CLAUSE 4.6 – HEIGHT OF BUILDINGS
(CLAUSE 4.3 MLEP 2013)

(Revised 18 October 2022)

WRITTEN SUBMISSION PURSUANT TO CLAUSE 4.6 OF MANLY LOCAL ENVIRONMENTAL PLAN 2013

54 FRANCIS STREET, MANLY

ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING

VARIATION OF A DEVELOPMENT STANDARD RELATING TO COUNCIL'S HEIGHT OF BUILDINGS CONTROL AS DETAILED IN CLAUSE 4.3 OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

For: Additions and alterations to an existing dwelling
At: 54 Francis Street, Manly
Owner: Joely & Greg Hackman
Applicant: Joely & Greg Hackman
C/- Vaughan Milligan Development Consulting Pty Ltd

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum height of a building as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

This revised written request considers the revised architectural plans prepared by Novam Design Studio will, Revision_D dated September

2.0 Background

Clause 4.3 of MLEP sets out the maximum height of a building as follows:

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

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

(b) to control the bulk and scale of buildings,

(c) to minimise disruption to the following—
(i) views to nearby residential development from public spaces (including the harbour and foreshores),
(ii) views from nearby residential development to public spaces (including the harbour and foreshores),
(iii) views between public spaces (including the harbour and foreshores),

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

(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.

The Height of Buildings Map specifies a maximum building height of 8.5m.

The proposed additions to the existing dwelling will result in a portion of the new roofing being up to 9.152m in height, resulting in a non-compliance of 0.652m or 7.67% to the control, as noted in Figure 1.

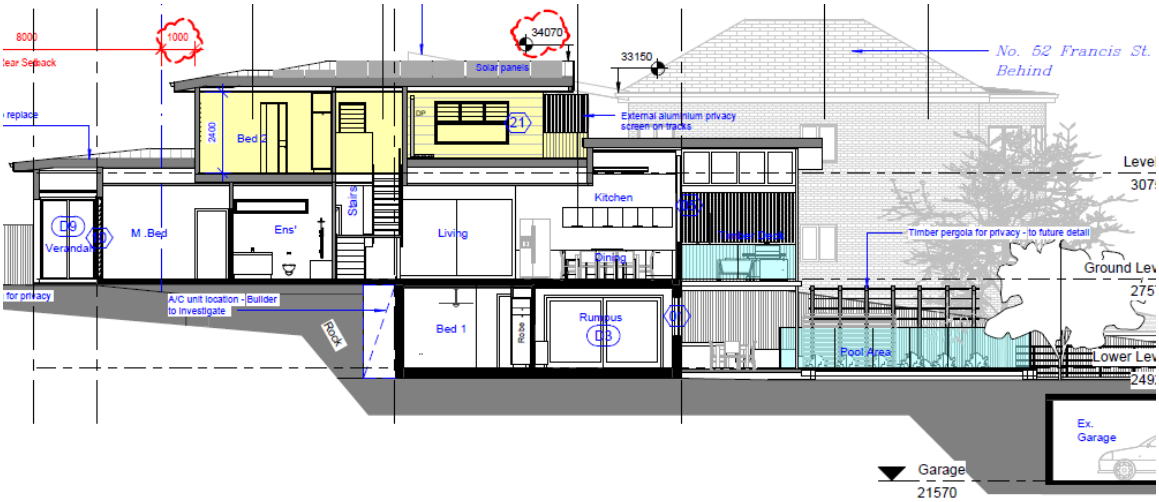


Fig 1: Section indicating proposed roof exceeding Council's height of buildings control (Source: Novam Design Studio)

The Dictionary to MLEP operates via clause 1.4 of MLEP. The Dictionary defines "building height" 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.

For the purposes of calculating the maximum building height, the existing excavated level within the site and in particular the excavated lower floor level has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].

When the excavated lower level is used as the reference point for the 8.5m height control, the proposed additions and alterations present a non-compliance with the maximum building height standard, having a height of up to 9.152m.

When measured above the external ground levels and in particular the southern elevation, the visual height of the building does not exceed 8.5m when viewed from the south, east and north. From the west, the building presents as a stepped two storey height.

As noted in *Merman* [at 74] the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the land, is considered to be an environmental planning ground within the meaning of clause 4.6 (3)(b) of MLEP 2013.

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

Is clause 4.3 of MLEP a development standard?

(a) The definition of "development standard" in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

"(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work."

(b) Clause 4.3 relates to the maximum height of a building. Accordingly, clause 4.3 is a development standard.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

(a) To provide an appropriate degree of flexibility in applying certain development standards to particular development, and
(b) To achieve better outcomes for and from development by allowing flexibility in particular circumstances.

