

UPDATED CLAUSE 4.6 TO CLAUSE 4.3 OF MANLY LEP 2013

EXCEPTIONS TO DEVELOPMENT STANDARDS – **HEIGHT VARIATION**

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

at

60 CASTLE CIRCUIT SEAFORTH

PREPARED BY

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MANLY LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

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

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

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

Clause 4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.3 of the MLEP2013 – maximum height 8.5m, as demonstrated on the LEP map in **Figure 1** below.

The proposed height is 3.6m over the 8.5m height limit as the overall height is 12.1m. the maximum height variation is shown on Section F below:

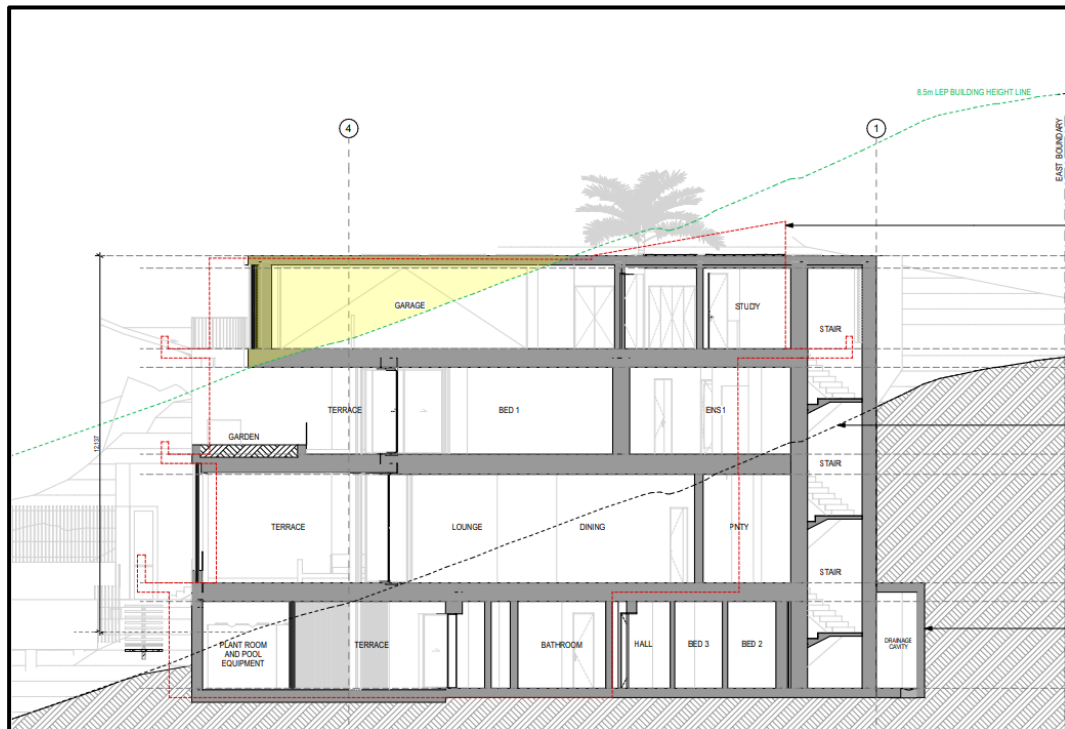


Figure 1: Excerpt of Section F which includes the greatest height variation of 3.6m



Figure 2: Excerpt of Building Height Maps

Justification for Contravention of the Development Standard

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

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

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

- The proposal complies with the objectives of the development standard and the R2 Low-Density Residential zone, indicated in the assessment in **Table 1** below. Furthermore, compliance with the development standard is unreasonable and unnecessary as it is in the public interest, given it is consistent with the objectives for the development within the zone.
- The proposed height has been reduced from that submitted with the DA, as shown in the comparison between that submitted and amended. It is apparent that the built form and height has been reduced in accordance with Council's comments in the correspondence. The following 3D images confirm that the height variations are confined to components of the uppermost level.

