

Clause 4.6 Variation to a Development Standard – Building Height



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VIEW FROM PACIFIC ROAD

New Granny Flat and Garage above, lift and stair to
An Existing Dwelling @

7 Pacific Road, Palm Beach

Prepared For C & M Lamb

project no 2412

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issue A

1.0 INTRODUCTION

This request to vary a development standard has been prepared on behalf of C & M Lamb, owners of the property at 7 Pacific Road, Palm Beach in relation to a development application for a garage and secondary dwelling, with lift and stair connecting to the existing dwelling. The garage and secondary dwelling are considered detached.

This request is made pursuant to clause 4.6 of Pittwater Local Environmental Plan (PLEP 2014) and with regard to relevant case law including 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 North Sydney Council* [2019] NSWCA 130.

2.0 STANDARD TO BE VARIED

The standard in the PLEP 2014 that is proposed to be varied, is Clause 4.3 Height of Buildings.

Clause 4.3 (2) requires *the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map*. The map indicated that the height on any land is not to exceed 8.5m in height. Building Height is defined as:

- a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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:

the existing level of a site at any point.

The stated objectives of such control, Clause 4.3 (1) 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 any adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

3.0 EXTENT OF THE PROPOSED BREACH

The application seeks consent for new work – garage, secondary dwelling, lift and stair to the existing dwelling. The proposal seeks to replace an existing driveway and garage at low level with an elevated garage and driveway off the street and secondary dwelling below the garage. A stair and lift connect the new works to the existing dwelling.

The slope of the land is 43% directly from the road to the bottom of the site and the result of the steep slope is a breach of height. The garage, stair and lift sit above 8.5m above natural ground and below 10m above natural ground. The stair however is located above a small area of excavated ground or *existing ground* and this is the highest point of the proposed structures at 11.04m above ground. This height occurs for a small portion of the structure only.

The proposed maximum height above *existing ground* being the excavated entry terrace, is 11.04m

The breach of 8.5 is consistent through the garage and stair due to the extreme 43% slope. The extent of the breach is 2.54m or 29% of the building height development standard.

