



23 November 2020  
Our Ref: 20323A.2AJC\_cl4.6 HOB

planning consultants

**RE: WRITTEN REQUEST FOR EXCEPTION TO A DEVELOPMENT STANDARD  
CLAUSE 4.3 HEIGHT OF BUILDINGS DEVELOPMENT STANDARD  
PROPOSED ALTERATIONS AND ADDITIONS TO NEWPORT SLSC  
394 BARRENJOEY ROAD, NEWPORT**

**1.0 Introduction**

DFP has been commissioned by Adriano Pupilli Architects (APA) on behalf of Northern Beaches Council (Council) to prepare a request pursuant to clause 4.6 of *Pittwater Local Environmental Plan 2014* (the LEP) in respect of the proposed alterations and additions to Newport Surf Life Saving Club (Newport SLSC) building at 394 Barrenjoey Road, Newport (the site)

The proposal exceeds the 8.5m height of buildings development standard under clause 4.3 of the LEP with the existing and proposed extension to the terracotta gable roof having a maximum height of 8.95m measured to the top of the ridge, representing a variation of 0.45m.

Notwithstanding the contravention of the development standard, the proposal is considered to be consistent with the objectives of the 8.5m height of buildings development standard and the objectives of the RE1 Public Recreation zone (the RE1 zone) within which the development is to be carried out. There are sufficient planning grounds to justify the contravention in this instance, having regard to the following:

- The proposed development is consistent with the objectives of the height of buildings development standard and the objectives of the RE1 zone;
- The exceedance of the height of buildings development standard is consistent with the existing 8.95m height of the Newport SLSC building with the proposed terracotta gable roof extending the form and architectural detailing of the existing terracotta gable roof to match;
- The proposed development will not have an adverse impact on the significance of the heritage item (Item 2270445 "Newport Surf Life Saving Club");
- The exceedance of the 8.5m height of buildings development standard will not result in additional visual impact and the proposed alterations and additions are consistent with the desired future character of Newport and the distinctive landscape character of Newport Beach; and
- The proposed alterations and additions to the Newport SLSC will not result in any significant view loss and the view-sharing is considered to be reasonable with the development representing a skilful and high-quality architectural design.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of clause 4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the height of buildings standards.

## 2.0 The Nature of the Variation

Clause 4.3(2) of the LEP sets out the building height limit as follows:

*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.*

The Height of Buildings Map identifies the maximum height for the site as 8.5m.

The LEP defines building height (or height of building) as follows:

- (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.*

The proposed alterations and addition extend the existing terracotta gabled roof of the Newport SLSC building to the north by 6m (**Figure 1**). The gable roof has a maximum RL of 14.6m, which is 8.95m above ground level (existing) and exceeds the maximum building height of 8.5m by 0.45m. This is equivalent to a variation of 5%.

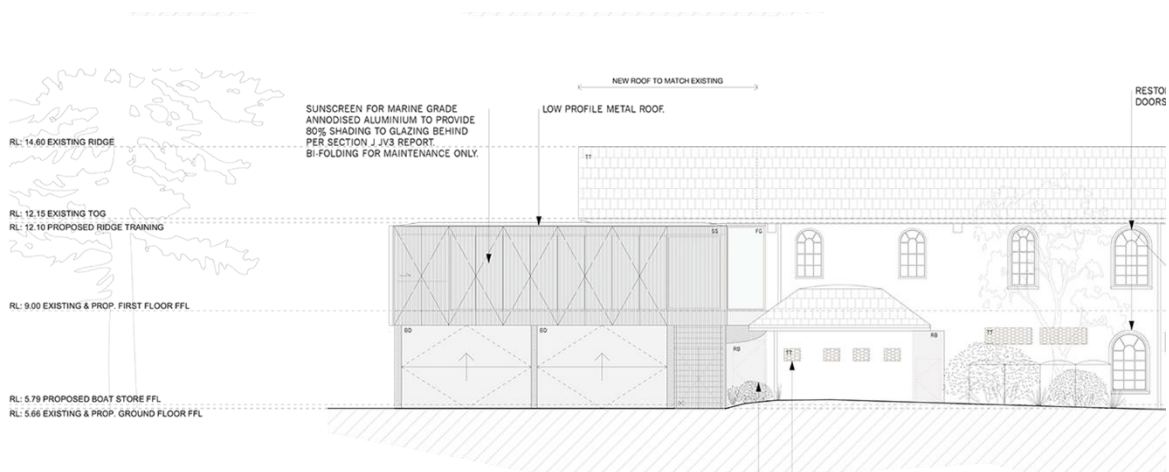


Figure 1 Extract of the northern end of the proposed west elevation of Newport SLSC

