

2nd July 2020

Development Application DA2019/1398
Updated clause 4.6 variation request – Building height
Alterations, additions and change of use to shop top housing
63 – 67 The Corso, Manly

Reference is made to the amended plans prepared by Platform Architects in response to a number of issues raised by Council during the assessment of the application. Please find attached an updated clause 4.6 variation request in support of a variation to the clause 4.3 - Building height standards contained within Manly Local Environmental Plan 2013 (MLEP 2013). The GFSA/ FSR has not changed and to that extent we continue to rely on the clause 4.6 variation request for FSR contained within the original Statement of Environmental Effects.

Yours sincerely

Boston Blyth Fleming Town Planners



Greg Boston

B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director

Attachment 1	Updated clause 4.6 variation request - Clause 4.3 MLEP 2013 – Height of buildings
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Attachment 1

Updated clause 4.6 variation request – Height of buildings

Pursuant to Clause 4.3 of MLEP 2013 the height of a building on the subject land is not to exceed 10 metres in height. The objectives of this control 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 environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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

The development has a maximum height of 14.97 metres measured to the proposed lift overrun, 14.37 metres measured to the stairwell roof and 12.6 metres measured to the proposed roof top open space balustrade. The stair extension structures are consistent with the height of the pre-existing structures at this level with the lift extension necessary to satisfy the accessible provisions of the BCA and the applicable DDA legislation. These heights represent non-compliances of 4.97, 4.37 and 2.6 metres respectively and a maximum variation of 49.7% as depicted in Figure 1 below.

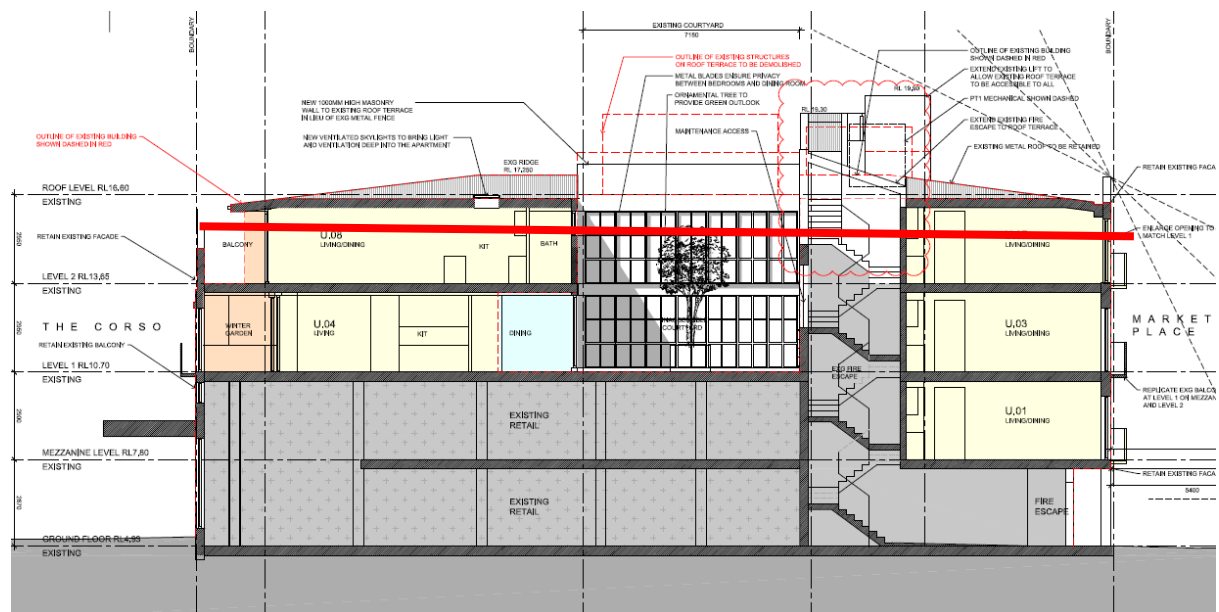


Figure 1 – Section extract showing relationship of existing development and proposed works to the 10 metre height standard

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

Clause 4.6 of MLEP 2013 provides a mechanism by which a development standard can be varied. The objectives of this clause are:

- (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.*

Pursuant to clause 4.6(2) 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.

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) states that 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.*

Clause 4.6(4) states 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 Director-General has been obtained.*

Clause 4.6(5) states that in deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Claim for Variation

Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to Manly Local Environmental Plan 2013 ("MLEP 2013") with commercial premises and shop top housing permissible in the zone with consent. The developments consistency with the stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Response: The proposed development retains the existing ground floor and mezzanine level retail uses the area of which far exceed the minimum 25% floor space requirement. The proposal is consistent with this objective.

- *To encourage employment opportunities in accessible locations.*

Response: Again, the proposed development retains the existing ground floor and mezzanine level retail uses the area of which far exceed the minimum 25% floor space requirement. Manly CBD is one of the most accessible commercial areas within the northern beaches LGA and as such the proposal is also consistent with this objective.

