KEY URBAN PLANNING

Clause 4.6 – Exceptions to Development Standards

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

Lot 12 in DP 231944 No. 1 Dilkera Close, HORNSBY

Construction of alterations and additions to an existing dwelling house.

16th June 2023

Issue No	Amendment	Date
A	Initial draft Report	10th October 2022
B	issue to Client	11th October 2022
C	issue to Council	28th November 2022
D	Amended Design	30th May 2023
E	Final Amended Design	16th June 2023

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[redacted]

Director,

KEY URBAN PLANNING

Waiver

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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 *'Construction of alterations and additions to an existing dwelling house'.*

The property is known as Lot 12 in DP 231944 No.1 Dilkera Close, Hornsby (the **"site"**). The site is located at the intersection of Dilkera Close and Manor Road.

The site is located on the southern side of Dilkera Close and has a splayed frontage to the roadway of 87.82m/16.98m. The southern and western property boundaries and bounded by bushland. The site has a steep slope (crossfall) from east to west. The site comprises an existing two storey residential building with frontage to Dilkera Close.

Photograph 1 – Aerial photograph *(courtesy Hornsby Shire Council)*

The proposed development detailed under the Statement of Environmental Effects prepared in support of the development application includes an assessment of the proposed works. 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
- Considered the relevant provisions of the Environmental Planning and Assessment Act, 1979 (the **"Act"**) and the Environmental Planning & Assessment Regulation, 2021 (the **"Regs"**).

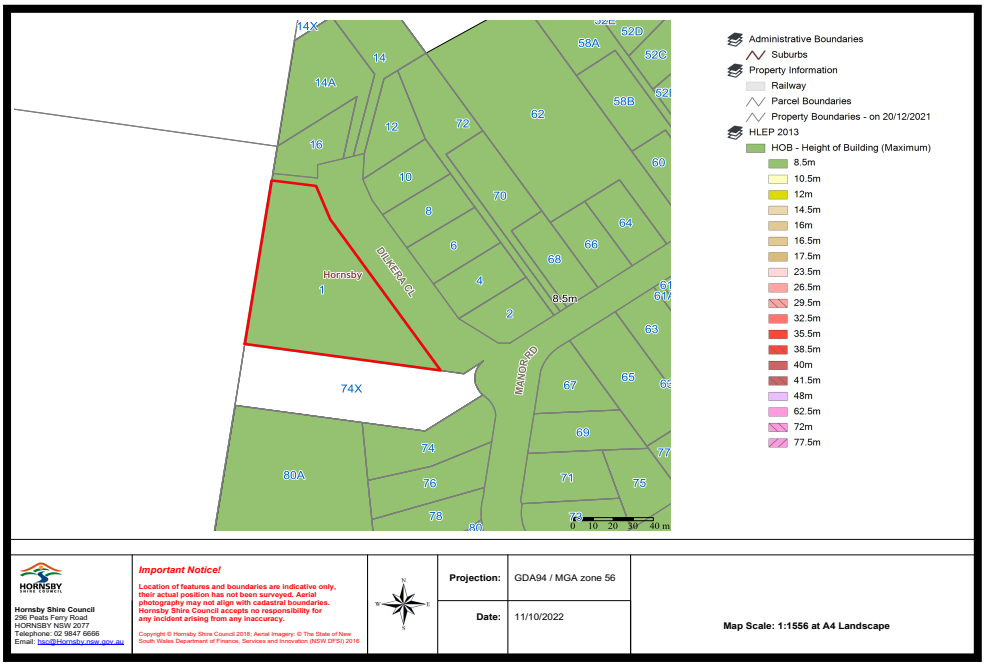
1. INTRODUCTION & BACKGROUND

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. The proposal involves the construction of additions to the existing dwelling house on the site. Due to the steep slope of the land, the proposed works will result in a portion of the new building works along the western elevation of the building to exceed the maximum height control prescribed under the LEP.

Figure 1- Extract of the LEP height map.