## 3.0 Clause 4.6 Assessment

### 3.1 Subclause 4.6(1) – Objectives

Subclause 4.6(1) of the LEP states the objectives of the clause as follows:

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

In the Judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action') Preston CJ rules that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority must be satisfied that the development achieves these objectives. Furthermore, neither clause 4.6(3) or clause 4.6(4) expressly or impliedly require that development that contravenes a development standard “achieve better outcomes for and from development”.

Accordingly, the remaining subclauses of clause 4.6 provide the preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument. These preconditions are discussed hereunder.

### 3.2 Subclause 4.6(2) – Consent may be granted

Subclause 4.6(2) provides that:

- (2) *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.*

The height of building development control in clause 4.3 of the LEP is a development standard, defined in Section 1.4 of the EP&A Act as follows:

*Development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being 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 character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work.*

Under clause 4.6(8), the height of buildings development standard is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted.

### 3.3 Subclause 4.6(3) – Consent Authority to Consider Written Justification

Subclause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- “(3) *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 letter and information referred to herein, constitute a written request for the purposes of clause 4.6(3).

It will be a matter for the consent authority to consider the written request prior to granting development consent to this DA and, as discussed in the Judgement of *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* ('Al Maha'), the consent authority or the Court must, in determining the DA clearly enunciate that it has satisfied itself of the matters in clause 4.6(4). In the case of a consent authority, this might be by way of a statement in the reasons for approval authored by the consent authority.

### 3.4 Subclause 4.6(4) – Written Request

Subclause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- “(a) *the consent authority is satisfied that:*  
*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, and*
- (b) *the concurrence of the Director-General has been obtained.”*

The following subsections address these matters.

#### 3.4.1 Clause 4.6(4)(a)(i) – Written request to adequately address the matters in clause 4.6(3)

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that this written request adequately address the matters in clause 4.6(3).

#### Compliance is unreasonable or unnecessary

In his judgement of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* (‘Micaul’), Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that development would not cause environmental harm and is consistent with the objectives of the development standard.

It is considered that compliance with the 8.5m height of building development standard is unreasonable and unnecessary and that the potential adverse impacts of the proposed development can be appropriately mitigated or minimised as described in **Table 1**.

**Table 1 Environmental Impact Mitigation and Management**

Issue	Discussion
Heritage	<p>Newport SLSC is identified as a local heritage item under schedule 5 of the LEP (Item 2270445). The Newport SLSC has historical, associative, social and aesthetic significance for the Newport community. A Statement of Heritage Impact has been prepared by Heritage 21 that reviews the impacts of the proposed development on the heritage significance of Newport SLSC. The SOHI specifically addresses the extension to the existing building as follows:</p> <p><i>All additions have been kept low-lying and are clearly identifiable as ‘new’ to ensure clear readability. The proposed form, scale, materiality, siting and detailing of the new additions would be congruent the original built form. The additions would be low-lying and minimal in bulk. Further, the use of retractable fabric awning and vertically proportioned aluminium batten screen would reduce the perceived bulk of the new additions. The proposed extension along the northern wings is intended to be clearly distinguishable as ‘new work’ and subservient to the original double storey central section. However, the proposed new roof extension would be a continuous extrusion of the existing terracotta gable roof form, allowing for visual connectivity between the original building and the new works. By the use of transparency and modern materials that are sympathetic to the original building, the proposed ensures that the additions remain subservient and visually recessive to the original building.</i></p>

**Table 1 Environmental Impact Mitigation and Management**

Issue	Discussion
	The SOHI concludes that the proposed development will have a minimal impact on the heritage significance of the building.
Bulk and scale	The bulk and scale of the proposed development is considered to be appropriate to the beachside setting and landscape character of Newport Beach. The scale of the proposed alterations and additions is generally subservient to the original 1930s Newport SLSC clubhouse. The extension of the terracotta gable roof provides a link between the original building and the new addition.
Solar Access	The proposed development will not result in any additional overshadowing of neighbouring properties.
Views	A detailed assessment of the proposed development against the view sharing planning principle established by <i>Tenacity Consulting v Warringah Council [2004] NSWLEC 140</i> has been provided in the SEE. The assessment concluded that there the proposed development will result in a minor or negligible impact on views available from the residential apartment buildings located on the western side of Barrenjoey Road. The proposed alterations and additions provide a reasonable sharing of views as the proposal represents a skilful design that balances heritage considerations with the requirement.

