

## Exception to Development Standards Submission

This Exception to Development Standards Submission accompanies a Development Application (DA) proposing demolition of the existing dwelling house and garage and construction of a new dwelling house, double garage and studio below with landscaping and other required site works at 13 Amiens Road, Clontarf (the **site**). Calculations in this submission are based on plans and calculations provided by Case Ornsby Design.

As required by Clause 4.6(3) of Manly Local Environmental Plan 2013 (**LEP 2013**), this submission provides a written request to the Northern Beaches Council (the **Council**) that justifies the proposal's departure from the height of buildings development standard is acceptable from an environmental planning point of view and that compliance with the standard is both unreasonable and unnecessary given the circumstances of the case. This submission takes into consideration relevant judgements.

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

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

Manly Local Environmental Plan 2013 (**LEP 2013**).

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

The land is zoned R2 Low Density Residential.

#### ***What are the objectives of the zone?***

The objectives of the R2 Low Density Residential zone are:

- *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.*

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

Development Standards' are defined under Section 1.4 of the Environmental Planning and Assessment Act, 1979 (the **Act**) as follows:

*development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...*

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,***
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*

- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) *the volume, nature and type of traffic generated by the development,*
- (i) *road patterns,*
- (j) *drainage,*
- (k) *the carrying out of earthworks,*
- (l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) *the provision of services, facilities and amenities demanded by development,*
- (n) *the emission of pollution and means for its prevention or control or mitigation, and*
- (o) ***such other matters as may be prescribed. (my emphasis)***

The height of buildings control at Clause 4.3 of LEP 2013 is clearly a development standard as it relates to the height of building as specified in **subclause (c)**.

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

No.

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

The development standard is listed under Clause 4.3 of LEP 2013.

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

The objectives of the development standard are expressly stated at Clause 4.3(1) of LEP 2013 and 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*

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

Clause 4.3(2) of LEP 2013 establishes a maximum building height of 8.5m for the site.

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

Existing and proposed height calculation diagrams by Case Ornsby Design are contained within the Architectural Drawings submitted separately. Due to substantial topographical variations, the maximum building height of the existing and proposed dwelling house and the garage / studio as measured from ground level existing varies as demonstrated at **Table 1**.

**Table 1** – Varying existing and proposed maximum heights

Element	Existing	Proposed
Dwelling	9.631m northern elevation	9.5m northern elevation
	9.382m southern elevation	8.917m southern elevation
Garage / studio	7.322m northern elevation	7.294m northern elevation
	7.139m southern elevation	7.347m southern elevation

Based on the above, the proposed dwelling's maximum height is 9.5m, which departs from the standard, albeit the height than that existing.

The proposed garage / studio's maximum height is 7.347m, which complies with the standard.

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

The percentage variation is 13.3% to the *existing* dwelling's maximum height of 9.631m.

The percentage variation is **reduced** to 12.5% for the **proposed** dwelling's maximum height of 9.5m.

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

As stated at Clause 2.3 of LEP 2013, the objectives of the R2 Low Density Residential zone are:

- *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.*

The proposal is consistent with the objectives of the R2 Low Density Residential zone as it:

- proposes a low density dwelling house on the site, an existing and approved low density residential allotment of land;
- will not adversely reduce existing residential amenity levels of the locality;
- enables a built form relative to height, bulk and scale and contemporary design that is compatible with the existing and likely future built form context;
- maintains existing amenity levels for adjacent landowners; and
- does not propose any non-residential land uses although the occupants can work from home as/if required.

