

**CLAUSE 4.6 REQUEST FOR VARIATION OF HEIGHT OF
BUILDINGS STANDARD UNDER CLAUSE 4.3 OF NORTH
SYDNEY LOCAL ENVIRONMENTAL PLAN 2013**

PROPERTY: 2 WARUDA STREET, KIRRIBILLI

*Tony Moody
BTP (UNSW), LL.B (UTS) (Hons.), MPIA
Email: tonymoody@tonymoody.com.au
Mobile: 0414 330 807*

1.0 INTRODUCTION

This Clause 4.6 Request is made pursuant to the provisions of Clause 4.6 of North Sydney Local Environmental Plan 2013 (**LEP 2013**).

Variation under Clause 4.6 of LEP 2013 is requested in relation to Clause 4.3 of LEP 2013 entitled “Height of Buildings” (**HoB Development Standard**) in support of a Development Application (**DA**) seeking approval of North Sydney Council (Council) for the “*Change of Use from a Residential Flat Building to a Dwelling House and Proposed Associated Alterations and Additions*” on a property known as 2 Waruda Street, Kirribilli (subject site).

The Objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes arising from a proposed development.

For the reasons referred to in this Clause 4.6 Request and the accompanying Statement of Environmental Effects (SEE), I consider that variation of the HoB Development Standard in the circumstances of the current DA would achieve a better Planning Outcome rather than requiring strict adherence to the development standard.

Clause 4.6 of LEP 2013 allows a Consent Authority to grant a variation to a development standard as stated below.

Clause 4.6 – Exceptions to Development Standards

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority 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.*
- (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.*

Note. *When this plan was made it did not include all of these zones*

(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 4.3 in relation to land identified as “Area 1” on the Special Provisions Area Map, other than subject land within the meaning of clause 6.19C,*

(cab) *clause 4.4, 5.6 or 6.19C in relation to land identified as “Area 1” on the Special Provisions Area Map,*

(cb) *clause 6.3(2)(a) and (b),*

(cba) *clause 6.19A.*

(cc) *(Repealed)*

(8A) *(Repealed)*

I note that the HoB Development Standard is not specifically excluded from the operation of Clause 4.6 of LEP 2013.

2.0 MERMAN INVESTMENTS PTY LTD V WOOLLAHRA MUNICIPAL COUNCIL

It is clearly the case that the breach of the HoB Development Standard is a direct result of the approved excavation for a basement level/carpark under Development Consent No. 357/2015/1 and the associated Modification Application approvals. In other words, the “*existing ground level*” is very different to that which existed prior to the granting of Development Consent No. 357/2015/1 and the associated Modified Application approvals.

Accordingly, the question to be answered is how to measure the proposed maximum HoB in circumstances where there has been approved excavation to create a basement level/carpark on the subject site which distorts the previous existing ground levels.

I particularly note the approved excavation for the basement level/carpark is wholly under the approved building footprint. The approved basement level/carpark has been constructed.

As the level of the existing basement level/carpark is known, the judgement of the Land and Environment Court (Court) in “***Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582***” (**Merman**), is the relevant judgment in determining the proposed maximum HoB in this instance.

In the Court’s judgment in Merman, the Court held that one must adopt the known lowest level of the hole up to the maximum height of the proposed building to determine the proposed maximum height. The Court, however, further held that when assessing the merits of such a breach, one can also adopt the levels at the adjoining property boundaries prior to any excavation to determine the effective maximum height relative to the adjoining property boundaries. On this point *Merman* states the following:

“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.”

Consequently, in accordance with the Court's judgment in ***Merman***, the Architect has advised that the proposed development has a maximum Height of Building of 16.416m and therefore breaches the Height of Buildings Standard by 4.416m and 36.8%

Adopting *Merman*, one can also adopt the assumed natural ground level at the adjoining property boundaries prior to excavation of the subject site to assess the merits of the proposed maximum height. On this point, I note that the maximum height of the current proposed development would only be 11.97m. when one adopts the levels prior to the approval and construction of the basement level/carpark.

