

CLAUSE 4.6 -

Height of Building

**122 and 124
Queenscliff Road,
Queenscliff**

RESPONSIBLE FOR THIS REPORT:

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1 Clause 4.6 exception for Height of Building

1.1 Overview

Clause 4.6 of the Warringah LEP 2011 is applicable to the proposal and provides a mechanism to allow an exception to a development standard.

The proposal contravenes LEP Clause 4.3 'Height of Building' (building height), which is a development standard, and an exception is sought.

The building height applicable to the site is 8.5m. The existing and proposed developments exceed the 8.5m building height standard.

The method of calculating building height has been revised to address the Commissioner's judgment in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

In summary:

- the existing building height exceeds the development standard in small sections as shown within figures 2 and 8 below and on the architectural plans.
- the proposed building height is variable and extends upto 9.655m above the existing ground level.
- the proposed building height represents an exception ranging from approximately 360mm up to 1,155mm.
- The area of the building footprint is 546m². The area of the proposed building above the building height plane compared to building footprint is approximately 51m² or 9%.

Figures 1 and 2 in section 2.2 (drawing no. A9002) below shows the location, nature, and extent of the proposed development's building height exception.

2 Site Analysis

2.1 Site description

The site is located at 122 and 124 Queenscliff Road, Queenscliff and legally described as Lot 6 (122 Queenscliff Road) and Lot 5 in Deposited Plan 16941 (124 Queenscliff Road). The combined sites have an area of 950.6m².

The site is rectangular in shape with a total northern frontage of 25.98m to Queenscliff Road, eastern and western side boundaries of approximately 36.545m and a southern (rear) boundary of approx. 26m.

The site is located on the southern side of Queenscliff Road. The topography slopes away from Queenscliff Road with a level difference of approximately 5m between the front and rear the boundaries.

The land at 122 Queenscliff Road contains a two to three storey brick building with tile roof containing flats, two dwellings, one above the other. There is no vehicle access or car parking on the site.

The land at 124 Queenscliff Road contains a two to three storey brick building with tile roof containing flats, being two dwellings, one above the other. Car parking for two vehicles is provided within the lower ground level of the building accessed along the eastern side and entered from the southern / rear of the building.

Residential flat buildings are intermixed with dwelling houses on sloping topography within the local area that comprises the Queenscliff suburb.

Development to the south of the site fronts Aitken Avenue and is positioned on significantly lower topography.

The streetscape character is varied with a mix of residential housing types, building forms and variable building setbacks.

The location is characterised by sloping topography. The streetscape character comprises higher, visually prominent 4 storey flat buildings along the northern side of the road. Development along the southern side of the road is positioned below the street level and is more mixed comprising residential flat buildings, dwelling houses, mainly 2-3 storeys in height, but with some larger 4 to 5 storey flat buildings.

The figures on the following pages depict the character of the property and its existing development.

