



Corona Projects

ABN: 33 122 390 023

Suite 106, L1, 35 Spring Street, Bondi Junction, 2022

PO Box 1749 Bondi Junction NSW 1355

Ph: 0419 438 956

Email: info@coronaprojects.com.au

23 November 2020

The General Manager
Northern Beaches Council
1 Belgrave Street
MANLY NSW 2095

Dear Sir/Madam,

89 Cutler Road, Clontarf

Clause 4.6: Exceptions to Development Standards

Height of Buildings (Clause 4.3) – Manly Local Environmental Plan 2013

1. Introduction

Clause 4.3 of Manly Local Environmental Plan (MLEP) 2013 relates to the maximum **building height** requirements and states that “the maximum building height for a building on any land is not to exceed the building height shown for the land on the Height of Buildings Map”. The Height of Buildings map stipulates that the maximum building height for 89 Cutler Road, Clontarf is 8.5m.

The architectural plans submitted with the Development Application at 89 Cutler Road, Clontarf for the “alterations and additions to dwelling house” indicate that the proposed development has a building height of 10.646 metres, resulting in a 20% variation to the development standard and non-compliance of 2.14 metres.

The height variance is related to the topography of the site falling from Cutler Street (RL 28.61) towards the rear existing ground level (RL 17.814) of the site by approximately 10.796 metres. More specifically, the northern elevation from ground level to the proposed roofline is 8.062 metres, and the southern elevation will remain 10.646 metres in height as per existing due to the sloped topography of the site. The height of the proposal is 0.76 metres lower in height to the existing ridge line, therefore will not result in discernible view loss, bulk, overshadowing or other impact for the adjoining neighbours and surrounding locality.

The proposal is of a reasonable scale and provides a high quality and durable dwelling house development which assists to meet the high demand for spacious housing in the Clontarf locality. The development is commensurate in scale and character with other properties in the streetscape, and

meets the objectives behind every Manly Development Control Plan 2013 control. The variation results in the substantial increase in amenity for the subject site without producing any adverse impacts on the privacy, solar access and overall amenity of surrounding properties.



Figure 1 – Existing rear façade of the property to be maintained.

2. Clause 4.6

An application to vary a development standard can be made under Clause 4.6 of MLEP 2013.

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,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6(3) specifies that:

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.

Clause 4.6(4) specifies that:

Development 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 Secretary has been obtained.

These matters are considered below.

3. Justification of proposed variance

Samadi v Council of the City of Sydney [2014] NSWLEC 1199 provides jurisdictional guidance on the assessment of variations under Clause 4.6.

Paragraph 27 of the 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)(iii)). 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)).'

4. Precondition 1 – Consistency with zone objectives

The land is located in the E3 – Environmental Management zone under the Manly Local Environmental Plan 2013.

The objectives of the zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that 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.*

The development is compatible with the zone objectives as the proposed alterations and additions to the dwelling house it increases the amenity of the property and meet day to day needs of the residents, with respect to the existing streetscape and vegetation surrounding the site. The proposed development recognises the desirable elements of the existing streetscape and built form by proposing a contemporary renovation to the existing dwelling house of a height, bulk, and scale commensurate with emerging contemporary built forms in the immediate locality. The proposal is designed in a manner that will contribute to the desired future character of the area and does not dominate the natural scenic qualities of the foreshore.

The variation to the maximum building height does not render the development incompatible with the zone objectives, in accordance with the approach of the former Chief Judge, Justice Pearlman in *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21, in Paragraph [27]:

‘The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.’

5. Precondition 2 – Consistency with the objectives of the standard

The objectives of the maximum building height as specified in Clause 4.3 are:

- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,*
- (b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*
- (c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*

The variation is supportable in relation to the aforementioned objectives.

Objective (a) – The development results in no unreasonable adverse impacts on adjoining properties. The development does not impact any neighbouring residential developments in relation to solar access or privacy. There is no view loss impact. Subsequently the development does not detract from the desired future character of the locality.

