

120A Quarter Sessions Road, Westleigh

Clause 4.6 Exceptions to Development Standards

Height of Buildings

1. Introduction

Clause 4.6 of the Hornsby Local Environmental Plan 2013 (HLEP 2013) 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 Hornsby LEP 2013 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.

Under Clause 4.6(3) and (4) of the HLEP 2013, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

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

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

(4)(a)(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,

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

It is of interest that the consent authority specifies a number of development standards that cannot be varied under Clause 4.6, listed in Clause 4.6(8). Clause 4.3 - Height of buildings is not one of the standards excluded, it must therefore be assumed that the standard for height of buildings, is one of the development standards that can have an appropriate degree of flexibility applied under clause 4.6.

2. Environmental Planning Instrument Details (Hornsby LEP 2013)

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

Hornsby Local Environmental Plan 2013 (HLEP 2013)

2.2 What is the zoning of the land?

R2 – Low Density Residential

2.3 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 provides facilities or services to meet the day to day needs of residents.*

2.4 What is the development standard being varied?

Cl 4.3 of the Hornsby Local Environmental Plan 2013, Height of Buildings

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

Cl 4.3 of the Hornsby Local Environmental Plan 2013

2.6 What are the objectives of the development standard?

- (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.*

2.7 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.

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

The numeric value of the development standard in this development application is a maximum of 9.96 metres.

building height (or ***height of building***) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

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

The percentage variation sought is 17.17% or 1.46 metres.

3. 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.

3.1 *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).

3.2 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.

3.3 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.*

3.4 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.

3.5 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.

4. Consideration

The following section addresses the provisions of clause 4.6 of the HLEP 2013 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:

4.1 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 permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

The proposed development will present with a patio cover and pergola of compatible scale to both the existing and neighbouring developments. It is an aesthetically pleasing addition to the existing elevated deck and will remain masked from public view, therefore having nil impact upon the public domain and streetscape. The height non-compliance results only where the site falls away rapidly towards the rear of the site overlooking the heavily vegetated bushland. This section of the building is centrally located on the site, therefore being well distanced from adjoining lot boundaries and minimising any potential impacts on adjoining land or the streetscape.

It is therefore considered this objective is met, despite the numerical variation.

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.

4.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning 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:

Detail of Variation

- The variation to the height limit occurs at the rear of the existing development, being an open patio cover and pergola structure to the existing elevated deck. As the site falls away rapidly to the rear, this is where the breach occurs, with the majority of the roof structure otherwise being kept within the 8.5m height limit. This proposed roof design allows for the amenity of the outdoor living space to be achieved, providing suitable year-round protection from the elements.
The variation is required in this instance to achieve suitable amenity and compliance with the development standard would be unreasonable given that the proposal can readily achieve the objectives of the standard.

Neighbour Amenity

Fulfillment of each of the criteria below demonstrates a development satisfying Cl1.3(g).

- The variation in height will have a negligible impact on neighbours. The patio cover breach in these circumstances is considered small, being located at the rear where the site topography falls away rapidly. This is of no significant impact to neighbours, particularly given the substantial setbacks from boundaries and there are no key views across the site in this location.
- Compliance with the height control would not result in a building which has a significantly lesser bulk and any improvement as a result of compliance would be barely discernible to the side neighbours as the non-compliant roof form is centrally located within the site and not readily perceived from these adjoining dwellings. Accordingly, compliance with the development standard in this instance is unreasonable.
- Solar access impacts as a result of the small height variation are negligible. Solar access on the neighbouring sites is compliant as the development proposed is sufficiently distanced. Accordingly, compliance with the development standard based on this would be unreasonable.

- The small variation to the height of the roof form has no consequence for the privacy of neighbours. Accordingly, the variation is reasonable in the circumstances of the case.

Site Constraints

- The design, including the variation to the height, is largely a result of working with the existing site constraints and topography. It would be unreasonable to require compliance with the development standard, when the variation result allows for the orderly and economic use of the site and allows for an ecologically sustainable development satisfying Cl1.3(g) and (f).

