

24 March 2020

Submission - Clause 4.6 Exception to a Development Standard

Warringah LEP 2011 - Clause 4.3 – Height of Buildings 9 Nenagh Street, North Manly

1 Request for exception to Clause 4.3 Building Height

1.1 Overview

Clause 4.6 of Warringah LEP 2011 provides a mechanism to allow an exception to a development standard.

As previously identified, the proposal contravenes Clause 4.3 Height of Buildings 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. The land is within building height designation Area (Figure) where a building height of 8.5m is applicable.

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 at 9 Nenagh Street, North Manly described as Lot A in Deposited Plan 392120. The site has an area of 601.3 m². The site is of regular shape with dimensions as follows:

- Northern side boundary of 30.48 m
- Southern side boundary of 30.48 m
- Eastern rear boundary of 19.72 m
- Western front boundary of 19.76 m

The land is developed with a one and two storey brick and tiled roof dwelling. A double garage is positioned underneath the dwelling with concrete driveway from Nenagh Street.

The property is significantly sloping from the middle to the rear with exposed rock ledges contributing to an overall level difference of approximately 8m between the front and the rear boundaries (approximately RL 6.5 at the street level, to RL 14.5 at the rear of the site).

The property is set within a developed hillside and predominantly, low density residential location, characterised by some large single dwellings.

The streetscape character is varied with a mix of building types and scales and a variable front setback. Surrounding development comprises a mix of detached residential dwellings on similar sized allotments of varying heights and scales comprising 1 storey up to 3 storeys.

1.3 Proposed development and the nature and extent of exception sought

The exception relates to LEP clause 4.3 in relation to a relatively modest section of the proposed building height at the front of the proposed additions. The proposal displays a building height of up to approximately 9m or 500mm above the maximum height permitted by clause 4.3, as illustrated within the figures below.

The proposed building elements that exceed the building height standard are located at the western extent of the proposed upper level building additions and include the eave / roof of the upper floor level and part of an awning over the west facing balcony (figure 1 to 3 below).

The proposed building height exceedance arises due to the slope of the land and because these are alterations and additions to an existing dwelling that has established building levels, configuration, and position on the site.

Clause 4.6 of Warringah LEP 2011 (LEP) provides a mechanism to allow an exception to a development standard. Clause 4.3 is a development standard and is applicable to the assessment of the proposal.

As required by clause 4.6 (3) the following is a written request for the proposed development to exceed the development standard for the consent authority's consideration.

