Four Towns Planning

Planning and property consultant

REVISED WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

VARIATION OF A DEVELOPMENT STANDARD REGARDING HEIGHT OF BUILDINGS AS DETAILED IN CLAUSE 4.3 OF THE WARRINGAH ENVIRONMENTAL PLAN 2011

Alterations and Additions to Existing Dwelling House, Swimming Pool and Associated Works

17 Egan Place,
Beacon Hill NSW 2100

mathew@fourtowns.com.au

0425232018

www.fourtowns.com.au

PO Box 361, Balgowlah NSW 2093

This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.

Report prepared by:
Mathew Quattroville
Director – Four Towns Pty Ltd

Report prepared for:
Siobhan Little and Tim Burt

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Introduction

This revised written request under Clause 4.3 of the Warringah Local Environmental Plan 2011 (**WLEP 2011)** accompanies a Development Application seeking consent for additions and alterations to an existing dwelling house at 17 Egan Place, Beacon Hill.

The revised written request is made pursuant to Clause 4.6 WLEP 2011 and requests a variation to height of buildings as detailed under Clause 4.3 of Warringah Local Environmental Plan 2011. Clause 4.3 of WLEP 2011 notes:

> *(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.*

The site has a maximum building height provision of 8.5m. The proposal will result in a maximum height of 9.39m which reduces the lodged proposal by 0.24m. It is noted that the breach is the result of the sloping nature of the site and the existing man-made changes, notably the lower ground floor existing. The revised proposal reduces the first-floor floor structure from 600mm to 450mm and also reduces the pitch of the roof which results in a height reduction of 0.24m to that originally lodged with the application.

The proposed addition is reasonable within the context of the site and surrounding development and will not result in excessive bulk and scale. It is submitted that there is more than enough justification and precedence within the area to support the breach.

In this regard, it is requested Council support a variation with respect to compliance with the maximum height of buildings as described in Clause 4.3 of the WLEP 2011. The nature and extent of the contravention is as follows:

Requirement	8.5m
Proposed	9.15m
Is the planning control in question a development standard?	Yes
Is the non-compliance with to the clause requirement a numerical/or performance based variation?	Numerical
If numerical enter a % variation to requirement	7.65%

