

**CLAUSE 4.6 VARIATION REQUEST
RELATING TO HEIGHT**

**TO ACCOMPANY DEVELOPMENT APPLICATION
FOR PROPOSED ALTERATIONS AND ADDITIONS
TO EXISTING RESIDENCE**

AT

**19 MARCELLA STREET [LOT 3, DP. 231814]
NORTH EPPING NSW 2121**

FOR

J & F McKINNON

October, 2022
Ref: McKinnon 4.6 Submission2.doc



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01: INTRODUCTION

- 1.1 This is a written request to seek an exception to a development standard by way of a Clause 4.6 submission about maximum height requirement of the Hornsby LEP 2013 (HLEP2013).
- 1.2 This submission accompanies a development application submitted to Hornsby Shire Council for alterations and additions to an existing residence. The proposed alterations and additions include new first floor level addition of bedrooms and sitting area, renovated al fresco and small ground floor addition. An existing basement garage and storage area is located under the existing ground floor.
- 1.3 The development application assessment for this project is being carried out by Hornsby Shire Council.
- 1.4 The site is located to the North Eastern side of Marcella and has a site width of 18m, a frontage of 18.3m and an area of 752m². Existing floor space is measured at 141m² and the proposal is for an addition of 77m². Existing maximum height is 5.9m above ground or 7.4m from existing basement floor (as requested by Council).
- 1.5 The Hornsby Local Environment Plan 2013 (HLEP2013) states in Part 4 Section 4.3(2) ‘the height of a building on any land is not to exceed the maximum height shown for the land on the height of buildings map’ which prescribes a maximum building height of 8.5 metres for No. 19 Marcella Street, North Epping.
- 1.6 Council guidelines in the DCP define ‘*building height*’ (or *height of building*) as the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like, and a ‘basement’ is termed by Section 3.1.1 of the HDCP as the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).
Under these DCP definitions Council defines the existing single storey dwelling with basement garage as not being a ‘basement’ and that height needs to be calculated from the existing excavated garage and storage area floor level.
- 1.7 While the proposed new floor provides a maximum height (as noted on the drawings) of 8.4m, when measured as advised by Council, from the basement floor level, the proposed alterations and additions provide a maximum 9.86m height – which is a 16% variation from the HLEP2013 height control. Therefore a 16% variation to the floor space control is sought in accordance with clause 4.6 of HLEP2013. We provide this submission to address the technical variation to the LEP when height is defined by Council from the DCP.
- 1.8 This statement has been prepared in accordance with the NSW Department of Planning and Environment guidelines and demonstrates that compliance with the height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify variation of the standard.

02: HORNSBY LEP 2013 CLAUSE 4.6

2.1 Clause 4.6 Exceptions to Development standards reflects the content of the standard instrument and requires:

- (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 Planning 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 Planning Secretary before granting concurrence.*
- (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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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 of these zones.

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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.

(8A) This clause does not allow development consent to be granted for development that would contravene clause 4.4 for a building on land in Zone B2 Local Centre within the Epping Town Centre, identified as “Area 9” on the Floor Space Ratio Map for the following purposes—

- (a) boarding houses,*
- (b) group homes,*
- (c) hostels,*
- (d) shop top housing,*
- (e) tourist and visitor accommodation*
- (f) a mixed-use development comprising a combination of uses specified in paragraphs (a)–(e).*

(8B) Subclause (8A) and this subclause are repealed at the beginning of 31 July 2024.

03: STRUCTURE OF CLAUSE 4.6 SUBMISSIONS

3.1 In *Brigham (Brigham v Canterbury–Bankstown Council* [2018] NSWLEC 1406) the Senior Commissioner Dixon emphasised that a 4.6 Request should have the following features:

- it should address each element of clause 4.6(3) in the order that it is read. This checklist approach helps to avoid legal error and ensure that all relevant subclauses are referred to in the written document
- it must make specific reference to the particular subclause being addressed, rather than using a general topic heading
- it should not paraphrase but rather, use the precise wording from the relevant clause when addressing particular considerations in respect of the development
- it should be direct and to the point. The request should not include discussions of irrelevant matters such as the historical case law or comments by a commissioner or judge.

04: GROUNDS FOR VARIATION

4.1 This section responds to the questions provided in Appendix 3 of the NSW Planning & Infrastructure 'guide for varying development standards.'

4.2 What is the name of the environmental planning instrument that applies to the land?

Hornsby Local Environmental Plan 2013

4.3 What is the zoning of the land?

The subject site is zoned R2:Low Density Residential

4.4 What are the objectives of the zone?

- *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.*

Comment:

We submit that proposed alterations and additions meet the objectives of the Zone R2 Low Density Residential. The proposed alterations and additions will improve the living amenity for the residents, provide much needed additional space within the home and provide for their housing needs while maintaining the low-density residential character of the area.

