

65 Dolphin Crescent, Avalon Beach

Clause 4.6 Written Request – Height of Buildings

On behalf of
Jaedho Two Pty Ltd
September 2022



Project Director

Georgia Sedgmen

Dated:

Project Planners

Hugh Halliwell

David Duong

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

Contact

Mecone

Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au
mecone.com.au

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1 Height of Buildings

1.1 Introduction

This clause 4.6 written request has been prepared having regard to the Land and Environment Court judgments in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

The site at 65 Dolphin Crescent (the site), legally identified as Lot 20 DP 28663, is currently occupied by a double storey brick and weatherboard dwelling house with a detached carport in the front and timber deck area in the rear yard.

The surrounding development is characterised by other low-density residential dwellings of similar scale and proportion and are defined topographically by the steep southward downslope of the land along the northern length of Dolphin Crescent.

The proposed development at 65 Dolphin Crescent comprises a number of alterations and additions to the built form of the existing dwelling. These works propose a variation to the Height of Building control under Pittwater Local Environmental Plan 2014 (PLEP 2014), which is identified as 8.5 metres for the site. The development proposes a built form that exceeds the blanket 8.5 metre height limit in various locations, including a maximum height of 11.1 metres, which provides a variation of 2.6 metres, or 30.59%.

For the reasons set out below, it is considered that strict compliance with the Height of Building is unreasonable or unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to justify contravening the development standard.

2 Pittwater Local Environmental Plan 2014

2.1 Clause 4.3 Height of Buildings

Pursuant to clause 4.3 of PLEP 2014, the maximum permitted building height on the site is 8.5m. The stated objectives of this standard are as follows:

- a) *To ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- b) *To ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- c) *To minimize any overshadowing of neighbouring properties,*
- d) *To allow for the reasonable sharing of views,*
- e) *To encourage buildings that are designed to respond sensitively to the natural topography,*
- f) *To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

