



Minto Planning Services

Town Planning Consultants

**PROPOSED NEW DWELLING & SWIMMING POOL  
25 CABBAN STREET, MOSMAN**

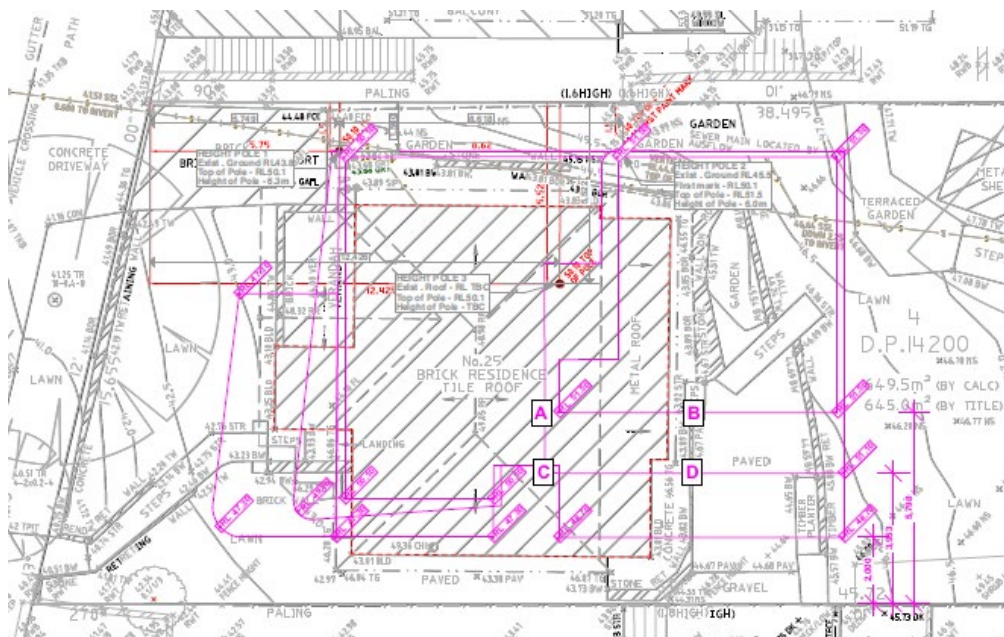
**LEC PROCEEDINGS 2021/00142608**

**Clause 4.6 - Exceptions to Development Standards  
Variation to Clause 4.3A - Maximum Wall Height**

The proposal seeks approval for the erection of a new dwelling house and swimming pool upon the subject site.

The Council contends that the proposal in part results in wall heights which exceed 7.2m in height. It is my understanding that the alleged non-compliances occur between Points A & B and Points C & D marked on the plan below. It is understood that the exact extent of the non-compliance is unknown given that it in part relates to the existing ground level located within the sub-floor area of the existing dwelling house and which has not been accessed or surveyed (Points A & C). This Clause 4.6 variation provides for an estimation of the existing ground level in relation to Points A & C.

I do not agree with Council that Points A & B form part of the external wall of the dwelling. It is my opinion that Points A & B relate to part of the roof structure.



**Extract of Architectural Plan DA33**



Extract of Architectural Plan DA36

In relation to Points A & B it is noted that they form part of a 400mm high parapet associated with the roof form and that relative to the southern side boundary it is noted that:

- Points A & B do not comprise the southern-most alignment of the proposed dwelling.
- The southern-most ground floor external wall of the dwelling is provided with a 2.0m setback from the southern side boundary.
- The southern-most first floor external wall of the dwelling is provided with a 3.953m setback to the southern side boundary.
- Points A & B are provided with a 5.798m setback from the southern side boundary.
- Points A & B comprise approximately 50% of the length of the southern alignment of the parapet roof.

In relation to Points C & D it is noted that they form part of the first floor level southern elevation and that relative to the southern side boundary it is noted that:

- Points C & D do not comprise the southern-most alignment of the proposed dwelling.
- The southern-most ground floor external wall of the dwelling is provided with a 2.0m setback from the southern side boundary.
- Points C & D are provided with a 3.953m setback to the southern side boundary.

- Points C & D comprise approximately 50% of the length of the southern upper level wall.

In relation to Points A, B, C & D it is noted that the existing ground levels located below those points are:

- Points A & C - The existing ground level located immediately below Points A & C is currently unknown as the existing ground level is located within the sub-floor space of the existing dwelling and has not been accessed for the purpose of a survey to determine the existing ground level. The following estimate of the existing ground level relative to these points is provided based upon the existing ground levels immediately adjacent to the external walls of the northern elevation of the existing dwelling (RL 43.83) and the southern elevation of the existing dwelling (approx. RL 43.6), both of which are located along a similar alignment to Points A & C. It is therefore my estimation that the RL under Points A & C would be approximately RL 43.7 and which is 400mm below the floor level of the existing dwelling. This is considered a reasonable assumption in my opinion.
- Point B & D - RL 43.81 being the external paved area immediately at the rear of the existing dwelling.

It is noted that the area to the east of Point B & D has an RL of greater than RL 44.67 which results in a compliant wall height.

On the basis of the above it is my opinion that the non-compliances associated with Points A, B, C & D are:

- Point A (RL 51.5) - 600mm (estimated)
- Point B (RL 51.5) - 490mm
- Point C (RL 51.1) - 200mm (estimated)
- Point D (RL 51.1) - 9mm

On this basis the proposal will result in a non-compliance with Council's wall height controls, certainly in relation to Points C & D.

