



Clause 4.6 Variation – Height of Buildings (Clause 4.3)

Proposed Two-lot Torrens Title Subdivision and Residential Dwelling

50 Grandview Grove, Seaforth NSW 2092

Lot 235 DP 4889

**Prepared by Willowtree Planning on behalf of
PDC Holdings Pty Ltd**

March 2019

PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation has been prepared in support of the Development Application (DA) for the proposed Two-lot Torrens Title subdivision and proposed residential dwelling at 50 Grandview Grove, Seaforth (Lot 235 DP 4889),

The Clause 4.6 Variation has been submitted to assess the non-compliance of the development with *Clause 4.3 Height of Buildings* of *Manly Local Environmental Plan 2013* (MLEP2013) which has the following aims and objectives:

- 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.*

(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 proposed variation related to *Clause 4.3 Height of Buildings* of MLEP2013.

In summary, the following variation is proposed:

Table 1: Variation Summary			
MLEP2013 Clause	MLEP2013 Development Standard	Proposed Development Non Compliance	Percentage of Variation
Clause 4.3 Height of Buildings	Maximum 8.5m building height	The proposal seeks development consent for a 9.747m maximum building height.	14.6%

In accordance with Clause 4.6 of the MLEP2013 Council is required to consider the following:

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:

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- 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.*

This request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standard.

PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF THE MLEP2013

In accordance with Clause 4.6 of MLEP 2013 Council is required to consider the following Subclauses:

- (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 Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

These matters are responded in **Part D** of this Clause 4.6 Variation

2.2 CASE LAW

Relevant case law on the application of the Standard Local Environmental Plan Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;

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- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, which held the degree of Clause 4.6 does not require a better planning outcome as a result from the non-compliance;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasised the need to demonstrate the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds that sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
 - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
 - 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; or
 - The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in **Part D** of this Clause 4.6 Variation.

2.3 THE OBJECTIVES/UNDERLYING PURPOSE OF THE CLAUSE

A key determination of the appropriateness of a variation to a development standard is the proposal's compliance with the underlying objectives and purpose of the development standard. Therefore, while there is a specified numerical control for maximum building height, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

Part C of this Clause 4.6 Variation addresses the proposed variation to the Clause 4.3 development standard.

PART C THE STANDARDS BEING OBJECTED TO

3.1 CLAUSE 4.3 HEIGHT OF BUILDINGS MLEP 2013

The development standard being requested to be varied is Clause 4.3 Height of Building of MLEP 2013, which provides the following:

4.3 Height of Buildings

(1) The objectives of this Clause 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, to control the bulk and scale of buildings,*
- b) 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), views between public spaces (including the harbour and foreshores).*
- c) 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,*
- d) 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.*

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 MLEP 2013 map referred to in Clause 4.3 identifies the Site as being subject to a maximum built height of 8.5m. Pursuant to Clause 4.6 the proposed development seeks exception to the 8.5m building height standard prescribed by Clause 4.3. It is noted the variation is only sought on proposed Lot 235A.

3.2 THE OBJECTIVES/UNDERLYING PURPOSE OF THE CLAUSE

A key determination of the appropriateness of a variation to a development standard is the proposal's compliance with the underlying objectives and purpose of the development standard. Therefore, while there is a specified numerical control for maximum building height, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

Part C of this Clause 4.6 Variation addresses the proposed variation to the Clause 4.3 development standard.

3.3 PROPOSED VARIATION TO STANDARDS

The proposed development will result in a building exhibiting a maximum height of 9.747m. The proposed 9.747m building height represents a breach of 1.247m under Clause 4.3 of MLEP2013.

Table 2 provides a summary the proposed Clause 4.6 Variation to MLEP 2013 **Clause 4.3**.

Table 2: Variation Summary			
MLEP2013 Clause	MLEP2013 Development Standard	Proposed Development Non Compliance	Percentage of Variation
Clause 4.3 Height of Buildings	Maximum 8.5m building height	The proposal seeks development consent for a 9.747m maximum building height.	14.6%

The Site is zoned R2 Low Density Residential under the provisions of the MLEP2013, whereby residential dwellings are permissible. This DA therefore relies upon what is reasonably concluded to be the underlying objectives of the standard and the R2 zone.

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PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS

Pursuant to Clause 4.6 of the MLEP2013, exception is sought from the 8.5m height of buildings standard applicable to the Site pursuant to Clause 4.3 of the MLEP2013. Clause 4.6(4)(a)(ii) requires that such a request must establish that the proposed contravention is consistent with the objectives of the standard and zone.

4.1 OBJECTIVES OF THE STANDARD

The objectives of the standard as stated in the MLEP2013 are:

- 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, to control the bulk and scale of buildings,*

The proposal is considered to be consistent with the existing context of the immediate locality. The proposed pitched roof design is prevalent throughout adjoining properties of Grandview Grove. Similarly, the adjoining property at 48 Grandview Grove has a ridge height of ADH78.74 whilst the proposed ridge height at 50 Grandview Grove is ADH78.24. Given that adjoining property has a similar height to that proposed at 50 Grandview Grove, the proposal is considered consistent with the existing a streetscape character and adjoining built form scale.

Through maintaining the prevailing building height, the relationship of the Site with adjoining built form, the streetscape and the surrounding area, would remain consistent with the existing situation.

Accordingly, the building height and roof form of the development is highly appropriate for the Site and its context.

