

Exception to Development Standards Submission

This Exception to Development Standards Submission accompanies a Development Application (DA) proposing alterations and additions to the existing dwelling house and its surrounds at 3 Bynya Road, Palm Beach (the **site**). Calculations in this submission are based on plans and calculations provided by Case Ornsby Design.

As required by Clause 4.6(3) of Pittwater Local Environmental Plan 2014 (**LEP 2014**), this submission provides a written request to the Northern Beaches Council (the **Council**) that justifies the proposal's departure from the height of buildings development standard is acceptable from an environmental planning point of view and that compliance with the standard is both unreasonable and unnecessary given the circumstances of the case. This submission takes into consideration relevant judgements.

Description of the planning instrument, development standard and proposed variation

What is the name of the environmental planning instrument that applies to the land?

Pittwater Local Environmental Plan 2014 (**LEP 2014**).

What is the zoning of the land?

The land is zoned E4 Environmental Living.

What are the objectives of the zone?

The objectives of the E4 Environmental Living zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

What is the development standard being varied?

Development Standards' are defined under Section 1.4 of the Environmental Planning and Assessment Act, 1979 (the **Act**) as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) ***such other matters as may be prescribed. (my emphasis)***

The height of buildings control at Clause 4.3 of LEP 2014 is clearly a development standard as it relates to the height of building as specified in **subclause (c)**.

Is the development standard a performance based control? Give details.

No.

Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.3 of LEP 2014.

What are the objectives of the development standard?

The objectives of the development standard are expressly stated at Clause 4.3(1) of LEP 2014 and are:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) of LEP 2014 establishes a maximum building height of 8.5m for the site.

What is the proposed numeric value of the development standard in the development application?

Due to substantial topographical variations, the existing dwelling house has an existing maximum building height ranging from 3.671m (Bynya Road frontage) to a maximum of 11.243m (centrally) and 9.515m at its eastern elevation as measured from ground level existing.

As demonstrated by **Figure 1**, the proposed works will decrease the dwelling's height which ranges from 4.791m (Bynya Road frontage) to a maximum of 10.303m at its eastern elevation.

The existing dwelling is shown outlined and notated in blue with the proposed works shown hatched red.

