



AMENDED CLAUSE 4.6 VARIATION REQUEST TO BUILDING HEIGHT DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.3 OF NORTH SYDNEY LEP 2013

47 East Crescent Street, Lavender Bay

Alterations and additions to existing dwelling

Submitted to North Sydney Council
On Behalf of Michael Bell Architects

September 2025

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CLAUSE 4.6 VARIATION REQUEST TO BUILDING HEIGHT DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.3 OF NORTH SYDNEY LEP 2013

This Clause 4.6 variation request has been prepared to accompany the development application for alterations and additions to the existing dwelling at No. 47 East Crescent Street, Lavender Bay.

The site is zoned R3 Medium Density Residential under North Sydney Local Environmental Plan 2013 (NSLEP 2013).

The proposal includes the following alterations and additions to the existing dwelling:

- Extending the existing Basement Level to the west and reconfiguring the floor layout of the Basement Level to accommodate living room/gym, bathroom, wine cellar and store room
- Extending the existing Ground Floor to the north and reconfiguring the floor layout of the Ground Floor to accommodate a new kitchen, dining area, WC, laundry and double garage accessed from Waimera Street
- Extending the existing First Floor to the north, enclosing the existing rear veranda and reconfiguring the floor layout of the First Floor to accommodate a Main Bedroom with ensuite, Bedroom 1 with north facing balcony and east facing balcony, Bedroom 2 with Juliet balcony and main bathroom
- Reconfiguring the floor layout of the Attic Level to accommodate an Attic Bedroom with ensuite and new dormer roof
- Excavating the existing ground level western courtyard to create a new basement level western courtyard
- New ground level courtyard in rear eastern corner of the site
- Roof garden at the rear of the First Floor
- New drain and sewer pit at Basement Level and a 5,000L water tank under the garage slab
- Extending the existing driveway crossover off Waimera Street

The proposal results in a non-compliance with Clause 4.3 of NSLEP 2013 which relates to height of buildings. As such, this Clause 4.6 variation request has been prepared in accordance with Clause 4.6 of NSLEP 2013:

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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (caa) clause 5.5,
- (ca) clause 6.27(4),
- (cb), (cc) (Repealed)
- (cd) clause 6.31.

This Clause 4.6 variation has been prepared in accordance with the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023.

This Clause 4.6 variation request outlines the nature of the exceedance to the building height development standard and assesses the relevant matters in Clause 4.3 NSLEP 2013.

This Clause 4.6 variation request demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary and establishes sufficient environmental planning grounds to justify contravening the development standard, satisfying Clause 4.6(3) of NSLWP. This Clause 4.6 variation request also demonstrates that the proposed development will be consistent with the objectives of the height of buildings development standard and the zoning of the site.

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.3 of NSLEP 2013 and the associated building height map (refer to extract below).

