



*request to vary  
a development standard*



## **REQUEST TO VARY A DEVELOPMENT STANDARD**

173-175 WHALE BEACH ROAD  
WHALE BEACH NSW 2107

**May 2023**

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## *introduction*

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This request to vary a development standard is made by Northern Beaches Planning on behalf of Peter Heyworth in relation to a development application for the subdivision of 2 lots into 3 and the construction of a new dwelling house on each resultant allotment at 173-175 Whale Beach Road, Whale Beach (**site**). This request is made pursuant to clause 4.6 of Pittwater Local Environmental Plan (**PLEP 2014**) and with regard to relevant case law.

## *standard to be varied*

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With a maximum building height of 12.01m in relation to Dwelling C and 10.58m in relation to Dwelling B,, the proposed development is non-compliant with the 8.5m maximum building height prescribed by clause 4.3 of PLEP 2014. The maximum building height is a development standard, as defined by the EP&A Act:

***development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...*

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

Accordingly, the provisions of clause 4.6 of PLEP 2014 can be applied.

Pursuant to clause 4.6(2) of PLEP 2014, consent may be granted for development even though the proposal contravenes a development standard prescribed by an environmental planning instrument. Whilst this clause does not apply to those standards expressly excluded from this clause, the building height development standard of clause 4.3 of PLEP 2014 is not expressly excluded and thus, the provisions of clause 4.6 can be applied in this instance.

## *extent of the proposed breach*

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Dwelling C reaches a maximum height of 12.01m, representative of a 3.51m or 41% variation to the 8.5m maximum building height development standard. Dwelling B reaches a maximum height of 10.58m, representative of a 2.08m or 24% variation to the 8.5m building height development standard. The extent of non-compliance with the 8.5m maximum building height development standard is highlighted in the Architectural Plans prepared by Bureau SRH and in the height blanket diagrams, extracts of which are provided at Figures 1 -4, over the page.

