

CLAUSE 4.6 TO CLAUSE 4.3 OF MANLY LEP 2013

EXCEPTIONS TO DEVELOPMENT STANDARDS – **HEIGHT VARIATION**

*Construction of new four-storey dwelling house with swimming pool, and off-street
car parking*

at

60 CASTLE CIRCUIT SEAFORTH

PREPARED BY

ABC PLANNING PTY LTD

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MANLY LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

This Clause 4.6 variation request has been prepared to accompany the development application that seeks construction of new four-storey dwelling house with swimming pool, and off-street car parking, at Lot 16 in DP 200638, commonly known as No. 60 Castle Circuit, Seaforth.

Clause 4.6 of the *Manly Local Environmental Plan 2013* (MLEP2013) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement from *Initial Action Pty Ltd v Woollahra Council [2017] NSWLEC 1734*, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

Clause 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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.3 of the MLEP2013 – maximum height 8.5m, as demonstrated on the LEP map in **Figure 1** below. The proposed height of 11.87m is an 39.65% (3.37m) variation from the 8.5m numerical development standard for the site pursuant to Clause 4.3 of MLEP2013.



Figure 1: Height Map

Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

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

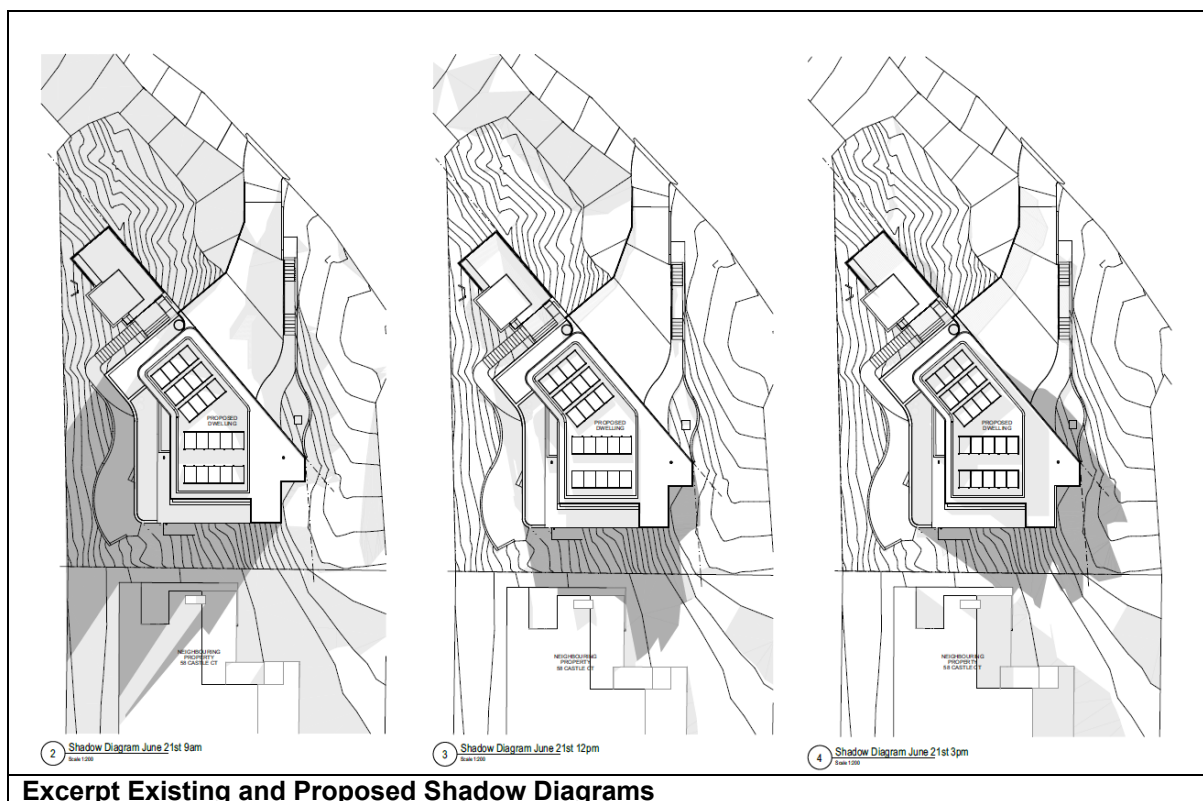
Assessment: It is considered that strict compliance with the development standard for height on the site is unreasonable and unnecessary in the circumstances for the following reasons:

- The proposal complies with the objectives of the development standard and the R2 Low-Density Residential zone, indicated in the assessment in **Table 1** below. Furthermore, compliance with the development standard is unreasonable and unnecessary as it is in the public interest, given it is consistent with the objectives for the development within the zone.
- Notwithstanding the numeric departure, the proposed dwelling house will have a height, bulk, and scale compatible with the scale of the site conditions and surrounding local area, and the height non-compliance will not have an adverse impact to surrounding properties and the streetscape in relation to significant additional overshadowing, visual impact from the bulk and scale, visual or acoustic privacy impacts, or view loss. Furthermore, the proposal provides for high-quality internal amenity to the existing dwelling house.

Overshadowing

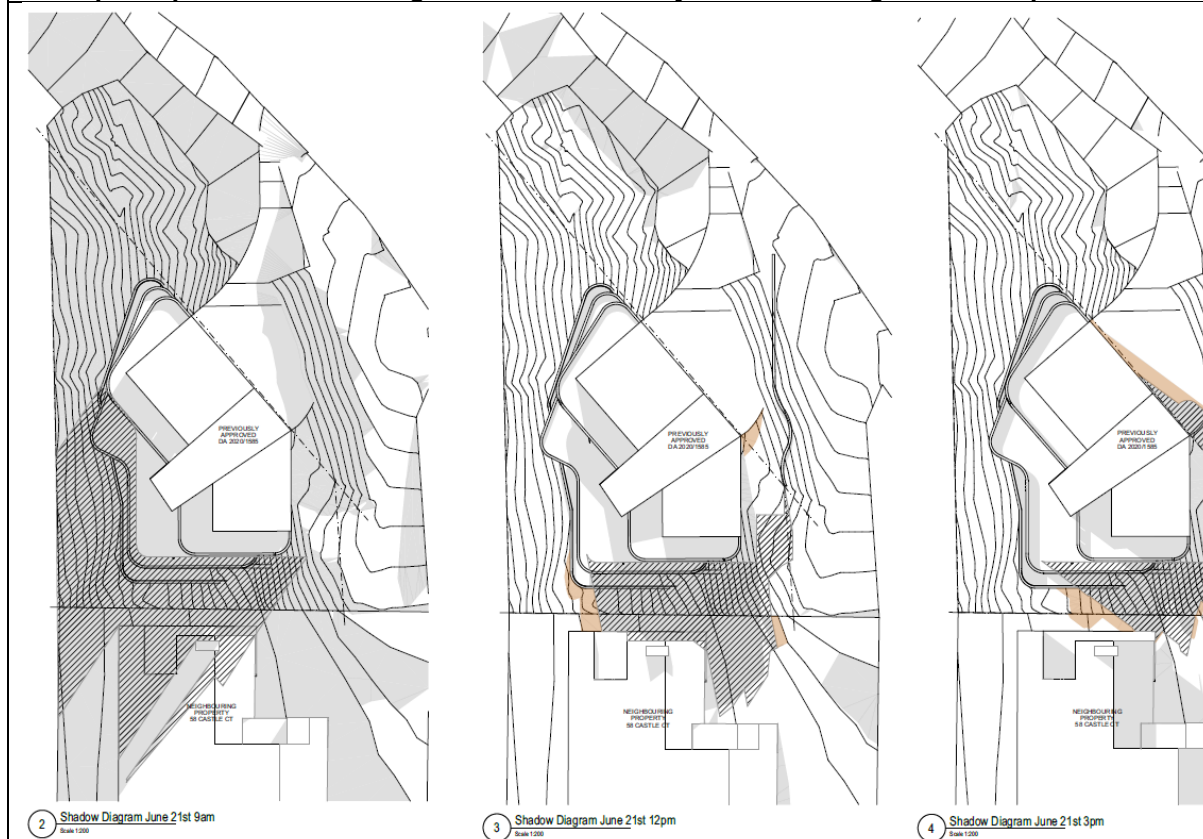
- In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south, ensures that the proposed development will provide compliant solar access to public domain and surrounding properties. In this regard, the adjoining southerly neighbour has windows orientated with a western outlook to enjoy ocean views.

