

STATEMENT OF ENVIRONMENTAL EFFECTS

Proposed Alterations
and Additions to a
Dwelling and New
Swimming Pool

37 Parkes Street,
Manly Vale

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Statement of Environmental Effects

Proposed Alterations and Additions to a Dwelling with attached Secondary Dwelling.

37 Parkes Street, Manly Vale

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ANNEXURE 1: CLAUSE 4.6 REQUEST TO VARY DEVELOPMENT STANDARD

1 Introduction

This Statement has been prepared as part of the documentation associated with a Development Application proposing alterations and additions to the existing dwelling with a new swimming pool and associated decking at 37 Parkes Street, Manly Vale.

In addition to the Statement of Environmental Effects the application is also accompanied by the following:

- Survey Plan
- Architectural plans prepared by Colling Caddaye Architect
- Basix Certificate
- Preliminary Geotechnical Assessment by White Geotechnical
- Arborist Report

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act, 1979.
- Warringah Local Environmental Plan 2011, and
- Warringah Development Control Plan 2011

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the site and the proposed development.
- The proposed alterations and additions are compatible with the desired future character and zone objectives for the locality.
- The proposed alterations and additions will have a satisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is assessed as suitable for the proposal, having regard to the relevant land use and planning requirements.

2 Site Analysis

2.1 Site Description and Location

The application relates to Lot 33 in DP 12186, 37 Parkes Street, Manly Vale. A location map is included as **Figure 1**.



Figure 1: Site Location (Source: Six Maps)

The subject site is a rectangular shaped allotment with a frontage and address to Parkes Street. The site area measures 489.2m² and has a width of 12.19m and a depth of 40.235m. The topography of the site slopes down from Parkes Street to the rear of the site and also has a slope across the site in an easterly

direction. Several significant trees are located on or adjacent to the site. A sewer bisects the rear of the site.

The existing development on the site contains a 2 storey weatherboard and brick dwelling. A sewer bisects the site at the towards the rear of the site.

Development in the vicinity generally consists of singles residential dwellings in informal landscaped settings. Manly golf course is located in close proximity to the east of the site with Manly beach further beyond.

2.2 Zoning and Key Environmental Considerations

The site is zoned R2 Low Density Residential pursuant to the Warringah Local Environmental Plan 2011. The site is mapped as being within Landslip Risk Area B.

3 Description of Proposed Development

3.1 Details of the Proposed Development

This application proposes alterations and additions to the existing dwelling house, comprising the following works as detailed on the architectural drawings prepared by Collins Caddaye Architects. Specifically the works include:

Ground Floor Plan:

- Demolition of the existing deck and stairs at the rear
- Extension to the family room which opens to the new deck
- New rear deck extension to include swimming pool
- New driveway slab
- New internal staircase

Level 1 Floor Plan:

- New internal reconfigurations to include new open plan kitchen/dining/living area
- Addition to the rear of the dwelling which includes a new balcony

The new additions will connect to the existing stormwater management system. 1 tree is proposed to be removed with this application.

4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the Environmental Planning & Assessment Act, 1979 as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

4.1 Warringah Local Environmental Plan 2011

The Warringah Local Environmental Plan 2011 is the principal local planning instrument applicable to the land. The relevant provisions of the LEP and the manner in which they relate to the site and the proposed development are assessed below.

4.1.1 Zoning and Permissibility

As previously noted the site is zoned R2 Low Density Residential pursuant to the provisions of the Warringah Local Environmental Plan 2011.

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The application relates to alterations and additions to a dwelling which is permissible use in the zone.

4.1.2 Height of Buildings

Pursuant to clause 4.3 WLEP the height of any building on the land shall not exceed 8.5 metres above existing ground level. The stated objectives of this clause are as follows:

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

The proposed alterations and additions results in a minor breach to the 8.5m height of building development standard however the max roof ridge height is to remain the same. A clause 4.6 request to vary the building height development standard has been prepared and is provided as annexure 1.

