

March 24, 2022

Clause 4.6 Exceptions to development standards

35 Burbank Avenue, East Hills

*Demolition of existing structure, removal of five (5) trees and
a proposed dwelling house with basement, swimming pool
and cabana*

Written request to vary Clause 4.3(2B) of the Bankstown Local Environmental Plan 2015

Submitted to
City of Canterbury-Bankstown Council

March 2022

1. INTRODUCTION

This written document has been prepared for the variation to a development standard in accordance with the provisions of Clause 4.6 of the *Bankstown Local Environmental Plan 2015* (BLEP 2015). The request relates to varying Clause 4.3(2B) of the BLEP 2015 at the subject site 35 Burbank Avenue, East Hills – Maximum wall height of 7m.

The proposed development is for the Demolition of existing structure, removal of five (5) trees and a proposed dwelling house with basement, swimming pool and cabana

This report should be read in conjunction with the plans prepared by ES Design.

2. SITE ANALYSIS

2.1. Site Location and Context

The subject site is located to the south west of Burbank Avenue, is a waterfront property backing onto Georges River, and is legally identified as Lot 82, DP 709289 – 35 Burbank Avenue, East Hills NSW 2213 (see Figure 1 & 2). The locality is a residential area where the surrounding development consists of a mixture of luxury dwelling homes with basement.

The subject site has a street frontage of 15.09m and a maximum depth of 96.73m at the south-most corner. The site is rectangular in shape and has a total land area of 1435sqm. The site is very steep with a maximum fall of 15m from Burbank Avenue street to the waterfront on Georges River.

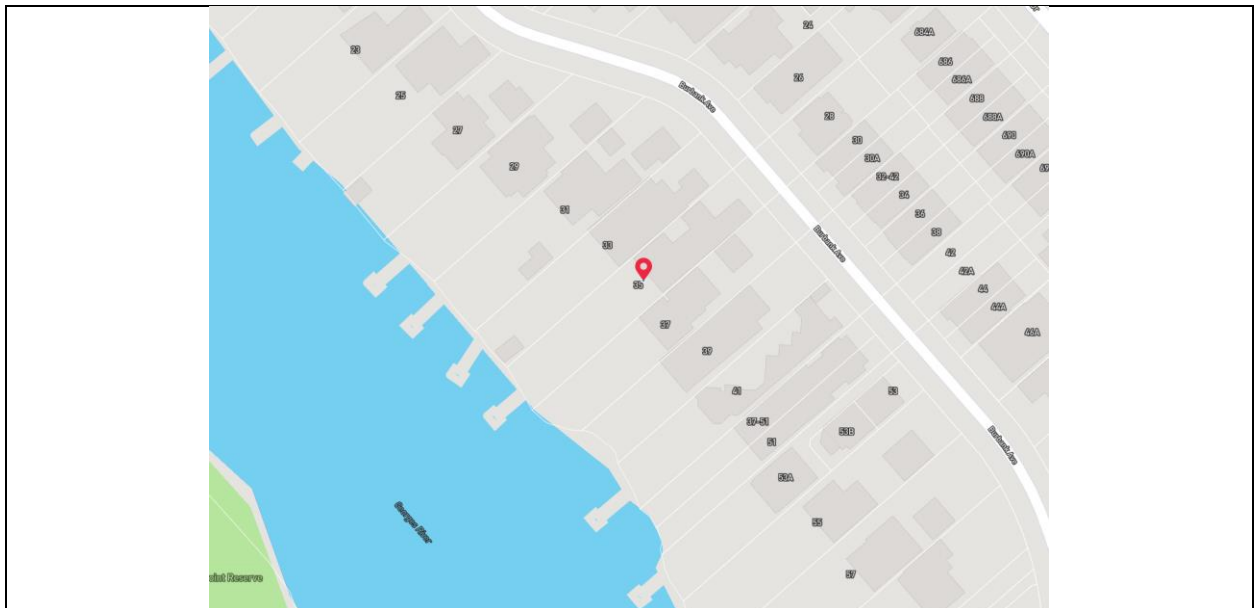


Figure 1: Location Map - No. 35 Burbank Avenue, East Hills NSW 2213



Figure 2: Satellite Photo - No. 35 Burbank Avenue, East Hills NSW 2213

3. EXTENT OF NON-COMPLIANCE

The content of Clause 4.3(2B) of the *Bankstown Local Environmental Plan 2015* (BLEP 2015) requires for a dwelling house or a dual occupancy—the maximum wall height is 7 metres in the R2 zone. The development proposes a maximum wall height of 8.16m. This represents a variation to the maximum wall height of 1.16m or 16.57% variation.