- Despite the height variation, the adjoining dwelling to the south will maintain access to sunlight. In this regard, the east-west orientation of the adjoining lot and west facing living areas with extensive glazing to the west to provide views over the ocean, plus the generous setback of the proposed dwelling to the southerly neighbour, the private open space and habitable rooms of the adjoining dwelling will receive a minimum of three (3) hours of direct sunlight between 9am and 3pm in mid-winter.
- In this regard, shadow diagrams have been prepared which illustrate, existing and proposed shadows, plus shadows from the additional height variation, plus shadows additional to the approved **DA2020/1585**. In this regard, it is illustrated that the north facing elevation of the adjoining dwelling at No. 58 castle Circuit is overshadowed in the morning, and any additional overshadowing will not affect the adjoining dwelling. Furthermore, the proposed shadowing is of the northern elevation to the adjoining dwelling is reduced from the approved shadowing under **DA2020/1585**.





Excerpt Proposed Shadow Diagrams – Shadows beyond above height non-compliance



Excerpt Proposed Shadow Diagrams – Additional to approved DA2020/1585

Figure 2: Shadow Diagrams, illustrating shadowing - existing, proposed, height variation and approved under DA2020/1585

Visual and Acoustic Privacy

- Visual and acoustic privacy impacts to adjoining neighbours from the additional height has also been carefully considered, with primary living areas oriented to the front and rear of the dwelling, which ensures that visual privacy is maintained to the southern adjoining neighbour. In this regard, the Level 1 Plant Room is suitably screened to maintain acoustic amenity, and privacy screens are fitted to terraces along the southern elevation to mitigate overlooking the adjoining southerly neighbour.
- The generous separation distance between the proposed development and the neighbouring dwelling to the south, plus significant separation to the dwellings across Castle Circuit, along with deep soil planting further mitigates potential visual and acoustic privacy impacts from the additional height.

Visual Impact from Bulk and Scale

- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, with the additional height being not visually dominant in the streetscape (**Figures 2 & 3**).
- The proposed height non-compliance will be imperceptible from Castle Circuit and adjoining neighbours given the fact that the proposal exhibits a modest single-storey street presentation which is well below the maximum 8.5m permissible and sited on RL43.72 whilst the street kerb is RL46.20, being therefore compatible with the sensitive site and context of the locality. Therefore, the bulk, mass and scale of the proposal relate to the prevailing patterns of the streetscape character in the vicinity, and will not be responsible for any potential adverse visual impacts to surrounding properties and public domain (**Figures 2 & 3**).



Figure 3: View from across Castle Circuit to the proposed development noting the modest single-storey scale addressing the streetscape

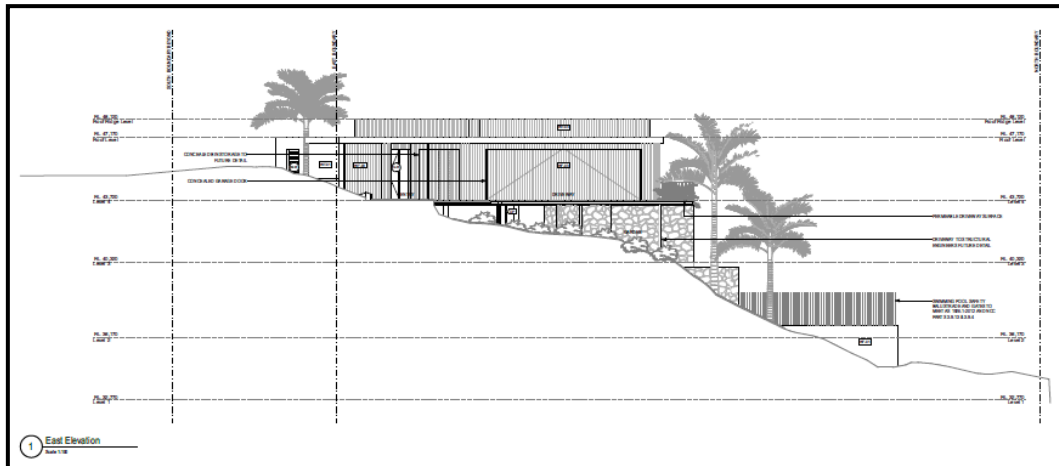


Figure 4: Excerpt East Elevation Plan, illustrating single-storey presentation to the streetscape

