

CLAUSE 4.6

Height of Building

**139 George Street,
Avalon Beach**

RESPONSIBLE FOR THIS REPORT:

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1 Clause 4.6 exception for Height of Building

1.1 Overview

Clause 4.6 of the Pittwater LEP 2014 (LEP) provides a mechanism for an exception to a development standard.

The proposal contravenes LEP Clause 4.3 'Height of Building' (building height), which is a development standard, and an exception is sought.

The building height applicable to the site is 8.5m pursuant to cl 4.3 and 10m cl 4.3(2D).

The existing and proposed developments exceed the building height standard.

The DA has used the *Merman* method of calculating building height in response to the Commissioner's judgment in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

In summary:

- the existing building height exceeds the development standard as shown within figure 8 below and on the architectural plans. It displays maximum building heights of:
 - Approx. 9.9m at the rear part of the house
 - Approx. 11.05m
- the proposed building height is variable and ranges up to 10.1m above the existing ground level (Figure 8).

1.2 Additional height provision for sloping land

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. However, the provision is not rely upon this provision because the proposal exceeds 10m and therefore does not satisfy the numerical limit (10m) within clause 4.3 2(D). Notwithstanding, the clause 4.6 exception provides the necessary mechanism to approve the proposed building height.

1.3 Site and location description

The site is located at 139 George Street, Avalon Beach and legally described as Lot 4 in Deposited Plan 204164. The site has an area of 1,170m².

The site is located on the southern side of George Street and is accessed via a long 'battle-axe shaped' driveway from George Street.

The allotment is of irregular shape, with a narrow northern street frontage of 4.57m.

The allotment has a second egress from its western side via Careel Bay Crescent.

The property contains an existing large split-level dwelling house, carport, double garage, with various elevated decks above the ground level.

The site has a long, narrow driveway which provides access to the rear of the lot where the dwelling is situated. The existing dwelling house is positioned close to the rear boundary.

The topography slopes steeply from the rear of the dwelling to the front of the site. There is a level difference of approximately 9.46m between the rear of the dwelling house and the front boundary (RL 17.99 to RL 8.53).

The property is within a north facing hillside that enjoys views over Careel Bay and Pittwater. There is dense vegetation to the east and south of the site.

The undulating topography results in dwelling houses being sited at different levels and within an irregular pattern within the hillside.

Neighbouring properties to the east, south, south-east and south-west are significantly separated, elevated and screened by vegetation.

The figures on the following pages depict the character of the property and its existing development.



Figure 1 – Alignment, orientation, and spatial layout of the subject site and adjoining dwellings (courtesy Northern Beaches Council)



Figure 2 – the configuration and orientation of the subject site (courtesy Northern Beaches Council Maps)



