



MANLY LEP 2013

Clause 4.6 Exceptions to Development Standards – Building Height

Demolition of Existing Dwelling and Construction of a New Dwelling with New Swimming Pools and Landscaping at

No. 32 Bower Street Manly

Prepared for:

No 32 Bower Street Property

c/- I've Got Time Group

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MANLY LOCAL ENVIRONMENTAL PLAN (LEP) 2013 CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: No 32 Bower St Property

SITE ADDRESS: No. 32 Bower Street, Manly

PROPOSAL: Demolition of existing dwelling and construction of a new dwelling with new swimming pools and landscaping

1. (i) **Name of the applicable planning instrument which specifies the development standard:**

Manly Local Environmental Plan (LEP) 2013

- (ii) **The land is zoned:**

E3 Environmental Management Zone

- (iii) **The number of the relevant clause therein:**

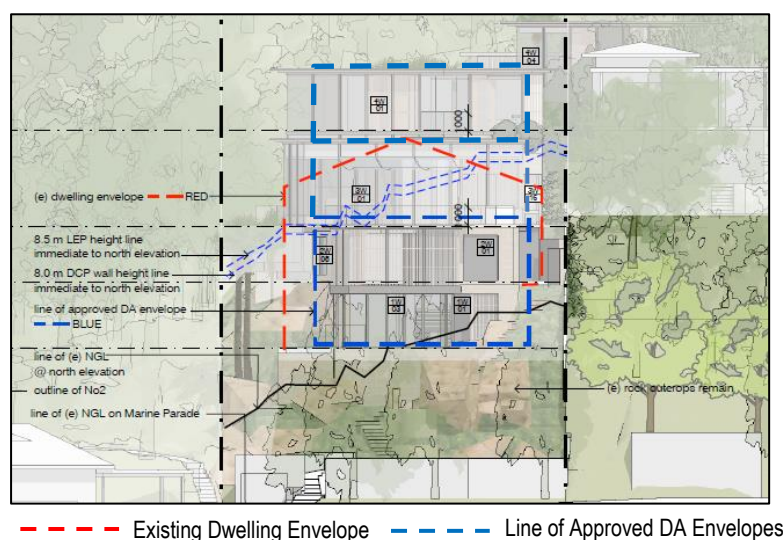
Clause 4.3 – Height of Buildings

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

2. **Specify the nature of Development Standard sought to be varied and details of variation:**

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the Height Map which indicates a maximum building height of 8.5m applies to the subject site.

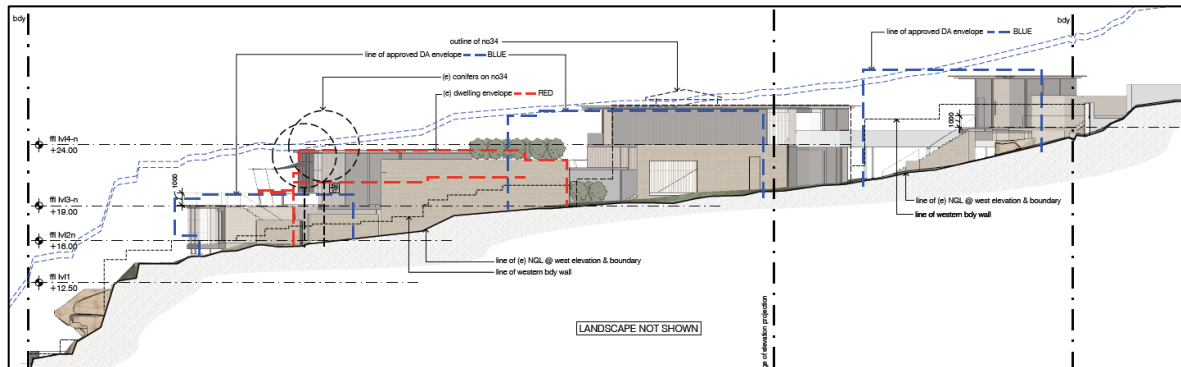
The proposal generally complies with the building height control, with the exception of small portions of the roof and upper levels at the middle and rear of the dwelling, with the non-compliant area sloping down towards the east. Figure 1 illustrates this significant cross-fall from west to east within the site.



