

21 August 2019

## Submission - Clause 4.6 Exception to a Development Standard

### LEP Clause 4.3 - Building Height Variation

**ADDRESS: 32 The Strand, Whale Beach**

#### **1 Request for exception to LEP Clause 4.6 building height**

##### **1.1 Overview**

Clause 4.6 of Pittwater LEP 2014 provides a mechanism to allow an exception to a development standard.

As identified, the proposal contravenes *Clause 4.3 building height which is a development standard* and an exception is sought.

As required by clause 4.6 (3) the following is a *written request* to justify this contravention for the consent authority's consideration.

##### **1.2 Site details**

The site is located 32 The Strand, Whale Beach. It is legally described as Lot 70, in Deposited Plan 11067. The site has an area of 1,105m<sup>2</sup>. The site is irregularly shaped with dimensions as follows:

- Northern, side boundary of 63.385m
- Southern, side boundary of 57.53m
- Eastern, rear boundary of 18.29m (to The Strand)
- Western, front boundary of 19.13m (to Whale Beach Road)

The site has a slope that ranges from moderate at the eastern end to steep towards the west, displaying grades up to approximately 27 degrees- between 51 to 55%, to the rear of the existing dwelling and partly where the proposed dwelling is positioned.

##### **1.3 Proposed development and nature and extent of exception sought**

The proposed development is for demolition of the existing structures and development of a new dwelling at 32 The Strand, Whale Beach.

The proposal involves, demolition, excavation and construction of 3-level terraced dwelling house incorporating with vehicle access from Whale Beach Road, and private open space areas to the west and east of the dwelling, but mainly at the rear (east) of the site.

The exception relates to LEP clause 4.3 in relation to a relatively modest section of the proposed building height at the south east section at a maximum ridge RL of 19.415, translating to a maximum building height of 9.850m or 150mm below the maximum height permitted by 4.3 (2D), as illustrated within the figures below. Clause 4.3(2), by reference to the Height of Buildings Map, establishes a maximum height of 8.5m for the land. However, clause 4.3 2(D) also applies to the proposal because the *building footprint is situated on a slope that is in excess of 16.7 degrees*. It states:

*(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.*

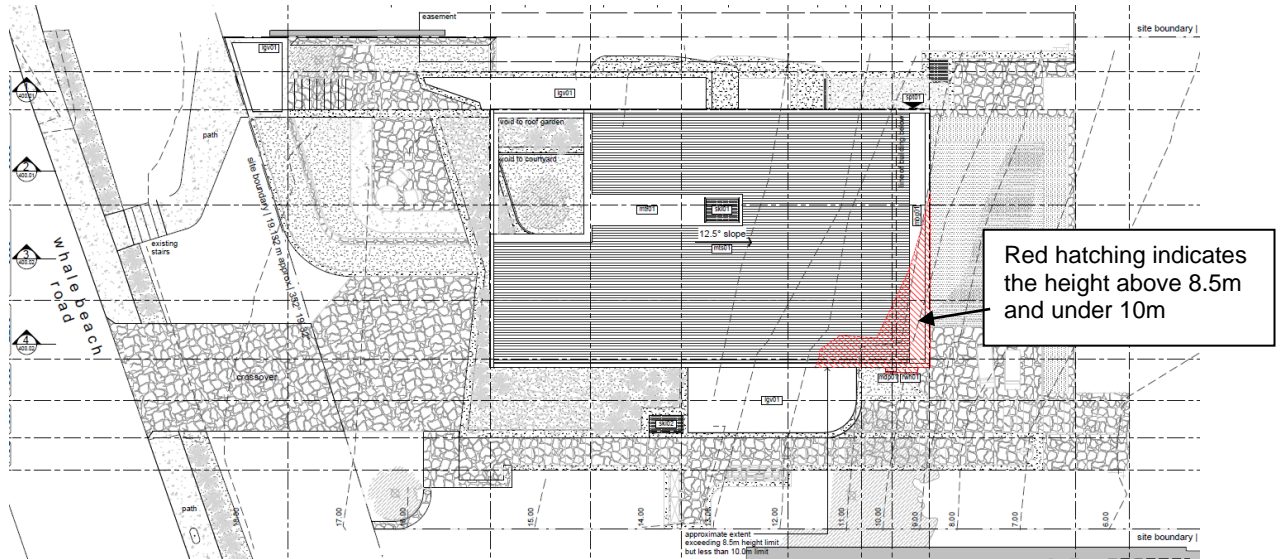
In accordance with 4.3 (2D) the proposal displays a maximum building height of 9.850m and is situated on a slope of approximately 27 degrees and up to 55%.

The extent of exception sought relates to the eastern portion of the building between 8.5m and 10m. Incidentally due to the slope of the site and terraced building design, this is the lowest point of the roof structure. These areas of the proposed building's 8.5m height exceedance are illustrated within figures 1 to 3 below from the architectural plan set.

Clause 4.3 (2D) relies on the consent authority forming the opinion that the proposed development satisfies the discretionary criteria within clause 4.3(2D) (a) to (e). In our opinion the building design satisfies these characteristics for the reasons provided within section 4 of this submission. Notwithstanding, this 4.6 submission is made for abundant caution, because if in the opinion of the consent authority the proposal does not satisfy clause 4.3 D, then the DA cannot be approved.

