



**32 TIPPERARY AVENUE  
KILLARNEY HEIGHTS**

**CLAUSE 4.6 VARIATION REQUEST (HEIGHT OF BUILDINGS)  
FOR ALTERATIONS AND ADDITIONS TO A DWELLING**



Report prepared for  
**Action Plans**  
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## **Clause 4.6 Exceptions to Development Standards – Building Height**

Clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP 2011) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of the Warringah LEP 2011 Clause 4.6 are as follows:

*(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Under Clause 4.6(3) and (4) of the WLEP 2011, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

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

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

*(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,*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **1. Environmental Planning Instrument Details (Warringah LEP 2011)**

### **1.1 What is the name of the environmental planning instrument that applies to the land?**

Warringah Local Environmental Plan 2011

### **1.2 What is the zoning of the land?**

R2 Low Density Residential

### **1.3 What are the objectives of the 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 ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

**1.4 What is the development standard being varied?**

Clause 4.3 – Height of Buildings

**1.5 Under what clause is the development standard listed in the environmental planning instrument?**

Clause 4.3 – Height of Buildings of the Warringah LEP 2011

**1.6 What are the objectives of the development standard?**

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

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

**1.7 What is proposed numeric value of the development standard in the environmental planning instrument?**

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

**1.8 What is the numeric value of the development standard in your development application?**

The numeric value of the proposed building height proposed is 9.268 metres metres (when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*). See Figure 1 below.

The proposed maximum building height is 8.417 metres (cross section) to 8.432 metres (long section) to the roof ridge (when measured in accordance with the previously applied *Bettar judgement*). See Figure 2 below.

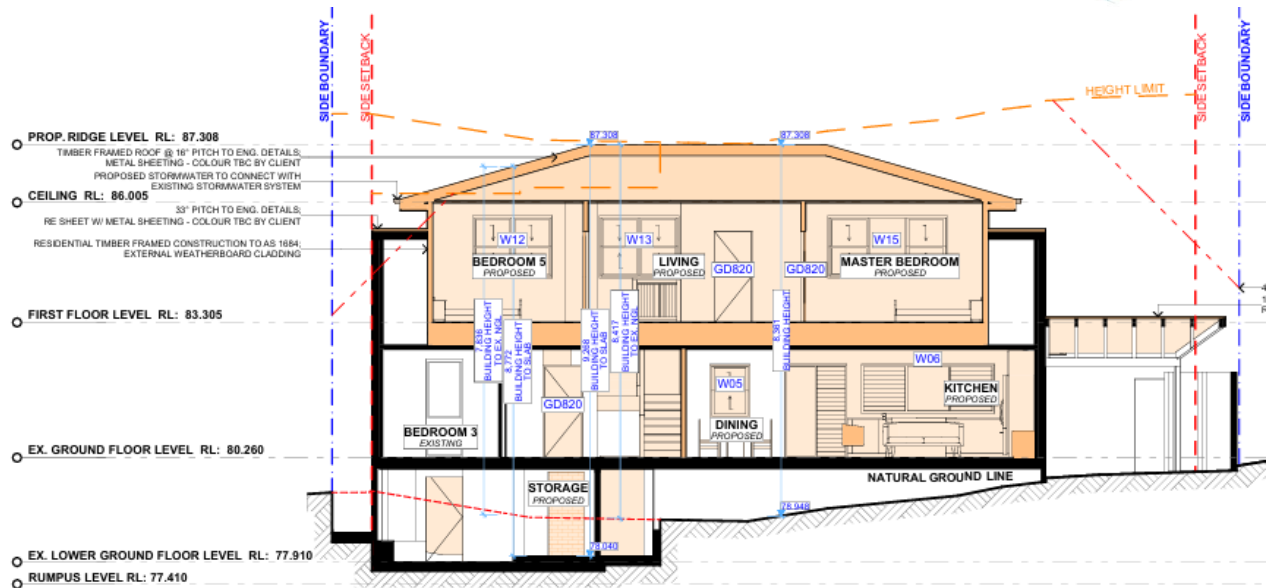


Figure 1. Cross section



Figure 2. 3D Height Blanket prepared by Action Plans illustrating compliance with the maximum height control using the *Bettar* calculation method

### **1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?**

The development proposes a variation of 0.768 metres or 9.03% (when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*).

The proposed development has a compliant maximum building height when measured in accordance with the previously applied *Bettar judgement*.