Furthermore, the proposed alterations and additions to Newport SLSC building are considered to be consistent with the objectives of the height of building development standard as described in **Table 2**.

**Table 2 Assessment against the objectives of the height of buildings development standard**

Objective	Assessment
<i>(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,</i>	Newport SLSC is a landmark building on Newport Beach, providing essential surf lifesaving functions as well as recreational and social opportunities for the local community. The proposed alterations and additions to the Newport SLSC building are consistent with its coastal setting, which is dominated by the beach, adjoining headlands and recreational opportunities.
<i>(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	The proposed northern extension of the gabled terracotta roof has the same height as the original 1930s roof. The extension of the gabled roof provides a connection between the alterations and additions and Newport SLSC have been designed to respond to the heritage significance of the existing building and are subservient to the bulk and scale of the original 1930s surf club building.
<i>(c) to minimise any overshadowing of neighbouring properties,</i>	The proposed alterations and additions do not result in any adverse overshadowing impacts on neighbouring properties.
<i>(d) to allow for the reasonable sharing of views,</i>	The proposed development will allow for a reasonable sharing of views. The proposed development is considered to represent a skilful design that balances heritage considerations with the need to provide additional storage for the club.
<i>(e) to encourage buildings that are designed to respond sensitively to the natural topography</i>	The site is relatively flat.
<i>(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.</i>	The proposed development will have a minimal impact on the visual character and setting of Newport SLSC. The proposed development has been assessed as having a negligible impact on the significance of the heritage item and is consistent with the Conservation Management Plan developed for the item.

## Sufficient Environmental Planning Grounds

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (“Four2Five”) Pearson C indicated there is an onus on the applicant to demonstrate, through the written request, that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

In Initial Action, Preston CJ indicated that it is reasonable to infer that “*environmental planning grounds*” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s1.3 of the EP&A Act. The specific environmental planning grounds relevant to this proposal are outlined in **Table 3**.

**Table 3 Environmental planning grounds supporting the proposed variation**

Environmental Planning Ground	Discussion
Heritage	The proposed alterations and additions provide for upgrade and maintenance of an existing heritage item building. An assessment of the impact of the proposed development on the heritage significance of the item has been undertaken by Heritage 21, which concludes that the impact is negligible.
Bulk and scale	The proposed maximum height of the new terracotta gable roof is consistent with the existing 8.95m height of the terracotta gable roof. The roof extension provides a visual connection between the original 1930s Newport SLSC clubhouse and the proposed northern addition. The overall bulk and scale of the new addition is subservient to the bulk and scale of the original building
Desired landscape character	The proposed development is consistent with the distinctive landscape character of Newport Beach which is characterised by Newport SLSC, the Norfolk Island Pine trees, the beach and views towards Bungan Head and South and North Bilgola Heads.

In addition, in Micaul and Initial Action, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As summarised in **Table 1**, the proposal satisfactorily manages and mitigates adverse amenity impacts to neighbouring residential and commercial properties.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard in this instance.

#### 3.4.2 Clause 4.6(4)(a)(ii) – Public Interest

Pursuant to clause 4.6(4)(b) and as discussed by Preston CJ in Initial Action, if the development is consistent with the objectives of the development standard and the objectives of the zone, the consent authority can be satisfied that the development will be in the public interest.

An assessment of the proposal against the objectives of the 8.5m height of buildings development standard is provided at Error! Reference source not found. and an assessment of the proposed development against the objectives of the RE1 Public Recreation Zone (the RE1 zone) expressed in the Land Use Table to clause 2.3 of the LEP is provided in **Table 4** below.

