

23 Wolseley Road, Point Piper

**AMENDED REQUEST FOR VARIATION TO HEIGHT OF BUILDINGS
DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF
WOOLLAHRA LEP 2014**

Clause 4.3 – Building Height

Clause 4.3 of the 4.3 Woollahra LEP 2014 and the associated map prescribe a maximum building height of 13.5 metres for this site.

The approved development on the site has a maximum building height of 19.39m, when calculated from the previously existing ground level, as it existed prior to approved excavation. Based on the now existing ground level, being the basement level, the approved building has a height of 25.8m.

The proposal seeks to construct an additional level to the approved residential flat building. The proposed works will result in a maximum building height of 29.63m, based on the now existing ground line being the basement level. This equates to a 119% variation to the building height development standard, an increase of 28% from the approved non-compliance from 91.1% (25.8m).

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

The objectives of Clause 4.3 are as follows:

- (a) *to establish building heights that are consistent with the desired future character of the neighbourhood,*
- (b) *to establish a transition in scale between zones to protect local amenity,*
- (c) *to minimise the loss of solar access to existing buildings and open space,*
- (d) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (e) *to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

The zoning of the land is R3 Medium Density Residential. 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 ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the Woollahra Local Environmental Plan 2014 allows for exceptions of 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 and Infrastructure (DP&I) 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 DP&I's Guide.

Clause 4.6(3) and 4.6(4)

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 ways¹:

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;

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

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 Morris². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

The most common way of establishing that compliance with a standard is unreasonable and unnecessary is to establish that the objectives of the standard are met, even though the standard is not complied with⁴. This objection relies on this method. Compliance with the objectives of the height standard is addressed under **Point 4 below**.

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 and is compatible with surrounding development and the desired future character for the locality.
- The proposed additional storey will provide a development of a bulk and scale which is compatible with the surrounding development in the locality, in particular the 7-storey residential flat buildings at 25 Wolseley Road and 2A Wentworth Street (adjoining the site to the north), and 2B Wentworth Street (adjoining the site to the south).
- The proposed additional storey will provide a density of development, which is appropriate and acceptable given the context of the locality and overall, the building will not appear out of character when viewed

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁴ *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

in its context of other buildings in the vicinity, noting the setbacks provided at the upper level as occurs on the adjoining properties.

- The proposed additional storey has been designed to provide an overall development of an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site with the footprint set back from the edges of the level below and the balcony have a reduced floorplate from those below.
- The development as a whole provides an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site.
- The proposed additional storey achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.
- The proposed additional storey and subsequent non-compliance with the building height standard does not contribute to adverse environmental or amenity impacts on adjoining developments in terms of overshadowing or privacy having regard to Council's DCP requirements. Refer to the extracts of the shadow diagrams prepared by the project architects below.



Figure 1: Extract of the shadow diagrams demonstrating that the proposal will not result in unreasonable overshadowing impacts to adjoining properties

- The proposed additional storey and subsequent non-compliance with the building height standard will minimise view impact on adjoining

developments. Refer to the extracts of the photomontages prepared by AE Design below.



Figure 2: Extract of the view analysis demonstrating that the proposed height will not result in unreasonable view impacts or visual bulk from 25 Wolseley Road (VP 1)



Figure 3: Extract of the view analysis demonstrating that proposal will not result in unreasonable view impacts to adjoining properties from upper open space area of 2B Wentworth Street (VP 6)



Figure 3: Extract of the view analysis demonstrating that proposal will not result in unreasonable view impacts to adjoining properties from upper open space area of 2B Wentworth Street (VP 7)