***Objectives of the height of building standard.***

The proposal despite its departure from the height of buildings standard is nonetheless consistent with the relevant objectives and therefore provides an appropriate planning outcome for the following reasons:

***Objective (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,***

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

- a single dwelling house on an existing single low density residential allotment of land is maintained. This low density built form and land use is desired by the site's and surrounding locality's R2 Low Density Residential zoning;
- the surrounding locality is characterised by multi level elevated dwellings set on typical allotments of land influenced by the locality's topographical characteristics and mature/thick vegetation. A variety of housing types and architectural styles are provided within a varied subdivision pattern that is influenced by the locality's topographical variations (falling from east to west or front to back). The integrity of individual dwellings varies considerably. There is little architectural, aesthetic, social or cultural built form significance. Dwellings are typically adjusted to the natural topography and are oriented to take advantage of their westerly views and vistas. As demonstrated by **Figure 1**, the existing and higher (as compared to that proposed) built form sits comfortably within its established and likely future built form context;
- the proposal responds and contributes to its context by engaging its desired future character as envisaged by the proposed land uses and densities permissible in the surrounding locality. The surrounding area is undergoing a period of regeneration. The site's appropriate redevelopment will enable the realisation of Council's strategic direction for the locality's future built form;
- the scale of the proposal is characterised by the desired future character for the area. The height (reduced from that existing), bulk and scale of the built form does not influence or set a precedent for future buildings along the western side of Amiens Road. This is aptly demonstrated at **Figure 1**;
- the building volume has been designed to be articulated, and to facilitate a contextually appropriate massing. The elevations are articulated in response to the form and size of the dwelling. The proposed design is re-interpreting established roof shapes and slopes, whilst integrating contemporary materials and an architectural aesthetic;
- the proposed parapet and skillion roof design is not an inconsistent design element and improves views (including water, land and water interface) from the surrounding public domain as compared to the existing varied pitched roof form;
- the building design creates a modern facade treatment to the elevations with a variation of materials, colours, patterns and textures which assist in the delineation of zones within the building and create an aesthetically pleasing development that is consistent with desired future character
- the visual catchment contains several buildings that will present a similar bulk and scale and which set the character. Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development (see **Figure 1**);



*Figure 1 – The site (circled) and its neighbours as viewed from the opposite side of the harbour*

- the site is proportioned to allow the efficient realisation and internalisation of the impacts of the altered built form without an adverse visual impact or perceived built form dominance;
- the proposal conforms to and reflects the site’s natural landforms. Excessive excavation is not proposed and FFL’s are consistent with those existing,
- the expression of the built form is adjusted to respond to:
  - solar access and the site’s orientation;
  - the site and surrounding locality’s topographical characteristics;
  - the design and character of existing adjacent development;
  - maintaining the amenity of the adjacent property owners;
  - internal and external amenity for the occupants. In this regard, the design of the proposed built form specifically responds to the location of its adjacent built form relative to the retention of existing amenity levels for those properties.

***Objective (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),***

- generally, a similar building alignment is proposed as existing, albeit with an overall reduced maximum height. Dwellings are adjusted to the natural topography and are typically oriented to take

advantage of their panoramic westerly views and vistas of the harbour, including land and water interface. The site's only real built form neighbours are to the north and south respectively. These are typically two or three storey dwellings with elevated external spaces that are also logically oriented to take advantage of their westerly vistas, generally with minimal interruption;

- the dwelling and its surrounds sit comfortably within the established and likely future built form relative to height, bulk, scale and envelope including setbacks locational context (see **Figure 1** above and **Figure 14** in the SEE). The proposal exhibits a high quality architectural, urban and landscape design solution for the site and which appropriately responds to the site's constraints. The built form is highly articulated and visually interesting whilst at the same time maintaining a human scale. Adjacent properties will continue to be provided with vistas out, over and across the site (sometimes via side boundary), particularly those to the site's north and south;
- views from the Amiens Road carriageway (i.e. the public domain) will be improved due to the proposed dwelling's decreased height and relatively flat parapet and skillion roof design. These views are significant and include land and water interface. This is a desirable planning outcome; and
- the overall bulk and scale and building envelope of the proposed built form has been reduced from that existing. It is generally consistent with that of its neighbouring and nearby properties and does not in any way preclude the appropriate redevelopment of these properties, nor impinge on existing views and vistas.

