



Clause 4.6 Variation Request

Clause 4.3 - Height of Buildings
MLEP 2013

14 Bareena Drive, Balgowlah Heights

September 2024



1. INTRODUCTION

This Clause 4.6 Exceptions to Development Standards request has been prepared BMA Urban on behalf of HA S. It is submitted in support of a Development Application for the '**alterations and additions**' to the dwelling at 14 Bareena Drive, Balgowlah Heights

This request seeks approval to vary the height of buildings development standard in clause 4.3 of the *Manly Local Environmental Plan 2013* (MLEP 2013). Clause 4.3 prescribes a numerical building height limit of 8.5m over the subject site. The proposed building height departs from this standard as demonstrated in **Part 2** of this variation request.

Clause 4.6 of the MLEP 2013 enables consent for development to be granted even though it contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for and from development.

As the following request demonstrates, flexibility may be afforded by Clause 4.6 because compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard.

The following sections of the report provide an assessment of the request to vary the development standard relating to "**height of buildings**" in accordance with Clause 4.6 of MLEP 2013.

Consideration has been given to the following matters within this assessment:

- *Guide to varying Development Standards*, prepared by the Department of Planning and Environment dated November 2023.
- *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582
- Relevant planning principles and judgments issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgment is the most relevant of recent case law.

Chief Justice Preston of the Land and Environment Court confirmed in the above judgment:

The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable or unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

On the 'Five Part Test' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked

ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way..." [22]

That in establishing 'sufficient environmental planning grounds' the focus must be on the contravention and not the development as a whole:

"The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole" [26]

That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

"Clause 4.6 does not directly or indirectly establish this test. 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 will have a better environmental planning outcome than a development that complies with the development standard."

[88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

In accordance with the MLEP 2013 requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (**Part 2**);
- identifies the variation sought (**Part 2**);
- summarises relevant case law (**Part 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Part 4**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Part 4**); and
- provides a conclusion summarising the preceding parts (**Part 5**).

This Clause 4.6 Exceptions to Development Standards request should be read in conjunction with the architectural plans prepared by HA S.

2. VARIATION OF HEIGHT OF BUILDINGS STANDARD

2.1 DEVELOPMENT STANDARD

Clause 4.3(2) of MLEP 2013 sets out the maximum building height for development as shown on the Height of Buildings Map. The site is subject to a maximum building height of 8.5 metres, as illustrated in **Figure 1** below.



Figure 1: Height of Buildings Map
(Source: NSW Planning Portal Spatial viewer)

Subject site 

Clause 4.3(1) of MLEP 2013 sets out the objectives for building height, 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 conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

The definition of “building height” for the purposes of clause 4.3 of MLEP 2021 is as follows:

“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.”

2.2 VARIATION TO HEIGHT OF BUILDINGS STANDARD

The proposed height departure across the dwelling when measured against the existing excavated ground lines is a maximum of 440mm or 5.1%. When measured against the natural ground lines, which in this case, are more reflective of the natural topography of the land, a diminutive height breach is observed. The extent of contravention with the prescribed height measured against the existing levels is best demonstrated in Figure 2 below.

