

CLAUSE 4.6 VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS
OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

1. Introduction

This Clause 4.6 ‘*written variation to a development standard*’ has been prepared with regards to a development application seeking alterations and additions to an existing residential dwelling at 33 Beatty Street, Balgowlah Heights. The proposed development results in a variation to Clause 4.3 of the Manly Local Environmental Plan 2013, being the development standard pertaining to **height of buildings**. It is demonstrated within this submissions that the proposed development meets the requirements prescribed under Clause 4.6 of the Manly LEP 2013.

This submission is made under Clause 4.6 of the Manly Local Environmental Plan 2013 – *Exceptions to development standards*. Clause 4.6 states the following:

“4.6 Exceptions to development standards

(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 Planning Secretary has been obtained.*

(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.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

When this Plan was made, it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (caa) clause 5.5,*
- (ca) clause 6.15,*
- (cb) a development standard on land to which clause 6.19 applies."*

The use of Clause 4.6 to enable an exception to this development control is appropriate in this instance and the consent authority may be satisfied that all requirements of Clause 4.6 have been satisfied in terms of the merits of the proposed development and the content in this Clause 4.6 variation request report.

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

(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*

The Environmental Planning Instrument to which these variations relate to is the Manly Local Environmental Plan 2013.

The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which reads as follows:

(1) The objectives of this clause are as follows:

- (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 to 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.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Council's maps identify a maximum height of 8.5m to the subject site. Refer to Figure 1 on the following page.

The proposed maximum height is 9.57 metres, being a variation of 1.07m. It should be noted that the proposed alterations and additions do not exceed the highest RL of the existing dwelling (RL 40.43), with the additions stepped down with the built form to align with the existing first floor level (RL 36.03). The variation to building height is generally as a result of previous excavation works undertaken on the site, which have consequently lowered the ground level of the site.

A written justification is therefore required for the proposed variation to the maximum height of buildings development standard, in accordance with Clause 4.6 of the Manly Local Environmental Plan 2013.



Figure 1 Height of Buildings Map (Source: NSW Legislation, MLEP13 map 004)

2. Site Background

The subject site is commonly known as 33 Beatty Street, Balgowlah Heights, and is legally described as Lot 1 in Deposited Plan 565383. The subject site is located on the western side of Beatty Street and is bound by residential properties to the north, west and south.

The site provides for a frontage of 11.580m to Beatty Street. The total site area is 959m². Refer to Figure 2 below.



Figure 2 Site Location Map (Source: Mecone Mosaic)

Located on the subject site is a two-storey split-levelled dwelling house with swimming pool and garage. The site is heavily affected by a slope of approximately 16 metres, which falls from west to east.

Development in the area reflects the R2 Low Density Residential zoning, being comprised almost entirely of detached dwelling houses. The adjoining properties around the subject site are such, with the properties on the western side of Beatty Street similarly being constructed well above street level, reflective of the slope of the area.

Immediately adjoining the subject site to the north at No. 33A Beatty Street is a 2-storey brick dwelling with tiled roof. Currently adjoining the site to the south at No. 31 Beatty Street is a 2-storey brick dwelling with tiled roof. It should be noted that a first floor addition to the existing dwelling with a secondary dwelling at the rear of No. 31 Beatty Street are currently under construction as per DA2020/0803.

3. Extent of Non-Compliance

As noted above, Clause 4.3 of the Manly LEP 2013 states that the maximum height of the building must not exceed 8.5m.

The proposal seeks to extend the roof over the ground floor level terrace. Although the proposed alterations and additions sought do not exceed the existing overall heights of the dwelling, the proposed works are situated above previously excavated areas that resulted in unused subfloor voids beneath the dwelling. Subsequently, a portion of the proposed works sought are situated above the maximum 8.5m LEP building height standard, with the maximum variation sought equating to 9.57m above the existing ground level (Figure 3).