In other words, if one compares the proposed maximum height of the proposed development against the existing ground levels prior to excavation, the proposed development would only be 11.97m which complies with the HoB Standard.

Further to the above, I wish to note that the proposed building envelope is substantially the same as the approved building envelope under Development Consent No. 357/2015/1 and the associated Modified Application approvals.

3.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

The development standard to be varied is a numerical standard under Clause 4.3 of LEP 2013. Clause 4.3 states: -

Clause 4.3 – Height of Buildings

(1) *The objectives of this clause are as follows—*

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) to promote the retention and, if appropriate, sharing of existing views,*
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) to ensure compatibility between development, particularly at zone boundaries,*
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area,*
- (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*

The numeric value of the development standard in the environmental planning instrument

The Height of Buildings Map pursuant to Clause 4.3 of LEP 2013 permits a maximum HoB for a building on the subject site of 12m.

The Proposed HOB

As previously advised, in accordance with the Court's judgment in **Merman**, the Architects have advised that the proposed development has a maximum Height of Building of 16.416m and therefore breaches the Height of Buildings Standard by 4.416m and 36.8%.

Adopting *Merman*, I also wish to note that the proposed development has a compliant maximum Height of Building of 11.97m should one use the extrapolated natural ground level prior to approval of the basement excavation.

Visual representation of the proposed variation

Adopting calculations from the “existing ground level” in accordance with the Court judgment in *Merman*, the HoB Development Control is shown by way of the **pink** dotted line in Figure 1 below. All elements above the **pink** dotted line are breaching.

Adopting calculations from the “extrapolated natural ground level” in accordance with the Court judgment in *Merman*, the HoB Development Control is shown by way of a **green** dotted line in figure 1 below.