- The proposed variety of architectural features are considered to be of a high standard which will enhance the character of the street, including indentation and recesses, deep set balconies, privacy screens, and steps in the floor levels, creating good articulation to the built form and building façade. In this regard, the proposed dwelling is sensitively designed with regard to the site conditions, with the additional height from the non-trafficable roof and portion of Level 4 provided in a discrete and sympathetic manner (**Figures 4 & 5**).

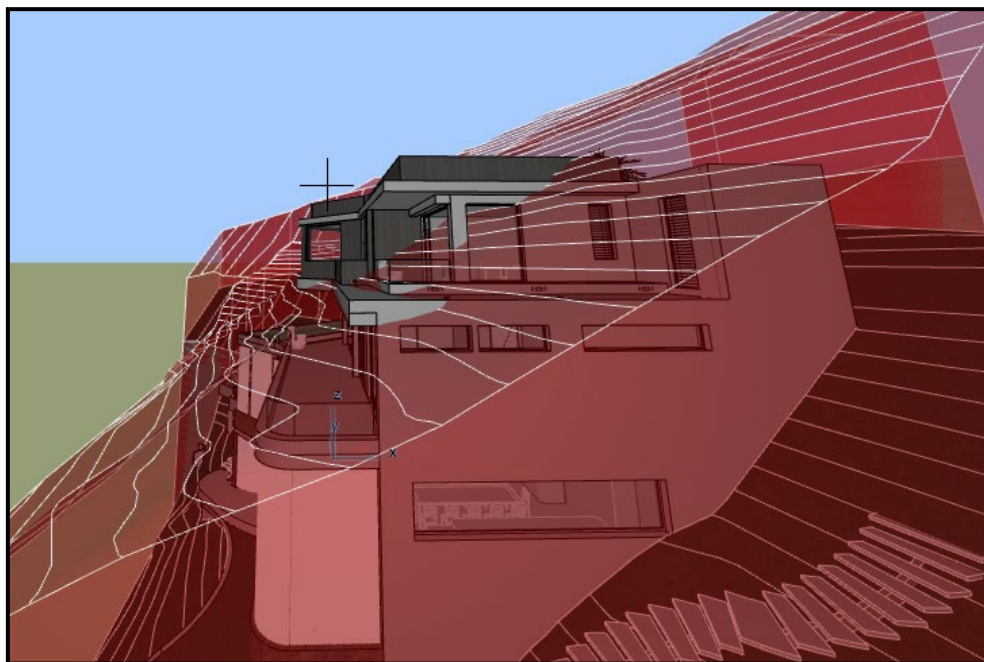


Figure 5: Excerpt of Height Plane Diagram, illustrating southern elevation and height variation