**Table 4 Assessment against the objectives of the RE1 zone**

Objective	Assessment
<ul style="list-style-type: none"> <li>To enable land to be used for public open space or recreational purposes.</li> </ul>	The proposed alterations and additions of Newport SLSC facilitates the on-going use of the site for public open space community and recreational purposes.

**Table 4 Assessment against the objectives of the RE1 zone**

Objective	Assessment
<ul style="list-style-type: none"> <li>To provide a range of recreational settings and activities and compatible land uses.</li> </ul>	The use of the Newport SLSC as a community facility is compatible with the use of the site for recreational activities.
<ul style="list-style-type: none"> <li>To protect and enhance the natural environment for recreational purposes.</li> </ul>	The proposed development does not have an adverse impact on the natural environment.
<ul style="list-style-type: none"> <li>To allow development that does not substantially diminish public use of, or access to, public open space resources.</li> </ul>	The proposed alterations and additions to Newport SLSC will result in improvements to public use of and access to Newport Beach and the adjoining public open space. The proposed alterations and additions will improve the efficiencies and functional layout of the Newport SLSC building including improved access and provide additional storage to better meet the needs of the surf lifesaving club, Council and community groups.
<ul style="list-style-type: none"> <li>To provide passive and active public open space resources, and ancillary development, to meet the needs of the community.</li> </ul>	Newport SLSC is a significant community facility. Overall, it is considered that the proposed development will have a positive impact for both the Newport SLSC and the broader community.

### 3.5 Clause 4.6(4)(b) – Concurrence of the Secretary

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

The Secretary's concurrence may not be assumed by a delegate of Council if:

- The development contravenes a numerical standard by greater than 10%; or
- The variation is to a non-numerical standard.

The proposed development comprises alterations and additions to the Newport SLSC and exceeds the maximum building height of 8.5m by 0.45m, representing a variation of 5%.

In this instance the DA is regionally significant development and will need to be determined by the Sydney North Planning Panel (SNPP) due to the type (Council related development) and cost (Capital Investment Value of over \$5 million) of the proposed development. The above restrictions on the Secretary's concurrence do not apply to the decisions made by the Planning Panel.

### 3.6 Clause 4.6(5) – Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning,*

The proposed non-compliance does not of itself raise any matter of significance for State or regional Environmental Planning.

- (b) *the public benefit of maintaining the development standard,*

The proposed variation does not set a precedent given the community and recreational uses of the site, and the specific land use requirements of the surf club. In this instance there is not considered to be a public benefit in maintaining the development standard.

- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

It is considered that there are no other matters of relevance that need to be taken into consideration.

### **3.7 Clause 4.6(6) – Subdivision on Certain Land**

Clause 4.6(6) is not relevant to the proposed development as it does not relate to subdivision of land.

### **3.8 Clause 4.6(7) – Keeping of Records**

Clause 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

### **3.9 Clause 4.6(8) – Restrictions on use of clause 4.6**

Clause 4.6(8) of the LEP states as follows:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) *a development standard for complying development,*
  - (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,*
  - (c) *clause 5.4,*

Clause 4.6(8) is not relevant to the proposed development as it is subject to a DA and does not constitute Complying Development, does not seek to vary any requirements of SEPP BASIX and does not relate to a standard under clause 5.4 of the LEP.

## **4.0 Conclusion and Recommendations**

We have assessed the proposed exceedance of the 8.5m height of buildings development standard against the relevant statutory provisions of clause 4.6 of LEP and prepared this written request which provides justification that compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case, as follows:

- The proposed development is consistent with the objectives of the height of buildings development standard and the objectives of the RE1 zone;
- The exceedance of the height of buildings development standard is consistent with the existing height of the Newport SLSC building with the proposed terracotta gable roof extending the form and architectural detailing of the existing terracotta gable roof to match;
- The proposed development will not have an adverse impact on the significance of the heritage item (Item 2270445 “Newport Surf Life Saving Club”);
- The exceedance of the height of buildings development standard will not result in additional visual impact and the proposed alterations and additions are consistent with





the desired future character of Newport and the distinctive landscape character of Newport Beach; and

- The proposed alterations and additions will not result in any significant view loss and the view-sharing is considered to be reasonable with the development representing a skilful and high-quality architectural design.

Accordingly, the justification within this written request is considered to be well founded.