4.3 Height of buildings

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*
 - (b) *to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low-Density Residential,*
 - (c) *to provide appropriate height transitions between development, particularly at zone boundaries,*
 - (d) *to define focal points by way of nominating greater building heights in certain locations.*
- (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)—*
- (a) *for land in Zone B2 Local Centre—if a lot is in “Area 1” as identified on the [Height of Buildings Map](#) and has a width of less than 20 metres at the road frontage, the maximum building height is 17 metres, and*
 - (b) *for land in Zone B6 Enterprise Corridor—if a lot is in “Area 2” as identified on the [Height of Buildings Map](#) and has an area less than 5,000 square metres, the maximum building height is 11 metres.*
- (2B) *Despite subclause (2), the following restrictions apply to development on land in Zone R2 Low-Density Residential—*
- (a) *for a secondary dwelling that is separate from the principal dwelling—the maximum building height is 6 metres and the maximum wall height is 3 metres,*
 - (b) for a dwelling house or a dual occupancy—the maximum wall height is 7 metres,**
 - (c) *for boarding houses—*
 - (i) *the maximum building height for a dwelling facing a road is 9 metres and the maximum wall height is 7 metres, and*
 - (ii) *the maximum building height for all other dwellings at the rear of the lot is 6 metres and the maximum wall height is 3 metres.*
- (2C) *In this clause, **wall height** means the vertical distance between ground level (existing) and the underside of the eaves at the wall line or the top of the parapet or the flat roof (whichever is the highest).*

This submission contends that strict compliance with the maximum wall height is unreasonable and/or unnecessary in the circumstances of the case and that the variation sought can be supported and that the Clause 4.6 exception to the development standard should be upheld.

	Requirement	Proposal	Compliance	Variation
Lot 22	7m	8.16m	No	16.57%

The design of the future development will consider this to avoid compromising the residential amenity of the site and creating adverse impacts on the adjacent dwellings.

4. CLAUSE 4.6 ASSESSMENT

The development proposes to vary the maximum wall height for dwellings under the provisions of Clause 4.6 of BLEP 2015 – Exceptions to development standards. The purpose of Clause 4.6 is to provide a suitable extent of flexibility in applying development standards to achieve better and ideal building design outcomes. According to Clause 4.6(2) of the BLEP 2015, development consent may be granted for development even though the development cannot comply with the subject control of the BLEP 2015 and certain requirements have to be followed as the subclause (3) and (4) of the BLEP 2015.

Clause 4.6 Exceptions to development standards

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

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

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

This written request seeks to demonstrate how the proposal satisfies Clause 4.6 (3)(a) and (b) of the BLEP2015 and how the development is in the public interest. In the preparation of this request, consideration has been given to the tests arising from *Wehbe v Pittwater Council* [2007] NSWLEC 827. This case sets out five (5) ways of demonstrating that

compliance with a development standard is unreasonable or unnecessary. Other cases (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Randwick Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7) are recognised as typical examples of how Clause 4.6 may be administered. Generally, the 'Wehbe' principles are seen as an appropriate approach to define compliance with a development standard as "unreasonable or unnecessary". To determine whether the proposal's compliance with a development standard is considered as "unreasonable or unnecessary", the proposed variation should meet at least one, preferably more, of the "Wehbe principles". The proposed variation is required to be considered within the context of the provisions under Clause 4.3(2B) of the BLEP 2015. Clause 4.3(2B) stipulates the building height and wall height development standards in an R2 zone. Therefore, this written request is required to demonstrate in this circumstance, it is unreasonable and unnecessary for the proposal to demonstrate compliance with Clause 4.3(2B) of the BLEP 2015, in line with the requirements outlined in Clause 4.6(3) of the BLEP2015.

