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To Northern Beaches Council
DEE WHY NSW

Clause 4.6 Application to Manly LEP Height Control – Property 36 Beatrice Street Balgowlah Heights for small breach of the MLEP basic 8.5 metre height control but below the existing ridge height due to an excavated area behind the existing garage. Lot 1 in DP 1087622 with site area of 1449m² existing; and in the approved subdivision (incomplete) of 780m². Development application for part demolition, additions with new lower roof form, basement, and internal rearrangements – DA2022/2269.

1.0. Introduction and Summary

1.1. This Clause 4.6 application relates to the above development application DA No.2022/2269, and is submitted following council response to ground levels existing and recent L&E Court judgements relating to the measuring of ground levels (existing) below existing buildings. The apparent issue is an excavated foundation void area behind the existing garage. The architect drew the height plane shown on the DA drawings on the basis of generally accepted surveyed existing RLs directly around the perimeter walls existing (*i.e., Better v Sydney City judgement*).

We were OK with that relying on the fact that the external building bulk is not impacted by any excavations below ground levels within the footprint of the existing building, that there are various L&E Court Judgements relating to the measuring of heights and continuing confusion in some quarters. The effect of measuring ground levels (existing) below the existing building results in a small area of the new roof breaching the height control – which remains below the existing roof height and results in no loss of views or amenity impacts. We acknowledge there are various L&E Court Judgements relating to the measuring of heights.

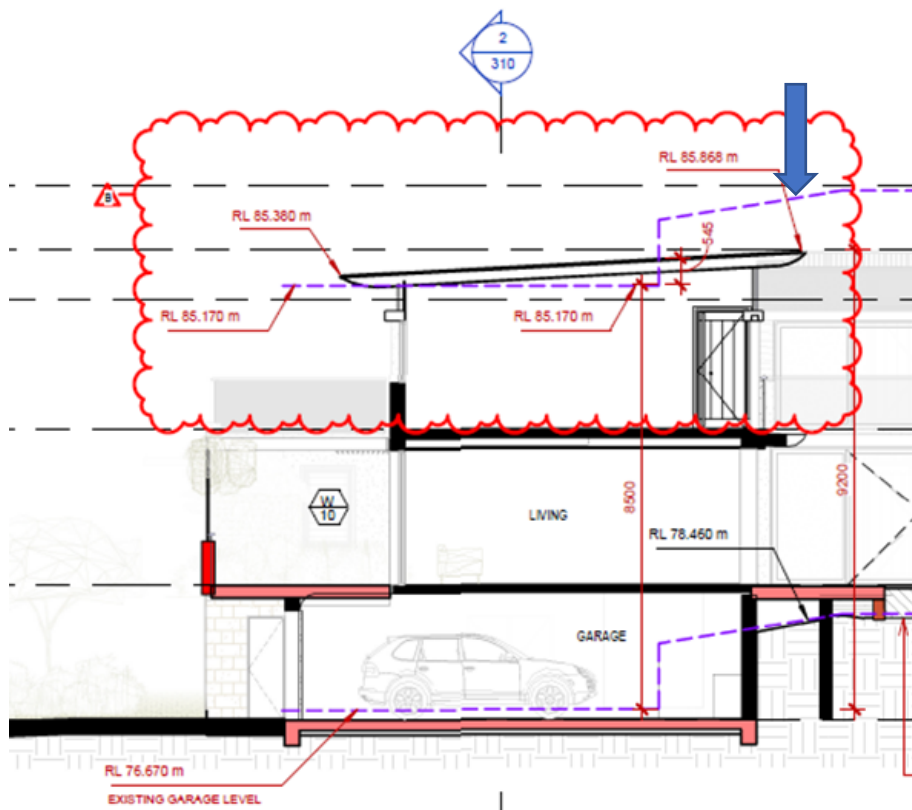
1.2. The void area behind the existing garage has been inspected and photographed as shown in – Fig. 4.6-01.



