**CLAUSE 4.6 VARIATION – HEIGHT OF BUILDING**
**ALTERATIONS AND ADDITIONS TO EXISTING BUILDING**
**1/84 LAUDERDALE AVENUE FAIRLIGHT**
**MARCH 2024**

## 1.0 Introduction

This statement constitutes a request for variation to a development standard, made under Clause 4.6 of Manly Local Environmental Plan 2013 for Northern Beaches Council.

The objectives of Clause 4.6 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.

For this to occur, the Development Application is to be supported by a written application that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case. This application should be read in conjunction with the accompanying Development Application drawings prepared by MHDP Architects and Statement of Environmental Effects.

## 2.0 Zoning of the land

The site is zoned R1 General Residential.

## 3.0 Objectives of the zone

The objectives of the zone are as follows:

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

## 4.0 Standard to be varied

The standard to be varied is Part 4, Clause 4.3 of LEP 2013, which sets the maximum building height for a building as shown on the Building Height Map.

The maximum building height for Lauderdale Avenue is 8.5 metres.
This standard assumes building works added to existing buildings must also comply with the standard.

## 5.0 OBJECTIVES PERTAINING TO STANDARD TO BE VARIED

The objectives that relate to the Building Height standard is found in LEP 2013, Clause 4.3.

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 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 conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Critical to analysis of the building height is the definition of what is existing building height.

***building height (or height of building) means—***

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

***ground level (existing)*** means the existing level of a site at any point.

***ground level (finished)*** means, for any point on a site, the ground surface after completion of any earthworks (excluding any excavation for a basement, footings or the like) for which consent has been granted or that is exempt development.

As this is an Alteration and addition, then the existing building height would take into consideration the underground garage – even though it is excavated underground and invisible. For this Clause 4.6 we intend showing the difference between the existing ground level and the pre-development ground level (ie the ground level prior to excavation or fill occurring on the site).

## 6.0 EXTENT OF NON-CONFORMITY TO THE STANDARD

The extent of the non-conformity is described graphically on Section A-A (A221). You will see from these diagrams that the only reason the proposed works are non-complying with the height plane is due to the area of existing excavation that is occupied by the underground garage. Outside of these areas, the works fully comply to the height plane. This basement is quite buried and the visible ground line flows around this down either side of the house at a much higher level. So, the *perceptible* height of the new addition can be regarded as complying with the *perceived* (or pre-development) height plane.

Section A-A shows two height plans – the "existing" height plan inclusive of the garage basement and the Pre-development ground line.

Projected up 8.5m – for the pre-development height plane the majority is below 8.5m in height. The only location where the building is above the pre-development building height plane is the a 200mm capping at the leading edge. This is shown on the section.

It should be noted that for the existing building height, the whole building does not comply and this would have been the case at the time of construction.

Numerically, the extent of the non-compliance can be described as follows:
**"Existing" building height variation** – 1605mm (across whole floor) = 18% variation
**"Pre-development" building height variation** – 200mm (very small extent) = 2.3% variation

## 7.0 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposal does not comply with the building height control (from existing excavated levels); however, this non-compliance is justifiable and strict compliance can be regarded as unreasonable or unnecessary for the following reasons:

The current proposal is only for a small area of enclosure of an existing unroofed balcony. This new roof is central to the site and will not affect any views or overshadowing.

Existing site conditions
The main reason for why strict compliance can be regarded as unreasonable or unnecessary is that the proposal is within the (pre-development) height limit except for a very small portion of the edge of the new roof.

If you use the existing height plane, the situation is different but the impact the same. In that case the entire top floor is non-compliant…so therefore what difference does a small extension of an existing non-compliance make?

It is unreasonable to apply the regulation to the extent of including the basement garage as the point of height generation of the 8.5m, considering the fact that the surrounding ground levels are all significantly higher. We therefore submit that it should be judged against the pre-development levels.

Centralised non-compliance
Not only does the side boundary height compliance bear out that the works would not really be non-compliant if not for the excavated garage, but it should also be recognised that the portion of works that is non-compliant is very much centralised on the block. That means that any potential impact from the height non-compliances minimised, including:

- Perceived bulk and scale from adjoining side residences is minimised because the building sits back behind the roof form
- Shadow impact from the area of non-compliance falls on the subject site property and does not cause shadow impact on neighbours.

Views
There are no view impacts as demonstrated by the view analysis diagrams previously provided resulting from the height non-compliances.

## 8.0 THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6 requires the departure from the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. As demonstrated below, there are no negative impacts resulting from the proposed works: Overshadowing, Privacy and View Loss have all been assessed and found to be no issue.

Bulk and Scale
The height control primarily is used to protect against undesirable impacts resulting from an inappropriate bulk and scale. While the perception from the street is of a three storey residence (due to the visibility of the garage entry) it is easily recognised that the garage is subterranean. The building above-ground presents as a two story dwelling. As such, the bulk and scape of the new roof – as an extension of the existing – is minimal and in keeping..

