

## Clause 4.6 Exceptions to Development Standards – Height of Buildings

### 2 Harvey Street Seaforth

#### 1. Introduction

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) 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 Manly LEP 2013 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.*

**Commencing on 1 November 2023** Clause 4.6(3) and (4) of the NSLEP 2013, state that development consent, that contravenes a development standard, must not be granted 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 the contravention of the development standard.*

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

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

## **2. Environmental Planning Instrument Details (Manly LEP 2013)**

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

Manly Local Environmental Plan 2013

### **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 provide facilities or services to meet the day to day needs of residents.*

### **2.4 What is the development standard being varied?**

Cl. 4.3 - Height of Buildings

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

Cl. 4.3 of the Manly Local Environmental Plan 2013

### **2.6 What are the objectives of the development standard?**

*(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.

## 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 proposed numeric value of the development standard in your development application?

The numeric value of the building height proposed is 8.98 metres (when measured in accordance with the existing excavated garage level as required by *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*), consistent with the existing maximum building height.

The proposed building height is a compliant maximum 8.4 metres, when measured in accordance with the previously applied *Bettar judgement*.

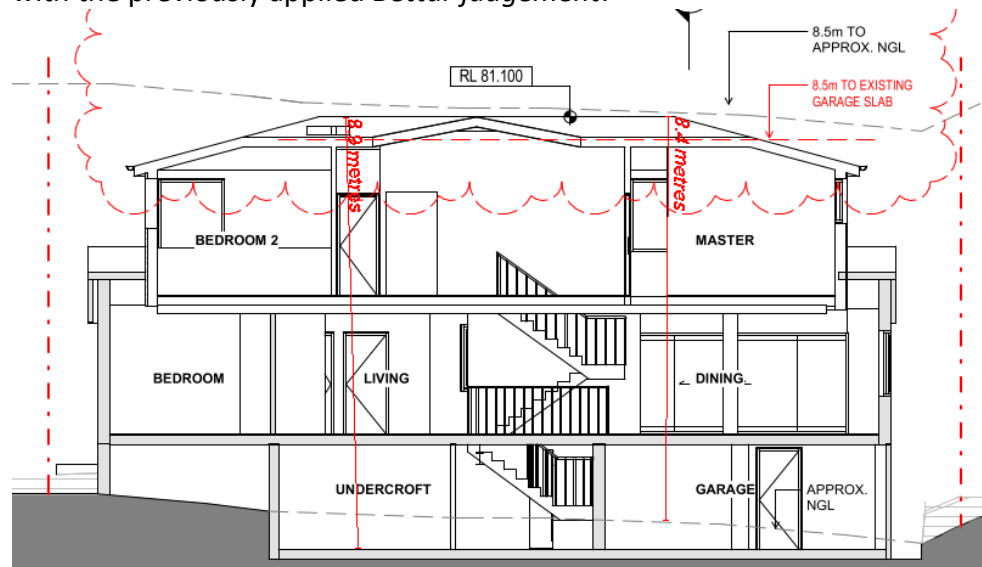


Figure 1. Plan Extract: Section B illustrating maximum building height.

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

The development proposes a numerical variation of 0.48m or 5.65%.

### 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.

### **3.5 Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

## 4. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 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 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,*

The proposed alterations and additions are appropriate to the site and will result in a similar or lesser scale development than surrounding properties. The variation is the result of taking into account the existing excavated garage and sub-floor area as required by *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, rather than the interpolated ground line previously applied by the *Bettar* judgement.

The dwelling presents with a compliant building height of 8.4 metres when the natural ground line is interpolated into the section, as illustrated in the section and height plane contours extracts provided above.

The proposal will not result in any discernible impact and will sit comfortably within the streetscape. There will be no unreasonable view loss, loss of privacy or increase in shadowing for neighbouring properties.

It is considered this objective is met, despite the numerical variation.



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

**Comment**

The proposed built form for the most part is located below the maximum height of 8.5m as illustrated above. The proposed height exceedance of an additional 0.48 metres or 5.65% to the excavated garage area, is considered to be negligible in relation to bulk and scale.

It is considered this objective is met, despite the numerical variation.

*(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**

A site visit has been undertaken and it is considered the proposed development will have no impact on views from surrounding properties. It is therefore considered this objective is met, despite the numerical variation.

*(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 variation to height does not result in any unreasonable solar access impacts to adjoining dwellings. Given that compliant solar access is achieved, despite the height variation sought, it is considered the underlying objective of this clause has been satisfied.

