

CLAUSE 4.6 – VARIATION REQUEST
TO MAXIMUM BUILDING HEIGHT
(CLAUSE 4.3)
DEVELOPMENT STANDARD –
PITTWATER LOCAL
ENVIRONMENTAL PLAN 2014
PROPOSED ALTERATIONS AND
ADDITIONS TO EXISTING
DWELLING AT 72 CABARITA ROAD
AVALON BEACH

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TABLE OF CONTENTS

- 1.0 INTRODUCTION**
- 2.0 SUBJECT SITE AND LOCALITY**
- 3.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT**
- 3.0 THE OBJECTIVES OF THE DEVELOPMENT STANDARD**
- 4.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD
UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES
OF THE CASE?**
- 5.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING
GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT
STANDARD?**
- 6.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL
FOUNDED?**

CLAUSE 4.6 – EXCEPTION TO A DEVELOPMENT STANDARD IN RELATION TO CLAUSE 4.3(2) – HEIGHT OF BUILDINGS OF THE PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

1.0 INTRODUCTION

This written request accompanies a Development Application for the provision of alterations and additions to the existing dwelling at 72 Cabarita Road Avalon Beach including a swimming pool and boatshed (ramp under separate DA).

This request is made pursuant to the provisions of Clause 4.6 of the Pittwater Local Environmental Plan 2014 (PLEP 2014). A variation is sought in relation to the Height of Buildings Development Standard of Clause 4.3(2) and Clause 4.3 2(D) and associated maps of the PLEP 2014, in relation to the existing structure undergoing alterations and addition works.

2.0 SUBJECT SITE AND LOCALITY

The subject site located on the northern side of Cabarita Road and is known as No.72 Cabarita Road (Lot 1 DP771371) comprising a single lot with an access handle containing Reciprocal Rights of Way serving other lots relying upon the ROW for access to and from Cabarita Road.

The subject site slopes from a high point of RL 14.5 metres at the Cabarita Road ROW frontage to a low point of RL 3.56 metres and

contains several specimens of Pittwater Spotted Gum. It is proposed to retain the majority of trees within the subject site.

The existing structure currently exceeds the 8.5 m maximum building height development standard under clause 4.3 of the Pittwater Local Environmental Plan 2014. The subject works will retain the breach of the control by maintaining the existing roof form and height.



**VIEW SHOWING SUBJECT SITE CIRCLED NOTING TILE AND
GLASS ROOF TO BE RE-CLAD WITH METAL SHEETING**

Surrounding development along the southern side of Careel Bay (see preceding photograph) predominantly comprises detached multi level dwellings and associated boatsheds none of which are identified as items of heritage significance.

There is no prevailing architectural character within this part of Avalon Beach apart from predominantly stepped built forms.

2.0 THE PROPOSAL

The proposal includes enlarging the existing carport to provide an additional undercover carspace, replacing a small part glass roof with corrugated metal sheeting over the entire roof, internal renovations and additional residential floor area, a lift, a swimming pool and a boatshed to the site waterfrontage.

The proposed works incorporate the demolition of the rear existing glass roof and replacement with new metal roof sheeting. As the subject dwelling currently breaches the Maximum Building Height development standard of 10m Maximum Building Height, this Clause 4.6 request is submitted to enable Council to assess the proposal.

3.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

3.1 PITTWATER LOCAL ENVIRONMENTAL PLAN 2014 (PLEP)

The Development Standard, the subject of this request is as follows- Pursuant to Clause 4.3(D) of Pittwater Local Environmental Plan 2014 (PLEP) *development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres but not be more than 10.0 metres.* The objectives of this control are as follows:

4.3 Height of Buildings

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

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

(c) to minimise any overshadowing of neighbouring properties,

(d) to allow for the reasonable sharing of views,

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

(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.

building height (or height of building) is defined as follows under PLEP Dictionary

(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.

3.2 Measuring Building Height

In order to clearly establish an accurate and consistent means of measuring building height as defined under the above definition, the following definition of ground level (existing) is relevant –

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

Prior to the decision of Commissioner O'Neill in *Merman Investments Pty Ltd v Woollahra Municipal Council*, [2021] NSWLEC 1582, it was common practice for building height to be measured from the existing ground level around the building periphery. In the above decision, O'Neill C only

partially accepted this method but clarified the method by emphasizing that the definition includes “at any point” which effectively measures building height from excavated areas within existing structures.

