

**Attachment I – Updated Clause 4.6 Request to Vary Development Standard**

## Introduction

Clause 4.6 of the Tweed LEP 2014 provides a mechanism to vary development standards under the local planning instrument. The proposed building height exceeds the maximum prescribed under Clause 4.3 of the Tweed LEP 2014. Clause 4.3 requires a maximum building height of 9.0m, where the proposal provides a height of 10.50m to top of the roof top planter, 10.35m to the top of the frameless glass balustrade on the roof top terrace and 9.4m to the south eastern corner of the glass sliding canopy access.

The location of the elements that exceed the 9.0m height limit are identified in the figures below. The maximum extent of the variation is identified as 1.05m or 11.66% to top of the planter; 1.35m and 15% to top of frameless glass balustrade and 0.4m and 4.44% to the south eastern corner of the glass access canopy. Additional perspectives of the extent of variation are included in the Architectural Plan set on drawing No.DA1.21.

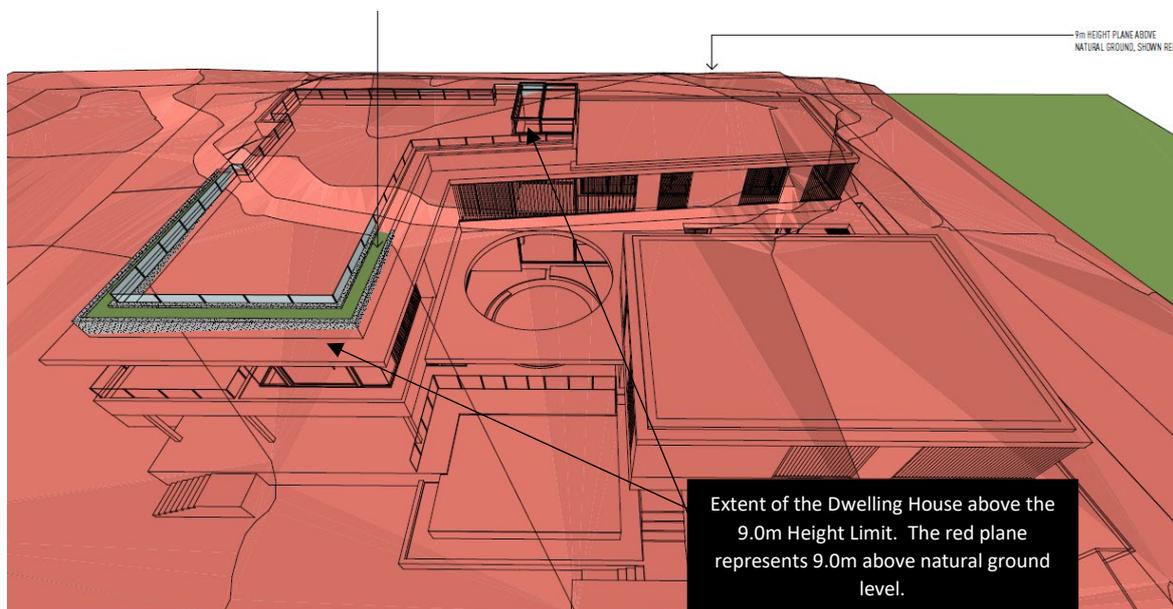


Figure 1: Elements exceeding 9.0m height limit

The following justifies a variation to this provision in this instance to demonstrate to Council and the consent authority, that it could allow the proposed development on the site. The following forms a written request to vary the development standard under Clause 4.6 of the TLEP 2014.

### Request to Vary Under Clause 4.6

- (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.*

The proposal seeks a variation to Clause 4.3 (Height of Buildings) under the Tweed LEP 2014. This clause is not expressly excluded from the operation of Clause 4.6.

(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

Compliance with the development standard is unreasonable in this instance. The maximum height of buildings for the site under the TLEP 2014 is 9.0m. The proposed Dwelling House has building height of 10.35m to the top of glass balustrade. This equates to an additional 1.35m of building height. The elements which exceed the height limit is a small area and consist of either 'decorative' elements on the roof (planter Boxes) or clear transparent element (frameless glass balustrade and roof access canopy). Refer **Figure 1** of this request.

In preparing the proposals design, a key consideration was avoiding and minimising impact upon the ecological features of the site and that adjoining the site as much as practical. Given the adjoining area of coastal wetland and rainforest areas impact upon the water table and major ground level changes have been avoided. Importantly the proposals design uses existing topographic features of the site, minimises the extent of land forming and avoids dewatering in construction. The need to avoid and minimise impact to the ecological features has resulted in the proposed building height variation.

However, despite the additional building height, the proposed development complies with all of Council overshadowing and privacy requirements, as demonstrated by the Shadow diagrams; and through clever design and placement is either not visible from the street or where visible the height variation will be indistinguishable from a compliant 9.0m building height. Effectively the proposal continues to meet the objectives of the Clause despite the non-compliance. Refer **Figure 2** below demonstrating the building from Dune Street



Figure 2: Building Montage – Dune Street

While the proposal could be amended to 'sink' the building into the ground, this would result in a significant direct impact upon to the ecological communities on and adjoining the site, noting an exponential increase in land forming and the introduction of dewatering. Given the proposal continues with meeting the objectives of Clause 4.3, complying with the development standard is unreasonable in the instance given the additional impact and compliance issues this would place upon the proposal.

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

There are sufficient environmental planning grounds to justify the contravention of the standards and that compliance with the standard is therefore unreasonable. While the proposal could be amended to 'sink' the building into the ground this would result in a significant direct impact upon to the ecological communities on and adjoining the site, noting an exponential increase in land forming and the introduction of dewatering. There is a significant body of Environmental Planning Instruments and indeed the EP&A Act itself, that requires environmental harm to be avoided or minimised where possible. Through the process of avoiding / minimising where possible the proposal exceeds the height limit in a very minor way.

