KEY URBAN PLANNING

Clause 4.6 – Exceptions to Development Standards

VARIATION TO THE MAXIMUM HEIGHT OF BUILDINGS STANDARD UNDER CLAUSE 4.3 OF HORNSBY LEP 2013

Lot 2 in Deposited Plan 1155697 No. 20A Amaroo Avenue, MOUNT COLAH

Alterations and Additions to an Existing Dwelling House.

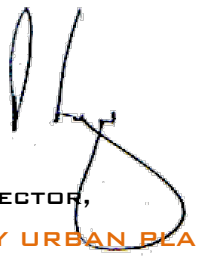
3rd NOVEMBER 2020

Issue No	Amendment	Date
Issue 1	Draft issue to client	2nd November 2020
Issue 2	Final issue to council	3rd November 2020

REPORT PREPARED BY:

Peter Fryar

BTP (UNSW), CERT T&CP (Ord4), MPIA



Director,

KEY URBAN PLANNING

KEY URBAN PLANNING

VARIATION UNDER CLAUSE 4.6 OF THE HORNSBY LOCAL ENVIRONMENTAL PLAN 2013 TO DEVELOPMENT STANDARD FOR MAXIMUM HEIGHT OF BUILDINGS (CLAUSE 4.3)

Peter Fryar of Key Urban Planning has prepared this clause 4.6 request (the **"request"**) to assist in gaining development consent for *'Alterations and Additions to an Existing Dwelling House'*. The development proposal includes the demolition of part of the existing dwelling house.

- Peter is a Town Planner with over 35 years' experience in Local Government and private practice.
- Peter holds a Degree as a Bachelor of Town Planning (UNSW) and Certificate under Ordinance 4 as a Town and Country Planner.
- Peter is a Corporate Member of the Planning Institute of Australia (PIA).

The property is known as Lot 2 in Deposited Plan 1155697, No.20A Amaroo Avenue, Mount Colah (the **"site"**). The site is located on the northern side of Amaroo Avenue and is accessed via a right of carriageway 4 metres wide formed as a concrete driveway. The site contains a dwelling house comprising 3 storeys and is accessed from an elevated and covered stairway to a detached garage.

The total site area is 597m^2.

Figure 1- Aerial photograph *(courtesy Hornsby Council)*

The allotment was created as part of a subdivision of one lot into two under DA/293/2010 approved on 2nd July 2010. The original allotment comprised an existing 'multi - unit housing development' and included a variation to the minimum allotment size requirement under the previous Hornsby LEP 1994. Council in granting subdivision that created the site supported an written objection under the now repealed State Environmental Planning Policy No. 1 (SEPP 1).

In consideration of this matter, we have:

- Undertaken an inspection of the site and surrounding locality;
- Undertaken a review of the relevant provisions of the Hornsby Local Environmental Plan 2013 (the **"LEP"**);
- Undertaken a review of the relevant sections of the Hornsby Development Control Plan 2013 (the **"DCP"**); and
- Given consideration to the relevant provisions of the Environmental Planning and Assessment Act, 1979 (the **"Act"**) and the Environmental Planning & Assessment Regulations, 2000 (the **"Regs"**).

INTRODUCTION

Key Urban Planning is providing urban planning services to the owners of the site in support of the above described development application submitted to Hornsby Shire Council.

The purpose of this request is to seek a variation to Clause 4.3 (Height of Buildings) of the Hornsby Local Environmental Plan 2013. It is proposed to undertake the part demolition of the existing dwelling house building including demolition of a number of building elements that currently exceed the maximum height development standard. The proposed works will result in a portion of the new building structure further exceeding the maximum height standard.