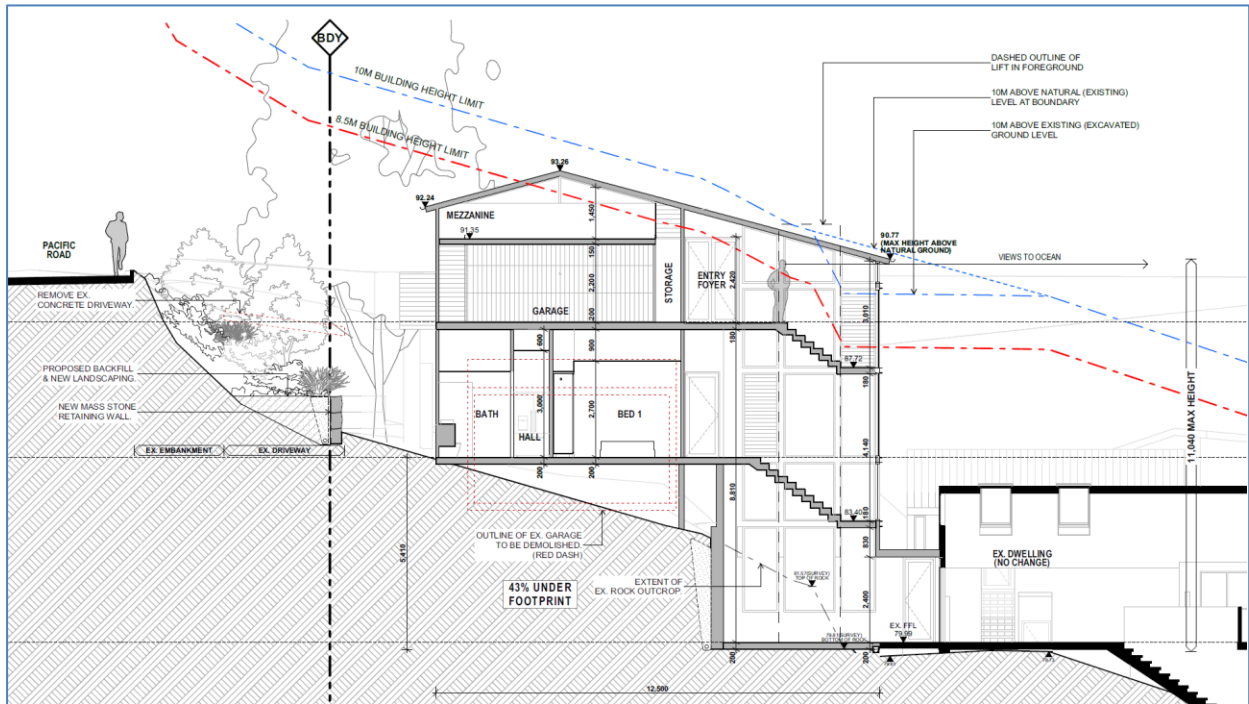


Figure 1. Extract of Section drawing from drawing DA-08

Although the maximum height technically breaches the standard, the dwelling remains consistent with the desired character of the locality and compatible with the height and scale of surrounding and nearby development, satisfying the objectives of the standard.

Figure 2. Streetscape view 3D montage of the proposal in context with surrounding properties



VIEW FROM PACIFIC ROAD

4.0 CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS

The objectives of Clause 4.6 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.*

Reference is drawn to the court precedent of *Initial Action* where the conclusion was that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operation provisions.

Pursuant to clause 4.6(2) 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 the clause 4.3 Height of Buildings Development Standard

Clause 4.6(3) states 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.*

The proposed development does not comply with the height of buildings development standard at clause 4.3 of PLEP 2014 which specifies a maximum height of 8.5m. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) states.... "*consent must not be granted for development that contravenes a development standard unless:*

- a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- b) *the concurrence of the Planning Secretary has been obtained.*

Reference is drawn to *Initial Action* for 4.6a)(i), where the test of unreasonable or unnecessary, and sufficient environmental planning grounds, are dealt with below in section 5 of this report.

Reference is further drawn to *Initial Action* for 4.6a)(ii), where the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development in the zone, also dealt with in section 5 of this report.

In terms of satisfying clause 4.6 (4)b), we refer to section 5 of this report.

The remaining clauses 4.6 (5) through (8) are not relevant to this application.

5.0 REQUEST FOR VARIATION

Unreasonable or Unnecessary

Clause 4.6 (3)a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstance.

In accordance with the decision of the NSW LEC in the matter of *Wehbe v Pittwater Council* [2007] NSWLEC 827, one way in which strict compliance with a development standard may be found to be unreasonable or unnecessary is if it can be demonstrated that the objectives of the standard are achieved, despite non-compliance with the development standard. The proposed development is consistent with the objectives of the Building Height development standard, as prescribed by clause 4.3 of PLEP 2014, as follows:

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

Comment: The non-compliance arises as a consequence of extreme slope of the land. The proposed development is limited to a maximum of two storeys in height as it steps up a sloping site and maintains a building below the tree canopy. The proposal achieves this outcome.

- *to ensure that buildings are compatible with the height and scale of surrounding and nearby development*

Comment: The non-compliance has no impact on the ability of the proposal to be compatible with surrounding development. The elevation from the south side boundary in figure 3 below shows how the proposal is consistent with the height and scale of surrounding two storey development.



Figure 3. South elevation from 5 Pacific Road – two storey presentation

- *To minimise any overshadowing of neighbouring properties*

Comment: The proposal has no additional overshadowing to the neighbouring properties to living areas of private open space as demonstrated in the shadow diagram drawings.

- *to allow for the reasonable sharing of views*

Comment: Views to all properties to the Pacific Ocean to dwellings on the opposite side of the street and adjoining sites are maintained with no affect due to height. The proposed garage has a low 3m height from the road and occupies only 40% of the frontage, maintaining public views through the site across the driveway to the ocean view to the north east (figure 4 below).

Figure 4. View to the north east to Pacific Ocean



The objective is satisfied notwithstanding the non-compliance with the building height development standard.

