

Clause 4.6 Variation Request – Exception to Development Standards (Height of Buildings - Clause 4.3)

Property address:	2 Orana Road Mona Vale NSW 2103
Lot/Section/Plan No:	29/E/DP6195
Local government area:	Northern Beaches Council
Zone:	R2 Low Density Residential
LEP:	Pittwater Local Environmental Plan 2014
Variation summary:	Clause 4.6 Variation Request – Height of Buildings (Clause 4.3)

Pittwater Local Environmental Plan 2014

The Pittwater Local Environmental Plan 2014 (LEP) is the principle local planning instrument that applies to the site.

Zoning & permissibility

The subject site is zoned as R2 Low Density Residential under the LEP. The objectives of the zone are as follows:

- *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 provide for a limited range of other land uses of a low intensity scale, compatible with surrounding land uses.*

The proposed dwelling house is permissible with consent in the zone. The site is located within a rural-residential area which is designed for proposals of this nature. The site has access to the appropriate services required and is accessible from the existing road network. The proposed dwelling house is seen to be in line with the existing streetscape and surrounding built form and to meet the prescribed intent of the zone. Therefore, the proposal it is seen as a desirable outcome for the subject site and will not adversely affect the amenity of the surrounding area.

Height of Buildings (Clause 4.3)

The objectives of Clause 4.3 of the LEP 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.*

The proposed dwelling house has a proposed building height of 8.88m and therefore does not comply with the maximum permitted building height of 8.5m under Clause 4.3 of the LEP. The subject non-compliance results in a 380mm exceedance regarding the maximum allowable building height. Therefore, a Clause 4.6 variation is required as an exception to the LEP development standards.

With respect to the design of the dwelling house, the proposed building is a two-storey dwelling house, where the structure of the building is approximately 8.4345m from FGL (and 8.05m from FFL), however, due to the allotment's flood constraints, the finished floor level is required to be raised to ensure the proposal is not impacted by overland flow. The proposed dwelling therefore results in additional fill beneath the foundation coupled with the orientation of both the building and the slope which results on a technical non-compliance with the LEP standards. The floor to ceiling heights of the proposed dwelling at a modest 2.58m for the upper floor and 2.73m for the ground floor, which is a human scale; it is not excessive and does not diverge from standard residential ceiling heights. The highest proposed roof pitch of the proposed dwelling is at 22.5°, including in the location of non-compliant building height. The design characteristics of the proposed dwelling house include a modest ceiling height and standard roof pitch, which is not indicative of excess or visually impacting. The proposal would comply if not for the additional fill required to ensure that the maximum probable flooding does not impact or cause any damages to the proposed dwelling. It is to be noted also that the proposal has been designed in order to retain the existing vegetation in front of the allotment, which provides great screening and reduces any associated impacts to the visual amenity of the streetscape.

The non-compliant building height, while unavoidable without significant amendments, will not be noticeable from any public domain spaces or nearby residents. The subject site is filled with high quality vegetation, which partially blocks sightlines between the dwelling and any location outside the site boundaries. The proposed height is therefore considered have zero impact on surrounding land. Further to this, the area of the building that is non-compliant is insignificant and therefore the proposal does not impose any adverse impacts onto the scenic qualities, conservation values or character of the area.

It is asserted that the proposed development will not adversely impact on the amenity of the streetscape, will not increase building dominance and bulk, will not affect residential amenity of any surrounding development in terms of visual and acoustic privacy, overshadowing, access to views or bulk dominance. The proposal is also understood to be in line with the surrounding built form and streetscape, and the proposed development was designed to combine rich mixture of architectural style, together with a highly articulated modern and efficient building, with good contemporary characteristics that incorporate modulation and a varied palette of materials in order to break the visual dominance of the building. It is asserted that the proposed dwelling house is a good outcome for the subject site, as it is well presented in terms of bulk and scale, and will add to the quality of the area and sense of place of the locality. Therefore, the proposal it is seen to meet the desired future character of the locality. Given the nature of the proposed development and the flood constraints it is subject to, the proposal is considered compatible with the desired future character of the locality. Please refer to below sections for a formal Clause 4.6 variation request.

How is Strict Compliance with the Development Standard Unreasonable or Unnecessary in this Particular Case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).