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

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

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP provides:

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

Clause 4.3 (the height of a building standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the maximum height of a building development standard pursuant to clause 4.3 of MLEP which specifies a maximum building height of 8.5m. As a consequence of the site's slope and the existing built form the proposal will present a maximum height of 9.152m.

As discussed in *Merman* [at 74] the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the land, is considered to be an environmental planning ground within the meaning of clause 4.6 (3)(b) of MLEP 2013.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

In the circumstances of this case, there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

(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.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 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 development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained.

Under cl 55 of the *Environmental Planning and Assessment Regulation 2021,* the Secretary has given written notice dated 5 May 2020, 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.

Clause 4.6(5) of MLEP provides:

(5) In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause

4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

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

The development will achieve a better outcome in this instance as the site will provide for the construction of alterations and additions to an existing dwelling, which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal will provide for the construction of alterations and additions to an existing dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the minor non-compliance with the maximum height control of 0.652m or 7.67%, the new works will provide attractive alterations and additions to a residential development that will add positively to the character and function of the local residential neighbourhood.

It is noted that the adjacent dwelling to the south at No 52 Francis Street appears as a two and three level dwelling and is this regard, the proposal for a stepped two and three level addition is not considered to be out of character with its neighbour,

It is also noted that the adjoining dwelling to the north is an original single storey dwelling with works underway to provide for a contemporary two storey rear addition.

The amended plans provide for northern side setbacks to 1.5m for Bedroom 2 and the stairwell and to 2m for Bedroom 1, accordingly the visual bulk and scale of the development as viewed from each adjoining neighbour will be appropriately mitigated.

Further, the maximum ridge level is limited to RL 34.070, which will appropriately address the height of the roof element that contributes to the extent of the height non-compliance.

5.0 The Nature and Extent of the Variation

5.1 This request seeks a variation to the maximum height of a building development standard contained in clause 4.3 of MLEP.

5.2 Clause 4.3 of MLEP specifies a maximum building height of 8.5m for development in this part of Manly.

5.3 As a consequence of the sloping topography of the site and the previous excavation to the existing lower floor level within the building footprint, the proposed additions and alterations to the existing dwelling will incorporate a new first floor addition with a maximum building height of 9.152m, which exceeds the building height control by 0.652m or 7.67%.

6.0 Relevant Caselaw

6.1 In Initial Action the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

> *17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
>
> *18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
>
> *20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
>
> *21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the*

case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

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 of 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.

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the R1 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP?

7.0. Request for Variation

7.1 Is compliance with clause 4.3 unreasonable or unnecessary?

(a) This request relies upon the 1st way identified by Preston CJ in Wehbe.

(b) The first way in Wehbe is to establish that the objectives of the standard are achieved.

(c) Each objective of the maximum building height standard and reasoning why compliance is unreasonable or unnecessary is set out below:

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by two – three storey development. The proposal seeks to accommodate the additions within a compatible building form, with the slope of the site towards the west and as a consequence of the excavated levels within the lower floor level of the building footprint, the new works will be up to 9.152m in height when measured above the existing excavated lower floor level.

The overall building height respects the surrounding character and the design seeks to minimise the visual impact through distributing the new first floor area with a significant setback from the rear, retaining the current single storey height and presenting a substantial setback from the western elevation of the lower levels which present modest two storey

(b) to control the bulk and scale of buildings,

The proposed additions and alterations to the existing dwelling will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

Further, the modulation of the front façade and building elevations where visible from the public domain minimises the visual impact of the development. Combined with a substantial setback to the rear boundary of between 9 - 10 m, which exceeds Council's minimum rear setback control within the Manly DCP 2013 (Cl. 4.1.4.4) of 8m.

The proposal presents a compatible height and scale to the surrounding development and the articulation to the building facades and low pitch roof form will suitably distribute the bulk of the new floor area.

The amended plans provide for increased northern first floor side setbacks to 1.5m for Bedroom 2 and the stairwell and to 2m for Bedroom 1, accordingly the visual bulk and scale of the development as viewed from each adjoining neighbour will be appropriately mitigated.

Further, the maximum ridge level is limited to RL 34.070, which will further reduce the height of the roof element that contributes to the extent of the height non-compliance.

(c) to minimise disruption to the following:

- ***(i) views to nearby residential development from public spaces (including the harbour and foreshores),***
- ***(ii) views from nearby residential development to public spaces (including the harbour and foreshores),***
- ***(iii) views between public spaces (including the harbour and foreshores),***

Due to the general slope of the site towards the west, the adjoining properties on the eastern side of Francis Street enjoy district views towards the north-west.

