

Memo

Department

To: Development Determination Panel

Copy Daniel Milliken – Manager Development Assessment

From: Penny Wood, Planner

Date: 19 September 2022

Subject: 11 Pitt Road North Curl Curl

Record Number: 2022/590013

Dear Panel Members,

The purpose of this memo is to inform the panel that the additional information for DA2021/1265 has been provided by the applicant.

On the 13 July 2022, the DDP resolved:

*“THAT Council as the consent authority **defers determination** of Development Consent No. DA2021/1265 for demolition works and construction of a dwelling house, including a swimming pool on land at Lot 1 DP 21968, No. 11 Pitt Road NORTH CURL, to allow the following to take place:*

1. The applicant is to lodge a written Clause 4.6 Variation request to vary the 8.5m Height of Buildings development standard under Clause 4.3 of the WLEP 2011, applying the measurement of building height as per the Merman Investments v Woollahra Council case law. A supplement to the Statement of Environmental Effects (SEE) addressing the revised height of the development is also to be submitted. The additional information is to be submitted within 14 days from the date the minutes are posted on the website.

2. The application will be re-notified for 14 days, to allow interested persons to view the applicants written Clause 4.6 Variation and Supplement to the SEE, and make any further submissions on the application.

3. The Assessment Officer is to carry out an assessment of the Clause 4.6 variation, the supplement to the SEE and any new submissions, and provide a Supplementary Memo addressing the additional information, the issue of building height and any relevant planning and resident issues associated with building height.

4. The Panel will then consider the additional information, including the applicants Clause 4.6 variation and supplement to the SEE, any submissions received in response to the re-notification, the Supplementary Memo by the Assessment Officer and remainder of the application and Assessment Report, and make a determination.”

Additional Information and Notification

To address the above, the Applicant has provided the following on 10 August 2022.

- A Clause 4.6 Variation request
- Revised architectural plans dated 2 August 2022

The Applicant did not provide a Supplement to the SEE.

The development application was re-notified from 12 August 2022 to 31 August 2022. Four (4) submissions were received in response to the re-notification.

The submissions raised the following concerns:

1. Privacy
2. Bulk and Scale
3. Excessive Excavation and Fill
4. View Loss
5. Wall Height
6. Height of Buildings
7. Front Boundary Setbacks
8. Rear Boundary Setback
9. Solar Access
10. Assessment carried out against repealed State Environmental Planning Policies
 - a. State Environmental Planning Policy No 55—Remediation of Land.
 - b. State Environmental Planning Policy (Infrastructure) 2007.
 - c. State Environmental Planning Policy (Coastal Management) 2018.
11. Inadequate Clause 4.6

The issues raised in Points 1 – 9 have been addressed in the original Assessment Report with no further issues raised by the Panel.

The issues raised in Points 10 and 11 are addressed in further detail within the Supplementary Memo addressed to the Panel.

ASSESSMENT OF THE SUBMITTED INFORMATION

A revised assessment under the current State Environmental Planning Policies is as follows:

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

The assessment report referenced SEPPs which have now been repealed. The relevant SEPPs have new titles with the clauses within the SEPPs remaining the same. A revised discussion under the new SEPPs is provided below.

SEPP (Transport and Infrastructure) 2021

Ausgrid

Section 2.48 of Chapter 2 requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).

- immediately adjacent to an electricity substation within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment

The proposal was referred to Ausgrid. A response has been received within the 21 day statutory period with no objections are raised and no conditions are recommended.

SEPP (Resilience and Hazards) 2021

Chapter 2 – Coastal Management

The site is subject to Chapter 2 of the SEPP. Accordingly, an assessment under Chapter 2 has been carried out as follows:

Division 3 Coastal environment area

2.10 Development on land within the coastal environment area

- 1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:
 - a) the integrity and resilience of the biophysical, hydrological (surface and groundwater and ecological environment,
 - b) coastal environmental values and natural coastal processes,
 - c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
 - d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
 - e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
 - f) Aboriginal cultural heritage, practices and places,
 - g) the use of the surf zone

Comment:

The proposed works are located wholly within the site and visually and physically separated from the foreshore, beach, headland or rock platform. The works are for standard residential development and will not cause an unreasonable impact on the coastal environment area and meet the requirements of this clause.

- 2) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:
 - a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subsection (1), or
 - b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
 - c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

Comment:

The proposed works are located wholly within the site and visually and physically separated from the foreshore, beach, headland or rock platform. The works are for standard residential development and will not cause an unreasonable impact on the coastal environment area.

Division 5 General

2.12 Development in coastal zone generally—development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

Comment:

The proposed development is contained wholly within the subject site and is considered to be standard alterations and additions to an existing dwelling house. The works are not likely to cause any increased risk of coastal hazards on that land or other land.