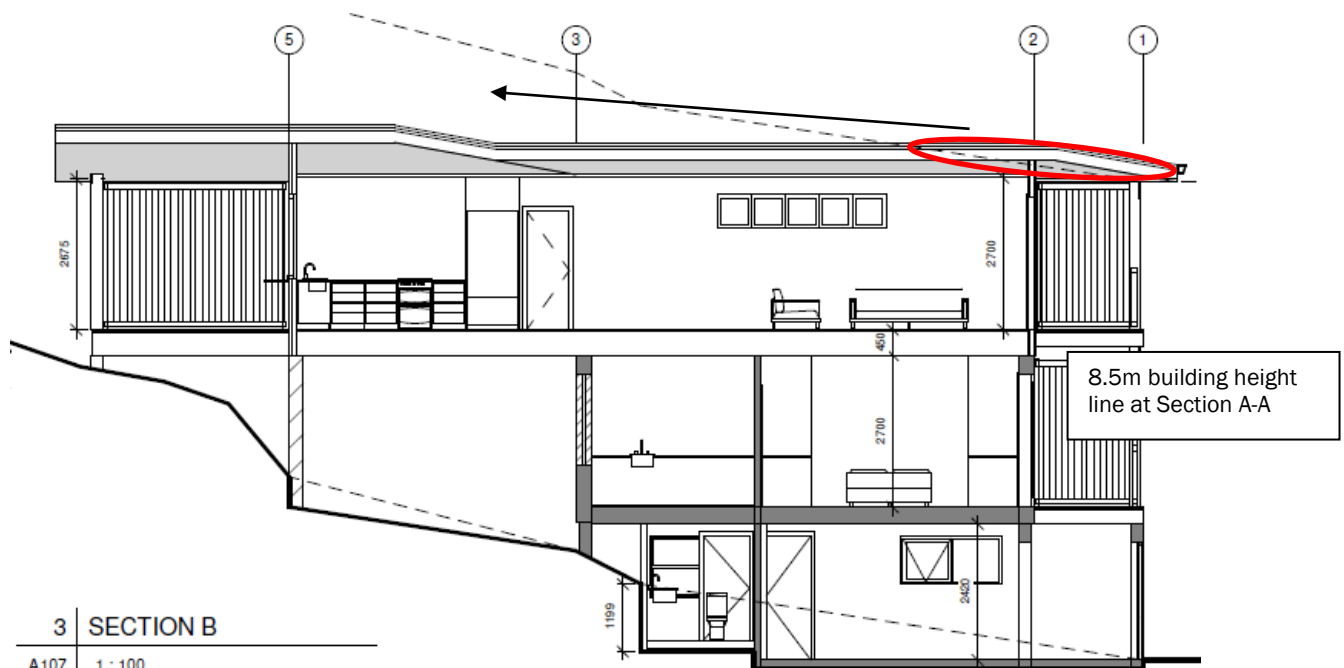
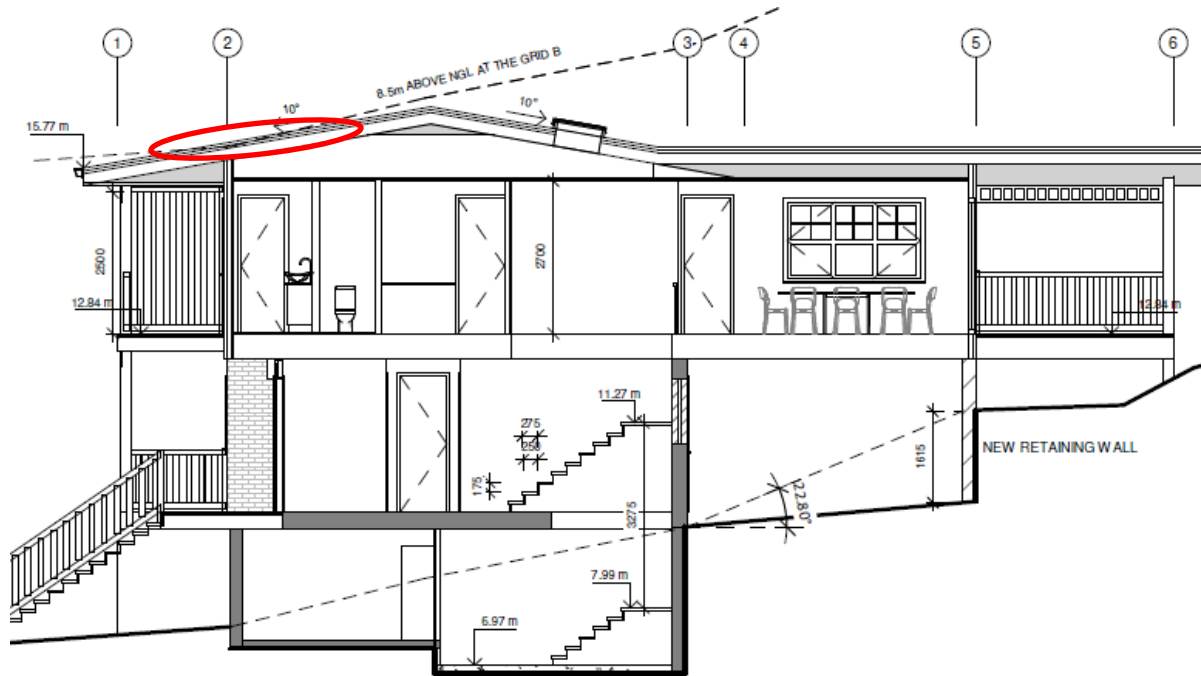


Figure 1 – excerpt of the architectural plans showing the extent and location of the building height exception



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Figure 2 – excerpt of the architectural plans showing the extent and location of the building height exception



Figure 3 – excerpt of the architectural plans showing the extent and location of the building height exception

