

Clause 4.6 Variation Request – Height of Building

49 South Creek Road, Dee Why

Proposal: Alterations and additions to existing dwelling

February 2021

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1. Introduction

This Clause 4.6 variation request has been prepared by Altitude Urban Planning on behalf of the applicant. It is submitted to Northern Beaches Council (the Council) in support of a Development Application (DA) for alterations and additions to an existing dwelling at 49 South Creek Road, Dee Why.

The proposed development results in a numerical non-compliance with a development standard within the Warringah LEP 2011 (the LEP). Consistent with the terms set out in clause 4.6 of the LEP, a variation to the height of buildings development standard is being sought.

Clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP) enables Council to grant consent for development even though the development varies a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. In this regard, Clause 4.6 provides flexibility to vary the development standards specified within the LEP where it can be demonstrated that the development standard is unreasonable or unnecessary in the circumstances of the case and where there are sufficient environmental grounds to justify the departure.

The pertinent excerpt from Clause 4.6 states the following:

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

- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) That there are sufficient environmental planning grounds to justify contravening the development standard.”*

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

(a) the consent authority is satisfied that—

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

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

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

To assist Councils and applicants, the NSW Land and Environment Court has established a set of principles from relevant judgments to guide assessment of whether a variation to development standards should be approved. Accordingly, this variation request has been prepared in accordance with the relevant principles established in the following NSW Land and Environment Court judgments:

- Wehbe v Pittwater Council [2007] NSWLEC 827;
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;
- Moskovich v Waverley Council [2016] NSWLEC 2015; and
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.

This Clause 4.6 variation request relates to the development standard for Height of Buildings (HOB) under Clause 4.3 of the WLEP 2011 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Altitude Urban dated February 2021 as well as the plans submitted to Council in respect of the associated development application. This Clause 4.6 variation request demonstrates that compliance with the HOB development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify variation to the standard.

2. Proposed Variation

An exception is being sought under clause 4.6 of the WLEP 2011 from the need to strictly comply with the development standard clause 4.3 Height of Buildings, which reads as follows:

“4.3 Height of buildings

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

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

(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) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.”

The Height of Buildings Maps – Sheet HOB_009 under WLEP 2011 identifies the subject site as having a maximum building height of 8.5m – see Figure 1

The Dictionary to the LEP provides the following definition of ‘*building height*’:

“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.”

