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13 September 2021

To Northern Beaches Council

RE: Clause 4.6 Application 5 Commonwealth Parade Manly – S4.55 Application to modify current consent DA436/2008. Clause 4.6 to Vary the Maximum Height Numerical Standard above ground levels existing by amounts varying from 0.540 metres (4.9%) to 1.090 metres (9.9%) at the southern end of the upper roof eaves. The s4.55 Modifications comprise reduced basement and excavation in response to concerns of neighbours to minimise risk, and improvements to pedestrian and road safety.

1.0. Introduction and Summary

1.1. This Manly Local Environmental Plan Clause 4.6 Application to the Northern Beaches Council relates to a s4.55 application to **Modify Consent No. Mod2020/0139 - DA436/2008** for demolition and construction of a new residential flat building. Although this clause 4.6 application is not required for a s4.55 application we do so in response to council's request. We are advised that Clause 4.6 applications are NOT required or appropriate for s4.55 applications and confirmed by Northern Beaches Council letter of 3 September 2021 reference PAN-138666. We quote from that letter (our Italics).

"A Clause 4.5 Exception to Development Standards statement which addresses the non-compliance with clause 4.3 – Building Height is required to properly assess the application, despite not being technically required for a Modification of Consent. The Land and Environment Court has ruled in recent judgements that a clause 4.6 statement should be lodged nonetheless and the assessment officer will expect a Clause 4.6 statement to be lodged for their consideration of the merits of the proposed increase in building height."

This clause 4.6 application is submitted to satisfy council's specific request relating to the height control and should be read in conjunction with our Statement of Environmental Effects (SEE) dated 13 September 2021.

1.2. The modifications result in a breach of the clause 4.3 numerical height control Height varying from 0.54 metres at the roof ridge to 1.090 metres at the southern top level roof eaves.

1. The current consent is below the MLEP 11 metre height control.
2. The approved height in the current consent is RL25.470) and the modifications propose to increase this to RL26.470). When comparing ground levels existing the breaches in the height control vary when viewed at different points from 0.540m and 1.090 metres. Refer to architects drawing A3.01A.
3. The breach varies from 4.9% to 9.9% and is 1.090 metres at its maximum above the height control.
4. We assess it on the worst case scenario to be sure.

1.3. The consent authority should be satisfied that this application demonstrates the proposal:

- Does not conflict the Height planning objectives.
- Has no negative environmental issues and does not impact on views.
- There are sufficient environmental planning grounds to justify contravening the standard.
- The development is in the public interest.
- There is no public benefit in maintaining the Height development standard in this instance.

2.0. The Site and Locality

2.1. Details of the site and locality are contained in our Statement of Environmental Effects of 11 September 2021, which we summarise.

1. The property is Lot C in SP 11874 and known as No. 5 Commonwealth Parade Manly. NSW 2095. Erected on the site is an older three-storey residential flat building with vehicle access from The Crescent at the

rear. The description of the site and locality is provided in previous documents lodged with the MOD2020/0139 and also in the Statement of Environmental Effects accompanying this latest application.

2. The site is irregular in shape with a frontage of 15.4 metres in Commonwealth Parade, 9.2 metres to The Crescent and a depth of 38.8 metres. The site area is 460m² and slopes approximately 6m west to east.
3. The adjacent property 1-3 Commonwealth Parade comprises a three-storey residential development.
4. The adjacent property 7 Commonwealth Parade comprises a multi-storey residential flay building known as “Hilder Lea” The property is listed as an Item of heritage issue in the Manly LEP. The building is seven (7) storeys and is described in council reports as – “The Hilder Lea block of flats is of significance for the local area for historical and aesthetics and as a representative example of early “Chicagoese” style architecture applied to residential flats. The building is one of the earliest high rise apartment buildings in the Manly district and Sydney area. The building has local landmark qualities and makes a major contribution to the townscape of Manly.”



