

Clause 4.6 – Exceptions to Development Standards in relation to Clause 4.3(2) - Height of buildings, of the Pittwater Local Environmental Plan 2014.

1. Introduction.

This written request is made pursuant to the provisions of Clause 4.6 of the Pittwater Local Environmental Plan 2014 (the LEP). A variation is sought in relation to the height of buildings standard of Clause 4.3(2), in relation to alterations and additions to the existing dwelling house, at 106 Prince Alfred Parade, Newport.

This exception statement has been prepared having regard to the Land and Environment Court judgments in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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, *Brigham v Canterbury Bankstown Council* [2018] NSWLEC 1406 and *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

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,

(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 Planning Secretary has been obtained.

(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.

(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 all of these zones.

(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).

(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.

Clause 4.6(1) provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

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

The decision of the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

In *Initial Action* Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial effect relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [95(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

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) 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.

This clause applies to Clause 4.3(2) Height of buildings development standard of the Pittwater Local Environmental Plan (the LEP).

2. Is the provision a development standard? If so, is the operation of the flexibility provision excluded in the LEP?

Clause 4.3 of the Pittwater LEP sits within Part 4, which is titled 'Principal Development Standards'. Clause 4.3(2) is a development standard in relation to the maximum height of buildings and the relevant standard is as follows:

Clause 4.3 – Height of Buildings

(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.

A maximum height of 8.5m applies in accordance with Clause 4.3(2) as shown on the Height of Buildings Map of the LEP.

Details of the non-compliance with the standard

The height of the building will actually be reduced by the removal of the existing pitched tile roof and replacement with a new low profile, low pitched metal clad roof.

Notwithstanding the reduction in overall building height, the height of the northern end of the new roof has been calculated to be 10.16m at RL20.11 above the interpolated ground level below the north end of the new roof at RL9.95 and therefore exceeds the 8.5m height of buildings standard.

3. What is the underlying purpose or objectives of the standard?

The objectives of the height of building standard is expressly set out in clause 4.3(1). This provides:

Clause 4.3 (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.*

Objectives of the standard

The proposed development will be in the public interest because it is consistent with the objectives of the height of buildings standard for the following reasons:

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

The height, form and scale of the building will remain consistent with the desired character of the locality that comprises dwelling houses of a similar height and two storey and three storey form and scale.

The existing lower ground level of the house is a function of the slope of the site from the front to the rear down to the foreshore. The design maintains this existing lower ground level, which is also the swimming pool level. In this way and height is responsive to the topographical constraints of the site and maintains the lower ground level under the house for the secondary living areas and utility areas at the back of this level in a basement, where it does not contribute to an increase in the bulk and scale of the building.

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

The alterations and additions to the house will not alter the stepped form and appearance of the building and its height, form and scale will remain compatible with the height and two storey to three storey form and scale of dwelling houses in the locality.

There is diversity in terms of the scale and character of the houses in the locality, but they are predominantly two storey and three storey houses with a variety of roof forms and wall finishes. The contemporary style of the additions and new low profile, low pitched roof will maintain compatibility with the diverse character of the houses in the vicinity.

(c) to minimise any overshadowing of neighbouring properties,

The proposal maintains solar access to the adjoining dwelling houses in the morning and afternoon periods and will not affect any north facing windows of principal living areas or private open space areas of the adjoining dwellings.

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

The proposal, in particular the part of the roof of the building on the north end of the roof where the breach of the height of buildings standard occurs will not involve an impact on views from the adjoining and adjacent properties.

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

The stepped form and appearance of the house in response to the steeply sloping site will be maintained.

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

The house is not highly visible from the street and to the extent that it is, it will be lower in height by removing the pitched tile roof and replacing it with a low pitched, light coloured metal roof.

The visual impact from the bay will be largely unchanged but will on fact be enhanced as well by the new low pitched roof, by the removal of the swimming pool enclosure (walls and roof) and the supplementary landscaping proposed on the lower part of the site, between the swimming pool and the foreshore.

The site is not adjacent to any heritage conservation areas or heritage items.

A variation to the 8.5m height of buildings standard in this case would be in the public interest because the proposal achieves an acceptable outcome and an appropriate level of consistency with the objectives of the standard, particularly in relation to compatibility with the local area character, and landscape character and minimising the effects of bulk and scale, and maintaining local amenity in particular views, solar access and privacy.

Objectives of the zone

The objectives of the E4 Environmental Living Zone are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

The individual objectives of the E4 Environmental Living Zone are addressed as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The site is located in a foreshore area but is not identified as having special ecological, scientific, cultural or aesthetic values. The landscape quality of the site and the area will be maintained and the proposal does not involve the removal of any significant native trees or natural features on the site.