Figure 3 – existing northern elevation



Figure 4 – proposed northern elevation

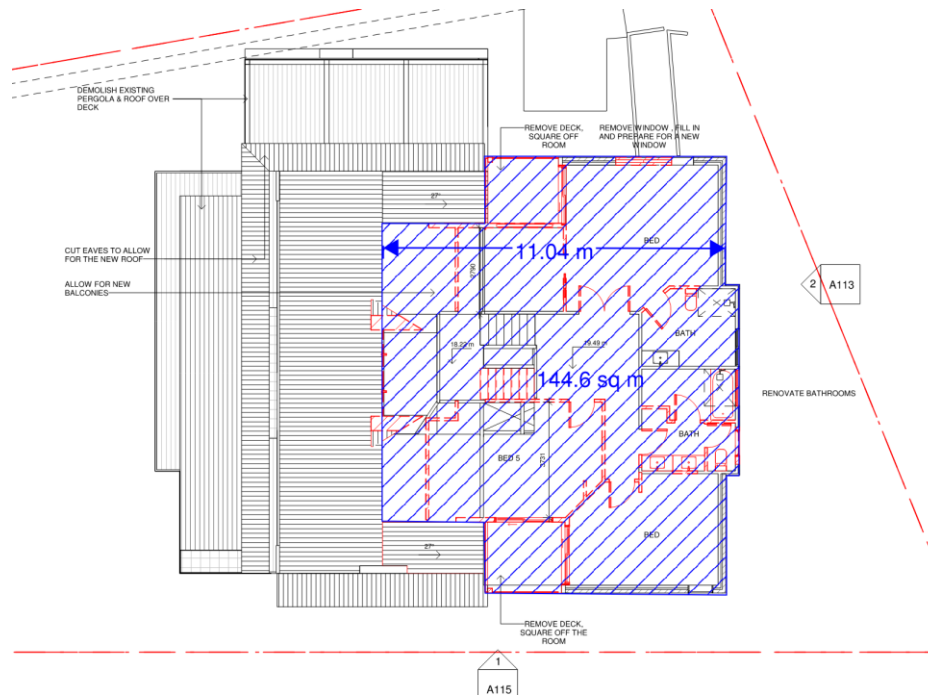


Figure 5 – existing floorplate of the upper building level; the floor plate is 11m deep and approx. 144m² in area

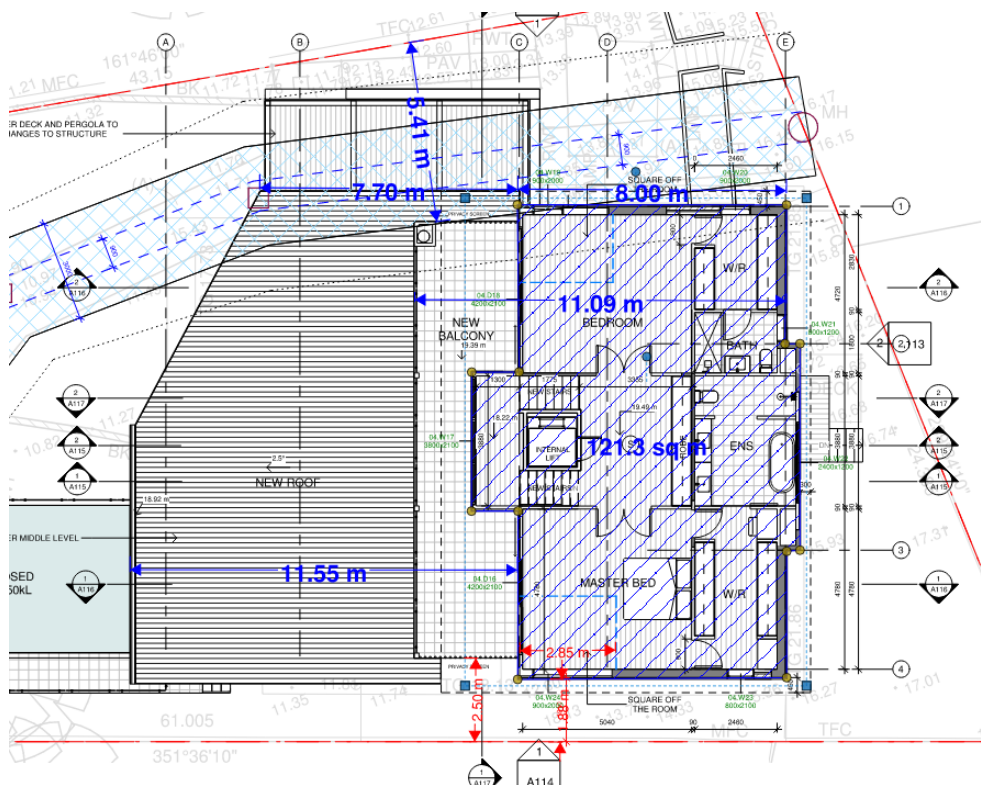


Figure 6 – proposed floorplate of the upper building level; the floor plate is approx. 8m deep and 121m² in area