4.1.3 Development on Sloping Land

The site is identified as falling within Land Slip Risk Area B. The objectives of Clause 6.4 seek to:

- *Avoid significant adverse impacts on development and on properties in the vicinity of development sites resulting from landslides originating either on or near sloping land;*
- *Ensure the impacts of storm water runoff from development or near sloping land are minimised so as to not adversely affect the stability of the subject and surrounding land;*
- *To ensure subsurface flows are not adversely affected by development so as to not impact on the stability of existing or adjoining land.*

The preliminary geotechnical report provided concludes that provided good engineering and building practice are followed, no further Geotechnical assessment is recommended for the proposed development.

4.2 Warringah Development Control Plan 2011

The proposal relates to alterations and additions to the existing dwelling and the following relevant DCP controls have been addressed with respect to consideration of the proposed subdivision application.

4.2.1 DCP Compliance Table

A table demonstrating compliance with the relevant provisions of the Warringah DCP 2011 is detailed as follows:

Control	Requirement	Proposed	Compliance
Wall Height DCP Control B1	7.2 metres from ground level (existing) to the underside of the ceiling to the uppermost floor of the building (excluding habitable areas wholly located within a roof space).	The proposed development will have wall heights compliant with the 7.2m control. The rear extension will have a maximum wall height of approximately 6m at its highest point	Yes
Side Boundary Envelope	Buildings must be sited within a building envelope determined by	The development is largely compliant with the building envelope control with the breaches occurring towards	No – worth on merit

Control	Requirement	Proposed	Compliance
<p>DCP Control B3</p>	<p>projecting planes at 45 degrees from a height above ground level (existing) at the side boundaries of 4 metres.</p>	<p>the rear of the dwelling due to the sloping topography.</p> <p>The front elevation is compliant with the building envelope control. As site slopes down at the rear the new addition will not strictly comply with this control. The area of non-compliance does not result in any unreasonable visual impact or bulk and scale concerns. The dwelling maintains its existing maximum ridge height with the proposed additions to the dwelling reasonably modest. The additions to the dwelling do not result in any significant additional overshadowing.</p>	
<p>Side Boundary Setback</p> <p>DCP Control B5</p>	<p>Development is to maintain a 900mm minimum setback from side boundaries.</p>	<p>The side setbacks to the dwelling are compliant with the 900mm side setback control.</p> <p>To the staircase adjacent to the eastern boundary has a setback of 595mm which is minorly non-compliant with the control. It allows for access from the street down the side of the house to the rear. The setback is considered acceptable in this instance.</p> <p>The deck surrounding the pool extends to the western side boundary. The DCP includes exceptions for encroaching</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
		<p>into the 900mm control for the following:</p> <p><i>Screens or sunblinds, light fittings, electricity or gas meters, or other services infrastructure and structures not more than 1 metre above ground level (existing) such as unroofed terraces, balconies, landings, steps or ramps may encroach beyond the minimum side setback</i></p> <p>As the slope falls to the rear the deck does become elevated above 1m however, the majority of the deck adjacent to the boundary is below 1m above ground level.</p> <p>The pool fence will provide some screening and mitigate concerns regarding privacy of the neighbouring dwelling. The deck and pool is not directly adjacent to the neighbouring dwelling limiting overlooking ability into their dwelling. It is considered the setback of the deck is appropriate in this instance.</p>	
<p>Front Boundary Setback</p>	<p>Development is to maintain a front setback of 6.5 metres.</p>	<p>The existing dwelling encroaches within this front setback and will be</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
DCP Control B7		maintained with the proposed development	
Rear Boundary Setback DCP Control B9	Development is to maintain a minimum rear boundary setback of 6 metres.	complies	Yes
Parking Facilities DCP Control C3	2 off street parking spaces must be located behind the front building alignment.	The existing car parking circumstance is to be maintained.	Yes
Stormwater DCP Control C4	To protect and improve the ecological condition of Warringah's beaches, lagoons, waterways, wetlands and surrounding bushland; to minimise the risk to public health and safety;	The alterations and additions will connect to the existing stormwater drainage system for the dwelling.	Yes
Excavation and Landfill DCP Control C7	Excavation and landfill works must not result in any adverse impact on adjoining land.	No significant excavation proposed. The geotechnical report provided states that the	Yes