Source: Campbell Architecture

Figure 1: North Elevation Showing Cross-fall

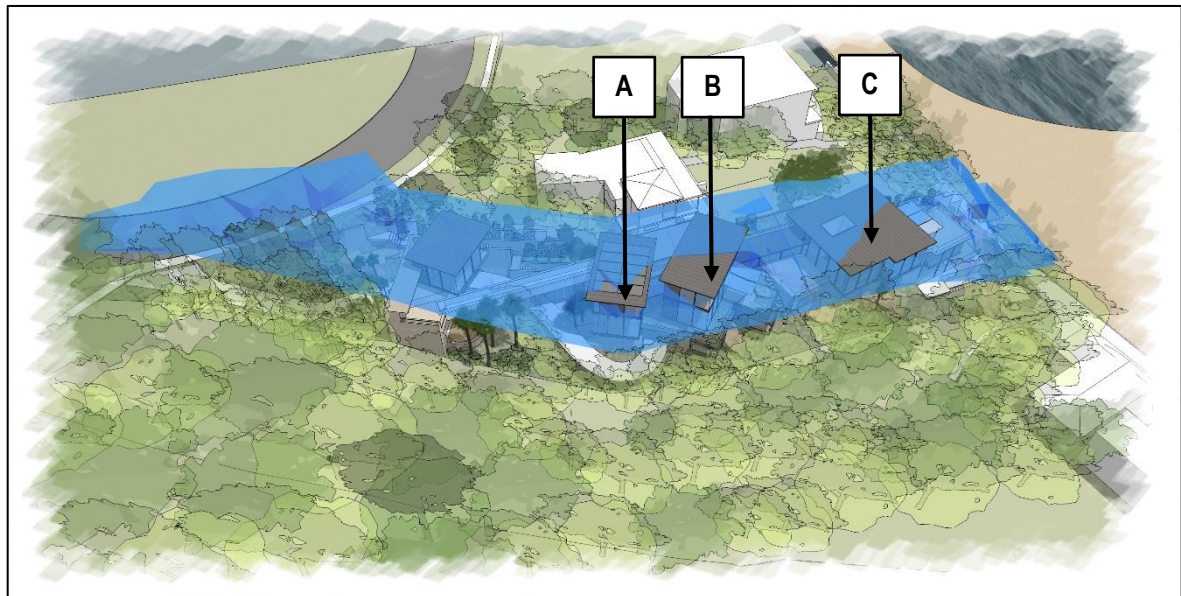
Figure 2 shows the proposed dwelling is fully compliant with the height limits on the western side, where it is adjacent to No. 34 Bower Street.



Source: Campbell Architecture

Figure 2: Western Elevation

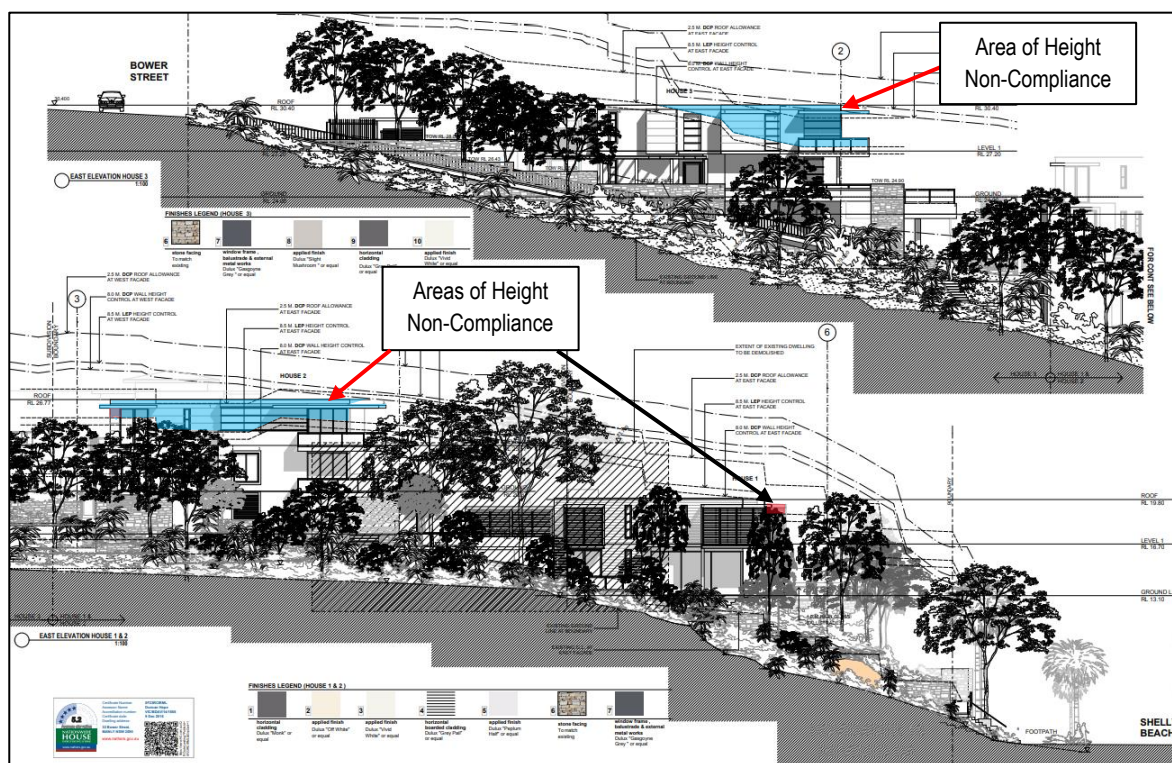
The variation is most clearly shown in Figure 3, which illustrates the areas of the dwelling which are greater than the height limit. These vary from 0.5m (A); 2.9m (B); and 0.8m (C) across the site (5.88% - 23.53%) (see Figure 3).



