

## CLAUSE 4.6 VARIATION REQUEST



**SITE:** Lot 21 DP 499759  
66 Calabash Point  
Berowra Water

**PROPOSED DEVELOPMENT:** Alterations and additions to an existing dwelling



## Clause 4.6 Variation Overall Height

It is requested that Council consider the following request for a variation under the provisions of Clause 4.6 of *Hornsby Local Environmental Plan 2013 (HLEP2013)* during assessment of this application:

### Hornsby Local Environmental Plan 2013

#### 4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows—*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 of the LEP - Exceptions to development standards provides the opportunity for Council to vary the controls based on the merits of the application. The case of *Randwick v Micaul* indicates that Council, as the consent authority, maintains a high level of discretion with regard to the level of justification required in order to support a variation request. As detailed below, it is considered that the current application satisfies the Clause 4.6 criteria in the LEP, and therefore should be supported.

- (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.*

The overall height development standard is not expressly excluded from the operation of Clause 4.6.

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

As discussed below, it is unreasonable and unnecessary to require compliance with the overall height control as all key Clause 4.6 requirements are satisfied despite the non-compliance.



The proposed floor addition height exceeds the maximum permitted building height for the development by 1.125m. It is considered that the application, and in particular the proposed building height, should be supported as:

The subject site is zoned 'C4 Environmental Living' under Clause 2.1 of the HLEP2013.

The objectives of the zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To permit development that is compatible with the character, infrastructure capacity and access limitations of the area.*

The proposed development will maintain a low-density residential dwelling being compatible with the existing and future character of the locality. The proposed development has been designed to meet the day to day needs of the residents and is provided with appropriate services and facilities. Furthermore, the dwelling is designed to provide a high level of amenity for adjoining residents whilst considering the natural restraints of the site.

The proposal, including building height variation, is consistent with the objectives of the C4 Environmental Living zone in that the proposal will continue to provide low-impact residential development, that the proposal maintains overall landscaped area and vegetated character of the site, and that solar access continues to be available to the subject site and existing neighbouring developments.

Therefore, the proposal is considered to meet the objectives of the C4 Zone.

The objectives of Clause 4.3 are:

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*



The objective of this control is understood to be a measure to ensure the dwelling does not have an unreasonable impact on adjoining properties or the surrounding area by way of overshadowing, overlooking or visual bulk.

The 1.125m non-compliance is the direct result of the topography of the allotment, with a significant fall through the site it is difficult to site the proposed addition without a level of non-compliance to the height provisions. It is considered that some level of variation is anticipated on allotments such as the subject site where the allotment has a significant fall the allotment and the need to site the proposed works over existing ground floor walls for structural integrity. Further compliance with the requirements of the National Construction Code (NCC) which contains minimum ceiling levels for habitable and non-habitable area of dwellings which further impacts the potential for compliance with the height of buildings provisions. Thus, providing a compliant proposal with strict adherence with the height of buildings provisions whilst also complying with the NCC ceiling height requirements would render re-development of the existing dwelling unviable.

The proposed addition has been designed with consideration given to the existing topography and minimisation of excavation to site the addition, the existing architectural design of the dwelling and the existing development character of the area. The surrounding development pattern consists of dwellings of varying scales with pitched roofs that have set a strong architectural theme for this section of Berowra. During the design phase of the proposal consideration was given to alternate locations and designs elements for the development including a flat roof proposal however this style of addition is out of character for the area and is not considered suitable for the proposed addition. As such the proposed design incorporates a first floor addition and internal works designed to modernise the dwelling, increase its lifespan and enhance internal amenity whilst appear to be in keeping with the predominant development theme in the surrounding area.

The required variation only relates to the northern upper most portion of the proposed addition and is limited to a small portion of the roof structure as shown on Section A-A within the accompanying architectural plans. The variation will not detrimentally impact on the amenity of the adjoining properties given the articulated design, adequate side and rear setbacks and building separation distances along with the orientation of the site which will allow for a reasonable level of solar access to living areas and private open space areas of the adjoining properties. The windows proposed to the upper floor bedrooms are not likely to provide opportunities for overlooking as they are appropriately designed, setback and offset from neighbouring dwellings. The shadows cast by the proposed development will not have an overall negative impact upon the adjoining properties, whilst there is



still some overshadowing, the POS of the adjoining property will have a reasonable level of solar access throughout the day due to the orientation of the allotments where north is to the waterway and POS areas are predominantly orientated towards this aspect and subsequent views.

