

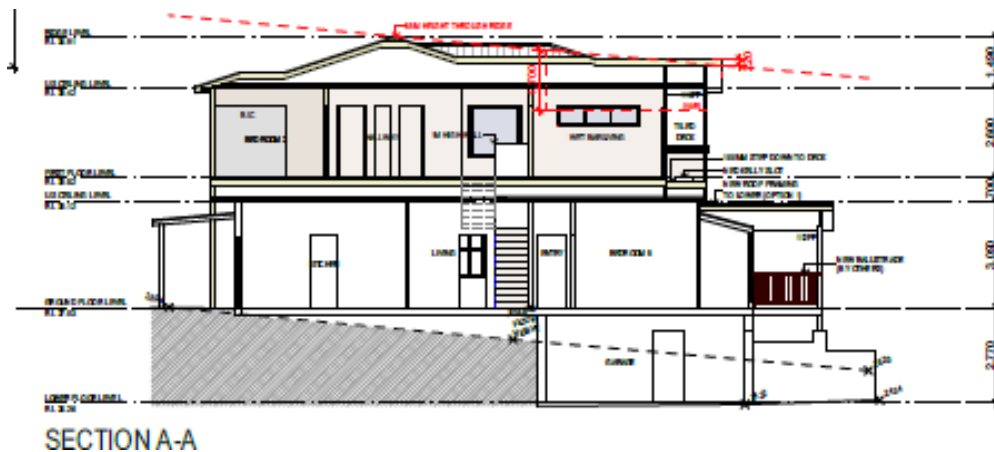
## Clause 4.6 Justification – Building Height

### No 17 Herbert Street Manly

#### Introduction - Content of the clause 4.6 request

The proposed development seeks approval for a variation to the building height development standard pursuant to Manly LEP 2013. Clause 4.3 of the LEP relates to building height. The maximum permitted building height for the subject site is 8.5m.

The proposed development presents a maximum building height of 10.2m representing a variation 1.7m or 20%.



Given the above non-compliance with Clauses 4.3 of the LEP, consideration of the matter is given pursuant to the provisions of clause 4.6 of the MLEP 2013.

The objectives of clause 4.6 of the LEP 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.

Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome.**

The variation to the building height control arises due to a fall in the site towards the front boundary and the presence of garaging below the

existing floor level of the dwelling. The proposed building height is limited to the portion of the proposed upper level which is sited over the excavated existing garage. The remainder of the proposed upper level is compliant with the building height control.

A degree of flexibility to the application of the building height development standard is warranted in this instance.

No serious adverse planning consequences (no additional overshadowing given shadows are cast to the rear, privacy, urban design/streetscape, heritage, neighbourhood character) arise because of the variation. Rather, in this case the variation facilitates the provision of a proportionate built form with a strong streetscape appeal. Once constructed, the proposed dwelling will retain a comparable height to that of the adjoining western dwelling.

The proposed development will sit comfortably in its context in terms of scale, massing and form given the prevalence of significant large 2 storey dwellings either side of the subject property.

For reasons expressed in this submission the ‘flexibility’ provided by clause 4.6 of the LEP facilitates a design outcome that does not adversely impact on any adjoining property despite the proposed variation to the building height standard.

A degree of flexibility to the application of the building height development standard is warranted in this instance.

No adverse planning consequences (excess overshadowing, privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise because of the variation. Rather, in this case the variation facilitates the provision of quality internal spaces and a proportionate built form with a strong streetscape appeal.

#### **Application of Clause 4.6**

*(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.*

**Comment:**

Clause 4.6(2) of the LEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this does not apply to a development standard that is expressly excluded from the operation of this clause.

Clauses 4.3 of the LEP is not expressly excluded from the operation of clause 4.6 and thus Council would have the authority to grant consent to a breach of the specified development standard under clause 4.3 subject to being satisfied of other matters under clause 4.6.

**Contravention of a Development Standard**

Clause 4.6(3) of the LEP provides that Council, as consent authority, must not grant development consent for a development that contravenes a development standard unless it is satisfied that the applicant has adequately addressed the matters required to be demonstrated by clause 4.6(3).

The matters required to be demonstrated by clause 4.6(3) are considered below.

*(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.*

**Clause 4.6(3)(a) - Unreasonable and Unnecessary**

Clause 4.6(3)(a) requires the applicant to provide a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

This requires Council to consider the applicant's submission rather than Council undertaking its own enquiry and forming a direct opinion of

satisfaction on whether compliance with the development standard is unreasonable or unnecessary in the circumstances.

The term “unreasonable or unnecessary” is not defined in the relevant environmental planning instruments or in the Act. Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] – [49] identifies 5 ways by which strict compliance with a development standard may be unreasonable or unnecessary. This written request adopts the first way identified by Preston CJ.

*42..... The most commonly invoked way is to establish that compliance with the development standard 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. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”*

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, the Chief Judge of the Land and Environment Court stated that the commonly cited tests he set out in *Wehbe* remain relevant to a consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances under clause 4.6.

Justice Preston’s analysis requires the following questions to be answered.

1. What are the objectives of the development standard?
2. Does the development proffer an alternative means of achieving the objectives of the development? (unnecessary)
3. Would no purpose be served if strict compliance was required? (unreasonable)

Provided below is a commentary in relation to the above three considerations.

## 1 Objectives of development standard

The objectives of clause 4.3 – Building Height control are:

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following—*
  - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
  - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
  - (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

The extent of the breach of the building height is exacerbated by part of the proposed upper level sited over the existing excavated garage. A technical breach of the building height eventuates. For the most part, the proposed upper level is compliant with the building height control.