The five (5) “Wehbe Principles” are as follows:

Principle 1. “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)”

Clause 4.3, Height of Buildings, BLEP2015, Objective (a) “to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located”.

The compliance with the standard is unreasonable or unnecessary in this case because the proposal complies with the objectives of the standard and the zone. Clause 4.6(4)(a)(i) requires the proposed development to be in the public interest, and the proposal needs to be consistent with the objectives for development within the subject zone.

The proposal is compatible with the changing character of Burbank Avenue to a modern dwelling house design. Recent developments at No. 31, 33, and 39 Burbank Avenue has represented this transition of the streetscape character along Burbank Avenue. The design is comparable to the modern style and steeped down design of the neighbouring properties. The proposal captures visual amenity by seeking a variation of the water-front façade wall height. The variation to the wall height allows the proposal to protect the surrounding amenity and views by minimising the maximum height of the development.

The proposal seeks to approve the demolition of existing structures and proposed a two (2) storey dwelling house with basement and swimming pool. The proposal complies with the maximum building height of 9m in accordance with Clause 4.3(2) of the BLEP 2015. The subject site has a significant fall of 16m from Burbank Avenue towards the rear of the site which is immediately adjacent to the Georges River (Figure 3).

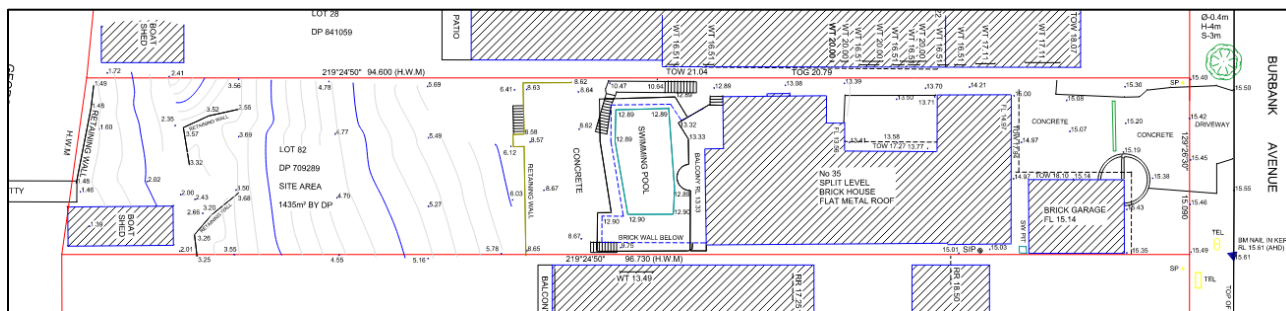


Figure 3: Survey plan shows the fall from the street to the rear of the property (Source: Survey Plan)

The wall height variation is associated with the building feature on the south-western elevation and the rear portion of the dwelling house which contains the first-floor balcony awning, master bedroom and the ground floor living and terrace area. The majority of the building forms are below the 7m wall height and compliant with the maximum 9m building height. (Figure 4).