Therefore, the proposed alterations and additions before Council seek to vary the maximum MLEP13 building height standard by 1.07m (12.58)%.

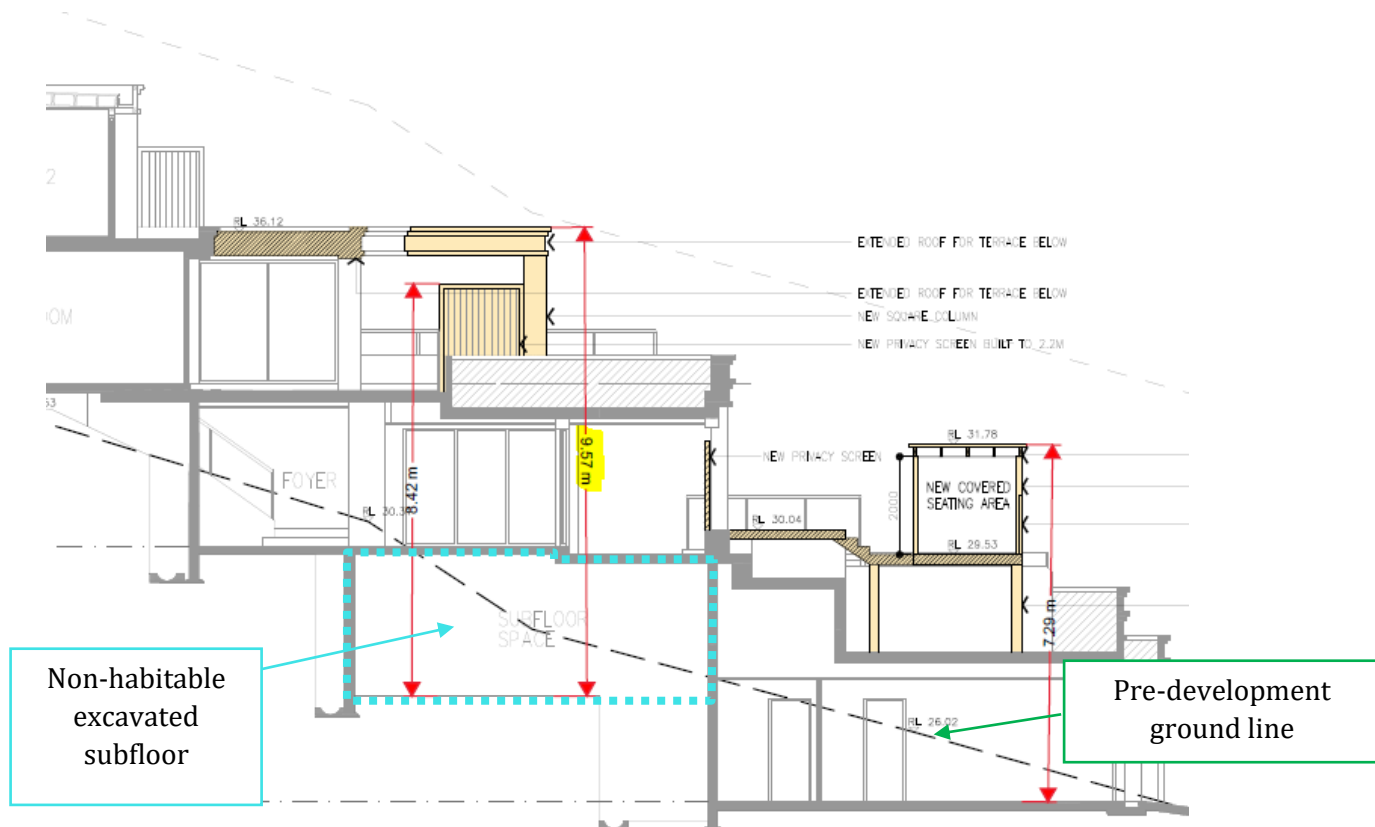


Figure 3 Excerpt of Section A-A showing the extent of variation (Source: Simon Chan + Associates)

Although a variation is sought, the proposal will not result in any adverse impacts to the adjoining lots, and will integrate with the bulk, scale and architectural detail of the existing dwelling, thus maintaining the desired future character of the area.