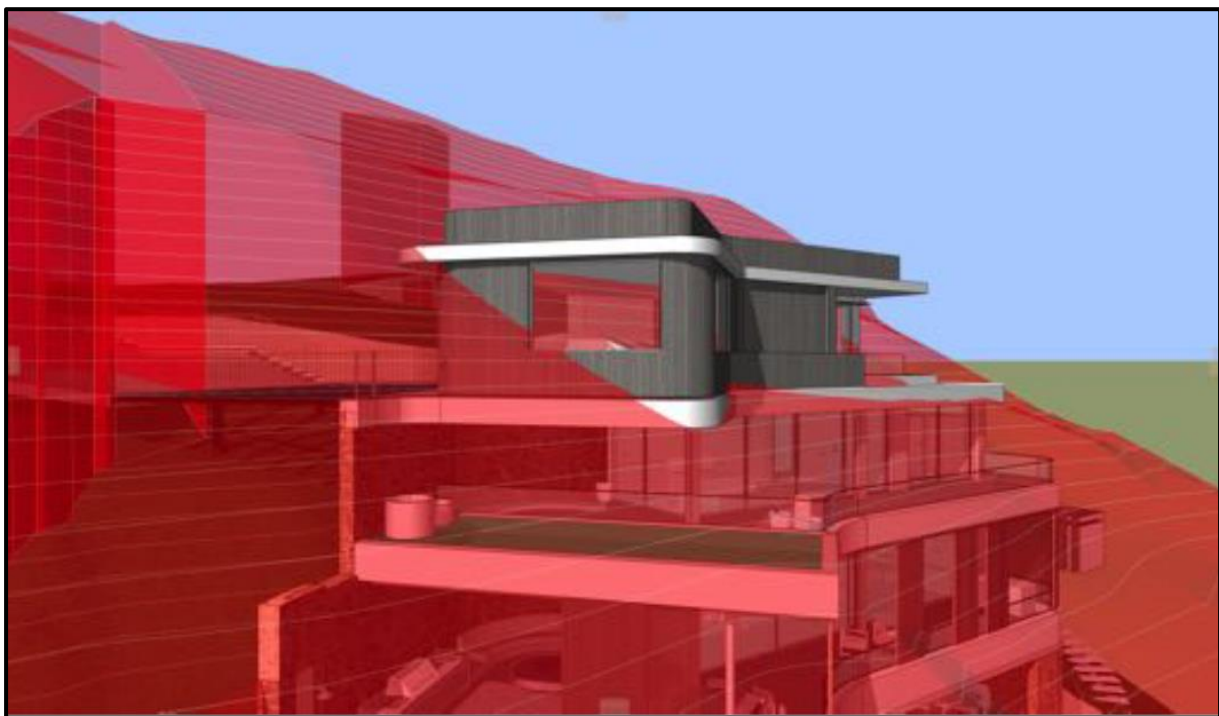


Figure 3: Height as submitted as viewed from north.