As such, it is considered that the application complies with the requirements of Chapter 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021.

Chapter 4 – Remediation of Land

Sub-section 4.6 (1)(a) of Chapter 4 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under sub-section 4.6 (1)(b) and (c) of this Chapter and the land is considered to be suitable for the residential land use.

4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

A Clause 4.6 variation request has been submitted by the Applicant to address the non-compliant building height as established in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582

Description of Non-compliance

Development standard	Height of Buildings
Requirement	8.5m
Proposed:	9.3m
Percentage variation to requirement	9.4%

Assessment of Request to vary a Development Standard

The following assessment of the variation to Clause 4.3 – Height of Buildings development standard, has taken into consideration the judgements contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130

Clause 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.*

(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.

Comment:

Clause 4.3 – Height of Buildings development standard is not 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) 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 Secretary has been obtained.*

Clause 4.6 (4)(a)(i) (Justification) Assessment

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

The Applicant's written request has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act(cf previous s 5)

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.*

Applicants Written Request

The applicants written request argues, in part:

- *"The proposed departure is of a technical nature only in that the proposed new dwelling is to be erected over the location of an existing locally excavated portion of the site and which accommodates the existing dwelling.*

- *The existing excavation is largely located internal to the existing and proposed building and will not in itself result in a built form of unreasonable height.*
- *The proposal will present as a dwelling which will appear as being compliant with the applicable height controls."*

I agree with the above, that strict compliance with the building height development standard is unreasonable in the circumstances as the proposed non-compliance is a result of the existing excavated lower ground level. The proposed works that result in

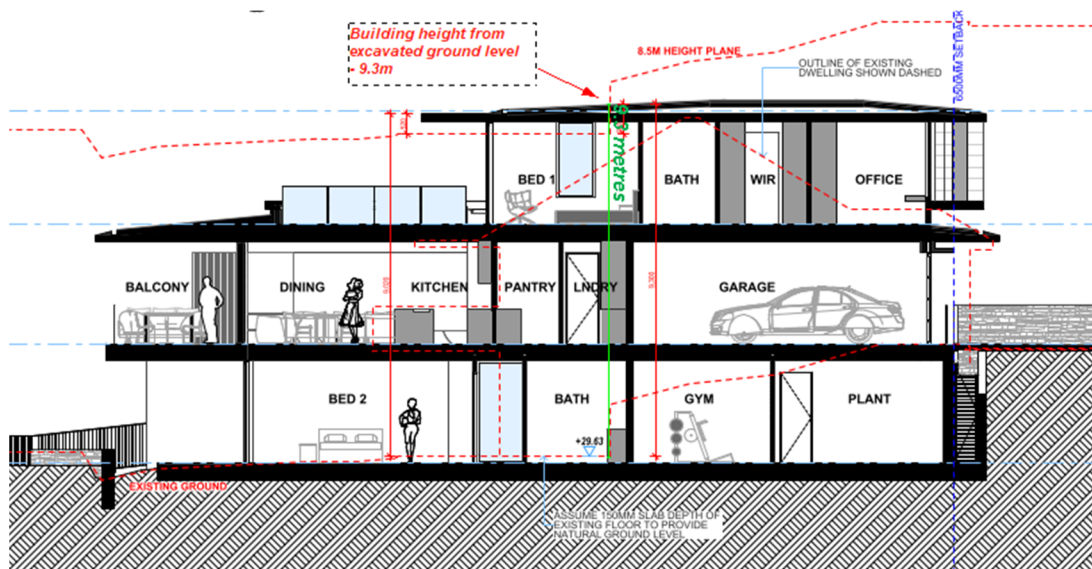


Image 1

the non-compliance with the building height consist of upper portion of the first floor component of the dwelling (see Image 1).

The height breach is a result of the requirement to measure the building height from the existing excavated ground level. This has been established in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582. The Court accepted (at [74]) there is an ‘*environmental planning ground*’ that may justify contravening a development height standard under a ‘*clause 4.6*’ when existing excavation of the site (which sits within the existing building) distorts the maximum building height plan.

Point 74 of the judgement reads:

“The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl4.6(3)(b) of LEP 2014.”

When measuring the development from the natural ground level, the proposal complies with the building height development standard. The building height would sit within the 8.5m height limit relative to the natural level of the land which is visible at present along the side boundary. The discernible height of the dwelling is therefore unaltered as a result of measuring the building height from the existing excavated ground level.

I generally agree with the applicant, that the area of non-compliant building height does not result in unreasonable amenity impact when considered against the WLEP 2011 and WDCP 2011.

