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

PROPOSED ALTERATIONS AND ADDITIONS TO EXISTING DWELLING

For: For proposed alterations and additions to existing dwelling
At: 55 Carefree Road, North Narrabeen
Owner: A Williams
Applicant: Peter Princi Architects

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 and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed alterations and additions to the dwelling will see a modification to the roof form, to encompass a rear addition to a roof gable.

The new gable roof form will see a new height of 9.35m above the ground level which exceeds Council's maximum building height by 850mm or 10.0% and therefore does not comply with this control.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

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 increased amenity for its residents.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality. The variation will not be visible from the street.

Notwithstanding the non-compliance with the maximum overall height, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The new roof amendments to the first floor level which will breach the 8.5m height is centrally located and over the southern elevation of the dwelling and by being well clear of the site's perimeter and the adjacent boundaries, will mitigate any adverse impacts of overshadowing and loss of views for any neighbouring properties.

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 the R2 Low Density Residential. The objectives of the R2 zone are noted as:

- *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 and scale, compatible with surrounding land uses.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control (850mm), the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R2 Low Density Residential Area as follows:

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

The proposal provides for complementary alterations and additions to the existing dwelling, including changes to the first floor levels in a manner which will retain the single dwelling character of the site and the immediate area.

The external form of the development is stepped with the sloping topography of the form, which will reduce the visual bulk of the development.

Further, the modulation of the front façade and side elevations, together with the increased side setbacks to the upper level will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and will not be a visually prominent element in the area.

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

The design prepared by Peter Princi Architects has been prepared to meet the client brief, together with ensuring that the visual bulk and overall height of the dwelling is effectively managed.

The design is considered to be an improvement in terms of the building's appearance and visual impact and for these reasons, the development does not result in an adverse impact on the special aesthetic values of the site.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

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 minor 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,

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future character of the locality.

The surrounding area is predominantly characterised by one and two storey development, with the additions to the dwelling to maintain the two story form.

The proposal seeks to accommodate the existing upper level facilities within the existing roof form, just extending it to the rear.

The proposed external colour and materials palette utilises darker finishes to the upper floor level and is intended to ensure that the building's visual height and scale is minimised.

The design by Peter Princi Architects introduces greater modulation to the building, will ensure that the building remains 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 works will see a change to the building's rear roof, which together with other design changes will introduce increased modulation and a recessive materials treatment to the upper floor level will ensure that the dwelling will be compatible with the form and nature of the surrounding development.

(c) to minimise any overshadowing of neighbouring properties,

As the proposal will see the primary changes to the building's height within the centre of the site, the overall bulk and scale of the new works will appropriately maintain the neighbour's amenity and will not see any unreasonable loss of solar access for the subject site and neighbouring properties.

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

Views past the site are generally along the side setback areas.

The proposed roof changes to the first floor level of the dwelling and the new works will not significantly alter the views through or over the site.

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

The site falls away from the street, which presents a challenge to a compliant roof height for the development.

As discussed, the modifications to the existing building which will introduce increased modulation and a recessive materials treatment to the upper floor level to reduce the visual height and bulk of the upper level, which will ensure that the dwelling will respond sensitively to the local topography.

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

The development will not have any direct or adverse impacts on any heritage items of the conservation areas in the wider area.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

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, together with the sloping topography of the site.

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

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:

- The proposed new works are modest in bulk and scale and will maintain consistency with the extent of other residential development in the area. In addition, the proposed roof changes will remove an unsympathetic saw tooth roof style and box gutter which has introduced waterproofing issues for the dwelling. The replacement roof form provides for a simple gable

roof which matches the existing eastern and western elevations of the dwelling. Furthermore, the works are in keeping with the character of the locality.

- The overall bulk and scale of the new works will appropriately maintain the neighbour's amenity and will not see any unreasonable loss of solar access for the subject site and neighbouring properties.

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: Whilst it is not suggested that Council has abandoned its control, variations to the maximum building height control have been granted in the immediate vicinity, where Council has considered it appropriate to do so for development that meets the objectives of the zone. In this instance it is considered that the proposed development appropriately addresses the zone objectives and is worthy of the support of Council.

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 for the subject development.

The proposed alterations and additions to the dwelling will provide a height of 9.35m or an 850mm variation.

The development is justified in this instance for the following reasons:

- The modifications to the existing building are considered to be compatible with the form and nature of the surrounding development.
- The proposal is consistent with the character of development in the locality. The proposal sees the construction of a new skillion roof that will not result in any loss of views for neighbouring sites.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed new work provides for improved amenity, is considered to promote good sustainable design and enhance the residential amenity of the building's occupants and the immediate area, which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

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:

- The proposed new works which exceed the 8.5m height standard are considered to promote good sustainable design and enhance the residential amenity of the buildings’ occupants and the immediate area, which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard
- The proposed minor addition will maintain the general bulk and scale of the existing surrounding detached dwelling and maintains architectural consistency with the current dwelling and the scale of the prevailing development pattern which promotes the orderly & economic use of the land (O 1.3(c)).
- The works are necessary repairs and maintenance which by ensuring the longevity of the building will promote the sustainable management of the built and cultural heritage of the site (O 1.3(f)).

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 to provide a maximum building height of 9.35m.

This variation occurs as a result of the siting of the existing development on site and the sloping topography of the site. The variation is for a very small portion of the rear roof.

This objection to 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.