



DETERMINATION BUSINESS PAPER

LOCAL PLANNING PANEL MEETING

**Wednesday 26 July 2023
at 4:00pm**



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2 DA/1314/2022 - ALTERATIONS AND ADDITIONS TO A DWELLING HOUSE INCLUDING A HOME BUSINESS

DA No:	DA/1314/2022 (20 December 2022)
Description:	Alterations and additions to a dwelling house including a home business
Property:	Lot 12 DP 231944, No. 1 Dilkera Close, Hornsby
Applicant:	Key Urban Planning
Owners:	Mr Matthew Sullivan and Mrs Belinda Sullivan
Estimated Value:	\$680,000
Ward:	A
Clause 4.6 Request:	Clause 4.3 Height of Buildings
Submissions:	Nil
LPP Criteria:	Proposal contravenes a development standard by more than 10%
Author:	Madeleine Bayman, Senior Town Planner
COI Declaration:	No Council staff involved in the assessment of this application have declared a Conflict of Interest.

RECOMMENDATION

THAT Council assume the concurrence of the Secretary of the Department of Planning and Environment pursuant to Clause 4.6 of the Hornsby Local Environmental Plan 2013 and approve Development Application No. DA/1314/2022 as a deferred commencement pursuant to Section 4.16(3) of the *Environmental Planning and Assessment Act 1979* for alterations and additions to a dwelling house including a home business at Lot 12 DP 231944, No. 1 Dilkera Close, Hornsby subject to the conditions of consent detailed in Schedule 1 of LPP Report No. LPP23/23.

EXECUTIVE SUMMARY

- The application proposes alterations and additions comprising a two-storey rear extension to an existing dwelling house and use of 36m² of the additions as a home business.
- The proposal does not comply with the Hornsby Local Environmental Plan 2013 (HLEP) with regard to Clause 4.3 'Height of Buildings'. The applicant has made a submission in accordance with Clause 4.6 'Exceptions to development standards' of the HLEP to contravene the maximum building height of 8.5m development standard. The submission is considered well founded and is supported.
- The application is required to be determined by the Hornsby Local Planning Panel as the proposal would contravene the HLEP development standard for maximum height of buildings by more than 10 percent.
- No submissions were received with respect to the application.
- It is recommended that the application be approved as a deferred commencement.

BACKGROUND

On 25 July 2012, Development Application No. DA/664/2012 was approved for the demolition of the existing dwelling and construction of a new dwelling house.

On 10 February 2014, Council approved DA/664/2012/A to modify the approved dwelling house by amending the roofline and window openings, removing 8 windows on the lower ground floor, installing 2 roller doors on the lower ground floor and amending the shared double garage opening to be a single garage opening.

On 5 August 2016, Council approved DA/664/2012/B to further modify the approved development as follows:

- The addition of 4 new windows.
- Alteration to the location, dimensions and style of all previously approved windows under DA/664/2012/A.
- Alteration to the façade treatment of the building with the addition of fixed concrete panels and Colourbond spandrel panels on all four sides of the structure.

On 12 February 2014, a Construction Certificate was issued by a private certifier for the works associated under DA/664/2012. On 24 July 2018, a Final Occupation Certificate was issued by a private certifier for the completion of all works associated with DA/664/2012.

On 20 December 2022, the subject development application was lodged.

On 2 March 2023, the application was reviewed by Council's Development Advisory Panel (DAP) in which advice was provided with regards to a number of issues listed in the following request for additional information.

On 20 April 2023, Council requested additional information with regards to lodging a Building Information Certificate (BIC) for the 'environmental protection works', the submission of an arborist report, further clarification of the height of building and a Clause 4.6 request, accuracy of floor area information, illegible/ inaccurate levels on plans, a reduction in the home business floor area, the potential use of the development, inaccurate BASIX certificate, incorrect/ clarification regarding cost of works.

On 30 May 2023, the requested additional information was submitted for Council's consideration.

On 6 June 2023, the amended plans and documentation submitted were further reviewed by the DAP. The Panel considered the matters and provided the following comment and support for the proposal, subject to:

- The works being identified as alterations and additions to a dwelling.
- A condition be imposed that that additions cannot be used as a separate domicile.
- Submission of a revised cl 4.6 to address height from existing ground level.
- Deferred commencement condition requiring a BIC to be issued for the unauthorised works, prior to the consent (if granted by LPP) being operative.

On 13 June 2023, Council requested revised plans and revised Clause 4.6 request to reflect the true height of the development in relation to the definition 'from existing ground level'.

On 16 June 2023, the revised plans and Clause 4.6 request was submitted for Council's consideration.

