

# Appendix A

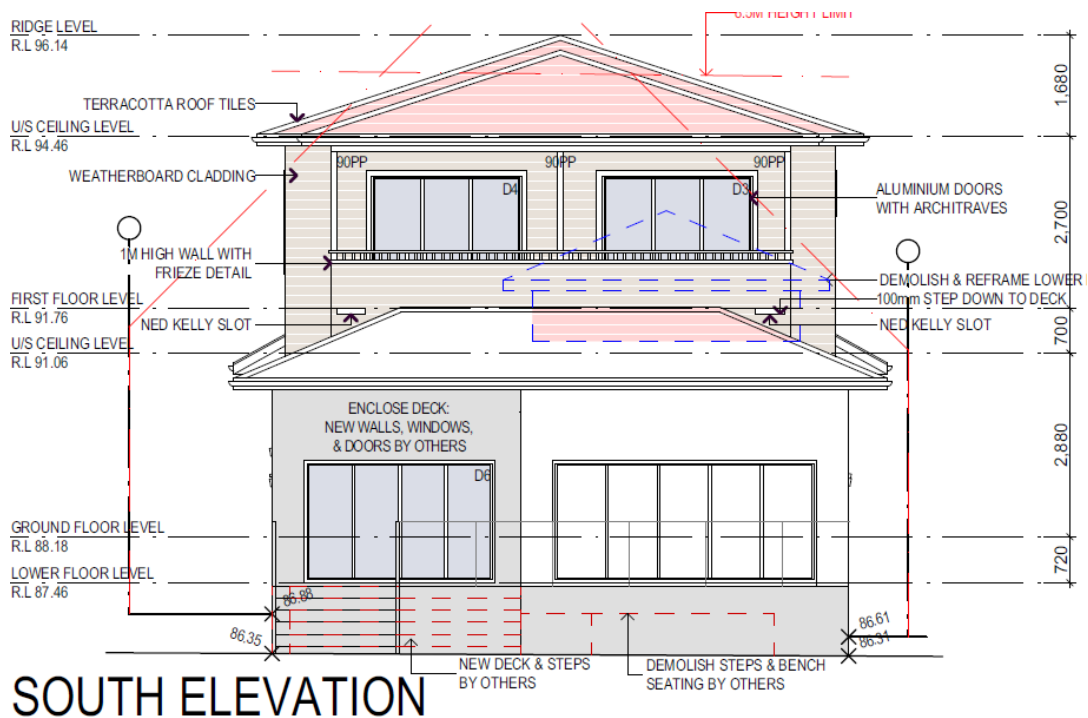
## Clause 4.6 Justification – Building Height

### No 7 Ethel Street Balgowlah

#### 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 approximately 9.1m representing a variation sought of around 7%.



Given the above non-compliance with Clause 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 by approximately 0.6m arises due to a fall in the site towards the rear boundary and an elevated lower level of the dwelling towards the rear. The proposed building height encroachment is minor and is contained centrally over the existing dwelling.

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

No serious adverse planning consequences (only minor additional 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 a proportionate built form with a strong streetscape appeal and consistency in built form with adjoining buildings. It is likely that once constructed, the proposed dwelling will retain a height less than that of the adjoining eastern duplex and will be lower in height than the apartment buildings located opposite.

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. The proposed variation to the building height standard will not be discernible to the casual observer from a streetscape perspective given that the proposed upper-level addition is reasonably well setback from the street and is well articulated.

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(4)(a)(i) 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 a written request prepared by or for the applicant (as required under clause 4.6(3)) 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, with clause 4.6(4)(a)(i) requires Council to consider the written request and to form an opinion that it satisfactorily demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances, 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 proposed roof design provides interest and expression to the dwelling with high streetscape presentation. The encroachment into the building height plane occurs for a portion of the roof which sits towards the rear of the dwelling centrally on-site.

The subject site sits within an R2 Low Density Residential zone that 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 impacts and solar access.

The centred nature of the proposed encroachment with regards to building height ensures that there will be a containment of impacts given the existing generous street setback and separation between buildings.

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 in regard to overshadowing and bulk/scale.

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.

This, with clause 4.6(4)(a)(i) requires Council to consider the written request and to form an opinion that it satisfactorily demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard, rather than Council undertaking its own enquiry, and forming a direct opinion of satisfaction on whether 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.

The proposed built form will not be intrusive and will sit well within its site context. Effectively a compliant building height is achieved when considering ground levels external of the dwelling.

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 can only benefit the neighbourhood.

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

#### **Clause 4.6(4) Public Interest**

Clause 4.6(4)(a)(ii) 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 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.

Unlike clause 4.6(4)(a)(i), this requires Council, as consent authority to form a direct opinion of satisfaction the proposed development will be in the public interest (rather than considering whether the applicant's written request demonstrates that the proposed development will be in the public interest).

A consideration of the public interest aspects of the development is provided in the following, to assist Council form the requisite opinion of satisfaction.



The proposed development will be in the public interest because it is consistent with the objective of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

With regards to the objectives for building height, it is noted that the scale and form of the building is consistent with surrounding built form.

The objectives of the R2 Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *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 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 are 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.

### **Concurrence of the Planning Secretary**

*(5) In deciding whether to grant concurrence, the Planning Secretary must consider—*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and  
(b) the public benefit of maintaining the development standard, and  
(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

It is expected that the Council will obtain the concurrence of the Planning Secretary as required (possibly through delegation).

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 has 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 breach 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 cursive script, reading "Nigel White". The signature is written in dark ink and is positioned above the printed name and title.

Nigel White  
Bachelor of Applied Science (Environmental Planning)  
18<sup>th</sup> February 2024