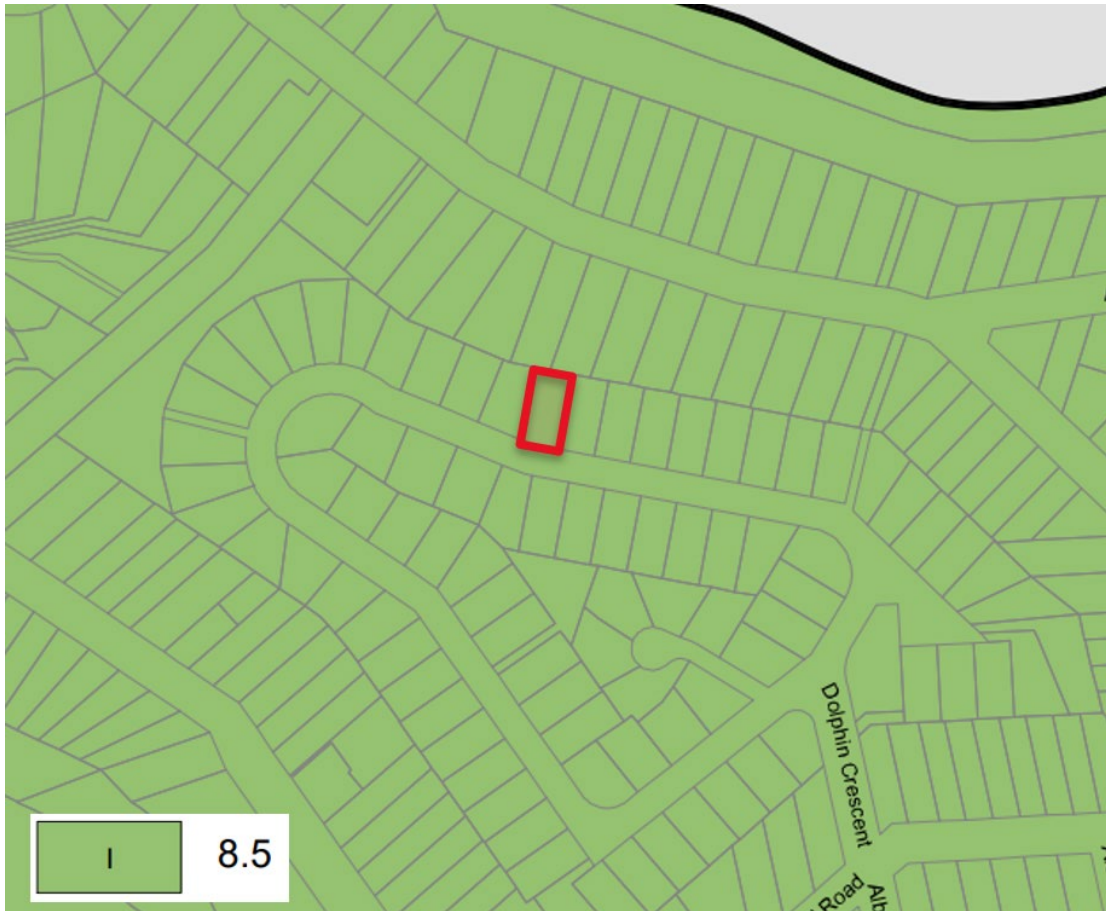


Figure 1: Maximum height of buildings map (Source: Pittwater LEP 2014)

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP 2014 provides:

- 1) *The objectives of this clause are:*
 - (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.*

The decision handed down by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of Initial Action the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a

development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in Initial Action is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of PLEP 2014 provides:

(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.

This clause applies to the clause 4.3 Height of buildings standard.

Clause 4.6(3) of PLEP 2014 provides:

(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

The proposed development does not comply with the maximum height of buildings provision of clause 4.3 of PLEP 2014, which specifies a maximum building height, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of PLEP 2014 provides:

(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.

In Initial Action the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant’s written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (Initial Action at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (Initial Action at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (Initial Action at [28]).

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

Clause 4.6(5) of PLEP 2014 provides:

- (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.*

3 Relevant Case Law

In Initial Action, the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

- 1) The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*
- 2) 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.*
- 3) 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.*
- 4) A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- 5) A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case*

would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

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

The relevant steps identified in Initial Action (and the case law referred to in Initial Action) can be summarised as follows:

- 1) Is clause 4.3 of PLEP 2014 a development standard?
- 2) Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - a) compliance is unreasonable or unnecessary; and
 - b) there are sufficient environmental planning grounds to justify contravening the development standard
- 3) Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
- 4) Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
- 5) Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of PLEP?

4 Request for Variation

4.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The commonly adopted approach in order for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary is set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Achievement of objectives of the maximum building height standard

An assessment as to the proposal's achievement of the objectives of the standard is as follows:

- *To ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality.*

Response: Section A4.1 of Pittwater DCP establishes the desired character of the Avalon Beach locality within which the subject site is located. These characteristics include:

- An informal relaxed casual seaside environment;

The proposed additions will not result in any major alterations to the existing dwelling and its contribution to the existing seaside environment.

- A low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape;

The proposed additions will retain the low-density nature of the dwelling and surrounding residential area as well as the existing landscaped setting and the integration of the dwelling with the landform through the stepped design. The extent to which the proposal exceeds the prescribed building height is minimal and is predominantly compliant with the established 8.5 metre height limit. The additions have been located such that the dwelling retains a two-storey appearance and character when viewed from the street.

- Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale;

The proposed additions will not extend beyond the established tree canopy and has been adequately setback from the front elevation of the dwelling to the street, in order to minimise any perceived bulk and scale when viewed from Dolphin Crescent.

- Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance;

The proposed additions maintain the existing stepped-down design of the dwelling to minimise any further site disturbance.

- Most houses are set back from the street with low or no fencing and vegetation is used extensively to delineate boundary lines; and

The proposed height exceedance will not modify existing setbacks, which remain compliant with established setback standards and are extensively vegetated.

- The locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment.

The proposed height exceedance will not remove any significant canopy trees or vegetation. Further plantings and landscaping works are proposed with this development to further integrate the development into the natural environment.

The proposed development is predominantly under the 8.5 metre height limit blanket. Locations of variation, including a small portion of the roof of the proposed first floor level and a portion of the roof and supporting posts to the existing balcony on the ground floor (refer to **Figure 2**), propose a height variation that is minimal in scale, negligible in impact and will be indiscernible when viewed from the public domain, including Dolphin Crescent. The location of the proposed first floor level has been carefully considered in light of the topography of the site with the site sloping to the south-west.