We submit that the proposed alterations and additions meet all the other controls in relation to bulk and scale including FSR, landscaped area and maximum site coverage, thus clearly demonstrating that this is a reasonable development with bulk and scale conforming to the R2 zoning context.

We submit that there are no statutory zoning or zone objectives that preclude the granting of approval to the proposed development.

4.5 What is the development standard being varied?

Building Height – 8.5m maximum

Comment:

Development standards has the following definition under Section 4(1) of the EP&A Act:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(amongst others)

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

4.6 Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.3 Height of buildings' of the Hornsby Local Environmental Plan 2013

4.7 What are the objectives of the development standard?

The objectives of this clause are as follows—

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

Comment:

This request is for variation to the 8.5m maximum height standard prescribed in the LEP. The existing residence is primarily in a single storey form with undercroft garage and workshop which responds to the slop of the site. Due to the slope of the land (from north rear down to street frontage, the existing garage and workshop is constructed under the residence and extends back under the residence to a maximum depth of about 1.8m into the ground. We understand Council interprets existing ground level as including the floor of garage/workshop, so while the majority of the roof above the new upper floor is below the maximum 8.5m height limit, the area of roof immediately above the garage and workshop, in a footprint to match, is non-compliant with the height limit

The figure below demonstrates the limited area of roof exceeding the height limit. Possible alternatives have been considered to meet the height standard, including a very low pitch roof, or a low pitch ‘cut-out’ section of roof following the position of basement garage below, but both would be awkward and out of character and create a poorly articulated residential addition. Due to the slope of site and existing placement of the home, it is also considered larger ground floor alterations would provide worse amenity and landscaping.

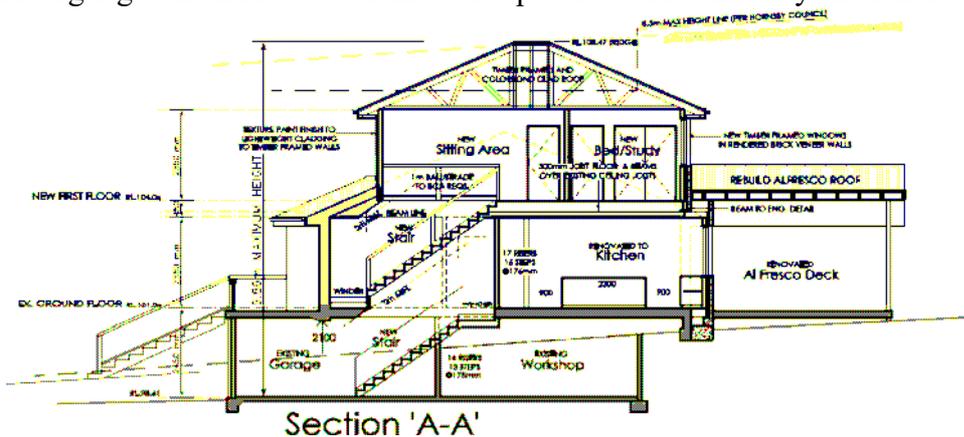


Figure 1: Section showing building height notations (maximum 8.3m from ground level, maximum 9.86m where measured from basement floor level

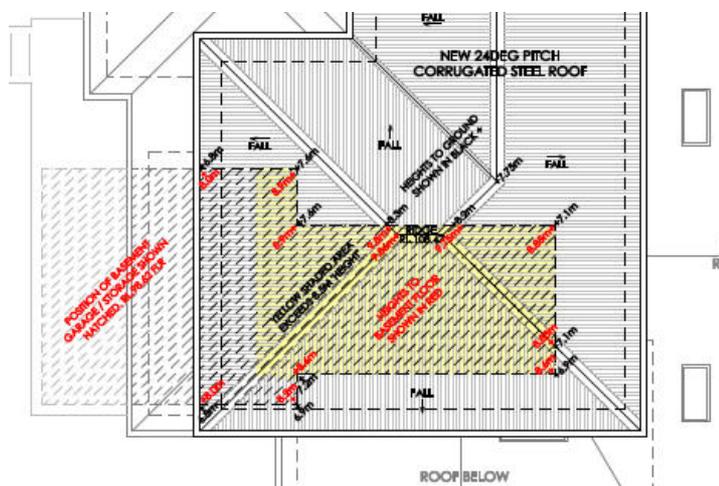


Figure 2: Roof plan showing building height notations (maximum 8.3m from ground level, maximum 9.86m where measured from basement floor level

Figures 1 and 2 depict the extent of the non-compliance. The proposal is for a maximum height of building of 9.86m. While the height of building from existing ground levels is a maximum of 8.3m, where the existing excavated garage and storage area floor level are located the height is greater – indicated with yellow shading. Measuring from the existing excavated garage and storage area results in a maximum proposed height of 9.86m, which equates to a 16.0% variation to the 8.5m development standard. However, the majority of the proposed new upper floor roof is within the development standard.