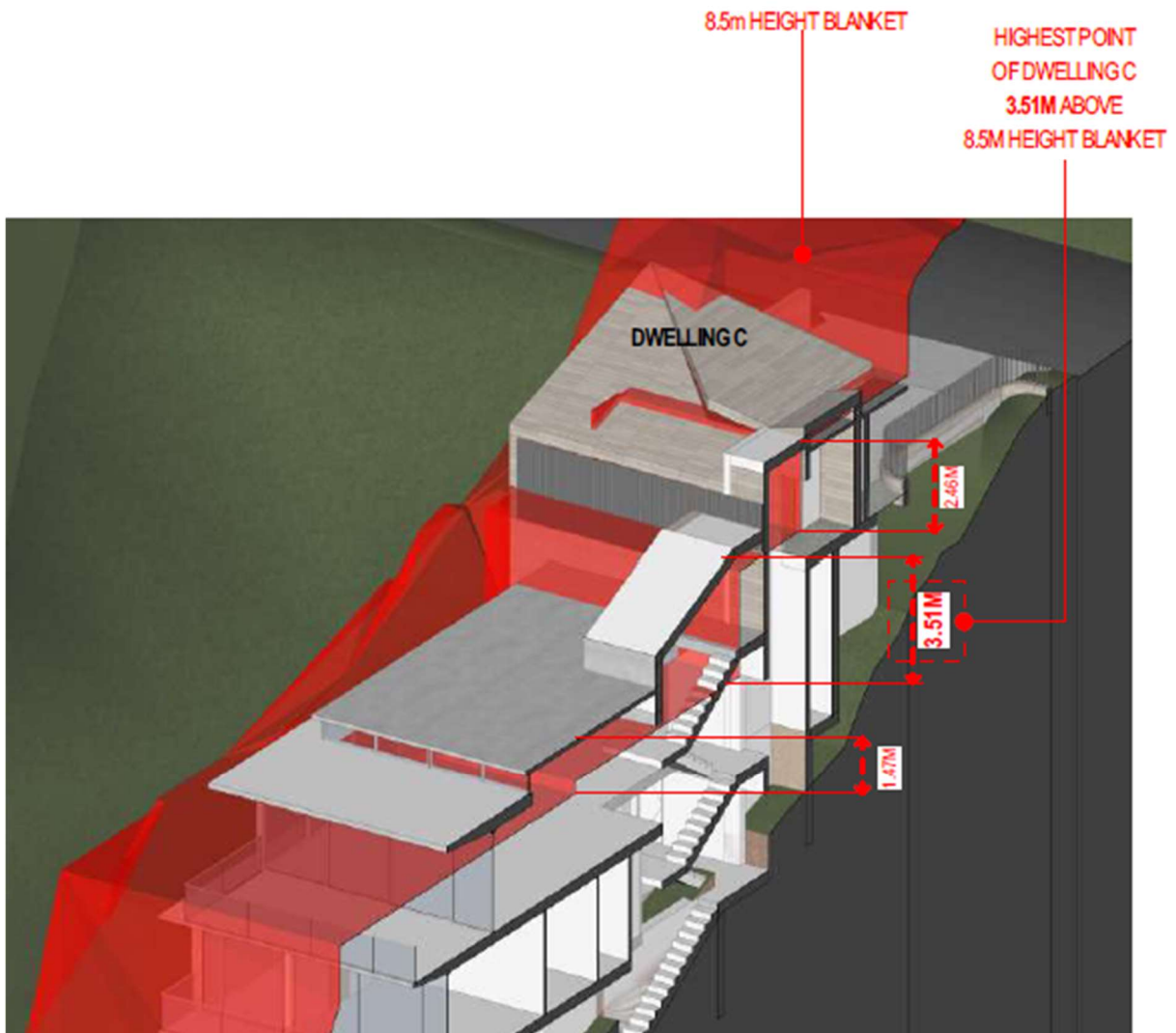


Figure 1 – Height Blanket Diagram Dwelling C  
Source: Bureau SRH

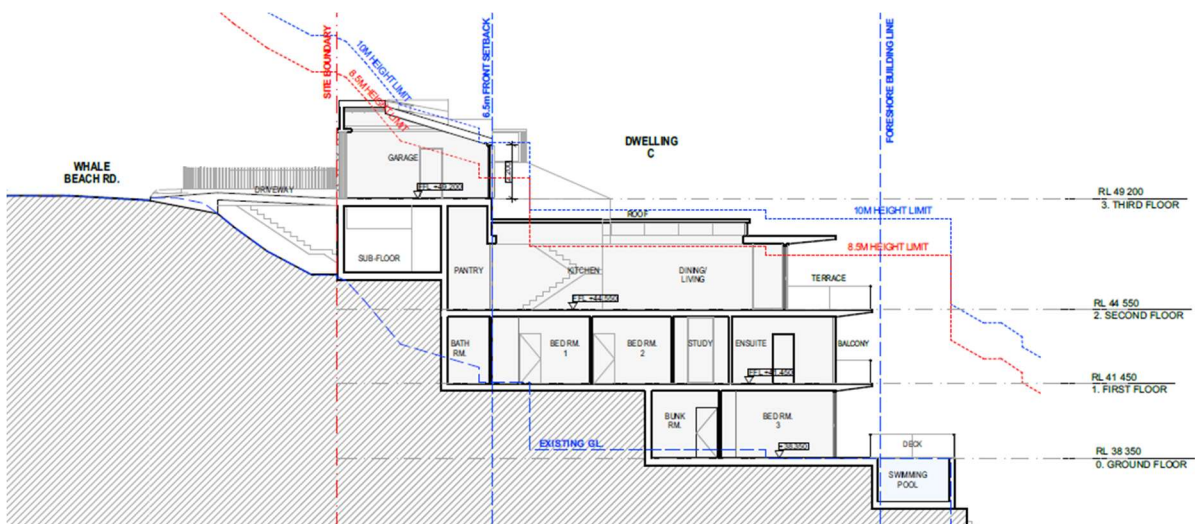


Figure 2 – Section through Dwelling C  
Source: Bureau SRH

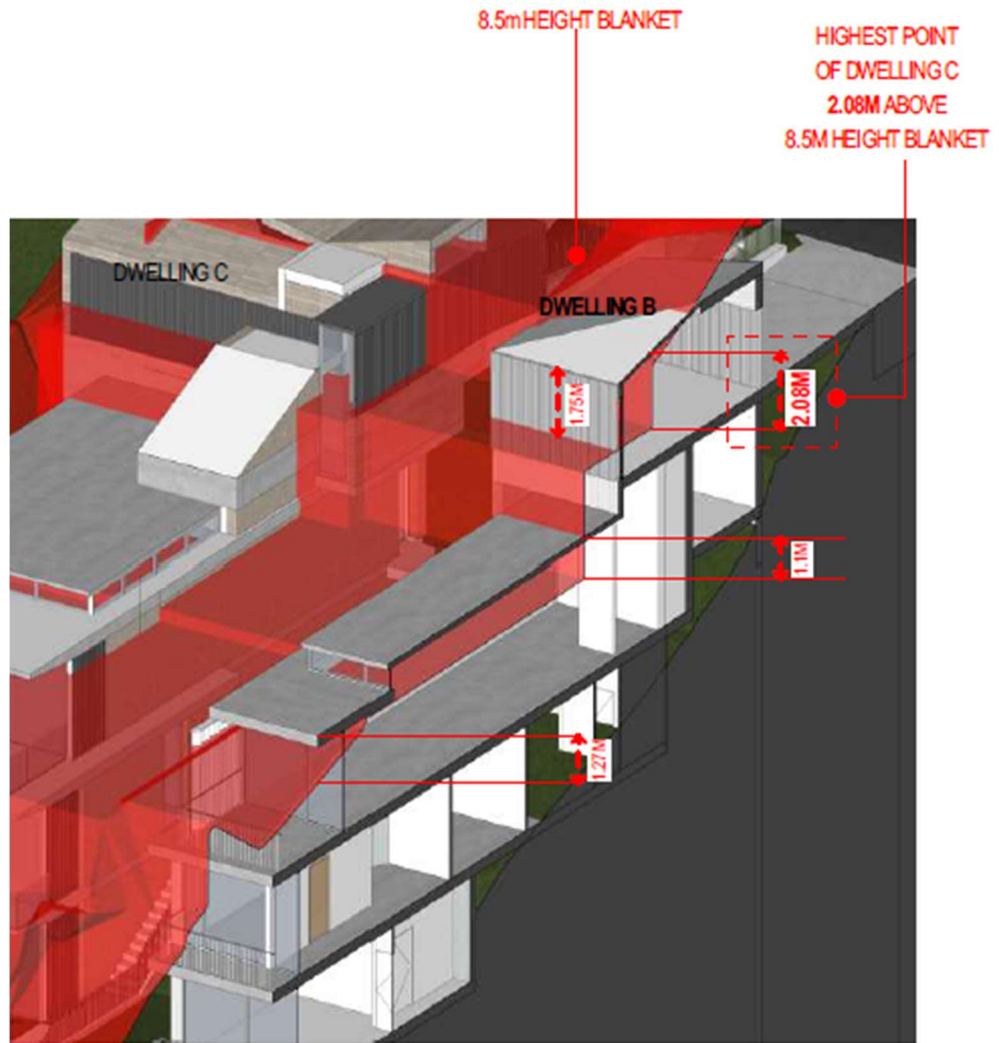


Figure 3 – Height Blanket Diagram Dwelling B  
Source: Bureau SRH

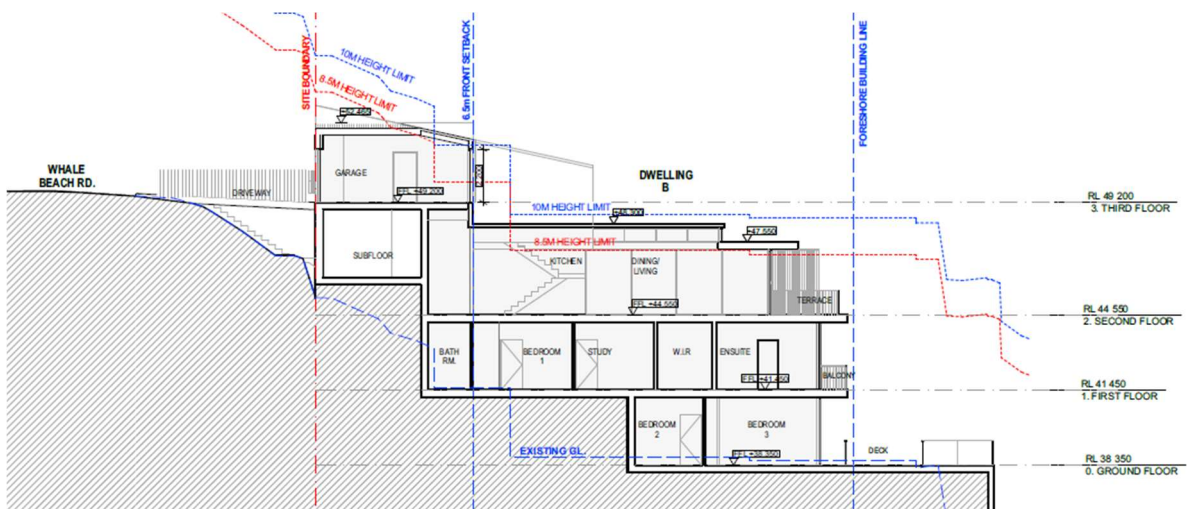


Figure 4 – Section through Dwelling B  
Source: Bureau SRH

## *unreasonable or unnecessary*

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Pursuant to clause 4.6(4) of PLEP 2014, consent can only be granted if the consent authority is satisfied that the applicant's written request to vary the development standard has addressed the criteria of clause 4.6(3) of PLEP 2014. Clause 4.6(3)(a) of PLEP 2014 requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In accordance with the decision of the NSW LEC in the matter of *Wehbe v Pittwater Council* [2007] NSWLEC 827 and as confirmed in the matter of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, one way in which strict compliance with a development standard may be found to be unreasonable or unnecessary is if it can be demonstrated that the objectives of the standard are achieved, despite non-compliance with the development standard.

The proposed development is consistent with the objectives of the building height development standard, as prescribed by clause 4.3(1) of PLEP 2014, as follows:

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

Comment: The desired future character of the Palm Beach Locality is identified in clause A4.12 of P21 DCP, which states the following with respect to height and scale:

*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... Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale.*

The proposed dwellings have a single storey presentation to Whale Beach Road and are stepped in response to the fall of the land. Whilst portions of the dwellings reach three storeys above existing ground levels, these three-storey elements are stepped back from the level below and are highly articulated to ensure that the apparent size of the development is appropriately minimised.

The resultant development will sit comfortably below the canopy of proposed landscaping and below the line of canopy upslope and on surrounding sites. The dwellings are integrated into the hillside and are of a scale that is commensurate with that of neighbouring and nearby dwellings. The three storey nature of the proposed dwellings is consistent with the three storey character of development along Whale Beach Road and does not detract from consistency with the desired future character of the locality.

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

Comment: The proposed dwellings present as single storey structures to Whale Beach Road, with a distinct landscaped break between each building. As shown in Figure 5, the garage doors are semi-transparent, maximising the retention of views through the structure, as seen on other elevated garages along Whale Beach Road (Figures 6 and 7).



**Figure 5 – Perspective images of the proposed dwellings as seen from Whale Beach Road)**  
Source: Bureau SRH



**Figure 6 – 223 Whale Beach Road**  
Source: Google Streetview



Figure 7 –167 Whale Beach Road  
Source: Google Streetview

The dwellings present as two and three storey buildings to the rear, consistent with that of surrounding dwellings, as shown in Figure 8. Consistent with the findings of the NSW LEC in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, to be compatible in an urban design context is to be capable of existing in harmony together. The proposed dwellings will sit harmoniously in this specific context, and most observers would not find the height or bulk of the proposed development to be offensive, jarring or unsympathetic in the streetscape context. This is particularly relevant noting the low likelihood that the dwellings will be seen by the general public from the rear of the site, as the only public vantage point at which the rear of the proposed dwellings will be visible is from the ocean. The rear of the site is not visible from Whale Beach and the rocky foreshore below the site is not readily accessible.

