



REQUEST UNDER CLAUSE 4.6 OF WARRINGAH LEP 2011

Proposed Residential Building,
2 Brighton Street, Curl Curl

CONTACT INFORMATION

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1.0 The Proposal

This request is written in support of a development application (DA) that proposes the partial demolition of the existing dwelling and at-grade garage on site, excluding some internal and external walls, construction of a two-storey detached dwelling, swimming pool, car parking and associated works at 2 Brighton Street, Curl Curl.

This Clause 4.6 Request relates to a variation proposed to Council's Maximum Building Height control as prescribed by Warringah Local Environmental Plan (LEP) 2011.

1.1 Relevant Case Law

Clause 4.6 of the Warringah Local Environmental Plan 2011 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (the Court) and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Randwick City Council V Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
4. *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406;
5. *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118; and
6. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard;

2. The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
3. Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
4. The development standard has been abandoned by the council; or
5. The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

1.2 Relevant Development Standard

The relevant development standard to which this objection relates to is Clause 4.3 Height of Buildings. Clause 4.3 Height of Buildings sets out the following:

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

- a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

(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.

(2A) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

Comment:

The applicable maximum building height for the site is 8.5m. The development proposes two portions of the building which exceed the height control by a maximum of 0.76m.

1.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 1.4(1) 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,...”

Comment:

The maximum building height control under Clause 4.3 of the Warringah LEP 2011 is clearly a development standard.

2.0 The Contravention

The proposal results in the following variation to Council’s Maximum Building Height Control as demonstrated in the table below:

Table 1: Variation to Council’s Maximum Building Height Control		
	Control	Proposed
Maximum Building Height	8.5m	9.26m
Variation	-	0.76m 8.9%

As described in the Statement of Environmental Effects (SEE) and identified on the Architectural Drawings prepared by Sachs Architecture, the height of the proposed development will exceed the maximum building height of 8.5m by 0.76m, which equates to a variation of 8.9%. The proposed variation accommodates a minimal percentage of the total building volume proposed.

The principal reason for the exceedance in maximum building height limit is as a result of the sloping topography of the subject site. The exceedance only consists of a small portion of the roof and a non-trafficable portion of the balcony and does not contain any habitable floor space, as detailed in **Figure 1** and **Figure 2** below.

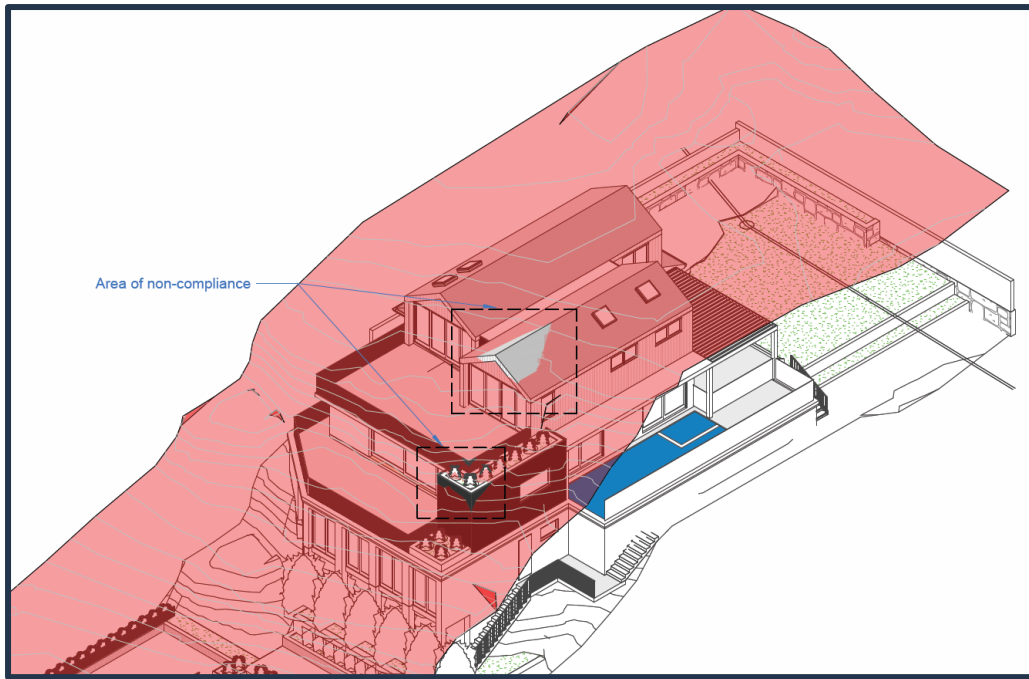


Figure 1: 3D Height Plane demonstrating the proposed exceedance of the building height control (Source: Sachs Architecture)