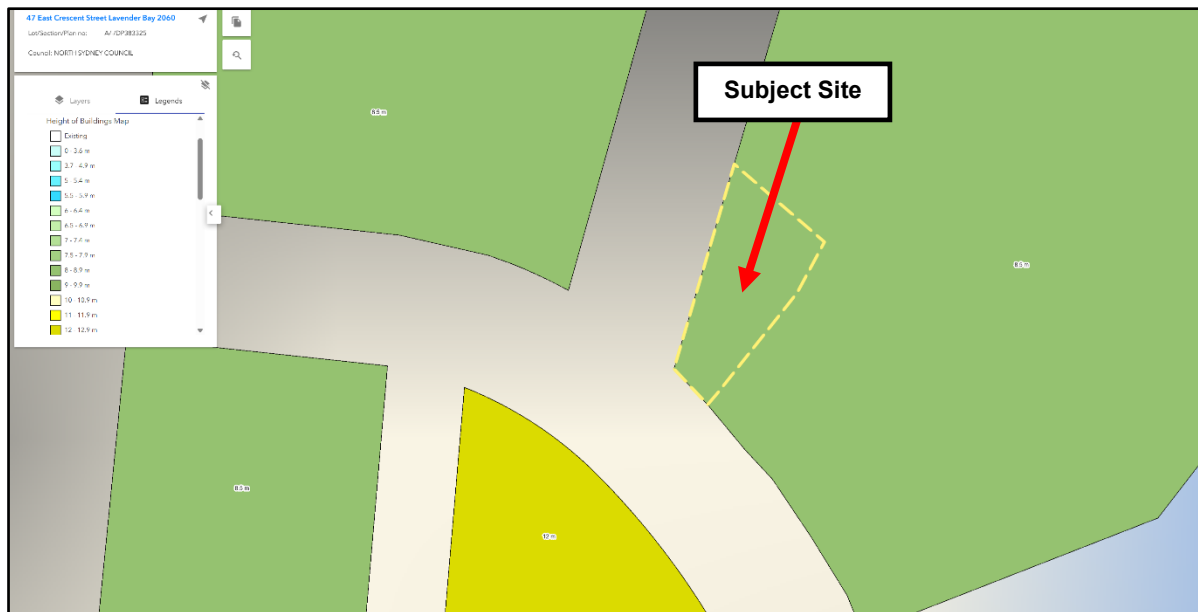


Figure 1: Height of Buildings Map

Clause 4.3 of NSLEP 2013 and the associated building height map prescribe a maximum building height limit of 8.5m for a development on the site.

The proposed works have a maximum building height of 9.85m (measured from the existing ground level to the top of the proposed rear dormer at Attic Level), equating to a 15.88% (1.35m) variation to the building height development standard.

The building height departure is limited to the rear dormer at Attic Level. The remainder of the development complies with the building height development standard. Refer to the extract of the Section below.