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

Although the proposed building height is greater than the allowable height pursuant to the MLEP2013, the architectural design of the building is considered sympathetic to the immediate locality and have a negligible visual impact on adjoining properties. Additionally, the proposed development, and resulting bulk and scale have been designed to address the site opportunities and constraints and will not result in an over development of Lot 235A, nor will it preclude the future development of Lot 235B for the purpose of residential development.

- 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 Site is not located in foreshore or harbour areas. However, future development on Site considers the nearby public spaces and ensures that they will not impede on views that may be directed towards those areas.

- 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,*

The proposed development and orientation has been configured to ensure an appropriate level of privacy is achieved both with the Site and to neighbouring properties.

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The proposed development is located on a corner lot therefore only adjoins one dwelling that won't be impacted in regards to solar access. The proposed development has been adequately designed to ensure the adjoining property at 48 Grandview Grove, Seaforth will receive a minimum of 2hrs of sunlight per day to habitable rooms between the hours of 9am and 3pm. Similarly, the private open space to the rear of the proposed development and adjoining property will not be impacted in terms of solar access as the proposed residential dwelling has been designed to provide optimal solar access for this area.

- 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.*

The proposed development is located in a R2 Low Density Residential Zone and is not adjoining a recreation or environmental protection zone.

4.2 OBJECTIVES OF THE ZONE

The Site is zoned R2 Low Density Residential under the MLEP2013, and the proposal for proposed two-lot Torrens Title subdivision and residential dwelling is permissible with development consent. The proposal, in particular the future residential dwelling, is consistent with the R2 zone objectives as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

The proposal achieves a high level of amenity and housing choice resulting in a density appropriate to the Site and regional context.

The height and proportion of the building is commensurate of the desired and existing character of the immediate locality.

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

This objective is not affected by the variation sought.

The proposed development is located within an established residential area and has been developed to compliment surrounding land uses within the Seaforth area.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR NECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.2**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

As provided in **Section 4.1**, the proposed development is considered to be consistent with the objectives of **Clause 4.3**.

Compliance with Clause 4.3 Height of Building requirement is considered unnecessary given that the objectives of the Site are achieved notwithstanding the non-compliance, and the underlying objective of the development standard would be defeated in the event a compliant scheme was proposed.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

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As demonstrated in **Section 4.1** and **4.2**, the proposed development would result in a built form outcome which meets the future desired character of the Site as part of the Seaforth area. The proposed development is permissible at the Site and is considered a suitable use of the Site for residential purposes remaining consistent with the objectives of the R2 zone.

The Clause 4.6 Variation to the development standard for height of buildings, is considered well founded on planning grounds as, notwithstanding the proposed non-compliance:

- The proposed development is consistent with the underlying objectives or purposes of the standards as demonstrated in Section 4.1;
- The proposed development is consistent with the underlying objective or purpose of the R2 Low Density Residential Zone as demonstrated in Section 4.2;
- The proposed development would lead to a preferred development for the adjoining proposed lot forming part of the subdivision;
- The development will maintained neighbouring amenity as well as the amenity of the public domain;
- The proposed development is consistent with the desired character of the Site and surrounding Seaforth area;
- The proposed development would not result in significant environmental or amenity impacts.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised it is for the proponent to demonstrate the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development 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.

Sections 4.1 and **4.2** have already demonstrated how the proposed development is consistent with the objectives of Clause 4.3, as well as the R2 Low Density Residential Zone under the MELP2013.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- Providing additional housing for the greater local of the Manly region;
- Providing employment-generating opportunities during construction stages;
- Provide a development outcome that is compatible with the existing and emerging residential area that is a permissible land use and consistent with the land use zone objectives.

There are no significant public disadvantages which would result from the proposed development.

The proposed development is therefore considered to be justified on public interest grounds.

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4.6 MATTERS OF STATE OR REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 4.3 would not raise any matters of significance for State or regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directives under Section 117 of the *Environmental Planning and Assessment Act* (EP&A Act).

Planning circular PS 08-014, issued by the NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by the relevant Local Planning Panel rather than under delegation. The proposed development would result in exceedances of the relevant planning controls as follows:

- Height of Building Control by 14.6%, at a maximum.

The non-compliance is more than 10% prescribed in this planning circular.

Furthermore, by including these non-compliances with Clause 4.3, the proposed development would be better able to meet the objectives of the Greater Sydney Region Plan and North District Plan as per the following:

- Contributes to providing a variety of housing typologies;
- The proposed development will provide a built form consistent with the general provisions of the Local Environmental Plan; and
- The proposal is appropriate for the Site and context and achieves a high level of amenity for residents.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Given the strict compliance with Clause 4.3 would result in:

- Minimising opportunities to respond to the housing need of the Seaforth area;
- Minimising opportunities to develop the Site for public benefit;

As such, there is no genuine public benefit in maintaining this strict height of building control for the Site.

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PART E CONCLUSION

It is requested that The Northern Beaches Council exercise their discretion (as identified in *Randwick City Council v Micaul Holdings Pty Ltd* – refer to Section 2.2) and find that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of the MLEP 2013.

Given the justification provided throughout this Clause 4.6 variation the development should be considered favorable by Council. As each of the relevant considerations are satisfied for the reasons outlined elsewhere in this report, concurrence can be assumed under Clause 4.6(5).