

## APPENDIX A

### Clause 4.6 – Exceptions to development standards

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#### Clause 4.3 Height of Buildings

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Clause 4.6 of Warringah Local Environment Plan (WLEP) 2011 is intended to provide an appropriate level of flexibility in applying development standards to development to achieve a better outcome in certain circumstances.

Subclause (2) states:

*“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.”*

This allows a variation to be sought to development standards under Clause 4.6. In accordance with Subclauses (3), (4) and (5) the following written request seeks to:

- Justify contravention of the maximum building height development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds particular to the circumstances of the proposed development and the subject site to justify the contravention;
- Demonstrate that the proposed development will be in the public interest as it remains consistent with the objectives for development in the R2 Low Density Residential zone as well as the objectives of the building height development standard;
- Demonstrate that the contravention of the building height development standard does not raise any matter of significance for State or regional environmental planning; and
- Consider the public benefit of maintaining the building height development standard.

#### NSW Land and Environment Case Law

In order to clarify the extent of the matters required to be addressed within a request for a variation under Clause 4.6, consideration has been given to the following case law:

*Wehbe v Pittwater [2007] NSWLEC827*

*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC90*

*Randwick City Council v Micaul Holdings Pty LTD [2016] NSWLEC7*

*Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSW LEC118*

Review of these cases indicates that a request for a variation under the provisions of Clause 4.6 is more onerous than previously required under SEPP 1. The case of *Randwick v Micaul* indicates that Council, as the consent authority, maintains a high level of discretion with regard to the level of justification required in order to support a variation request.

The following request provides an assessment of the proposed variation to the maximum building height with respect to the test methodology and requirements outlined within the relevant Case Law and requirements of NSW Councils.

*Introduction and Description of the development standard to be varied*

The Environmental Planning Instrument that applies to the land is Warringah Local Environmental Plan 2011 (WLEP). The subject site is zoned R2 Low Density Residential and a variation is sought to 'Clause 4.3 Height of buildings', specifically subclause (2) which states that the maximum height of a building is not to exceed the maximum height shown on the land as per the Height of Buildings map.

The maximum permitted building height as per the height of buildings map is 8.5m. The proposed dwelling provides a maximum height of 9.267m as a result of the increased finished floor heights to provide suitable levels for flooding.

The maximum height proposed requires a variation of 767mm to the maximum height of buildings therefore results in a percentage variation of 9.02%. The exception to the development standard is requested as a result of the flood level requirements.

*What are the objectives of the development standard to be varied?*

*(1) The objectives of this clause are as follows—*

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

*Compliance with the objectives of the development standard*

The proposed maximum height of 9.267m for the section of the roof impacted does not impact upon the dwelling being able to achieve the objectives of the zone or the objectives of the development standard. The proposal is considered to have a positive impact on the streetscape character of the area and will enhance the streetscape character.

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

The dwelling continues to meet objectives of the building height controls as it is considered consistent with the site constraints and will not detract from the prevailing building height or desired future streetscape character of the area. The dwelling proposed is considered to be appropriate in terms of scale with the surrounding development, whilst considering the requirements of the flood impacts. The bulk and scale of the dwelling has been minimized as much as possible through appropriate ceiling heights and articulation. The bulk and scale of the proposal as viewed from the street and surrounding properties would be consistent with the dwellings within the area.

The proposed height of the addition maintains the provisions of the area, and it is anticipated that the addition will blend with existing and new development as that occurs.

*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

The overall height will not result in any detrimental visual impact when viewed from the street or adjoining property given the high quality design and articulation provided in order to soften the development.

The proposed dwelling is unlikely to have any detrimental impact upon views, as views to Manly Creek can be maintained from adjoining properties, and any views from opposite dwellings can be maintained along the sides of the dwelling over the recreational area.

The siting of the dwelling ensures that minimal impacts upon privacy are anticipated as the dwelling is appropriately offset from living and POS areas.

Shadows cast from the proposed dwelling and variation to the height do not have any significant impact upon the adjoining properties. The shadows cast as a result of the proposed development are over the recreational area and rear of the site. The neighboring property will maintain solar access to 50% of the POS despite the proposed height of the dwelling. Therefore, no impact upon solar access of adjoining properties results from the request to vary the height.

*(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

The resultant building height variation will not result in any adverse environmental impacts. The variation to the overall height is unlikely to have any significant impacts upon adjoining properties or the wider streetscape. The dwelling is of a quality design that will enhance the visual and scenic quality of developments as viewed from Manly Creek and surrounding recreational areas.

*(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The proposed dwelling will maintain an attractive addition to the streetscape and will not have any detrimental impacts upon the visual amenity of the public places that surround the dwelling.

#### Compliance with the objectives of the zone

The objectives of the R2 Zone are:

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

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposed dwelling will not have any detrimental impact upon surrounding dwellings or the streetscape.

The dwelling has been designed to retain a high level of amenity for adjoining residents and the streetscape, and the high quality design will ensure the dwelling enhances the streetscape. Residents will still be able to carry out a range of activities, without affecting adjoining properties.

The design of the dwelling will ensure a high degree of internal and external amenity to suit the needs of the residents.

The landscape areas are able to be maintained within the front and rear setbacks to ensure the landscaped character of the area is maintained and the dwelling fits within the natural environment.

