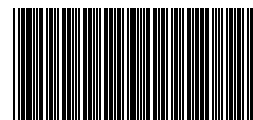




Filed: 8 June 2023 11:20 AM



D0001QB43X

Expert Report

COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2023/00026455

TITLE OF PROCEEDINGS

First Applicant	Peter John Zembis
First Respondent	SUTHERLAND SHIRE COUNCIL ABN 52018204808

FILING DETAILS

Filed for	Peter John Zembis, Applicant 1
Legal representative	Jason Brian Hones
Legal representative reference	
Telephone	0299293031
Your reference	JBH:PC:22277

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Expert Report (Updated Clause 4.6 (May 2023) - 421 Willarong Road, Carringbah South.pdf)

[attach.]



CLAUSE 4.6 VARIATION STATEMENT

Alterations and additions to an existing dwelling

421 Willarong Road,
CARINGBAH SOUTH

Prepared for: Peter and Anastasia Zembis

REF: M210570

DATE: 26 May 2023





CLAUSE 4.6 VARIATION STATEMENT – HEIGHT OF BUILDINGS (CLAUSE 4.3(2))

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Sutherland Shire Local Environmental Planning Plan 2015 (SSLEP 2015) to accompany Development Application No.22/0248. The application seeks consent for alterations and additions to an existing dwelling at No. 421 Willarong Road, Caringbah South ('the site').

2. HEIGHT OF BUILDINGS STANDARD

Clause 4.3(2) of SSLEP 2015 relates to the maximum height requirements and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 8.5m.

Building height is defined as:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.

The relevant map [sheet HOB_001FA] indicates that the maximum building height permitted at the subject site is 8.5m.

3. PROPOSED VARIATION

The architectural plans indicate that the proposed development has a maximum height of approximately 10.4m to the new first floor level roof towards the middle of the dwelling, and is therefore non-compliant. The non-compliance is a maximum of 1.9m or 22.3%, when measured to the edge of the highest point of the proposed roof, with the other non-compliances relating to the existing pitched roof and remainder of the first floor level below this point.

It should be noted that the existing dwelling reaches a maximum height of 10.42m, and therefore is also non-compliant with the existing maximum building height standard. Importantly, the maximum height of the proposed development does not exceed the maximum height of the existing dwelling.

The non-compliances with the building height are primarily a result of the sites steep topography and historic excavation to establish the existing building. The proposed elements which exceed the maximum building height are largely roof features. The portion of the non-compliance which does contain habitable space is where the existing dwelling is also above the height limit, thereby no significantly altering the impact of the variation.

The portions of the proposal which are non-compliant are shown on the architectural plans submitted with this application, and in Figures 1 and 2 below.