The control is a development standard and this clause 4.6 is made to address the statutory provisions of the Act and the LEP and there is no statutory impediment to the consideration of this submission under clause 4.6.



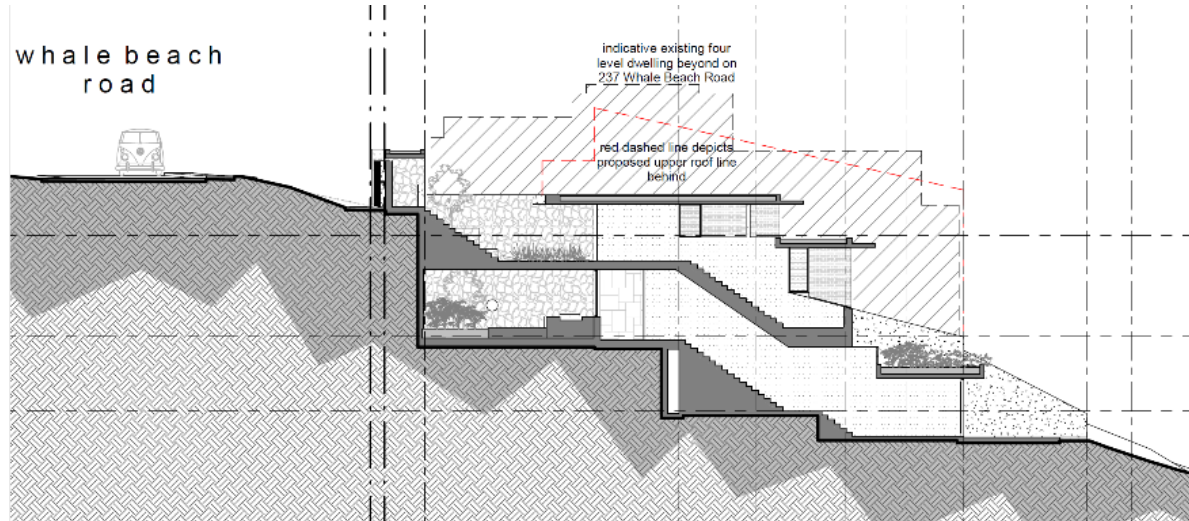


**Figure 3 – the extent of the proposed height exceedance in plan view is indicated by the red shading**



**Figure 4 – Site and existing cottage as viewed from the east showing the site's cross-fall from north west to south east**





**Figure 5 – site section from the architectural plans (site analysis) showing the terraced levels of the proposed design**

