

## Attachment 2

### **Clause 4.6 variation request – Height of buildings Alterations and additions to a residential flat building Units 4 and 7, 1A Greycliffe Street, Queenscliff**

#### **1.0 Introduction**

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

#### **2.0 Warringah Local Environmental Plan 2011 (WLEP)**

##### **2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control are as follows:

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

**Building height** is defined as follows:

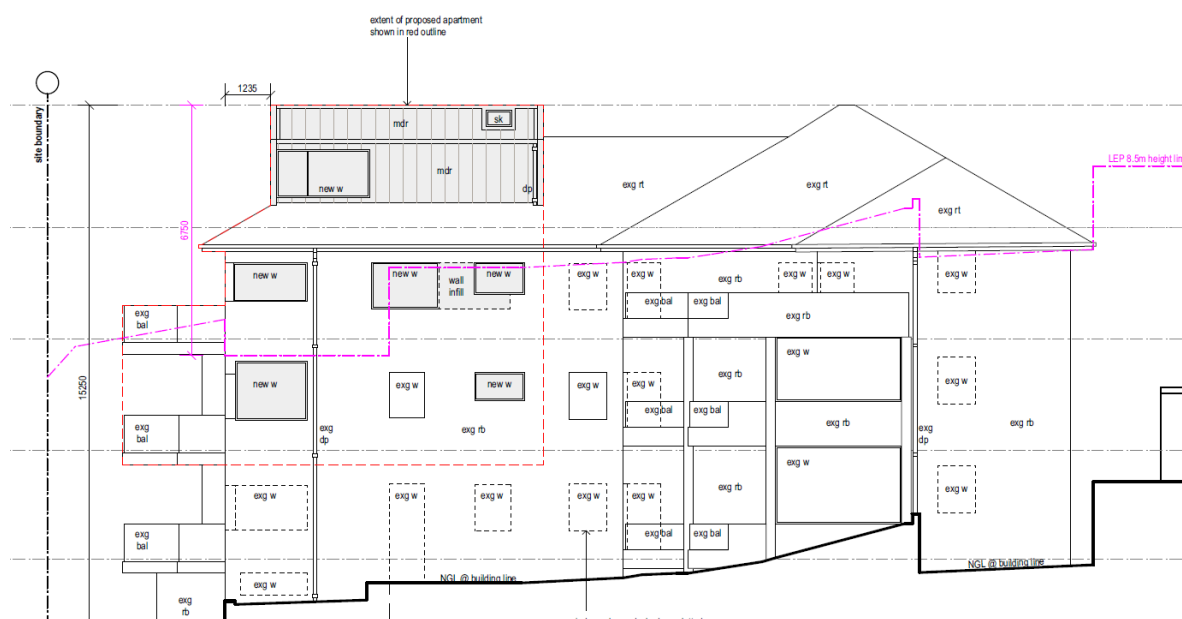
***building height*** (or ***height of building***) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Ground level (existing) is defined as follows:

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

It has been determined that the upper-level additions increase building height on the southern portion of the site from the existing ridge height of RL 21.8m AHD to a proposed ridge height of RL 22.66m AHD being the same height of the existing northern roof ridge. This represents an 860mm increase in building height.

The southern end of the proposed additions has a maximum building height measured above ground level (existing), being the slab level of Unit 1, of 15.25m representing a non-compliance of 6.75m or 79.4%. This is depicted in the plan extract below.



**Figure 1** – Plan extract depicting the existing and proposed building height breaching elements.

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

- (1) *The objectives of this clause are:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

*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.*

This clause applies to the clause 4.3 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

*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 proposed development does not comply with the height of buildings provision at 4.3 of WLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].*

*However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard

#### **4.0 Request for variation**

##### **4.1 Is clause 4.3 of WLEP a development standard?**

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision 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:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 WLEP prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 WLEP is a development standard.



