

**Four Towns
Planning**

Planning and property consultant


**WRITTEN REQUEST PURSUANT TO
CLAUSE 4.6 OF PITTWATER LOCAL
ENVIRONMENTAL PLAN 2014**

**VARIATION OF A DEVELOPMENT
STANDARD REGARDING HEIGHT OF
BUILDINGS AS DETAILED IN CLAUSE
4.3 OF THE PITTWATER
ENVIRONMENTAL PLAN 2014**

**Alterations and Additions to Existing
Dwelling House and Detached
Carport**

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This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.

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Introduction

This written request under Clause 4.3 of Pittwater Local Environmental Plan 2014(**PLEP 2014**) accompanies a Development Application seeking consent for additions and alterations to an existing dwelling house and detached carport at 23 Grandview Drive, Newport.

The written request is made pursuant to Clause 4.6 PLEP 2014 and requests a variation to height of buildings as detailed under Clause 4.3 of Pittwater Environmental Plan 2014.
Clause 4.3 of PLEP 2014 notes:

(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.

The site has a maximum building height provision of 8.5m. The proposal will result in a maximum height of 9.141m. The proposed height breach is a result of the proposed roof over the existing first floor balcony.

The breach in the height of buildings standard is a result of the existing topography of the site. The proposed roof over the balcony is reasonable within the context of the site and will not result in excessive bulk and scale. It is submitted that there is more than enough justification and precedence within the area to support the breach.

In this regard, it is requested Council support a variation with respect to compliance with the maximum height of buildings as described in Clause 4.3 of the PLEP 2014.

The nature and extent of the contravention is as follows:

Requirement	8.5m
Proposed	9.141m
Is the planning control in question a development standard?	Yes
Is the non-compliance with to the clause requirement a numerical/or performance based variation?	Numerical
If numerical enter a % variation to requirement	7.5%

Pittwater Local Environmental Plan 2014 (“PWLEP”)

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned C4 – Environmental Living (the C4 zone) and the Land Use Table in Part 2 of PLEP 2014 specifies the following objectives for the R1 zone:

- The proposed additions and alterations will likely result in low impact to the ecological value of the site. Whilst some trees are proposed for removal, they generally relate to low category value trees which will not impact the ecological values of the site.

- The proposed works will not have an adverse impact on the ecological value of the area. As noted above, the proposal has been designed to avoid and minimise impacts to the site.

- The proposed alterations and additions are appropriately integrated with existing landform and landscape. The external works are to improve pedestrian access throughout the site and generally minimise cut and fill to maintain the existing site levels, despite the steep topography of the site.

- **To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.**

Not applicable – the proposal is not within a riparian or foreshore area.

2.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) PLEP 2014 provides:

(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.*

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”). *Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of PLEP 2014 provides:

(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.*

Clause 4.3 is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the PLEP 2014.

Clause 4.6(3) Of PLEP provides:

(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.*

The proposed development does not comply with the prescribed height of buildings for residential accommodation in Zone C4, as prescribed under Clause 4.3 of the PLEP 2014, however strict compliance is unreasonable or unnecessary in the circumstances of this case and there sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

3. Relevant Caselaw

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of PWLEP 2014 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard?

4. Request for Variation

4.1 Is Clause 4.3 of PLEP 2014 a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act includes:

“(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work”

Clause 4.3 relates to the height of a building. Accordingly, Clause 4.3 is a development standard.

4.2 Is compliance with Clause 4.3 unreasonable or unnecessary?

This request relies upon the First method identified by Preston CJ in *Wehbe*. The first way in *Wehbe* is to establish that the objectives of the standard are achieved.

In determining a merit-based assessment of the landscaped area for the proposed development, due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – floor space ratio (*Salanitro-Chafei V Ashfield Council (2005) NSWLEC 366*) and *Project Venture Developments v Pittwater Council (2005) NSW LEC 91*).

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard, site topography should be considered when

assessing the proposed height of buildings for the site. Given the proposed application is relatively minor and consistent with the built form character of the areas, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard.

By providing flexibility the subject proposal is capable of achieving a better development and design outcome which adequately caters for enhanced housing options for the residential needs within the Northern Beaches LGA, in particular the Newport precinct.

The First Method

The proposal is consistent with the objectives of Clause 4.3, as outlined below:

(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.*

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

The site is located within an area identified within A4.10 Newport Locality which outlines the desired character of the area. The desired character statement of A4.10 Newport locality is provided below:

A4.10 Newport Locality

Desired Character

The Newport locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a natural landscaped setting, integrated with the landform and landscape. Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community. Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors. Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.

