

**Four Towns
Planning**

Planning and property consultant

**OBJECTION PURSUANT TO CLAUSE 4.6 OF
PITTWATER LOCAL ENVIRONMENTAL PLAN
2014**

**VARIATION OF A DEVELOPMENT STANDARD
REGARDING THE HEIGHT OF BUILDINGS AS
DETAILED IN CLAUSE 4.3 OF PITTWATER
LOCAL ENVIRONMENTAL PLAN 2015**

**DEMOLITION OF EXISTING DWELLING HOUSE,
SUBDIVISION INTO TWO (2) TORRENS TITLE
LOTS AND THE CONSTRUCTION OF A NEW
DWELLING HOUSE ON EACH LOT INCLUDING
A SWIMMING POOL AND ASSOCIATED
LANDSCAPING WORKS**

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Demolition of existing dwelling house, subdivision into (2) Torrens Title lots and the construction of a new dwelling house on each new lot including a swimming pool and associated landscaping works
120 Prince Alfred Parade, Newport

This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.

Report prepared by:

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Report prepared for:

Bravo Futura Residential Development No 1 Pty Ltd

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Introduction

This objection is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height of a building as described in Clause 4.3 of the Pittwater Local Environmental Plan 2014 (PLEP 2014). It is noted that this request is made for the proposed dwelling house to be located on the new lot 120 Prince Alfred Parade, with the proposed dwelling house on 120a Prince Alfred Parade complying with the maximum building height.

The following assessment of the variation to Clause 4.3 – Building Height development standard, has taken into consideration the recent judgement contained within 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.

Requirement	8.5m
Proposed	9.143m
Is the planning control in question a development standard?	Yes
Is the non-compliance with to the clause requirement a numerical/or performance based variation?	Numerical
If numerical enter a % variation to requirement	7.56%

The proposal must satisfy the objectives of Clause 4.3 – Height of Buildings, the underlying objectives of the particular zone, and the objectives of Clause 4.6 - Exceptions to Development Standards under the PLEP 2014. The proposal is consistent with surrounding developments and the proposed minor increase is compatible with the locality and complies with other relevant controls which determine the built form of the site.

A variation to the strict application of the Height of Building standard is considered appropriate for the subject site and is supportable for the following reasons:

- The objectives of the PLEP2014 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the PLEP2014 C4 Environmental Living zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has a steep topography and slopes from the front to the rear of the site. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposal is consistent with the building heights and roof forms of the area, noting that a streetscape review noted developments ranging from two to four storeys in height.
- The proposal is consistent with the existing bulk and scale of the area.
- The proposal has no adverse impacts to views or view corridors, as redevelopment of the site is permissible.
- The proposal does not adversely impact existing solar access to private and public places. It is noted that the project architect has created a dwelling that does not adversely impact neighbours while addressing the sites constraints such as the topography.

- The site has a steep topography and slopes from the rear to the front of the site by approximately 9.5m. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposed development is below the building height and building bulk of properties immediately surrounding the site. Refer to streetscape analysis which outlines properties along Prince Alfred Parade with a greater RL.
- The breach to the building is minimal and is due to man made changes to the land which divert the original natural level of the site.
- The breach in building height will not be noticeable and will have no adverse impacts on neighbouring properties. The proposal will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

Clause 4.6 Variation Requirements

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case 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* and review the following:

Compliance being unreasonable or unnecessary

1. 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]*.
2. The underlying objective or purpose of Clause 4.3(2) is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council at [45]*
3. 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]*
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the stand is unnecessary and unreasonable: *Wehbe v Pittwater Council at [47]*.
5. The relevance of the zoning provisions of the land to which the development is proposed.

Sufficient environmental planning grounds

1. First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard"
2. 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]

Is the proposed development in the public interest?

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;

- b. the zone in which the development is proposed to be carried out.

Secretary's Concurrence

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (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 Secretary before granting concurrence.*

General Provisions Relating to Clause 4.6 which will be applicable to Clause 4.3(2) Height of Building

4.6 Exceptions to development standards

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

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted 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.*

(5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production

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Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note— *When this Plan was made it did not include all of these zones.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4.*

Comment: As detailed previously in this request, Clause 4.6 of PLEP2014 is applicable to enable a variation to the Height of Building to permit Northern Beaches Council power to grant development consent to the subject development.