- *To ensure that residential development does not have an adverse effect on those values.*

The proposed development for alterations and additions to the existing dwelling house is a low impact, low intensity use of the land that is consistent with the E4 Environmental Living Zone.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

The stepped form and design of the house will be maintained and will actually be enhanced by the removal of the roof and walls enclosing the existing swimming pool on the lower ground level and the supplementary landscaping between the pool and the foreshore will also enhance the landscape of the site as viewed from the bay.

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

The proposed alterations and additions will not affect riparian and foreshore vegetation or wildlife corridors in this waterfront location.

No adverse impact

The proposal will be consistent with the objectives of the development standard and there will not be any adverse impacts or environmental harm due to the non-compliance on the north end of the roof.

Solar access is maintained in accordance with the criteria of the DCP and the visual and acoustic privacy of neighbours and views and vistas will also be unaffected by the proposal.

b) that there are sufficient environmental planning grounds to justify contravening the development standard?

Of relevance is the judgment in the Land and Environment Court of NSW, *Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 1009, NSWLEC 90, NSWLEC 248*, which raised the issue that the grounds should ideally relate to a site specific proposal, rather than generic reasons.

Also, given the term “environmental planning grounds” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the minor breach of the height of buildings development standard, on this particular site and for this particular development.

Previous excavation for the lower ground floor under the existing house, demonstrates that the natural ground would have been higher than the existing ground level of the lower ground floor and therefore the breach of the standard would be less, relative to the previous natural ground level on the site. The following drawing shows the section through the building and the existing pitched roof of the house shown dotted in red, the new low profile roof and the lower ground floor level under the house.

The environmental planning grounds that are unique to the site and the proposal is the actual reduction in building height and scale.

Whilst the proposal involves a breach of the height of buildings standard on the north end of the building, the height of the building and the roof will actually be lower in height compared to the existing pitched tile roof that is to be replaced with a new low profile, low pitched metal roof.

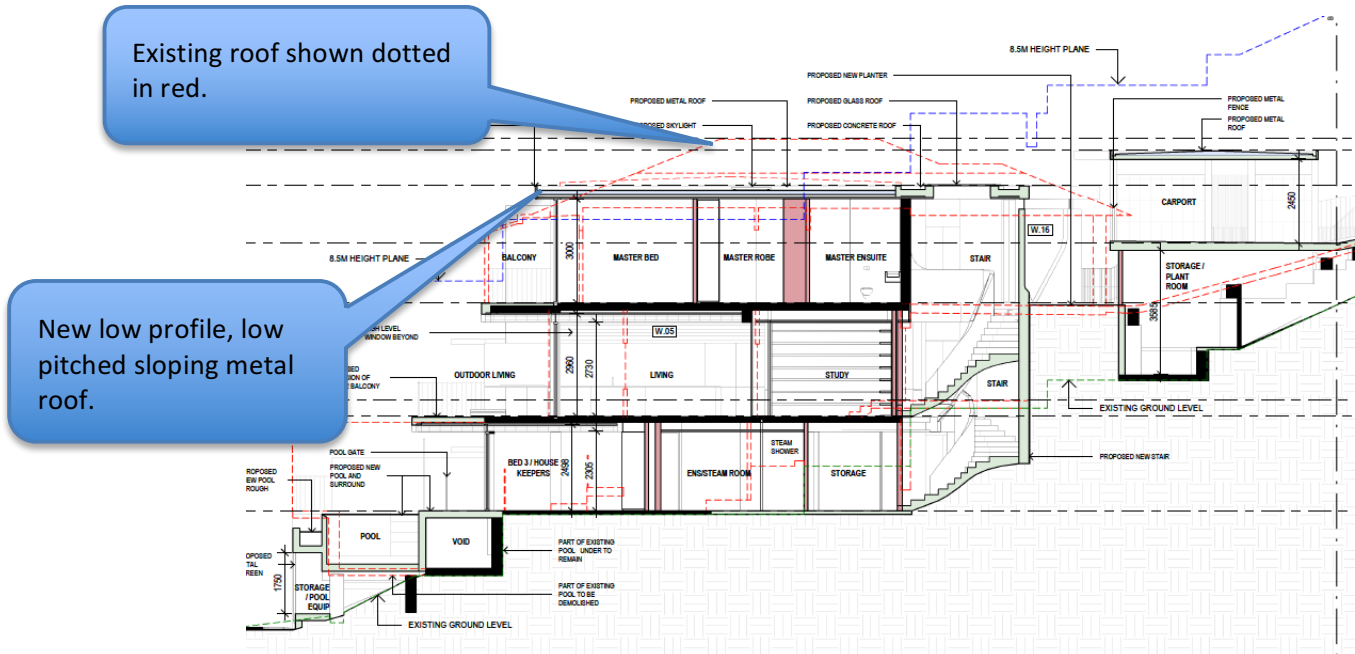


Figure 1: Extract from Drawing DA321 Section AA, showing the height of the existing roof and the new roof above the previously excavated lower ground floor level.

