

Clause 4.6 variation - Exception to Development Standards

Property: 2 Manor Road, Ingleside 2101

Development: Construction of a new secondary dwelling, car port, tree removal and ancillary works

Introduction

Clause 4.6 of Pittwater Local Environmental Plan 2014 (PLEP 14) allows Council to permit consent for development even though the proposal seeks a dispensation from a development standard imposed.

Clause 4.6 also requires that a consent authority may be satisfied before granting consent to a development that contravenes a development standard in PLEP 14:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.

Assistance on the approach to justifying a contravention to a development standard is taken from legal decisions of the Land and Environment Court of NSW in the following cases:

1. Wehbe v Pittwater Council [2007] NSWLEC 827;
2. Four2Five Pty Ltd v Ashfield Council [2013] NSWLEC 1009;
3. Micaul Holdings Pty Limited v Randwick City Council [2013] NSWLEC 1386; and
4. Moskovich v Waverley Council [2016] NSWLEC 1015.

With respect to the matters above, this Clause 4.6 request outlines the departure sought to the Height of buildings control and establishes that compliance with this development standard is unreasonable and unnecessary in the circumstances.

It also demonstrates that there are enough environmental planning grounds to justify the contravention and provides an assessment of the matters the Council is required to consider in the development assessment process.

The Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 (2FA) of PLEP 14, relating to the Height of buildings, and reads:

- (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](#).*
- (2FA) *Despite subclause (2), the maximum height for a secondary dwelling or a rural worker's dwelling in Zone C4 Environmental Living or Zone RU2 Rural Landscape is 5.5 metres if the secondary dwelling or rural worker's dwelling is separate from the principal dwelling.*

Clause 2FA prescribes a 5.5 metre control for the site for the category of development and would in any other case be 8.5 metres.

The Proposed Variations

PLEP 14 requirement	Subject site	Variation
5.5 metres	The non-compliances relate to the upper roofline and floor plate of the secondary dwelling (refer to architectural drawings).	<p>Western (front) elevation, the eave protrudes the height by <u>0.47 metres</u> or 8.55% variation.</p> <p>Eastern (rear) elevation, the roofline, and upper walls protrude the height by <u>1.13 metres to 3.13 metres</u> or 20.5% to 56.9% variation.</p> <p>Northern (left side) elevation, the roofline, and column protrudes the height by <u>0.985 metres to 2.75 metres</u> or 17.9% to 50% variation.</p> <p>Southern (right side) elevation, the roofline protrudes the height by <u>1.135 metres to 2.36 metres</u> or 20.6% to 42.91% variation.</p> <p>We note this variation at first glance may be significant, however we would like to remind the reader the height control is low for this category of development where normally a control of 8.5 metres would apply.</p>

Justification for Contravention of the Development Standard

Clause 4.6 of PLEP 14 states:

- (1) The objectives of this clause 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.*
- (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.*
- (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.*
- (4) Development consent must not be granted for development that contravenes a development standard unless—*
 - (a) the consent authority is satisfied that—*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (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, and*
 - (b) the concurrence of the Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

- Wehbe v Pittwater Council [2007] NSW LEC 827; and
- Four2Five Pty Ltd v Ashfield Council [2013] NSWLEC 1009.

The relevant matters contained in Clause 4.6 of the PLEP 14, with respect to the Height of building control development standard, are each addressed below, including with regard to these decisions.

Clause 4.6(3)(a): Compliance with the development standard is unreasonable and/or unnecessary in the circumstances of the particular case

In Wehbe, Preston CJ of the Land and Environment Court provided some assistance by outlining five main ways in which a variation to a development standard had been shown as unreasonable or unnecessary.

While Wehbe related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see Four2Five at [61] and [62]).

As the language used in subclause 4.6(3)(a) is the same as the language used in Clause 6 of SEPP 1, the principles contained in Wehbe are of assistance to this clause 4.6 variation request.

The five methods outlined in Wehbe include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).
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 Method).
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 Method).

The 'First Way' is of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary.

The following section addresses the matters in Clause 4.3, how the objectives of the Height of building control are achieved notwithstanding the non-compliance with the numerical control.

The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method)

The first method, demonstrating that the objectives of the Height of building control can be achieved and we offer the following opinion and discussion.

We accept that is prudent for our written request to demonstrate why the height exceedance over and above what might be permissible under the LEP is justified on environmental planning grounds.