This proposal involves a departure from the Height of Building control of MLEP2013, a formal variation to this standard is required under *Clause 4.6 – Exceptions to Development Standards*. This provision allows consent to be granted for a development even though it would contravene a development standard imposed by this or any other planning instrument.

The provisions of Clause 4.6, which the consent authority must have regard to in determining whether a development that contravenes a development standard should be supported, includes the following:

- *That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case; Cl 4.6 (3)(a)*
- *That there is sufficient environmental planning grounds to justify contravening the development standard; Cl 4.6 (3) (b)*
- *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: Cl 4.6 (4)(a)(ii)*
- *The public benefit of maintaining the development standard, and Cl 4.6 (5)(b)*
- *Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence Cl 4.6 (5)(c)*

4.3 Height of buildings

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

- (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.*

(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) Despite subclause (2), development on land—

- (a) at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and*
- (b) that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map, may exceed a height of 8.5 metres, but not be more than 8.0 metres above the flood planning level.*

(2B) Despite subclause (2), development on land—

- (a) at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and*
- (b) that has a maximum building height of 11 metres shown for that land on the Height of Buildings Map, may exceed a height of 11 metres, but not be more than 10.5 metres above the flood planning level.*

(2C) Despite subclause (2), development on an area of land shown in Column 1 of the table to this subclause and identified as such on the Height of Buildings Map, may exceed the maximum building height shown on the Height of Buildings Map for that land, if the height of the development is not greater than the height shown opposite that area in Column 2.

Column 1 Column 2

Area	Maximum height above the flood planning level
Area 1	11.5 metres
Area 2	8.5 metres on the street frontage and 10.5 metres at the rear
Area 3	8.5 metres
Area 4	7.0 metres

(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if—

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and*
- (b) the objectives of this clause are achieved, and*
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and*
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.*

(2E) Despite subclause (2), development for the purposes of shop top housing on land identified as “Area 5” on the Height of Buildings Map may have a height of up to 10 metres if the top floor of the building is setback a minimum of 6 metres from the boundary to the primary street frontage.

(2F) Despite subclause (2), development on land identified as “Area 6” on the Height of Buildings Map must not exceed 8.5 metres within the area that is 12.5 metres measured from the boundary of any property fronting Orchard Street, Macpherson Street, Warriewood Road or Garden Street.

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(2FA) Despite subclause (2), the maximum height for a secondary dwelling or a rural worker's dwelling in Zone E4 Environmental Living or Zone RU2 Rural Landscape is 5.5 metres if the secondary dwelling or rural worker's dwelling is separate from the principal dwelling.

(2FB) Despite subclause (2), in the case of a dual occupancy (detached), the maximum height for the dwelling that is furthest back from the primary street frontage of the lot is 5.5 metres.

(2G) In this clause—

***flood planning level** means the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metres freeboard, or other freeboard determined by an adopted floodplain risk management plan.*

***floodplain risk management plan** has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0), published in 2005 by the NSW Government.*

Comment: It is acknowledged that the proposed development does not comply with clause 4.3 (2) and accordingly there is a requirement to submit a Clause 4.6 Variation. This Clause 4.6 seeks an exemption to the development standard as prescribed under the PLEP2014 and demonstrates that compliance with the provisions of clause 4.3 (2) is both unreasonable and unnecessary and the proposed development meets the required steps that are set out in the relevant NSW Land and Environment Court decisions to justify that the standard can be varied to achieve the subject proposal.

The development standard in Clause 4.3 (2) of the PLEP2014, is amendable to variation. The purpose of this Clause 4.6 is to vary the Height of Building as a building height referable to the building to give Council the power to grant development consent to the non-compliant purposes. This proposition is reinforced by the following:

Clause 4.3 (2) states:

(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.

The Height of Building Map sets a maximum Height of Building control of 8.5m. For the purpose of calculating Height of Building, the MLEP2013 provides the following definition:

Building height is defined as follows:

***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.

***ground level (existing)** means the existing level of a site at any point.*

The leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

The Height of Building in clause 4.3(2) of the PLEP2014 is a development standard in accordance with the definition set out below:

Development standards' is defined in section 1.4 of the EP&A Act 1979 as:

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:

(c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Despite the variation to the Height of Building control which occurs as a result of the topography of the land and modified components, the proposed development is considered to be in keeping with the desired future character of the locality. The proposal has been strategically designed to minimise the impact and bulk and scale of the project. The project architects have worked tirelessly to design two new modern high-end dwellings that meet the sites constraints and the existing bulk and scale of the area; therefore, the proposal will not result in any unreasonable visual impact on the Prince Alfred Parade streetscape.