The house will be lower in height compared to the existing higher pitched roof and will be reduced in bulk and scale by the new low profile roof and removal of the enclosure of the existing swimming pool as well.

In this regard, a variation to the height of buildings standard would be reasonable and appropriate because the proposal alterations do not involve any adverse visual impact when viewed from the bay or from adjoining properties, and the amenity of the adjoining properties will also be maintained to an acceptable degree.

The proposal will be consistent with the aims and objectives of the Pittwater LEP, the objectives of the height of buildings standard and the objectives of the E4 Environmental Living Zone.

The absence or lack of environmental harm in this case, with specific reference to the adjoining properties and more generally the locality, is also an appropriate environmental planning ground to justify contravening the development standard.

The contention that an environmental planning ground could include establishing a lack of environmental harm was supported in a recent case in the Land and Environment Court of NSW in *Initial Action v Woollahra Council (2018) NSWLEC 118*.

This was also an appeal against a Commissioner's decision on questions of law. This case related to the Commissioner's refusal to grant development consent for a residential flat building that contravened the height of buildings development standard of the Woollahra LEP 2014, and the Commissioner was

not satisfied that contravention of the development standard was justified in the Clause 4.6 exception to a development standard.

In his Principal judgment Preston CJ made a similar finding as he did in *Randwick City Council v Micaul Holdings Pty Ltd at [34]*, in relation to consistency of a development with the objectives of a development standard and consideration that a lack of adverse amenity impacts on adjoining properties is a sufficient ground justifying a development contravening the development standard.

The underlying objectives of the height of buildings standard is to minimise adverse amenity impacts specifically in relation to solar access and views.

In relation to the subject proposal, there will be no adverse impacts on the amenity of the surrounding properties or the locality by virtue of the breach of the height of buildings standard on the north end of the roof. The proposal is also consistent with the objectives of the E4 Environmental Living Zone, as outlined in Part 4 of this statement.

The absence of any adverse amenity impacts from the elements of the proposed additions to the house that breach the height of building standard are also environmental planning grounds that justify the departure from the height of buildings standard.

In terms of the Objects of the EPAAct, the proposal will be consistent with the objectives of the Act, particularly in relation to ecologically sustainable development, the orderly and economic use and development of the land, sustainable management of built and cultural heritage and good design and amenity of the built environment.

The proposal will be consistent with the objectives of the EP&AAAct and the aims and objectives of the LEP, the objectives of the height of buildings standard and the objectives of the E4 Environmental Living Zone.

For these reasons, there are sufficient environmental planning grounds as outlined that are particular to the circumstances of the site and the proposed alterations and additions to the existing house, to justify the departure from the height of buildings standard.

4. Is the proposed development in the public interest because it is consistent with the underlying purpose or object of the standard and the objectives for development in the zone in which it is proposed to be carried out?

In accordance with Clause 4.6(4)(a), development consent must not be granted to a development that contravenes a development standard unless Council is satisfied in relation to certain matters as follows:

Clause 4.6(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 Director-General has been obtained.

Clause 4.6(4)(a)(i) has been addressed in the previous section of this written request. The objectives of the standard (4.6(4)(a)(ii) as well as the objectives of the E4 Environmental Living Zone have been addressed previously and are adopted (rather than repeated) for the purposes of this section of the written request. The requirement in Clause 4.6(4)(b) is also met, as outlined as follows in relation to the concurrence of the Director-General.

Clause 4.6(4)(b) Concurrence of the Director-General

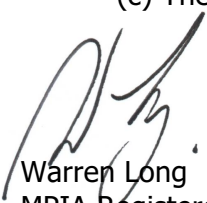
Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. In accordance with Clause 4.6(4)(b) the concurrence of the Director-General is assumed.

5. Conclusion

This exception to the height of buildings standard is considered to be well founded and Council as the consent authority can be satisfied for the reasons outlined, that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the zone.

This written request pursuant to Clause 4.6(3) of the Pittwater LEP 2014 is acceptable for the following reasons:

- (a) The written request adequately addresses the matters required to be demonstrated by sub-clauses 4.6(3)(a) and (b);
- (b) The proposal will be in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives for development within the E4 Environmental Living Zone; and
- (c) The concurrence of the Director General is assumed.


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