Careful consideration of the elevation of the site has been made with the proposed first floor being located at the highest point of the existing footprint,

in order to minimise the height variation and resulting in the bulk of the first-floor level remaining largely within the 8.5 metre control. Furthermore, the location of the first floor ensures that it is set back from the front elevation of the dwelling such that the visual bulk of the dwelling house is minimised when viewed from the street and visually remains consistent with the scale and bulk of nearby dwellings.

The proposed roof above the existing ground floor balcony, which represents the greatest extent of variation with a height of 11.1m, is an open structure that presents minimal bulk and scale. Notwithstanding the height variation, the roof above the ground floor balcony (and, in particular, the part of the roof that exceeds the development standard) is consistent with the desired character of the locality. The roof profile is modest in scale and ensures the extent of variation of the roof is minimal. The design of the proposed works, specifically the roof, ensures an appropriate height and scale, with the extent of variation proposed a direct result of the existing levels and topography of the land. It follows, that the objective is achieved notwithstanding the non-compliance.

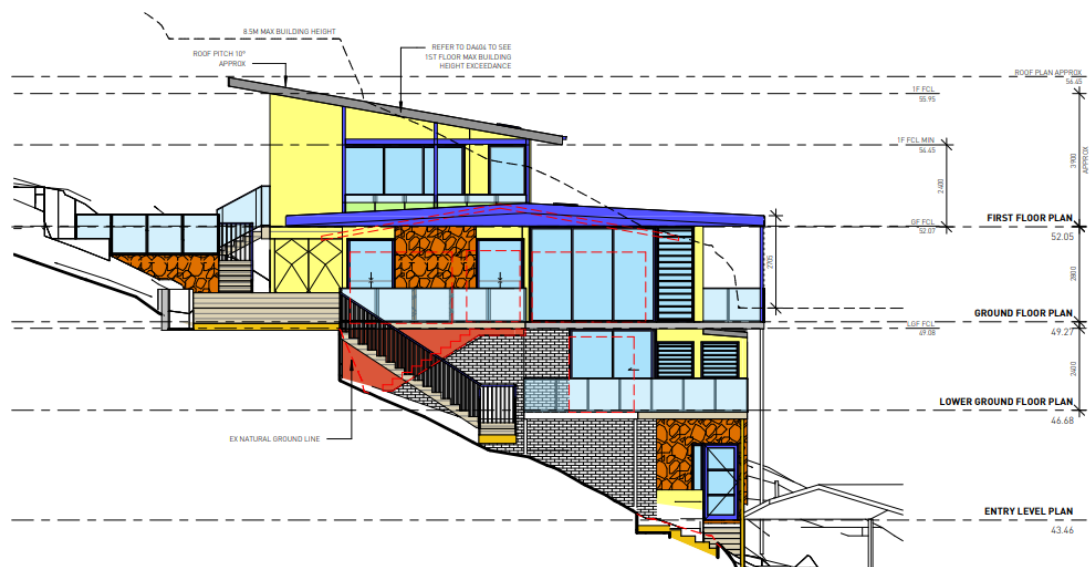


Figure 2: Section CC showing the areas of height variation in relation to the 8.5m height plane. (Source: Giles Tribe)

- *To ensure that buildings are compatible with the height and scale of surrounding and nearby development.*

Response: The proposed development has been designed to ensure that its scale and bulk remains compatible with that of surrounding and nearby residential dwellings. The height of adjoining dwellings, including to the east and west is characterised by similar two storey dwellings on sloping sites consistent with the subject site and proposed works.

The placement of the first-floor level has been carefully considered, being placed at the highest point of the existing dwelling to minimise the extent of height variation. As such, the proposed first floor level remains predominantly under the 8.5 metre height limit blanket (refer to **Figure 7**). Further, its location ensures that the first-floor level is adequately set back from the front elevation of the dwelling such that the visual bulk of the dwelling is minimised when viewed from the street. It follows, that the proposed development is compatible with the height and scale of surrounding and nearby development notwithstanding the non-compliance.

