

Clause 4.6 Variation

BUILDING HEIGHT

1-3 CAREEL HEAD ROAD, AVALON
BEACH

13 JUNE 2025



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CLAUSE 4.6 DEPARTURE

BACKGROUND TO THE DEPARTURE

This Clause 4.6 variation has been prepared in support of a development application for the construction of a mixed use development at 1-3 Careel Head Road, Avalon Beach.

The proposed development exceeds the maximum permitted height control of 8.5m that applies under the Pittwater Local Environmental Plan 2014.

The contravention to the development standard varies across the site, but can be summarised as follows:

- i. Lift Over-run: Maximum Height of 8.77m and a breach of 270mm;
- ii. Parapet upturn: Maximum Height of 9.28m and a breach of 780mm;

The height breach arises from two (2) components- being an artificial dip in the topography and then the need to achieve a required flood freeboard level to the finished floor level.

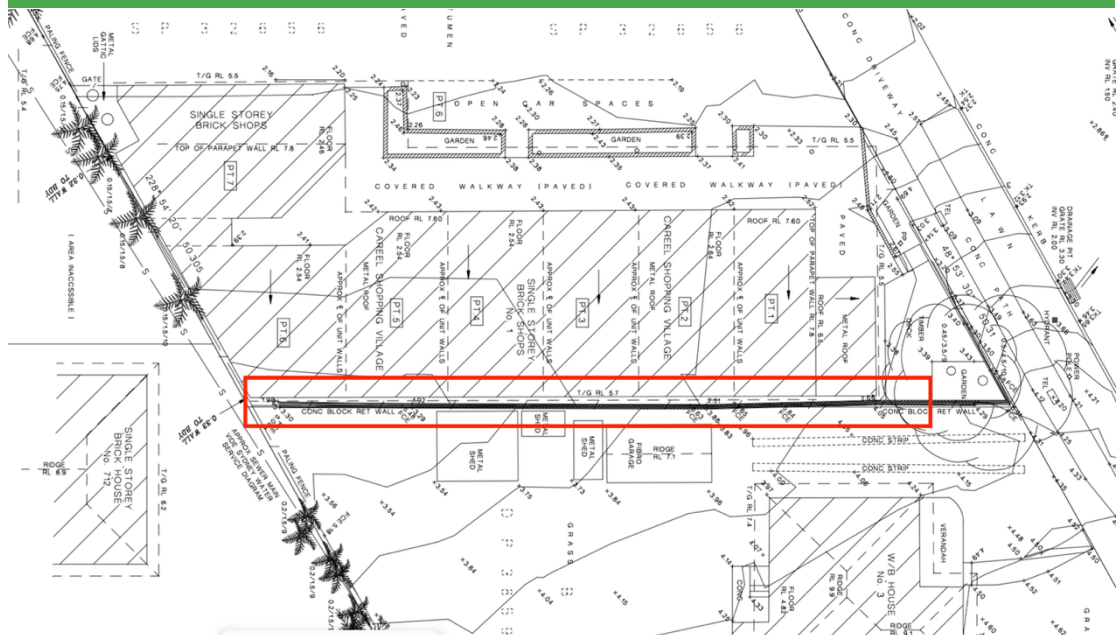
Topographical Dip

The height breach arises in part due to a substantial 'dip' in the topography on the property boundary between 1 & 3 Careel Head Road- owing to excavation of No. 1 Careel Head Road as part of the original commercial development on that site. This has resulted in a stark level difference between the properties and creates a substantial 'dip' when measuring ground levels across the site.

This is best understood on the Survey Plan, an extract of which is provided over the page and this shows:

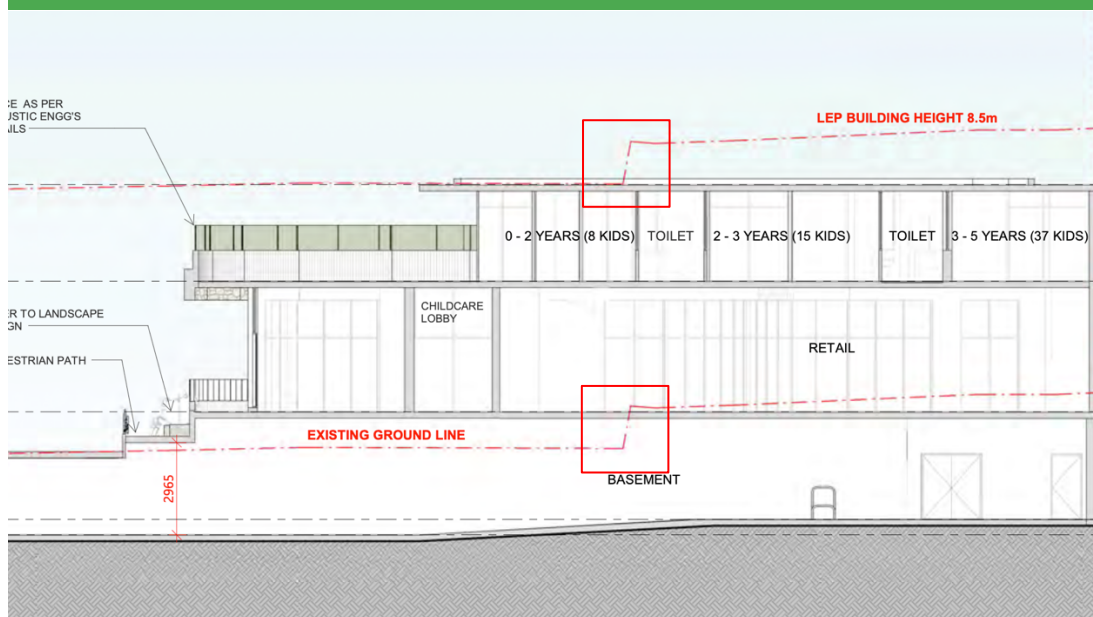
- No.3 Careel Head has RL's ranging between 3.3-4.05 at the common boundary;
- No.1 Careel Head has RL's ranging between 1.92- 2.68 on the other side of the fence- at the base of an existing retaining wall;
- There is a 1.4m drop in levels between the properties owing to the excavation that has occurred to No.1 as part of the development of the shops- which has the effect of artificially lowering the ground level on No.1 by approximately 1.4m through the excavation that has occurred.

Figure 1: Survey Extract Showing the Area of the Level Change



In Section this gives a substantial 'dip' in the permitted height as it follows ground level existing- as shown below.

Figure 2: Section Extract Showing the 'Dip'



The photographs below show this existing arrangement with photographs taken along the boundary area highlighted in red on the Survey at Figure 1.

Figure 3: Photograph of this area – noting change in ground levels



Figure 4: Photograph of this area – noting change in ground levels



The above approach utilises the 'Merman' approach as set out in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582. This adopts ground level existing across the site.

This means the height is artificially increased to the proposal through No.1 (and the variation is greater in numerical terms) given the excavation that has occurred. Notably the parapet is some 600mm below the height limit on the boundary of No.3 but then 780mm above the height limit on the boundary of No.1- given the artificial lowering of levels that has occurred on No.1.

Flood Planning Level

The other key issue that results in an increased building height, and the breach, is the need to achieve a finished floor level of RL3.7 to meet the flood planning level for the development.

The reason this generates a height breach is because the existing RL to the shops is at RL2.54- which is 1.16m below the required freeboard level. This means that the building needs to be raised by 1.16m relative to the existing FFL on the site- which raises the whole development and is one of the reasons for the height breach- notably to the lift over-run and then part of the parapet element.

NUMERICAL VARIATION TO THE STANDARD

Clause 4.3 of Pittwater Local Environmental Plan 2014 stipulates a maximum building height of 8.5m.

'building height' or 'height of building' is defined in the *Pittwater Local Environmental Plan 2014* as:

- (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.*

For the purposes of ground level existing the 'Merman' approach is used- as set out in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

The contravention to the development standard varies across the site, but can be summarised as follows:

- i. Lift Over-run: Maximum Height of 8.77m and a breach of 270mm;
- ii. Parapet upturn: Maximum Height of 9.28m and a breach of 780mm;

This adopts ground level existing across the site. This means the height is artificially increased to the proposal through No.1 (and the variation is greater in numerical terms) given the excavation that has occurred. Notably the parapet is some 600mm below the height limit on the boundary of No.3 but then 780mm above the height limit on the boundary of No.1- given the artificial lowering of levels that has occurred on No.1.

It is also noted that the breach arises to achieve the FFL of RL3.7 which is some 1.16m higher than the existing FFL of the shops- which artificially increases the height of the building.

RELEVANT CASE LAW

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the building height departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*- including that ‘the development standard has been virtually abandoned or destroyed by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable’
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating there are sufficient environmental planning grounds to vary the standard; and
- Satisfying the relevant provisions of Clause 4.6.

ADDRESS OF CLAUSE 4.6 PROVISIONS

Clause 4.6 of the Pittwater Local Environmental Plan 2014 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

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.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note.

When this Plan was made it did not include all of these zones.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5.