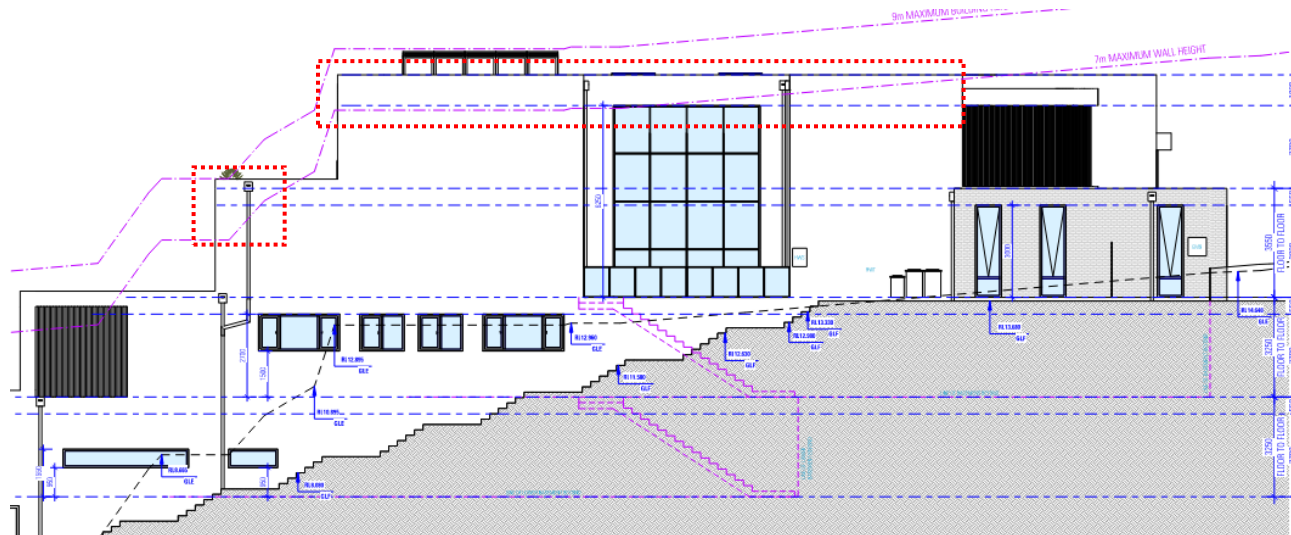


Figure 4: South-east elevation

The land is constrained by the large fall to the rear of the property. The proposed design has paid attention to terrain to ensure that the bulk of the dwelling is minimised. The variation to the wall height is not visible from the street. The portion of the wall height non-compliance is located at the rear of the site. The overall bulk and scale of the development as seen from street view on Burbank Avenue is representative of a two (2) storey dwelling house that is fully compliant with wall height and maximum building height (refer to Figure 5). The design will sit comfortably in the streetscape and is consistent with the wall heights along the Burbank Street. The proposed variation does not cause any adverse impacts on the streetscape which is compatible with the surrounding development along Burbank Avenue (refer to Figure 6 and Figure 7) and desired future design outcome.

The proposal responds to the unique landscape along the George's River waterfront. The future occupant's access to visual amenities is enhanced through this proposal. The minor variation in wall height is consistent with the character and amenity of the neighbouring properties and streetscape. The recent developments surrounding the subject site has been approved with a larger variation to wall and building height. The design demonstrates the development is compatible with the local character, amenity and landform of the area satisfying the objective (a) of Clause 4.3. Therefore, it is unreasonable for our proposal to comply with the 7m wall height as it will stand out from the existing height planes along Burbank Avenue creating an undesired outcome. In addition, compliance with controls is considered unnecessary as the proposed design is well below the maximum building height of 9m as per Clause 4.3 of BDCP 2015.