The proposed new alterations and additions have been designed to provide improved resident amenity within the potential of the site, while maintaining a residential scale that is appropriate to the low-density area. The proposed design also carefully responds to the existing residence with an in-character building form that will sit comfortably in the existing streetscape. The proposal also conforms comfortably with all other controls that limit bulk and scale including FSR, landscaped area and site coverage – thus supporting our submission that is a modest development.

Due to the slope of the site towards the street and the existing undercroft garage and garage door, the proposed new work is visible from the street and forms part of the streetscape, but is well articulated and designed to match the existing character of the home, with the new upper floor addition provided with matching windows, articulated walls and pitched roof form. Removal of the area of height non-compliance over the undercroft garage and workshop area would have no effective improvement to the reasonable overshadowing effect – as it would be unchanged by reducing a central portion of the pitched roof.

In relation to streetscape we submit that the proposal is reasonable. Adjacent homes on either side are two storey in form, but with driveways which slope up from the street to ground floor garages. By contrast number 19 has an existing undercroft garage and near level driveway access. The proposed height (maximum ridge at RL.108.47) is below number 21 at RL.108.96 and provides a reasonable step corresponding to the sloping ground contours to number 17.

We submit that the small area of addition height contributes to the delivery of a high quality and better designed residence on the site. Possible variations to the design discussed above which would provide a complying solution would only serve to create a dysfunctional or out of character building form on this sloping site. As designed the proposal provides for orderly development.

The proposal is for alterations and additions and is not anticipated to generate additional vehicle or pedestrian traffic to the street. The site is well serviced with public infrastructure including electricity, water, sewer, and the proposal will not have undue impact on any of these.

We submit that proposed alterations and additions meet the objectives of the Zone R2 Low Density Residential within the constraints of the site, and that the additional height proposed provides for a superior design response worthy of approval.

What is the numeric value of the development standard in the environmental planning instrument?

Maximum Building Height 8.5m – From natural ground level

Refer figure below for extract of the height of building map from the HLEP2013.

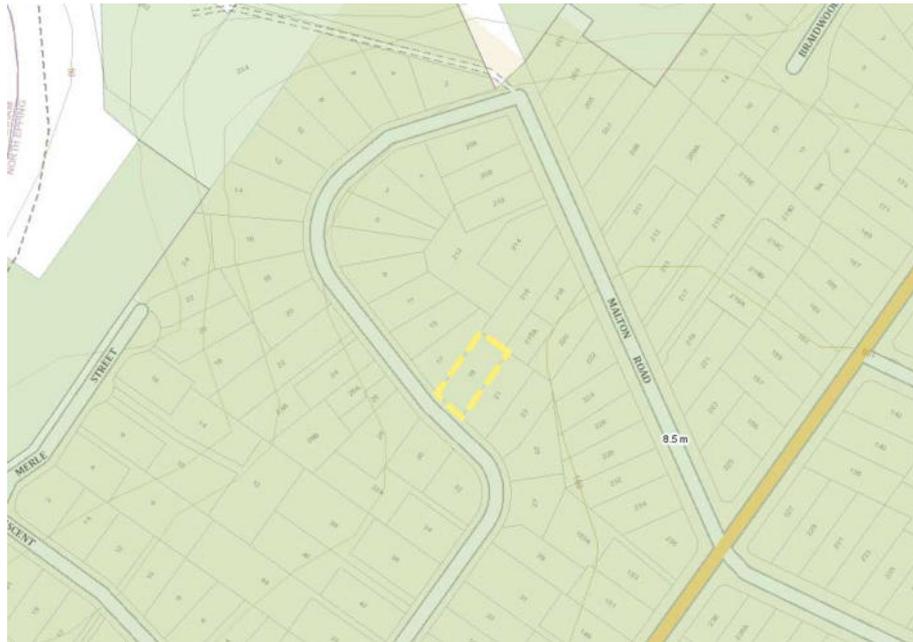


Figure 3: HLEP2013 Height of Buildings Map (8.5m)

4.8 **What is the proposed numeric value of the development standard in your development application?**

9.86m

4.9 **What is the percentage variation (between your proposal and the environmental planning instrument)?**

16%

4.10 **How is strict compliance with the development standard unreasonable or unnecessary in this particular case?**

As outlined above, we submit that these proposed alterations and additions are reasonable and in keeping with the existing home character, the established form and density of the local vicinity, and in keeping with the low-density character of the zoning. The proposed design also meets the other relevant planning controls from the LEP and guidelines from the DCP – as detailed in the Statement of Environmental Effects.

