

IP INTERFACE **PLANNING**

Clause 4.6 Written Request Height of Building

Proposed Dwelling

Property:

Address: 39 Calvert Parade, Newport

Title: Lot A DP 395094

Landowner/Applicant:

Mark and Tina Bukofzer

Date: 30 April 2025

Document Control Sheet

Issue No.	Amendment	Date	Prepared By	Checked By
A	Final Draft for client and peer review	29 April 2025	NM	CS
B	Final for DA Lodgement	30 April 2025	NM	CS

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1. Introduction

This Clause 4.6 Written Request has been prepared by *Interface Planning* to accompany a Development Application (DA) to be lodged with Northern Beaches Council for a proposed two storey dwelling at 39 Calvert Parade, Newport. The request seeks to vary the maximum height of building development standard pursuant to Clause 4.3 of *Pittwater Local Environmental Plan (PLEP) 2014*.

This written request should be read in conjunction with the Statement of Environmental Effects (SEE) Report lodged with the DA submission.

The site is occupied by an existing two storey brick dwelling with tile roof and detached garage. Built form is situated within a landscaped setting that includes paved pathways, structural and non-structural retaining walls, freestanding trees, private gardens and grassed open space. The existing development reflects a typical low-density residential character and is consistent with surrounding land uses.

The site is zoned C4 – Environmental Living under *PLEP 2014*, with the site having a history of residential land uses.

This Clause 4.6 Written Request demonstrates that the non-compliant building height delivers an acceptable planning outcome, with strict compliance considered unnecessarily restrictive.

Compliance with development standards is usually necessary to ensure the objectives of the Local Environmental Plan (LEP) are achieved. Where an applicant proposes a development that contravenes a development standard within an Environmental Planning Instrument (EPI), a consent authority does not have the power to approve the application unless the application is accompanied by a “written request” prepared in accordance with Clause 4.6 of the relevant Local Environmental Plan (LEP).

The requirements of cl. 4.6 were summarised by *Gray C in Abrams v Council of the City of Sydney* [2019] NSWLEC 1586 at [32] who drew reference from the earlier decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. The requirements follow:

- *The written request adequately demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (cl 4.6(3)(a)); and*
- *The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b))*

1.1 WHAT IS A CLAUSE 4.6 WRITTEN REQUEST?

A Clause 4.6 Written Request is a submission accompanying a Development Application (DA) which justifies a variation to a development standard in an EPI. A written request is required to enable a consent authority to have the power to consider and approve a DA which contravenes a development standard.

1.2 WHEN IS A CLAUSE 4.6 WRITTEN REQUEST REQUIRED?

When a development proposal does not comply with a development standard contained in an EPI, a Clause 4.6 Written Request justifying a non-compliance with that standard and in that circumstance is required. If more than one variation to a development standard is proposed, a written request is required to justify each variation.

A Clause 4.6 is not required to vary the development controls contained within a Development Control Plan (DCP). However, other written justification is required to support the proposed departure.

1.3 IN WHAT FORM SHOULD A CLAUSE 4.6 WRITTEN REQUEST BE SUBMITTED TO COUNCIL?

A Clause 4.6 Written Request must be prepared, and address the mandatory matters contained within Clause 4.6(3)(a) and (b) of the relevant LEP. A consent authority must be satisfied that the following preconditions are met before granting approval of a development application that contravenes a development standard:

- *the written request must adequately demonstrate that compliance with the development standard is unreasonable or unnecessary (cl 4.6(3)(a));*
- *the written request must adequately demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).*

This written request satisfactorily addresses the preconditions of cl.4.6.