- To minimise any overshadowing of neighbouring properties.

Response: The proposed development has been designed to minimise overshadowing of neighbouring properties.

The subject site benefits from a favourable north-south orientation with solar access to adjoining areas of private open space and principal living areas continuing to receive sufficient solar access in accordance with requirements under P21 DCP.

Notwithstanding, the shadow diagrams provided in the Architectural Plans, submitted with this DA (refer to **Figures 3 - 5**), indicate that the proposed additional elements have been designed and located such that any overshadowing resulting from these elements on the private open space of the adjacent property at No. 63 and 67 Dolphin Crescent during midwinter will remain substantially the same as shadowing from the existing dwelling.

The location of the height exceedance on the ground floor is located to the south-west corner of the dwelling. As such, the exceedance will result in no further overshadowing of the dwelling to the west (No. 63) with overshadowing limited to the front open space. Further overshadowing of adjoining properties, in particular No. 63 is a result of compliant built form elements, as demonstrated by **Figure 5**. While the minor height exceedance on the first-floor results in additional overshadowing of the ground floor, as demonstrated in **Figure 3**.

The exceeding elements will have minimal, if any, shadowing impact on neighbouring properties. Accordingly, this objective is achieved notwithstanding the non-compliance.

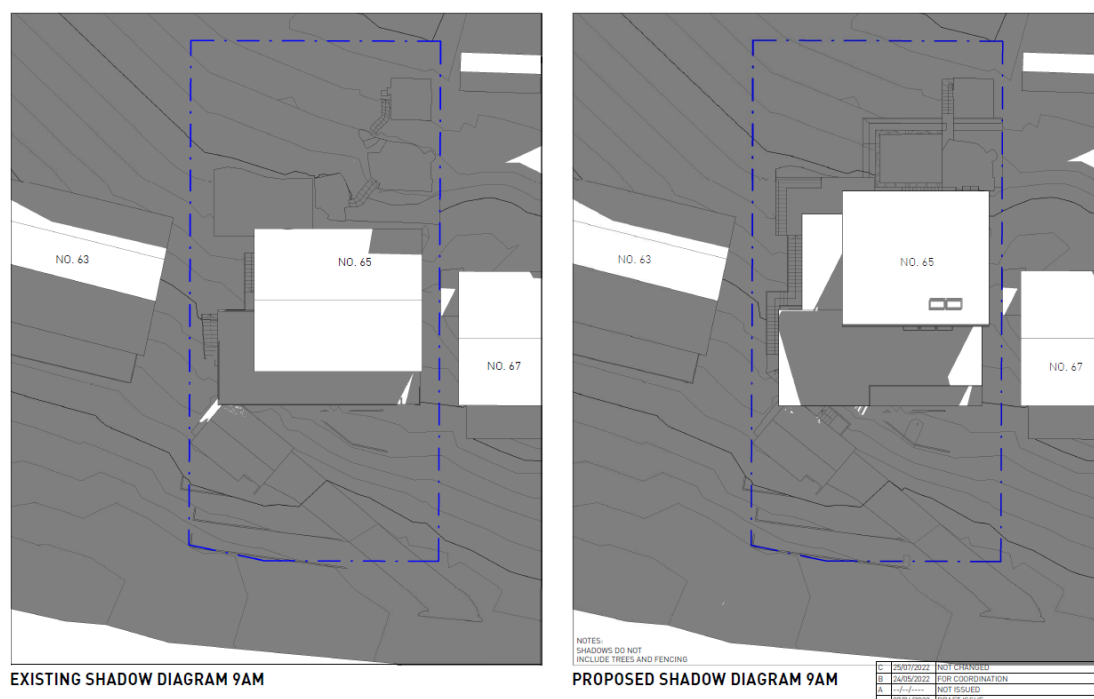


Figure 3: Comparison of existing and proposed shadowing at 9am on 21 June.
(Source: Giles Tribe)

