

9 Alexander Street, Collaroy

Clause 4.6 Exceptions to Development Standards

Height of Buildings

1. Introduction

Clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP 2011) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

The aims and objectives of Warringah LEP 2011 Clause 4.6 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.

Under Clause 4.6(3) and (4) of the WLEP 2011, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

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

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

(4)(a)(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,

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

It is of interest that the consent authority specifies a number of development standards that cannot be varied under Clause 4.6, listed in Clause 4.6(8). Clause 4.3 - Height of buildings is not one of the standards excluded, it must therefore be assumed that the standard for height of buildings, is one of the development standards that can have an appropriate degree of flexibility applied under clause 4.6.

2. Environmental Planning Instrument Details (Warringah LEP 2011)

2.1 What is the name of the environmental planning instrument that applies to the land?

Warringah Local Environmental Plan 2011 (WLEP 2011)

2.2 What is the zoning of the land?

R2 – Low Density Residential

2.3 What are the objectives of the zone?

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

2.4 What is the development standard being varied?

Cl 4.3 of the Warringah Local Environmental Plan 2011, Height of Buildings

2.5 Under what clause is the development standard listed in the environmental planning instrument?

Cl 4.3 of the Warringah Local Environmental Plan 2011

2.6 What are the objectives of the development standard?

(1) The objectives of this clause 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.*

2.7 What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

2.8 What is the proposed numeric value of the development standard in your development application?

The numeric value of the development standard in this development application is a maximum of 8.64 metres.

2.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation sought is 1.63%

3. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

3.1 **Wehbe v Pittwater [2007] NSW LEC 827**

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827*, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
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 (Fourth Way).*
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 (Fifth Way).*

In the *Micaul* decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

3.2 **Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC**

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe v Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

3.3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

3.4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

- 1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;*
- 2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and*
- 3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.*

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone

objectives by considering whether the development was antipathetic to the objectives.

In contrast to four2five, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

4. Consideration

The following section addresses the provisions of clause 4.6 of the WLEP 2011 together with principles established in the NSW Land and Environment Court Case Law outlined above.

Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

4.1 Five (5) Part Test - *Wehbe v Pittwater*

1. ***The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).***

The objectives of the standard are:

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

The existing dwelling has a non-compliant maximum building height of 8.64 metres. The proposed replacement of the roof covering at first floor level retains the existing 8.64 metre maximum building height. A very minor portion of the roof at first floor level will exceed the 8.5 metres height limit as a result of the changes to the roof covering.

The proposed alterations and additions will ensure that the dwelling retains a compatible scale to neighbouring development. The development proposes aesthetically pleasing alteration and additions to an existing dwelling, which have been designed to improve the appearance of the dwelling when viewed from Alexander Street. The very minor height noncompliance is the result of the replacement to the roof covering, thereby not significantly adding to the bulk and scale of the dwelling.

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

The noncompliance is the result of only the replacement of the roof covering at first floor level. The development proposes a very negligible increase in height to a small portion of the roof at rear first floor level. The new roof materials will result in a visual improvement to the dwelling from neighbouring properties. Given that the existing height of the dwelling is being primarily retained, there will be no change to existing views, privacy and solar access for neighbouring dwellings.

All of the proposed alterations and additions are located in the existing building footprint of the dwelling which ensures that amenity impacts to neighbours will be negligible.

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

The proposed alterations and additions will result in significant improvement to the dwellings contribution to the character of the area. Further, the existing street view will be enhanced by the modern alterations and additions proposed to the dwelling. Colours and materials have been chosen to complement the scenic coastal location and there will be no adverse impacts as a result of the height variation.

- 2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).***

This exception to development standards request does not rely on this reason.

- 3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).***

This exception to development standards request does not rely on this reason.

- 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 (Fourth Way).***

This exception to development standards request does not rely on this reason.

- 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 (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

4.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*.

In particular:

Detail of Variation

- The variation to the height relates only to the change in the roof covering to an already non-compliant part of the roof. A majority of the dwelling complies with the standard at all its elevations, and the breach is minor (1.63%). The proposed variation will not be evident from Alexander Street as the existing height of the dwelling is being retained.
- As noted above, the majority of the first floor complies with the maximum height limit and the variation is primarily the result of aesthetic improvements to the dwelling. Therefore, compliance with the development standard would be unreasonable given that the proposal can readily achieve the objectives of the standard.

Neighbour Amenity

Fulfillment of each of the criteria below demonstrates a development satisfying Cl1.3(g).