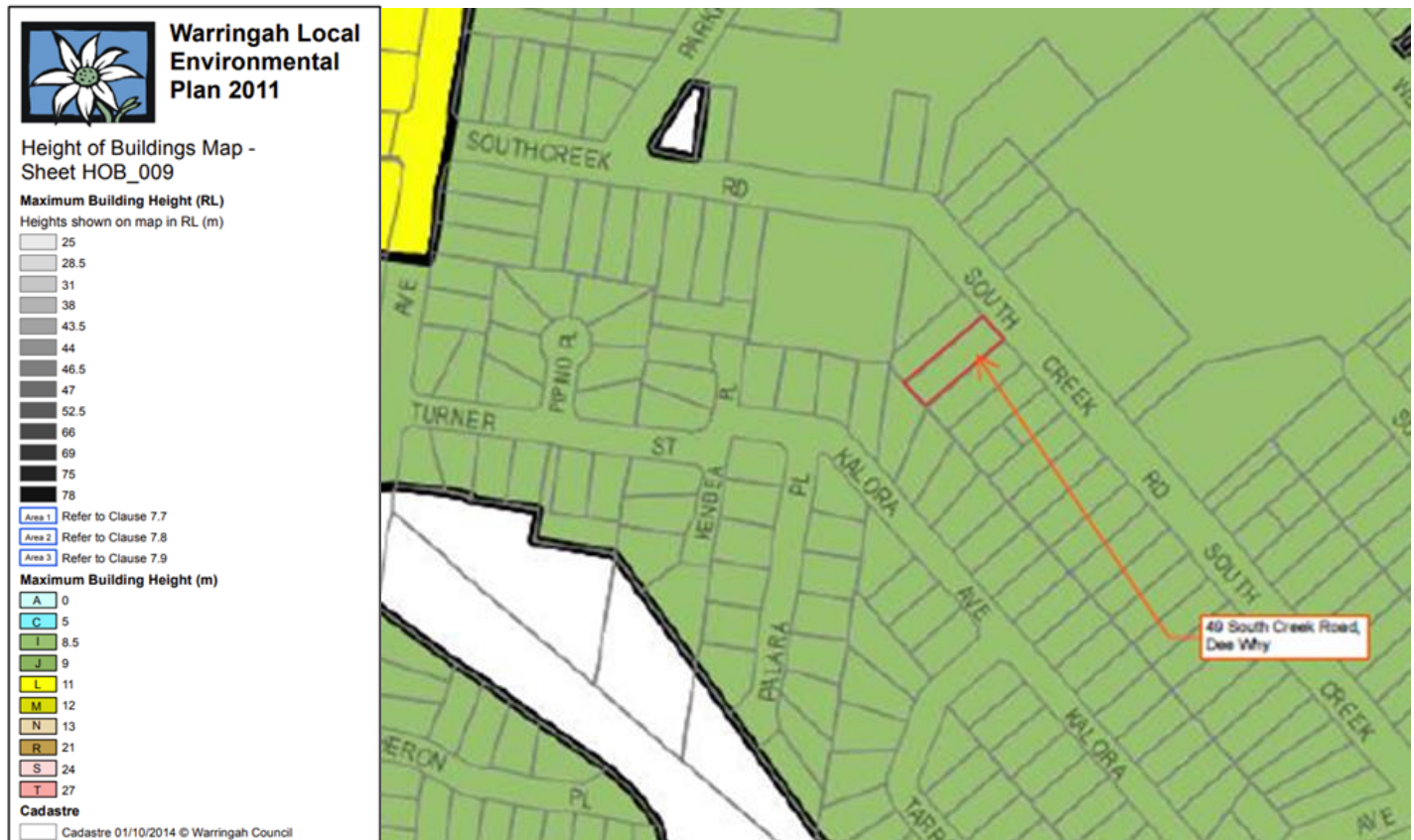


Figure 1: Excerpt from WLEP 2011 Height of Buildings Map

Architectural drawings prepared by Alan Johnson Architect display the proposed development and include a specific drawing (Drawing No. DA 03 – Refer to Figure 2) that indicates the extent of the proposed exceedance of the height of buildings standard.

The proposed variation to the building height relates to the proposed dormers on the rear (western) elevation of the existing dwelling. The top portion of the 3 new dormers proposed exceed the maximum building height of 8.5m by up to 845mm, being a maximum height of 9.345m to the ridge of the dormers. This is a variation of 9.94% to the HOB development standard under WLEP 2011.

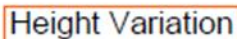


Figure 2: Height Variation (Section Drawing No. DA 03, Issue B, dated 12.02.21, Alan Johnson Architect)



Figure 3: West Elevation depicting proposed dormers below existing roof ridge level (Drawing No. DA 04, Issue C, dated 12.02.21, Alan Johnson Architect)

3. Clause 4.6 Exceptions to Development Standards

3.1 Subclause 4.6(1) – Objectives

Clause 4.6 Exceptions to Development Standards of the WLEP 2011 permits Council the flexibility to grant consent where a development exceeds a development standard of the LEP. The objective of clause 4.6 is to provide flexibility in applying certain development standards to development to achieve a better planning outcome than would otherwise occur through strict compliance to the development standard.

Clause 4.6 of the LEP sets out the objectives of the clause:

“(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.”*

In the circumstance of the case, as explored in detail in this statement, it is entirely appropriate to apply a degree of flexibility in considering the development standard. The proposed development would result in an exceedance of the numerical building height by 845mm or 9.94% at the greatest exceedance. This is limited to only the upper portions of the proposed dormers, the remainder of the proposed development complies with the maximum permitted building height. This is a minor variation to the development standard that results in a development that is consistent with the future desired character of the area and will not result in significant adverse effects upon adjoining development.

