52 Burchmore Road, Manly Vale

Clause 4.6 *Exceptions to Development Standards – Height of Buildings*

Clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP 2011) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979 (EP&A Act) being:*

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

The aims and objectives of Warringah LEP 2011 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.*

Under Clause 4.6(3) and (4) of the WLEP 2011, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

> *(3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
>
> *(3)(b) there are sufficient environmental planning grounds to justify contravening the development standard.*
>
> *(4)(a)(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,*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

It is of interest that the consent authority specifies a number of development standards that cannot be varied under Clause 4.6, listed in Clause 4.6(8). Clause 4.3 - Height of buildings is not one of the standards excluded, it must therefore be assumed that the standard for height of buildings, is one of the development standards that can have an appropriate degree of flexibility applied under clause 4.6.

1. Environmental Planning Instrument Details (Warringah LEP 2011)

1.1 What is the name of the environmental planning instrument that applies to the land?

Warringah Local Environmental Plan 2011 (WLEP 2011)

1.2 What is the zoning of the land?

R2 – Low Density Residential

1.3 What are the objectives of the zone?

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

1.4 What is the development standard being varied?

Cl 4.3 of the Warringah Local Environmental Plan 2011, Height of Buildings

1.5 Under what clause is the development standard listed in the environmental planning instrument?

Cl 4.3 of the Warringah Local Environmental Plan 2011

1.6 What are the objectives of the development standard?

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

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

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

1.7 What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

1.8 What is proposed numeric value of the development standard in your development application?

The numeric value of the development standard in this development application is a maximum of 9.042m (for new works). This is a variation of 542mm.

We note that this height exceedance is due to the steep topography of the site and relates to a portion of the dwelling at the rear north eastern corner. It is noted that the existing dwelling has a non-compliant building height of 9.223m and the proposed rear addition sits below the highest part of the existing dwelling, as it steps down to follow the site topography.

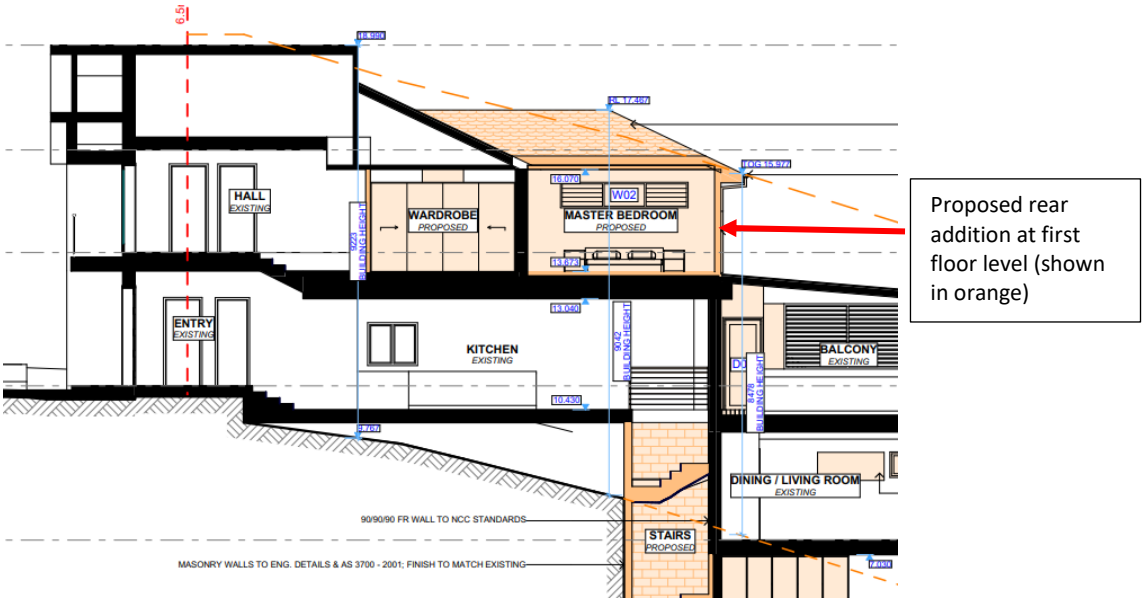

Figure 1: Excerpt from Proposed Long Section Drawing Nos. DA17 prepared by Action Plans

building height (or ***height of building***) means:

(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.