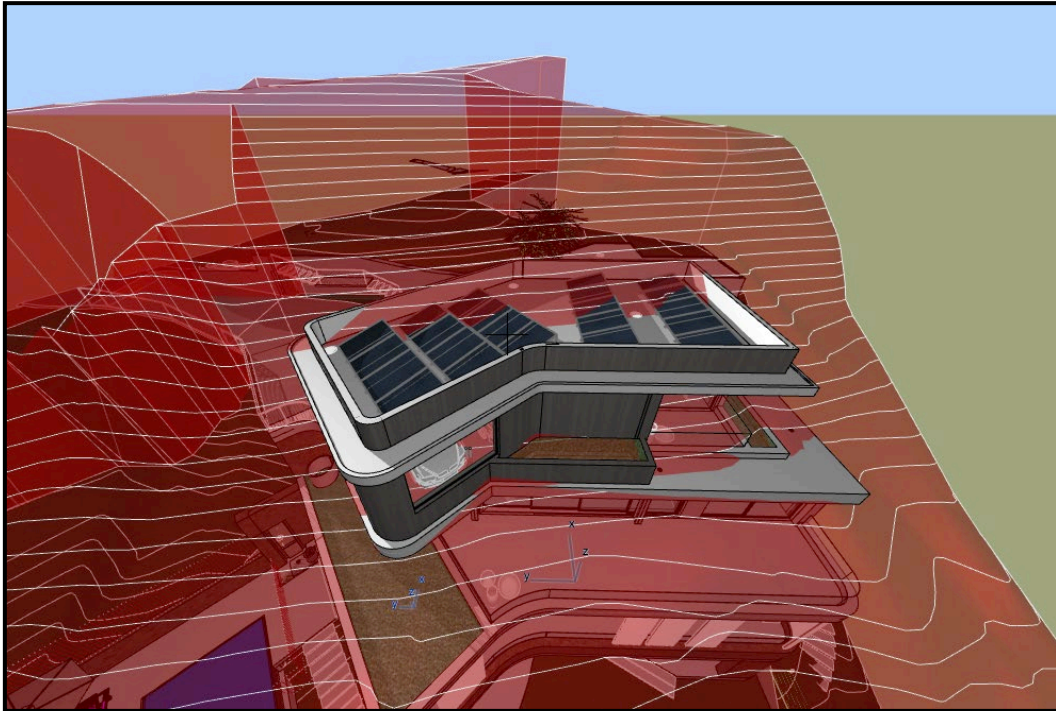


Figure 6: Excerpt of Height Plane Diagram, illustrating western elevation and height variation

- The proposed height variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography and surrounding properties (Figures 6 & 7).

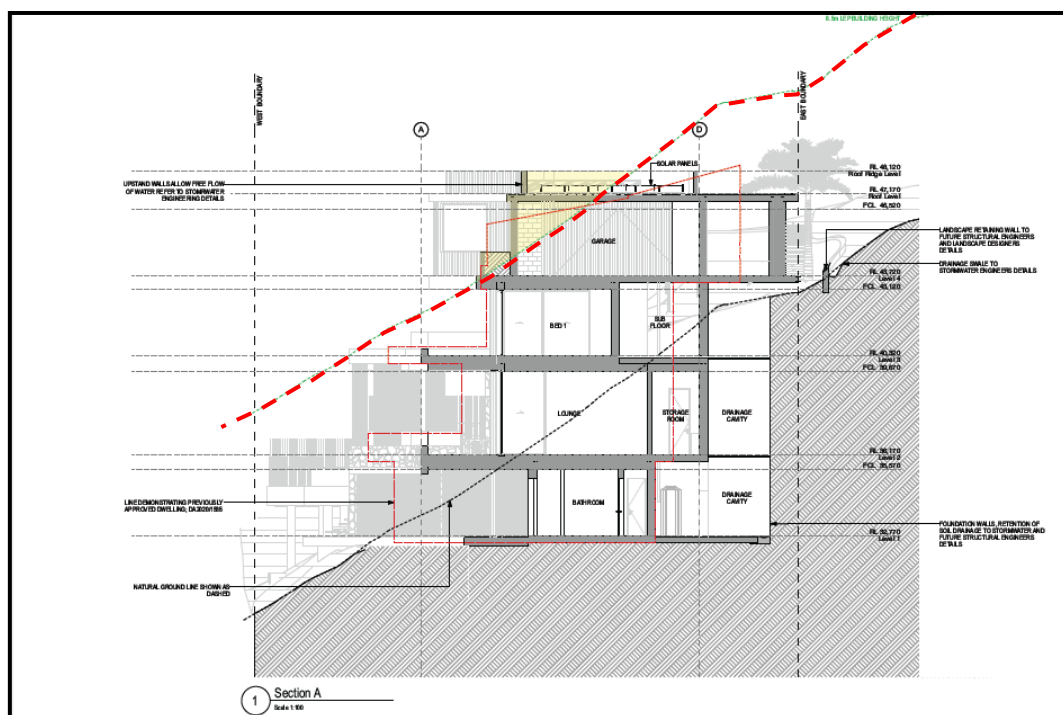


Figure 7: Excerpt Section A noting the minor portion above the height limit line



Figure 8: Excerpt Southern Elevation Plan, illustrating articulation and modulation, with the built form stepping with the slope of the site