4. Is Compliance With the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The proposed variation from the development standard is assessed against the required tests in Clause 4.6. In addition, in addressing the requirements of Clause 4.6(3), the accepted five possible approaches for determining whether compliances are unnecessary or unreasonable, established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council (2007) LEC 827*, are considered.

In the matter of Four2Five, 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 as set out below:

First	<i>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.</i> <i>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. (applicable)</i>
Second	<i>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)</i>
Third	<i>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)</i>
Fourth	<i>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)</i>
Fifth	<i>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)</i>

In respect of the height of buildings standard, **the first method is invoked.**

The objectives supporting the maximum height of buildings control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

The discussion provided below demonstrates how the proposal is consistent with the objectives of Clause 4.3.

“(1) The objectives of this clause are as follows:

- (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 to 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.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”

With respect to **objective (a)**, the proposed alterations and additions have had regard to the site context and topography. The proposed roof extensions do not alter the existing levels of the site and will be situated below the existing highest levels of the dwelling to integrate into the existing building form. The variation to building height is generally as a result of previous excavation works undertaken on the site, which have lowered the ground level of the site and resulted in subfloor voids and drainage infrastructure, thus exacerbating the variation to the 8.5m building height standard. The maximum building height of 9.57m sought is measured from the top of the extended non-trafficable roof to the level of the subfloor space (Figure 3).

As the maximum building height is to an underfloor void, the proposed variation to building height will not be visually discernible from the streetscape, given that the proposed works are below the existing height of the dwelling and the subfloor space is not visible from Beatty Street, nor the side elevations. The street elevation (Figure 4; east elevation) plan demonstrates this point.