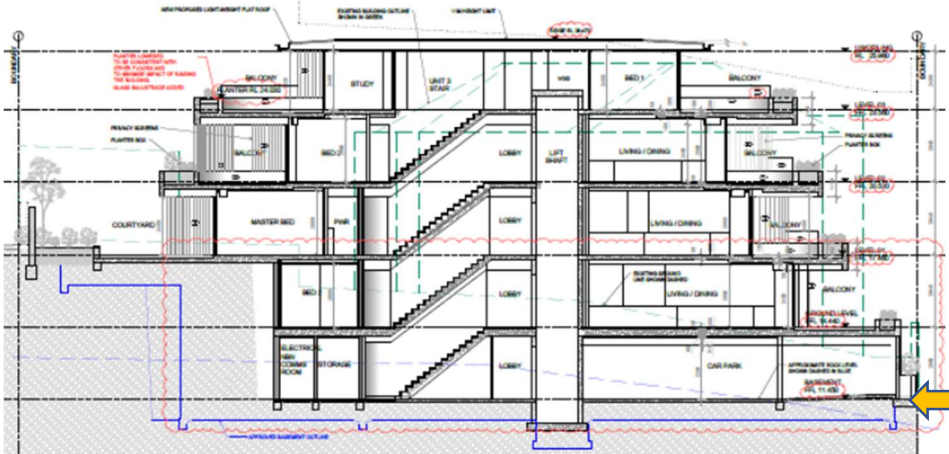
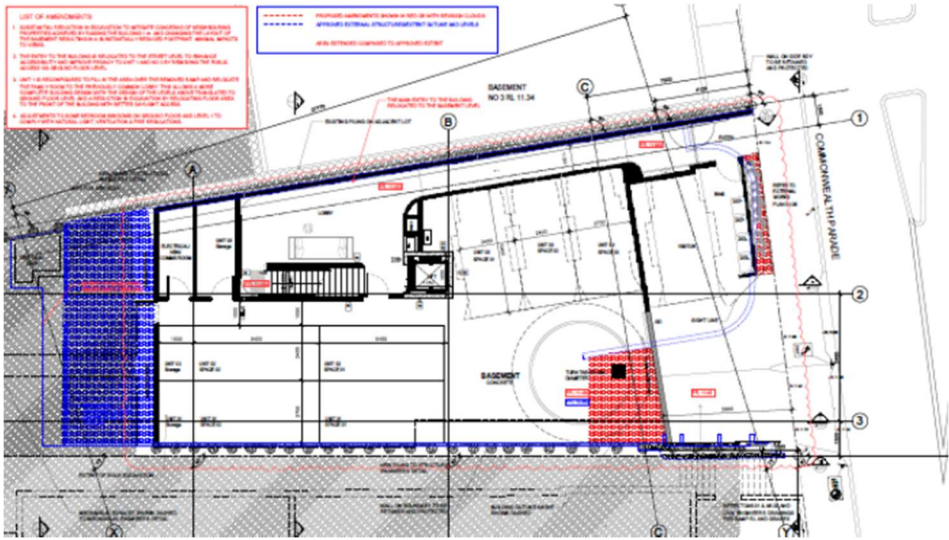

Above – Fig.2.0-1 – Aerial view of locality and subject site. The building footprint of adjoining No. 7 Commonwealth Parade and others is clearly visible. Also, the shadow impact of No. 7 Commonwealth Parade due to the height of that building.

