

## 417a Maroubra Road, Maroubra

### AMENDED REQUEST FOR VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF RANDWICK LEP 2012

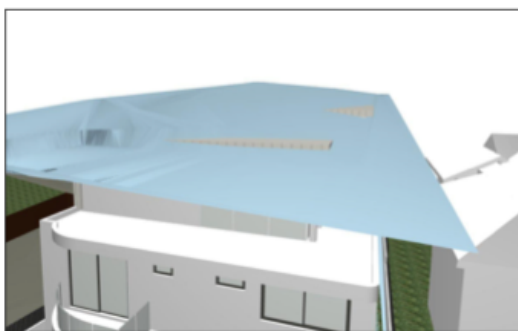
This Clause 4.6 variation relates to a proposal for the demolition of the existing dwelling and construction of a pair of semi-detached dwellings with Torrens-Title subdivision and is to be read in conjunction with the Revision E plans dated 12 April 2022 and prepared by Archispectrum and the attached view analysis prepared by AE Design and verified by Survey prepared by Byrne & Associates dated 21 March 2022.

#### Clause 4.3 – Building Height

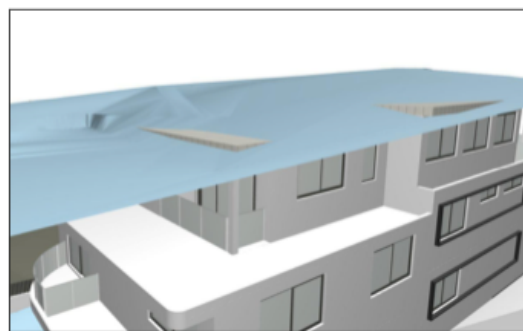
Clause 4.3(2) of the Randwick LEP 2012 and the associated map prescribe a maximum building height of 12 metres for this site. Clause 4.3(2A) states:

*(2A) Despite subclause (2), the maximum height of a dwelling house or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.*

The proposal seeks to provide a maximum height of 9.93m, providing a non-compliance with this control. The variation is 430mm equating to 4.52% of the 9.5m height standard. The areas of non-compliance are illustrated below.



View 1



View 2

The proposal therefore seeks to vary the building height development standard.

The objectives of Clause 4.3 are as follows:

- (a) *to ensure that the size and scale of development is compatible with the desired future character of the locality,*
- (b) *to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*
- (c) *to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*

The zoning of the land is R3. The objectives of the R3 zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.*
- *To protect the amenity of residents.*
- *To encourage housing affordability.*
- *To enable small-scale business uses in existing commercial buildings.*

## **Clause 4.6 – Exceptions to Development Standards**

Clause 4.6 of the Randwick LEP allows for exceptions to Development Standards. The objectives of this Clause 4.6 are:

- (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.*

The clause goes on to state:

- (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) *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*
- (4) *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.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the height of building development standard.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying

development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

### **Clause 4.6(3)(a)**

The proposal is considered against the four matters required to be established under Clause 4.6.

#### **1. Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:**

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways<sup>1</sup>:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by Commissioner Morris<sup>2</sup>. Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance<sup>3</sup>. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

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<sup>1</sup> see *Wehbe v Pittwater Council* [2007] NSWLEC 827. See also *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245.

<sup>2</sup> *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

<sup>3</sup> *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

This objection relies on the first method set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with<sup>4</sup>.

Compliance with the objectives of the height standard is addressed under **Point 4 below**.

In addition, the following points are raised:

- Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale having regard to the context of the site, the medium density nature of surrounding development and given that the proposal provides a two-storey development with an additional upper level contained within a roof form.
- Strict compliance with the height control would not permit the orderly and economic development of the land in the form envisaged by the controls and by the zone as compliance would necessitate the removal of the upper level of each proposed dwelling. Compliance with the control cannot be achieved by adjustment to the building form in respect of a reduction of the floor plate for the upper level of each dwelling.
- The component of the development above the height control is limited to the south-eastern portion of the roof to each dwelling due to the slope of the land (existing ground level immediately below).
- Exceedance of the height control will not create additional adverse environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity. A reduction in height to achieve compliance would not create additional benefit for adjoining properties or the locality.
- The siting and design of the proposed development will not have an adverse impact on water views from neighbouring dwellings and the public domain as demonstrated in the attached view analysis.