2.2 Images

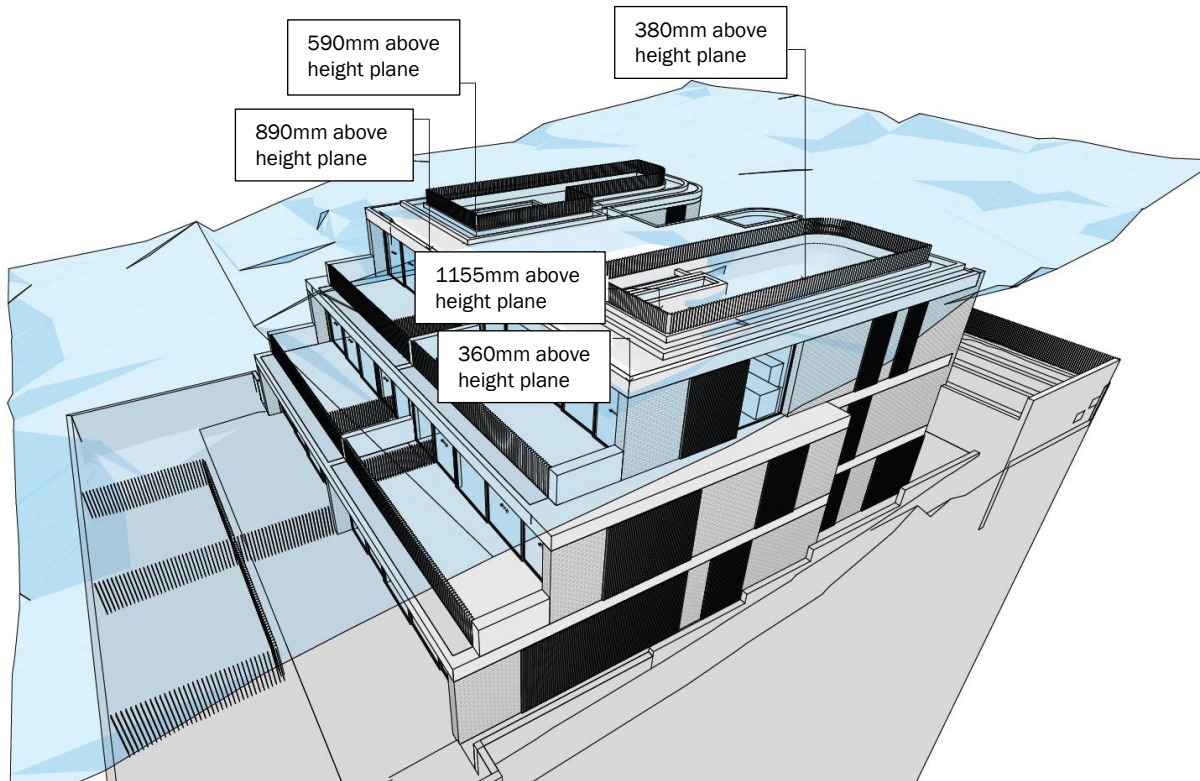


Figure 1 – excerpt of drawing no. A9002 showing the building height plane 'blanket' and the proposed building showing the location and extent of elements exceeding 8.5m building height plane

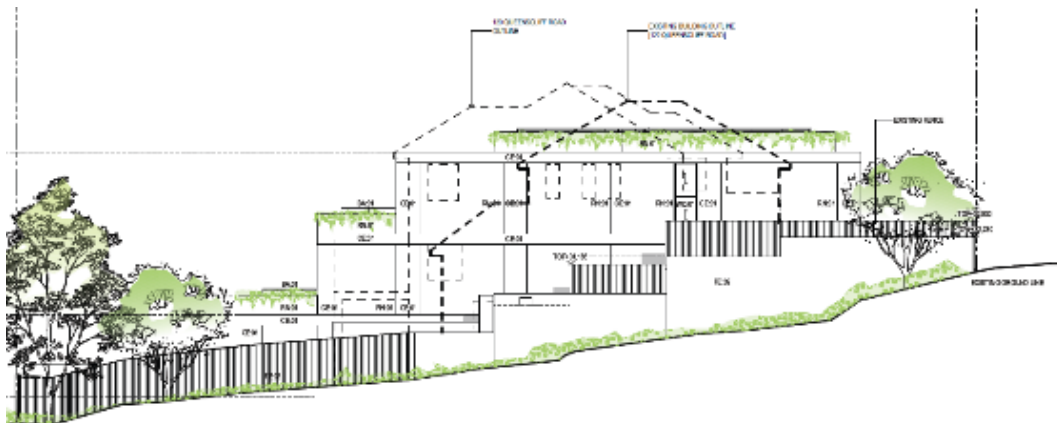


Figure 2 – the existing and proposed building outlines (eastern elevation). The flat roof of the proposed building is lower than the roof ridge heights of the existing building



Figure 3 – the existing 3 storey character to the rear of 122 Queenscliff Road



Figure 4 - the existing 3 storey character to the rear at 124 Queenscliff Road as viewed from the south-east



Figure 5 – 3 storey character at the rear of the development to the east of the subject site



Figure 6 – the subject site within the pattern of development in the local area



Figure 7 – rear elevation of the proposal within the local development context (source: architectural plan set, see full size image within)

