



60 Bower Street, Manly

**REQUEST FOR VARIATION TO HEIGHT OF BUILDINGS
DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF
MANLY LEP 2013**

This Clause 4.6 variation relates to a proposal for alterations and additions to units 2 & 5 within the existing flat building on the subject site.

The proposal results in a non-compliance with clause 4.3 of the *Manly Local Environmental Plan 2013 (MLEP)* which relates to height of buildings. As such, this Clause 4.6 request has been prepared in accordance with Clause 4.6 of the *Manly Local Environmental Plan 2013*, which applies to the subject site.

The request demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying clause 4.6(3) of the MLEP.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard under the MLEP, in which the development is proposed to be carried out.

The nature of the exceedance to the development standard relating to height is set out below, followed by consideration of the relevant matters in clause 4.6 of the MLEP.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

Zoning of the site

The zoning of the land is C3 – Environmental Management. The objectives of the C3 zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

Clause 4.3 – Building Height

The Standard

Clause 4.3 of the MLEP and the associated map prescribe a maximum building height of 8.5 metres for this site. The proposal will retain the maximum height of the building at 14.89m with some of the proposed internal works reaching a maximum height 8.82m to the finished ceiling level.

The percentage variation is 3.76% (320mm).

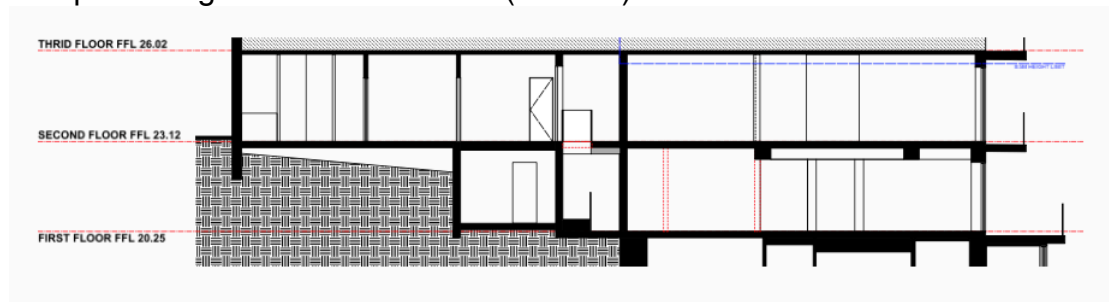


Figure 1: Extract from section showing height non-compliance

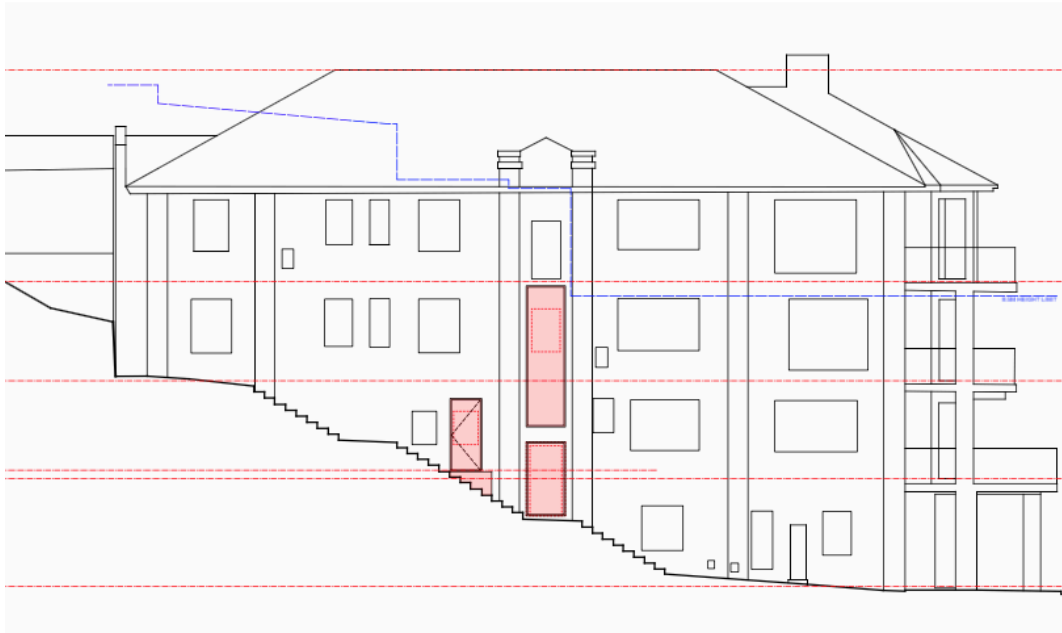


Figure 2: Extract from elevation showing height non-compliance

The objectives of Clause 4.3

The objectives of Clause 4.3 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 conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the MLEP allows for exceptions to Development Standards. The objectives of this Clause 4.6 are:

- (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.*

Clause 4.6(2) provides the power for development consent to be granted even though the development would contravene a development standard, subject to that clause:

- (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.*

Clause 4.6(3) sets out what a clause 4.6 written request seeking to justify a contravention of a development standard must demonstrate in order for consent to be granted for development that contravenes a development standard:

- (3) *Development consent must not be granted for 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 of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

The matters required to be demonstrated under clause 4.6(3) are set out below as Points 1 and 2.

Clause 4.6(4) requires that Council keep a record of its assessment carried out under Clause 4.6(3).