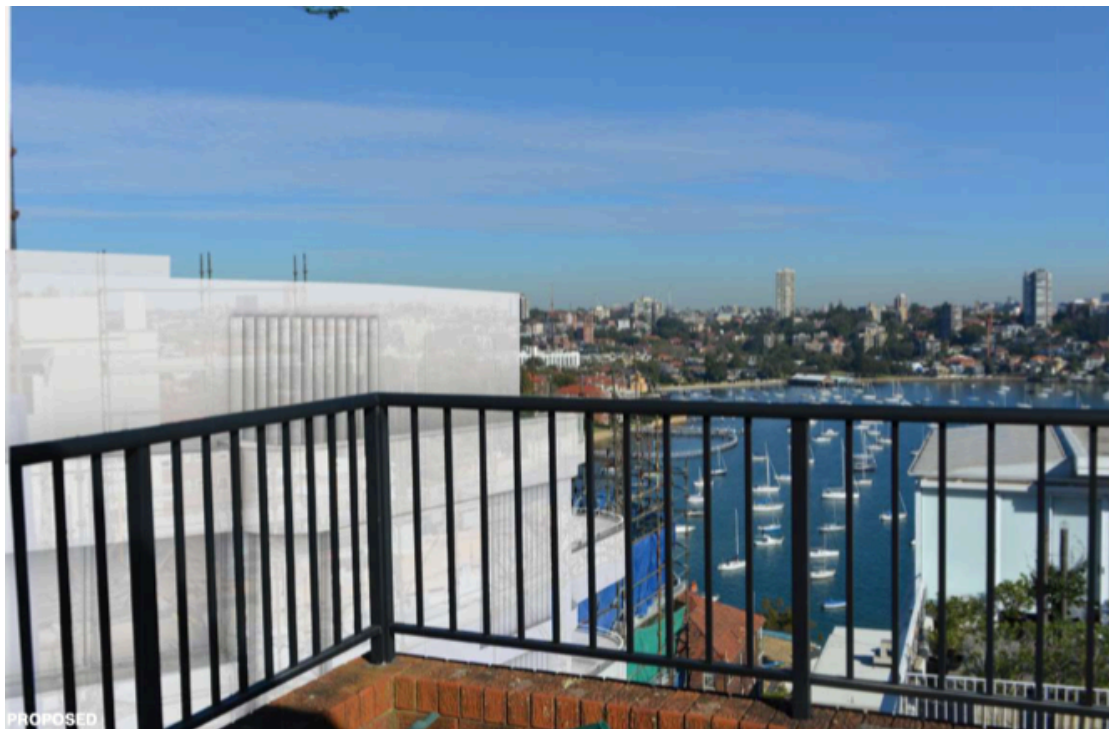


Figure 4: Extract of the view analysis demonstrating that proposal will not result in unreasonable view impacts to adjoining properties from upper rear open space area of 2A Wentworth Street (VP 3)

- The proposed alterations and additions to the approved development represent an efficient and appropriate use of land that is compatible with the environmental capacity of the site and its R3 Medium Density Residential zoning.

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

The components proposed above the height control are (to be confirmed with height limit on elevations and provide consistent numbering of levels):

- Part Level 2 (approved)
- Level 3 (approved)
- Level 4 (approved)
- Level 5 (proposed)

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.

In addition, there are sufficient environmental planning grounds that the proposed height can be achieved without adverse impacts for the following reasons:

- The proposed Level 5 will minimise view loss from surrounding development;
- The proposed Level 5 will not result in unreasonable overshadowing of adjoining properties;
- The proposed Level 5 will provide a dwelling within an approved residential flat building, which has been designed to ensure that the visual and acoustic privacy of adjoining properties is maintained; and
- The addition of Level 5 will provide an overall 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 setbacks provided.

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, 1979) and the building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

The aspect of the development that breaches the height control is justified as the proposal provides a consistent scale with neighbouring development with comparable setbacks as provided on adjoining properties. This can be described as an environmental planning ground because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome⁵.

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).

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) seeks to *establish building heights that are consistent with the desired future character of the neighbourhood.*

Comment: The proposed additional storey provides a development, which is compatible with the surrounding development in the locality, in particular the 7-storey residential flat buildings at 25 Wolseley Road (adjoining the site to the northwest) and 2B Wentworth Street (adjoining the site to the south). The proposed additional storey has been set back from the edges of the levels below, providing a recessed level comparable to those on adjoining properties.

Overall, the proposed density, scale and bulk of the development is appropriate and acceptable given the context of the locality and will not appear out of character when viewed in its context of other buildings in the vicinity, particularly given the comparable upper level setbacks as provided on adjoining properties.

⁵ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 1097 at [42]

Objective (b) seeks to *establish a transition in scale between zones to protect local amenity.*

Comment: The subject site is zoned R3 Medium Density with R2 Low Density zoning to the opposite side of Wentworth Road to the east and to the north beyond the adjoining site (2A Wentworth Road) to the north.

