
Appendix D – Great Lakes LEP Clause 4.6: Exceptions to development standards

Proposed Development | **New Dwelling**

Property Address | **80 Hillside Parade, Elizabeth Beach NSW 2428**

Property Description | **Lot 4249 DP 1285824**

Property Owner | **K & M Barrow**

11 November 2025

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1. Introduction

Clause 4.6 of the Great Lakes Local Environmental Plan 2014 (LEP) provides a degree of flexibility in the application of certain development standards. This clause allows development standards to be varied where it can be demonstrated that compliance with the standard is unreasonable or unnecessary in the circumstances of the proposed development, and where there are sufficient environmental planning grounds to vary the standard.

2. Request to vary a development standard

The proposed request to vary a development standard is made pursuant to clause 4.6 of the Great Lakes LEP 2014. This request to vary the standard is submitted to Council for consideration as part of the Statement of Environmental Effects for a development application for the construction of a new dwelling, on Lot 4249 DP 1285824, located at 80 Hillside Parade, Elizabeth Beach.

Clause 4.6 of the LEP allows Council to grant development consent for a development even though the proposed development contravenes a development standard. The objectives of clause 4.6 are to provide an *“appropriate degree of flexibility”* to development standards in order to *“achieve better outcomes for and from development by allowing flexibility in particular circumstance”*.

Clause 4.6 requires the consent authority to be satisfied of two (2) matters before granting consent to a development that relies upon contravention of a development standard. This includes:

- i. That the applicant has suitably demonstrated that compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the proposed development
- ii. That the applicant has suitably demonstrated sufficient **environmental planning grounds** to justify contravening the development standard

The above matters have been well entrenched in case law in the NSW Land and Environmental Court (LEC) decisions. The LEC has established tests and considerations to be addressed in variations to development standards through cases such as *Wehbe v Pittwater Council* (2007), *Four2Five v Ashfield Council* (2015), *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council* (2016). The outcome of these decisions resulting in principles for clause 4.6 variations.

The proposed clause 4.6 variation utilises the relevant principles established by the LEC referred to above.

3. Development standards to be varied

The development standard to be varied by the proposed development is clause 4.3, subclause (2) – Height of Buildings.

4. Variation to Clause 4.3. – Height of buildings

Pursuant to the LEP, clause 4.3 of the Great Lake LEP 2014 states:

4.3 Height of buildings

(1) *The objectives of this clause are as follows—*

- (a) to ensure that the scale of proposed buildings is compatible with the existing environmental character and the desired future urban character of the locality,*
- (b) to encourage residential development that is consistent with AS 4299.1995, Adaptable housing.*

(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) *Despite subclause (2), the height of a building may exceed the maximum height shown for the land on the Height of Buildings Map by 10% if the land is in Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone B1 Neighbourhood Centre, Zone B2 Local Centre or Zone B4 Mixed Use and the consent authority is satisfied that—*

- (a) internal lift access will be provided to all levels in the building, and*
- (b) the design of the building is consistent with AS 4299–1995, Adaptable housing.*

4.1 Nature of Proposed Variation to development standard to be varied

Clause 4.3 of the Great Lakes LEP 2014 relates to the maximum height requirements. Subclause (2) requires buildings on any land not to exceed the height shown on the Height of Buildings Map for that land. The LEP defines building height as:

the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Figure 1 below identifies the site as having a maximum height of 8.5m on the Height of Buildings map.