Importantly, the elements which exceed the height limit is a small area and consist of either 'decorative' elements on the roof (planter Boxes) or clear transparent element (frameless glass balustrade). Refer Figure 1 of this request.

Effectively the proposal continues to meet the objectives of the Clause despite the non-compliance, while achieving higher order development controls to avoid and minimise environmental harm.

*(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*

The matters required to be addressed under subclause (3) have been demonstrated above.

*(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*

The proposal is not inconsistent with the objectives of Clause 4.3 or the intent of the R2 Low Density Residential Zone. Regarding height of buildings, the objectives of Clause 4.3 are:

- (a) to establish the maximum height for which a building can be designed,*
- (b) to ensure that building height relates to the land's capability to provide and maintain an appropriate urban character and level of amenity,*

- (c) to ensure that taller development is located in more structured urbanised areas that are serviced by urban support facilities,
- (d) to encourage greater population density in less car-dependant urban areas,
- (e) to enable a transition in building heights between urban areas comprised of different characteristics,
- (f) to limit the impact of the height of a building on the existing natural and built environment,
- (g) to prevent gross overshadowing impacts on the natural and built environment.

The proposal is consistent with the objectives of the height of buildings control in that:

- The proposal achieves a high-quality visual appearance which is broken up using building articulation, colour, balconies, vertical landscaping and feature walls and windows;
- The elements which exceed the height limit is a small area and consist of either 'decorative' elements on the roof (planter Boxes) or clear transparent element (frameless glass balustrade). Refer Figure 1 of this request;
- Through clever design and placement, the height exceedance is either not visible from the street or where visible the height variation will be indistinguishable from a compliant 9.0m building height;
- The proposal design achieves a building scale at the perimeter of the proposal that fully complies with the building height requirement;
- The additional building height allows the proposal to minimise direct impacts upon the natural environment as discussed above; and
- Despite the additional building height, the proposal is fully compliant with Councils overshadowing and privacy controls.

The proposal is also consistent with the objectives of the zone in which it is located. The site is zoned R2 Low Density Residential Zone. 'Dwelling House' is a permitted use with consent in the R2 zone under the TLEP 2014. The objectives of the 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.

The proposal seeks to establish a Dwelling House over two existing allotments which combined provide a total site area of 2025.02m<sup>2</sup>. The proposal will positively contribute to the housing needs of the community in the existing low-density residential environment which is predominately comprised of single dwellings.

The establishment of the Dwelling House on the site is permissible with consent, consistent with the R2 zone objectives and consistent with the intent of the R2 zone under the Standard Instrument LEP.

The proposal will not conflict with the public interest as it is consistent with the objectives of the standard and the zone in which the development is located.

*(b) the concurrence of the Director-General has been obtained.*

The variation sought is to a numerical standard and the extent of the variation is 15% at its greatest. As per Planning Circular PS18-003 as the variation to the development standard is greater than 10%

the concurrence of the Secretary may be assumed by the consent authority but not a delegate of Council. Concurrence referral is not triggered by the proposals Clause 4.6 request if the development is determined at Council meeting. If the proposal is to be determined by a delegate of Council the Concurrence of the Secretary will be required.

*(5) In deciding whether to grant concurrence, the Director-General must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

The proposal relates to a Dwelling House in a low-density residential area that is seeking a minor height variation as part of strategy to minimise and avoid environmental impact to ecological features on and adjoining the site. The elements which exceed the height limit is a small area and consist of either 'decorative' elements on the roof (planter Boxes) or clear transparent element (frameless glass balustrade).

The proposal does not raise any matters of State or Regional planning significance.

*(b) the public benefit of maintaining the development standard, and*

As the proposed development demonstrates consistency with the intent and objective of the development standard, the granting of a variance in this instance would not prejudice the future integrity of that standard nor impact upon the amenity of the locality. The proposal inclusive of the minor height variation will allow the proposal to avoid and minimise ecological impact as much as practical. In this regard there is no public detriment in varying the development standards in the particulars of this proposal.

*(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

There are no other matters required to be taken into consideration by the Secretary's (former Director General's) delegate.

Regarding the above, there are enough planning grounds to justify the contravention of the standard and therefore compliance with the standards is unreasonable in the case.

### **Five (5) Part Test**

In accordance with the Department of Planning and Environment's '*Varying development standards: A Guide, 2011*' written applications to vary development standards will not only address the above matters but may also address matters set out in the 'five-part test' established by the NSW Land and Environment Court.

The 5 different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy are discussed below.

*(1) the objectives of the standard are achieved notwithstanding noncompliance with the standard;*

The objectives of the standard are achieved as outlined above. The proposal is well founded on this test.

*(2) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

N/A - The proposal is not founded on this test.

*(3) the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Compliance with the standard would defeat the underlying object or purpose of the clause, precluding high quality residential development on the site that is compatible with the surrounding environment, consistent with the existing and future intended residential character. The proposal is well founded on this 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;*

N/A - The proposal is not founded on this 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.*

N/A - The proposal is not founded on this test.

In consideration of the Land and Environment Court five part test, it is considered that the proposal would be consistent with two of the tests and accordingly a departure from the standard is justified.

### **Conclusion**

Considering the matters raised under Clause 4.6 of the Tweed LEP 2014 and the 'Five Part' test, it has been demonstrated that there are enough planning grounds to justify the contravention of the standard and therefore compliance with the standard is unreasonable in the case.

Support for the proposed Clause 4.6 variation is respectfully requested.