



WARRINGAH LEP 2011

Clause 4.6 Exceptions to Development Standards – Height of Buildings

Proposed demolition of an existing dwelling and
construction of a new dwelling house at

**No. 38 The Drive,
Freshwater**

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WARRINGAH LOCAL ENVIRONMENTAL PLAN (LEP) 2011
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

SITE ADDRESS: No. 38 The Drive, Freshwater

PROPOSAL: Proposed demolition of an existing dwelling and construction of a new dwelling house

1. (i) Name of the applicable planning instrument which specifies the development standard:

Warringah Local Environmental Plan (LEP) 2011

(ii) The land is zoned:

R2 Low Density Residential. The objectives of the R2 are as stated:

- *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 Warringah.*

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings which is stated as follows:

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
 - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
 - (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
 - (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*
- (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](#).*
- (2A) *If the [Height of Buildings Map](#) specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

2. Overview

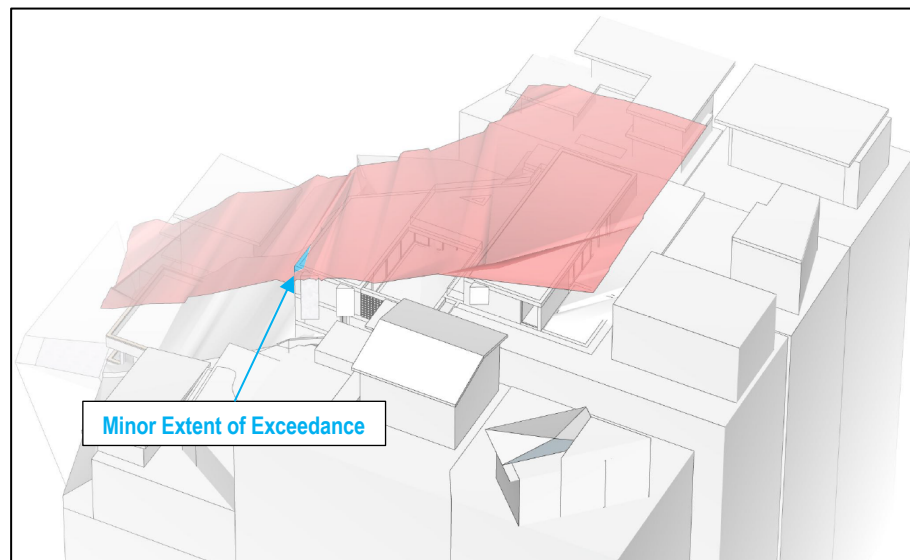
This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation achieves the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

3. Specify the nature of Development Standard sought to be varied and details of variation:

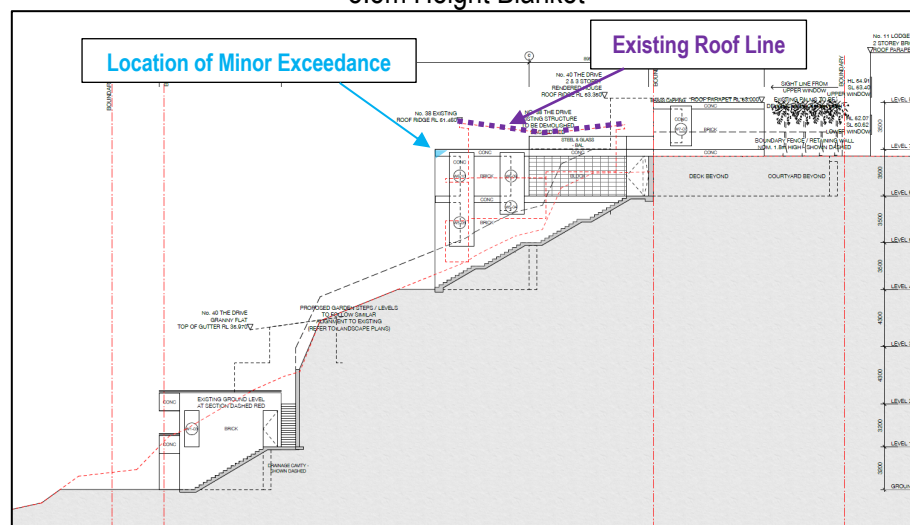
The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the height map which indicates a maximum building height of 8.5m applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The existing building is up to 10.38m high, exceeding the standard by 1.88m (22%). The proposed dwelling will have a maximum building height of 9.03m, measured from the highest point of the roof (above the Sixth Floor Level) to the Existing Ground Level immediately below. This results in a maximum height of building exceedance of 0.53m (6%) from the LEP standard. However, this is reduced from the existing situation. The variation is also at a much lower RL than the rear roof which is compliant.