The proposed development will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing. Therefore, this written submission is considered to be compliant with the Statutory Provisions prescribed both under PLEP2014 and the provisions of Clause 4.6 which permit a variation to a development standard.

Objection to Development Standard – Height of Building (Clause 4.3(2))

Compliance being unreasonable or unnecessary

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the stand: *Wehbe v Pittwater Council at [42] and [43].*

Comment: Clause 4.6(3)(a) of the MLEP2013 states that the proposed variation to the development standard must demonstrate that compliance with the development standard is *'unreasonable or unnecessary in the circumstances of the case'*.

In determining a merits-based assessment for the Height of Building of the development due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – *Veloshin v Randwick Council [2007] NSWLEC 428*.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor and consistent with similar approvals granted in the area, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the

Newport precinct. As noted under the review of Clause 4.3 within the Statement of Environmental Effects, the proposal is consistent with the objectives of Clause 4.3, as outlined below:

- The objectives of the PLEP2014 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the PLEP2014 C4 Environmental Living zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has a steep topography and slopes from the front to the rear of the site. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposal is consistent with the building heights and roof forms of the area, noting that a streetscape review noted developments ranging from two to four storeys in height.
- The proposal is consistent with the existing bulk and scale of the area.
- The proposal has no adverse impacts to views or view corridors, as redevelopment of the site is permissible.
- The proposal does not adversely impact existing solar access to private and public places. It is noted that the project architect has created a dwelling that does not adversely impact neighbours while addressing the sites constraints such as the topography.
- The site has a steep topography and slopes from the rear to the front of the site by approximately 9.5m. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposed development is below the building height and building bulk of properties immediately surrounding the site. Refer to streetscape analysis which outlines properties along Prince Alfred Parade with a greater RL.
- The breach to the building is minimal and is due to man made changes to the land which divert the original natural level of the site.
- The breach in building height will not be noticeable and will have no adverse impacts on neighbouring properties. The proposal will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

As outlined above, the proposed development is consistent with the underlying objectives of the Height of Building standard, notwithstanding the proposed variation. Given the modified state of the site and existing dwellings to the west, through this application the permissible Height of Building control does not align with the permissible height on the site, nor several built form controls of the PDCP. This essentially limits any redevelopment potential of the site without varying Council's standard.

2. The underlying objective or purpose of Clause 4.3 is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council at [45]*

Comment: In determining the building heights of the development, it is important to understand the definitions of building height and ground level (existing) and also relevant case law from the NSW Land and Environmental Court. The following is pertinent to the assessment of the proposed building heights for this development:

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Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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

Ground level existing is defined as follows:

ground level (existing) means the existing level of a site at any point.

The court provides two key examples which consider the definition of “ground level (existing)” been *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was then followed by the decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In *Stamford Property Services*, the Court followed the reasoning adopted in *Bettar* and confirmed that “ground level (existing)” must relate to the levels of the site, and not to the artificially modified levels of the site as reflected by the building presently located on the land. In this regard the Court preferred the Council’s approach which required that the proposed height be measured from the natural ground levels of the site where known, such as undisturbed levels at the boundary, and from adjacent undisturbed levels such as the level of the footpath at the front boundary of the site. These levels could then be extrapolated across the site reflecting the pre-development sloping topography of the land, consistent with the approach adopted in *Bettar*.

As a result of the above, it is determined that the maximum building above interpolated unmodified ground level is 9.143m for the proposed dwelling on 120 Prince Alfred Parade. This results in a 0.643m variation or 7.56%. This is a result of the existing building structures on the land which prove that the site has been modified to its current form including retaining walls within the front setback and the existing building footprint. The review above allows a thorough analysis of the objectives of Clause 4.3, which confirms that the proposal is consistent with the objectives of the zone, as outlined below:

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

The site is located within an area identified within A4.10 Newport Locality which outlines the desired character of the area. The desired character statement of A4.10 Newport locality is provided below:

A4.10 Newport Locality

Desired Character

The Newport locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a natural landscaped setting, integrated with the landform and landscape. Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community. Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors. Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.