The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

The objectives of the standard are set out in above section of this report (Height of Buildings). A response to each of the objectives is provided below:

a) *to ensure that the size of development is compatible with the desired future character of the locality*

The locality consists of an established residential area with relatively large residential developments on suburban lots with varying front setback established within the streetscape given the existing land form and allotment shapes. This established area is seen to consist of a rich mixture of architectural styles embraced by large residential developments, with emphasis on their connection to the landform and retention of significant vegetation and views. Low masonry, timber and wire fencing, rockery or shrubs provide demarcation of the front boundary with the abutting grassed verges with informally landscaped areas along street frontages. The residential character of the area is of one- and two-storey buildings, similar to the proposal, with a balanced composition of vegetation, greenspace and the built form. The subject site is currently improved by a dwelling house and detached garage, which is proposed to be demolished under a separate application. The proposed dwelling is to be two storeys in height, well recessed from the street frontage and separated from all property boundaries by a notable vegetation which obscures the dwelling from view from outside the property boundaries. This will result on only limited visibility from the street and the proposed dwelling will not protrude above the tree line or any nearby buildings and does not visually break the level of the skyline. The proposed dwelling design is understood to be in line with the surrounding built form and streetscape, and the proposed dwelling was designed to combine rich mixture of architectural style, together with a highly articulated modern and efficient dwelling house, with good contemporary characteristics that incorporate modulation and a varied palette of materials in order to break the visual dominance of the proposal. It is seen that the proposed dwelling is a good outcome for the subject site, as it is well presented to the street in terms of bulk and scale, and will add to the quality of the streetscape and sense of place of the locality. Therefore, the proposal it is seen to be in line with the established built form of the locality and also with its desired future character.

The proposal has been oriented to minimise earthworks and does not detract from the amenity of the area and does not provide any negative effects onto the streetscape or locality. Hence, it is asserted that the proposed dwelling will blend with the existing built form and will not adversely impact on the amenity of the adjoining residents or locality. Hence, the proposed development is considered to be appropriate for the subject site and warrants favourable consideration from Council.

b) *To ensure that buildings are well articulated and respond to environmental and energy needs*

The proposed height does not diminish the quality of the building, the level of articulation or the building's responsiveness environmental and energy needs. The proposed two-storey dwelling house has a scale and form that responds and contributes to the quality and identity of the area and responds to the environmental, natural and cultural settings of this locality. The proposed roof pitch has been reduced to below the 22.5° in order to reduce the proposed non-compliance. The proposed dwelling design in is line with the visual character, scale, built form, density, resources management, landscape attributes, amenity, safety, aesthetics, human scale, layout and predominant character of the streetscape. Please note that only a small portion of the dwelling exceeds the maximum height provision and this is due to the proposal's appropriate response of elevating floor level for a flood prone lot. Please refer to the attached plans package and energy reports for further information on articulation and energy efficiency.

c) *To ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item*

Not applicable – not within a heritage conservation area or near a heritage item.

d) To ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views

The dwelling is only two storeys in height and is not likely to diminish the quality of views within the area.

The SEE submitted with the DA undertakes a detailed assessment of the proposal with regard to the surrounding sites concluding no adverse impact. The proposal's physical impacts on surrounding development/land are therefore acceptable. Figure 1 below shows the extent of non-compliance with respect to the line of maximum building height, which is minor in nature.