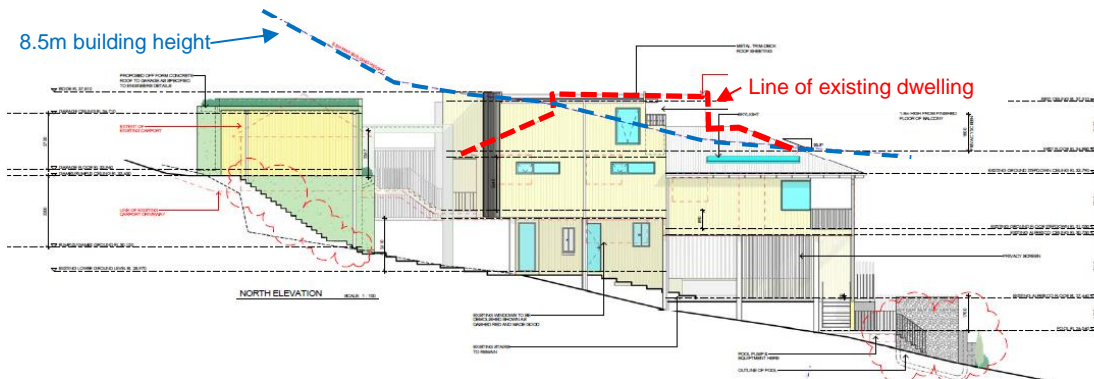


Figure 1 Northern elevation the proposed development

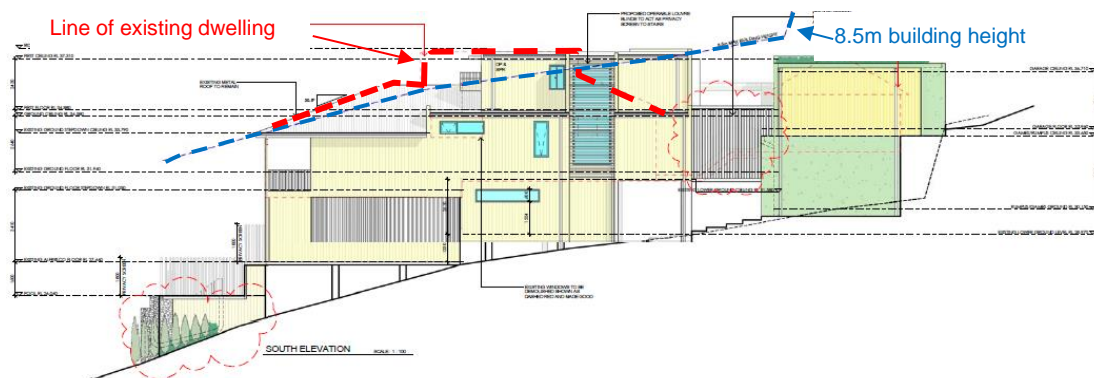


Figure 2 South elevation of the proposed development

4. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of clause 4.6 are as follows:

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.

It is requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of approximately 10.4m which equates to a numerical variation of 1.9m and a percentage variation of 22.3%, noting that a similar variation to building height already exists.



5. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary.

The judgement states that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

In *Wehbe*, Preston CJ set out 5 different ways to establish that compliance with a development standard is unreasonable or unnecessary as follows: (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

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 of 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in Section 7 of this request.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:



*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) 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: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, 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 under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*



The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90. On the above basis, the following environmental planning grounds are submitted to justify contravening the maximum building height:

1. The existing building on the site exceeds the building height and reaches a maximum height of 10.42m and is therefore also non-compliant. The maximum height proposed by the alterations and additions is 10.4m and will therefore be lower than the existing maximum height given the increased setback of the first floor level. Other minor non-compliant portions of the roof will sit well below the existing 10.42m maximum height and appear to blend in with the backdrop of surrounding buildings of varied heights.
2. The non-compliance is a maximum breach of 1.9m or 22.3% and is a result of the existing site conditions and nature of the proposed development, being alterations and additions. Importantly, at the point of the maximum variation, the existing lower ground slab (to be retained) has a level of RL28.9 which is up to 1.2m above the natural ground level which contributes to the extent of the variation. Furthermore, the point of the maximum breach is located within the centre of the site and setback up to 10.4m to the east of the ground floor level below, creating a stepped and recessive element when viewed from the waterway.
3. The height breach is a result of the site topography, which has a fall of approximately 6m over the length of the existing dwelling. This is a specific condition that the LEP height limit does not contemplate, in that the height limit applies equally to a vast area of the LGA with distinctly different topography. The proposed alterations and additions have been designed to respond to the topography of the site and existing built form through complementing, and replacing where necessary, the existing features of the dwelling, which does not create any physical bulk or scale.
4. The proposed building envelope has been carefully considered and is supported by other neighbouring and nearby existing and approved developments with similar characteristics as the subject site (that is; a single built form on a steeply sloping site). The height of the proposed first floor level which exceeds the height of buildings development standard will be entirely compatible with the heights of adjoining properties to the north and south, despite the variation. The proposed first floor level will have a maximum height of RL 37.8 (parapet) which lower and entirely compatible with the height of No. 417 Willarong Road to the north (ridge of RL38.54 approx.) and also compatible with the height of No. 425 Willarong Road to the south (RL34.75) given the cross fall of the site towards the south.