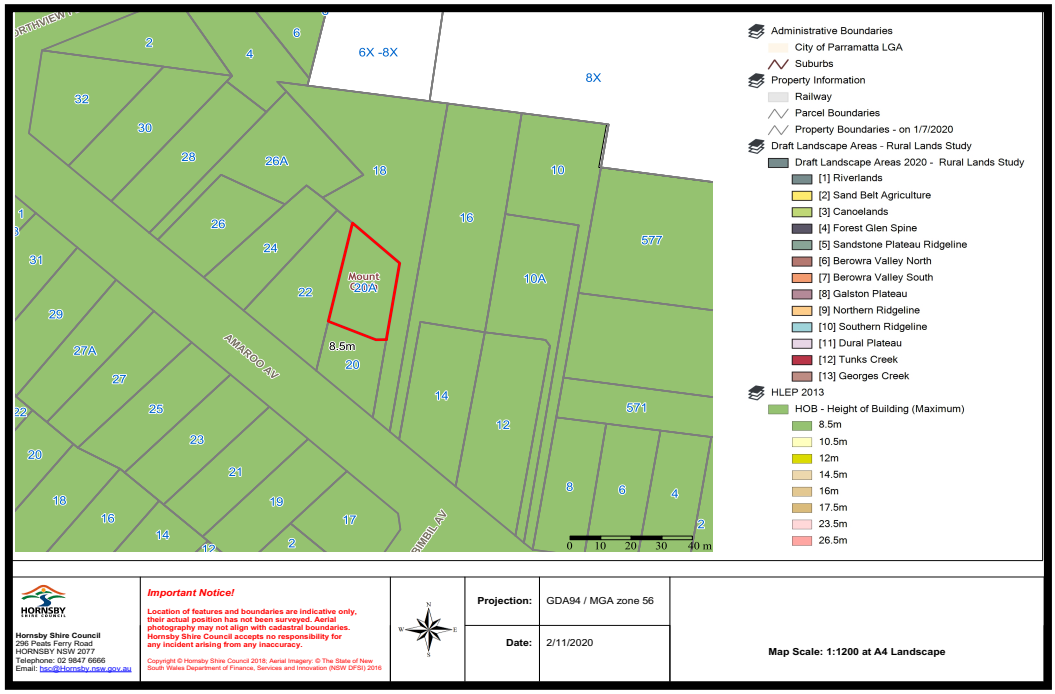
Clause 4.3 of the LEP states:

> *"4.3 Height of buildings*
> *(1) The objectives of this clause are as follows:*
> *(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*
> *(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map."*

The request seeks a variation to the 8.5 metre maximum height standard prescribed under the LEP. A portion of the existing roof structure currently exceeds the building height standard. The proposed works involve the replacement of an existing internal 'spiral stairway' with a lift to assist in making the home more "liveable" for the occupants of the dwelling house. The creation of a lobby and plant area to accommodate the lift will result in a small portion of the building subject of the proposed works exceeding the maximum building height control. The proposed

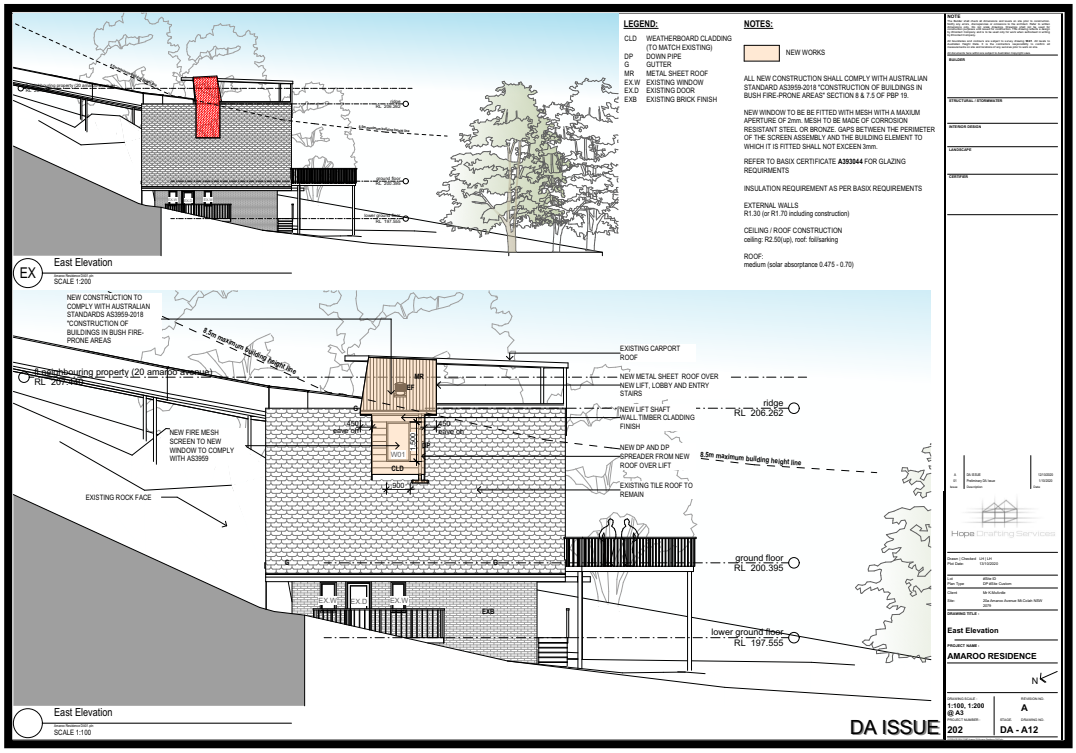
lift will result in a small portion of the roof protruding to a height of approximately 10.75 metres.

