

CLAUSE 4.6 SUBMISSION

33 BEACH ROAD, COLLARORY

Clause 4.3 Building Height

Clause 4.3, Height of buildings, provides objectives and a standard for height of buildings. The objectives of the clause are:

- (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.*

Clause 4.3(2) effectively limits the height of buildings in this locality to 8.5 metres. The designer has confirmed that the maximum building height is 8.73-metres (RL17.52 – RL8.79). Therefore, the proposal does not comply with the standard. The non-compliance is equivalent to 230mm or 2.7% of the standard and it is numerically minor. Nonetheless, a submission pursuant to Clause 4.6 follows.

Clause 4.6, Exceptions to development standards, 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, and*
 - (b) *to achieve better planning 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) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard [and]*
- (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.*

Clause 4.3, Height of buildings is a development standard that is not subject to any of the specified exclusions from the operation of clause 4.6.

Relevant Case Law

There are a number of decisions of the Land and Environment Court that are relevant to clause 4.6 departures including *Four 2 Five v Ashfield*, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition, the decision in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118 confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard.

Therefore, this must be considered when evaluating the merit of the departure.

The further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 is authority that requires the consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in *Al Maha* was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where the Court found that:

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally, the decision in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that:

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).
- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives.
- The development be compatible with the objectives, rather than having to *achieve* the objectives.
- In establishing that '*compliance with the standard is unreasonable or unnecessary in the circumstances of the case*' does not always require the applicant for development to show that the relevant objectives of the standard are achieved by the proposal (the first test in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827). Other

methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe*.

- The proposal is required to be in '*the public interest*'.

In accordance with the guidelines provided by these decisions, this submission addresses the requirements of clause 4.6 in turn.

HEIGHT OF BUILDINGS

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The judgment in *Wehbe v Pittwater Council* [2007] NSWLEC 827 identified five ways of establishing under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) that compliance is unreasonable or unnecessary. The subsequent cases referred to above have confirmed that these considerations are equally applicable under the clause 4.6 regime.

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard.* This contention is required to be addressed separately as set out below.

The objectives of the building height standard are set out in clause 4.3:

- 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.*

to ensure that buildings are compatible with the height and scale of surrounding and nearby development

The proposal includes a first-floor addition to the existing dwelling as well as minor alterations and additions at ground and lower ground floor level. The non-compliance arises primarily for two reasons. Firstly, the abrupt fall in slope of the land from front to rear of the site, in particular, in the middle of the existing dwelling. There is also a cross-fall which also contributes to the non-compliance and the variation in the site's slope in the middle of the existing dwelling is evident by comparing the northern and southern side elevations. Secondly, the proposal provides a pitched roof for the first floor which is identical to the existing gable ended dwelling to maintain its architectural character and its contribution to the streetscape.

The proposal could comply with the standard in several ways, involving lowering the roof pitch, lowering the pitching points or introducing a hip roof at the rear. A requirement to comply with the standard would be for the sake of compliance because of its minor nature and without any substantive benefit to local residential amenity. The non-compliance is acceptable because it provides a two-storey form in the street elevation, which is consistent with the height and scale of surrounding and nearby development.

Lowering the roof pitch to comply would result in a mismatch of roof pitches on the existing house and would be detrimental to its character and the streetscape.

Lowering the roof pitches at the sides of the first floor would be detrimental to the appearance of the proposal because in simple terms it “visually” compresses the first floor whereas the proposal currently is visually balanced generally with even floor-to ceiling heights over each floor.

A hip roof rather than a gable end at the rear of the house would also be inconsistent with the dwelling’s gable end character without any material improvement in the environmental performance of the dwelling. It would also have no impact on lowering the overall height of the dwelling.

to minimise visual impact, disruption of views, loss of privacy and loss of solar access.

As previously discussed, the proposal generally provides a conventional two-storey form in the street elevation (public domain) and it will not result in any unreasonable visual impact, disruption of views, loss of privacy and loss of solar access. The two-storey form is generally consistent with the pattern of development in the locality. It is noted that the proposal may have some minor impact on views from the dwelling on the opposite side of the street, however, any view loss is not unreasonable because the two-storey form of the proposal is consistent with those dwellings on the opposite side of the street and in the locality generally. Furthermore, any view impact is minimal and significant views will remain for these neighbours. The proposal is in accordance with Council’s DCP view assessment controls as well as the planning principles enunciated in the judgment of *Tenacity v Warringah Council* by the Land & Environment Court of NSW.

The proposed first floor includes three windows serving the master bedroom as well as a balcony in the eastern elevation and the predominant view is generally down the line of subdivision towards the water rather than to adjoining neighbours. The balcony will not result in any unreasonable privacy impact on No. 31 because its hip metal roof covering the lower-level ground floor (with a shorter rear setback component) intervenes and will largely obstruct the outlook over the eastern end of its backyard inground swimming pool. Furthermore, the location of these windows and balcony is generally consistent with the pattern of development in the locality.

Windows proposed in the northern side elevation serve the master bedroom’s ensuite (W17), WC (W16) and study (W14). The outlook from the study is primarily towards the street front, providing valuable casual surveillance of it and will not result in any unreasonable privacy. The ensuite and WC windows will not result in any unreasonable privacy impacts as these windows are generally obscure for their own privacy purposes. The window in the southern elevation (W19) incorporates a planter bed to provide acceptable screening and to enhance visual separation between neighbours.

In addition, the proposal will not result in any unreasonable June 21 shading as confirmed in the architect’s shadow diagrams

to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments.