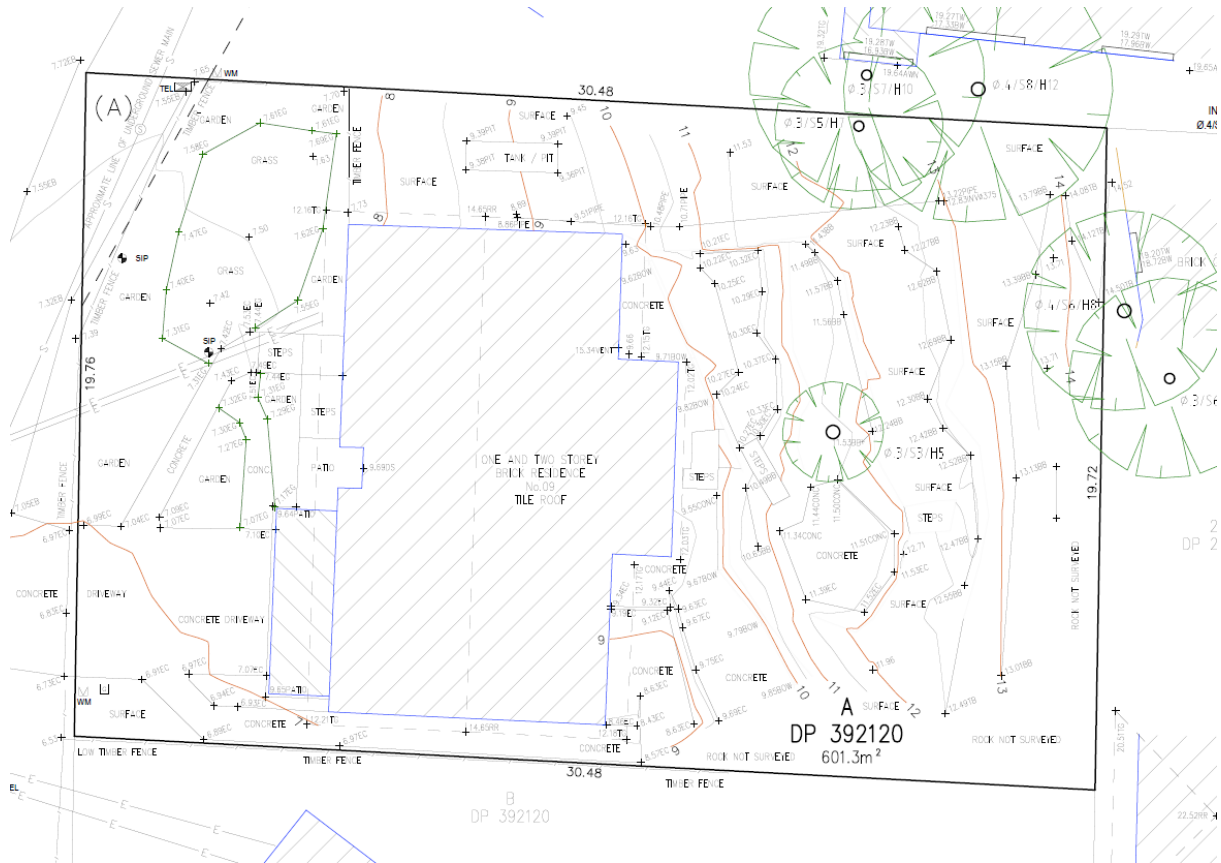


Figure 4 – excerpt from land survey showing the steep change in levels within the site at the front of the existing dwelling

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.*

2.1 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*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353*

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 Assessment

3.1 Compliance is unreasonable or unnecessary in the circumstances

Subsection 3 (a) of Clause 4.6 states:

- (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

Guidance is provided by the following court judgement in establishing what the relevant considerations are in assessing what is ‘unreasonable or unnecessary in the circumstances of the case’.

In addressing the requirements of Clause 4.6 (3) (a), the accepted five possible approaches for determining whether compliance is unnecessary or unreasonable were established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council*. Whilst at the time, this was specific to SEPP 1, in the matter of *Four2Five* (2007) LEC 827, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

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 five possible ways are:

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. applicable to the subject proposal*

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.

2nd *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary. (not applicable to the subject proposal)*

3rd *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. (not applicable to the subject proposal)*

4th *A fourth way is to establish that 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. (not applicable to*

the subject proposal)

- 5th *A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable to the subject proposal)*

In response to the 5 Wehbe principles it is assessed that the first principle is relevant to the subject matter. Our assessment of the proposal under clause 4.6(3)(a) finds that:

- The proposed development will not be incompatible or out of context with the visual scale and character of established development in the location.
- The proposed building height exceedance will not result in significant or inappropriate visual impacts on the streetscape or public spaces.
- The non-compliance is minor in extent, in and of itself, and relative to the site area and development footprint that it occupies.
- The proposed building height exceedance will have an insignificant impact in terms of shadowing, privacy, bulk, scale and view impacts.

The proposed development meets the objectives of the standard and the R2 zone as stated within this submission. For these reasons, in the circumstances, insistence upon strict compliance with the standard would be *unreasonable or unnecessary*. For these reasons it is assessed at the requirements of clause 4.6(3)(a) are satisfied and Council has the authority to grant approval to the proposal.