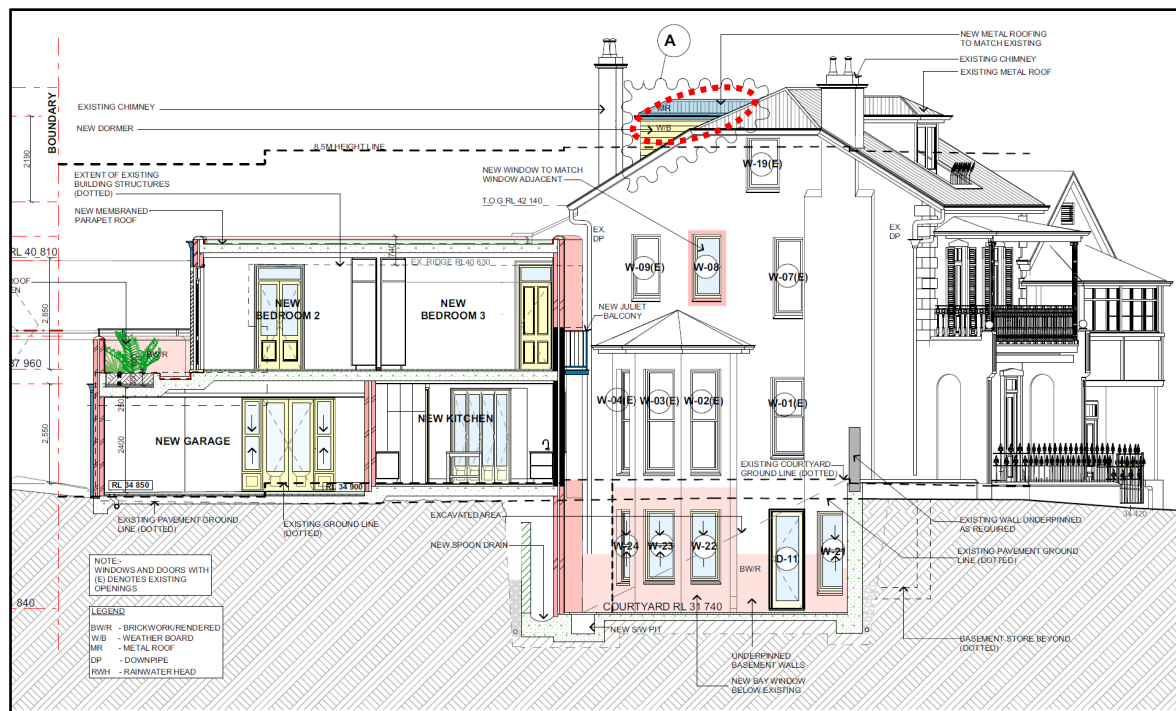


Figure 2: Extract of Section demonstrating that the proposed rear dormer at Attic Level does not comply with the building height development standard (red dotted circle); the remainder of the proposal complies with the building height development standard

Justification for Contravention of the Development Standard

This Clause 4.6 variation 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:

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

5-Part test

As outlined in the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023, the common ways to establish whether compliance with the development standard is unreasonable or unnecessary is known as the '5-Part Test' (from the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The 5-Part Test is summarised as follows:

Compliance with the development standard is unreasonable or unnecessary if the:

- 1. objectives of the development standard are achieved notwithstanding the non-compliance**
- 2. underlying objective or purpose is not relevant to the development*
- 3. underlying objective or purpose would be defeated or thwarted if compliance was required*

4. *development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard*
5. *zoning of the land on which the development is proposed was unreasonable or inappropriate.*

An applicant only needs to satisfy at least one part of the 5-Part Test, not all 5 parts.

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

Consistency with the objectives of the building height development standard in the LEP	
Objectives	Assessment
<i>(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</i>	The proposed works and building height non-compliance reflect the topography of the site. The proposed rear dormer at Attic Level, which does not comply with the building height control, sits below the maximum height of the existing dwelling.
<i>(b) to promote the retention and, if appropriate, sharing of existing views,</i>	The proposal and associated building height non-compliance will not unreasonably impact views from the public domain or surrounding properties. The RFI Response Letter prepared by Michael Bell Architects dated 5/09/2025 provides a detailed view analysis of the potential view loss impacts from the dwellings at No. 2A Waiwera Street, No. 4 Waiwera Street and No. 49 East Crescent Street as a result of the proposed development, having regard to the 4 step assessment in <i>Tenacity Consulting v Warringah</i> [2004] NSWLEC 140. The proposed alterations and additions represent a skillful design response in relation to view sharing under the Principle and are not responsible for any unreasonable view impacts. The rear dormer, which contravenes the building height limit, will not result in view loss impacts. Despite the building height non-compliance, the proposed rear dormer will retain the existing views of the Sydney Harbour Bridge and Luna Park from No. 2A Waiwera Street, No. 4 Waiwera Street, No. 49 East Crescent Street and the public domain. Refer to the extract of the View Analysis Diagrams below.
<i>(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,</i>	The proposed rear dormer at Attic Level which contravenes the building height limit, will not result in any additional overshadowing to the adjoining properties. As demonstrated in the Shadow Diagrams submitted with this DA, the adjoining properties to the north and

	east will continue to receive more than 3 hours of solar access to main living areas and private open space areas between 9am to 3pm on June 21, thereby complying with the NSDCP 2013 solar access control.
<i>(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,</i>	The component of the dwelling that exceeds the building height control is limited to the proposed rear dormer at Attic Level. The rear dormer is generally setback greater than the DCP setback requirements, thereby providing adequate separation from the adjoining properties. Despite the rear dormer not complying with the building height development standard, the proposed rear dormer will not result in any unreasonable impacts on the amenity of the adjoining properties in terms of privacy.
<i>(e) to ensure compatibility between development, particularly at zone boundaries,</i>	The bulk and scale of the proposal is compatible with the existing and desired future character of the locality. The proposed development is consistent with the anticipated built form for the site as established by NSLEP 2013. The 8.5m building height limit that applies to the site would be assumed to allow for a 2- to 3-storey development. Despite the building height non-compliance, the proposal will not alter the maximum building height or storey height of the existing dwelling. The proposed rear dormer at Attic Level, which contravenes the building height limit, sits below the maximum height of the existing dwelling. Despite the building height non-compliance, the proposal will retain the existing 2-storey height with Basement Level and Attic Level. The proposed height variation is associated with a built form that is compatible with the height of surrounding buildings, noting the residential flat buildings within the vicinity of the subject site. The proposed rear dormer at Attic Level, which does not comply with the building height control, is a minor element of the overall built form and will not generate any adverse streetscape, visual bulk or amenity impacts. The dormer is located at the rear of the dwelling, behind and below the ridge line of the existing dwelling and is submissive in scale.
<i>(f) to encourage an appropriate scale and density of development that is in</i>	The bulk and scale of the proposal is appropriate for the R3 zoning of the site and is compatible with the existing and desired future character of the locality.

