



CLAUSE 4.6 WRITTEN REQUEST

The Proposal: *Demolition of existing structures, construction of a two storey dual occupancy development and 1 secondary dwelling within proposed Lot 2 and associated Torrens Title subdivision*

Project Address: *Lot 12 DP 30221, No. 22 Collins Crescent, YAGOONA
NSW 2199*

Report Date: *28th September 2022*

REPORT INTRODUCTION

Development proposals need to be prepared with reference to Development Standards in all relevant Environmental Plans. These plans have been prepared and are consistently implemented to ensure appropriate and sensitive development of the Bankstown Local Government Area.

Compliance with the Development Standards is usually necessary to ensure that the objectives are achieved. Where an applicant proposes to vary a Development Standard within Bankstown Local Environmental Plan 2015 (BLEP 2015), Council should consider the variation where a written Clause 4.6 Variation is included.

This report serves as a written Clause 4.6 variation to vary the maximum Wall Height of the Secondary Dwelling development standard applying to the proposed development of *“Demolition of existing structures, construction of a two storey dual occupancy development and 1 secondary dwelling within proposed Lot 2 and associated Torrens Title subdivision, to the consent authority of Bankstown City Council.*

This submission should be read in conjunction with the statement of environmental effects, architectural plans and sub consultant’s reports.

1. What is the name of the environmental planning instrument that applies to the land?

The name of the environmental planning instrument that applies to the land is the Bankstown Local Environmental Plan 2015 (BLEP 2015).

2. What is the zoning of the land and what are the objectives of the zone?

Under the BLEP 2015, the land is identified as *R2 Low Density Residential*. The Objectives of the R2 Low Density Residential 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 allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.*
- *To allow for the development of low density housing that has regard to local amenity.*
- *To require landscape as a key characteristic in the low density residential environment.*

3. Identify the Development Standard to which this Clause 4.6 Variation applies?

The Development Standard to which this Clause 4.6 Variation applies is *Clause 4.3(2B)(a) of the BLEP 2015* which states:

(2B) Despite subclause (2), the following restrictions apply to development on land in Zone R2 Low Density Residential—

(a) for a secondary dwelling that is separate from the principal dwelling—the maximum building height is 6 metres and the maximum wall height is 3 metres.

In part, this report relates to the maximum wall height perceived as exceeding 3.0 metres in height.

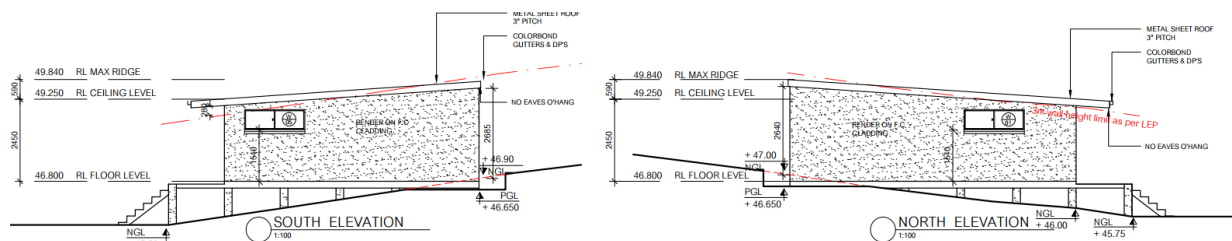
4. What are the objectives of the development standard?

The objective of this clause is stated as:

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,
- (b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low Density Residential,
- (c) to provide appropriate height transitions between development, particularly at zone boundaries,
- (d) to define focal points by way of nominating greater building heights in certain locations.

5. What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the development standard in the environmental planning instrument is 3.0 metres.



There appears to be no definition of Wall Height pursuant to the BLEP 2015, however there is a definition of the Wall Height pursuant to the BDCP 2105, of which states:

Wall height means the vertical distance between the ground level (existing) and the underside of the eaves of the wall line or the top of the parapet or the flat roof (whichever is the highest).

The wall height definition fails to consider a structure with open and elevated sub floors, such as the developed as proposed. In reality the wall height should be measured from the floor level to the underside of the roof, of which measures 3.280 metres.

6. How do the existing and proposed numeric values relate to the development standard? What is the percentage variation (between your proposal and the environmental planning instrument)?

The variation is approx. from 0.0 metres to 280mm. A variation of upto 9%

7. How is compliance with the development standard unreasonable or unnecessary in the circumstances of this particular case?

The NSW Land and Environment Court in *Four2Five Pty LTD v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827. The court provided five tests as follows:

Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard.

