

Clause 4.6 Written Exception

Exceptions to Development Standards Clause 4.3 - Maximum Height of Buildings

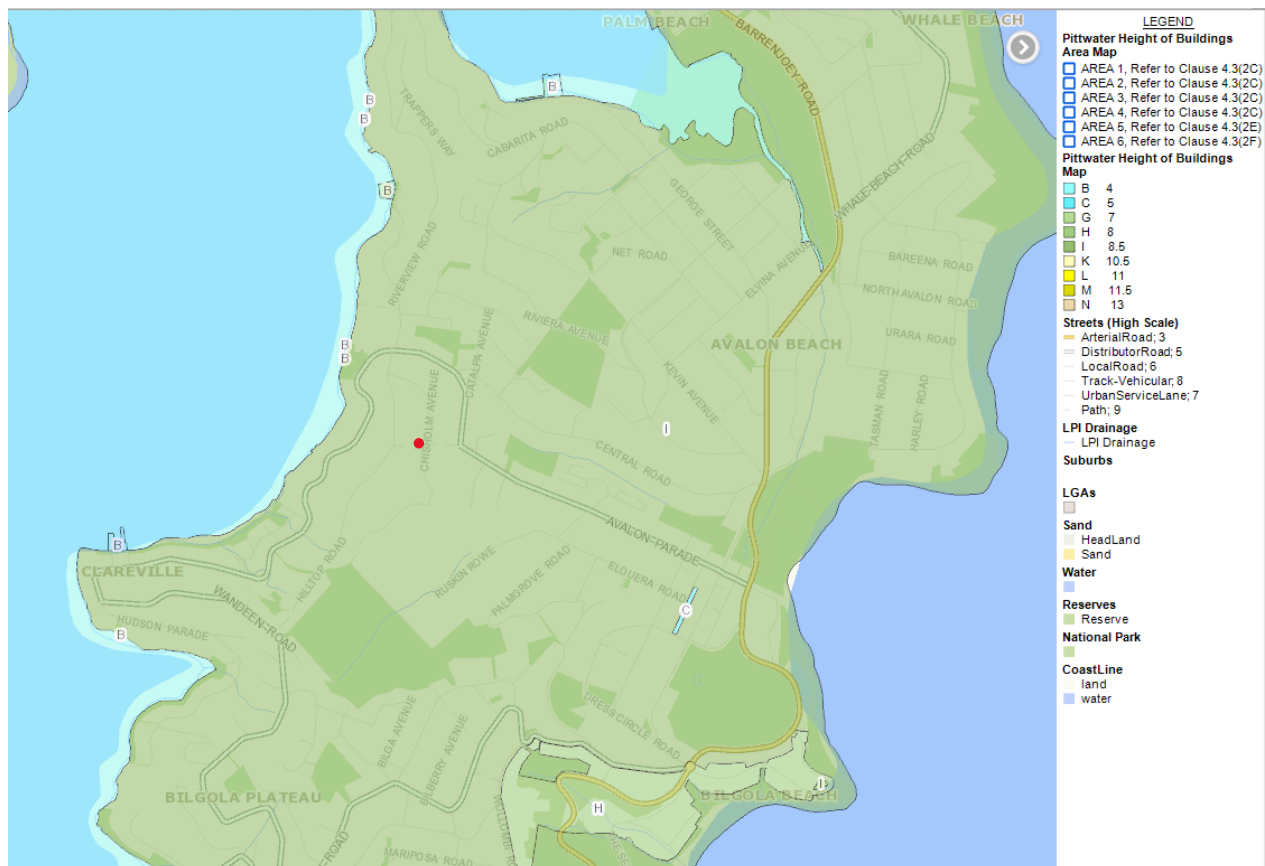
1. Introduction

This Clause 4.6 application has been prepared by the applicant and Registered Architect Richard Smith in support of a development application (DA2019/0128) for the demolition of the existing structures and construction of a new two storey dwelling with a 2 car garage excavated into the hillside beside the house at 24 Chisholm Avenue Avalon Beach NSW 2017.

The request seeks to vary the maximum height of buildings development standards prescribed in Clause 4.3: Height of Buildings of the Pittwater Local Environmental Plan 2014 and the variation of the development standard has been prepared pursuant of Clause 4.6 of the Pittwater Local Environmental Plan 2014.

