

**WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF PITTWATER LOCAL ENVIRONMENTAL PLAN
2014**

49 GRANDVIEW DRIVE, NEWPORT

For: Alterations and additions including first floor addition
At: 49 Grandview Drive, Newport
Owner: Ben Weatherall and Mariela Sanchez
Applicant: Beecraft P/L

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Pittwater Local Environmental Plan 2014 (PLEP 2014).

2.0 Background

Clause 4.3 restricts the height of a building in this locality to a maximum of 8.5m above ground level and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

Ground level (existing) means the '*existing level of a site at any point*' as defined in the Dictionary annexed to PLEP 2014.

As a result of a portion of existing lower ground floor structure being located below natural ground level a portion of new first floor structure will technically exceed the maximum height requirement although when viewed externally the same structure is maintained below the maximum height line.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979 and therefore the development as a whole inclusive of existing structure needs to be assessed in relation to current development controls.

3.0 Purpose of Clause 4.6

The Pittwater Local Environmental Plan 2014 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (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.*

The development will achieve a better outcome in this instance as the site will provide for alterations and additions to an existing approved dwelling, which is consistent with the stated Objectives of the E4 Environmental Living Zone, which are noted as:

- *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.*

As sought by the zone objectives, the proposal will provide for alterations and additions to an existing dwelling to provide for an increased accommodation and an improved amenity for its occupants.

As discussed above the first floor addition when viewed externally will conform to the maximum height requirement and be compatible to surrounding multi-level development.

The breach of the building height control is a result of existing lower ground floor structure located below ground level being the 'existing level' from which overall height is measured from.

At its highest point new first floor structure will reach a maximum height measured from 'existing lower ground floor level' of 8.9 metres.

5.0 Onus on Applicant

Clause 4.6(3) provides 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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11 Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in

the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in an E4 Environmental Living Zone. The objectives of the E4 zone are noted as:

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

The first floor addition has been designed as a low profile contemporary structure located as close as possible to natural ground level at the front to reduce its height and overall bulk and scale towards the rear where natural surface falls away. The development is contained generally over existing built upon areas maintaining a generous portion of the site as landscaped area well in excess of the minimum area stated in the relative control.

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

The development will not result in any undue impact on the properties existing unique vegetated environment.

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

The design incorporates a stepped multi-level design that respects the fall in natural surface.

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

The property is not located within a riparian or foreshore area.

As discussed above the development will maintain the existing generous areas of natural vegetation which provides for a local wildlife habitat.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

(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.*

Despite the variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

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

We note that the non-compliance occurs as a result of existing lower ground floor structure located below natural ground level.

As discussed above when viewed in the context of the surrounding landform (natural surface) the proposed first floor structure is contained below the maximum building height and therefore meets the objectives of the control by providing new structure that is consistent with the desired future character of the locality.

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

The surrounding area comprises a mix of one, two and multilevel development all elevated at the rear due to the moderate fall in natural surface. By virtue of the fact that the new first floor addition is maintained below the maximum building height ***in relation to the surrounding landform*** we submit that the development will be compatible with other multi-level development in the surrounding area.

(c) to minimise any overshadowing of neighbouring properties,

The properties along this part of Grandview Drive are orientated on a north / south axis with the front of their properties facing north.

The shadow plans accompanying this application indicate the adjoining property to the west No.51 sustaining some additional shadow at the front of its residence in the morning and along its eastern side wall during the middle part of the day. In the afternoon additional shadow technically striking the side wall of No.47's residence to the east will actually fall within shadow cast by No.49's higher placed carport.

We note that the shadow plans detail shadow cast by existing and new structure ignoring any shadow cast by existing trees which in this forested and heavily vegetated locality contribute significantly to shadowing particularly during the winter months.

We submit that in this instance the majority of additional cast by new structure will be negated by shadow from existing trees and thick vegetation located on the northern hillside.

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

The proposed works will not result in the loss of any views from adjoining residences.

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

The design incorporates a stepped multi-level design that respects the fall in natural surface.

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

Refer to comments in (e) above regarding measures implemented within the design of the first floor addition to minimize adverse visual impacts when viewed from the surrounding area.

The property is not a heritage item or located in a conservation area.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the alterations and additions to an existing building, which is constrained by the nature of the existing development on site.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- As the proposal will not exceed the maximum building height relative to the natural landform that surrounds the existing residence the development will meet the broad objectives of the control and will appropriately maintain the surrounding properties amenity.
- The development will not result in any unreasonable loss of solar access to the subject site or neighboring properties and will maintain the views of adjoining properties.
- When viewed from the street the first floor addition will not be seen.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

Comment: Not applicable.

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.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 4.3 provide a maximum building height of 8.5m above ground level for the subject development.

The proposed alterations and additions to the dwelling will provide a maximum height of 8.9 metres above the structures 'existing lowest level' or a 400mm variation.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

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 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 this means:

“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”.

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- By adopting a stepped design with a flat roof form the visual impact of the proposed first floor addition will be effectively minimized when viewed from the surrounding area resulting in a dwelling that will be compatible in scale to other multi-level development in the neighbouring area.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighboring properties.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposes a departure from the maximum building height control, with the proposed alterations and additions to the existing building resulting in a maximum building height of 8.9m as defined in Clause 4.3 of Pittwater LEP 2014.

This variation occurs as a result of existing development on site located below natural ground level and the sloping topography of the site.

This written request to vary the maximum building height control specified in Clause 4.3 of the Pittwater LEP 2014 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height would be unreasonable and unnecessary in the circumstances of this case.

John Wright
Building Designer