
CLAUSE 4.6 VARIATION – HEIGHT OF BUILDING

1. Introduction

This Clause 4.6 Variation Request is to accompany a development application to Northern Beaches Council seeking consent for *demolition of an existing dwelling and construction of a dwelling house over basement parking with associated fencing and landscaping* at No. 72 Frenchs Forest Road, Seaforth.

The proposal seeks variation to the 8.5m Height of Building (HOB) development standard pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP 2013). The maximum extent of variation is 2.19m (25.76%), resulting in a maximum HOB of 10.69m. The variation predominately relates to the northern edge of the proposed balcony pergola structure where the site topography falls steeply.

The remaining parts of this variation request details the departure and responds to the statutory requirements of Clause 4.6 of MLEP 2013 informing that the application of flexibility to the development standard in this instance appropriate.

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

Manly Local Environmental Plan 2013.

3. What is the zoning of the land and what are the objectives of the zone?

Objectives of R2 – Low Density Residential

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

4. Identify the Development Standard to which this Clause 4.6 Variation applies?

This variation request relates to Clause 4.3 of Manly LEP 2013 – Height of Buildings.

5. Is the standard expressly excluded from operation of Clause 4.6?

Clause 4.3 is not identified as being expressly excluded from operation of 4.6 as it is not identified at Clause 4.6(6) or (8) of the LEP.

6. What are the objectives of the Development Standard?

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 conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

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

Clause 4.3(2) of the LEP permits a maximum Height of Building of 8.5m.

The maximum of Height of Buildings is defined by the numerical standard shown on the relevant MLEP 2013 Height of Buildings Map applicable to the land.

7. How do the existing and proposed numeric values relate to the development standard? What is the percentage variation (between your proposal and the environmental planning instrument)?

As noted above, the proposal seeks variation to the 8.5m Height of Building (HOB) development standard pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP 2013). The maximum extent of variation is 2.19m (25.76%), resulting in a maximum HOB of 10.69m. The variation predominately relates to the northern edge of the proposed balcony pergola structure where the site topography falls steeply.

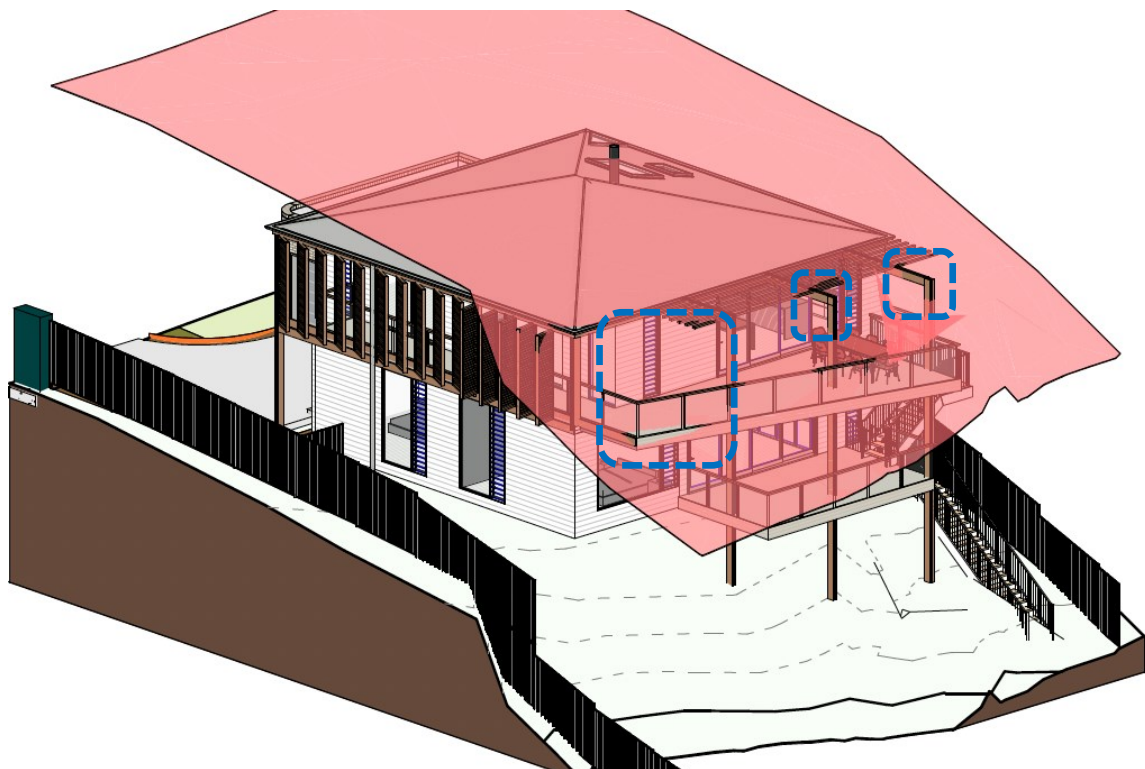


Figure 1: 3D Model illustrating height plane, dwelling and topography

The proposed two-storey dwelling is height compliant when measured across most of the building footprint. The minor non-compliances illustrated (Figure 1) are for elements of the pergola and north-eastern corner of the First Floor balcony that arise due to the sudden change in levels associated with an existing natural rock outcrop.