## **2. NSW Land and Environment Court Case Law**

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

### **2.1 *Wehbe v Pittwater* [2007] NSW LEC 827**

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827*, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

## **2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LE**

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

## **2.3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7**

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

## **2.4 Zhang v City of Ryde**

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent



with the objects of the standard which is not met; and

3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

## 2.5 Action Pty Ltd v Woollahra Municipal Council [2018]

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

## 3. Consideration

The following section addresses the provisions of clause 4.6 of the WLEP 2011 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

### 3.1 Five (5) Part Test - *Wehbe v Pittwater*

**1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).***

The Objectives of the standard are:

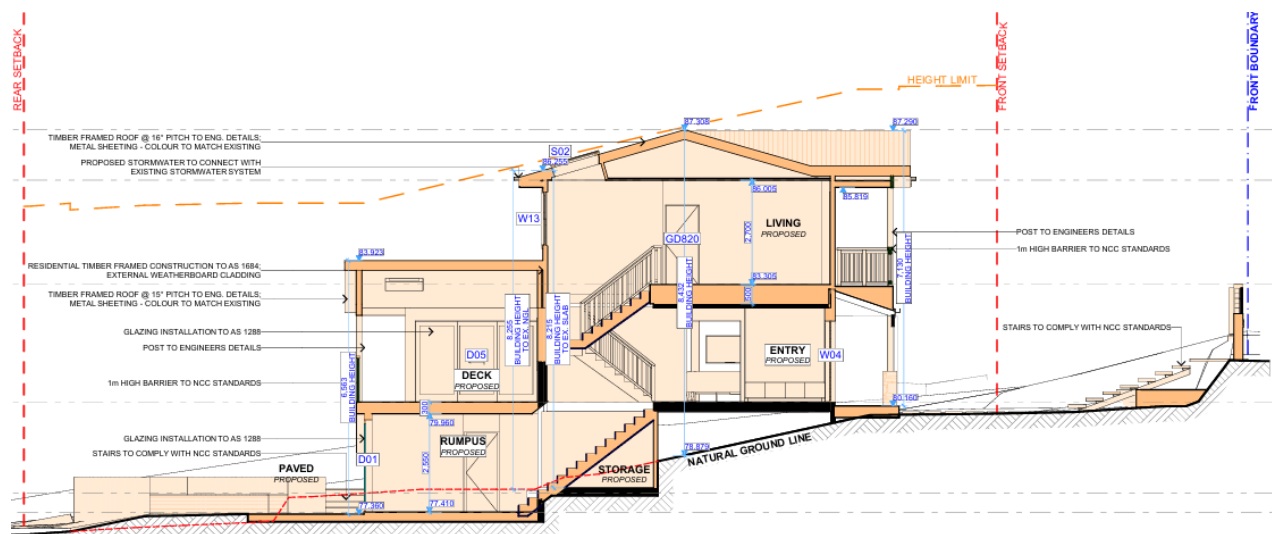


(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

**Comment**

The proposed alterations and additions are appropriate to the site and will result in a similar or lesser scale development than surrounding properties. The proposed development also achieves compliant wall heights. The variation is to the greatest extent, the result of taking into account the existing excavated sub-floor area as required by *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*, rather than the interpolated ground line previously applied by the *Bettar judgement*. The variation also occurs at the northern point of the roof ridge and fairly central within the new first floor level.

The dwelling has a compliant building height when the natural ground line is interpolated into the cross section, as illustrated in Figure 1(above) and Figure 2 (below).



**Figure 2. Long section**

The proposal will not result in any discernible impact as the natural ground line of the site is at a lower level than Tipperary Avenue and the adjoining properties to the south. It is also appropriately separated from the neighbour to the north. The resulting dwelling will sit comfortably within the streetscape and there will be no unreasonable view loss, loss of privacy or increase in shadowing for neighbouring properties.

The numerical variation to the building height is 0.768 metres or 9.03%, however, the height measurement utilising the natural interpolated ground line is compliant with a maximum height control. As a result, the built form is considered to be consistent with the building height controls and compatible with the streetscape character within the locality, despite the numerical non-compliance.

See Figure 2 above, a 3D blanket showing compliance with the 8.5 metres height control when the *Bettar* judgement is considered.

*(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

The proposed development presents with a consistent scale to surrounding dwellings within the locality. It will not present with excessive bulk when viewed from the adjoining properties, and the non-compliance will not result in any unreasonable view loss, loss of privacy or increase in shadowing for neighbouring properties.

A site visit has been undertaken and the proposed development is unlikely to result in any view loss.

Privacy will be retained for neighbours with the design being considerate of window placement/sill heights and the configuration of upper-level rooms (bedrooms and bathrooms). Key living areas are maintained on the ground floor and windows have been appropriately located. The additional living area to the upper floor has been orientated to the street frontage limiting opportunities for any direct overlooking into any key living areas.

The private open space of both the subject site and the adjoining properties maintain compliant solar access despite the variation as described in the SEE.

It is therefore considered this objective is met, despite the numerical variation.

*(c) to minimise any adverse impact of development on the scenic quality of Warringah' s coastal and bush environments,*

The alterations and additions will result in a dwelling which will remain in character with its surrounds and the streetscape. The residential locality will remain reflected in the character of the site and the scenic quality of the area will be positively contributed to, as a result of the development proposed.

It is therefore considered this objective is met, despite the numerical variation.