As the dwelling remains able to meet the requirements for low density residential living without any detrimental impact on the amenity of the surrounding sites, the development is found to achieve the objectives of the R2 Low Density Residential Zone.

*Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

The requested variation to the maximum building height provision is considered to be a reasonable and appropriate design outcome for the following reasons:

- The development standard objectives and zone objectives are able to be maintained despite contravention to the numerical requirement.
- The proposed dwelling responds to the constraints on the site and maintains suitable ceiling heights and bulk to avoid any adverse impacts upon adjoining properties or the environment.
- The increase in height will not have an excessive impact upon the streetscape or adjoining properties and is considered to result in an appropriate outcome for the residents needs.
- The dwelling is well designed and will remain consistent with the existing and future character of Pittwater Road.
- As mentioned above, the building height variation is largely the result of higher finished floor levels as required for the flood impacts.
- The dwelling maintains the objectives of the control and development standard and will have minimal impact upon the adjoining properties or the streetscape.

*Sufficient environmental planning grounds that are particular to the circumstances of the proposed development*

There are sufficient environmental planning grounds in these circumstances to justify contravening the building height development standard. The development is not considered

to be overdevelopment of the site and sufficient grounds for the variation are provided below:

- The dwelling proposed is able to maintain the objectives of the R2 Low Density Residential Zone, as well as the objectives of development standards Clause 4.3 Height of buildings
- The bulk and scale of the dwelling is consistent with surrounding dwellings and the larger streetscape.
- The high quality design, with suitable materials and finishes ensures the dwelling remains well articulated and will further ensure the variation to the height of the dwelling will not result in any adverse environmental impacts to the adjoining properties or public domain.
- The proposal is a well considered, high quality design solution that sensitively responds to the site context and character and scale of the surrounding built form to ensure the privacy, view sharing and solar access of the subject site and surrounding properties is maintained.
- The dwelling appropriately responds to the issues of flooding on the site, with a design that responds to these requirements and has been suitably designed so as to minimize the bulk and scale as much as possible.

In determining if there are sufficient environmental planning grounds the *Initial Action* judgment considers that it is appropriate to apply the Objectives of Section 1.3 of the EP&A Act in order to demonstrate that the grounds exist to warrant a variation.

The objectives of 1.3 are listed along with a comment with respect to compliance in the table below.

Objective	Comment
<i>(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.</i>	This object is not relevant to this development.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.</i>	The proposal will facilitate an ecologically sustained development given that no negative impact on environmental and social considerations are present. This in turn will serve to offer the ongoing sustainment of the economic health of the area.
<i>(c) to promote the orderly and economic use and development of land.</i>	The proposed development will maintain the orderly and economic use of the land by providing a development and land use that is consistent with that envisaged by Council through zoning.
<i>(d) to promote the delivery and maintenance of affordable housing.</i>	This object is not relevant to this development.

<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.</i>	There is no anticipated impact upon any threatened species of ecological communities.
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage).</i>	This object is not relevant to this development.
<i>(g) to promote good design and amenity of the built environment.</i>	The proposed development is a high quality design that remains within the a suitable built form and scale to be aesthetically appropriate. The proposed development is considered to appropriately respond to the established and changing character of the development identified within both the immediate and broader context. The development maintains the amenity of the area through a suitable design.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.</i>	The proposed development will comply with all relevant BCA codes and will promote the health and safety of occupants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State.</i>	This object is not relevant to this development.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The proposed development has been publicly notified to meet with this objective.

Based on the above, the consent authority can be satisfied that the proposed development remains consistent with the Objects of the Act despite the variation to the minor height breach.

*Does the development remain within the public interest?*

There is overall public benefit in maintaining the development standards, however, there is also benefit to providing flexibility in specific circumstances. Strict compliance with the development standards would waive the opportunity to provide a superior design outcome that is in keeping with the height, scale and character of the surrounding built form.

Council approves development applications which depart from the building height development standard with larger percentage variations than that of the proposed, subject to satisfactory environmental performance. On balance, the proposed variation to the building height development standard is considered to be an appropriate use of the provisions of Clause 4.6.

### Conclusion

The contravention of the development standard in this case will not raise any issues of State or regional planning significance as it relates to local and contextual site conditions. The dwelling will provide for the housing needs of the residents by improving functionality and amenity while retaining the low density character of the built form which will in turn assist in meeting local housing demand.

Variations under the provisions of Clause 4.6 are understood to be permitted in circumstances where the non-compliant development is found to be able to meet with the objectives of the zone, but does not expressly need to result in a better outcome than a compliant proposal. In this case, the proposed height of the dwelling is considered to meet with the objectives of the zone and provides for a suitable design given the dwelling is located on a raised finished floor level.

Numerical provisions such as building height are considered to be in force as a guide to achieve the objectives of the control. In this instance the objectives of the building height control are achieved through the proposed siting of the dwelling, despite the increase in building height. The variation is not anticipated to result in any detrimental impact to surrounding properties and despite the minor variation is largely compliant with Councils controls.

It is requested that Council consider this variation due to the minimal impact upon the surrounding properties and the public places. The proposed height will not have any detrimental impact beyond that of the existing dwelling or a compliant proposal.