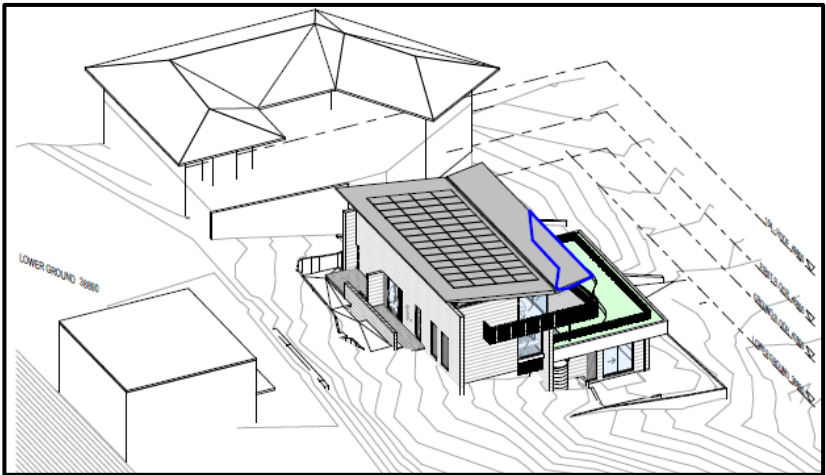
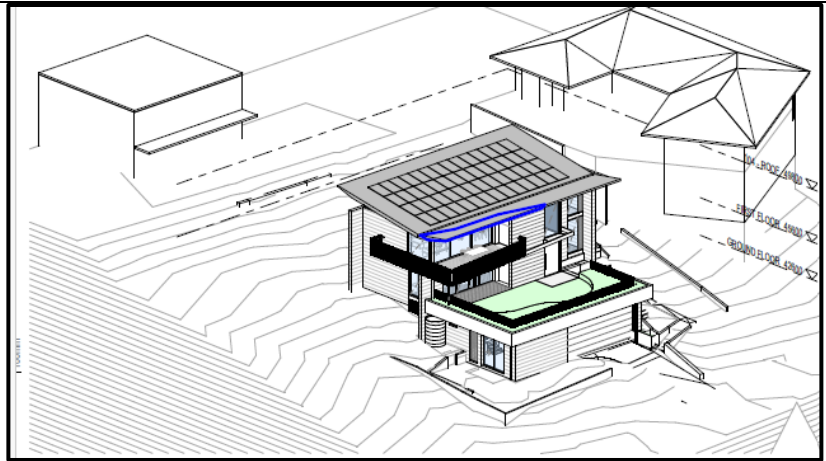
Note: Clause 35B of the Environmental Planning and Assessment Regulation (EPA Reg) 2021, requires the consent authority to consider a written request seeking to justify a contravention of a development standard.


2. Clause 4.6 Written Request

2.1 CLAUSE 4.6 WRITTEN REQUEST TABLE

ITEMS TO ADDRESS	RESPONSE
1. <i>What is the name of the environmental planning instrument that applies to the land?</i>	Pittwater Local Environmental Plan (PLEP) 2014.
2. <i>What is the zoning of the land and what are the objectives of the zone?</i>	<p>The land is zoned C4 – Environmental Living. The objectives of the zone are as follows:</p> <p><u>Objectives:</u></p> <ul style="list-style-type: none">• <i>To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.</i>• <i>To ensure that residential development does not have an adverse effect on those values.</i>• <i>To provide for residential development of a low density and scale integrated with the landform and landscape.</i>• <i>To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.</i> <p>The development proposes the construction of a new residence, being a low scale and low impact form of development that:</p> <ul style="list-style-type: none">○ preserves the existing residential amenity together with the aesthetic and scenic values of the land.○ is compatible with the desired future character of the locality.○ incorporates best practice design outcomes in a low-density residential setting.○ seeks to locate the proposed residence within an area of the site considered to be most suitable for development purposes and which will result in the least environmental impact.

	<ul style="list-style-type: none"> o proposes a form of development considered to be ecologically, socially, and economically sustainable.
3. <i>Identify the Development Standard to which this Clause 4.6 applies?</i>	The development standard to be varied is <i>Clause 4.3 – Height of Buildings</i> . The height of a building on any land is not to exceed the maximum height shown for the land on the <i>Height of Buildings Map</i> .
4. <i>What are the objectives of the development standard?</i>	<p>The objectives of Clause 4.3 are as follows:</p> <ul style="list-style-type: none"> a) <i>to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,</i> b) <i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i> c) <i>to minimise any overshadowing of neighbouring properties,</i> d) <i>to allow for the reasonable sharing of views,</i> e) <i>to encourage buildings that are designed to respond sensitively to the natural topography,</i> f) <i>to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.</i>
5. <i>What is the numeric value of the development standard in the environmental planning instrument?</i>	The land is mapped as having a maximum building height of 8.5 metres.
6. <i>How do the existing and proposed numeric values relate to the development standard? What is the percentage variation (between subject proposal and applicable height of building development standard)</i>	<p>The development standard prescribes a maximum building height for the site of 8.5 metres.</p> <p>The proposed dwelling results in a minor height exceedance, with the highest point of the butterfly roof reaching a maximum height of 9.19 metres, a variation of 690mm or 8%. The area of roof outside the 8.5 metre building height is 13m².</p> <p>The height non-compliance is limited to a small portion of the roof structure and is a direct consequence of the site's natural topography, which slopes down from the rear boundary toward the street. The variation is not associated with additional floor space or bulk and would not be dominant on the streetscape or adjoining properties.</p> <p>For the most part, the proposed dwelling complies with, or falls below, the maximum 8.5 metre building height standard. Refer to Architectural Plans (Appendix 4 to SEE Report) and diagrams below:</p>




BUILDING HEIGHT BREACH
 13m² = 6% (of Roof Area)

7. How is compliance with the development standard unreasonable or unnecessary.

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827.