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<sup>4</sup> *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

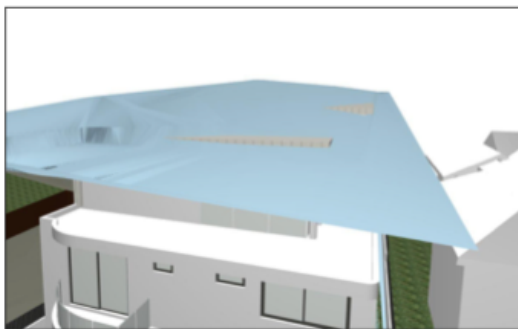
## Clause 4.6(3)(b)

### 2. There are sufficient environmental planning grounds to justify contravening the development standard:

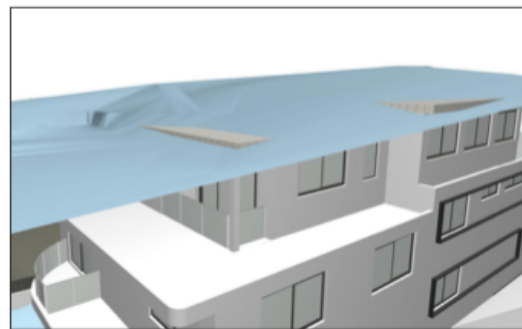
The components proposed above the height control are:

- Southern end of roof to Dwelling 417c
- Southern end of roof to Dwelling 417d

The areas of non-compliance are illustrated below.



View 1



View 2

The site falls from east to west from RL range of RL25.5 to RL23.5 being a fall of 2 metres. In addition, a comparable fall from north to south occurs.

Given the consistency of the proposal against the zone objectives and height objectives (see **Point 4 below regarding both**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard.

There are sufficient environmental planning grounds which demonstrate that the proposed height can be achieved without adverse impacts for the following reasons:

- The proposal will not result in the loss of views from surrounding development as demonstrated in the attached view analysis.
- The proposal will not result in adverse overshadowing of the private open space or living areas of adjoining properties with the adjoining properties to the east and south.
- The proposed development will ensure that the north facing windows of adjoining properties, namely 419 Maroubra Road (front facing) and 3-5 Hereward Street (side facing), will receive more than 3 hours of

direct sunlight between 8am and 4pm on 21 June. The north-east facing solar panels of 3-5 Hereward Street will receive more than 3 hours of direct sunlight.

- The rear private open space of 419 Maroubra Road is located to the south of the lot and will be affected between from 12pm to 2pm as a consequence of the orientation of the site and not the height non-compliance.
- The height non-compliance will not have an adverse impact on the visual and acoustic privacy of adjoining properties; and
- The proposal will provide a development which is consistent with the scale of the adjoining developments and is of an appropriate visual bulk for the locality, having regard to the revised roof form and materials selected for the upper level.
- Strict compliance with the height control would not permit the orderly and economic development of the land in the form envisaged by the controls and by the zone, as compliance would necessitate the removal of the upper level of each proposed dwelling. Compliance with the control cannot be achieved by adjustment to the building form in respect of a reduction of the floor plate for the upper level of each dwelling.
- The 9.5m height development standard applies only because the proposed development comprises semi-detached dwellings rather than a dual occupancy (attached). The difference between the 2 types of development arises from whether the dwellings resulting from them are, or are not, on one lot of land. That difference does not affect the height of the dwellings.
- The site has the benefit of a valid consent for a three-storey residential flat building of a greater height. The applicant agrees to surrender this approval on issue of the Construction Certificate for the subject development.

The proposal will provide a suitable design and of suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act).

Reduction in the height to comply will not result in improved amenity for adjoining properties. The lack of impact on adjoining properties in terms of

solar access, privacy, view loss and visual bulk establishes sufficient planning grounds<sup>5</sup>.

**Clause 4.6(4)(a)(i)**

**3. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):**

The written request adequately addresses the matters referred to above by Clause 4.6(3).

**Clause 4.6(4)(a)(ii)**

**4. 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:**

**Objectives of the Standard**

The proposal will be in the public interest as it meets the objectives of the height development standard as follows:

***Objective (a)***

*(a) To ensure that the size and scale of development is compatible with the desired future character of the locality,*

*Comment:* The site is zoned R3 and the locality comprises a mix of larger dwellings and residential flat buildings. The building as proposed provides a low density development, which is non inconsistent with the medium density zoning but has been designed as two-storey dwellings with a further level contained within a roof form.

The height non-compliance does not result in a development, which is out of character with the bulk scale of adjoining and adjacent development.

The maximum height for buildings in the locality (R3 zone) is 12 metres with the exception of dwellings or semi-detached dwellings for which the maximum height is 9.5 metres. The types of residential development permissible in the locality to which the 12 m height limit applies include boarding houses, dual

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<sup>5</sup> *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [94(c) and *Randwick City Council v Micaul Holdings Pty Ltd* at [34]



occupancies (whether attached or detached), group homes, hostels, multi-dwelling housing, residential flat buildings, seniors housing, serviced apartments. With such a breadth of residential housing, it is reasonable to conclude that the desired future character of the locality would be of development with a 12m height limit.

Further, the 9.5m height development standard applies only because the proposed development comprises semi-detached dwellings, rather than a dual occupancy (attached). That difference between the 2 types of development arises from whether the dwellings resulting from them are, or are not, on one lot of land. That difference does not affect the character of the locality.

