

22 Addison Road, Manly – Alterations and Additions to Residential Flat Building

Clause 4.6 Variation Statement – March 2023



CONTENTS

CONTENTS	1
Introduction	1
RELEVANT ASSESSMENT FRAMEWORK	2
THE EXTENT OF VARIATION	4
CLAUSE 4.6(3) (A) – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE	5
CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?	7
CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?	12
CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?	12
CONCLUSION	13

INTRODUCTION

1. Overview

This Clause 4.6 Variation request has been prepared in support of the development application for the proposed alterations and additions to the residential flat building at 22 Addison Road, Manly.

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Manly LEP 2013 (MLEP 2013) which has the following aims and objectives:

- 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.*

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Height of Buildings of the MLEP 2013. In summary the following variations are proposed:

Manly LEP 2013 Clause	MLEP 2013 Development Standard	Proposed Development Non Compliance	% of Variation
Clause 4.3 Height of Buildings	Maximum Height 8.5m	The existing building is 13.4m high. The proposal does not result in any additional height to the overall building.	57%

In accordance with Clause 4.6 of the MLEP 2013 Council is required to consider the following:

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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.



RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development, including the aims and objectives, of the provisions for Height of Buildings control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgments issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

Manly Local Environmental Plan 2013

Clause 4.6 of MLEP 2013 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

- (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 development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

This document forms a Clause 4.6 written request to justify the contravention of the Height of Building standard under the MLEP.

NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the Height provisions in accordance with Clause 4.6 of MLEP 2012. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- 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 judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
 - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and 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 grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' 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.

THE EXTENT OF VARIATION

Relevant Development Standards

The development standard being requested to be varied is Clause 4.3 Height of Buildings of the MLEP 2013.

The objectives/underlying purpose of the clause

A key determination of the appropriateness of a variation to a development standard is the proposal's compliance with the underlying objectives and purpose of the development standard. Therefore, while there is a specified numerical control for Clause 4.3 Height of Buildings, the objectives and underlying purpose behind each of the development standards are basic issues for consideration in the development assessment process.

Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Height of Buildings of the MLEP 2013. In summary the following variations to development standards are proposed:

Manly LEP 2013 Clause	MLEP 2013 Development Standard	Proposed Development Non Compliance	% of Variation
Clause 4.3 Height of Buildings	Maximum Height 8.5m	The existing building is 13.4m high. The proposal does not result in any additional height to the overall building.	57%

CLAUSE 4.6(3) (A) – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

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

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *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.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in the following sections, the proposed development is consistent with the objectives of the standard for Building Height. The proposal is also consistent with the objectives of the E4 zone of MLEP 2013.

As addressed previously the proposal has demonstrated compliance with the relevant objectives.

Underlying objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) provides the following objective of the legislation:

to promote the orderly and economic use and development of land

Requiring strict compliance with the Height of Building standard would undermine the achievement of this objective of the legislation.



This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed development demonstrates that there are sufficient environmental planning grounds justifying the contravention for the following reasons:

In **Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118**, the Land and Environment Court (LEC) addressed the ‘sufficiency’ of environmental planning grounds:

The environmental planning grounds relied on in written request under cl 4.6 must be ‘sufficient’. There are two respects in which the written request needs to be ‘sufficient’. First the environmental planning grounds advanced in the written request must be sufficient ‘to justify contravening the development standard’ The focus of Cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must satisfy the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

In **Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90**, the LEC found that the environmental ground advanced by the applicant in the Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. In this regard, the proposed variation is particular to the circumstances of the proposed development on the site for the following reasons:

The variation to the development standard for Height of Building is considered well founded because, notwithstanding the proposed non-compliance with Height of Building standards:

- The proposed development is consistent with the underlying objective or purpose of the standard and zone as demonstrated in the following sections.
- The maximum height of building on the site is currently in exceedance of the height of building controls as existing and is appropriate for an E4 zone that primarily consists of residential development. The existing building is 13.4m high, and the proposal adds no additional height.
- The proposed building is consistent with the prevailing building height. Furthermore, the new works all occur well below the 8.5m height limit.
- The proposed building envelope is consistent with the existing building envelope and other similar development.
- The bulk and scale of the proposal is consistent with this style of residential flat building which is common for residential areas.
- The proposed building provides an appropriate height, bulk and scale to the site and is largely compliant with MLEP 2013 height provisions.
- The proposal will not have any impact on the existing streetscape or the foreshore character and appearance.

