

## Clause 4.6 Exceptions to a Development Standard

The proposed development seeks to vary Clause 4.3 Height of Buildings of the Warringah Local Environmental Plan 2011 (LEP).

The maximum building height prescribed by Clause 4.3 is 8.5m. An overall height of 8.67m is proposed, which equates to a 2% variation. The extent of variation is highlighted in red in the below figure.

The below written request to vary the Height of Buildings development standard, provides an assessment against Clause 4.6 of the LEP.

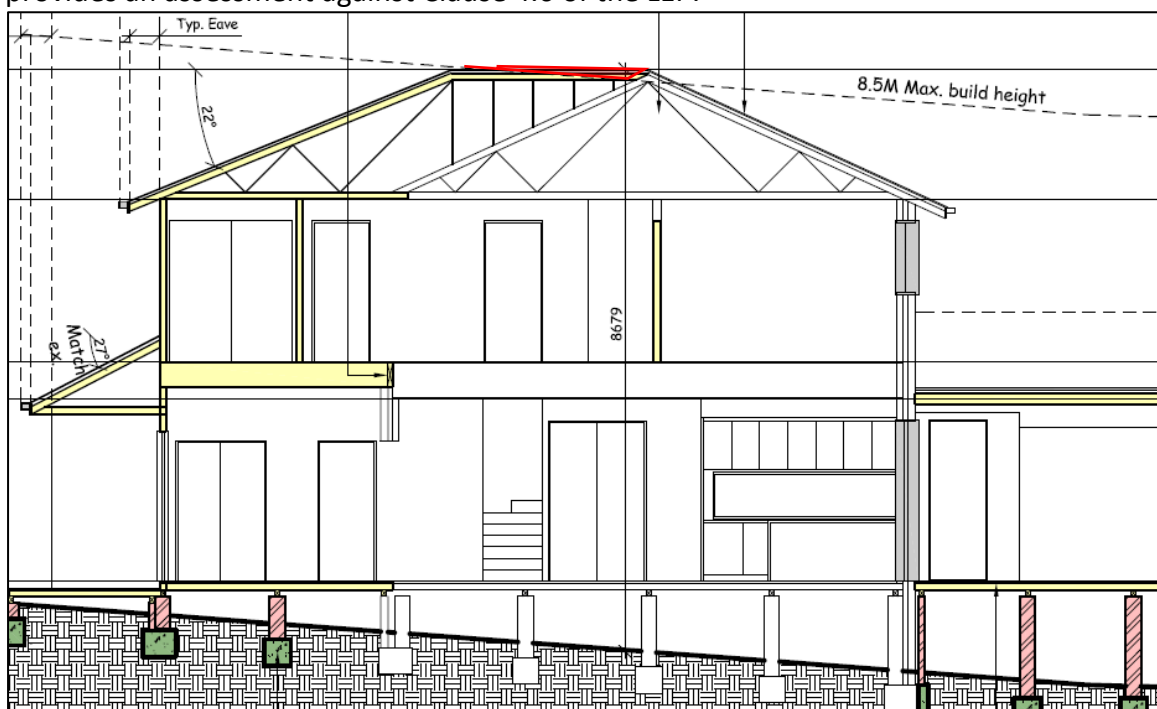


Figure 1: An extract from the Long Section Plan (Drawing No. A12) highlights the minor extent of non-compliance (in red).

## Clause 4.6 (4)(a)(i) (Justification) assessment

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by clause 4.6(3).

Standard	Development Standard	Provided	Extent of Variation
Height of Buildings	8.5m	8.67m	2%

The following assessment of the variation to Clause 4.3 – Height of Buildings development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*.

#### **Clause 4.6 Exceptions to development standards:**

##### ***(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,***

##### Response

The negligible variation to the height control relates only to the central elements of the building. The variation is a maximum of 0.17m, which occurs within a small portion of the roof ridge as demonstrated above in *Figure 1*.

##### ***(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.***

##### Response

The proposal clearly achieves a better outcome for both the subject and neighbouring properties as compared to that of strict adherence to the development standard. As discussed within the accompanying Statement of Environmental Effects, there are no adverse environmental impacts to surrounding properties as a result of the non-compliant building height.

##### ***(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.***

##### Response

Clause 4.3 – Height of Buildings development standard is not expressly excluded from the operation of this clause.

##### ***(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***

#### Response

Strict compliance to the building height control is unreasonable and unnecessary for the following reasons:

- i. The design of the building and the façades that address the streets are of a design that is integral to the overall architectural integrity of the building proposed. Any amendments to this element of the building would result in a diminished outlook from the street in terms of visual interest and adding to the vista enjoyed by the public when the site is viewed from the surrounding open areas and roadways.
- ii. In reviewing the alternatives to the current design, it is concluded that this proposal finds an appropriate balance between topography and site constraints, bulk and scale and visual interest. The proposed development responds in a balanced and thoughtful approach to the key constraints on and around the subject site.

***(b) that there are sufficient environmental planning grounds to justify contravening the development standard.***

#### Response

The matter of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ* provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

*'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'*

***The objects of this Act are as follows:***

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,***

#### Response

The assessment of the application has shown that any environmental impacts resulting from the proposal will be negligible. Regard is shown for the natural environment in terms of on-site management of storm water and drainage, with appropriate measures incorporated into the overall design that operate in concert with the extensive areas of landscaping provided by the site layout.

