



PITTWATER LEP 2014 Clause 4.6 Exceptions to Development Standards – Height of Buildings

Proposed Demolition of Existing Building and Construction
of a New Dwelling House at

**No. 121 Pacific Road,
Palm Beach**

Prepared for:

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PITTWATER LOCAL ENVIRONMENTAL PLAN (LEP) 2014
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Karen, Colin and John Bowers

SITE ADDRESS: No. 121 Pacific Road, Palm Beach

PROPOSAL: Proposed Demolition of Existing Building and Construction of a New Dwelling House

1. (i) Name of the applicable planning instrument which specifies the development standard:

Pittwater Local Environmental Plan (LEP) 2014

(ii) The land is zoned:

R2 Low Density Residential

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE), prepared by GSA Planning.

2. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the Height Map which indicates a maximum 8.5m applies to the subject site.

The proposal largely complies with the height limit, with the exception of the ridge of the gable roof on the northern side of the dwelling, which reaches a maximum height of 9.042m. The non-compliance is predominantly a result of the topography of the site, which has a steep west to east slope, in addition to a south to north slope. The extent of non-compliance is in the order of approximately 6.3% and relates only to the ridge of roof form. The existing dwelling has a maximum assumed height of approximately 8.9m, measured from the roof ridge at RL 82.14AHD to the existing ground line immediately below (accounting for approximately 0.45m structure and clearance below the existing ground floor level), which is an existing non-compliance. However, it is also noted that the maximum roof level of the proposal will be decreased by 0.69m compared to the existing situation. (see Figure 1 on the following page).

3. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118 (*Initial Action*), Preston CJ notes at [87,90]:

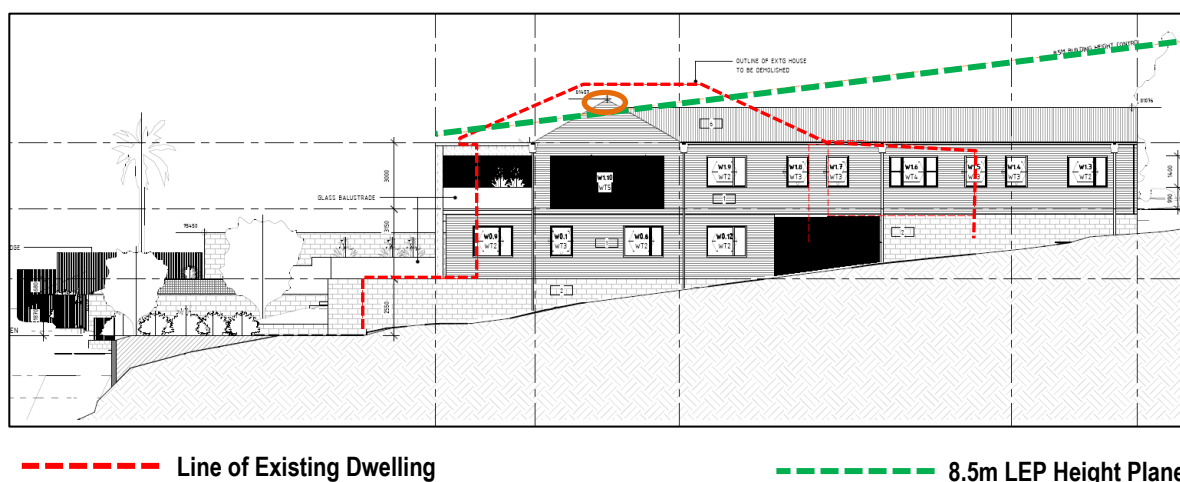
Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

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

The proposal seeks flexibility in the application of the height development standard to the proposal in the circumstance of this particular case. In our opinion, the proposed maximum height of 9.042m is appropriate given the site constraints and surrounding context. The proposal complies with the floor space ratio (FSR) development standard and the majority of DCP controls. In addition, flexibility is sought because the maximum roof ridge of the existing dwelling is greater than the proposed roof and the extent of the non-compliance will not result in unreasonable impacts to nearby dwellings.