The existing dwelling, as approved, exceeds the 8.5m building height at approximately 9.6m (12.94% variation) to the roof ridge and 9.94m (16.94% variation) to the top of the chimney. The ridges of the proposed dormers are 340mm below the ridge of the dwelling and therefore not visible from the street (Refer to Figure 3).

As explored within this statement the development achieves a better planning outcome than would otherwise occur through strict compliance of the development standard.

3.2 Subclause 4.6(2) – Exclusions from the Operation of Clause 4.6

Subclause 4.6(2) provides that;

“(2) 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 Height of Buildings is not expressly excluded from the operation of clause 4.6. Therefore, consent may be granted under the operation of the clause.

3.3 Subclause 4.6(3) – Written Request

Subclause 4.6(3) establishes that consent must not be granted by Council unless it has considered a written request that seeks to justify the contravention of the development standard and demonstrating certain matters:

“(3) 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 is non-compliant with the clause 4.3 Height of buildings development standard. This document constitutes a written statement for Council’s consideration under the terms of this clause.

Strict compliance with the numerical development standards is considered to be unreasonable and unnecessary in the circumstances of the case under clause 4.6(3)(a) and that there exist sufficient environmental planning grounds to justify the departure from the development standard consistent with clause 4.6(3)(b).

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

Clause 4.6(3)(a) of the LEP provides that a written request must demonstrate that compliance with the development standard is ‘unreasonable or unnecessary in the circumstances of the case’.

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston expressed the view that there are five ways in which it could be shown that a variation to a development standard was unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive and an applicant does not need to establish all of the ways. That is, the position that compliance with the development standard is unreasonable or unnecessary may be demonstrated in any one of the five methods outlined in *Wehbe*. Table 1 provides an assessment of the request against the five methods in *Wehbe*.

Table 1 – Wehbe v Pittwater Council, Five Methods

Wehbe v Pittwater Council [2007] NSW LEC 827	
The Five Methods	Response
1. <i>The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method)</i>	<p>As detailed within section 3.4 of this report the objectives of the development standard are achieved despite the non-compliance with the height of building standard.</p> <p>The variation to the development standard will not result in: any adverse overshadowing of adjoining properties; disruption of views; loss of privacy; visual impact upon adjoining properties and the public domain.</p>
2. <i>The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).</i>	This method is not relied upon to determine that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
3. <i>The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).</i>	This method is not relied upon to determine that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
4. <i>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 (Fourth Method)</i>	This method is not relied upon to determine that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
5. <i>The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable and unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).</i>	This method is not relied upon to determine that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

As demonstrated in Table 1, and elsewhere in this report compliance with the development standard is unreasonable and unnecessary in the circumstances of the case consistent with the test established in Wehbe v Pittwater [2007] NSW LEC 827.

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

There are unique circumstances to this case and sufficient environmental planning grounds specific to the development and subject site which warrant support, including:

- The existing dwelling, as approved, exceeds the 8.5m building height at approximately 9.6m (12.94% variation) to the roof ridge and 9.94m (16.94% variation) to the top of the chimney. The ridges of the proposed dormers are 340mm below the ridge of the dwelling and therefore not visible from the street (Refer to Figure 3).
- The provision of dormer windows on the rear elevation/roof provides additional articulation to the existing building to reduce its building mass when viewed from adjoining and nearby properties.
- The proposed development has been designed to be commensurate in scale and character to existing and the desired future development in the area. Whilst located in a low density residential area, the immediate locality is characterised by a mix of low to medium residential development, a defence site (Australia Air Force Barracks) and a school. Adjoining the site to the north is a 2 storey apartment building and to the south a part 1 and 2 storey dwelling, whilst directly across the road is a medium density residential development of 2-3 storey construction.
- The design of the proposed dormers also ensures that any potential views or vistas are not adversely impacted from the public domain or adjacent/ nearby properties, whilst at the same time ensuring the internal amenity and outlook of the proposed development is not compromised.
- The proposed development does not result in any overshadowing of public open space.
- As demonstrated in the shadow diagrams accompanying this application, the proposed development does not result in any adverse overshadowing of the subject dwelling's and adjoining dwellings' private open space area. In fact, the proposed development ensures that the required quantum of solar access is maintained to the respective private open space areas.
- The proposed dormer windows have satisfactorily addressed the visual privacy of the development and occupants of adjoining properties, with the following:
 - The windows are associated with low-traffic areas, namely a bedroom, study and bathroom;
 - The windows have been sited to not directly overlook the side boundaries and not provide direct or close views into the windows of other dwellings; and
 - By virtue of their siting and separation distances to common boundaries, the dormer windows will not directly overlook any adjoining private open space areas.