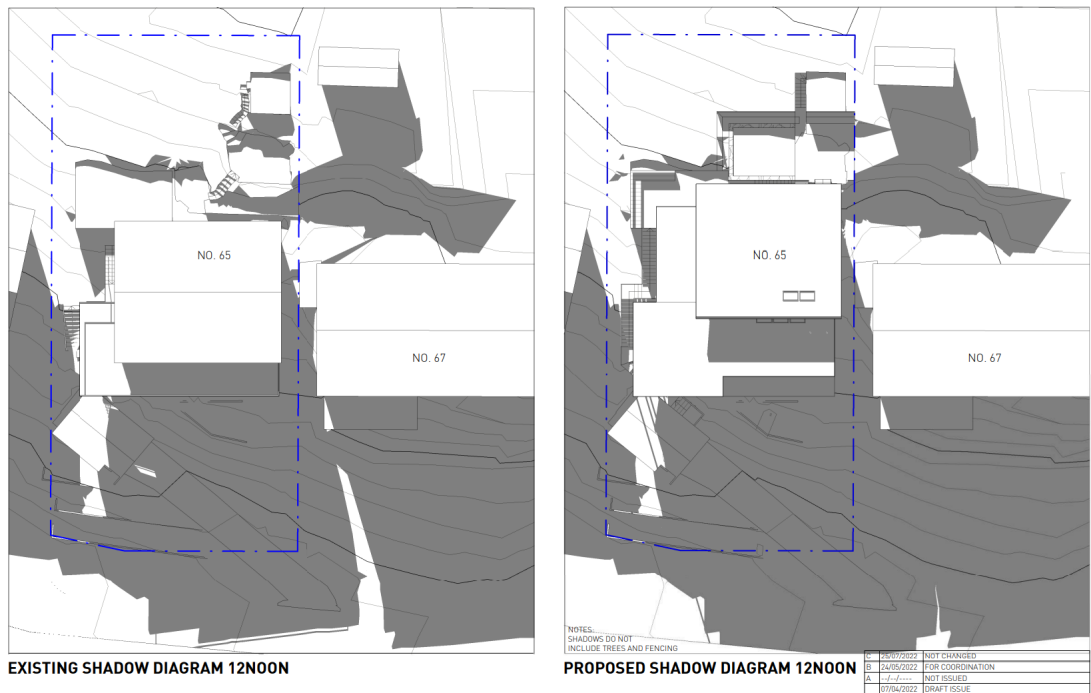


Figure 4: Comparison of existing and proposed shadowing at 12pm on 21 June.
(Source: Giles Tribe)