The only area of non-compliance with the height is a portion of the roof which follows the footprint of the undercroft garage and workshop. This undercroft is clearly not visible so has no apparent impact on apparent building height.

Alternative low pitched roof form, or ‘cut-out’ portion of the roof, which could provide a compliant design solution have been considered and dismissed as the building form and appearance would be poor and detrimental to the location and streetscape. The proposed design and form fits comfortably into the streetscape and is not more bulky or large in scale. With an articulated form stepping away from the street the proposed design provides a good transition and match to adjacent homes.

Assessment of the impact of the additional area of roof height – located towards the centre portion of the proposed roof – indicates that it will not create any adverse environmental or amenity impacts. In particular:

- No view loss – no views or view corridors impacted
- No impact on privacy – roof form only variation to height standard, above not visible undercroft garage and workshop area
- No additional adverse solar access impacts – with the additional height located to the centre of the proposed roof shadows no increase in shadow affect is caused

We therefore submit that the proposed variation will have negligible adverse impact over a strictly compliance solution. Thus strict compliance with the development standard is unreasonable and unnecessary.

Rather, the proposed alterations design provides for better designed solution that is in character with existing development and conforming to the existing streetscape.

4.11 How would strict compliance hinder the attainment of the objects specified in Section 1.3(a) and (c)?

1.3 (a) To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.

1.3 (c) To promote the orderly and economic use and development of land.

Comment:

We submit that the proposed alterations are well designed and provide for orderly development, improved housing and maintain local character and quality of the built environment. Strict compliance in this situation – where a previously excavated garage/workshop area which is not visible, is used to define height rather than original natural ground level – would hinder providing a good design solution.

4.12 Is the development standard a performance-based control? Give details

We submit that this standard is not a performance based control, particularly where the entire area of technical non-compliance is caused by defining non-visible undercroft spaces as natural ground level. In a practical or visible performance sense the proposed alterations reflect an 8.5m height above ground form. The proposed design is well articulated and steps back above the existing residence to ensure compliance with the natural ground line and natural contours in the vicinity.

4.13 Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

Please refer to points 10, 11 and 12 above.

4.14 Are there sufficient environmental planning grounds to justify contravening the development standard? Give details

Yes, clause 4.6 of the LEP provides for a development standard to be varied providing there

are sufficient and compelling arguments based on sound planning rationale provided. Such grounds must be particular to this proposed development. We submit this is the case with the following:

- The non-compliance arises solely from the existing, non-visible, undercroft garage and storage spaces. Using floor levels in this vicinity to limit roof form immediately above, rather than the natural ground levels and trend of contours is unreasonable when these levels have no impact on actual building form.
- Alternative fully compliant roof responses to the portion of undercroft garage and workshop would provide for a poor design solution not in keeping with the existing character or contributing positively to streetscape.
- The request for a 16% variation to maximum height – which only affects a portion of the roof area – does not impact on full compliance with the other LEP controls and DCP guidelines.
- All other controls that limit bulk scale including FSR, area of landscaping and maximum site coverage are met – indicating that the proposed alterations maintain a reasonable low-density form.
- The proposal is consistent with the objectives of the clause 4.3 height standard in the LEP.
- The requested variation to the maximum height standard will have no adverse impact on adjoining residents in relation to overshadowing, views or privacy.
- The variation results from particulars of the existing dwelling and site contours and would not establish a precedent for other unjustified non-compliances.
- The proposed variation to the height standard does not conflict with any matters of State or regional environmental planning significance, nor does it conflict with any State Planning Policies or Ministerial directives. The significance of the non-compliance is acceptable in the context of the overall development of the broader Hornsby area.
- The public benefit would be best served by approval of this application, despite the height variation proposed as doing so provides for a higher quality design outcome which responds suitably to the natural site levels.

05: CONCLUSION

- 5.1 We submit that the proposed non-compliance to the maximum height standard of the HLEP2013 is considered acceptable based on the planning rationale in the variation request.
- 5.2 We submit that this requested variation does not
- hinder the attainment of objectives of 1.3(a) and (c) of the Environmental Planning and Assessment Act 1979
 - raise any significant matters in relation to State or Regional Planning
 - create any unreasonable precedent
 - have any unreasonable impact on the amenity of adjoining properties
- 5.3 We submit that the on planning grounds that proposed alterations and additions are capable of achieving relevant planning LEP and DCP objectives, notwithstanding the minor height variation requested. As presented here, we submit it is unreasonable and unnecessary to Council to insist on compliance with the 8.5m maximum height standard - measured from existing excavated spaces in this instance.



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PROJECT ARCHITECT

Date: 17 October 2022