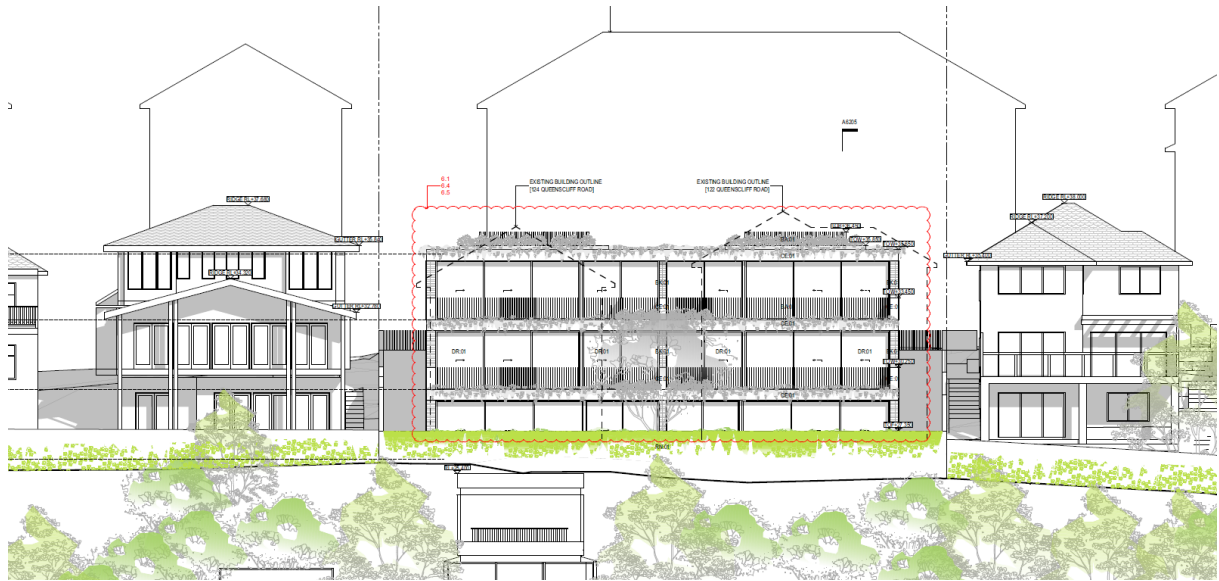


Figure 8 – rear elevation of the proposal within the adjoining development context. The maximum building height of the proposed development is lower than the adjacent buildings to the east and west and significantly below the height of buildings on the northern side of Queenscliff Road (source: architectural plan set, see full size image within).

3 Assessment

3.1 4.6 (3)(a) - compliance with the development standard is unreasonable or unnecessary in the circumstances

Having regard for the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, and in accordance with 4.6 (3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the objectives of the height standard are satisfied.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The first possible way is relevant to the subject matter and is repeated below:

1st *'The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.'*

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable'.

The objectives of the height standard are addressed within section 3.4.1 below. In summary, the proposed height exception does not threaten the proposal's ability:

- to achieve a height and scale that is compatible with the height, scale and form of surrounding residential development.
- to achieve a development that is compatible with the scenic quality of the local area which includes the adjacent street and long distant views of the hillside from the south.
- to achieve a presentation that is not visually intrusive, that does not result in inappropriate view disruption, and satisfies privacy and solar access controls.
- to achieve a residential flat building compatible with its setting that will enhance the built form and landscape quality on the site to the benefit the adjoining streetscape and nearby land.

Strict compliance with the development standard would therefore be unreasonable and unnecessary in these circumstances.

3.2 4.6 (3)(b) sufficient environmental planning grounds to justify contravening the development standard

In accordance with 4.6 (3)(b) there are sufficient environmental planning grounds to justify the exception to the development standard. The environmental planning grounds in support of the exception are described below.

3.2.1 Ground 1 – Purpose / minor nature and extent / no additional GFA

The height of building exceedance is depicted in figure 1 and relates to a portion of the southern edge of the roof, roof terrace, and roof terrace balustrade.