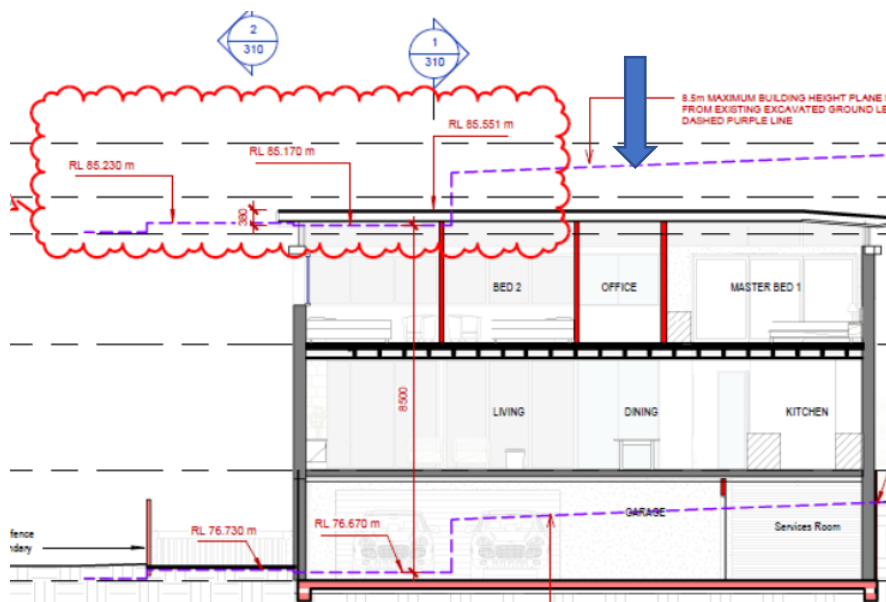
Above – Fig. 4.6-01 Existing void area behind the existing garage showing the ground level existing being 320mm higher than the existing garage floor.

1.3. Revised height plane. The amended drawings reflect the ground levels existing below and behind the existing garage and redraw the 8.5 metre height plane to reflect the council method of measuring heights from excavated levels below an existing building. Taking the vertical height plane from these levels slightly changes the 8.5 metre height plan over area. Amended drawings and section have been prepare and issued. This is the basis of this

clause 4.6 application to vary the MLEP 8.5 metre height plane to allow a small breach of a portion of the new roof. The variation is from 360mm to 545mm and equates to 6.411%. Refer to Figs. 4.6-02 and 03 below being extracts from the amended drawings and indicating the small areas of the roof that breach the 8.5 m height plane. The purple dotted line below shows the new height plane and the minor breach (Blue arrow).



Above – Fig. 4.6-02

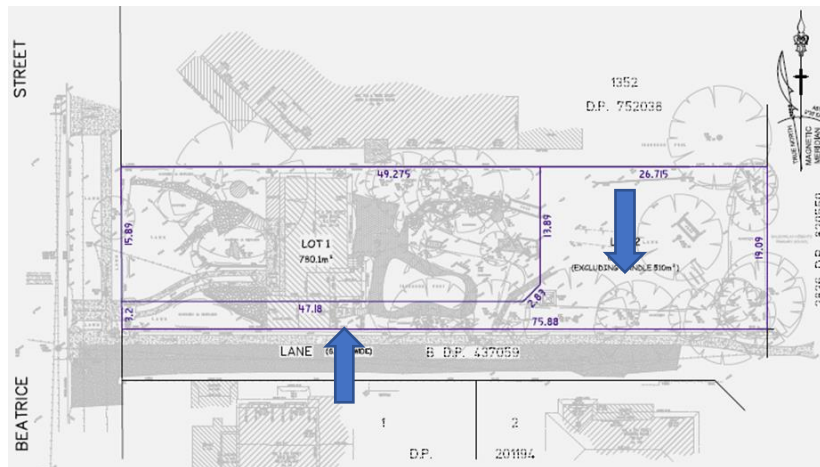


Above – Fig. 4.6.03

1.4. The proposal. The proposal serves two purposes:

1. To comply with the provisions of the L&E Court subdivision consent DA 0103/2015 (now activated) to demolish the existing pool and part of the dwelling to allow the construction of the battle-axe access handle to the rear allotment as per that consent. The 2 lots will have areas of 780m² (front) and 669.3m² (rear) – refer to approved subdivision plan below Fig. 4.6-04.

2. To undertake alterations and additions to the remainder of the dwelling to provide a modern upgrade with improved architecture and modern comfortable living facilities, new lower roof height, new pool, landscaping, and fencing.