Control	Requirement	Proposed	Compliance
		proposed development will not alter the surface further.	
Demolition & Construction DCP Control C8	A demolition and waste management plan must be satisfactorily completed and submitted.	Some minor demolition is proposed with the development. Demolished materials will be disposed of appropriately. These details can be provided at construction certificate stage.	Yes
Landscaped Open Space DCP Control D1	A minimum 40% landscaped open space is to be provided.	The proposed landscaped area is calculated at 44%, which is compliant with the control.	Yes
Private Open Space DCP Control D2	Dwelling houses with 3 or more bedrooms are to provide a minimum area of 60sqm of private open space.	>60m ² achieved	Yes
Access to Sunlight DCP Control D6	<p>Pursuant to these provisions development is not to unreasonably reduce sunlight to surrounding properties. In the case of housing:</p> <ul style="list-style-type: none"> At least 50% of the required area of private open 	<p>Shadow diagrams have been prepared and accompany this application. The diagrams show that compliant levels of solar access will be achieved with the proposed works.</p> <p>Additional overshadowing will be experienced more significantly to 39 Parkes Street at 3pm however will still receive at least 3 hours of solar access to their private open space areas.</p>	Yes

Control	Requirement	Proposed	Compliance
	<p>space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21.</p>		
<p>Views DCP Control D7</p>	<p>To allow for the reasonable sharing of views.</p> <p>To encourage innovative design solutions to improve the urban environment.</p> <p>To ensure existing canopy trees have priority over views.</p>	<p>The proposed works will not result in any unreasonable view loss for neighbouring dwellings. The works are consistent with the principals of view sharing pursuant to the planning principle <i>Tenacity vs Warringah Council</i>.</p>	<p>Yes</p>
<p>Privacy DCP Control D8</p>	<p>Ensure the siting and design of buildings provides a high level of visual and acoustic</p>	<p>The addition to the dwelling will not have any significant adverse impact to the privacy of adjoining properties. The windows proposed to the first</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>privacy for occupants and neighbours.</p> <p>To encourage innovative design solutions to improve the urban environment.</p> <p>To provide personal and property security for occupants and visitors.</p>	<p>floor kitchen/dining/living area are modest in size and designed to provide light into the space. Little overlooking opportunity is present with these windows.</p> <p>The proposed deck surrounding the pool is not directly adjacent to the dwelling at 35 Parkes Street nor 39 Parkes Street. It is considered that the location of the new deck will not result in any significant impacts to the acoustic or visual privacy of their homes or private open space areas.</p>	
<p>Building Bulk DCP Control D9</p>	<p>Encourage good design and innovative architecture to improve the urban environment.</p> <p>Minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.</p>	<p>The alterations and additions do not result in a significant increase to the existing bulk and scale of the dwelling.</p> <p>The works generally maintain the existing streetscape presentation to the street. No unreasonable visual impact will occur as a result of the works proposed.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
<p>Building Colours and Materials</p> <p>DCP Control D10</p>	<p>Ensure the colours and materials of new or altered buildings and structures are sympathetic to the surrounding natural and built environment.</p>	<p>A range of materials and finishes is proposed and detailed on the architectural plans provided.</p>	<p>Yes</p>
<p>Roofs</p> <p>DCP Policy D11</p>	<p>Roofs are to be designed to complement the local skyline.</p>	<p>The extension to the roof will match the existing.</p>	<p>Yes</p>
<p>Swimming Pools</p> <p>D16</p>	<p>To ensure swimming pools and spas are located to preserve the natural environment, streetscape and residential amenity.</p> <p>To encourage innovative design solutions to improve the urban environment.</p>	<p>The works proposed a swimming pool and surrounding deck located behind the dwelling. The pool will be predominately raised above ground level due to the sloping topography. It will have little impact on the existing local environment</p>	<p>Yes</p>
<p>Provision and Location of Utility Services</p> <p>D21</p>	<p>To encourage innovative design solutions to improve the urban environment.</p> <p>To ensure that adequate utility services are</p>	<p>The deck is proposed to be built over the existing sewer that bisects the site.</p> <p>It is understood that a section 73 compliance certificate will be required to ensure that the asset is protected.</p>	<p>Yes.</p>