Test 2: The underlying object or purpose of the standard is not relevant to the development and compliance is unnecessary.

Test 3: The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

Test 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.

Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

Additionally, of note, in the judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the standard was unreasonable or unnecessary, rather that the applicant's written request adequately addresses the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, this written request establishes and adequately addresses the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary because the underlying objective of purpose of the standard is not relevant to the development irrespective of the non-compliance, and accordingly justifies the variation pursuant to the Test 2 outlined in *Wehbe*, as follows.

(a) to ensure future development is in keeping with the desired scale and character of the street and local area,

The NSW Land and Environment Court in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, considered *Scale and density in the context of the surrounding area* and formed the following planning principle: *Compatibility in the urban environment* which can be applied to the objective "scale" and "character"

The planning principles provides: The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

In order to test whether a proposal is compatible with its context, two questions should be asked.

- Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites*

In relation to the physical impacts, consideration is given to noise, overlooking, overshadowing and constraining development potential which can be assessed with relative objectivity (as was applied in this principle). The development is for a detached Secondary Dwelling in a single elevated form located in a R2 Low Density area at the rear of the site. The development will not have noise beyond that expected of a residential nature.

Overlooking impacts are mitigated by the orientation of the development on the site primarily to the respective street frontage and location of the Secondary Dwelling to the rear of this site. It is also noted that the site slopes steeply to the Marion Reserve at the rear of the site of which is the Eastern Elevation.

This orientation significantly reduces any perceived storey impact on the Collins Crescent streetscape, and will remain predominately unseen from Collins Crescent and surrounding Streets.

- *Is the proposal's appearance in harmony with the buildings around it and the character of the street?*

The most important contributor to urban character is the relationship of built form to surrounding space, a relationship that is created by building height, setbacks and landscaping. In special areas, such as conservation areas, architectural style and materials are also contributors to character. As this site is not located within a conservation area (or "key site") the test is applied to building height, setbacks and landscaping.

The principle provides that *Buildings do not have to be the same height to be compatible*. The Secondary Dwelling is not more than single storey at any one point and the Secondary Dwelling appears as a single storey dwelling from within the streetscape. The secondary dwelling height is less than dwellings along the streetscape. The principal notes front and rear setbacks are an important element of urban character and determine the rhythm of building and void. While it may not be possible to reproduce the rhythm exactly, new development should strive to reflect it in some way. The development complies with the requirements for rear setbacks.

Landscaping is also an important contributor to urban character. In the most common sense, the Commissioner provides that most people "experience the urban environment without applying the kind of analysis described above" and simply moving around a city is enough for a person to respond to their surroundings that if simply taking a walk in this neighbourhood there is little chance that the development would be seen "out of context" *and therefore within a compatible scale and density in the context of the surrounding area*.

(b) to allow reasonable daylight access to all developments and the public domain.

The site generally orientated along the west - east axis with shadows cast to the south to the reserve. The neighboring dwellings will continue to receive adequate solar access to its living areas and private open space. The variation to the height of the Secondary Dwelling wall height does not increase overshadowing.

8. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act. (now Section 1.3)

The objects of this Act are as follows:

- 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,*
- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- to promote the orderly and economic use and development of land,*
- to promote the delivery and maintenance of affordable housing,*
- to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- 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.*

Strict compliance does not at all hinder the attainment of the objects specified in the Act.

9. Is the development standard performance based control? Give details.

Yes, the development standard is a numerical control.

10. Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?

Yes. The reasons have been canvassed under heading 8 above. In addition, strict compliance with the development standard would be onerous and a little difference would result if full compliance was made. The variation is sought due to flooding impacts onsite requiring a set finished floor level. The Secondary Dwelling will not impact upon any flooding measures and pedestrian access for evacuation of the Secondary Dwelling will be adequate.

11. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

Yes. Considering that the development achieves the objectives of the land use zone, and furthermore achieves a satisfactory level of compliance with the other applicable State and Council Planning Policies, the proposal is meritorious and the contravention of the development standard is justified. The contravention of the development standard allows for a better amenity and design outcome to be realised for the site and development than what would be achieved if strict compliance was to be enforced.

Report Conclusion

Having regard to the assessment of the proposal and Clause 4.6 Variation to Development Standard, it is considered that the proposed development achieves the objectives of the land use zone; strict compliance with the numerical component of the development standard is unnecessary and unreasonable in these circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

For the reasons outlined within this request, the subject variation is worthy of Council's support.

Sincerely
EPlanning Pty Ltd



Barry Cotten MPIA CPP
Mobile: 0437 804079