

APPENDIX A

Clause 4.6 Variation Request to Appendix 2, Clause 4.3 – Height of Buildings of
Penrith Local Environmental Plan 2010

Construction of a new two storey dwellings with swimming pool and associated
site landscaping.

92 River Road, Emu Plains
(Lot 12 in DP 1247788)

June 2021

1 INTRODUCTION

This variation request is prepared pursuant to Clause 4.6 of Penrith Local Environmental Plan 2010 (PLEP 2010) and considers several New South Wales Land and Environment Court (NSW LEC) planning principles and judgements that have refined the manner in which variations to development standards are to be approached. The development in question relates to the construction of a new two storey dwelling with swimming pool and associated site landscaping on the site known as 92 River Road, Emu Plains.

2 PROPOSED VARIATION

Clause 4.3(2) of the PLEP 2010 refers to the Building Height Map with the subject site located within Area 'I' illustrated below of which prescribes a maximum building height of 8.5m.



The dictionary of the PLEP 2010 defines building height as follows:

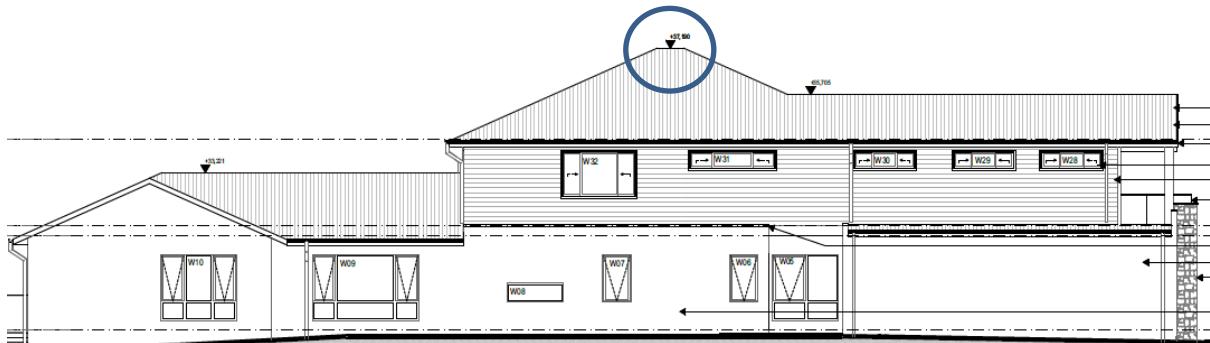
building height (or **height of building**) means -

- (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.



The proposed dwelling has a maximum 9.2m height, noting existing natural ground level (27.99AHD) and roof height (37.19AHD), which represents a 700mm non-compliance or 8.24% variation to the control. With respect to the extent of the non-compliance it relates purely to the upper-level ridge as illustrated below.



3 CLAUSE 4.6 ASSESSMENT

3.1.1 Clause 4.6(1) - Objectives

Clause 4.6(1) outlines objectives that underly the clause as follows:

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

Reference is made to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 in which Preston CJ ruled that there is no provision that requires compliance with the objectives of the clause and that cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). It was also noted that in particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

Given the above the remaining considerations of clause 4.6 form the basis for which the consent authority is to be satisfied that the request for variation of the development standard is acceptable.

3.1.2 Clause 4.6(2) - Development Consent May be Granted

Clause 4.6(2) provides that ...‘*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*’.

Building height is a development standard as defined in Section 1.4 of the Environmental Planning & Assessment Act 1979 to which exceptions can be granted under cl 4.6. It is not excluded from operation.

3.1.3 Clause 4.6(3) - Consent Authority to Consider Written Submission

Clause 4.6(3) provides that ...‘*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’.*

This submission and information contained within, constitutes a written request for the purposes of clause 4.6(3) and the following subsections address the justifications required under that subclause.

3.1.4 Clause 4.6(4) - Consent Authority is to be Satisfied

Clause 4.6(4) provides that ...‘*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 Secretary has been obtained’.*

Each of the abovementioned matters has been addressed individually under the following subheadings.

3.1.4.1 Clause 4.6(4)(a)(i) Written Request to Address Matters Required by 4.6(3)

Clause 4.6(3) requires the applicant to justify contravention of 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’.*

With respect to clause 4.6(3)(a) the common ways in which an Applicant may demonstrate that compliance with a development standard is unreasonable or unnecessary are listed in the ‘five-part test’ outlined by Preston CJ in *Wehbe v Pittwater* [2007] NSWLEC 827. In this respect an Applicant does not need to establish all of the tests or ‘ways’, rather it may be sufficient to establish only one, although if more are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The five possible ways are as set out below:

First	<i>The objectives of the standard are achieved notwithstanding non-compliance;</i>
Second	<i>The underlying objective or purpose of the standard not relevant to the development and therefore compliance is unnecessary;</i>
Third	<i>The underlying object of purpose be defeated or thwarted if compliance was required and therefore compliance is unreasonable;</i>

Fourth	<i>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;</i>
Fifth	<i>The zoning of the particular land 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.</i>

With respect to the subject application, the first way is utilised with the sole objective underlying the building height development standard contained within clause 4.3(1) of PLEP 2010 addressed as follows:

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*

Comment - The building height non-compliance in this instance is limited to a very small component of the roof form, setback approximately 28m from the street frontage and largely screened by the two-storey form forward. The 24 degree pitch of the roof form in question is considered reasonable and reflective of surrounding built form as is the general height, bulk and scale of the building.

- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*

Comment - With respect to amenity the height non-compliance is restricted to the higher centre ridge, setback significantly from all boundaries with the small extent of the breach not readily perceived, noting also that the building as a whole is suitably articulation. Given also surrounding topography and orientation of the site, no adverse impacts upon the amenity of adjoining sites are foreseen.

- (c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*

Comment - The site is located adjacent to a heritage item (I69) which is the Lewers Bequest and Regional Art Gallery, houses and gardens at 84 - 88 River Road. Noting spatial separation as well as vegetation of which provides a visual buffer, the setting and, or significance of the item is not compromised. Likewise, the Nepean River which opposes the site is identified on the PLEP 2010 Scenic and Landscape Values Map with the spatial separation, large front setback and landscape curtilage ensuring no impact.

- (d) *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity*

Comment - The proposed development despite the minor non compliance maintains a high quality urban form noting also that the site is located within an established low density zone and not at any transition.

With respect to clause 4.6(3)(b) the above demonstrates that the environmental impacts of the proposed development are acceptable notwithstanding non-compliance with the building height standard.

3.1.4.2 Clause 4.6(4)(a)(ii) Written Request to Address Matters Required by 4.6(3)

As discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the

development will be in the public interest. Objectives of the Building Height development standard have been previously addressed with those of R2 Low Density Residential Zone outlined and addressed below.

Zone Objective	Comment
<ul style="list-style-type: none"> <i>To provide for the housing needs of the community within a low density residential environment.</i> 	Construction of the dwelling upon a site which is currently vacant promotes the housing needs of the community with the form characteristic of the low-density zone.
<ul style="list-style-type: none"> <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> 	N/A - Development relates only to alterations and additions to existing dwelling.
<ul style="list-style-type: none"> <i>To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.</i> 	Dwelling provides a suitably landscaped setting, particularly to the street frontage.
<ul style="list-style-type: none"> <i>To enhance the essential character and identity of established residential areas.</i> 	The proposed dwelling has adopted a traditional design with pitched roof form that is characteristic of existing built form.
<ul style="list-style-type: none"> <i>To ensure a high level of residential amenity is achieved and maintained.</i> 	As detailed in the SEE that accompanies the application no adverse or unreasonable impacts towards adjoining sites foreseen.

As detailed the proposed building height variation does not contravene any of the zone objectives.

3.1.4.3 Clause 4.6(b) Concurrence of the Secretary.

Planning Circular (PS 18-003) dated 21 February 2018 provides that concurrence can be assumed when a Local Planning Panel (LPP) is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to.

Accordingly, concurrence of the Secretary can therefore be assumed in this case.

3.1.5 Clause 4.6(5) - Concurrence Considerations

Clause 4.6(5) provides that ...*'In deciding whether to grant concurrence, the Secretary must consider:*

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

N/A - As detailed above, concurrence of the secretary can be assumed in this instance.

3.1.6 Clause 4.6(6) - Subdivision of Certain Land

Clause 4.6(6) provides that ...*'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.*

N/A - Development does not seek subdivision.

3.1.7 Clause 4.6(7) - Keeping of Records

Clause 4.6(7) provides that ...*'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).'*

Penrith City Council are required to keep a register of Clause 4.6 variations publicly available. Should this application be supported it would be added to the register along with specific factors as required.

3.1.8 Clause 4.6(8) - Exclusions from use of Clause 4.6

Clause 4.6(8) provides that ...*'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 listed in the table to this clause,*
- (c) *clauses 5.4*
- (ca) *clause 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 7.24, 8.4(5) or Part 9.*

N/A - The proposed development does not contravene any of the stated considerations.

4 CONCLUSION

The proposed development seeks variation to the 8.5m building height control prescribed by Clause 4.3(2) of the PLEP 2010 and thus the subject clause 4.6 submission has been provided.

The application to vary the building height development standard is well founded and as addressed meets the objectives of the building height development standard. The proposal achieves an acceptable design outcome and one that does not result in unreasonable amenity impacts towards surrounding properties.

Consequently, strict compliance with the development standard is unreasonable and unnecessary in this instance and that the use of Clause 4.6 of the PLEP 2010 to vary the control is appropriate.