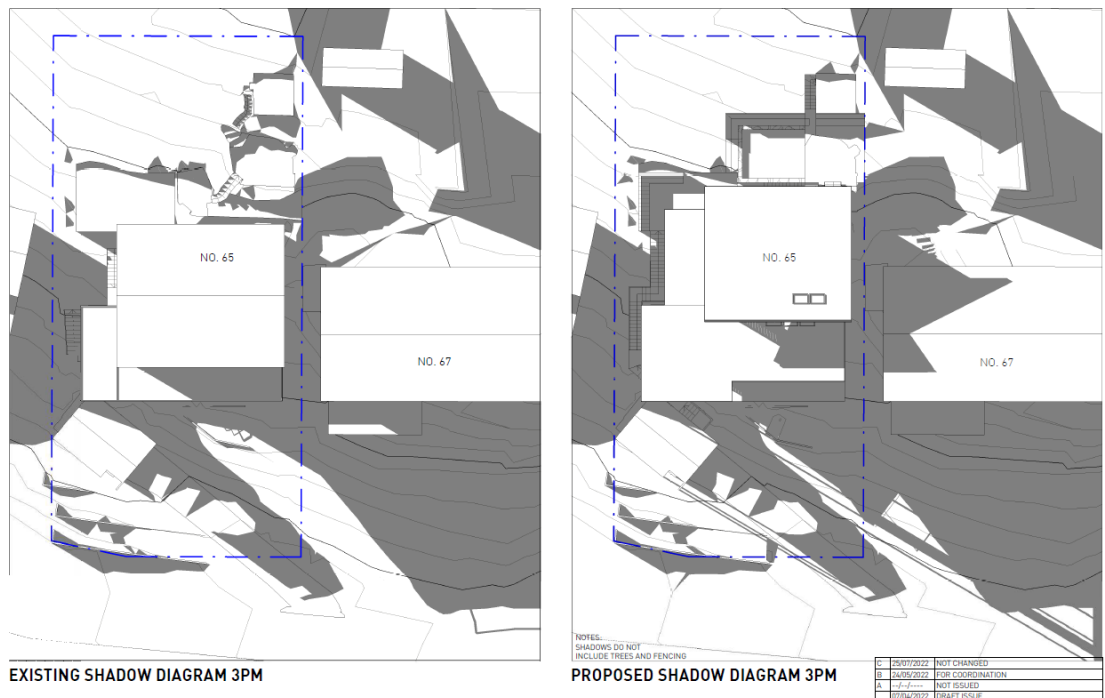


Figure 5: Comparison of existing and proposed shadowing at 3pm on 21 June.
(Source: Giles Tribe)

- To allow for the reasonable sharing of views.

Response: The subject site is steeply sloped such that neighbouring properties to the rear are elevated above the existing dwelling. The proposed height variations resulting from the addition of the roof to the ground floor balcony and the addition of a first-floor level are minor in scale. These works are not expected to present any material impacts on views from the rear neighbouring properties due to the topographical features of the locality.

The built form elements encroaching beyond the prescribed height plane will not materially impact on existing views enjoyed by adjoining properties to the east and west at No. 63 and 67 Dolphin Crescent. Accordingly, this objective is achieved notwithstanding the non-compliance.

- *To encourage buildings that are designed to respond sensitively to the natural topography.*

Response: Cut and fill works and other excavations are minimised to spot locations where such works are required, including the provision of the swimming pool in the rear yard (refer to **Figure 6**). The height variations themselves will not result in any additional earthworks and will be integrated into the stepped design of the existing dwelling, thus ensuring that the dwelling continues to respond to the steep sloped topography of the site and is adequately integrated with the landform. Accordingly, this objective is achieved notwithstanding the non-compliance.

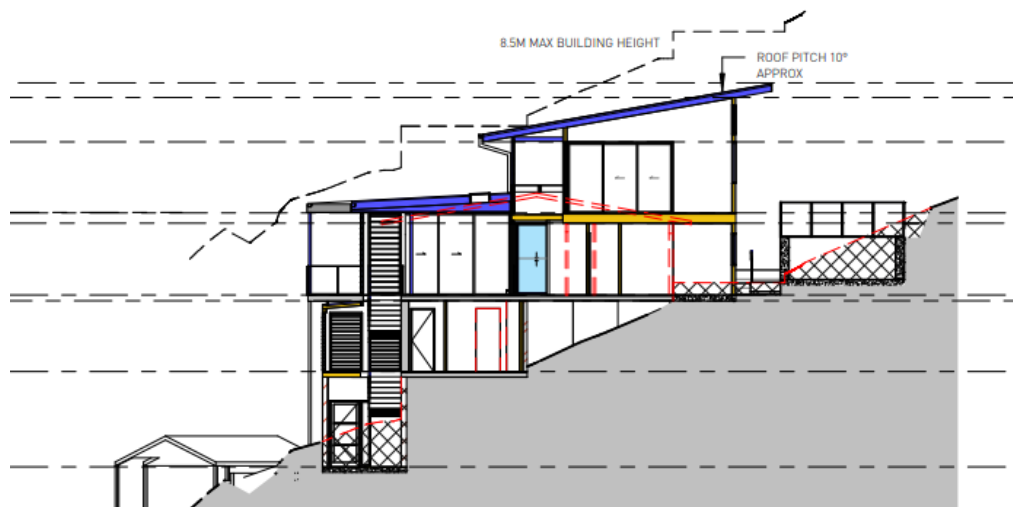


Figure 6: Section of proposed excavation works. (Source: Giles Tribe)

- *To minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Response: The site is not located in proximity of a heritage conservation area or a heritage item. The proposed alterations and additions are for an existing dwelling in an established residential area, and as such will not pose any additional visual impact on the natural environment. There are no heritage conservation areas or heritage items in the proximity of the site or the surrounding locality. Notwithstanding this, the proposed first-floor has been set back and designed such that its visual impact as perceived from the street is minimised. Accordingly, this objective is achieved notwithstanding the non-compliance.