When measured to assumed natural ground, excluding the historical excavation at the footprint of the existing dwelling at 173 Whale Beach Road, each dwelling is maintained below the 10m variable height limit prescribed by clause 4.3(2D) of PLEP 2014, which is specifically intended to provide flexibility to the height plane on steeply sloping sites and which has been relied upon extensively throughout the Palm Beach locality.





Figure 8 – Drone image of site  
Source: realestate.com.au

- *to minimise any overshadowing of neighbouring properties,*

Comment: The proposed development will not result in any adverse impacts upon adjoining properties with regard to solar access. The site adjoins a drainage channel to the south, with no unreasonable impacts upon adjoining residential properties.

- *to allow for the reasonable sharing of views,*

Comment: Properties on the opposite side of Whale Beach Road sit significantly higher on the escarpment compared to the proposed dwellings, and as such, it appears unlikely that the height breach will result in any adverse impacts upon views. Views to the ocean and to distant headlands over the roofs of the proposed dwellings will be retained.

- *to encourage buildings that are designed to respond sensitively to the natural topography,*

Comment: The height of the development is stepped in response to the natural fall of the land. Whilst excavation is proposed, the degree of excavation is entirely commensurate with that which has been approved and undertaken on sloping sites throughout the Palm Beach locality and the wider LGA.

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

Comment: The proposed new dwellings are highly articulated, with varied setbacks and materiality, to ensure that the apparent size of the dwellings are reasonably reduced.

The dwellings are stepped in response to the fall of the land and comprise a range of different roof forms and awnings to manipulate light and shade across the elevations. Landscaping is also proposed to soften the visual impact of the dwellings as seen from the street, with a significant enhancement of landscaping within the foreshore area. The proposal will not result in any adverse visual impacts upon the surrounding natural environment.

As such, strict compliance with the maximum building height development standard is unreasonable and unnecessary in the circumstances of this case.

## *sufficient environmental planning grounds*

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Clause 4.6(3)(b) of PLEP 2014 requires the applicant to demonstrate that there are sufficient environmental planning grounds to justify contravention of the standard. The specific environmental planning grounds to justify the proposed contravention of the height standard are as follows:

### **1. Historical excavation**

The maximum height breaches occur where proposed Dwellings B and C are situated over the excavated footprint of the existing dwelling at 173 Whale Beach Road. In accordance with the findings of the NSW LEC in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, 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 land, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of PLEP 2014.

When measured from assumed natural ground level, the maximum height of Dwelling C is reduced to approximately 9m and is wholly maintained below the 10m variable height plane prescribed by clause 4.3(2D) of PLEP 2014, as shown in Figure 9.

Dwelling B is partially located over existing excavation and partially located on undisturbed existing ground. The maximum exceedance of the 8.5m height plane occurs in the area of existing excavation, and as demonstrated in Figure 10, Dwelling B is wholly maintained below the 10m variable height plane when measured from undisturbed ground level.