Source: Campbell Architecture

Figure 3: Height Blanket Diagram, as viewed from the East

Both areas of non-compliance are not readily visible from the street, with the proposed dwelling consistent with both existing and approved height non-compliances. The proposal is predominantly within the existing approved building envelope (see Figure 4 on the following page). The proposal also offers building heights comparable with the approval for three dwellings and subdivision (DA 142/2016) approved on **16 March 2017** (see Figure 4 on the following page).



Source: Wolski Coppin Architecture

Figure 4: Previously Approved Proposal – Eastern Elevation (Three Dwellings)

The new proposal is for an architecturally-designed part one, two and three storey dwelling, however when viewed from Bower Street the proposal will present as an elevated one-storey built form, with the additional storeys concealed from the streetscape. The proposal provides a compatible building height alignment with nearby developments. The non-compliances are considered technical, resulting from the steep cross-fall and sloping topography from the front to rear boundary of the subject site.

3. Consistency with Objectives of Clause 4.6

It is noted that the objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the recent Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, for abundant caution, it is still considered helpful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- Objective (a)* to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- Objective (b)* to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The proposal seeks flexibility in the application of the building height development standard to the development in the circumstance of this particular case. The proposal's height, bulk and scale has been carefully considered and designed to maintain the streetscape and reserve amenity and respect the scenic significance of the foreshore and ocean to the rear. The proposal contributes to the existing and emerging character of the locality and minimises issues regarding view impacts, privacy and overshadowing.

The assessment relates to portions of the building at the middle and rear sections of the proposed dwelling. The technical non-compliances are attributed to the challenging topography of the site and a significant fall in the existing ground line both from the front of the site to the rear, and across site. The proposal complies with the major built form controls including FSR and minimum lot size. On this basis, the non-compliance is considered to be consistent with the objectives of Clause 4.6.

Flexibility in this circumstance will provide a better outcome for and from development. This includes the additional height on the eastern side having no effect on the amenity of Bower Street residents to the east. The additional height also minimises level changes within the building, which is stepped down the site to replicate the existing landform. To refuse this application would unnecessarily complicate the design of the built form whilst reducing the floor-to-ceiling heights at the rear section of the dwelling.

4. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The clause is stated, *inter alia*:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

4.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

In our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. Commissioner Brown has considered the question of consistency in *Abrams v The Council of the City of Sydney* [2017] NSWLEC 1371, and at [26] held:

In considering the question of consistency, I have adopted approach of the former Chief Judge, Justice Pearlman in Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21 where, Her Honour expresses the following opinion [at 27]:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.

Similar reasoning was provided in *Initial Action*, however this has been challenged, but not overturned, in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*). Despite the non-compliance, the proposal is consistent with the desired environmental management zone character of the area. The proposal provides a bulk and scale that is consistent with that envisaged by Council's controls. Clause 4.3 of the LEP states the objectives for Height of Building, inter alia:

Objective (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

The proposed dwelling's building height is generally compliant with the LEP development standard, with the exception of three portions of the dwelling's roof and small areas of the upper levels. The proposed flat roof form and stepped design of the proposal utilises the existing topography of the site.

