

CLAUSE 4.6 VARIATION REQUEST (HEIGHT VARIATION)

**Development Consent for a new
Dwelling House, Secondary Dwelling
and Swimming Pool**

**2 Prince Edward Road, Seaforth NSW
2092**

Lot 28F DP 16341

February 2025

1. Introduction

The following written request has been prepared in accordance with the provisions of Clause 4.6 - Exception to development standards of the *Manly Local Environmental Plan 2013* to support the Development Application (DA) for a dwelling house, secondary dwelling and swimming pool on land at 2 Prince Edward Road, Seaforth NSW 2092, legally described as Lot 28F in DP 16341.

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Clause 4.6 of the Manly Local Environmental Plan 2013 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2. Development Standard to be Varied

The site is zoned R2 Low Density Residential under the Manly LEP 2013 and development for the purposes of a Dwelling House is permitted with consent. The proposal seeks a variation to the development standard contained within Clause 4.3 of the Manly LEP2013 – maximum height 8.5m, as demonstrated on the LEP map in Figure 1 below.

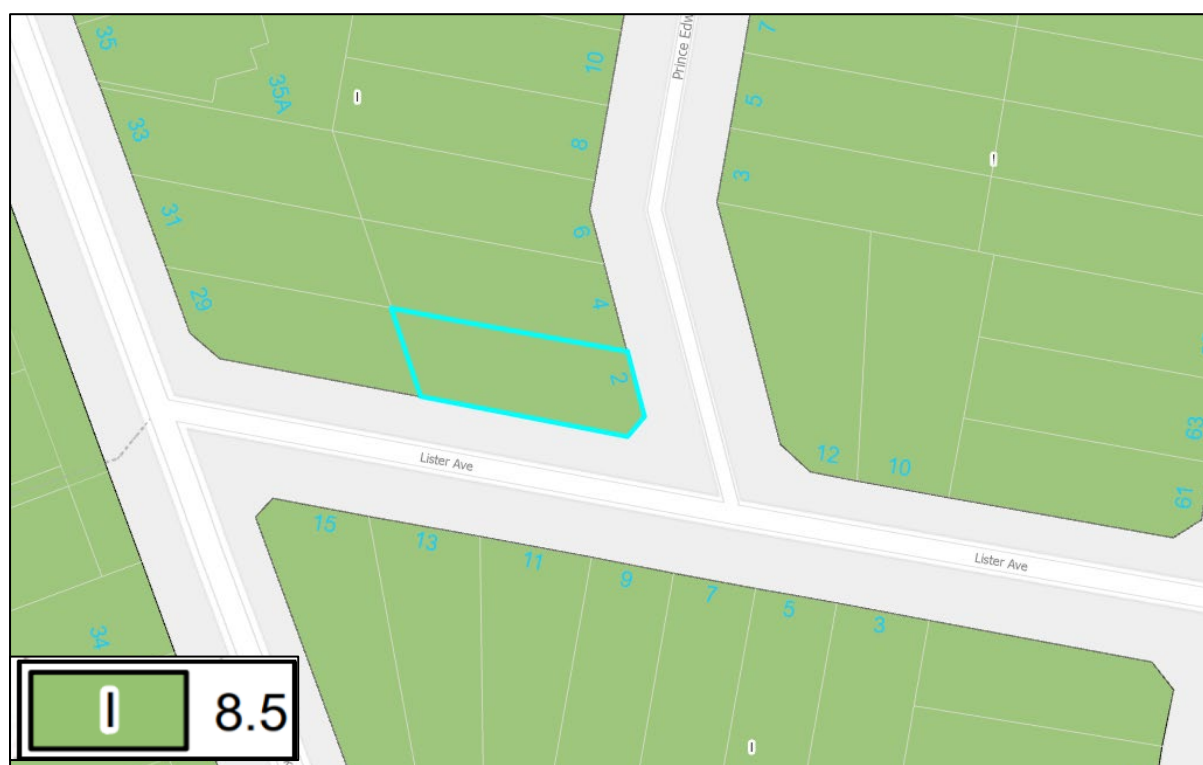


Figure 1: Manly Height of Buildings Map

The proposed dwelling house has a maximum height of 8.58m which represents a 0.94% (0.08m) variation from the 8.5m numerical development standard for the site pursuant to Clause 4.3 of MLEP2013. The very minor roof form element that protrudes above the maximum height limit is due to

the slope of the site. The entirety of the dwelling house remains under the maximum height limit which ensure that the proposed development mitigates adverse impacts to surrounding properties and public domain.

