

Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.3 – Height of Buildings

Address: 7 Bruce Avenue, Manly

Proposal: Substantial demolition of, and alterations and additions to, an existing dwelling

Date: 27 September 2021

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of Manly Local Environmental Plan (MLEP) 2013. The development standard for which the variation is sought is clause 4.3 Height of Buildings under MLEP 2013.

The site is subject to development consent DA2018/0639 *for alterations and additions to the existing dwelling house*. A deferred commencement consent was issued for DA2018/0639 on 21 February 2019, which required amendments to the design of the roof of the additional level. Amended plans were submitted with an altered roof design to satisfy the condition of the deferred commencement and the consent was activated on 18 December 2019.

The amended roof form significantly impacted on the floor to ceiling heights of the uppermost level and reduced the usability and amenity of the space. Furthermore, as part of detailed design development, structural investigations were undertaken which identified that the existing structure had deteriorated. While the proposal retains portions of the south-western and north-western walls, it was found not to be feasible to retain portions of the other elevations given the safety risk during the demolition process.

Consequently, as a result of the reduced functionality and amenity of the uppermost level and the findings of the structural investigations, further demolition of the existing structure is necessitated, including the demolition of existing floors and internal walls and the north-eastern and southern-eastern elevations. Importantly, the proposal is consistent with the height, roof form and building footprint of the approved DA2018/0639.

2.0 Description of the planning instrument, development standard and proposed variation

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

The Manly Local Environmental Plan (MLEP) 2013.

2.2 *What is the zoning of the land?*

The land is zoned E4 Environmental Living under MLEP 2013.

2.3 What are the Objectives of the zone?

The objectives of the E4 Environmental Living zone are:

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.
- To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.
- To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.
- To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.

2.4 What is the development standard being varied?

The proposal seeks to vary the maximum building height of 8.5m. The height of a building on any land is not to exceed the maximum height shown on the Height of Buildings Map.

2.5 Is the development standard a performance based control? Give details.

No, the height of buildings development standard is a numerical control.

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

The development standard is listed under Clause 4.3(2) of MLEP 2013.

2.7 What are the objectives of the development standard?

The objectives of Clause 4.3 are:

- “(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”*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 establishes a maximum height of buildings control for the site as illustrated in the extract of the Height of Buildings Map included in Figure 1 below.

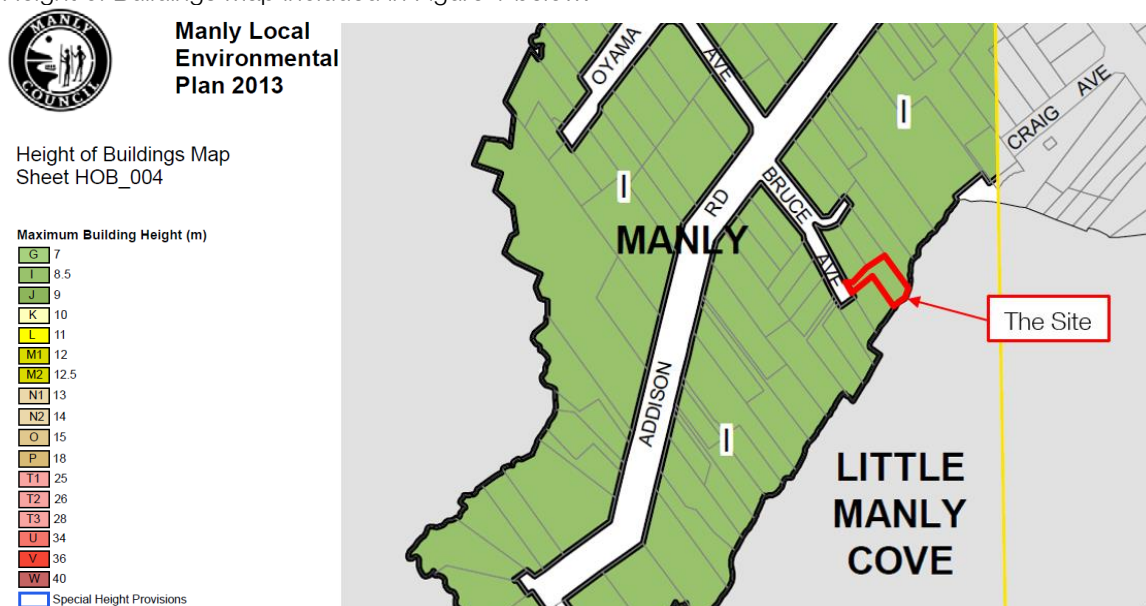


Figure 1: Extract of MLEP 2013 Height of Buildings Map

2.9 What is the proposed numerical value of the development standard in the development application?

The proposal exceeds the 8.5m maximum building height standard as outlined in Table 1 below. As identified in the table existing building on site currently exceeds the height control. The existing and proposed variations in the building height at the nominated points are graphically illustrated in Figure 2. The existing non-compliances are denoted in red and the proposed non-compliances are denoted in blue.