- *To maximise public transport patronage and encourage walking and cycling.*

Response: The proposal does not provide any carparking and as such satisfies this objective.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Response: The development is not within proximity of any zone boundaries. The change of use from backpacker accommodation to shop top housing will reduce potential noise` and odour impacts with no impacts associated with the delivery of materials or use of machinery. In this regard no objection is raised to standard conditions pertaining to the acoustic performance of roof mounted air conditioning condensers.

The proposed development is consistent with the zone objectives as outlined.

Consistency with height of buildings standard

The development has a maximum height of 14.97 metres measured to the proposed lift overrun, 14.37 metres measured to the stairwell roof and 12.6 metres measured to the proposed roof top open space balustrade. The stair extension structures are consistent with the height of the pre-existing structures at this level with the lift extension necessary to satisfy the accessible provisions of the BCA and the applicable DDA legislation. These heights represent non-compliances of 4.97, 4.37 and 2.6 metres respectively and a maximum variation of 49.7% as depicted in Figure 1.

Having regard to the stated objectives it is considered that strict compliance is both unreasonable and unnecessary for the following reasons:

- (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,*

Comment: The bulk and scale of the building is not significantly altered with the minor increase in floor space located within the established building envelope.

The subject property is heritage listed, located within immediate proximity of other heritage listed properties and is located within the Town Centre Conservation Area. Accordingly, primary consideration must be given to maintaining a contextually appropriate building form which respects the significance of the existing building, its setting and its relationship with the building form and height established by adjoining development including the heritage listed New Brighton Hotel.

The application is accompanied by a detailed Architect Design Statement prepared by the project Architect which details the design philosophy and considerations which influenced the design and final built form and heights proposed. Such design response was dictated, to a large extent, by the advice received during the design phase from the project heritage consultant and as detailed within the accompanying HIS. Particular attention must be given to the content of these documents as they form a critical component of the application. The conclusion contained at clause 9.6 of the HIS is as follows:

Given the heritage significance of the building and its condition, options for retention and adaptive reuse of the building are most appropriate. The scale and alignment of the building reinforce the character of the adjacent New Brighton Hotel and anchor this important corner opposite the Steyne Hotel.

In relation to building height we note that the existing 3 storey parapet to The Corso is maintained with the glass line at the upper level pushed back to create balcony space with the existing roof form retained over. The existing roof top ancillary structures are demolished and replaced with more integrated access structures. The consent authority can be satisfied that the additional works above the height standard will not give rise to any inappropriate or jarring streetscape, urban design or residential amenity outcomes.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the minor increase in building height of the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of adjoining development and development generally along the length of The Corso. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings and representative of the existing and desired future character of development within the Town Centre Heritage Conservation Area.

The proposal is consistent with this objective.

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

Response: We rely on our response to objective (a) above. This objective is not defeated.

- (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: Having inspected the site to determine available view lines across the site from surrounding residential development to public spaces (including Manly Beach and The Corso) and from public spaces to surrounding development including the surrounding adjoining heritage items we have formed the considered opinion that the development, by virtue of its height, maintains a view sharing scenario in accordance with the principles established by the Land and Environment Court in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140.

View impacts have been minimised and accordingly the proposal is consistent with this 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,*

Comment: The accompanying shadow diagrams clearly demonstrate that the only minor additional shadowing created by the development between 9am and 3pm will occur to adjoining development. The extent of additional shadowing is appropriately described as minor and will not unreasonably impact on the amenity of the adjoining properties. No additional overshadowing will occur to The Corso.

- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Comment: Not applicable.

Accordingly, the consent authority can be satisfied that the building height non-compliance proposed will not defeat the objectives of the height standard and accordingly strict compliance is both unreasonable and unnecessary under the circumstances.

Having regard to the matter of *Veloshin v Randwick City Council* [2007] NSWLEC 428 this is not a case where the difference between compliance and non-compliance is the difference between good and bad design.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance.

Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.

He held that the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, it is considered that there are sufficient environmental planning grounds to justify the variation sought namely the contextually appropriate building form achieved which respects the significance of the existing building, its setting and its relationship with the building form and height established by adjoining development including the heritage listed New Brighton Hotel.

The application is accompanied by a detail Architect Design Statement prepared by the project Architect which details the design philosophy and considerations which influenced the design and final built form proposed. Such design response was dictated, to a large extent, by the advice received during the design phase from the project heritage consultant and as detailed within the accompanying HIS. Particular attention must be given to the content of these documents as they form a critical component of the application.

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 the proposed development and associated height breaching elements, in particular the communal open space roof terrace, pergola and associated access, are consistent with objectives 1.3(c), (f) and (g) of the Act in they that promote good design and amenity, promote the sustainable management of built and cultural heritage with the approval of the variation facilitating the orderly and economic use and development of the land.

The proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives of the zone.

Conclusions

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

- (d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning.

As such we have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Yours sincerely

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA
Director