The approved building was recognised by Council as ensuring adequate separation from the boundaries of the site. The proposed upper level will have a reduced footprint compared to the level below, providing additional separation.

Given the context within buildings of similar heights with a similar or lesser separation from the adjacent R2 zoned properties, the proposal sits well within the existing transition between the two zones.

In addition, there will be no adverse amenity impacts to the properties located in the R2 zone in terms of overshadowing, over-looking, noise, or views as a result of the breach of the height standard⁶.

Objective (c) seeks to *minimise the loss of solar access to existing buildings and open space.*

Comment: The proposal will not contribute to adverse environmental or amenity impacts on adjoining developments in terms of overshadowing. With respect to overshadowing of 2B Wentworth Street, one bathroom window is affected and minor overshadowing will occur over a passageway within the lower private open space area of the penthouse. The open space area will continue to receive significant solar access over the majority of its surface and the upper level will remain unaffected.

Objective (d) seeks *minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion.*

Comment: The proposal does not contribute to adverse environmental or amenity impacts on adjoining developments in terms of overshadowing, privacy and view loss. With respect to overshadowing of 2B Wentworth Street, one bathroom window is affected and minor overshadowing will occur over a passageway within the lower private open space area of the penthouse. The open space area will continue to receive significant solar access over the

⁶ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 1097 at [52]

majority of its surface and the upper level will remain unaffected.

As demonstrated in the submitted photomontages, the proposed upper level has been designed and located to minimise view loss. In particular, the following is noted:

- VP 1: No view loss will occur from 25 Wolseley Road
- VP 2: No view loss will occur from rear open space of 2A Wentworth Street due to location of balcony to Wolseley Road
- VP 3: Negligible view loss due to location of balcony to Wolseley Road
- VP 4: No view loss will occur from western open space of 2B Wentworth Street
- VP 5: No view loss will occur from eastern open space of 2B Wentworth Street
- VP 6: Negligible view loss will occur from western open space of 2B Wentworth Street, which has been further minimised with glass balustrade
- VP 7: No view loss will occur from eastern open space of 2B Wentworth Street
- VP 8: Negligible view loss will occur from eastern open space of 2B Wentworth Street
- VP 9: No view loss will occur from penthouse unit of 2A Wentworth Street
- VP 10: No view loss will occur from penthouse unit of 2A Wentworth Street
- VP 11: No view loss will occur from penthouse unit of 2A Wentworth Street
- VP 12: No view loss will occur from penthouse unit of 2A Wentworth Street

Objective (e) seeks to *protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

Comment: The proposed additional storey does not contribute to adverse amenity impacts to the public domain in terms of view loss.

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 ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

The proposal is consistent with the zone objectives, as follows:

- The proposal will retain the existing residential use of the site and continue to provide for housing needs in the area.
- The proposal will not inhibit other land uses to be provided in the area that provide facilities or services to meet the day to day needs of residents.
- The proposed additional height, bulk and scale provides a development, that is compatible with the existing and desired future character of surrounding development.
- The proposed additional storey will not compromise the amenity of other residents in terms of privacy, solar access or views.

As demonstrated above, the approved development as proposed to be altered 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.

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

With respect to Clause 4.6(4)(b), concurrence of the Planning Secretary is taken to have been obtained as a result of written notice dated 21 February 2018 attached to the Planning Circular PS 18-003⁷.

Conclusion

The consistency of the development with the zone objectives and the objectives of the FSR standard, the suitability of the development in its context and the minimisation of impact arising is sufficient grounds to support that breach and confirms the lack of necessity for the development to comply. This therefore demonstrates sufficient environmental planning grounds to justify contravening the standard.

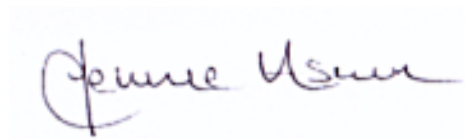
⁷ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at Para [28]

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, 1979 (formerly 5(a)(i) and (ii) of the 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.

In the context of other requirements of Clause 4.6, 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.

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.



Jennie Askin
Director
aSquare Planning Pty Ltd

Date: 9 July 2021