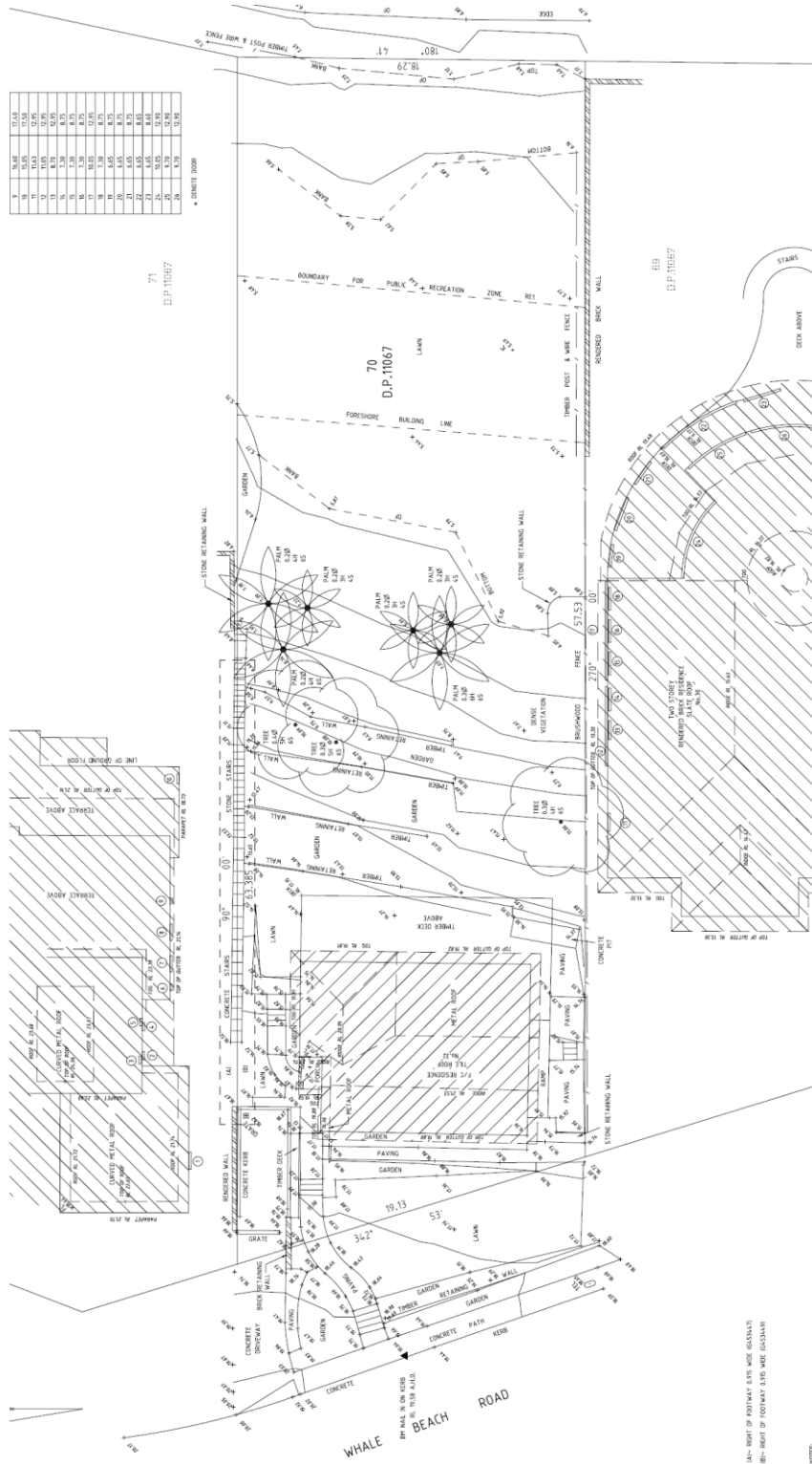


Figure 6 – excerpt from land survey showing the steep levels within the western half of the site

## 2 Clause 4.6

Relevant to the subject matter, Clause 4.6 states:

- (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 Secretary has been obtained.*

In response to the provisions of Clause 4.6, and with the guidance provided by the above judgements, the matters in support of the proposal are documented with this *written request* to justify this contravention of the development standard.

## 3 Context and Format

This “*written request*” has been prepared having regard to “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*

- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015; and*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*
- *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*

In applying clause 4.6, the findings from these judgements have been taken into account in preparing this submission.

## **4 Assessment**

### **What is the underlying object or purpose of the standard?**

The objectives to clause 4.3. are stated 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.*

Each of these objectives is repeated and responded to below. However firstly the nature, location on the site and the extent of the exception is described as follows:

The extent of exception sought relates to the south eastern portion of the building that ranges in height between 8.5m and 9.850m. Incidentally, due to the slope of the site and the terraced character of the building design, this is the lowest point of the roof structure at RL 19.415 (figure 1) whereas the maximum height of the roof is at the western end on the dwelling which is RL 23.040 AHD.

The area of the proposed building's 8.5m height exceedance is illustrated within figures 1 to 5 (herein) from the architectural plan set.

The land is characterised by steeply sloping topography. The land slopes significantly from the Whale Beach Road frontage down to the east, with a level difference of approximately 14.13m between Whale Beach Road and the lowest level within the rear of the property (approximately RL20 to RL 5.87). The steepest section of the site is within the western portion where there are level changes of upto 8.5m over a 16.5m distance. The land also has a 'crossfall' sloping from



its north western to its south eastern side, in some locations upto approximately 2 metres (see figure 4).

Despite the steepness of the site and the proposed building height, the design incorporates compensatory design measures which are summarised briefly below and further detailed within this submission:

- Increased side and rear setbacks beyond the minimum requirements of the DCP. The Increased southern side setbacks to the dwelling of approximately 3.350 to 4.650 to the south eastern corner of the dwelling. The northern side setback is approximately 1.25 to 2.6m. The eastern rear setback is approximately 29m.
- Terraced floor plates from Whale Beach Road down the slope of the site to the east
- 12.5-degree skillion roof, angled in the downward direction of the sloping topography
- Flat roof over some building sections near the side boundaries
- Reduced building height at the western edge (Whale Beach Road frontage) of the proposed building to 7.220 being 1.280m below the 8.5m maximum building height.

Each of the objectives is repeated and responded to below.

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

Response –

Despite a section of the proposed building displaying heights of 8.5 to 9.850m the proposed building height exceedance does not compromise the proposal's ability to be consistent with the desired character of the locality.

Under the Pittwater Development Control Plan, the property is located within the *Palm Beach locality*. The desired future character of the locality is stated as follows:

*'The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in maximum of two storeys in any one place in a 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 lowlands 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 whilst ensuring that future development*

*respects the horizontal massing of the existing built form. 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.*

*The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.*

*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.*

*Palm Beach will remain an important link to the offshore communities'.*

#### Response –

- The land is characterised by steeply sloping topography, most notably within the western portion of the site where there are level changes of upto 8.5m over a 16.5m distance displaying gradients up to 55%;
- The proposed development will not result in any excessive or inappropriate environmental impacts as documented within this submission;
- Adequate infrastructure is available to the site;
- The proposed building does not protrude through the canopy of local trees;
- The proposed building minimises, and provides an appropriate, bulk and scale by stepping responsive to the topography, providing generous boundary setbacks, providing a landscape setting and achieves a landscaping and deep soil outcome that meets and exceeds the planning controls under the and DCP, high quality architecture and materials.
- The proposed building is comparable in its height and massing when compared to the existing height and massing of nearby contemporary development within the hillside and the local context;

- The proposed building incorporates an appropriate range of natural colours and materials, compatible with the location and context and will harmonise with the natural environment;
- The proposed building is sympathetic to the site's landform, landscape and other features of the natural environment given that it provides a landscape setting, provides a significant setback of 23 to 29.4m to the eastern boundary of the site, does not propose any change or development within the rear part of the site that is zoned for future public acquisition.

Based on the above it is concluded that the proposal satisfies objective (a) of the standard.