Flexibility in this circumstance would result in a better outcome for the development. The proposed roof will maintain a traditional pitched form and will be compatible with the character of the locality. The non-compliance only covers a portion of the roof at the northern end and will enable consistent internal floor levels. This will improve the amenity for the residents. In addition, the majority of the proposed roof is located below the 8.5m height limit.



Source: Daniel Boddam Architecture and Interior Design

Figure 1: Northern Elevation of Proposal Showing Area of Roof that Exceeds the 8.5m LEP Height Plane (area of non-compliance circled)

4. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause is stated, inter alia:

- (3) 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 written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

4.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. Despite the non-compliance, the proposal is consistent with the desired low density character of the area. The proposal provides a bulk and scale that is generally consistent with that envisaged by Council's controls. The proposal achieves the objectives of the height standard which will now be discussed.

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

The locality is characterised by two storey dwelling houses displaying a range of architectural styles. Older dwellings are being replaced with contemporary designed buildings that represent the future character of the area.

As indicated in the accompanying SEE, the proposal satisfies the desired future character of the Palm Beach locality by creating a low density dwelling house that appears as a single storey when viewed from the street and two storeys from the rear. The proposed dwelling will retain the residential scale with pitched roof forms and will positively contribute to the desired character of the area. The proposal is compliant with the landscaping controls and the majority of built form controls and is of a bulk and scale that is consistent with surrounding development. The extent of

non-compliance is limited to one portion of the gable roof on the northern side which is not visible from the street and will not be discernible from nearby development.

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

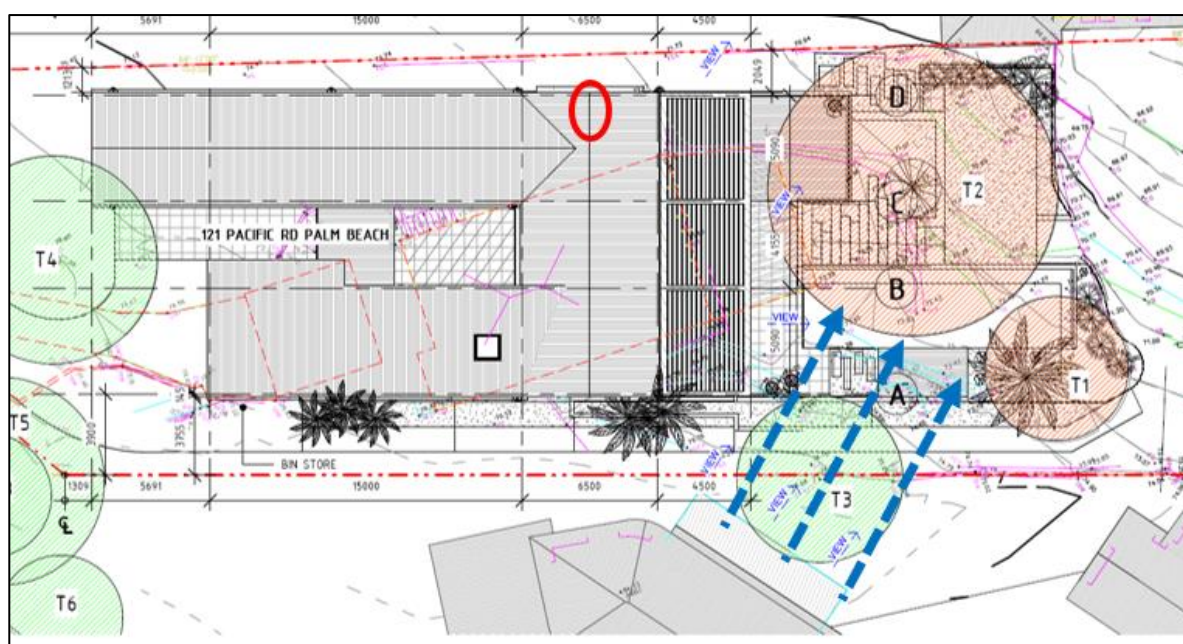
The area of non-compliance occurs at the roof of a proposed two storey dwelling house, which will remain compatible with other two storey dwelling houses that are commonly found in Pacific Road.