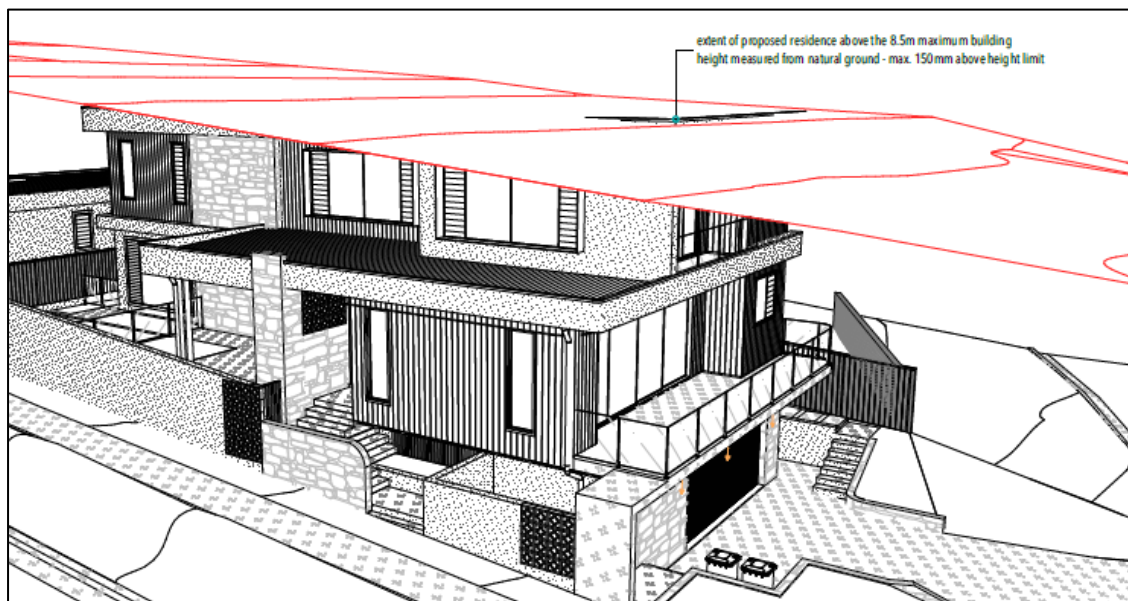


Figure 2: Extent of proposed building height variation

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control 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.*

This Clause 4.6 Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under Manly LEP 2013. It considers the various planning controls, strategic planning objectives and existing characteristics of the site, and concludes that the proposed non-compliances achieve the objective of encouraging orderly and economic use and development of land under Section 5 of the *Environmental Planning and Assessment Act 1979* ('EP&A Act').

Further, this Clause 4.6 Variation Request has demonstrated that there are sufficient environmental planning grounds for the departure to the height of building development standards in accordance with Clause 4.6(3)(b) of the LEP. In this respect, this Clause 4.6 Variation Request has provided the following:

- Identified the specific aspect or feature of the development that contravenes the relevant development standard;
- Justified why the contravention of the development standard is acceptable, rather than simply promoting the benefits of carrying out the development as a whole; and
- Explained on what basis there are sufficient environmental planning grounds to justify contravening the development standard.

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In justifying the proposed contravention and demonstrating sufficient environmental planning grounds, this request is considered to have demonstrated how the proposed contravention itself satisfies Section 1.3 of the EP&A Act.

2.1 Clause 4.6 of the Manly LEP 2012

In accordance with Clause 4.6 of the Manly LEP 2013 a written request that seeks to justify a contravention to a development standard must demonstrate compliance with the following subclauses:

- 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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
 - a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Pursuant to clause 4.3 in the LEP the max building height shall not exceed 8.5 metres, however 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.