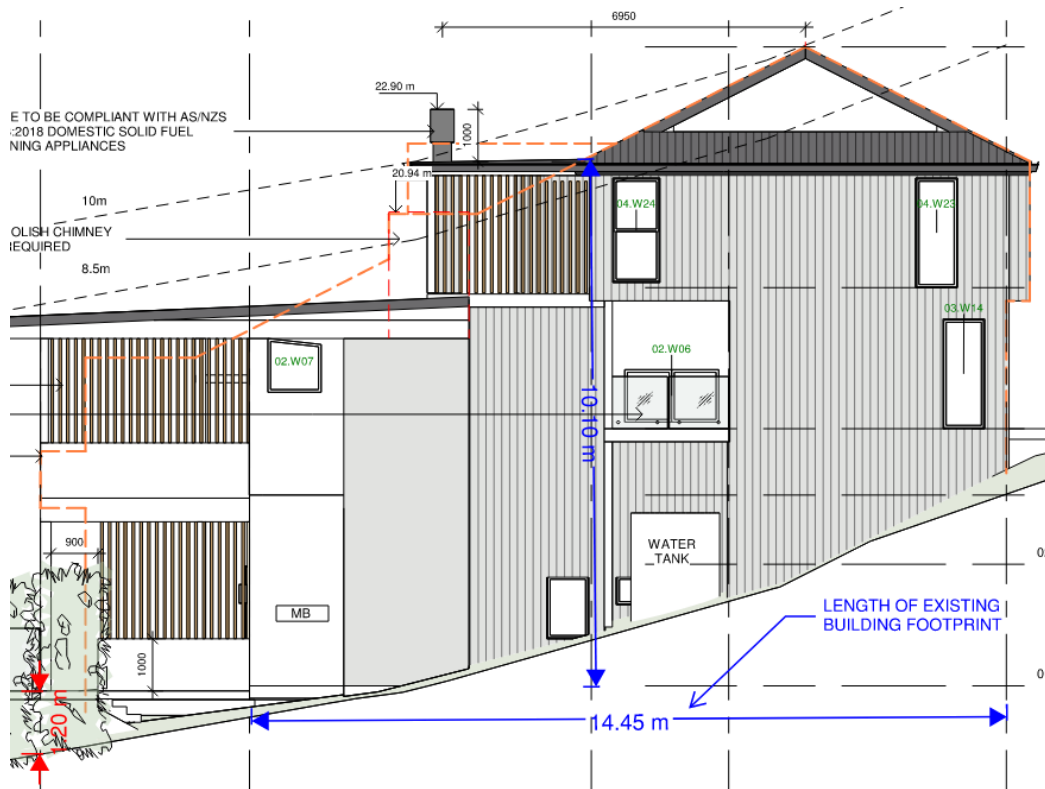


Figure 7 – extent of the proposed exception – west elevation

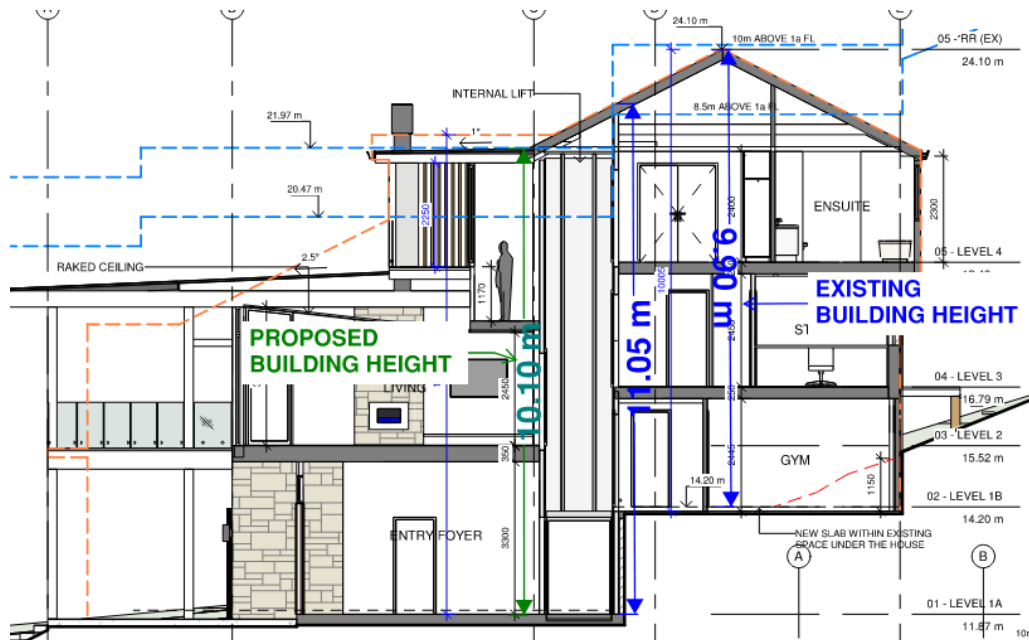


Figure 8 – extent of the existing and proposed exception at the section 4-4

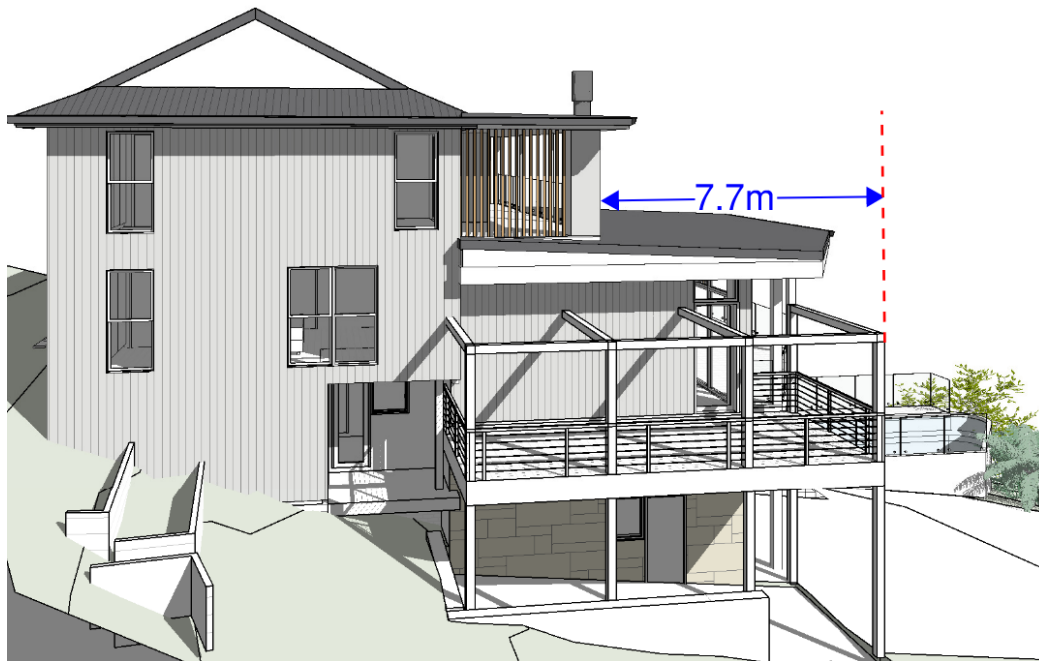


Figure 9 – the upper-level height exception is significantly set back from the front of the dwelling and will present as a recessive form to downslope areas



Figure 10 – existing dwelling frontage as viewed from shared access driveway



Figure 11 – existing presentation of site to Careel Bay Crescent. The existing dwelling is obscured in this photograph



Figure 12 – existing privacy interface with eastern adjoining property at 137 George Street



Figure 13 – existing privacy interface with south eastern adjoining property at 142 Cabarita Road



VIEW FROM 139 GEORGE ST, AVALON - RIDGE LINE
(IMAGE FROM REALESTATE.COM.AU)



VIEW FROM 2 CAREEL BAY CRES, AVALON
(IMAGE FROM REALESTATE.COM.AU)



VIEW FROM 140 CABARITA RD, AVALON
(IMAGE FROM REALESTATE.COM.AU)



VIEW FROM 138 CABARITA RD, AVALON
(IMAGE FROM REALESTATE.COM.AU)

Figure 14 – the character of views to Pittwater from four nearby / adjoining properties

2 Key statutory considerations

2.1.1 Objectives of clause 4.6

The objectives of clause 4.6 are as follows:

- (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.*

2.1.2 Objectives of Clause 4.3 Height of Building

The objectives of Clause 4.3 Height of Building are:

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

2.1.3 Ground level (existing)

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

2.1.4 Objectives of the C4 Environmental Living Zone

The objectives of the C4 Environmental Living zone are:

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

To ensure that residential development does not have an adverse effect on those values.

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

To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

3 Assessment

Within the spirit of the objectives of clause 4.6, the matters in support of the proposed exception are demonstrated by the characteristics of the proposal and circumstances of the case as set out below.

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

3.1 4.6 (3)(a) - compliance with the development standard is unreasonable or unnecessary in the circumstances

Having regard for the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, and in accordance with 4.6 (3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the objectives of the height standard are satisfied.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The first possible way is relevant to the subject matter and is repeated below:

1st *'The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.'*

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable'.