Design and Streetscape Appeal

- Strict numerical compliance with the height control would not result in a better urban design outcome. The roof form is consistent with the predominant architectural character of the street and will complete an appealing design. Compliance with the development standard based on this would be unreasonable.
- The proposed development will not present with excessive bulk from the public domain. The patio cover proposed is located over the rear deck and will not be viewable from any public vantage points in Quarter Sessions Road or from neighbouring sites. Accordingly, the streetscape appeal is unaffected by the variation to the height standard, and it would be unreasonable to require compliance with development standard based on this.

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 ensuring that appropriate and reasonable housing suitable for the local community is proposed. Compliance with the development standard based on this would be unreasonable.

Natural Environment

- The inclusion of the height variation has no impact on the natural environment. The variation sits at the rear of the existing dwelling and will not result in any impact to the existing natural components of the site or neighbourhood. No landscape area is lost or impacted through the height variation satisfying Cl1.3(b). The natural environment is unaffected by the small departure to the development standard, and it would be unreasonable for the development to be refused on this basis.

Environmentally Sustainable Development

- The proposal represents an environmentally sustainable design, making an appropriate enhancement to the liveability of the existing dwelling satisfying Cl1.3(f). Compliance with the development standard based on this would be unreasonable.

Social and economic welfare

- The small variation to the height as detailed above will have no social impacts for the site or local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.
- The small variation to the height control as detailed above will have no economic impacts for the site or the local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

Appropriate Environmental Planning Outcome

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as is detailed earlier in the report.
- The variation does not result in a roof form or height beyond that which is found in the general locality. The maximum height of the varied portion of the roof form is located at the rear of the site, well distanced from neighbours as detailed in the Architectural Plan Elevations. The small variation will be compatible within the context in which it sits and is reasonable in the circumstances of the case satisfying Cl1.3(c). Compliance with the development standard based on this would be unreasonable.

- Removal of the non-compliance would not result in any meaningful reduction in the perceived bulk and scale of the proposal due to its minor nature, siting and topography.

The variation is and the discussion above reflects the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and retention of amenity.

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 height variation.

4.3 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 which the development is proposed to be carried out.

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A)). An assessment of consistency with the objectives of the Zone is provided below:

Zone – R2 Low Density Residential

- *To provide for the housing needs of the community within a low density residential environment.*

Consistent. The proposal is for a patio cover to an existing elevated deck at the rear of the residential dwelling.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Not relevant. The proposal is ancillary to a residential dwelling.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effect as the variation is set well back from all boundaries, centrally located on the site and due to site topography.

The proposal will not result in any discernible impacts, being complementary to the existing dwelling and masked from view of any public vantage point.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The non-compliance will not raise any matter of State or Regional Significance.

Clause 4.6(5)(b) the public benefit of maintaining the development standard,

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence

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 metre height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats and promoting good design and amenity of the built environment.*

Conclusion

The proposed development is for alterations and additions to an existing residential dwelling, in the form of a new elevated patio cover on land zoned R2 Low Density Residential.

As stated above, the non-compliance between the proposal and the environmental planning instrument is 1.46 metres or 17.17%. It occurs largely as a result of working with the constraints of the existing site levels but is confined to the rear of the site where it falls away rapidly, resulting in it not being readily understood as excessive or in excess of the height limit. It will not create any unreasonable impacts associated with view loss, loss of privacy or increase in shadowing for neighbouring properties and will result in a development of a similar scale to development on surrounding properties. Further, the proposal will remain masked from any public vantage point and therefore have no impact upon the streetscape. Amenity is retained for all neighbours.

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 statement sufficiently demonstrates that compliance with the development standard is both unreasonable and unnecessary in this instance.

The sufficient environmental planning grounds stipulated within this request, demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic development of the land, notwithstanding the height variation.

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.