The subject site sits within an R1 General Density Residential zone, which is characterised by a mix and variety of housing types including medium density housing. The proposal will maintain a proportionate scale of built form expected in the zone.

There will be no disruption of views, loss of privacy or significant loss of solar access given the site context and orientation and design resolution.

There will be no erosion of bushland or scenic quality because of the proposed building height.

The proposed building height does not add any undesirable bulk to the building when viewed from the public domain particularly when compared to the size and scale of the neighbouring dwellings.

### **Compliance unnecessary**

The development proffers alternative means of achieving the objective of the building height standard by providing an acceptable built form without comprising the amenity of the surrounding area in terms of visual and solar impacts.

The proposed upper level is suitably recessed and tiered. A typical two storey dwelling is proposed Across the rear elevation.

As the development proffers alternative means of achieving the objectives of clause 4.3 based on the site context, strict compliance is unnecessary.

### **Compliance unreasonable**

There would be no purpose served if strict compliance was required by the consent authority given that the proposed dwelling is consistent with the scale of nearby buildings.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (additional overshadowing and loss of privacy). There are no adverse 'flow on' adverse environmental impacts arising from the variation in this instance.

A compliant development in relation to building height would have a similar performance regarding overshadowing as the topography rises to the rear (south).

No particular benefit would be derived from the strict application of the building height standard in this instance, particularly in terms of streetscape considerations; strict compliance is therefore unreasonable. Compliance with the building height can be readily achieved by incorporating a lower roof pitch or a flat roof however this would represent a detriment to the aesthetics of the building.

The proposed dwelling design represents a cost effective, orderly and economic outcome for the site.

### Clause 4.6(3)(b) - Sufficient Environmental planning grounds

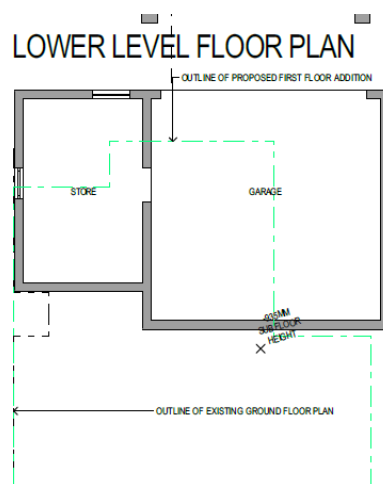
Clause 4.6(3)(b) requires the applicant's written request to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

The term "environmental planning grounds" is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts : Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

Strict compliance with the building height control in this instance would not achieve any additional architectural integrity or urban design merit of the development. Setting the proposed upper level further into the subject site would reduce the architectural presentation to the street.

The proposed built form will not be intrusive and will sit well within its site context. Effectively the extent of building height non-compliance would be far less when considering ground levels external of the dwelling as opposed to applying the excavated garage level.



The extent of non-compliance effectively applies to the green box over the garage.

In addition, there are no adverse amenity impacts arising, which affect existing residential properties or affect the environment. No trees require removal and the site is not flood prone. There are no sensitive land uses adjoining the site which will be adversely impacted by the additional building height.

An attractive dwelling is proposed which will be a feature of the streetscape.

Having regard to the above there are well founded environmental planning grounds to vary the development standards in this instance.

The objectives of the R1 General Residential zone are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development is consistent with the objectives as follows:

The proposed development provides an appropriate infill development and contemporary construction.

Provides for the housing need of the community by permitting residentially zoned land to be used for residential purposes of an appropriate density and scale.

Is not inconsistent with, or incapable of, existing in harmony with other developments in the immediate locality.

The building height, scale and massing of the development is considered to be compatible with the existing, evolving and desired built character of the area.

The building height variation is of no consequence in respect of the zone objectives. Approval of the proposed development will have no impact on any other nearby development opportunities.

The building height generated on-site will not result in any significant view loss, loss of privacy and minimal additional overshadowing in the context of the site. There is no adverse heritage impacts associated with



the proposed development. The height and scale of the development is typical within the residential context.

Standard floor to ceiling heights is proposed inclusive of a standard roof profile.

Having regard to the above the proposal is consistent with the objectives of the building height control and the objectives of the zone.

The variation to the building height standard will not raise any matters of significance for State or regional environmental planning.

There is no public benefit that would be achieved by maintaining strict adherence with the development standard or compromised by approving the building.

It is contextually appropriate not to strictly apply the building height development standard in this instance and it is not an abandonment of the standard.

## **Conclusion**

The proposed upper level to the dwelling maintains a consistent built form with nearby buildings.

Amenity considerations have been reasonably resolved through design.

Strict compliance with the development standard is therefore unnecessary and unreasonable given the circumstances of the site and design initiatives.

There are sufficient environmental grounds to justify the departure from the development standard in this instance.

The building height is construed to be in the public interest.

It is recommended that Council invoke its powers pursuant to clause 4.6 and approve the application.

It is noted that Acting Commissioner P Clay (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112) in a recent consideration in relation to the consideration of clause 4.6, deemed that there is no

numerical limitation to the extent of the variation sought. Such will be determined on merit. In consideration of the merits of the application, the proposal is reasonable.

Should you require any further information please contact the undersigned.

Yours Faithfully

A handwritten signature in black ink, reading "Nigel White". The signature is written in a cursive style, with the first name "Nigel" and the last name "White" clearly legible.

Nigel White  
Bachelor of Applied Science (Environmental Planning)  
17<sup>th</sup> March 2025