The salient provisions of that decision are as follows-

73 The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to

the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

74 The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

The subject proposal has architectural plans and sections which reflect internal and external site levels from the site

survey to enable an accurate numerical assessment of the proposal to take place.

3.3 Variation sought

The subject site has a prescribed maximum building height at any one point of 10 m above existing ground level within the building footprint under the provisions of NSLEP2013.

Ground level (existing) is defined as follows under PLEP Dictionary-

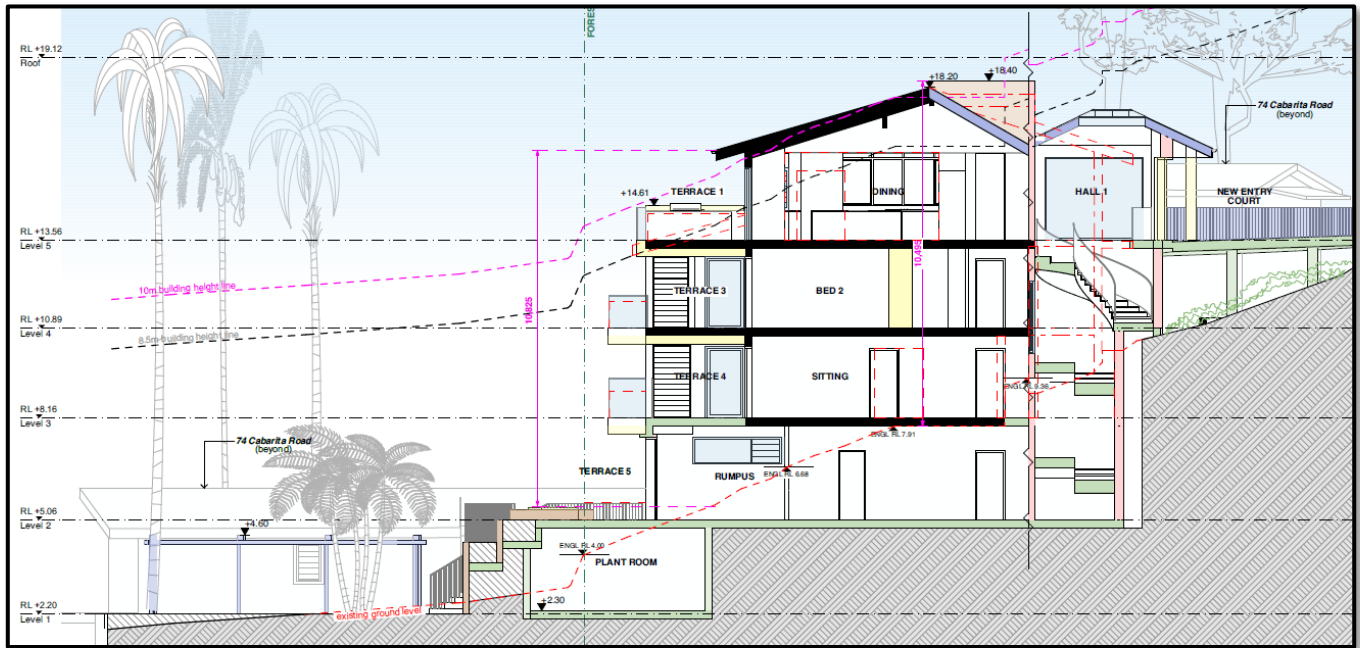
ground level (existing) means the existing level of a site at any point.

The submitted architectural plans by Corben Architects accompanying the Development Application (an extract of which follows) illustrate the breach of the maximum building height development standard measured from the existing ground level within the perimeter of the building and the 8.5 m and 10.0 m building heights development standard superimposed.

The plan indicates a maximum building height of 10.825 m at the highest point, a resultant breach of the 8.5m development standard of 2.312m, and a breach of the 10.0m building height development standard of .825 m, a breach of 8.25%.