Figure 2 – Height of Building Map – Hornsby LEP 2013



The following sectional elevation illustrates the extent of the breach of the maximum 8.5 metre height standard.

Figure 3 - Height control details – (Maximum proposed 10.75 metres)



CLAUSE 4.6 FRAMEWORK

Clause 4.6 (*Exceptions to Development Standards*) provides a mechanism for a Consent Authority to grant flexibility in Development Standards when it considers this would result in improved planning outcomes for and from a development.

Clause 4.6(3)(a) and (b) requires that a consent authority must not grant a variation to a development standard unless it is satisfied:

> *"(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;"*

Additionally, there is Case Law precedence that must be considered prior to determining any variation request under the Clause. The Land and Environment Court Case law has set questions to be addressed in requests for variations facilitated by Clause 4.6. The relevant precedence is in:

- *Wehbe v Pittwater Council (2007);* and, more recently
- *Four2Five Pty Ltd v Ashfield Council (2015).*

More recently, in two recent decisions (one in the Court of Appeal and one in the Land and Environment Court), Preston CJ further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and *Al Maha*.

1. Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61

At first instance, Grey C refused development consent to the DA. One of the bases on which consent was refused was that the Commissioner was not satisfied that the Applicant's 4.6 variation request had adequately addressed the matters required to be demonstrated by cl 4.6(3).

On appeal to a judge of the Land and Environment Court (Preston CJ), Baron argued that the Commissioner had misdirected herself by asking whether she was '*directly and reasonably satisfied* with the reasons given in the 4.6 request. The applicant made this submission in reliance on Preston CJ's statement in *Initial Action* (*at [25]*) that:

> *"…the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b)."*

After a detailed consideration of the issue (*at [74] – [81]*), His Honour rejected the applicant's argument. At *[78]*, His Honour held:

> *"The consent authority's consideration of the applicant's written request, required under cl 4.6(3), is to evaluate whether the request has demonstrated the achievement of the outcomes that are the matters in cl 4.6(3)(a) and (b). Only if the request does demonstrate the*

> *achievement of these outcomes will the request have "adequately addressed the matters required to be demonstrated" by cl 4.6(3), being the requirement in cl 4.6(4)(a)(i) about which the consent authority must be satisfied. The request cannot "adequately" address the matters required to be demonstrated by cl 4.6(3) if it does not in fact demonstrate the matters."*

2. RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130

Subsequent to the decision in *Baron Corporation*, the Court of Appeal once again considered the proper construction of clause 4.6 in *RebelMH*. Preston CJ sat in the Court of Appeal and delivered the Court's reasons.

The development in question contravened the height development standard set out in the *North Sydney Local Environmental Plan 2013* ('NSLEP') and a clause 4.6 variation request was therefore required.

At first instance, Moore J dismissed the appeal as he was not satisfied that the request had adequately addressed the matters required to be demonstrated by cl 4.6(3) of the NSLEP. His Honour also found that the proposed development was not in the public interest because it was not consistent with objectives (b) and (f) of the height development standard. Objective (b) was to promote the retention and sharing of existing views and Objective (f) was to encourage an appropriate scale and density of development that was in accordance with the character of an area.

On appeal, the applicant argued that Moore J had misconstrued and misapplied cl 4.6 by finding that to '*adequately address* the matters required to be demonstrated in cl 4.6(3), the request had to actually demonstrate those matters, rather than merely seek to demonstrate those matters.