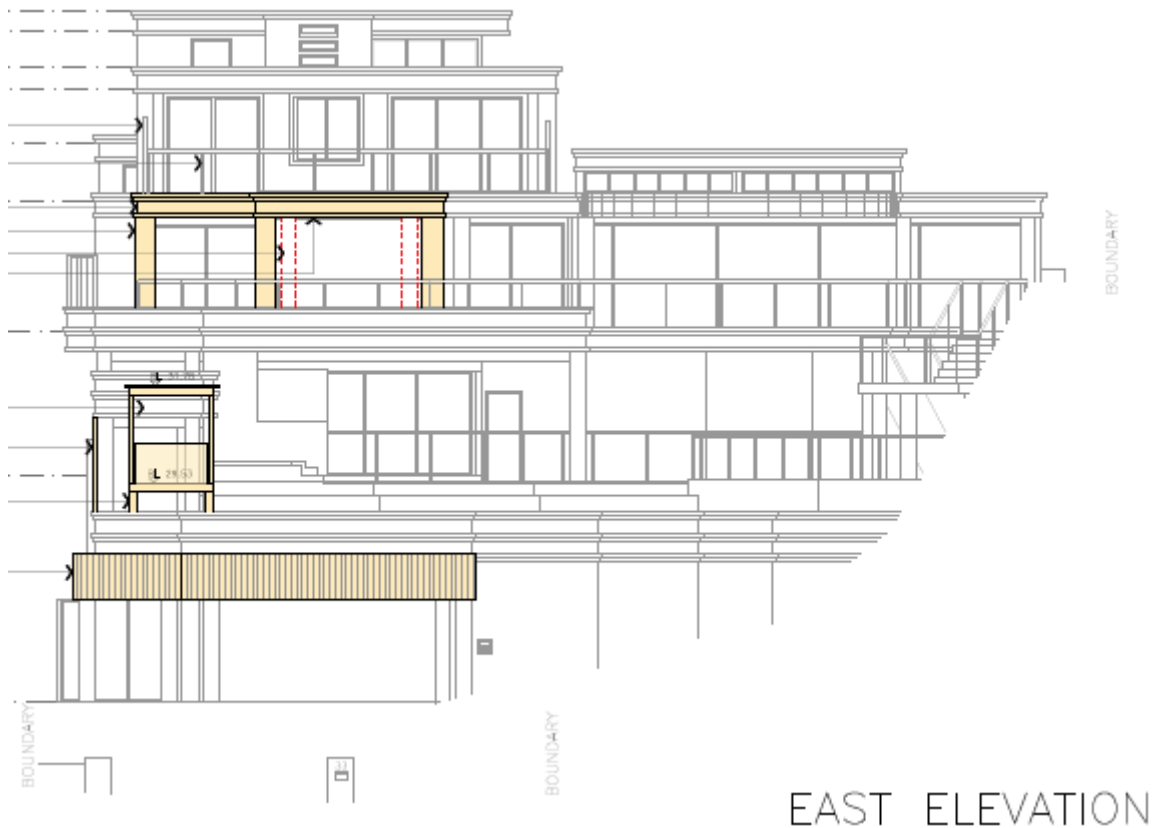


Figure 4: Extract of East Elevation Plan (Source: Simon Chan + Associates).

In regard to **objective (b)**, the proposed alterations and additions sought do not significantly alter the existing bulk and scale of the buildings. The proposed works do not alter the existing number of storeys or gross floor area of the dwelling. As previously outlined, although a variation to building height is sought, the proposed works are situated below the existing highest points (levels) of the dwelling, and nonetheless integrate into the overall architectural bulk and scale of the dwelling (Figure 4). Moreover, the variation to building height is generally as a result of previous excavation works undertaken on the site, which have lowered the 'existing' ground level of the site. Notably, the proposed alterations and additions would have complied with the maximum 8.5m building height standard prior to the excavation of the previous natural ground level of the site. The additional perceived bulk that will be generated by the proposed variation to building height can be attributed to subfloor space and will therefore incur no visual non-compliance to the bulk and scale, with no discernible impact to adjoining properties, nor the streetscape.

In response to **objective (c)**, the proposed alterations and additions sought on the site will have minimal to no impact to existing views of North Harbour. The proposed roof extensions align with the existing levels of the roof and sit below the existing height of the dwelling, thus will have no impact to views from rear adjoining properties.

In terms of No. 31 Beatty Street, the proposed roof extension will not obstruct any views from the primary or secondary dwelling, noting the living areas and bedrooms have been orientated to face east towards North Harbour. Height poles were installed on the site and certified by Cibar Land Surveyors. As evident in the Height Pole Positions plan prepared by Cibar Land Surveyors, the proposed roof extensions sought will be situated between RL36.11 and RL36.24 which is below the level of the secondary dwelling balcony (RL37.20) approved on the adjoining property at No.31 Beatty Street under DA2020/0803.

The proposal will not alter the existing view lines to the foreshore. As the proposal seeks to maintain the existing roof heights, there will be no view loss impact to the adjoining properties as a result of the proposal.

In regard to **objective (d)**, reference should be made to the shadow diagrams prepared by Simon Chan and Associates. The additional overshadowing generated by the proposed alterations and additions is inconsequential and will not impact solar access to the adjoining property at No. 31 Beatty Street (illustrated in light grey in Figures 5-7 below). The adjoining north facing terrace (currently under construction) will continue to receive direct solar access between 9am – 12pm during the winter solstice. No public open space areas will be impacted by overshadowing generated by the proposed alterations and additions.