The Court provided five tests as follows that can be used as prompts to answer the question in relation to an application.

Test 1: *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*

The objectives of Clause 4.3 are to ensure that building height is compatible with the desired character of the locality, protects amenity (including views, privacy and solar access) and responds appropriately to the natural topography of the site and surrounding area.

As noted above, the proposed dwelling results in a minor height exceedance, with the highest point of the butterfly roof reaching a maximum height of 9.19 metres, a variation of 690mm or 8%. The area of roof exceeding the 8.5 metre height limit is 13m². The departure is modest in extent, not visually apparent from adjoining spaces and does not contribute to a perception of excessive bulk or dominance.

The proposal appropriately responds to the natural topography

	<p>of the site by siting the dwelling at the lower end of the property and within the existing disturbed and cut footprint.</p> <p>The minor height encroachment is not a consequence of a reduced side setback, but rather results from a low point along the northern side boundary, which presents challenges in achieving strict compliance with the building height development standard.</p> <p>The development provides a reasonable design response to site constraints, and the small portion of roof that exceeds the height control is not responsible for any cumulative impacts on neighbour amenity.</p> <p>As demonstrated on the Architectural Plans (Appendix 4 to SEE Report) the proposed dwelling is entirely compatible (and harmonious with) the desired future character of the Newport locality (noting that desired future character is not fixed by the development standards, rather it is derived by the nature of development that forms the context of the subject property).</p> <p>When having regard to the surrounding development context, the proposal is considered compatible in terms of height, bulk, scale, and architectural expression. The immediate locality is characterised by substantial, high-quality dwellings—many of which are large, architecturally designed residences that capitalise on views to the east and maximise solar access. The proposed dwelling is consistent with this pattern of development and reflects the prevailing built form character, which is commensurate with the high land values in the area.</p> <p>The proposed dwelling will retain a low-density residential character consistent with existing housing stock. The design strategically reduces the prominence of facades through the use of extensive glazing oriented towards the street.</p> <p>As addressed in detail in the <i>Pittwater 21 DCP</i> Compliance Table (Appendix 11 to the SEE Report), the minor height breach will not result in any adverse amenity impacts in terms of view sharing, privacy, bulk, scale or solar access. As will be evident during Council’s inspection of the site and surrounding area, the height and scale of the proposed development is consistent with existing, approved built form in the locality.</p> <p>Specifically, it is noted that the elevated siting of neighbouring dwellings on higher slopes and which essentially overlook the subject site, further reduce the potential for amenity impacts associated with the minor height exceedance.</p> <p>The Detail and Level Survey (Appendix 3 to SEE report), notes that the nearest dwelling directly south of the site has a main ridge height of approx. RL 53 metres AHD, with north facing first floor window sill and head heights located above the ridge level (RL 49.8m to RL 48.8m AHD) of the proposed dwelling. A similar scenario is evident for the western elevation of the neighbouring dwelling at No. 37 Calvert Pde, located east of the site (refer to Sheet 3 of the Detail and Level Survey).</p>
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	<p>Notwithstanding the numerical non-compliance with the building height development standard, the objectives of the Clause are achieved and satisfied.</p> <p><u>Test 2:</u> <i>The underlying object or purpose of the standard is not relevant to the development and compliance is unnecessary.</i></p> <p>Although the object and purpose of the standard is relevant, compliance is challenging for steeply sloping sites that are subject to the same controls that apply to a level or near level site.</p> <p>Typically, buildings on a steep sloping site will occupy a larger footprint in response to topography constraints and to limit the amount of excavation required.</p> <p>Clause 4.6 is intended to provide a degree of flexibility in the strict application of certain development standards. Having regard to site factors, negligible impact on the character of the area and adjoining dwellings, it is considered appropriate to utilise Clause 4.6 as a mechanism for varying the maximum building height control in this instance.</p> <p>The height of the proposed dwelling would not be visually obvious or intrusive on the streetscape and will not create any view loss or overshadowing beyond what would be expected from a compliant design. In recognition of site constraints and the local urban context, it is put forward that strict compliance with the maximum building height development standard of 8.5 metres is unnecessary for the minor roof encroachment. The proposed dwelling maintains the desired future character of the area and objectives of the zone.</p> <p>There would be no impacts as a result of the proposed height variation.</p> <p><u>Test 3:</u> <i>The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.</i></p> <p>The proposed height will not defeat or thwart the objectives of Clause 4.3 nor would ensuring compliance defeat or thwart the objectives of the Clause which are to ensure that development is of an appropriate scale and height. However, strict compliance in this instance would not produce the best outcome for the site.</p> <p>The dwelling has been designed to follow the natural slope of the land through a split-level configuration, incorporating a single lower ground floor with rooftop garden terrace and a two-storey component comprising the ground and first floor levels, thereby facilitating a built form that integrates sensitively with the site's topography.</p> <p>Strict compliance with the 8.5 metre building height development standard would impose an unnecessary constraint without achieving any meaningful planning benefit.</p>
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	<p>Test 4: <i>The development standard has been virtually abandoned or destroyed by the Council's own actions by granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.</i></p> <p>While there is no suggestion that Council has abandoned or destroyed the building height development standard, there is evidence that strict compliance has been set aside in certain circumstances to facilitate better planning outcomes in the locality. In such cases, it would have been necessary for Applicants to demonstrate that any amenity impacts were reasonable and that height variations would satisfactorily integrate with the character of the site and local area.</p> <p>Local precedents indicate that Council has demonstrated a degree of flexibility in applying the building height development standard where merit-based considerations warrant variation. Given this established approach, it is reasonable to expect that similar flexibility be afforded in this instance, where the proposed variation delivers comparable planning benefits and results in no discernible adverse impacts.</p> <p>Test 5: <i>Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.</i></p> <p>The subject site is appropriately zoned and aligns with the broader residential character of the local area.</p> <p>While strict compliance with the development standard is neither inherently unreasonable nor inappropriate, a measured degree of flexibility is warranted to accommodate a minor height exceedance affecting a small portion of the proposed roof form. This variation arises due to the site's topographical constraints—specifically, the steep fall toward the street—and is offset by site-specific opportunities, including substantial separation from neighbouring dwellings located upslope. The proposed building height is comparable to surrounding built form in terms of scale and height, reinforcing the variation's acceptability in this context.</p>
<p>8. Are there sufficient environmental planning grounds to justify contravening the development standard?</p>	<p>There is sufficient environmental planning justification to support the departure. As demonstrated in the SEE Report, Compliance Tables (Appendix 11 to SEE Report) and supporting specialist investigations (Geotech, Arborist, Landscape etc), the increase in building height does not result in any adverse impact to the built or natural environment.</p> <p>The proposed dwelling height is consistent with the objectives of the C4 zone and the objectives of <i>PLEP 2014</i>, Clause 4.3.</p> <p>The proposed dwelling design provides for a better planning outcome and respectfully responds to the steep sloping nature of the site and the scale of built form in the locality. The minor exceedance of the development standard will ultimately ensure</p>