The proposal will provide for a low profile roof form which will allow for suitable views to be maintained through and over the site.

Views from the surrounding public spaces are not adversely affected.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

As the proposal will see the construction of alterations and additions to an existing dwelling, the shadow analysis prepared by Novam Design Studio details the proposed shadow impacts.

The assessment confirms that the proposed alterations and additions will not result in any unreasonable or adverse impacts to the existing solar access enjoyed by the primary private open spaces and primary living rooms of the adjacent southern neighbour.

The southern neighbouring dwelling contains three living areas in addition to the rear private open space and rear ground floor terrace.

The shadow analysis confirms that the southern neighbour will retain the opportunity for the first floor level rumpus room and western living room to maintain equitable and adequate solar access in accordance with Council's DCP control Clause 3.4.1.

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

The site is not located within an environmental protection zone or is the immediate locality characterised by bushland and alternative surrounding land uses.

The proposal is intended to reflect the predominant scale and form of the surrounding development in Francis Street and will reflect the existing single dwelling uses in the vicinity.

The proposal will not require the removal of any significant vegetation, and maintains a suitable area of soft landscaping.

7.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *24. 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].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The low pitch roof form maintains modulation and architectural relief to the building's facade, and distributes any sense of visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed alterations and additions introduce modulation and architectural relief to the building's facade, without seeing any substantial increase to the building's bulk, which promotes good design and improves the amenity of the built environment (1.3(g).

- The design will maintain the general bulk and scale of the existing surrounding dwellings and responds to the sloping topography and the constraints presented by the location and form of the existing dwelling, which promotes the orderly & economic use of the land (cl 1.3(c)).

- Similarly, the proposed additional floor area will provide for improved amenity within a built form which is compatible with the streetscape of Francis Street which also promotes the orderly and economic use of the land (cl 1.3(c)).

- The height non-compliance can be attributed to the prior excavation of the site within the footprint of the existing building, which has distorted the height of buildings development standard plane overlaid above the site when compared to the topography of the existing land and this is considered to be an environmental planning grounds which supports the variation to the control.

- The proposed new works which exceed the maximum building height control are considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, by massing the new work towards the centre of the existing building footprint, minimising the visual impact of the bulk and scale when viewed from the rear yards of the northern and southern neighbours.

- The alterations demonstrate good design and improve the amenity of the built environment by creating improved and functional living area whilst retaining suitable amenity for the adjoining properties (cl 1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst reducing the maximum building height and manages the bulk and scale and maintains views over and past the building from the public and private domain.

The previous excavation of the site and the consequent distortion of the height of buildings plane over the site when compared to the external levels and natural topography of the land is considered to be a constraint which impacts on the aspect of the development that contravenes a development standard, being the minor breach to the maximum building height control that is directly above the former excavation of the site.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the height of buildings control.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that

contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.
As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R1 General Residential zone?

(a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.

(b) Each of the objectives of the R1 General Residential Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ found also that "*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone".*

In response to *Nessdee,* I have provided the following review of the zone objectives:

It is considered that the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R1 General Residential Zone for the following reasons:

- ***To provide for the housing needs of the community***

  The proposal provides for alterations and additions to the existing dwelling, which continues to provide for the housing needs of the community.

- ***To provide a variety of housing types and densities.***

  The proposal seeks to add to and alter the existing dwelling which maintains its contribution to the housing stock in the locality.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

  This does not apply to the subject residential development.

7.4 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed additions to the dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

This development proposed a departure from the maximum building height development standard, with the proposed additions and alterations to provide for a maximum building height of 9.152m when measured above the prior excavated levels of the site immediately within the building footprint which results in a non-compliance with the standard of 0.652m or 7.67%.

The maximum ridge level is limited to RL 34.070, with the overall height 9.152m or a breach of the control by 0.652m or 7.67%.

The plans provide for increased northern side setbacks to the first floor level and further privacy protection measures to windows facing the side boundaries which also assists in alleviating the impacts to the neighbouring properties resulting from the proposed works.

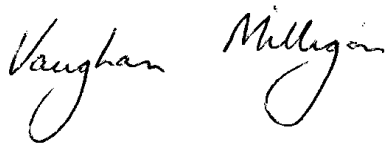
This variation occurs as a result of the sloping topography of the site and the prior excavation of the site within the building footprint, resulting in the distortion of how the building height plane relates to a site with excavated levels below the current building.

The extent of the variation to the building height control does not result in any significant impact for the views and outlook for the neighbouring properties.

This written request to vary to the maximum building height standard specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.



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