

Clause 4.6 variation - Exception to Development Standards

Property: 20B Clifford Avenue, Fairlight (Lot 2 in SP 60808) also known as 2/20 Clifford Avenue, Fairlight

Development: Alterations and additions to an existing dwelling that forms part of an attached dual occupancy

Introduction

Clause 4.6 of Manly Local Environmental Plan 2013 (MLEP 13) allows Council to permit consent for development even though the proposal seeks a dispensation from a development standard imposed by MLEP 13.

Clause 4.6 also requires that a consent authority may be satisfied before granting consent to a development that contravenes a development standard in MLEP 13:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.

Assistance on the approach to justifying a contravention to a development standard is taken from legal decisions of the Land and Environment Court of NSW in the following cases:

1. Wehbe v Pittwater Council [2007] NSWLEC 827;
2. Four2Five Pty Ltd v Ashfield Council [2013] NSWLEC 1009;
3. Micaul Holdings Pty Limited v Randwick City Council [2013] NSWLEC 1386; and
4. Moskovich v Waverley Council [2016] NSWLEC 1015.

With respect to the matters above, this Clause 4.6 request outlines the departure sought to the Height of buildings control and establishes that compliance with this development standard is unreasonable and unnecessary in the circumstances.

It also demonstrates that there are enough environmental planning grounds to justify the contravention and provides an assessment of the matters the Council is required to consider in the development assessment process.

The Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of MLEP 13, relating to the Height of buildings, and reads:

4.3 Height of buildings

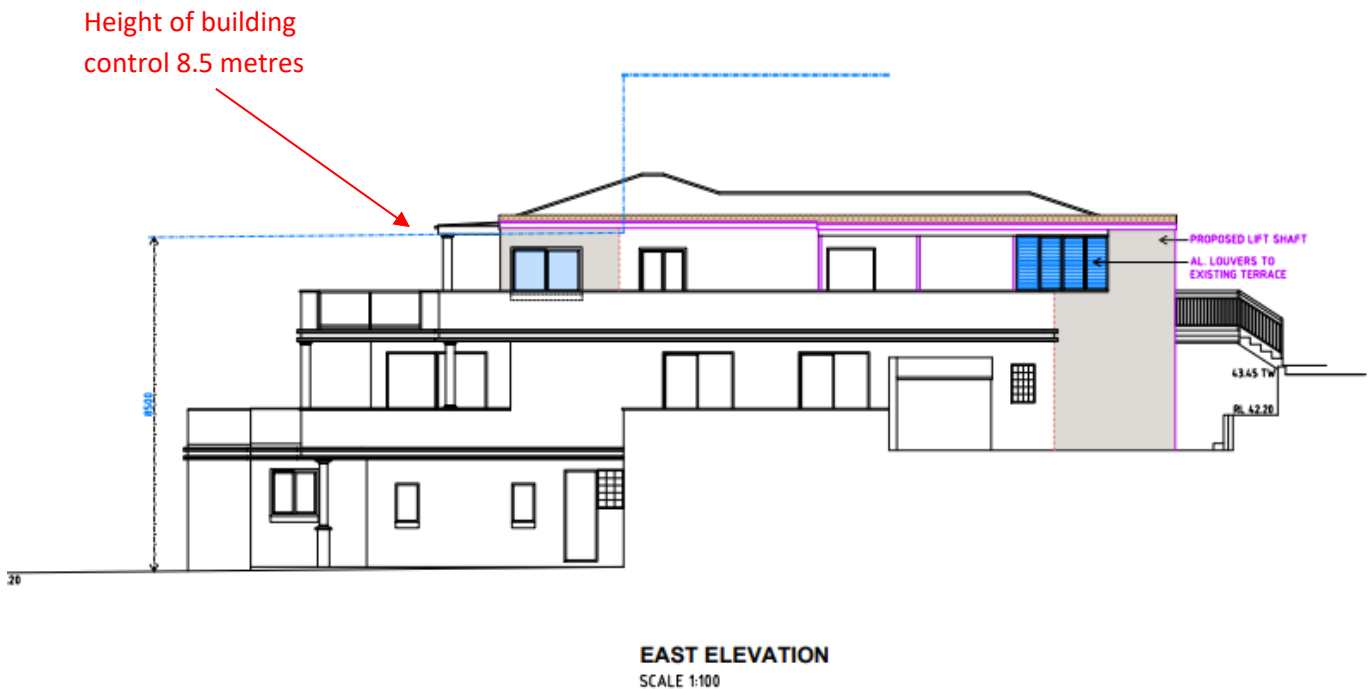
(1) The objectives of this clause are as follows—

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following—*
 - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
 - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
 - (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

The Height of Buildings Map prescribes an 8.5m control for the site.

