

CLAUSE OBJECTIVES AND EXCLUSIONS

Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) – Clause Objectives

Clause 4.6 provides a mechanism to vary development standards prescribed within Port Stephens Local Environmental Plan (PSLEP) 2013.

The objectives of the clause are as follows:

- To provide an appropriate degree of flexibility applying certain development standards to particular development.*
- To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(2) – Exclusions to the operation of clause 4.6

Development consent may be granted even though the development would contravene a development standard imposed by the PSLEP, unless the development standard is expressly excluded under Clause 4.6(8). Clause 4.3 is not excluded from the operation of Clause 4.6, and therefore the proposed variation has been considered below.

PROPOSED VARIATION REQUEST

The development application includes a written request to vary a development standard(s) in the PSLEP 2013. The written request is made in accordance with Section 35B of the Environmental Planning and Assessment regulation 2021.

The relevant development standard(s) and the extent of the proposed variation(s) is:

Development Standard	Proposed Variation	Extent of Variation (%)
Clause 4.3 of the PSLEP – 9m	0.69	7.66%

It is noted that a number of the new dwellings (16) exceed the 9m height limit, with the largest breach being 9.69m in height, representing a 7.66% variation. The dwellings complying with/exceeding the height limit are shown in **Figure 1** below.

UNIT NUMBER	COMPLIANCE TO 9M LIMIT	UNIT NUMBER	COMPLIANCE TO 9M LIMIT	UNIT NUMBER	COMPLIANCE TO 9M LIMIT
TH1	MAX 0.69m OVER	TH11	COMPLIES	TH21	COMPLIES
TH2	COMPLIES	TH12	MAX 0.31m OVER	TH22	COMPLIES
TH3	MAX 0.21m OVER	TH13	COMPLIES	TH23	MAX 0.04m OVER
TH4	COMPLIES	TH14	MAX 0.04m OVER	TH24	COMPLIES
TH5	COMPLIES	TH15	MAX 0.43m OVER	TH25	COMPLIES
TH6	MAX 0.11m OVER	TH16	MAX 0.22m OVER	TH26	COMPLIES
TH7	COMPLIES	TH17	MAX 0.57m OVER	TH27	MAX 0.44m OVER
TH8	MAX 0.23m OVER	TH18	MAX 0.52m OVER	TH28	COMPLIES
TH9	COMPLIES	TH19	COMPLIES	TH29	MAX 0.09m OVER
TH10	MAX 0.43m OVER	TH20	MAX 0.02m OVER	TH30	MAX 0.44m OVER

Figure 1. Height compliance table.

ASSESSMENT

Clause 4.6(3) – Request to vary development standards

Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary

Clause 4.6(3)(a) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances.

In *Wehbe v Pittwater Council* (2007) LEC 827 (*Wehbe*), Chief Justice Preston identified five ways in which a request to vary a development standard may be determined to be well founded. These reasons include:

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard,*
2. *The underlying objective or purpose of the development standard is not relevant to the development,*
3. *The objective or purpose of the development standard would be defeated or thwarted if compliance was required,*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard, and*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary as applied to the land.*

The Clause 4.6 request makes reference to reason 1 identified in the *Wehbe v Pittwater Council*.

The applicant's Clause 4.6 Variation request asserts that compliance with Clause 4.3 is unreasonable or unnecessary having regard to the first test set down in *Wehbe*, being that the objectives of the standard are achieved notwithstanding non-compliance with the standard.

The objectives of Clause 4.3 of the PSLEP are:

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

- (a) to ensure the height of buildings is appropriate for the context and character of the area,*
- (b) to ensure building heights reflect the hierarchy of centres and land use structure.*

A summary of the applicant's demonstration of compliance with these objectives is provided below.

- The proposed development slightly exceeds that extent of existing development on site when viewed from Fleet Street. It was argued that this creates a tiered visual impact with the magnitude limited due to height exceedances being limited to buildings in the central portion of the site.
- The variation request suggests that the tiered nature of the built outcome lessens the perceived bulk and scale of the development rendering it more appropriate for the area.