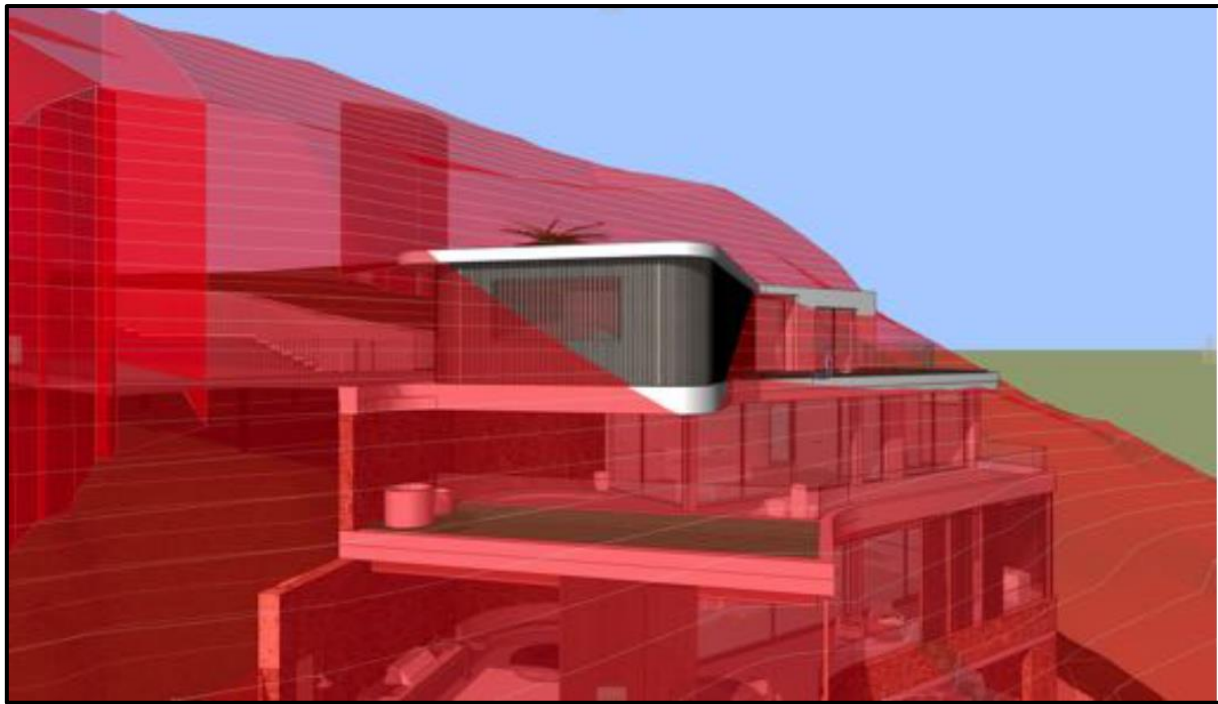


Figure 4: Height as amended as viewed from north.

- The above images are taken from an elevated location and do not represent the view of the building that would be available having regard to the sloping nature of Castle Circuit to the south of the site as well as the dense bushland to the south of the site. It is therefore considered that the above height variation would not be evident from any public vantage point along Castle Circuit. It is acknowledged that the overall height will be visible from the harbour to the west of the site, however, the proposed built form will be perceived against the backdrop of the sloping topography which includes substantially larger and more prominent dwellings higher upslope. The subject site represents the northernmost site in this section of Castle Circuit whilst the land to the west and north-west is zoned C2 which prohibits dwelling houses. This confirms that the bushland to the north, north-west and west of the site is likely to remain and maintain an effective landscape buffer. On this basis, the proposed height will not generate any visual bulk concerns from either public vantage points (i.e. Castle Circuit or the harbour).

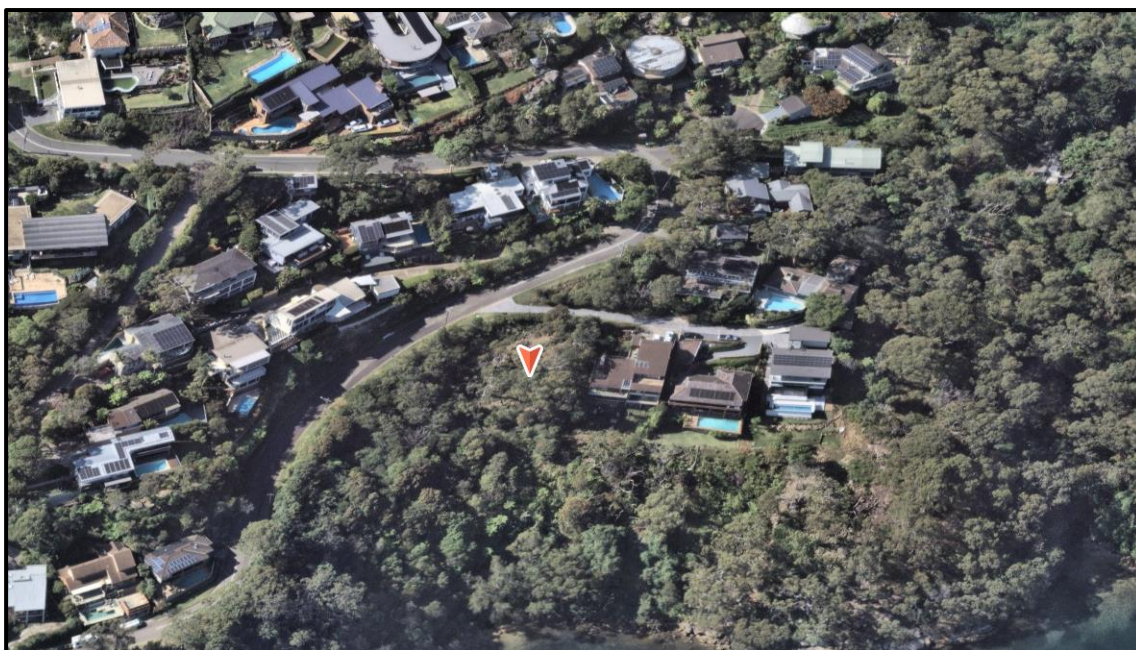


Figure 5: 3D aerial view which shows that the built form will be screened from the north and north-west from Castle Circuit by the established bushland which extends north of the subject site.

