

Clause 4.6 Variation Statement (Height)

43 BOUVARDIA STREET ASQUITH 2077

Title Details:	Lot 36 on DP30826
Proposal:	Development Application (DA) for 'Proposed ground floor alterations and first floor addition to an existing residential dwelling'.
Owner:	Mr. Suraj Kumar and Mrs. Shiny Suraj Kumar
Consent Authority:	Hornsby Shire Council
Date:	24 March 2022
Revision:	B



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Introduction

This Clause 4.6 Variation Report supports a Development Application submitted to the Council of the Shire of Hornsby, pursuant to the Environmental Planning and Assessment Act 1979 (EP&A Act). The Development Application is seeking consent for proposed ground floor alterations and first floor addition to an existing residential dwelling at Lot 36 on DP30826 known as 43 Bouvardia Street Asquith in the Council of the Shire of Hornsby.

This report has been prepared to request a variation to Clause 4.3 Height of Buildings of the Hornsby Local Environmental Plan 2013 as it applies to the Addbuild proposal plans, job no.1909/2, dated 08.12.21, submitted under separate cover.

This request responds to NSW Planning & Infrastructure 'guide for varying development standards' which states that development applications seeking to vary a development standard must include a Clause 4.6 written request. Additionally, case law has been considered to justify the strict compliance with the standard is unreasonable and has incorporated as relevant principles identifies in the judgement *Four2Five Pty Ltd v Ashfield Council* (2015) NSWLEC 90.

The NSW Planning & Infrastructure guide outlines all matters that need to be considered in Clause 4.6 written requests. Each of these matters has been diligently addressed in Section 4.0 of this report.

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Clause 4.6

Clause 4.6 of Hornsby Local Environmental Plan 2013 (HLEP 2013) enables an exception to the maximum allowable yield standard, subject to consideration of a written request from the applicant justifying the contravention. Relevant extracts of Clause 4.6 of HLEP 2013 read as follows:

Clause 4.6 Exceptions to development standards

- (1) The objectives of this clause 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.**
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) 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.**
- (4) Development consent must not be granted for development that contravenes a development standard unless—
 - (a) the consent authority is satisfied that—
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and**
 - (b) the concurrence of the Planning Secretary has been obtained.**
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

When this Plan was made it did not include of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4.*

(8A) This clause does not allow development consent to be granted for development that would contravene clause 4.4 for a building on land in Zone B2 Local Centre within the Epping Town Centre, identified as "Area 9" on the Floor Space Ratio Map for the following purposes—

- (a) boarding houses,*
- (b) group homes,*
- (c) hostels,*
- (d) shop top housing,*
- (e) tourist and visitor accommodation,*
- (f) a mixed-use development comprising a combination of uses specified in paragraphs (a)–(e).*

(8B) Subclause (8A) and this subclause are repealed at the beginning of 31 July 2024.

3 Relevant Case Law

New South Wales Land and Environment Court (NSW LEC) have supplemented the Clause 4.6 request with several key case laws that have refined the evolving method of planning principles and ‘tests’ in which variations to development standards are required to be approached. Reference is made in Section 4.0 of this statement to case *Four2Five Pty Ltd v Ashfield Council* (2015) NSWLEC 90 as summarised here in:

1. *Four2Five Pty Ltd v Ashfield Council* (2015) NSWLEC 90

The judgement of this case emphasised that the proponent must address the following:

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives of the particular standard; and
- The development is consistent with the objectives for development within the zone;

4 Grounds for variation

This section responds to questions provided in Appendix 3 of the NSW Planning & Infrastructure ‘guide for varying development standards.’

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

Hornsby Local Environmental Plan 2013

2. What is the zoning of the land?

The subject site is zoned R2: Low Density Residential

3. What are the objectives of the zone?

- *To provide for the housing needs of the community within a low-density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment:

It is considered that the proposal meets the objectives of the Zone R2 Low Density Residential. This opinion is justified on the basis that the proposal will improve the living amenity for the residents and provide much needed space within the home thereby providing for their housing needs while maintaining the low-density residential character.

The proposal meets all other controls that limit bulk and scale including FSR, landscaped area and maximum site coverage, therefore demonstrating that this is a modest development with bulk and scale that is within context of the R2 zoning.

There are no statutory zoning or zone objectives that are an impediment to the granting of approval to the proposed development.

4. What is the development standard being varied?

Building Height – 8.5m maximum

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

'Clause 4.3 Height of buildings ' of the Hornsby Local Environmental Plan 2013

6. What are the objectives of the development standard?

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.*

Comment:

The request seeks a variation to the 8.5 metre maximum height standard prescribed under the LEP. The topography of the site, which slopes to the rear, results in the first floor addition being non-compliant over the rear portion of the site only. The proposal complies with the height control at the front of the site, but becomes gradually non-compliant towards the rear as the site slopes down.