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

Response –

Despite a section of the proposed building displaying heights of 8.5 to 9.850m the proposed development will be compatible with the height and scale of the surrounding and nearby development. The following characteristics are noted:

- The proposal will be compatible with the character of nearby dwelling houses in relation to building bulk, form and scale noting the land to the north and west is sloping and development is predominantly characterised by multi-level residential dwelling houses.
- The proposal will present as a contemporary single storey dwelling to Whale Beach Road. This presentation is compatible with nearby dwellings to the north, located on the eastern side of Whale Beach Road that generally present to the street as 1 to 2 storey dwellings.
- When viewed from Whale Beach – the proposal is significantly setback from its eastern boundary and The Strand by 29m setback. The proposed design reflects the sloping hillside topography that rises up from the beach level. Its 3-level presentation is compatible with nearby dwellings to the north, located on the eastern side of Whale Beach Road that generally present to the east (Whale Beach) as 2 to 3 level dwellings.
- When viewed from adjoining properties, the proposed dwelling design is terraced responsive to the sloping topography, with the relative steepness of the topography influencing the apparent visual scale of development. The proposed dwelling design presents appropriately to adjoining properties noting that:
  - It proposes high quality architecture and materials
  - It steps responsive to the topography
  - It provides generous boundary setbacks
  - It provides a landscape setting and achieves a landscaping and deep soil outcome that meets and exceeds the planning controls under the and DCP

Based on the above it is concluded that the proposal satisfies objective (b) of the standard.

***(c) to minimise any overshadowing of neighbouring properties,***

Response –

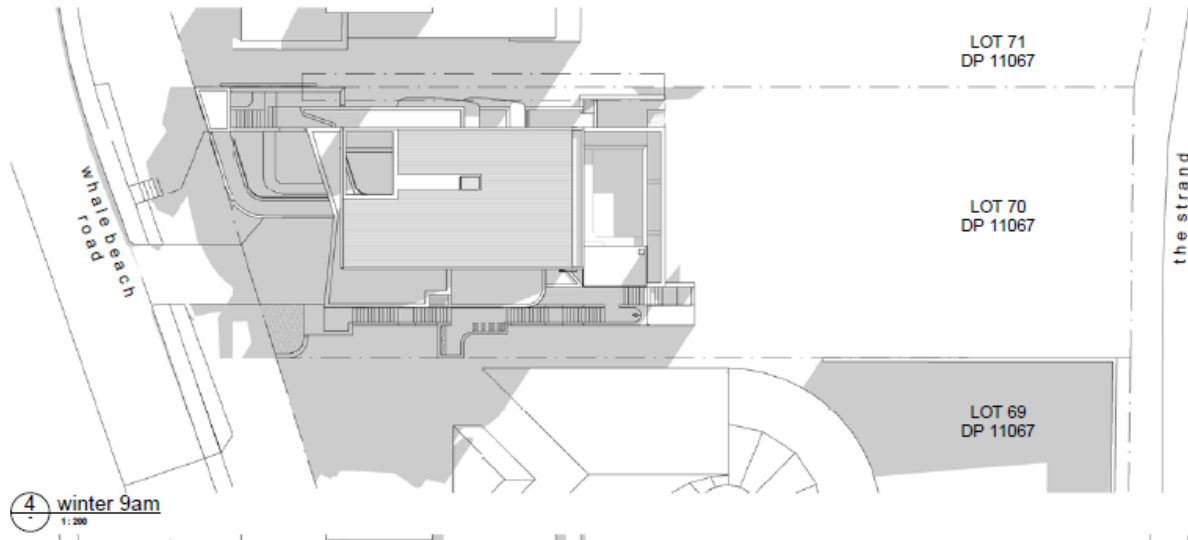
Despite a section of the proposed building displaying heights of 8.5 to 9.850m the proposed building will result in an acceptable level of overshadowing on the southern adjoining land at 30 The Strand.

In relation to proposed shadowing impacts - Shade will be cast over the adjoining land at 30 The Strand during the specified times (between 9am and 3pm on June 21<sup>st</sup> - figures 7 and 8 below). The following characteristics of the property and proposed shading outcome are noted below:

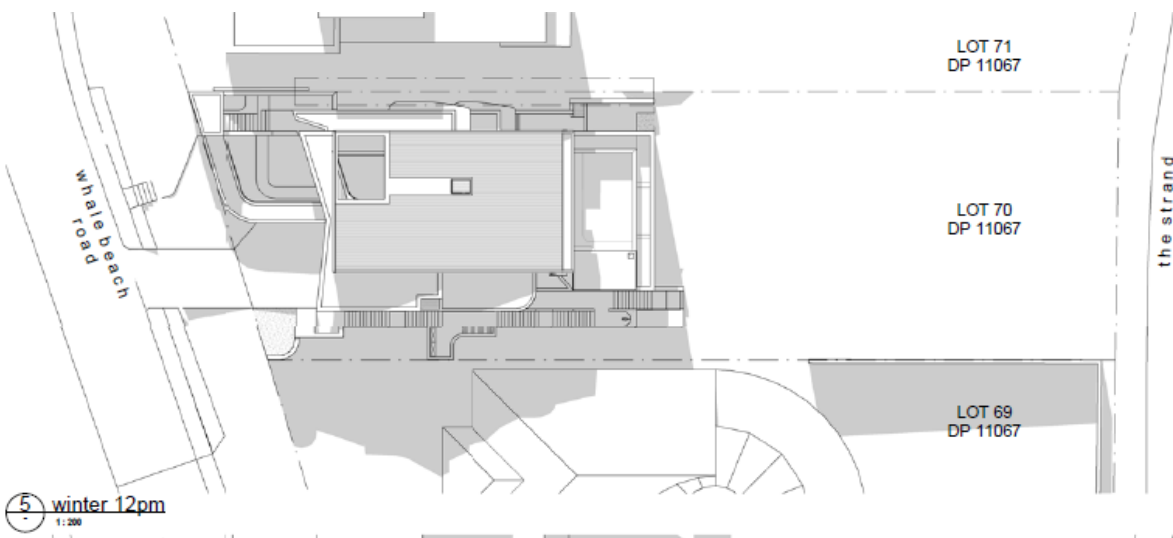
- The subject site and the adjoining properties have an east / west orientation to The Strand and Whale Beach Road, with principal outdoor recreation spaces (e.g. balconies, decks, pools and terraces) are generally located to the east of dwellings (to access the coastal views) and secondary, private gardens/terraces are generally to the west of dwellings.
- The proposed 9am shadow will be cast over the properties Whale Beach Road frontage. This mainly comprises vegetation; it does not contain the dwelling's principle private open space areas
- The proposed 12pm shadow will be cast over the properties Whale Beach Road frontage and upon the roof of the dwelling, but the large majority of the property, including the dwelling's principle private open space areas to the east, are not affected by the proposal.
- Between 1pm and 3pm the rear private open space area will experience shading from the proposal. The shadow extent in this location at this time is partly a characteristic of is the Whale Beach escarpment to the north west of the site (the ridge top being at approximately RL 104 AHD). This exacerbates the shadow cast during the afternoon time period.

Based on these characteristics the following conclusions are made:

- Given the relatively small area and extent of the roof that exceeds 8.5m it will not significantly exacerbate the shadows cast by the proposed dwelling. The extent of sunlight available to the adjoining property's private open space areas satisfies the provisions of Clause C1.4 of the Pittwater DCP because it will not prevent the dwelling receiving a minimum of 3 hours of sunlight to the main private open space of the adjoining dwelling between 9am and 3pm on June 21<sup>st</sup>.
- It is concluded that the proposal will not significantly or unreasonably reduce the available sunlight to the adjoining properties and the consideration of solar access to adjoining land is satisfied by the proposal. Based on the above the proposal satisfies objective (c) of the standard.



**Figure 7 – the proposed shading impact to the southern adjoining development at 9am**



**Figure 8 – the proposed shading impact to the southern adjoining development at 12pm**

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

Response -

Despite a section of the proposed building displaying heights of 8.5 to 9.850m the proposed building will allow for the reasonable sharing of views. The following characteristics are noted:

- Properties to the west, on the opposite side of Whale Beach Road, generally orientate to the east, are located on higher topography, and to varying degrees, enjoy an easterly outlook including coastal views. Dwellings are typically 3 levels, terraced into the hillside with elevated east facing terraces and balconies.



- The proposed building height exceedance will allow for the reasonable sharing of views because it is located at the south eastern, lowest section of the roof (at approximately RL 19.415, whereas the maximum height of the roof is at the western end on the dwelling at RL 23.040 AHD. This is due to the slope of the site and terraced nature of the building design.
- Furthermore, the exceedance is located at the south eastern corner of the proposed building where the potential for it to impact on views is minimised due to the steep change in the topography and the direction of the topography towards the south east.
- The maximum height of the roof is at the western end on the dwelling which is RL 23.040 AHD. This is illustrated within figures 1 to 5 (herein) from the architectural plan set. The building height at the western edge of the proposed building (Whale Beach Road frontage) is reduced to 7.220, being 1.280m below the 8.5m maximum building height.
- For these reasons the proposed exceedance is not anticipated to result in view impacts upon properties to the west of the site.

Based on the above it is concluded that the proposal satisfies objective (d) of the standard.

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

Response -

Despite a section of the proposed building displaying heights of 8.5 to 9.850m the proposed building is designed to respond sensitively to the natural topography. The following characteristics are noted:

- The proposed building a skillion roof that is angled (at 12.5 degrees) similar to the gradient of the topography and incorporates floor plates that step responsive to the slope of the land (figure 2). In these ways it is reasonable to expect that a casual observer will see the building form as one that reflects the steep slope of the hillside when viewed from surrounding land.
- The proposed building has been designed to respond sensitively to the natural topography as evidenced by:
  - The upper and lower level floor plates incorporate split levels; varying from RL17.4 to RL 16.29 for the upper level and RL9.630 to RL 8.52 for the lower level.
  - The floor plates are staggered (or terraced); the lower ground floor level has an increased western setback (to the levels above) of 12m to 19m from the site's western boundary.
  - The proposal displays a skillion roof that is angled similar to the gradient of the topography and incorporates floor plates that step responsive to the slope of the land.
  - In these ways it is reasonable to expect that a casual observer will see the building form as one that reflects the steep slope of the hillside.
- The proposal is sited within a landscape setting (there being 536 m<sup>2</sup> of landscaped area and 61% of the site area) providing the opportunity for future endemic vegetation. Furthermore, when viewed from Whale Beach– the proposal is significantly setback from its

eastern boundary and The Strand (29m), ensuring the building will be viewed within its natural topography and landscape setting within the sloping hillside.