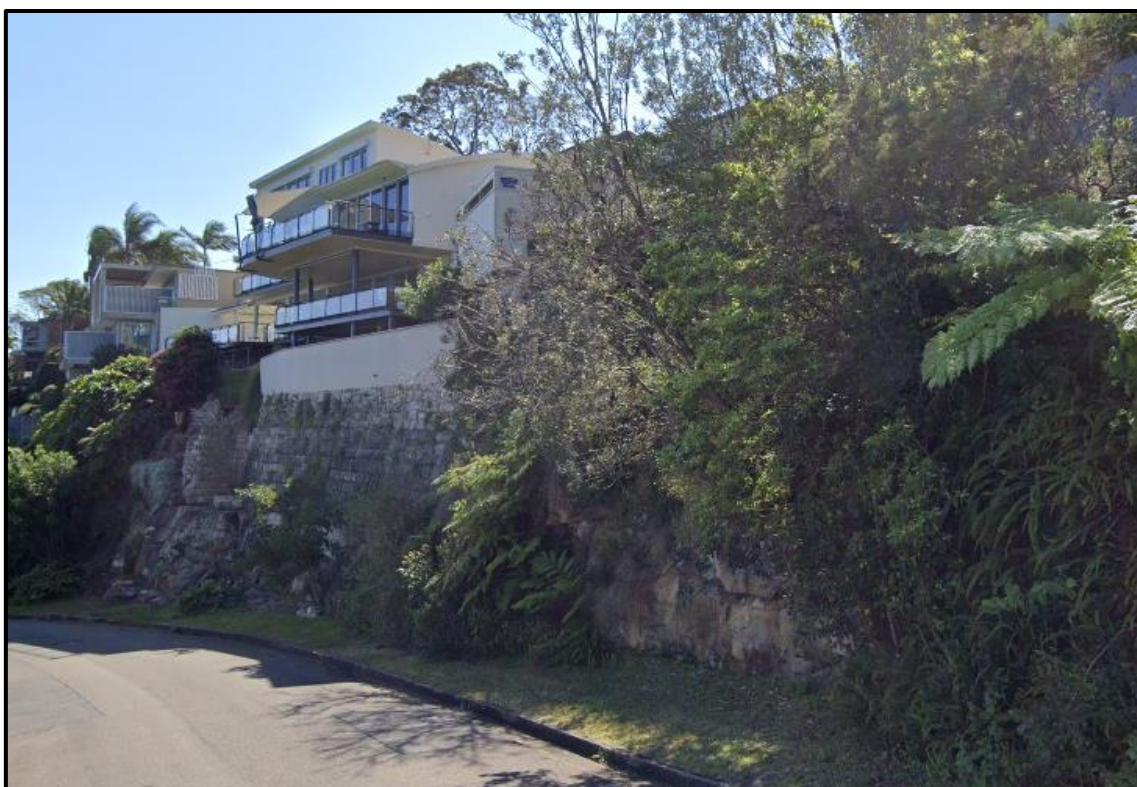


Figure 6: Elevated nature of the dwellings higher upslope which consist of 3 or more storeys elevated above the public domain



Figure 7: Elevated nature of the dwellings higher upslope which consist of 3 or more storeys elevated above the public domain.

- The 3D images from the south (58 Castle Circuit) show that only a minor portion of the built form above the height limit will be visible. In this regard, it is noted that the primary orientation of the adjoining dwelling is to the west, south-west and north-west towards the expansive harbour views, not sideways southwards to the subject property.