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 eight and one half (8.5) metre maximum height standard prescribed under the LEP. The plans submitted as part of the development application form the basis for this clause 4.6 variation request. The maximum proposed height on the development is 10.45m (23% variation). The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath. The proposed variation to the height standard results from the steep fall of the site to the west and the desire to maintain connectivity with the main dwelling house. Furthermore, the subfloor area includes a concrete retaining wall that was constructed to retain earth following a landslide that occurred during a recent period of heavy rain. Whilst the slab is lower than the ground level prior to the landslide, the ground level (existing) has been applied to the ground level beneath to retaining wall slab. The retaining works were necessary to avoid further landslip occurring that would undermine the house as well as cause significant environmental harm to the adjacent bushland and watercourses.

Background

Revised plans have been prepared in response to correspondence received from council dated 20 April 2023. Several changes were made to the original plans to address the concerns raised by council regarding the non-compliance with the maximum height standard prescribed under the Hornsby LEP 2013. The revised plans were supported by a further clause 4.6 variation request. The maximum proposed height on the revised plans was determined to be 9.15m above the ground level (existing). Council disputed the methodology applied in the calculation of the 'height of building'.

The Dictionary contained in the LEP defines building height as follows:

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.

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NOTE: Underlining by Author.

Whilst the methodology adopted by council in the interpretation of the existing ground level is disputed, further design amendments to the plans have been made. The calculation of the height of the proposed building addition has been determined on the existing ground level currently in existence on the site and not as modified by the landslip that occurred.

2. 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

After 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 LEP. 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 the relevant Case Law. It is set out as follows:

1. Verification that a statutory Development Standard is proposed to be varied.
2. Description and quantification of the proposed variation.
3. 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.
4. Assessment against the remaining relevant statutory heads of consideration in the LEP 2013 and other relevant case law.
5. As required by clause 4.6(3)(b) the request will demonstrate that there are sufficient environmental grounds to justify contravening the development standard.

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3. DEVELOPMENT STANDARD PROPOSED TO BE VARIED

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

The building height map (Figure 1) indicates that the maximum height for a building must not exceed 8.5 metres. The request seeks a variation to the eight and one half (8.5) metre maximum height standard prescribed under the LEP. The maximum proposed height of the building addition is 10.45m (23% variation). The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath. The proposed variation to the height standard results from the steep fall of the site to the west and the desire to maintain connectivity with the main dwelling house. Furthermore, the subfloor area includes a concrete retaining wall that was constructed to retain earth following a landslide that occurred during a recent period of heavy rain. breach of the maximum height control is along the length of the western elevation being a balustrade for the roof terrace.

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 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."

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,

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(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' (Figure 1) is 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 & additions to the existing dwelling house 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.

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4. EXTENT OF VARIATION SOUGHT

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 request seeks a variation to the eight and one half (8.5) metre maximum height standard prescribed under the LEP. The plans submitted as part of the development application form the basis for this clause 4.6 variation request. The maximum proposed height on the development is 10.45m. The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath.

The extent of the variation is 1.95m or 23%.

The subfloor area includes a concrete retaining wall that was recently constructed to retain earth following a landslide that occurred during a period of heavy rain. The retaining works were necessary to avoid further landslip occurring that would undermine the house as well as cause significant environmental harm to the adjacent bushland and watercourses. The retaining wall has altered the natural profile of the ground causing difficulty in designing a two-storey addition permitted under the DCP 2013.