2.2 Case Law

Relevant case law on the application of the standard LEP Clause 4.6 provisions has established the following principles:

- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, which emphasised that the proponent must address the following:
 1. Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 2. There are sufficient environmental planning grounds to justify contravening the development standard;
 3. The development is in the public interest;
 4. The development is consistent with the objectives of the particular standard; and
 5. The development is consistent with the objectives of development within the zone;

- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- Wehbe v Pittwater Council [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 1. The objectives of the standard are achieved notwithstanding the 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 objective or 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; or
 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The objectives supporting the maximum building height control identified in Clause 4.3 are discussed in section 3 below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

3. Justification for Contravention of the Development Standard

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless 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*
- (j) 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*

The Environmental Planning Instrument to which these variations relate to is the Manly LEP 2013. The development standard to which this variation relates to is Clause 4.3 – Height of Buildings.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.3 being:

- a) *to ensure that the height of buildings is compatible with the bulk, scale and character of the locality,*
- b) *to minimise adverse impacts on existing or future amenity of adjoining properties and the scenic or landscape quality of the locality,*
- c) *to protect significant views from public places.*

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Referring to the architectural plans submitted, it is noted that the maximum building height of the proposed dwelling house is approximately 8.58 metres, exceeding the maximum permitted by 80mm. Despite the minor exceedance, the development achieves appropriate separation to the adjacent dwelling houses and provides generous landscaped areas, private open space and various other requirements. Assessment against the matters required to be demonstrated by Clause 4.6(3) are addressed below.

3.1 Clause 4.6(3)(a) - Is compliance with the Development Standard unreasonable or unnecessary in the circumstances of the case?

As to the “unreasonable or unnecessary” component, in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [16]-[21] the Chief Judge of the Land and Environment Court explained the common ways in which this requirement is satisfied:

1. The objectives of the standard are met, notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* (2007) 156 LGERA 446 at [42] and [43].
2. The underlying objective or purpose of the development standard is not relevant to the development meaning that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
3. The underlying objective or purpose would be defeated if compliance was required.
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard: *Wehbe v Pittwater Council* at [47].
5. The zoning of the land on which the development is proposed to be carried out is unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary and compliance with the standard is therefore unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48].

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 set out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

- 1 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.
- 2 Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
- 3 Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

- 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 unnecessary and unreasonable.
- 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 Clause 4.6 Variation – Sun Access Planes Façade Upgrade to Existing Commercial Premises 2 -26 Park Street, Sydney (Lot 12 DP 1048563) 9 applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".

In applying the tests of *Wehbe v Pittwater Council* [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding, in consideration of the above tests, compliance with the height limit is considered both unreasonable and unnecessary in the circumstances of the case for the following reasons:

Assessment: The proposed height of 8.58m is a 0.94% (0.08m) variation from the 8.5m numerical development standard for the site pursuant to Clause 4.3 of MLEP2013. The extent to which the proposal exceeds 8.5m is limited to a very minor roof form element that protrudes above the maximum height limit is due to the slope of the site. The entirety of the dwelling house remains under the maximum height limit by as much as 1.4m which ensure that the proposed development mitigates adverse impacts to surrounding properties and public domain.

