

## Clause 4.6 Exceptions to Development Standards – Height of Buildings

### 3 Lauderdale Avenue Fairlight

#### 1. Introduction

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) 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 Manly LEP 2013 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.*

**Commencing on 1 November 2023** Clause 4.6(3) and (4) of the NSLEP 2013, state that development consent, that contravenes a development standard, must not be granted 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 the contravention of the development standard.*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **2. Environmental Planning Instrument Details (Manly LEP 2013)**

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

Manly Local Environmental Plan 2013

### **2.2 What is the zoning of the land?**

C4 – Environmental Living

### **2.3 What are the objectives of the zone?**

- *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 protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

### **2.4 What is the development standard being varied?**

Cl. 4.3 - Height of Buildings

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

Cl. 4.3 of the Manly Local Environmental Plan 2013

### **2.6 What are the objectives of the development standard?**

*(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,*

*(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.

## 2.7 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 8.5m.

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

The development proposes a maximum building height of 9.1 metres, a numerical variation of 0.6 metres or 7.1%.

The resulting development is of a consistent scale to the neighbouring dwellings to the west and is of a significantly lesser scale than the large 15 storey residential flat building to the east.

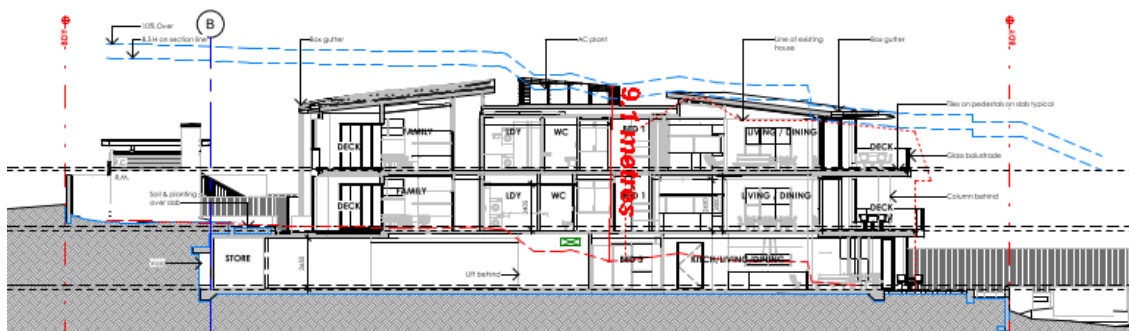


Figure 1. Plan Extract: Long Section – Maximum building height



**Figure 2. 3D Height Plane demonstrating very minor variation**

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

The development proposes a numerical variation of 0.6 metres or 7.1%.

### 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 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.

### **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.

### **3.5 Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.



## 4. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 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:

### 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 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,*

Consistent. The majority of the proposed building presents within the permitted height and building envelope, as illustrated above. The minor variation applies to a small section of the roof and results from the slope of the site.

The resulting development presents with an appropriate 2 storey scale to the street and is of a consistent scale to the neighbouring dwellings to the west and of a significantly lesser scale to the large 15 storey residential flat building to the east.

It is considered this objective is met, despite the numerical variation.

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

Comment

Consistent. The resulting development presents with an appropriate 2 storey scale, addressing the Lauderdale Avenue street frontage and a 3 storey scale to Fairlight Walk. The apparent bulk

and scale is of a consistent scale to the neighbouring dwellings to the west and is of a significantly lesser scale than the large 15 storey residential flat building to the east, as such it considered this objective is met, despite the numerical variation.

*(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),*

#### Comment

A site visit has been undertaken and it is considered the proposed development will have no impact on views from surrounding properties, as no views are obtained across the subject site.

It is therefore considered this objective is met, despite the numerical variation.

*(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,*

#### Comment

The proposed numerical variation to the building height control does not result in any unreasonable solar access impacts to adjoining dwellings or the Fairlight Beach foreshore area.

The shadow diagrams provided with this application conclude that the private open space and living room windows of No. 3A Lauderdale Avenue will be unaffected by the proposed development. The west facing balconies at No. 1 Lauderdale Avenue will experience a minor increase in shadowing at 3pm only, retaining existing, compliant solar access at 9am and 12pm. In addition, there will be no unreasonable overshadowing of the foreshore as the works will result in a relatively equal increase and decrease in shadowing at 12pm only on 21 June.

Given that compliant solar access is achieved, despite the height variation sought, it is considered the underlying objective of this clause has been satisfied.

*(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.*

#### Comment

The subject site is located in the C4 – Environmental Living zone. As described above the development will result in a 2 and 3 storey built form, consistent with the neighbouring dwellings to the west and of a significantly lesser scale than the large 15 storey residential flat building to the east.