- The neighbourhood context and character can be described as a mixture of low and medium density development. It was noted that strict compliance with the height of buildings control would not result in a substantially different outcome when considering the objective of Clause 4.3. The exceedance has not resulted in a development outcome that is inappropriate for the area with the proposed development bringing a degree of medium density development into the area (as permitted in the zone). The variation request notes that taking these elements into consideration, the height of the proposed buildings is appropriate for the context and character of the area, and objective (a) is achieved.
- In addressing objective 4.3(b), the variation request notes that a hierarchy of centres, or broad land use structure is not established within the location and surrounding area. The site and surrounding land are zoned R2 Low Density Residential, with land to the west being C2 Environmental Conservation. The non-residential zoned land in the immediate surrounding area does not contain maximum building height controls. The proposed development, and height exceedance, will not compromise any perceived land use structure, per objective (b).

The applicants Clause 4.6 variation request identifies that the remaining four reasons identified in *Wehbe* are not applicable to the proposal.

Council Assessment

The first of objective of Clause 4.3 *is to ensure the height of buildings is appropriate for the context and character of the area*. The site is mostly surrounded by low to medium density residential development to the north, south and east. The west of the site is heavily vegetated land that fronts onto Cromartys Bay. Further to the east of the site is the Karuah River.

It is considered that the development has been designed to ensure that the building height is appropriate for the context and character of the area in that the height variations proposed are largely as a result of the topography of the site and are restricted to the roof components of the dwellings, as shown in **Figure 2** below. The dwellings heights have been reduced during assessment of the application, which has resulted in the dwellings being located below the tree line to the sites west when viewed from public areas including Salamander Bay foreshore , further responding to the context and character of the area.

In addition, the dwellings where the height is exceeded are mostly located towards the centre of the site reducing visibility from the public domain. Notwithstanding, it is to be acknowledged that the proposed development will be visually prominent compared to that of the existing development on the site and sites within the immediate surrounds. This is largely due to the site currently containing small scale cabins from the historic tourist use and being on a slope. The visual prominence is not considered to be exacerbated by the proposed height variation as it is considered that a development with a compliant building height would be similarly prominent.

The second objective of Clause 4.3 *is to ensure building heights reflect the hierarchy of centres and land use structure*. The applicant's variation argues that a hierarchy of centres and land use structure is not established within the location and surrounding area. It is considered that the land use structure is established by virtue of the sites land use zoning and corresponding building height control which seeks to provide residential development of a certain density.



CLAUSE 4.6 ASSESSMENT REPORT

Notwithstanding, it is considered that despite the proposal breaching the height limit for some dwellings, the development reinforces the intended residential nature of area in comparison to the existing tourist and visitor use which is no longer a permissible land use within the zone.