The nature and extent of the exceedance is minor. The exceedance relates to minor parts of the proposed building, for example, a section of the balustrade associated with the roof terrace, not the whole balustrade).

The height of the balustrade must meet the minimum quite standards under the building code.

The exception does not result in additional gross floor area or bulk above the building height plane.

The site is challenged by its orientation and topography in achieving good solar access. The roof terrace provides a valuable private open space that achieves good solar access on a south sloping property. The roof terrace is assessed as a positive feature of the design that adds to the amenity and quality of the proposed building.

3.2.2 Ground 2 - the prior excavation of the site distorts the maximum building height plane.

The method of calculating the building height follows the Commissioner's judgment in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

The existing developments located on the property have been excavated into the slope of the land. The following aspects are noted:

- The laundry and storage room within the lower ground floor level of 122 Queenscliff results in the proposed development breaching the height plane by approximately 1,155mm at the retaining wall of the handrail, and 380mm at the rooftop handrail.
- The two garages and a laundry room within the lower ground floor level of 124 Queenscliff results in the proposed development breaching the height plane by approximately 890mm.

In accordance with the Merman judgement at 74:

'The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014'.

It is clear from the various survey and architectural plans accompanying the application that the prior excavation of the site (within the footprint of the existing building) distorts the maximum building height plane. The proposed building height is compatible with the building heights of the adjacent dwelling houses, as further addressed in 3.2.3 below.

3.2.3 Ground 3 – Compatibility with the height and scale of surrounding and nearby development is achieved

It is noted that objective (a) of the standard is *‘to ensure that buildings are compatible with the height and scale of surrounding and nearby development’*.

The existing and proposed developments on the site exceed the 8.5m building height standard. Furthermore, it is evident from figures 7 and 8 that there are numerous examples of developments within the local area that exceed 8.5m building height standard.

The objective seeks for the design to respond to its context, which in this case, comprises a mix of 3 to 5 storey residential buildings, rather than just adhere to the numerical standard which may not (and typically, does not) relate to the specific heights of buildings in a location.

Given the 3-to-5 storey flat building context, the proposed building height will have an appropriate scale to a casual observer when viewed *surrounding and nearby development’*. Therefore, the height of the proposed building will be *‘compatible with surrounding and nearby development’*.

3.2.4 Ground 4 – the proposal is of good design and satisfies the relevant objectives of the Environmental Planning and Assessment Act

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the proposal is consistent with the following objectives at 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, through consistent streetscape alignment and increased landscaping at the street edge.

In response to (c), the proposal will facilitate the orderly and economic use and development of the land, in an appropriate location, in a manner that satisfies the applicable planning considerations because it will facilitate consolidation of two individual lots, renewal of the land/dwellings, additional housing, in a highly desirable location, designed to meet contemporary living needs, and meet building sustainability (BASIX) requirements.

In response to (g), the proposal results in a residential development that will promote good design and amenity of the built environment and increased landscaped deep soil area and planting at the site’s street edges.

A positive streetscape outcome is achieved for the land through, street setbacks that are compatible with the adjoining developments, the provision of a single vehicle driveway (whereas the existing circumstance, two properties, has the potential to generate two vehicle driveways), deep soil areas and planting around the proposed building.

The site is challenged by its orientation and topography in achieving good solar access. The roof terrace provides a valuable private open space that achieves good solar access on a south facing property. The roof terrace is assessed as a positive feature of the proposal that promotes good design and amenity.

3.3 4.6 (4)(a)(ii) - the public interest

3.3.1 Objectives of the Development Standard

In accordance with 4.6 (4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the Height of Buildings development standard which are repeated and responded to below:

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

In response:

The objective seeks for the design to respond to its context, which in this case, comprises a mix of 3 to 5 storey residential flat buildings, rather than just adhere to the numerical standard which typically, does not relate to the specific heights of buildings in a location.

The proposed building height exception is compatible with the building height and mix of residential building forms or nearby development, noting:

- With reference to figures 2 and 8, it is evident that the proposed building height is lower than the existing building.
- With reference to figure 8, it is evident that the proposed building height is lower than the adjacent buildings located on the southern side of Queenscliff Road.
- With reference to figures 7 and 8, it is evident that the proposed building height is significantly lower than the buildings opposite located on the northern side of Queenscliff Road.