4 Environmental Planning Grounds

Subsection 3 (b) of Clause 4.6 states:

(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:

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The following section outlines the environmental planning grounds upon which the exception is justified.

- The proposed building height exceedance arises because the proposal is for alterations and additions to an existing dwelling that has established building levels, configuration, and position on the site. For example, the existing garage level is unsuitable for habitation however it is approximately 2.7m in height (floor to floor) and has the effect of adding to the overall height of the proposed additions. Therefore, the ability for the design to strictly comply with the development standard is constrained by the levels of the existing dwelling.

- The proposed building height exceedance arises because the proposal is for alterations and additions to an existing dwelling that has an established position on the property where the existing levels have been altered and are appropriate for accommodating further building additions. Whereas the slope of the land is significantly steeper at the rear of the site and less suitable for accommodating significant additions to the dwelling. The topography is sloping at the rear of the dwelling with a level difference of approximately 8m between the front and the rear boundaries (RL 14.5 to RL 6.5). Given the topography the building additions are appropriately located over the footprint of the existing dwelling to avoid locating the additions where the topography is steep.
- The design of the proposed additions has sought to address the objectives of the standard as they relate to bulk, scale and neighbouring amenity (sunlight access, privacy, views and visual impact) by providing significant setbacks to the side boundaries of the proposed additions of 3.0m and 4.1m to the south and north sides respectively.
- The proposed building form, height and scale is compatible with the local development character.
- The extent of the additional building height exceedance is modest, both in terms of its building footprint and in terms of its relative height above the existing ground levels. It is also is modest in terms of the amount of additional building volume that exceeds the height limit (the majority of additional building volume proposed is within the height limit).
- The extent of the height variation, and the site area over which it occurs is minor. In this way, the exceedance does not significantly add to the overall height and scale of the dwelling.
- No significant amenity impacts are attributable to this exceedance and compliance with the objectives of the zone and the development standard are achieved.
- Overall building additions and facade changes proposed will positively enhance the streetscape presentation of the building and will be in the wider public interest.

4.1 Unreasonable burden

Compliance could be achieved by lowering the height of the dwelling at that point or increasing the front setback of that portion of the building, however there would be insignificant gains in amenity and the change would be to the detriment of the dwelling's future occupants. There are positive impacts achieved by the development in its proposed form. To step the proposed dwelling down below the maximum height standard would reduce the amenity afforded to the future residents of the dwelling.

It is appropriate that the merits of the proposal on environmental planning grounds be balanced with the impact that strict compliance with the standard places on the site, and whether such strict compliance would result in a better or neutral planning outcome. The proposed building height exceedance will provide a compatible building outcome which will have no significant or inappropriate impact on streetscape.

The height exceedance, to accommodate the western section of roof at the front of the dwelling, has minimal impact on the surrounding amenity in terms of shading, visual bulk, scale, privacy, and streetscape appearance. Strict compliance in the circumstances would not achieve any significant gains with regards to the neighbouring community or relevant objectives of the zone

or standard. Based on the above strict compliance would result in an unreasonable burden on the proposed development with insufficient planning or amenity benefits.

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

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the built form outcomes achieved through the minor height exceedance arising from alterations and additions to an existing dwelling (that has established building levels) are consistent with the following objectives at clause 1.3 of the Environmental Planning and Assessment Act 1979 (the Act) noting the following:

In response to objective 1.3(c) of the Act, 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 that retains the existing dwelling and by a design that is responsive to its development context that achieves high amenity for future occupants and maintains high amenity to adjoining land.

In response to objective 1.3(g) of the Act, 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 proposed building envelope has been designed to be compatible with the neighbouring properties, providing significant side setbacks to the proposed upper level building addition. The proposed development maintains high levels of residential amenity to adjoining properties by minimising its impacts, by being compatible with those developments in terms of its scale, boundary setbacks and landscape spaces.

4.3 Conclusion

For these reasons the proposed building height exception is assessed as being appropriate to the circumstances of the site it's topography, it's built form context and compatibility with the amenity considerations of the neighbouring properties. It is assessed that there are appropriate and sufficient environmental planning grounds to support the building height exception.

5 Public Interest Considerations

5.1 Objectives of the height of buildings 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 Height of buildings development standard which are stated as follows:

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

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

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

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

The following responses are made to these objectives.

