

CLAUSE OBJECTIVES AND EXCLUSIONS

Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) – Clause Objectives

Clause 4.6 provides a mechanism to vary development standards prescribed within Port Stephens Local Environmental Plan (PSLEP) 2013.

The objectives of the clause are as follows:

- a) *To provide an appropriate degree of flexibility 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(2) – Exclusions to the operation of clause 4.6

Development consent may be granted even though the development would contravene a development standard imposed by the PSLEP, unless the development standard is expressly excluded under Clause 4.6(8). Clause 4.3 is not excluded from the operation of Clause 4.6, and therefore the proposed variation has been considered below.

PROPOSED VARIATION REQUEST

The development application includes a written request to vary a development standard(s) in the PSLEP 2013. The written request is made in accordance with Section 35B of the Environmental Planning and Assessment regulation 2021.

The relevant development standard(s) and the extent of the proposed variation(s) is:

Development Standard	Proposed Variation	Extent of Variation (%)
Clause 4.1B of the PLSEP 750m ²	-83.4m ²	11.12%

ASSESSMENT

Clause 4.6(3) – Request to vary development standards

Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary

Clause 4.6(3)(a) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances.

In *Wehbe v Pittwater Council* (2007) LEC 827 (*Wehbe*), Chief Justice Preston identified five ways in which a request to vary a development standard may be determined to be well founded. These reasons include:

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

Whilst the Clause 4.6 request does not specifically reference the *Wehbe* case, it makes reference to Reason 1.

The applicant's Clause 4.6 Variation request asserts that compliance with Clause 4.1B is unreasonable or unnecessary as the objective of the standard is achieved notwithstanding non-compliance with the standard. In demonstrating this, the applicant assessed the proposal against the objective of Clause 4.1B. The objective of Clause 4.1B are:

- (1) *The objectives of this clause is to achieve planned residential density in certain zones*

A summary of the applicant's assessment against the objective is provided below.

Compliance with 4.1B(1)

- The proposed lot would contain social housing and therefore the design of the multi dwelling housing has been undertaken in accordance with the NSW Land and Housing Corporation Design Requirements Guideline (the guidelines)
- In this regard, each social housing dwelling has a floor area between 82.21 – 96.2m², which exceeds the 70m² recommended floor area for a two bedroom dwelling within the guidelines
- Each unit is provided with 16m² or more of private open space, which is consistent with the guidelines and the PSDCP
- The majority of the dwellings achieve a minimum of 2 hours solar access to living spaces and all dwellings achieve a minimum of 1 hour of solar access to their private open space
- The proposed dwellings do not result in any significant overshadowing or privacy impacts to adjoining properties, including the affordable housing proposed on the western lot
- The development would not generate unacceptable parking or congestion impacts on the neighbourhood due to sufficient on-street parking and public transport links
- The development would provide a high level of amenity for residents, is permissible in the R2 zone and is consistent with the objectives of zone

Council Assessment

The objective of Clause 4.1B is to *achieve planned residential density in certain zones*. The site is surrounded by predominately low density residential developments, with a medium density residential development located on the adjoining western site. The surrounding residential development is generally characterised by single and two storey dwellings.

It is considered that the development has been designed to achieve planned residential density, consistent with the R2 zone, noting a development of similar density is located immediately to the west. As the subdivision is occurring within the same application as the construction of the multi-dwelling housing, the applicant has been able to clearly demonstrate how the site, even when under the minimum lot size, can achieve the objective of this clause. In addition, the development is generally consistent with the PSDCP, LEP and the guidelines in respect to items such as setbacks and site coverage, indicating that the development is of an appropriate scale and density for the site. The density of the proposed development can also set a precedent for desirable multi-dwelling housing in this area where in-fill housing is being encouraged by the Port Stephens Local Housing Strategy.

The development also provides sufficient landscaping and private open space to ensure a high level of amenity for future residents. The development would not result in any significant overshadowing, privacy or traffic impacts that would impact the amenity of adjoining properties and the public domain. For these reasons, the proposed development is considered to achieve the planned residential density of the zone.

Based on the above, it is considered that the proposal satisfies clause 4.6(3)(a).

Clause 4.6(3)(b) – Sufficient environmental planning grounds

Clause 4.6(3)(b) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the development standard.

The applicant's Clause 4.6 request notes that there is sufficient environmental planning grounds to contravene the development standard as:

- The proposal would enhance the amenity of the locality
- The development would provide social benefits for the community through the provision of six (6) two bedroom dwellings for social housing
- The proposed development is designed so as to avoid adverse built and environmental impacts to adjoining properties and the locality
- The façade design and materiality, along with the landscape design would result in a visually attractive streetscape and the development is considered to promote good design and amenity of the built environment, consistent with the objects of the Act (s1.3(g))
- The development is consistent with the objectives of the R2 zone

The applicant contends that the potential environmental planning benefits justify the contravention of the development standard.

Council Assessment

It is considered that the applicant's assessment of the development demonstrates that there are sufficient environmental planning grounds to justify the contravention of the development standard. Notwithstanding, the following is also noted:

- The development is consistent with the existing built environment, noting a similar medium density residential developments is located on the adjoining western lot
- Any variations to landscaping, private open space, solar access and the like are primarily due to the lots irregular shape rather than its size
- The development is considered to be consistent with Council's adopted Local Housing Strategy which identifies Raymond Terrace as a strategic centre and as an area for infill housing opportunities
- The development is balanced by proposed Lot 2, which significantly exceeds the lot size requirement
- The proposed height exceedance does not result in additional adverse amenity impacts relating to noise, visual impact and overshadowing.
- The proposal would have both positive social and economic impacts through the creation of social housing in an established residential area and through increasing the number of residents in the locality.
- The development would not have any significant adverse impacts on the natural environment
- The proposed development would improve public infrastructure through the provision of footpaths and street trees



CONCLUSION

The proposed development is considered to be consistent with the objectives of Clause 4.6 given it will achieve better outcomes for and from the development in these particular circumstances as the objectives of the height development standard are achieved, notwithstanding the non-compliance and there is sufficient environmental planning grounds to justify the contravention.