Building Height Control	Existing Heights	Existing non-compliance	Proposed Heights	Proposed non-compliance	Proposed increase in existing non-compliance
8.5m	A. Ridge: 11.45m (max) RL13.97m)	Ridge: 2.950m (max. non-compliance = 35%)	C. Roof slope: 11.635m (max. proposed height)	3.135m (Max. non-compliance = 37%)	0.185m (2%)
			D. Roof slope: 8.595m	0.095m (1%)	
	B. Roof flat: 8.858m	Roof flat: 0.358m (4%)	E. Roof/terrace flat: 8.595m	0.095m (1%)	1.415m (Max. non-compliance = 17%)
			F. Terrace balustrade: 9.645m		
			G. Wall: 9.075m	0.575m (7%)	

Table 1: Description of Building Height Exceedances

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The percentage of the proposed variation to the height standard ranges from 1% to 37%. The existing building varies from the height standard from 4% to 35%.

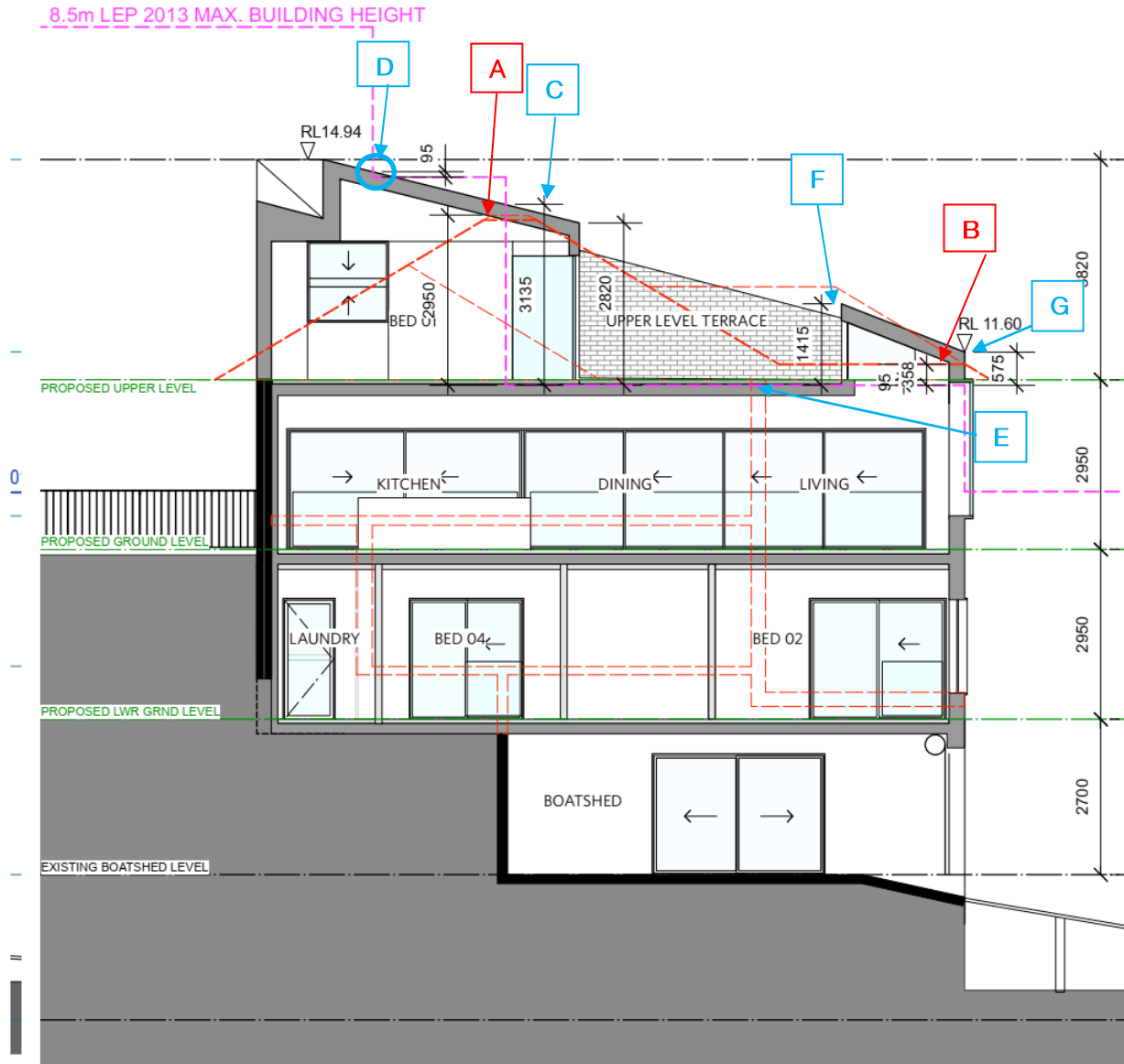


Figure 1: Existing and Proposed Building Height Non-compliances. The red labels (A and B) denote the existing height non-compliances while the blue denotes the proposed height non-compliances.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- “(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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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 Secretary before granting concurrence.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