The proposed building height and scale relates to site conditions including the sloping topography and the mix of two to three storey residential dwellings on the adjacent properties to the east and west.

The front of the proposal will present as two storeys to the street with significant recesses and landscaping incorporated.

The proposed building adopts a terraced form with the rear setbacks increasing as the height of the building rises. The rear of the building also incorporates elevated landscape planting. When viewed from the sides, the proposal will present obliquely as a terraced building form of two to three storeys that responds to the slope of the land.

The perimeter of the property incorporates appropriate deep soil landscaped areas that are proposed to accommodate a new and improved planting regime. The proposed landscaped areas incorporate a range of appropriate sized plants that will complement the design's visual scale, achieve a landscaped setting, and enhance the presentation of the proposed building

Large areas of continuous wall planes are avoided by recesses within the building floorplates, incorporation of balconies, appropriate fenestration, elevated planting, use of materials, and articulation. The design treatments proposed are considered effective in reducing the building scale and providing a visually interesting design.

It is assessed that the proposed building form is appropriate in ensuring that its height and scale will be '*compatible with surrounding and nearby development*'.

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

Relevant to *visual impact*, Objective (b) of the building height development standard states:

‘(b) to minimise ... visual impact’

In response:

The proposed building height exception minimises its visual impact from the locations that the proposal development may be seen noting:

- The proposed building height exception is located at the rear of the proposed building, centrally within the building footprint. It will not be perceivable from the streetscape.
- The side setbacks at the upper level are inset by an additional 1m (providing a 3.2m side setback) from the lower levels (which are at 2.3m).
- The proposed building adopts a terraced form with the rear setbacks increasing as the height of the building rises. The proposed upper level, a minor southern section of which exceeds the building height plane, has a significantly smaller floor plate with larger rear setback of 23.4m. The rear of the building also incorporates elevated landscape planting. Noting these design features:
 - When viewed from adjoining land to the east, west, and south, the proposal will present obliquely as a three dimensional, terraced building form of two to three stories that responds to the slope of the land.
 - When seen from longer distance views of the site to the south, the minor elements of the proposed development that exceed the building height plane would be visually recessive and not apparent to a casual observer, noting the proposed building height would be lower than, and compatible with, the surrounding hillside development.
- The building height of the proposed development is compatible with the heights of the surrounding hillside developments which range from approximately 2 to 5 storeys.
- The elements of the proposed development that exceed the building height plane are minor in extent (approx. 7% of the basement footprint), located at the rear of the proposed building, away from the site boundaries.

It is assessed that the proposed building height exception is appropriate in minimising its visual impact.



Figure 9 – architectural render of the proposed development’s streetscape presentation

Relevant to view sharing, Objective (b) of the building height development standard states:

‘(b) to minimise ... disruption of views’

In response:

Coastal, district, and lagoon views are available from the location to the south, including southeast and southwest of the site.

The proposed building adopts a terraced form with the rear setbacks increasing as the height of the building rises. The proposed upper level, a minor southern section of which exceeds the building height plane, has a significantly smaller floor plate with larger rear setback of 15m.

The majority of the proposed building height exception is located centrally within the building footprint.

The additional rear setbacks for each level of the proposal allow for increased access to the views by each of the adjacent properties.

Noting these features, the proposed development is assessed to be of good design that minimises its disruption of views.

It is also noted that the application was publicly exhibited between 15/06/2022 to 29/06/2022 (Council’s webpage) and minimal concern has been raised in relation to view sharing impacts.

It is assessed that the proposed building height exception is appropriate in minimising the disruption of views.