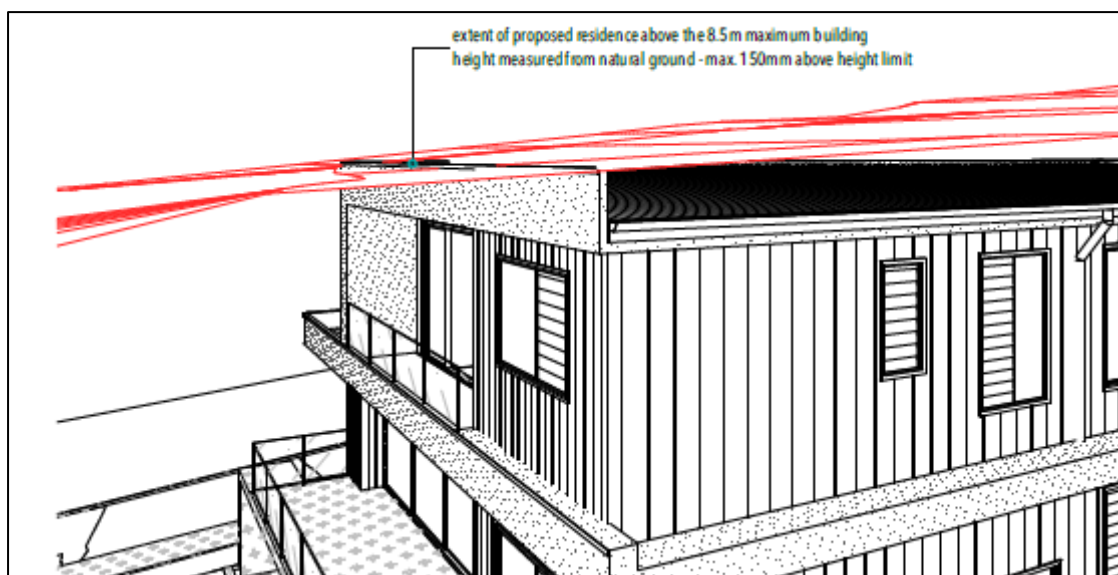


Figure 3: Extent of proposed dwelling above 8.5m Source: New Paradigm Design

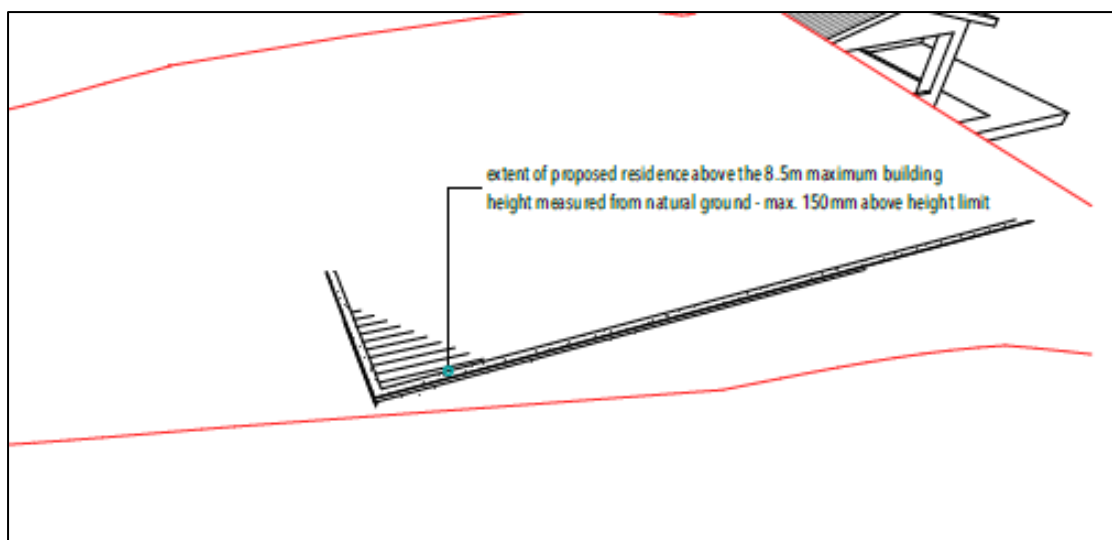


Figure 4: Extent of proposed dwelling above 8.5m **Source: New Paradigm Design**

As seen in the above figures, despite the 0.08m exceedance the proposed dwelling house maintains a height, bulk, and scale compatible with the site conditions and surrounding local area. The height non-compliance will not have an adverse impact to surrounding properties and the streetscape in relation to significant additional overshadowing, visual impact from the bulk and scale, visual or acoustic privacy impacts, or view loss.

The proposed dwelling house will primarily appear as a two-storey dwelling from Lister Avenue and the adjoining properties to the north and west. The dwelling house will only appear as three storeys from Prince Edward Road. To ensure the dwelling house doesn't appear dominant on this elevation the design utilises vertical timber battens on the garage door, feature stone on the southern and eastern elevation, formed concrete finish above the garage and a white rendered finish. Balconies and large varied shaped windows create a sense of openness into the design. It is considered that the proposal results in a high-quality product that takes into consideration the topography of the site.

In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and appropriate side setbacks, ensures that the proposed development will provide compliant solar access to public domain and surrounding properties

Due to the topography of site, the garage/basement will require excavating into the site to allow for safe and efficient vehicle access. To demonstrate that the design/layout of the proposed development is consistent with streetscape character, the below figures have been included. It is highlighted that there are a number of dwelling houses with similar built form outcomes in the immediate area which involve lower level car parking with habitable levels above. As seen in these figures, there are a number of dwelling houses that have incorporated a similar design as a result of the sites respective topography.



Figure 5: Three storey Dwelling house at 18 Prince Edward Road



Figure 6: Three storey Dwelling house 34 Alto Avenue



Figure 7: Three storey Dwelling houses at 11 Alto Avenue and 13 Alto Avenue



Figure 8: Three storey Dwelling house at 36 Alto Avenue.

The proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed two-storey height presentation to Lister Avenue and northern and western adjoining properties, appropriate building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain. The variation is justified on the basis that the stepped building respects the sloping site and that the variation has no adverse streetscape, visual bulk, view, or amenity impacts.

The proposal complies with the objectives of the development standard and the R2 Low- Density Residential zone, indicated in the assessment in Table 1 below. Compliance with the development standard is unreasonable and unnecessary as it is in the public interest, given it is consistent with the objectives for the development within the zone.

Consistency with the objectives of the height standard in the LEP

Objectives	Assessment
4.3(a) to provide for building heights and roof forms that are consistent with the topography landscape, prevailing building heights and desired future streetscape character in the locality	The proposed dwelling has two-storey presentation to the majority of the streetscape and adjoining properties. The only elevation where the dwelling appears as three storeys is from Prince Edward Road. Notwithstanding, the dwelling house proposes a flat roof which is consistent with several newly constructed dwelling houses in the locality. The height variation is well integrated with the architectural design and contributes to a high-quality dwelling house which reinforces the desired streetscape character in the locality. As shown in the building height view drawings prepared by New Paradigm Design, the building height exceedance is limited to a very minor portion of roof form that will have negligible impact on streetscape character and locality.
4.3(b) to control the bulk and scale of buildings	The majority of the building envelope is compliant with the height limit, and the minor encroachments are related to a lightweight roof element. The height protrusions beyond the height limit do not preclude the proposed development to achieve a bulk and scale that are suitable to the site and compatible with surrounding properties. The non-compliant height responds to the sloping nature of the site and is not related to excessive bulk, mass, or inappropriate scale. Therefore, the proposed development and additional height is suitable to the site and context of the locality. Therefore, these portions above the height limit are lightweight elements, and do not create a building which dominates the streetscape.
4.3(c) to minimise disruption to the following: (i) views to nearby residential developments from public spaces (including the harbour and foreshores) (ii) views from nearby residential developments to public spaces (including the harbour and foreshores) (iii) views between public spaces (including the harbour and foreshores)	The proposed height, setbacks, plus the orientation of lots and surrounding topography, ensures that outlook is maintained for adjoining properties and the public domain. The proposed height variation is confined towards the eastern side of the site, on the downslope. The proposed separation distances, including a generous western side setback, ensures the height non-compliance maintains outlook for the adjoining neighbour to the west.
4.3(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	In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. Considering the subject site is a corner lot combined with the solar orientation and generous side setbacks ensures that the proposed development will provide compliant solar access to the public domain and surrounding properties.
4.3(e) to ensure the height and bulk of any proposed building or structure in a recreational or environmental protection zone has	The subject site is located within the R2 Low Density Residential zone.

regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses

Consistency with the objectives of the R2 Low Density Residential

Objectives	Assessment
To provide for the housing <i>needs of the community within a low density residential environment.</i>	The proposed height variation does not raise any inconsistency with the R2 Low-Density Residential zone objectives. The height is associated with a high-quality contemporary dwelling house which provides for the needs of the community and presents a compatible height, bulk and scale with the dwellings in the vicinity of the site.
To enable other land uses that <i>provide facilities or services to meet the day to day needs of residents.</i>	The topography of the site associated with the built form mitigates any adverse or significant view, overshadowing, or privacy impacts to adjoining neighbours or the public domain. The proposal will maintain the low-density residential environment, thereby confirming that the variation does not raise any inconsistency with the objectives of the zone.

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3.2 Clause 4.6(3)(b) - Are there sufficient planning grounds to justify contravening the development standard?

The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance, which include the following:

- The proposed 0.94% (0.08m) variation from the 8.5m numerical development standard is only for an imperceptible portion of the flat building roofline. The dwelling house responds to the sites topography and is appropriate to its location, surrounding development, environmental characteristics and the existing streetscape;
- The variation does not give rise to any measurable or unreasonable visual impacts from the public domain. The proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions.
- The overall form of the dwelling will present appropriately a two storey dwelling to Lister Avenue and the two adjoining properties which is consistent with the prevailing residential amenity and character of the surrounding area. The dwelling house will only present as three storeys from Prince Edward Road, however as seen in the above street photos, there are a number of dwellings of similar design and scale.
- The height variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of landscaping and total open space, and above ground open space. The proposed landscaping contributes to softening the visual bulk appearance of the development.
- In accordance with the submitted Shadow Diagrams solar access will be maintained to the primary living and private open space areas of the adjoining dwelling