<i>accordance with, and promotes the character of, an area,</i>	The proposed rear dormer at Attic Level, which does not comply with the building height control, is a minor element of the overall built form and will not generate any adverse streetscape, visual bulk or amenity impacts. The proposed rear dormer at Attic Level, which contravenes the building height limit, sits below the maximum height of the existing dwelling.
<i>(g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living.</i>	The bulk and scale of the proposal is appropriate for the R3 zoning of the site and is compatible with the existing and desired future character of the locality. Despite the building height non-compliance, the proposal will retain the existing 2-storey height with Basement Level and Attic Level. The proposed rear dormer at Attic Level, which does not comply with the building height control, sits below the maximum height of the existing dwelling.
Consistency with the objectives of the R3 Medium Density Residential zone	
Objectives	Assessment
<i>To provide for the housing needs of the community within a medium density residential environment.</i> <i>To provide a variety of housing types within a medium density residential environment.</i> <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> <i>To encourage the development of sites for medium density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.</i> <i>To provide for a suitable visual transition between high density residential areas and lower density residential areas.</i> <i>To ensure that a high level of residential amenity is achieved and maintained.</i>	The site is zoned R3 Medium Density Residential under the provisions of NSLEP 2013. The proposed building height variation does not raise any inconsistency with the ability of the proposal to achieve the objectives of the R3 zone. The proposal is consistent with the objectives of the R3 zone as follows: - Despite the building height variation, the proposal is of a height and scale that is compatible with the character of surrounding development. The proposed rear dormer at Attic Level, which does not comply with the building height control, sits below the maximum height of the existing dwelling. - The proposed rear dormer at Attic Level, which contravenes the building height limit, will not result in unreasonable amenity impacts to neighbouring properties in terms of visual bulk, privacy, view loss and overshadowing. - Despite the building height variation, the proposal will continue to provide for the housing needs of the community within a medium density residential environment. - The proposal will result in dwelling that exhibits a high level of amenity with an open plan layout

	for the dining and kitchen on the Ground Floor, pleasant outlooks, privacy, good sized rooms, access to sunlight, daylight, ventilation, storage, on-site parking and private open space areas. • The proposal will improve the internal and external amenity and functionality of the existing dwelling. • The proposal will not inhibit other land uses that provide facilities or services to meet the day to day needs of residents. Therefore, it is considered that the proposed development satisfies the zone objectives, notwithstanding the height variation.
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Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality and meets the objectives of the development standard.

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

As outlined in the 'Guide to Varying Development Standards' prepared by the Department of Planning and Environment in 2023, the term 'environmental planning grounds', while not defined in the EP&A Act or the Standard Instrument, refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the EP&A Act. The scope of environmental planning grounds is wide as exemplified by the court cases (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [10]).

Assessment: Environmental planning grounds justifying the contravention of the building height development standard include:

- The building height departure is limited to the rear dormer at Attic Level. The remainder of the development complies with the building height development standard. Refer to the extract of the Section below.