Newport's coastal setting is what contributes most to the distinctive character of the commercial centre. Responsive, energy efficient buildings will support and enhance this relaxed, beachfront character and its outdoor lifestyle, contributing to a unique sense of place. Contemporary design solutions within the commercial centre will respond to Newport's climate and setting, including providing shade and shelter to streets and entries, generous private outdoor spaces, openings that capture ocean breezes, and shade elements.

After reviewing the desired character statement, it is my professional opinion that the buildings by virtue of its height, bulk and scale, is consistent with the locality and desired character of the area. The following is noted to support my opinion:

- Notwithstanding the minor building height breaches to the dwelling for 120 Prince Alfred Parade, the Newport locality will remain a low-density residential area for dwelling houses, noting the proposed 2 and 3 storey dwellings with this application and the existing 3 to 4 storey dwellings to the west along Prince Alfred Parade.
- The building height breach is toward the rear of the entry level before the dwelling further stepping down with the topography of the site. The dwelling is consistent with the streetscape noting the drop down in RL levels from the neighbouring properties.
- The building presents as a 1-2 storey dwelling from the streetscape and has been strategically designed as a 2-3 storey appearance from Salt Pan Cove with the breaching element not readily discernible as viewed from adjoining properties. It is noted that the adjoining properties to the west present as 4 storey dwellings to Salt Pan Cove.

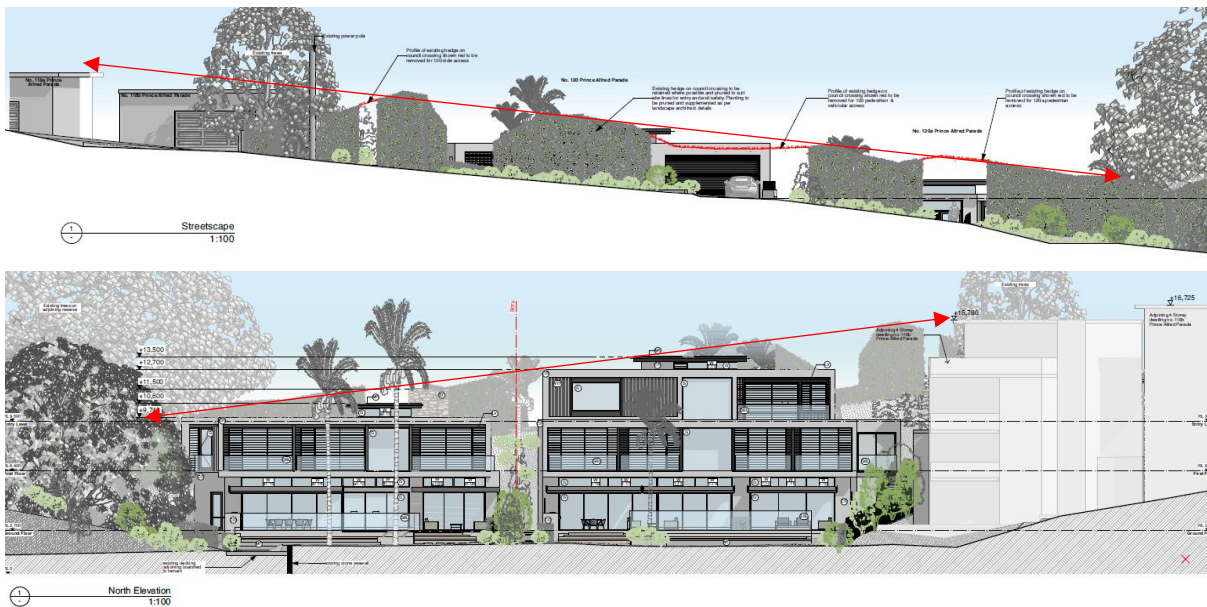
As a result of the above, I have formed the considered opinion that the project is a sympathetic design and development with a bulk and scale consistent with the existing and future character of the area. It is also noted that most observers would not find the proposed development by virtue of its height and scale, in particular the building height breaching elements, offensive, or unsympathetic in a streetscape context nor the context from Salt Pan Cove.

Notwithstanding the proposed minor variation to the building height, the proposal is consistent with this objective.