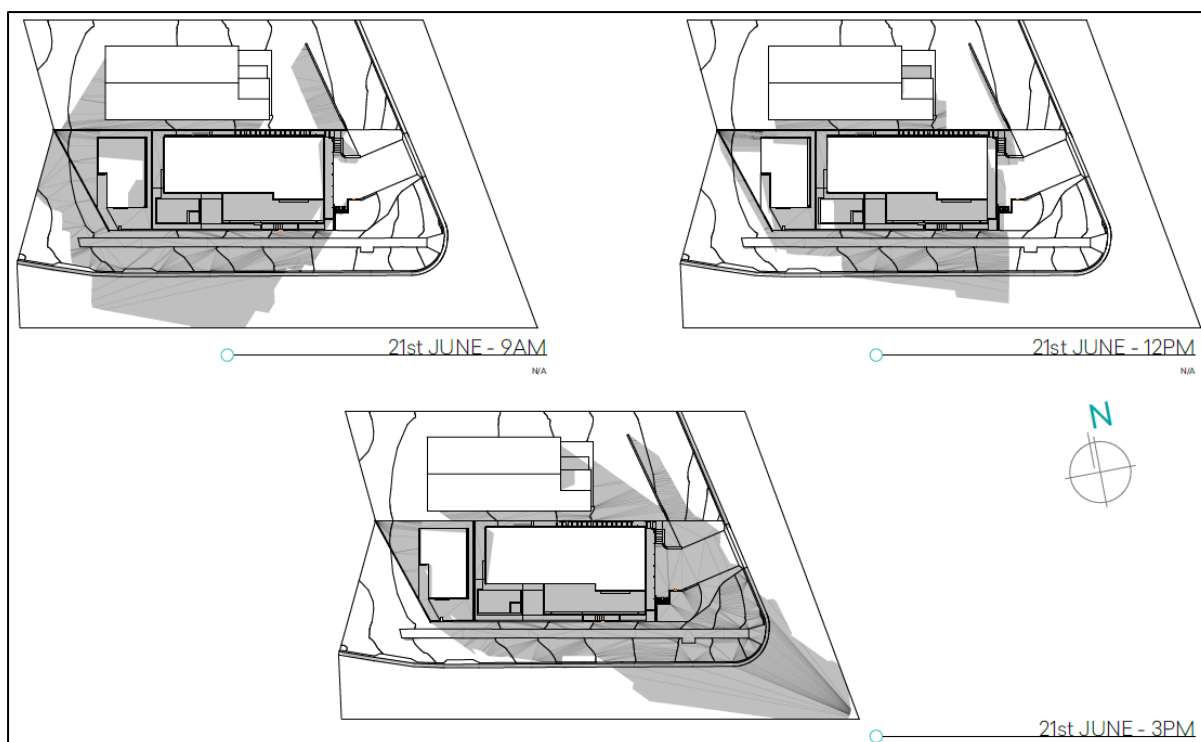


Figure 9: Shadow diagrams for 21st June 9am – 3pm.