Relevant to privacy, Objective (b) of the building height development standard states:

‘(b) to minimise ... loss of privacy’

In response:

The building height exception relates to a portion of the southern edge of the roof, roof terrace, and roof terrace balustrade. These aspects are appropriately designed to address privacy considerations. The following features of the design and its relationship with adjoining land are noted:

- In relation to the roof terrace, privacy is addressed by the position of the access stairs, limited space for congregation near the property interfaces, significant separation from the adjacent private open spaces, and the perimeter planter that will limit downward sightlines (figure 10 below).
- The roof terrace level sits above neighbouring living levels and in line with where the neighbouring roof levels begin.
- The sections of the proposed roof terrace that exceed the building height plane are minor in extent, located at the rear of the proposed building, with the majority positioned centrally within the building footprint- away from the site boundaries. Furthermore, as shown in Figure 10 below, the proposed roof terraces do not adjoin the private open spaces of the adjacent properties.
- Appropriate building setbacks are provided by the roof terrace to the eastern, western, and southern boundaries noting:

- 6.4m and 4.15m side setbacks to the eastern and western boundaries respectively
- A 23.45m setback is provided to the southern (rear) boundary.
- The existing development pattern is orientated north to south with the principal private open spaces to the south to take advantage of the amenity and views. The proposed dwellings follow this pattern and are orientated north to south with their outlook and principal private open spaces (balconies and terraces) to the south to take advantage of the amenity and views.
- With the coastal views located to the east, and district views extending to the west, there is an established pattern where there is degree of overlooking experienced between properties in order to enjoy the view outlook. In this regard it is observed that there is generally an absence of privacy screens and therefore a general acceptance that view access is favoured over complete privacy.
- Minimal openings are proposed within the side facing elevations of the proposed development. The design will obtain most of its ventilation and solar access from north and south facing openings.

It is assessed that the proposed building height exception is appropriate in minimising the loss of privacy to neighbouring properties.