PLEP Clause 4.3 (2) specifies that 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.

Figure 1: Extract from the Pittwater Height of Buildings Map LEP 2014



The Height of Buildings Map prescribes for the site that the development has a maximum building height of 8.5 metres.

Clause 4.3 (1) outlines the objectives of Height of Buildings and reads as follows:

(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 deck is proposed on the north eastern corner of the dwelling, open to a roof that extends over and forms an eave east of the building. The roof in this location reaches a maximum building height of 9.95 metres. The development results in a non-compliance of 1450mm and is an equivalent of a 17% variation to the height of buildings development standard. The variation to the height is as follows:

Proposed height of building	9.95 metres
Maximum Permissible height of building	8.5 metres
Exceedance of the LEP development standard	1450mm (17% variation)

2. Variation to the maximum height of buildings requirement

The area of non-compliance to the maximum height of building requirements to the proposed residence is as follows:

Figure 2: EASTERN ELEVATION - Area of non-compliance – PORTION OF ROOF OVER 8.5m

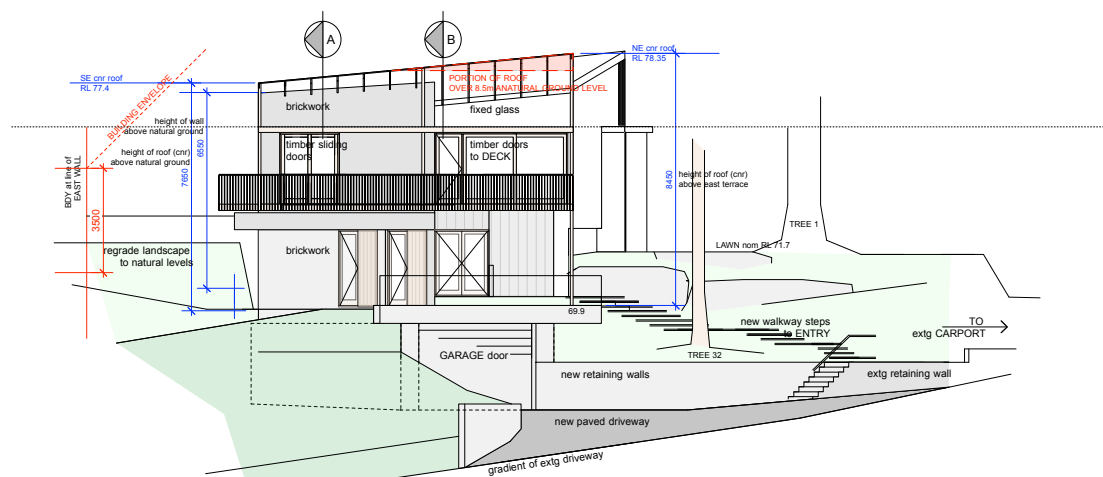
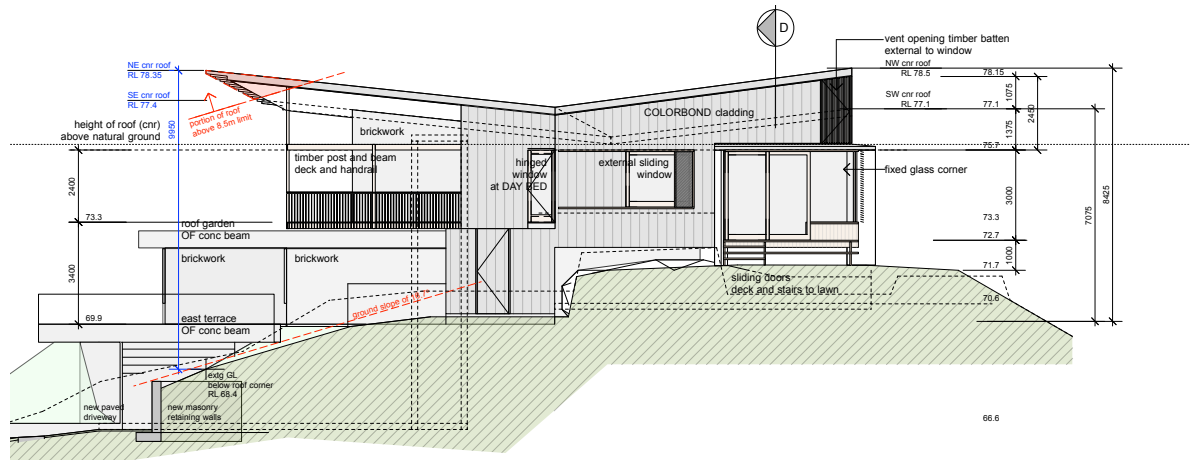