Source: New Paradigm Design

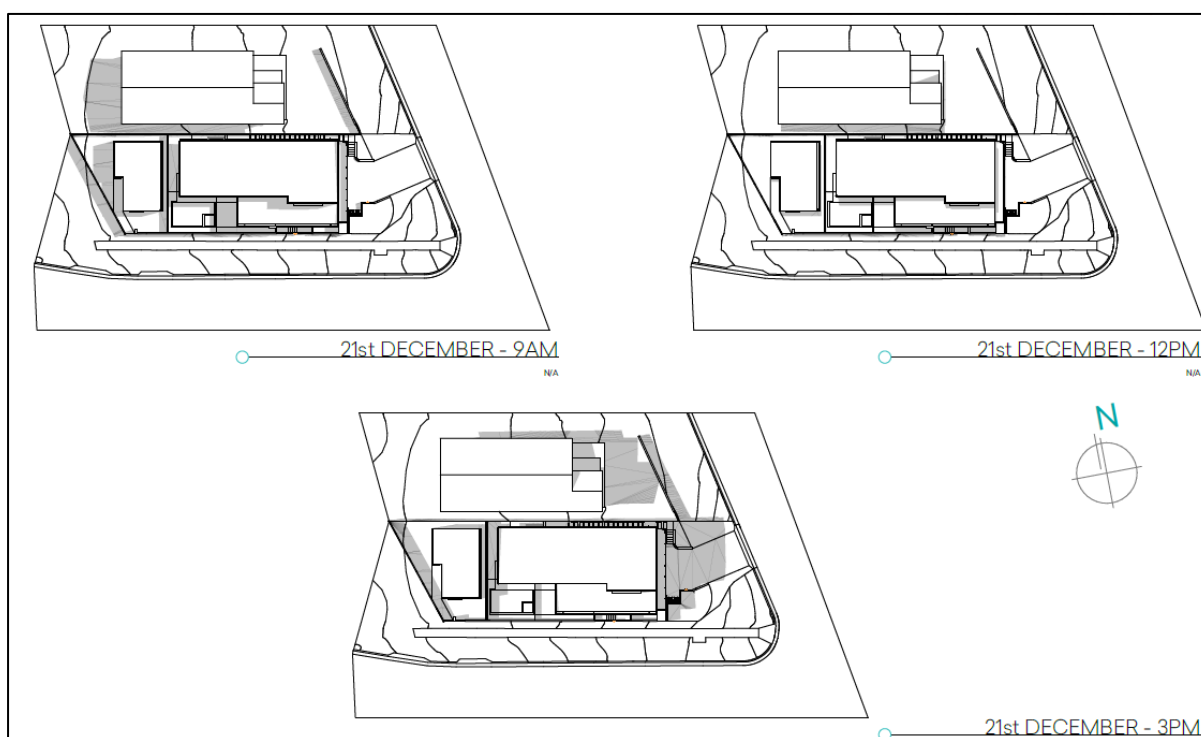


Figure 10: Shadow diagrams for 21st December 9am – 3pm. Source: New Paradigm Design

For the reasons outlined above, it is considered that there are sufficient environmental planning grounds to justify the proposed variation to the Height of Building Development Standard under Clause 4.3 and is therefore worthy of support having regard to the matters listed within Clause 4.6 under Manly LEP 2013.

3.3 Is the proposed development in the public interest and consistent with objectives of the standard and land use zone?

The above assessment demonstrates that the proposed height satisfies the objectives of the height standard and the R2 Low-Density Residential zone

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the height variation. The dwelling is architecturally designed and complements the existing streetscape. The variation is minor in scale and does not create any adverse impacts on existing or future amenity of adjoining properties. Given the nature of the locality, no views from public places are impacted upon.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

3.4 Public benefit of maintaining the standard

It is considered that the public benefit will not be undermined by varying the standard. The proposal provides for the orderly and economic development of the site. Given the site's orientation, location and context it is considered that the site is well suited for the development. The development is generally consistent with the current planning controls. There is no public benefit in maintaining the height standard given the limited amenity impacts associated with the development, which provides a high level of internal amenity, and the positive streetscape outcome that would arise from the development of the subject site, while being sympathetic to the environmental constraints of the surrounding local area.

It is not considered that the variation sought raises any matter of significance for State or Local environmental planning. The departure from the building height control within the State Environmental Planning Policy allows for the orderly and economic development of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

3.5 Is the Variation well founded?

The above information demonstrates that, given the planning context and minor scale of the variation, the proposed building height represents a suitable building form for the site.

It is considered that this has been adequately addressed in Parts 3.1 to 3.5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 under the Manly LEP 2013 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (building height) and objectives of the R2 Low Density Residential zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State or Local significance; and
- The development submitted aligns with the predominantly residential nature of the desired future character of the neighbourhood.

Based on the above, the variation well founded and can be supported.

4. Conclusion

The proposed 0.94% (0.08m) variation from the 8.5m numerical development standard does not strictly comply with the maximum building height controls as prescribed by Clause 4.3 of the Manly LEP 2013.

The proposed height, bulk, and scale of the development are not considered to be visually dominant in the streetscape and does not introduce a significant impact to neighbours and does not have a detrimental visual amenity impact onto the streetscape. It is therefore considered that the objectives of Clause 4.6 of the Manly LEP 2013 are satisfied, as the breach to the controls does not create any adverse environmental impacts.

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Consequently, strict compliance with this development standard is unreasonable and unnecessary in this instance and that the use of Clause 4.6 of the Manly LEP 2013 to vary this development controls is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

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