

**APPENDIX B**  
**CLAUSE 4.6 VARIATION**  
**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM**  
**BUILDING HEIGHT REQUIRED BY CLAUSE 4.3 OF THE MANLY LOCAL**  
**ENVIRONMENTAL PLAN 2015**

**For:** Proposed Dwelling Alterations and Additions  
**At:** 21 Wattle Avenue, Fairlight  
**Applicant:** SketchArc

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## **Introduction**

This Clause 4.6 variation is a written request to vary a development standard to support a development application for construction of dwelling alterations and additions at **21 Wattle Avenue, Fairlight**.

The specified maximum building height under Clause 4.3 (1) of the Manly Local Environmental Plan 2013 (the LEP) is 8.5m. The development proposes a departure from this numerical standard and proposes a maximum height of 9.249m.

This wall height requirement is identified as a development standard which requires a variation under Clause 4.6 of the Manly Local Environmental Plan 2013 (the LEP) to enable the granting of consent to the development application.

## **Background**

Clause 4.3 restricts the height of a building within this area of the Balgowlah locality and refers to the maximum height noted within the “Height of Buildings Map.”

The relevant building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

Due to the siting of the existing building and sloping topography of the site, the proposed new works will be up to approximately 9.249m in height (RL 30.30).

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

Due to the existing elevated ground level, a portion of the new roof will be up to approximately 9.249m in height above the existing ground levels.

The substantial majority of the dwelling is comfortably under Council’s maximum height control of 8.5m above existing ground level.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

## **Purpose of Clause 4.6**

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

## **Objectives of Clause 4.6**

The objectives of Clause 4.6 are as follows:

- (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 development will achieve a better outcome in this instance as the site will provide for alterations and additions to an existing dwelling which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

As sought by the zone objectives, the proposal will provide for alterations and additions to an existing dwelling which are sensitive to the location and the topography of the locality.

The proposal includes modulated wall lines and a consistent palette of materials and finishes in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum height control, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

## **Onus on Applicant**

Clause 4.6(3) provides that:

*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.*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

### **Justification of Proposed Variation**

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* & *Samadi v Council of the City of Sydney [2011] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

*Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

### **Precondition 1 - Consistency with zone objectives**

The site is located in the R1 General Residential Zone. The objectives of the R1 zone are noted as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

## Comments

It is considered that the proposed development will be consistent with the desired future character of the surrounding locality for the following reasons:

- The proposal will be consistent with and complement the existing residential development within the locality.
- The overall height of RL30.3 is compatible with (and does not exceed) height of the two adjoining properties, No. 19 Wattle (RL30.3) and No. 23 Wattle (RL30.9).
- The proposed development respects the scale and form of other new development in the vicinity and therefore complements the locality.
- The setbacks maintain compatibility with the existing surrounding development.
- The proposal does not have any unreasonable impact on long distance views.

Accordingly, it is considered that the site may be developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

## Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

- (1) The objectives of this clause are as follows:*
- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
  - (b) to control the bulk and scale of buildings,*
  - (c) to minimise disruption to the following:*
    - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
    - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
    - (iii) views between public spaces (including the harbour and foreshores),*
  - (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
  - (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

## Comments

Whilst the proposal will present a minor variation to the statutory height limit as a result of the existing elevated ground floor level of the dwelling, the proposal is considered to be in keeping with the objectives of Clause 4.3.

The proposed development will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

The proposal is generally consistent with the height and scale of newer development in the locality. The overall height of RL30.3 is compatible with (and does not exceed) height of the two adjoining properties, No. 19 Wattle (RL30.3) and No. 23 Wattle (RL30.9).

The proposed new works to the existing dwelling are subject to a maximum overall height of 8.5m, and the proposal will provide for a height of up to 9.249m.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for additions and alterations to an existing dwelling, which are constrained by the design of the existing building. In this regard the existing ground level is elevated above the natural ground level.

Council's controls in Clause 4.3 provide a maximum overall height of 8.5m.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- The proposed works will maintain consistency with the general height and scale of residential development in the area and the character of the locality. The overall height of RL30.3 is compatible with (and does not exceed) height of the two adjoining properties, No. 19 Wattle (RL30.3) and No. 23 Wattle (RL30.9).
- The proposed height and the overall scale of the new works will maintain amenity and appropriate solar access for the subject site and neighbouring properties.

For the above reasons it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

Council's controls in Clause 4.3 provide a maximum overall height of 8.5m for the subject development.

Due to the existing building design, the proposed new works will be up to approximately 9.249m in height.

The development is justified in this instance for the following reasons:

- Compliance with the height control is constrained by the siting/design of the existing dwelling (with existing floor level elevated by up to 1.5m).
- Compliance could be achieved with a flat roof, however this would be detrimental to the design and character of the streetscape. The proposal provides for a conventional pitched roof form to match the existing dwelling and complement the character of the locality.
- The development does not result in a significant bulk when viewed from either the street or the neighbouring properties. The overall height of RL30.3 is compatible with (and does not exceed) height of the two adjoining properties, No. 19 Wattle (RL30.3) and No. 23 Wattle (RL30.9).
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity comprises predominantly large two storey dwellings elevated above the street, this proposal will reflect a positive contribution to its streetscape.
- The extent of the proposed new works where they are not compliant with Council's maximum height control do not present any significant impacts in terms of view loss for neighbours, loss of solar access or unreasonable bulk and scale.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied



with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*

Accordingly, in regard to the proposed development at 179 Woodland Street South, Balgowlah, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The development is constrained by the siting of the existing development and sloping topography of the site.
- The variation to the height control is inconsequential as it will not result in any unreasonable impact to the streetscape and the amenity of neighbouring properties.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

In the *Wehbe* judgment (*Wehbe v Warringah Council [2007] NSWLEC 827*), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

**Comment:** Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

**Comment:** It is considered that the purpose of the standard is relevant but the purpose is satisfied.

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

**Comment:** Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

**Comment:** Not applicable.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

**Comment:** The development standard is applicable to and appropriate to the zone.



## **Conclusion**

This development proposed a departure from the maximum building height development standard, with the proposed alterations and additions to the existing dwelling to provide a maximum overall height of 9.249m.

This variation occurs as a result of the siting and design of the existing building.

This objection to the maximum building height specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.

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