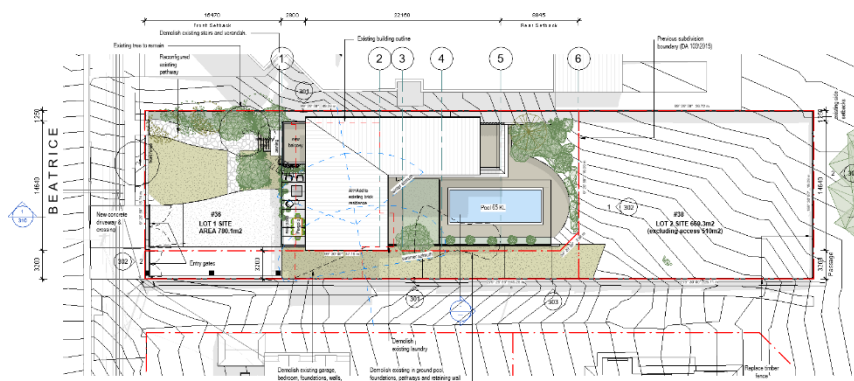


Above – Fig. 4.6-0-4 – Approved battle-axe subdivision plan – Consent DA 0103/2015.

The proposed alterations and additions relate to the front lot following demolition of those parts of existing improvements (pool and part dwelling) indicated with blue arrows required to facilitate the subdivision consent, and alterations and additions to the remainder of the dwelling. The proposal is outlined in more detail in our Statement of Environmental Effects dated 9 December 2022.



Above – Fig 4.6-05- Architect's perspective of proposed front elevation and streetscape relationship to neighbouring properties with proposed driveway access to rear allotment on immediate right (second gate), and the council laneway further to the right



Above – Fig. 4.6-06- Proposed development for alterations and additions and new pool shown within the approved new front lot and the new rear lot in accordance with Development consent DA 0103/2015. The consent requires demolition of the existing pool and part of the dwelling.

The proposed development has been assessed in our Statement of Environmental Effects dated 9 December 2022 including photos and details demonstrating existing streetscape, structures, and adjoining dwellings. In our Statement of Environmental Effects, we conclude that the proposal complies with applicable statutory planning objectives and numerical height controls – except now for a minor height breach as outlined in this application. There are no negative amenity or environmental impacts resulting and the principles of view sharing are achieved.

1.5. The subject site is - Zoned 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.
- To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

The proposal complies with the zone objectives .

1.6. View Sharing - A site inspection, review of neighbouring properties and examination of photos has been undertaken. We conclude that the reduction in roof height below the existing results in there being no apparent impact on existing views.

1.7. Summary

The proposal is permissible and achieves the MLEP R2 Zone objectives and complies with the applicable planning controls and objectives of statutory legislation including the Manly Local Environmental Plan 2013 other than minor breach of the height control varying from 360mm to 545mm over a short length, and achieves the desired future character of the neighbourhood. The Manly Development Control Plan controls and objectives including wall heights and setbacks are compliant or deemed such by way of past consents and our assessment in our Statement of Environmental Effects dated 9 December 2022. The revised height plane does not vary the assessment.

2.0. Breach of numerical height control

1. Height Control. The Manly Local Environmental Plan 2013 (MLEP) provides for an 8.5 metre height control above ground levels (existing) for this site. This application seeks to vary the clause 4.3 numerical control as provided for in clause 4.6 for a small non-compliance where the proposed height exceeds the control varying from 360mm to 545mm over a short distance. The maximum variation being 6.411% above the 8.5 metre control. Refer to Figs. 4.6-02 and 03 above.

2. The proposed roof is lower than the existing roof height and the breach is relatively small over a small area, with the remainder of the development being below the height control. It is noted that the northern end of the dwelling is significantly below the control.

3. The breach results from council measuring the height which council now measures from any internal excavated area whereas in past DAs the measurement was from ground levels existing around the perimeter of external walls. The breach should be accepted without hesitation.

4. The proposed development has been assessed in our Statement of Environmental Effects of 9 December 2022 with the conclusion that the proposal complies with applicable statutory planning objectives and numerical height controls – except for what we consider a minor breach as outlined in this application due to a change in the method of measuring existing heights. There are no negative amenity or environmental impacts.

3.0. Concurrence of the Director-General

NSW Department of Planning Circulars, advise the concurrence of the Director-General may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. Given the consistency of the variation to the objectives of the zone, we consider the concurrence of the Director-General may be assumed in accordance with authority delegated to Council.

