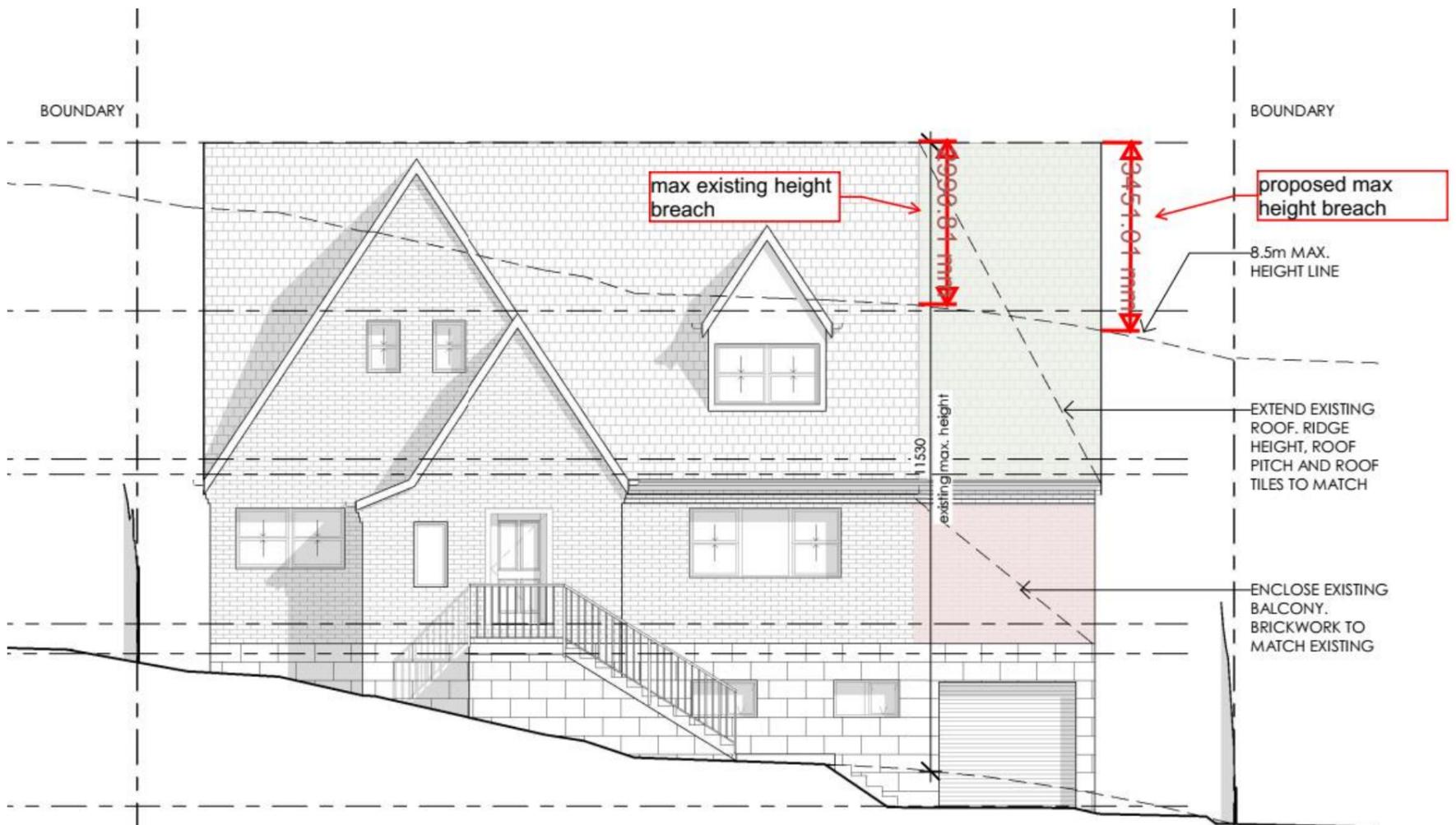


**REQUEST TO BREACH HEIGHT CONTROL PURSUANT TO CLAUSE 4.6 OF HORNSBY LEP IN RELATION TO –  
14 Sutherland Road Cheltenham - October 2021**

Clause 4.3 of the *Hornsby Local Environmental Plan 2013 (LEP)* and the relevant map indicate that the site is subject to an 8.5m height control. The proposal achieves a maximum height of RL116.33m at the roof ridge level which is at the same level as the existing roof ridge. At the lowest part of the site beneath this ridge, the proposal is a maximum of around 3.36m above the height control. The SE end of the existing building already breaches the height control by around 3m (see figure below). There is also a very minor breach by the extension of the roof in the NW part of the building (around 400mm).



Notwithstanding the above, a request to breach the control must be submitted in accordance with Clause 4.6 of the LEP.

The relevant parts of Clause 4.6 of Hornsby LEP 2013 are:

(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 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.*

(4) *Development consent must not be granted for development that contravenes a development standard unless:*

(a) *the consent authority is satisfied that:*

(i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Secretary has been obtained.*

(5) *In deciding whether to grant concurrence, the Secretary must consider:*

(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

(b) *the public benefit of maintaining the development standard, and*

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The purpose of this written request is to satisfy (3)(a) and (b) above and to demonstrate that (4)(a)(ii) and 5(a) and (b) can be satisfied. In preparing this request, regard has been had to the document: "Varying development standards: A Guide (August 2011)" prepared by the NSW Department of Planning & Infrastructure, and to relevant Land Environment Court judgements including the recent judgements of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, by Chief Judge Preston CJ in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118 and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *Rebel MH Neutral Bay Pty Ltd v North Sydney Council*. And, most recently, the decision of Chief Justice Preston in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

**Clause (3)(a) - whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

Whilst it was prepared in relation SEPP 1, the Land and Environment Court judgment *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007), is referred to in the Four2Five judgment and remains relevant to the consideration of concept of compliance being unreasonable or unnecessary. The DP&I Guide referred to above outlines the following 5 part test used in *Wehbe*:

1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

It should be noted that the Courts have reiterated that it is only necessary to satisfy **one of** these 5 paths, although in some instances more than one may be relevant and achieved.

