

Clause 4.6 Exceptions to Development Standards – Building Height

37 Lanford Avenue, Killarney Heights

Clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP 2011) 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 the Warringah LEP 2011 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 WLEP 2011, 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.

1. Environmental Planning Instrument Details (Warringah LEP 2011)

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

Warringah Local Environmental Plan 2011

1.2 What is the zoning of the land?

R2 Low Density Residential

1.3 What are the objectives of the zone?

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

1.4 What is the development standard being varied?

Clause 4.3 – Height of Buildings

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

Clause 4.3 – Height of Buildings of the Warringah LEP 2011

1.6 What are the objectives of the development standard?

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

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

1.7 What is proposed 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.

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

The development proposes a maximum building height of 8.9 metres.

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

The development proposes a variation of 0.4 metres or 4.7%.

2. 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.

2.1 *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).

2.2 *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LE

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.

2.3 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.*

2.4 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.

2.5 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.

3. Consideration

The following section addresses the provisions of clause 4.6 of the WLEP 2011 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:

3.1 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 ensure that buildings are compatible with the height and scale of surrounding and nearby development,

Comment

Surrounding development is characterised by 2 and 3 storey detached dwelling houses of varying architectural styles. Overall, the bulk and scale of neighbouring development is resultant of the site topography of the locality.

The proposed alterations and additions are appropriate to the site and will result in a scale consistent with the existing dwelling and surrounding development. The proposed dwelling will sit comfortably within the streetscape, presenting with a compliant height when viewed from Lanford Avenue. Additionally, there will be no unreasonable view loss, loss of privacy or increase in shadowing for neighbouring properties.

The numerical variation to the building height is 0.4m or 4.7% and is for a small portion of the roof towards the rear of the lot, where the site slopes downwards towards the rear (western side) of the lot. Overall, the built form is considered to be consistent with the building height controls and compatible with the streetscape character within the locality, despite the numerical non-compliance.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

As stated above, the proposed development presents with a consistent scale to surrounding dwellings within the locality. It will not present with excessive bulk when viewed from the Lanford Avenue or adjoining properties, and the non-compliance will not result in any unreasonable view loss, loss of privacy or increase in shadowing for neighbouring properties.

Privacy will be retained for neighbours with appropriate setbacks proposed and no direct overlooking into any key living areas or private open space. The design incorporates a number of privacy measures including high sill heights and skylights.

The private open space of both the subject site and the adjoining properties maintain compliant solar access despite the variation as described in the SEE.

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

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The alterations and additions will result in a dwelling which will remain in character with the existing dwelling, the residential surrounds and the streetscape. The residential locality will remain reflected in the character of the site and the scenic quality of the area will be positively contributed to, as a result of the development proposed.

Specifically, the consistent pitched roof form and compliant boundary setbacks to the dwelling will ensure the development provides a positive visual contribution to the locality. Appropriate materials and finishes will also minimize any adverse impact on the scenic quality of this part of Killarney Heights.

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

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

The proposed development is not visible from any significant public places other than Lanford Avenue, from which it will be an attractive addition.

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 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 between the proposed works and the building height control is minor at 0.4 metres or 4.7%,
- The sections provided with the plan set, demonstrate the alterations and additions present with an appropriate bulk and scale and the minor variation does not result in inappropriate height encroachment, remaining consistent with the adjoining dwellings and other dwellings in the locality, satisfying Cl1.3(g).

Neighbour Amenity

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

- The new works are appropriately located on the site, and the height variation is resultant of the sloping topography, resulting in a dwelling which is consistent with the bulk and scale of neighbouring dwellings.
- Compliance with the height control would not result in a building which has a significantly lesser bulk.
- A numerically compliant building height would have no material impact to neighbours, and amenity for the subject site and neighbouring dwellings is retained.
- The proposed minor 4.7% height variation has no impact on privacy for neighbours, accordingly, the variation is reasonable in the circumstances of the case.

Site Constraints

- The design of the additions is constrained by the site topography, and the built form of the existing dwelling house, as such the minor variation allows for the orderly and economic use of the site and allows for an ecologically sustainable development.

Design and Streetscape Appeal

- Strict numerical compliance with the height control would not result in a better urban design outcome. The architectural character proposed will result in visually appealing additions to the property, consistent with surrounding dwellings.
- The proposed development will not present with excessive bulk from the public domain and presents with a consistent scale to Lanford Avenue and surrounding properties.

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 is proposed. Compliance with the development standard based on this would be unreasonable.

Natural Environment

- The numerical height variation has no impact on the natural environment, satisfying CI1.3(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 allowing for the extension of the life on the existing dwelling satisfying CI1.3(f). Compliance with the development standard based on this would be unreasonable.

Social and economic welfare

- The variation to the height as detailed above will have no social impacts for the site or local area satisfying CI1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.
- The variation as detailed above will have no economic impacts for the site, or the local area, satisfying CI1.3(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.
- The variation will be compatible within the context of the site surrounds and reasonable in the circumstances of the case satisfying CI1.3(c). Compliance with the development standard based on this would be unreasonable.

The environmental planning ground set out above, reflect 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.

Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*

Will the proposed development be in the public interest?

It is considered that the proposed alterations and additions to the dwelling on an existing residential site, does not raise any matters contrary to the public interest.

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 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper*

construction and maintenance of buildings, including the protection of the health and safety of their occupants.

4. Conclusion

The proposed development is for alterations and additions to an existing dwelling house on land zoned R2 – Low Density Residential.

As stated above the non-compliance between the proposal and the environmental planning instrument is just 0.4 metres or 4.7%.

The variation will not result in any unreasonable impacts in regard to view loss, loss of privacy or increase in shadowing for neighbouring properties. The resulting development will be of a similar scale to surrounding properties and consistent with the existing dwelling.

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 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.

Planner Declaration

Document Control Table

Document Purpose:	Clause 4.6 Variation Request (Building Height)	
Date	Prepared by	Approved by
13/08/2025	Susan May-Roberts Senior Planner	Sarah McNeilly Director

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