This Clause 4.6 variation has been prepared having regard to the recent decisions of the Land & Environment Court.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

**1. What are the objectives of Clause 4.6 and is the proposal consistent with them.**

The objectives of Clause 4.6 of the LEP are:

- (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.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this Clause as flexibility is required as a result of the topography of the site, the inability to survey the existing ground level relative to the identified points, the building design and the location of the identified points relative to the boundaries of the site.

**2. Is the standard to be varied a Development Standard to which Clause 4.6 applies**

Clause 4.3A is contained within Part 4 of the LEP and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to matters which constitute development standards.

It is also noted that Clause 4.3A does not contain a provision which specifically excludes the application of Clause 4.6.

On this basis it is considered that Clause 4.3A is a development standard for which Clause 4.6 applies.

**3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.**

It is my opinion that compliance with the requirements of Clause 4.3A is both unreasonable and unnecessary in the circumstances of this case on the basis that it satisfies the underlying objectives of the control as detailed below:

- The proposal is for the construction of a new dwelling which will have a maximum building height of approximately 7.8m in circumstances whereby a maximum building height of 8.5m.

- Points A & B in my opinion do not constitute part of the external wall and actually form part of the roof structure and are located towards the centre of the building consistent with where a roof ridge would normally be located.
- Points C & D are provided with a setback from the southern side boundary of 3.953m from the southern side boundary which is nearly twice the setback of the corresponding section of the ground floor and is 953mm greater than the minimum setback required by Council's DCP.
- The proposed non-compliances associated with Points C & D are considered to be minor in nature and range from between 9mm to 200mm.
- It is considered that the non-compliances would not be discernible from the street or adjoining properties given that the existing ground level immediately below those points is not capable of being observed from any vantage point.
- The subject building element does not result in any unreasonable overshadowing of the adjoining property.
- The subject building element does not result in a loss of privacy to the adjoining properties.
- The subject building element will not result in any unreasonable external impacts.
- The proposed dwelling is of a design which is in keeping with and which will complement the surrounding locality.

Importantly, the proposal in my opinion will not result in any unreasonable impacts upon either adjoining properties or the streetscape as a result of the non-compliance.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

#### **4. Are there sufficient environmental planning grounds to justify contravening the development standard.**

It is considered that a contravention of the development standard is justified on environmental planning grounds given the minor nature of the breach in relation to Points C & D combined with:

- a. The sloping and previously altered topography of the site. The site on average has a fall of approximately 3.5m over the length of the building platform and a diagonal cross fall of approximately 5m from the north east to the south west.
- b. The setback provided to the subject wall, noting that it is not the closest external wall of the dwelling relative to the side boundary, being inset from the ground floor wall by 1953mm.

- c. The fact that at no point following completion of the building will it be possible to identify that the height of Points C & D exceeds 7.2m measured from the existing ground level.

**5. Is the proposed development 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.**

The proposed development is in my opinion in the public interest because it will provide for a high-quality outcome for the site in a manner which is in keeping with the character of the locality and is otherwise compliant with the requirements of the LEP, the applicable zone objectives and the objectives of the particular standard.

In this regard, it is submitted that in relation to the objectives for the R2 - Low Density Residential zone that:

- *To provide for the housing needs of the community within a low density residential environment.*

The proposal seeks to maintain the existing single dwelling residential use of the site.

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

Not applicable.

- *To retain the single dwelling character of the environmentally sensitive residential areas of Mosman.*

The proposal seeks to maintain the existing single dwelling residential use of the site.

- *To maintain the general dominance of landscape over built form, particularly on harbour foreshores.*

The proposal achieves compliance with the landscape area requirements of Council and in my opinion will maintain the general dominance of landscape over built form.

- *To ensure that sites are of sufficient size to provide for buildings, vehicular and pedestrian access, landscaping and retention of natural topographical features.*

The proposal does not seek to alter the size of the existing allotment.

- *To ensure that development is of a height and scale that seeks to achieve the desired future character.*

Notwithstanding the proposed non-compliance the proposal is considered to provide for a development having a height and scale consistent with the desired character sought by the Council.

Importantly it is noted that the proposal has an overall height which is 700mm less than the maximum height of building permitted by Clause 4.3 of the LEP and is provided with a compliant FSR in accordance with the requirements of Clause 4.4 of the LEP.

- *To encourage residential development that maintains or enhances local amenity and, in particular, public and private views.*

It is my opinion that the proposal will result in any unreasonable view impacts.

- *To minimise the adverse effects of bulk and scale of buildings.*

It is my opinion that there will be no adverse effects of bulk and scale resulting from the proposal.

The proposal is also considered to be consistent with the objectives of Clause 4.3A - Height of Buildings in that:

1. The proposed dwelling is considered to be compatible with the height and scale of surrounding and nearby development.
2. The proposal will not result in any unreasonable visual impacts, disruption of views, loss of privacy or loss of solar access.
3. The proposal will not result in any visual impacts when viewed from public places.

**6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.**

It is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning.

**7. What is the public benefit of maintaining the development standard.**

It is my opinion that there is no public benefit in maintaining the development standard in this instance given the high quality of the proposal and the absence of any unreasonable detrimental impacts.

## **Conclusion**

It is therefore my opinion based upon the content of this submission that a variation of the wall height requirements of Clause 4.3A of the Mosman LEP 2012 is appropriate in this instance.

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MINTO PLANNING SERVICES PTY LTD  
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