(a) 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 a height exceedance, the proposed exceedance does not compromise the proposal's ability to ensure that it is compatible with the height and scale of surrounding and nearby development.

Overall the proposed development outcome will be contextually appropriate with the built form and landscape setting of the site, without any unreasonable physical impacts on the adjoining residential properties. It is therefore assessed as being compatible with the local character and satisfying this assessment consideration.

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

Response –

Despite a section of the proposed building displaying a height exceedance, it does not compromise the proposal's ability to *minimise its visual impact, disruption of views, loss of privacy and loss of solar access.*

In relation to minimising its visual impact:

There will not be any significant or inappropriate visual impact resulting from the proposed section of building exceeds the building height limit due to:

The proposed building height exceedance will not result in significant or inappropriate visual impacts on the streetscape or public spaces.

The non-compliance is minor in extent, in and of itself, and relative to the site area and development footprint that it occupies.

The proposed side setbacks to the upper level provide a generous and appropriate spatial separation to the adjoining dwellings. Furthermore, the adjoining dwellings are located on different levels, sufficiently separated and orientated and therefore will not be significantly or inappropriately adversely visually impacted by the proposed building height exceedance.

For these reasons the proposal is assessed as satisfying the objective of the development standard will minimise its visual impact.

In relation to disruption of views:

Given the sloping topography, the siting of the proposed additions, position of adjacent dwellings on different levels and the compatibility of the proposed built form with that of the adjoining and nearby development, the proposal is not anticipated to significantly or unreasonably impede established views from surrounding residential properties or any public vantage points and satisfies the control.

For these reasons the proposal is assessed as satisfying the objective of the development standard and will minimise its disruption of views.

In relation to solar access -

Shadow diagrams showing the existing and proposed shadows accompany and support the proposal. They demonstrate that compliance with the DCP is achieved. The following key aspects are noted:

The site and the adjoining properties have an east / west orientation to Nenagh Street. As a result, shadow diagrams demonstrate that shade will be relatively evenly shared between the front yard (morning) and rear yard (afternoon) of the adjacent property at 7 Nenagh Street.

This reflects the existing development & shading pattern for properties along the eastern side of Nenagh Street, and provides a relatively even distribution of shade, consistent with the development pattern along the street.

The DCP requires:

'2. At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21'.

In accordance with Clause D6 of the DCP, the sunlight available to the private open space of adjoining the dwelling will not be impacted by more than 3 hours between 9am and 3pm on 22 June.

It is assessed that, whilst shade onto the adjoining property will be moderately increased above the current levels, the extent of the increase is within reasonable limits, and satisfies the DCP. Therefore, it is concluded that the provisions of the control are satisfied.

The site and the adjoining properties have a south / north orientation to Nenagh Street. As a result, shade will be relatively evenly shared between the front yard of each adjacent property.