The Court rejected this argument. After setting out Preston CJ's conclusions in *Baron Corp*, the Court reaffirmed (at *[51]*):

> *"… in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).*"

This application to vary a development standard is framed to provide responses to each of the heads of consideration under Clause 4.6 and to address the precedence set by this relevant Case Law. It is set out as follows:

- Verification that a statutory Development Standard is proposed to be varied;
- Description and quantification of the proposed variation
- Justification on merit of the validity of the variation requested (with particular attention to the current case law precedence in *Four2Five vs Pty Ltd v Ashfield Council & Wehbe v Pittwater Council (2007)*). Particularly, clause 4.6(3)(a) identifies that the request must demonstrate that

compliance with the development standard is unreasonable or unnecessary in the circumstances.

- Assessment against the remaining relevant statutory heads of consideration in the LEP 2013 and other relevant case law.
- As required by clause 4.6(3)(b) the request will demonstrate that there are sufficient environmental grounds to justify contravening the development standard.

DEVELOPMENT STANDARD PROPOSED TO BE VARIED

Height Standard

The Development Standard to be varied by this application is Clause 4.3 (Height of buildings) of the Hornsby LEP 2013.

The map (figure 2) indicates that the maximum height for a building must not exceed 8.5 metres. The purpose of this request is to seek a variation to Clause 4.3 (Height of Buildings) of the Hornsby Local Environmental Plan 2013.

The site is zoned R2 Low Density Residential Zone under the LEP.

The Dictionary to LEP 2013 defines "Height of Buildings Map" as:

*"**Height of Buildings Map** means the Hornsby Local Environmental Plan 2013 Height of Buildings Map."*

Building height is defined in the LEP 2013 as:

*"**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."

Is 'Height' a Development Standard?

Section 1.4 of the Act defines a 'development standard' to mean:

*"**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*
(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
(b) the proportion or percentage of the area of a site which a building or work may occupy,
(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
(d) the cubic content or floor space of a building,
(e) the intensity or density of the use of any land, building or work,
(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
(h) the volume, nature and type of traffic generated by the development,
(i) road patterns,
(j) drainage,
(k) the carrying out of earthworks,
(l) the effects of development on patterns of wind, sunlight, daylight or shadows,
(m) the provision of services, facilities and amenities demanded by development,
(n) the emission of pollution and means for its prevention or control or mitigation, and
(o) such other matters as may be prescribed."

The maximum building height identified on the 'Height of buildings map' is deemed to be a 'development standard' as defined under section 1.4 of the Act.

The Land and Environment Court of NSW in *Bramley v Coffs Harbour City Council* [2014] NSWLEC 1194 considered a development proposal involving a clause 4.6 submission seeking variation to the height standard. Commissioner Brown at para. 28 to 29 described the clause 4.6 assessment framework as follows:

"28. Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

29. In considering the question of consistency, I have adopted approach of the former Chief Judge, Justice Pearlman in Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21 where, Her Honour expresses the following opinion at [27]:
The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible."

NOTE: Bold and underlining by author.

Accordingly, the proposed alterations and additions forming part of the DA constitutes a variation to the maximum building height development standard contained within the LEP and requires the proponent to formally seek a variation under the provisions of clause 4.6 of the LEP.

