

**7 CLIFF STREET, MANLY  
CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO EXISTING SEMI-DETACHED  
DWELLING**

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM  
HEIGHT OF BUILDING CONTROL AS DETAILED IN CLAUSE 4.3 OF THE MANLY  
ENVIRONMENTAL PLAN 2013**

**For:** Construction of Alterations and Additions to an Existing Semi-Detached Dwellings  
**At:** 7 Cliff Street, Manly  
**Owner:** Mr Burton & Ms Keenan  
**Applicant:** Mr Burton & Ms Keenan

## **1.0 Introduction**

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum height of building development standard as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

## **2.0 Background**

Clause 4.3 of MLEP sets out the maximum height of building standard as follows:

- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Building Map specifies a maximum height of 8.5m.

The proposed dwelling house provides for a maximum height of 10.965m. This is a non-compliance of 2.465m or a variation of 29%.

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

### **Is Clause 4.3 of the LEP a development standard?**

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of the development and includes:

*“(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work.”*

- (b) Clause 4.3 relates to the maximum height of building. Accordingly, Clause 4.3 is a development standard.

### 3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

### 4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51]** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

- (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 4.3 (the Height of Building Control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

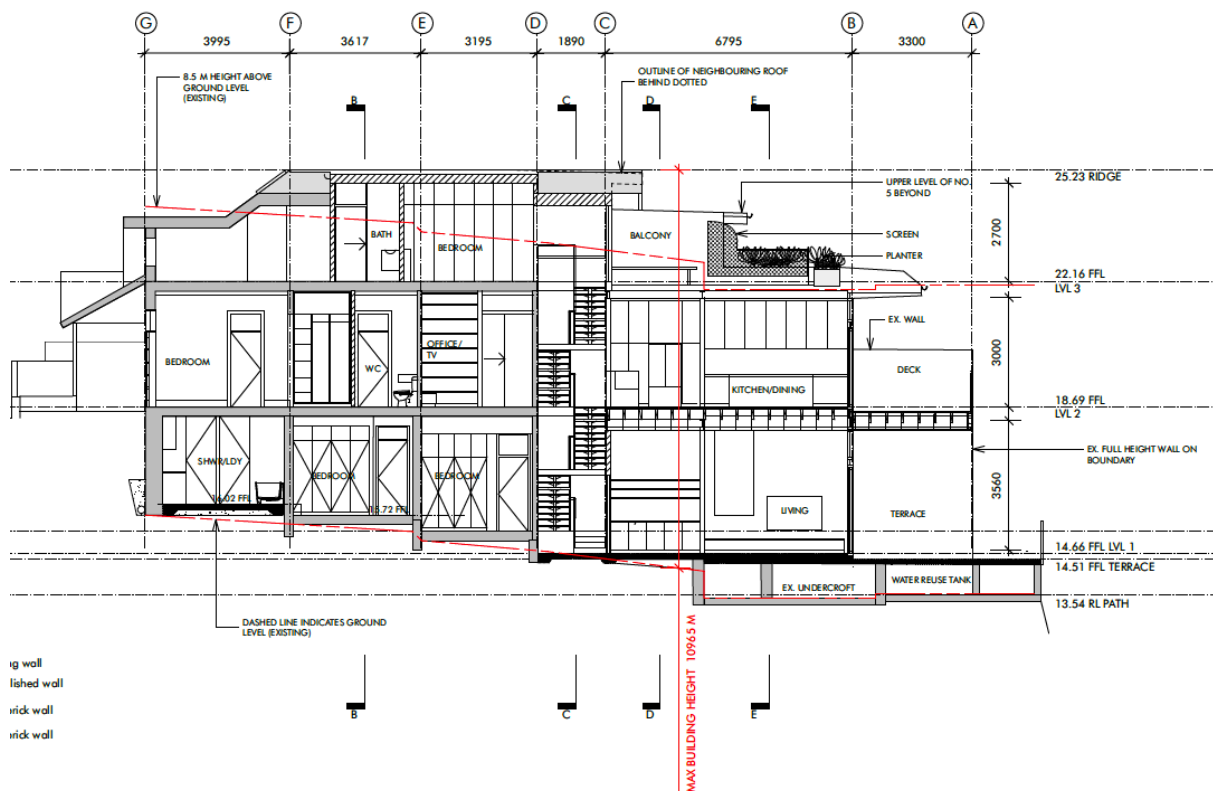
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
  - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.**

The proposed development does not comply with the maximum height of building development standard pursuant to Clause 4.3 of MLEP which specifies a maximum height of building of 8.5m in this area.