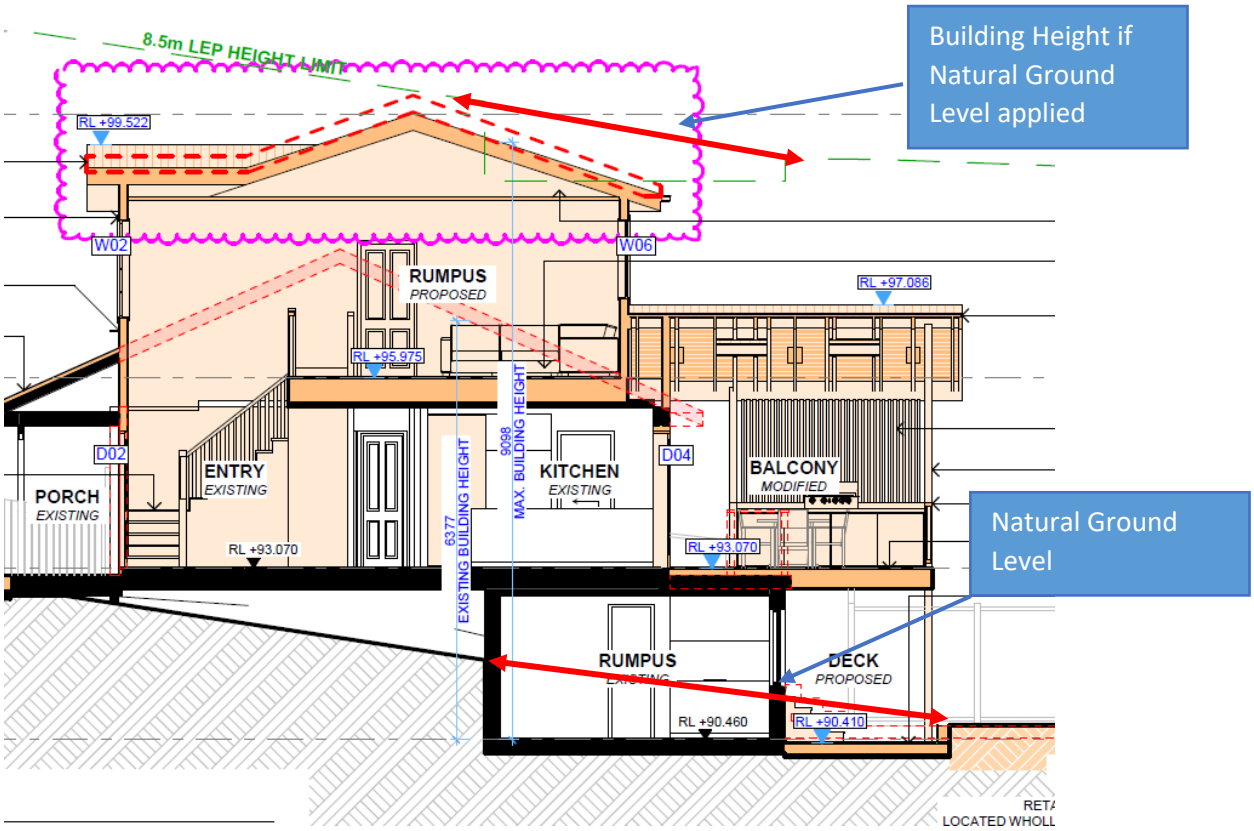


Figure 1: Extract from architectural plans shows the extent of the proposed variation.

Warringah Local Environmental Plan 2011 (WLEP2011)

2.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R2 – Low Density Residential (the R2 zone) and the Land Use Table in Part 2 of WLEP 2011 specifies the following objectives for the R2 zone:

- ***To provide for the housing needs of the community within a low density residential environment***

  Comment: The proposed additions and alterations to the existing dwelling will improve the quality and functionality of the existing dwelling house on the site and ensure high quality dwelling which contributes to the ongoing provision of housing in the Beacon Hill area.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

  Comment: The proposed additions to the dwelling will enhance the existing residential accommodation within the site and does not propose any other alternate land use.

- ***To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.***

Comment: The proposal will maintain the established landscaped settings within Egan Place and will be visually pleasing when viewed from surrounding areas. The proposal will not involve the removal of any significant vegetation and maintains landscaped area within the front setback.

2.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) WLEP 2011 provides:

(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.

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("*Initial Action*"). *Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP 2011 provides:

(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.

Clause 4.3 is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the WLEP 2011.

Clause 4.6(3) Of WLEP provides:

(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.

The proposed development does not comply with the prescribed height of buildings for residential accommodation in Zone R2, as prescribed under Clause 4.3 of the WLEP 2011, however strict compliance is unreasonable or unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

3. Relevant Caselaw

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of WLEP 2011 a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
   (a) compliance is unreasonable or unnecessary; and
   (b) there are sufficient environmental planning grounds to justify contravening the development standard?

4. Request for Variation

4.1 Is Clause 4.3 of WLEP 2011 a development standard?

(a) The definition of "development standard" in clause 1.4 of the EP&A Act includes:

"(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"

(b) Clause 4.3 relates to the height of aa building. Accordingly, Clause 4.3 is a development standard.

4.2 Is compliance with Clause 4.3 unreasonable or unnecessary?

This request relies upon the First method identified by Preston CJ in *Wehbe*. The first way in *Wehbe* is to establish that the objectives of the standard are achieved.

In determining a merit-based assessment of the landscaped area for the proposed development, due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – floor space ratio (Salanitro-Chafei V Ashfield Council (2005) NSWLEC 366) and Project Venture Developments v Pittwater Council (2005) NSW LEC 91).

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard, existing man-made changes and the sites topography should be considered when assessing the proposed height of buildings for the site. Given the proposed application is relatively minor and consistent with the built form character of the area, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard.

By providing flexibility the subject proposal is capable of achieving a better development and design outcome which adequately caters for enhanced housing options for the residential needs within the Northern Beaches LGA, in particular the Beacon Hill precinct.

The First Method

The proposal is consistent with the objectives of Clause 4.3.

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

Comment: It is acknowledged that the proposed development does not comply with clause 4.3 (2) and accordingly there is a requirement to submit a Clause 4.6 Variation. This Clause 4.6 seeks an exemption to the development standard as prescribed under the WLEP2011 and demonstrates that compliance with the provisions of clause 4.3 (2) is both unreasonable and unnecessary and the proposed development meets the required steps that are set out in the relevant NSW Land and Environment Court decisions to justify that the standard can be varied to achieve the subject proposal.

The development standard in Clause 4.3 (2) of the WLEP2011, is amendable to variation. The purpose of this Clause 4.6 is to vary the Height of Building as a building height referrable to the building to give Council the power to grant development consent to the non-compliant purposes. This proposition is reinforced by the following:

Clause 4.3 (2) states:

(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.

