

Appendix B Clause 4.6 variation request – building height

Request for exception under clause 4.6 of Pittwater Local Environmental Plan 2014
to clause 4.3(2) of Pittwater Local Environmental Plan 2014

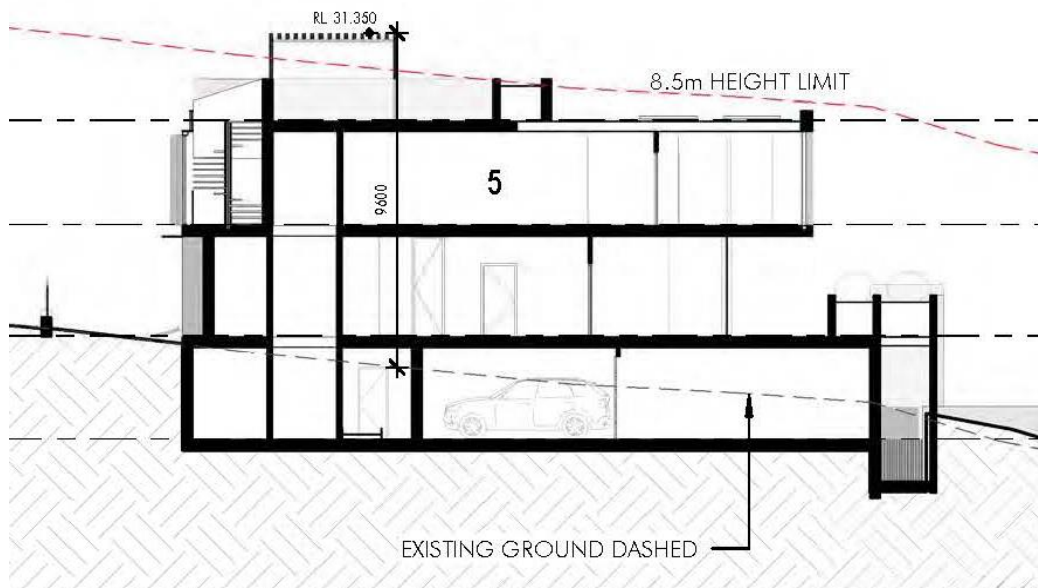
Premises: No. 60-62 Beaconsfield Street and 7-13 Queens Parade, Newport

Proposal: Demolition of existing structures and construction of a multi dwelling housing development comprising 18 x 3-bedroom dwellings.

Control: Building height

Clause 4.3(2) of PLEP 2014 permits a maximum building height of 8.5m.

The proposal generally complies with this control. However, the proposal incorporates sun control structures over the proposed roof terraces and some of these structures breach the control by up to 1.1m (as shown on drawing DA055), representing a variation of 12.9%. These structures also provide solar electricity generation for the proposed dwellings.



Extract from drawing DA055 showing the maximum extent of the breach of the building height control.

Introduction:

Clause 4.6(1) of PLEP 2014 states:

(1) The objectives of this clause 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.*

To utilise the flexibility provided by clause 4.6 of PLEP 2014 it is necessary for the applicant to demonstrate:

- (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.*

In addition, Council must be satisfied that:

- (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.*

In exercising delegation from the Director-General of the Department of Planning, Council must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

This clause 4.6 request has been structured in accordance with the approach adopted by the Court in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46 and also considers the ways in which a SEPP 1 objection can be sustained as listed in *Webhe v Pittwater Council* [2007] NSWLEC 827 at [26]. Consideration has also been given to demonstrating that there are sufficient environmental planning grounds to justify contravening the standard as discussed in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and to the guidance provided in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

1. Is the planning control in question a development standard?

Clause 4.3 of PLEP 2013 is attached as Appendix B1.

The definition of “*development standards*” in Section 4(1) of the *Environmental Planning and Assessment Act 1979* is attached as Appendix B2.

Clause 4.3(2) is a development standard as it fixes a requirement for the height of a building.

2. What is the underlying object or purpose of the standard?

The underlying objects of the standard are stated in clause 4.3(1) to be:

- (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.*

3. Is compliance with the development standard consistent with the objectives of clause 4.6?

- Compliance would necessitate an inflexible application of the development standard in circumstances where the development otherwise satisfies the objectives of the control.

4. Does non-compliance with the development standard raises any matter of significance for State or regional environmental planning?

No.

5. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Compliance with the development standard is unreasonable and unnecessary for the following reasons:

5(a). Achievement of the underlying objectives of the standard

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
 - The proposal has a height and scale that reflects the controls that apply. The area is characterised by a variety of housing types and the proposal contributes to this variety. The consistency with the desired future character of the Newport locality is discussed in detail in the Statement of Environmental Effects.
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
 - The site is located in an area with a mix of surrounding development including dwelling houses, apartment buildings and commercial

development. The proposal has been designed to sit comfortably within this context. Particular care has been taken to ensure that the development provides appropriate transitions to neighbouring developments in terms of setbacks and scale.

(c) *to minimise any overshadowing of neighbouring properties,*

- The proposal has been designed to minimise overshadowing of neighbouring properties. All neighbouring properties retain sunlight to their living areas for in excess of 3 hours in midwinter as required by P21 DCP. The proposal has minimal impact on solar access to neighbouring private open space, noting that the rear yard of 58 Beaconsfield Street is currently overshadowed for most of its area in midwinter by existing structures and large trees.