Objectives (b) and (c) – The proposal is considered compatible with its context as:

- The development is consistent with the height, scale and character of development in the locality. The bulk and scale of the development is reasonable and does not visually dominate neighbouring properties.
- The proposed 20% variation from the maximum building height is reasonable in comparison to nearby sites. The below table demonstrates that properties within the same locality who exceed their maximum building height, as stipulated by Clause 4.3 of the MLEP 2013. This highlights that the area is characterised by similar densities to that of the proposal.

Site address	Extent of Variation from Maximum Building Height
59 Cutler Road, Clontarf	7%
3 Alma Street, Clontarf	29%
404 Sydney Road, Balgowlah	44.80%
8 Alma Street, Clontarf	9.40%
43 West Street, Balgowlah	20.70%
14A Beauty Street, Balgowlah Heights	8.20%

1-3 Amiens Road, Clontarf	27.60%
77 Cutler Road, Clontarf	5.59%
43 Peronne Avenue, Clontarf	20.40%
88 Cutler Road, Clontarf	11.70%
22 Amiens Road, Clontarf	23.50%
13 Sandy Bay Rad, Clontarf	11.30%

Table 1 – Nearby properties with approved maximum building height variation. Information derived from the Planning Register (2016 – 2020) available on Northern Beaches Council's website.

The proposed height is considered to be consistent with other approved dwelling houses with the locality on sloping sites which exceed the height limit. The non-compliance of 2 metres in height is attributed to the sloping topography of the site which contains a cross fall. Notwithstanding the prescribed height requirement of 8.5 metres, the proposed height of 10.6 metres results in a building height which is generally consistent with the prevailing building height of dwellings within the locality. Despite the numerical variation, the objective of this clause to control the bulk and scale of the development has been achieved.

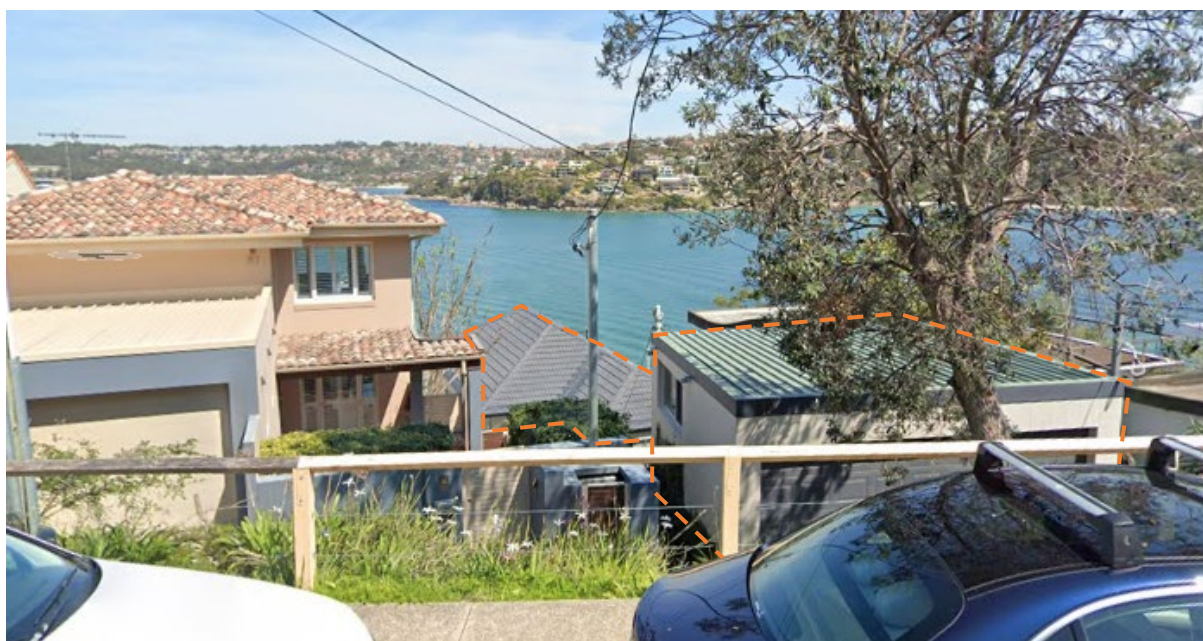


Figure 2 - View overlooking subject site from Cutler Road. It is considered that the views are retained for adjoining properties as the proposed roof will be lower in height to the existing. (Google Maps, 2018)

6. Precondition 3 – To consider a written request that demonstrates that compliance with the development standards is unreasonable or unnecessary in the circumstance of the case.

