

20 February 2017

The General Manager  
Warringah Council  
Civic Centre  
725 Pittwater Road  
DEE WHY NSW 2099

Dear Sir,

## SECTION 96(1a) APPLICATION

**Premises:** Lot 14 in DP 10974, No. 13 Highview Ave,  
Manly Vale  
**Amendments:** Amend Plans – Refer to Plans  
**Development Application:** 2015/0687

## INTRODUCTION

On behalf of Ms Melanie Tsakiris I seek Council consent pursuant to Section 96(1a) of the *Environmental Planning & Assessment Act* 1979 to amend the plans of Development Application No. 2015/0687 relating to the construction of alterations and additions to an existing dwelling at No. 13 Highview Avenue, Manly Vale.

## PROPOSED MODIFICATION

This proposal to amend the approved plans as follows:

- Amend roof form to provide a more uncomplicated form, including removing gables.
- Increase size of storage loft from 3.24m x 6.1m (as approved) to 3.595m x 8.21m (proposed).
- Increase ridge height by 300mm.

## LEGISLATION

Section 96(1a) of the Act states:

*A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:*

- (a) *it is satisfied that the proposed modification is of minimal environmental impact, and*

Comment: The Consent granted approval for the construction of alterations and additions to an approved dwelling house. The proposed amendment seeks approval to increase the size of the storage loft and amend the roof form. The amendments are considered to be of minimal impact.

- (b) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*

Comment: The original consent granted approval to the construction of alterations and additions to an existing dwelling. This application seeks to amend the plans to enlarge the storage loft and amend the roof form. This is considered to be substantially the same development.

- (c) *it has notified the application in accordance with:*
- (i) *the regulations, if the regulations so require, or*
  - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Comment: The application will be notified in accordance with Council guidelines.

## **WARRINGAH LOCAL ENVIRONMENTAL PLAN 2012**

The site is zoned R2 Low Density Residential. Dwelling alterations/additions are permissible in this zone with the consent of Council. The objectives of the R2 Low Density Residential Zone is as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposed amendments to the plans achieves the objectives by retaining a low density residential environmental within a landscaped setting.

The following provisions of the LEP are relevant to the proposed development:

Clause	Development Standard	Proposal	Compliance
4.3 Height	8.5m	9.7m	Refer to Clause 4.6 Variation at end of correspondence,

The following provisions also apply:

#### **Clause 6.4 Development on Sloping Land**

The proposal does not alter the building footprint nor result in any additional excavation. Therefore, the original Preliminary Geotechnical Report prepared by Asset Geotechnical remains relevant. No further information is required in this regard.

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

#### **4.3 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
B3 - Side Boundary Envelope	Building envelope 45 degrees from 4m. Eaves up to 675mm are an allowable encroachment	Whilst the proposal slightly extends the approved height, it also incorporates the removal of the gable roof ends. This reduces bulk and scale and therefore reduces the non-compliance of the existing dwelling with the building envelope. A discussion on the height controls is contained at the end of this submission. The
B5 - Side Boundary setbacks	Minimum: 0.9m	Yes The amendments do not encroach the approved setbacks.

Clause	Requirement	Compliance
B9- Rear Boundary Setbacks & B10 Merit Assessment of Rear Setbacks	6.0m	Yes The amendments do not encroach the approved setbacks.
B7 – Front Boundary Setbacks	Minimum 6.5m	Yes The amendments do not encroach the approved setbacks.
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 drain to the existing system in the street gutter.
C5 – Erosion and Sedimentation	Soil and Water Management required	Yes The approved soil and water management plan will be implemented.
C7 - Excavation and Landfill	Site stability to be maintained	Yes The amendments do not require any excavation or fill.
D1 – Landscaped Open Space and Bushland	Min 40% Landscaped Area to be maintained	Yes There is no change to the existing approved landscaped area. Landscaped area of 46%.
D2 - Private Open Space	Dwelling houses with three or more bedrooms Min 60m <sup>2</sup> with min dimension 5m	Yes No change to approved private open space.
D3 - Noise	Mechanical noise is to be attenuated to maintain adjoin unit amenity. Compliance with NSW Industrial Noise Policy Requirements	Not Applicable

Clause	Requirement	Compliance
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' POS receives not less than 3 hours sunlight between 9am – 3pm on 21 June winter solstice.	Shadow diagrams have been prepared depicting both the approved shadow and proposed shadow. These diagrams show very minimal additional shadowing, with shadowing reduced in some areas. Of particular note is that the proposed development does not result in any additional shadowing to the window/door openings on the adjoining properties and there is negligible additional impact on the private open space with more than 50% of the rear private open space receiving direct solar access for 3 hours on the winter solstice.
D7 - Views	View sharing to be maintained	Yes The subject site and surrounding properties enjoy district views towards the east. Given that the site is significantly lower than the street the proposed additions will not result in any view loss. Even the minor increase in ridge height (of 300m) will not result in any view loss.
D8 - Privacy	This clause specifies that development is not to cause unreasonable overlooking of habitable rooms and principle private open space of adjoining properties.	Yes The proposal merely seeks to increase the size of the storage loft and does not provide for any amendments in the location of windows, doors or balconies. The proposed enlarged storage which is not habitable space will not reduce privacy to the adjoining properties.