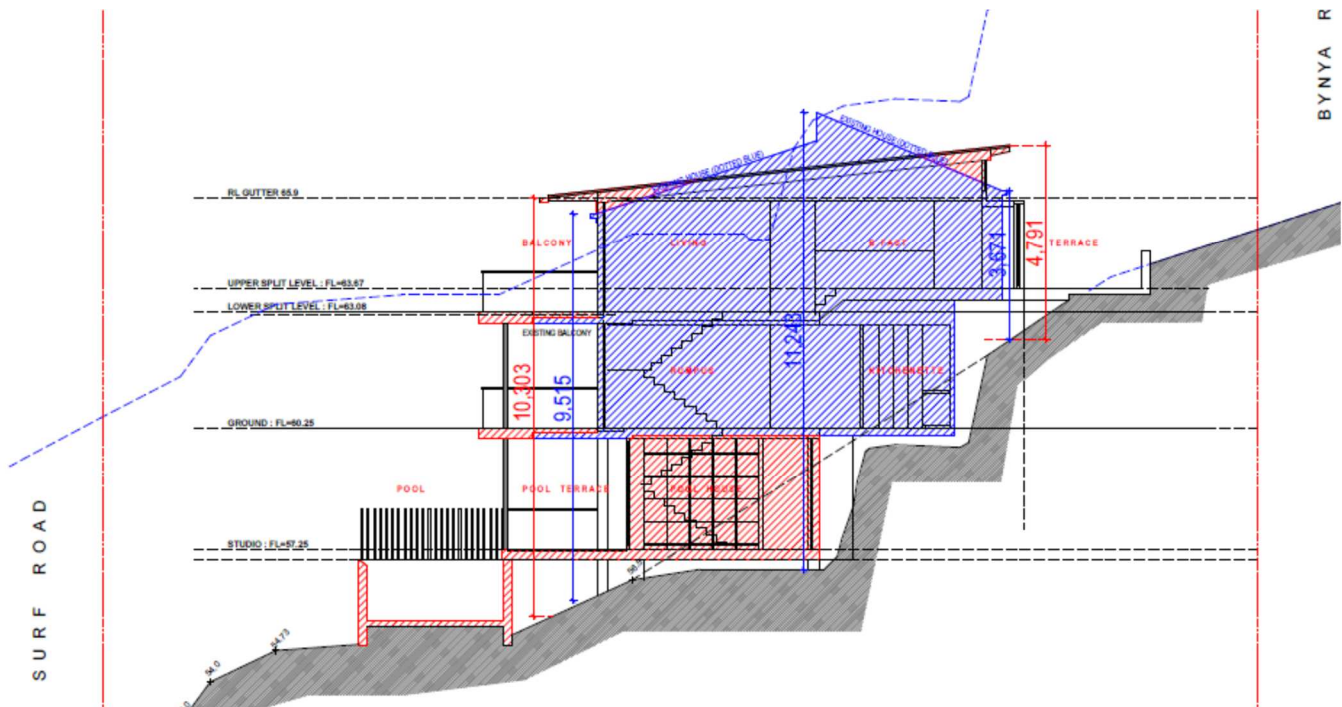


Figure 1 – Varying existing and proposed maximum heights

What is the percentage variation (between the proposal and the environmental planning instrument)?

The existing percentage variation is 32.3% to the maximum height of 11.243m.

The proposed percentage variation is 21.2% to the maximum height of 10.303m.

Assessment of the proposed variation

Is the proposed development in the public interest because it is consistent with the objectives for development in the zone and the objectives of the particular standard?

Objectives of the zone

As stated at Clause 2.3 of LEP 2014, the objectives of the E4 Environmental Living zone are:

- to provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- to ensure that residential development does not have an adverse effect on those values.

- *to provide for residential development of a low density and scale integrated with the landform and landscape.*
- *to encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

The proposal is consistent with the objectives of the E4 Environmental Living zone as it:

- maintains the existing dwelling house on an existing single low density residential allotment of land;
- undertakes works which maintain and/or improve the site's natural landscape features;
- provides a built form which is integrated into its landscape;
- has no impact on foreshore vegetation or wildlife corridors; and
- does not result in the loss of significant vegetation.

Objectives of the height of building standard.

The proposal despite its departure from the height of buildings standard is nonetheless consistent with the relevant objectives and therefore provides an appropriate planning outcome for the following reasons:

Objective (a) – to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality

Objective (b) - to ensure that buildings are compatible with the height and scale of surrounding and nearby development

- a single dwelling house on an existing single low density residential allotment of land is maintained. This low density built form and land use is desired by the site's and surrounding locality's E4 Environmental Living zoning;
- the surrounding locality is characterised by multi level elevated dwellings set on typical allotments of land influenced by the locality's topographical characteristics and mature/thick vegetation. A variety of housing types and architectural styles are provided within a relatively consistent subdivision pattern that is influenced by the locality's topographical variations (falling from west to east or front to back). The integrity of individual dwellings varies considerably. There is little architectural, aesthetic, social or cultural built form significance. Dwellings are typically adjusted to the natural topography or are provided with large undercroft areas. They are oriented to take advantage of their easterly views and vistas. As demonstrated by **Figure 1**, the existing and higher (as compared to that proposed) built form sits comfortably within its established and likely future built form context;
- the proposal responds and contributes to its context by engaging its desired future character as envisaged by the proposed land uses and densities permissible in the surrounding locality. The surrounding area is undergoing a period of regeneration. The site's appropriate redevelopment will enable the realisation of Council's strategic direction for the locality's future built form;
- the scale of the proposal is characterised by the desired future character for the area. The height (reduced from that existing), bulk and scale of the built form is generally consistent with Council's key planning controls and does not influence or set a precedent for future buildings along the eastern side of Bynya Road. This is aptly demonstrated at **Figure 1**;