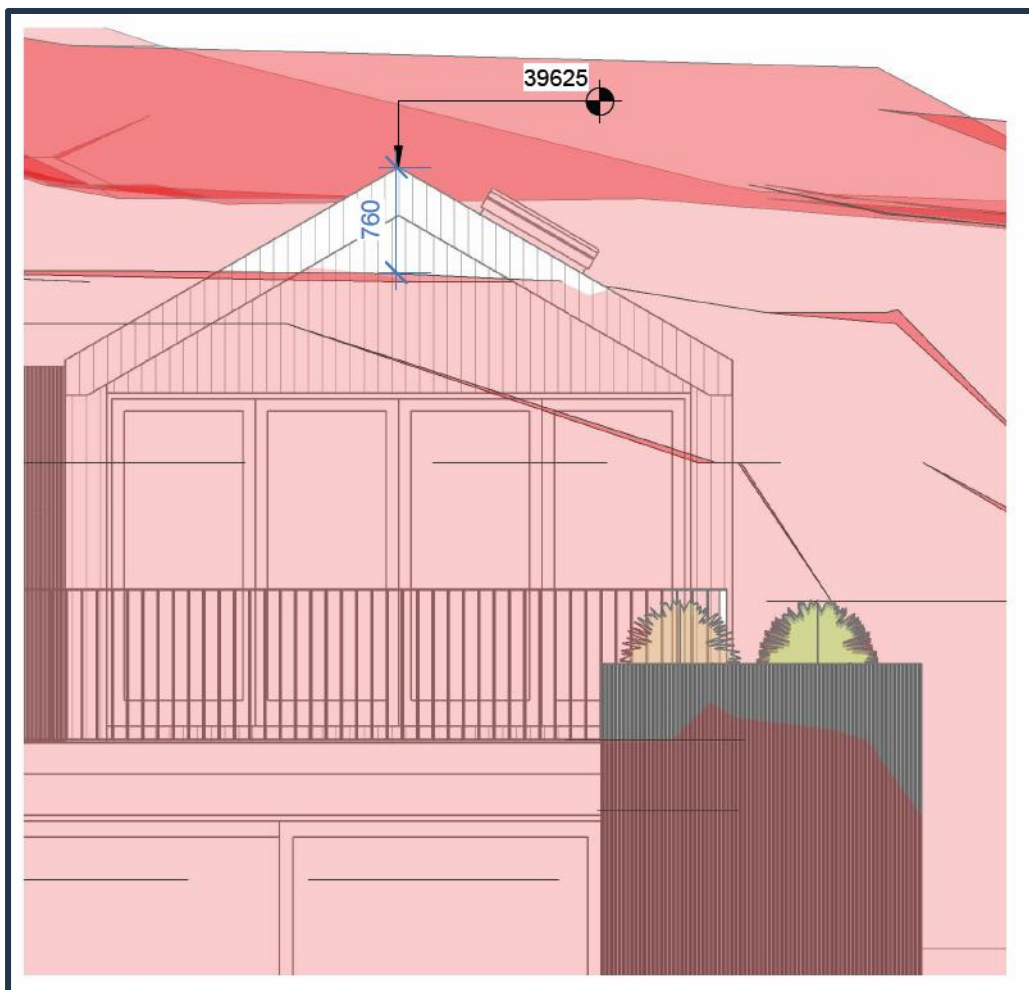


Figure 2: Height Compliance Detail demonstrating the proposed exceedance of the building height control (Source: Sachs Architecture)

2.1 Impacts of the Contravention

There are no adverse impacts as a result of the proposed contravention. The proposed exceedance does not result in any visual impact and is consistent with the desired future character of the area, as detailed below.

Visual Impacts

From a visual perspective, an appropriate composition of building elements, material textures and colours have been utilised to reflect the building's residential character.

The external appearance of the building demonstrates consideration to the various development controls and the articulation of the building along with its massing composition which successfully reflects the desired future character of the area.

The massing of the proposed dwelling has been designed to achieve an aesthetic outcome to fit within a desired building envelope. Its facade is designed with various architectural elements to provide articulation, depth and a pleasing aesthetic.

The development is considered to represent a positive contribution to the streetscape and its siting design and location of car parking within the street-level garage ensures the amenity of adjoining properties is not unduly compromised.

The height variation only relates to a small portion of the roof and a non-trafficable portion of the balcony and does not contain any habitable floor space.

Solar Access

The proposed development and associated variation do not result in any adverse impacts on surrounding development. A key consideration in the design of the proposal was the amenity of adjoining properties. The proposed development has been sited and designed to ensure an appropriate level of solar access is maintained for adjoining properties and to ensure they can be redeveloped in line with the applicable development controls for the site.

As detailed in the Shadow Analysis provided in the Architectural Plans (**Appendix C**) the proposed development does not adversely impact the solar access of adjoining properties.

The proposed height variation does not result in any increased solar access impacts from a development demonstrating strict compliance with the 8.5m height limit. Strict compliance with the height limit would not result in reduced solar access impacts and therefore the proposed variation is deemed to be reasonable.