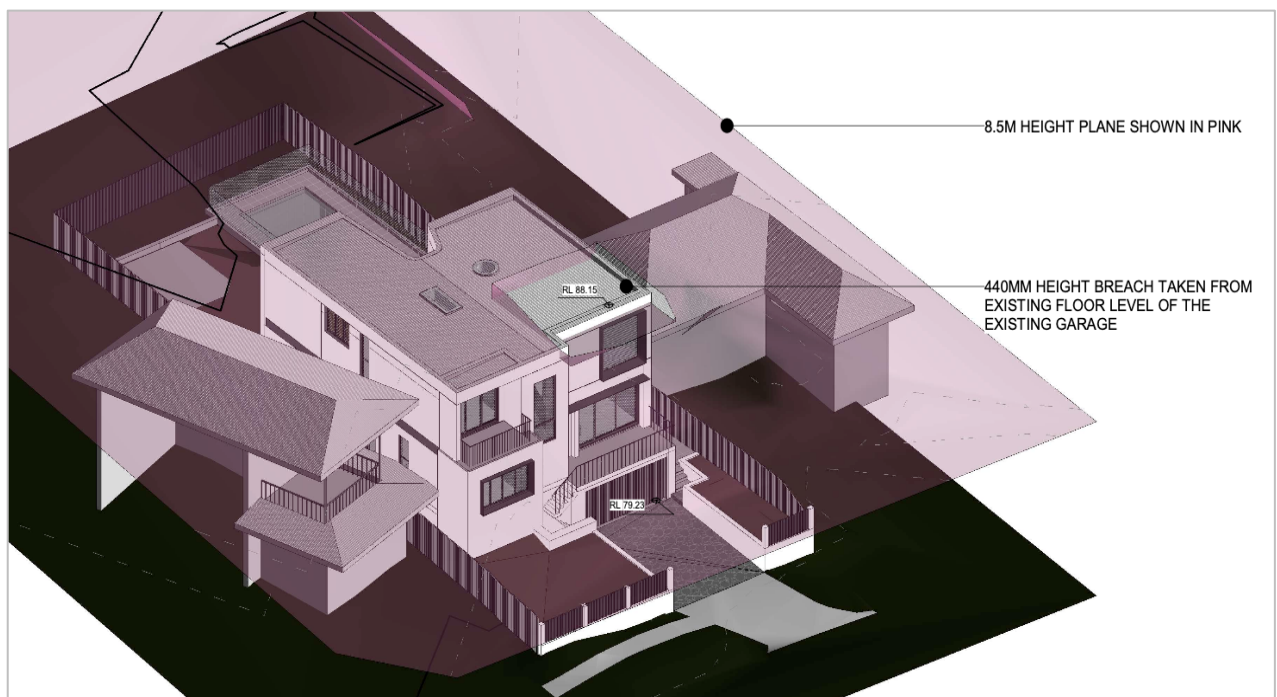


Figure 2: Height breach 3D diagram
Source: HA S

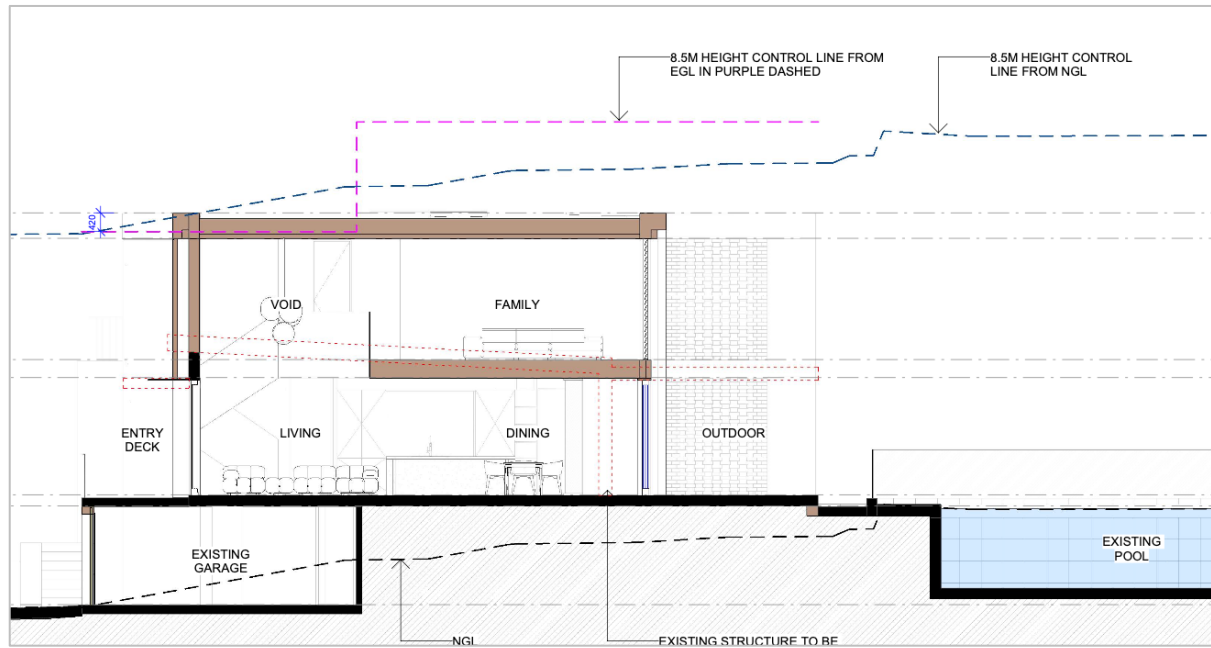


Figure 3: Height breach Section A-A
Source: HA S

3. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of MLEP 2013 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of MLEP 2013 are:

- (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 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority consider a written request from the applicant that seeks to justify the contravention of the development 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) requires the consent authority to keep a record of its assessment under subclause (3).