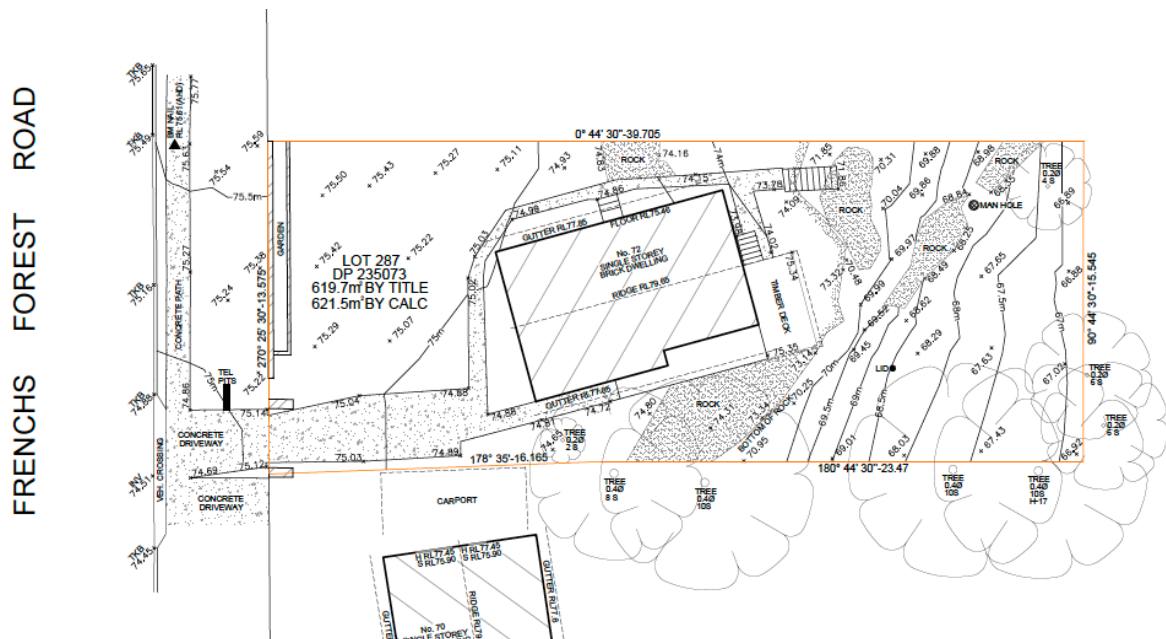


Figure 2: No. 72 Frenchs Forest Road, Seaforth - Site Survey

The rock outcrop, located directly beneath the proposed balconies, results in a change of level of over 4.5m across 6m of the site. Maintaining a compliant HOB, when taking into consider the rapid change in ground levels would be unreasonable and unnecessary.

8. How is compliance with the Development Standard unreasonable or unnecessary in the circumstances of this particular case?

The Court decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827 provides the five-part test to determine if compliance with a development standard is unreasonable or unnecessary with only one test needing to be satisfied.

Note: These five tests are not exhaustive of the ways in which you might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. You do not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, you can demonstrate that compliance is unreasonable or unnecessary in more than one way.

Test 1: In our view, the proposal satisfies the first test in *Wehbe v Pittwater Council* [2007] NSWLEC 827 as the objectives of the standard are achieved notwithstanding non-compliance with the standard. Refer to discussion below relating to compliance with the objectives of the development standard.

9. Are there sufficient environmental planning grounds to justify contravening the development standard?

In considering whether there are sufficient environmental planning grounds to support the building height non-compliance, the following principles are relied on.

In the recent Court decision Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ further clarified the correct approach in the consideration of clause 4.6 requests. This advice further confirms 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.

As held in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [39], Preston CJ confirmed (at [25]) that the test in 4.6 (4)(a)(i) does not require the consent authority to directly form the opinion of satisfaction regarding the matters specified. Rather, it needs to do so only indirectly in forming its opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated.