Consistency with zone objectives

The subject site is zoned C4 – Environmental Living pursuant to Pittwater Local Environmental Plan 2014 (PLEP 2014). No use is proposed as part of the application. The objectives of this zone are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Response: The extent of the proposed height variation is minimised to spot locations resulting from the addition of a roof over the existing ground floor balcony and the addition of a first-floor level that is predominantly below the

8.5 metre height control. These variations are of a low scale and scope such that minimal impact is expected on any items of special ecological, scientific, or aesthetic value in the locality.

The highly constrained nature of the site, owing to its steeply sloping nature, has resulted in a design proposal that is considered to respond to the challenges of the topography and surrounding context in the best possible manner. The first-floor level has been carefully considered and located to the highest point of the existing dwelling to ensure that height variations are minimised to the greatest possible extent. In this case, the majority of the first-floor level remains under the 8.5 metre height limit, with only a small portion of the roof exceeding the height limit. Further, the location of the first floor level ensures that it is adequately set back from the front elevation of the dwelling, such that the visual impact of the house is minimised when viewed from the street.

The location of the greatest height variation, on the ground floor balcony, is due to the proposed roof to provide shelter to the currently exposed space and overall improved residential amenity and enhanced sustainability. The variation consists predominantly of the roof structure, its supporting pillars, and the open space of the existing balcony. Due to this, it is considered that the impacts of this variation on the visual massing of the dwelling and on overshadowing is minimal and will not impact on the aesthetic value or amenity of the neighbourhood.

Further, it is noted that the proposed height variation is for an existing dwelling in an established residential area, and as such will not pose any additional impact above that what was originally deemed acceptable under the original consent for the existing dwelling. Accordingly, the proposed development, including the exceeding elements, are consistent with this objective.

- *To ensure that residential development does not have an adverse effect on those values.*

Response: The proposed height variation is minimal in scale, as discussed above. It will present no further impact on the aforementioned values than what was originally deemed acceptable under the original consent for the existing dwelling. Accordingly, the proposed development, including the exceeding elements, are consistent with this objective.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

Response: The proposed development will remain a low density dwelling of minimal scale. It will maintain the existing stepped design to minimise cut and fill and other major earthworks to ensure the integration of the development with the sloping landform. Vegetation and landscaping will be retained and enhanced with new tree and shrub plantings to preserve the existing leafy character of the locality. Accordingly, the proposed development, including the exceeding elements, are consistent with this objective.

- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

Response: The subject site is not located within the vicinity of any riparian or foreshore vegetation or wildlife corridors. Further, the proposed height variation is for an existing dwelling in an established residential area and will not present any further impact on local vegetation and wildlife than what was deemed acceptable under the original consent for the existing dwelling.

Accordingly, the proposed development, including the exceeding elements, are consistent with this objective.

4.2 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

25. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

In this regard, we have formed the considered opinion that sufficient environmental planning grounds exist to justify the contraventions.

Due to the extreme topographical constraints of the site, variation of the building height control is considered appropriate in the circumstances of this case. The design of the proposed works to the existing dwelling ensures that the variations and any resulting impacts from these variations on the site and surrounding area are minimised to the fullest extent possible and are acceptable. As discussed earlier, the placement of the first-floor level towards the highest elevation of the existing dwelling and the design of the ground floor balcony roof have been carefully considered such that the variations occur only in spot locations, as demonstrated in the height blanket analysis in **Figure 7** below. It has been determined that these proposed additions present the best possible design outcome within the working limits of the building height standard, as they avoid further substantial exceedances of the height limit and resulting adverse impacts on residential amenity that would result from the alternate placement of these additions in locations of lower elevation. In this case, it is the inherent sloping nature of the site that creates environmental planning grounds. The exceeding elements of the proposed development will provide environmental planning benefits both for and from the development by materially contributing to a design that will ensure the objectives of the zone and applicable standards are met. The addition of the first floor will significantly enhance the amenity of the existing dwelling without any resultant

adverse impacts on neighbouring properties or the streetscape. The addition of the roof to the existing balcony of the ground floor will provide enhanced amenity and sustainability by providing shelter and relief from the sun particularly where the dwelling faces the north and west.