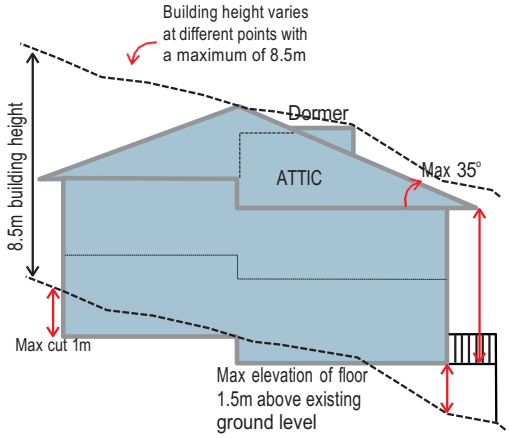
Part 3 – Dwelling Houses (3.1.1 Scale) of Hornsby DCP contains prescriptive measures regarding building height. In particular, the DCP states:

"Buildings should respond to the topography of the site by:

- *minimising earthworks (cut and fill), and*
- *siting the floor level of the lowest residential storey a maximum of 1.5 metres above natural ground level."*

The design of the proposed addition responds to the natural topography of the site and minimises the extent of earthworks.

The DCP adopts the definition of building height contained in the dictionary of the LEP 2013. The definition refers to *'ground level (existing)'* and at figure 3.1(a) of the DCP depicts the method for the calculation of the building height.



Sloping Site Example

As previously discussed, the height of building control defined under the Hornsby LEP 2013 adopts the height of building control in the Standard Instrument Local Environmental Plan. The control states that:

"4.3(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 Hornsby LEP contains a definition of "building height (or height of a building") which states:

*"**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".

Under this definition, it is essential to know how to correctly understand and identify the "ground level (existing)" of any development site for the purposes of maximising the development that may be undertaken. It is the term "ground level (existing)" that causes much confusion and the interpretation made by council is at odds with the opinion of the author based upon case law albeit the court has made a number of contradictory interpretations.

The Hornsby LEP 2013 defines a 'ground level (existing) to mean:

"ground level (existing) means the existing level of a site at any point."

The original and therefore leading decision on determining "ground level (existing)" on land that is sloping or completely excavated is the decision of Commissioner O'Neill in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 ('***Bettar***'). In *Bettar*, consent was sought for, amongst other things, a four and five storey residential flat building on a site where an existing building already occupied the entire site, meaning there was no longer any "ground" for determining the existing ground level. In addition, there was an existing part-basement excavated into one part of the site.

The Council's argument focused entirely on the existing building on the site and took the approach that the "ground level (existing)" should be calculated using the ground floor level of the existing building, and then dropping it down to the basement level in the part of the site where the existing basement was located.

The Commissioner determined that once the existing building is demolished, the ground levels of that prior building would no longer be discernible or relevant as a starting point for measuring the height of any new building, and that it would be conceivable that surrounding properties (with differing ground floor levels) could have starkly different height limits arising from the same development standard. The Commissioner held at paragraph [40] that this would result 'in an absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be

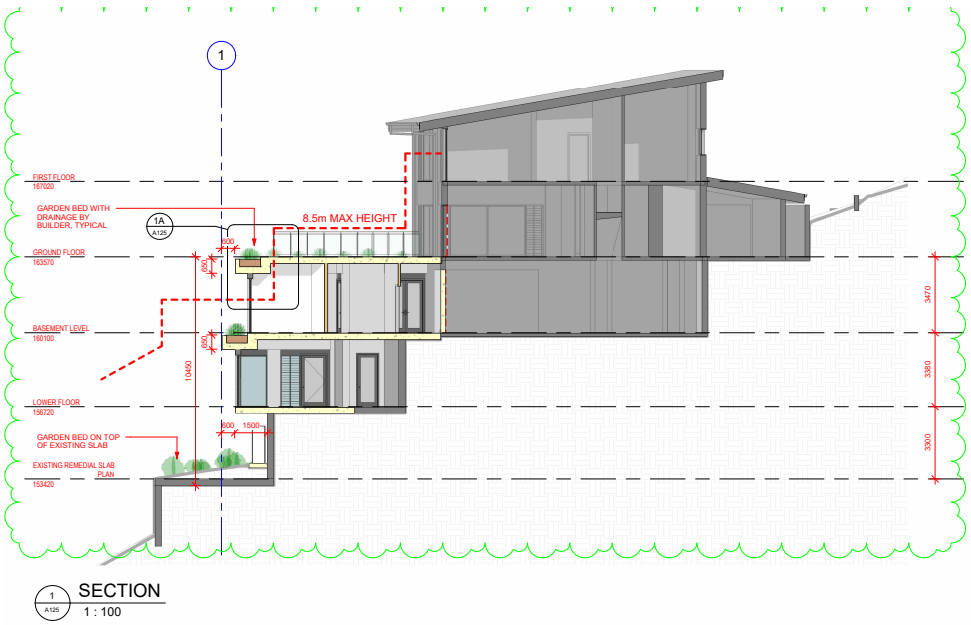
demolished and has no relationship to the context of the site.'