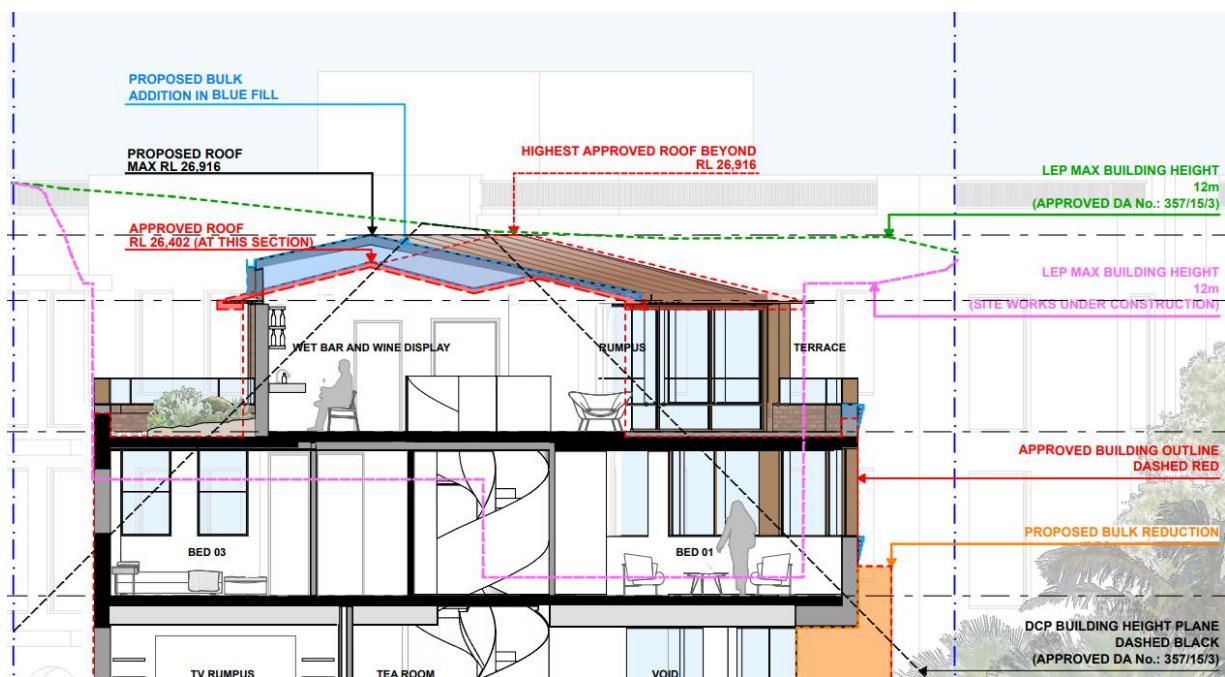


Figure 1 – Section AA

Accordingly, it is clear that the proposed breach is a numerically significant breach, but I note the following: -

- The Court has previously established that the numerical degree of breach is not the seminal reason as to whether a Clause 4.6 Request should be supported.

- As previously advised, the maximum breach is a direct result of the approved excavation for a basement level/carpark under Development Consent No. 357/2015/1 and the associated Modified Application approvals. As previously advised, the proposed development has a compliant maximum Height of Building of 11.97m when one implements the extrapolated natural ground level method in accordance with the Court's judgment in Merman.
- I further note that the proposed building envelope is substantially the same as the approved building envelope under Development Consent No. 357/2015/1 and the associated Modified Application approvals.

I consider the proposed breach of the HoB Development Standard is entirely reasonable for the reasons referred to throughout this Clause 4.6 Request and the accompanying SEE.

3.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

For the reasons outlined in this Clause 4.6 Request, I consider that compliance under LEP 2013 is unreasonable and unnecessary in the circumstances of the proposed development.

I particularly note the following reasons why I consider that compliance with the HOB Standard is unreasonable or unnecessary: -

- i. The Court has previously established that the numerical degree of breach is not the seminal reason as to whether a Clause 4.6 Request should be supported.
- ii. The maximum breach is a direct result of the approved excavation for a basement level/carpark under Development Consent No. 357/2015/1 and the associated Modified Application approvals. As previously advised, the proposed development has a compliant maximum Height of Building of 11.97m when one implements the extrapolated natural ground level method in accordance with the Court's judgment in Merman.
- iii. I further note that the proposed building envelope is substantially the same as the approved building envelope under Development Consent No. 357/2015/1 and the associated Modified Application approvals.
- iv. In relation to the Objectives of the HoB Standard, I consider that the proposed development satisfies the Objectives of the HoB Standard for the following reasons: -
 - (a) In relation to Objective (a), I note that the proposed development does not propose any additional Excavation nor Earthworks compared to the approved development under Development Consent No. 357/2015/1 and the associated Modified Application approvals. Accordingly, the proposed development will reflect the existing landform over the subject site.
 - (b) In relation to Objective (b), the proposed development will ensure the sharing of existing views for the reasons referred to

in the accompanying Visual Impact Assessment prepared by Urbaine Pty Ltd, Consultants.

- (c) In relation to Objective (c), in accordance with the Shadow Diagrams prepared by Cad Draft P/L, there will be a negligible increase in overshadowing between the hours of 9:00am and 3:00pm on June 21st when compared to the approved development under DA 357/2015/1. In fact, there appears to be a net reduction in overshadowing at certain hours of the day when compared to the approved development.
- (d) In relation to Objective (d), I do not consider that there will be adverse Visual Privacy Impact based on the Architectural Plans, particularly noting the following comments of the Architects: -
 - (i) Appropriate consideration of window glazing allows the outlook to be enjoyed while maintaining privacy of the neighbouring dwellings.
 - (ii) There has also been a reduction in the number of windows facing neighbouring properties compared to the approved development.
- (e) In relation to Objective (e), I note the Development Consent No. 357/2015/1 and the associated Modification Application approvals. In approving the above, Council considered the proposed development was compatible with the adjoining RE1 zone. Considering the building envelope of the proposed development is substantially as the approved development, I consider the proposed development will also be compatible with the adjoining RE1 zone.
- (f) In relation to Objective (f), I consider the proposed development is of a scale and density in accordance with the character of the area for the reasons referred to in the accompanying HIS prepared by Urbis.
- (g) Objective (g) does not apply to the R4 High Density zone.