- a single storey built form is maintained to the site's Bynya Road frontage, whilst the three storey built form is formalised (use of the existing undercroft and overall height reduced from that existing) at the site's Surf Road frontage;
- the visual catchment contains several buildings that will present a similar bulk and scale and which set the character. Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development (see **Figure 1**);

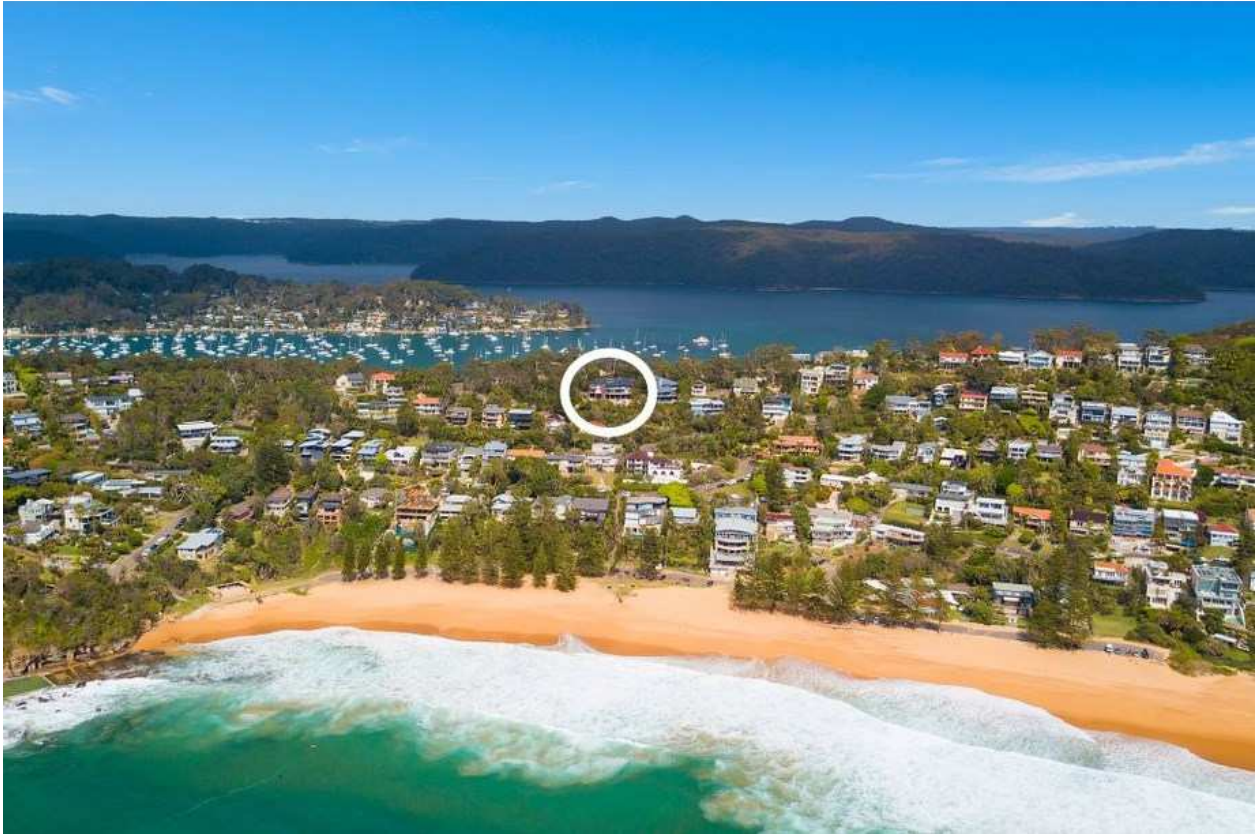


Figure 1 – Aerial photo of the site (the existing built form) and its surrounding hillside built form context