For reasons listed above, it is considered that there are sufficient environmental planning grounds consistent with clause 4.6(3)(b) to warrant support from Council.

3.4 Subclause 4.6(4) – Adequacy of the written request as well as the consistency with the objectives of the standard and the objectives for development in the zone

Subclauses 4.6(4)(a) and (b) establish further still that development consent must not be granted for development that that departs from a development standard unless the following is addressed:

“(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.”

The matters required to be addressed by subclause (3) are contained in Section 3.3 of this report . Furthermore, the development is considered to remain in the public interest consistent with clause 4.6(4)(a)(ii) given that the proposal is consistent with the objectives of the development standard being varied and the objectives of the land use zone in which it is proposed.

Clause 4.6(4)(a)(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.

In establishing whether the proposed development is in the public interest, despite the variation being sought to a development standard, it is necessary to consider the objectives of the standard that is being varied. Table 2 below provides an assessment against each of the objectives of clause 4.3 Height of buildings.

Table 2 – Clause 4.3: Height of Buildings Objectives (WLEP 2011)

Clause 4.3 Height of Buildings	
Objectives	Response
<i>(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i>	The proposed development has been designed to be commensurate in scale, height and character to existing and the desired future development in the area. Whilst located in a low

Clause 4.3 Height of Buildings	
Objectives	Response
	<p>density residential area, the immediate locality is characterised by a mix of low to medium residential development, a defence site (Australia Air Force Barracks) and a school. Adjoining the site to the north is a 2 storey apartment building and to the south a part 1 and 2 storey dwelling, whilst directly across the road is a medium density residential development of 2-3 storey construction.</p>
<p><i>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i></p>	<p>The proposed will not result in any adverse overshadowing of adjoining properties, disruption of views, loss of privacy, visual impact upon adjoining properties and the public domain.</p> <p>Visual Impact</p> <p>The proposed external works, namely dormer windows, have been designed to be integrated into the existing high pitched roof, similar to the dormer windows incorporated at the front the dwelling. The height of the proposed is below the existing roof ridge height ensuring that the building height is appropriate relative to the existing topography and site conditions.</p> <p>Furthermore, the provision of dormer windows on the rear elevation provides additional articulation to the existing building to reduce its building mass when viewed from adjoining and nearby properties.</p> <p>Views</p> <p>Having regard to the siting of adjoining and nearby properties relative to the subject property, the proposed development will not result in any adverse impacts on views. In particular, the proposed dormer windows have been designed to be below the existing roof ridge and recessed-in from the side of the building to ensure that reasonable view sharing is maintained.</p> <p>Privacy</p> <p>The proposed dormer windows have satisfactorily addressed the visual privacy of the development and occupants of adjoining properties, with the following:</p> <ul style="list-style-type: none"> - The windows are associated with low-traffic areas, namely a bedroom, study and bathroom;

Clause 4.3 Height of Buildings	
Objectives	Response
	<ul style="list-style-type: none"> - The windows have been sited to not directly overlook the side boundaries and not provide direct or close views into the windows of other dwellings; and - By virtue of their siting and separation distances to common boundaries, the dormer windows will not directly overlook any adjoining private open space areas. <p>Solar Access</p> <p>As demonstrated in the shadow diagrams accompanying this application, the proposed development does not result in any adverse overshadowing of the subject dwelling's and adjoining dwellings' private open space area. In fact, the proposed development ensures that the required quantum of solar access is maintained to the respective private open space areas.</p>
<i>(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>	The proposed development is not in close proximity to any coastal or bush environments to have any potential adverse impact upon their scenic quality.
<i>(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>	The proposed development will not be readily visible from the street or any other public places. In this regard, the proposed dormer windows have been designed to be below the existing roof ridge and recessed-in from the side of the building to ensure they are not apparent from South Creek Road. Therefore, there is no adverse visual impact upon the public domain.