The Height of Building Map sets a maximum Height of Building control of 8.5m. For the purpose of calculating Height of Building, the WLEP2011 provides the following definition:

Building height is defined as follows:
building height *(or* ***height of building****) means—*
(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.
***ground level (existing)** means the existing level of a site at any point.*

The Height of Building in clause 4.3(2) of the WLEP2011 is a development standard in accordance with the definition set out below:

Development standards' is defined in section 1.4 of the EP&A Act 1979 as:

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:
(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Despite the variation to the Height of Building control which occurs as a result of the topography of the land, the proposed development is considered to be in keeping with the desired future character of the locality. The proposal has been strategically designed to minimise the impact and bulk and scale of the project. The project designer has worked tirelessly to design through alterations and additions a modern high-end development that meet the sites constraints and the existing bulk and scale of the area; therefore, the proposal will not result in any unreasonable visual impact on the Egan Place streetscape.

The proposed development will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing. Therefore, this written submission is considered to be compliant with the Statutory Provisions prescribed both under WLEP2011 and the provisions of Clause 4.6 which permit a variation to a development standard. It is noted it is consistent with the approval granted through the case *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 is that the distorted height plane creates reasonable environmental planning ground that justifies the contravention of the height standard.

In determining the building heights of the development, it is important to understand the definitions of building height and ground level (existing) and also relevant case law from the NSW Land and Environmental Court.

The court now considers the definition of "ground level (existing)" *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, which insists that the ground level (existing) is measured from the **excavated** ground level (within the footprint of the existing building) to the highest point of the proposal directly above. It is noted that the Court accepted (at [74]) that there is an 'environmental planning ground' that may justify the contravention of the height standard under 'clause 4.6' when the prior excavation of the site (within the footprint of the existing building) distorts the maximum building height plane. This falls hand in hand with the original leading cases *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* and *Stamford Property Services Pty Ltd v City of Sydney & Anor [2015] NSWLEC 1189*.

It is noted that common-sense should prevail from the new court case "Merman Investments Pty Ltd" with the fact that many height planes are now going to be distorted creating an argument

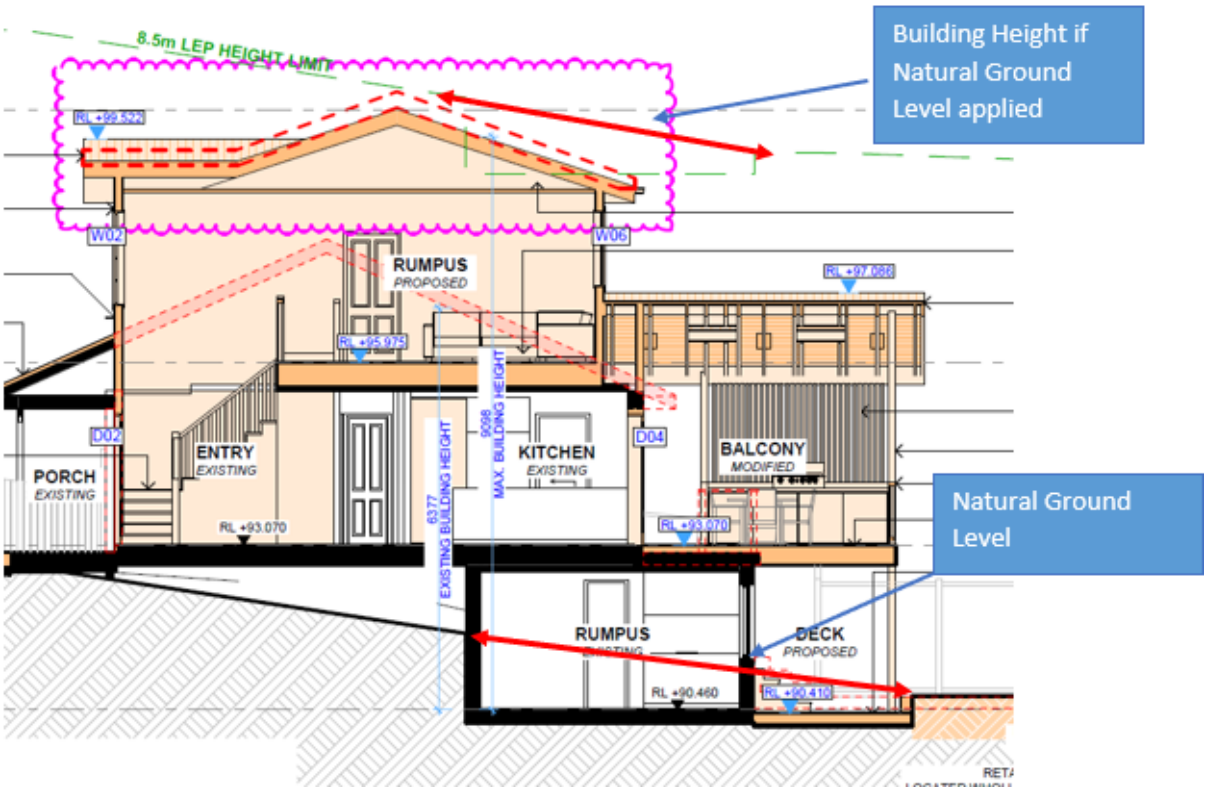
which goes hand in hand with the original court cases relating to the extrapolated levels of a site through 'Bettar'.