This clause 4.6 request demonstrates that compliance with the height of building prescribed for the site in Clause 4.3 of MLEP 2013 is unreasonable, and there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is consistent with the development standard.

In accordance with clause 4.6(3), the applicant requests that the building height standard be varied.

4. ASSESSMENT OF THE CLAUSE 4.6 VARIATION

The following sections of this report provide a comprehensive assessment of the request to vary the development standard relating to height of buildings, in accordance with clause 4.3 of MLEP 2013.

Detailed consideration has been given to the following matters within this assessment:

- *Guide to varying Development Standards*, prepared by the Department of Planning & Environment dated November 2023; and
- Relevant planning principles and judgements issued by the NSW Land and Environment Court.

The following sections of this report provide detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of MLEP 2013.

4.1 ABILITY TO VARY THE STANDARD

The height of buildings standard as prescribed in Clause 4.3 of MLEP 2013 is a development standard capable of being varied under clause 4.6(2) of that LEP. The proposed variation is not excluded from the operation of clause 4.6(2) of MLEP 2013, as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of that LEP.

4.2 CONSIDERATION

4.2.1 Clause 4.6(3)(a) – Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires that the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently reaffirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable or unnecessary’ requirement.

■ ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43]).

The specific objectives of the height of buildings development standard, as specified in clause 4.3(1) of MLEP 2013, are detailed in the table below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Objectives	Assessment
<i>(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,</i>	The proposal retains a roof form that is commensurate with that of the retained components of the retained dwelling. The proposed ' additions ' and more specifically the height breach, do not alter the roof form relationship the dwelling will have with either neighbouring properties and or the street.
<i>(b) to control the bulk and scale of buildings,</i>	The extent of height breach while minor and primarily associated with a horizontal roof element at the upper dwelling level, is numerically exacerbated when measured against the excavated ground levels of the land which are not a clear representation of the site's topography. When measured against the natural and better representative land topography, a wholly compliant building height is observed. The overall proportions of the dwelling are not inconsistent with that deemed appropriate for the site in terms of built form siting, setback and or volume and while a numerical height breach is presented, it will not perceptibly contribute to the bulk and or scale of the dwelling to a degree that would be deemed inconsistent with this objective. More generally, the proposal maintains and further incorporates staggered facades, building recesses and the use of a variety of materials and detailing, to provide a highly articulated built form of contemporary external appearance. This design response ensures that the perceptible volume of the development, most notably the breaching component, will not be identified as an adverse contribution to bulk but rather, will continue to facilitate for the provision of a contextually compatible design outcome.
<i>(c) to minimise disruption to the following—</i> <i>(i) views to nearby residential development from public spaces (including the harbour and foreshores),</i> <i>(ii) views from nearby residential development to public spaces (including the harbour and foreshores),</i> <i>(iii) views between public spaces (including the harbour and foreshores),</i>	The siting, scale and relationship the breach will have with neighbouring properties will not give rise to any disruption in view attainment and or impacts.

(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,	In terms of overshadowing, the shadowing analysis prepared by HA S which forms part of the architectural plan detail set relied upon in preparation of this variation request (Issue P4-dated 10 September 2024), demonstrates that the extent of additional shadowing impact resulting from the breach, is not unreasonable and does not adversely prejudice the extent of available solar access to the neighbouring properties and or public areas located proximate to the dwelling on the subject land.
(e) to ensure the height and bulk of any proposed building or structure in a recreation or conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.	This objective is not relevant to this development.

4.2.2 Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

Clause 4.6(3)(b) of MLEP 2013 requires the consent authority to be satisfied that the applicant’s written request has adequately addressed that clause, by demonstrating:

“that there are sufficient environmental planning grounds to justify contravening the development standard.”

The environmental planning grounds relied upon in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development, as summarised in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] (NSWLEC 118).

