

Clause 4.6 Exceptions to Development Standards
Special Height Provisions
135 Seaforth Crescent, 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.*

Under Clause 4.6(3) and (4) of the MLEP 2013, 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.

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 4.3A – Special height provisions

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

Cl 4.3A of the Manly Local Environmental Plan 2013

2.6 What are the objectives of the development standard?

(1) The objective of this clause to maintain public views to Sydney Harbour from street level on local roads above steeply sloping sites on certain land.

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

The height of a building on a lot identified as “Special height provisions” on the Height of Buildings Map must not exceed the height of the highest point of the road adjoining the centre point of the lot boundary that adjoins the road that is the frontage to that lot.

For the subject site, this has been identified as RL62.92.

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

The maximum height of the proposed development (i.e. top of hardstand balustrading) is RL64.04.

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

The percentage variation between the proposal and the environmental planning instrument is 1.78%.

2. 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.

2.9 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).

2.10 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.

2.11 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.*

2.12 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.

2.13 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.

3. 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:

3.9 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 *to maintain public views to Sydney Harbour from street level on local roads above steeply sloping sites on certain land*

Comment

The variation results from the need to construct compliant and safe parking.

The breach allows for a balustrade to be provided around the parking platform where cars can safely be parked off site.

The proposed balustrade allows for a view through to the harbour, similar to neighbouring structures and accordingly is of minimal and appropriate impact.

The variation is consistent with surrounding development, is the result of the site topography and limited to the top of the platform and balustrade. It is considered this objective is met, despite the numerical 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 Special Heights Provision 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 proposed variation of 1.78% is minor in scale being a balustrade which allows for views though to the water from the street. The additional height provided through the variation is negligible and not to the detriment of the view, being consistent with the Seaforth Crescent streetscape satisfying Cl1.3(g).
- The small area of variation to the height occurs to allow for safe and compliant parking and has similar height to neighbouring structures.

Neighbour Amenity

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

- The variation is provided in line with both side neighbours and is entirely in character. Compliance with the development standard would be unreasonable, resulting in either non-compliant balustrading or access to parking.
- Views are retained from the street and for neighbours.

Site Constraints

- The development of the site is constrained by the slope, falling away dramatically to the rear of the proposed parking structure.
- It is also constrained by a street tree.
- There is no option to provide compliant parking in another form and as this option does not result in view loss, it is reasonable and meets the objects of the Act.
- The final design with a variation to the height is a result of the existing site constraints and 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 Special Height provision would not result in a better urban design outcome with the street view being that of a parking planform at

street level with no roof, with a view through the balustrade. Compliance with the development standard based on this would be unreasonable.

- The proposed development will not present with excessive bulk from the public domain with the open balustrade satisfying Cl1.3(g). The streetscape appeal is unaffected by the small 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 objective of the zone ensuring retention of the street view. Compliance with the development standard based on this would be unreasonable.

Natural Environment

- The inclusion of the small height variation to facilitate safe parking has no impact on the natural environment. Retention of the water view satisfies 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 variation to the special height provision 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 special height provision 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 is detailed earlier in the report.
- The variation does not result in a parking structure or height beyond that which is found in the immediate context, including the immediately neighbouring sites. The development allows for safe and compliant parking on site, which would otherwise be unfeasible. The variation will be compatible within the context in which it sits and is reasonable in the circumstances of the case allowing for the retention of views and satisfying CI1.3(c). Compliance with the development standard based on this would be unreasonable.

The variation confined to the compliant tandem parking platform with balustrade is minor and the discussion above reflects the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and safe and accessible parking. These are not simply benefits of the development as a whole but are a direct result of the breach of the maximum height control.

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 CI 4.6(3)(A)). An assessment of consistency with the objectives of the Zone is provided below:

Zone – R1 General Residential

Objectives of zone

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

Consistent. The proposal is for alterations and additions to an existing dwelling and will provide compliant and safe parking for the residents whilst retaining views.

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

Not relevant. The proposal is for alterations and additions to a residential dwelling.

Despite the proposal seeking an exception to the special height provisions clause, the views from the street will be retained, with the variation confined to the balustrade which is consistent with surrounding development.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see CI 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. The variation is reasonable, with the vast majority of the development easily complying and the balustrade being an open structure allowing for a view through to the water.

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.*

As proposed the development allows for all of the above objects to be achieved. In particular it is noted that there is no social or economic impact other than the benefit of a small amount of employment through the works which will be undertaken.

The upgrade of parking to an improved and safe standard is a positive environmentally sustainable result.

The development proposed a good design and allows for compliant balustrades ensuring safety.

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.*

Conclusion

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 limited to the tandem parking platform with balustrade at 1.78%. The variation does not result in any unreasonable impacts and is largely

the result of taking into account the slope of the site and working within the constraints of updating on an existing developed site. It is of a very limited area and will permit a view to be retained.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought, is consistent with the objective of the control despite the 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.