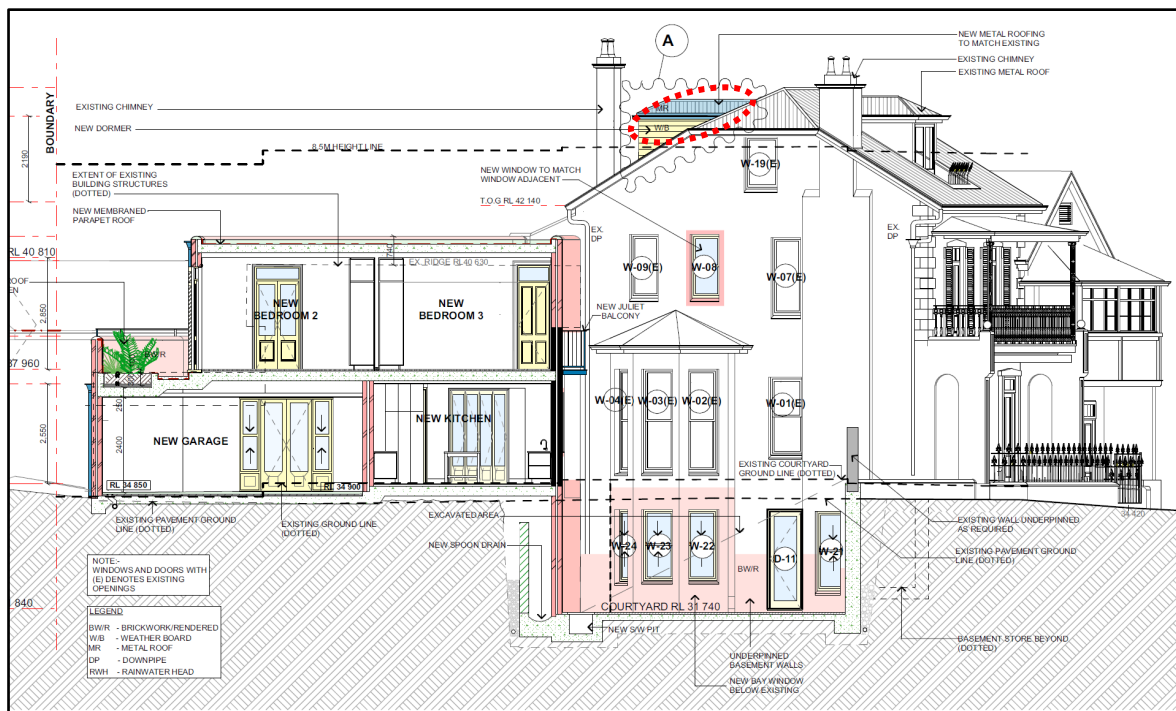


Figure 3: Extract of Section demonstrating that the proposed rear dormer at Attic Level does not comply with the building height development standard (red dotted circle); the remainder of the proposal complies with the building height development standard

- As demonstrated in the extract of the Section above, the proposed rear dormer at Attic Level, which does not comply with the building height control, sits below the maximum height of the existing dwelling.
- The height variation at the rear dormer at the Attic Level is due to the existing excavation of the Basement Level, which has been established in the land and environment court judgement of *Merman Investments v Woollahra Council* [2021] as constituting a sufficient environmental ground.
- Despite the building height non-compliance, the proposal will not alter the maximum building height or storey height of the existing dwelling. The proposal will retain the existing 2-storey height with Basement Level and Attic Level. The proposed development is consistent with the anticipated built form for the site as established by NSLEP 2013. The 8.5m building height limit that applies to the site would be assumed to allow for a 2- to 3-storey development.
- The building height non-compliance is small in scale (1.29m) and will be indiscernible from the streetscape and surrounding properties.
- The proposed rear dormer at Attic Level, which does not comply with the building height control, is a minor element of the overall built form and will not generate any adverse streetscape, visual bulk or amenity impacts. The dormer is located at the rear of the dwelling, behind and below the ridge line of the existing dwelling and is submissive in scale.