As such the proposed non-compliant works do not represent an obtrusive extension of the existing bulk and scale.

Overshadowing
As noted also above, due to the centralised nature of the additional roof, the possible shadow impact that may occur from the non-complying portion falls only on the subject site and does not add to overshadowing to any neighbours.

View Loss
There is no view loss resulting from the proposal.

Privacy Impacts
The proposed works are for amenity purposes only – to make use of an existing balcony that didn't have any rain cover. As a result of the centralised aspect and the fact that it has you look out over the Common Space area, there is no opportunity to look down from here to neighbours. As a result, it is possible to confirm that there are no privacy impacts resulting from the non-compliance.

Planning Principle – Calculation of "Existing ground line":
There is a developing question within LEC hearings to challenge the definition of "Existing ground line" and return to a more logical extrapolation method for determining the height limit. In Bettar v Council of the City of Sydney [2014] NSWLEC 1070 ('Bettar'), which related to a site where an existing basement was used by the Council as the existing ground level even though it was surrounded by other properties situation at previous natural ground level, the Court agreed with the extrapolation method.

For that case, the Commissioner held that for Council's definition of using the existing basement *"this would result 'in an absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be demolished and has no relationship to the context of the site.'*

The Commissioner preferred the approach of the Applicant on this issue which was for the existing ground level of the site to be determined by extrapolating the ground levels found on the footpath (i.e. – outside the site) across the entire site to measure the vertical distance to the highest point of the building. The Commissioner's reasoning for this, given at paragraph [41], was that the *'level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site, and remains relevant once the existing building is demolished.'*

Other cases after the Bettar case have dealt with similar issues within a site but again it was agreed that an extrapolation method is deemed reasonable considering the existing basement cannot be discerned from the external ground levels.

The recent decision in Nicola v Waverley Council [2020] NSWLEC 1599 is an example of where the Bettar extrapolation method can applied to levels contained within the site the subject of the development application. In Nicola, an existing slab made the determination of the "ground level (existing)" (which was arguably hidden underneath the slab) a difficult task. Despite the Council arguing that the use of the extrapolation method was not appropriate as the site had not been completely built out (as in Bettar and Stamford), the Commissioner held at paragraph [37] that the extrapolation method should be applied and that in this case, that approach is: *"not inconsistent with the principle applied in Bettar and Stamford Properties, which by necessity had to rely on the footpath levels outside the property boundaries because the buildings, in those cases, occupied the whole of their respective sites. In the subject development proposal the known ground levels identified are also outside the building and also closest to its exterior walls. The fact they are located within the site's property boundaries, as opposed to outside the boundaries and on the footpath, does not derogate from the key selection criteria of closest immediate proximity."*

If you take these two examples as relevant for this site, the only reason for the non-compliance is the basement room, as noted above. Using the extrapolation method, the extent of non-compliance is minimal.

## 9.0 COMPLIANCE WITH THE OBJECTIVES PERTAINING TO STANDARD TO BE VARIED

The objectives of the standard to be varied 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,*

As noted above, the proposal is restricted to a very small extension of the existing envelope, with the new roof over the balcony. This results in a minor height non-compliance if we take the **pre-development** excavation into picture as shown on the section.
**The objective is maintained.**

b) *to control the bulk and scale of buildings,*

The proposed dwelling is similar in scale to neighbouring properties – albeit that each property id different.

The proposed building's height and scale are consistent with the desired character of the Lauderdale Avenue. The proposed building merges with the surroundings and is integrated with the landform and landscape.
**The objective is maintained.**

*(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 proposed dwelling will not adversely impact the views of the neighbouring properties as the existing setbacks have been maintained and the first-floor addition has been situated so that it is predominantly behind the existing building (in terms of views). The views from the living levels of the adjoining neighbours to the east and west have been preserved by maintaining the existing envelope of the building. There are currently limited views of the harbour from the street. The proposed design aims to maintain the street views along with preserving the privacy of the proposed dwelling.
**The objective is maintained.**

*(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 proposed dwelling has been designed to minimise its impact on the solar access of neighbouring properties by retaining the setbacks of the existing dwelling.
**The objective is maintained.**

*(e) to ensure the height and bulk of any proposed building or structure in a recreation or conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

This is not relevant top this site.

## 10.0 Conclusion

It is submitted that a variation to the maximum height control within Northern Beaches Council LEP is appropriate for this project as the non-conformity does not add any specific impact to adjoining or nearby properties whilst complying with all objectives of the standard and providing suitable amenity for the occupants.

As demonstrated above, strict compliance with this standard is inappropriate (unreasonable and unnecessary) to be applied to the small area of non-compliance for this Development Application.

Approval should not therefore be withheld due to the non-compliance of the development standard.