

977-979 Barrenjoey Road, Palm Beach

ALTERATIONS TO AN EXISTING DWELLING AND CONSTRUCTION OF A SWIMMING POOL

Clause 4.6 Exceptions to Development Standards – Revised Plans Feb 2020

Clause 4.6 of the Pittwater Local Environmental Plan 2014 (PLEP 2014) 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 Pittwater LEP 2014 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 PLEP 2014, 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.

It is of interest that the consent authority specifies a number of development standards that cannot be varied under Clause 4.6, listed in Clause 4.6(8). Clause 4.3 - Height of buildings is not one of the standards excluded, it must therefore be assumed that the standard for height of buildings, is one of the development standards that can have an appropriate degree of flexibility applied under clause 4.6.

1. Environmental Planning Instrument Details (Pittwater LEP 2014)

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

Pittwater Local Environmental Plan 2014 (PLEP 2014)

1.2 What is the zoning of the land?

E4 Environmental Living

1.3 What are the objectives of the zone?

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

1.4 What is the development standard being varied?

Cl 4.3 of the Pittwater Local Environmental Plan 2014, Height of Buildings

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

Cl 4.3 of the Pittwater Local Environmental Plan 2014

1.6 What are the objectives of the development standard?

(1) The objectives of this clause are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) to minimise any overshadowing of neighbouring properties,*
- (d) to allow for the reasonable sharing of views,*
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

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

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 10m pursuant to Clause 4.3(2D)

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

The numeric value of the development standard in this development application is a maximum of 8.5m or 10m (for a lot with slope exceeding 30%)

building height (or ***height of building***) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but*

excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

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

The percentage variation sought is 9.9% for the loggia roof and 6% to the pool balustrade.

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.

2.1 *Wehbe v Pittwater* [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in Wehbe) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. *Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;*
2. *That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);*
3. *That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;*
4. *All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.*

2.3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

2.4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. *The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;*
2. *The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and*

3. *The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.*

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

3. Consideration

The following section addresses the provisions of clause 4.6 of the PLEP 2014 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:

3.1 Five (5) Part Test - *Wehbe v Pittwater*

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

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

The development will not alter the bulk and scale of the existing dwelling when viewed from Barrenjoey Road. The proposed development adopts a built form which

is consistent with the existing dwelling on the site and neighbours within the locality. The development will not alter the bulk and scale of the existing dwelling when viewed from the waterway/public domain and remains consistent with the streetscape in the locality.

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

The variation is reasonable considering the location and with the height remaining lower in RL than much of the bulk of the large dwelling and will be dwarfed when viewed from the water by the bulk of the existing structure. It has been designed to be compatible and complementary to the scale of the existing site and the dwellings which neighbour.

The large drop in the ground level results in a vastly greater height than is apparent for the bulk of the dwelling.

The generous width of the site also aids in ensuring that the impacts are further reduced for neighbours with the overall development proposal being a positive addition to the site and locality.

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

The shadowing is reasonable as is demonstrated in the accompanying plans. We note that the neighbour has no windows immediately adjacent and dense screening exists on the subject site and an inclinometer is located on the neighbour's site which all result in implications of the subject development being greatly reduced.

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

The proposed development will have no impact on any neighbouring properties' views.

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

The proposed additions will allow the dwelling to continue to respond to the waterfront site and the character of the Palm Beach waterfront will be retained.

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

The 0.99m (loggia) and 0.6m (pool) height variation will be appropriate when considered in the context of its environment. There will be no detriment to the natural surrounds or any item of heritage significance.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).

This exception to development standards request does not rely on this reason.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*

This exception to development standards request does not rely on this reason.

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).*

This exception to development standards request does not rely on this reason.

5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient grounds to permit the variation of the development standard. In particular:

- The variation is will not be easily discernible, particularly when considered in the context of surrounding development which has similar RLs.
- The area of variation will be of negligible impact to neighbours with reasonable privacy and solar access implications.
- The structures exceeding the height limit are open and transparent and will not create bulk. They are elevated significantly above the ground level, which is open with a large undercroft, which does not contribute to bulk and scale.

3.3 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 – E4 Environmental Living

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Consistent.

The proposal provides elevated open structures breaching the height limit which have no impact on the special ecological, scientific or aesthetic values, with an attractive and positive result proposed, complementing the existing dwelling.

- *To ensure that residential development does not have an adverse effect on those values.*

Consistent.

The proposal will not result in changes to the natural, environmental and aquatic environment.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

Consistent.

The development will retain a low density detached dwelling enhancing its amenity and being appropriate to the scale of the topography and large lot.

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

Consistent

The proposal will have a nil impact.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effect as the variation is minimal. The development will present to the waterway as a barely discernible change, complementary to the locality and its character.

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.

3.4 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.

3.5 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.

3.6 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.*

Strict compliance with the 10 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats and promoting good design and amenity of the built environment.*

The proposed development is for alterations to an existing dwelling on land zoned E4 Environmental Living.

The proposed alterations and additions are located to complement the existing dwelling siting and to avoid impacting upon the surrounding natural environment.

The height non-compliance proposed by development will not alter public views as it is hidden from street view and dwarfed by the upper level RLS when viewed from the waterway.

There will be no detrimental impact on private views with works being open and located to ensure neighbour's amenity is retained.

From no perspective will the structure present with excessive bulk.

The proposed structures will not result in any unreasonable overshadowing or privacy impacts to surrounding properties.