Control	Requirement	Proposed	Compliance
	<p>provided to land being developed.</p>	<p>We anticipate this will be conditioned with any future consent before a construction certificate can be issued</p>	
<p>Preservation of Trees or Bushland Vegetation</p> <p>E1</p>	<p>To protect and enhance the urban forest of the Northern Beaches.</p> <p>To effectively manage the risks that come with an established urban forest through professional management of trees.</p> <p>To minimise soil erosion and to improve air quality, water quality, carbon sequestration, storm water retention, energy conservation and noise reduction.</p> <p>To protect, enhance bushland that provides habitat for locally native plant and animal species, threatened species populations and endangered ecological communities.</p>	<p>A jacaranda tree is proposed to be removed and an arborist report has been prepared.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>To promote the retention and planting of trees which will help enable plant and animal communities to survive in the long-term.</p> <p>To protect and enhance the scenic value and character that trees and/or bushland vegetation provide.</p>		
<p>Landslip Risk DCP Policy E10</p>	<p>The site is identified as falling within Landslip Risk Area B</p> <p>The applicant must demonstrate that:</p> <ul style="list-style-type: none"> • The proposed development is justified in terms of geotechnical stability; and • The proposed development will be carried out in accordance with good 	<p>This has been addressed in section 4.1.3 of this report.</p> <p>A preliminary geotechnical report is provided with this application.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	engineering practice.		

4.3 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX certificate accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

4.4 State Environmental Planning Policy (Coastal Management) 2018

The aim of this Policy is to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act 2016. The subject site is mapped as being within the Coastal Environmental area.

Clause 13 of the SEPP states that:

(1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
- (b) coastal environmental values and natural coastal processes,*
- (c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
- (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
- (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (f) Aboriginal cultural heritage, practices and places,*
- (g) the use of the surf zone.*

(2) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:

(a) the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or

(b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or

(c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

Given the extent of the proposed works it is considered that it will have no impact on the coastal environment and its processes. No existing public open space or access to the foreshore is compromised with the works proposed.

4.5 Matters for Consideration Pursuant to Section 4.15 of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (in *italic*) to help identify the issues to be considered have been prepared by the Department of Planning and Environment. The relevant issues are:

(i) The provision of any Planning Instrument

The proposed alterations and additions are permissible and consistent with the intent of the Warringah Councils Local Environmental Plan and Development Control Plan as they are reasonably applied to the proposed works given the constraints imposed by the sites location, environmental and topographical constraints.

(ii) Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

N/A

(iii) Any development control plan

Warringah DCP applies

(iiia) Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and

N/A

(iv) The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

N/A

(v) Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)

N/A

(b) The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,

Context and Setting

i. What is the relationship to the region and local context in terms of:

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

The proposed alterations and additions to the existing dwelling are entirely commensurate with that established by adjoining development and development generally within the sites visual catchment with no adverse residential amenity impacts in terms of views, privacy or overshadowing.

ii. What are the potential impacts on adjacent properties in terms of:

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report. The works have been designed such that potential impacts are minimal and within the scope of the built form controls.

Access, transport and traffic:

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

The proposal provides for 2 off-street car spaces.

Public Domain

The proposed development will have no adverse impact on the public domain.

Utilities

Existing utility services will continue to service the dwelling house.

Flora and Fauna

1 tree is proposed to be removed.

Waste Collection

Normal domestic waste collection applies to the existing dwelling house.

Natural hazards

A geotechnical report has been prepared.

Economic Impact in the locality

The proposed development will not have any significant impact on economic factors within the area notwithstanding that it will generate additional employment opportunities through the construction period with respect to the proposed works.