5. The height exceedance will only be visible from the waterfront and to the surrounding properties given the subdivision pattern and location. Given the setback of the first floor level (up to 10.4m from the western (rear) elevation), and central location on the site, the extent of the variation will appear compliant with the intended height and compatible with the context of surrounding development on the foreshore. The greatest extent of the non-compliance is largely existing, with the proposed alterations setback further and not exceeding the existing maximum height of the existing dwelling as detailed in Figures 1 and 2 (above).
6. When viewed from the Port Hacking the height variation will not be readily apparent due to its location within the middle of the site and recessive design. It has been calculated that the first floor level will only be apparent approximately 50m into Yowie Bay (where the separation distance is over 100m) which will minimise the apparent scale and ensure the proposed alterations and additions will blend into the backdrop and be compatible with the scale of other waterfront dwellings in the locality. The proposed roof design will match the existing roof pitch where practicable, whilst also improving the articulation of the façade through a contemporary form which will not be visually obtrusive from the public domain.
7. The proposed height variation enables this beneficial approach to massing of the buildings with the variation centrally located on the site and compatible with the scale of surrounding properties. When viewed from the waterway, the height breach will not be visually jarring when compared to the bulk and scale of residential dwellings surrounding the site, which often present as three and four storeys to the waterfront. That is, the proposed variation will blend with the eclectic scale of development on and around the foreshore.
8. It is considered that there is an absence of any significant material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically:
 - a. The extent of the non-compliance creates no additional adverse overshadowing to adjoining properties as demonstrated by the shadow diagrams prepared by Deneb Design (refer to Figures 3-8 below). Furthermore, when considering the extent of overshadowing against the backdrop of the applicable planning controls, the extent of overshadowing caused by the non-compliant element would be insignificant.
 - b. The height breach does not result in any significant additional privacy impacts. The area of the height breach is setback up to 10.4m from the western (rear) elevation of the ground level which is behind the building to the north in order to minimise overlooking to open space and windows of adjoining properties. Given the use of the rooms to the first floor level are bedrooms, the design and proposed screening, the extent of the variation will have no greater impact on the privacy of adjoining properties when compared to the complying elements of the building; and
 - c. The proposed development will not result in any material loss of views or outlook when compared to a building with a compliant height, given its centralised location and consistency with the existing maximum height of the dwelling. When considering the extent of view sharing against the backdrop of the applicable planning controls, the extent of view loss caused by the non-compliant elements would be insignificant or nil.
9. There is no planning purpose to be served by limiting the height strictly to the maximum height allowable given the absence of amenity related impacts.



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10. The proposed development meets the objectives of the development standard and meets the objectives of the C3 Environmental Management zone (as further detailed in Section 7 below).
 11. The proposed building envelope has been carefully considered and is reflective of the topographical features of the site and compatible with the neighbouring dwellings and views afforded to the waterway. The proposed works have been designed with a compliant floor space ratio and maintains established setbacks (as discussed in this Statement) to mitigate any concerns regarding bulk and scale.
 12. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - b. The proposed developed promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the steeply sloping topography which skews the height of buildings calculation and proposed nature of the development, being alterations and additions. The additional height delivers improved residential amenity and useability whilst providing a contemporary roof form to complement the character of the locality and deliver a high quality design which successfully addresses the waterway.

7. THE APPLICANT'S WRITTEN REQUEST HAS ADEQUATELY ADDRESSED THE MATTERS REQUIRED TO BE DEMONSTRATED BY SUBCLAUSE (3), (CLAUSE 4.6(4)(A)(I))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a 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). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 5 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 8 below). Clause 4.6(3)(b) is addressed in Section 6 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 8 below.

8. 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 (CLAUSE 4.6(4)(A)(II))



Height of Buildings Objectives

The objectives and relevant provisions of Clause 4.3 of SSLEP 2015 are as follows, inter alia:

- (1) The objectives of this clause are as follows—*
 - (a) to ensure that the scale of buildings—*
 - (i) is compatible with adjoining development, and*
 - (ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and*
 - (iii) complements any natural landscape setting of the buildings,*
 - (b) to allow reasonable daylight access to all buildings and the public domain,*
 - (c) to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,*
 - (d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,*
 - (e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,*
 - (f) to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.*

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.3 are addressed in turn below.