The area of non-compliance relates entirely to a portion of the non-trafficable concrete roof structure. It is important to note that this non-trafficable roof exceedance at the northeastern point remains below the level of the existing roof height and is a function of the steep topography of the site (see **Figure 1**).



8.5m Height Blanket



Northern Elevation

Source: Tobias Partners

Figure 1: Blanket and Elevation Demonstrating Maximum Height

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- | | |
|---------------|---|
| Objective (a) | <i>to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i> |
| Objective (b) | <i>to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i> |

Flexibility is sought in the application of the height development standard to the proposed development in the circumstance of this particular case as the proposed exceedance is limited to a small portion of a non-trafficable roof that is substantially recessed and raised from the street level. As the proposed height exceedance will be at a lower level than the existing dwelling at a similar location, it will not be readily discernible when viewed from the street.

The proposal has been designed to ensure amenity is maintained, both in the streetscape and for neighbours. The built form will positively contribute to the public domain when viewed from The Drive, with a built form that is contextually compatible and a building height that is well below the permissible level at the street frontage. The building height non-compliance is part of non-trafficable roof form located in a recessed location from the street and is mainly technical, given the steep terrain. The height variation allows for a high-quality building design which provides an appropriate roof form to the living area below. The proposed height is considered a desirable alternative to additional bulk and scale at the street frontage or an awkward roof form, inconsistent with the proposed design on the site or nearby and resulting in amenity impact.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant test will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite the proposed development's non-compliance with the applicable height development standard, the proposal achieves the desired low-density character of the area. The proposal provides a bulk and scale that is generally consistent with that envisaged by Council's controls. Reasons why the proposed development achieves the objectives of the height standard are explained below.

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

Compatibility with the height and scale of surrounding and nearby development is determined by the built forms permissible under the LEP and DCP and is dependent on the desired future character of the locality, which is shaped by these instruments.

'Desired future character' is not defined in the LEP. In *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 [63] ('SJD'), Preston CJ states, inter alia:

...the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Accordingly, the desired future character is shaped by the text of the LEP and recent approvals in the vicinity. Each of these will now be discussed. The relevant clauses in the LEP which relate to urban character and built form are:

- a. The zoning of the land (Clause 2.2 and the Land Zoning Map);
- b. The zone objectives (Clause 2.3);
- c. The land use table (at the end of Part 2); and
- d. The development standards in Part 4:
 - i. Clause 4.3 Height of Buildings and Height of Buildings Map which prescribes a maximum height of 8.5m.

The R2 Low Density Residential zoning permits a wide range of uses and built form on the site, which promotes the eclectic desired future character. The permissible uses are:

*Bed and breakfast accommodation; Boat sheds; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; **Dwelling houses**; Educational establishments; Emergency services facilities; Environmental protection works; Exhibition homes; Group homes; Health consulting rooms; Home businesses; Hospitals; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture; Veterinary hospitals*

The new dwelling will contribute to the eclectic mix of permissible uses in the R2 zone by retaining the site's use as a dwelling house. It is compatible with the envelopes of neighbouring developments recently approved and constructed in the vicinity of the subject site. This demonstrates the external envelope is contextually compatible. In other words, the proposal is consistent with the built form in the areas and the area's desired future character despite the height breach. In *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 [63], Preston CJ states, inter alia:

...the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Accordingly, the desired future character is shaped by the LEP and other developments in the vicinity. The locality is characterised by large dwellings, stepping up the steep topography of the western side of The Drive, displaying a mix of architectural styles. Specifically, the dwelling house at No. 1 Seddon Hill Road, located to the immediate south of the subject site was recently approved. This application was approved with a maximum height of 9.17m, which is a greater exceedance than what is proposed in this application and is similarly limited to a portion of the flat, non-trafficable roof form.