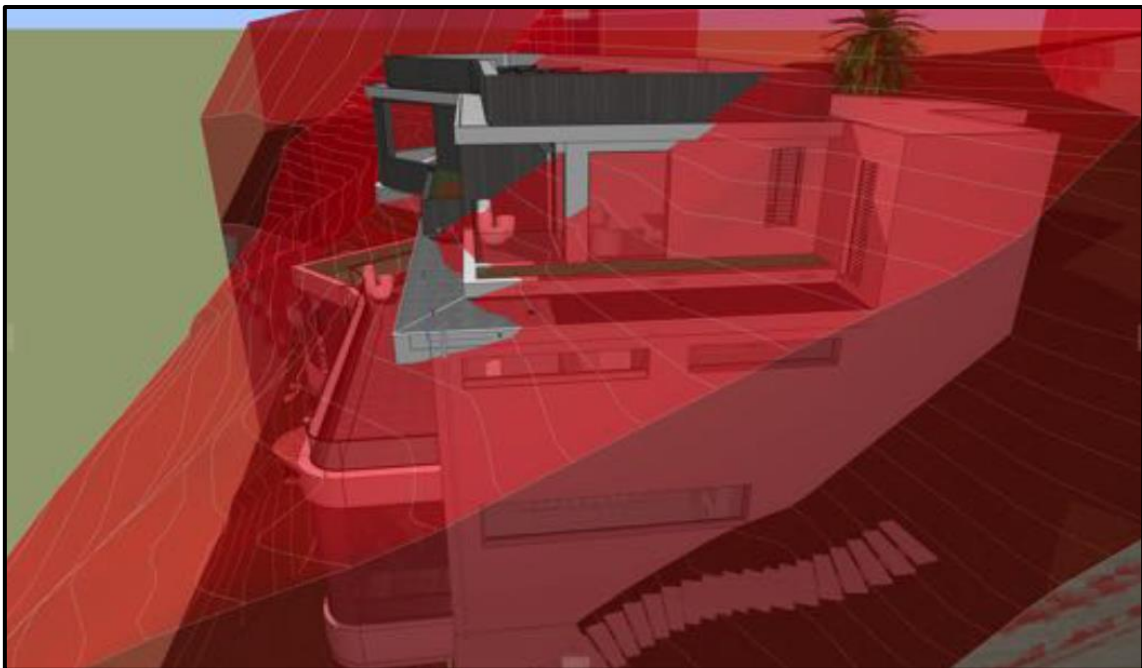


Figure 8: Height as submitted- as viewed from south.

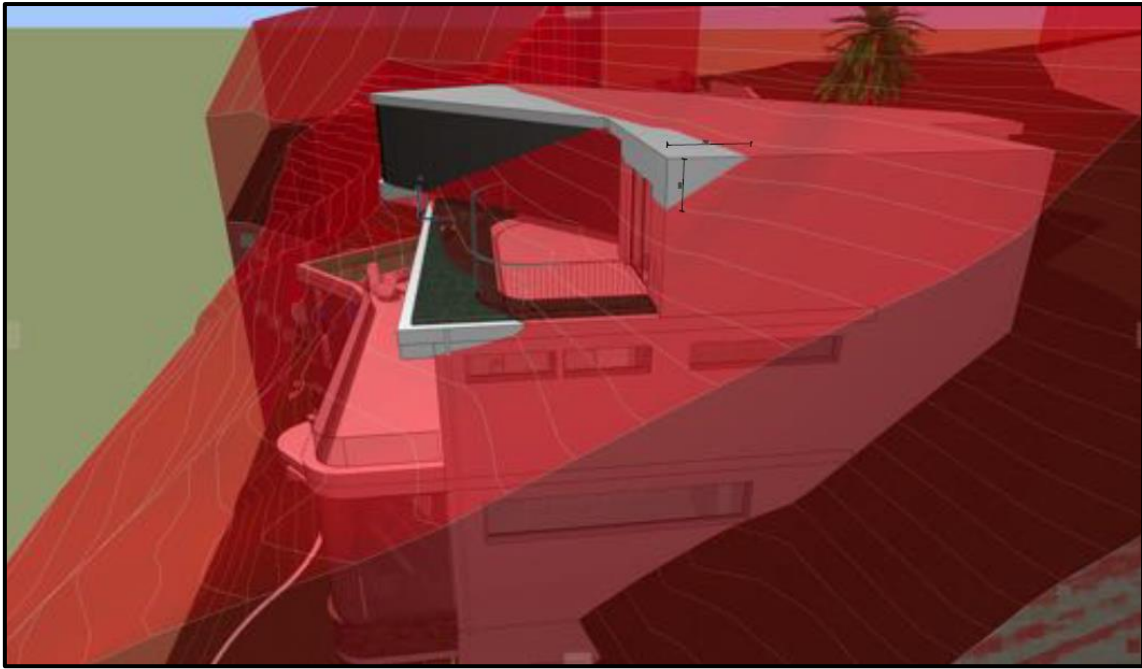


Figure 9: Height as amended as viewed from south

- It is reiterated that the proposed height variation will be imperceptible from Castle Circuit due to the steep slope of the site downwards from the site frontage towards the harbour. On this basis, it is confirmed that the height variation will not be responsible for any adverse streetscape impacts, as shown below:



Figure 10: View of existing and proposed views of the streetscape and site in general which shows that the single storey garage/entry form will not generate any adverse streetscape impacts whilst the proposed replacement plantings will actually improve views to the harbour from the public domain.

- Furthermore, the height variation will not be apparent from the properties higher upslope as shown in the image below:



Figure 11: View from higher up slope showing the single storey of the built form.

The proposed height variation will also not generate any adverse shadow impacts as the shadows to 58 Castle Circuit are generated by the built form which is compliant with the height limit. In any event, the property to the south will maintain in excess of 3 hours solar access between noon and 3pm to the primary living and private open space areas of that property, as shown below:

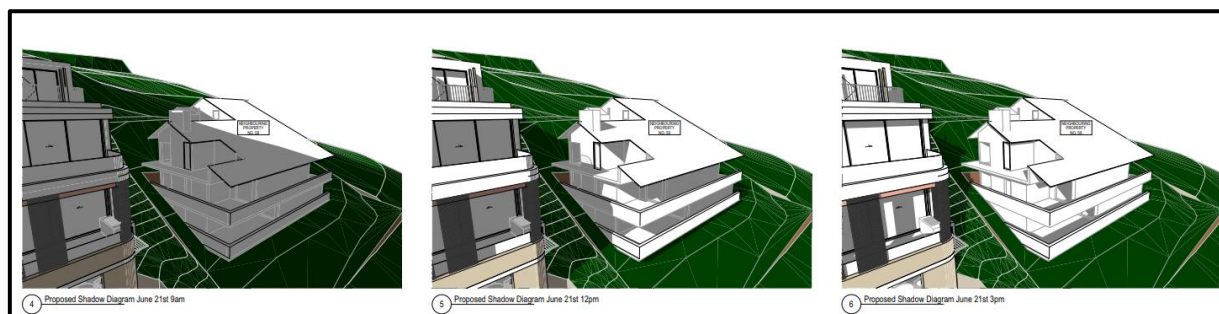


Figure 12: 3d solar access diagrams which show that the primary north and east-facing living room will continue to receive in excess of 3 hours between 9am and 3pm on June 21