There is an absence of environmental harm arising from the contravention of the development standard and positive planning benefits arising from the proposed development, as outlined in detail above. These include:

- The proposal is consistent with the objectives of the development standard and the objectives for development in the R2 Low Density Residential Zone.
- The height non-compliance is a direct result of the topography of the site and the base garage floor plate which was previously excavated onto the ground. As can be seen in the Section A-A drawing forming part of the architectural plan detail prepared by HA S, there is a sharp drop off natural topography of the site and this co-incides with where the height breach begins to occur. Despite the minor height breach, the proposed dwelling additions continue to respond to and respect the natural landform. The proposed variation to the height is deemed a necessary outcome to allow for a well resolved and functional floor plate arrangement offering high levels of residential

amenity. The height breach will result in no adverse impacts on adjoining properties in terms of visual bulk, views, privacy or overshadowing.

- The location and design of the height breaching element has been organised to ensure that they do not present as visually jarring to the streetscape and in addition, do not result in any adverse level of amenity impact on neighbouring properties.
- The element which breaches the height does so largely as a result of the sites topography which as observed, displays a slope from the rear towards the street. This slope was again exacerbated by the previously undertaken site excavation works which have created a further topographical disparity that now has a direct influence on the extent of numerical height breach.
- Prior excavation of the site and the consequent distortion of the height of buildings plane over the site, when compared to the topography, is an environmental planning ground sufficient to justify contravening the development standard. The site's topography and characteristics distinguish this case from the more generic development for which a numeric standard of this kind inevitably must anticipate.
- The proposed development, notwithstanding non-compliance with the height development standard not only is an orderly and economic use and development of the land, but also promotes good design and amenity of the built environment.
- There is no planning purpose to be served by limiting the height strictly to the maximum height allowable given the site constraints and absence of unreasonable levels of amenity related impacts.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed non-compliance with the height of buildings standard in this instance.

The Objects of the Environmental Planning & Assessment Act 1979 ('EP&A Act') under Section 1.3 of that Act are also relevant to whether grounds exist to warrant a variation. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in the table below we consider whether the proposed development is consistent with each object.

The objects of the EP&A Act and how this proposal responds to each of the objects are detailed as follows:

Object	Comment
<i>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</i>	This object is not relevant to this development.
<i>To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment</i>	The proposal will facilitate an ecologically sustainable development given that no negative impact on environmental and social considerations will arise. This in turn will serve to offer the ongoing sustainment of the economic health of the area.

<i>To promote the orderly and economic use and development of land</i>	The proposed development will promote the orderly and economic use of the land by way of providing a land use typology and intensity, consistent with that envisaged by Council.
<i>To promote the delivery and maintenance of affordable housing</i>	This object is not relevant to this development.
<i>To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats</i>	Given the nature and character of the urban setting the proposed development is located within, no impact on threatened species or ecological communities is likely to result.
<i>To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)</i>	This object is not relevant to this development
<i>To promote good design and amenity of the built environment</i>	The proposed development promotes good design in that it serves to provide a built form and massing arrangement that serves to positively influence the future amenity of the dwelling occupants while adopting an architectural form and language, with an overall silhouette, height and land use intensity compatible with both the established and emerging development and housing typology.
<i>To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants</i>	The proposed development will comply with all relevant BCA codes and will promote the health and safety of occupants.
<i>To promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State</i>	This object is not relevant to this development
<i>To provide increased opportunity for community participation in environmental planning and assessment</i>	This proposed development has been publicly notified in accordance with Council's Community Engagement Strategy/DCP.

Based on the above, the consent authority can be satisfied that the proposed development remains consistent with the Objects of the Act despite the height non-compliance.

4.2.3 Clause 4.6(4) – The consent authority must keep a record of its assessment carried out under subclause (3).

Northern Beaches Council has a current Clause 4.6 register. Any record of this development and its address of subclause (3) will be required to be uploaded on this register.

5. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of buildings development standard contained within clause 4.3 of MLEP 2013 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the height of buildings development standard to the extent proposed, for the reasons detailed within this submission and as summarised below:

- Compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the proposed development.
- The proposal, notwithstanding the non-compliance, is consistent with the objectives of the height of buildings standard.
- There are sufficient environmental planning grounds to justify the contravention.
- There is an absence of any environmental impacts arising from the proposed variation.
- The proposed non-compliance with the height of buildings standard will not result in any matter of significance for State or regional environmental planning

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the height of buildings development standard should be applied.