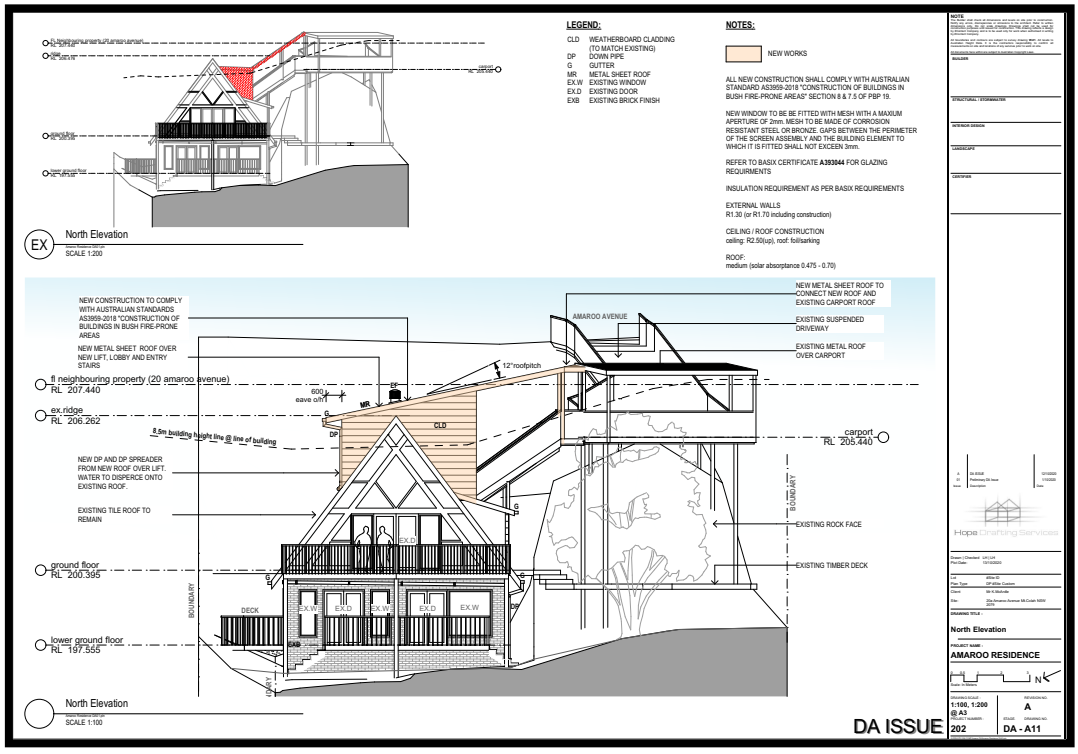
EXTENT OF VARIATION SOUGHT

Height Standard

The purpose of this request is to seek a variation to Clause 4.3 (Height of buildings) of the Hornsby Local Environmental Plan 2013. It is proposed that elements of the roof of the proposed addition and replacement roof cover of the existing stairway that extends from the house to the garage will exceed the maximum height control.

Figures 3 and 4 depict the extent of the non-compliance with the maximum height standard being a maximum height of approximately 10.7 metres or 25% variation (max). The majority of the building will remain within the maximum 8.5 metre development control standard.

Figure 4 - Height control details – (Maximum proposed 10.7 metres)



JUSTIFICATION FOR CONTRAVENTION OF THE DEVELOPMENT STANDARD

The proposed variation is justified below firstly via a merit based assessment on the recent case law and subsequently against the relevant heads of consideration in the LEP 2013. Case law (*Winten Property Group v North Sydney Council, 2001* & *Wehbe v Pittwater Council, 2007*) sets the basis for decision making on tests to assess variations to a Development Standard founded in whether the varied development would achieve the objectives of the relevant zoning and the Development Standard. In the decision in *Four2Five Pty Ltd v Ashfield Council, 2015*, Commissioner Pearson found that merely showing that the development achieves the objectives of the development standard would be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of a Clause 4.6 objection. This refined the test set in *Wehbe v Pittwater Council* to include an obligation to tie the test to outcomes specific to the proposed development and its site as opposed to grounds that would apply to any similar development on the site or in the vicinity. Consent authorities have since been applying this site & development specific test ("*the Four2Five Test*") to objections under Clause 4.6. The merit based assessment of this variation request is based on this test.

With respect to the *Four2Five* test, there are a number of outcomes for the development on this site that go to justification of the variation request for maximum building height. These include:

- The shape and locality of the site and the opportunities and constraints that arise for its redevelopment (in part) as a result;
- The potential for negative town planning and urban outcomes that may arise from strict compliance with the requirement are negligible when considering the context of the site with surrounding development;
- The unique qualities of the site and the proposed alterations and additions will maintain and enhance these and the character of the locality;
- The character, operation and appearance of the current development will not be substantially altered by the height.
- The shape and locality of the site and the opportunities and constraints that arise for its development as a result – specifically the opportunity to provide substantial benefits for the occupants of the dwelling house.
- The extent of the non-compliance is minor (max. 25%) with the majority of the building less than the maximum development standard. The extent of works that cause the protrusion of the building roof form above the height standard is minor. The new roof material to the existing covered stairway is essentially a "replacement" of the existing roof cladding.
- There is limited opportunity to 'step' the design due to the site constraints and the existing built form of the house.