View Loss

As set out in the View Loss Analysis (**Appendix K**), the main view loss concern relates to No. 67 Gardere Avenue and as demonstrated in the View Loss Analysis, the existing dwelling already inhibits views across the site. This is demonstrated by the estimated view line and although the proposed dwelling will exceed the height of the existing dwelling, views across the subject site from No. 67 Gardere Avenue are already inhibited.

The View Loss Analysis also demonstrates that all dwellings surrounding the subject site either don't have views across the subject site, including No.54 Curl Curl Parade; existing views are inhibited by a tree, including No.65 Gardere Avenue; or are at a higher elevation and there is no potential for view loss, including No.63 Gardere Avenue.

In addition, a view analysis is provided in the Architectural Plans (**Appendix C**) of the two neighbouring dwellings. From No. 4 Brighton Street, the view analysis demonstrates that uninterrupted district views will be retained as existing. From No. 54 Curl Curl Parade, restricted views to district and water will be retained as existing.

3.0 Justification of the Contravention

3.1 The Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site is zoned R2 Low Density Residential under the provisions of the Warringah LEP 2011. The surrounding area comprises a range of low density residential in the form of detached dwellings.

The following details recently approved developments within the Northern Beaches LGA that have been approved with a height exceedance:

Table 2: Recently Approved Developments in Proximity to the Subject Site that Varied Council's Maximum Building Height Control			
DA No & Address	Proposed	Comment	Approved
DA2023/0438 13 Playfair Road, North Curl Curl	Demolition works and construction of a dwelling house	The proposed building has a maximum building height of 8.9m. This equates to a maximum of 4.70% variation to the permitted height of buildings under the Warringah LEP 2011.	11 July 2023
DA2022/1573 32 Ian Avenue, North Curl Curl	Alterations and additions to a dwelling house	The proposed building has a maximum building height of 10.2m. This equates to a maximum of 20% variation to the permitted height of buildings under the Warringah LEP 2011.	12 April 2023

As detailed above, developments were approved due to the variations on the basis that the developments were consistent with development in the area and the variation did not result in any adverse impacts or additional bulk.

The proposed development is consistent with the recently approved developments approved by Council with a variation to the maximum height limit as the variation only relates to a small portion of the roof and a non-trafficable portion of the balcony and does not contain any habitable floor space. The variation does not result in noticeable bulk, height or scale, as viewed from the public domain, and will not result in additional solar access, view loss or privacy and the development is consistent with the desired future character of the area.

4.0 Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))?

Clause 4.6(3)(a) of Warringah LEP 2011 requires the departure from the development standard to be justified by demonstrating:

- ***Compliance with the development standard is unreasonable or unnecessary in the circumstances***

Comment

The proposed development will remain compatible with existing development in the area. The proposed development attempts to provide a built form massing that responds favourably to its setting and does not appear out of character in the streetscape. It is considered that the proposed design achieves this, and the proposed height exceedance will not result in an overbearing or bulky built form.

The numeric increase in building height for the proposed development is 9.26m. The proposed height exceedance is a function of the sloping topography of the site and is deemed to be reasonable as it involves a minimal percentage of the building volume, only relating to a small portion of the roof and non-trafficable portion of the balcony and it does not result in adverse impacts on surrounding development.

The proposed development, including the proposed building elements that exceed the height limits, will continue to achieve the objectives of the standard. It is therefore considered that the objectives of the development standard are met notwithstanding the breach of the height of buildings standard.

5.0 Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard (Clause 4.6(3)(b))?

Clause 4.6(3)(b) of Warringah LEP 2011 requires the departure from the development standard to be justified by demonstrating:

- ***There are sufficient environmental planning grounds to justify the contravention of the development standard***

Comment

It is our opinion that there are sufficient environmental planning grounds to justify contravening the building height standard in this instance. These are as follows:

- The proposed development is consistent with the objectives of the zone and the objectives of the building height control;
- The proposal does not result in any adverse impacts on adjoining properties;
- The height variation only includes a minor portion of the building located away from adjoining properties;
- The proposed dwelling will not result in view loss impacts on surrounding development;
- The area of exceedance does not contribute to the visual bulk of the development; and
- The area of exceedance only consists of a small portion of the roof and a non-trafficable portion of the balcony and does not contain any habitable floor space.

It is considered that the proposed built form is a suitable design response and that although this results in a minor building height variation, the objectives of the LEP height standard are achieved in this instance where the proposal produces a high quality-built form that ensures a high level of amenity.

Whilst the built form exceeds the building height control applicable to the site, it is considered that the proposed design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment as demonstrated in architectural plans prepared by Sachs Architecture.

6.0 Conclusion

The proposed contravention of the 8.5m maximum building height is based on the reasons outlined in this request that are summarised as follows:

- It is considered that this proposal represents an individual circumstance in which Clause 4.6 was intended and to be available to set aside compliance with unreasonable or unnecessary development standards.
- The proposed development will not create an undesirable precedent.

In view of the above, it is considered that this written request has adequately addressed the matters required by Clause 4.6(3) of the Warringah LEP 2011 and Council's support to contravene the maximum building height development standard of Clause 4.3 is therefore sought.

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