

# Clause 4.6 Exemption Analysis

49-51 Annam Road, Bayview, NSW, 2104



**Construction of a new dwelling house and ancillary development**

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## 1.0 Report Purpose

This Clause 4.6 Exemption justification accompanies the Development Application for the construction of a new dwelling house located at 49-51 Annam Road, Bayview. The purpose of this report is to justify specific variations from the PLEP 2014 that have arisen due to the development sought for approval. This report specifically analyses these variations in accordance with clause 4.6 of the Pittwater Local Environmental Plan 2014 & the Standard Instrument - Principal Local Environmental Plan and the objectives of the zone within the PLEP 2014.

## 2.0 Applicable Legislation and Controls

- Environmental Planning and Assessment Act 1979 referred to as EP&A (1979)
- Environmental Planning and Assessment Regulation 2000 referred to as EP&R (2000)
- Standard Instrument—Principal Local Environmental Plan referred to as the Standard Instrument
- Pittwater Local Environmental Plan 2014 referred to as [Category].
- Warringah Development Control Plan 2011 referred to as WDCP (2011)

## 3.0 Site location

The subject site is located at 49-51 Annam Road, Bayview, NSW, 2104 . The property is legally identified as Lot SP 78255 and consists of a regular shaped land parcel that has a lot size of 4047m<sup>2</sup>.



Image 1: Locality map showing the subject site and its general surroundings (Near Maps, 2021).



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## 4.0 Description of Development Proposal and Context

The development proposal consists of the following elements:

- Construction of a dwelling house
- Construction of a detached swimming pool and spa
- Construction of ancillary development
- Removal of vegetation

## 4.1 Description of non-compliance

The maximum permissible Building Height is 8.5m, however, a minor portion of the propose dwelling exists beyond this height achieving an approximate height of 9.8m. The area of proposed structure that breaches the height projects for an approximate span of 2.8m towards the rear of the lot.

### Height of Buildings Map

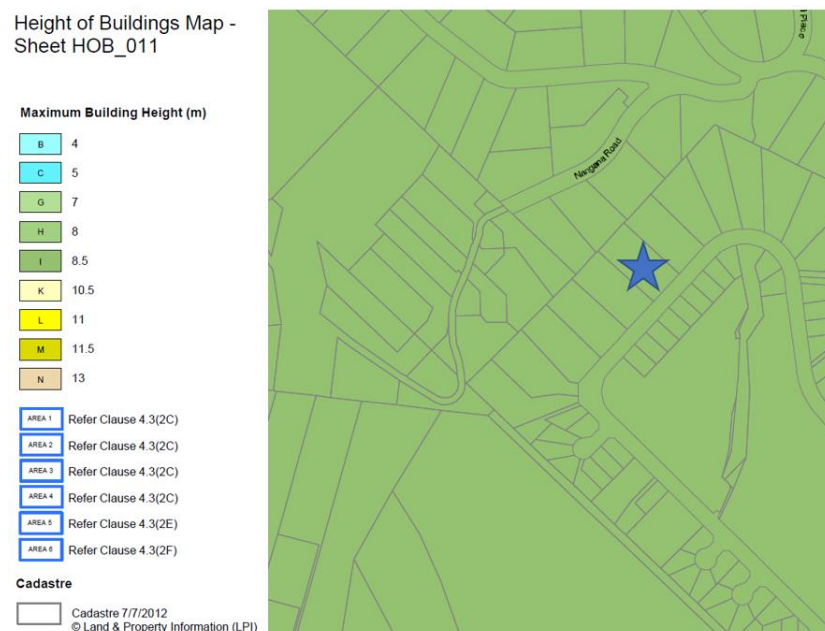


Image 2: HOB map (Source: Pittwater Local Environmental Plan 2014).



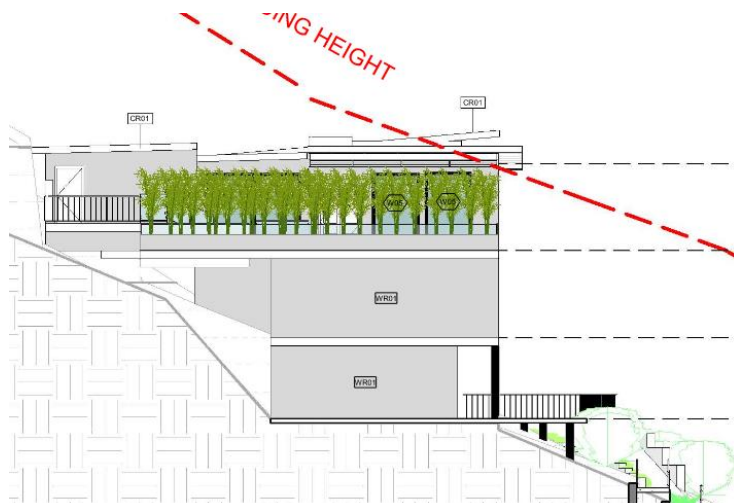


Image 3: Extract of Architectural plans showing subject building element beyond the 8.5m maximum permissible building height