- 
- In light of the proposal's contribution to achieving the desired future character of the area, a reduction of building height would serve no material planning purpose, other than numerical compliance with a generic Council control.
 - The proposal will add to delivering a mix of well-designed housing that meets the needs of Sydney's growing population unique family dwellings to meet the changing population needs.
 - The proposed development will not significantly impact on the amenity of adjoining occupiers.
 - The proposed development will not result in any unreasonable privacy intrusion or loss of daylight access to adjacent properties.



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 IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

Overview

Pursuant to Clause 4.6 of MLEP 2013, we hereby seek exception to the 8.5m height applicable pursuant to Clause 4.3 of MLEP 2013. Clause 4.6(4)(ii) requires that such a request must establish that the proposed contravention is consistent with the objectives of the standard and the zone.

The variation to the 8.5m height standard is a direct result of the existing building exceeding that height standard. The maximum height of the existing building is unchanged by the proposal.

As a result of the above numerical non compliances, the following addresses the objectives of each respective development standard and the E4 zone.

Objectives of the Height of Buildings Standard (Clause 4.3)

The objectives of the Clause 4.3 Height of Building standard of the MLEP 2013 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.*

Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives:

- (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,*

The maximum height of building on the site is currently in exceedance of the height of building controls as existing and is appropriate for an E4 zone that primarily consists of residential development. The existing building is 13.4m high, and the proposal adds no additional height.



The portion of the building that exceeds the maximum height standard is the roof form which contributes to the numerical non-compliance.

The proposal reflects the topographic landscape, stepping down with the slope of the land.

The desired streetscape is maintained through the provision of new landscaping.

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

- The proposal does not alter the overall scale and bulk of the existing building.
- The breaches of the building height relate to existing elements of the building and the majority of the building is substantially below the building height control.

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

- The proposed building forms part of the urban backdrop when viewed from the harbour and foreshores. The building will have no perceptible impact on views to nearby residential development from public places. This objective is achieved.

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

- No views are impacted. This objective is achieved.

(iii) views between public spaces (including the harbour and foreshores),

- The proposal does not result in any disruption to views between public spaces. This objective is achieved.

(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,

- The proposal will not give any additional bulk or scale. Some variation to shadowing is anticipated, however additional shadowing will not impact upon the neighbours. No adjoining habitable rooms will be impacted from the proposal. The proposed impacts are considered negligible.

(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 proposal is considered to be consistent with this objective. The proposal will not impact upon the landscape character of the site or the area.
- The character and appearance of the harbour frontage will not be altered and will largely be improved as a result of the proposal.



Objectives of the Zone

The site is currently zoned E4 Environmental Living zone under the Manly LEP 2013. The proposed development results in alterations and additions to the existing dwelling house, and is therefore considered permissible within the E4 zone, as outlined in the accompanying SEE.

The proposed works are consistent with the E4 zone objectives in that:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The proposed development is acceptable in terms of its impacts on the ecological and aesthetic values.

- *To ensure that residential development does not have an adverse effect on those values.*

The proposed development is acceptable in terms of its effects on values.

- *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*

Not applicable. No trees affected.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

The proposal is considered to be consistent with this objective. The proposal will not impact upon the landscape character of the site or the area and is located at ground floor level.

The character and appearance of the harbour frontage will not be altered and will largely be improved as a result of the proposal.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate and minimise the impact of hard surfaces and associated pollutants in storm water run-off on the ecological characteristics of the locality, including water quality.*

The proposal is not considered to have any negative impacts on the foreshore.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The height and bulk of the building is as is existing and has regard to the adjoining development and the existing landscaping and topography of the adjoining sites.



CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?

Strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality residential development which achieves the strategic objectives of Council.

CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?

The Planning Circular PS 20-002, issued on 5 May 2020 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The MLEP is a standard instrument.

This assumed concurrence is subject to some exceptions in - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council. However, in the present case the consent authority is the NSW Land and Environment Court and not a delegate of the Council, and accordingly concurrence may be assumed.



CONCLUSION

This exception to the development standard demonstrates that the proposed variation to Height of Buildings standard should be supported because:

- The maximum height of building on the site is currently in exceedance of the height of building controls as existing and is appropriate for an E4 zone that primarily consists of residential development. The existing building is 13.4m high, and the proposal adds no additional height.
- The proposed new built form and character are consistent with the underlying objectives of the standard.
- The proposed variation allows for the provision of improved residential accommodation.
- The proposed variation does not result in any unreasonable privacy, sunlight, view loss or visual impacts.
- The proposed variation to the standard does not raise any matter of significance for State or regional environmental planning.
- There is no public benefit in maintaining strict compliance with the standard.
- Strict application of the standard is therefore unreasonable and unnecessary in the circumstances of the case.

Overall, it is considered that the proposed variation to the maximum Height control is entirely appropriate and can be clearly justified having regard to the matters listed within MLEP Clause 4.6.