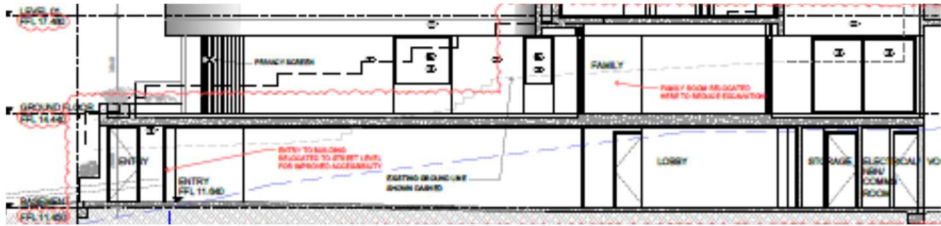
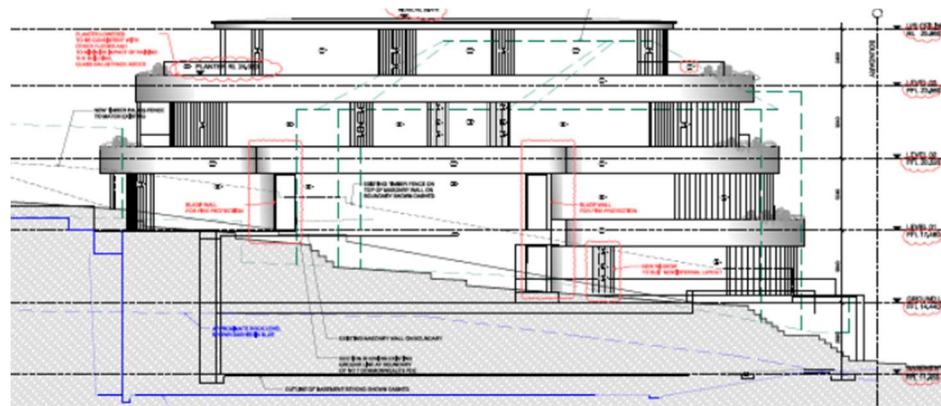
3.0. Proposed Modifications, Comparison, and Impact Summary - Architect’s drawings.

3.1. The modifications are outlined below numbered 1 to 6.

The existing approved height is at RL25.470 and the modifications increase this comparative ridge height to RL26.470. Variations in ground levels existing result in breaches varying up to 1.090 metres but all within the ridge height of RL25.470. The proposed modifications are outlined in the Table below.

Primary Modifications		Reason	Impact Assessment/Outcome
1	Reduction in basement excavation, changed layout of basement, raising of floor heights and the approved building ridge height by 1 metre.	<p>To mitigate concerns of adjoining properties, particularly No. 7 Commonwealth Parade and the absence of structural drawings of that building including footings.</p> <p>To improve driveway safety and people access to the building.</p>	<ol style="list-style-type: none"> 1. Reduced excavation and associated risks. 2. Reduced volume of spoil from the site. 3. Reduced basement footprint. 4. Significantly improved pedestrian access. 5. Significantly improved road safety for cars entering and exiting the carpark and for drivers driving along Commonwealth Parade. 6. No impact on views which are mostly interrupted by the dense tree growth in and around West Esplanade and the Manly Art Gallery and Museum. 7. Breaches the MLEP height control result in no negative impacts and achieves planning objectives.

	 <p>A301</p>  <p>A100</p>
<p>2</p> <p>Entrance to building relocated to street level.</p>	<p>In conjunction with the desire to reduce excavation risks there was deliberate reconsideration of the approved access to achieve improved pedestrian access to the building - more people friendly, especially for an older age group with possible restricted movement.</p> <p>1. The current consent does not have disabled access (not required). However, this new modification provides disabled access. 2. This is a positive improvement to pedestrian access and also to the building streetscape and design.</p>  <p>A202</p>

3.	Unit 1 reconfigured to fill in the area above the removed ramp and relocate family room to the previous common Lobby.	Take advantage of the changed basement carpark ramp and allow a more complete building design with the layout of apartments above transposed to the ground floor.	<ol style="list-style-type: none"> 1. Improved design and livability of apartment 1. 2. Transfer of some floor area to the front of the building with improved natural lighting. 3. Reduce extent of excavation. 4. No negative impact.
			
4.	Adjustments to bedroom windows on ground floor and level 1.	Review of regulations, privacy and amenity of neighbours and occupants.	<ol style="list-style-type: none"> 1. Improved and compliance with natural light, ventilation, and fire regulations. 2. Improved privacy. 3. No negative impact.
5.	Minor internal adjustments to apartments and planters & balustrades.	Opportunity to review internal layouts and planter boxes and provide partial glass balustrades to minimise impact of raising height of building.	<ol style="list-style-type: none"> 1. No negative impacts 2. Redesign of planter boxes with partial glass balustrades a positive.
6.	Provision for Blade walls on south elevation	For fire protection.	Positive.
		 <p>A204</p>	

1.0. SUMMARY

1. The raising of the basement level and reduction in excavation will mitigate concerns of neighbouring properties relating to the potential to cause damage to their buildings and raises the overall ridge height above the MLEP Height control over as relatively short distance by amounts varying from 540mm to 1090mm with no apparent negative impacts as demonstrated in the Shadow diagrams and view analysis drawings, photos and montages prepared by the project architects and assessed in our Statement of Environmental Effects.
2. The height increase is shown in the following 3D drawings – Existing building and Current consent (left drawing) and Proposed modifications and breach (right drawing).