Objectives (e) and (f) are not applicable to the proposal as it is a residential development and is located within an C3 Environmental Management zone. An assessment of the proposal with consideration to objectives (a) to (d) is provided below.

Objective (a):

Objective (a) seeks to ensure that buildings are compatible with the height, bulk and scale of the existing and future character of the locality and positively complement adjoining developments and the natural character of the area.

It is noted that objective (a) refers to being 'compatible, consistent and complementary' with the above mentioned elements. It is considered that "compatible" does not promote "sameness" in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191 which notes that compatible does not mean "sameness".

The variations to the height of buildings development standard are limited to a maximum 1.9m variation to a portion of the first floor level centrally located on the site. The extent of maximum variation is actually less than that of the existing building with the first floor level setbacks further from the waterway to reduce the apparent bulk and scale. The height variation is considered acceptable and will not be alarming to the visual aesthetic of the streetscape or waterway.





The proposed building envelope has been carefully considered and is compatible with the form and scale of neighbouring and nearby existing and approved developments with similar characteristics as the subject site (that is; a single built form on a steeply sloping site). The height of the proposed first floor level which exceeds the height of buildings development standard will be entirely compatible with the heights of adjoining properties to the north and south, despite the variation. The proposed first floor level will have a height of RL 37.8 which is lower and entirely compatible with the height of No. 417 Willarong Road to the north (ridge of RL38.54 approx.) and also compatible with the height of No. 425 Willarong Road to the south (RL34.75) given the cross fall of the sites from north to south.

The non-compliant portions of the dwelling are adequately setback from the boundaries shared with the neighbouring properties. Given the proposal is generally compliant with all other standards and retains the residential amenity of surrounding developments, this ensures that the height variation is compatible to the scale of neighbouring properties, achieving objective (a) (i).

When viewed from the right-of-carriageway and neighbouring properties, the building will appear as two storeys and below the 8.5m height limit. That is, the breach to the height is as a result of the topography as the building steps down the site. The proposed development has been designed as a high quality contemporary form which is consistent with the current and desired streetscape and waterfront character. When viewed from the waterway, the retention of the existing ground floor level raked ceiling and pitched roof successfully masks the height breach and presents as a compliant built form which will not be readily discernible to the casual observer given compatibility with the height and scale of neighbouring properties (discussed above).

It is considered that the variation created by the additions will not result in a scale of development that is noticeably different from the remaining compliant built form. The design of the proposal, location of the height breach and setbacks provided to the non-compliant elements ensure that the development will nestle comfortably between the immediately adjoining neighbours and reflect the characteristics of the remaining buildings found along the waterfront. As such, it is considered that this non-compliance will not be visually jarring when viewed from the public domain and is considered to achieve objective (a) (ii).

The height variation does not in any way compromise the landscaped area provided or result in a non-compliance with the FSR development standards as stipulated under the SSLEP 2015. The additional height is not visually obtrusive when viewed from Willarong Road or the waterway, the landscaped design and natural features of the site will maintain compatibility with the character of the area. As such, the proposal is therefore consistent with objective (a) (iii), despite the minor height breach.

Objective (b):

The objective states that “reasonable daylight access to all buildings....” is to be provided which sets a lower bar when considering the effects of overshadowing on surrounding development. In any event, as demonstrated by the shadow diagrams prepared by Deneb Design (refer to Figures 3-8 below), the proposed development, including the elements above the height limit will not create any adverse additional shadows to north facing windows when compared to the existing development.

The proposed development will create some additional overshadowing to the open space between the dwelling and the garage of No. 425 Willarong Road but this is not considered to be the primary area of private open space which is located towards the rear of the site. The diagrams clearly demonstrate that the adjoining dwellings will continue to receive at least 3 hours of sunlight from 9am to 3pm in midwinter.