The location of the variation at the upper northeastern corner of the roof will ensure consistency with the desired location of the locality as it will be located a significant distance from the front boundary and public domain, making it not readily discernible. Additionally, if the proposal were to fully comply with the LEP height standard, it would result in a discontinuous upper façade which would be a worse design outcome when viewed from the streetscape and surrounding properties.

Importantly, the proposal complies with the building height standard at the street frontage, meaning the proposed dwelling will retain the residential scale and will positively contribute to the desired character of the area. The partial variation and extent of non-compliance is limited to the corner of the non-trafficable roof on the rear building structure which is at a substantial distance from The Drive and will not be discernible from nearby development.

(b) To minimise visual impact, disruption of views, loss of privacy and loss of solar access,

The proposal has been carefully designed to preserve the environmental amenity of neighbouring properties and public spaces. The following will discuss privacy, views and solar access.

Privacy

As the height non-compliance is only related to the non-trafficable roof, there are no opportunities for sightlines to surrounding properties as a result of the height non-compliance.

Views

Our assessment relies on an inspection of the subject site and the surrounding public domain, survey information, a view assessment for a previous application on the site and real estate photographs available at the time of preparing this report. We have not had the opportunity to inspect the adjoining properties.

The accompanying SEE demonstrates that the proposal is not likely to create unreasonable view impacts on adjoining development. The area of height exceedance will be lower than the existing dwelling as well as lower than the highest level of the proposed dwelling. Additionally, the sloping terrain of the site means the majority of the roof at the same level complies with the building height control.

Accordingly, as the proposed exceedance is limited to a portion of the roof that is at the same or lower level than large portions of the proposal, the exceedance will not result in a loss of views.

Solar Access

As the proposed exceedance is located on the northern façade of the proposed dwelling, there will not be any overshadowing to adjoining properties as a result of the height exceedance.

(c) To minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The proposal will include an architecturally designed landscaped area comprising many native trees, shrubs and groundcover. Substantial landscaping is proposed in front of the primary building where the minor height exceedance is located, maintaining the scenic quality of the coastline and bush environment. Importantly, compliant landscaped area is achieved.

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

The variation is an extremely limited part of the two-storey stepped dwelling house, with generous landscaping forward of the main building line. As discussed, the minor extent of non-compliance occurs at a portion of the non-trafficable roof that is located a substantial distance from the front boundary. As the height non-compliance serves as a continuation of the rear building's front façade, it will have a favourable visual impact when viewed from surrounding public places.

Accordingly, although the proposal will exceed the height standard, this is unlikely to have any significant adverse impacts as the design is generally contained within a compliant building envelope.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