1. Clause 4.6(3)(a) - Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways¹:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by the Court². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all tests may be applicable in each case. Therefore, not all tests need to be met.

This objection relies on the first method set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with⁴.

Objective (a)

- (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,*

Comment: The internal works will not alter the maximum building height as existing. The height and roof form of the existing building will be retained. The proposed works above the 8.5m height limit are limited to small sections of the top of the internal walls and windows at second floor level. Accordingly,

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁴ *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

the proposal will have no visual impact on the streetscape character in the locality.

Objective (b)

- (b) *to control the bulk and scale of buildings,*

Comment: The proposal will not alter the bulk and scale of the building, with all works above the 8.5m height being internal. The proposal does not add to the massing of the building, increase its height or change its overall size.

Objective (c)

- (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),*

Comment: The internal works above the height control will not disrupt views.

Objective (d)

- (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,*

Comment: The proposed works above 8.5m are internal works, with no increase to scale or massing and as a result there are no additional solar access impacts for the adjoining properties as a result of those works.

Objective (e)

- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

The breach in height will not impact on existing vegetation as all works above 8.5m are internal. Overall, the proposal will not alter the existing topography and any other aspect that might conflict with bushland and surrounding land uses.

2. Clause 4.6(3)(b) - There are sufficient environmental planning grounds to justify contravening the development standard:

The proposal will retain the maximum height of the building at 14.89m with the proposed internal works to 8.82m above existing ground level. The percentage variation is 3.76% (320mm).



Figure 3: Extract from section showing height non-compliance

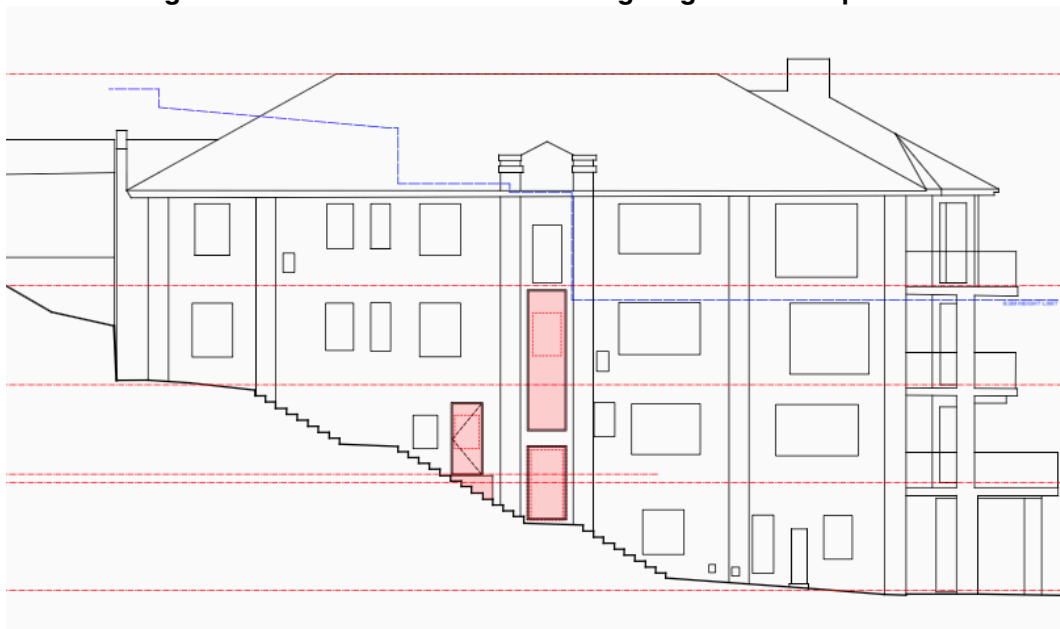


Figure 4: Extract from elevation showing height non-compliance

There are sufficient environmental planning grounds which demonstrate that the proposed height can be achieved without adverse impacts for the following reasons:

- The works above the height limit are entirely internal.
- Exceedance of the height control will not create additional building bulk that results in unreasonable environmental amenity impacts as follows:

- The proposal will not result in the loss of views from surrounding development as the existing envelope will be retained with the works in breach of the height standard being entirely internal and therefore not disrupting the existing views to the north from adjoining properties.
- The breach in height is internal and will not impact on solar access to adjoining private open space or north facing windows to living areas.
- The breach in height is entirely internal and will therefore not affect views.
- The breach in height with the internal works will not impact on the privacy of adjoining properties noting that all window openings will be retained as existing.
- The proposal will not alter the visual appearance of the building, maintaining the existing visual amenity with no external works proposed
- The extent of the variation is only 3.76% (320mm) and will not give rise to any impacts. The Court has held that a particularly small departure without impacts is considered a suitable environmental planning ground.⁵

The aspect of the development that breaches the height control can be justified as the proposed works above the height limit are entirely internal and do not alter the existing building's envelope, overall height or the amenity of adjacent sites.

3. Clause 4.6(5)

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

Conclusion

The proposal is consistent with the objects of Section 1.3 of the EP& A Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land, to promote

⁵ *Eather v Randwick City Council* [2021] NSWLEC 1075 at [38]

the delivery and maintenance of affordable housing and to promote good design and amenity of the built environment.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to support the variation.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development is consistent with the objectives of the height development standard under the MLEP, in which the development is proposed to be carried out.



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