- Based on the findings of the expert reports that accompany the application in the expertise of geotechnical engineering, arboriculture, stormwater, flooding and coastal engineering the land is not identified as having unmanageable sensitive natural qualities. Therefore, the proposal retains a low impact residential use on the site which does not give rise to any unacceptable impacts upon natural sensitivities.

Based on the above it is concluded that the proposal satisfies objective (e) of the standard.

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

Response -

Despite a section of the proposed building displaying heights of 8.5 to 9.850m:

- The proposed building will have a positive visual impact on the natural environment noting the significant rear setback of 29.4m from The Strand and 23m from the RE1 zoned land to the east; the minimum setbacks being 6m under the DCP.
- The proposed building will present as a contemporary single storey dwelling Whale Beach Road. This presentation is compatible with nearby dwellings to the north, located on steep topography on the eastern side of Whale Beach Road that generally present to the street as 1 to 2 storey dwellings to the street. When viewed from Whale Beach – the proposal is significantly setback from its eastern boundary and The Strand by 29m. The proposed design reflects the sloping hillside topography that rises up from the beach level. Its 3 level presentation is compatible with nearby dwellings to the north, located on the eastern side of Whale Beach Road that generally present to the east (Whale Beach) as 2 to 3 level dwellings.
- The proposed building provides appropriate building setbacks and achieves a landscaping and deep soil outcome that meets and exceeds the planning controls under the and DCP. The designs landscape setting is complemented by a landscaping plan that will enhance the site to the benefit of future occupants and the surrounding amenity. 536m<sup>2</sup> or 61% of the site is proposed to be landscaped area (exceeding the DCP requirement by 6m<sup>2</sup>), within which the proposed building will be sited.
- The proposed building is not within a heritage conservation area and it does not relate to any heritage items.

Based on the above it is concluded that the proposal satisfies objective (f) of the standard.

#### **4.1 LEP clause 4.3(2D)**

Clause 4.3 2(D) applies to the proposal because the *building footprint is situated on a slope that is in excess of 16.7 degrees*. It states:

*(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.*

In accordance with 4.3 (2D) the proposal displays a maximum building height of 9.850m and is situated on a section of the site that has a slope of upto 55 degrees (figures 1 – 6). Each of these provisions are repeated and responded to below:

- (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***

Response –

- The extent of the proposed building above 8.5m is minor because it occupies a small area of the proposed building footprint, at the eastern end (lowest section) of the roof, as demonstrated within figures 1 and 3.
- Based on the above it is concluded that the proposal satisfies subclause (a) of the standard.

- (b) the objectives of this clause are achieved, and***

Response –

- Each of the objectives of clause 4.3 are addressed above and it is concluded that the objectives are achieved.
- Based on the above it is concluded that the proposal satisfies subclause (b) of the standard.

- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and***

Response –

- The proposed building footprint is situated on a slope that is measured to be up to 27 degrees and 55% which is a slope that is in excess of 16.7 degrees (30%),
- Based on the above it is concluded that the proposal satisfies subclause (c) of the standard.

***(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.***

Response –

- The land is characterised by steeply sloping topography, most notably within the western portion of the site where there are level changes of up to 8.5m over a 16.5m distance.
- In terms of the siting of the building, the location of the RE1 zoned land at the eastern end of the site constrains the ability to site the new dwelling on the flatter sections of the allotment and still maintain convenient vehicle access to the dwelling from Whale Beach Road.
- In these ways it is reasonable to expect that a casual observer will see the building form as one that reflects the steep slope of the hillside when viewed from surrounding land.
- The proposed building has been designed to integrate with the landform noting that it displays a skillion roof that is angled similar to the gradient of the topography (figure 2). and incorporates floor plates that step (or are 'staggered') responsive to the slope of the land.
- The proposed building has been designed to respond sensitively to the natural topography as evidenced by:
  - The upper and lower level floor plates incorporate split levels; varying from RL17.4 to RL 16.29 for the upper level and RL9.630 to RL 8.52 for the lower level.
  - The floor plates are staggered (or terraced); the lower ground floor level has an increased western setback (to the levels above) of 12m to 19m from the site's western boundary.
  - The proposal displays a skillion roof that is angled similar to the gradient of the topography and incorporates floor plates that step responsive to the slope of the land.
  - In these ways it is reasonable to expect that a casual observer will see the building form as one that reflects the steep slope of the hillside.
- Based on the above it is concluded that the building is sited and designed to take into account the slope of the land. Furthermore, the need for cut and fill is reduced because the design of the proposed building steps down the slope of the site as it falls to the east. Based on the above it is concluded that the proposal satisfies subclause (d) of the standard.

For the reasons outlined above, it is assessed that the provisions for clause 4.3 (2D) are satisfied by the proposal.



**Figure 9 – photomontage – the proposal's presentation to The Strand is compatible with the character of adjoining development and significantly setback from the eastern boundary**

### **How does the proposed development / exception relate to the objectives of the Act?**

Further to the objectives of the development standard, the proposed exceedance is appropriate when considering the objectives of the Environmental Planning and Assessment Act 1979. The objectives are:

#### **'1.3 Objects of Act**

*The objects of this Act are as follows:*

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*



- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment’.*

In response to these objectives:

- In response to objective 1.3(c), the exception results in a proposed residential development that will promote the orderly and economic use and development of the land in an efficient manner by a design that is responsive to its development context with a site specific design that achieves high amenity for future occupants and maintains high amenity to adjoining land.
- In response to objective 1.3(g), the proposed development results in a residential development that will promote good design and amenity of the built environment. The built form outcome has been developed through detailed site, context, privacy, view sharing and shadow analysis to ensure an appropriate contextual and streetscape fit. The building footprint has been designed to reflect the angular and irregular shape of the site creating an interesting, site-specific building design that presents well to each of its boundaries. The proposed development maintains high levels of residential amenity to adjoining properties by its site specific form, by generous boundary setbacks and through the quality of its surrounding landscape spaces.