We would say that the construction of the secondary dwelling would obviously provide additional affordable housing, and Council may take the view that the secondary dwelling would be for private use, and we accept that may not be an acceptable ground.

We have taken the approach that from the local context and understanding compatibility, we have elected to argue the physical topography constraints and built form context is an environmental planning ground in the meaning at Clause 4.6(3)(b), and how it might be appropriately reflected about the question of sufficiency.

The height exceedance occurs primarily due to the steepness of the site and its topography surrounding the footprint of the secondary dwelling where the upper envelope and roofline of the building protrudes beyond the 5.5 metre projection from the existing ground level as nominated on the architectural drawings to the respective elevations.

We note the grounds levels range from RL 22.4 (front property boundary interface) and drop to RL 18.4 (rear building line of secondary dwelling) or is some 14.5%.

We point out the intent of Clause 2FA does not provide any objectives to support this 5.5 metre height approach, and the fall back is in fact Clause 1- the objectives contained in Clause 4.3, and we will have regard to these as we assess the First Method.

We also note that the intent of the Clause 2FA relates specifically to secondary dwellings or rural worker's dwelling that are separate from the main dwelling.

However, if the secondary dwelling in this instance was in fact attached, then the control of 5.5m would not apply and that the maximum height would be 8.5 metres instead by default and would result in a neutral outcome.

Now when we compare these parameters i.e., 5.5 metres versus 8.5 metres, we note that it results in a height difference of 3 metres or 1 storey.

At our first reading of Clause 2FA, we would say the intent of the control from a planning point of view and in the mind of the author at the time of writing the control, would have been likely to regulate the scale and height of the building if it was detached so that the exterior and appearance would not be dominant to the rural landscape in which the building would be found and that

proposed development is compatible with the height and scale of surrounding and nearby development.

And we also assume that such a building would most likely be found behind the rear building line of the main dwelling house, as naturally, from a planning and architectural design point of view, you would not have dominant buildings behind a rear building for visual reasons as the main residence would be expected to take centre stage.

Our presumption is based on our experience and education, and we would comfortably say the same intent is derived upon this approach from reading clause 2FB, where the example of a dual occupancy is cited where the dwelling furthest back would be limited to a height control of 5.5 metres.

Of interest, we do not see what the control would be in place if someone choose to erect a farm building in place of the secondary dwellings or that of a rural worker's dwelling, where the controls are silent on this and that the maximum control would be 8.5 metres from our interpretation.

We would simply conclude that the controls are in part related to controlling the height and scale of a building when it is located behind the rear building line of the main dwelling and for visual intrusion considerations to take priority in creating a consistent scale for a townscape or neighbourhood is an environmental planning ground.

The project architect's approach is to create a consistent scale with neighbouring development and with the main dwelling house and that trajectory from a height relationship would be consistent at the street level as being 1 storey. The architect could call the building as something else and that would be disingenuous.

Another consideration is understanding the placement of footprints and managing visual impact, we feel there needs to be a consistency with that of the front and rear building lines, and in this case, the scenario envisaged by Clauses 2F, and 2FB does assist our understanding of the intent, as the secondary dwelling is clearly detached to form a separation between neighbouring development and with the main dwelling house building to minimise visual impact.

The project architect in this instance feels that it would be inappropriate to position the secondary dwelling behind the main dwelling house found on the land or attaching the building, due to site constraints and that addressing the public road frontage would be a desirable outcome given the townscape.

We have provided the lines of projection below of the proposal and that of neighbouring development and the main dwelling house to provide some perspective on consistency to the front and rear building line.



*Projection of **front** and **rear** building lines*

If we extend our thought process and consider the controls contained in Clauses 2D to 2FB, we would say that in our view, the site is identified as a steep site, and naturally, town planning rules do not provide much tolerance when working with steep sites or steep grades, as the controls adopted by town planners assume ground levels are flat which isn't the reality and some thought was applied upon reading Clause 2D on face value and we could conclude to rely on Second Method.

Now, if we compare the immediate context and style of the immediate dwellings (the existing dwelling house found on the subject land) and that of the adjoining dwelling at 10 Manor Road to understand the historical built form approach taken from a neighbourhood contextual point of view, it is evident these buildings contain an undercroft or storey, and when we visually breakdown this, we can see from the street/public domain, these dwellings present as a single storey building and from the rear, it resembles a 2 storey building (see images below).