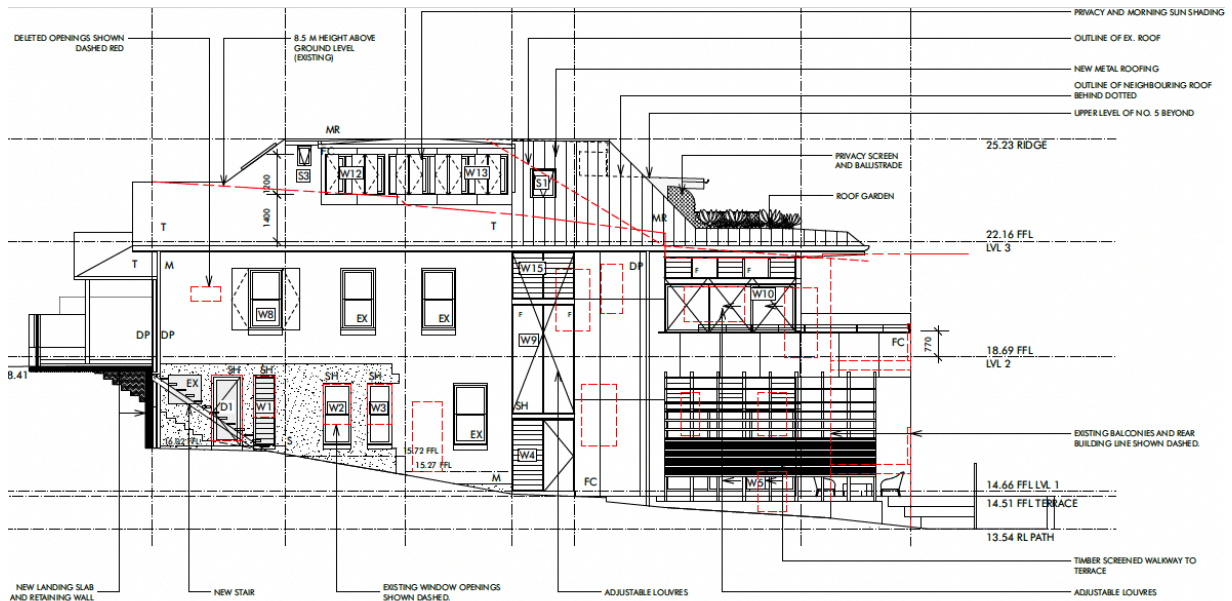
The proposed dwelling will result in a maximum height of 10.965m, resulting in a non-compliance of 2.465m or a variation of 29%.

The non-compliance with the height of building control is a result of the slope of the site and the existing roof form of the subject site and the adjoining property. The proposal provides for an attic style addition that is consistent with the additions to the adjoining semi-detached dwelling at No. 5 Cliff Street. The application merely seeks to extend the existing ridge line towards the rear and does not extend the height or depth of the adjoining semi detached dwelling at No. 5 Cliff Street. The sections and elevations below depict both the existing and dwelling on site and the adjoining semi-detached dwelling.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.



**Existing section depicting existing outline of adjoining semi-detached dwelling at No. 5 Cliff Street**



**Elevation Depicting existing roof form, height limit and outline of adjoining semi-detached dwelling at No. 5 Cliff Street**

Clause 4.6(4) of MLEP provides:

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

A register has been established to record assessments carried out.

In *Initial Action* the Court found that clause 4.6 required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed 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 (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) has been repealed. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) has been repealed. Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

Clause 4.6(6) relates to certain subdivision of land clauses. This does not apply to the proposal.

The specific objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will provide additions to an existing dwelling on site. The non-compliance is a direct result of the slope of the site and the existing roof form. It is important to note that the subject site is part of a pair of semi-detached dwellings with No. 5 Cliff Street to the west. This application merely seeks to replicate the previous approved and constructed additions at No. 5 Cliff Street. It is considered that allowing for flexibility in this instance is reasonable and given the proposal is consistent with additions and constructed at No. 5 Cliff Street. The existing dwelling has a height exceeding the maximum height control which is exacerbated by the significant slope of the site. The additions merely seek to extend the existing roof ridge towards the rear, as has been done by No. 5 Cliff Street, and does not result in any increase in height to the existing ridge. The area is limited to the area behind the existing roof form at the front of the dwelling. The additions will not be prominent in the streetscape, being largely obscured by the existing dwelling on site.

The resultant dwelling will provide for a ridge height of RL25.23, consistent with the ridge height of existing dwelling on site and No. 5 Cliff Street. The proposed non-compliance provide for a better planning outcome by continuing the existing roof form and providing an addition that is consistent with that constructed at No. 5 Cliff Street.