. In summary, the proposed height exception does not threaten the proposal's ability:

- to achieve a development is consistent with the desired character of the locality;
- to achieve a development that is compatible with the height and scale of development within the property's visual catchment;
- due to the battle-axe location of the site, and the dwelling house's location at the rear of the site, has a small visual catchment. From where it can be seen, the design minimises its visual impact on surrounding land due to its recessive form.
- to achieve an appropriate shading outcome to neighbouring properties;
- to achieve view sharing noting the additional building form is at the front, north and lower than the existing dwelling house.
- to achieve a building form and mass that is responsive to the site sloping topography and presents appropriately to adjoining land;
- to achieve a development on the property that results in an enhanced visual quality through improved materials and building design.

Strict compliance with the development standard would therefore be unreasonable and unnecessary in these circumstances.

The objectives of the height of buildings standard are addressed in further detail within section 3.4.1 below.

3.2 4.6 (3)(b) sufficient environmental planning grounds to justify contravening the development standard

In accordance with 4.6 (3)(b) there are sufficient environmental planning grounds to justify the exception to the development standard. The environmental planning grounds in support of the exception are described below.

3.2.1 Ground 1 - the prior excavation of the site distorts the maximum building height plane.

The method of calculating the building height follows the Commissioner's judgment in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

In accordance with the Merman judgement [at 74]

'The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014'.

It is clear from the various survey and architectural plans accompanying the application that the prior excavation of the site (within the footprint of the existing building) distorts the maximum building height plane. The proposed building height is compatible with the building heights of the existing development upon the site and nearby dwelling houses, as further addressed below.

3.2.2 Ground 2 – the existing development exceeds the height standard and the proposal involves a lower building height

The existing development has a maximum building height of approx. 11.05m and already exceeds the building height standard. The proposed addition results in a lower building height.

The design, form, and location of the existing development limits the ability for the proposal to achieve strict compliance with the numerical standard. The proposed additional building form is at the front, north, and lower than the existing dwelling house.

The additions will provide a recessive upper- level, and a more contemporary design that is responsive to the site conditions.

3.2.3 Ground 3 – a compatible built form, bulk, and mass is proposed

The proposed developments' height, mass, and form is compatible with other residential dwelling forms within the visual catchment. This is further addressed in response to objective (a) of the standard within section 3.3.1 of this report.

The proposal displays an appropriate bulk and scale within a vegetated landscaped setting noting:

- The proposal maintains the existing developments setback pattern.
- The property has a limited visual catchment due to its position within a battle-axe allotment and the vegetated character of the surrounding land.
- The proposal involves a modest GFA/FSR increase noting the existing GFA is 322m² (FSR of 0.28:1) and the proposed GFA is 347m² / 0.29:1, maintaining a suburban character below 0.5 to 1 as per the planning principle for 'Compatibility in a suburban context' established in *Salanitro-Chafei v Ashfield Council* [2005] NSWLEC 366 at 23-28.
- The proposal appropriately responds to, and sensitively relates to the site's setting and characteristics including, the sloping topography, irregular dwelling house pattern, allotment configuration, established landscape screen planting, orientation, outlook, and built form context. The proposed building height exception is setback from the northern façade, comprises a reduced volume of the dwelling's first floor level, and are recessed.
- The proposal is located appropriately upon the site in terms of the topography and the landscaped hillside setting. The proposed recessed upper-level will contribute to achieving a development of reduced bulk and scale that is integrated with the sloping landform.

The proposed developments' height is compatible with the scale and form of residential DWELLINGS within the visual catchment. This is further addressed in response to objective (a) of the standard within section 3.3.1 of this report.

3.2.4 Ground 4 – the proposal is of good design and satisfies the relevant objectives of the Environmental Planning and Assessment Act

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the proposal is consistent with the following objectives at under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

(c) to promote the orderly and economic use and development of land; and

In response to (c), the proposal results in a residential development that will promote orderly and economic use and development of land.

The levels and configuration of the existing dwelling house limits the ability to achieve strict compliance with the building height development standard.

The proposed development responds appropriately to the height, bulk, scale, and alignment of the adjoining development.

The proposed design is successful in minimising its impacts. It incorporates an upper-level floor plate with increased setbacks, that are appropriately articulated to create a recessive building mass.

The design incorporates a contemporary, low profile roof form that is appropriate in improving solar access and views to the dwelling house.