ASSESSMENT AGAINST THE STATUTORY HEADS OF CONSIDERATION

The proposed variation is assessed below against the relevant sub-clauses in Clause 4.6 of the LEP.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl.4.6(3)(a))

In his decision in *Wehbe v Pittwater Council [2007] NSW LEC 827* (relating to the now repealed State Environmental Planning Policy No.1), Chief Justice Preston expressed the view that there are 5 different ways in which a Development Standard may be shown to be unreasonable or unnecessary (and so that an objection to the development standard may be well founded). In accordance with this precedent, the proposed variation is tested below against each of these.

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

The relevant objective underpinning the building height development standard is:

"(a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,"

Our opinion is that the relatively modest additional height proposed contributes to the delivery of a high quality and better functioning development on the site. The proposed height variation realises the development potential of the site and provides a higher quality outcome than the alternative solution.

It is clear that the objectives of the standard are able to be achieved, notwithstanding the additional height, and that a superior development outcome would result. The works involving the breach of the height standard will not be visible from the adjoining roadway and consequently the impacts on the existing streetscape are negligible.

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The underlying objective or purpose of the standard is relevant to this development but, as illustrated in the plans submitted with the development application, it is achieved through the height variation with a higher quality urban planning and urban design outcome. The works involving the breach of the height standard will not be visible from the adjoining roadway and consequently the impacts on the existing streetscape are negligible.

- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The underlying object or purpose of the standard would not be defeated or thwarted if compliance was

required. However, strict compliance with the development standard would result in a missed opportunity specific to this site to develop a high quality and functional development. The element of the roof that is subject of the height non-compliance is minor in the context of the site.

- *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;*

Council has departed on the development standard in historic planning circumstances on the site. The existing building contains a number of building elements that currently exceed the maximum height standard.

Likewise, the Council created the site as a constrained and undersized allotment in granting the initial subdivision that created lot 2.

- *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.*

Not applicable. The zoning of the site is appropriate.

The proposed variation is consistent with the heads of consideration set by the decision of *Wehbe v Pittwater Council [2007]* and thus that for this particular case it would be unreasonable to strictly apply the numerical height standard for the development.

There are sufficient environmental planning grounds to justify contravening the development standard (Cl.4.6(3)(b))

The merit - based justification above in this request provides strong evidence that the proposed height variation would have clear positive outcomes.

Our opinion is that the additional height is a negligible issue within the context of the greater planning benefit, including opportunities for enhancement of local values and provision of high quality development that would result from the minor variation to the height standard.

In this regard, there are sufficient environmental planning grounds specific to this site to justify the proposed minor departure from the development standard.

The proposal will be in the public interest because it is consistent with the objectives of the relevant development standard and the objectives for development within the relevant zone (Cl.4.6(4)(a)(ii))

The analysis previously in the SEE indicates that the proposed height variation will result in a development that is consistent with the objectives of the R2 Low Density Residential zone and the Height Standard clause within the LEP 2013.

In *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [75]-[80].

Case concerned a DA to carry out alterations to an approved but as yet unconstructed residential flat building that exceeded the maximum FSR in Sydney Local Environmental Plan 2012. The Applicant contended that the Commissioner who heard the matter had applied the wrong test of needing to be directly and personally satisfied that compliance with the development standard is unreasonable or unnecessary rather than whether the written request had adequately addressed that matter.

Justice Preston said:

"The upshot is that a consent authority, and the Court on appeal, in order to determine whether the applicant's written request has demonstrated the achievement of the matters (the outcomes) in cl 4.6(3)(a) and (b), might need to form a view about whether the matters have in fact been achieved. Take, for example, the matter in cl 4.6(3)(a). One of the ways in which compliance with the development standard might be shown to be unreasonable or unnecessary in the circumstances of the case is if the development achieves the objectives of the development standard, notwithstanding that the development contravenes the development standard. Demonstrating that the development achieves the objectives of the development standard involves identification of what are the objectives of the development standard and establishing that those objectives are in fact achieved. The applicant's written request will need to demonstrate both of these things: correctly identifying the objectives of the development standard and establishing that the objectives are in fact achieved. The consent authority may not be in a position to be satisfied that the applicant's written request does demonstrate both of these things unless the consent authority forms its own view about these things."