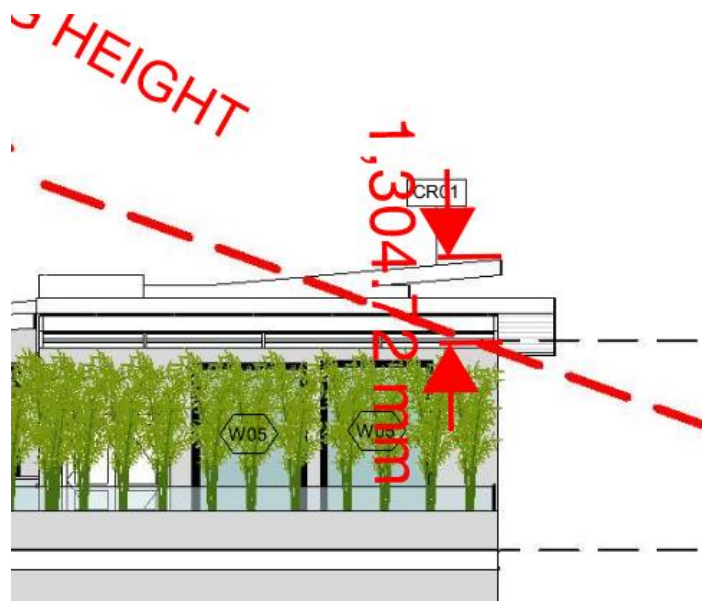


Image 4: Extract of Architectural plans showing subject building element beyond the 8.5m maximum permissible building height

The existing and proposed building heights are displayed below:

Building Height (Existing)	Building Height (Proposed)	Maximum Building Height (LEP)	Building Height Breach
NA	9.8m	8.5m	1.3m



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## 4.2 Effect on environment and general amenity

The proposed breach of maximum building height will have no effect on any adjoining neighbouring dwellings as well as the public domain for the following reasons:

1. The proposed domicile is located centrally to a considerably large lot which results in significant boundary setbacks. The breach in building height is resulted by in an inconsequential low scale span of roof structure exceeding the 8.5m limit. Due to the minor scope of the subject structure and the considerable setbacks, there will be no loss of amenity in terms of overshadowing, solar access, privacy implications etc to the adjoining dwellings. The objective of restricting building height is to fundamentally protect these amenity rights afforded to neighbouring dwellings and in the context of this breach, this is upheld.
2. The site is heavily sloping and preservation of the existing lot features is imperative to good design as well as the ecological safekeeping of the land. The design compliments the natural slope and due to the steepness a minor allowance should be allowed for the proposed breach given that there is no amenity loss to any adjoining neighbouring dwellings. The breach in height is not sought for the current and future inhabitants to benefit at the expense of others, it has arisen due to a combination of natural features belonging to the land. In the image below it can be seen that there is a steep drop of approximately 6m from the second storey to the ground level which is the cause of the non-compliance.

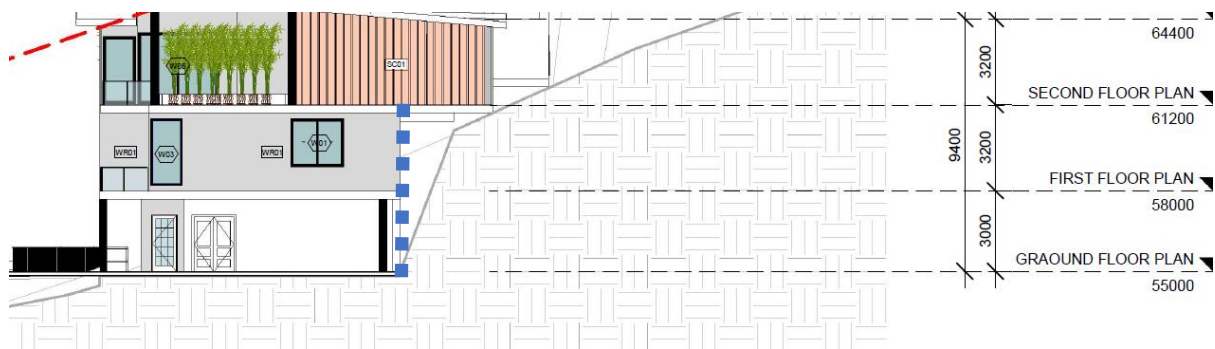


Image 5: Extract of Architectural plans showing the sloping sight and steep fall

3. Due to the steep drop, the second storey whilst breaching the maximum building height, will exist below the upwards slope towards the primary road and therefore will not be visible from the public domain.