The existing residential dwelling has an understorey which is below the rear portion of the residence. The first-floor addition would create a three-storey element at the rear of the property but importantly would present as a two-storey dwelling from the street.

Figures 1 and Figure 2 depict the extent of the non-compliance with the maximum height standard, being a height of approximately 9.485 metres or 11.59% variation (max). As demonstrated by the Architectural plans submitted with this application, the majority of the building will remain within the maximum 8.5 metre development control standard.

Please refer to Sheet No 6 and 7 of job no. 1909/2.3 prepared by Addbuild.

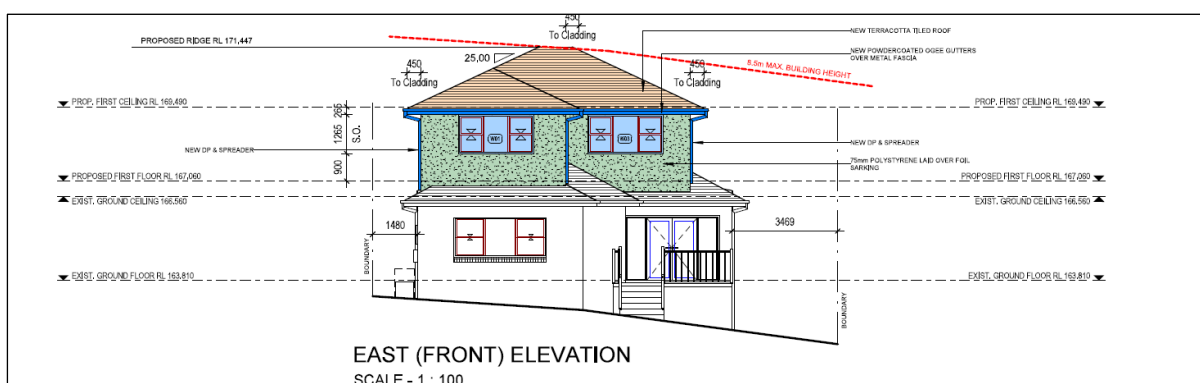


Figure 1: East (Front) Elevation (Source - Addbuild)

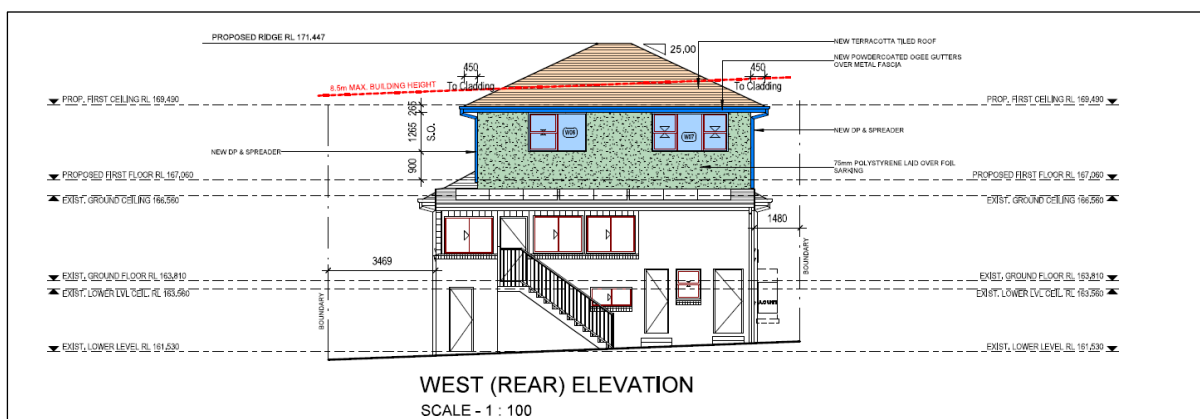


Figure 2: West (Rear) Elevation (Source - Addbuild)

The proposal has been designed to create a high-quality home that can comfortably accommodate a large family, and maximise the potential of the site while maintaining a residential scale that is appropriate for the low-density area. This is confirmed by the fact the proposal meets all other controls that limit bulk and scale including FSR, landscaped area and maximum site coverage, therefore demonstrating that this is a modest development.

Importantly the height non compliance is only over the rear portion of the site as seen in Figure 2, and would not be viewed from the public domain, thereby not impacting the streetscape. As seen in Figure 1 the proposal presents as a compliant, 2 storey dwelling to the street frontage.