4.0. Exceptions to LEP development standards – NSW Land and Environment Court Judgements.

In preparing this application we had regard to relevant L&E Court judgements including *Winton Property Group Limited v North Sydney Council* [2001] NSWLEC 46; and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; and judgement *Randwick City Council v Micaul Holdings Pty Ltd* [2016]; and *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118; and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('Al Maha'); and L&E Court judgement in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61; and the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

We are not lawyers, and our understanding of these judgments is that they related to confusion and tension as to the matters that must be addressed and satisfied in a clause 4.6 application and the extent of satisfaction in the eyes of a consent authority. We understand that the legal principles were settled in the 2019 Court of Appeal judgement (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.). We note the advice stated in an article published by Lindsay Taylor Lawyers on 5 August 2019 which appears to summarise the legal situation. We quote in part as follows (our Italics):

"On appeal, the applicant argued that Moore J had misconstrued and misapplied cl 4.6 by finding that to 'adequately address' the matters required to be demonstrated in cl 4.6(3), the request had to actually demonstrate those matters, rather than merely seek to demonstrate those matters.

The Court rejected this argument. After setting out Preston CJ's conclusions in Baron Corp, the Court reaffirmed (at [51]):

... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

"In our view, the decisions in Baron Corp and RebelMH make clear that the position set out in Al Maha is now the settled law on cl. 4.6 requests. A request under cl. 4.6 will only adequately address cl. 4.6(3) if the consent authority is satisfied that the matters have in fact been demonstrated. This is, in our view, a different test and a higher standard than was required under the test in Initial Action."

5.0. Applicable RLs and Height Measurement on Developed Sites and Non-Compliance.

5.1. The determination of ground levels (existing) and measuring heights on a developed site is the subject of various appeals to the L&E Court and subsequent judgements. Our understanding being -

- *Better v Sydney City Council* judgement - Surveyed existing RLs directly around the perimeter walls existing.
- *Cadele Investments v Randwick City Council*. In August 2021, the Court decided not to apply Better in a particular case (*Cadele Investments Pty Ltd v Randwick City Council* [2021] NSWLEC 1484 at [90]-[91]). A new standard but may have been a one-off. However, the latter decision in *Merman* more squarely deals with the issue.
- *Merman Investments v Woollahra Municipal Council* – where rather than the previous established approach (*Better v Council of City of Sydney*), the measurement for a property with excavation below structures is taken from those excavated RLs. We are informed that there continues to be confusion and legal debate surrounding the determination of Ground Level (Existing) for a non-greenfield site and existing structures where there exists excavation below the building perimeter and on sloping sites. We understand from our reading that the judgement in *Double Bay* did not really assist when the Court held the GLE was the height down to the existing basement excavation, but then concurred this was a strict literal interpretation that could and would be resolved by a clause 4.6 application which was immediately submitted and accepted by the Court (as we understand the judgement).
- Northern Beaches Council is relying on the *Merman Investments v Woollahra council* judgement and a strictly limited interpretation. The revised drawings reflect that scenario.

5.2. MLEP 2013 Clause 4.3 Maximum Height - Non-Compliance

1. The LEP Clause 4.3 – Maximum Height is 8.5 metres above ground levels existing.
2. The height plane has been measured in accordance with the definition of ground level existing as required by Manly Council relying on the Judgement *Merman Investments v Woollahra Municipal Council*. It is determined by surveyed levels by a registered surveyor and cross checked by the project architects.
3. The proposal complies with the maximum height control over the whole of the proposed development other than a minor breach varying from 360mm to 545mm over a short distance with the maximum variation being 6.411% above the 8.5 metre control. The proposal otherwise complies with the height control with the proposal mostly below the 8.5 metre control and further, the roof of the dwelling at the northern end is significantly below the height control. Refer to architects' drawings.
4. There are no negative amenity impacts, and the assessment otherwise is unchanged from our Statement of Environmental Effects dated 9 December 2022.
5. This application seeks to vary the MLEP clause 4.3 numerical control as provided for in clause 4.6 to allow this small non-compliance in the development application.

6.0. Proposed Variation Justification

6.1. Summary

LEP Requirement	8.5 metres above ground levels (existing)
Proposed	A new roof lower than the existing roof. A small section of the proposed addition breaches the height control by amounts varying from 360mm to 545mm.
Is the planning control in question a development standard?	Yes
Is the non-compliance relating to the clause requirement a Numerical and/or Performance based variation?	Numerical
Numerical variation as a % variation to the requirement	Varying to 6.411%.

6.2. Relevant Questions and Assessment

The proposal must satisfy the objectives of Clause 4.3 – Height of buildings, the underlying objectives of the particular zone, and the objectives of Clause 4.6 - Exceptions to Development Standards under the Manly Local Environmental Plan 2013. Relevant questions and response follow.