Subject site (existing dwelling)



Adjoining dwelling at 10 Manor Road

The design approach of the new secondary dwelling is to appear as a single storey building and we note there is an exceedance of the eave line to the upper skillion roof lines, and we would say that the exceedance would not be readily noticeable to a passer-by at the streetscape level and naturally, the secondary dwelling would be 1 storey in appearance at first observation, and this would be the key visual consideration and that of the landscape absorption factors.

And from the side elevations and that of the rear building elevation would be less important given the configuration of the land holding and the projection of the front and building lines are consistent with the buildings found on the land and the neighbouring land holding.

And, we would say that it would be fitting to adopt this approach for the secondary dwelling and that the characterisation of the immediate area would remain low density residential housing set within a rural setting and in our view the proposal would not alter the character of the wider setting because of the noncompliance.

In our view, we cannot say the proposal will provide a positive or beneficial outcome, and that rather the proposal on balance would result in a neutral outcome which is acceptable to justify contravention of the standard.

We also say that a consistent scale from the streetscape would be achieved because of the exceedance, and we mentioned earlier, the development site creates exceptional opportunities and constraints to achieving a good design outcome, as another type of roofline would provide a poorer architectural outcome.

From the point of view of the landowners, about why the secondary dwelling is not attached to the main dwelling house to allow no exceedance to the height of building control is because it would not be appropriate since the owner's request for some form of separation from the main dwelling to the secondary dwelling to house a multi-generational family. We understand that this is not a sufficient environmental planning ground and would be a private benefit.

The objectives of Clause 4.3 are:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Assessment:

We understand that there is a direct correlation between floor space ratio and height controls to understand bulk and scale considerations.

In this instance, there is no floor space ratio at play. There is a floor area control of 60sq.m, which is compliant.

The proposed development proposes a density that will achieve the objectives of the zone that applies to the site and the desired character of the area in our view is to remain low density residential housing set within a rural setting and the proposal is contextually appropriate given the topography of the landscape.

- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Assessment:

We note that there are other land uses that are not strictly rural style housing in the locality and these include places of worship and the NSW Rural Fire Service compound. And opposite the site is the local listed heritage item known as 1 Manor Road and 12 King Road, Ingleside (*Ingleside House*).

We feel that the proposal would be compatible with the height and scale of surrounding development and that from the streetscape visual line of projection, the proposal would appear to be single storey in built form and the immediate context contains dwellings up to 2 storeys, and this new secondary dwelling building would not be out of character.

- (c) *to minimise any overshadowing of neighbouring properties,*

Assessment:

The secondary dwelling does not negatively affect the solar access enjoyment for the neighbouring property at 10 Manor Road in our view.

- (d) *to allow for the reasonable sharing of views,*

Assessment:

There are no important views in this instance for consideration and we note that the visual assessment of the secondary dwelling from the streetscape would present as a single storey-built form and would not be out of context given the exceedance.

The rear 2 storey element would not be readily visible as the ground slopes downwards from the public viewpoint.

We also note the visual catchment contains bushland and undulating topography that allows for better visual absorption opportunities.

- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*

Assessment:

In this case, we note that the topography of the site is defined as steep in our earlier opinion and presents challenges.

To overcome this, we would say the design of the secondary dwelling responds to the steepness of the site by adopting a raised floor/bearer and joist construction technique with the least amount of intrusiveness.

And the adoption of a veranda to the south elevation, and along with the car port to the east elevation creates a sense of openness and breaks the dominance of a heavy base or massing of lower walls. The direct use of vertical supports provides a human scale link between the floor plates and that of the ground levels.

We note the roofline is causing the exceedance; however, we feel the skillion roof lines are not visually imposing and if an alternative roofline was adopted, it would result in a distracting design and interrupt the rhythm of the building.

- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Assessment:

We feel that the visual catchment contains bushland and undulating topography that allows for better visual absorption opportunities and the impacts on the natural and built environment and along with the heritage item is within acceptable levels in our view.

We also note that environments which contain good quality vegetation coverage also has a greater capacity to visually absorb a structure than an environment which is barren of vegetation or tree canopies.

For example, the placement of a building within a flat environment will tend to have a greater degree of visibility from surrounding areas than one which has been introduced into undulating land. And the reason for this is due to the abating effect of undulating land by either reducing views of the building or providing a backdrop to it.