Our opinion is that the relatively modest additional height proposed contributes to the delivery of a high quality and better functioning residence on the site. The proposed height variation realises the development potential of the site and provides a higher quality outcome than the alternative complying solution which would be a restricted and dysfunctional development form as a result of having to mirror the sloping topography in order to meet the height control.

As stated above, Asquith is an undulating area and subsequently the non-compliance arises as a result of the nature of the topography of the site. Several alternative design options were considered before finalising the proposed design. However, if the ground floor had been extended to provide a complying solution, this would have considerably affected the private open space and created privacy issues for the occupants of the granny flat at the rear end of the site.

Given the nature of the proposal which is for additions and alterations, it will not generate any additional vehicular or pedestrian traffic around the site or in the street.

The site is well serviced by public infrastructure including water, waste, electricity and other utilities and the proposal will not have any undue impact upon these. The proposed development is coordinated and orderly urban development.

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.

7. What is the numeric value of the development standard in the environmental planning instrument?

Max. building height 8.5m - From Natural ground level.

Refer Figure 3 below for extract of the Height of the building map from the HLEP 2013.

(Map 17, I = 8.5m)



Figure-3: Height of Buildings Maps (Source- Hornsby Local Environmental Plan 2013)

8. What is proposed numeric value of the development standard in your development application?

9.485m

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

Approximately 11.59%

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

As outlined above, this development is in keeping with the low-density residential character and environment, desired by the Council in this area, and the proposal meets all of the objectives of the zone. The proposal presents as a compliant, 2 storey dwelling to the street frontage. As demonstrated in the Statement of Environmental Effects submitted with this application, the proposal generally meets all other planning controls, which reflects that this is a modest addition.

However, as a result of the unique topography of the site which slopes down from the street, the proposed first floor addition exceeds the height control over the rear sloping portion of the site. If it were not for the topography and existing floor level the proposed first floor addition would be fully compliant. However due to these factors a portion of the roof over the rear of the first floor addition is non compliant.

Several alternative design options were considered before finalising the proposed design. However, if the ground floor had been extended to provide a complying

solution, this would have considerably affected the private open space and created privacy issues for the occupants of the granny flat at the rear end of the site. The alternative complying solutions for a first floor addition would create in an irregular and dysfunctional development form as a result of having to mirror the sloping topography.

Rather, the designer has appropriately designed the proposed addition by considering the overall form of the building and aligning it with the existing ground floor and understorey. The proposal will provide a high quality of living, functional space and amenity to the occupants of the dwelling and an aesthetically improved dwelling.

The proposal has been developed in congruence with the streetscape, and maintains a consistent street rhythm with the adjoining properties that are also recessed behind the front building line of the dwelling. The immediate neighbourhood predominantly comprises dwellings that have a ground floor level or a lower ground floor garage level, with pitched roof form and an upper storey level with considerably similar or even greater bulk and scale than the proposed dwelling. Many dwellings incur the same impact of the topography on their built forms, creating non compliances with the height and in some cases even presenting as three storeys to the street.

Please refer to figure 4 and 5 for the adjoining buildings of the subject site.



Figure- 4: 41 Bouvardia St (Adjoining building on the West)

41 Bouvardia Street, Asquith is located to the west of the subject site and is a two storey dwelling when viewed from the streetscape, comprising of a garage and entry feature at the ground floor level and an upper storey level.

Similarly, to the immediate east of the subject site at 45 Bouvardia Street, Asquith is a two-storey dwelling with a garage entry from the street



Figure- 5: 45 Bouvardia St (Adjoining building on the East)

Some of the other residential developments along Bouvardia Street and in the immediate area are shown in Figure 6-8 below.



Figure- 6: 31 Bouvardia St



Figure- 7: 34 Bouvardia St



Figure- 8: 39 Bouvardia St



Figure- 9: 3 Aster Ave



Figure- 10: 5 Gardenia St

These example of neighbouring residential dwellings indicate that the proposed development seamlessly integrates with the established residential characteristics of the neighbourhood dwellings in terms of architectural style and bulk and scale, and will not appear out of character when viewed from the street and public domain, despite the minor non-compliance to the building height.

Analysis of the impact of the addition on neighbouring properties or on the streetscape reveals it will not create any adverse environmental or amenity related impacts, specifically:

1. No view loss

There are no view corridors to be impacted.

2. No impact on privacy

The minor non compliance with height at the rear of the dwelling will not increase the impact on privacy of the occupants and to the occupants of the neighbouring dwellings. The subject dwelling is significantly setback from the street relative to the two adjoining dwellings either side of the subject property.

3. Complies with solar access requirements

Please refer the shadow diagrams provided with the application.