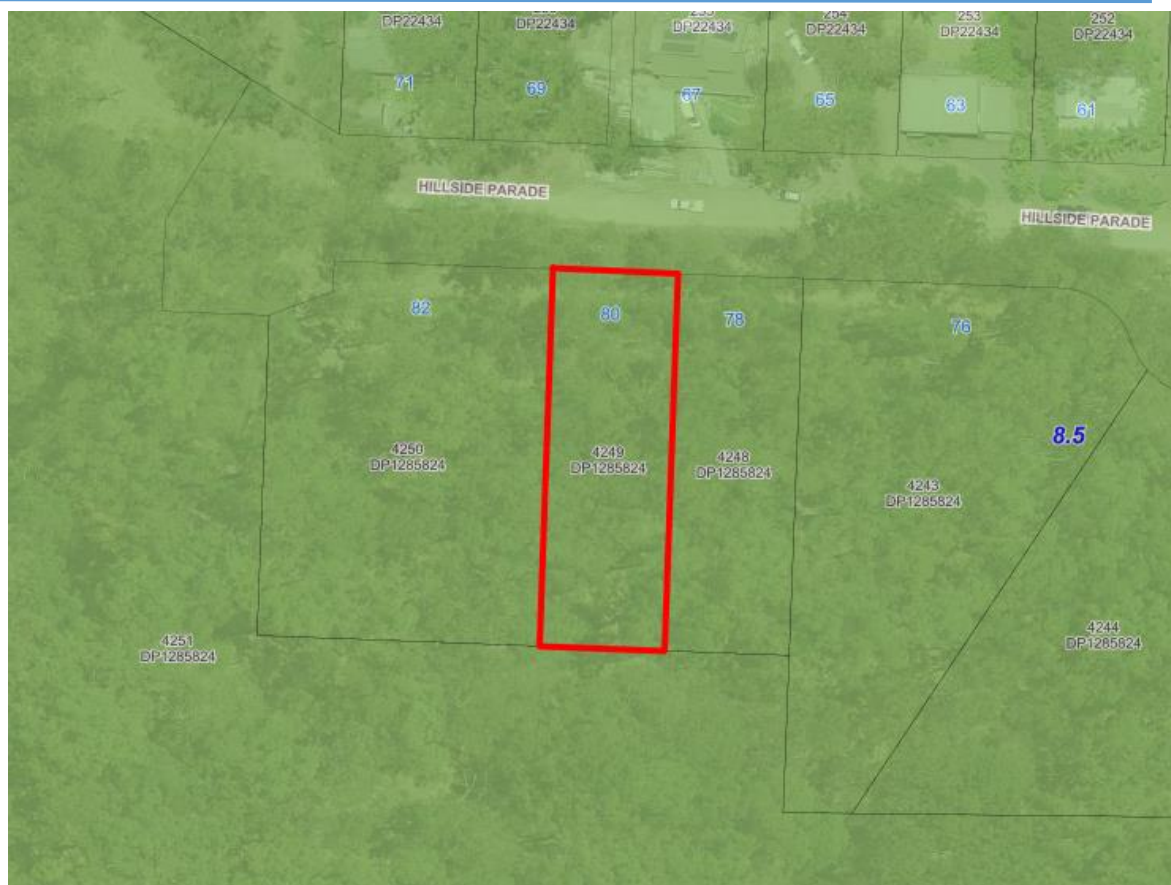


Figure 1 –Height of Buildings Map -Great Lake LEP 2014, depicting the site having a maximum height control limit of 8.5m.

The eastern elevation plan of the proposed development is provided in Figure 2 below. Due to the significant slope of the land, the plans reveal the highest part of the building will be 8.9m above the existing ground level. The proposed dwelling will result in a minor exceedance of the maximum allowable height by 0.4m (4.7%). This breach is associated with the roof over the verandah on the second-floor level, in the north-eastern corner of the dwelling.

As shown in Figure 2 below, this breach quickly diminishes as the building moves further up the slope with the varying existing ground level beneath. The blue shaded areas in Figure 3 depicts the portion of the roof being greater than 8.5m in vertical distance above the existing ground level below.

The proposed development seeks a minor variation to the height provisions pursuant to the LEP. The area of the roof associated with the variation comprises approximately 18.2m². This equates to 6.7% of the total roof area exceeding the allowable height control.

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4.2 Justification for Contravention of the development standard

Subclause 3 of clause 4.6 of the LEP establishes matters which must be considered and satisfied by Council in order to justify the contravention of a development standard.

Subclause 3 states:

- 3 *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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 contravening the development standard.*

4.3 Clause 4.6 (3)(a) – that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case

The LEC decision in the case of *Whebe v Pittwater Council* (2007) outlined five ways through which a variation to a development standard has been considered unreasonable or unnecessary. This includes:

- i. The objectives of the standard are achieved, notwithstanding non-compliance with the standard.
- ii. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unreasonable.
- iii. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
- iv. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting departures from the standard and hence compliance with the standard is unnecessary and unreasonable
- v. 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.

Point i above are considered the most relevant to the circumstances of the proposed variation. Compliance with the development standard is considered unreasonable and

unnecessary given the development meets the objectives of the standard. The proposed dwelling is considered compatible with the surrounding build environment.

Noncompliance with the numerical value of the development standard for height does not diminish the ability of the proposal to achieve the objectives of the development standard.

Recent examples can be found on Midcoast Council's Development Standards Variation register where a departure from the development standard has been granted in similar circumstances as the proposed development.

As per the outcome of *Whebe v Pittwater Council (2007)*, it has been held that these departures serve as grounds for demonstrating Council's acceptance of the development standard being unnecessary and unreasonable.