In regard to the issue here, it is considered that Tests 1 and 3 are applicable.

Test 1

Strict compliance with the development standard for building height in clause 4.3 of the LEP would be unreasonable and unnecessary because the proposal achieves the only stated objective of the height control:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

Comment – In relation to 'site constraints' one of the characteristics of the site is that it slopes and this results in the level of non-compliance being greater at the SE of the building. As noted above, at the NW end the proposal is non-compliant to the same extent of the existing building (only 400mm). Given the design of the existing dwelling and being within a conservation area, it would not be appropriate to step the height of the roof down with the slope. In this regard the heritage constraints are considered to be more important than the constraint of sloping land.

Another constraint is the proximity to adjoining neighbours. The proposal responds to this constraint accordingly, ensuring that there are no unreasonable impacts on surrounding properties. In particular, the additional height proposed does not result in any additional overshadowing that will affect the use or enjoyment of neighbours' dwellings or open space. As can be seen in the submitted midwinter diagrams, additional shadow will fall on the site itself, the roof of adjoining buildings or on the adjoining front yard at various times of the day. All the relevant solar access standards will be achieved.

In relation to development potential, the proposal almost fully complies with the relevant development standards except for building height. All of the proposed additional floor space is below the height control (floor space being measured at 1.4m above floor level) and so the breach of the control does not provide for additional development potential. In fact the proposal has significantly less floor space than permitted (232sqm compared to 430sqm) and covers significantly less site area (216sqm compared to 481sqm). With design changes, the new additions could fully comply with the height control however this would result in a built form that was not consistent with the height and character of the existing dwelling or the overall quality of the heritage conservation area. Therefore it is important to allow the breach of the control to allow a better design outcome to be achieved.

In relation to infrastructure capacity, as the development potential of the site does not exceed that which can be expected, the proposal will be within existing and planned increases to infrastructure capacity.

Test 3

Requiring compliance with the control would thwart achieving the objective of the height control as it would result in conflict with the heritage constraints of the site. As noted above the proposed breach means that the height of the existing building and its unique 'dutch gable' style is maintained and that the building maintains its role in the significance of the heritage conservation area in which it is located. Enforcing compliance would result in a flat roof solution which would detract from the quality of the building and conservation area.

In view of the above, having regard to Tests 1 and 3 of *Wehbe* enforcing compliance in the circumstances is considered to be unreasonable and unnecessary. Flexibility should be applied, consistent with objective (a) of clause 4.6 of the LEP.

**Clause (3)(b) – whether there are sufficient environmental planning grounds to justify contravening the development standard**

In addition to the above the following comments are made.

Compliance would result in poorer planning outcomes

As noted above the proposal has been specifically designed to provide a superior planning outcome, consistent with the objective of Clause 4.6 to “achieve better outcomes for and from development by allowing flexibility in particular circumstances”. As detailed above strict compliance with the controls would result in a poorer level of integration with the existing dwelling, which already substantially breaches the height control. It would mean relying on a flat roof solution which would detract from the quality of the existing building and the significance of the heritage conservation area.

Lack of impact

As detailed above and in the submitted SEE, the proposal has very minimal impact on surrounding properties and the level of impact arising from the non-compliance is negligible. This is because the height breach is limited to the pitched roof and therefore it does not add significantly to the overall bulk and scale of the building. It is also setback from neighbours to reduce visual and overshadowing impacts. A compliant building would be lower but could be much larger than what is being proposed and be located closer to the site boundaries, creating greater impact.

In view of the above it is considered that there are sufficient environmental planning grounds, specifically related to the subject site, that warrant contravention of the height standard.

As determined in *Randwick City Council v Micaul Holdings Pty Ltd*, and supported by Preston CJ in *Initial Action*, lack of impact is a sufficient ground for allowing a breach of a development standard pursuant to Clause 4.6.

**Clause (4)(a)(ii) – whether the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out**

As noted above the proposal will be consistent with the relevant objectives of the height standard. In relation to the objectives of the subject R2 zoning the following comments are made:

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

Comment – the proposal provides for a low density residential dwelling, consistent with this objective.

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

Comment - NA

In view of the above it is considered that the proposal suitably achieves the objectives of the R2 zone.

**Clauses 4.6(4)(b) and 4.6(5)**

**Clause 4.6(4)(b) – SECRETARY’S CONCURRENCE**

In *Initial Action*, Preston CJ noted at [28-29] that:

“Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.”

It is therefore noted that concurrence is to be assumed, but the relevant matters for consideration are assessed below for completeness.

**Clause 5(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

No, the variation of the height standard is a minor matter and not uncommon. It does not raise any issues at a regional or state level.

**Clause 5 (b) the public benefit of maintaining the development standard**

For the reasons outlined above there is no public benefit in maintaining the standard. In fact, there will be public benefits in allowing a variation as a better planning outcome will be achieved.

**Conclusion**

Having regard to the above it is considered that this written request satisfies the requirements of Clause 4.6 and that the consent authority can be satisfied that the proposal also meets the other requirements of Clause 4.6. The proposed contravention of the standard will meet the objectives of Clause 4.6 as it achieves “better outcomes for and from development by allowing flexibility in particular circumstances”.

It is considered that the proposal represents a high quality planning outcome for the site.

Brett Brown, Ingham Planning Pty Ltd

October 2021