The Proposed Variation

MLEP 13 requirement	Subject site	Variation
8.5 metres	<p>The noncompliance relates to the proposed upper floor addition being the lean-to addition and walls.</p> <p>The proposed extension of the existing living/dining room to the south-east corner of the first floor will result in a height of 9m (refer to architectural drawings).</p>	This represents a 500mm, or 5.8% variation.



Plans showing the Height of building line (8.5m above the existing ground line)

Justification for Contravention of the Development Standard

Clause 4.6 of MLEP 13 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.*

(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.

(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.*

(4) 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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

- *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
- *Four2Five Pty Ltd v Ashfield Council* [2013] NSWLEC 1009.

The relevant matters contained in Clause 4.6 of the MLEP 13, with respect to the Height of building control development standard, are each addressed below, including with regard to these decisions.

Clause 4.6(3)(a): Compliance with the development standard is unreasonable and/or unnecessary in the circumstances of the particular case

In *Wehbe*, Preston CJ of the Land and Environment Court provided some assistance by outlining five main ways in which a variation to a development standard had been shown as unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) is the same as the language used in Clause 6 of SEPP 1, the principles contained in Wehbe are of assistance to this clause 4.6 variation request.

The five methods outlined in Wehbe include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).
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 (Fourth Method).
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 (Fifth Method).

The 'First Way' is of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary.

The following section addresses the matters in Clause 4.3, how the objectives of the Height of building control are achieved notwithstanding the non-compliance with the numerical control.

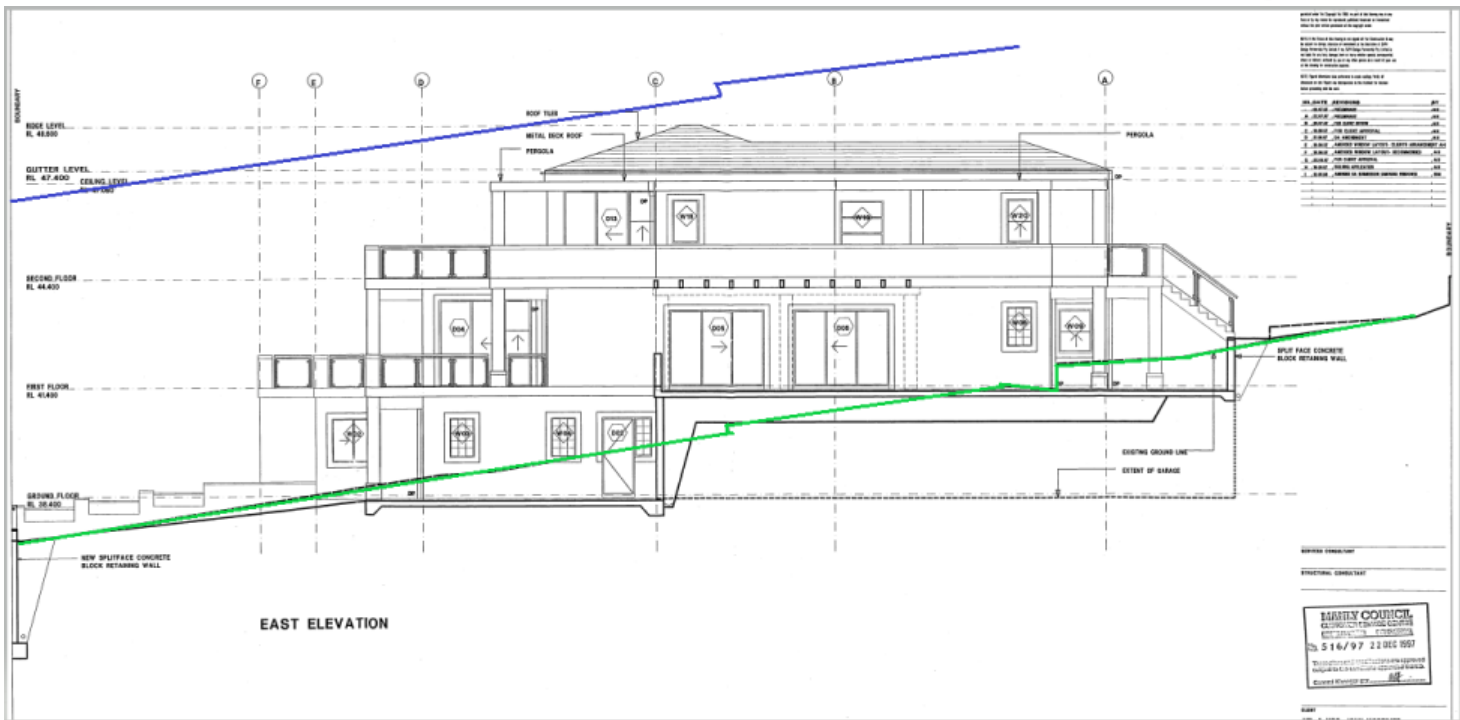
The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method)