***Objective (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***

- as a similar building alignment and reduced overall building height is proposed, the shadows cast by the new built form are not materially different nor do they affect different areas of the neighbouring properties. Generally existing levels of sunlight is retained to the neighbours and their primary living rooms and private open space areas;
- the design is consistent with the objectives of the control as it ensures the form and scale of the dwelling is not excessive and it also maintains a relative continuity of building form. By this the proposal exhibits a similar height, bulk and scale to that of adjacent properties;
- the site's open plan primary living rooms will receive more than adequate levels of direct solar access and natural ventilation which will have a positive impact on levels of residential amenity;
- a large portion of the site's landscaped and private open space area receives satisfactory levels of direct solar access and thus has a positive impact in relation to residential amenity. Furthermore, the private open space areas of the neighbouring properties maintain appropriate levels of solar access and their useability and functionality is not compromised;
- due to the existing development density, fencing, topographical and vegetative characteristics of the area, the adjacent development is already overshadowed. The proposed built form does not fully block solar access to any western elevation openings (those which provide significant outlook and amenity) or external elevated open space;
- the shadow cast by the built form is generally expected and typical of existing development in the locality, particularly given the locality's topographical characteristics;
- primary living rooms generally remain unaffected as they are logically provided with a westerly orientation (and more than one opening) for significant outlook and amenity;

- small areas of land (typically the battle-axe driveway) are affected and their relative useability is not materially compromised;
- any existing or proposed overshadowing impact will not preclude an appropriate redevelopment or the redevelopment potential of any nearby property that is zoned to do so.
- the limited overshadowing of the proposal is acceptable in the circumstances of the case as it occurs for short periods of time and in the winter arc of the sun. Overshadowing within a relatively dense locality is inevitable due to the closeness and type of built form, fencing, associated vegetation, topographical and landscape characteristics. Separation between the site and the adjoining property has been maintained.

***Objective (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***

- the site is within the R2 Low Density Residential zone. Therefore, this objective is of no relevance to the proposal.

**Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

A development at 13 Amiens Road, Clontarf, that strictly complies with the 8.5m height standard is unreasonable or unnecessary given the following presented circumstances:

- the existing built form departs from the standard;
- the proposed dwelling's height is less than that existing;
- a three storey building is proposed and which replaces an existing three storey building;
- the environmental impacts of the existing higher built form are known. The proposed dwelling, lower than existing is unlikely to cause any further environmental impacts above those existing;
- following a rigorous merit based assessment, approval of a building height on the site that relates to the locality's existing character but which exceeds the LEP 2013 development standard, will not set a precedent for other non-conforming applications;
- the proposed built form sits comfortably in the site's wider visual context as viewed from the surrounding public domain (see **Figure 1**), given the scale and form of other hillside developments in the vicinity;
- it has been demonstrated within the SEE that the works that exceed the height limit will not result in additional adverse environmental impacts to adjacent properties and the surrounding public domain. In this regard the resultant built form provides for an acceptable and equitable planning outcome in relation to:
  - solar access and overshadowing;
  - access to natural daylight and ventilation;
  - aural and visual privacy;
  - views and vistas; and
  - visual impact;

- the height of the building does not preclude (and hasn't done so in the past) redevelopment of the neighbouring properties.

In *Wehbe v Pittwater Council [2007] NSWLEC 827*, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. Those tests have been considered below.

***Are the objectives of the standard are achieved notwithstanding non-compliance with the standard?***

See above detailed assessment of the proposal by reference to the objectives of the height standard. That assessment demonstrates that the objectives of the standard are achieved notwithstanding the non-compliance with the standard, and in some cases the non-compliance better achieves the objectives by allowing for a reasonable extension in the appropriate location.

***The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary?***

N/A

***Would the underlying objective or purpose of the standard be defeated or thwarted if compliance was required?***

Compliance with the underlying objective of the 8.5m height standard would be thwarted if strict compliance with the standard was required in the circumstances as the quality of the residential outcome would be compromised for no sound planning reason.

The resultant built form is one that exhibits substantial merit relative to architectural, urban and landscape design. It includes appropriate environmental initiatives and has a positive built form relationship with its neighbouring and nearby elevated multi level dwellings.