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

The proposal has been strategically designed to minimise the impact and bulk and scale of the project. The project architects have worked tirelessly to design two new modern high-end dwellings that meet the sites constraints and the existing bulk and scale of the area. Due to the topography of the site and requiring driveway access to the new lot, the proposal integrates an entry level from the street for 120 Prince Alfred Parade, which is consistent with the adjoining properties to the west (Refer to Visual Analysis on pages 11-12 for photos). Further, the project architects have integrated the new dwellings to flow from the four-storey bulk and scale of the western neighbours, with a proposed three-storey dwelling for 120 Prince Alfred Parade and a two-storey dwelling for 120a Prince Alfred Parade. Refer to the excerpt from the streetscape plan and north elevation plan (below) which shows the reduction in height compared to the adjoining western dwelling houses. It is noted there is a 2.28m reduction in height from the adjoining neighbour to the west to the proposed maximum building height of 120 Prince Alfred Pde. The proposal then drops another 2.0m in height from 120 Prince Alfred Pde to the proposed maximum building height of 120a Prince Alfred Pde.



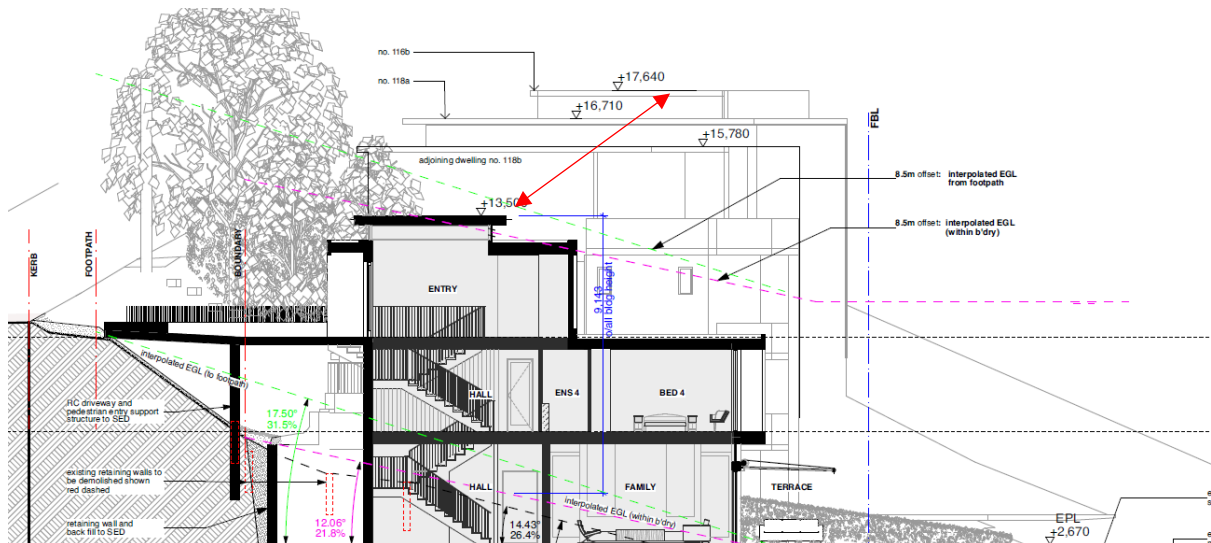
It is important to acknowledge the existing approved RLs of the adjoining neighbours to the west, and the concerted effort from the project architects to provide an enhanced reduction in height between the existing neighbours and the proposed new dwellings. The following RLs are noted (and shown below with the plan Section A No 120):

- 116b Prince Alfred Parade – RL17.64
- 118a Prince Alfred Parade – RL16.71
- 118b Prince Alfred Parade – RL15.78
- Proposed 120 Prince Alfred Parade – RL13.50
- Proposed 120a Prince Alfred Parade – RL11.50

It is essential to recognise the 0.9m reduction between existing dwellings and the proposed increase by 2.28m to proposed 120 Prince Alfred Parade and then a further 2.0m reduction to proposed 120a

Demolition of existing dwelling house, subdivision into (2) Torrens Title lots and the construction of a new dwelling house on each new lot including a swimming pool and associated landscaping works
120 Prince Alfred Parade, Newport

Prince Alfred Parade. The proposal has been designed to be compatible with the existing streetscape while accommodating a bulk and scale that is complementary to the natural environment.