(c) to minimise any overshadowing of neighbouring properties

The shadow diagrams provided indicate the proposal will not create unreasonable shadow impacts on adjoining properties. As the area of non-compliance occurs on the northern side of the dwelling, it will not have an adverse impact on the extent of overshadowing to No. 119 Pacific Road to the south, when compared to a compliant height.

(d) to allow for the reasonable sharing of views

The accompanying SEE states that the proposal is not likely to create unreasonable view impacts on adjoining development. The area of height non-compliance will not interfere with the north-eastern water views currently enjoyed by No. 119 Pacific Road. This is due to that property being located higher than the subject site as well as the proposed roof ridge being lower than the existing roof ridge (see Figure 2).



Source: Daniel Boddam Architecture and Interior Design

— — — — —> Existing View Lines
From No. 119 Pacific Road

Figure 2: Location of the Non-Compliant Roof Area (circled red),
Relative to No. 119 Pacific Road

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

The proposal has been designed to respond sensitively to the natural topography. The proposal has a single storey appearance when viewed from the street, to maintain a low density residential appearance and the area of height non-compliance is not easily discernible from the public domain. Notwithstanding this, the proposal has two storey built form at the rear which is compatible with development in the locality. A flat pergola structure at the rear housing the first floor outdoor private open space creates a stepped appearance when compared to the highest roof ridge, thus reducing visible bulk when viewed from the rear.

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

The proposal presents a modest two storey dwelling house within a large allotment that will unlikely have adverse visual impacts on the natural environment or nearby heritage items. The proposal presents as a single storey dwelling when viewed from Pacific Road and two storeys from the rear. The extent of non-compliance occurs on the northern side of the dwelling which faces sites that contain heritage items. Notwithstanding this, the proposed built form complies with the side setback controls and as the top of the gable roof is only 0.54m over the height standard, it is lower than the existing roof ridge and will not be easily discernible from the adjoining properties.

Test 3 - the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

In our opinion, the purpose of the development standard is to present a dwelling that is compatible with the height, context and character of the locality whilst preserving the amenity of adjoining properties.

Compliance with the development standard would result in a shallower roof pitch or flat roof, which would affect the character of the dwelling, or require a reduction in the ceiling height, which is not desirable. It is also unnecessary when the area of non-compliance is lower than the existing roof ridge, is not easily discernible within the context of the overall roof design, is contextually appropriate in the locality and does not result in unreasonable view affectation, privacy or solar impacts.

Accordingly, strict compliance with the height standard would unnecessarily complicate orderly and economic development of the land in accordance with the intentions of the zoning and the objectives of the Environmental Planning and Assessment Act (1979). For the reasons contained in the SEE and outlined above, the development standard is unreasonable and unnecessary in this instance.

4.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

As discussed in the SEE, the proposal will maintain the residential use which is permissible within the R2 Low Density Residential Zone and will be consistent with the zone objectives. The proposed height is a contextual fit with the density and scale of the area. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

The proposal has a maximum ridge height of RL 81.457 AHD and this part of the roof is located substantially back from the portion of the roof fronting the street that complies with the standard. The subject site adjoins dwelling houses to the north that have ranging roof levels of RL 74.64 AHD to RL 81.13 AHD, and also adjoins a dwelling to the south that has a roof ridge of RL 83.33 AHD. The proposal will therefore provide an appropriate transition in height when viewed from Pacific Road. The dwelling will remain consistent with the two storey developments along Pacific Road. As indicated, there are several additional environmental planning grounds that justify the proposed height, including:

- The proposed height facilitates a low density residential development, consistent with the planning objectives of the area as well as other developments in the locality;
- The proposal represents a preferred design outcome by promoting consistent internal floor and ceiling levels with modest pitched roofs;
- As with the development as a whole, the area of non-compliance satisfies the relevant objective of the R2 Low Density Residential zone, which is to ensure development is of a height and scape that is contextually appropriate in the locality and satisfies the desired future character of Palm Beach;
- An appropriate response to the sloping topography;
- Maintaining environmental amenity for nearby dwellings and the public domain;
- The minor contravention of height relating only to the roof form;
- The central location of the non-compliant area which will not be readily noticeable from Pacific Road to the west or Florida Road to the east; and
- Compliance with the majority of built form controls under the DCP.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard, as required in Clause 4.6(3)(b).

5. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (4) *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*

The applicant submits that the consent authority can and should be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this request, and having regard to the site and locality.

In our opinion the proposal achieves the objectives of the Development Standard, as already demonstrated; and the Low Density Residential Zone, as discussed in the SEE. From this, we consider the proposal is in the public interest and should be supported.

6. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the Consent Authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each Consent Authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal does not exceed the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

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

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The height non-compliance will enhance the amenity and functionality of the proposed dwelling without significantly impacting neighbouring properties. The exceedance with the development standard is limited to the roof form only and will not result in any adverse privacy or unreasonable overshadowing impacts. The height non-compliance is mainly in response to the sloping topography and will not cause unreasonable view impacts to neighbouring dwellings.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the non-compliance, the proposal will appear consistent in the streetscape. The proposal will provide a transition in height when viewed from Pacific Road and will present a contemporary version of a traditional pitched roof form.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the precinct and is, in our opinion, in the public interest.

7. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see Table 1 on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the Low Density Residential Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 – Height of Buildings should be upheld.

Table 1: Compliance Matrix

| Para (Initial Action) | Requirement | Section | Summary | Satisfied |
|-----------------------------|---|---------|---|-----------|
| 10 | Is it a development standard (s.1.4) | 1 | Yes | YES |
| 11 | What is the development standard | 1 | Height of Buildings | YES |
| 12 | What is the control | 1 & 2 | 8.5m | YES |
| 14 | First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions: | | Both positive opinions can be formed as detailed below. | YES |
| 15, 25 | 1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement. The consent authority does not have to directly form the opinion of satisfaction regarding the matters in Clause 4.6(3)(a)&(b), but only that the applicant's written request has adequately addressed the matters required. The applicant bears the onus to demonstrate that the matters in Clause 4.6(3) have been adequately addressed in order to enable the consent authority to form the requisite opinion of satisfaction. | 4 | The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations. | YES |
| 16-22 | First Aspect is Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> . | 4.1 | The proposal is consistent with Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. | YES |
| 23-24 | Second Aspect is Clause 4.6(3)(b) – 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 indirectly satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: a) The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus 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 | 4.2 | Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposed height facilitates a low density residential development, consistent with the planning objectives of the area as well as other developments in the locality; The proposal represents a preferred design outcome by promoting consistent internal floor and ceiling levels with modest pitched roofs; As with the development as a whole, the area of non- | YES |

| | | | | |
|-------|--|---|--|-----|
| | <p>environmental planning grounds.</p> <p>b) 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.</p> | | <p>compliance satisfies the relevant objective of the R2 Low Density Residential zone, which is to ensure development is of a height and scape that is contextually appropriate in the locality and satisfies the desired future character of Palm Beach;</p> <ul style="list-style-type: none"> • An appropriate response to the sloping topography; • Maintaining environmental amenity for nearby dwellings and the public domain; • The minor contravention of height relating only to the roof form; • The central location of the non-compliant area which will not be readily noticeable from Pacific Road to the west or Florida Road to the east; and • Compliance with the majority of built form controls under the DCP. | |
| 26-27 | <p>2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. This second opinion differs from the first opinion of satisfaction in that the consent authority must be directly satisfied about the matter in Clause 4.6(4)(a)(ii).</p> | 5 | <p>The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Webbhe</i>. The proposal is also consistent with the objectives of the Low Density Residential Zone, as addressed in the SEE.</p> | YES |
| 28-29 | <p>Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.</p> | 6 | <p>As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.</p> | YES |

