

3 PAVILION STREET, QUEENSCLIFF
CLAUSE 4.6 VARIATION STATEMENT
COLLINS AND TURNER

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A	T Dwyer	DA Issue	10/03/23
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CLAUSE 4.6 VARIATION STATEMENT

3 PAVILION ST, QUEENSCLIFF

NOTE: This statement is prepared with reference to the architectural drawings and needs to be read in conjunction with the Statement of Environmental Effects (SEE) that is submitted with this development application. Both the architectural plans and SEE have been prepared by Collins and Turner Pty. Ltd.

This variation statement refers to the questions contained in the judgement in Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118. Wehbe v Pittwater Council [2007] NSWLEC 827 and Project Ventures v Pittwater Council [2005] NSWLEC 191 are also considered.

1. Introduction

The permissible height of buildings (HoB) for the subject site is defined by clause 4.3 of the Warringah Local Environment Plan 2011 (WLEP).

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.

The HoB map defines the permissible HoB for the subject site as 8.5m above the existing ground level.

The proposed development is partially non-compliant. The parapet and balustrade of the roof terrace sit approximately 1150mm above the 8.5m height line in some areas.

The existing dwelling, prior to demolition, also breached the HoB control. These differences can best be appreciated from the 3D analysis shown in figures 2 and 3.

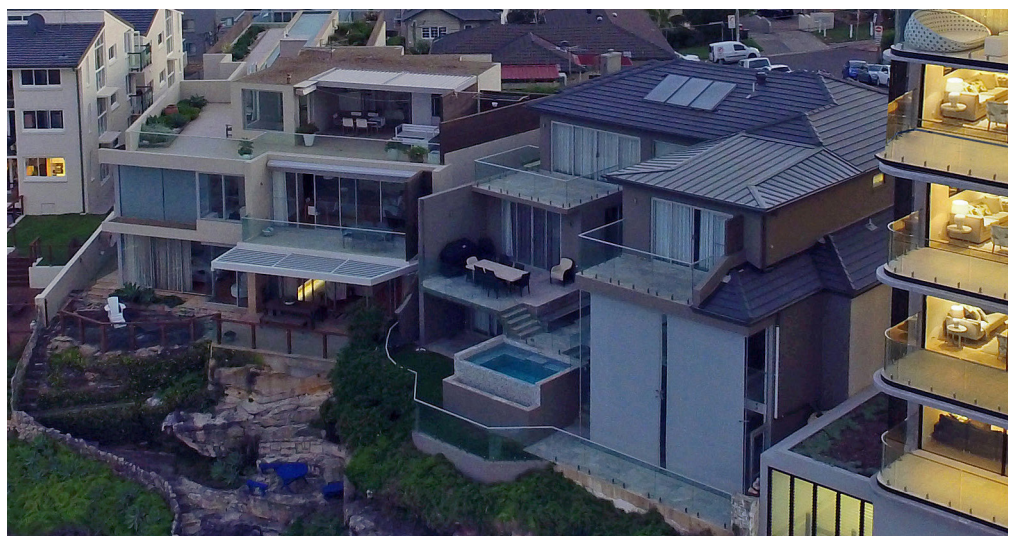


Figure 1: The subject site - centre right - as seen from a drone above Freshwater Beach