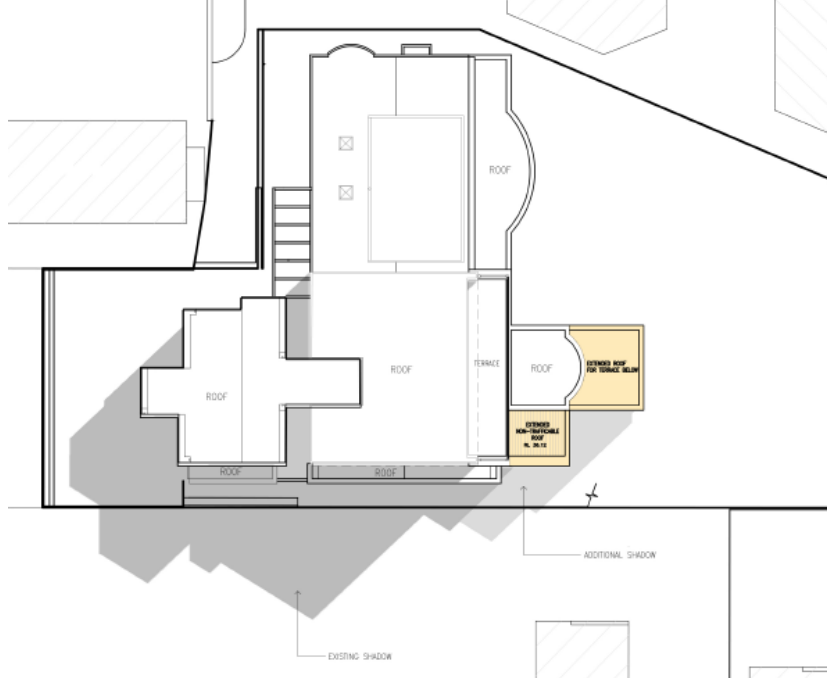


Figure 5: Extract of 9am shadow diagram (Source: Simon Chan + Associates).

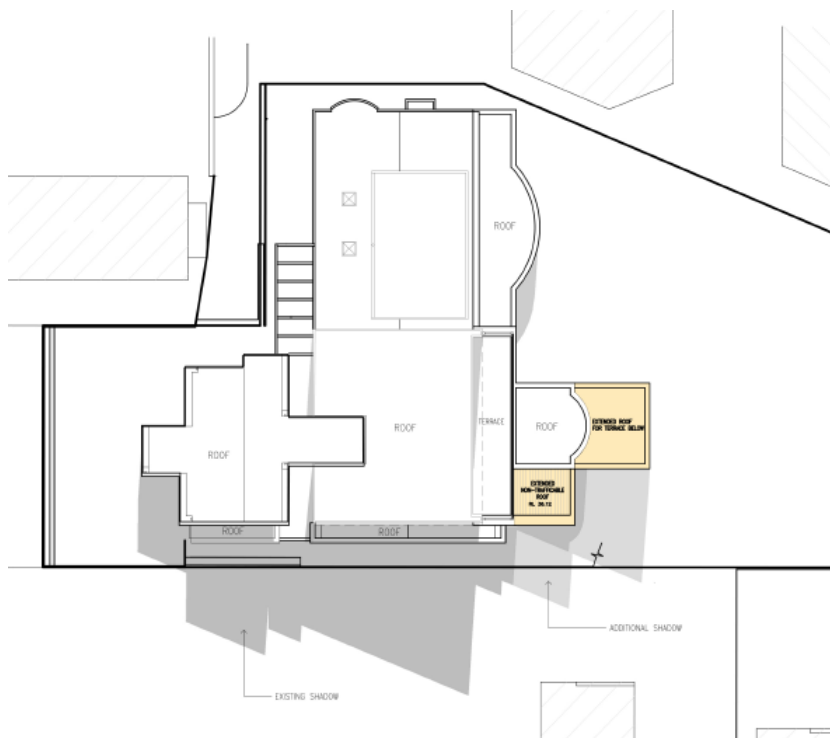


Figure 6: Extract of 12pm shadow diagram (Source: Simon Chan + Associates).

