

18 Jenner Street Seaforth

Clause 4.6 relates to **Exceptions to development standards**. The applicant proposes a variation from the building height development standard.

1. *The objectives of this clause are as follows:*

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

Comment:

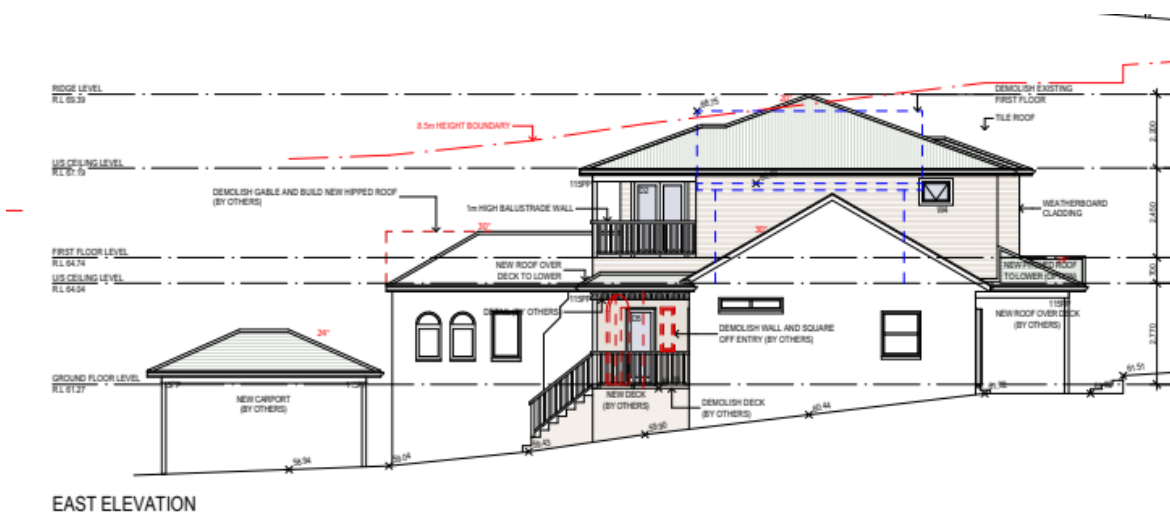
Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome**.

The applicant has recently amended the roof design of the dwelling by lowering the roof pitch from 24 to 20 Degrees. The roof is now hipped.

The only breach to the 8.5m height limit is on the Eastern elevation and it is very minor at 350mm. All other elevations comply.

The variation to the height control arises because of the topography of the site and general cross fall in the land from the rear boundary to the street. Also, the existing dwelling includes a sub floor across the frontage, which contributes to the building height. The encroachment into the height plane is for a portion of the roof ridge line only, which is centralised on-site.

Provided below is a depiction of the eastern elevation highlighting the maximum extent of the departure from the height standard.



The existing dwelling however is in good condition and retains quality floor space worthy of retention. The location of the upper level as proposed is logical and appropriately relates to the street and neighbouring dwelling circumstances - view sharing and maintaining privacy.

Clause 4.6 of the instrument provides flexibility when applying development standards.

The proposed development has been architecturally designed to provide a well composed building that provides good amenity for future occupants, that respects the amenity of existing and future neighbouring development and that is compatible with the emerging character and development pattern of the locality.

It is significant to note that the variation does not result in excessive floor space or development density. The variation does not manifest in an overdevelopment of the site.

No adverse planning consequences (shadowing, privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise from the variation with the proposed development sitting comfortably on-site within the required setbacks. Rather, in this particular case the variation facilitates a good design outcome in terms of amenity, streetscape, built form and outlook from the proposed upper level.

The proposed development will sit comfortably in its context in terms of scale, massing and form. The minor variation to the building height standard will not be discernible to the casual observer from a streetscape perspective given that tall buildings are prominent in this precinct.

For reasons expressed in this submission the 'flexibility' provided by clause 4.6 of the LEP facilitates design outcome that does not impact on any adjoining property despite the proposed variation to the building height standard.

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.

Comment:

The height development standard is not expressly excluded from the operation of clause 4.6.

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.

Comment:

Clause 4.6(3)(a) of the LEP provides a similar test as that set out in clause 3 of *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) and mirrors the fourth question Justice Lloyd established for considering SEPP 1 objections in *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 24. This written request therefore draws from the authorities that deal with Justice Lloyd’s fourth question.

The term “unreasonable or unnecessary” is not defined in the relevant environmental planning instruments or in the Act. Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] – [49] identifies 5 ways by which strict compliance with a development standard may be unreasonable or unnecessary. This written request adopts the first way identified by Preston CJ.

42..... The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would

be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Justice Preston’s analysis requires the following questions to be answered.

1. What are the objectives of the development standard?
2. Does the development proffer an alternative means of achieving the objectives of the development? (unnecessary)
3. Would no purpose be served if strict compliance was required? (unreasonable)

Objectives of development standard

The objectives of the height control are:

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

(b) to control the bulk and scale of buildings,

(c) to minimise disruption to the following—

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

(iii) views between public spaces (including the harbour and foreshores),

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

The subject site is zoned low density residential and does contain dwellings built on sloping ground which are similar in scale. The dwelling will be consistent in this regard.