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

The Department of Planning published “*Varying development standards: A Guide*” (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

***1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;***

The proposed development is generally consistent with, or not antipathetic to, the objectives of the building height control, as detailed above, notwithstanding the numerical variation.

***2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;***

The objectives of the building height control remain relevant, and the proposed development is generally consistent with, or not antipathetic to, the objectives of the building height control, notwithstanding the numerical variation.

***3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;***

The proposed development is generally consistent with, or not antipathetic to, the objectives of the building height control, notwithstanding the numerical variation.

Further, the proposed development will provide a new dwelling house and landscaped setting without imposing any significant or adverse impacts on the amenity of the surrounding land.

In the circumstances, strict compliance with the building height control would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the overarching objectives of the LEP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity or aesthetic value of the surrounding land.

***4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;***

The building height control (clause 4.3 of the LEP) has not specifically been abandoned or destroyed by the Council's actions. Irrespective, Council has historically adopted a relatively flexible approach to the implementation of development standards in circumstances where the objectives of the control are achieved, notwithstanding a numerical non-compliance.

***5. Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.***

Strict compliance with the building height control would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the objectives of the LEP and DCP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of the surrounding land.

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

The proposed exception to the building height control is reasonable and appropriate in the particular circumstances on the basis of the following considerations:

- the proposed building presents a site-specific design that responds appropriately to some considerable site and planning control constraints relating to the steep slope of the topography and the location of the RE1 zoned land at the eastern end of the site, which

constrains the ability to site the new dwelling on the flatter sections of the allotment and still maintain convenient vehicle access from Whale Beach Road.

- The proposed building height exception is addressed by a range of compensatory design measures, which are summarised as follows:
  - Increased side and rear setbacks beyond the minimum requirements of the DCP. The Increased southern side setbacks to the dwelling of approximately 3.350 to 4.650 to the south eastern corner of the dwelling. The northern side setback is approximately 1.25 to 2.6m. The eastern rear setback is approximately 29m.
  - Terraced floor plates from Whale Beach Road down the slope of the site to the east;
  - 12.5-degree skillion roof, angled in the downward direction of the sloping topography;
  - Flat roof over some building sections near the side boundaries;
  - Reduced building height at the western edge (Whale Beach Road frontage) of the proposed building to 7.220 being 1.280m below the 8.5m maximum building height.
- The proposed building height exception is located at the eastern (rear) portion, below the maximum roof ridge level, minimising its potential to adversely impact upon coastal views.
- Despite the proposed building height exceeding 8.5m, noting the minor extent and location of the exceedance, the proposal will not result in any inappropriate physical or amenity impacts on the streetscape or adjoining land noting that:
  - The southern side boundary setback is increased from the minimum 1m (under the DCP) to 3.350 to 4.650 to the south eastern corner of the dwelling.
  - In terms of the physical impacts of the proposal, the proposal will not unreasonably impact upon the existing amenity or physically constrain the future development potential of the surrounding land. The proposal does not result in any inappropriate or unacceptable physical amenity impacts upon the adjoining land in terms of shading, privacy, view loss or visual impact.
- The scale of the exceedance is moderate, and the footprint of the development over which the exceedance occurs is modest. For these reasons the exceedance is not determinative in adding excessively or inappropriately to the bulk and scale of the proposed building when viewed from surrounding land.
- The proposed building height exceedance does not compromise the design's ability to achieve a development that is compatible with the nearby development character of contemporary multi-level dwellings within the hillside and the desired future character of development of the locality.
- The proposed building height exceedance does not compromise the designs ability to achieve a development that is compatible with the desired future character of development within the E4 zone of when viewed from the coastal foreshore.
- The proposed building height exceedance does not compromise the designs ability to achieve a development that is compatible with the desired future character of development within the E4 zone of when viewed from the coastal foreshore.
- The proposed building height complies with and satisfies clause 4.3(2D) of the LEP.

### **The proposed development**

- The extent of the proposed development is compatible to that accommodated on adjoining and nearby properties. The proposed building height does not result in an excessive visual building bulk or scale, maintaining an appropriate building presentation to each of its street frontages, neighbouring properties and nearby public land.
- The proposed development will not result in unreasonable or excessive physical impacts on the neighbouring properties.
- The proposed development will not result in an appropriate streetscape quality and enhancement of the property.
- The proposed development is capable of being accommodated on the site without imposing any significant or adverse impacts or the scenic quality of the foreshore (see figure 9), streetscape or the wider locality.
- Strict compliance with the building height control would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of surrounding land.
- The property provides appropriate extent of landscaped area that positively contributes to the visual presentation of the proposal and surrounding properties and public spaces. In particular to the eastern, beach side.
- The proposed development is consistent with, or not antipathetic to, the objectives of the E4 zone.
- The proposed development is consistent with, or not antipathetic to, the objectives of the building height (clause 4.3 of the LEP), notwithstanding the variation.
- For the above reasons, it is assessed that the extent of the proposed variation in building height control (clause 4.3 serves no practical or material planning purpose.