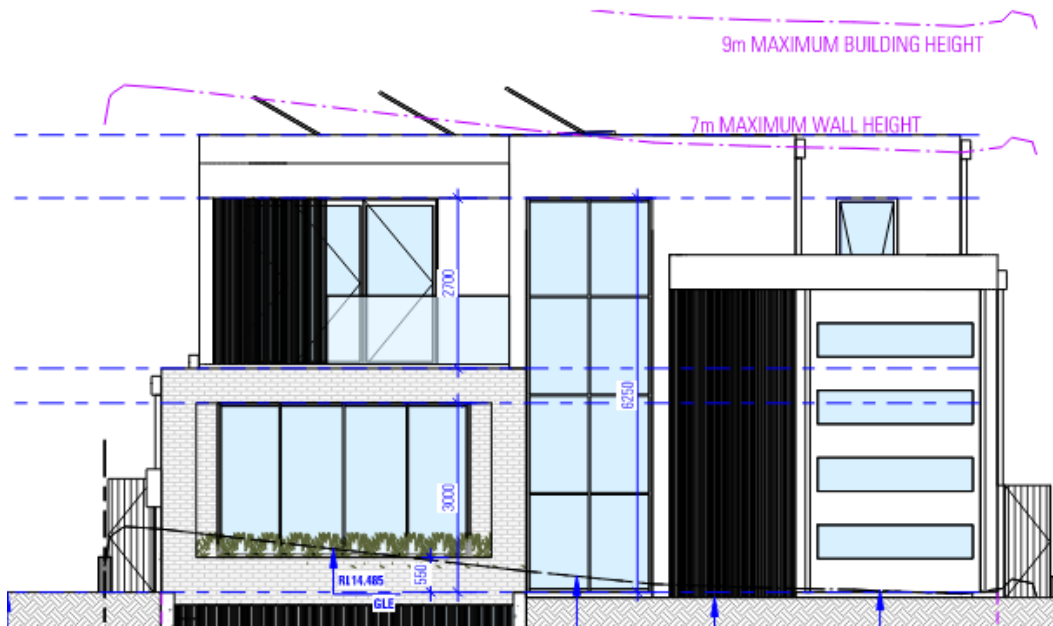


Figure 5: Development as seen from Burbank Avenue street view



Figure 6: No. 31 and No. 33 Burbank Avenue showing the desired future character of the area



Figure 7: A series of two-storey dwellings with flat roof at No. 30 to No. 38 Burbank Avenue

The proposal has been designed to step down to follow the natural terrains. However, it is inevitable to have the wall height exceeding the allowance in the rear of the proposal without significantly increasing the excavation volume due to the ground level drop in the rear portion of the site. The 4.3m change in ground level is drastic and the building has been stepped down to follow the terrain to ensure that the building is a maximum of 2 storeys at each point.