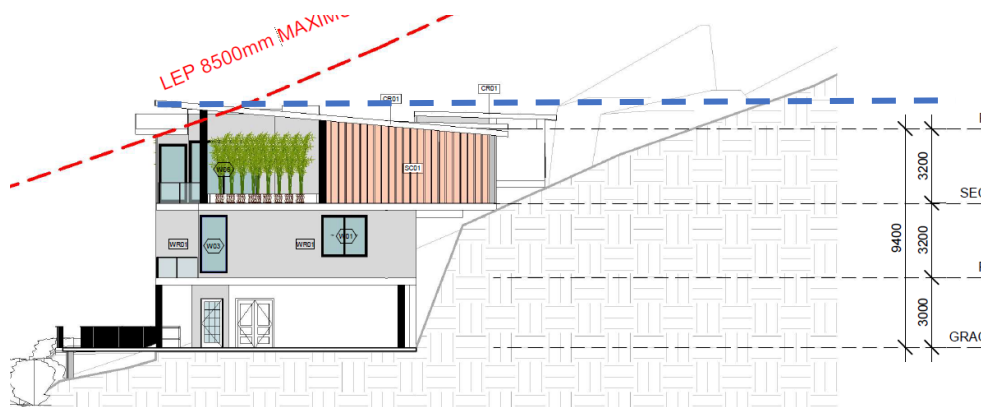


Image 6: Extract of Architectural plans showing the plane of the building protrusion in relation to the upper portion of the land.

4. Clause 4.3 (2D) of the PLEP permits a building height of 10m if certain criteria are met. This is analysed further in section 5 of this report.

## 5.0 Objectives Analysis

Under the Pittwater Local Environmental Plan 2014 the property is identified to be located in an R3 – Medium Density Residential zone

### 5.1.1 Objectives Table

Objectives of zone	Compliance Comment
<b>4.3 Height of buildings</b>	
(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>Complies.</b> The Bayview locale consist of a plethora of building typologies and the proposed dwelling is contextually appropriate.
(b) To ensure that buildings are compatible with the height and scale of surrounding and nearby development	<b>Complies.</b> As discussed in clause 1 there are a vast number of comparable dwellings throughout the Bayview locale.
(c) To minimise any overshadowing of neighbouring properties,	<b>Complies.</b> The development proposal strongly complies with this clause. There are no impacts to the solar access or additional overshadowing caused to the adjoining dwellings due to the proposed significant setbacks.
(d) To allow for the reasonable sharing of views,	<b>Complies.</b> There are no view impacts to the adjoining dwellings due to the proposed significant setbacks.
(e) To encourage buildings that are designed to respond sensitively to the natural topography,	<b>Complies.</b> The non-compliance arises due to the preservation of the ground level (existing) and natural topography of the land.
(2) To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.	<b>Not applicable.</b> There are no heritage items within close proximity to the subject lot.

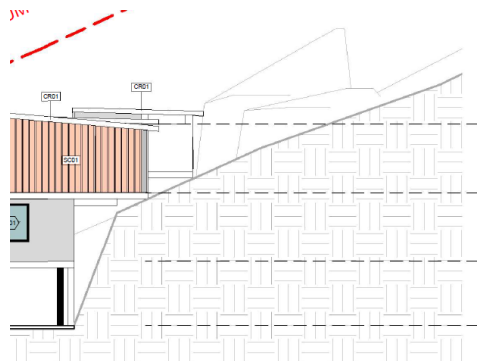
Clause 4.3 2D provides concessionary sub clauses that permit an exceedance of maximum building height from 8.5m to 10m provided the criterion are satisfied.

*(2D) 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—*

<b>4.3 (3D) Analysis</b>	
(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>Complies.</b>



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	Council are to consider the analysis of the breach in height contained within the SoEE and clause 4.6 report when assessing this application.
(b) The objectives of this clause are achieved, and	<b>Complies.</b> As discussed throughout the SoEE and 4.6 report, the objectives of all relevant clauses has been achieved.
(c) The building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and	<b>Complies.</b> The land is not consistently sloping, however, there are various points in which 16.7 degrees is exceeded by a significant amount. Furthermore, this clause does not take into consideration the steep drop that exists on the subject land.  Image 7: Extract of Architectural plans showing the slope and deep fall of the land.
(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.	<b>Complies.</b> The proposal does not propose any significant cut and fill.