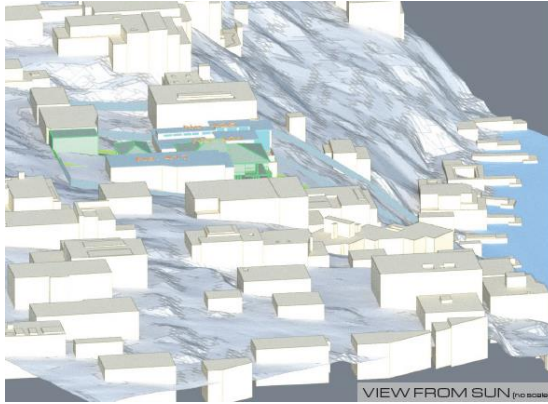


Figure 3 Existing: 9am mid winter

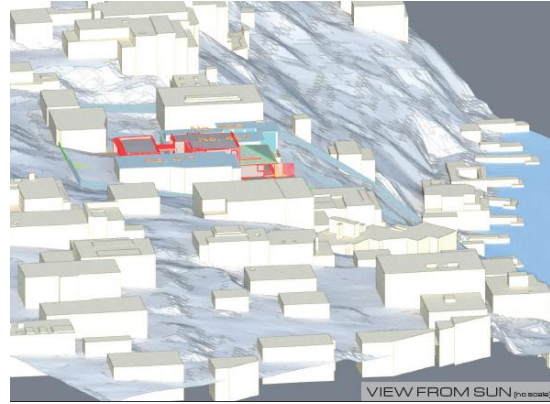


Figure 4: Proposed: 9am mid winter

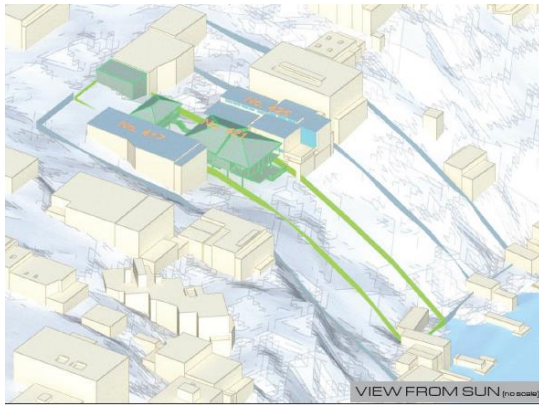


Figure 5 Existing: 12pm mid winter

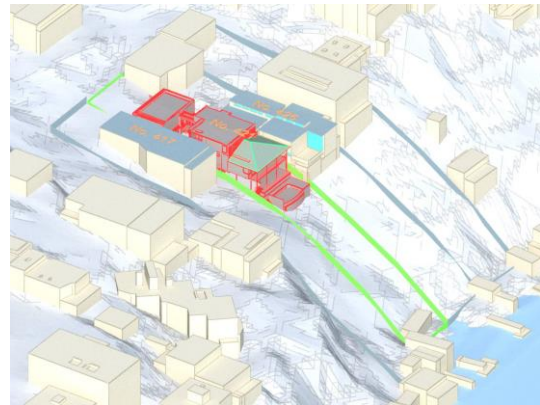


Figure 6: Proposed: 12pm mid winter

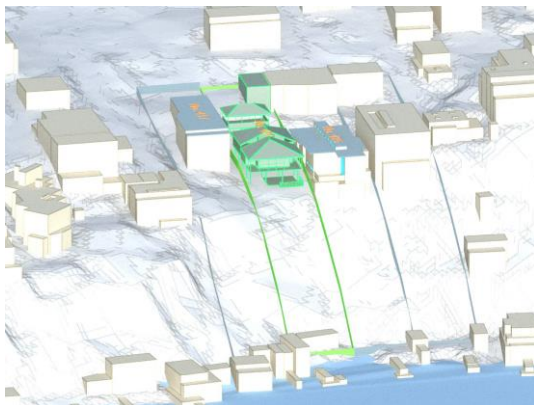


Figure 7: Existing: 3pm mid winter

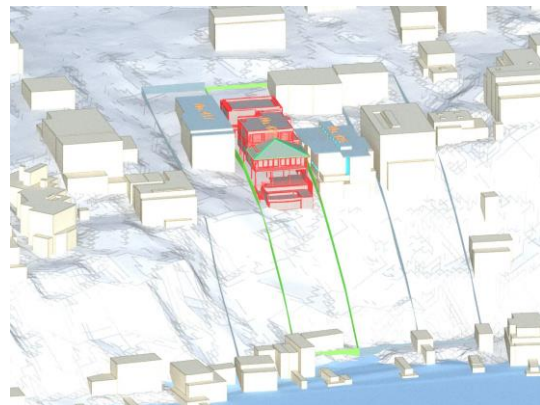


Figure 8: Proposed: 3pm mid winter

The shadows cast by the proposed development have not been significantly exacerbated by the proposed roof form and solar access to the neighbouring properties will therefore permit “reasonable daylight access” to neighbouring properties. The proposed variation will also ensure that, in accordance with the requirements stipulated in SSDCP, 3 hours of solar access to all neighbouring properties will be maintained between 9am and 3pm in midwinter. As such, the development achieves objective (b), despite the height breach..

Objective (c):

This objective envisage that building heights must be controlled to “minimise” the impact on the amenity of neighbouring properties, with regards to views, privacy, overshadowing or visual intrusion. The issues of overshadowing and visual intrusion are considered in the objectives above.

It is noted the use of the word “minimise” was considered in a recent judgement which included a variation to the height of buildings control in *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council [2022] NSWLEC 1048* where Morris AC states:

99. I do not accept Mr Perdigao’s evidence that for the impact to be minimised it would have to be reduced the smallest possible amount or degree. To do so would mean that there would be no impact at all. The objective of the control contemplates some impact, it just requires the impact to be minimised. I accept the submission of Mr To, for the Applicant, that to adopt this logic, there would always be a further reduction possible to the point of there being no breach and therefore no impact. This is not what is contemplated by cl 4.6 of the WLEP. It contemplates that the development standard will be breached. What has to be determined is if that breach is appropriate in the circumstances of the case. I consider that it is.