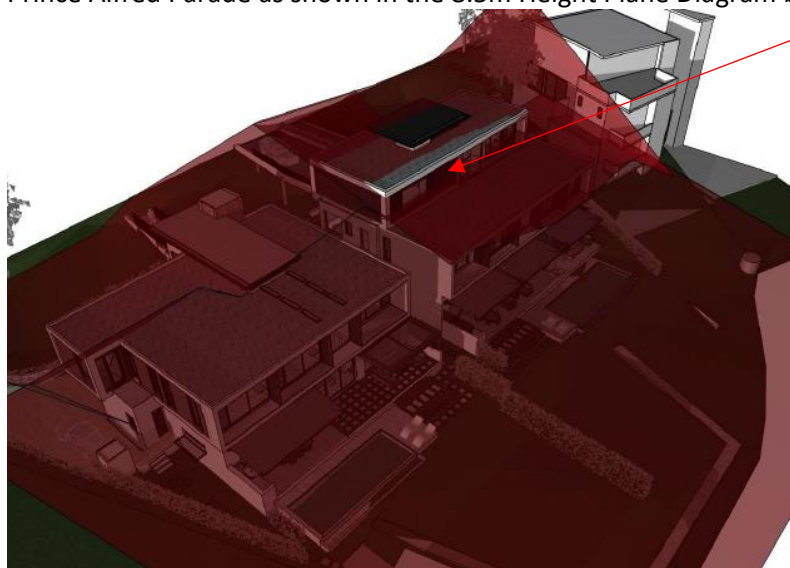


(c) to minimise any overshadowing of neighbouring properties,

The proposal has been designed with compliant side setbacks and side boundary envelope to the western neighbour. The sites are north-south facing and will have no adverse impacts to access to sunlight requirements. Further, the proposed minor variation to the building height on 120 Prince Alfred Parade will not further impact neighbouring properties than that of a compliant design. Refer to Shadow Studies provided as part of the architectural package.

(d) to allow for the reasonable sharing of views,

The sites are located on the foreshore of Salt Pan Cove with views across Newport. It is noted that views are in a north-west direction with minimal (if any) impact proposed. The proposal has been designed with a compliant building height for 120a Prince Alfred Parade and a minor variation to 120 Prince Alfred Parade as shown in the 8.5m Height Plane Diagram below:



1 8.5m Height Plane Diagram

The proposed variation will not have an adverse impact as it sits towards the rear of the building and below the potential maximum due to the topography of the site. The proposal has also been designed with compliant side setbacks, including an increase to the 1m requirement with a proposed 3.237m corridor through the middle of the site. The proposal has also been designed to sit below the existing front hedge.

The proposal as designed allows for adequate view sharing and will not adversely impact view corridors to Salt Pan Cove.

Having inspected the site and identified available public and private view lines over and across the site, I am satisfied that the building height variation will not give rise to any unacceptable view loss with a view sharing outcome maintained in accordance with the planning principle established in the matter of *Tenacity vs Warringah Council* (2004) NSWLEC 140. Notwithstanding the proposed minor building height variation, the proposal is consistent with this objective.

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

The proposed dwellings have been designed to respond to the existing natural topography of the land, while still accommodating dwellings that are consistent with the bulk and scale of the area. The proposal is consistent with this objective.

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

The proposal will enhance the site through new sustainable dwellings which will improve the landscaping of the site. The proposal will add value to the natural environment and will be visually pleasing to the surrounding areas. The site is not identified or located close to known heritage items. The proposal is consistent with this objective.

3. 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]*

Comment: It would indeed be unreasonable for Council to refuse the development that is proposed by way of a relatively minor variation as the proposal does not have any adverse impacts on the immediate amenity of the area. The development has been designed with the necessary sensitivity to complement existing buildings and the natural landform of the area. There is no adverse visual impact associated with the form and structures proposed.

4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the stand is unnecessary and unreasonable: *Wehbe v Pittwater Council at [47]*.

Comment: Whilst the proposal seeks a variation to Councils numerical Height of Building standard, it is consistent with the relevant objectives (as outlined previously in this report).

A review of other developments within the immediate area and approvals granted show that the development standard for Height of Buildings has been virtually abandoned or destroyed by Council's own decisions in granting development consents, hence compliance with this development standard is unnecessary and unreasonable.