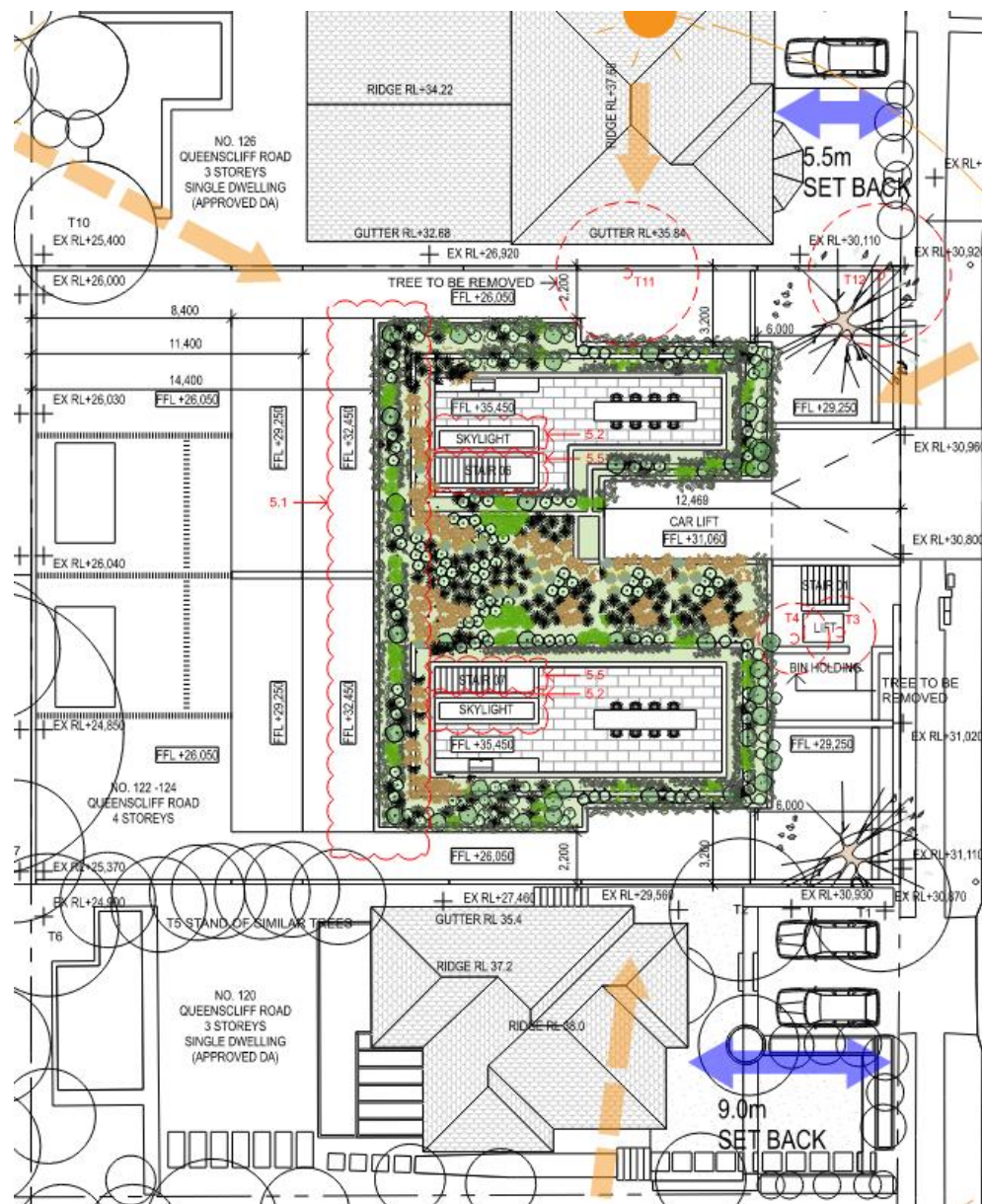


Figure 10 – location and configuration of the proposed roof terraces in relation to the adjacent residential developments (source: excerpt from architectural plans)

Relevant to overshadowing, Objective (b) states:

‘(b) to minimise ... loss of solar access’

In response:

The adjoining properties are dwelling houses, therefore consideration is given to DCP controls D2 (Private Open Space) and D6 (Access to Sunlight). These require two hours of solar access to be maintained to 30 square metres of private open space for a 3-bedroom dwelling house.

The building height exceptions relate to a small portion of the southern section of the roof parapet, the majority of which are centrally located at the roof level of the proposed building.

The proposed building complies with the solar access requirements under the section D6 of the Warringah DCP. The following aspects are noted:

- In relation to the property at 120 Queenscliff Road, drawing number A2603 confirms:
 - 6 hours of solar access is maintained to more than 30m² of private open space at mid-winter in accordance with the DCP control. The area in sunlight ranges from 44m² to 77m², which meets and exceeds minimum requirements of the DCP the control.
 - The areas in sunlight, on an hourly basis from 9:00 AM to 3:00 PM, are shown in the table below from the architectural drawings.

■ 120 QUEENSCLIFF ROAD, SOLAR ACCESS TO PRIVATE OPEN SPACE, TOTAL POS: 275M²

SOLAR ACCESS	09:00	10:00	10:30	11:00	11:30	12:00	12:30	15:00	TOTAL HOURS
PROPOSED POS AREA	66m ²	67m ²	77m ²	59m ²	49m ²	48m ²	54m ²	44m ²	6 HOUR

MINIMUM TOTAL PRIVATE OPEN SPACE - 60m²

MINIMUM REQUIRED SOLAR TO PRIVATE OPEN SPACE - 30m² (50% OF TOTAL POS)

It is also noted that:

- The areas of building height exceedance do not impact on solar access to 120 Queenscliff living rooms
- The areas of building height exceedance have minimal area impacts to 120 Queenscliff solar to private open space between 11:30am and 12:30am
- In relation to the property at 126 Queenscliff Road, due to the orientation of the subdivision pattern / site, the existing and proposed developments do not overshadow number 126 after 10 AM midwinter. Therefore, the proposed development will have a very modest impact on the western adjoining property.

The proposed building therefore satisfies the relevant planning controls relating to solar access and the proposed building height exception minimises the loss of solar access.

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

It is noted that the proposed development adjoins Queenscliff Road within an established urban area that is characterised mostly by medium density development; it is not adjacent to coastal land or bushland.

