

Clause 4.6 variation - Height of buildings (clause 4.3 PLEP 2014)
Proposed shop top housing
1749 – 1753 Pittwater Road, Mona Vale

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v Pittwater Council* [2019] NSWCA 130.

2.0 Pittwater Local Environmental Plan 2014

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Pittwater Local Environmental Plan 2014 (PLEP) the height of a building on the subject land should not exceed the height shown on the height of buildings map. In the case of the subject land, the height shown on the map is 13 metres.

The objectives of this standard 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.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

ground level (existing) means the existing level of a site at any point.

I note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 where at paragraphs 73 and 74 O'Neill C found:

73. *The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.*
74. *The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.*

The application proposes the provision of in-fill affordable housing apartments in accordance with the affordable housing height incentive provisions contained within Chapter 2, Part 2, Division 1 Infill affordable housing provisions of State Environmental Planning Policy (Housing) 2021 (Housing SEPP).

Applying the 30% building height incentive results in a maximum building height for development across the land of 16.9m.

In this regard, it has been determined that all habitable floor space and roof forms sit comfortably below the 16.9-metre building height standard, with the building height breaching elements confined to the upper portion of the three lift structures and associated overruns. The largest breach occurs on Lift 2,

which has been extended to the roof level to provide disabled access to the proposed roof-top communal open space.

The development breaches the height standard to varying extents, from 1m (Lift 1 and Lift 3) to 3.1m (Lift 2 and rooftop facilities), representing a maximum breach of 18.3%. The breaching elements are depicted in the following section extract.



Figure 1 – Section F with the 16.9m building height line plotted and non-complying elements highlighted yellow (Source: Gartner Trovato)

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP provides:

- (1) *The objectives of this clause are:*
 - (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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v Pittwater Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of PLEP provides:

- (2) *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.*

This clause applies to clause 4.3, Height of Buildings Development Standard.

Clause 4.6(3) of PLEP provides:

- (3) *Development 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.*

The proposed development does not comply with the height of buildings provision at 4.3 of PLEP, which specifies a maximum building height. However, strict compliance is considered to be both unreasonable and

unnecessary in the circumstances of this case. There are sufficient environmental planning grounds to justify contravening the development standard.

The relevant analysis is set out later in this written request.

3.0 Relevant Case Law

In *Initial Action*, the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law from [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].*

The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of PLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard

4.0 Request for variation

4.1 Is clause 4.3 of PLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 prescribes height provisions that relate to certain development. Accordingly, clause 4.3 is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

The first way, which has been adopted in relation to all objectives, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: The property is located within the Mona Vale Locality. The desired future character of the locality is described as:

The Mona Vale locality will contain a mix of residential, retail, commercial, industrial, recreational, community, and educational land uses.

Existing residential areas will remain primarily low-density with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancies will be located on the valley floor and lower slopes that has less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities.

Retail, commercial and light industrial land uses will be employment-generating. The Mona Vale commercial centre status will be enhanced to provide a one-stop convenient centre for medical services, retail and commerce, exploiting the crossroads to its fullest advantage and ensuring its growth and prosperity as an economic hub of sub-regional status. The permissible building height limit is increased to promote economic growth within the centre. The Mona Vale Hospital, as a regional facility servicing the Peninsula, is an essential part of the future local economy.

Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the Mona Vale commercial centre will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

Light industrial land uses in Darley and Bassett Streets will be enhanced as pleasant, orderly, and economically viable areas.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, and to enhance wildlife corridors.

Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. Improved public transport, pedestrian accessibility and amenity, carparking and an efficient surrounding local network will support the commercial centre, moving people in and out of the locality in the most efficient manner. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.

In accordance with the Mona Vale desired future character statement the building, with the exception of the lift overruns and facilities associated with the roof top communal open space, is compliant with the 16.9 metre height of buildings development standard and appropriately responds to the topographical characteristics of the site through the provision of a stepped floor plate design.

The proposed design appropriately responds to the site's flood affection while providing a development of exemplary design quality that will positively contribute to the Pittwater Road and Bungan Lane streetscapes and the wider locality.

Given the flooding affectation along Pittwater Road and the necessity to have floor levels above the Flood Planning Level the desired future character must anticipate buildings with elevated ground floor levels with the possibility of exceeding the height standard to achieve the orderly and economic use and development of the land.

The height, design, scale and treatment of the proposed development are compatible with that anticipated in this precinct, as reflected by recent approvals. External materials and finishes will be consistent with the colours and materials anticipated in the locality.

The design, scale, and treatment of the proposal reflect the prominent position of the site through building design and landscaping and principles of good urban design. The site is conveniently located within the Mona Vale commercial centre, within immediate proximity of public transport and community facilities, and is supported by adequate infrastructure. In this regard, the development is consistent with the desired future character of the Mona Vale Locality notwithstanding the non-compliance with building height.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: The findings of Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 are relevant in this instance:

There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

The size of the development is consistent with the surrounding approved and/or constructed development and anticipated development.

The protruding elements, including the lift overruns and the facilities associated with the communal rooftop area, will not be readily perceived from the public domain.

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building form will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

In this regard, I note that the building height breaching elements are limited to the lift overruns and the structures needed to provide disabled access to the proposed roof top communal open space. As the building presents to Pittwater Road and Bungan Lane, the eastern and western parapets comply with the 16.9 metre building height standard. The central location of the lift shafts and rooftop communal open space, ensures that they will not be readily discernible in a streetscape context and will not in any measurable manner contribute to unacceptable building height, bulk or scale. The overall height, bulk and scale the building as viewed from Pittwater Road and Bungan Lane is entirely consistent with that established by surrounding development including the Council carpark to the southwest of the site.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, I have formed the considered opinion that most observers would not find the height or bulk of the proposed development offensive, jarring or unsympathetic in the streetscape context.