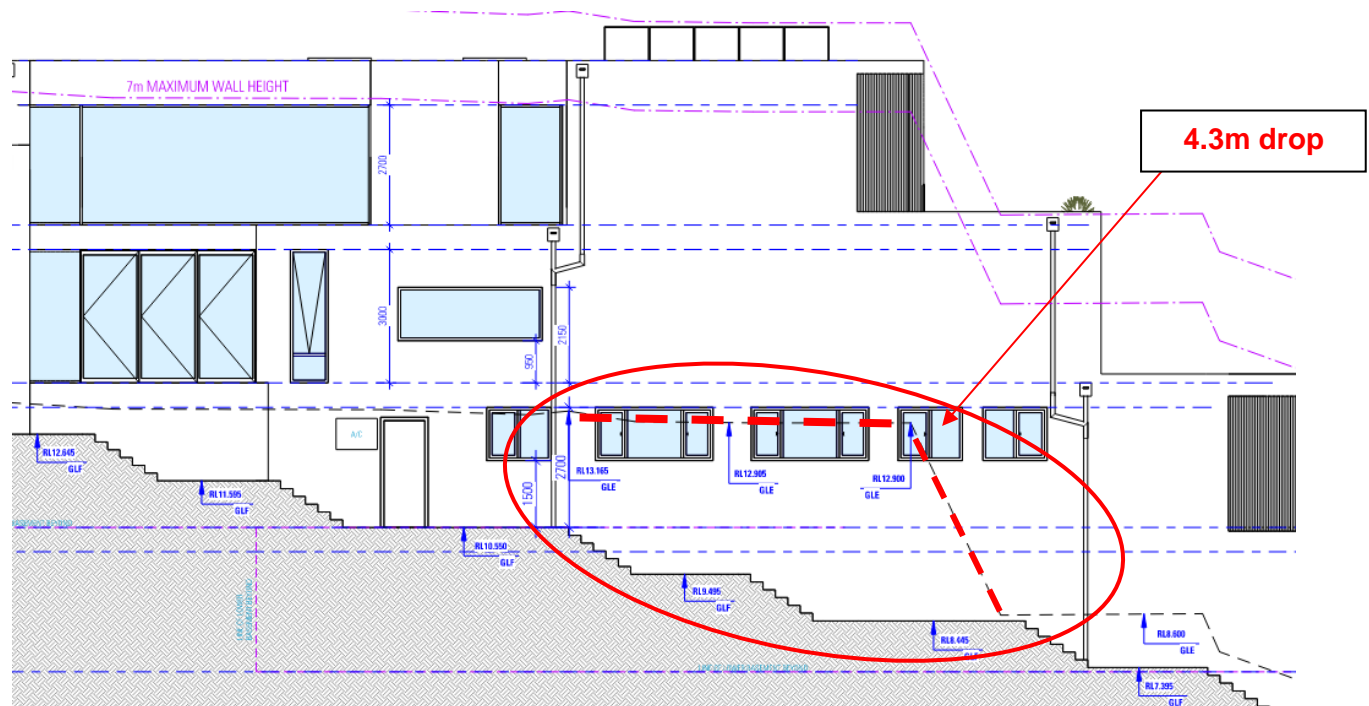


Figure 9: Significant drop in the rear of the site

The wall height variation will not generate any unreasonable adverse impacts to surrounding properties including overshadowing and view loss or privacy. The compliant front, side setbacks ensure there are adequate separation distances between neighbouring development. The unique location which is adjacent to the riverbank eliminates the possibility of overlooking impacts.

The wall height variation is well integrated into the high-quality, articulated design of the proposal and ensures that the built form will contribute positively to the locality. It is for the reasons listed above ES Planning considers objective (a) is satisfied.

Clause 4.3, Height of Buildings, BLEP2015, Objective (b) “to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low-Density Residential”

The proposal maintains the prevailing suburban character of Burbank Avenue, East Hill. The prevailing suburban character is represented by contemporary two (2) storey dwellings. The dwellings on the southern side of Burbank Avenue, East hill responds to the difficult and sloping terrain by stepped down building designs to comply with maximum 2 storey built form control. The modern neighbouring developments are all typified by significant wall heights, significant floor to ceiling heights, and open entertainment areas in the rear.

The proposal respects the existing streetscape and sits significantly under the maximum building height. A development approach to maximise the available Georges River water views can be seen in neighbouring developments. The proposal maintains the prevailing suburban character by capturing the unique Georges River Water views. By maintaining the prevailing suburban character and complying with the maximum permissible building height, the proposal satisfies Objective (b).

The proposed height variation will not be overbearing in the streetscape. The proposal will sit comfortably and appropriately along Burbank Avenue, East Hill. In line with the objective outlined above, the proposal has been limited to two (2) storeys in the R2 zone. For the above reasons, the proposal satisfies Objective (b) and is compliant with the desired future character. It is for these reasons ES Planning believes the proposal is appropriate.

Clause 4.3, Height of Buildings, BLEP2015, Objective (c) *“to provide appropriate height transitions between development, particularly at zone boundaries,”*

The proposal demonstrates a wall height non-compliance contained within the roof design. This proposal provides an appropriate height transition throughout the R2 zone and between developments. Specifically, the proposal provides an appropriate transition into a modern style along the southwestern side of Burbank Avenue. As demonstrated along the street view, the newer development has been approved and built with a ridge height significantly higher than the proposal. There is no additional impact to the neighbour's solar amenity due to orientation. The proposed wall height is an appropriate height transition responding to the unique Georges River water views and the neighbouring wall heights. By maintaining a wall height transition that is compatible and a compliant building height, it is ES Planning's opinion the proposal satisfies Objective (c).

Clause 4.3, Height of Buildings, BLEP2015 objective (d) *“to define focal points by way of nominating greater building heights in certain locations.”*

The proposal sits in line with the streetscapes existing building height provision. By complying with the maximum building height in clause 4.3(2) of the BLEP 2015 the proposal maintains the future desired street character. Furthermore, breaching clause 4.3(2B) within the waterfront façade does not redefine focal points outside of the future desired streetscape. The proposal seeks to maintain the existing focal point by proposing a building height significantly under the maximum permissible building height. It is ES Planning's opinion that objective (d) is satisfied.

Principle 2. *“the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary”*

Not Applicable

Principle 3. *“the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable”*

Not applicable. The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

Principle 4. *“Establish that 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 unreasonable or unnecessary.”*

Not applicable.

Principle 5. *Establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.*

Not applicable.

4.2 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

The proposal complies with the maximum building height of 9m in accordance with the BLEP 2015. The flat roof design significantly reduces the potential building bulk in the subject location as the strict compliance of building height and wall height could generate amenity impacts to adjoining neighbours.

Collectively, the strict compliance with the standard is unreasonable and unnecessary in the particular circumstances of the case.