***(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,***

Response

As the variation to the height control is negligible, it would be logically considered that ecologically sustainable development would be impacted upon in an insignificant amount. The proposal has stormwater, solar access, and environmentally friendly design incorporated into the built form and does not have an impact that would be considered unreasonable in regards to these environmental prerequisites.

***(c) to promote the orderly and economic use and development of land,***

Response

The proposal is clearly an improvement with regards to the orderly and economical use and development of land. The upgraded dwelling proposed for the site is an appropriate fit in terms of built form, with modern features and design characteristics that add to the gentrification of the locale.

The orderly use of the site is augmented by the modern, up to date design features that lend themselves to environmentally sympathetic design features. The removal of the dated elements, and their replacement with the contemporary design concepts results in a reduced impact on the site, achieving a consummate response to land development.

***(d) to promote the delivery and maintenance of affordable housing,***

Response

The proposal is not for affordable housing as defined. This objective does not apply.

***(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,***

Response

The proposal has negligible interaction with threatened and other species of native animals and plants, ecological communities and their habitats. This objective does not apply.

***(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),***

Response

The proposal has no impact upon any built and or cultural heritage.

***(g) to promote good design and amenity of the built environment,***

Response

When considering the alternative designs for the site, it is evident that whilst the negligible variation in the ridgeline exists, this design solution is successful in finding a synergy with topography makes a positive outcome to the variations in built forms along the streetscape.

***(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,***

Response

This element may be addressed under conditions of consent.

***(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,***

Response

This is achieved by the interaction of both the overarching Environmental Planning and Assessment Act and the standard LEP instrument. No further investigation is required in this regard.

***(j) to provide increased opportunity for community participation in environmental planning and assessment.***

Response

This is achieved through Councils Notification policies and the procedures followed in the assessment of the proposal.

***(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***

Response

This request adequately addresses the matters contained within subclause 3.

***(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***

Response

This request has demonstrated the proposals consistency with all objectives, plans and policies.

***(b) the concurrence of the Secretary has been obtained***

Response

Concurrence is achieved at a strategic level. *Planning Circular PS 18-003 dated 21 February 2018*, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument where the variation is not greater than 10%.

Following the release of PS-003, Council received correspondence from a delegate of the Secretary which granted Council staff, for a period of 30 months from 24 May 2019, the ability to assume the Secretary's concurrence for Class 1 buildings which seek to vary a development standard by more than 10%.

As the application seeks to vary the development standard by less 10% the concurrence of the Secretary is not required.

**Clause 4.6 (4)(a)(ii) (Public Interest) assessment**

***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***

Response

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the WLEP 2011 are:

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

***(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,***

Response

The proposal has demonstrated a clear, positive response to all topographical and man-made constraints on the site. The prevailing building height, on both sides of the street is varied and mixed along with the age and design of the existing developments creates an eclectic mix of design, height, bulk and scale. The proposed development is an appropriate fit into this locale.

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

Response

The bulk and scale of the development is controlled via its response to the topography and its incorporation of the design into this property. Any bulk and scale impacts are reduced through thoughtful design responses and the design of the dwelling thus

reducing to a minimum, any impact upon with regards to bulk and scale when viewed from adjoining properties.

***(c) to minimise disruption to the following:***

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

Response

The development has negligible impact upon views from the public realm. There is no impact on views to nearby residential properties from any public areas or the street forward of the subject site. The dwelling is consistent with this objective.

- ii. ***views between public spaces (including the harbour and foreshores),***

Response

The dwelling does not have an impact on views between any public spaces. The proposal is consistent with this objective.

***(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,***

Response

Adequate solar access has been demonstrated to be provided in accordance with all plans and policies. No further investigation is required in this regard.

***(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.***

Response

The subject site is not located within a recreation or environmental protection zone. This objective is not relevant to the proposal.

**Zone objectives**

The underlying objectives of the R2 Low Density Residential zone are:

***To provide for the housing needs of the community within a low-density residential environment.***

Response

The purpose of the low-density residential zone is to provide for predominantly detached dwelling houses within existing suburban areas supported by some community uses and small-scale services and facilities that cater for residents. Development is low rise, consistent with the low-density character of the region's existing suburban areas.

The question asks, “does the proposal achieve this”. The provision of the dwelling clearly provides for the housing needs of the community and adds to a varied and eclectic mix of housing stock within the locale.

***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

#### Response

This objective is not relevant to the proposal.

### **Conclusions and Recommendations (The Five Part Test)**

The five part test “Varying Development Standards: A Guide – August 2011”, prepared by NSW Planning and Infrastructure, states:

1. The objectives of the standard are achieved notwithstanding noncompliance with the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
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.
5. The compliance with the 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.

As is demonstrated, the proposal qualifies for 3 out of the 5 criteria for the variation to be granted consent. The remaining requirements being the abandonment of the control and the incorrect zoning, do not apply in these circumstances

The proposal clearly shows, that when all alternatives are reviewed, the proposed planning solution is the appropriate planning response and provides a superior outcome to both view retention and its interaction with built form and streetscape integration.