Site Design and Internal Design

- i) *Is the development design sensitive to environmental considerations and site attributes including:*
 - *size, shape and design of allotments*
 - *The proportion of site covered by buildings*

- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the general principles, desired future character and built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development can comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

Construction

i) *What would be the impacts of construction activities in terms of:*

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

(c) *The suitability of the site for the development*

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The site is located in an established residential area. The adjacent development does not impose any unusual or impossible development constraints. The proposed development will not cause excessive or unmanageable levels of transport demand.

The site being of moderate grade, adequate area, and having no special physical or engineering constraints is suitable for the proposed works.

(d) Any submissions received in accordance with this act or regulations

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) The public interest

The proposed works are permissible and consistent with the intent of the LEP and DCP controls as they are reasonably applied to the proposed alterations and additions. The development would not be contrary to the public interest.

5 Conclusion

The proposed works are permissible and consistent with the intent of the built form controls as they are reasonably applied to the proposed works. The clause 4.6 request to vary the building height is considered to be well founded and that the proposal is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the site and the proposed development.
- The proposed alterations and additions are compatible with the desired future character of the locality.
- The proposed alterations and additions will have a satisfactory impact on the environmental quality of the land and the amenity of surrounding properties.
- The site is suitable for the proposal, having regard to the relevant land use and planning requirements.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

Annexure 1. Clause 4.6 Request To Vary Building Height Development Standard

1. Introduction

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. Warringah Local Environmental Plan 2011

2.1. Clause 4.3: Height of Buildings

Pursuant to Clause 4.3 of the LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

- 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.*

This request seeks a variation to the 8.5m height limit standard. The nature and extent of the variation is 400mm which equates to a max building height of 8.9m. The 400mm breach represents a 4.7% variation to the development standard. The existing dwelling has non-compliant elements above the 8.5m which are detailed below. The extension of the dwelling at the rear creates a minor breach to the height standard and is a result of the sloping topography. Details of the encroachments above the 8.5m are shown below.