As a result of the above, it is determined that the maximum building above ground level (existing) is 9.15m for the proposed development. This results in a 0.65m variation or 7.65%. It is noted that the building height flows from 6.9m at the front of the site to the maximum 9.15m which is consistent with the topography of the northern side of Egan Place. It is noted that the breach is the result of the sloping nature of the site, several existing man-made level changes which distort the existing ground level and the existing man-made changes. If the natural ground level was applied, the proposal would comply. Regardless, the natural topography of the site and the existing building (which is already non-compliant) makes compliance with the building height impractical, and therefore unreasonable for Council to enforce. The proposal is supported and in our opinion is consistent with the objectives of the Clause, as outlined below:

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

The proposed development is compatible with the height and scale of surrounding and nearby development. The proposal is in keeping with the desired future character of the Egan Place precinct noting the capacity for future development in the street, particularly with the adjoining neighbours at 15and 19 Egan Place which are currently one-two storey dwellings. The potential for development on the adjoining sites suggests that the height and scale of the proposal is not unreasonable as it will remain compatible with the future desired character of the streetscape.

It is noted that notwithstanding the proposed breach to the building height, the proposal is below the maximum building height for the majority of the proposed dwelling and when you take into consideration the topography and man-made level changes existing on the site, the proposal would comply if the natural ground level was taken, as demonstrated by the following extract from the architectural plans:



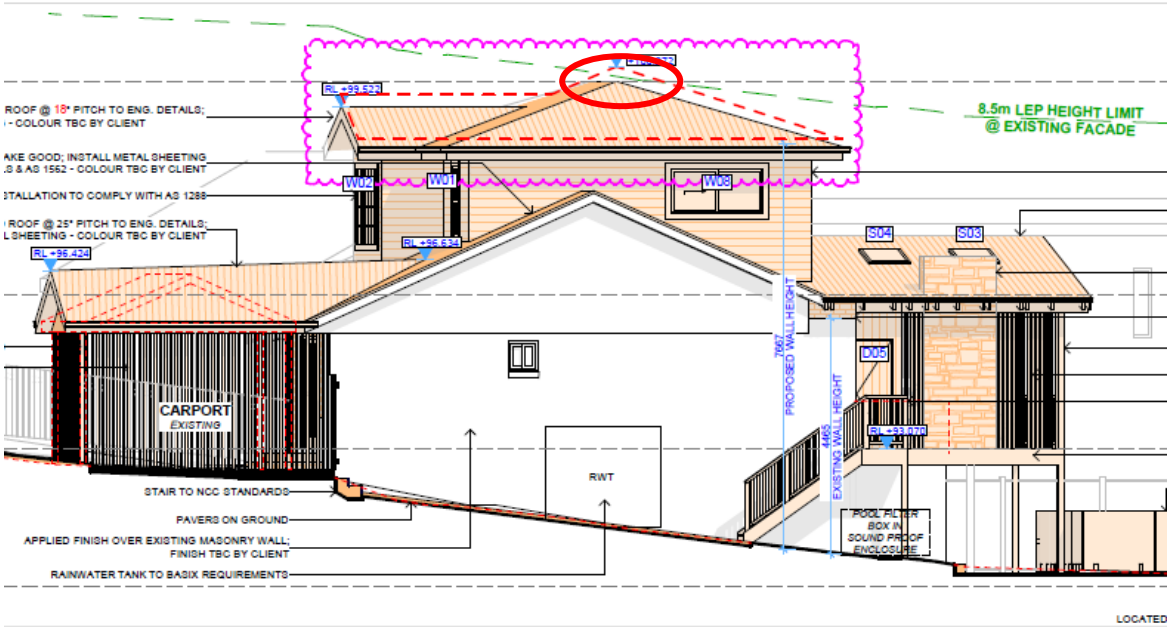
Notwithstanding the proposed breach to the building height, the proposed dwelling house presents as two storeys to the street and the approval would not result in significant impacts to the bulk and scale of Egan Place.