1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation sought is 6.37%

2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

2.1 Wehbe v Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827,(*expanded on the findings in *Winten v North Sydney Council),* identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

*1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).*

*2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).*

*3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).*

*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 Way**).*

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 Way**).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in Wehbe) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

2.3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In Randwick City Council v Micaul Holdings, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

2.4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;

2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and

3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to four2five, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

3. Consideration

The following section addresses the provisions of clause 4.6 of the WLEP 2011 together with principles established in the NSW Land and Environment Court Case Law outlined above.

Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in Winten v North Sydney Council and expanded by Justice Preston in Wehbe v Pittwater [2007] NSW LEC 827 is considered.

The five ways outlined in *Wehbe* include:

3.1 Five (5) Part Test - Wehbe v Pittwater

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).

The objectives of the standard are:

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

The proposed development will present with a dwelling of similar architectural form and scale to what is existing on the site. It is noted that immediately adjoining the subject site to the south is a mirror image of the subject dwelling in terms of design, height and setbacks and the proposed development will be compatible with the existing architectural form. The proposed height noncompliance results only from the fall of the land at the location of the proposed rear addition at first floor level. The height is compliant at the street frontage and the area of departure relates to the northern side of the rear addition. The rear addition is contained within the existing building envelope (with the enclosure of an existing balcony), thereby maintaining the existing side setback to the northern property

boundary. The additional height in this corner of the site will not significantly affect views through the space from the northern neighbour due to the siting of the dwelling on this property.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

The variation relates to part of the rear addition, in the north eastern corner of the site. The impacts of the height of the proposal will not be to the detriment of neighbours with compliant solar access retained, a high level of privacy continued and no loss of significant views.

The orientation of the land and the fall of the site aid in ensuring that the impacts are further reduced for neighbours. Further, the development proposal being located at the rear ensures that there will be no impact on the streetscape.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Colours and materials have been chosen to match the existing dwelling, as well as complement the scenic coastal location. There will be no adverse amenity or environmental impacts as a result of the area where there is a breach in height, thereby ensuring that the scenic quality of Warringah's coastal and built environment is retained.

(d) (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The proposed development will not be visible from the public domain.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).

This exception to development standards request does not rely on this reason.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).

This exception to development standards request does not rely on this reason**.**

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 Way).

This exception to development standards request does not rely on this reason.

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 Way).

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

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

There are sufficient environmental planning grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*.

In particular:

Detail of Variation

- The apparent bulk through the variation is negligible, consistent with neighbours (in particular the neighbour to the south of the site at 50 Burchmore Road) and is not to the detriment of the scale of the dwelling from any point satisfying Cl1.3(g).

- The variation to the height occurs at a portion of the north eastern corner of the site, to allow for the enclosure of half of an existing balcony to provide additional residential floor space. The impact of this allows for adequate ceiling height to be provided in a master bedroom, without resulting in excessive height or bulk satisfying Cl1.3(g).

As the site slopes steeply from west to east, there is an existing and proposed breach in building height. However, from the street the existing dwelling house complies with the maximum 8.5 m height limit. The proposed rear addition allows for liveable accommodation and long term occupation of the dwelling for its occupants. The breach does not result in any adverse environmental or amenity impacts and compliance with the development standard would be unreasonable.

Neighbour Amenity

Fulfillment of each of the criteria below demonstrates a development satisfying Cl1.3(g).

- The variation in height will have no real impact on neighbours, being in the north eastern corner of the dwelling, where the siting and topography results in significant distance to any neighbouring dwelling.
- Compliance with the height control at this location would not result in a building which has a significantly lesser bulk and the impact to neighbours of compliance would be barely discernible

as the variation is for a 6.37% increase and does not present a large bulky structure. Accordingly, compliance with the development standard in this instance is unreasonable.

- The shadow diagrams demonstrate that solar access impacts as a result of the small height variation are negligible. Accordingly, compliance with the development standard based on this would be unreasonable.
- The small % variation to the height it is not to the detriment of views.

Site Constraints

- The final design including the variation to the height at the north eastern corner of the dwelling, is a result of the existing building siting and site topography. It would be unreasonable to require compliance with the development standard, when the variation result allows for a lesser RL to the existing front portion of the dwelling and the orderly and economic use of the site and allows for an ecologically sustainable development satisfying Cl1.3(g) and (f).