Wehbe vs Pittwater Council [2007] NSWLEC 827 establishes the five-part test for determining whether strict compliance with the development standard is deemed unnecessary or unreasonable. These five ways have recently been re-emphasised in the *Four2Give Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 cases, by Commissioner Morris in *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312 and by Commissioner Tuor in *Moskovich v Waverley Council* [2016] NSWLEC 1015. This approach has recently been upheld in the case of *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386. An appeal on a point of law against this decision by Randwick Council was dismissed by Commissioner Morris on 19 February 2016: *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7.

In the decision of *Wehbe vs Pittwater Council*, Preston CJ established the five ways in which an objection has been well founded and that approval of the objection may be consistent with the aims of the policy:

- ‘the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
- 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; and
- the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.’

It is noted that each ‘test’ offers a potential way of demonstrating that compliance is unnecessary or unreasonable in each case. Therefore, not all tests need to be met.

Test	Comment
1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard	Yes — The development meets the objectives of the development standard demonstrated in part 5 of this document.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary	Not applicable — The purpose of the standard is relevant.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required	Not applicable — Compliance does not defeat the underlying object of the standard development; however, compliance would

with the consequence that compliance is unreasonable	prevent the approval of an otherwise supportable development and prevent the site to better meet the zoning objectives as discussed in part 4 of this document.
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	Not applicable — the development standards of maximum building height cover a wide area and whilst they are not appropriate to this site, they are appropriate to other sites elsewhere in the locality. There are numerous instances where consents departing from the standard have been approved and others where the standards have been upheld. This is more an indication of the inappropriateness of particular standards to some sites rather than a comment on Council's actions.
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.'	Not applicable — The zoning of the site is not considered to be inappropriate.

Application of the above tests thus demonstrate that strict numerical compliance is unreasonable and unnecessary for this proposal. The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

The variation of height is unlikely to be visually apparent when viewed from the streetscape, as the proposed alterations and additions result in a lower ridge line to the existing. The proposed development on the sloped topography is considered to be compatible within other built forms in the locality, and is unlikely to result in an undesirable impact or outcome.

Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The proposed development is consistent with the provisions of orderly and economic development of land, in that it proposes to provide high quality housing in a manner which meets the objectives of

applicable controls. The proposed dwelling house development over its economic life is consistent with the promotion and coordination of the orderly use and development of land.

8. 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

This report is the written request demonstrating that there are sufficient environmental planning grounds to justify deviation from the development standard.

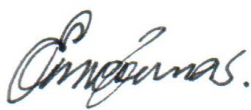
The development has been designed to complement the existing scale and character of surrounding development. The building envelope of the building is compliant with the objectives behind LEP and DCP controls. The proposal will integrate seamlessly with the existing streetscape and does not result in adverse amenity impacts on adjoining properties in the way of bulk impact, shadow impact or privacy loss.

The above is considered to represent sufficient environmental planning grounds to justify the contravention of the development standard. It has been demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, and thus the resultant development will be in the public interest.

9. Conclusion

The proposal seeks a variation to the maximum building height development standard prescribed in Clause 4.3 of Manly Local Environmental Plan 2013.

This submission is considered to adequately address the matters required by Clause 4.6. The proposal meets the assessment criteria set out in Clause 4.6 (3) (a) and (b) and (4) (a). As demonstrated, strict compliance with the prescribed maximum building height development standard is unreasonable and unnecessary in the circumstances of the case. The proposal is in the public interest because it is consistent with the objectives of the E3 – Environmental Management zone and the objectives for maximum building height standard. There are thus sufficient environmental planning grounds to justify the non-compliance.



Eleni Emvalomas

Town Planner

Bachelor of Architecture and Environments (USYD)