3.2 Clause 4.6 (3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the 8.5m maximum building height is unreasonable or unnecessary in this circumstance for the following reasons:

- The existing dwelling currently exceeds the height controls, which is largely attributed to the steep slope of the site. As the proposal maintains the footprint and siting of the existing dwelling and elements of the structure, and the steep site topography, it also exceeds the height controls.
- The proposal results in a marginal increase in the existing maximum height variation by 0.185m, or 2%. However, the proposal does not exceed the building height applying under the development consent to DA2018/0639 issued on 18 December 2019.
- The height, scale and bulk of the proposal is consistent with the surrounding development and nearby dwellings fronting the foreshore. At the highest point the proposal has an RL of 14.94m, comparative to the existing dwelling which has an RL 13.97m. Importantly, the overall (ridge) height of the proposal sits below the ridge height of the adjacent dwellings. The proposal maintains appropriate scale relationships so that built form outcomes are compatible with surrounding development.
- The proposal locates the additional storey towards the north (rear) of the existing dwelling. Consequently, while the maximum RL 14.94m of the proposal is higher than the maximum RL 13.97m of the existing dwelling, the part of the proposal at RL 14.94m is within the height control (refer to Figure 2).
- The proposal does not have unreasonable amenity impacts on adjoining properties by way of overshadowing, visual and view impacts, or loss or privacy. Importantly, as the proposal maintains the building height of the approved DA2018/0639, it does not result in additional overshadowing or view loss impacts from what was previously assessed and determined to be acceptable.
- The height non-compliance does not adversely impact on the character or landscape setting of the harbour or foreshore. Removing the non-compliance would not significantly alter the perceived height and bulk of the building as viewed from the harbour and foreshore, or from surrounding development.
- The proposal complies with the FSR standard applying to the site.
- The proposal remains consistent with the objectives of the building height standard and the objectives of the E4 Environmental Living zone, despite the non-compliances as outlined below.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The underlying purpose of the objectives would not be defeated if compliance was required, however it is considered unnecessary in the circumstances as the proposal does not give rise to any adverse impacts in terms of views, visual impacts, overshadowing and privacy, or bulk and scale. In addition, the proposal is consistent with the character of the existing foreshore.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The objectives of Clause 4.6 seek to provide flexibility in applying development standards to achieve better outcomes for and from developments. This can involve a consideration of the objectives of s1.3(a), (b), and (c) of the *EP&A Act 1979* which are addressed separately at Section 3.6.

There are sufficient planning grounds to justify contravening the development standard in the circumstances of the case given the proposal is for alteration and additions to an existing development that already exceeds the controls and there will be minimal adverse impacts associated with the development as proposed.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

No. But the choice of controls has not taken into account the scale and form of surrounding development.

3.3 *Clause 4.6 (3)(b) requires demonstration that there are sufficient environmental planning grounds to justify contravening the development standard*

Topography

The non-compliances with the height limit are attributed to the steep topography of the site, which falls towards the foreshore. The existing dwelling accommodates a boatshed at the lower level, which is retained in the proposal. The height non-compliances occur directly above the existing boatshed level and closest to the foreshore where the site drops away. The highest parts of the building are setback further from the foreshore and are not located above the boatshed level and for this reason comply with the height limit. In this regard the scale and siting of the proposal responds to the topography and the constraints imposed by the existing boatshed.

Existing development

While the proposal involves the substantial demolition of the existing dwelling to enable the replacement of floor levels, key elements of the existing dwelling will be retained. The external walls on the south-west and north-west elevations, the boatshed and the siting, footprint and general arrangement of the dwelling will be retained. As noted above the proposed height non-compliances occur above the existing boatshed level and closest to the foreshore, which is where the existing height non-compliances occur.

Existing approval

The proposal is consistent with the building height approved under DA2018/0639, and as such has the same height variations which were previously assessed and considered acceptable in the circumstances.

The current proposal has arisen from the need to replace the existing floor levels due to compromised structural integrity, while increasing the floor to ceiling heights and functionality of the upper level.