Figure 3: NORTHERN ELEVATION - Area of non-compliance – PORTION OF ROOF OVER 8.5m



The degree of non-compliance is limited to a portion of deck roof on the north eastern corner of the building on the subject site.

The Clause 4.6: Exceptions to Development Standards contends that strict compliance with the maximum height of 8.5 metres (as prescribed within Clause 4.3(2) of the Pittwater Local Environmental Plan 2014) is unreasonable and unnecessary in the circumstances of the case and that exceedance by 1450mm can be supported by Council in considering the merits of the proposal.

The maximum height control is a development standard to which exceptions can be granted pursuant to Clause 4.6 of the LEP being achieved.

The relevant objectives and provisions of Clause 4.6 are as follows:

- (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.*
- (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.*
- (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.*
- (5) *In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

3. Compliance with Clause 4.6(4) Exceptions to Development Standards

3.1 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;

The objectives Clause 4.3: Height of Buildings within the Pittwater Local Environmental Plan 2014 are achieved as follows:

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development*

Comment: The two storey dwelling remains consistent with the desired future character of the immediate locality. The new dwelling maximum height is less than the ridge of the building it replaces. The proposal involves floors at various levels to take into account the topography of the site and minimise its profile to neighbouring properties.

The ground falls away steeply from the central north-south ridge through the site. The building is sited and designed to take into account the slope of the land that allows the building to step down the slope.

The non compliance is generated as the ground level below the deck roof falls away to the east at a gradient in excess of 30%.

- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access*

Comment: The breach to the height of buildings requirement will not contribute to any overshadowing or reduce any solar access to the neighbouring properties.

The proposed development will not contribute to any loss of views to the neighbouring dwellings consistent with the planning principles for view loss as per *Tenacity Consulting vs. Warringah Council [2004] NSWLEC 140*. The area of non-compliance to the maximum building height plane is restricted to portion of roof FURTHEST from the southern neighbour (no26 Chisholm Avenue). No26 Chisholm Avenue enjoys extensive views to the east and north east. Furthermore the roof is open over the deck and presents a slender profile to the south.

The development is designed to sensitively and skilfully minimise any view loss impacts from the neighbouring buildings and is an acceptable form of development.

- (c) *to minimise any adverse impact of development on the scenic quality of Pittwater's coastal and bush environments,*

Comment: The subject site consists of steeply sloping topography with a front setback to Chisholm Avenue of more than 30m.

- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Comment: The proposed house is screened from all public spaces by the significant trees that exist and will be retained on the site.

In addition to the above, the objectives of the E4: Low Density Residential Zone within the Pittwater Local Environmental Plan 2014 are as follows:

- *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.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Pittwater.*

Comment: The proposed dwelling will remain entirely compatible with other similar land uses to the neighbouring premises within the immediate locality. The subject site is located within an E4: Low Density Residential Zone and is compatible with the existing built form character which consists of a mixture of single dwellings all located amongst heavy vegetation in proximity to the subject premises. The proposed development does not reflect a scale that is excessive in size or scale and the minor variation to the height of buildings requirement by 1450mm does not contribute to any adverse visual bulk and scale visible from the street. The minor variation does not give rise to any adverse environmental impacts in that the development does not contribute to any visual privacy impacts; overshadowing; view loss; or visual bulk and scale of the development. In considering the above, the development reflects a low intensity and scale development and will be consistent with the built form character of the neighbouring land uses within the E4 low density residential zone.