4.2 CLAUSE 4.6(3)(B) - SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

It is considered that there are sufficient environmental planning grounds to justify varying the building height development standard, which includes:

The subject site is flood-affected and is therefore also responsible for the height variation. In addition, the significant fall from the street to the river bank also contributes to the wall height which exceeds the standards as the site would comply if the site is flat.

The height variation ensures that it will not be visible from the public domain directly in front of the site and will therefore not be responsible for any unreasonable streetscape impacts, as shown on the elevations. The height variation will not be evident from the street and it will not appear uncharacteristic in the context of the site when viewed from surrounding properties.

The height variation of the proposal allows for the comfortable floor to ceiling height and access to the rear balcony which will benefit future residents from internal and external amenity points of view. The location of the balcony provides residents with a great chance of enjoying the external view of the Georges River.

The location of the height variation ensures there are unreasonable overshadowing or privacy impacts to neighbouring properties. The height variation has been well integrated into the high-quality and articulated design aesthetic of the built form and will positively contribute to locality.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the height variation in this instance.

4.3 PUBLIC INTEREST – CLAUSE 4.6(4)(A)(II)

Achieving the objectives of the zoning is the key to determining the proposal is in the public interest. In Part 4.1 of this letter, development controls have been considered as “unreasonable and unnecessary”, and objectives of Clause 4.3 and zoning could be achieved.

The proposed dwelling house proposal is considered to be in the public interest as the proposal meets the objectives of the subject clause.

4.3 Height of buildings

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

- (a) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*
- (b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of two storeys in Zone R2 Low-Density Residential,*
- (c) to provide appropriate height transitions between development, particularly at zone boundaries,*
- (d) to define focal points by way of nominating greater building heights in certain locations.*

Assessment

The proposed two-storey dwelling house with a basement is consistent with the scale of development anticipated by the R2 Medium Density Residential zone. Importantly, the height variation will sit comfortably and will not be visible from Burbank Avenue street frontage. In this regard, it is considered that the proposed height variation results in a built form that is of a size and scale that is compatible with the desired future of this part of East Hills.

The proposal is in the public interest, as the design is well articulated and provides an appropriate transition of building height, responding to the greater neighbouring building height. Furthermore, the design is aesthetically pleasing and increases amenity both for the occupants and the surrounding community area.

The height variation does not generate any unreasonable or adverse amenity impacts to neighbouring properties. In this regard, the recessed nature of the height variation will not generate any unreasonable overshadowing impacts to the adjoining neighbours. No significant views are obstructed by the height variation.

Based on the above assessment, it is considered that strict compliance with the LEP height standard is unreasonable and unnecessary in this instance.

Zone R2 Low-Density Residential

1 Objectives of zone

- *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 allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.*
- *To allow for the development of low-density housing that has regard to local amenity.*
- *To require landscape as a key characteristic in the low-density residential environment.*

The height variation facilitates the provision of a dwelling house which is permissible in the R2 Low-Density Residential Zone. The scale of the development type is compatible with the nature of the low-density residential area. The dwelling has been well designed by necessary recess and a combination of different building façade materials to improve the visual impact, bulk and scale and bring more architectural aesthetics to the streetscape. The basement garage has been recessed from the front elevation which assists to minimise the visual dominance from the streetscape.

The proposal complies with the BLEP 2015 requirements for floor space ratio, building height, setbacks and front landscape ratio. It does not create excessive potential overshadowing, privacy and noise impact to neighbouring developments which does not impact the living environment or amenity of the area. The proposal also respects the streetscape in accordance with the future desired building height and setbacks requirements.

Collectively, this project has achieved the objectives of the zoning and it is in the public interest.

6. CONCLUSION

For the above reasons, it is considered pursuant to Clause 4.6 of BLEP 2015 this written request addresses that strict compliance with the maximum wall height is unreasonable and unnecessary particular to the circumstance of the case and there are sufficient environmental planning grounds to justify the contravention. Notwithstanding, the development has also demonstrated an outcome that is consistent with the objectives of Clause 4.3 of the BLEP 2015 and in the public interest.

ES Planning

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