On the basis of the above, it is our professional opinion that the proposal meets objective (a).

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

The proposal has been strategically designed by the project designer to have compliant side setbacks. The revised plans have also reduced the wall height by 150mm and reduced the overall height by 240mm. The proposal will not have a visual impact, will not adversely disrupt views, will not increase privacy or amenity impacts and will not create an unreasonable loss of solar access.

The revised plans and the excerpt below of the eastern elevation shows from the eastern side elevation that the 8.5m height complies when viewed from the side boundary existing ground level. This enforces the point that the section of non-compliance is within the building footprint from existing man-made level changes to the site. The compliant western elevation illustrates how the breach is influenced by the topography of the site and the man-made changes existing. The proposal meets this objective.



EAST ELEVATION - PARALLEL TO BOUNDARY

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

The project designers have strategically designed the proposal to integrate seamlessly into the existing streetscape of Egan Place. The proposal will have no adverse impacts on the scenic quality of Warringah's coastal or bush environments. The proposal meets this objective.

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

The proposed development will be of an acceptable bulk and scale consistent with the desired future character of the Egan Place precinct noting the capacity for future development in the street. Accordingly, the visual impact of the development when viewed from public places is negligible. This objective is met.

It is our professional opinion that the building by virtue of its height, bulk and scale, is consistent with the locality and desired character of the area. We have formed the considered opinion that the project is a sympathetic design and development with a bulk and scale consistent with the existing and future character of the area. The proposal is not offensive, or unsympathetic in a streetscape context nor the context from Egan Place, and therefore the building height as proposed, can be supported by Northern Beaches Council.

For the reasons outlined within this written request, the proposal will achieve the objectives of Clause 4.3 and accordingly, are of the view that the proposal is consistent with the objectives of the development standard.

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

There are sufficient environmental planning grounds to justify contravening the development standard. Whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

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

It should be noted at the outset that in *Initial Action* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. From a planning perspective, there is sufficient grounds to justify the variation to the height of buildings development standard for the following reasons:

1. Historical excavation and site disturbance
2. Topography of the site
3. Characterisation of the development
4. Streetscape Appearance

- The sites topography and existing man-made excavation of the garage level distorts the height plane for the site. If the natural ground level was taken, the proposal would comply with the building height control.
- The proposed alterations and additions respond to the desired future character of the locality as depicted by the built form controls outlined in the Warringah DCP. Furthermore, the subject dwelling will continue to integrate into the existing streetscape and pattern of development within Egan Place.
- The development does not result in any unnecessary or undue bulk or visual impacts on adjoining properties and is of a scale that is compatible with the existing and surrounding buildings. The streetscape analysis completed within the Statement of Environmental Effects notes the area is ripe for redevelopment and the proposal is consistent with the changing character of the street.

- The amenity impacts to neighbouring residential properties, arising from the non-compliant building height, is negligible. Adjoining properties will continue to receive suitable solar access, privacy impacts are suitably minimised, and views are reasonably maintained.

- The building height breach is minor and relates to only a small portion of the proposed addition only (Refer Figure 1), which will largely be indiscernible when viewed from Egan Place. It is important to acknowledge that breaching element will not be viewed from the street and the front of the dwelling is approximately 1.6m below the allowable height.

Having regard to Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, and further to the proposal's consistency with the above strategic and statutory environmental planning provisions, the proposal is consistent with the following objectives under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

> *(c) to promote the orderly and economic use and development of land; and*
> *(g) to promote good design and amenity of the built environment,*

1. In response to (c), the proposal will facilitate the orderly and economic use and development of the land in a manner that is desired by the planning controls because it will facilitate the revitalisation of the dwelling that is functional. In considering the contrary (refusal of the DA), retention of the building in its current form would not promote the orderly and economic use and development of land in the manner that council's strategic and statutory planning provisions seek. Retention of the building in its current form makes no advancement towards achieving the goal of creating functional development opportunities.

2. In response to (g) the proposal has been designed to promote good design and amenity of the built environment, with a new enhanced and functional dwelling which fits in the northern side of Egan Places' topography.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height of buildings non-compliance in this instance.

5 Conclusion

Pursuant to clause 4.6(3), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

> *(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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.