## 6.0 Clause 4.6

This section of the report specifically analyses the requirements of clause 4.6 of the WLEP 2014 directly against the development proposal.

### 6.1 Clause 4.6 Preamble

Clause 4.6 exists within the PLEP 2014 and Standard Instrument to allow the consideration of variations to specific development standards contained within an LEP. NSW consists of a vast topography and many differing locales that contain unique attributes. Situations arise where the LEP requirements may be considered overbearing or impose unreasonable restrictions on potential development of land that prevents best use. Clause 4.6 allows the consideration for these developments to come to fruition if there is solid justification to do so in accordance with the requirements of clause 4.6 and relevant objectives of the PLEP 2014.

Clause 4.6 states: *(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

Development standards are defined in the Environmental Planning and Assessment Act 1979 as **development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being





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*provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—*

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

In this scenario development consent is being sought for a deviation from the maximum building height prescribed within clause 4.3 of the PLEP2014. This is permissible according to clause 4.6 of the PLEP 2014 as the exceedance of a specified EPI requirement (Development control) occurs in relation to the proposed building height.

## 6.2 Clause 4.6 Analysis

4.6 Exceptions to development standards [compulsory]	Compliance Comment
<p>1) The objectives of this clause are as follows—</p> <ul style="list-style-type: none"><li>a. to provide an appropriate degree of flexibility in applying certain development standards to particular development,</li><li>b. to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</li></ul>	<p>Objectives (a) and (b) allow for flexibility to be applied when considering applications. Flexibility should be exercised when considering a development proposal if the development proposal does not negatively impact relevant stakeholders, results in orderly development of the land and is in the wider public interest.</p> <p>In this specific situation council are to apply flexibility as the outcome for the residents of</p>



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	the dwelling is severely positive with not detrimental impacts to the public or neighbouring residential accommodation. The proposal will result in significantly improved amenity for the existing residents of the building whilst resulting in the necessary preservation of the natural topography of the land. Furthermore, there is no loss of amenity, overshadowing or detriment to the public domain as a result of this application.
2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.	<b>Complies</b> This application seeks development consent for a proposal that is contravening a development standard in relation to the maximum building height.
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.	<b>Complies</b> This justification provides a written request in relation to seeking approval for development that contravenes a development standard.  The relevant development standard is unreasonable and unnecessary in the context of this development as it is a complicated lot with a heavy slope and deep drops. The maximum building height does not consider unique lots and is design as a mechanism to restrict overpowering dwellings on standard land parcels.  Due to the minor nature of the breach, the positive outcome from the residents and no negative impacts to the public domain or adjoining dwellings, there are sufficient grounds for council to accept the clause 4.6 variation.
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	<b>Council is to determine compliance with this clause and consider it in their decision</b>



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<ul style="list-style-type: none"> <li>ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and</li> <li>b. the concurrence of the Secretary has been obtained.</li> </ul>	
5) In deciding whether to grant concurrence, the Secretary must consider— <ul style="list-style-type: none"> <li>a. whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</li> <li>b. the public benefit of maintaining the development standard, and</li> <li>c. any other matters required to be taken into consideration by the Secretary before granting concurrence.</li> </ul>	<b>The secretary is to determine compliance with this clause and consider it in their decision</b>
6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if— <ul style="list-style-type: none"> <li>a. the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or</li> <li>b. the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.</li> </ul>	<b>Not applicable</b>
7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).	<b>Council are to comply with this clause</b>
8) This clause does not allow development consent to be granted for development that would contravene any of the following— <ul style="list-style-type: none"> <li>a. a development standard for complying development,</li> <li>b. a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,</li> <li>c. clause 5.4.</li> </ul> Direction. Additional exclusions may be added.	<b>Not applicable</b>



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## 7.0 Conclusion

Having regard to the aforementioned assessments it is considered that the proposed development is acceptable and should be supported by council for the following reasons:

- The objectives and prescriptive measures of clause 4.6 are satisfied, more specifically that the development standards are unreasonable and there is sufficient ground for council to accept the variation
- The objectives and prescriptive measures of the PLEP 2014 are complied with
- There is a no effect to streetscape amenity and public spaces
- The proposed works are considered to be orderly development of the land
- There are no implications in relation to overshadowing or loss of solar access
- The proposed breach is minor in nature as the majority of the proposed base building will comply with the maximum building height
- The proposal will result in short term employment for the building works in a time of economic suppression
- The finished structures will directly increase the usability and functionality of the existing domiciles, resulting in an increased quality of life for future and current residents.