Height Development Standard

The underlying objective of the height standard is to minimise potential adverse environmental impacts of development of the site on the surrounding residential area.

The underlying objectives of the height standard are to minimise adverse environmental impacts upon the surrounding residential areas from overshadowing, overlooking, intensity of development. The height variation occurs on a small central element of the existing high pitched roof.

Although the proposal breaches the height of buildings control, the development achieves appropriate building envelopes and separation to the adjacent residential land. It is also worth noting that the development does comply with solar access, site coverage and other similar requirements adopted by Council. These matters are considered relevant in the context of the site being predominantly surrounded by residential development.

The underlying objective of the height standard prescribed under the LEP is as follows:

> *"4.3 Height of buildings*
> *(1) The objectives of this clause are as follows—*
>
> *(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map."

The additional building height allows for the efficient and economic use of the site. The minor non-compliance with the height standard is essentially a response to the local topography and does not exacerbate any likely adverse impacts from the development on surrounding lands.

Consideration of the proposed building height must be taken in the context of the existing development of the site compared to the proposed built form. The part of the building that will exceed the height standard will not exacerbate issues relating to overlooking and privacy to the surrounding residential areas.

The extent of the non-compliance with the height standard will not result in any adverse environmental outcomes and will essentially be inconsequential when considering the resultant built form of a fully compliant building with the height standard.

Clause 5.6 of the LEP permits variations to the building height standard for '*roof features of visual interest'*. Subclause 5.6(3) of the LEP prescribes matters for the consent authority to give consideration to when permitting architectural roof features that exceed the height standard. The element of the building that will exceed the height standard is considered to be consistent with the matters for consideration prescribed under clause 5.6(3) of the LEP.

In *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130

- Case concerned a DA for a 5 storey residential flat building that did not comply with the applicable development standard for height under North Sydney Local Environmental Plan 2013.
- One of the issues raised in the appeal to the Court of Appeal was whether, in order for a consent authority to be satisfied that an applicant's request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated.
- The appellant contended that clause 4.6(4)(a)(i) should be read as requiring the consent authority to be satisfied that the written request covers or deals with the required matters and that it was not necessary for the consent authority to agree with the conclusions of a request, nor the accuracy of the factual assertions contained within it. In other words the appellant asserted that the consent authority only needed to be satisfied that the written request contained an argument about each of the matters required to be demonstrated by cl 4.6(3).

- Justice Payne said:

"Clause 4.6(3) requires the consent authority to have "considered" the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is "unreasonable or unnecessary" and that "there are sufficient environmental planning grounds to justify" the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced."

- Justice Preston (sitting in the Court of Appeal) said at 51:

"...in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i))."

It is considered that the public benefit will not be undermined by varying the height development standard. The proposed development is considered to be generally consistent with the adopted planning controls for the site.

SECRETARY'S CONCURRENCE

Under Clause 4.6(5) of the LEP, the Secretary's concurrence is required prior to any variation being granted. The proposal is assessed below against the matters to be considered by the Secretary.

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

The variation to the height development standard will raise no matters that could be deemed to have State or Regional Significance. The proposed variations will have no potential for impacts outside the immediate vicinity of the site.

(b) the public benefit of maintaining the development standard, and

Maintaining the development standard in this case will not compromise that development form envisaged by the planning controls adopted by council.

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

We know of no other specific matters that would require the Secretary's consideration prior to granting concurrence.

CONCLUSION

The proposed development satisfies the test established by the Land and Environment Court of NSW in Wehbe -v- Pittwater Council [2007] NSW LEC 827 as being appropriate for consideration of "unreasonable or unnecessary" circumstances in the application of Clause 4.6 variation request because:

- the objectives of the standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose of the standard is not relevant to the development therefore compliance is unnecessary in the context of the facts of this case;
- the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable - it would not result in the orderly and economic development of the land;

In the circumstances set out above there are sufficient environmental planning grounds to vary the numerical standard in this matter. Requiring strict compliance with the standard would hinder attainment of the relevant objects of the Environmental Planning and Assessment Act 1979.

Peter Fryar

BTP(UNSW), CERT T&CP(Ord4), MPIA

Director,

KEY URBAN PLANNING