By contrast, the test in cl4.6(4)(a)(ii) requires that the consent authority must be directly satisfied about the matter in that clause (at[26]); namely that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

With regard to the above, it is considered that there are sufficient environmental planning grounds to support the proposed non-compliance for the following reasons:

- a. The proposed variation relates to a portion of the site that has a sudden drop in topography which is associated with an existing rock outcrop. The variation is therefore unique to the site topography.
- b. The non-compliant parts of the building could be reduced or removed altogether, however, this would have no benefits to neighbour amenity or appearance of the dwelling, but would unreasonably impact on the future amenity of the building occupants by either a reduced building form or elimination of a redeeming visual feature of the building.
- c. The extent of variation relates to structural elements of the building and will therefore not in of themselves have any impact on neighbour amenity. As detailed in the attached Statement of Environmental Effects, there will be no impact on existing views/outlook associated with the variation.
- d. The proposed development meets the objectives of the development standard and meets the objectives of the R2 General Residential zone;
- e. The scale and form of the development is well resolved and compatible with the existing varied typologies, age and form of development in the immediate locality.
- f. The accompanying SEE details that the proposal will not give rise to any adverse impacts on the amenity of the adjoining neighbours in terms of privacy, overshadowing or view loss.
- g. The subject proposal represents a reasonable approach to development of the site based on specific site and locality factors and the large number of controls that apply. Insistence on compliance would not create any measurable, material benefits.
- h. The proposed development achieves the objects in Section 1.3 of the Environmental Planning & Assessment Act, 1979, specifically:
 - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of the site to provide a dwelling that facilitates current and desired living standards (objective 1.3c);

- b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context and will improve the amenity for future residents whilst respecting the local built form character (objective 1.3(g)).

In addition to the above, the proposal is in the public interest because it is consistent with the objectives of the standard and the zone in which the development is carried out. Provided below is an assessment of the proposal with respect to the objectives of the building height development standard and the R2 – Low Density Residential Zone.

The proposal is consistent with the objectives of Clause 4.3 Height of Buildings and as detailed below.

***Objective (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*

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

Response: The proposal is for a 2 dwelling and this is entirely consistent with the character of the locality as outlined above. The proposed height variation relates to small/isolated parts of the dwelling that create no change to compatibility of the development with local character. Externally, the proposal will appear to be height compliant the sudden fall created by the rock outcrop will not be externally visible.

The proposal will improve the visual aesthetic of the site compared to existing and results in a building form that is reasonably expected at the site and within the wider locality. Visual impacts of the development have been minimised through the majority compliant form, with the extent of variation being so minor that it has no bearing on building appearance when viewed from the meaningful or adverse public domain or a neighbouring property.

The dwelling will be consistent with the surrounding built form context and entirely consistent with the character of the area. There will be no adverse impacts created on a public space.

The proposal is therefore consistent with the intended character and scale of development for the locality.

***Objective (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),*

Response: View loss is addressed in the attached Statement of Environmental Effects, with no measurable or meaningful change created by the height variation. There will be no impact on views enjoyed from a public space.

***Objective (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,*

Response: As detailed in the accompanying SEE, the subject site and neighbouring properties have a northerly aspect and the existing/proposed dwellings are located high on each property in order to capture the available views/outlook. As a result of the site orientation and prevailing topography, the dwelling will only create shadowing impacts on each neighbouring during the morning or afternoon periods (not both onto one property), however, the extent impact will not be materially impacted by the small height variations proposed. High levels of solar access will remain for the neighbouring properties and the street, which will largely be created by height compliant form.

Objective (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.

Response: N/A

In addition to the above, proposal is consistent with the objectives of the R2 – Low Density Residential Zone, as it will provide housing within a low density residential environment. The extent of proposed variation is minor and will not impact on the ability of the development to achieve consistency with the relevant zone objective, which is *to provide for the housing needs of the community within a low density residential environment*.

10. Matters of significance for State or Regional Environmental Planning.

The proposed variation to the building height development standard does not raise any matter of significance for State or regional environmental planning.

11. The public benefit of maintaining compliance with the Development Standard

This variation request demonstrates that the proposed variation is consistent with the relevant zone and standard objectives, and that insistence on strict compliance is unreasonable unnecessary in the circumstances. As also demonstrated in this variation request, there are no unreasonable impacts that will result from the contravention to the maximum building height standard.

On this basis, there is no public benefit in maintaining strict compliance with the development standard. The proposal's consistency with the relevant zone objectives and development standard objectives deems that the subject application is in the public interest.

12. Conclusion

Notwithstanding numerical non-compliance, the form of the proposed building is well resolved and presents appropriate scale and bulk through a modulated form and visually interesting form. The building height variation is considered to be acceptable, without material adverse impact, and the dwelling is demonstrated to fit comfortably within the local context, which is characterised by a variety of dwelling typologies, ages and form within a low density residential setting.

Compliance with the development standard is unreasonable and unnecessary in the circumstances and there are sufficient environmental planning grounds to justify the proposed variation. Despite the proposed building height exceedance, the development is in

the public interest as it remains consistent with the development standard and the zone within which is it being carried out.

In satisfaction of the statutory tests of Clause 4.6 of MLEP 2013, it is requested that Council support the variation as proposed.