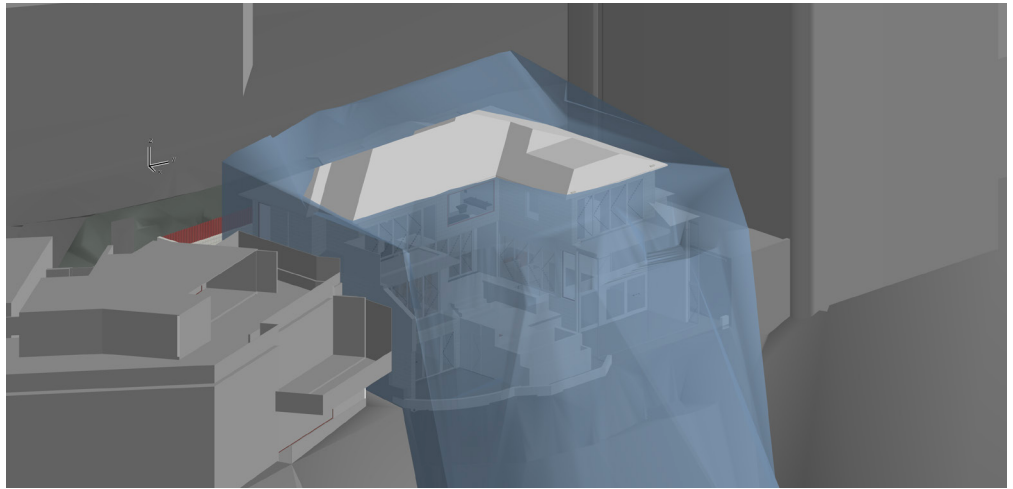


Figure 2: Existing non-compliance with the HoB shown in white

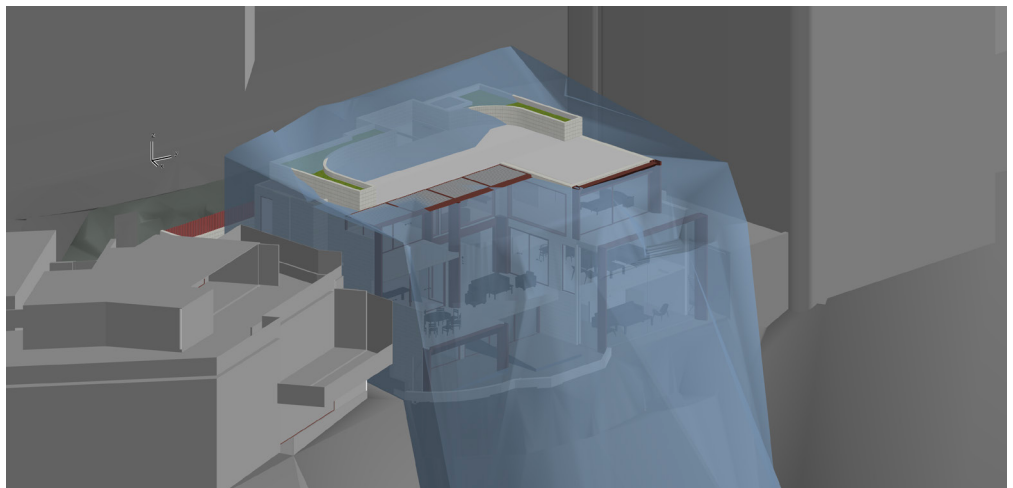


Figure 3: Proposed non-compliance with the HoB shown in white/ green

2 Requirement for a clause 4.6 Variation Statement

Under Clause 4.6 of the WLEP 2011, consent may be granted for development even though the development would contravene a development standard imposed under the WLEP 2011. Subclauses 3 and 4 require a “written request” to be prepared and submitted by the applicant to the consent authority in relation to any breaches of a specific development standard. The following requirements have to be addressed in the written request:

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

In addition, subclause (4) states development consent must not be granted for development contravening 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 ...

As a result of the proposed alterations and additions incorporating a green roof to reduce the urban heat island effect, a small part of the roof structure results in a maximum HoB of 9.65m, a 1150mm variance from the standard. Therefore, a Clause 4.6 variation statement is required to justify the non-compliance with the HoB standard.

The requirements of subclauses 3 and 4 of Clause 4.6 of the LEP are addressed in the following sections of this report.

3 What is the degree of non-compliance?

Clause 4.3 of the WLEP establishes a maximum Height of Building of 8.5m for the subject site.

As a result of the proposed green roof and terrace (which replace the existing, concrete tile roof), the maximum height of the building will be increased to 9.65m, a breach of 1035mm from the WLEP height standard. It should be noted this breach only occurs over a small, largely non-trafficable area of planter boxes, as shown in Figure 3.

As previously noted, the existing roof is already in breach of the WLEP with a maximum RL of 43.36 AHD. Therefore, although still non-compliant, the proposed design achieves a reduction in maximum height of 775mm.

