

23 July 2021

Clause 4.6 Variation to Development Standard

Property Description: 37-38 East Esplanade, Manly

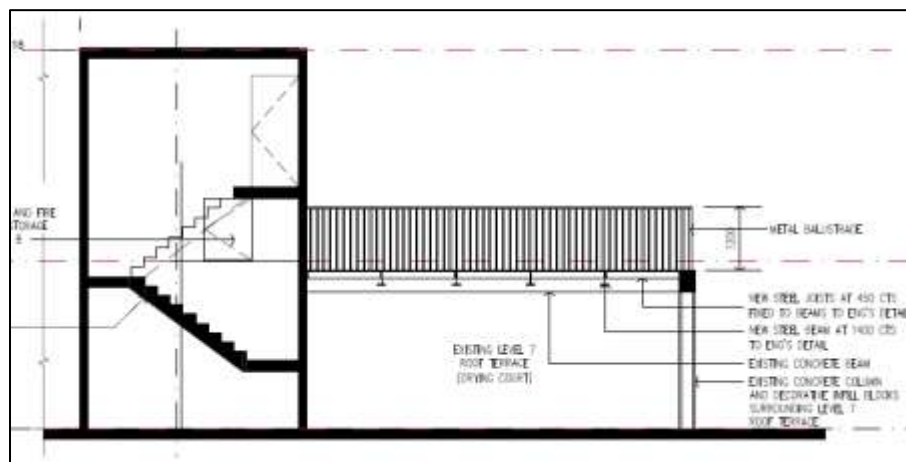
Development: Alterations and Additions to Mixed Use Building

Development Standard: Height of Buildings

Introduction

This is a clause 4.6 variation to support the development application for alterations and additions to an existing mixed use building at 38 East Esplanade, Manly. This clause 4.6 seeks a variation to the 15m building height development standard contained in clause 4.3 – Height of Buildings of the *Manly Local Environmental Plan 2013*.

The proposed works include a new rooftop deck and balustrade above an existing terrace which is currently located above the 15m height limit. It is noted that there is no increase in the overall height of the development with the new works sitting below the existing lift overrun as depicted in the plan extract below:



The proposed works maintain the existing maximum building height of the development however the works include a new 1.2m balustrade which sits on top of the existing privacy screening associated with the terrace at level 7. The balustrade presents a height of 22.25m. There is no increase in the maximum building height measured to lift overrun.

The maximum numerical variation is 7.25m.

It is noted that the proposed works do not result in any perceptible change to the streetscape presentation of the existing building, noting the proposed works – new roof terrace are located at the rear of the upper level. The existing building varies the 15m height control with a maximum height of 25.18m.

The application to vary the development standard – height of buildings incorporates the relevant principles in the following judgements:

1. **Winten Property Group Limited v North Sydney Council** (2001) 130 LGERA 79;
2. **Wehbe v Pittwater Council** (2007) 156 LGERA 446 (“Wehbe”);
3. **Four2Five Pty Ltd v Ashfield Council** [2015] NSWLEC 1009; and
4. **Initial Action Pty Ltd v Woollahra Municipal Council** [2018] NSWLEC 118.
5. **RebelMH Neutral Bay Pty Limited v North Sydney Council** (2019) NSWCA 130

The recent judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

“The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.” [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Matters required to be demonstrated under clause 4.6(3) of the LEP

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the variation to the height of buildings development standard is acceptable in the circumstances of this case and compliance with the development standard is considered unreasonable and unnecessary because the proposed alterations and additions achieve the objectives of the height of buildings standard and the objectives of the B2 – Local Centre zone, notwithstanding non-compliance with the standard.

• Objectives of the Height of Buildings Development Standard

The objectives of the development standard are at clause 4.3(1) of the LEP 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 proposed alterations and additions meet the objectives of the height of buildings development standard (notwithstanding non-compliance with the standard) based on the following assessment:

Objective (a) – The development proposal is located within the existing building footprint at the rear of the site and generally is consistent with the existing maximum height established on the subject site. The proposed new deck and balustrade will not be perceptible when viewed from the public domain and will not impact the established character of the locality.

Objective (b) – The additional building elements – deck and balustrade would not have a significant bulk and scale impact upon adjoining properties, noting there is no additional GFA proposed and the works do not contribute any additional bulk and scale above the existing building.

Objective (c) – The proposed deck will not significantly obstruct views/outlook from the adjoining properties, noting the additional built form - balustrading will sit within the existing building footprint and is generally consistent with the established building height on site. The adjoining properties to the north-west and south-east (side boundaries) will not be impacted by the proposal with regard to view loss noting significant views are to the south-west – Manly Cove.

Objective (d) – The proposal is unlikely to result in any significant overshadowing of adjoining properties.

Objective (e) – The proposal will not impact upon existing vegetation or topography.

- **Objectives of the B2 – Local Centre Zone**

The development proposal achieves the objectives of the zone based on the following assessment in the table below.