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) Assessment

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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.

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

Objectives of the Development Standard

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the WLEP 2011 are:

(1) The objectives of this clause are as follows:

a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

Comment:

While the proposal includes some numerically non-compliant built form elements, the development remains sympathetic to the surrounding and nearby low-density residential development by providing a built form that is well articulated and is sympathetic to the natural topography of the site. The height non-compliance is a result of the existing excavated lower ground floor. The development proposes a two and three storey built form, which is consistent with the surrounding development. The height non-compliance represents a marginal increase on the existing building height to accommodate the new dwelling. The overall design is considered to respond positively to the sites topography which as a result minimises the overall bul

b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

Comment:

As noted above, the proposed development is compliant with the required building height with the non-compliance as a result of the existing excavated lower ground. The proposed development has been assessed in the assessment report reviewed by the Panel and is considered to ensure the privacy and solar access of nearby properties is not impacted with conditions imposed in the recommendation of the assessment report. A detailed view loss assessment of the proposed development was undertaken and discussed within the assessment report. The development is well articulated, incorporating a generous first floor setback of 6.1m to the western boundary. It was considered that through the revised proposal, whilst views are impacted, the development maintains reasonable view corridors through the sides as well as over the subject site.

c) to minimise adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment:

The impact of the development on the scenic quality of Warringah's coastal and bush environments is minimal. The area of non-compliance is a result of the existing excavated lower ground floor. When measured from natural ground level, the proposal is below the height 8.5m requirement. The proposal is consistent with the scenic quality of Warringah's coastal and bush environment.

d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities,

Comment:

The visual impact of development as viewed from any nearby public places, such as parks and reserves, roads and community facilities are minimised. The proposed works to the front of the dwelling remain compatible with the existing streetscape character and provides a setback to Pitt Road consistent with the DCP control.

Zone Objectives

The underlying objectives of the R2 Low Density Residential zone:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment:

The proposed height variation does not contravene this objective of the zone in that the use of the land remains (for detached housing) and is provided with sufficient landscaping concentrated at the front and rear that is compatible with the scale, density and pattern of surrounding development.

It is considered that the development satisfies this objective.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment:

This clause is not relevant to the proposal as no other (non-residential services or facilities) are proposed.

It is considered that the development satisfies this objective.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment:

The height variation does not impact the landscape setting of the site and the surrounding setting over the long term once landscaping is re-established for the garden areas. The proposed dwelling will incorporate suitable colours and materials consistent with surrounding development in keeping with the scenic quality when viewed from Pitt Road.

It is considered that the development satisfies this objective.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone.

Clause 4.6 (4)(b) (Concurrence of the Secretary) Assessment

Clause 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, issued by the NSW Department of Planning & Infrastructure, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of building Development Standard associated with a single dwelling house (Class 1 building).

SUBMISSIONS TO RENOTIFICATION

Four (4) submissions were received during the re-notification period. The issues raised in three (3) of the submissions were in fact addressed in the original assessment report. A submission received from *Shaw Reynolds Lawyers* on behalf of the owners of 13 Pitt Road has raised additional concerns which are discussed below:

- **Justification of proposed development, not the contravention**

Comment

The submission states that the Clause 4.6 variation request references the proposal as a whole in considering the objectives of the standard, the objectives of the zone and in setting out the environmental planning grounds put forward in the request. The submission makes reference to 4.6(3) of the WLEP 2011 and that the Applicant fails to justify the contravention of the development standard.

(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.*

The Clause 4.6 variation request submitted by the Applicant refers to the proposed development as breaching the 8.5m development height standard. The Clause 4.6 Variation request adequately addresses the non-compliance throughout the documentation with the plans provided with the application adequately indicating where exactly the contravention of the standard occurs in the context of the proposed development. Council can be satisfied that the Clause 4.6 Variation request does adequately address the impacts associated with the breach of the development standard.

- **Justifications lack evidence or support**

Comment

The submission raises concern that the proposal is not supported by “any analysis of visual impact, views, privacy impacts or solar impact”. These concerns were addressed by the Applicant in the original submission. The proposed non-compliance with the building height development standard does not alter the approved building height as viewed by surrounding properties or from a public place.

- **Environmental Planning grounds are not established**

Comment

The submission states that three environmental planning grounds are put forward in support of the proposed contravention of the development standard. As discussed in the Clause 4.6 Variation request discussion, Council can be satisfied that adequate environmental planning grounds are established in support of the proposed contravention.

- **Amenity impacts i.e. privacy concerns**

Comment:

These concerns were outlined in previous submissions which were addressed in the original assessment report.

Based on the above, it is recommended that the Panel support the proposal and approve the application.