Q1. Is the planning control in question a development standard?

Response: Yes - the prescribed Height of buildings limitation pursuant to Clause 4.3 of the MLEP 2013 is a development standard.

Q2. What are the underlying objectives of the development standard?

The underlying objectives of the standard, pursuant to Clause 4.3 – 'Height of buildings' of the MLEP 2013 and response:

The objectives of clause 4.3 are:	Response
<p>4.3 Height of buildings</p> <p>(1) The objectives of this clause are as follows—</p> <p>(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,</p> <p>(b) to control the bulk and scale of buildings,</p> <p>(c) to minimise disruption to the following—</p> <p>(i) views to nearby residential development from public spaces (including the harbour and foreshores),</p> <p>(ii) views from nearby residential development to public spaces (including the harbour and foreshores),</p> <p>(iii) views between public spaces (including the harbour and foreshores),</p>	<p>1. The MLEP maximum height of 8.5 metres above ground levels (existing), complies throughout the proposal other than a minor breach of the roof design as shown on the elevation and section drawings in Fig. 4.6-02 and 4.6-03 above. The breach results from measuring ground levels (existing) from the lowest existing height <u>below the existing building</u>.</p> <p>2. The extent of the breach varies from 360mm to 545mm over short distance and the percentage variation over a small area is 6.411%.</p> <p>3. There are no negative environmental impacts and no impact on existing views. The proposal complies with the planning objectives for view sharing.</p>

<p>(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,</p> <p>(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.</p> <p>(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. (The maximum height for the subject site is 8.5 metres).</p>	<p>4. Bulk and scale are consistent with the locality and the streetfront. It is noted that dwellings in the locality vary considerably in architectural style, size, bulk and scale – especially the immediately adjoining dwelling to the north.</p> <p>5. Conclusion: The proposal complies with the planning objectives. The minor height breach results in no negative impacts.</p>
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Q3. What are the underlying objectives of the zone?

The objectives of the zone R2 Low Density Residential are:	Response
<p>Zone R2 Low Density Residential</p> <p>1 Objectives of zone</p> <ul style="list-style-type: none"> 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. <p>2 Permitted without consent Home-based child care; Home occupations.</p> <p>3 Permitted with consent</p> <p>Attached dwellings; Bed and breakfast accommodation; Boat launching ramps; Boat sheds; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Emergency services facilities; Environmental protection works; Flood mitigation works; Group homes; Health consulting rooms; Home businesses; Home industries; Hostels; Information and education facilities; Jetties; Multi dwelling housing; Neighbourhood shops; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Recreation facilities (indoor); Respite day care centres; Roads; Secondary dwellings; Semi-detached dwellings; Shop top housing; Signage; Tank-based aquaculture; Water recreation structures; Water recycling facilities; Water supply systems</p> <p>4 Prohibited</p> <p>Advertising structures; Water treatment facilities; Any other development not specified in item 2 or 3.</p>	<p>1. The development for alterations and additions to an existing dwelling is permissible and consistent with the aims and objectives of the Manly LEP 2013 and the Land Zone objectives - and provides for the housing needs of the community in a low-density and low-impact environment.</p> <p>2. The proposed roof is lower than existing, with the overall design in a smart modern form by a widely acknowledged architect. The proposal is most pleasing and will be an asset to the streetscape and locality.</p> <p>3. No loss of view or any negative amenity issues.</p> <p>4. The bulk and scale of the building is moderate and low-impact and consistent with the planning objectives of the zone and the locality.</p> <p>5. The desired future character of the neighbourhood is achieved</p> <p>6. Conclusion: The proposal minimises any adverse effects of bulk and scale on the land and in the locality. The minor height breach does not impede iconic views and would not be apparent to an observer.</p>

Q4. Is the variation to the development standard consistent with the objectives of Clause 4.6 of MLEP 2013?