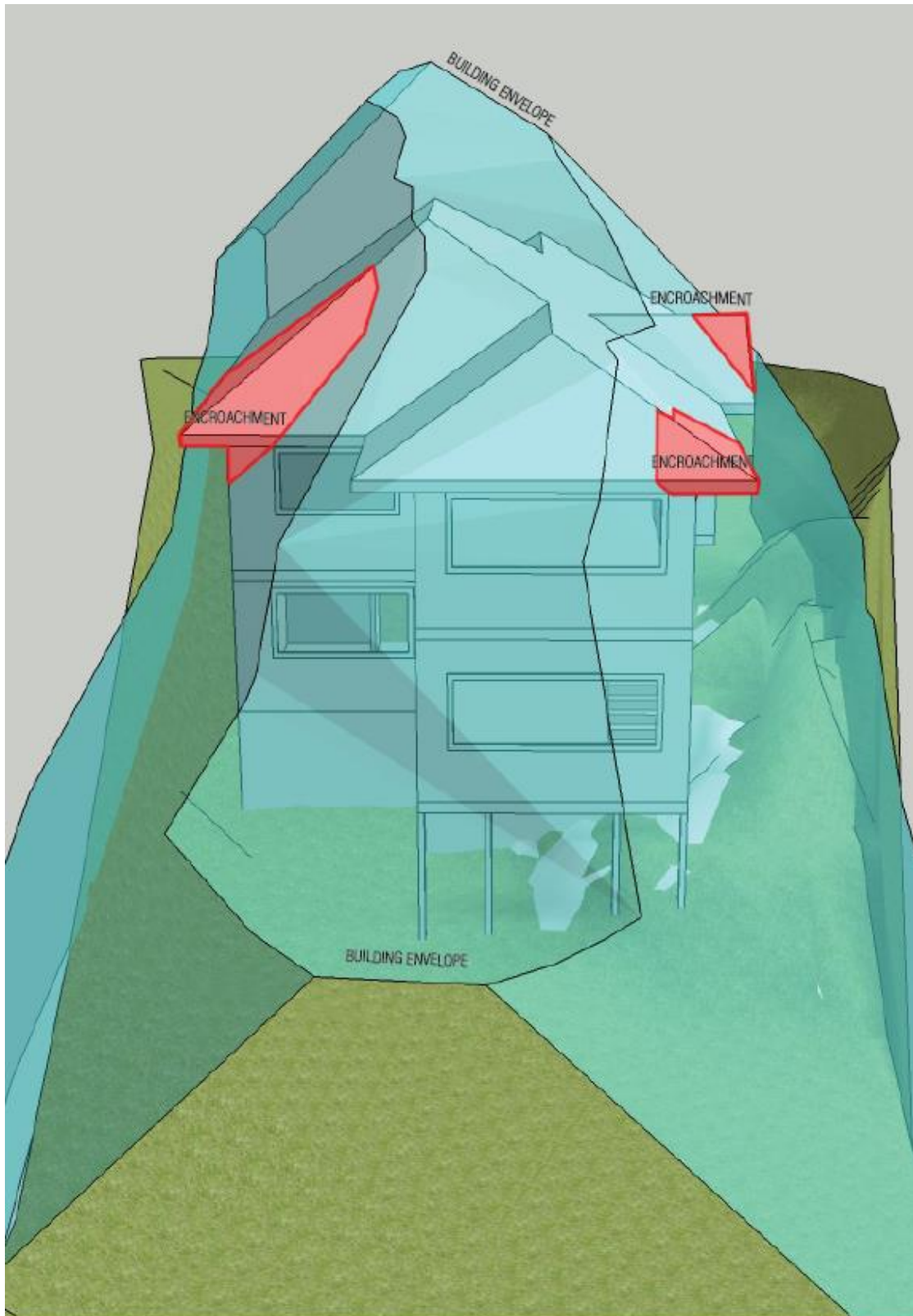
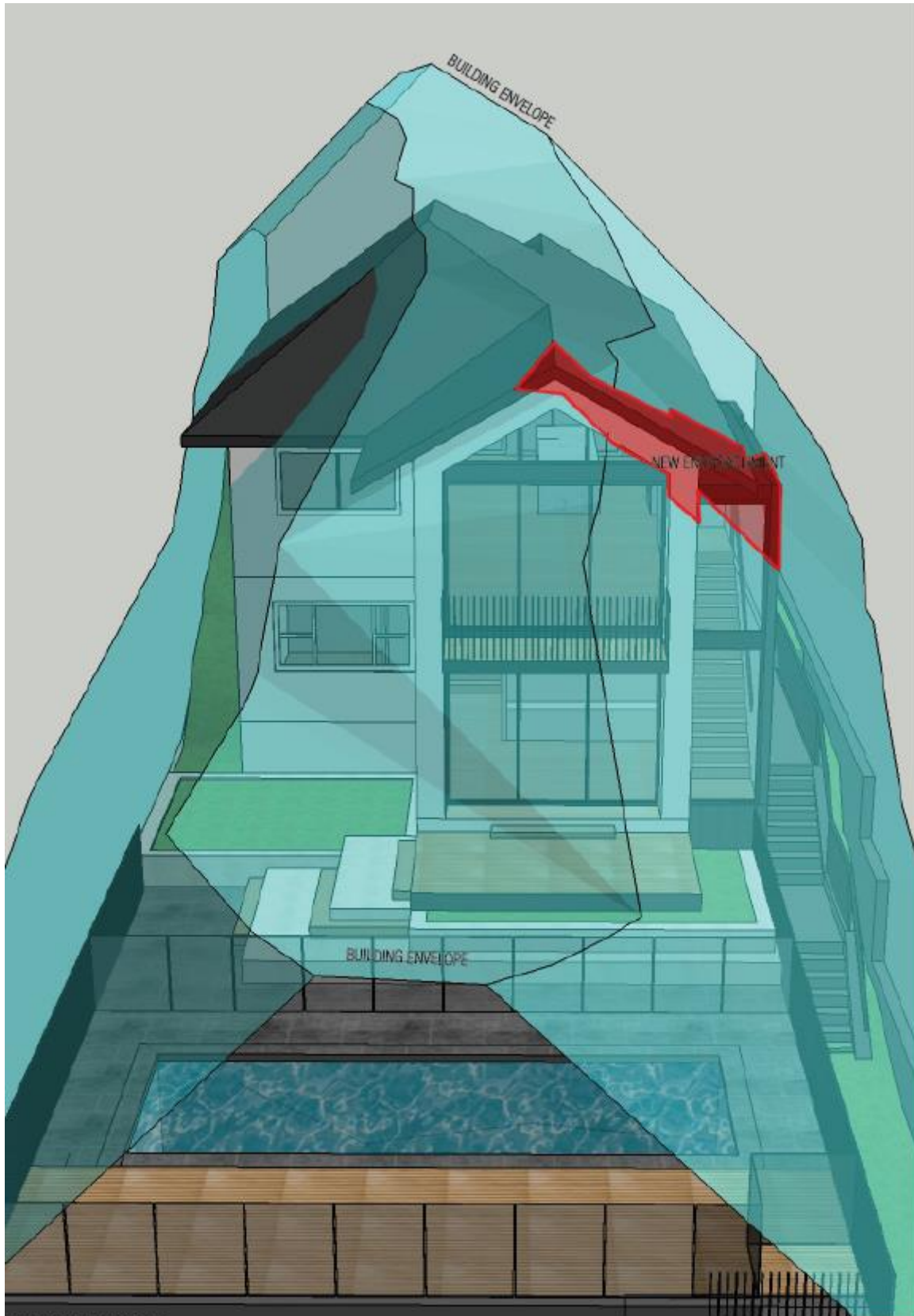