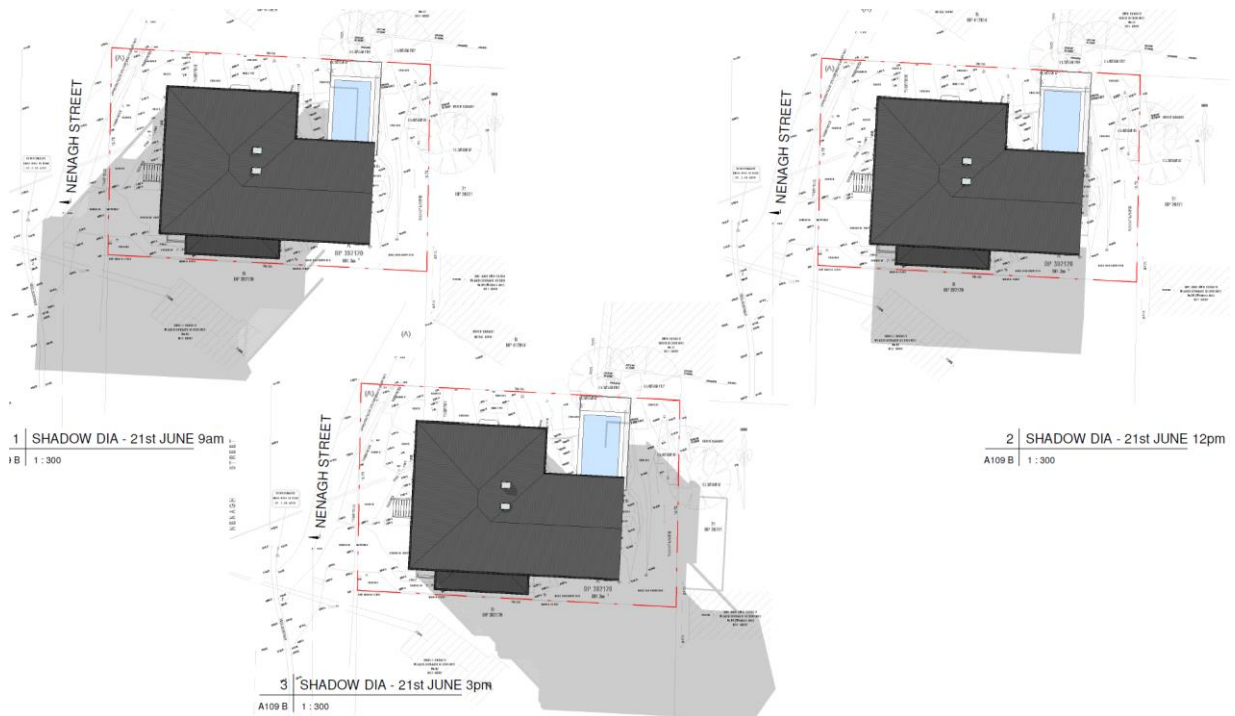


Figure 3 – the proposed shading impact to the southern adjoining development on 21 June

In relation to privacy -

Privacy has been considered in the proposed design and satisfies the DCP's objectives. The following aspects of the proposal are noted:

- Appropriate side building setbacks are provided by the proposal additions noting the significant 3m (south) and 4.1m (north) setbacks proposed to the upper level addition.
- Side boundary facing window openings are limited and appropriate in terms of their function (the rooms that they serve), location, sill height, and extent. The proposed upper level south side facing windows have a minimum high internal sill height and will provide appropriate privacy.
- Privacy screens are proposed to the balconies and terraces, on each side. In relation to the west facing balconies, being located at the site's street frontage, there is generally a lower expectation for complete privacy in these locations.

Considering these matters, it is concluded that the proposal will not significantly or unreasonably affect the visual privacy of the neighbouring properties.

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

Response –

Despite a section of the proposed building displaying a height exceedance, the proposed building does not compromise the proposal's ability to minimise adverse impact on the scenic quality of Warringah's coastal and bush environments.

The proposal will be compatible with the property's developed, residential, hillside, character. The hillside setting that the proposed building additions will be sited within provides an appropriate context for additional height to be located.

For these reasons, the proposal is assessed as satisfying the objective of the development standard and will have an appropriate impact on the *scenic quality* of the location.

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

Response -

Despite a section of the proposed building displaying a height exceedance, the proposed building does not compromise the proposal's ability to be consistent with the Objective to *manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

There are no public parks, reserves, or community facilities within the local context from which the proposed building height exceedance will be viewed.

In relation to the adjacent roadway -

For these reasons, the proposal is assessed as satisfying the objective of the development standard and will have an appropriate impact when viewed from the adjacent public roadway.

5.2 Zone Objectives

In accordance with 4.6 (4)(a)(ii), the proposed development will be in the public interest because it is consistent with the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out. These are stated and responded to as follows:

(a) To provide for the housing needs of the community within a low density residential environment.

Response -

The proposed development will provide for the housing needs of the community the stock of housing. The proposed development improves the quality and extent of housing on the property and therefore responds positively to this zone objective.

(b) To enable other land uses that provide facilities or services to meet the day to day needs of residents.

Response -

The proposed development is not antipathetic to this objective of the zone.

(c) To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah

Response -

The proposed development provides appropriate building setbacks to each of the property boundaries. The proposal will maintain/provide a landscaped setting to the property/dwelling with DCP compliant landscaped area. It is assessed that the proposed building height exceedance will be compatible with the character of the area and will not compromise the proposal's ability to satisfy the third objective of the zone.

In conclusion it is assessed that the proposal is consistent with or not antipathetic to the objectives of the zone.

5.3 Are there any matters of State or regional significance?

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

5.4 What is the public benefit of maintaining the standard?

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

6 Conclusion

The purpose of this submission is to formally request a exception to the development standard in Clause 4.3 Height of Buildings.

The proposed building height exception 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.

The cl 4.6 request is well founded and compliance with the building height development standard would be unreasonable and unnecessary in the circumstances. There are sufficient environmental planning grounds to justify the contravention of that standard and that the proposed building would be consistent with the objectives of the standard and the zone and thereby be in the public interest.

Yours sincerely,



Michael Haynes
Director - BBF Town Planners