

Clause 4.6 request – building height control

Request for exception under clause 4.6 of Pittwater Local Environmental Plan 2014 to clause 4.3(2) of *Pittwater Local Environmental Plan 2014*

Premises: No. 316 Hudson Parade, Clareville

Proposal: Alterations and additions to existing dwelling house and construction of a secondary dwelling.

Control: Maximum building height

Clause 4.3(2) of PLEP 2014 provides that the maximum building height on the subject site is 8.5 metres.

The following definitions from PLEP 2014 are relevant:

building height (or height of building) means—

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

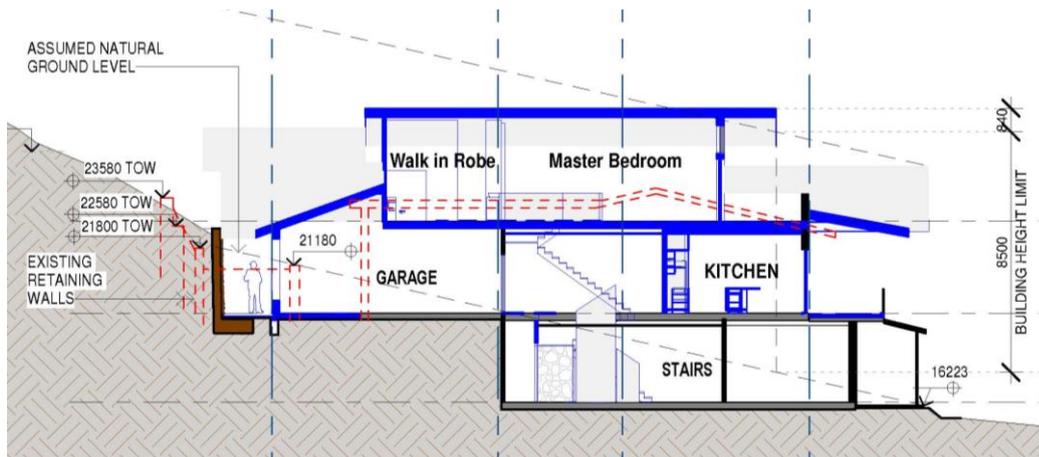
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

ground level (existing) means the existing level of a site at any point.

Extent of variation:

The proposed alterations and additions have a maximum building height of 9.31m, representing a variation of 840mm or 9.88%. The variation is limited to a small part of the western end of the gable roof ridge over the proposed upper level of the building.

The ground levels have been altered historically and so the “*existing ground level*” for the purposes of measuring the building height has been interpolated, consistent with the judgement of the Land and Environment Court in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 and *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189. Existing ground levels were identified using spot levels shown on the detail survey prepared by Lockley Registered Surveys (Drawing No 43725DT), being the ground level to the west of the dwelling house (RL16.223) and the east of the dwelling house (RL21.18), and verified by geotechnical information provided by White Geotechnical Services:



Introduction:

Clause 4.6(1) of PLEP 2014 states:

- (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.*

To utilise the flexibility provided by clause 4.6 of PLEP 2014 it is necessary for the applicant to demonstrate:

- (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.*

In addition, Council must 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.*

In exercising delegation from the Director-General of the Department of Planning, Council must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

This clause 4.6 request has been structured in accordance with the approach adopted by the Court in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46 and also considers the ways in which a SEPP 1 objection can be sustained as listed in *Webhe v Pittwater Council* [2007] NSWLEC 827 at [26] and the judicial guidance provided in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

1. Is the planning control in question a development standard?

Clause 4.3 of PLEP 2014 is attached as Appendix 1

The definition of “*development standards*” in Section 4(1) of the Environmental Planning and Assessment Act 1979 is attached as Appendix 2.

Clause 4.3(3) contains a development standard because it fixes a requirement for the height of a building.