- the proposal conforms to and reflects the site's natural landforms. Excavation is not proposed, rather use of existing undercroft areas. The non-compliance with the height standard allows for a reasonable ground level (undercroft) addition to the dwelling while maintaining a single storey built form to Bynya Road and a reduced height to the site's Surf Road frontage;
- the site is proportioned to allow the efficient realisation and internalisation of the impacts of the altered built form without an adverse visual impact or perceived built form dominance;
- the expression of the built form is adjusted to respond to:
 - the site's locational context;
 - the site's topography;
 - an improved connection to external areas;
 - the design and built form character of the adjoining and adjacent development;
 - solar access and the site's orientation; and
 - internal and external amenity for the occupants. In this regard, the design of the proposed built form specifically responds to the location of its adjacent built form relative to the retention of existing amenity levels for those properties.

Objective (c) - to minimise any overshadowing of neighbouring properties

- the site's only neighbouring built form is at 5 Bynya Road. This property is not affected at all relative to overshadowing at any critical time of the day or year as it is to the site's north. Existing levels of sunlight have been retained to their primary living rooms and private open space areas;
- additional shadows cast by the proposal predominantly fall internally within the site or the carriageways of Bynya Road and Surf Road;
- small areas of land are affected and their relative useability is not compromised;
- the site's primary living rooms, front and backyards and numerous private open space areas receive more than adequate direct solar access;
- the design is consistent with the objectives of the control as it ensures the form and scale of the dwelling is not excessive. By this the proposal exhibits a similar height, bulk and scale to that of neighbouring and nearby properties; and
- any existing or proposed overshadowing impact will not preclude an appropriate redevelopment or the redevelopment potential of any nearby property that is zoned to do so.

Objective (d) - to allow for the reasonable sharing of views

- dwellings are adjusted to the natural topography and are typically oriented to take advantage of their panoramic easterly, north easterly and south easterly views and vistas. The site's only real built form neighbour is to its north at 5 Bynya Road, a three storey dwelling. This dwelling is generally screened from the site via existing perimeter mature vegetation. This dwelling is also oriented in an easterly direction with numerous elevated external areas to take advantage of the panoramic views without interruption. The proposal has no identifiable impact on these existing views'
- views from the Bynya Road carriageway (i.e. the public domain) will be improved due to the dwelling's decreased height and relatively flat roof design. These views are significant and include land and water interface;
- views from the Surf Road carriageway are not impacted in any way;
- the bulk and scale and building envelope of the building has been reduced. It is generally consistent with that of its neighbouring and nearby properties and does not in any way preclude the appropriate redevelopment of these properties.

Objective (e) - to encourage buildings that are designed to respond sensitively to the natural topography

- the site is on the low side of Bynya Road. The surface slopes down from the road at angles between 15 and 25° from an outcrop of sandstone that runs across the site near the front boundary and a sandstone shelf is present under the existing dwelling. The existing multi level masonry and concrete dwelling steps down the site. It is supported on concrete columns and strip footings and concrete slabs;
- the surrounding locality is characterised by multi level elevated dwellings set on typical allotments of land influenced by the locality's topographical steep characteristics and mature/thick vegetation. A variety of housing types and architectural styles are provided within a relatively consistent subdivision pattern that is influenced by the locality's topographical variations (falling from west to east or front to back). The integrity of individual dwellings varies considerably. There is little architectural, aesthetic, social or cultural built form significance. Dwellings are typically adjusted to the natural

topography or are provided with large undercroft areas. They are oriented to take advantage of their easterly views and vistas. As demonstrated by **Figure 1**, the existing and higher (as compared to that proposed) built form sits comfortably within its established and likely future built form context;