*(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.*

**Comment**

Not applicable as the subject site is not located in a recreation or environmental protection zone.

**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 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:

**Context**

- The area surrounding the subject site is characterised by 1 and 2 storey residential dwellings, a number with lower level garages. The development retains the existing 2 storey dwelling with lower level garage and retains the existing maximum building

height.

- The variation between the proposed works and the building height control is reasonable at 0.48 metres or 5.65% when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. The proposed building height is a compliant maximum 8.4 metres, when measured in accordance with the previously applied interpolated height set out in the *Bettar judgement*.
- The proposed variation is the result of taking into account the existing excavated garage and subfloor which is acknowledged in the *Merman judgement* to distort the height of buildings development standard plane overlaid above the site, when compared to the topography of the hill. The judgement acknowledges that this distortion can be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.
- The small variation is for a limited area and the vast majority of the building complies with the height control. The apparent bulk through the variation is negligible and the resulting development remains consistent with the streetscape, satisfying Cl1.3(g).
- Variation to the Manly LEP 2013 Cl. 4.3 Building Height control has been the subject of recent precedent for the following developments:
  - DA2022/1046 - 8 Bligh Crescent SEAFORTH, Height Variation 11.14%,
  - DA2022/1784 - 35 Fisher Street BALGOWLAH HEIGHTS, Height Variation 14.1%
  - DA2022/1760 – 82 Seaforth Crescent SEAFORTH, Height variation 15.6%,
  - DA2022/1244 - 9 Sandy Bay Road CLONTARF, Height variation 17.6%,
  - DA2022/1953 - 52 Castle Circuit SEAFORTH, Height variation 18.8%,
  - DA2022/1718 - 2 Woodland Street BALGOWLAH HEIGHTS, Height variation 23.5%,
- The setting and context with similar height variations recently approved, demonstrates that a varied building height is reasonable and that it is consistent with clause 1.3(c) and (d).

### **Future Development**

- The proposed development will allow for the provision of additional bedrooms to the existing dwelling, to meet the housing needs of the residents,
- This represents an efficient use of an existing residential site, with all services readily available,
- The works do not result in any unreasonable impacts to neighbouring properties.

- The proposed works will not hinder any future development of the lot,
- The alterations proposed demonstrate fulfillment of clause 1.3(a), (b), (c) and (g).

### **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 residential zone, allowing for alterations and additions of to the existing dwelling house. The bulk and scale proposed is consistent with the existing built form and other dwellings in the locality, as such compliance with the height standard based on this would be unreasonable, with clause 1.3(c) demonstrated as fulfilled.

### **Natural Environment**

- The proposed development allows for the current and future housing needs of the residents to be met, without developing a greenfield site, representing an efficient use of existing developed land,
- The development does not require the removal of any significant native trees and will have minimal environmental impact,
- The natural environment is unaffected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with Cl 1.3(b) satisfied.

### **Social and Economic Welfare**

- The small 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 small 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 small variation is for a limited area and the vast majority of the building complies with the height control. The apparent bulk through the variation is negligible and the resulting development remains consistent with the streetscape, satisfying Cl1.3(g).

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 building height variation.

**Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979***

***Will the proposed development be in the public interest?***

It is considered that the development of an existing dwelling house on the subject site, does not raise any matters contrary to the public interest.

**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, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## 5. Conclusion

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

As stated above the non-compliance between the proposal and the environmental planning instrument is 0.48 metres or 5.65%, when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. The proposed building height is a compliant 8.4 metres when measured in accordance with the previously applied interpolated height set out in the *Bettar judgement*.

The non-compliance is the result of taking into account the existing excavated garage and sub-floor which is acknowledged in the *Merman judgement* to distort *the height of buildings development standard plane overlaid above the site, when compared to the topography of the hill*. The judgement acknowledges that this distortion can *be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014*.

The variation does not result in any unreasonable impacts in regards to view loss, loss of privacy or increase in shadowing for neighbouring properties and will result in a development of a similar scale development to surrounding properties.

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 numerical variation of which have been reasonably satisfied under the provisions of Clause 4.6.

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.

## Planner Declaration

### Document Control Table

Document Purpose:	Clause 4.6 Variation Request	
Date	Prepared by	Approved by
29 January 2024	Naomi Lyons Senior Planner	Sarah McNeilly Director

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