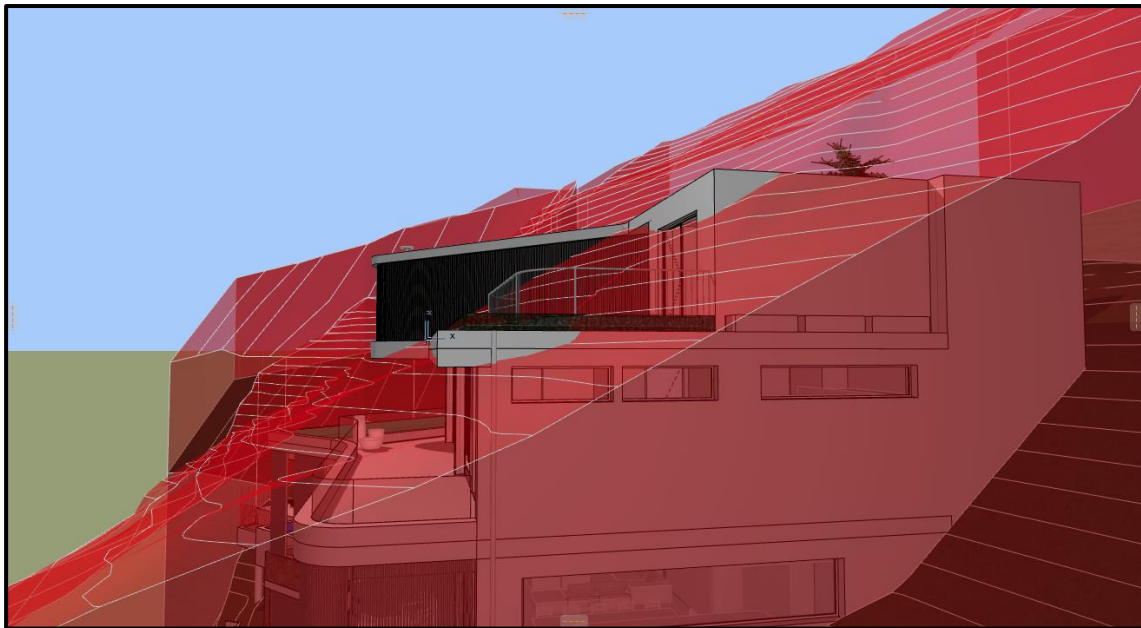


Figure 13: 3d view from the south which shows that the built form is below the height limit at the southern end (which is where the shadows are generated)

- The proposed height variation is not responsible for any privacy impacts as the primary elements associated with the height variation are associated with the garage. The other component over the height limit is the projecting eave along the western side which provides much needed shade protection. The 3rd component is the upper south-west corner of the upper-level study wall. Neither of these elements generate any privacy impacts.
- 180-degree views from the southern neighbouring dwelling at 58 Castle Circuit to harbour views will be maintained with no impact from the height variation.
- The above assessment confirms that the proposed height is appropriate for the site as there are no adverse streetscape, visual bulk, shadow, view or privacy impacts associated with the height variation.
- The proposed height variation will not be perceptible from the Harbour. Given the heritage landscape area at the rear of the site, the residence will be screened by existing trees on the steep hillside, which combined with the expansive separation distance from publicly accessible areas from across Middle Harbour, will ensure that there will be limited visibility of the proposed dwelling house with additional height from waterways or foreshores (**Figure 14**).



Figure 14: Zoomed photo from Castlecrag noting the substantial distance to the proposal from the public view access

Amenity

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

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

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

Consistency with the objectives of the height standard in the LEP	
Objectives	Assessment
4.3(a) to provide for building heights and roof forms that are consistent with the topography landscape, prevailing building heights and desired future streetscape character in the locality	<p>The proposed flat roof is consistent with existing dwellings with flat roofs along Castle Circuit.</p> <p>The proposed dwelling has single-storey presentation to the streetscape and a stepped built form, which respects the topography and sensitive character of the foreshore area and is consistent with the size, bulk and scale of surrounding properties.</p> <p>The height variation is well integrated with the architectural design and contributes to a high-quality dwelling house which reinforces the desired streetscape character in the locality.</p>

<p><i>4.3(b) to control the bulk and scale of buildings</i></p>	<p>The majority of the building envelope is compliant with the height limit, and the minor encroachments are related to the non-trafficable roof and the upper floor level facing the foreshore. Therefore, these portions above the height limit are lightweight elements, and do not create a building which dominates the hillside or streetscape.</p>
	<p>The height protrusions beyond the height limit do not preclude the proposed development to achieve a bulk and scale that are suitable to the site and compatible with surrounding properties.</p> <p>The non-compliant height responds to the sloping nature of the site and is not related to excessive bulk, mass, or inappropriate scale. Therefore, the proposed development and additional height is considered to be suitable to the site and context of the locality.</p>
<p><i>4.3(c) to minimise disruption to the following:</i> <i>(i) views to nearby residential developments from public spaces (including the harbour and foreshores)</i> <i>(ii) views from nearby residential developments to public spaces (including the harbour and foreshores)</i> <i>(iii) views between public spaces (including the harbour and foreshores)</i></p>	<p>The proposed height, setbacks, plus the orientation of lots and surrounding topography, ensures that outlook is maintained for adjoining properties and the public domain.</p> <p>The proposed height variation is confined towards the rear/western side of the site. The proposal has been carefully designed to mitigate any potential loss of view by maintaining the front elevation well below the permissible height presentation.</p> <p>The proposed separation distances, including a generous southern side setback, ensures the height non-compliance maintains outlook for the only adjoining neighbour to the south. The southern neighbouring property will maintain 180-degree views of the harbour and the height variation will not be responsible for any view impacts.</p>
<p><i>4.3(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings</i></p>	<p>In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south ensures that the proposed development will provide compliant solar access to the public domain and surrounding properties. In this regard, The adjoining southerly neighbour has its primary windows and balconies orientated to the west to enjoy ocean views.</p> <p>The living and private open space areas of No. 58 will continue to receive more than 3 hours solar access between 9am and 3pm on June 21.</p> <p>Furthermore, the above assessment confirms that the additional height beyond the 8.5m height limit is not responsible for any shadow impacts.</p>