Noting these characteristics, the proposed variation is assessed as satisfactory and there are sufficient environmental planning grounds to justify contravening the development standard.

### **Are there any matters of State or regional significance?**

The proposed variation to the building height does not raise any matters of State or regional significance.

### **What is the public benefit of maintaining the standard?**

The proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control, notwithstanding the numerical variation. In the circumstances, the proposed development does not affect the public benefit of maintaining the site frontage control in other instances.

### **Any other matters?**

There are no further matters of relevance to the proposed variation to the control.

### **Zone Objectives and the Public Interest**

The proposed development will be in the public interest because it is consistent with the objectives for development within the E4 Environmental Protection zone in which the development is proposed to be carried out. These are stated and responded to as follows:

***(a) To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.***

In response –

- Based on the findings of the expert reports that accompany the application in the areas of geotechnical engineering, arboriculture, stormwater, flooding and coastal engineering the land is not identified as having special or unique ecological or scientific qualities. The proposal retains a low impact residential use on the site which does not give rise to any unacceptable ecological or scientific impacts.
- In relation to the site and the proposal's aesthetic values, the application is accompanied by a comprehensive set of architectural plans that include photo montages that consider the topographical and built form context of the site. The proposal involves a contemporary, site specific building design that is responsive to the topography, micro-climatic conditions, and the coastal hillside development context. The proposed building has been influenced by the sloping, east facing topography, street frontage character, orientation of the block, planning control parameters, and the prevailing zoning provisions. In response to these considerations:
  - The design's Whale Beach Road frontage aligns with the streetscape character to make use of the existing frontage and established development alignment.
  - The proposed building form has been strongly defined architecturally to step-down the site, responsive to the topography; views to the east, and the desire to reinforce the 'low profile' streetscape character along the eastern side of Whale Beach Road.
  - The scale of the development is appropriate given the appropriate building footprint proposed (relative to the site area and adjoining development) and its generous boundary setbacks.
  - Overall, it is assessed that the design has been customised to fit within the identified site parameters and will harmonise with the established and anticipated development character.

Based on the above it is concluded that the proposal satisfies objective (a) of the standard.

***(b) To ensure that residential development does not have an adverse effect on those values.***

In response -

- Based on the findings of the expert reports that accompany the application in the areas of geotechnical engineering, arboriculture, stormwater, flooding and coastal engineering the



proposed development is not assessed as not having an adverse effect on those values. The proposal retains a low impact residential use on the site which does not give rise to any unacceptable ecological or scientific impacts.

Based on the above it is concluded that the proposal satisfies objective (b) of the standard.

***(c) To provide for residential development of a low density and scale integrated with the landform and landscape.***

In response -

- Being a dwelling house, the proposal will provide a residential development of a low density.
- The proposal's scale has been designed to integrate with the landform noting that it displays a skillion roof that is angled similar to the gradient of the topography and incorporates floor plates that step responsive to the slope of the land. In these ways it is reasonable to expect that a casual observer will see the building form as one that reflects the steep slope of the hillside.
- The proposal is sited within a landscape setting (there being 536 m<sup>2</sup> of landscaped area and 61% of the site area) providing the opportunity for future endemic vegetation.

Based on the above it is concluded that the proposal satisfies objective (c) of the standard.

***(d) To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.***

In response -

- The property is not identified as containing riparian and foreshore vegetation and wildlife corridors. The proposal will not result in the removal of ecologically significant vegetation or habitat. This is confirmed by the conclusions of the arborist's assessment which states:
  - *A total of twelve (12) trees were assessed and accorded retention values based on their current health and condition (i.e. their Useful Life Expectancy) and their significance in the landscape.*
  - *No assessed tree on the site or on adjoining properties was identified as an endangered species.*
  - *No assessed tree on the site or on adjoining properties was identified as, or associated with, a heritage item.*
- The proposal provides a landscaping and deep soil outcome that meets and exceeds the planning controls under the and DCP. The design's landscape setting is complemented by a landscaping plan that will enhance the site to the benefit of future occupants and the surrounding amenity. 536m<sup>2</sup> or 61% of the site is proposed to be landscaped area (exceeding the DCP requirement by 6m<sup>2</sup>), within which the proposed building will be sited.

Based on the above it is concluded that the proposal satisfies objective (d) of the standard.

The proposed development is permissible on the site pursuant to the provisions of the LEP. The proposed development serves the public interest by providing additional residential accommodation within an established residential environment, offering a high level of internal amenity without imposing any significant adverse impacts on the amenity of surrounding land.

The proposed development is not antipathetic to the objectives of the zone based on the above points. Finally, the variation to the control does not raise any significant matters of public interest.

## **5 Conclusion**

The purpose of this submission is to formally request an exception to the building height development standard in Clause 4.3 of the LEP.

The proposed variation is modest, and strict compliance with the control is unreasonable on the basis that the objectives are achieved anyway, and unnecessary on the basis that no beneficial planning purpose would be served.

In the circumstances, there are sufficient environmental planning grounds to justify the exception to the building height development standard.

Yours sincerely,



Michael Haynes  
**Director - BBF Town Planners**