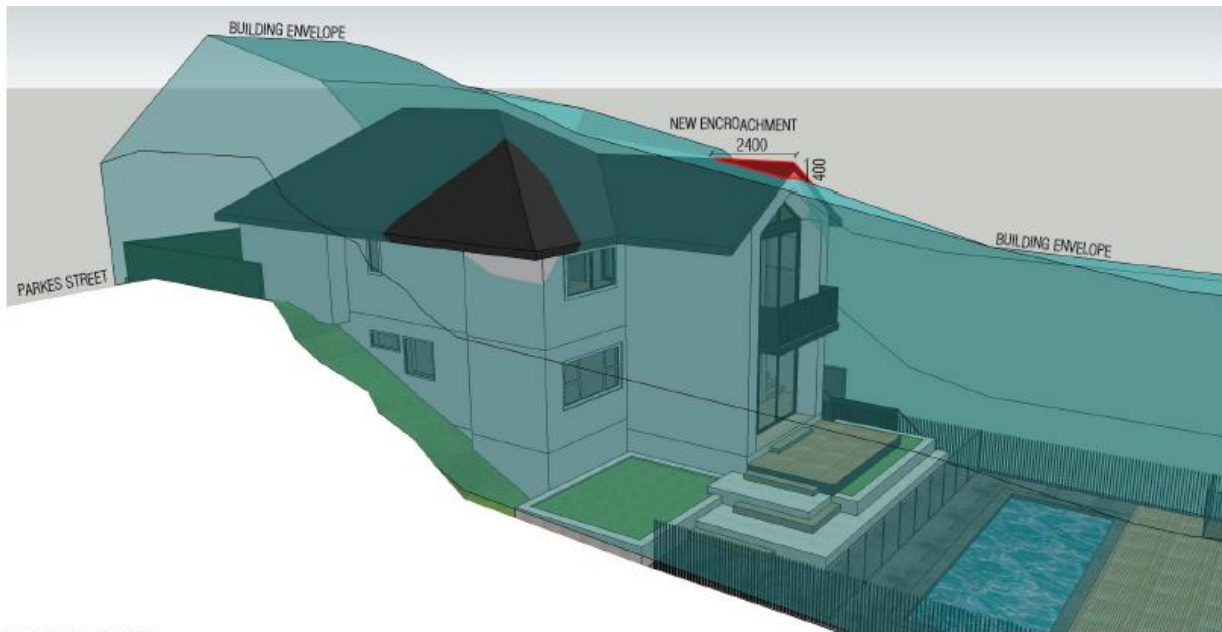