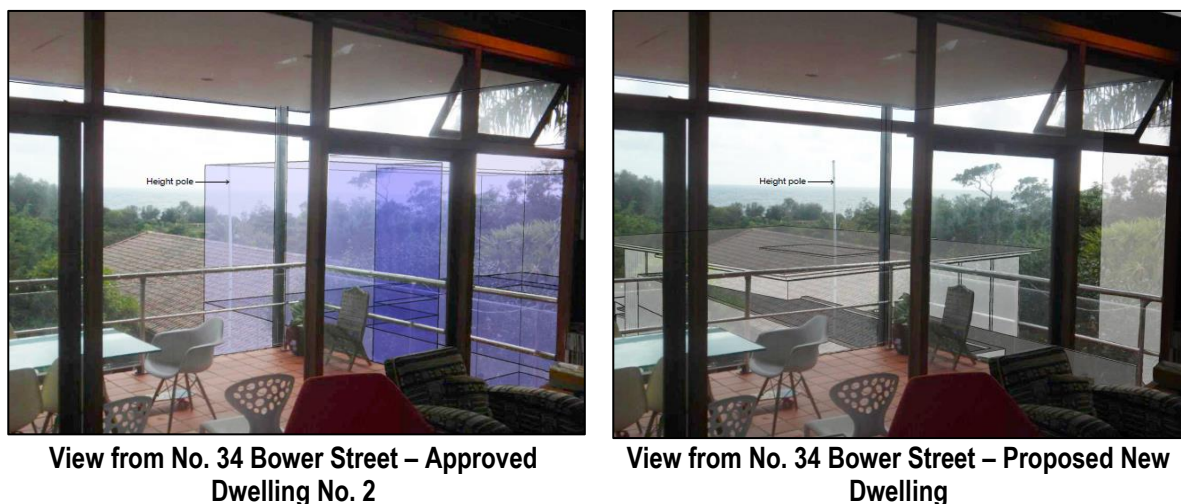
Objective (b): to control the bulk and scale of buildings

By breaking up the form into a series of linked pavilions, bulk and scale are minimised when viewed from the street. Accordingly, although portions of proposal are greater than the height control, neighbour and local amenity will be maintained as the proposal is well-designed and sited.

Objective (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)**

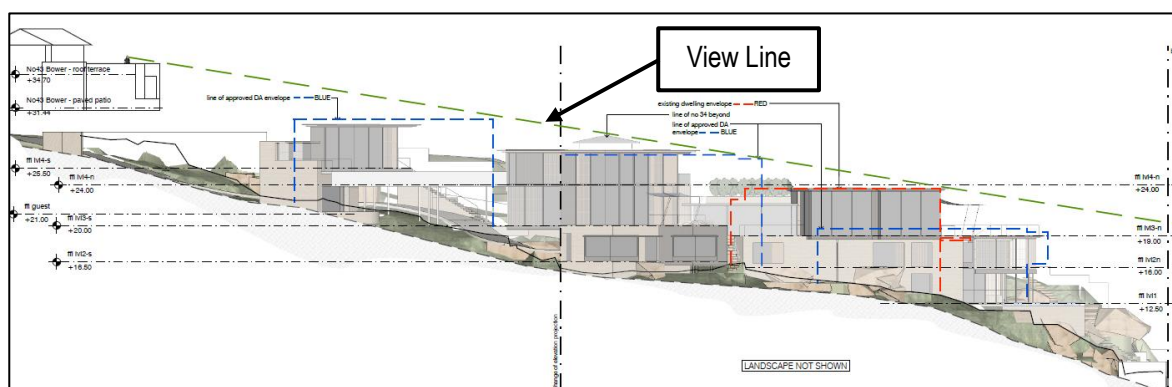
The proposal and areas of its additional height have been designed to maximise potential views across the site from habitable rooms of neighbouring and nearby properties. To maximise views from No. 34 Bower Street, the areas of additional height have been carefully positioned across the site; are stepped in height; and incorporate a flat roof form. This provides reduced view impacts compared to the previously approved heights and maintains ocean views currently enjoyed by No. 34 Bower Street (see Figure 5 on the following page).



Source: Campbell Architecture

Figure 5: Approved and Proposed View Impacts – No. 34 Bower Street

Views exist across the subject site from the roof terrace of No. 43 Bower Street towards the ocean. Potential impacts of the proposed dwelling have been similarly minimised through the siting of the additional height; incorporation of flat roofs; and the stepped nature of the design to respond to the sloping site (see Figure 6).



View-line from the Roof Terrace of No. 43 Bower Street Over Proposed New Dwelling

Figure 6: Proposed View Impact Diagram – No. 43 Bower Street

There are currently limited public views across the site from street level due to the dense vegetation, with a small area of ocean views enjoyed from the street maintained despite the additional height.