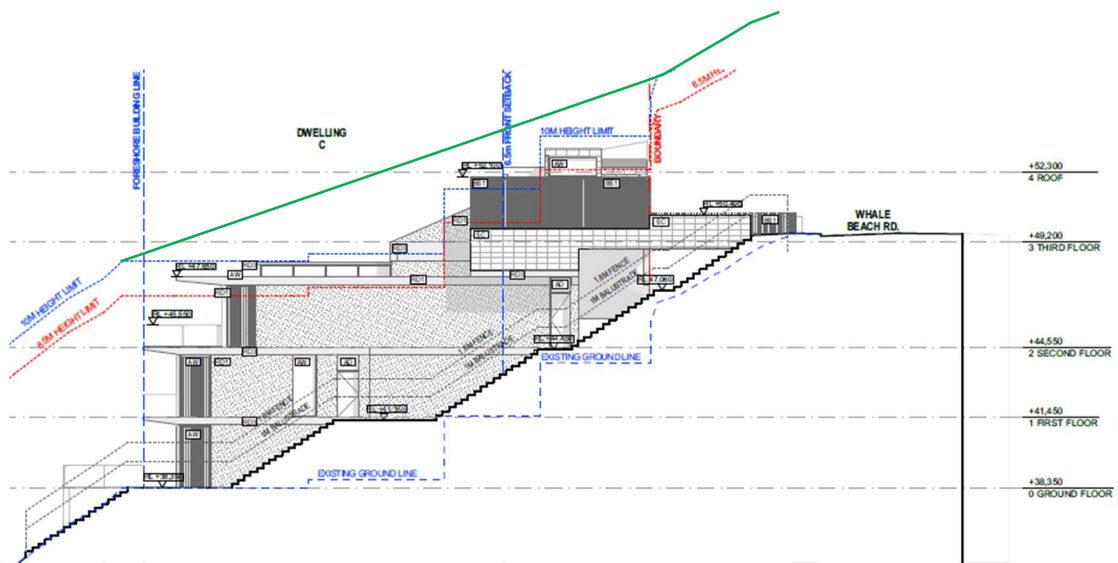


Figure 9 – Extract of West Elevation of Dwelling C with 10m height plane to assumed natural ground shown in green  
Source: Bureau SRH

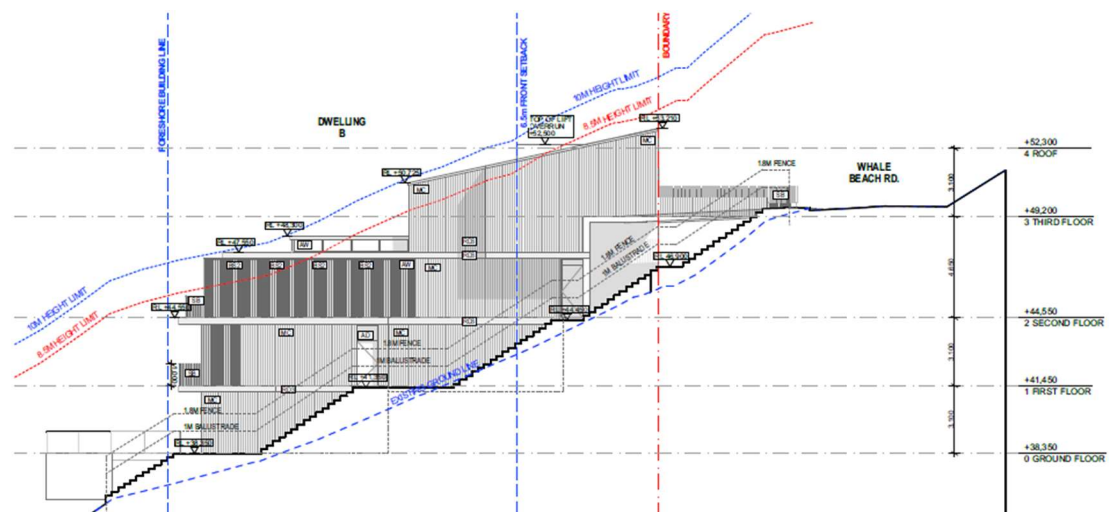


Figure 10 – Extract of West Elevation of Dwelling B with 10m height plane to existing natural ground shown in blue  
Source: Bureau SRH

The only portions of the proposed dwellings that protrude above the 10m height plane are those portions located over existing excavation, as shown in Figure 11. If not for this existing excavation, the development as a whole could rely upon the 10m variation of clause 4.3(2A) of PLEP 2014 and a request made pursuant to clause 4.6 would not be required.