There will be no disruption of views, loss of privacy or significant loss of solar access given the site context and orientation.

There will be no erosion of bushland or scenic quality.

Compliance unnecessary

The proposed development proffers alternative means of achieving the objective of the minimum building height standard. The surrounding precinct maintains sloping land and large residential dwellings in the R2 low density residential zone.

The proposed development achieves the desired residential character without comprising the amenity of the surrounding area in terms of visual impacts and solar access.

The exceedance of the building height standard does not result in a building that is excessively bulky. Effectively 2 levels will be presented to Jenner Street.

As the development proffers alternative means of achieving the objectives of clause 4.3 based on the site context, strict compliance is unnecessary.

Compliance unreasonable

There would be no purpose served if strict compliance was required by the consent authority.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (shadowing and privacy). There are no adverse 'flow on' non compliances or adverse environmental impacts arising from the variation in this instance.

A compliant development (building height) would have a similar performance in regards to overshadowing and bulk/scale. A lower roof profile or flat roof however would not be consistent with the standard roof profile adopted elsewhere on the dwelling and carport and would appear disjointed from an architectural perspective.

Despite the building height variation, a compliant floor space ratio is achieved facilitating the orderly and economic development of the land.

No particular benefit would be derived from the application of the standard in this instance (rather compliance would result in negative urban design outcomes); strict compliance is therefore unreasonable.

The proposed design is effectively a better and more cost effective outcome than that of the approved design.

Environmental planning grounds

A written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b) and 4.6(4)(a)(i)).

The term “environmental planning grounds” is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts : Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

In this particular case the variation to the building height control does not impact on the ability of the proposal to accord with all other development standards and controls.

Compliance with the building height control in this instance would not achieve any additional architectural integrity or urban design merit of the development, as previously discussed.

Having regard to the above there are well founded environmental planning grounds to vary the development standard in this instance.

- 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.*

Comment:

The objectives of the zone are:

R2 Low Density:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment:

The proposed development will be in the public interest because it is consistent with the objective of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed development is consistent with the objectives as:

- The proposed development provides for the construction of a modest and well proportioned upper level addition and ground level alterations and additions. The development has been site specifically designed and will positively contribute to the streetscape and enhance the streetscape relative to the existing built form on the site. A general upgrade of the existing built form will also occur.
- The proposed development assists in establishing the desired future character for the locality. The proposal may act as a catalyst stimulating further redevelopment in the locality, consistent with the zone objective of meeting the housing needs of the community.
- The proposed development is well contained on-site and will not result in significant adverse amenity impacts to adjoining properties.
- The proposed development provides an appropriate low-density infill development and contemporary construction.

There has been a progressive change in the built character of the locality with a number of older style dwellings being replaced with new contemporary two storey dwellings.

The proposed height scale and massing of the development is considered to be compatible with the evolving and desired built character of the area.

The height mass and scale of the development is compatible with that of other development in the locality.

The design solution respects the development pattern of the locality (the spatial arrangement of buildings having regard to side, rear and street building setbacks) maintaining the rhythm of the street.

The proposed height variation is of no consequence in respect of this objective. Approval of the proposed development will have no impact on any other nearby development opportunities.

It is expected that the Council will obtain the concurrence of the Director-General as required (possibly through delegation).

The proposed height encroachment does not result in any significant view loss, loss of privacy or overshadowing in the context of the site. There are no adverse heritage impacts associated with the proposed development. The height and scale of the development is typical within the residential context.

Standard floor to ceiling heights are proposed inclusive of a standard roof pitch.

Having regard to the above the proposal is consistent with the objectives of the height control and the objectives of the zone.

(b) the concurrence of the Director-General has been obtained.

Comment:

It is expected that the Council will obtain the concurrence of the Director-General as required (possibly through delegation).

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(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 Planning Secretary before granting concurrence.

Comment:

The proposed variation does not raise any matter of significance for State or regional environmental planning.

There is no public benefit that would be achieved by maintaining the development standard or compromised by approving the building as proposed.

(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—

(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

(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.

Note.

When this Plan was made, it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

Comment:

Not relevant as the development application is not for land subdivision nor is it within the zones specified in the clause.

(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).

Comment:

It is assumed that the consent authority will keep the required records.

(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,

(ca) clause 6.15,

(cb) a development standard on land to which clause 6.19 applies.

Comment:

No adverse matters arise in respect of the above considerations.

In view of the above, the proposed variation from the development standard is reasonable in this instance. A standard roof profile is proposed maintaining a consistent built form with other dwellings in the vicinity and appropriately addressing site circumstances.

The proposed development is appropriate in consideration of the streetscape objectives, siting requirements and protecting neighbour amenity. It is recommended that Council invoke its powers pursuant to clause 4.6 and approve the application in this instance.