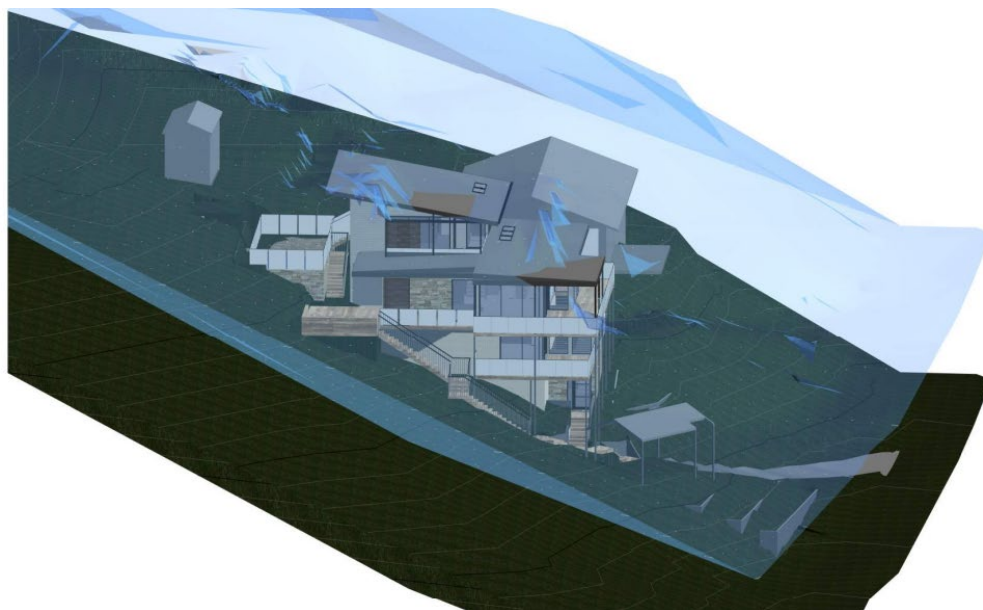


Figure 7: Height blanket analysis demonstrating locations of height variations. (Source: Giles Tribe)

Notwithstanding the variation to the standard, the proposed additions result in a dwelling that remains consistent with the desired and established character of adjacent and neighbouring dwelling houses in the locality and remains compatible with the site and its contextual constraints. The aforementioned siting of the proposed first-floor level towards the rear of the existing dwelling maintains its stepped form and ensures that the visual bulk of the dwelling when viewed from the street is minimised.

Should the development be required to comply with the prescribed building height standard, it is likely that it will result in detrimental environmental, and amenity impacts by further eroding the ecological values of the site, including further clearing of land and site disturbance through additional excavation works for an expanded building footprint. This outcome runs contrary to the established objectives of the locality and C4 Environmental Living land use zone as established within Pittwater LEP 2014, which aims to prevent adverse impacts on the ecological value of the site.

As such, it is found that the proposed development achieves a desired outcome by providing a balanced outcome by protecting the existing environmental significance and amenity of the site by protecting existing plant species on site and minimising earthwork disturbances to the sloping site.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard, thereby satisfying clause 4.6(4)(b).

The departing scheme is one which achieves the overarching Objects of s1.3 of the EP&A Act 1979, allowing for the orderly and economic use of the subject site without undue impact on any adjoining or adjacent land.

It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives of the C4 Environmental Living zone?

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

This request has demonstrated that the proposed development is consistent with the objectives of the development standard and the objectives of the zone in which the development is proposed to be carried out.

It is our opinion that the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard,

because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

4.5 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) that the contextually responsive development is consistent with the zone objectives, and
- b) that the contextually responsive development achieves and is consistent with the objectives of the building height standard, and
- c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- d) that having regard to (a), (b) and (c) above, compliance with the maximum building height standard is unreasonable or unnecessary in the circumstances of the case, and
- e) that given the developments ability to comply with the zone and maximum permitted building height standard objectives that approval would not be antipathetic to the public interest, and
- f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- 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.*

In conclusion, we have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a variation to the building height standard in this instance.



Suite 1204B, Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au

mecone.com.au