In terms of views, the height variation will not significantly compromise the use and enjoyment of neighbouring properties in terms of views and outlook when compared to a building with a compliant height. The proposed development has been designed to generally retain the building footprint and envelope which is generally anticipated by the applicable planning controls. Any view impact (if any at all) from surrounding properties would only occur to the east of the site with the height variation generally “masked” by the compliant building form towards the east of the dwelling or from the proposed garage (both below the height limit). That is, the height breach is located to the centre of the site and is similar to the existing maximum building height of the dwelling which will, at the very least, minimise the impacts on views (if any). It is noted that views from the neighbouring properties was not raised as an issue in the original assessment report. As such, any view impact is considered the result of the compliant built form anticipated by the applicable planning controls.

In terms of privacy, the height variation will not compromise the use and enjoyment of neighbouring properties. The area of the height breach is setback approximately 10.4m from the western (rear) elevation of the ground level which is greater than the setback of the building to the north in order to minimise overlooking to open space and windows of adjoining properties. Given the use of the rooms to the first floor level are bedrooms, the extent of the variation will have no greater impact on the privacy of adjoining properties when compared to the complying elements of the building.

It is therefore considered that the amenity of adjoining properties is “minimised”. That is, the amenity of adjoining properties will not be significantly reduced and certainly not beyond a scheme that is fully compliant with the relevant building envelope controls. Therefore, the proposal satisfies objective (c), despite the height breach.

Objective (d):

As discussed in objective (a), the proposal has been designed as a high quality contemporary building which is presented to the right-of-carriageway with a compliant building height. The proposal has been designed to provide visual interest through architectural elements including façade modulation, glazed openings, vertical and horizontal elements and parapet roof forms to “minimise” the visual intrusion. As discussed above, from the street and public reserves, the additional height breach will not be readily discernible visible and “masked” by compliant elements of the building.