The development has negligible negative consequences as a result of this minor non-compliance. Further, it meets the objectives of the development standard, and therefore strict compliance with the development standard would be unreasonable and unnecessary.

Clause 4.6 allows Council to vary a control where a written request is made by an applicant demonstrating that two criteria are met. The criteria to be satisfied is that:

- a) Compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) That there are sufficient environmental planning grounds to justify contravening the standard.*

In this circumstance, it is unreasonable and unnecessary to strictly comply with the building height control given that the resulting addition will be absent of any additional negative environmental or planning outcomes. Rather, the merit - based justification provided in this request provides strong evidence that the proposed height variation would have clear positive outcomes.

The designer has carefully planned the additions and alterations considering the sloping nature and the topography of the site with an established lower ground floor and ground floor level. Strict compliance with the development standard is unreasonable or unnecessary in this particular case considering the constraints of the land and established built form, which result in a minor variation to the final building height as indicated in each elevation of the built form.

The proposed development ultimately results in a planning outcome that meets Council's desired intent for the area.

For the reasons stated above, it is argued that the variation deserves support as it has no negative and significantly noticeable impact on the streetscape, the surrounding locality and the neighbouring properties.

11. How would strict compliance hinder the attainment of the objects specified in Section 1.3(a) and (c) [previously s5(a)(i) and (ii)] of the Act.

1.3 (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.

1.3 (c) To promote the orderly and economic use and development of land.

Comment: The proposed dwelling is a well-designed and orderly development providing a desirable and improved housing situation for the residents while maintaining the low-density residential character of the built environment.

The proposal is a more efficient and orderly development on the land that is of high-quality architectural design that maximises the sites development potential along with providing improved housing stock for the community in the locality.

As such strict compliance in this regard would limit the above objects being fully attained.

12. Is the development standard a performance- based control? Give details.

The objectives of the development standard provide the controls to allow a performance-based solution. For the reasons outlined herein, it is demonstrated the proposal meets the objectives of the development standard, therefore Council should consider "compliance to the standard unreasonable in the circumstances of the development" based on the merits of the proposal.

13. Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

Yes, please refer to answers in 10, 11 and 12 preceding.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

Yes, Clause 4.6 enables a development standard within an LEP to be varied, providing sufficient and compelling arguments based on sound planning rationale and legislation are put forward to support the variation.

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “sufficient environmental planning grounds” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

Accordingly, the particular circumstances of the proposed development justify varying the development standard under Clause 4.6 as sufficiently demonstrated in this statement:

- The non-compliance arises solely as a result of the topography of the site, which slopes to the rear, and results in the first floor addition being non compliant over the rear portion of the site only. The proposal complies with the height control at the front of the site and presents as a complying development to the street.
- Alternative design options were not feasible in this circumstance.
- The proposed height variation provides a higher quality outcome than the alternative complying solution.
- The request for the variation of 11.59% does not prevent compliance with all other LEP controls and DCP controls generally.
- All other controls that limit bulk and scale including FSR, landscaped area and maximum site coverage, therefore demonstrating that this is a modest development.
- The proposal is consistent with the objectives of the height standard, contained in Clause 4.3 of the LEP.
- The departure from the maximum height standard will not result in any significant adverse impact upon the amenity of the adjoining neighbours in terms of overshadowing, loss of privacy or views.
- The non-compliance is as a result of the sites unique topography and particular existing built form. No precedent will be set that would allow unjustified non-compliance with the standard in future applications.
- The proposed variation to the height standard does not conflict with any matters of State or regional environmental planning significance, nor does it conflict with any State Planning Policies or Ministerial directives. The significance of the

non-compliance is acceptable in the context of the overall development of the broader Hornsby area.

- The public benefit would be best served by approval of the development application under consideration, given the absence of any demonstrable adverse impacts resulting from the proposal and that a higher quality outcome would be provided than the alternative complying solution.

5 Conclusion

The non-compliance to the maximum building height is considered acceptable based on the extensive and accepted planning rationale outlined herein.

Specifically, it is our view that the variation does not:

- Hinder the attainment of the objects specified in 1.3(a) and (c) [previously s5(a)(i) and (ii)] of the Environmental Planning and Assessment Act 1979;
- Raise any matter of significance for State or Regional planning; or
- Create any unreasonable precedent.
- Impact unreasonably on adjoining properties.

As shown herein, the development is still capable of satisfying the relevant objectives notwithstanding the minor height variation. and having regard to the facts outlined in this submission it is our view that it is both unreasonable and unnecessary for Council to insist upon compliance with the prescribed maximum building height of 8.5m in this instance.

Melissa Neighbour
Principal Planner
SKY Town Planning
March 2022