Given the proposal does not alter the approved height it does not give rise to any additional adverse impacts relating to overshadowing, view loss or visual impacts from the harbour, from what was assessed and determined as acceptable in DA2018/0639.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the Height of Building standard

“(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,

- The height of the proposal is appropriate when considering the constraint of the site, including the fall of the land and vicinity to the harbour. The proposal has regard to the site topography by containing the upper level within a sloped roof form. The height is also setback to the rear of the existing dwelling, thereby ensuring a stepped built form that responds to the topography.
- The height, scale and bulk of the proposal is consistent with the height and scale of the 9 Bruce Street and other nearby dwellings fronting the foreshore. Importantly, the overall (ridge) height of the proposal at RL14.94 sits below the ridge height of the adjacent dwellings.
- As the site is a battle-axe block, the proposed additions are not visible from Bruce Avenue. Consequently, the increase in the non-compliance with the height standard will not adversely impact on the streetscape of Bruce Avenue.

(b) to control the bulk and scale of buildings,

- The bulk and scale of the proposal responds to topography of the site, the adjacent development and foreshore location. In this regard the proposal has an appropriate relationship to the surrounding development and the foreshore location.

(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),*
- The proposal has been assessed against the planning principles for view sharing established by Senior Commissioner Roseth in the Land and Environment Court decision of *Tenacity Consulting v Warringah [2004] NSWLEC140*. The proposal is not considered to result in unreasonable view loss from public places or from surrounding residential development. Importantly the proposal maintains the approved building height of DA2018/0639 which was assessed and determined to have an acceptable impact on views.
- Removing the non-compliance would not significantly alter the perceived height of the building as viewed from the harbour and foreshore. The height and bulk of the proposal is commensurate with adjacent development and will not have adverse impacts when viewed from the foreshore, harbour or Little Manly Beach.

(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,

- The proposed non-compliances in the height do not give rise to unreasonable overshadowing impacts of adjacent dwellings. Importantly, given the proposal maintains the building height of the approved DA2018/0639, it does not result in additional overshadowing impact from what was previously approved.

- (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"*
- As outlined in response to objective (a) above, the bulk and height of the proposal responds appropriately to the site topography. The additional bulk is largely located to the rear of the to the rear where the existing ground level is higher. Consequently, while the proposal increases the overall height of the existing dwelling by 0.97m from RL13.97 to RL14.94m, this portion of the proposal complies with the height limit (refer to Figure 2).
- The proposal does not adversely impact on significant vegetation or landscape features, including the existing rock face. The proposal does not alter nearby bushland environs or involve the removal of natural vegetation.

3.4.2 Objectives of the zone

The proposal is consistent with the objectives of the E4 Environmental Living zone as outlined below:

- (a) *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- The proposal provides for alterations and additions to the existing dwelling house. The proposal maintains the existing setback to the foreshore and primarily sits within footprint of the existing dwelling;
- (b) *To ensure that residential development does not have an adverse effect on those values.*
- The proposal does not adversely impact on the ecological, scientific or aesthetic values of the area;
- (c) *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*
- The proposal does not impact on canopy trees. The bulk and scale of the proposal ensures it will not dominate the natural scenic qualities of the harbour;
- (d) *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- The proposal does not negatively impact on the foreshore. While the proposal is located close to the foreshore, it does not alter the existing rock face, or other nearby geological features. Nor does the proposal alter nearby bushland environs or involve the removal of natural vegetation;
- (e) *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- The proposal does not involve works within the existing foreshore. Potential impacts on the ecological values and water quality of foreshore and harbour will be mitigated through the implementation of the stormwater management measures detailed in the Stormwater Management Plan prepared by ITM Design Consulting Hydraulic Engineers.
- (f) *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*
- The proposed respond to the topography of the site by containing the upper level within a sloped roof form that is setback to the rear of the existing dwelling. The proposal also has regard to the adjacent development and the existing landscaping and topography of the adjoining sites.

For the reasons outlined above the proposal is considered to be consistent with the objectives of the E4 Environmental Living zone.

3.5 *Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?*

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions.

3.6 *Is there public benefit in maintaining the development standard?*

Generally speaking, there is public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. The breach of the development standard in this instance is justifiable as the existing development already exceeds the controls and the proposal does not give rise to any adverse impacts. There is, in the specific circumstances of this case, no public benefit in maintaining the development standard.

3.7 *Is the objection well founded?*

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

The development does not contravene the objectives specified in Section 1.3(a), (b), and (c) of the Act, and the development will satisfy the E4 Environmental Living zone objectives and the objectives of Clause 4.3 Height of Building standard.

The development does not hinder the attainment of the objects specified with Section 1.3(a), (b), and (c) of the Act.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties or the foreshore.

A development that strictly complied with the numerical standard would not significantly improve the amenity of surrounding development or the landscape or environmental qualities of the foreshore. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the particular site circumstances and surrounding pattern of development.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.