In establishing whether the proposed development is in the public interest, despite the variation being sought to the HOB development standard, it is necessary to also consider the objectives of the land use zone. Table 3 below provides an assessment against each of the objectives of the R2 Low Density Residential zone.

Table 3 – R2 Low Density Residential Zone Objectives (WLEP 2011)

R2 Low Density Residential Zone	
Objectives	Response
<i>To provide for the housing needs of the community within a low density residential environment.</i>	The alterations and additions provide an opportunity for the existing residents to remain in their community by providing an appropriate level of accommodation to cater for their changing family needs without compromising the surrounding low density environment.

R2 Low Density Residential Zone	
Objectives	Response
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposed development will not detract from the enabling of other land uses on this site, or other nearby sites, from providing facilities or services to meet the day to day needs of residents.
<i>To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.</i>	No site works or changes are proposed to the existing landscaped setting of the site or its immediate surrounds. In this regard, the extensive existing tree plantings throughout the site will be maintained to provide effective privacy screening and as well as a rich landscaped setting for the existing dwelling and surrounding properties. .

The proposed development achieves the objectives of the development standard being varied and the objectives of the zone in which it is proposed, despite the non-compliance with the clause 4.3 Height of buildings development standard. Therefore, the proposed development remains in the public interest despite the variation being sought.

Clause 4.6(4)(b) - concurrence of the Planning Secretary

Pursuant to clause 64 of the Environmental Planning and Assessment Regulation 2000, consent authorities were notified by Planning System Circular PS18-003 dated 21 February 2018 that a Council or its independent hearing and assessment panel (IHAP) may assume the Secretary's concurrence. However, the Secretary's concurrence may not be assumed by a delegate of Council if:

- The development contravenes a numerical standard by greater than 10%; or
- The variation is to a non-numerical standard.

The above restriction does not apply to IHAPs.

In the case of the subject variation, which is to a numerical standard and being less than a 10% variation, the Secretary's concurrence may be assumed by a delegate of Council.

The exceedance to the building height limit is minor in nature constituting a maximum exceedance of 845mm or 9.94%.

4. Conclusion

The assessment above demonstrates that compliance with the maximum HOB standard contained in Clause 4.3 of WLEP 2011 is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the standard.

In this case, the exceedance to the building height limit is minor in nature constituting a maximum exceedance of 845mm or 9.94%. This should also be considered in the context of the existing dwelling which, as approved, exceeds the 8.5m building height at approximately 9.6m (12.94% variation) to the roof ridge and 9.94m (16.94% variation) to the top of the chimney. The ridges of the proposed dormers are 340mm below the main ridge of the existing dwelling, ensuring that they will not be visible from the street.

The proposed development, as demonstrated in this report and the Statement of Environmental Effects accompanying the subject development application, will not result in any adverse overshadowing of adjoining properties, disruption of views, loss of privacy or visual impact upon adjoining properties and the public domain.

In addition, this Clause 4.6 variation demonstrates, notwithstanding the non-compliance with the maximum HOB development standard, that:

- The development as proposed will deliver a superior built-form outcome in consideration of the site's location and the surrounding buildings. In particular, the provision of dormer windows on the rear elevation provide additional articulation to the existing building/roof to reduce its building mass when viewed from adjoining and nearby properties; and
- Compliance with the development standard would be both unreasonable and unnecessary in this instance because the development is able to fully satisfy the objectives of the R2 Low Density Residential Zone and the objectives of the maximum HOB development standard.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, a departure from the HOB development standard is considered appropriate in these circumstances and satisfies the public interest. Therefore, Council can be satisfied that the variation to the standard is reasonable and justified.