

Appendix 1 - Clause 4.6 – Exceptions to Development Standards

1. Introduction

Clause 4.6 of the Waringah Local Environmental Plan 2011 (WLEP 2011) 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 the Waringah LEP 2011 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 WLEP 2011, 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.

2. Environmental Planning Instrument Details (Warringah LEP 2011)

2.1 What is the name of the environmental planning instrument that applies to the land?

Warringah Local Environmental Plan 2011

2.2 What is the zoning of the land?

R2 Low Density Residential

2.3 What are the objectives of the zone?

- *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.*

2.4 What is the development standard being varied?

The height control under clause 4.3 of the WLEP11 requires a maximum height of 8.5 metres for the subject site.

2.5 Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.3 – Height of Buildings

2.6 What are the objectives of the development standard?

(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.*

2.7 What is proposed 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 8.5m.

2.8 What is the numeric value of the development standard in your development application?

The numeric value proposed is 8.63 metres

2.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation sought is 1.6% or 0.13 metres

3. 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.

3.1 *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).

3.2 *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LE

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.

3.3 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.*

3.4 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.

4. Consideration

The following section addresses the provisions of clause 4.6 of the LCLEP 2009 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: b

The five ways outlined in *Wehbe* include:

4.1 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 buildings are compatible with the height and scale of surrounding and nearby development,

The proposed alterations and additions to the building are appropriate to the site and will fit with the bulk and scale of both the site and the immediate locality. The existing dwelling has a non-complaint maximum height of 9.5 metres and this will be reduced as a result of the proposal to a maximum height of 8.63metres. The proposal is of a similar scale to surrounding properties.

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

The proposed additions have a minimal visual impact, in that they are consistent with the existing built form on the site. The building height non-compliance will be visible along the northern elevation, as a result of the three storey element of the dwelling and the slope of the site.

The proposed alterations and additions will retain the existing levels for the lower ground floor, ground floor and first floor and therefore will generally maintain the existing bulk and scale when viewed from Seaview Crescent and Gardere Avenue, retaining a compatible scale to the street.

The proposed development does not result in loss of privacy or loss of solar access for neighbours or the subject site. Some view loss will be experienced by No. 24 Seaview Avenue to the north and north east, however this is not a result of the height variation. The proposed height in this location (southern elevation) is compliant with the 8.5 metre control.

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

The alterations and additions will result in a dwelling which will remain in character with its surrounds and the streetscape. The coastal locality will remain reflected in the character of the site and the scenic quality of the area will be positively contributed to as a result of the development proposed.

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

The site and the development are not visible from any significant public places other than Seaview Avenue and Gardere Avenue, from which it will be an attractive addition.

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.

In addition, strict compliance is considered unreasonable and unnecessary as the proposed development complies with the maximum building height control for the vast majority of the development. A variation is justifiable in this case, as the existing building height is non-compliant at 9.5 metres and the proposed development will result in a reduced maximum building height of 8.63 metres. This is a very minor exceedance and the proposed built form is aesthetically pleasing, consistent with the existing dwelling

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

4.2 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 proposed variation is very minor 0.13 metres or 1.6%.
- The area of the exceedance does not present a dominant built form to the street.
- It has no impact on solar access or privacy of neighbouring sites
- It is compatible in scale to surrounding properties

4.3 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 – R2 Low Density Residential

Objectives of zone

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

The improvements to the existing dwelling are consistent with this aim.

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

This is not applicable to the existing detached dwelling.

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

The landscaped setting will be improved with the alterations and additions to the dwelling that are proposed. In particular the removal of the second driveway will provide a larger landscaped area fronting Seaview Avenue and Gardere Avenue.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effects as it represents a minor exceedance and is consistent with surrounding development.

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.

4.4 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.

4.5 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.

4.6 Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence

4.7 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 8.5 metre height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

The proposed development is for alterations and additions to an existing dwelling house on land zoned R2 – Low Density Residential.

The proposed non-compliance is minor and is a result of the sloping nature of the site. The proposed works result in a lesser non-compliance than currently exists. Overall the proposed development does not present with excessive bulk and is of a consistent scale to surrounding properties.