The design incorporates an appropriate mix of high-quality materials and finishes in a manner that will enhance the property's aesthetic character and form.

The proposed development will have an appropriate mass and form that is compatible with adjoining development, will not be visually intrusive, and will present appropriately to adjoining private and public land.

3.3 4.6 (4)(a)(ii) - the public interest

3.3.1 Objectives of the Development Standard

In accordance with 4.6 (4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the LEP Clause 4.3 Height of Buildings (as such objectives relate to the C4 Environmental Living zone) which are 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 upto 10.10m the proposed building height exceedance does not compromise the proposal's ability to be consistent with the desired character of the locality.

'Desired future character' is a term which is undefined within the LEP but described at a suburb level within the DCP (key excerpts below). In terms of compatibility with desired future character, three recent court matters have considered the term 'desired future character'¹ and how such terms should be applied. Guidance may therefore be appropriately taken from the range of environmental planning instruments, the court's findings, and the DCP provisions applicable to the land.

Key observations from the desired future character statement at A4.1 of the DCP include:

'The most important desired future character is that Avalon Beach will continue to provide an informal relaxed casual seaside environment. The locality will remain primarily a low-density residential area with dwelling houses a 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 occupancies will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity, fewer hazards and other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, commercial, community and recreational facilities will serve the community.'

Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including

¹ Big Property Pty Ltd v Randwick City Council [2021] (Big Property),
 HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] (HPG),
 SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 and Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD)

canopy trees, will be integrated with development. The objective is that there will be houses amongst the trees and not trees amongst the houses.

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.

Most houses are set back from the street with low or no fencing and vegetation is used extensively to delineate boundary lines. Special front building line setbacks have been implemented along Avalon Parade to maintain the unique character of this street. This, coupled with the extensive street planting of canopy trees, gives the locality a leafy character that should be maintained and enhanced'.

The desired feature character of the suburb is not proposed to change by the planning controls and therefore the existing character is relevant to consider.

The property's visual catchment is very limited noting:

- The site is not a standard suburban lot. It is of a regular shape and characterised by steep topography. This topography is also characteristic of the adjoining properties to the east and west; it establishes a context to which the proposed built form has appropriately responded.
- The site has a long, narrow driveway which provides access to the rear of the lot where the dwelling is situated. The existing dwelling house is positioned close to the rear boundary.
- The property is within a north facing hillside that enjoys views over Careel Bay and Pittwater. There is dense vegetation to the east and south of the site.
- The undulating topography results in dwelling houses being sited at different levels and within an irregular pattern within the hillside.
- Neighbouring properties to the east, south, south-east and south-west are significantly separated, elevated, and screened by vegetation.

The proposed exception will:

- not be visible from George Street
- be significantly setback (by approx. 35m) from Careel Bay Crescent
- be visible from limited locations. From where it can be seen, it will not be visually intrusive due to its significant set back from the front facade of the levels below.

(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 upto 10.10m the proposed development will be compatible with the height and scale of the surrounding and nearby development. The following characteristics are noted:

- The proposed additions will have a lower maximum building height than the existing dwelling house. The proposed development involves additions that are down-slope and

in front of the dwelling house that has an existing building height of 11.05m (Figure 8). The proposed eave and roof ridge heights are lower than the height/ maximum level (RL 24.10) of the existing building height dwelling houses.

- The proposed building height exception is compatible because:
 - it is located appropriately upon the site in terms of the topography and the landscaped hillside setting. The recessed upper-level proposed will contribute to achieving a development of reduced bulk and scale that is integrated with the sloping landform and landscape.
 - it will be positioned within a landscaped and heavily vegetated setting, compatible with the surrounding development.
 - The existing building form will be enhanced by the proposed modifications the upper-level. It will result in a more contemporary building form, increased amenity to the dwelling via additional north facing openings, a recessive building form with appropriate visual presentation to neighbouring land.
 - The proposal maintains the existing development's setback pattern.
 - The property has a limited visual catchment due to its position within a battle-axe allotment and the vegetated character of the surrounding land.
 - The proposal involves a modest GFA/FSR increase noting the existing GFA is 322m² (FSR of 0.28:1) and the proposed GFA is 347m² / 0.29:1, maintaining a suburban character below 0.5 to 1 as per the planning principle for 'Compatibility in a suburban context' established in *Salanitro-Chafei v Ashfield Council*[2005] NSWLEC 366 at 23-28.