Demolition of existing dwelling house, subdivision into (2) Torrens Title lots and the construction of a new dwelling house on each new lot including a swimming pool and associated landscaping works
120 Prince Alfred Parade, Newport

5. The relevance of the zoning provisions of the land to which the development is proposed.

Zoning Map



Zone E4 Environmental Living

1 Objectives of zone

- 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.

2 Permitted without consent

Home businesses; Home occupations

3 Permitted with consent

Bed and breakfast accommodation; Boat sheds; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; Dwelling houses; Environmental protection works; Group homes; Health consulting rooms; Home-based child care; Home industries; Jetties; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture; Water recreation structures

4 Prohibited

Industries; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3

Zone W1 Natural Waterways

1 Objectives of zone

- *To protect the ecological and scenic values of natural waterways.*
- *To prevent development that would have an adverse effect on the natural values of waterways in this zone.*
- *To provide for sustainable fishing industries and recreational fishing.*
- *To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.*
- *To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.*

2 Permitted without consent

Environmental protection works

3 Permitted with consent

Aquaculture; Environmental facilities; Mooring pens

4 Prohibited

Business premises; Hotel or motel accommodation; Industries; Multi dwelling housing; Recreation facilities (major); Residential flat buildings; Restricted premises; Retail premises; Seniors housing; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3

Comment: The relevance of the zone objectives are assessed below:

Clause 4.6(4)(a)(ii) states that a request for exemption from a development standard must establish that the proposed variation is consistent with both the objectives of the zone and standard.

Objectives of the C4 Environmental Living zone:

- *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 site is zoned C4 Environmental Living pursuant to PLEP2014. A dwelling house is a permissible land use and, therefore, the proposed subdivision and construction of two dwelling houses are permissible with Council's consent. The proposed works are consistent with the objectives of the zone, as supported below:

- The development provides a low-impact residential development designed and supported by expert consultants
- The proposal does not have an adverse effect on the values of ecological, scientific or aesthetic values

- The proposal provides a residential development of a low scale that integrates with the landform and landscape and has been strategically designed lower than the dwellings to the west.

Sufficient environmental planning grounds

1. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”

Comment: Sufficient environmental planning grounds exist to justify the height of buildings variation namely the topography of the land and man-made alterations to the land which take away from the natural elements of the site which makes strict compliance difficult to achieve whilst appropriately distributing height, in the form of legitimate dwelling, on this particular site. Further justification to support the proposed variation is provided below:

- The proposed development is for a minor variation to the building height
- The LEC planning principles on Height of Building relating to the height, bulk and scale, including compatibility between subject buildings and its surrounding context to ensure the proposal is compatible with its context. The planning principle seeks qualification of the following:

Planning principle: assessment of height and bulk

· The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:

Are the impacts consistent with impacts that may be reasonably expected under the controls? (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)

How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?

· Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:

Does the area have a predominant existing character and are the planning controls likely to maintain it?

Does the proposal fit into the existing character of the area?

· Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:

Is the proposal consistent with the bulk and character intended by the planning controls?

· Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:

Does the proposal look appropriate in its context?

Note: the above questions are not exhaustive; other questions may also be asked.

In addressing the above planning principals, the benefits of the proposal, represents a new functional dwelling which enhances the site and blends in with the natural landscape.

From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the PLEP2014 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the PLEP2014 C4 Environmental Living zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has a steep topography and slopes from the front to the rear of the site. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposal is consistent with the building heights and roof forms of the area, noting that a streetscape review noted developments ranging from two to four storeys in height.
- The proposal is consistent with the existing bulk and scale of the area.
- The proposal has no adverse impacts to views or view corridors, as redevelopment of the site is permissible.
- The proposal does not adversely impact existing solar access to private and public places. It is noted that the project architect has created a dwelling that does not adversely impact neighbours while addressing the sites constraints such as the topography.
- The site has a steep topography and slopes from the rear to the front of the site by approximately 9.5m. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposed development is below the building height and building bulk of properties immediately surrounding the site. Refer to streetscape analysis which outlines properties along Prince Alfred Parade with a greater RL.
- The breach to the building is minimal and is due to man made changes to the land which divert the original natural level of the site.
- The breach in building height will not be noticeable and will have no adverse impacts on neighbouring properties. The proposal will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

The non-compliance does not result in any unacceptable environmental consequences in terms streetscape, or residential amenity. In this regard, I consider the proposal to be of a skilful design which responds appropriately to the topography and environmental constraints on the site. Such an outcome is achieved whilst realising the reasonable development potential of the land.