Figure 2 – Photomontage of the proposed development as viewed from Pittwater Road (Source: Gartner Trovato)

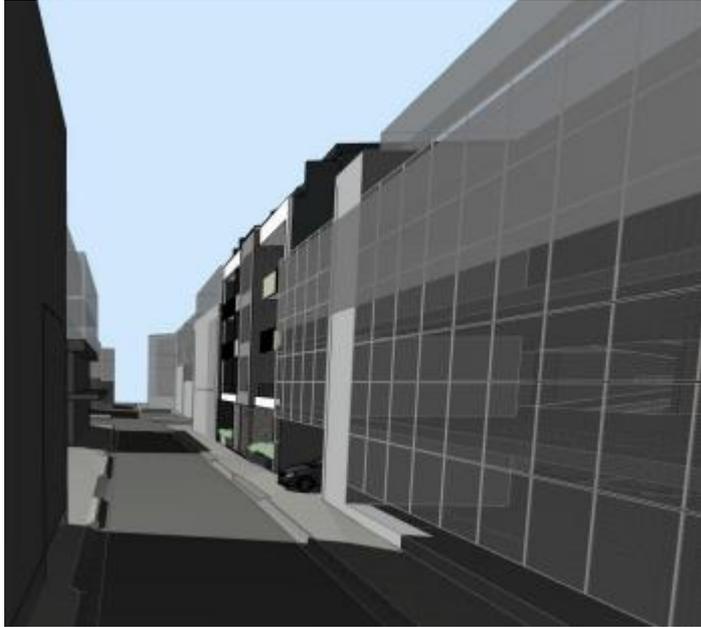


Figure 3 – Photomontage of the proposed development as viewed from Bungan Lane (Source: Gartner Trovato)

Notwithstanding the building height breaching elements, the resultant development is compatible with the height and scale of surrounding and nearby development and accordingly the proposal achieves this objective.

(c) to minimise any overshadowing of neighbouring properties,

Comment: The accompanying shadow diagrams demonstrate that the building height breaching elements will not cast any shadowing on the adjoining property to the north with associated shadowing falling onto the roof of the proposed development.

The location of the proposed lift overruns minimises/ prevents any overshadowing of neighbouring properties, and accordingly, this objective is satisfied notwithstanding the non-compliant building height breaching elements.

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

Comment: Upon review of the site and its surrounding context, there do not appear to be any view corridors obtained over the subject site, and certainly not to the extent that the non-compliant building height elements will give rise to unacceptable public or private view affectation. A view-sharing outcome is maintained.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: A factor of the proposed building height is the hazard flood affectation affecting the site's frontage. The proposed development has been sensitively designed to balance the competing factors of developing above the flood planning level (FPL) whilst providing street activation with retail presenting to Pittwater Road and high-quality residential development above.

The building height breaching elements do not themselves require excavation or modification of the landform.

Notwithstanding the building height breaching elements, the proposal is consistent with this objective.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: The proposed areas of non-compliance will not adversely impact the natural environment with no site disturbance directly attributed to the building height breaching elements proposed. The site is not listed as a heritage item or within a heritage conservation area.

The proposed development has been designed with a 5 storey dominant façade, consistent with surrounding and nearby more contemporary development. The lift overruns and structures associated with the communal open space are set back from the site's boundaries and will not be readily perceived from the public domain.

The façade of the development is well articulated, with various materials utilised to ensure that the apparent size of the development is appropriately relieved. Landscaping is proposed in the street setbacks to soften and screen the built form. Overall, the proposed development has been designed to ensure that the visual impact of the development is appropriately minimised, with no adverse impacts upon the natural environment.

This objective is achieved notwithstanding the building height non-compliance proposed.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the height of building standard. Adopting the first option in *Wehbe*, strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

4.2B Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient Environmental Planning Grounds

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

Ground 1 - Minor nature of breach & lack of impact

The building height breaching elements are appropriately described, both quantitatively and qualitatively, as minor. I am satisfied that the building height breaching elements do not contribute to building height or massing to the extent that the overall building will be incompatible with the desired future character of the precinct as anticipated through strict compliance with the applicable in-fill affordable housing incentive provisions, which anticipate buildings having a height and floor space 30% more than the maximum prescribed by the relevant Local Environmental Planning instrument.

I am also satisfied that the building height breaching elements will not give rise to adverse streetscape or residential amenity impacts. Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Ground 2 – Objectives of SEPP Housing

Approval of the building height breaching elements will achieve the objective of the Division 1 in-fill affordable housing provisions within SEPP Housing, which is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low, and moderate-income households (clause 15A).

Ground 3 – Height variation facilitates the provision of communal open space

The size, geometry, orientation and zoning of the land makes the provision of ground level communal open space with appropriate amenity difficult to achieve whilst realising the orderly and economic use and development of the land.

The provision of rooftop communal open space is consistent with objective 3D-1 of the Apartment Design Guide where the design guidance indicates that where development is unable to achieve the design criteria, such as on small lots, sites within business zones, or in dense urban areas should provide communal open space elsewhere such as a landscaped rooftop terrace.

Approval of a building height variation facilitates the provision of well-designed roof top communal open space which receives exceptional levels of solar access between 9am and 3pm on 21st June. The provision of BBQ facilities, a WC and lift and stair access improve the usability of area, with the size and dimension of the communal open space facilitating a range of passive and active recreational activities.

Ground 4 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of height variation will facilitate the provision of rooftop communal open space and, in doing so, promote good design and amenity of the built environment consistent with Objective 1.3(g) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



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