Above – Fig. 3.0-1 – Current consent - Rear-The Crescent

Fig.3.0-2 – Proposed s4.55 (with approved shown in red).

Note: Outline of the existing building is overlaid in the drawings. There is no impact on views other than minor loss of trees.

2.0. BENEFITS ACHIEVED:

1. Raising the basement level, and changing the layout results in a reduced basement footprint and elimination of driveway ramp access with resultant improvements in access and safety.
2. The pedestrian entry to the building is relocated to the street level to provide level pedestrian accessibility and improve privacy to unit 1 and No 3.
3. The elimination of the former driveway ramp increases entry and exit safety, and allows a vehicle to wait on-site if another vehicle is exiting rather than wait on the street. Positive.
4. Unit 1 is reconfigured to fill in the area over the deleted ramp and also to relocate the family room to the previously common lobby. This allows a more 'complete' building design with the design of the levels above translated to ground floor level and a reduction in excavation by relocating floor area to the front of the building with better daylight access.
5. Adjustments to some bedroom windows on ground floor and level 1 to comply with natural light, ventilation & fire regulations.

3.0. CONCLUSION

1. The modifications are minor and well founded and based on sensible and practicable considerations to reduce the extent of site excavations and risk to adjoining properties, also improve pedestrian safety and vehicle/traffic safety in Commonwealth Parade. The apartment internal modifications result in increased livability of the apartments.
2. The modifications provide improved outcomes and comply with the requirement for essentially the same development. When comparing the current consent with the proposed modifications, the visual differences – including the increased height, when viewed from any location, including from above and when viewed from Commonwealth Parade, adjoining properties and locality are minimal, of a minor nature, and would be difficult for a casual observer to notice.

4.0. Manly Local Environmental Plan 2013 (MLEP)

4.1. The land is zoned R1 General Residential under the provisions of the MLEP 2013. The MLEP Clause 4.3 – Maximum Height Control and objectives apply.

4.2. MLEP 2013 –Clause 4.3 Height of Buildings - Objectives

(1) The objectives of this clause are as follows—

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,
- (b) to control the bulk and scale of buildings,
- (c) to minimise disruption to the following—

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),
- (iii) views between public spaces (including the harbour and foreshores),

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

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

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

5.0. Authority to contravene a development standard.

The authority to contravene a development standard is contained in clause 4.6 of the Manly Local Environmental Plan (MLEP). This clause 4.6 application is submitted to support the development application and Vary Development Standard – Exceptions to Development Standards.

6.0. Assessment Clause 4.6 - Exceptions to development standards

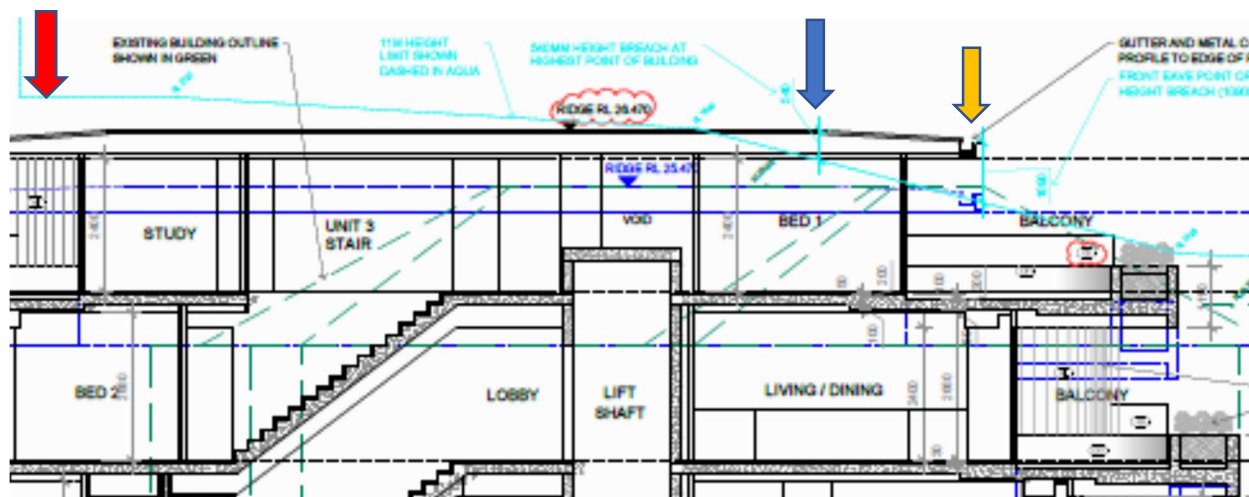
6.1. Basis of assessment - In preparing this clause 4.6 application we had regard to relevant L&E Court judgements including *Winton Property Group Limited v North Sydney Council [2001] NSWLEC 46* where his Honour set out five questions that need to be addressed; and *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and a later judgement *Randwick City Council v Micaul Holdings Pty Ltd [2016]*; and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*. We are not lawyers, and our understanding of these judgments is briefly as follows:

1. The judgement – Four2 Five Pty Ltd –in essence that Clause 4.6 applications need to be more detailed than the former SEPP 1 Applications and need to address the environmental grounds particular to the circumstances, the proposed development, and the site specific, as opposed to grounds that could apply to any similar development on the site or in the vicinity.
2. The judgement – Randwick
3. City v Micaul Holdings – suggests that the approach is less restrictive than that adopted in the Four2Five judgement in that a clause 4.6 application would be acceptable if it can substantiate that the variation sought did not cause environmental harm.
4. The judgement – Initial Action – the consent authority must be satisfied there are sufficient environmental grounds to justify contravening a development standard. The written application to vary the control must:
 - Focus on the element that contravenes the LEP numerical standard, not the development as a whole.
 - Demonstrate to the consent authority that there are sufficient environmental planning grounds to justify contravening the development standard.

6.2. Variation Summary

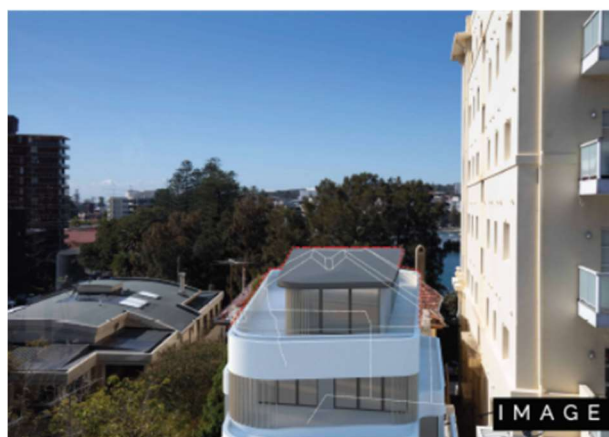
The existing development consent is being modified to minimise the potential risk of damage to adjoining buildings responding to concerns raised by owners of buildings adjoining on both sides and the absence of architectural and engineering drawings for No. 7 Commonwealth Parade. The modifications reduce the extent of excavations and associated risks, and also provide other benefits as outlined elsewhere in this application and in our Statement of Environmental Effects dated 13 September 2021.

The MLEP height control for the land is 11 metres and the approved height in the current consent is RL25.470, and the modifications propose to increase this to RL26.470. A review of surveyed ground levels shows that the breach varies from 0.540m and 1.090 metres as measured from the architectural drawing No. A3.01A – extract below –



Above - (Red arrow =11m height control, Blue arrow =540mm and Yellow arrow =1090mm towards southern end.

The architect's 3D diagrams below demonstrate the visual difference between existing building and the current consent (left) and that now proposed (right).