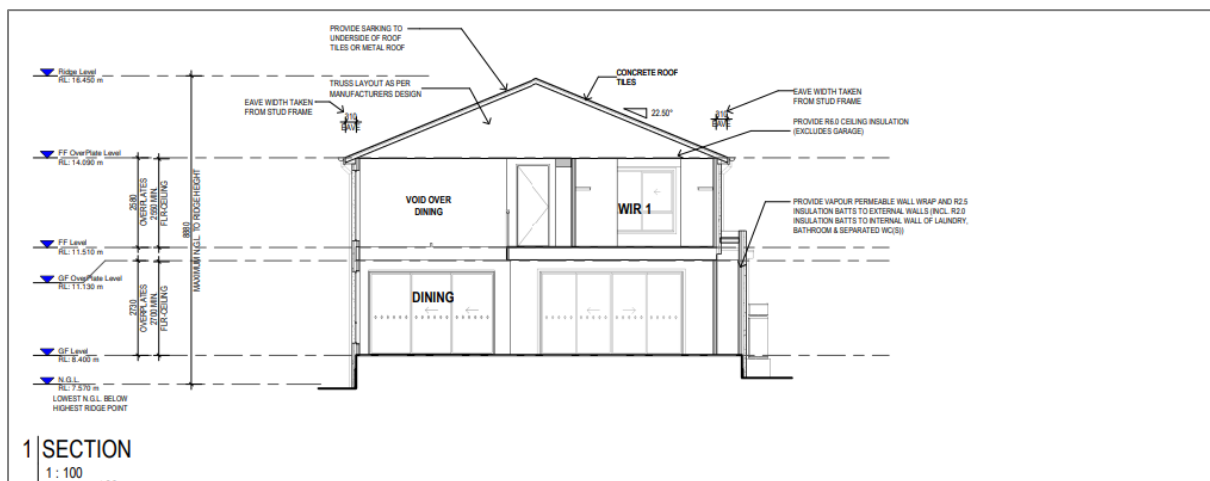


Figure 1: proposed section plan indicating overall height

Has the proposed development of the site been undertaken with due consideration of the existing and future redevelopment of neighbouring properties?

The proposed height takes into consideration the future height expected for nearby development, where proposals in the area should still be required to comply with the height limit so long as they are not impacted by flooding or sloping topography. Where land is impacted by flooding, it is asserted that double storey residential development should be able to exceed the maximum height by a reasonable level in order to design with a safe finished floor level as well maintaining amenity through provision of adequate floor to ceiling heights and without the need to excessively reduce the roof pitch or alter the overall roof form.

To conclude, the proposal is a suitable development option for the site which is in keeping with the existing and desired future character for low density residential development in the area.

Is the proposal's appearance in harmony with the buildings around it and the character of the street?

The proposal results in a built form outcome which is compatible with the desired built form for the site and the immediate area. As such, the proposal is capable of being in harmony with existing and future buildings within the locality and the existing and desired future character of the street network following transformation of the Precinct.

Strict compliance with the building height would not be considerate of the minimum floor level required due to flood constraints on the site. The proposed variation of the building height is simply designing the development to be compatible with constraints of the allotment while maintaining the amenity and

aesthetic design of the building and roof type. The variation therefore is more consistent with the future desired character of similar development in the zone than a fully compliant proposal, as the fully compliant proposal would require a sacrifice of floor space, ceiling heights or the overall quality of aesthetic design. It is also to be noted that the dwelling house is only 8.5m deep; it is asserted that the site is ineligible for a stepped design as the ground slope is not steep enough for stepped design to result in a compliant solution. It is also asserted that the additional fill proposed to increase the FFL is required to maintain accordance with the Flood Report.

The reasons set out above, we consider that the proposed development, notwithstanding the variation, achieves consistency with objectives of the standard.

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

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

The objective would not be entirely defeated if compliance was required, but arguably, a lesser degree of consistency with the objective is achieved. That is, adhering completely to the LEP controls would likely result in a highly constrained dwelling design that would lead to diminished aesthetic design quality and a detraction of amenity for future residents.

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;*

Not applicable. The development standard is not shown to be virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard. Nevertheless, development nearby is limited by the extensive allotment size and neighbouring dwellings are distanced too far from each other and from the street to be able to be visually comparable with each other, or to be easily visible from public spaces.

5. *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

Not applicable.

Consistent with the *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, in addition to demonstration that Wehbe way "1" is satisfied, it is not necessary to find other Wehbe "ways" to demonstrate "unreasonable and unnecessary" but rather, to find other additional reasons rather than simply relying on Wehbe way "1".

Exceptions to development standards (Clause 4.6)

The objectives of Clause 4.6 of the LEP are as follows:

- *To provide an appropriate degree of flexibility in applying development standards to particular development,*
- *To achieve better outcomes for and from development by allowing flexibility in particular circumstances*

The proposed Clause 4.6 variation request would be seen to provide an appropriate degree of flexibility in applying certain development standards under the LEP in order to allow for a development with similar bulk and scale as its surrounding built form.

Allowances to exceptions to development standards (Clause 4.6 (2))

Under sub-clause (2) of Clause 4.6 of the LEP, development consent may be granted to vary certain development standards as follows:

- *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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Is to be noted that the height standard is not expressly excluded from a variation under Clause 4.6.

Justification to exceptions to development standards (Clause 4.6 (3))

Under sub-clause (3) of Clause 4.6 of the LEP, development consent must not be granted to vary certain development standards unless the consent authority has considered a written request from the applicant as follows:

- *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
 - a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - b) there are sufficient environmental planning grounds to justify contravention of the development standard.*

As further discussed above and below, it is unreasonable and unnecessary to require compliance with the height control as other key development standards are compliant under the applicable LEP and DCP, and the Clause 4.6 objectives are fully satisfied. It is to be noted that the proposed development is seen to meet the overall objectives of Clause 4.3 of the LEP and will provide a bulk and scale that is suitable for the subject site. The below section also aims to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard in order to allow for a better planning outcome (which is in line with the proposed LEP changes).