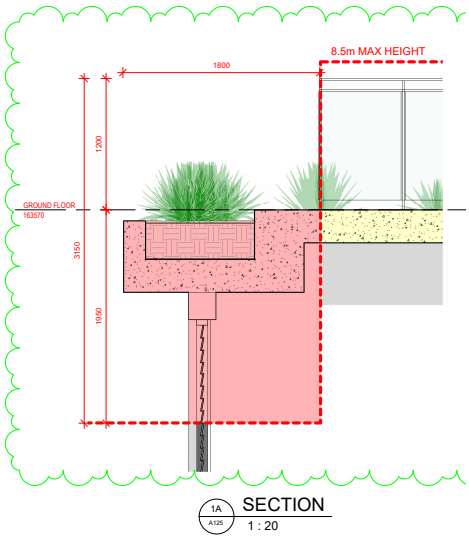
The Commissioner preferred the approach of the Applicant on this issue which was for the existing ground level of the site to be determined by extrapolating the ground levels found on the footpath (i.e. – outside the site) across the entire site to measure the vertical distance to the highest point of the building. The Commissioner's reasoning for this, given at paragraph [41], was that the 'level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site, and remains relevant once the existing building is demolished.' In our experience, this has become known as the *extrapolation method* for determining "ground level (existing)".

I consider that this is a practical approach to measuring height, albeit that it tends to be very reminiscent of the old 'natural ground level' approach to measuring height. In other words, it takes a non-literal approach, but rather a pragmatic and workable approach, to determining 'ground level (existing)'.

However, council has made a different interpretation of what constitutes ground level (existing) and is of the opinion that the extrapolation method should not be applied, and the existing ground level is the current state of the ground as modified. In the context of the subject site, the methodology adopted by council is of paramount importance and highly relevant where existing topography (natural or developed) would result in an absurd or at least irregular height plane, and it is a result that would not place a proposed building in its true context on the site and surrounds. That scenario suggests that using the extrapolation method for determining ground level (existing).

In accepting the council methodology in determining what constitutes existing ground level, the amended design results in a small portion of the proposed building exceeding the maximum height standard.





5. 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 several 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 development (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 namely bushland adjacent.
- The unique qualities of the site and the proposed alterations and additions will maintain and enhance these and the character of the locality.
- The need to construct retaining works due to a recent landslide that has undermined the existing dwelling and further landslip is likely to cause environmental harm if not properly retained.
- The shape and locality of the site and the opportunities and constraints that arise for its development as a result.
- The extent of the non-compliance is minor in the context of the existing built form.
- There is limited opportunity to 'step' the design due to the retaining wall required for the recent landslip that has occurred in the location on the site.
- Scale of the building as viewed from the adjoining roadway is negligible due to existing site topography. The proposed building in the context of the backdrop of the existing dwelling house is considered reasonable.
- The need to construct the additions at the heights proposed to allow the additions to integrate with the existing dwelling floor plan.

The objective of clause 4.3 – Heights of Buildings is as follows:

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

The height of the building is appropriate accounting for the steep topography of the land. The addition will have no impact upon the local environment of the amenity of the neighbourhood. In this regard, the proposed height satisfies the performance requirements of Part 3.1.1 of the Hornsby DCP in that the height, bulk and scale of the addition is in keeping with the surrounding low density residential environment.