3.2 Is compliance with the Development Standard unreasonable or unnecessary in the circumstances of the case?

Full compliance with the maximum height of building requirements at 8.5 metres is considered to be unreasonable or unnecessary in the circumstances of the case for the following reasons:

- The proposal involves a minor non-compliance to the height of buildings with the north eastern corner of the dwelling roof a height of 9.95 metres and an exceedance of 1450mm. The breach is considered marginal and is contributed by the significant sloping nature of the site with a fall of approximately 30%.
- The development has been skilfully designed to minimise the breach to the building height plane away from boundaries and neighbouring buildings.

- The built form presentation will continue to respect the topography of the site and address the significant fall from the central ridge to the eastern boundary on Chisholm Avenue.
- The area of non-compliance is negligible and is not expected to contribute to any adverse amenity impacts to the neighbouring dwellings. The additional building height is negligible and will not result in any adverse environmental impacts to the amenity of the neighbouring dwellings including overshadowing, visual privacy and view sharing from the neighbouring dwellings.
- The development is commensurate in bulk and scale, does not dominate or detract from the appearance of the existing buildings within the existing streetscape. The development is in keeping with the scale of the local streetscape context and will be compatible with the bulk and scale of the existing developments within close proximity of the subject site.

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

The proposed design scheme provides for a built form that will fit comfortably within the subject allotment. The minor increase above the maximum height of building requirements will not form a detracting feature that compromises the streetscape character. The variation to the height of buildings development standard will not give rise to any unreasonable level of amenity impacts in regard to visual privacy, overshadowing and view loss impacts to the neighbouring dwellings. Furthermore, the variation to the height limit is due to a roof over steeply falling land. The development provides adequate justification in contravening the development standard and will provide for a better planning outcome.

4. The Five Part Test (Wehbe v Pittwater Council [2007] NSWLEC 827

In relation to the matters required to be demonstrated by subclause (3) there are various ways that may be invoked to establish that compliance with a development standard is unreasonable or unnecessary as discussed by Chief Justice Preston of the NSW Land and Environment Court in the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827. Although the *Wehbe* case was determined in respect to State Environmental Planning Policy No. 1 – Development Standards (“SEPP 1”) it is still applicable in identifying ways in which an applicant may demonstrate that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case.

In the *Wehbe* case Justice Preston said the most commonly invoked way to establish that compliance with a development standard is unreasonable or unnecessary is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The five-part test outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827 is as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance 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 zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the parcel of land should not have been included in the particular zone.

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

Comment: Refer to Section 3.1 for full assessment relating to compliance with the development standard.

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

Comment: Refer to Section 3.2 for full assessment relating to relevance of the development standard.

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

Comment: The underlying objective of the development standard is to ensure any new development is contextually compatible with the height and character of the immediate locality whilst ensuring the amenity of adjoining retained. The objective is thwarted if compliance with the development standard is strictly observed.

The area of non-compliance from the height of buildings requirement will not be visible any public space. The breach to the building height is limited to the north eastern corner of the proposed dwelling due to the significant fall of the site which slopes from west (central ridge) to east (Chisholm Avenue) with the existing driveway crossing the site east of the dwelling.

The minor breach which accounts for a minor portion of the roof is acceptable in that it retains an established height and scale and will be sympathetic to the character and scale of the neighbouring buildings.

In addition to the above, the minor breach of 1450mm does not form a detracting element and does not contribute to any significant visual bulk and scale impacts that would otherwise compromise the appearance of the building.

Above all, the discernible breach to the building height does not compromise the amenity of the adjoining neighbours. The southern neighbouring property will continue to receive adequate solar access to the living areas and private open space during the morning/midday periods; the roof will not contribute to any overlooking impacts to the adjoining dwellings given the building separation.

In considering the above, the underlying purpose of the above objective would present a building that is appropriate to the height, context and character of the area would not be achieved if strict compliance with the building height was required.

- 4.4 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;**

No Comment

- 4.5 The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the parcel of land should not have been included in the particular zone.**

Comment: Not applicable. The site is appropriately zoned as E4: Low Density Residential and is suitable for low density forms of residential accommodation including single dwellings such as this.

5. Conclusion

In conclusion, strict compliance with the 8.5 metre building height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the non-compliance. The proposal is consistent with the objectives both of the E4: Low Density Residential Zone and the objectives for height of buildings in accordance with Clause 4.3 of the Pittwater Local Environmental Plan 2014.