The non-compliance results in a development that is compatible with the existing surrounding development in this portion of Cliff Street and which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:



- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

## **5.0 The Nature and Extent of the Variation**

- 5.1 This request seeks a variation to the maximum height of building standard contained in Clause 4.3 of MLEP.
- 5.2 Clause 4.3 of MLEP specifies a maximum building height of 8.5m in this area of Manly.
- 5.3 The proposal provides for additions to an existing dwelling. The works proposed result in a development that is compatible with the existing surrounding development in this portion of Cliff Street and in particular matches the height and envelope of the adjoining semi-detached dwelling at No. 5 Cliff Street. The non-compliance is a result of the significant slope of the site, the existing roof form and to design an addition consistent to the provided to the adjoining semi-detached dwelling.

## **6.0 Relevant Caselaw**

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*

19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46]*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of MLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and



- (b) there are sufficient environmental planning grounds to justify contravening the development standard
- 3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives for development for in the R1 zone?

## **7.0. Request for Variation**

### **7.1 Is compliance with Clause 4.3 unreasonable or unnecessary?**

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum height of building development standard, as outlined under Clause 4.3, and reasoning why compliance is unreasonable or unnecessary, is set out below:
  - (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 additions have been designed having regard to the existing roof form of the subject site and the built form of the adjoining semi-detached dwelling at No. 5 Cliff Street.

The proposed additions merely seek to extend the existing roof ridge to the rear, consistent with the additions at No. 5 Cliff Street. The existing dwelling on the subject currently exceeds the height of building control and the extension of the existing roof ridge which in conjunction with the significant slope further exceeds the height control.

The proposed additions do not exceed the ridge height of the existing dwelling on site and does not exceed of the existing dwelling of the adjoining semi-attached dwelling, No. 5 Cliff Street.

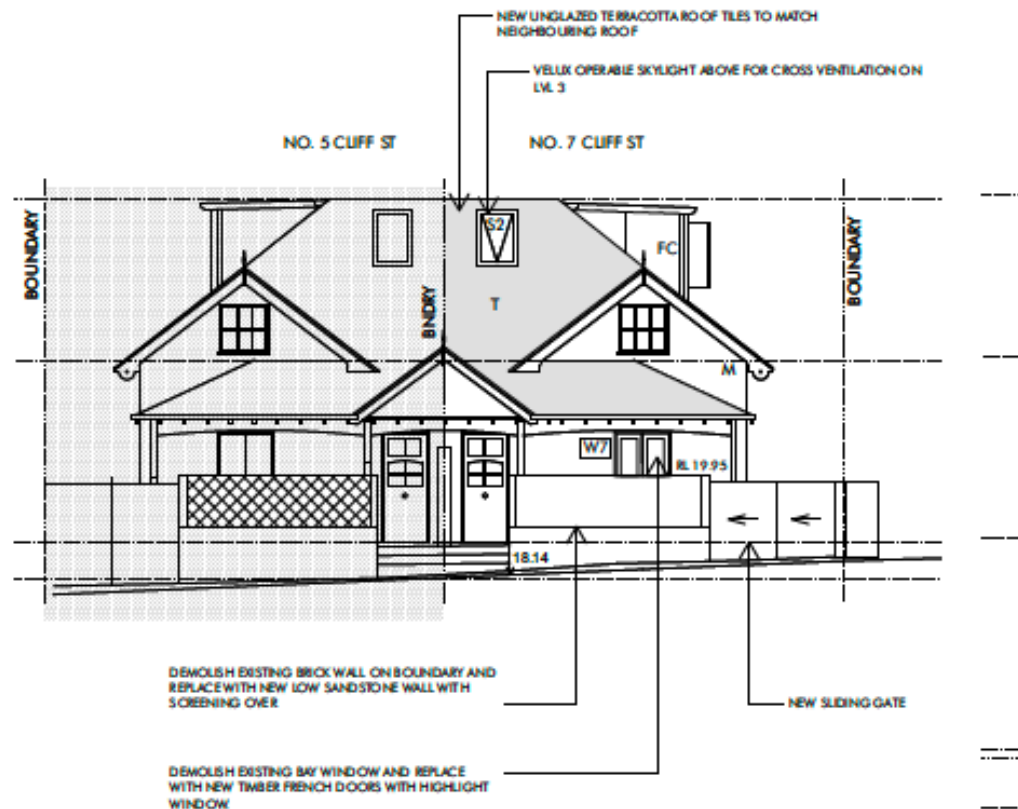
The resultant dwelling is compatible with the prevailing building height in the immediate locality, particularly having regard to No. 3, 5 and 9 Cliff Street.

The proposed additions are located behind the existing roof form and will predominately be obscured from the public domain and streetscape as it will be largely screened by the existing dwelling. In this regard, the resultant dwelling will continue to present as single level dwelling

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

The proposed additions which result in the non-compliance with the height control, merely relates to the existing of the existing roof ridge towards the rear. The resultant dwelling is consistent the bulk and scale with the adjoining semi-detached dwelling at No. 5 Cliff Street. The subject dwelling is part of a pair of two semi-detached dwellings with No. 5 Cliff Street and additions have designed to generally reflect the adjoining semi-detached dwelling.