Further, the Hornsby DCP 2013 (Part 3.1.1) contains prescriptive requirements that include both height in metres and the maximum number of storeys. The height of the addition complies with the maximum number of storeys prescribed under the DCP (2 storeys plus attic). The building works will minimise earthworks (cut and fill) by siting the addition on top of the retaining wall. An excavation into the natural ground will result in greater environmental harm by causing further land instability.

Part 3.1.1 contains a table 3.1.1(c)that specifies a maximum floor area for a dwelling house and ancillary building. For lots greater than 900m^2 the maximum total floor area should be 430m^2. This is an arbitrary figure that does not provide proper consideration for a site of a size that is well more than the 900m^2. The maximum floor area requirement for large sites that are well in excess of the 930m^2 should be considered in context of the maximum site coverage requirement under the DCP.

The site has an area of 4,179,9m^2. The proposed addition is a modest floor area of 148.96m^2 when considered in the context of the large site area. The total site coverage is 23.71% (30% allowable).

The development is within the environmental capacity of the site as demonstrated by the supporting documentation that forms part of the DA.

6. 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.

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

The additional height proposed (above the retaining wall) contributes to the delivery of a high-quality development on this site. The zoning of the site and surrounding residential lands includes land of relatively steep topography that may be considered in some respects unsuitable for residential development. Consequently, several dwelling houses in the locality have been approved by Council in contravention of the current LEP height standard. The proposed building works are consistent with the height and scale of the building constructed on the site.

The lateral expansion of the building by 'stepping' the design will have no impact upon the amenity of the surrounding low density residential environment. The natural topography of the site will result in unreasonable impacts by way of excavation should the additional floor space be provided by an excessive lateral extension of the existing building envelope.

The objectives of the standard can be achieved, notwithstanding the additional height, and that a superior development outcome would result.

- *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. This also accounts for the natural/modified topography of the land.

- *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 development that will present in a positive manner to the adjacent roadway and avoid any disturbance to the adjacent bushland. The proposed additions will not result in any additional land disturbance beyond the footprint of the retaining wall.

- *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 and on surrounding sites due to the steep topography of the sites that adjoin the bushland.

It is considered that compliance with the standard in the circumstances is unreasonable and unnecessary when considering historic approvals by the council in the locality.

- *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*.

The zoning of the site and surrounding residential lands includes land of relatively steep topography that may be considered in some respects unsuitable for residential development. Consequently, several dwelling houses in the locality have been approved by Council in contravention of the current LEP height standard. The proposed additions are consistent with the height and scale of the dwelling house constructed on the site.

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.

6.2 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 including the protection and enhancement of identified values specific to the site and provision of high-quality residential development in the locality.

The additional height is a negligible issue within the context of the greater planning benefit, including opportunities for the protection and enhancement of local values and provision of high-quality residential development that would result from the variation to the height standard. The proposed works will not extend beyond the footprint of the retaining wall constructed to manage landslip occurring on the site.

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

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

Although the proposal breaches the height of buildings control, the development achieves appropriate building envelopes and separation to the adjacent bushland. It is also worth noting that the development does comply with solar access, site coverage and other similar requirements adopted by Council.

6.3 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. The development proposal will result in a gross floor area that will effectively match the resultant development potential of the site.

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 generally consistent with the adopted planning controls for the site.

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7. 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 minimum lot area development standard will raise no matters that could be deemed to have State or Regional Significance. The proposed variation 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.

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8. CONCLUSION

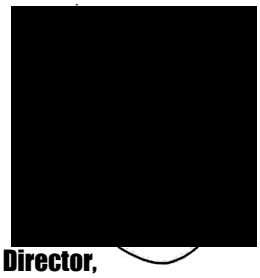
The proposed development satisfies the test established by the Land and Environment Court of NSW in Wehbe -v- Pittwater Council [2007] NSW LEC 827 as being appropriate for consideration of "unreasonable or unnecessary" circumstances in the application of Clause 4.6 variation request because:

- 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,

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