- The variation in height will have a negligible impact on neighbours. The breach primarily occurs to an already non-compliant part of the roof. The change to the roof covering will have a negligible impact to neighbours, particularly given that the dwelling has compliant front and side setbacks and there are no key views across the site in this location.
- Compliance with the height control would not result in a building which has a significantly lesser bulk and any improvement as a result of compliance would be barely discernible to the side neighbours as there is an existing non-compliant roof form.

Accordingly, compliance with the development standard in this instance is unreasonable.

- Solar access impacts as a result of the minor height variation are negligible. Solar access on the neighbouring sites is compliant, as detailed in the accompanying solar access diagrams. Accordingly, compliance with the development standard based on this would be unreasonable.
- The very minor variation to the height of the roof form has no consequence for the privacy of neighbours.

Site Constraints

- The final design including the height variation, is a result of the proposed replacement of the roof covering to the already non-compliant first floor level roof form. It would be unreasonable to require compliance with the development standard, when the variation result allows for the orderly and economic use of the site and allows for an ecologically sustainable development revitalising an existing underdeveloped site satisfying Cl1.3(g) and (f).

Design and Streetscape Appeal

- Strict numerical compliance with the height control would not result in a better urban design outcome. The roof form is existing and consistent with the predominant architectural character of surrounding development and will complete a very appealing design. Compliance with the development standard based on this would be unreasonable.
- The proposed development will not change the apparent bulk of the dwelling from the public domain, with no actual height increase proposed. The streetscape appeal is unaffected by the variation to the height standard, and it would be unreasonable to require compliance with development standard based on this.

Consistent with Zone Objectives

- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone ensuring that appropriate and reasonable housing suitable for the local community is proposed. Compliance with the development standard based on this would be unreasonable.

Natural Environment

- The inclusion of the height variation has no impact on the natural environment. The variation sits above the existing first floor level and will not result in any impact to the existing natural components of the site or neighbourhood. No landscape area is lost or impacted through the minor varied roof form and height satisfying Cl1.3(b). The natural environment is unaffected by the small departure to the development standard, and it would be unreasonable for the development to be refused on this basis.

Environmentally Sustainable Development

- The proposal represents an environmentally sustainable design allowing for extension of the life on an existing dwelling satisfying Cl1.3(f). Compliance with the development standard based on this would be unreasonable.

Social and economic welfare

- The minor variation to the height as detailed above will have no social impacts for the site or local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.
- The minor variation to the height as detailed above will have no economic impacts for the site or the local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

Appropriate Environmental Planning Outcome

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as detailed earlier in the report.
- The variation does not result in a roof form or height beyond that which is found in the immediate context, including the immediately neighbouring sites. The minor variation will be compatible within the context in which it sits and is reasonable in the circumstances of the case satisfying Cl1.3(c). Compliance with the development standard based on this would be unreasonable.
- Removal of the non-compliance would not result in any meaningful reduction in the perceived bulk and scale of the proposal due to its minor nature, siting and topography.

The variation is and the discussion above reflects the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and retention of amenity.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the height variation.

4.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A). An assessment of consistency with the objectives of the Zone is provided below:

Zone – R2 Low Density Residential

- *To provide for the housing needs of the community within a low density residential environment.*

Consistent. The proposal is for a residential dwelling.

- *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*

Not relevant. The proposal is for a residential dwelling.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Consistent. The proposal is for a single dwelling house with the proposed alterations and additions resulting in significant improvement to the dwelling's contribution to the character of the area. The existing street view will be improved by the design elements which have been created to compliment the natural environment, including improved landscaping at the rear of the site.

Despite the proposal seeking an exception to the building height clause, the proposed development will have no impact on the bulk and scale of the dwelling. The development will present as compliant to the street, as a positive development to neighbouring sites and will be complementary to the locality and its character.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The non-compliance will not raise any matter of State or Regional Significance.

Clause 4.6(5)(b) the public benefit of maintaining the development standard,

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats and promoting good design and amenity of the built environment.*

The proposed development is for alterations and additions to an existing residential dwelling on land zoned R2 Low Density Residential.

As stated above the proposed non-compliance is a very minor variation and does not result in any unreasonable impacts and is the result of replacement to the existing roof covering to an already non-compliant part of the roof. The negligible increase in height at the rear of the dwelling above the 8.5 metre height limit will also not result in any unreasonable impacts. It is of a limited area and will not be readily understood as excessive from any location and appearing appropriate and consistent from those areas where it may be viewed.

The proposed works at first floor level have generous side setback and do not present with excessive bulk in comparison to surrounding properties. There is not anticipated to be any view loss and solar access is fully compliant with Council controls. Amenity is retained for all neighbours.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the minor numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6.

The statement sufficiently demonstrates that compliance with the development standard is both unreasonable and unnecessary in this instance.

The sufficient environmental planning grounds stipulated within this request, demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the height variation.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.