The front façade and material choices are anticipated to be in keeping with recent development throughout the area and will help to enhance the character of the area which contains dwelling appearances of one and two storey dwellings. The visual bulk of the proposed addition as viewed from the adjoining dwellings is not considered to be excessive as a result of the variation given the increased setback from the existing rear building line, appropriate roof form, articulation provided throughout the design as well as the existing landscaping to the front and sides of the proposal to further reduce the bulk of the development. As there is no perceived impact on the character of the area or the amenity of adjoining properties beyond that of a compliant proposal, the dwelling is considered to be able to meet the objectives of the height control despite the numerical non-compliance.

In the circumstances of this particular case, it is considered that strict compliance with the overall height requirements of Hornsby Local Environmental Plan 2011 is considered unreasonable and unnecessary. The alterations and additions to the existing dwelling has been designed to reduce the height as much as possible, whilst still complying with the ceiling requirements of the NCC and providing a design which is in keeping with the existing dwelling design and the residents' needs. The increase in height proposed for the residence is the direct result of the topography and is consistent with the development theme in the surrounding area where several dwellings have been permitted to be built in an area of escarpment with building heights that are consistent with the proposal. Given the development pattern of the area of Berowra the height of building development standard has been virtually abandoned as a result of past development. Thus, despite the non-compliance the proposed development can still attain the objectives of the Environmental Planning and Assessment Act 1979, C4 Environmental Living zone and the subject development standard.

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The requested variation relates to Clause 4.3(2) as shown below:

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*



The subject site is identified to have a maximum building height of 10.5m.

In this instance the proposed development provides a maximum building height of 11.625m is proposed requiring a 1.125m variation to the 10.5m development standard however the subject site is noted to have steep topography which impacts the building height. The requested variation is restricted to a small portion of the dwelling roof and relates to the works located over an existing built form where the topography of the land has been altered through historic development. The area of the non-compliance relates to an area centrally within the dwelling, and will not detrimentally impact on the amenity of the adjoining properties and is in keeping with the established context of the area being adjacent to a waterway and an area of steep topography.

The building height of the proposed development is large exacerbated by the existing excavation on the steep allotment which provides an artificial existing ground level for the calculation of building height, thus an overall building height of 11.625m. The 1.125m non-compliance is the direct result of the topography of the allotment, which makes it is difficult to site the proposed addition without a level of non-compliance to the height provisions. Compliance with the requirements of the National Construction Code (NCC), which contains minimum ceiling levels for habitable and non-habitable area of dwellings, further impacts the potential for compliance with the height of buildings development standard. Thus, providing a compliant proposal with strict adherence with the height of buildings provisions whilst also complying with the NCC ceiling height requirements would render re-development of the existing dwelling unviable.

The increase to the overall building height is considered to have minimal impact on the overall development in terms of bulk and scale appearance, due to the maximum building height positioned to the center of the dwelling which has limited visibility from the surrounding developments and waterways. The proposed development is not considered to be excessive in size, having been designed to include extensive articulation, increased setbacks from existing building lines and the retention of suitable existing landscaping that follows the topography of the allotment and softens the visual bulk of the development. The proposed development is in keeping with surrounding historical developments in an area where the overall height control appears to have been virtually abandoned due to the topography of the allotments. Further the proposed development provides a suitably sized dwelling in keeping with developments of the surrounding area.





The proposed alterations and additions are considered to be a reasonable development for the site as three storey dwellings are considered to be a suitable use of the land in areas where the building footprint is restricted due to site constraints. The variation directly relates to the topography of the land and due to historical development on the allotment. Reducing the overall building height of the dwelling is not considered feasible as the reduction in height would detrimentally impact the amenity of the development through reducing ceiling heights that have been minimised as much as possible to provide compliance with the NCC requirements whilst taking into consideration the existing dwelling and its structural integrity.