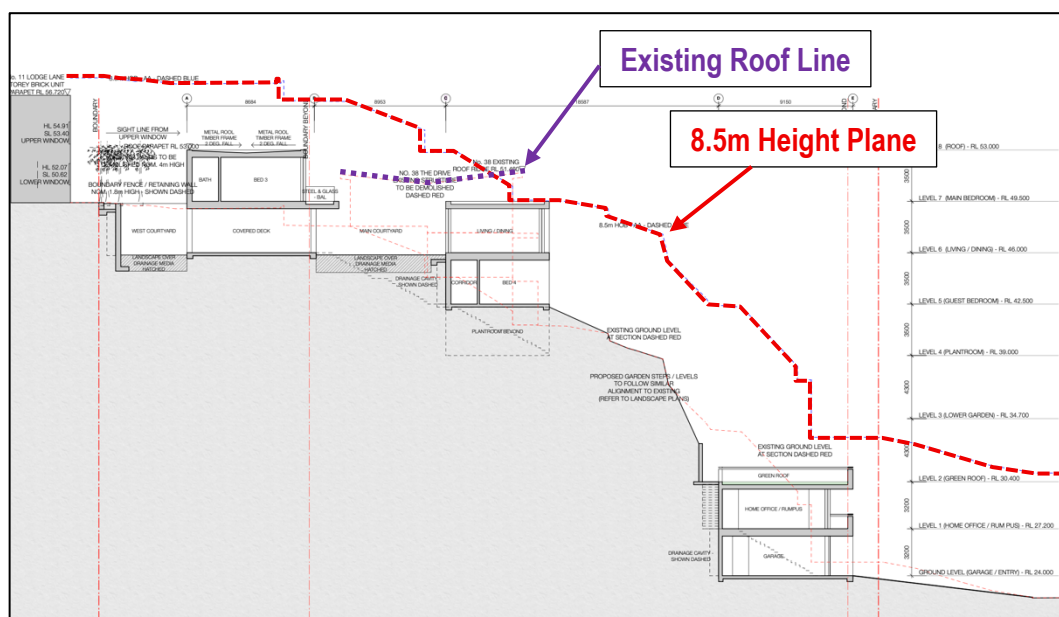
Minor Extent of Variation

As discussed, the area of height variation is very minor, limited to a corner of the non-trafficable roof. The marginal extent of variation ensures it will not be discernible from a compliant built form. In fact, a compliant envelope would appear greater in height, bulk and scale.

Topography

The height exceedance is a function of the topography of the site, which slopes from the rear boundary towards the street. The topography has been previously modified to accommodate the existing dwelling. As the steep terrain varies across the crossfall of the site, it causes the minor portion of the non-trafficable roof to be above the height plane.

The extent of exceedance would be removed if the existing excavation at that location did not result in an artificially altered groundline (see **Figure 2** on the following page). Prior excavation was identified as an environmental planning ground in the judgment for *Merman Investments Pty Ltd v Woollahra Municipal*



Source: Tobias Partners

Figure 3: Long Section

Contextual Compatibility

The proposal will not result in an unreasonable bulk and scale, with a proposed building envelope that is lower than the existing. This contextual sensitivity ensures that the new development respects and enhances the dwelling's streetscape appearance. Requiring strict compliance with the development standard would compromise an architecturally designed, reasonable low-density residential upgrade that is visually compatible with neighbouring buildings.

In other words, it would not serve a benefit to neighbours or pedestrians to restrict the development to the maximum building height. The sympathetic works represent a sensible design solution to many of the inherent challenges associated with a steep sloping lot which has pre-existing excavated areas into the sloping terrain, and an appropriate design response to the competing objectives of the amenity controls.

In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

This report demonstrates that the proposed dwelling will be compatible with nearby developments. The area of height contravention will be less than the existing variation and will not impact the streetscape amenity or existing characteristics of the precinct.

Our assessment has demonstrated that the proposed area of variation will maintain neighbours' privacy, solar access, and views. The height exceedance is lower than the existing situation, and the variation is part of an architecturally designed dwelling that will substantially improve the existing housing stock on the site.

The proposal maintains the site's single dwelling use with an upgraded dwelling which is of a similar height and scale to the area's existing, recently approved, and desired high-quality dwellings. Overall, the

proposed dwelling maintains a two-storey built form, compliant landscaping, and a generally flat roof form to maintain the surrounding character. Overall, the sympathetic works will maintain visual and environmental amenity.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard in the circumstances of this case, as required in Clause 4.6(3)(b).

6. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 1** on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it achieves the objectives of the standard and the development objectives of the R2 Low Density Residential Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.3: Height of Buildings	
12	What is the control	1 & 2	8.5m	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – 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). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard. 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposed building height non-compliance is minor and isolated to a small corner of the non-trafficable flat roof; The proposed height variation is a function of the existing steep, excavated topography; The variation is less than the existing; The proposed height facilitates a low-density development achieves the planning objectives of the area; The area of variation is contextually compatible with existing and recently approved developments nearby; and The building height non-compliance will not be visually intrusive and will maintain neighbours' privacy, solar access or views. 	YES