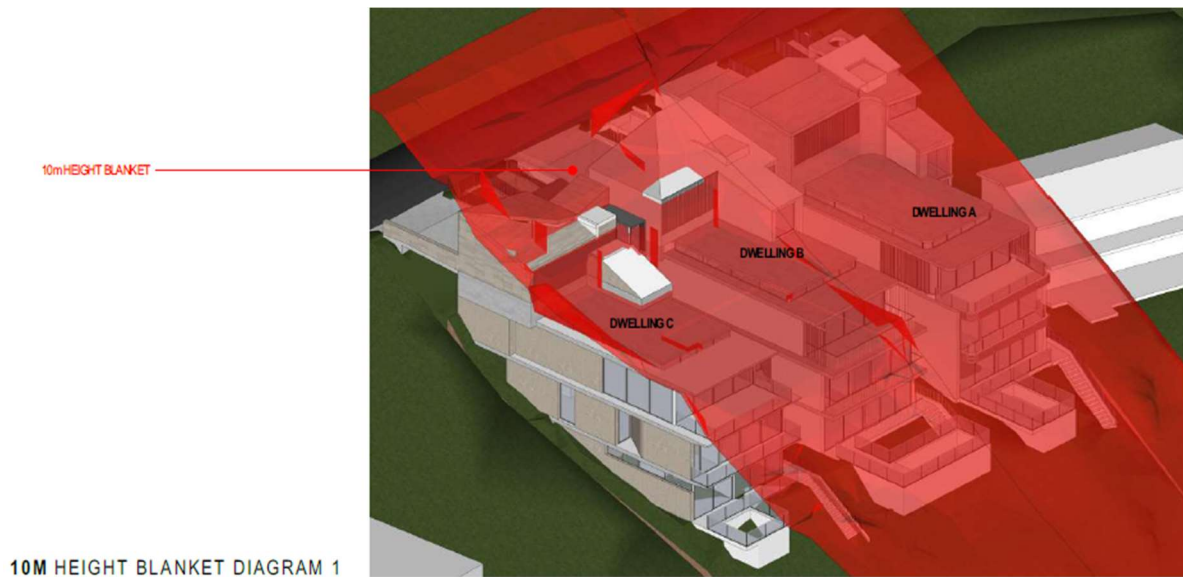


Figure 11 – Extract of 10m height plane diagram  
Source: Bureau SRH

## 2. Topography

The maximum height of the development occurs in association with the garage and entrance ways. The garages cannot be lowered due to the need to comply with Council's prescribed driveway profiles, with the resultant height non-compliance directly attributed to the steep fall of the land within the road reserve and into the frontage of the site.

If not for the existing excavation, the site would be able to benefit from the 10m variation of clause 4.3(2D) for sites with a slope in excess of 30%, which provides that minor portions of the building may reach more than 8.5m in height, but not more than 10m in height, if certain criteria are achieved.

No part of the building reaches more than 10m above natural ground levels, with a single storey presentation to Whale Beach Road.

Allowing for the development to appropriately respond to the individual context of the site, including the levels of the existing dwelling and the steep terrain of the site, promotes good design and amenity of the built environment, and the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants, consistent with objectives (g) and (h) of the EP&A Act. Furthermore, allowing for a variation to the height plane that is consistent with the height and scale of nearby development promotes the orderly and economic development of the land, consistent with objective (c) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravention of the maximum height development standard.

## *public interest*

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Under the provisions of clause 4.6(4)(a) of PLEP 2014, consent must not be granted to a proposal that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone in which the development is to be carried out.

As identified above, the proposed development is consistent with the objectives of the building height development standard. Furthermore, the proposal is consistent with the objectives of the C4 Environmental Living zone, as follows:

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

Comment: The proposed dwellings are well articulated with distinct vegetated breaks between each built form. The buildings are stepped in response to the fall of the land and are of a scale that is commensurate with surrounding development along Whale Beach Road and within the wider C4 Environmental Living Zone and the Palm Beach locality.