Exceptions to development standards request (Clause 4.6 variation request)

The proposed development does not comply with Clause 4.3 (2) of the LEP in respect to the fact that the height exceeds the maximum allowable amount by 0.38m, with the proposed development having a height of 8.88m. The non-compliance results in a 0.38m variation request to the maximum allowable building height. Therefore, a Clause 4.6 variation is required as an exception to the LEP development standards. The proposed variation is of a minor nature and is mainly non-compliant due to the flood impacts that constrain development on the lot, which imposes a floor level nearly 1m above NGL and highly constrains the roof design at the front of the house. Due to the existing flood risk, it is asserted that the proposed dwelling is suitably designed and will not protrude above the existing tree canopy line, will not protrude above adjacent 1 and 2 storey buildings and does not visually break the level of the skyline by protruding above the ridgelines around the site. Therefore, the surrounding views, overshadowing, privacy and public amenity would not noticeably be improved with a complaint building height of 8.5m. Greater earthworks in order to lower or alter the ground level are not seen to be advantageous in this instance due to the characteristics of the site, its existing flood risk conditions and how the proposal will be integrated with the surrounding built form and environmental features. And in this case, it is considered that a breach in height is more advantageous than excessive cut in order to

achieve a building with a floor level that is safe for residents during flood events. The existing vegetation along the site boundaries will also provide relief and basically do not allow the building to be seen from public domain. The parts of the proposed building which exceed the 8.5m in height are highlighted below and are seen as minor in nature and will not result in additional detriment or amenity impacts to adjoining landowners or environment.

It is asserted that the proposal will not cause any adverse impacts on the surrounding locality. It is noted that the proposal complies with all other remaining controls under the LEP, such as: minimum lot size, FSR, local provisions, architectural roof features, preservation of trees, and earthworks. Additionally, the proposal complies with landscaping requirements, deep soil planting zone requirements, private open space requirements and the majority of setback requirements in the DCP. Strict compliance with the building height control under Clause 4.3 of the LEP would be unnecessary and unreasonable in this case, as a reduced height as a reduced compliant height of 8.5m (reduced height of 0.38m) would not result in a noticeable change in relation to the overall site plan in terms of building bulk, height, scale and how the development is presented to the public domain. However, compliance with the 8.5m requirement may potentially result in reduced amenity for residents and building being lowered too much is not a desirable outcome due to issues related to inundation, infiltration of water, mould, and safety concerns such as the potential for electrical equipment to be in contact with water.

It is affirmed that the proposed development will not adversely impact on the amenity of the streetscape, will not increase building dominance and bulk, will not affect residential amenity of any surrounding development in terms of visual and acoustic privacy, overshadowing, access to views or bulk dominance. The proposal is also considered line with the surrounding built form and streetscape, and the proposed dwelling house was designed to combine rich mixture of architectural style, together with a highly articulated modern and efficient building which will add to the quality of the streetscape and sense of place of the locality. Therefore, the proposal it is seen to meet the desired future character of the locality. Given the nature of the proposed development and variation permitted for the adjoining development, the proposal is considered fully compatible with the desired future character of this locality.

Based on the non-compliance with the height controls, and the significant non-compliance of the adjoining development, the proposal should be fully supported as it is a technical non-compliance where the proposal will sit well within the locality and provide a built form, scale and bulk that is compatible with existing residential developments in the surrounding. The proposal is therefore seen to meet the objectives of Clause 4.3 and Clause 4.6 of the LEP. Based on the above, it can be determined that there are sufficient environmental planning grounds to justify the exception to the height limit of the LEP. Accordingly, Council's agreement is sought to the proposed variation to the maximum allowable building height that applies for the subject site.

Conclusion

It is considered that the proposed Clause 4.6 variation request to vary the height is appropriate for the subject site. The variation request is not expected to have any adverse impacts on the surrounding natural or built environment, and is seen to meet the objectives of Clause 4.3 and Clause 4.6 of the LEP. It is considered that there would be no public benefit in refusing the proposed height variation request in order to ensure that full compliance with the maximum height control is achieved. Ultimately the proposal complies with the intent and design objectives of the relevant planning controls and represents ongoing investment in the area. For these reasons it is seen that there are sufficient environmental planning grounds to justify the exception to the height limit of the LEP with the proposed Clause 4.6 variation request.