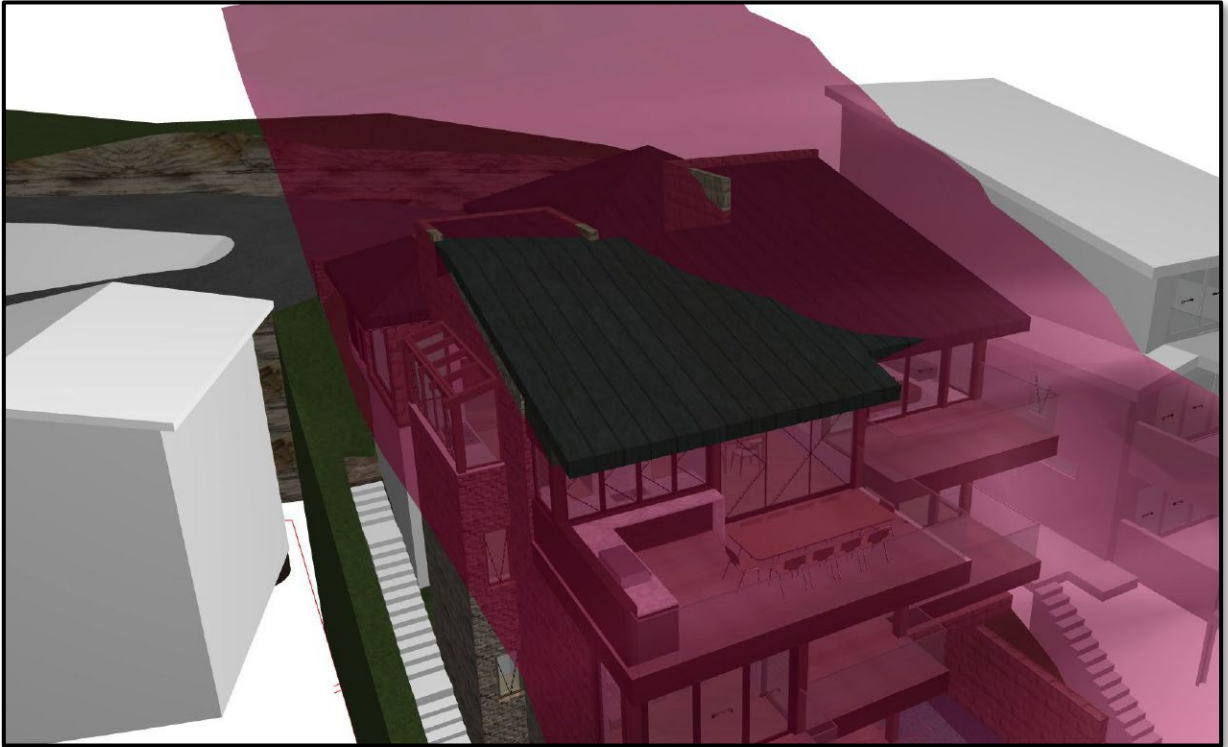
The subject works will retain the breach of the control by maintaining the existing roof form and height.

The below extract from the architectural plans shows a section through the proposal illustrating relative levels.



ARCHITECTURAL PLAN SECTION SHOWING MAXIMUM BUILDING HEIGHT LINES AND ROOF LEVEL

The following extract from the architectural plans shows the extent of the existing re-clad roof and parapet and the incursion through the 10.0m height standard representation.



**ARCHITECTURAL PLAN SHOWING 10.0 m MAXIMUM BUILDING
HEIGHT LINE AND ROOF LEVEL INCURSION**

3.3 PLEP 2013 Clause 4.6 – Exceptions to Development Standards

(1)The objectives of this clause 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.*

Chief Justice Prestons decision in *Initial Action Pty Ltd v
Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial

Action”) provides guidance in respect of the operation of clause 4.6. This was later clarified by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51]. This decision by the Court where the Court confirmed that a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of Initial Action the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. 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”. If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in Initial Action is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

This Clause 4.6 request seeks flexibility in the application of the height development standard under the PLEP to the proposed development in the circumstances of this particular case.

The circumstances of the proposal are such that the proposed building height, although breaching the *Height of buildings* development standard is appropriate as the proposal seeks consent for a replacement roof cladding and sandstone parapet with no increased breach of the development standard.

4.0 CLAUSE 4.6(3)(a) IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Established practices for applicants to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

Wehbe sets out a five part test for an applicant to satisfy the criteria for demonstrating satisfaction of this component of Clause 4.6.

These five tests are as follows-

1. by demonstrating that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard.
2. by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary.

3. by confirming that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable.

4. by illustrating that the Council itself has granted development consent that departs from the standard and arguing from this that the development standard has been 'virtually abandoned or destroyed,' rendering it unnecessary and unreasonable.

5. by establishing that the zoning area of the proposed development was 'unreasonable or inappropriate' such that the development standard which is appropriate to that zoning is no longer reasonable or necessary for the particular area.

Preston CJ has explained that the focus of this reason is that the zoning of the land in question is unreasonable or inappropriate, rather than the standard being inappropriate in that zone.