*(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The site and the development are not visible from any significant public places other than Tipperary Avenue, from which it will be an attractive addition.

It is therefore considered this objective is met, despite the numerical variation.

- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).***

This exception to development standards request does not rely on this reason.

- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).***

This exception to development standards request does not rely on this reason.

- 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).***

This exception to development standards request does not rely on this reason.

- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

### **3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*. In particular:

#### **Detail of Variation**

- The variation between the proposed works and the building height control is under 10%, when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*. The proposed building height is compliant at 8.417 metres,

when measured in accordance with the previously applied interpolated height set out in the *Bettar judgement*.

- The proposed variation is largely the result of taking into account the existing excavated subfloor which is acknowledged in the *Merman judgement* to distort *the height of buildings development standard plane overlaid above the site, when compared to the topography of the hill*. The judgement acknowledges that this distortion can *be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014*.
- The sections provided with the plan set, demonstrate the dwelling largely presents with a compliant building height and the small variation does not result in inappropriate bulk or scale, remaining consistent with the adjoining dwellings and other dwellings in the locality, satisfying Cl1.3(g).

### **Neighbour Amenity**

Fulfillment of each of the criteria below demonstrates a development satisfying Cl1.3(g).

- The new works are appropriately located as a first floor addition to the existing dwelling, with an increased setback on all elevations to the floor level below and compliant wall heights. The adjoining dwellings to the south is located at a higher natural ground line than the subject site, meaning the resulting dwelling presents with consistent or lesser bulk and scale than neighbouring properties.
- Compliance with the height control would not result in a building which has a significantly lesser bulk, as the dwelling largely complies with the height control when measured in accordance with the interpolated natural ground line. Compliant building setbacks are proposed.
- A numerically compliant building height would have no material impact to neighbours, accordingly compliance with the development standard in this instance is unreasonable.
- Solar access impacts as a result of the small height variation are negligible. The works do no result in any increase in shadowing to neighbouring properties, as detailed in the accompanying solar access diagrams. Accordingly, compliance with the development standard based on this would be unreasonable.
- The minor height variation has no impact on privacy for neighbours, accordingly, the variation is reasonable in the circumstances of the case.

### **Site Constraints**

- The design, with a minor variation to the height, largely results from taking into account the existing excavated sub-floor area and the revised building height measurement definitions set out in the *Merman judgement*. As such the proposed variation allows for the orderly and economic use of the site and allows for an ecologically sustainable development satisfying Cl1.3(g) and (f).

### **Design and Streetscape Appeal**

- Strict numerical compliance with the height control would not result in a better urban design outcome. The architectural character proposed will result in the appealing redevelopment of this property, consistent with renovation works undertaken by other properties. Compliance with the development standard based on this would be unreasonable.
- The proposed development will not present with excessive bulk from the public domain and presents with a consistent two storey scale to surrounding properties.

### **Consistent with Zone Objectives**

- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone, ensuring that appropriate and reasonable housing is proposed. Compliance with the development standard based on this would be unreasonable.

### **Natural Environment**

- The numerical height variation has no impact on the natural environment, satisfying Cl1.3(b).
- The natural environment is unaffected by the small departure to the development standard and it would be unreasonable for the development to be refused on this basis.

### **Environmentally Sustainable Development**

- The proposal represents an environmentally sustainable design allowing for the extension of the life on the existing dwelling satisfying Cl1.3(f). Compliance with the development standard based on this would be unreasonable.

### **Social and economic welfare**

- The variation to the height as detailed above will have no social impacts for the site or local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.
- The variation as detailed above will have no economic impacts for the site, or the local area, satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

### **Appropriate Environmental Planning Outcome**

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard.
- The variation will be compatible within the context of the site surrounds and reasonable in the circumstances of the case satisfying Cl1.3(c). Compliance with the development standard based on this would be unreasonable.

The environmental planning ground set out above, reflect the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and retention of amenity.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the height variation.

### **Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979***

#### ***Will the proposed development be in the public interest?***

It is considered that the proposed alterations and additions to the dwelling on an existing residential site, does not raise any matters contrary to the public interest.

#### **How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

*(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*

- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## Conclusion

The proposed development is for alterations and additions to an existing dwelling house on land zoned R2 – Low Density Residential.

As stated above the non-compliance between the proposal and the environmental planning instrument is 0.768 metres or 9%, when measured in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*.

The non-compliance is largely the result of taking into account the existing excavated subfloor which is acknowledged in the *Merman judgement* to distort *the height of buildings development standard plane overlaid above the site, when compared to the topography of the hill*. The judgement acknowledges that this distortion can be described as *an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014*.



The variation will not result in any unreasonable impacts in regards to view loss, loss of privacy or increase in shadowing for neighbouring properties, due to the lower natural ground line of the subject site and the provision of compliant boundary setbacks. The resulting development will be of a similar scale to surrounding properties.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.