The objectives of clause 4.6 are:	Response
<p>4.6 Exceptions to development standards</p> <p>(1) The objectives of this clause are as follows—</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p> <p>(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.</p> <p>(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—</p>	<p>1. The maximum height of 8.5 metres above ground levels existing complies throughout other than a minor breaches of the roof as shown in Figs 4.6-02 and 03 in this application.</p> <p>2. The breach over a short area varies from 360mm to 545mm. and equates to a 6.411% variation to the control.</p> <p>3. The bulk and scale of the building is moderate and low-impact and consistent with the planning objectives of the zone and the locality noting that the roof is below the existing ridge height.</p> <p>4. The proposal retains a single residential dwelling and character with building structures at a height, bulk and scale consistent with the site and locality.</p> <p>5. The desired future character of the locality, neighbourhood is achieved</p> <p><u>6. Flexibility is appropriate and should be applied in this circumstance to achieve excellence in architectural design and amenity for the residents</u></p>

<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p> <p>(4) Development consent must not be granted for development that contravenes a development standard unless—</p> <p>(a) the consent authority is satisfied that—</p> <p>(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Planning Secretary has been obtained.</p> <p>(5) In deciding whether to grant concurrence, the Planning Secretary must consider—</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p> <p>(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.</p> <p>(6)</p>	<p><u>while resulting in no negative impacts on neighbours and locality.</u></p> <p><u>7. Compliance with the standard is unreasonable, unnecessary and justified. There are sufficient environmental planning grounds to justify contravening the standard.</u></p> <p>8. Conclusion: The application has adequately addressed the matters required to be demonstrated by subclause (3). In this circumstance strict compliance with the development standard is unreasonable and unnecessary and there are sufficient environmental planning grounds to justify contravening the standard.</p> <p><i>It is in the public interest because it is a modest development and achieves planning objectives.</i></p>
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Q5. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Response:

1. The proposal is specifically designed to respond to the requirements of the L&E Court determination relating to the subdivision of the site with the battle-axe access handle requiring demolition of part of the existing dwelling and pool, and also responding to the needs of the owner’s family to provide additional floor space and garaging in a modern dwelling form. The DA proposal provides for a lower building height than existing.

2. Strict compliance with the height control would require lowering the roof and ceiling heights which are not acceptable as this would be detrimental to the architecture and interior; and would serve no useful purpose – noting that the roof is lower than existing, and the roof pitch is at a minimal slope.

3. The proposal does not result in environmental or amenity negatives.

Conclusion: A requirement to strictly comply with the numerical controls is unnecessary and would result in negative impacts with no apparent benefits being achieved. The variation sought results in no loss of iconic views or negative environmental impacts. The proposal is worthy of consent and acceptance of this variation..

Q6 .Does the noncompliance with the development standard raise any matter of significance for State or Regional Environmental Planning?

Conclusion: The non-compliances do not raise any matter of significance.

7.0. Conclusion

1. This application submits that the variation for the breach of the 8.5 metre height over a small area varying from 360mm to 545mm and equating to a 6.411% variation to the control is justified in the circumstances and should be accepted. The consent authority should be satisfied that this application demonstrates that the variation is minimal and that the offending portions of the roof are a direct result of measuring ground levels (existing) from directly below the existing building in a void foundation area. This will not result in any negative environmental or amenity outcomes.

2. The breach of the MLEP height control by 6.441% is reasonable, appropriate, and justified in achieving the planning objectives and the reasonable expectation of an owner to develop their property. Strict compliance is unnecessary in the circumstances of the case:

- The proposal is consistent with the objectives of the building height standard and the zoning of the land when assessed against each individually, and as a whole.
- The proposal is in the public interest for the reason that it achieves the relevant planning objectives, and has no negative environmental impacts.
- The clause 4.6 application adequately address cl. 4.6(3) and the consent authority should be satisfied that the matters have in fact been demonstrated.

3. It is for the consent authority to determine that the written application request has “adequately addressed” the matters required to be demonstrated by cl 4.6(3). It is a matter for the consent authority to form such opinion that this Clause 4.6 application justifies acceptance of the noncompliance. We suggest the consent authority should have no difficulty in being satisfied that this application demonstrates:

- The proposal compliance with the MLEP 2013 Objectives and Maximum Height objectives.
- The development standard is unnecessary and unreasonable in this circumstance.
- There are sufficient environmental planning grounds to justify contravening the standards, and that.
- The development is in the public interest.

Yours faithfully,



Wayne Collins
Director

Qualification/Disclaimer

This report is based on information provided by the instructing party and relates only to the information provided at the date of issue of this report and planning legislation applicable at that date. Colco has made what it considers reasonable enquiries in preparing this report; however, it cannot confirm the accuracy of architectural drawings or supporting consultant's specialist reports. Colco accepts these documents in good faith. The report is for the benefit of the client in regard to a development application for development on the subject site and not for any other purpose. Colco cannot forecast an outcome of a consent authority.

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