The proposed development, specifically the construction of Dwelling A, will result in site disturbance and tree removal. However, this is not unreasonable in consideration of the development of a heavily vegetated vacant site. Furthermore, the dwellings have been sited to maximise the area for rehabilitation and revegetation of the foreshore area, resulting in an overall enhancement of the quality and quantity of vegetation across the site.

Excavation is proposed to accommodate the proposed dwellings. However, excavated material is to be used as fill on Lots B and C, where historical excavation has eroded the natural fall of the land. This will ensure that the volume of material leaving the site will be appropriately minimised.

In consideration of the context of the site, in an area characterised by large multi-storey development, the proposed development is considered to be reasonably described as low-impact.

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

Comment: The LEP does not specify what attributes of this specific site constitute special ecological, scientific or aesthetic values, and as such, it is difficult to gauge how such values are to be impacted.

It could be said that the geotechnical and coastal hazards are special values of the site. In this respect, the application is accompanied by a Geotechnical Report and a Coastal Report to confirm that the sites can be developed safely and without adverse impact.

The landscaped quality of the site could be said to be special, given the coastal foreshore location of the site. In this respect, the application is accompanied by a Landscape Plan that demonstrates a superior landscaped treatment, with the majority of the site to be revegetated and rehabilitated to enhance the landscape character of the site and avoid adverse impact.

Alternatively, it could be the scenic quality of the site that is said to have special value. In this regard, the proposed development provides three high-quality architecturally designed homes that are to be complemented by significant landscaping. The bulk and scale of the dwellings is commensurate to that which currently exists on the site and that of surrounding and nearby dwellings along Whale Beach Road. In consideration of the context of the site, and what is reasonably anticipated on the two existing sites, the proposed development does not result in any adverse impacts upon the scenic quality of the site.

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

Comment: The proposed development seeks to provide three new dwellings, each on a lot size in excess of 700m<sup>2</sup>. Despite the additional lot proposed, the development remains a low density development. The proposed new dwellings are designed to follow the natural topography of the land, with excavation limited in both area and height. The degree of excavation proposed is entirely commensurate with that on surrounding properties and other properties on steeply sloping land. The footprint of each of the dwellings is also appropriately minimised, with compliant landscaped area calculations and an enhancement of the quality of landscaping across the site.

Minor parts of each dwelling reach a maximum of three storeys in height. This is not uncommon in the locality and is characteristic of contemporary dwellings on blocks fronting the ocean, and specifically of dwellings along Whale Beach Road. Whilst the dwellings involve departure with the building envelope control, the bulk and scale of the three dwellings proposed is considered to be significantly less than what would be achieved if a single dwelling was developed at 175 Whale Beach Road in conjunction with the existing dwelling at 173 Whale Beach Road, or if a single dwelling was constructed across both lots. The provision of three dwellings accommodated two district landscape breaks between the proposed built form, which would be lost if developed for one or two dwellings.

The proposed development is also considered to be appropriately integrated with landform and landscape, and of a scale that is contextually appropriate in its setting.

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

Comment: The existing foreshore area is heavily weed infested, and the majority of existing trees are in poor health. The proposed development provides for the rehabilitation and revegetation of the site, significantly improving the quality of landscaping, specifically that within the foreshore area.

Council can be satisfied that the proposal is in the public's interest, in so far as it is consistent with both the objectives of the zone and the objectives of the maximum height limit.

### *concurrence*

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Pursuant to clause 4.6(4) of PLEP 2014, development consent must not be granted to a development that contravenes a development standard unless the concurrence of the Secretary has been obtained. In accordance with Council's DDP Charter (in response to advice received from the Department of Planning, Industry and Environment, dated 2 November 2021), applications for Class 1 buildings with a variation greater than 10% to the building height development standard within PLEP 2014 may be determined by the DDP.

As such, the Secretary's concurrence can be assumed by the DDP in this instance.

### *conclusion*

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Overall, the consent authority can be satisfied that this written request has adequately addressed all relevant matters and that the provisions of clause 4.6 of PLEP 2014 have been met. As such, there is no jurisdictional impediment to the granting of consent in relation to the proposed breach of the building height development standard.



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