2. 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]

Comment: This report demonstrates that there is sufficient environmental planning grounds to justify contravening the development standard for Clause 4.3(2). The proposal has assessed the relevant impacts (if any) and has assessed the bulk, scale and mass of the proposed dwelling which will breach the development standard. This report finds that a merit assessment is applicable and determines that there is sufficient grounds to justify the breach to the Height of Buildings. The proposal has been skilfully designed and strategically located to not have an adverse impact to neighbouring properties. Therefore, the development as proposed is sufficiently justified to contravene the development standard.

Is the proposed development in the public interest?

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;
- b. the zone in which the development is proposed to be carried out.

Comment: As demonstrated in this request, the proposed development 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. The proposal is in the public's interest as there is very little public benefit in maintaining the development standard of Height of Building applicable to this site. Additionally, the building improvements add significant social and healthy benefits through a new functional dwelling. Council should encourage such developments via support of positive intention to upgrade sites within the Northern Beaches LGA.

Accordingly, the consent authority can be satisfied that the proposed 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.

Secretary's Concurrence

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (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 Secretary before granting concurrence.*

Comment: The contravention of the development standard will not result in any consequences for State or regional environmental planning.

There would be no public benefit in maintaining the development standard in this instance for the following reasons:

- The variation to the Height of Building development standard does not give rise to any adverse environmental impacts. As such, the maintenance of the development standard in this specific instance would not provide any public benefit and would hinder the orderly and economic development of the site.

- Maintaining the development standard, in the context of this site, would be inconsistent with the objectives of the zone, and the Act, as it would be inconsistent with the surrounding developments.

By Planning Circular dated 5th May 2020, 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. There are no other relevant matters required to be taken into account by the Secretary.

Summary and Conclusion

It is therefore submitted that Clause 4.6 is applicable to the subject development in respect to the variation to clause 4.3(2) Height of Building and this statement verifies that compliance with the provisions of clause 4.3(2) would be both unreasonable and unnecessary in the circumstances of this case. The development is consistent with the objectives of Clause 4.6 as per below:

1(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

1(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

A variation to the strict application of Council's Height of Buildings development standard is considered appropriate for the site at 120 Prince Alfred Parade, Newport.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor and consistent with similar approvals granted in the area, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the Newport precinct. As noted under the review of Clause 4.3 within the Statement of Environmental Effects, the proposal is consistent with the objectives of Clause 4.3. From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the PLEP2014 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the PLEP2014 C4 Environmental Living zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has a steep topography and slopes from the front to the rear of the site. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposal is consistent with the building heights and roof forms of the area, noting that a streetscape review noted developments ranging from two to four storeys in height.
- The proposal is consistent with the existing bulk and scale of the area.
- The proposal has no adverse impacts to views or view corridors, as redevelopment of the site is permissible.
- The proposal does not adversely impact existing solar access to private and public places. It is noted that the project architect has created a dwelling that does not adversely impact neighbours while addressing the sites constraints such as the topography.
- The site has a steep topography and slopes from the rear to the front of the site by approximately 9.5m. The resulting constraints from the topography of the site contribute the minor variation in the building height.
- The proposed development is below the building height and building bulk of properties immediately surrounding the site. Refer to streetscape analysis which outlines properties along Prince Alfred Parade with a greater RL.
- The breach to the building is minimal and is due to man made changes to the land which divert the original natural level of the site.
- The breach in building height will not be noticeable and will have no adverse impacts on neighbouring properties. The proposal will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

As outlined above, the proposed development is consistent with the underlying objectives of the Height of Building standard, notwithstanding the proposed variation. The permissible Height of Building control does not align with the permissible height on the site, nor several built form controls of the PDCP2014. This essentially limits any redevelopment potential of the site without varying Council's standards.

In addition to the above justification, the proposal is considered to meet the intent of Council's controls relating to Height of Building, the C4 Environmental Living zone objectives and the desired future character of this precinct. It is therefore submitted that the non-compliance with the Height of Building Clause 4.3(2) is acceptable, and flexibility should be exercised by Council as a better outcome is achieved for the site and the immediate locality. The variation under Clause 4.6 is to vary the Height of Building control to give Northern Beaches Council the power to grant development consent to the proposed development.