Above – Fig. 6.0-1 – Approved design- Rear-The Crescent

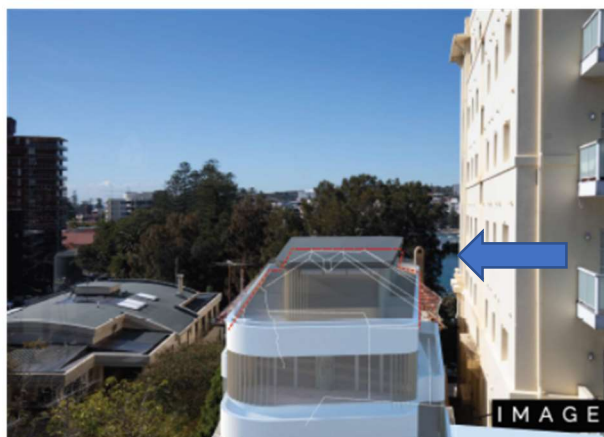


Fig.6.0-2 – Proposed s4.55 (with approved shown in red)

Note: Outline of the existing building is also overlaid in the drawings. There is no impact on views.

LEP Requirement – Maximum height of buildings	11 metres above ground levels (existing).
Proposed – RL26.470	Varying from 540mm to 1090mm
Is the planning control in question a development standard?	Yes
Is the non-compliance relating to the clause requirement a Numerical and/or Performance based variation?	Numerical
Numerical variation as a % variation to the requirement.	Maximum variation = 9.9%

6.3. Relevant Questions and Assessment Response

The proposal must satisfy the objectives of Clause 4.3 – Height of Buildings, the underlying objectives of the particular zone, and the objectives of Clause 4.6 - Exceptions to Development Standards under the MLEP. The assessment follows:

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

Response: The prescribed Building Height limitation pursuant to Clause 4.3 of the MLEP 2013 is a development standard.

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

Response: The underlying objectives and response is set out in the following table:

The objectives of clause 4.3 are:	Response
<p>1) The objectives of this clause are as follows—</p> <p>(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,</p> <p>(b) to control the bulk and scale of buildings,</p> <p>(c) to minimise disruption to the following—</p> <p>(i) views to nearby residential development from public spaces (including the harbour and foreshores),</p> <p>(ii) views from nearby residential development to public spaces (including the harbour and foreshores),</p> <p>(iii) views between public spaces (including the harbour and foreshores),</p> <p>(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,</p> <p>(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.</p>	<p>1. The current development consent DA436/2008 is contained within the MLEP 11 metre height control. The approved height in the current consent is RL25.470) and the modifications propose to increase this to RL26.470 – varying over a relatively small area from 540mm to 1090mm representing an increase over the control varying from 4.9% to 9.9% - and does not increase the visual building bulk or scale, or the streetscape.</p> <p>2. The proposed modifications are for significant beneficial reasons including reduced construction risk to adjoining properties, reduced excavation and basement footprint, achievement of accessible pedestrian access to the building, increased safety to pedestrians and significant improvements in safety for vehicles entering and exiting the building.</p> <p>3. The proposal is compatible with the existing and desired future character of the area.</p> <p>4. There are no view losses and no negative impacts on either public or private views or increased shadows relating to the small breaches of the control.</p> <p>Conclusion: The proposal achieves the planning objectives.</p>

Q3. What are the underlying objectives of the zone?

Response - set out in the following table:

The objectives of the zone R1 General Residential	Response
<p>Objectives of zone</p> <ul style="list-style-type: none"> • To provide for the housing needs of the community. • To provide for a variety of housing types and densities. • To enable other land uses that provide facilities or services to meet the day to day needs of residents. 	<p>1. There is no change to the current consent in providing three residential apartments.</p> <p>2. There is no change to the apparent visible bulk, scale, height, or amenity of the current development consent and the small breaches in height varying from 0.540m and 1.090 metres would not be discernible to casual observers or from neighbouring properties.</p> <p>3. Conclusion: The proposal achieves the planning objectives of the zone, and the minor height breach would not be discernible to a casual observer or neighbour. The breach in height does not have a negative effect on ecological, scientific, or aesthetic values or impact negatively on neighbouring properties.</p>

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

Response – as stated in the following table:

The objectives of clause 4.6 are:	Response
<p>Exceptions to development standards</p> <p>(1) The objectives of this clause are as follows—</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p>	<p>1. Flexibility in the numerical control will achieve considerable benefits as outlined in clause 3.0 of this Application. The need for flexibility is recognised in the MLEP and is an essential component of LEP – clause 4.6.</p> <p>2. The variation to the 11m height control is over a relatively small area and varies from 540mm to 1090mm.</p>