Based on the literature of our office in the Planning Report, we say that from a visual assessment, the size and scale of the secondary dwelling would not impact the heritage item located directly opposite and that is because of the spatial separation between the new building and the existing heritage building i.e., approximately 70 metres.

Any visual intrusion is mitigated by the architectural design of the new building, where the secondary dwelling is presented in a postmodern sense and does not mock the features of the heritage building and the area has greater capacity to visually absorb the secondary dwelling given the landscape setting and the exceedance to the height is nugatory.

Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the Height of building as it applies to the site.

Conclusion on Clause 4.6(3)(b)

Considering the above it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the Height of building standard in this case.

If the height plane was followed strictly speaking on this site, it would result in our view an absurd and detracting roofline and our approach is to create a consistent scale with neighbouring development which is an environmental planning ground.

There are clear and justifiable environmental planning merits which justify the application of flexibility allowed by Clause 4.6.

Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the Height of building development standard, for the reasons discussed earlier in this report.

Consistency with objectives of the zone

The subject site is zoned RU2 Rural Landscape under Pittwater Local Environmental Plan 2014.

Assessment:

The development proposal satisfies the objectives of PLEP 14 whereby the secondary dwellings are a permissible form of development and would be consistent with Points 2, 4 and 5. Other Points would not be applicable.

No unreasonable impacts are associated with the proposed variation in our view.

Therefore, the proposal does not result in any circumstance that would be contrary to those objectives.

The development proposal satisfies the objectives of PLEP 14.

Secretary Concurrence

Under Clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation does not raise any matter of significance for State or regional planning.

The variation allows for the orderly and economic use of land as envisaged by the Environmental Planning and Assessment Act, 1979.

There are no detrimental impacts on amenity and environmental impacts to neighbours.

The architectural presentation is site responsive and meets the desired future local character.

The variation to the standard will not undermine the legitimacy or future standing of the PLEP 14 controls.

The development controls are generally compliant except for the height of building breach.

Clause 4.6(5)(b): The public benefit of maintaining the development standard

The non-compliance is of no consequence in our view and there is no public benefit in maintaining the control as the outcome would be neutral.

Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence.

None.

Note, pursuant to the Notification of assumed concurrence of the Director-General under clause 4.6(4) (and the former clause 24(4)) of the Standard Instrument contained in Planning Circular PS 08-003 (dated 9 May 2008), the concurrence of the Director-General under clause 4.6(4)(b) may be assumed to the granting of development consent to the development that contravenes the development standards.

Conclusion

For reasons mentioned herein, the proposed development satisfies the provisions of Clauses 4.6(3) and (4) of PLEP 14 despite the secondary dwelling exceeding the height of building control.

In all, we feel that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

From our point of view, the land use is to remain low density in nature and the existing and desired rural residential character is to remain in balance despite the noncompliance of the height of the secondary dwelling, as we feel the building as presented to the streetscape would be consistent in scale with neighbouring development and the existing building found on the land which is an environmental planning ground.

The proposal would not alter the character of the wider setting of the locality despite the exceedance with the 5.5 metre height of building standard itself and would result in a neutral outcome which is acceptable to justify contravention of the standard because in our view, we cannot say the proposal will provide a positive or beneficial outcome.

We feel there are sufficient environmental planning grounds to justify contravening the development standard as the proposal would meet the relevant zone and height of building objectives.

We find the variation will allow for orderly and economic use and development of land and we note there are no adverse privacy concerns or loss of solar access constraints for the adjoining property and the proposal does not adversely affect any views to and from the Heritage property being *Ingleside House* and that from a visual absorption point of view, there would be minor potential visual effects.

We accept that introducing some landscaping to the front boundary line will provide for a positive improvement to the streetscape as currently there is a lack of structured planting, and the removal of the vegetation is justified, and we would say this is minor rather than major and can be offset by the introduction of embellishment and is an acceptable planning outcome.

There is no public benefit in maintaining strict compliance with the standards and approval based on our assessment in this document would not be contrary to the public interest.

This Clause 4.6 variation is forwarded to Council in support of the development proposal and this request be looked upon favourably by Council.

Prepared by:

Momcilo (Momo) Romic
BTP (UNSW), MEM (UNSW)
NSW Builder Licence No. 252856C
Town Planning Consultant

Dated: 28 May 2023