2. What is the underlying object or purpose of the standard?

The underlying objects of the standard are stated in clause 4.3(1) to be:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

3. Is compliance with the development standard consistent with the objectives of clause 4.6?

- Compliance would necessitate an inflexible application of the development standard in circumstances where the development otherwise satisfies the objectives of the control.
- Compliance would not achieve a better outcome from the development of the land because it would result in a dwelling house with less internal amenity compared to the proposal.

4. Does non-compliance with the development standard raises any matter of significance for State or regional environmental planning?

No.

5. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Compliance with the development standard is unreasonable and unnecessary for the following reasons:

5(a). Achievement of the underlying objectives of the standard

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Comment: For the reasons discussed in the Statement of Environmental Effects, the proposal is consistent with the desired character of the D3 Bilgola locality.

- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: The building generally complies with the 8.5m building height control that applies to the land. The site is relatively large (1903m²) and the variation is sited in the middle of the site, mitigating its apparent height and scale.

- (c) *to minimise any overshadowing of neighbouring properties,*

Comment: The proposed variation to the building height control does not result in any overshadowing of neighbouring properties.

- (d) *to allow for the reasonable sharing of views,*

Comment: The proposed variation of the building height control does not result in any impact on views from neighbouring properties. Dwellings on the eastern side of Hudson Parade are sited well above the subject site such that views over the property are unimpeded. There are no cross views over the site from neighbouring properties.

- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*

Comment: The building steps down the slope of the land, with the basement level occupying the western portion of the building footprint.

- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Comment: The proposed variation to the building height control has no impact on the natural environment. The site does not contain a heritage item, is not in the vicinity of any heritage items, and is not within a conservation area.

5(b). Is the standard relevant to this development?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(c). Would the underlying objective be defeated or thwarted if compliance was required?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(d). Has the development standard been abandoned or destroyed by Council's own actions?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(e). Is the zoning of the particular land unreasonable or inappropriate?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

6. Are there sufficient environmental planning grounds to justify varying the development standard?

The following environmental planning grounds justify the proposed variation:

- (a) The building generally complies with the building height control, with the variation relating only to a small part of the roof ridge.
- (b) The variation to the building height control is located centrally within a relatively large site. As a result, the distance of the roof ridge from the neighbouring properties, the street and the foreshore mitigate potential impacts such as impacts on views, overshadowing, streetscape, and impacts related to the bulk and scale of buildings.
- (c) The proposed variation occurs because the building has been designed to maintain the existing gabled roof form so as to maintain the character of the building and its contribution to the character of the area. A different roof form could be adopted that would comply with the control (eg: a hipped or flat roof form) but this would have no identifiable environmental benefit and would be to the detriment of the character of the area and the architectural consistency of the building.

7. Is the proposal consistent with the objectives of the zone?

The site is zoned E4 Environmental Living. The objectives of the zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Comment: The proposal is for low-impact residential development.

- *To ensure that residential development does not have an adverse effect on those values.*

Comment: The proposal has no identifiable impact on the ecological, scientific or aesthetic values of the area.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

Comment: The site is relatively large (1,903m²) and the proposed development of a dwelling house and secondary dwelling represents low density development. The scale of development is appropriate for the site. The building steps down with the slope of the land and site landscape ensures that the building is integrated into the landscape.

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

Comment: The proposal has no impact on riparian and foreshore vegetation or on wildlife corridors.

8. Is the exception request well founded?

For the reasons given above the exception request is considered to be well founded.



Geoff Goodyer
18 March 2021

Appendix 1

Clause 4.3 of PLEP 2014

4.3 Height of buildings

- (1) The objectives of this clause are as follows—
 - (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
 - (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
 - (c) to minimise any overshadowing of neighbouring properties,
 - (d) to allow for the reasonable sharing of views,
 - (e) to encourage buildings that are designed to respond sensitively to the natural topography,
 - (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.
- (2A) Despite subclause (2), development on land—
 - (a) at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and
 - (b) that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map,may exceed a height of 8.5 metres, but not be more than 8.0 metres above the flood planning level.

Appendix 2

Definition of “development standards”

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.