Due to the nature of the proposal (being alterations and additions), site topography and scale of neighbouring properties, when viewed from the waterway the visual intrusion will be “minimised” as the proposed development, including the elements above the height limit will blend into the backdrop of development in the locality. Specifically, the height variation is setback approximately 10.4m from the western (rear) elevation and be behind the raked ceiling and pitched roof that is retained for the ground floor level. The proposed development, including the height breach, will be compatible with the scale and character of surrounding development, including the properties to the north and south in that it will nestle comfortably between the two dwellings to ensure the visual intrusion is “minimised”. Importantly, when viewed from the waterway, the height variation will not be greater than the existing maximum building height on the site which ensures that the non-compliance will not be visually obtrusive to the casual observer.

In terms of the visual impact to the neighbouring properties, the location of the proposed height breach ensures that the roof form will not create a sense of enclosure to the adjoining properties. As discussed under objective (a)(i) and objective (c), the height breach will be compatible with the scale of surrounding development and minimise the impacts on the amenity of the neighbouring properties. Therefore, the proposal satisfies objective (d), despite the height breach.

Zone Objectives

Clause 4.6 (4)(a)(ii) also requires consideration of the relevant zone objectives. The objectives of the C3 Environmental Management Zone are as follows:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To allow development of a scale and nature that maintains the predominantly natural landscape setting of the locality and protects and conserves existing vegetation and other natural features of the locality.*
- *To limit development in the vicinity of the waterfront so that the locality's natural qualities can dominate.*
- *To allow the subdivision of land only if the size of the resulting lots makes them capable of development that will not compromise the sensitive nature of the environment.*
- *To share views between new and existing development and also from public space.*

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The proposed development is consistent with the relevant zone objectives in that:

- The proposal will involve alterations and additions to the existing dwelling predominantly retaining the built form and envelope therefore protecting (and managing) the ecological and aesthetic character of the locality. For the reasons discussed above, the height variation will not be visually obtrusive and will protect (and manage) the aesthetic values of the locality;
- The proposal will retain the existing use of a dwelling house on the site which is permissible within the zone and will not have any adverse impact on the ecological, scientific or aesthetic qualities of the subject site or locality;
- The proposed alterations and additions will significantly improve and rationalise the landscaping and built form on the subject site through the provision of a contemporary design, native vegetation and permeable deep soil areas, ensuring that the built form and natural landscape setting will complement each other and be preserved;

- The proposal will provide a contemporary residential dwelling which will considerably improve the existing dwelling on the subject site and therefore reflect the established and desired character of the locality anticipated by the planning controls;
- The proposal will retain the existing residential dwelling and will not increase the intensity of use, therefore minimising risk to life for future occupants and neighbouring properties;
- The proposal is not antipathetic to the objective pertaining to the subdivision of land and will protect the natural features of the site; and
- The proposal will predominately retain the built form and envelope and will retain the views from the public domain and neighbouring properties.

The building height variation does not contravene any objectives for the zone and for that reason the proposed variation is acceptable. For the reasons set out above, the proposal will be in the public interest because it is consistent with all applicable zone objectives.

9. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(B))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

10. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(A))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

11. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(B))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by 1.9m (22.3%), the breach is as result of the site topography, and is consistent with the existing height non-compliance on the site. The proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

12. CONCLUSION

This written request has been prepared in relation to the proposed variation to the height of buildings development standard contained in SSLEP 2015.

Despite the non-compliance with the height of buildings development standard, the proposed built form is compatible with the character of Willarong Road, the surrounding properties and the foreshore as anticipated by the planning controls under the SSLEP and SSDCP.



The proposed variation is largely located towards the centre of the site to minimise the visual impact and amenity on adjoining properties. It has been demonstrated that the proposed development sits comfortably amongst surrounding dwellings as viewed from the waterway and provides an appropriate built form that is compatible with the building heights within the locality, despite the height variation. Furthermore, the proposed development will not have an adverse impact on the amenity of adjoining properties.

The request explains that, with the proposed variation, the development satisfies the objective of the standard and the objectives of Zone C3. It further explains why it is therefore unreasonable and unnecessary to require strict compliance with the height of buildings development standard. In addition, this request demonstrates that there are sufficient site specific environmental planning grounds to justify the variation, and therefore the proposal is considered to be in the public interest.