On 15 June 2023, BIC No. BC/45/2023 was submitted to regularise the retaining wall structures built beneath the proposed additions to the dwelling house. This BIC is currently under assessment.

SITE

The 4,180m² site is located on the south-western side of Dilkera Close, Hornsby and contains a 2-3 storey dwelling house, swimming pool and associated landscaping. The site has an overall 38 metre (45%) fall from the front boundary to the south-western, rear corner.

The site is identified as bushfire prone land with a bushfire attack level of flame zone.

The site contains Peppermint-Angophora forest to the rear which is identified as an endangered species under the NSW *Biodiversity Conservation Act 2016*.

The site is located within close proximity to Nos. 2 and 4 Dilkera Close which are listed as heritage item Nos. 466 and 477 under Schedule 5 of the Hornsby Local Environmental Plan 2013, namely the house at No. 4 Dilkera Close and sandstone fence at No. 2 Dilkera Close.

The rear, western boundary adjoins the Berowra Valley National Park.

PROPOSAL

The application proposes alterations and additions comprising a two-storey rear extension to an existing dwelling house.

The lower floor level of the additions would comprise a guest retreat/ gymnasium and bathroom.

The basement level would comprise the entry, a 36m² home business and a theatre.

At ground level, the roof of the addition would be utilised as a deck with surrounding garden bed, accessed via a new sliding glass door from the ground floor of the existing dwelling house.

Whilst the additions would be attached, the internal spaces would be accessed externally via a separate entry, stairway and lift accessed via the existing driveway.

It is recommended that the application be approved as a deferred commencement requiring a Building Information Certificate to be issued for the unauthorised retaining wall works, prior to the consent being operative - BC/45/2023 is currently under assessment.

No tree would be removed by the development.

ASSESSMENT

The development application has been assessed having regard to the Greater Sydney Region Plan – A Metropolis of Three Cities, the North District Plan and the matters for consideration prescribed under Section 4.15 of the *Environmental Planning and Assessment Act 1979* (the Act). The following issues have been identified for further consideration.

1. STRATEGIC CONTEXT

1.1 Greater Sydney Region Plan - A Metropolis of Three Cities and North District Plan

The Greater Sydney Region Plan - A Metropolis of Three Cities has been prepared by the NSW State Government to guide land use planning decisions over the next 40 years (to 2056). The Plan sets a strategy and actions for accommodating Sydney's future population growth and identifies dwelling targets to ensure supply meets demand. The Plan also identifies that the most suitable areas for new housing are in locations close to jobs, public transport, community facilities and services.

The NSW Government will use the subregional planning process to define objectives and set goals for job creation, housing supply and choice in each subregion. Hornsby Shire has been grouped with Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Ryde, Northern Beaches and Willoughby to form the North District. The Greater Sydney Commission has released the North District Plan which includes priorities and actions for Northern District over the next 20 years.

The identified challenge for Hornsby Shire will be to provide an additional 4,350 dwellings by 2021 with further strategic supply targets to be identified to deliver 97,000 additional dwellings in the North District by 2036. The following Planning Priorities are considered relevant to the proposal:

- Planning Priority N5 - Providing housing supply, choice and affordability, with access to jobs, services and public transport.
- Planning Priority N6 - Creating and renewing great places and local centres and respecting the Districts heritage.

In giving effect to A Metropolis of Three Cities, these Planning Priorities deliver on the following objective and the corresponding strategies:

- Objective 11 - Housing is more diverse and affordable.

The proposed alterations and s to the dwelling house have been thoroughly considered and identified within this report. It is considered that the additions to the dwelling house would provide a contemporary, more user-friendly family home, whilst maintaining the amenity of the area.

The proposal would meet objectives of these planning priorities and would be considered acceptable in the context of the Greater Sydney Region Plan - A Metropolis of Three Cities and North District Plan.

2. STATUTORY CONTROLS

Section 4.15(1)(a) requires Council to consider “*any relevant environmental planning instruments, draft environmental planning instruments, development control plans, planning agreements and regulations*”.

2.1 Hornsby Local Environmental Plan 2013

The proposed development has been assessed having regard to the provisions of the Hornsby Local Environmental Plan 2013 (HLEP).

2.1.1 Zoning of Land and Permissibility

The subject land is zoned R2 Low density residential under the HLEP. The objectives of the R2 zone are:

- *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.*

The proposed development is defined as alterations and additions to a 'dwelling house' and a 'home business'. The proposed uses are permissible in the zone with Council's consent and would meet the objectives of the zone by providing for the housing needs of the community within a low-density residential environment.