	that the proposed dwelling has a positive relationship with the bulk and scale of neighbouring dwellings.
9. Is there any other information to be considered in order to justify varying the development standard?	<p>This Clause 4.6 Written Request should be read in conjunction with the SEE Report and Compliance Tables (Appendix 11) submitted with the DA submission which provide a detailed assessment of all relevant matters under Section 4.15 of the <i>Environmental Planning and Assessment (EP&A) Act, 1979</i> inclusive of commentary to address all amenity considerations (views, privacy, overlooking, shadowing and visual bulk etc).</p> <p>The proposed variation to the 8.5 metre building height development standard represents a well-considered planning outcome that will not result in any adverse impacts or raise issues of State or Regional significance. There is no public benefit in strictly maintaining the standard in this instance.</p> <p>The proposed dwelling aligns with the objectives of the C4 – Environmental Living zone, generally complies with other relevant State and Local planning controls and is consistent with the character of surrounding residential development.</p>

3. Conclusion

In summary, it is considered that strict compliance with the 8.5 metre building height development standard is unreasonable and unnecessary for the following reasons:

- the breach relates to a small section of the roof (13m²), which is well-articulated, lightweight in appearance, and does not contribute to adverse visual bulk or scale.
- the non-compliant roof area would not result in any cumulative impacts with respect to overshadowing, privacy or view loss to adjoining properties.
- the butterfly roof form responds positively to site constraints, improves architectural interest, and enhances the overall streetscape presentation.
- positioning the new dwelling at the lower end of the site, where topography is less challenging, provides a more practical and logical design solution and minimises potential impacts on neighbour amenity.
- the objectives of Clause 4.3 are achieved, as the proposal respects the desired character of the area, maintains neighbour amenity, and appropriately responds to the sloping site conditions.
- there is sufficient environmental planning justification to support the departure, and there are no public interest issues arising from the non-compliance.

The justification provided in this Clause 4.6 Written Request demonstrates that the proposed contravention to the building height development standard under Clause 4.3 of *PLEP 2014* is reasonable, well founded and warrants Council's support. Strict compliance with the standard would hinder the design quality and functionality of the proposed dwelling. The variation is therefore considered to be in the public interest and satisfies the requirements of Clause 4.6 of *PLEP 2014*.

Yours faithfully



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