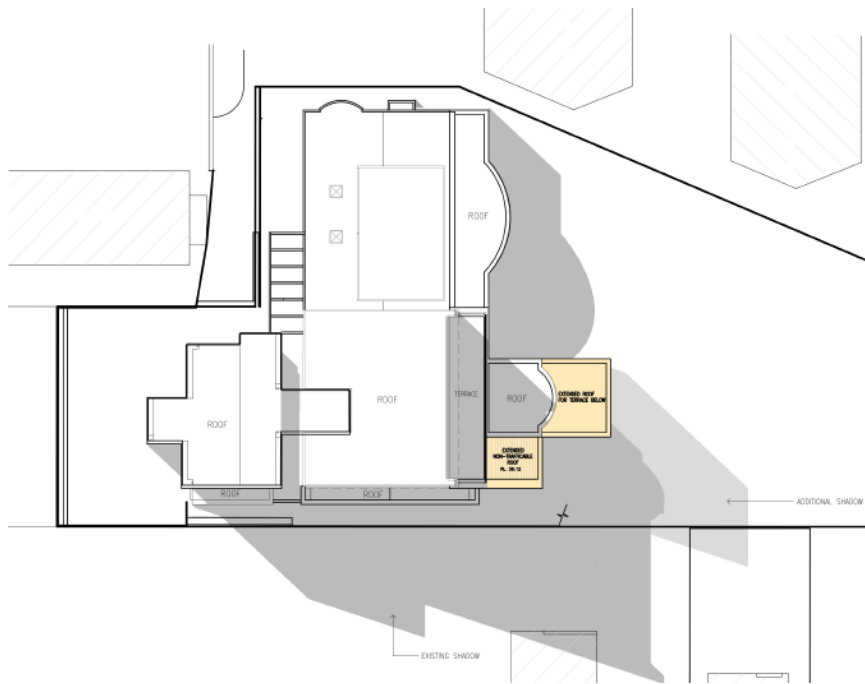


Figure 7: Extract of 3pm shadow diagram (Source: Simon Chan + Associates).

Objective **(e)** does not apply to the proposed development as the subject site is not within a recreational or environmental protection zone.

Therefore, the proposed development is considered to satisfy objectives (a) – (e) of the MLEP13 height of buildings standard.

It is considered that this submission demonstrates the proposal is consistent with the objectives of the standard to justify contravening the development standard. As demonstrated, compliance with the standard is unreasonable as the objectives of the standard have been achieved.

5. Are there Sufficient Environmental Planning Grounds?

The assessment above demonstrates that the resultant environmental impacts of the proposal will be satisfactory, as the objectives of the standard are achieved.

It is worthy to note that the proposed alterations and additions sought do not exceed the existing overall heights of the dwelling (Figure 3 and 4). The variation to building height is generally a result of previous excavation works undertaken on the site, which have lowered the ground level of the site, exacerbating the variation to the 8.5m building height standard. It should be noted that the proposed alterations and additions would have complied with the maximum 8.5m building height standard prior to the excavation of the previous natural ground level of the site.

Moreover, the majority of the proposed alterations and additions sought comply with the maximum 8.5m building height. The extent of variation sought is limited to the roof extension on the lower ground floor level which aligns with the existing levels of the roof. The variation sought is limited to outdoor spaces, with no habitable rooms located above the 8.5m building height standard.

As this variation has no impact on view corridors or results in any detrimental overshadowing, it is considered a variation with no negative impact to adjoining properties or the streetscape is an acceptable outcome for the site.