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 Whilst the proposal increases the overall ridge height, there is a reduction in bulk through the removal of the gable roof ends. It is considered that the amendments approve the appearance of the approved dwelling and reduce bulk.
D10 – Building Colours and materials	External finishes and colours sympathetic to the natural and built environment.	Yes
D11 - Roofs	The LEP requires that roofs should not dominate the local skyline.	Yes The proposal amends the approved plan to provide for an uncomplicated roof form and reduces bulk by removal the gable ends.
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

<b>Clause</b>	<b>Requirement</b>	<b>Compliance</b>
E1 – Private Property Tree Management	Arboricultural report to be provided to support development where impacts to trees are presented.	Not applicable
E4 – Wildlife Corridors	Subject site is not identified as being within a wildlife corridor.	Not Applicable
E7 – Development on land adjoining public open space	Not Applicable	Not Applicable
E8 – Waterways and Riparian Lands	Not Applicable	Not Applicable
E10 – Landslip Risk	Identified on map as Class B	Yes Preliminary Geotech Report submitted with the original DA remains valid.
E11 – Flood Prone Land	Not Applicable	Not Applicable

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

## **JUSTIFICATION**

The proposed amendments to the plans are considered justified for the following reasons:

- The minor increase in height does not contribute to loss of views, unreasonable loss of solar access or excessive bulk.
- The proposal removes the existing gable features which will reduce bulk and scale and decrease the non-compliance of the building envelope.
- The proposal merely seeks to enlarge the storage loft which is a non-habitable area and will not have a detrimental impact on the adjoining properties.
- Given the topography of the site and that the majority of the dwelling is below the gutter level, the proposed amendments will not have any detrimental impact on the streetscape.

## **CONCLUSION**

The proposed amendments to the plan requires consent from Council.

For the reasons stated above it is considered that this application should be supported. Should you require any further information please do not hesitate to contact me.

Yours faithfully,



**Natalie Nolan**



**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE  
MAXIMUM HEIGHT REQUIRED BY CLAUSE 4.3 OF THE WARRINGAH  
LOCAL ENVIRONMENTAL PLAN 2011**

**For:** Proposed Alterations/Additions to an Existing Dwelling  
**At:** 13 Highview Avenue, Manly Vale  
**Applicant:** Mr & Mrs Tsakiris

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## **Introduction**

This objection is made pursuant to the provisions of Clause 4.6 of the Warringah Local Environmental Plan 2011. In this regard it is requested that Council support a submission regarding the application of Clause 4.3 of the Warringah LEP.

Clause 4.3 provides for a maximum height of 8.5m. The proposed new dwelling provides for a maximum height of approximately 9.7m which does not comply with the numerical requirements of this clause.

## **PURPOSE OF CLAUSE 4.6**

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument 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 Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

## **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.*

## **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.*

## **JUSTIFICATION OF PROPOSED VARIANCE**

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the 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 land is located in the R2 – Low Density Residential zone. The objectives of the R2 zone are:-

- 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

The modification proposes for an amendment to the approved dwelling additions/alterations. The proposal is considered to meet the objectives of the R2 zone for the following reasons:

- The proposal provides for only minor amendments to the approved dwelling additions/alterations which retains the low density residential environment.
- The proposed additions do not remove any vegetation nor impact on the environment.

## 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

The proposed amendments provide for minor alterations to the approved dwelling alterations/additions. The amendments provide for a very minor increase in the overall height (300m). This increase in height will not be discernible and will continue to provide a height that is compatible with the existing surrounding development. The existing dwelling and proposed amendments will be obscured from the street by the significant slope of the site. Therefore, the proposal satisfies Objective 1(a).

The increased loft area, which exceeds the numerical height controls, is located centrally on the dwelling and is provided with ample setbacks to all boundaries of the site. The minor increase in height does not obstruct views, loss of privacy or unreasonable overshadowing. The proposal therefore achieves Objective 1(b).

The proposal will not be visible from the coast or any natural bush environment, therefore achieving objective 1(c).

The topography of the site is such that the building platform is well below the street level. The minor increase in height will not be prominent when viewed from the street. Therefore the proposal achieves the objective of 1(d).

For the above reasons, we are of the view that the variation requested and the resultant development is consistent with the objectives of the development standard.

**Precondition 3 - To a consider 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 given the slope of the site and that there is no detrimental impact.

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**

The primary issue is whether or not there are sufficient environmental planning grounds particular to the site to allow the variation to the height development standard.

In this regard the following has been considered: -

- The site comprises an existing approved dwelling and the proposed increase is very minor.
- The existing dwelling exceeds the maximum height controls.

When having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum 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 each and 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 in regards to the proposed development at 13 Highview Ave, Manly Vale, 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 amendments are very minor and will not be discernible from the street or the surrounding properties.
- The amendments do not result in unreasonable overshadowing, loss of privacy or unreasonable bulk or scale.

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.

The interaction of the site slope and the desired architectural outcome combine to produce a meritorious development despite the numerical variation to the maximum height standard.

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 Variance' 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:** Not applicable.

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 the zone.

## CONCLUSION

The development proposes a departure from the maximum height development standard and proposes a height of 9.7m. This departure does not detract from streetscape or the amenity of the area.

The proposal produces an appropriate development outcome. The variation to the maximum height control is appropriate given the existing development on site and slope of the property. It is important to note that the variation would be indiscernible from the public domain. Furthermore, the proposal satisfies the zone objectives and the objectives of the development standard.

As there is no material impact on adjoining properties or the public domain arising from the variation to the maximum height development standard and the objectives of the control are satisfied, it is considered that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Therefore, we request that council support the variation on the basis that there are sufficient environmental planning grounds to justify a variance to the development standard.