

23 Robertson Road, Scotland Island

Clause 4.6 Exceptions to Development Standards

This clause 4.6 exception is provided to supplement the Statement of Environmental effects prepared by SDG dated 23 April 2018. The clause 4.6 relates specifically to the height of the boathouse, in relation to the proposed development, which is to refurbish and raise the existing waterfront structures at 23 Robertson Road, Scotland Island.

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?

W1 Natural Waterways

1.3 What are the objectives of the zone?

- *To protect the ecological and scenic values of natural waterways.*
- *To prevent development that would have an adverse effect on the natural values of waterways in this zone.*
- *To provide for sustainable fishing industries and recreational fishing.*
- *To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.*

- *To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.*

1.4 What is the development standard being varied?

CI 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?

CI 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 4m.

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 4.13m.

The existing boatshed will be raised by 0.32 metres to prevent water inundation, with the maximum RL raising from RL5.41 to RL5.73. Based on a highest astronomical tide level of 1.6AHD, the height of the raised boatshed would be 4.13 metres.

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 3.25%

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 proposed development, being for the redevelopment of an existing jetty and raising of an existing boatshed, will present with a development of compatible scale to neighbouring development. The development involves the minor raising of an existing boatshed by 0.32 metres. The height of the jetty will be consistent with neighbouring development and entirely in character with its surrounds. The need for the level change and small height noncompliance results from the inundation of the existing jetty during high tides. The small departure will not be obvious from the

immediate area given that the structures will remain in the same footprint and at a low level relative to the neighbouring waterfront structures and dwellings on the island.

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

The variation is minimal at only 0.13 metres. The increase in floor level proposed is only 0.32 metres greater than the existing level. The impact of the limited raising of an existing structure above the high water line will be negligible when considered with regards to its surrounding development. The impacts of the height of the proposal will not be to the detriment of neighbours with similar jetties evident immediately neighbouring and access to the site improved.

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 water access of the site.

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

The proposed raising of the jetty will have no impact on any neighbouring properties solar access.

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

The proposed raising of the jetty will have no impact on any neighbouring properties views.

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

The existing jetty is to be retained, with the minimal height increase proposed for safety and security reasons. The building will continue to respond to the waterfront site and the character of the island will be retained.

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

The 0.13 metre 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 existing boatshed has unique qualities which are worthy of retention and accordingly the development has used this existing structure and is constrained by its historic levels.
- The design has retained the footprint of the existing structure to avoid impacting upon the surrounding natural environment.
- The variation is very minor in nature and will not be easily discernible, particularly when considered in the context of surrounding development.
- The area of variation will be of negligible impact to neighbours being a great distance for the site, with no views, privacy or solar access implications.
- The minor variation is required to ensure safety and security as a result of water inundation currently experienced for the existing jetty.

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 Cl 4.6(3)(A). An assessment of consistency with the objectives of the Zone is provided below:

Zone – W1 Natural Waterways

- *To protect the ecological and scenic values of natural waterways.*

Consistent.

The proposal is for raising the existing waterfront structures and there will be no increase in the footprint on the waterway as a result.

- *To prevent development that would have an adverse effect on the natural values of waterways in this zone.*

Consistent.

The proposal is for raising the existing waterfront structures and will not result in changes to the natural, environmental and aquatic environment.

- *To provide for sustainable fishing industries and recreational fishing.*

Consistent.

The development will have a nil impact on fish stock when completed. All works will be undertaken in accordance with relevant requirements and conditions of consent to ensure no detriment to aquatic life.

- *To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.*

Consistent

The proposal is for raising the existing waterfront and will have no impact on navigation.

- *To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.*

Consistent.

The works related to privately owned land has not impact on public waterway access. Access to the waterway in this area is unaffected with the minimal additional height being for raising of an existing structure and no footprint increase resulting.

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, and due to rising water levels. 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 Cl 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 4 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 the raising of existing waterfront structures on land zoned W1 Natural Waterways.

The proposed alterations and additions are located within the footprint of the existing structures, to avoid impacting upon the surrounding natural environment.

The height non-compliance proposed by development will not alter public views as it is located over water adjacent to the site and is due to rising water levels.

There will be no impact on private views with works within the existing locations and of minimal impact.

From no perspective will the structure present with excessive bulk. The retention of the existing boatshed is to the vast benefit of the character of the site and the Scotland island waterfront.

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

The Estuarine Risk report accompanying the application specifies that the structure is unsafe at its current height with risk of water inundation inevitable multiple times per year. It encourages a higher floor level to allow for a reasonable lifespan for the works and supports the development in its current form.

The proposed raising of the existing boatshed will result in significant improvement to safety and security, and improved access to the site. The proposed structure provides access without concern for tidal variations and is appropriate and worthy of consent.