Newport's coastal setting is what contributes most to the distinctive character of the commercial centre. Responsive, energy efficient buildings will support and enhance this relaxed, beachfront character and its outdoor lifestyle, contributing to a unique sense of place. Contemporary design solutions within the commercial centre will respond to Newport's climate and setting, including providing shade and shelter to streets and entries, generous private outdoor spaces, openings that capture ocean breezes, and shade elements.

After reviewing the desired character statement, it is my professional opinion that the proposed roof over the balcony is consistent with the locality and desired character of the area. The following is noted to support my opinion:

- Notwithstanding the minor building height breach to the covered balcony only, the Newport locality will remain a low-density residential area for dwelling houses.
- The building height is attributed to the proposed roof over the facing balcony only, which is sympathetic to the façade of the existing dwelling, whilst adding depth and articulation.
- The proposed works are consistent with the established streetscape character and the covered balcony will be indiscernible when viewed from Grandview Drive.

As a result of the above, I have formed the considered opinion that the project is sympathetic with the existing and future character of the area. It is also noted that most observers would not find the proposed development offensive, or unsympathetic in a streetscape context.

Notwithstanding the proposed minor variation to the building height, the proposal is consistent with this objective.

(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

The proposal has been strategically designed to minimise the impact and bulk and scale of the project, noting that it is only the balcony roof that exceeds the building height.

(c) to minimise any overshadowing of neighbouring properties,

Further, the proposed minor variation to the building height will not further impact neighbouring properties than that of a compliant design. Refer to Shadow Studies provided as part of the architectural package.

(d) to allow for the reasonable sharing of views,

Having inspected the site and identified available public and private view lines over and across the site, I am satisfied that the building height variation will not give rise to any unacceptable view loss with a view sharing outcome maintained in accordance with the planning principle established in the matter of Tenacity vs Warringah Council (2004) NSWLEC 140. Notwithstanding the proposed minor building height variation, the proposal is consistent with this objective.

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

The proposed works have been designed to respond to the existing natural topography of the land, as site levels are generally maintained throughout.

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

The proposal will add value to the natural environment and will be visually pleasing to the surrounding areas. The site is not identified or located close to known heritage items. The proposal is consistent with this objective.

For the reasons outlined within this written request, the proposal will achieve the objectives of Clause 4.3 and accordingly, are of the view that the proposal is consistent with the objectives of the development standard.

4.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to justify contravening the development standard. Whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

*“to achieve better outcomes **for and from** development by allowing flexibility in particular circumstances.”*

It should be noted at the outset that in *Initial Action* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. From a planning perspective, there is sufficient grounds to justify the variation to the height of buildings development standard for the following reasons:

- The proposed alterations and additions respond to the desired future character of the locality noting the proposed built form responds to Newport Locality controls outlined in the Pittwater DCP. Furthermore, the subject dwelling will continue to integrate into the existing streetscape and pattern of development within Grandview Drive.
- The development does not result in any unnecessary or undue bulk or visual impacts on adjoining properties and is of a scale that is compatible with the existing and surrounding buildings.
- The amenity impacts to neighbouring residential properties, arising from the non-compliant building height, is negligible. Adjoining properties will continue to receive suitable solar access, privacy impacts are suitably minimised, and views are maintained.
- The building height breach is minor and relates to the covered balcony only, which will largely be indiscernible when viewed from Grandview Drive.

Having regard to Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, and further to the proposal's consistency with the above strategic and statutory environmental planning provisions, the proposal is consistent with the following objectives under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

*(c) to promote the orderly and economic use and development of land; and
(g) to promote good design and amenity of the built environment,*

1. In response to (c), the proposal will facilitate the orderly and economic use and development of the land in a manner that is desired by the planning controls because it will facilitate the revitalisation of the dwelling that is functional. In considering the contrary (refusal of the DA), retention of the building in its current form would not promote the orderly and economic use and development of land in the manner that council's strategic and statutory planning provisions seek. Retention of the building in its current form makes no advancement towards achieving the goal of creating functional development opportunities.

2. In response to (g) the proposal has been designed to promote good design and amenity of the built environment, noting that the proposal is highly compliant with the Pittwater DCP.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height of buildings non-compliance in this instance.

5 Conclusion

Pursuant to clause 4.6(3), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

*(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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.