To ensure the approved development is used in accordance with the approved permitted land uses, an operational condition is recommended in Schedule 1 of this report as follows:

The development approved under this consent shall be used in conjunction with the principal dwelling as a single occupancy and home business and not for any other purpose without Council's separate written consent.

- No approval is granted or implied for the use of any part of the dwelling house for the purpose of a secondary dwelling or separate occupancy.*
- The home business must not involve the use of more than 50m² of floor area and must operate as per the definition of 'home business' under the Standard Instrument.*
- Built in cooking facilities are not permitted to be installed in the approved extension.*

This condition also ensures compliance with the relevant requirement of Clause 5.4(2) of the HLEP for home businesses ensuring the business does not involve the use of more than 50m² of the overall floor area.

2.1.2 Height of Buildings

Clause 4.3 of the HLEP provides that the height of a building on any land should not exceed the maximum height shown for the land on the Height of Buildings Map. The maximum permissible height for the subject site is 8.5 metres. The proposed development would result in a maximum height of 10.45 metres and does not comply with this provision.

The application is supported by a submission pursuant to Clause 4.6 of HLEP to contravene the maximum height of buildings development standard, which is discussed below in Section 2.1.3 of this report.

2.1.3 Exceptions to Development Standards

The application has been assessed against the requirements of Clause 4.6 of the HLEP. This clause provides flexibility in the application of the development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tender to hinder the attainment of the objectives of the zone.

The proposal would exceed the 8.5 metre maximum building height development standard for a low-density residential zone with a proposed height of 10.45 metres.

The objective of Clause 4.3 Height of Buildings is *“to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality”*.

The applicant has made a submission in support of the contravention to the development standard in accordance with Clause 4.6 of the HLEP. Clause 4.6 provides that 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.*

In *Initial Action Pty Ltd v Woollahra Municipal Council [2008]* NSW LEC 118, Preston CJ clarified the correct approach to dealing with a written request under Clause 4.6 to justify the contravention of a development standard.

In relation to determining the matter under Clause 4.6(3)(a), the consent authority must be satisfied that the applicant's written request adequately addresses the matter as opposed to the determining authority making its own judgement regarding whether compliance is unreasonable or unnecessary. Additionally, the clause does not require that a non-compliant development should have a neutral or beneficial effect relative to a compliant development.

In relation to determining the matter under Clause 4.6(3)(b), the environmental planning grounds clause, non-compliant development is not required to result in a 'better environmental planning outcome for the site' relative to a compliant development. Instead, the requirement is only that there are sufficient environmental planning grounds to justify the development standard contravention.

Council must be satisfied that the written request provided by the applicant under Clause 4.6 addresses both the unreasonable and unnecessary test and demonstrates sufficient environmental planning grounds to justify contravening the development standard. These matters are discussed below.

2.1.3.1 Unreasonable or Unnecessary

There are five common methods by which an applicant can demonstrate that compliance with a development standard is unreasonable or unnecessary in the circumstances of the development. Initially proposed for objections under clause 6 of *SEPP 1* in the decision of *Wehbe v Pittwater Council [2007]* NSWLEC 827 Pearson C summarised and applied these methods to written requests made under Clause 4.6 in *Four2Five Pty Ltd v Ashfield Council [2015]* NSWLEC 1009 [61-62]. These five methods are generally as follows:

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 object of 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 is not required to demonstrate that a development meets multiple methods as listed above, and the satisfaction of one can be adequate to demonstrate that the development standard is unreasonable or unnecessary.

The applicant made a submission in support of a contravention to the development standard in accordance with Clause 4.6 of the HLEP. The development application seeks to contravene the development standard by 1.95 metres (23%). The applicant states the proposed contravention is considered to be consistent with the objectives of the control being “to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality” and is justified as follows:

- *The height of the building is appropriate accounting for the steep topography of the land. The addition will have no impact upon the local environment or the amenity of the neighbourhood. In this regard, the proposed height satisfies the performance requirements of Part 3.1.1 of the Hornsby DCP in that the height, bulk and scale of the addition is in keeping with the surrounding low density residential environment.*
- *The additional height proposed (above the retaining wall) contributes to the delivery of a high quality development on this site. The zoning of the site and surrounding residential lands includes land of relatively steep topography that may be considered in some respects unsuitable for residential development. Consequently, several dwelling houses in the locality have been approved by Council in contravention of the current LEP height standard. The proposed building works are consistent with the height and scale of the building constructed on the site.*
- *The lateral expansion of the building by ‘stepping’ the design will have no impact upon the amenity of the surrounding low density residential environment. The natural topography of the site will result in unreasonable impacts by way of excavation should the additional floor space be provided by an excessive lateral extension of the existing building envelope.*
- *Further, the Hornsby DCP 2013 (Part 3.1.1) contains prescriptive requirements that include both height in metres and the maximum number of storeys. The height of the addition complies with the maximum number of storeys prescribed under the DCP (2 storeys plus attic). The building works will minimise earthworks (cut and fill) by siting the addition on top of the retaining wall. An excavation into the natural ground will result in greater environmental harm by causing further land instability.*
- *Part 3.1.1 contains a table 3.1.1(c) that specifies a maximum floor area for a dwelling house and ancillary building. For lots greater than 900m² the maximum total floor area should be 430m². This is an arbitrary figure that does not provide proper consideration for a site of a size that is well more than the 900m². The maximum floor area requirement for large sites that are well in excess of the 930m² should be considered in context of the maximum site coverage requirement under the DCP.*