**Objective (b)**

- (b) To ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*

*Comment:* The site is not located near any contributory buildings in a conservation or near a heritage item.

**Objective (c)**

- (c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*

*Comment:* The height non-compliance will not result in development, which is out of character with the visual bulk of the locality as viewed from the public domain or from adjoining properties.

With respect to privacy, the balconies and windows of the development have been designed to protect the privacy of adjoining properties. It is also noted that the terrace areas and the associated awning and balustrade are located below the height control.

The proposed development will not result in adverse overshadowing of the private open space or living areas of adjoining properties with the adjoining properties to the east and south. The proposed development will ensure that the north facing windows of adjoining properties, namely 419 Maroubra Road (front facing) and 3-5 Hereward Street (side facing), will receive more than 3 hours of direct sunlight between 8am and 4pm on 21 June. The north-east

facing solar panels of 3-5 Hereward Street will receive more than 3 hours of direct sunlight.

The rear private open space of 419 Maroubra Road is located to the south of the lot and will be affected between from 12pm to 2pm as a consequence of the orientation of the site and not the height non-compliance.

An updated view analysis has been prepared in terms of views from the following properties:

- 2/417b Maroubra Road
- 3/4 Hereward Street
- 5/4 Hereward Street

This view analysis demonstrates that the proposed development will not adversely impact on views from the above properties as follows:

- 2/417b Maroubra Road: The proposal will have a negligible impact on the view from the secondary living room and will retain the water view from this window from both positions (vantage points 1 and 2). The proposal will have a minor impact on the view from the bedroom (vantage point 3), noting that this view is at an oblique angle with the proposal complying with the front setback control. The proposal will have a moderate impact on the minor water view from the bedroom (vantage point 4) noting that any development of the subject site will impact this view.
- 3/4 Hereward Street: The proposal will have a minor impact overall on the water view from the living room and balcony (vantage points 11 and 12), noting that any development of the subject site in accordance with the controls will impact the views shown.
- 5/4 Hereward Street: The proposal will have a minor impact overall on the water view from the living room and balcony (vantage points 8, 9 and 10), whilst retaining the horizon view, noting the panoramic view available from and given that view loss does not occur from a non-compliant component.

The proposal will not result in a loss of views from the properties at 422 Maroubra Road or 1/219b Maroubra Road.

## Objectives of the Zone

The zoning of the property is R3 and the objectives of the zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.*
- *To protect the amenity of residents.*
- *To encourage housing affordability.*
- *To enable small-scale business uses in existing commercial buildings.*

The proposal is consistent with the zone objectives in the following manner:

- The proposal provides a semi-detached development, which is permissible with consent and does not conflict with the medium density residential environment.
- The development as proposed adds to the variety of housing types in the locality, providing a permissible use within the zone.
- The proposal will not affect the ability of other land uses that provide facilities or services to meet the day to day needs of residents to be provided.
- The proposal is consistent with the desired future character of the locality, which is for medium density development, which allows for a height of 12 metres for such development including dual occupancy development.
- The proposal will protect the amenity of residents in terms of sunlight access, access to views, acoustic and visual privacy and visual bulk.
- The proposal will provide more housing stock within the locality.
- The subject site is currently not used for commercial purposes.

The proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives of the R3 zone.

The above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

#### **Clause 4.6(4)(b) and Clause 4.6(5)**

Concurrence of the Planning Secretary is taken to have been obtained as a result of written notice dated 5 May 2020 attached to the Planning Circular PS 20-002.

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

#### **Conclusion**

The consistency of the development with the zone objectives and the objectives of the height standard together with the absence of adverse impacts arising establish that there are sufficient grounds to support the variation from the development standard and confirm that it is unreasonable and unnecessary for the development to comply. This therefore demonstrates sufficient environmental planning grounds to justify contravening the standard.

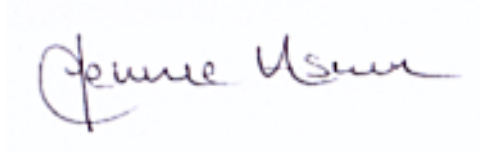
In addition, the resultant development will be in the public interest as it complies with the objectives of the zone and the objectives of the development standard.

Despite the breach with the standard, the proposal is consistent with the objects of Section 1.3 of the EP&A Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

The proposal is consistent with the objects of the EP&A Act, as it will provide a suitable development of appropriate design whilst protecting the amenity of adjoining properties.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case

and there are sufficient environmental planning grounds to support the variation.

A handwritten signature in dark ink, appearing to read 'Jennie Askin', is shown within a light blue rectangular border.

Jennie Askin  
Director  
aSquare Planning Pty Ltd

13 April 2022

# **APPENDIX 1**

## **VIEW ANALYSIS**

# **APPENDIX 2**

## **SURVEY**