maintained to the adjoining properties. This is discussed in detail in the Statement of Environmental Effects (in response to Clause D8 Privacy of the DCP). The appropriate design, orientation and setbacks ensures privacy is provided to the adjoining properties.

Shadow diagrams, have been prepared which depict both the existing and the proposed shadowing as well as elevational diagrams.

These diagrams depict that all adjoining properties will continue to receive at least 3 hours solar access to private open space and north facing living room windows on the winter solstice.

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

The proposal is not visible from any coastal waters or foreshore nor is it within a bush environment.

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

The proposal provides for a well articulated development that is provided with sufficient front setback and will not have any detrimental impact on Condoover Reserve.

Despite the variation to the building height control which occurs as a result of the sloping topography of the site and BASIX requirements, proposal is generally consistent with the height and scale of newer development in the locality.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the alterations and additions to an existing dwelling, which is constrained by the nature of the existing development on site and the sloping topography of the site.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m. As a result of the slope of the site towards the street and previous excavation, a very small portion of the roof overhang/eave will be up to 8.9m above ground level (as previously excavated). When measured from natural ground level, the proposal would have a maximum height of approximately 7.5m and comply with this control.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- The development will maintain a compatible scale relationship with the existing residential development in the area. Development within this portion of Condoover Street and surrounding properties has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.
- The proposed additions to the dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposal will maintain an appropriate area of soft landscaping which readily complies with Council's landscaping requirements, and the site will maintain an appropriate balance between the landscaping and the built form.



In the Wehbe judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

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

**Comment:** Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

**Comment:** It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

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

**Comment:** Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

**Comment:** Whilst it is not suggested that Council has abandoned its control, variations to the maximum building height control have been granted in the immediate vicinity, where Council has considered it appropriate to do so for development that meets the objectives of the zone. In this instance it is considered that the proposed development appropriately addresses the zone objectives and is worthy of the support of Council.

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.*

**Comment:** The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

Council's controls in Clause 4.3 provide a maximum building height of 8.5m for the subject development.

The proposed new dwelling the dwelling will provide a height of 8.9m or a 400mm/4.7% variation to the control.

The development is justified in this instance for the following reasons:

- The works will present a minor variation to the building height control which occurs as a result of the site's sloping topography, previous excavation and the requirements of BASIX. The resultant dwelling is considered to be compatible with the form and nature of the surrounding development.
- The proposal is consistent with the character of development in the locality.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed development is considered to promote good sustainable design with the non-complying element relating to a roof overhang/eave which provides sun protection to northeast openings which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development.

That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the *Four2Five* decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The external form of the proposed dwelling is stepped to follow the sloping topography of the site and results in a dwelling which is compatible in scale to its surrounding neighbours, which promotes the orderly & economic use of the land.

- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Condoover Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.
- The proposal promotes ecologically sustainable development by retaining the existing dwelling and providing for an eave (non-complying component) to provide shading as required by BASIX to northeast openings.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

## **7.0 Conclusion**

This development proposes a departure from the maximum building height control, with the proposed new dwelling to provide a maximum building height of 8.9m.

This variation occurs as a result of the siting of the sloping topography of the site.

This objection to the maximum building height control specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height would be unreasonable and unnecessary in the circumstances of this case.

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