- *The site has an area of 4,179,9m². The proposed addition is a modest floor area of 148.96m² when considered in the context of the large site area. The total site coverage is 23.71% (30% allowable).*
- *The development is within the environmental capacity of the site as demonstrated by the supporting documentation that forms part of the DA.*

Council considers the applicants request to contravene the height development standard is considered well founded for the following reasons:

- The height departure would not result in any significant amenity impact to surrounding neighbours and would not result in additional overshadowing of adjoining and nearby premises.
- The proposed extension is designed to respond to the topography of the land and utilise the remaining cleared component of the large site, uncharacteristic of standard low density residential site area.
- The overall appearance of the building, when viewed from the street front, would be substantially unchanged and consistent with the heritage requirements of the HLEP.
- The proposed development would not overly dominate the natural environment or surrounding built elements.
- The proposed height contravention is appropriate considering the constraints of the site in terms of land slope and protection of trees and biodiversity.
- The application provides for the orderly and economic development of land, improved residential amenity of the existing residence, and demonstrates adequate consideration and protection of the environmental and public interest.
- The proposed development generally meets the objectives of Clause 4.3 Height of Buildings of the HLEP by way of being appropriate with respect to the constraints of the site and in regard to the development potential of the site.

Based on this assessment, it is considered that compliance with the development standard would be unreasonable and unnecessary in the circumstances of the case.

2.1.3.2 Environmental Planning Grounds

In addition to demonstrating that compliance is unreasonable or unnecessary, Clause 4.6(3)(b) of the HLEP requires that there are sufficient environmental planning grounds to justify contravening the development standard. In demonstrating that sufficient environmental planning grounds exist, it must be demonstrated that the planning grounds are particular to the circumstances of the development on the subject site (summarised from *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 [60]).

In demonstrating the environmental planning grounds the written request states:

- *The merit - based justification above in this request provides strong evidence that the proposed height variation would have clear positive outcomes including the protection and enhancement of identified values specific to the site and provision of high-quality residential development in the locality.*
- *The additional height is a negligible issue within the context of the greater planning benefit, including opportunities for the protection and enhancement of local values and provision of*

high-quality residential development that would result from the variation to the height standard. The proposed works will not extend beyond the footprint of the retaining wall constructed to manage landslip occurring on the site.

- *In this regard, there are sufficient environmental planning grounds specific to this site to justify the proposed departure from the development standard.*
- *The underlying objective of the height standard is to minimise potential adverse environmental impacts of development of the site on the surrounding area.*
- *Although the proposal breaches the height of buildings control, the development achieves appropriate building envelopes and separation to the adjacent bushland. It is also worth noting that the development does comply with solar access, site coverage and other similar requirements adopted by Council.*

Council considers that the environmental planning grounds stated within the written request are sufficient with respect to Clause 4.6(3)(b) and that the stated grounds are specific to the proposed development and the circumstances of the development site. It is therefore considered that the written request adequately demonstrates compliance with the clause and is acceptable in this regard.

Council further notes that in demonstrating the unreasonable and unnecessary test, the applicant further established environmental planning grounds with respect to the site and the surrounding constraints.

2.1.3.3 Public Interest and Clause 4.6(4)

Clause 4.6(4) states that 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 Planning Secretary has been obtained.*

With regard to part (i), the written request is considered to adequately address the matter required to be demonstrated as outlined above.

With regard to part (ii), the proposed development is considered to 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.

With regard to (b), on 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice under cl. 64 of the Environmental Planning and Assessment Regulation 2000. The Secretary's concurrence may not be assumed by a delegate of council if:

- The development contravenes a numerical standard by greater than 10%.
- The variation is to a non-numerical standard.

Local Planning Panels constituted under the *Environmental Planning and Assessment Act 1979* exercise consent authority functions on behalf of a Council and are not delegates of Council.

