Clause 4.6 *Exceptions to Development Standards – Height of Buildings*
20 Rednal Street Mona Vale

Clause 4.6 of the Pittwater Local Environmental Plan 2014 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 the Pittwater LEP 2014 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.

Commencing on 1 November 2023 Clause 4.6(3) and (4) of the PLEP 2014, state that development consent, that contravenes a development standard, must not be granted unless the consent authority is satisfied the applicant has demonstrated that:

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

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

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

1. Environmental Planning Instrument Details

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

Pittwater Local Environmental Plan 2014

1.2 What is the zoning of the land?

C4 – Environmental Living

1.3 What are the objectives of the zone?

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors*

1.4 What is the development standard being varied?

Cl 4.3 - Height of Buildings

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

Cl. 4.3 of the Pittwater Local Environmental Plan 2014

1.6 What are the objectives of the development standard?

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

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

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

(c) to minimise any overshadowing of neighbouring properties,

(d) to allow for the reasonable sharing of views,

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

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 existing dwelling has a maximum height of 11.06 metres and no change is proposed. The new works propose a maximum height of 9 metres as illustrated below.

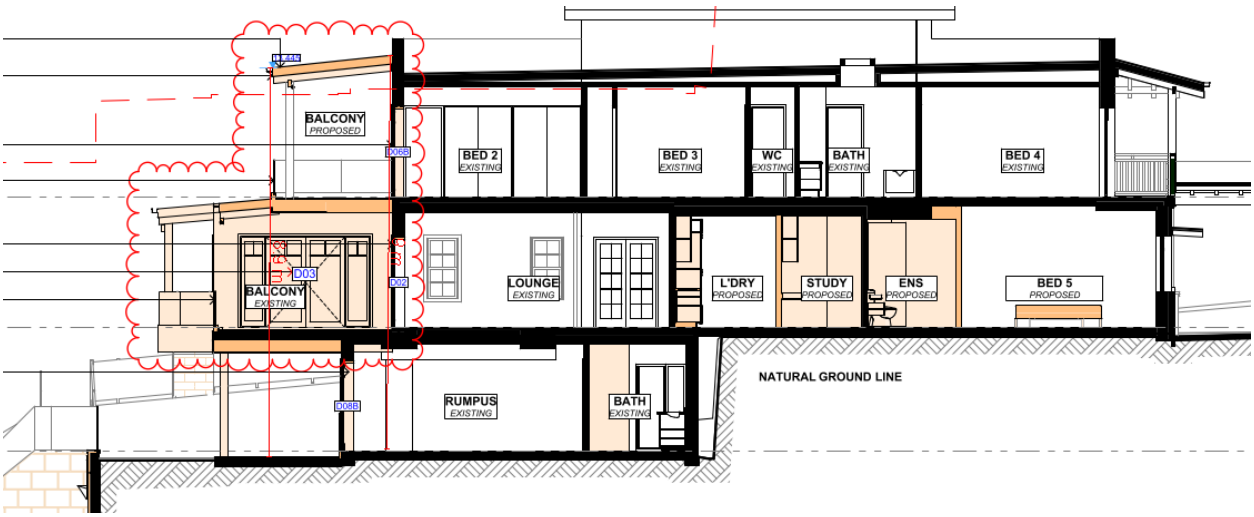

Figure 1: Plan Extract – Long Section

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

The variation sought is 500mm or 5.8%.

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.

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.*

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.

5. Action Pty Ltd v Woollahra Municipal Council [2018]

In Action Pty Ltd v Woollahra Municipal Council, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

3. Consideration

The following section addresses the provisions of clause 4.6 of LEP 2014 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 any building, by virtue of its height and scale, is consistent with the desired character of the locality,

Comment

The proposed height of the rear additions are located below the existing maximum building height of 11.06 metres, at a maximum height of 9.6 metres, ensuring the works remain consistent with the existing built form.

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

Surrounding development is characterised by one, two and three storey dwellings. Properties enjoy water views to the east.

It is considered the minor rear additions remain compatible with the height and scale of the existing dwelling and surrounding properties, presenting below the existing maximum building height.

(c) *to minimise any overshadowing of neighbouring properties,*

The proposed variation to height will not result in any unreasonable solar access impacts to neighbouring properties. The shadow diagrams provided with this application demonstrate the subject site and surrounding properties retain compliant solar access, despite the proposed height variation.

(d) to allow for the reasonable sharing of views,

A site visit has been undertaken and it is concluded the proposed development will not result in any view loss impacts, as no views are obtained across the location of the proposed additions.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

The existing dwelling responds to the site topography which will be retained. The minor rear additions will not alter the existing site topography.

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items

The works remain consistent with the existing dwelling and surrounding properties and will not create any visual impacts when viewed from the public domain. The site is not a heritage item, is not located within a heritage conservation area and is not located in close proximity to any heritage items.

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 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:

Context

- The subject site has an existing non-compliant building height of 11.06 metres and the additions are located below the existing maximum height, at 9.6 metres,
- The dwelling retains its two and three storey scale and the rear roof addition is not highly visible, being located at the rear of the site,
- As such, the varied building height is considered to be reasonable and is consistent with clause 1.3(c), (d) and (g).

Future Development

- The built form proposed is consistent with the existing dwelling and other buildings in the locality,
- Amendments to achieve compliance would not alter the existing non-compliant building height, with no gain for the site or neighbours,
- The alterations and additions proposed demonstrates fulfillment of clause 1.3(a), (b), (c) and (g).

Consistent with Zone Objectives

- The extent of the variation is considered to be in the public interest, as the proposal

remains consistent with the objectives of the zone, allowing for minor alterations to the existing dwelling, of a bulk and scale consistent with the locality.
- Compliance with the building height standard based on this would be unreasonable, with clause 1.3(c) demonstrated as fulfilled.

Natural Environment

- The natural environment is not affected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with Cl 1.3(b) satisfied.

Social and Economic Welfare

- The variation to the building height will have a positive social impact, as it will allow the housing needs of the residents to be met in their current local community.
- All services are existing, satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

Appropriate Environmental Planning Outcome

- The works proposed will not result in an overdevelopment of the site and satisfies the objectives of the zone and the objectives of the development standard, as detailed within this report,
- The variation does not result in a dwelling with excessive bulk.
- The variation will have no unreasonable amenity impacts to neighbours and the surrounds.

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 building height variation.

Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*

Will the proposed development be in the public interest?

It is considered that the development of an existing dwelling house on the subject site, does not raise any matters contrary to the public interest.

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, promoting good design and amenity of the built environment* and *promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

Conclusion

The proposed development for alterations and additions to an existing dwelling on land zoned C4 – Environmental Living.

As stated above, the existing dwelling has a non-compliant building height of 11.06 metres and the additions propose a maximum height of 9 metres, a variation of 500mm or 5.8%.

The variation does not result in any unreasonable impacts in regards to view loss, loss of privacy or increase in shadowing for neighbouring properties and will result in a development of a similar scale development to surrounding properties.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation of which have been reasonably satisfied under the provisions of Clause 4.6.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.

Planner Declaration

Document Control Table

Document Purpose:	**Clause 4.6 variation request (height)**	
Date	**Prepared by**	**Approved by**
17 December 2024	Naomi Lyons Senior Planner	Sarah McNeilly Director

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