- *to encourage buildings that are designed to respond sensitively to the natural topography,*
Comment: The proposed development achieves the objective with a design that blends into the built form of the surrounding area and has no affect on the scenic quality of the coastal and bushland setting. As the proposal contains the structure below the tree canopy, there is no loss of vegetation or bush environment.

The objective is satisfied notwithstanding the non-compliance with the building height development standard.

- *to minimise any adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*
Comment: The proposed development achieves the objective with a design that improves landscaped settings by building over the existing footprint and enhancing surrounding natural areas. There are no heritage conservation areas or heritage items in the vicinity of the proposal.

The objective is satisfied notwithstanding the non-compliance with the building height development standard.

As demonstrated above, the proposal achieves the objectives and as such, strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of this case.

Sufficient Environmental Planning Grounds

Clause 4.6 (3)b) requires demonstration that there are sufficient environmental planning grounds to justify contravention of the standard. These grounds are as follows:

1. Extreme Slope of Land.

The proposed height breach is a direct consequence of the extreme slope of 43% of the land. As demonstrated in Figure 1, the proposed roof is sloped to minimise height breach by following the slope of the land just above the 8.5m height plane to natural ground. The maximum height is only created above 10m due to existing excavated terrace levels to the front entry to the existing dwelling.

Consistent with the findings of Commissioner O'Neill in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the prior excavation within the building footprint that distorts the height of buildings development standard plane can be properly described as an environmental planning ground within the meaning of clause 4.6(3)(b) of the LEP.

2. Superior Architectural Design

The apparent size of the proposed development will be compatible with dwellings in the visual catchment of the site, which features a number of buildings of significantly greater bulk and scale, by way of the low 3m height of the garage as presented to the public interface of Pacific Road. The building is of high design quality with the variation facilitating a building height that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act. The variation also provides and improved accommodation and safety for vehicular parking to comply with the council policy, as against the current situation that has parking on an elevated platform within the road reserve for only one car.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic as seen from adjoining properties or as viewed from the waterway. The proposed development is compatible with other development in the visual catchment of the site, and the character of the wider C4 Zone.

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

Public Interest

Clause 4.6 (4)a) requires that consent must not be granted to a proposal that contravenes a development standard unless the proposed development will be in the public interest. A development can be considered in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

As identified above, the proposed development is consistent with the objectives of the foreshore building line development standard. The following commentary demonstrates that the development is also consistent with the objectives of the C4 zone:

- *to provide for low-impact residential development in areas with special ecological, scientific or aesthetic values*
Comment: The proposal is low impact and in a landscaped setting. There are no identified special values to the site. The proposal achieves this objective.
- *To ensure that residential development does not have an adverse effect on those values*
Comment: The proposed works will not impact the values of the area.
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
Comment: The proposal will retain the low density character with a single dwelling. The scale of the dwelling is entirely consistent with the landforms and adjoining development and increases the landscaped area on site from the existing dwelling, improving the amenity of landscape on site

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*
Comment: The proposal retains bushland areas and has a landscape ratio well in excess of the council minimum and achieves this objective.

Council can be satisfied that the proposal is in the public's interest, in so far as it is consistent with both the objectives of the zone and the objectives of the Height of Buildings standard.

Secretary's Concurrence

Pursuant to clause 4.6(4) of PLEP 2014, development consent must not be granted to a development that contravenes a development standard unless the concurrence of the Secretary has been obtained.

In terms of satisfying clause 4.6 (4)b), advice is provided by the Department of Planning, Industry & Environment by letter dated 2 November 2021;

Development applications for Class 1 buildings (single dwelling houses) with a Clause 4.6 variation greater than 10% to building height within the Warringah Local Environment Plan 2011, Manly Local Environment Plan 2013 and Pittwater Local Environment Plan 2014 and floor space ratio under the Manly Local Environment Plan 2013, may be determined by Council staff under delegation in accordance with Council procedures

6.0 CONCLUSION

Pursuant to clause 4.6 of PLEP 2014, the consent authority can be satisfied that this 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 we have submit that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.



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