(c) to minimise any overshadowing of neighbouring properties,

Response –

Despite a section of the proposed building displaying heights of upto 10.10m the proposed building will result in an acceptable level of overshadowing on adjoining land. In this regard the proposal is accompanied by shadow diagrams demonstrating the extent of proposed shading.

They show that shade will be cast over the rear of the adjacent property at 2 Careel Bay Crescent at 9am and over the rear of 138 and 140 Cabarita Road at 3pm. This represents a modest and even distribution of shade to the adjoining properties. s

The shade will not be cast onto the principal private open space but onto landscaped areas at the rear of the properties and for a compliant period of time.

It is concluded that the proposal will not significantly or unreasonably reduce the available sunlight to the adjoining land and the provisions of the control are satisfied.

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

Response -

Despite a section of the proposed building displaying heights of upto 10.10m the proposed building will allow for the reasonable sharing of views. The following characteristics are noted:

- There are significant views of Pittwater and Careel Bay to the north of the location.

- The proposed additional building form is at the front, north, and lower than the existing dwelling house.
- As shown within the photographs in figure 14, the three properties to the south of the site enjoy these views. It is observed from this photograph that the roofs of the dwellings in the foreground of the photos do not impede on these views. The proposed development involves a lowering of the existing roof level and there are unlikely to be adverse view sharing impacts.
- Given the sloping topography and the siting of the proposed structure, the proposal is not anticipated to adversely impact on the established views from surrounding residential properties or any public vantage points and achieves a reasonable sharing of views in accordance with the control.

(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 upto 10.10m the proposed height exception does not threaten the proposal's ability to achieve a building form and mass that is responsive to the site sloping topography and that presents appropriately to adjoining land.

The proposed upper level displays increased setbacks from the lower floor levels, including a significant 7.7m setback from the front façade of the dwelling house.

The proposed additional building form is at the front, north, and lower than the existing dwelling house.

The proposed upper-level alterations involve a reduced depth and area of the floor plate. The depth (north to south) reduces from 11.4m to 8m; the area of the floorplate reduces from approx. 144m² to 121m² (figures 5 and 6).

From where it can be seen, it will be recessive when viewed from downslope areas to the north of the dwelling house.

(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 upto 10.10m:

- The existing building form will be enhanced by the proposed modifications.
- The proposed additions will have a lower maximum building height than the existing dwelling house. The proposed development involves additions that are down-slope and in front of the dwelling house that has an existing building height of 11.05m (Figure 8).
- The proposed development will result in a more contemporary building form, increased amenity to the occupants via additional north facing openings, a recessive building form with appropriate visual presentation to neighbouring land.

- As a result of the above, the proposal will not have an adverse visual impact on the natural environment.

The property is not within a heritage conservation area nor is the property a heritage item or near a heritage item.

3.3.2 Objectives of the zone

The proposed development will be in the public interest because it is consistent with the objectives for development within the C4 Environmental Living zone under the LEP in which the development is proposed to be carried out.

The objectives of the C4 Environmental Living zone are:

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

To ensure that residential development does not have an adverse effect on those values.

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

To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

It is assessed that the proposed development is consistent with, or not antipathetic to the zone objectives as it:

- will provide a low-impact augmentation of the existing dwelling house that is compatible with the other dwelling houses within the visual catchment.
- will provide an augmentation of the existing dwelling house that is not antipathetic to the ecological, scientific, or aesthetic values of the land.
- retains a low impact residential use on the site which, based on the information accompanying this DA, does not give rise to any unacceptable ecological, scientific or aesthetic impacts.

Accordingly, the proposal has had sufficient regard to the zone objectives and there is no statutory impediment to the granting of consent.

3.4 Secretary's considerations

With regards to the Secretary's considerations the proposed variation of the development standard:

- Does not raise any matter of significance for State or regional environmental planning consistent with 4.6 (5)(a).
- The public benefit is not served by maintaining the development standard consistent with 4.6 (5)(b).

4 Conclusion

The variation proposed to the *Height of Building* development standard has been appropriately acknowledged and the circumstances assessed, having regard to the objectives of the control. In conclusion, Council can be satisfied that:

- this written request has adequately addressed the matters required to be addressed by cl 4.6(3) and
- that the proposed development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4),

The proposal should be granted development consent.