The proposed additions are predominantly obscured from the public domain as it is located behind the front façade of the existing dwelling. The resultant dwelling will continue to present as a single level dwelling with rooms within the roof form. This is compatible with the existing surrounding development. Proposed streetscape and existing streetscape is depicted below:



**Proposed Streetscape**



**Existing Streetscape**

*(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),*

The proposed additions are located behind the existing front façade and roof form and will not obstruct views to nearby development from public spaces.

The site is well separated from the foreshore and will not impacts from the foreshore to the adjoining dwellings.

The proposed additions will not obstruct existing views from nearby residential development. In relation to properties on the opposite (southern) side of Cliff Street, with the additions not exceeding the existing ridge height, there will be no loss of views. With regard to the two adjoining properties, No. 5 and 9A Cliff Street, the proposed additions do not extend beyond the rear wall of the adjoining dwellings. The proposal will not obstruct any existing views from the adjoining properties.

The proposal will not obstruct any existing views between public spaces.

*(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,*

Detailed shadow diagrams have been prepared and submitted with the application. This demonstrates only minimal additional shadow cast to a very small portion of the balcony of No. 5 Cliff Street. The proposal continues to provide a reasonable level of solar access in accordance with Council's DCP.

- (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 site is not within a recreation or conservation zone and as such this clause does not apply.

### **7.3 Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

There are sufficient environmental planning grounds to justify contravening the development standard. The site is currently occupied by a two storey dwelling which exceeds the maximum height control and is a part of a pair of semi-detached dwellings with No. 5 Cliff Street. The proposal merely seeks to provide an addition similar to that constructed at No. 5 Cliff Street which results in the non-compliance. The proposed development is consistent with the objectives of the zone and objectives of the building height control. The non-compliance does not result in any adverse impacts on the adjoining properties. The non-compliance does not result in any loss of views. The area of exceedance does not contribute to visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed additions have been designed to complement and be consistent with the additions provided at No. 5 Cliff Street. Therefore, the proposal will promote good design (cl 1.3(g)).
- The proposal provides for an appropriate bulk and scale when viewed from the public domain and surrounding properties and therefore strict compliance is therefore unreasonable.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposed dwelling additions have been designed consistent with the additions provided at No. 5 Cliff Street. The existing dwelling is part of a pair of semi-detached dwellings with No. 5 Cliff Street and the proposal provides for a consistent design approach. The non-compliance relates to extension of the existing roof ridge towards the rear, consistent with the works at No. 5 Cliff Street, and which does not impact on privacy, views or solar access of the adjoining properties.
- Shadow diagrams have been provided indicating that all adjoining properties receive appropriate solar access. The non-compliance does not contribute to any unreasonable shadowing to adjoining properties.
- The non-compliance with the building height control does not result in any loss of privacy or amenity to the adjoining properties.
- The resultant dwelling is compatible in terms of bulk and scale with the existing surrounding dwelling, particularly and importantly the adjoining semi-detached dwelling at No. 5 Cliff Street.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the existing roof form and built form of the adjoining semi-detached dwelling, No. 5 Cliff Street. Further, the resultant development and in particular the non-compliance with the building height standard, is compatible with the existing surrounding development.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

The area of non-compliance does not result in any detrimental impact and is a direct result of existing roof form of the existing dwelling and the built form of the adjoining semi-detached dwelling. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

**7.4 Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives of the R1 General Residential Zone?**

- (a) Section 4.2 of this written request suggests the 1<sup>st</sup> test in *Wehbe* is made good by the development.
- (b) Each of the objectives of the R1 General Residential Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council* [2017] NSWLEC 158 where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.



Preston CJ also found that *“The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone”*.

In response to Nessdee, I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of to the height of building control, the resultant building as proposed will be consistent with the individual Objectives of the R1 General Residential Zone for the following reasons:

- ***To provide for the housing needs of the community.***

The proposal results in additions to an existing semi-detached dwelling house which is consistent with this objective. The non-compliance relates to works behind the existing front facade and does not detract from the low density residential environment.

- ***To provide for a variety of housing types and densities***

The proposal provides for additions to an existing semi-detached dwelling which is appropriate in this location.

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

This objective is not relative to the proposal.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed height of building control, whilst maintaining consistency with the zone objectives.

## **7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?**

(a) Clause 4.6(5) has been repealed.

## **8.0 Conclusion**

This development proposed a departure from the maximum height of building development standard, with the proposed works providing for a maximum height of 10.965m.

The non-compliance is a result of the significant slope of the site, the existing roof form and the existing development to the adjoining semi-detached dwelling, No. 5 Cliff Street.

The extent of the variation to the height of building control does not result in any significant impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the maximum height of building standard specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum height of building control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan  
DIRECTOR  
NOLAN PLANNING CONSULTANTS