Objective (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,

The proposal provides generous sunlight access to neighbouring private open spaces and habitable rooms at No. 34 Bower Street and maintains existing levels of solar access to public spaces.

Objective (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 existing vegetation and topography of the site and its surrounds has been taken into consideration in the proposal, which retains trees where possible and provides generous soft landscaped areas whilst minimising cut and fill to preserve the prominent topography of the site.

In our opinion, the proposal meets the objectives of the LEP Clause 4.3 Height of Buildings by ensuring consistency with the landscape and streetscape; controlling the building's bulk and scale; maintaining views and solar access; and ensuring appropriate vegetation is provided and the topography of the site is maintained.

Test 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

The development standard's underlying purpose is to minimise the impacts of building heights on the topographic landscape, streetscape locality, bulk and scale, views, overshadowing, and bushland and surrounding land uses. The additional height proposed will maintain these objectives, being designed in consideration of the character of the locality and potential impacts on nearby properties.

Strict compliance with the development standard would complicate the built form design. The contemporary dwelling complements the existing and future character and scenic amenity of the area. We understand views are maintained and only minimal additional overshadowing of the shady reserve will occur. The additional building height ensures that level floor areas are provided throughout the dwelling. The height of the pavilion-style designed proposal also allows the building to blend with the dominant tree canopy of the reserve.

Accordingly, in our opinion, the requirement to comply with the maximum Height of Building control for the new dwelling is unreasonable as the area of additional height is not readily discernible from the street; the built form will improve the scenic amenity of the harbour and foreshore; and will maintain amenity to neighbouring properties.

Test 4 - 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;

While the standard has not been virtually abandoned or destroyed, it is important to note that Council have, on previous occasions, consented to proposals in the locality with a Building Height that exceeded the development standard, as evidenced in the Development Variation Registers published on Council's website. Recent examples of these in Manly are outlined in Table 1:

Table 1: Approved DAs with a non-compliant building height				
ADDRESS	DA NUMBER	LEP CONTROL	BUILDING HEIGHT APPROVED	ADDITIONAL HEIGHT
14 Bower Street, Manly	0079/2017	8.5m	9.35m	10%
82-84 Bower Street, Manly	0168/2017	8.5m	11.2m	31.8%
7-9 Marine Parade, Manly	0224/2017	8.5m	9.6m	12.9%
9 Addison Road, Manly	0270/2017	8.5m	8.9m	0.5%
61 Bower Street, Manly	0243/2017	8.5m	9.9m	16.5%
57 Addison Road, Manly	0540/2018	8.5m	10.8m	27%
32 Bower Street, Manly	0142/2016	8.5m	11m	29.4%

There are numerous examples of developments in the Northern Beaches LGA and in this immediate area which have been approved with non-compliances of the maximum Height of Building development standard. This also includes the previous DA approved for the subject site. While each DA is assessed on its own merits and each site has different characteristics, Council has accepted variations to the maximum building height standard in the past.

4.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

The proposal is consistent with the relevant zone objectives and satisfies four of the 'unreasonable and unnecessary' tests established by the Court in *Wehbe*. In *Initial Action*, Preston CJ states at [23] – [24] that the environmental planning grounds must be 'sufficient' in two respects, inter alia:

- a) *The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*
- b) *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.*

This report demonstrates the proposed new dwelling will be compatible with nearby and future development. The areas of contravention are unlikely to be visible from Bower Street or discernible as additional height from the reserve. Therefore, the height will not affect streetscape amenity or existing characteristics of the precinct in this sense. The location of the additional height is the result of the internal layout and design of the proposed dwelling; maintaining appropriate floor-to-ceiling heights; providing level floors; and the dwelling being stepped down the site due to the challenging topography.

Therefore, we consider the elements contributing to the proposal's additional height as being appropriate in this circumstance. The increased height will improve amenity for residents and maintain amenity for nearby development, through minimising overshadowing and loss of privacy by presenting a compliant building height on the western side to No. 34 Bower Street.

As detailed, strict compliance with the development standard would not result in a better outcome for development. It would unnecessarily complicate orderly and economic development of the land in accordance with the intentions of the zoning and the objectives of the Environmental Planning and Assessment Act 1979. This is particularly the case when the proposal is otherwise compliant with building height, FSR, lot size and landscaping. It is noted that the proposal is a contemporary and intricately designed response to the unique and sensitive location by a renowned architectural firm. As outlined in our SEE (separately submitted), the location has a number of constraints which have been met in this dwelling's thoughtful design.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning ground to justify the variation to the development standard, as required in Clause 4.6(3)(b).

5. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can and should be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this request, and having regard to the site and locality.

In our opinion the proposal satisfies both tests as outlined in *Initial Action* and *Al Maha*. It is consistent with both the objectives of the Development Standard, as demonstrated in this variation; and the E3 Environmental Management Zone, as set out in this submission. A detailed assessment of the proposal against the relevant zone objectives is undertaken below, inter alia:

Objective: *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

Response: The positioning of areas of additional height ensures the built form is of an appropriate scale that does not impact on the ecological, scientific or cultural values of the locality, and enhances the aesthetic value of the site.

Objective: *To provide for a limited range of development that does not have an adverse effect on those values.*

Response: The proposed new dwelling and landscaping works is a typical form of development in the locality and the additional height will maintain the area's ecological and aesthetic values.

Objective: *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Response: The proposed additional height will not impact on the appearance of nearby environments or dominate the natural scenic qualities of the foreshore. Significant trees will be retained where possible or replaced with new trees and plantings.

Objective: *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

Response: The additional height will not impact on the nearby foreshore and is a result of maintaining the topography of the site by minimising cut and fill.

Objective: *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutant in stormwater runoff on the ecological characteristics of the locality, including water quality.*

Response: Stormwater runoff will be managed in accordance with the Stormwater Management Plan, prepared by Campbell Architecture; is not impacted by the additional height; and will not affect the ecological characteristics of the locality.

Objective: *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

Response: Areas of additional height have been sited and designed to benefit the amenity of surrounding development and respond to the site's challenging topography.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify varying the development standard as the proposal is consistent with the development standard objectives, the zone objectives, and the intent of Clause 4.6. From this, we consider the proposal is in the public interest and should be supported.

6. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning and the Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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 Secretary before granting concurrence.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the non-compliance, the proposal will appear consistent in the streetscape with nearby development and provide minimal impacts on adjoining properties.

The additional height will enhance the amenity and functionality of the proposed dwelling without significantly impacting neighbouring properties. Careful consideration has been taken in the design of the proposed dwelling, which ensures appropriate setbacks and FSR provide an appropriate bulk and scale with nearby development, whilst maintaining solar access and privacy to adjoining properties.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the area and zone and is, in our opinion, in the public interest.

The proposal satisfies the objectives of the E3 Environmental Management Zone and Clause 4.3 of the LEP; is consistent with the intent of Clause 4.6; and should be supported.

7. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see Table 1 on the following page).

We are of the view that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the E3 Environmental Management Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Para (Initial Action)	Para (Initial Action)	Para (Initial Action)	Para (Initial Action)
10	Is it a development standard (s.1.4)	1	Yes	YES
11	What is the development standard	1	Height of Buildings	YES
12	What is the control	1 & 2	8.5m	YES
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Cl4.6(3). There are two aspects of that requirement. The consent authority does not have to directly form the opinion of satisfaction regarding the matters in Cl4.6(3)(a)&(b), but only that the applicant's written request has adequately addressed the matters required. The applicant bears the onus to demonstrate that the matters in Cl4.6(3) have been adequately addressed in order to enable the consent authority to form the requisite opinion of satisfaction.	4	The Cl4.6 variation has adequately addressed both matters in Cl4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Cl4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i>	4.1	The proposal is consistent with Tests 1, 3, and 4 of <i>Wehbe</i> : <ul style="list-style-type: none"> • The objectives of the standard are achieved notwithstanding the non-compliance with the standard; • The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable; and • 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. 	YES
23-24	Second Aspect is Cl4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be indirectly satisfied under Cl4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: c) The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the	4.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> • The proposed height facilitates a development consistent with the planning objectives of the environmental management zone; • The proposed new dwelling will be compatible with nearby and future development, and has been carefully designed to maintain neighbours' views, solar access and privacy; and • Strict compliance with the development standard would not result in a better outcome for development. 	YES

	<p>aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.</p> <p>d) The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.</p>			
26-27	<p>2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. This second opinion differs from the first opinion of satisfaction in that the consent authority must be directly satisfied about the matter in CI4.6(4)(a)(ii).</p>	5	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Webb</i> . The proposal is also consistent with the objectives of E3 Environmental Management Zone, as addressed in the SEE.	YES
28-29	<p>Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [CI4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under CI4.6.</p>	6	As the relevant matters for consideration under CI4.6 have been satisfied as outlined above, the Court can grant development consent	YES