- Notwithstanding the height variation, the proposed dwelling house has been designed to respect and enhance the water views whilst ensuring suitability of the development on the coastal foreshore, and will not have a detrimental impact on the visual amenity of the harbour or coastal foreshore. In this regard, the dwelling will be partially screened by the heritage landscape along the foreshore. The proposed development is considered to be suitable given its type, location and design and its relationship with and impact on the foreshore. The proposal provides for private open space and total landscaped area which outperform the control whilst combining with high-quality landscaping to ensure acceptable relationship between the development and the foreshore scenic protection area, and mitigation of visual bulk and scale impacts from the height variation.
- The proposed height variation will not be perceptible from the watercourse. Given the heritage landscape area at the rear of the site, the residence will be screened by existing trees on the steep hillside, which combined with the expansive separation distance from publicly accessible areas from across Middle Harbour, will ensure that there will be limited visibility of the proposed dwelling house with additional height from waterways or foreshores (**Figure 8**).

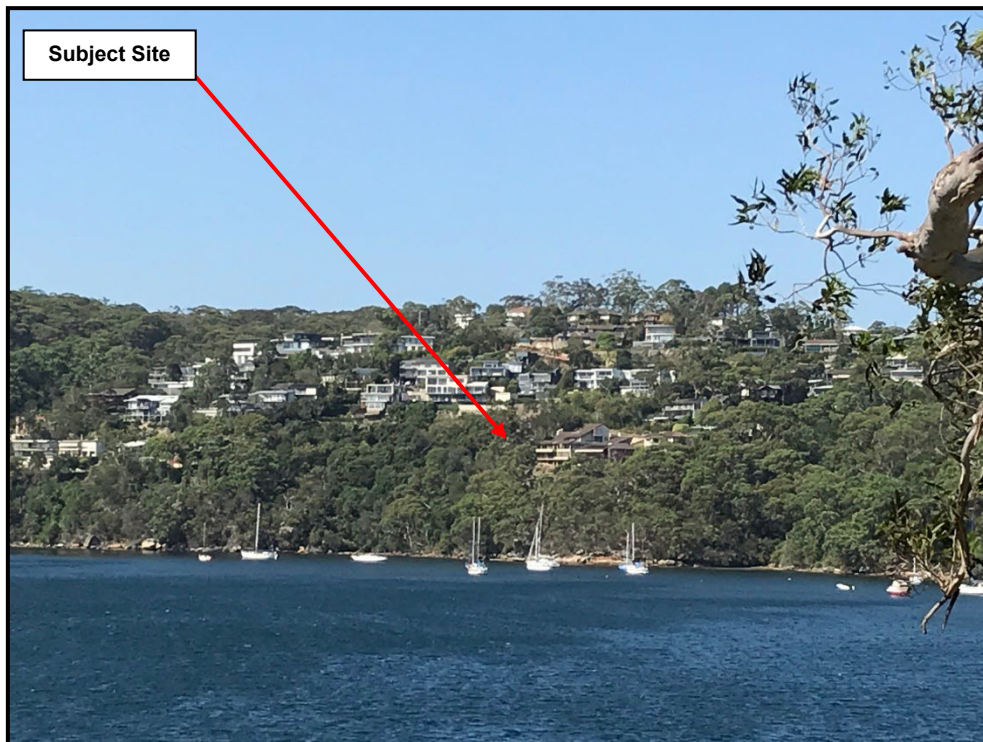


Figure 8: Zoomed photo from Castlecrag noting the substantial distance to the proposal from the public view access

View Impacts

- Despite the height variation, the proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed single-storey height presentation to the street, building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain.
- The proposed height, setbacks, plus the orientation of lots and surrounding topography, ensures that outlook is maintained for adjoining properties and the public domain (**Figure 9**), notwithstanding the height variation.
- The proposed separation distances, including a generous southern side setback, ensures the height non-compliance maintains outlook for the only adjoining neighbour to the south.