Design and Streetscape Appeal

- Strict numerical compliance with the height control would not result in a better urban design outcome. Compliance with the development standard based on this would be unreasonable.

- The proposed development will not be visible from the public domain as it is located at the rear of the dwelling satisfying Cl1.3(g). The streetscape appeal is unaffected by the variation to the height standard, and it would be unreasonable to require compliance with development standard based on this.

Consistent with Zone Objectives

- The extent of the variation is considered to be in the public interest as the proposal results in no impact to the streetscape of Burchmore Road or impact to neighbouring residents. It remains consistent with the objectives of the zone ensuring that appropriate and reasonable housing suitable for the local community is proposed. Compliance with the development standard based on this would be unreasonable.

Natural Environment

- The inclusion of the height variation has no impact on the natural environment. The variation sits within the existing building footprint and will not result in any impact to the existing natural components of the site or neighbourhood. No landscape area is lost or impacted through the additional height satisfying Cl1.3(b). The natural environment is unaffected by the small departure to the development standard and it would be unreasonable for the development to be refused on this basis.

Environmentally Sustainable Development

- The proposal represents an environmentally sustainable design fulfilling Cl1.3(f). Compliance with the development standard based on this would be unreasonable.

Social and economic welfare

- The variation to the height as detailed above will have no social impacts for the site or local area satisfying Cl1.3(b)and accordingly refusal of the development based on this reason would be unreasonable.

- The variation to the height as detailed above will have no economic impacts for the site or the local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

Appropriate Environmental Planning Outcome

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as is detailed earlier in the report.

- The variation does not result in a roof form or height beyond that which is found in the immediate context, including the immediately neighbouring sites. This is particularly the case given the steep site topography. The maximum RL of the roof of the rear addition sits below the existing RL of the front of the dwelling house facing Burchmore Road. The small variation will be compatible within the context in which it sits and is reasonable in the circumstances of the case satisfying Cl1.3(c). Compliance with the development standard based on this would be unreasonable.

- Removal of the non-compliance would not result in alter the perceived bulk and scale due to the minor nature, siting and topography.

The variation is confined to the north east corner of the roof above the rear addition. The discussion above reflects the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and retention of amenity. These are not simply benefits of the development as a whole, but are a direct result of the breach of the maximum height control.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the height variation.

3.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A). An assessment of consistency with the objectives of the Zone is provided below:

Zone – R2 Low Density Residential

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

Consistent. The proposal is for a residential dwelling.

- *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*

Not relevant. The proposal is for a residential dwelling.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Consistent. The proposal is for alterations and additions to an existing single dwelling house. The existing street view will be unaffected by the proposed development. Landscaping works at the rear of the subject site will complement the natural environment of Warringah.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effect as the variation is limited area and restricted to a portion of the rear addition.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

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

The non-compliance will not raise any matter of State or Regional Significance.

3.5 Clause 4.6(5)(b) the public benefit of maintaining the development standard,

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

3.6 Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

> *(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
>
> *(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
>
> *(c) to promote the orderly and economic use and development of land,*
>
> *(d) to promote the delivery and maintenance of affordable housing,*
>
> *(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
>
> *(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
>
> *(g) to promote good design and amenity of the built environment,*
>
> *(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
>
> *(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
>
> *(j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats* and *promoting good design and amenity of the built environment.*

The proposed development is for alterations and additions to a single residential dwelling, on land zoned R2 – Low Density Residential.

The proposed rear addition will not be visible from the public domain, affect the streetscape of Burchmore Road or result in any adverse environmental impacts.

The variation is due to a dramatic fall in the topography on the site.

The area of variation does not adjoin neighbouring dwellings due to the siting and topography of the land.

The area of variation will be of negligible impact to neighbours being limited in area.

The architectural merit of the design is complimentary to the existing dwelling and it would be of vast benefit to the occupants of the site.

There are no discernible solar access impacts as a result of the variation to the height control.

There are no neighbouring amenity or view loss impacts as a result of the variation to the height control.

The location of the variation is to the detriment of no neighbour or the streetscape. The development fulfils the objectives of the height controls and the zone and is therefore considered reasonable and appropriate as proposed.