The site is located in the Long Reef coastal environment. As previously discussed, the proposal provides a conventional two-storey form in the street elevation and it is consistent with the pattern and character of development in the locality. The proposal provides a three-storey form in the Long Reef (east) elevation, however, it should be generally seen as a two-storey dwelling because a storey is provided in a sub-floor level which should not be visible from a distance as it will be mostly obscured by the dwelling at the rear occupying No. 29 Beach Road. The proposed first-floor will harmoniously blend with the local built form and therefore it will not have any adverse impact on the scenic quality of the locality.

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

The site is a short distance from the Fox Park, Collaroy beach and Long Reef Aquatic Reserve. The proposal acceptably minimises its visual impact particularly when viewed from the park, beaches and reserve because its form, scale and height are consistent with nearby dwellings. The proposal is generally surrounded by adjoining dwellings which will effectively screen it from general view from these public places. Any view of the addition, will be a passing glimpse and it will be in harmony with surrounding development.

2. *The objective is not relevant to the development.*

This criteria is not applicable to the proposal because all objectives are relevant.

3. *The objective would be defeated or thwarted if compliance was required.*

This criteria is not applicable to the proposal.

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard.*

This criteria is not applicable to the proposal.

5. *The zoning of the land is unreasonable or inappropriate.*

This criteria is not applicable to the proposal.

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

The cases referred to above have established that the environmental planning grounds must be particular to the circumstances of the proposed development on its site. The following environmental planning grounds are relevant:

- The non-compliance is equivalent to 230mm or 2.7% of the standard and it is numerically minor. It is limited to the eastern end of the proposal's first floor gable end - a depth of approximately 300mm, which is equivalent to eaves depth or 3.9% of the entire 7.58-metre roof depth (see Dwg No. DA11). Section BB in Drawing No. 12 illustrates the proposal's compliance with the standard.
- As discussed previously, the non-compliance arises primarily for two reasons. Firstly, there is an abrupt fall in slope of the land from front to rear of the site, in particular, in the middle of the existing dwelling. There is also a cross-fall which also contributes to the non-compliance and the variation in the site's slope in the middle of the existing dwelling is evident by comparing the northern and southern side elevations.

Secondly, the proposal provides a pitched roof for the first floor which is identical to the existing gable ended dwelling in order to complement its architectural character as well as its contribution to the streetscape.

In true northern elevation, the proposal provides a conventional stepped part one and part two-storey dwelling appearance that from casual observation appears to comply – also assisted by a numerical compliance with the maximum 7.2-metre wall height control. Only in the southern elevation and in section where the dwelling is not visible in the public domain and absent of material impact, is it non-compliant.

- The proposal could comply with the standard involving lowering the roof pitch, lowering the pitching points or introducing a hip roof at the rear. A requirement to comply with the standard would be for the sake of compliance because of its minor nature without any substantive benefit to local residential amenity.
- The non-compliance is acceptable because it provides a two-storey form in the street elevation, which is consistent with the height and scale of surrounding and nearby development.
- Lowering the roof pitch to comply with the standard would result in mismatched roof pitches on the existing house and would be detrimental to its character and the streetscape without any material improvement in the environmental performance of the dwelling.
- Lowering the pitching points at the sides of the first floor would be detrimental to the appearance of the proposal because it “visually” compresses the first floor whereas the proposal currently is balanced generally with even floor-to ceiling heights on each floor. It is also considered that a reduction in the pitching points would unreasonably compromise the first floor’s internal residential amenity without any substantive improvement in the environmental performance of the proposal.
- A hip roof rather than a gable end at the rear of the house would also be inconsistent with the dwelling’s gable end character also without any improvement in the environmental performance of the dwelling. Furthermore, the overall height of the dwelling would remain the same as the proposal - set at RL17.52 and it complies with the standard.
- The proposal is an appropriate design for the site and balances the broader envelope controls having regard to the topography of the site. The proposed additions to the dwelling provide an improved standard of amenity for the future occupants - particularly in terms of views and outlook without unreasonably compromising the amenity of adjoining and nearby residents and the locality generally.
- The proposal is in keeping with the bulk, scale and mass of surrounding development, particularly the newer development and evolving character of the locality.
- The proposal will not have any unreasonable impacts on adjoining and nearby properties in terms of shading and privacy impacts.

Will the proposed development be in the public interest because it is consistent with the objectives of the zone?

The objectives of the R2 zone are:

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

The proposal provides modest alterations and additions to the existing detached dwelling on the land which will 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.*

This objective is not relevant to the proposal because it provides a single dwelling on the land.

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

As the proposal involves a single detached dwelling in a landscaped setting which is in harmony with Warringah's natural environment and its neighbours.

Concurrence of the Secretary

The concurrence of the Secretary may be assumed by the consent authority. The implications of a development not complying with a development standard of the Warringah LEP are local in scope and raise no matters of significance for State or regional environmental planning.

The circumstances of the case should be balanced against the usual presumption of public benefit in maintaining a development standard. The building height of the proposed development is justified as set out above. The non-compliance with building height arises on part of the site which falls significantly from front to rear as well as across the site and the non-compliance is minor.

The height and scale of the proposed additions are consistent with the prevailing pattern of development in the locality and despite the non-compliance it will not result in any unreasonable residential and environmental impact. The proposal is satisfactory in its context. The proposal will have no unreasonable impact on the public benefit of maintaining a development standard for this site.

Conclusion

This submission shows that, in the circumstances of the case, compliance with the development standard is unreasonable or unnecessary, that there are sufficient environmental planning grounds to justify contravening the development standard and that the proposed development will be in the public interest because it is consistent with the objectives of the development standards and with those of the R2 Low Density Residential zone.

Kim Burrell

Town Planner B. App. Sc. DURP RPIA