- the proposal conforms to and reflects the site's natural landforms. Excavation is not proposed other than for the swimming pool (a standard and accepted condition). Use of the existing undercroft area which contains numerous structural columns for the levels above. The non-compliance with the height standard allows for a reasonable ground level (undercroft) addition to the dwelling while maintaining a single storey built form to Bynya Road and an overall reduced height to the site's Surf Road frontage;
- the proposed excavation works:
 - will not be structurally detrimental to the existing or adjacent building structure;
 - will not significantly alter the underground flows of water;
 - retains the ability of stormwater to be gravity fed to Council's existing infrastructure;
 - does not have any impact on natural features or rocky outcrops;
 - maintains the approved residential use of the site, in accordance with the zone objectives;
 - where practicable, some of the excavated material will be re used on site however any remaining excavated material will be removed off site for disposal to a suitable landfill;
 - will result in an acceptable level of impact to surrounding properties and the excavation is not considered to result in any amenity impact to the neighbouring properties.

Objective (f) - to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

- the site is not an identified heritage item, is not located within the visual catchment of an identified heritage and is not located within a heritage conservation area;
- the proposal undertakes works which maintain and/or improve the site's natural landscape features;
- a built form is provided which is integrated into its landscape;
- the proposal has no impact on foreshore vegetation or wildlife corridors;
- the does not result in the loss of significant vegetation or any other natural feature; and
- the building volume has been designed to be articulated, and to facilitate a contextually appropriate massing to maintain a human scale.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

A development at 3 Bynya Road, Palm Beach, that strictly complies with the 8.5m height standard is unreasonable or unnecessary given the following presented circumstances:

- the existing built form already departs from the standard;
- the existing built form which departs from the standard provides a generally consistent height, bulk and scale with the neighbouring and nearby built form;
- the dwelling's maximum height is reduced by 0.94m;

- compliance would require demolition of the built form which is economically impractical and unlikely given the existing built form, its orientation and structural soundness;
- following a rigorous merit based assessment, approval of a building height on the site that relates to the locality's existing character but which exceeds the LEP 2014 development standard, will not set a precedent for other non-conforming applications;
- the proposed built form sits comfortably in the site's wider visual context as viewed from the surrounding public domain (see **Figure 1**), given the scale and form of other hillside developments in the vicinity;
- it has been demonstrated within the SEE that the works that exceed the height limit will not result in additional adverse environmental impacts to adjacent properties and the surrounding public domain. In this regard the resultant built form provides for an acceptable and equitable planning outcome in relation to:
 - solar access and overshadowing;
 - access to natural daylight and ventilation;
 - aural and visual privacy;
 - views and vistas; and
 - visual impact;
- the height of the building does not preclude (and hasn't done so in the past) redevelopment of the neighbouring properties.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. Those tests have been considered below.

Are the objectives of the standard are achieved notwithstanding non-compliance with the standard?

See above detailed assessment of the proposal by reference to the objectives of the height standard. That assessment demonstrates that the objectives of the standard are achieved notwithstanding the non-compliance with the standard, and in some cases the non-compliance better achieves the objectives by allowing for a reasonable extension in the appropriate location.

The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary?

N/A

Would the underlying objective or purpose of the standard be defeated or thwarted if compliance was required?

Compliance with the underlying objective of the 8.5m height standard would be thwarted if strict compliance with the standard was required in the circumstances as the quality of the residential outcome would be compromised for no sound planning reason.

The resultant built form is one that exhibits substantial merit relative to architectural, urban and landscape design. It includes appropriate environmental initiatives and has a positive built form relationship with its neighbouring and nearby elevated multi level built form.

Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard cannot be said to be abandoned. Notwithstanding and following a review of Council's Development Standard Variations Register there are numerous recent examples of built form (dwelling house only) that depart from the height of buildings standard within LEP 2014, including:

- DA 2018/309 at 8 Narla Road, Bayview (13.12% departure);
- DA 2018/397 at 34 Neptune Road, Newport (11.29% departure);
- DA 2018/434 at 1A Elanora Road, Elanora Heights (46% departure);
- DA 2018/508 at 5 Joanne Place, Bilgola Plateau (31.8% departure);
- DA 2018/814 at 66 and 66A Herbert Avenue, Newport (40.7% departure);
- DA 2018/1291 at 113 Pacific Road, Palm Beach (9.7% departure);
- DA 2018/1679 at 7 The Outlook, Bilgola Plateau (4.5% departure);
- DA 2018/1916 at 147 Queens Parade, Newport (9.9% departure);
- DA 2018/1965 at 166 Prince Alfred Parade, Newport (9.88% departure);
- DA 2018/1043 at 57 Robertson Road, Scotland Island (11.5% departure);
- DA 2018/68 at 199 Riverview Road, Avalon Beach (29.6% departure);
- DA 2017/377 at 98 Crescent Road, Newport (15.3% departure);
- DA 2017/475 at 192 Barrenjoey Road, Newport (28% departure);
- DA 2017/492 at 47 Hudson Parade, Newport (6.72% departure); and
- DA 2017/506 at 2 Carpenter Crescent, Warriewood (7.06% departure).

Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location. Large elevated multi level dwellings are found on neighbouring and nearby properties.

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

There are sufficient environmental planning grounds to justify contravening the height of buildings development standard being:

- the existing built form which departs from the standard provides a generally consistent height, bulk and scale with the neighbouring and nearby built form;
- the dwelling's maximum height is reduced by 0.94m;
- it has been demonstrated within the SEE that the height non-compliance will not result in material environmental impacts to neighbouring properties and the surrounding public domain. In this regard the resultant built form provides for an acceptable and equitable planning outcome in relation to:
 - solar access and overshadowing;
 - access to natural daylight and ventilation;
 - aural and visual privacy;

- views and vistas; and
- visual impact;
- the development provides for an appropriate environmental planning outcome and is not an overdevelopment of the site as follows:
 - compliance would require demolition of the built form which is economically impractical and unlikely given the existing built form, its orientation and structural soundness;
 - views from the Bynya Road carriageway (i.e. the public domain) will be improved due to the dwelling's decreased height and relatively flat roof design. These views are significant and include land and water interface;
 - the proposal satisfies the objectives of the E4 Environmental Living zone;
 - the proposal satisfies the objectives of the height development standard;
 - the resultant height, bulk and scale of the dwelling is comparable to that on neighbouring and nearby properties whether their built form is characteristic or not (see **Figure 1**);
 - the highly articulated façade treatment and selection of characteristic and recessive external materials and finishes reduces the dwelling's perceived height (relative to its most maximum location), bulk and scale, when viewed from the surrounding public domain;
 - the dwelling's reduced maximum height will not set an undue precedent and will not preclude the appropriate redevelopment of neighbouring and nearby properties. The building's architecture (including its proposed roofscape) provides an appropriate height and mass relationship to the locality's existing and likely future character, maintaining a positive urban character;
 - the nature of such an urban environment is that all future development will seek to maximise amenity and density through design. In this regard, the proposal represents an appropriate planning outcome with any adverse environmental impacts;
- appropriate environmental initiatives are proposed, including:
 - compliance with all BASIX requirements;
 - provision of a 1,500 litre RWT;
 - the provision of metal awnings and window projections;
 - retention of the existing concrete slab and internal FFL's;
 - increased useability of landscaped areas and retained / established landscaped areas;
 - the proposal provides significant natural light penetration throughout the dwelling through an open plan floor plan;
 - retention of existing substantial areas of the existing built form (and its materials);
 - the construction materials proposed provide high thermal mass to minimise heating and cooling loads;
 - the design minimises reliance on artificial lighting and mechanical ventilation;
 - the dwelling benefits from cross flow and stack effect ventilation;