4.4 Clause 4.6 (3)(b) - that there are sufficient environmental planning grounds to justify contravening the development standard

The proposed variation can provide sufficient environmental planning grounds to justify contravening the development standard. This includes:

- The proposed development meets the objectives of the development standard, as well as the objectives of the R2 Low Density Residential zone.
- The landform is significantly steep, approximately 26.5% slope, making it difficult to achieve full compliance for the complete footprint of the dwelling.
- Due to the landform the proposed dwelling will be positioned above street level. The part of the building affected by the variation is significantly setback from the street frontage.
- The small portion of the new roof line which exceeds the building height will not be easily distinguishable at the street frontage given the context of the site. The proposed variation to building height will not impact on the existing streetscape or character of the area.
- All efforts have been made to lower the roof pitch to minimise height exceedance and balancing the limitations of ceiling heights necessary to achieve solar access within the dwelling.
- The scale and proportion of the variation is considered minor, being less than 5%. The variation quickly diminishes with the contours of the land. Only a minor portion of the roof will breach the height control.

- The proposed variation will not have any adverse impact on views from neighbouring lands, overshadowing or privacy, in comparison to a compliant building height.
- The quantity and the quality of the variation is unlikely to generate any significant adverse impacts within the locality. The existing and desired future character of the area will not be impacted by the proposed variation.
- The proposed development achieves the objectives of Section 1.3 of the EP&A Act 1979 by:
 - i. Promoting the orderly development and economic use of the land through redevelopment
 - ii. Promoting good design and amenity of the building environment through a well-considered design that is responsive to its setting and context.

The merits of the proposal considered against its unique environmental planning grounds need to be balanced with the burden that strict compliance places on the site and whether strict compliance will result in a significantly better outcome. The proposed architecturally designed dwelling seeks to provide a high-quality dwelling within a coastal village setting. The non-compliance of the development standard will have no perceptible adverse impact on the streetscape, character or amenity of the area.

Building Design and Setbacks

The setback of the dwelling, slope of the landform and use of contemporary architectural design features assists in minimising the visual dominance of the building. The bulk and scale of the building is comparable with modern dwellings constructed in the surrounding area.

The building is compliant with floor space ratio provisions and predominately compliant with building height provisions. Each massing element has been articulated with architectural elements or contrasting materials to reduce the appearance of the bulk and scale of the building. The proposed building will not impact on streetscape or amenity of adjoining properties.

Compliance with objectives of the development standard (Height of Building)

Despite the variation, the proposal will achieve the objectives of clause 4.3 and the objectives of the R2 Residential zone. The objectives of clause 4.3 are:

The objectives of this clause are as follows—

- (a) *to ensure that the scale of proposed buildings is compatible with the existing environmental character and the desired future urban character of the locality,*

(b) to encourage residential development that is consistent with AS 4299–1995, Adaptable housing.

Objective (a) refers to being “compatible” with the scale of buildings. The desired future character of the Elizabeth Beach area is subjective and can be set by the existing development, recently approved development and proposed buildings within the neighbourhood.

The proposed development is considered a compatible building for the context and setting of the site and desired future character of Elizabeth Beach. The contemporary coastal architectural styling of the proposed dwelling will positively contribute to the amenity of the area. The proposed variation is considered compatible with the scale of existing and surrounding buildings and is considered reasonable on this occasion. The development demonstrates compliance with objective (a) of the development standard.

5. Conclusion for Variation to Height of Building

It is requested that consent be granted to vary the development standard specified in clause 4.3 *Height of Building* of the Great Lake LEP 2014. Strict compliance with the development standard in clause 4.3(2) is considered unreasonable and unnecessary due to the following reasons:

- The proposed development is considered compatible to the character of the area.
- The variation will not adversely impact on the amenity of future occupants or adjoining lands.
- The landform is significantly steep, approximately 26.5% slope, making it difficult to achieve full compliance for the complete footprint of the dwelling.
- The scale and proportion of the building associated with the variation is minor and quickly diminishes with the contours of the land.
- Strict compliance with the development standard is not necessary to achieve the objectives of the development standard and the zone.
- Similar variations to clause 4.3 have been approved by Council in recent years illustrating Council’s acceptance that strict compliance is not necessary to achieve the objectives of the development standard.
- The subject site is considered suitable for the development, and it is considered that the variation to the development standard is within the public interest.

It is considered that the proposed development satisfies the established tests derived under case law for a clause 4.6 variation and is an appropriate form of development for

the site. Strict application of the development standard within clause 4.3 (2) is considered unreasonable or unnecessary given the site-specific parameters and merits of the proposal.

As demonstrated above the proposed variation provides sufficient environmental planning grounds to justify contravening the development standard. In accordance with the objectives of the EP&A Act the proposed variation will promote good design and amenity, and will allow for the orderly and economic development of land.

Furthermore, the proposed variation to the development standard will not result in any adverse outcomes for the site, surrounding area or the general public. The proposed variation does not bring rise to any matters of State or regional environmental planning significance. It is considered that flexibility in the application of the development standard within clause 4.3 is justified on this occasion.