

**REQUEST TO VARY DEVELOPMENT STANDARD PURSUANT TO
CLAUSE 4.6 OF PITTWATER LOCAL ENVIRONMENTAL PLAN 2014**

**TO ACCOMPANY A DEVELOPMENT APPLICATION TO
PITTWATER COUNCIL FOR ALTERATIONS AND ADDITIONS TO A DWELLING**

Property: 37 Daly Street, Bilgola Plateau.
Proposal: Alterations and additions to a single dwelling.
Zoning: E4 Environmental Living.

Development standard to which the request to vary the standard is taken: Clause 4.3 of the Pittwater LEP 2014 (LEP 2014) prescribes a maximum building height of 8.5m applying to the site.

1. The Aim of the request

To allow works that are above the 8.5m height limit, being up to a height of 8.7m for a small section of roof to the front of the site, as shown in the image below.



Figure 1 – Demonstrating the very minor non-compliance (shown with blue line) with the building height control.

Clause 4.6 of LEP 2012 allows the applicant to request a departure from compliance with a development standard.

2. Objectives of the Standard

The objectives in relation to Height of Buildings in LEP 2014 are given as,

Clause 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.

3. Application and Assessment of Clause 4.6 Exceptions to development standards

Clause 4.6 of LEP 2012 is designed to provide the consent authority some flexibility in the strict compliance with the application of the development standard. There have been various Land and Environment Court judgments that have some relevance to addressing the application of Clause 4.6, among them being,

1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
2. Wehbe v Pittwater Council [2007] NSWLEC 827
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009; NSWLEC 90; NSWCA 248
4. Moskovich v Waverley Council [2016] NSWLEC 1015
5. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118
6. Hansimikali v Bayside Council [2019] NSWLEC 1353
7. Rebel MH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.

In the assessment of using Clause 4.6 it is particularly relevant to address parts (3) and (4) of the clause, being,

- (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.
- (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, and
 - (b) the concurrence of the Secretary has been obtained.

In assessment of the proposal against parts 3(a), 3(b) and 4(ii) the following is offered.

How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the non-compliance. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6 (3)(a). Furthermore in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the applicant must demonstrate that Clause 4.6(3) must be adequately justified. The standard method is in using the five part *Wehbe* test (as noted in the judgement) as an approach in justifying this requirement.

The five part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

- (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,

The non-compliance is minor, being only 0.2m and relates to a small area of the rear roof form and is a result of the slope of the land at the front south-east corner of the building's footprint, due to the land slightly falling at this point (as shown in Fig 1 above). Within the immediate area are comparable built forms with other dwellings rising to a comparable building height. From a streetscape perspective the appearance of the dwelling will sit comfortably within the streetscape. It is noted that the dwelling is set some distance from Daly Street which further mitigates any perceived height non-compliance. Accordingly the proposal satisfies these objectives.

- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,

Generally, the low roof has been provided to promote the sharing of views from dwellings from the rear (west). The area of non-compliance is to the front of the dwelling and will not interfere with any view that would not already be affected by the roof form on a complying portion of the roof. Additionally the works will not cast any meaningful shadows to an adjoining site, given the setbacks to the boundaries. Accordingly the proposal satisfies these objectives.

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

The dwelling is already constructed on a relatively flat area of ground on the site.

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

The works have no material impact on any of these aspects.

In light of the above, this request provides that the non-compliant height satisfies the objectives in question.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The exception request does not rely on this reason.

4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The exception request does not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning of the land is appropriate for the site. The exception request does not rely on this reason.

In addition to demonstrating that the principles of Wehbe are satisfied, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of this case for the following additional reasons.

In the case of *Moskovich v Waverley Council*, the Land and Environment Court accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. For the subject application, the proposed development which seeks to vary the height standard, achieves a better response to the objectives of the subject E4 Environmental Living Zone in that it provides a high level of internal amenity for occupants and safeguards the street appearance of the site which is consistent with various LEP and DCP requirements.

On the basis of the above, compliance with the standard is considered to be unnecessary and would be unreasonable.

Sufficient environmental planning grounds to justify the contravention

This request provides that there is sufficient environmental planning ground to justify the contravention. Such grounds include:

It has been demonstrated that the proposal and its height breach remains consistent with the objectives of the subject zone as well as Clause 4.3 and 4.6 of the Pittwater LEP 2014, despite the numerical non-compliance.

The proposal would not compromise the character or nature of the area sought by the local environmental planning framework.

The non-compliant height does not result in any unreasonable visual impacts. The works will provide a general consistency in building height with neighbours.

The non-compliant height does not result in any unreasonable overshadowing impacts as demonstrated in the shadow diagrams.

The height non-compliance assists with providing improved internal amenity for residents, allowing for adequate floor to ceiling space within the rear addition.

The non-compliance results due to the slope of the site, rather than any design flaw.

Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest. The proposal is considered to 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 objectives of the standard have been addressed above and are demonstrated to be satisfied. The works are consistent with the requirements for the E4 Environmental Living Zone because of significant improvements to the amenity of the housing stock on the site.

Is the variation well founded?

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the Pittwater LEP 2014, that:

Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;

There are sufficient environmental planning grounds to justify the requested contravention;

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The development achieves and is consistent with the objectives of the development standard and the objectives of the E4 Environmental Living Zone;

The proposed development is in the public interest and there is no public benefit in maintaining the standard; and

The contravention does not raise any matter of State or Regional Significance.

The variation is therefore considered well founded.