- all outdoor private spaces are designed as extension of the room to enhance and encourage outdoor and indoor living, while at same time acting as a transition space to modulate temperature within the dwelling;
 - the use of energy efficient fixtures;
 - despite excavation being proposed for the swimming pool, the site's existing contours have generally been retained. The proposal will not impact on existing natural drainage patterns, adjacent built form or the locality's natural environment;
 - substantial areas of deep soil landscaping and permeable areas are maintained. This permeable characteristic encourages infiltration and absorption; and
- appropriate curtilage to the neighbouring property at 5 Bynya Road is maintained; and
 - the proposal generally is of an intensity and scale commensurate with the locality's established and likely future urban conditions.

Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of the control applied across an area that supports a variety of built forms. The retention of improved housing for a family will assist in meeting housing and locational context demand.

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act?

The relevant objects of the Act as specified in Section 1.3, are in our opinion, achieved by the proposed development in that it:

- promotes the social and economic welfare of the community;
- facilitates ESD;
- promotes the orderly and economic use and development of land;
- promotes the sustainable management of built and cultural heritage;
- promotes good design and amenity of the built environment; and
- promotes the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 1.3 of the Act, particularly given:

- the predominant retention of the existing built form and envelope;
- the dwelling's overall height is reduced from that existing;
- the dwelling's height and built form supports high quality residential development that responds to demand for high quality residential accommodation in locations with excellent access to public transport, services, amenities and other facilities;

- the built form elements of the building which depart from the standard do not materially add to its bulk and scale and furthermore do not result in material environmental impacts to neighbouring properties and the surrounding public domain; and
- it would preclude redevelopment of the site in the manner proposed and which would not offer the level of amenity currently expected.

The site's redevelopment and subsequent departure from the height of buildings standard does not preclude or isolate an adjacent property(s) from being appropriately redeveloped. The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 1.3.

Is there public benefit in maintaining the development standard?

Generally, there is a public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height of buildings standard would serve no purpose other than to impose numerical inflexibility that would achieve no planning purpose. A rigid and inflexible compliance based approach to the development standard forgoes the opportunity to provide or encourage an appropriate planning outcome given the presented circumstances.

Following a review of other DA's (see earlier) Council has considered applications favourably which depart from the height of buildings standard subject to a satisfactory environmental performance. There are no reasons why it is not in the public interest and its refusal based on the standard's departure is not warranted. Therefore, it is argued that there is no public benefit in maintaining the adopted height of buildings planning control.

On balance, the variation to the height of buildings standard is an appropriate use of the provisions of Clause 4.6. Accordingly, there is in the specific circumstances of the case, no public benefit in strictly maintaining the development standard.

Is the objection well founded?

For the reasons outlined in previous sections, it is considered the objection is well founded in this instance and granting an exception to the development can be supported given the presented circumstances of the case. The development does not contravene the objects specified at Section 1.3 of the Act.

Conclusion

The proposed variation to the height of buildings standard is based on the reasons contained within this formal request for an exception to the standard. A development strictly complying with the numerical height of buildings standard would not significantly alter the development's environmental impacts and therefore impacts to neighbouring properties and the surrounding public domain as:

- the proposal satisfies and achieves the objectives of the E4 Environmental Living zone;
- the proposal satisfies and achieves the objectives of the height of buildings standard;
- the resultant built form sits comfortably within its established and likely future built form context;
- the dwelling's maximum height is reduced by 0.94m;

- compliance would require demolition of the built form which is economically impractical and unlikely given the existing built form, its orientation and structural soundness; and
- improved internal amenity for the occupants.

It is concluded that the objection:

- is well founded;
- demonstrates that compliance with the standard is both unnecessary and unreasonable; and
- demonstrates that there are sufficient environmental planning grounds in which to support the proposal.

On that basis, the consent authority can be satisfied that the proposed development is in the public interest because it is consistent with the objectives for development in the zone and the objectives of the standard.