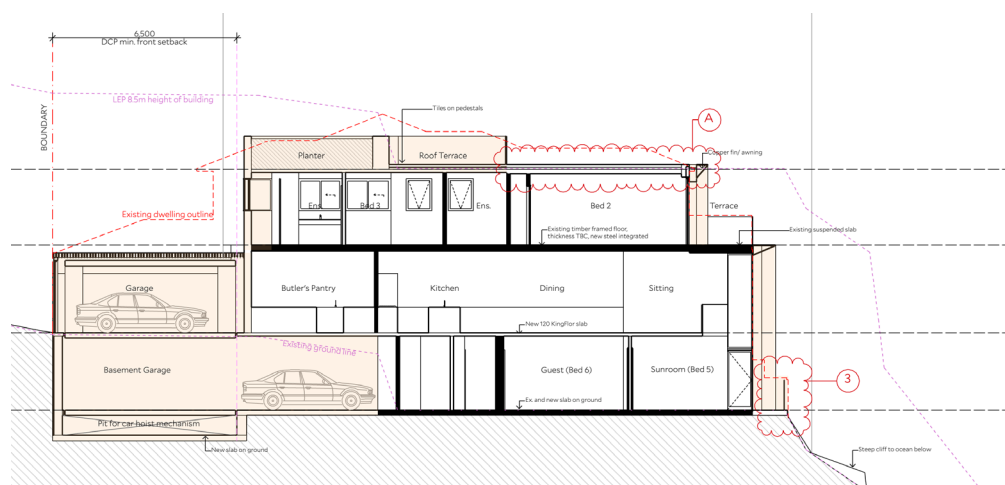


Figure 4: Section A showing minor non-compliance on roof terrace

4 Is the development consistent with the relevant aims of Warringah Local Environmental Plan 2011?

The relevant aims of WLEP 2011 under Clause 1.2(2) are:

(2) The particular aims of this Plan are as follows—

(d) in relation to residential development, to—

(i) protect and enhance the residential use and amenity of existing residential environments, and

(ii) promote development that is compatible with neighbouring development in terms of bulk, scale and appearance, and

- (iii) increase the availability and variety of dwellings to enable population growth without having adverse effects on the character and amenity of Warringah,
- (f) in relation to environmental quality, to—
 - (i) achieve development outcomes of quality urban design, and
 - (iv) ensure that development does not have an adverse effect on streetscapes and vistas, public places, areas visible from navigable waters or the natural environment, and

The proposal satisfies the relevant aims of the WLEP as follows:

Reducing the overall height of the existing dwelling to better enable view sharing

Providing a green roof to minimise heat island effects (a major emerging concern)

Minimising the transport of excavated material off-site by re-using it for the green roof.

Employing an award-winning and widely recognised architecture firm to design a building of design excellence.

The proposal is in keeping with the neighbouring developments in terms of bulk, scale and appearance, i.e. a two-storey residential dwelling when viewed from the street. This is in stark contrast to the outlier of Pavilion Street, #5, to the immediate north of the subject. Further, the site immediately to the south also includes roof terraces, demonstrating this is an emergent neighbourhood characteristic.

5. Is the development consistent with the relevant objectives of Zone R2 – Low-Density Residential?

The relevant objectives of Zone R2 are:

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

To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.

To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

The proposal satisfies the relevant objectives of Zone R2 as follows:

The proposed dwelling house is located within an area of dwelling houses on the coastal side of Pavilion Street. The proposal maintains the low-density residential environment of the neighbourhood, 5 Pavilion Street withstanding, and provides for the housing needs of the community.

The proposal for a dwelling house conforms with the existing low-density residential character of the area. The amenity of the neighbouring properties will be maintained through the proposed scheme, which minimises the degree of potential adverse environmental impacts of the new development on its surroundings.

The height non-compliance is minor and does not create any material adverse impacts on the public or private domains, as the proposal is well below the permitted building height when viewed from the street.

6. Is the development consistent with the relevant objectives of Clause 4.3 – Height of building?

The relevant objectives of Clause 4.3, Height of building, are:

- (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.

The proposal satisfies the relevant objectives of Clause 4.3 as follows:

Dwellings in the locality are controlled by a 8.5m height of building development standard. The immediate neighbour at 5 Pavilion is a six-storey, multi-residential development significantly in breach of this 8.5m level. The proposed dwelling is non-compliant by only 1135mm, a measurement that will not negatively impact neighbouring dwellings or the public domain

Shadow diagrams prepared for the proposal show very little additional shading of neighbouring properties. The small non-compliance does not result in loss of solar access to adjoining properties or open space.

Given the existing dwelling on the site has a higher ridge line than what is proposed, there will be a material improvement in the view sharing. The non-compliance has no discernible impact on public domain views. There have never been any views across the site from the public domain. The proposal does not change that.