Clause 4.6 does not restrain the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

CLAUSE 4.6(3)(A) - COMPLIANCE UNREASONABLE AND UNNECESSARY

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

Underlying Objectives are Satisfied

In *Wehbe v Pittwater* it was set out that compliance can be considered unreasonable or unnecessary where:

- (i) *The objectives of the standard are achieved notwithstanding non-compliance with the standard*

It is considered that this approach can be followed in this instance. The objectives of the building height development standard are stated as:

- (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.*

The proposal remains consistent with the objectives based on the following:

- In relation to objective (a) & (b) the non-compliance to the upper level parapet and lift over-run has limited bearing with the proportionality and character of nearby development. This is particularly the case because the location of the breach is in a location that will not be perceived at the street frontage given the area of breach cannot be 'read' in the streetscape and the building is actually lower than the adjoining building to the east (shop top housing proposal that is 3 storeys in height) terms of overall height. It is noted that this proposal is actually 1 storey lower than that development in terms of the way it is perceived. This means that the building height is in keeping with the desired character of nearby development despite the breach and noting the breach largely arises due to the artificial dip in the topography of the subject site. The proposal, being 2 storeys, is compatible with the height and scale of surrounding and nearby development with particular reference to the development to the east that is

also in the E1 zone and the proposal sits 1 storey lower than that building. The 2 storey form and presentation also means it is compatible with the nearby residential built forms that vary in height from 1-2 storeys.

- In relation to objective (c) the overshadowing impacts from this area of non-compliance are no greater than the overshadowing of the compliant scheme given the area of non-compliance is located relatively centrally located to the lift over-run and then noting the parapet is recessed 1m further back than the lower roof below. It is also noted that the parapet 'pulls away' from the adjoining R2 properties at 712 and 712A and then there is an open un-roofed element where the child care centre is located. This serves to minimise overshadowing despite the breach.
- In relation to objective (d) there are no view loss issues that arise from the breach;
- In relation to objective (e) the buildings are designed to respond sensitivity to the natural topography through elimination of the artificial excavation on No.1 Careel Head and provision of a suitable FFL responsive to topography and required freeboard for flooding. The design response, despite the breach, is responsive to topography noting the artificial topographical cut that exists on the site is the primary reason for the breach.
- In relation to objective (f) the visual impact of the breach on the natural environment, heritage conservation areas and heritage items is limited given there are no significant elements of the natural environment in proximity to the site that would be affected nor are there any heritage items of HCA's in proximity to the site.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

CLAUSE 4.6(3)(B) - SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, being grounds that are specific to the site. Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the development standard.

We note that the below points demonstrate suitable environmental planning grounds exist to justify contravening the height development standard:

- A large component of the breach is artificial and distorted by the prior excavation of the site within the footprint of the building and as per the findings in *Merman* this is an environmental planning ground that is sufficient to justify the variation to the components above the height limit that are artificially increased.
- The minor nature of the encroachment, after accounting for the ‘real’ height of the building using an interpolated level is negligible and as such will not generate unacceptable adverse impacts to surrounding properties or as viewed from the public domain as set out in *Eather v Randwick* [2021] NSWLEC 1075.
- The minor breach to the height standard also does not generate any adverse amenity impacts to adjoining properties with regard to visual privacy or overshadowing given the lot orientation and careful design of the development whereby the height breach enables a more responsive development that sits well below the height limit to the southern sensitive edge relative to the R2 zoned properties;
- The proposed variation ensures that the necessary flooding attenuation measures are achieved with the proposal required to increase the FFL from RL2.46 (existing) to RL 3.7 to achieve the flood freeboard requirements.
- The upper level roof form that exceeds is also limited in terms of the height breach and its located is away from the sensitive adjoining properties that will not have any unacceptable amenity impacts to adjoining properties.

Therefore, the current proposal is a suitable outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a suitable design response on the site.

This breach enables a suitable design outcome on the site and is consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

- (c) to promote the orderly and economic use and development of land,*
- (g) to promote good design and amenity of the built environment,*

This follows from:

- Rectification of the existing topographical 'dip' on the site; and
- Achieving the required flood freeboard requirements.

The minor breach to the height standard also does not generate any adverse amenity impacts to adjoining properties with regard to visual privacy or overshadowing given the lot orientation and careful design of the development whereby the height breach at the eastern portion of the site enables a more responsive development that sits well below the height limit to the western portion of the site.

Therefore, the current proposal is a preferred outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control on the site which demonstrates sufficient environmental planning grounds to support the departure.

CONCLUSION

Strict compliance with the prescriptive height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by residential development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, the Clause 4.6 variation request should be supported.