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

The development standard cannot be said to be abandoned. Notwithstanding and following a review of Council's Development Standard Variations Register there are numerous recent examples of dwelling houses that depart from the height of buildings standard within LEP 2013, including:

- DA 2018/594 at 14 Abbott Street, Balgowlah Heights (9.4% departure);
- DA 2018/722 at 2 Steinton Street, Manly (9% departure);
- DA 2018/816 at 5 Edgecliffe Esplanade, Seaforth (41.1% departure);
- DA 2018/882 at 21 Baranbali Avenue, Seaforth (8.2% departure);
- DA 2018/1312 at 19 Tutus Street, Balgowlah Heights (10% departure);
- DA 2018/1563 at 76 Woodland Street, Balgowlah Heights (1.1% departure);
- DA 2018/1640 at 18 Magarra Place, Seaforth (4.6% departure);
- DA 2018/1703 at 2 Panorama Parade, Seaforth (18.7% departure);
- DA 2018/1768 at 8 Allenby Street, Clontarf (5.8% departure);
- DA 2018/1847 at 7 North Harbour Street, Balgowlah (20% departure);
- DA 2018/1888 at 13 Beatrice Street, Clontarf (8.2% departure);



- DA 2018/1074 at 8 Alma Street, Clontarf (9.4% departure);
- DA 2018/1101 at 43 West Street, Balgowlah (20.7% departure); and
- DA 2018/30 at 10 Peronne Avenue, Clontarf (44.8% departure).

***Is the zoning of the land unreasonable or inappropriate?***

The zoning of the land is reasonable and appropriate given the site's location. Large elevated multi level dwellings are found on neighbouring and nearby properties.

**Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient environmental planning grounds to justify contravening the height of buildings development standard being:

- the existing built form which departs from the standard provides a generally consistent height, bulk and scale with the neighbouring and nearby built form;
- the new dwelling's height is less than that existing;
- it has been demonstrated within the SEE that the height non-compliance will not result in material environmental impacts to neighbouring properties and the surrounding public domain. In this regard the resultant built form provides for an acceptable and equitable planning outcome in relation to:
  - solar access and overshadowing;
  - access to natural daylight and ventilation;
  - aural and visual privacy;
  - views and vistas; and
  - visual impact;
- the development provides for an appropriate environmental planning outcome and is not an overdevelopment of the site as follows:
  - views from the Amiens Road carriageway (i.e. the public domain) will be improved due to the dwelling's decreased height and relatively flat parapet and skillion roof design. These views are significant and include land and water interface;
  - the proposal satisfies the objectives of the R2 Low Density Residential zone;
  - the proposal satisfies the objectives of the height development standard;
  - the resultant height, bulk and scale of the dwelling is comparable to that on neighbouring and nearby properties whether their built form is characteristic or not (see **Figure 1**);
  - the highly articulated façade treatment and selection of characteristic and recessive external materials and finishes reduces the dwelling's perceived height (relative to its most maximum location), bulk and scale, when viewed from the surrounding public domain;
  - the dwelling's maximum height (reduced from that existing) will not set an undue precedent and will not preclude the appropriate redevelopment of neighbouring and nearby properties. The building's architecture (including its proposed roofscape) provides an appropriate height and mass relationship to the locality's existing and likely future character, maintaining a positive urban character;

- the nature of such an urban environment is that all future development will seek to maximise amenity and density through design. In this regard, the proposal represents an appropriate planning outcome with any adverse environmental impacts;
- appropriate environmental initiatives are proposed, including:
  - compliance with all BASIX requirements;
  - provision of a 1,500 litre RWT;
  - the provision of metal awnings and window projections;
  - increased useability of landscaped areas and retained / established landscaped areas;
  - the proposal provides significant natural light penetration throughout the dwelling through an open plan floor plan and the provision of two roof skylights;
  - the construction materials proposed provide high thermal mass to minimise heating and cooling loads;
  - the design minimises reliance on artificial lighting and mechanical ventilation;
  - the dwelling benefits from cross flow and stack effect ventilation;
  - all outdoor private spaces are designed as extension of the room to enhance and encourage outdoor and indoor living, while at same time acting as a transition space to modulate temperature within the dwelling;
  - the use of energy efficient fixtures;
  - despite excavation being proposed for the swimming pool, the site’s existing contours have generally been retained. The proposal will not impact on existing natural drainage patterns, adjacent built form or the locality’s natural environment;
  - substantial areas of deep soil landscaping and permeable areas are maintained. This permeable characteristic encourages infiltration and absorption;
- appropriate curtilage is maintained to the neighbouring properties through a similar building alignment as that existing; and
- the proposal generally is of an intensity and scale commensurate with the locality’s established and likely future urban conditions.