For the purposes of this 4.6 Request, the first test under *Wehbe* is adopted to establish that **compliance with the development standard is unreasonable and unnecessary** as the breach of the development standard is existing and no works are proposed to the structure to increase that non-compliance with the numerical development standard.

The subject site, with a slope in excess of 16.7 degrees (30%), is a recognised site constraint under Clause 4.3 (2D) of the PLEP which states –

Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more

than 10.0 metres if—

(a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and

(b) the objectives of this clause are achieved, and

(c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and

(d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

4.1 Consistency with objectives of the height of buildings development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

RESPONSE

The proposed alterations and additions to the existing structure are primarily internal and consistent with the roof height and pitch. The existing structure is currently in exceedance of the 10.0 m maximum building height standard and the works (primarily structural repairs and re-cladding) to the roof area are

deliberately crafted to maintain the existing roof form and height.

(b) to control the bulk and scale of buildings,

RESPONSE

The bulk and scale of the building (if approved) will be entirely consistent with the existing structure in terms of its building height, slope and character with a completed proposal that will result in bulk and scale identical to the existing building and consistent with buildings in the immediate locality.

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

(iii) views between public spaces (including the harbour and foreshores)

RESPONSE

The unchanged roof height will retain views across the structure from any public or private locations surrounding the subject site.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

RESPONSE

The shadow diagrams submitted with the subject proposal have

been assessed against the provisions of the Pittwater Development Control Plan show no material variation to the shadows cast by the existing roof structure.

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

RESPONSE

Although not zoned for environmental protection, the proposal is a sensitive solution for a constrained site within an area of significant environmental values.

The above test under the first principle of *Wehbe* confirms the suitability of the proposal in terms of maintaining the appearance of the existing structure by providing an identical and therefore consistent roof form which importantly satisfies the objectives of the control and will not result in any material adverse impacts.

5.0 CLAUSE 4.6(3)(b) ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The decision of the Court in *Initial Action* found at [23]-[24] that:

*23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26].*

The adjectival phrase “environmental planning” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

Sufficient Environmental Planning Grounds

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as follows.

Environmental Planning Ground 1 – Topography of The Site

The subject site slopes from a highpoint of RL14.03 m AHD at the ROW boundary to a low point of RL6.6m AHD at the lowest point. The resultant slope is the prime contributing factor to the existing breach of the 10 m maximum building height development standard.

The subject site satisfies the provisions of Clause 4.3 (2D)(c) as *the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%).*

When viewed from the nearby locality, the building height (if approved) will be indistinguishable from the existing structure apart from the metal sheeting replacing the existing tiled and glass roof.

When viewed from the surrounding locality, the views across the subject site towards iconic features such as the Careel Bay wetlands will be unaffected by the proposed works to the dwelling structure, despite the breach of the development standard.

Environmental Planning Ground 2 - Objectives of the EP&A Act

The proposal clearly endorses the relevant objects of Clause 1.3 of the Act as follows –

The proposal endorses the provisions of clause 1.3 (c) of the Act as it promotes the **orderly and economic use and development of**

land by performing significant sympathetic renovations to an existing building rather than demolishing the existing structure.

The proposal promotes **sustainable management** of the built form by proposing structural repairs and building compliance works in a manner that will retain the principal visual character of the existing building. Extensive retention of a significant amount of the existing building and compliance with the provisions of the Building Sustainability Index further endorse this outcome.

The proposal promotes the **proper construction and maintenance of buildings, including the protection of the health and safety of their occupants** by performing structural repairs to ensure ongoing structural soundness and the incorporation of compliant building methods to ensure ongoing compliance with the controls under the Building Code of Australia.

I am of the view that sufficient environmental planning grounds exist for the breach of the development standard to be endorsed by the consent authority.

6.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL FOUNDED?

I believe that the preceding written objection is well founded and the exceedance of the standard resulting in a near identical built form compliant with the outcomes sought by the relevant planning controls and lack of environmental harm is a well-founded outcome.

The proposal does not seek to raise the height of the existing structure and incorporates the removal of some unsound elements

of the existing structure and retention of the site appearance when viewed from any public or private locations in the proximity of the subject site.

The proposal is worthy of support and will not result in an undesirable precedent due to the individual merits of the proposal and the retention of the built form to endorse the outcomes sought by sustainable development and endorse the outcomes prescribed by the C4 Environmental Living Zone.

A handwritten signature in dark ink, appearing to read 'Lance Doyle', is positioned above the printed name.

LANCE DOYLE

M. PLAN (UTS) B. APP SC. (UWS) RPIA

Dated: May 2025