<p>4.3(e) to ensure the height and bulk of any proposed building or structure in a recreational or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses</p>	<p>The subject site is located within the R2 Low Density Residential zone but is adjacent to a C2 zone and therefore provides a range of architectural design measures to ensure that any potential environmental impacts are mitigated.</p> <p>The bushland to the west and north of the site will maintain a vegetated buffer, noting that such vegetation is protected and likely to remain. Such landscaping screens the built form including the height variation.</p> <p>Furthermore, the height variation will be perceived against the backdrop of vegetation and housing higher upslope when viewed from distant vantage points.</p> <p>The proposal provides for a generous 46.18% (289.47m²) (6.18% outperformance) of the site to be deep soil zone, which contributes to an extensive landscaped setting. The provision of landscape plantings in the front setback provides for a suitable streetscape outcome which is compatible with the character of Castle Circuit. The proposal also provides for abundant landscaping with the private open space, in addition to landscape planters and green roof.</p>
Consistency with the objectives of the R2 Low Density Residential	
Objectives	Assessment
<ul style="list-style-type: none"> To provide for the housing needs of the community within a low density residential environment. To enable other land uses that provide facilities or services to meet the day to day needs of residents. 	<p>The proposed height variation does not raise any inconsistency with the R2 Low-Density Residential zone objectives. The height is associated with a high-quality contemporary dwelling house which provides for the needs of the community and presents a compatible height, bulk and scale with the dwellings in the vicinity of the site.</p> <p>The limited building footprint and envelope retain the low-density nature of the area whilst responding adequately to the sensitive adjacent Environmental Conservation zone to the west, which is within a foreshore area and classified as bushfire prone zone.</p> <p>The topography of the site associated with the stepped built form mitigates any adverse or significant view, overshadowing, or privacy impacts to adjoining neighbours or the public domain.</p> <p>The proposal will maintain the low-density residential environment, thereby confirming that the variation does not raise any inconsistency with the objectives of the zone.</p>

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

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

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

- The steeply sloping nature of the site is considered to be the primary environmental ground. The 3D height plane diagrams confirm that it is the extreme dips in the existing ground level which cause the greatest extent of height variation.
- In accordance with the submitted Shadow Diagrams solar access will be maintained to the primary living and private open space areas of the adjoining dwelling to the south at 58 Castle Circuit.
- The proposed dwelling house has been designed to respect and enhance the water views whilst ensuring suitability of the development on the coastal foreshore and will not have a detrimental impact on the visual amenity of the harbour or coastal foreshore. In this regard, the dwelling will be partially screened by the heritage landscape along the foreshore. The proposed development is considered to be suitable given its type, location and design and its relationship with and impact on the foreshore. The proposal provides for private open space and total landscaped area which outperform the control whilst combining with high-quality landscaping to ensure acceptable relationship between the development and the foreshore scenic protection area, and mitigation of visual bulk and scale impacts from the height variation.
- The generous separation distance between the proposed development and the neighbouring dwelling to the south, plus significant separation to the dwellings across Castle Circuit, along with deep soil planting further mitigates potential visual and acoustic privacy impacts from the additional height.
- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, with the additional height being not visually dominant in the streetscape.
- The proposed height variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography and surrounding properties.
- The proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed single-storey height presentation to the street, building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain.
- The proposed height variation will not be perceptible from the harbour to the west as the built form will be viewed against the steep hillside backdrop which includes more prominent dwellings above.

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

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

Other Matters for Consideration

4(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out

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

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

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

*(5) In deciding whether to grant concurrence, the Director-General must consider:
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning*

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

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

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

(b) the public benefit of maintaining the development standard

Assessment: There is no public benefit in maintaining the height standard given the limited amenity impacts associated with the development, which provides a high level of internal amenity, and the positive streetscape outcome that would arise from the development of the

subject site, while being sympathetic to the environmental constraints of the surrounding local area.

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

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

Conclusion

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