Despite the numerical non-compliance and required variation, the proposed continuation of low density residential land use is considered to be an orderly and economic use of the land and suitable development in an established residential area where increased residential dwelling heights have set a theme for over height dwellings in this area of Berowra Waters.

The variation will result in a maximum increase in height by 1.125m from the permitted overall height. The development will not be visually excessive in size due to maintaining appropriate setbacks, stepping of the front façade, as well as suitable existing landscaping to screen the development from neighbouring properties. The proposed development provides a suitably sized addition to an existing dwelling in keeping with the architectural theme of adjacent developments on Calabash Point and in the surrounding area.

Whilst being numerically non-compliant with the height of buildings control the proposed development is not anticipated to detrimentally impact the surrounding developments by way of solar access or privacy. In fact, the proposed development will result in an improved amenity and architectural appearance as a result of the urban renewal development and by ensuring that the bulk and scale of the development is consistent with surrounding developments.

*Initial Action Pty Ltd v Woollahra Municipal Council* provides that while 'environmental planning grounds' are not defined within the EP&A Act 1979, they would refer to the subject matter, scope and purpose of the *Environmental Planning & Assessment Act 1979* (EPA Act), including the objects in Section 1.3 of the EPA Act.

The objects of the Environmental Planning and Assessment Act 1979 are understood to be as follows:

### 1.3 Objects of Act



*The objects of this Act are as follows—*

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The most relevant objects to this development are objects 1.3(c), 1.3(g) and 1.3(h) as outlined above.

The proposed development relates to alterations and additions to an existing dwelling within a residential waterfront setting with steep topography that constrains development of the allotment. Allowing alterations and additions to an existing dwelling, despite the numerical non-compliance with the height of buildings provisions, ensures that the dwelling can be retained on the site whilst providing improved internal amenity and an improvement to the life span of the built form. Further, allowing the increase in building height ensures that the existing dwelling is enhanced by the development which is considered to promote orderly and economic use and development of the land.

Allowing the updating of existing dwellings through alterations and additions within residential area ensures that a range of dwelling and development types are available for residential occupation. The design of the proposed development is for the alteration and addition to an existing built form which promotes good design through improved functionality of the floor plan whilst complying with the requirements of the NCC requirements. Further the proposed alterations and additions provide





increased functionality of the internal room layouts within the design ensuring that the amenity of the development is enhanced as a result of the development.

The design of the proposed development has given consideration to the existing locality, site constraints, minimising environmental impact, surrounding development along with the orientation of the allotment during the design process. Further consideration has been given to compliance with all relevant development standards, Australian Standards and the NCC as part of the design phase with the proposed development being deemed as the most appropriate for the site whilst continuing the meets the owners needs. The development continues to appropriately address the waterway and provides visual bulk in keeping with recent development throughout the Berowra Waters area. Consideration of these key aspects promotes good design through a high quality architectural development. Further the proposed alterations and additions has been designed to provide high level of amenity to the development and future occupants of the dwellings.

Whilst "environmental planning grounds" are not separately defined within the EP&A Act 1979 the proposed development is considered to provide orderly and economic use and development of the land through retention of an existing dwelling. Further the proposal meets good design principals and enhanced amenity of the dwelling through additional internal space without detrimentally impacting the surrounding development by way of visual bulk, privacy, amenity and solar access.

*(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 Planning Secretary has been obtained.*

The proposal is able to satisfy 3(a) and 3(b) as discussed above, therefore the proposed development is considered to being the public interest. Further the proposed alterations and additions are orderly and economic use and development of the land whilst providing good design and amenity for the occupants of the development.



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

There is considered to be no public benefit in refusing the application (for the reasons stated above) so as to ensure that full compliance with the maximum height of buildings control is achieved. The contravention of the standard does not raise any matters of state or regional significance nor would it be detrimental to the site or surrounding area.

Accordingly, Council's agreement is sought to the proposed variation in maximum overall building height for the site.

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