7 Can the consent authority be satisfied that compliance with the development standard is unnecessary or unreasonable because the objectives of the development standard are achieved notwithstanding non-compliance with the standard? Clause 4.6(3)(a)

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 [16], Preston CJ states:

“As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51],

And although the above-referenced common ways were said in the context of an objection under SEPP 1 – Development Standards in *Wehbe*, they are still applicable to the purpose of an application under a Clause 4.6 variation statement.

Preston CJ further notes in [17] of *Initial Action*:

“the first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary, because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The proposal satisfies not only the relevant objectives of clause 4.3 for the HoB development standard but that the proposal also complies with the general aims of the WLEP 2011 and the objectives of zone R2, in which the site is located.

The application of the development standard is unnecessary because the proposal meets all the relevant objectives in the LEP in spite of the breach of the height of building by a maximum of 1035mm. If all the relevant objectives are met, the numerical development standard has no further work to do and is thus unnecessary. Additionally, as all the relevant objectives are met, it is also unreasonable to apply the development standard in this case, as the impact is negligible and arises only as a consequence of the slope along and across the site. Compliance with the relevant standard is, therefore, both unreasonable and unnecessary for the purposes of clause 4.6(3)(a) of the LEP.

As to whether or not compliance is unreasonable, the development is well below the required height from street level, and all views over the site are preserved with building height less than the of the existing dwelling.

The bulk and scale of the proposal are in keeping with the future character of the area to the extent that the planning controls reflect such character. Considering that the bulk and scale are largely consistent with dwellings in its vicinity, the proposal presents an acceptable design and demonstrates compliance with the first test under Wehbe, quoted above.

8 Are there sufficient environmental planning grounds to justify contravening the development standard?

The environmental planning grounds to justify contravening Clause 4.3 of WLEP 2011 are summarised below:

One element of the breach of the height control results from the provision of a green roof. The proposal accords with planning changes underway at Northern Beaches Council, where the reduction of heat island effects has become an emerging concern.

Part of the breach arises from an existing, excavated lower ground floor. But for that excavation, the ground level would have been higher. It is well established that where the existing ground level has been excavated, it is reasonable to disregard the excavated level (*Bettar v City of Sydney* [2014] NSW LEC 1070).

The lack of any material or discernible adverse impact resulting from the minor non-compliance of the proposal with the height control must be counted as a positive environmental planning ground.

The non-compliance is less than that of the existing building, as shown in Figures 2 and 3, leading to positive outcomes for adjoining buildings in terms of views.

With respect to the impact on solar access, the proposal complies with the solar access provisions contained in the WDCP, meaning the height variation does not contribute to an unreasonable overshadowing impact.

The lack of any material or discernible adverse impact resulting from the minor non-compliance of the proposal with the height control must be counted as a positive environmental planning ground (*Randwick v Micaul Holdings* [2016] NSW LEC 7).

The considerations above provide strong environmental grounds in favour of justification of the contravention of the height of building standard to the small degree proposed.

9 Can the consent authority be satisfied that the proposed development will be in the public interest having regard to the development standard and zone objectives?

In accordance with Clause 4.6, subclause (4)(a)(ii) of WLEP 2011, the proposal is in the public interest as the proposed development is consistent with: “(a) the objectives of the particular standard, and (b) the objectives for development within the zone in which the development is proposed to be carried out.”

The proposal is consistent with the objectives of the R2 zoning as the proposal maintains the low-density residential character of the area and will have a minimal environmental impact by meeting the key LEP and DCP planning controls other than two elements infringing the height control at the leading (coastal) edge of the dwelling.

To the extent that the public interest is served where the environmental impacts of the proposal are both contained and constrained, the proposal can be said to be in the public interest.

10 Can the approval authority be satisfied that subclause (3) of Clause 4.6 of the Warringah LEP 2011 has been met and that the proposal is in the public interest?

For the reasons enumerated above, subclause (3) of Clause 4.6 has been met. As discussed above, compliance with the development standard is both unnecessary and unreasonable in the minor circumstances of this particular case.

Compliance with the development standard is unnecessary as the proposed development is in keeping with the surroundings, has minimal impact on the neighbouring dwellings and is less than that of the existing building.

Compliance with the LEP standards and objectives, in general, is a matter of both public and private interest, and the proposal achieves this through its careful design and siting, even though infringing the height control to a minor degree.

There are sufficient environmental planning grounds to support the proposition that the minor contravention is in the public interest due to its benefits, such as a reduction in the heat island effect and improved view sharing.