Objective	Consistency
<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area</i>	The proposal provides for an additional roof terrace improving the communal amenity of the existing mixed use building.
<i>To encourage employment opportunities in accessible locations.</i>	Not applicable.
<i>To maximise public transport patronage and encourage walking and cycling.</i>	Not applicable
<i>To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.</i>	The proposal maintains the existing land use on the subject site and given there is no increase in the number of dwellings, would not result in a significant intensification of the existing use of the site which would result in a land use conflict.

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

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the height of buildings development standard because:

- The existing building varies the 15m height control, with a maximum height of 25.18m. The height variation to the proposed additions – roof terrace is a result of the existing height variation on the subject site.
- The variation to the height control will not result in unreasonable amenity impacts to adjoining properties noting the additions are located at the rear of the upper level and will not result in unreasonable overshadowing of the adjoining properties or a

loss of outlook-views. Further, the height variation will not impact upon the streetscape presentation of the existing building.

- The nearby heritage items and heritage conservation area will be unaffected by the proposal noting it will not be highly visible from the streetscape.
- The proposed development meets the relevant objects of the Environmental Planning and Assessment Act, 1979 as follows:
 - 1.3(c) - the proposal is an orderly and economic use of the site and the development is largely consistent with the established building height on the subject site with an additional deck that is below the existing height established on site,
 - 1.3(g) – the scale of the proposed development is compatible with the existing building on the site and development in the locality, and
 - 1.3(g) – the proposed development would not result in any significant bulk and scale impacts upon the adjoining properties noting the variation is confined to the rear upper level of the existing building. The balustrade has been designed as a lightweight structure that will not be dominant when viewed from the public domain.
- The proposed development meets the relevant aims of the *Manly LEP 2013* as follows:
 - 2(a)(i) – the proposal achieves a high standard of design that is consistent with the existing building on the site and the surrounding built form character,
 - 2(e) – the variation to building height would not impact upon the heritage significance of the nearby heritage items or conservation area noting the works are located at the rear of the building and will not be highly perceptible from the street,
 - 2(g) – the proposal would not affect the amenity or quality of the foreshore.

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the

requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

The proposed development is in the public interest

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed alterations and additions to the mixed use building are in the public interest because it is consistent with the objectives of the applicable height of buildings standard and the objectives for development in the B2 – Local Centre zone in accordance with the planning assessment addressed above.

In addition to the above reasons, the proposal is also in the public interest because:

- The development proposal would not be highly visible from the public domain, with the additional building height located at the rear of the upper level,
- The proposal is below with the maximum building height on the site and integrated with the existing built form. The proposal is consistent with the context and scale of other development in the locality, and
- The variation to the height standard is a result of the height of the existing building on the site which varies the 15m height control and a new rooftop deck and lightweight balustrade element. The additional height located above the height control is below the maximum building height established on the site.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the B2 – Local Centre zone.

The request for a degree of flexibility in numeric compliance with the height development standard is specific to the subject site conditions. The proposal does not undermine the intent and effectiveness of the maximum building height development standard in Clause 4.3 or the objectives of the height development standard and the zone for achieving positive outcomes on environmental planning grounds.

For these reasons, the proposal and the minor variation does not undermine the integrity of the building height development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

The concurrence of the Secretary

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect

of applications made under clause 4.6 of the LEP, subject to the conditions in the table in the notice. On appeal, the Court has the power under clause 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in clause 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under clause 4.6(4)(b), by reason of section 39(6) of the *Land and Environment Court Act 1979*.

Nevertheless, the matters in clause 4.6(5) of the LEP should still be considered when exercising the power to grant development consent for development that contravenes a development standard (***Fast Buck\$ v Byron Shire Council*** (1999) 103 LGERA 94 at 100 and Wehbe at [41]).

In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed above the non-compliance with the building height standard is considered to be in the public interest because the proposed development is consistent with the objectives of the height standard and the objectives of the B2 – Local Centre zone.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The exceedance of the standard will not result in adverse amenity impacts and is in the public interest.

Conclusion

The development proposal has a variation to the 15m building height control contained in Clause 4.3 of the *Manly LEP 2013*; notwithstanding, the proposal has been designed with a built form that is consistent with the intent of the height standard and is suitable form of development atop the existing building on the site which currently varies the control.

The proposed building height at the rear of the upper level is consistent with the existing established height on the subject site, noting the existing 8 storey building on the site currently varies the 15m height control.

The variation to the building height standard does not attempt to affect the planning outcome for the broader locality; rather the rooftop deck is integrated with the existing built form and is consistent with the height of the existing building on the site and surrounding buildings, thus reflecting the scale and form of development planned for the locality.

Further, the portion of the building that varies the height standard will not result in unreasonable overshadowing or contribute to a loss of outlook/views from the adjoining properties and the public domain.

In my opinion the application to vary the building height development standard is well founded and as addressed the proposed height meets the objectives of the building height development standard and achieves an acceptable outcome for the subject site that is in the public interest. In accordance with the environmental planning grounds addressed in this clause 4.6 variation, the building height can be supported.

Chapman Planning Pty Ltd