Thus, the key **environmental planning grounds** resulting in the non-compliance to the building height standard are:

- The development that originally accommodated the dwelling required excavation, which modified the 'existing' ground levels and placed subfloor void space within the dwelling footprint. The technical numerical variation to building height is inconsequential and not visibly perceived from the elevations of the dwelling, adjoining dwellings, nor the public streetscape.
- The site has a significant slope, of approximately 16m from east to west, resulting in a split-level dwelling of several levels requiring terraces to provide suitable outdoor amenity.
- The extent of the non-compliance to building height is a result of roof extensions, which are minor structures to improve the amenity of residents through the provision of shading and weather protection to outdoor private recreation areas.
- No habitable rooms breach the maximum height standard.
- The proposed alterations and additions are modest, and will integrate into the desired future character of the area as they have been design to integrate into the existing architectural form and presentation of the existing dwelling (Figure 4) with no resulting environmental impact.

In this case, strict compliance with the development standard for height of buildings in the Manly LEP 2013 is unnecessary and unreasonable given the proposed works are minor in nature and do not exceed the existing overall heights of the dwelling.

6. Is the Variation in the Public Interest?

Clause 4.6 states that the development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the relevant standard, and the objectives for development within the zone in which the development is to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 5. Further, the development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3.

The alterations and additions are well-designed and are sympathetic to the adjoining properties in terms of bulk, scale, privacy mitigation and retaining view lines. The development complements, and will continue to contribute to, the general character and amenity of the locality.

The proposed roof extension, which aligns with the levels of the existing roof, will provide shading and weather protection to the existing terrace, improving the amenity and useability of the private open space within the site for current and future residents.

Furthermore, it is important to also consider the objectives of the R2 Low Density Residential zone in relation to the development, which are as follows:

Zone R2 Low Density Residential

Objectives of zone

- *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.*

In response to the above the following is provided:

- The proposed alterations and additions to the existing dwelling house on the site will maintain the current land use and will continue to provide for the housing needs of the community into the future.
- There are no other land uses proposed.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

7. Public Benefit of Maintaining the Standard

It is considered that there is no benefit to the public or the community in maintaining the development standard. The proposed variation sought is in relation to a modest roof extension which aligns with the height of the existing roof above the rumpus room level terrace. The existing levels and number of storeys of the dwelling will not be altered by the proposed development. The proposed works will be situated below the existing highest points of the dwelling and will not be discernible from the streetscape (Figure 4).

The development is generally consistent with the current planning controls, as:

- The proposal would not create any adverse privacy, overshadowing and perceived bulk and scale impacts upon adjoining properties;
- The variation sought does not raise any matter of significance for State or regional environmental planning;
- The proposed development achieves the outcomes and objectives of the relevant planning controls.

9. Is the Variation Well Founded?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the Manly Local Environmental Plan 2013 in that:

- ☐ Compliance with the development standard would be unreasonable and unrealistic in the circumstances of the proposal;
- ☐ There are sufficient environmental planning grounds to justify the departure from the standard;
- ☐ The variation is existing, and the works are proposed would not exaggerate this breach;
- ☐ The breach does not raise any matter of State of Regional Significance; and
- ☐ The proposal submitted generally aligns with other provisions of Council's Local Environmental Plan, as well as Council's Development Control Plan.

Based on the above, the variation is considered to be well founded.

10. General

Clause 4.6 also states that:

“(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant’s written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (caa) clause 5.5,*
- (ca) clause 6.15,*
- (cb) a development standard on land to which clause 6.19 applies.”*

This variation does not relate to the subdivision of land in the stated land use zones. The variation sought is not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development.

The proposed works sought do not require a BASIX certificate to be prepared.

Clause 5.4, Clause 5.5, Clause 6.15 and Clause 6.19 do not apply to the proposed development.

11. Conclusion

The proposal does not strictly comply with the maximum height of building controls as prescribed by Clause 4.3 of the Manly Local Environmental Plan 2013. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the Manly Local Environmental Plan 2013 are satisfied as the breach to the controls does not create any adverse environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and that the use of Clause 4.6 of the Manly Local Environmental Plan 2013 to vary this development control is appropriate.

Based on the above, it is sensible to conclude that strict compliance with the height of building control is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.



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