### **Whether contravention of the development standard 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. The variation sought is responding to the broad brush nature of the control applied across an area that supports a variety of built forms. The retention of improved housing for a family will assist in meeting housing and locational context demand.

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

The relevant objects of the Act as specified in Section 1.3, are in our opinion, achieved by the proposed development in that it:

- promotes the social and economic welfare of the community;
- facilitates ESD;
- promotes the orderly and economic use and development of land;
- promotes the sustainable management of built and cultural heritage;
- promotes good design and amenity of the built environment; and
- promotes the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 1.3 of the Act, particularly given:

- the dwelling's height is less than that existing;
- the height of the garage and studio complies;
- the dwelling's height and built form supports high quality residential development that responds to demand for high quality residential accommodation in locations with excellent access to public transport, services, amenities and other facilities;
- the built form elements of the building which depart from the standard do not materially add to its bulk and scale and furthermore do not result in material environmental impacts to neighbouring properties and the surrounding public domain; and
- it would preclude redevelopment of the site in the manner proposed and which would not offer the level of amenity currently expected.

The site's redevelopment and subsequent departure from the height of buildings standard does not preclude or isolate an adjacent property(s) from being appropriately redeveloped. The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 1.3.

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

Generally, there is a public benefit in maintaining standards. However, there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height of buildings standard would serve no purpose other than to impose numerical inflexibility that would achieve no planning purpose. A rigid and inflexible compliance based approach to the development standard forgoes the opportunity to provide or encourage an appropriate planning outcome given the presented circumstances.

Following a review of other DA's (see earlier) Council has considered applications favourably which depart from the height of buildings standard subject to a satisfactory environmental performance. There are no reasons why it is not in the public interest and its refusal based on the standard's departure is not

warranted. Therefore, it is argued that there is no public benefit in maintaining the adopted height of buildings planning control.

On balance, the variation to the height of buildings standard is an appropriate use of the provisions of Clause 4.6. Accordingly, there is in the specific circumstances of the case, no public benefit in strictly maintaining the development standard.

### **Is the objection well founded?**

For the reasons outlined in previous sections, it is considered the objection is well founded in this instance and granting an exception to the development can be supported given the presented circumstances of the case. The development does not contravene the objects specified at Section 1.3 of the Act.

### **Conclusion**

The proposed variation to the height of buildings standard is based on the reasons contained within this formal request for an exception to the standard. A development strictly complying with the numerical height of buildings standard would not significantly alter the development's environmental impacts and therefore impacts to neighbouring properties and the surrounding public domain as:

- the proposal satisfies and achieves the objectives of the R2 Low Density Residential zone;
- the proposal satisfies and achieves the objectives of the height of buildings standard;
- the resultant built form sits comfortably within its established and likely future built form context;
- the dwelling's maximum height is less than that existing. Therefore, the extent of the departure is reduced;
- the height of the garage / studio complies; and
- improved internal amenity for the occupants whilst no adverse amenity impacts to the neighbouring properties.

It is concluded that the objection:

- is well founded;
- demonstrates that compliance with the standard is both unnecessary and unreasonable; and
- demonstrates that there are sufficient environmental planning grounds in which to support the proposal.

On that basis, the consent authority can be satisfied that the proposed development is in the public interest because it is consistent with the objectives for development in the zone and the objectives of the standard.