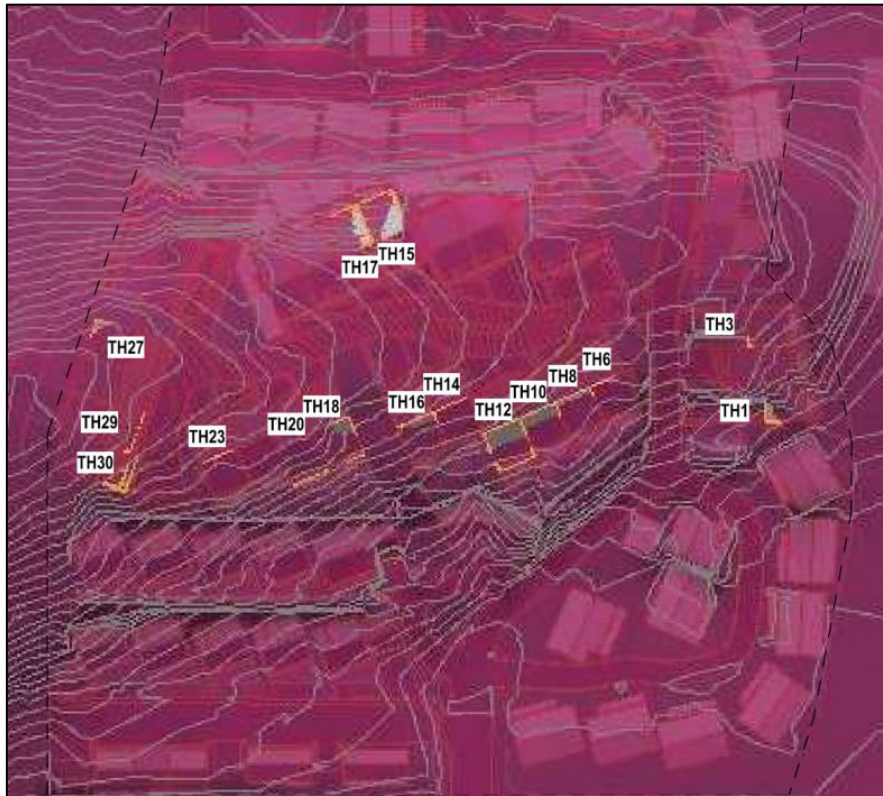


Figure 2. 9m height plan birds eye view

Clause 4.6(3)(b) – Sufficient environmental planning grounds

Clause 4.6(3)(b) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the development standard.

The applicant's Clause 4.6 request notes that there is sufficient environmental planning grounds to contravene the development standard as:

- The proposed development has been designed to respond to the topography of the site. If compliant building heights were enforced, the roof design of some dwellings would need to be amended to be flat roofs which are not desirable for stormwater collection purposes. A reduction in storeys proposed would impact the amenity of future dwellings.
- The variations proposed range from 0.02m to 0.69m which are not considered to be noticeable from the public domain. A compliant development would not provide a significantly improved visual outcome.
- Each dwelling has been designed to limit excessive earthworks in the form of cut and fill.

- The height variations proposed does not result in further overlooking, particularly due to the height exceedances being located in the centre of the site. Where overlooking issues may occur, it is not as a result of the height variation proposed and has been minimised through privacy screening and landscaping.
- Floor to ceiling heights could be reduced to reduce building heights, however, this would impact light and ventilation access.
- The Visual Impact Assessment found that the height exceedance is negligible.
- The proposed development is not likely to impact views of adjoining development with the most valuable views being whole water views in accordance with planning principle for views, established in *Tenacity Consulting v Warringah Council* (2004). The proposal not does not impact any water views.
- The proposal is consistent with the land use zoning.
- The proposal is in the public interest as it provides additional housing in the area.
- The height variation does not compromise the natural environment.

The applicant contends that the potential environmental planning benefits justify the contravention of the development standard.

Council Assessment

It is considered that the applicant's assessment of the height breach demonstrates that there are sufficient environmental planning grounds to contribute to the justification of a contravention of the development standard. Notwithstanding, the following is also noted:

- The height exceedance is localised to small sections of some of the dwellings. A large portion of the development is compliant with the 9m building height control.
- Given the extent of the variation proposed, a compliant building height for all dwellings would not result in a significantly different scale development and therefore impacts would likely remain the same or similar.
- The proposed height exceedance does not result in additional adverse amenity impacts relating to noise, visual impact, overlooking and overshadowing.
- The proposal is consistent with the Port Stephens Local Housing Strategy which seeks to encourage infill housing with Salamander Bay being identified as an area where there are opportunities for infill housing.

CONCLUSION

The proposed development is considered to be consistent with the objectives of Clause 4.6 given it will achieve better outcomes for and from the development in these particular circumstances as the objectives of the height of buildings development standard are achieved, notwithstanding non-compliance there are sufficient environmental planning grounds to justify the contravention.