The first method, demonstrating that the objectives of the Height of building control can be achieved.

The exceedance is the eastern and southern elevation building element and relates to the topmost floor plate with the upper wall and lean to roof section where there is an exceedance by 500mm due to the site's topography and in particular the terracing and benching along the eastern side boundary that created the floor plates across the site.

However, prior to the construction of the dwelling house and the benching of the site, the ground contours would have had the slope relationship shown below and the request for a Clause 4.6 Variation would not be required and this is a town planning technicality since there is a difference between the original contours prior and post construction of the dual occupancy.

We have shown this projection below.



Original grounds levels (green outline) and HOB control comparison (blue outline)

The lean-to roofline cannot be reshaped or redefined to follow the height of building line projection as this would interrupt the floor to ceiling height and roofline construction to the living/dining room.

The lean-to roofline element of exceedance does not affect the visual impact, and should the roofline be reduced or modified to achieve strict compliance with the height of building control, it would result in bad architecture if one was strictly to follow this projection from the existing ground level which is inorganic.

The proposal will not adversely impact on the amenity of adjoining properties by way of overshadowing, visual impact, or loss of privacy as the portion of the noncompliance does not make a material difference in our view.

The **non-compliance** should not be a reason for refusal on merit.

The objectives of Clause 4.3 are:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

Assessment:

The existing floor plates are scattered across the depth axis of the site that is affected by a significant slope from the front to the rear of the block.

There is also a steep slope to the public domain that produces a prevailing building height or height plane.

At the time of construction, there was no breach to the height of building controls because of the prior topographic landscape which was modified circa 1998. The modified ground levels around the lower eastern elevation have not resulted in an unnatural ground level.

The addition does not compromise the original architectural design of the dual occupancy where the rhythm of the portions of the built form remains consistent and to lessen the visual intrusion, the adoption of a lean-to roofline instead of a larger hipped ended roofline is viewed to be less intrusive.

The upper floor plate and lean to roofline is visually not imposing and in keeping with the current and future character of the locality that is to remain as low-density housing of various architectural styles.

The lean-to roof line and upper wall construction would not be readily visible from the streetscape in our view and would be consistent with the current and future character for low density housing accommodation.

(b) to control the bulk and scale of buildings,

Assessment:

The height exceedance in our view would not add any additional bulk connotations of the existing residential building given the cascading design where the existing building increases in height as the floor plates step up away further from the public domain interface.

The scale of the modified building would not be out of context with the profound larger scale buildings situated at the adjoining land holdings that are more visually prominent in our view.

We believe there is a clear and consistent down slope relationship amongst the adjoining properties due to the topography of the streetscape that have in turn dictated a solid massing of larger scale of the buildings and distracting retaining wall elements which presents a prevailing building height or height plane for the streetscape character.