The development necessitates the removal of a fig and silky oak tree as well as other minor vegetation as detailed and supported in the accompanying arborist report. New landscaping and plantings are proposed, as detailed in the landscape plan provided with this application. Banksia trees along the southeastern boundary are retained and the design has been careful to ensure that the Melaleuca on the footpath is not impacted by the proposal.

As all works are located within the subject site, it is considered there will be no impact on the adjoining foreshore area.

***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.

#### **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. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*. In particular:

##### **Context**

- The area surrounding the subject site has a wide range of residential densities, including 1-2 storey detached residential dwellings, 2-6 storey residential flat buildings and 1-3 storey semi-detached dwellings. A large 15 storey apartment building is located on the adjoining lot to the east of the site.
- The proposed residential flat building has been designed to remain consistent with the character of the locality, despite the variation to height, through design, architectural features and complimentary materials and colour choices.
- The numerical height variation proposed is considered minor at 0.6 metres or 7.1%, with the majority of the building presenting within the permitted height and building envelope,
- Variation to the Manly LEP 2013 Cl. 4.3 Building Height control has been the subject of recent precedent for the following developments:
  - DA2024/1639 – 32 Bower St Manly, Height Variation 17.1%,
  - DA2024/1427 – 14 Bareena Drive Balgowlah Heights, Height Variation 4.7%,
  - DA2024/1391 – 63 Francis Street Manly, Height Variation 8.23%,
  - DA2024/1205 – 85 Addison Road Manly, Height Variation 9.29%,
  - DA2024/0908 – 72 Frenchs Forest Road Seaforth, Height Variation 7.1%,
  - DA2024/0915 – 18 Bligh Crescent Seaforth, Height Variation 22.35%.
- The setting and context with similar Height variations recently approved, demonstrates that a varied building height is reasonable and that it is consistent with clause 1.3(c) and (d).

### **Future Development**

- The proposed development will allow for the provision of a small residential flat building, comprising of 3 dwellings on the subject site,
- This represents an efficient use of an existing residential lot, with all services readily available on this waterfront site,
- The built form proposed is of a consistent or lesser scale than other buildings in the locality,
- The works do not result in any unreasonable impacts to neighbouring properties.
- The proposed works will not hinder any future development of the lot,
- The alterations proposed demonstrate fulfillment of clause 1.3(a), (b), (c) and (g).

### **Consistent with Zone Objectives**

- The extent of the variation is considered to be in the public interest, as the proposal remains consistent with the objectives of the zone, allowing for the construction of a residential flat building which is permitted in the zone. The bulk and scale proposed is consistent with other dwellings in the locality, as such compliance with the height standard based on this would be unreasonable, with clause 1.3(c) demonstrated as fulfilled.

### **Natural Environment**

- The proposed development allows for the current and future housing needs of the residents to be met, without developing a greenfield site, representing an efficient use of existing developed land,
- The development does not require the removal of any significant native trees and will have minimal environmental impact,
- The natural environment is unaffected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with CI 1.3(b) satisfied.

### **Social and Economic Welfare**

- The variation to the numerical building height control will have a positive social impact, as it will allow for the provision of additional housing on this developed site. It utilises existing services, satisfying CI1.3(b). Accordingly, refusal of the development based on this reason would be unreasonable.

### **Appropriate Environmental Planning Outcome**

- The works proposed do not represent an overdevelopment of the site and satisfies the objectives of the zone and the development standard.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the building height variation.

**Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979***

***Will the proposed development be in the public interest?***

It is considered that the development of a residential flat building on the subject site, does not raise any matters contrary to the public interest.

**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 metres 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.*

## **5. Conclusion**

The proposed development for demolition of the existing dwelling and the construction of a new residential flat building, on land zoned C4 Environmental Living.

As stated above the proposed non-compliance is 0.6m or 7.1%, with the majority of the building presenting within the permitted height and building envelope. The resulting development does not result in any unreasonable impacts, does not present with excessive bulk and remains consistent with other buildings in the locality.

There will not be any unreasonable view loss or solar access impacts and amenity is retained for all neighbours.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation of which have been reasonably satisfied under the provisions of Clause 4.6.

The statement sufficiently demonstrates that compliance with the development standard is both unreasonable and unnecessary in this instance.

The sufficient environmental planning grounds stipulated within this request, demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the height variation.

The proposed variation satisfies the underlying intent of Clause 4.6 and therefore the merits of the proposed variation are considered to be worthy of approval.

## Planner Declaration

### Document Control Table

Document Purpose:	Clause 4.6 Variation Request	
Date	Prepared by	Approved by
31/03/2025	Naomi Lyons Senior Planner	Sarah McNeilly Director

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