- The proposed height variation is associated with a built form that is compatible with the height of surrounding buildings, noting the residential flat buildings within the vicinity of the subject site.
- The rear dormer which contravenes the building height limit, provides amenity to the Attic Level in terms of solar access, ventilation and outlook.
- A reduction of the proposed building height would provide an indiscernible benefit to the streetscape and would reduce the amenity of the building.
- The proposed exceedance of the height control will not create unreasonable environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in this height would not create additional benefit for adjoining properties or the locality.
- Overshadowing: The proposed rear dormer at Attic Level, which does not comply with the building height control, will not result in any additional overshadowing to the adjoining properties. As demonstrated in the Shadow Diagrams submitted with this DA, the adjoining properties to the north and east will continue to receive more than 3 hours of solar access to main living areas and private open space areas between 9am to 3pm on June 21, thereby complying with the NSDCP 2013 solar access control.
- View Loss: The proposal and associated building height non-compliance will not unreasonably impact views from the public domain or surrounding properties.

The RFI Response Letter prepared by Michael Bell Architects dated 5/09/2025 provides a detailed view analysis of the potential view loss impacts from the dwellings at No. 2A Waiwera Street, No. 4 Waiwera Street and No. 49 East Crescent Street as a result of the proposed development, having regard to the 4 step assessment in *Tenacity Consulting v Warringah* [2004] NSWLEC 140. The proposed alterations and additions represent a skillful design response in relation to view sharing under the Principle and are not responsible for any unreasonable view impacts.

The rear dormer, which contravenes the building height limit, will not result in view loss impacts. Despite the building height non-compliance, the proposed rear dormer will retain the existing views of the Sydney Harbour Bridge and Luna Park from No. 2A Waiwera Street, No. 4 Waiwera Street, No. 49 East Crescent Street and the public domain. Refer to the extract of the View Analysis Diagrams below.



Figure 10. View from No. 2 Waiwera St



Figure 11. photo montage view from No. 2A Waiwera St

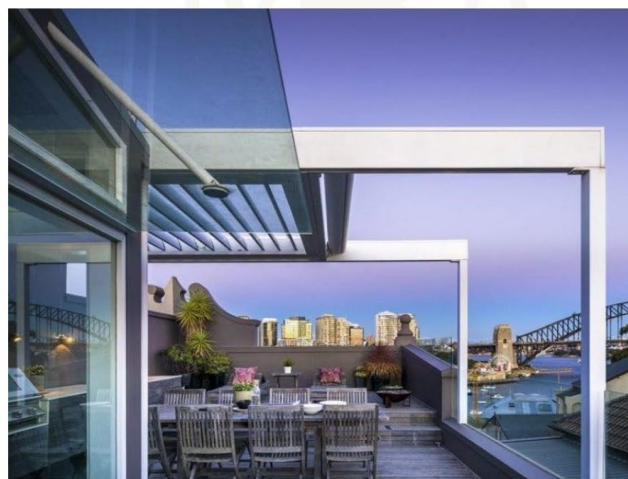


Figure 12. View from No. 2A Waiwera St- roof terrace

Figure 4: Extract of the View Analysis Diagram demonstrating that the proposed rear dormer at the Attic Level will retain existing views of the Sydney Harbour Bridge from No. 2A Waiwera Street



Figure 5. View 3 – The view from our master bedroom balcony on the second floor.