Figure 9: Excerpt 3D Diagrams, illustrating view west from Castle Circuit, noting the modest bulk and scale presentation to the street, and retained water views

Amenity

- The height variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of the deep soil landscaping (46.18%) and total open space (72.8%, plus above ground open space. The proposed 289.47m² of deep soil area allow for a sympathetic landscape planting which integrates with the adjacent C2 zone, whilst softening the visual bulk appearance of the development.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Table 1: Assessment against the Objectives of the Development Standard and Land Use zone.

Consistency with the objectives of the height standard in the LEP	
Objectives	Assessment
4.3(a) to provide for building heights and roof forms that are consistent with the topography landscape, prevailing building heights and desired future streetscape character in the locality	<p>The proposed flat roof is consistent with existing dwellings with flat roofs along Castle Circuit.</p> <p>The proposed dwelling has single-storey presentation to the streetscape and a stepped built form, which respects the topography and sensitive character of the foreshore area and is consistent with the size, bulk and scale of surrounding properties.</p> <p>The height variation is well integrated with the architectural design and contributes to a high-quality dwelling house which reinforces the desired streetscape character in the locality.</p>
4.3(b) to control the bulk and scale of buildings	<p>The majority of the building envelope is compliant with the height limit, and the minor encroachments are related to the non-trafficable roof and the upper floor level facing the foreshore. Therefore, these portions above the height limit are lightweight elements, and do not create a building which dominates the hillside or streetscape.</p>

	<p>The height protrusions beyond the height limit do not preclude the proposed development to achieve a bulk and scale that are suitable to the site and compatible with surrounding properties.</p> <p>The non-compliant height responds to the sloping nature of the site and is not related to excessive bulk, mass, or inappropriate scale. Therefore, the proposed development and additional height is considered to be suitable to the site and context of the locality.</p>
<p>4.3(c) to minimise disruption to the following:</p> <p>(i) views to nearby residential developments from public spaces (including the harbour and foreshores)</p> <p>(ii) views from nearby residential developments to public spaces (including the harbour and foreshores)</p> <p>(iii) views between public spaces (including the harbour and foreshores)</p>	<p>The proposed height, setbacks, plus the orientation of lots and surrounding topography, ensures that outlook is maintained for adjoining properties and the public domain.</p> <p>The proposed height variation is confined towards the rear/western side of the site. The proposal has been carefully designed to mitigate any potential loss of view by maintaining the front elevation well below the permissible height presentation, achieving a maximum ridge level of RL48.12 and overall height of 4.5m to the streetscape, which is 4m below the 8.5m height limit at street level.</p> <p>The proposed separation distances, including a generous southern side setback, ensures the height non-compliance maintains outlook for the only adjoining neighbour to the south.</p>
<p>4.3(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>In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south ensures that the proposed development will provide compliant solar access to the public domain and surrounding properties. In this regard, the adjoining southerly neighbour has windows orientated to the west to enjoy ocean views.</p>
<p>4.3(e) to ensure the height and bulk of any proposed building or structure in a recreational 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>The subject site is located within the R2 Low Density Residential zone, but is adjacent to a C2 zone and therefore, provides a range of architectural design measures to ensure that any potential environmental impacts are mitigated.</p> <p>The proposal provides for a generous 46.18% (289.47m²) (6.18% outperformance) of the site to be deep soil zone, which accommodates an extensive landscaped setting. The provision of landscape plantings in the front setback provides for a suitable streetscape outcome which is compatible with the character of Castle Circuit. The proposal also provides for abundant landscaping with the private open space, in addition to landscape planters and green roof.</p> <p>The height and bulk are considered adequate for the subject site and context. The siting and the design of the built form do not dominate the hillside or streetscape, whilst respecting the foreshore area and heritage landscape item to the west by maintaining an adequate rear setback which allows for an outperformance of total open space and deep soil landscaped area within the site and a low- density residential character. The sensitive siting and articulation of the proposed development which steps down the hillside preserves the existing adjoining bushland whilst maintaining a privacy and amenity of neighbouring properties.</p>