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

- The site analysis has not identified any significant views currently enjoyed by neighbouring and nearby residents that will be affected by the proposal.

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

- The development steps down the slope of the land from Queens Parade to Beaconsfield Street and also along the street frontages to reflect the natural topography of the land.

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

- The development has been designed around existing canopy trees on the site with generous internal areas retained. The recommendations of the consulting arborist have been incorporated into the design and can be enforced by condition through the construction phase. Proposed landscaping will enhance the natural environment. The site does not contain a heritage item and is not within a heritage conservation area.

5(b). Is the standard relevant to this development?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(c). Would the underlying objective be defeated or thwarted if compliance was required?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(d). Has the development standard been abandoned or destroyed by Council's own actions?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

5(e). Is the zoning of the particular land unreasonable or inappropriate?

The applicant does not rely upon this method of demonstrating that compliance with the development standard is unreasonable or unnecessary.

6. Are there sufficient environmental planning grounds to justify varying the development standard?

Yes. The variation to the control is to enable the installation of roofing over the principal private open spaces (roof terraces) of the proposed dwellings which will provide two significant benefits.

Firstly, it will improve the amenity of the roof terraces for the future residents of the building by providing a sense of enclosure and weather protection. This will enhance the usability of the roof terraces and ensure that they achieve the objectives of Council's controls for private open space.

Secondly, the roofing structures will enable the installation of solar electricity generating panels that will enhance the environmental sustainability credentials of the development.

When considering that the proposed roofing structures will not have negative impacts in terms of privacy, views or solar access for neighbouring and nearby properties, the benefits listed above provide sufficient environmental planning grounds to justify varying the development standard.

7. Are there any other matters to consider before agreeing to the exception?

Yes. Senior Commissioner Moore in *Chidiac v Mosman Council* [2015] NSWLEC 1044 drew attention to the requirement in clause 4.6(b)(ii) of MLEP 2011 (which is the same as clause 4.6(b)(ii) of PLEP 2014) and that it is necessary to demonstrate that the proposal will satisfy the objectives for the site coverage control and for the R3 Medium Density Residential zone to demonstrate that the requirement that the proposal be in the public interest has been met.

In this regard, the objectives for the R3 Medium Density Residential zone are:

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

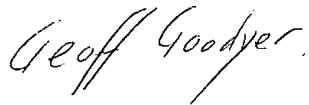
The proposal is consistent with these objectives for the following reasons:

- ✓ It provides for the housing needs of the community within a medium density environment.
- ✓ It enhances the variety of housing types and densities in the area.

[Note: The other zone objective is not relevant to this proposal.]

8. Is the exception request well founded?

For the reasons given above the exception request is considered to be well founded.



Geoff Goodyer
14 November 2019

Appendix B1

Clause 4.3 of PLEP 2014

4.3 Height of buildings

- (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.
- (2) 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.
 - (2A) Despite subclause (2), development on land -
 - (a) at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and
 - (b) that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map,may exceed a height of 8.5 metres, but not be more than 8.0 metres above the flood planning level.
 - (2B) Despite subclause (2), development on land—
 - (a) at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and
 - (b) that has a maximum building height of 11 metres shown for that land on the Height of Buildings Map,may exceed a height of 11 metres, but not be more than 10.5 metres above the flood planning level.
 - (2C) Despite subclause (2), development on an area of land shown in Column 1 of the table to this subclause and identified as such on the Height of Buildings Map, may exceed

the maximum building height shown on the Height of Buildings Map for that land, if the height of the development is not greater than the height shown opposite that area in Column 2.

Column 1	Column 2
Area	Maximum height above the flood planning level
Area 1	11.5 metres
Area 2	8.5 metres on the street frontage and 10.5 metres at the rear
Area 3	8.5 metres
Area 4	7.0 metres

- (2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if—
- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
 - (b) the objectives of this clause are achieved, and
 - (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
 - (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.
- (2E) Despite subclause (2), development for the purposes of shop top housing on land identified as “Area 5” on the Height of Buildings Map may have a height of up to 10 metres if the top floor of the building is setback a minimum of 6 metres from the boundary to the primary street frontage.
- (2F) Despite subclause (2), development on land identified as “Area 6” on the Height of Buildings Map must not exceed 8.5 metres within the area that is 12.5 metres measured from the boundary of any property fronting Orchard Street, Macpherson Street, Warriewood Road or Garden Street.
- (2FA) Despite subclause (2), the maximum height for a secondary dwelling or a rural worker’s dwelling in Zone E4 Environmental Living or Zone RU2 Rural Landscape is 5.5 metres if the secondary dwelling or rural worker’s dwelling is separate from the principal dwelling.
- (2FB) Despite subclause (2), in the case of a dual occupancy (detached), the maximum height for the dwelling that is furthest back from the primary street frontage of the lot is 5.5 metres.
- (2G) In this clause—

flood planning level means the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metres freeboard, or other freeboard determined by an adopted floodplain risk management plan.

floodplain risk management plan has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0), published in 2005 by the NSW Government.

Appendix B2

Definition of “development standards”

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.