For the abovementioned reasons, I consider that strict adherence to the existing approved HOB Development Standard is unreasonable and unnecessary.

4.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

I consider that there are strong Environmental Planning Grounds to justify contravention of the HoB Development Standard.

The Environmental Planning Grounds which justify a contravention of HoB Development Standard include the following: -

- The proposed development will not result in any additional Excavation when compared to the approved development under Development Consent No DA 357/2015/1. This is one of the Positive Outcomes of the proposed development.
- In accordance with the accompanying Photomontages, I consider the proposed development results in a significant visual improvement when compared to the approved development under DA 357/2015/1.
- Further to the above, the Architects for the proposed development have highlighted a number of elements of the proposed development which represent an improved design amenity generated by the proposed development compared to the approved development including, but not limited to, the following: -
 - The proposed new design removes awkwardly triangulated spaces for improved liveability on a challengingly shaped site.
 - Appropriate consideration of window glazing allows the outlook to be enjoyed while maintaining privacy of the neighbouring dwellings.
 - There has also been a reduction in the number of windows facing neighbouring properties compared to the approved development.
 - Increased ceiling height is made possible through the inclusion of double height spaces and adjusted pitched roof form resulting in approved amenity.
 - Generally improved proportion of spaces allows for better storage.
- The proposed development largely maintains the approved front setback under DA 357/2015/1. In fact, the proposed development will increase the front setback at ground level with a reduced bulk and scale presentation to the street and Dr Mary Booth Reserve.
- As advised by the Architects in the accompanying Design Report, *“The existing building presents low internal ceilings and limited access to light and outlook.*

The proposal seeks to enhance residential amenity by introducing a mezzanine level and partially removing the existing first floor. This improves solar access, internal spatial quality, while opening up views to the Reserve and Sydney Harbour beyond”.

- In relation to the approved development, cars entering into the approved development will have to traverse a “car lift”, “car turntable”, “internal ramp” and “car stackers”. I consider that the approved carparking arrangement to be a complex and a convoluted travel path. In contrast, the current proposed development involves a direct access off Waruda Street into the 2 proposed carparking spaces.
- Noting the 93m² of Landscaped Area and 54m² of “un-built upon area” over the subject site, I consider the proposed development easily complies with the minimum required 40m² of Private Open Space at ground floor level.
- I note the proposed “Green Roof” provided on the proposed 3rd floor which represents a significant Positive Outcome compared to the approved development. I consider that the proposed roof garden and landscaped perimeter beds will not only improve the visual aesthetics of the proposed development but will also ensure no adverse Overlooking Impact into adjoining properties.
- I consider the proposed development will ensure the diverse needs of a variety of occupants is met. On this point, I note the proposed lift which will provide access to **all** levels of the proposed Dwelling House. Not only will this allow for residents to “age in place” but will ensure accessibility for persons with a disability.
- The proposed development will improve the amenity of future occupants of the proposed development compared to the approved development for the reasons raised in this SEE and the Design Report prepared by the Architects.
- From a Heritage perspective, I defer to the positive advice in the HIS.

5.0 CONCLUSION

Notwithstanding the breach of the HoB Development Standard, I consider that this request for variation of the HoB Development Standard is well founded.

For the reasons outlined in this Revised Clause 4.6 Request, I fully support variation of the HoB Development Standard.

A handwritten signature in dark ink, reading "Tony Moody". The signature is written in a cursive, flowing style. The first name "Tony" is on the left, followed by a period, and then "Moody" on the right. The letters are connected and fluid.

TONY MOODY

BTP(UNSW), LL.B (UTS)(Hons.), MPIA

Dated: 16 September 2025