Consistency with the objectives of the R2 Low Density Residential	
Objectives	Assessment
<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>The proposed height variation does not raise any inconsistency with the R2 Low-Density Residential zone objectives. The height is associated with a high-quality contemporary dwelling house which provides for the needs of the community and presents a compatible height, bulk and scale with the dwellings in the vicinity of the site.</p> <p>The limited building footprint and envelope retain the low-density nature of the area whilst responding adequately to the sensitive adjacent Environmental Conservation zone to the west, which is within a foreshore area and classified as bushfire prone zone.</p> <p>The topography of the site associated with the stepped built form mitigates any adverse or significant view, overshadowing, or privacy impacts to adjoining neighbours or the public domain.</p> <p>The proposal will maintain the low-density residential environment, thereby confirming that the variation does not raise any inconsistency with the objectives of the zone.</p>

Based on the above assessment, it is considered that strict compliance with the LEP height standard is unreasonable and unnecessary in this instance.

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

Assessment: The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance, which include the following:

- In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south, ensures that the proposed development will provide adequate solar access to public domain and surrounding properties. In this regard, the adjoining southerly neighbour has windows orientated with a western outlook to enjoy ocean views.
- Visual and acoustic privacy impacts to adjoining neighbours from the additional height has also been carefully considered, with primary living areas oriented to the front and rear of the dwelling, which ensures that visual privacy is maintained to the southern adjoining neighbour. In this regard, the Level 1 Plant Room is suitably screened to maintain acoustic amenity, and privacy screens are fitted to terraces along the southern elevation to mitigate overlooking the adjoining southerly neighbour.
- The proposed dwelling house has been designed to respect and enhance the water views whilst ensuring suitability of the development on the coastal foreshore, and will not have a detrimental impact on the visual amenity of the harbour or coastal foreshore. In this regard, the dwelling will be partially screened by the heritage landscape along the foreshore. The proposed development is considered to be suitable given its type, location and design and its relationship with and impact on the foreshore. The proposal provides for private open space and total landscaped area which outperform the control whilst combining with high-

quality landscaping to ensure acceptable relationship between the development and the foreshore scenic protection area, and mitigation of visual bulk and scale impacts from the height variation.

- The generous separation distance between the proposed development and the neighbouring dwelling to the south, plus significant separation to the dwellings across Castle Circuit, along with deep soil planting further mitigates potential visual and acoustic privacy impacts from the additional height.
- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, with the additional height being not visually dominant in the streetscape (**Figures 2 & 3**).
- The proposed height variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography and surrounding properties (**Figures 6 & 7**).
- The proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed single-storey height presentation to the street, building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain.
- The proposed height variation will not be perceptible from the watercourse. Given the heritage landscape area at the rear (west) of the site, the residence will be screened by existing trees on the steep hillside, which combined with the expansive separation distance from publicly accessible areas from across Middle Harbour, will ensure that there will be limited visibility of the proposed dwelling house from waterways or foreshores (**Figure 8**).
- The height variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of the deep soil landscaping (46.18%) and total open space, and above ground open space. The proposed 289.47m² of deep soil area allow for a sympathetic landscape planting which integrates with the adjacent C2 zone, whilst softening the visual bulk appearance of the development.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the height in this instance.

Other Matters for Consideration

4(a)(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

Assessment: The above assessment demonstrates that the proposed height satisfies the objectives of the height standard and the R2 Low-Density Residential zone

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the height variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable

impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning

Assessment: The proposed height variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed height allows for the achievement of a compatible building envelope without creating a development with overbearing height, bulk, or scale and without compromising the desired future character of the area.

The proposed height is therefore consistent with the State and Regional Policies, particularly urban consolidation principles, which seek to provide additional height and density near transport and established services.

(b) the public benefit of maintaining the development standard

Assessment: There is no public benefit in maintaining the height standard given the limited amenity impacts associated with the development, which provides a high level of internal amenity, and the positive streetscape outcome that would arise from the development of the subject site, while being sympathetic to the environmental constraints of the surrounding local area.

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Assessment: There are not considered to be any additional matters to consider beyond those discussed above

Conclusion

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at No. 60 Castle Circuit, Seaforth and is requested to be looked upon favourably by the consent authority.