<p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p> <p>(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.</p> <p>(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—</p> <p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>3. There is no discernible visual change to the existing bulk, scale, height, or amenity.</p> <p>4. Public benefit is achieved in minimising constructions risks and providing accessible level pedestrian access and improved vehicle access and safety.</p> <p>5. Compliance with the 11m numerical standard in these circumstances is both unreasonable and unnecessary. There are sufficient environmental planning grounds in these circumstances to justify contravening the standard:</p> <p>6. Conclusion: The application has adequately addressed the matters required to be demonstrated. In this circumstance strict compliance with the development standard is unreasonable and unnecessary and there are sufficient environmental planning grounds to justify contravening the standard. It is in the public interest.</p>
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Q5. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Response:

1. Strict compliance with the numerical control would impact on the development by relying on the current consent which would deny the considerable benefits that will result in the proposed modifications as outlined in clause 3.0 of this Application. Namely,

1. Raising the basement level, and changing the layout of the basement results in a reduced basement footprint, reduction in excavated material, reduction in risk to adjoining buildings, provision of level accessible pedestrian access, elimination of the driveway ramp access with resultant improvements in access and safety.
2. The pedestrian entry to the building is relocated to the street level to establish level accessibility and improve privacy to unit 1 and No 3.
3. The elimination of the former driveway ramp increases entry and exit safety, and allows a vehicle to wait on-site if another vehicle is exiting rather than wait on the street. Positive.
4. Unit 1 is reconfigured to fill in the area over the deleted ramp and also to relocate the family room to the previously common lobby. This allows a more 'complete' building design with the design of the levels above translated to ground floor level and a reduction in excavation by relocating floor area to the front of the building with better daylight access.
5. Adjustments to some bedroom windows on ground floor and level 1 to comply with natural light, ventilation & fire regulations.

2. The proposal does not result in any negative environmental impacts and to enforce strict compliance would be restrictive on the development and/or negatively impact on the design integrity with no benefits achieved for anyone other than strict numerical compliance.

3. Conclusion: A requirement to strictly comply with the numerical control is unnecessary and would result in negative impacts with no benefits achieved other than satisfying a numerical compliance. The variations sought result in no loss of views or negative environmental impacts to neighbours or the public. The proposal is appropriate to the site, the residential flat building and locality, is in the public interest and worthy of consent. We note that it is a matter for the consent authority to form such opinion and we recommend such.

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

Response:

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

7.0. Concurrence of the Director-General

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

8.0. Conclusion

1. The proposed increase height over a relatively short distance varying from 540mm to 1090mm above the MLEP 11 metre Height control is necessary in order to reduce the extent of excavation and potential risk to adjoining buildings, provide level accessible pedestrian access and improve pedestrian and vehicle safety. The modifications result in considerable overall benefits to adjoining properties, safety, and the liveability of the proposed

2. The small area of the MLEP Height breach is over a relatively short distance, is reasonable. Strict compliance is unnecessary in the circumstances of the case:

- The proposal is consistent with the objectives of the Building Height standard and the zoning of the land when assessed against each individually and as a whole.
- The proposal is in the public interest for the reason that it complies with the relevant planning objectives, reduces risks, provides safety to adjoining properties increased resident amenity, and has no negative environmental impacts.

3. **The consent authority should have no difficulty in being satisfied that this Clause 4.6 application demonstrates compliance with the MLEP Building Height development standard is unreasonable and unnecessary in this circumstance, that there are sufficient environmental planning grounds to justify contravening the standard, and that the development is in the public interest.**

Yours faithfully,



Wayne Collins
Director

Qualification/Disclaimer

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

In preparing this report and reaching the conclusions stated, Colco, its officers and staff were required to make judgements on matters which are or may be incapable of precise assessment – being subjective in which others may reach a different conclusion. The statements, opinion and conclusions expressed in this report are made in good faith, reasonable belief they are correct and not misleading; and always subject to the limitation of accuracy of instructions and documents provided. Colco disclaims all liability to the extent permitted by law.