#### **4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary**

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

##### **Consistency with objectives of the height of buildings standard**

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: Development within the site's visual catchment, and within the 8.5 metre height precinct, is eclectic in nature with a predominant 4 and 5 storey built form character established by residential flat development located along the southern escarpment adjacent to Queenscliff Beach with a 9/10 storey residential flat building immediately to the east of the site. Surrounding resident flat development are all located within the R2 Low Density Residential zone and accordingly are assumed to benefit from existing use rights. The height and scale of surrounding development is depicted in the following Figures.



**Figure 2** - Subject property as viewed from Greycliffe Street.



**Figure 3** - Subject property (red arrow) as viewed from Queenscliff Beach.



**Figure 4** - Wider visual and built form context as viewed from Queenscliff Beach.

The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

- 22 *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban context.

The building height breaching elements will not be visually prominent as viewed from Greycliffe Street and to the extent that they will be visible they have been setback behind the existing northern pitched roof form such that they are recessive elements as viewed from the street. The overall height, bulk and scale the building as viewed from the street frontage is entirely consistent with that established on the immediately surrounding properties. Similarly, the upper-level additions have been set in from each existing building façade and contained predominantly within the area occupied by the existing pitched roof form such that they will be a recessive element as viewed from Queenscliff Beach.

In this regard, I have formed the considered opinion that the non-compliant building elements will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and broader urban context.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the height and scale of the additions, notwithstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably be concluded that, notwithstanding the building height breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

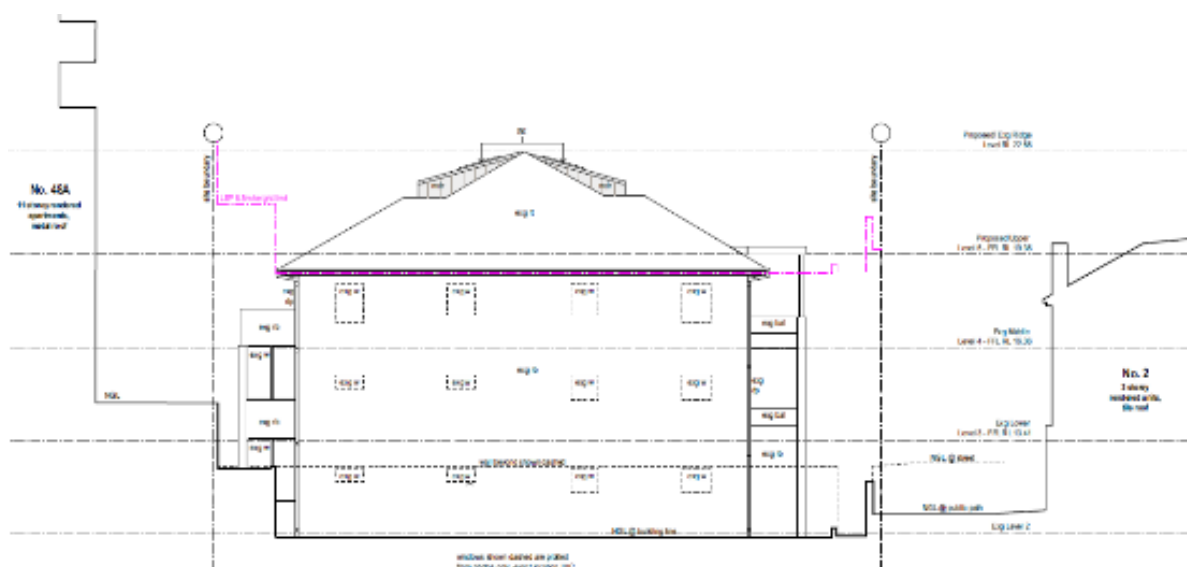
Notwithstanding the building height breaching elements, the resultant development is compatible with the height and scale of surrounding and nearby development and accordingly the proposal achieves this objective.



- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access.*

Comment: In relation to visual impact, I note that the setbacks proposed to the upper-level additions ensure that the breaching elements are visual recessive as viewed from surrounding properties, the street and Queenscliff Beach. Visual impacts have been minimised through the adopting of these design initiatives. I also rely on the analysis provided in response to objective (a) to demonstrate that visual impacts have been minimised and the objective achieved in this regard.

In relation to the disruption of views, having inspected the site and its immediate surrounds to identify existing view corridors we have formed the opinion that the proposed development will not give rise to any unacceptable view impacts from surrounding properties in particular the properties to the north of the subject site which obtain views over the properties located on the low side of Queenscliff Road towards Manly Beach. In this regard, the upper-level additions are contained predominantly within the visual roof/ view plane established by the existing development to minimise impacts on available views from surrounding development is depicted in the elevation extract below.



**Figure 5** – Plan extract northern elevation showing minor intrusion into view plane.

Notwithstanding the building height breaching elements, view disruption has been minimised and the objective achieved in this regard.

In relation to the minimisation of privacy loss, the development has been carefully designed to limit side boundary facing fenestration with primary living and bedroom windows and doors orientated to the south where possible to prevent direct and immediate overlooking opportunities into adjoining properties.

In this regard, we have formed the considered opinion that the development provides for the retention of an appropriate level of visual privacy consistent with that reasonably anticipated given the medium density nature of surrounding development and the dominant orientation of living areas to the south take advantage of available views.

In relation to solar access, the accompanying shadow diagrams demonstrate that the alterations and additions will not result in any additional shadowing impact to any surrounding residential property with the additional shadowing impact to Queenscliff Beach considered to be minor and acceptable. Solar access impacts have been minimised.

In this regard, I have formed the opinion that the design of the development has minimised visual impacts, disruption of views, loss of privacy and loss of solar access and accordingly this objective is achieved notwithstanding the building height breaching elements.

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

Comment: To the extent that the non-compliant building height elements are visible from Queenscliff Beach and its immediate environs I am satisfied that the recessive nature of the non-compliant building height elements as potentially viewed from the beach and surrounding public domain ensures that any adverse impacts have been minimised.

In any event, notwithstanding the height building breaching elements, the height, bulk and scale of the additions will not be perceived as inappropriate or jarring have regard to the height and scale of residential flat development located within the same visual catchment, with the building height breaching elements not giving rise to adverse impact on the scenic quality of Warringah's coastal and bush environments. This objective is achieved notwithstanding the building height breaching elements proposed.

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

Comment: To the extent that the non-compliant building height elements are visible from public places including Queenscliff Beach, North Steyne and Greycliffe Street, for the reasons previously outlined I am satisfied that the height, bulk and scale of the building will not be perceived as inappropriate or jarring have regard to the height and scale of residential flat development located within the same visual catchment.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development, in particular the building height breaching elements of the building, offensive, jarring or unsympathetic in a streetscape context. The building height breaching elements will not give rise to unacceptable visual impacts when viewed from any public places.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

#### **4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

*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.*

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

### **Sufficient environmental planning grounds**

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

#### **Ground 1 – Topography and prior excavation**

The site falls approximately 6m across its surface in a southerly direction and has been excavated to accommodate the existing residential flat building. The topography of the site and prior excavation contribute to the extent of building height breach.

#### **Ground 2 - Contextually compatible and responsive building form and design**

Despite non-compliance with the 8.5m building height development standard, the proposed additions are consistent and compatible with the height of surrounding buildings and other beachfront development within the street block. Further, the proposed development has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of good design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

#### **Ground 3 – Absence of unacceptable environmental impact**

This request demonstrates that the building height breaching elements will not give rise unacceptable environmental consequences whilst enhancing the amenity of the residential accommodation within the existing residential flat building in a contextually compatible and sensitive manner.

### **5.0 Conclusion**

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

**Boston Blyth Fleming Pty Limited**

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

**Greg Boston**  
B Urb & Reg Plan (UNE) MPIA  
**Director**

**16.4.25**