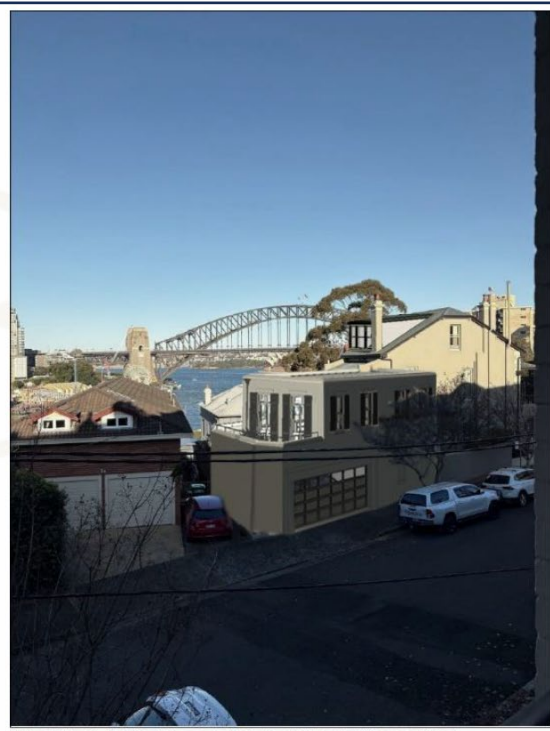


Figure 5. View 3 – The view from our master bedroom balcony on the second floor.

Fig 13. View from 4 Waiwera St Balcony

Fig 14. Montage from No.4 Waiwera St Balcony



Figure 15. View from roof Terrace - 4 Waiwera St

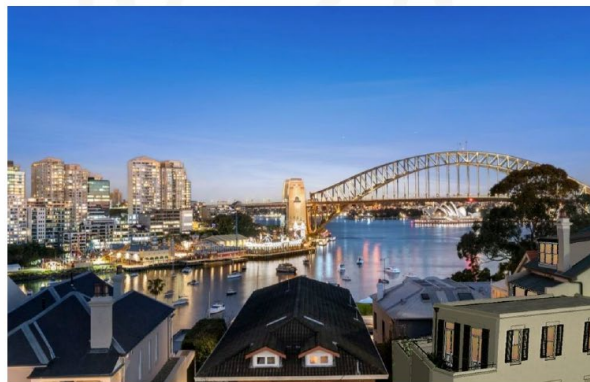


Figure 15a. Proposed view from roof Terrace - 4 Waiwera St

Figure 5: Extract of the View Analysis Diagram demonstrating that the proposed rear dormer at the Attic Level will retain existing views of the Sydney Harbour Bridge from No. 4 Waiwera Street



Dining Room



Main Bedroom



Figure 16. Real Estate Photos- 49 East Crescent St



Figure 5. View 3 - The view from the second storey living area

Figure 19. View from 2nd Floor Living Room- 49 East Crescent St

Figure 6: Extract of the View Analysis Diagram demonstrating that the proposed rear dormer at the Attic Level will retain existing views of the Sydney Harbour Bridge from No. 49 East Crescent Street



Figure 20. View 1a Waiwera & existing wall 49 East Crescent St



Figure 21. View between properties

Figure 7: Extract of the View Analysis Diagram demonstrating that the proposed rear dormer at the Attic Level will retain existing views of the Sydney Harbour Bridge from the public domain

- **Privacy:** The component of the dwelling that exceeds the building height control is limited to the proposed rear dormer at Attic Level. The rear dormer is generally setback greater than the DCP setback requirements, thereby providing adequate separation from the adjoining properties. Despite the rear dormer not complying with the building height development standard, the proposed rear dormer will not result in any unreasonable impacts on the amenity of the adjoining properties in terms of privacy.

The proposal will provide a suitable design and amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act). The building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site. On the above basis, it is considered that there are sufficient environmental grounds to permit the building height variation in this instance.

Conclusion

This Clause 4.6 variation request is considered to adequately address the relevant matters under Clause 4.6 and demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances (Clause 4.6(3)(a)) and that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

The proposal is consistent with the objects of Section 1.3 of the EP& A Act by promoting the following:

- economic welfare of the community and a better environment (Section 1.3(a))
- orderly and economic use and development of land (Section 1.3(c))
- delivery and maintenance of affordable housing (Section 1.3(d))
- protect the environment (Section 1.3(e))
- sustainable management of built heritage (Section 1.3(f))
- good design and amenity of the built environment (Section 1.3 (g))
- proper construction and maintenance of buildings, including the protection of the health and safety of their occupants (Section 1.3(h))

The proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard under NSLEP.

For reasons mentioned herein, this Clause 4.6 variation request is forwarded in support of the development proposal at No. 47 East Crescent Street, Lavender Bay and is requested to be looked upon favourably by the consent authority.