The proposed development will minimise any adverse impact on the scenic quality of local environment (context of the site). Indeed, it is assessed that the proposed development will positively contribute to the visual quality (both built form and landscape quality) of the site because:

- The proposed development will present as 2 storeys to the street compatible with the adjacent developments on the southern side of Queenscliff Road. The proposed building height exception is located at the rear of the upper level of the proposed development and will be imperceivable from the streetscape.
- The building height exception will occupy a minor portion of the proposed roof area and development footprint, setback from the perimeter of the proposed building and significantly setback from the property boundaries (figure 10).

- An improved streetscape outcome is achieved for the land through street setbacks that are compatible with the adjoining developments, the provision of a single vehicle driveway (whereas the existing circumstance has the potential to generate two vehicle driveways), deep soil areas and planting around the proposed building.
- The proposed building adopts a terraced form with the rear setbacks increasing as the height of the building rises. The proposed building height is compatible with the heights of hillside developments in the local area which range from approximately 2 to 5 storeys. Noting the location of the proposed building height exceedances, they will have a small visual catchment. They would also not be apparent to a casual observer on land to the south noting the proposed building height would be lower than, and compatible with (figure 7 and 8), the surrounding hillside development.

It is assessed that the proposed building height exception is appropriate in minimising its visual impact.

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

The proposal is assessed as being consistent with objective (d) noting that:

In terms of its visual impact when viewed from areas to the south of the site, including Queenscliff Lagoon and the public open space around it:

- The proposed development adopts a terraced building form, that steps in accordance with the slope of the land and increases its setbacks to the southern rear boundary as the height of the building rises.
- The proposed building height is appropriate when considering the pattern of development within the local hillside context. The local area is highly built-up and of mixed residential development character comprising flat buildings, attached dwellings, and dwelling houses with developments ranging from approximately 2 to 5 storeys (and more) when viewed from downslope areas to the south. The building height of the proposed development is compatible with the heights of the surrounding hillside developments (figures 7 and 8).
- The proposed development displays scenic qualities that will be compatible with its hillside context when viewed from Queenscliff Lagoon and the public open space around it.

In terms of its visual impact when viewed from Queenscliff Road:

- The proposed development will present as 2 storeys to the street compatible with the adjacent developments on the southern side of Queenscliff Road. The proposed building height exception is located at the rear of the upper level of the proposed development and will be imperceivable from the streetscape.
- The proposed development follows the established front and rear setback pattern which is established by development to the east and west of the subject site.
- The side setbacks at the upper level are inset by an additional 1m (providing a 3.2m side setback) from the lower levels (which are at 2.3m).

- The proposed development displays complaint setbacks and appropriate landscaped area. The proposal provides a new and enhanced planting regime that and will therefore maintain a landscaped setting for the site.

For these reasons the proposed development is assessed as having an appropriate visual impact of when viewed from public places such as parks, reserves, and roads.

3.3.2 Objectives of the zone

The proposed development will be in the public interest because it is consistent with the objectives for development within the R2 Low Density Residential zone under the Warringah Local Environmental Plan 2011 in which the development is proposed to be carried out. The zone objectives are repeated and responded to below.

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.

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

In response, the proposal is consistent with the zone objectives in that it:

- will enable the provision of 2 additional dwellings and thereby provide for the housing needs of the community in a highly suitable location.
- will provide for improved housing and car parking provision on the site to meet contemporary needs.
- will provide residential development in a manner that is respectful of, compatible with, and not disruptive to, the character of the local development context.
- will provide residential development that is compatible with the mixed residential development character within the local area, within a landscape setting, that is in harmony with the environmental conditions of the property and local area.

3.4 Secretary's considerations

With regards to the Secretary's considerations the proposed variation of the development standard:

- Does not raise any matter of significance for State or regional environmental planning consistent with 4.6 (5)(a).
- The public benefit is not served by maintaining the development standard consistent with 4.6 (5)(b).

3.5 Conclusion

The variation proposed to the *Height of Building* development standard has been appropriately acknowledged and the circumstances assessed, having regard to the objectives of the control. In conclusion, Council can be satisfied that:

- this written request has adequately addressed the matters required to be addressed by cl 4.6(3) and
- that the proposed development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4),

The proposal should be granted development consent.