We have projected these prevailing building height lines below (shown below in red are the building scales and in purple are the retaining structures).

The up-floor plate would not be interrupted as the lean-to additions would still follow the down slope topography of the public road and achieves a consistent height relationship or height plane and would not exceed this existing pattern.



Streetscape photograph

The proposal will not adversely impact on the amenity of adjoining properties by way of overshadowing.

(c) to minimise disruption to the following—

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
- (iii) views between public spaces (including the harbour and foreshores),*

Assessment:

The proposal will not adversely impact on the amenity of adjoining properties by way of loss of views, loss of privacy, overshadowing or visual intrusion given the lean-to addition is to be erected above an existing topmost terrace and follows the line of project along the eastern elevation is to run consistently down slope.

The noncompliance does not affect amenity of surrounding properties as the southeast corner of the building would remain aesthetically pleasing.

The noncompliance does not affect the building bulk and scale as foreseen by the architect and the outlook is appropriate for the area.

From this end, the building would not result in any additional bulk connotations given the lean-to is integrated as an architectural feature.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

Assessment:

Adequate day light access is to be maintained for adjacent dwellings.

- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Assessment:

This clause is not applicable.

Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the Height of building as it applies to the site.

Conclusion on Clause 4.6(3)(b)

In light of the above it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the Height of building standard.

If the control was to be enforced, the architectural design would be of an inferior quality and would not make a material difference due to the height relationship of adjoining properties where we have provided our analysis by projecting the lines of the down slope relationship or height plane amongst the adjoining properties.

If the height plane was followed strictly speaking on this site, it would result in our view an absurd and inorganic roofline as the ground level have obviously been modified from the original condition of the approval.

There are clear and justifiable environmental planning merits which justify the application of flexibility allowed by Clause 4.6.

Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the Height of building development standard, for the reasons discussed earlier in this report.

Consistency with objectives of the zone

The subject site is zoned R1 General Residential under Manly Local Environmental Plan 2013.

Assessment:

The development proposal satisfies the objectives of MLEP 13 whereby the dwelling houses additions are a permissible form of development.

No unreasonable impacts are associated with the proposed variation.

Therefore, the proposal does not result in any circumstance that would be contrary to those objectives.

The development proposal satisfies the objectives of MLEP 13.

Secretary Concurrence

Under Clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (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 Secretary before granting concurrence.*

These matters are addressed in detail below.

Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation does not raise any matter of significance for State or regional planning.

The variation allows for the orderly and economic use of land as envisaged by the Environmental Planning and Assessment Act, 1979.

There are no detrimental impacts on amenity and environmental impacts to neighbours.

The architectural presentation is site responsive and meets the desired future local character.

The variation to the standard will not undermine the legitimacy or future standing of the MLEP 13 controls.

The development controls are generally compliant except for the height of building breach.

Clause 4.6(5)(b): The public benefit of maintaining the development standard

The non-compliance is insignificant in nature.

There is no public benefit in maintaining the control.

Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence.

None.

Note, pursuant to the Notification of assumed concurrence of the Director-General under clause 4.6(4) (and the former clause 24(4)) of the Standard Instrument contained in Planning Circular PS 08-003 (dated 9 May 2008), the concurrence of the Director-General under clause 4.6(4)(b) may be

assumed to the granting of development consent to the development that contravenes the development standards.

Conclusion

For reasons mentioned herein, the proposed development satisfies the provisions of Clauses 4.6(3) and (4) of MLEP 13 despite the proposed new works exceed the height of building control.

The land use is to remain low density in nature and the existing character being a dual occupancy is to remain unaffected by the proposal.

There are no unreasonable environmental impacts are introduced because of the proposal and there would be no breaches if the original ground levels prior to the construction were assessed as the existing ground levels on the site are inorganic.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

There are sufficient environmental planning grounds to justify contravening the development standard.

There is no public benefit in maintaining strict compliance with the standards.

The proposed development is in the public interest.

The objective of better amenity and architectural design is achieved despite noncompliance with the standard itself and any reduction to the height of the building control would not make a material difference or can be said to be nugatory on environmental planning grounds in our view.

This Clause 4.6 variation is forwarded to Council in support of the development proposal and this request be looked upon favourably by Council.

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