Image 1: Existing encroachments above the 8.5m



SOUTH ELEVATION

Image 2: Location of breach to the 8.5m proposed with the new works



WEST ELEVATION

Image 2: Location of breach of proposed works

2.2. Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. The objectives of this clause 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.

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.

Pursuant to clause 4.6(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.

This Clause applies to the Clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) states that 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 height of buildings provision at 4.3 of LEP which specifies a maximum building height 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.

Clause 4.6(4) states 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 Director-General 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 the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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) states that in deciding whether to grant concurrence, the Director-General must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court 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), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still 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 4.3A of LEP from the operation of clause 4.6.

3. Relevant Case Law

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]. *Australian Company Number 121 577 768 Alterations and Additions 10 Aiken Avenue, Queenscliff* | Page 40

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.

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

1. Is clause 4.3A of WLEP 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 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 4.3A of the LEP?

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. The objectives of this clause 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.*

Pursuant to clause 4.6(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.

4. Request for variation

4.1. Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Height of Buildings Standard and Objectives

Pursuant to Clause 4.3 LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

- a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: The works represent a modest addition to the existing dwelling. The extent of the works proposed will have a negligible impact on the scale of the existing dwelling. The minor breach of the rear extension will sit below the existing maximum roof ridge which is compliant with the 8.5m building height.

In this context, consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191*, I am of the opinion that most observers would not find the height of the breaching elements offensive, jarring or unsympathetic in a streetscape context having regard to the built form characteristics of development within the sites visual

catchment. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings.

The proposal is consistent with this objective

b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

Comment: As previously mentioned, the extent of the additions do not create a significant increase to the overall bulk and scale of the dwelling. The existing presentation to the street is being maintained. The area of non-compliance will not be discernible from the street. No privacy or view loss is impacted as a result of the non-compliance.

Shadow diagrams provided demonstrate that compliant levels of the solar access will be achieved to adjoining properties.

c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment: No adverse impacts to the coastal areas or Warringah's scenic quality.

d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Comment: The existing presentation in terms of its bulk and scale will be maintain to the street. The area of non-compliance will not be readily discernible from public spaces as it will sit below the existing max roof ridge height of the dwelling.

Zone and Zone Objectives

The site is zoned R2 Low Density Residential pursuant to the provisions of the Warringah LEP. The objectives of the clause are as follows:

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

Comment: The development seeks to retain the existing dwelling house on the site which will provide for the housing needs of the community within a low density residential environment. The proposal is consistent with this objective.

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

Comment: N/A

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment: The proposal include the removal of a Jacaranda tree for which an arborist report was prepared. The report details that the tree is an unacceptable risk and supports its removal.

The large existing trees at the rear of the site will be retained and unimpacted by the proposed works. A large planter box is proposed to ensure the dwelling sits within a landscaped setting. The proposal is consistent with this objective.

The proposed works are permissible and consistent with the stated objectives of the zone. The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

4.2. Clause 4.6(4)(b) – 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].

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the design constraints imposed due to the site’s sloping topography.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the topography with the minor breach to the roof at the rear of the site not resulting in any significant amenity impacts nor be readily discerned from the street or adjoining properties.

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

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- Approval of the variation would promote good design and amenity of the built environment (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)). 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:

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.

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

4.3. Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it 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. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4. Secretary's concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings.
- Variations exceeding 10%; and
- Variations to non-numerical development standards. The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff. Concurrence of the Secretary can therefore be assumed in this case.

Concurrence of the Secretary can be assumed as the extent of the variation is less than 10%.

5. Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) that the contextually responsive development is consistent with the zone objectives, and
- b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and
- c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and
- f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- 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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

William Fleming

BS, MPLAN

Boston Blyth Fleming Pty Ltd.