Therefore, Local Planning Panels may determine a development application notwithstanding, a numerical non-compliance in excess of 10%.

Accordingly, it is considered that the written request satisfactorily responds to the relevant matters required to be addressed under Clause 4.6 and that the Panel, as consent authority, may rely upon the written request and grant development consent to the development application. Should the Panel resolve to approve the application, it should also provide a statement in the reasons for approval that it has satisfied itself of the matters in Clause 4.6(4).

2.1.4 Heritage Conservation

Clause 5.10 of the HLEP sets out heritage conservation provisions for Hornsby Shire Council.

The site is located within close proximity to Nos. 2 and 4 Dilkera Close which are listed as heritage item Nos. 466 and 477 under Schedule 5 of the Hornsby Local Environmental Plan 2013, namely the house at No. 4 Dilkera Close and sandstone fence at No. 2 Dilkera Close.

Given the location of the proposed extension on the site, entirely screened from the existing dwelling house from within the streetscape, there would not create any adverse impacts on the heritage significance of these items and no further concerns are raised in this regard.

In summary, the proposal would meet the objectives of Clause 5.10 of the HLEP and is considered acceptable.

2.1.5 Earthworks

Clause 6.2 of the HLEP states that consent is required for proposed earthworks on site.

- (1) *The objective of this clause is to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.*

The proposed additions have been approved as a deferred commencement consent, requiring the issue of a BIC to regularise the retaining wall structures built beneath the proposed additions to the dwelling house prior to the consent being operational.

The construction of these structures would have resulted in some earthworks; however, it is considered that these earthworks would have been acceptable to stabilise the site and would have had negligible impacts on adjoining properties, drainage patterns and/ or soil stability of the locality. Subject to the issue of the BIC to regularise these structures, the proposal is considered to meet the objective of this Clause.

2.2 State Environmental Planning Policy (Biodiversity and Conservation) 2021

The application has been assessed against the requirements of chapters 2 and 6 of State Environmental Planning Policy (Biodiversity and Conservation) 2021.

2.2.1 Chapter 2 Vegetation in Non-Rural Areas

Chapter 2 of this policy aims to protect the biodiversity and amenity values of trees within non-rural areas of the state.

Part 2.3 of the policy states that a development control plan may make a declaration in any manner relating to species, size, location and presence of vegetation. Accordingly, Part 1B.6.1 of the HDCP

prescribes works that can be undertaken with or without consent to trees and objectives for tree preservation.

Section 3.1.1 of this report provides an assessment in accordance with Part 1B.6.1 of the HDCP.

2.2.2 Chapter 6 Waterways

The site is located within the catchment of the Hawkesbury-Nepean River. The aim of this chapter is to protect the environment of the Hawkesbury-Nepean River system by ensuring that the impacts of development are considered in the regional context. This chapter contains general planning considerations and strategies requiring Council to consider the impacts of development on water quality, aquaculture, significant vegetation habitats, extraction, environmental heritage and scenic quality, recreation and tourism, and agriculture.

The plan addresses matters related to biodiversity, ecology and environment protection; public access to, and use of, foreshores and waterways; interrelationship of waterway and foreshore uses; foreshore and waterways scenic quality; maintenance, protection and enhancement of views and boat storage facilities.

Subject to the implementation of sediment and erosion control measures and stormwater management to protect water quality, the proposal would not impact on the water quality of the catchment and would comply with the requirements of chapter 6 of the Biodiversity and Conservation SEPP.

2.3 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The application has been assessed against the requirements of State Environmental Planning Policy (BASIX) 2004 which seeks to encourage sustainable residential development.

The proposal includes a BASIX certificate in accordance with the requirements of the SEPP including the list of commitments to be complied with at the construction stage and during the use of the premises. The BASIX certificate achieves the minimum scores for thermal comfort, water and energy.

The proposal is acceptable in this regard.

2.4 State Environmental Planning Policy (Resilience and Hazards) 2021

The application has been assessed against the requirements of chapter 4 of State Environmental Planning Policy (Resilience and Hazards) 2021.

2.4.1 Chapter 4 Remediation of Land

Section 4.6 of the Resilience and Hazard SEPP states that consent must not be granted to the carrying out of any development on land unless the consent authority has considered whether the land is contaminated or requires remediation for the proposed use.

Should the land be contaminated, Council must be satisfied that the land is suitable in a contaminated state for the proposed use. If the land requires remediation to be undertaken to make the land suitable for the proposed use, Council must be satisfied that the land will be remediated before the land is used for that purpose.

An examination of Council's records and aerial photography has determined that the site has been historically used for residential purposes. As demonstrated in the testing undertaken for the submitted Geotechnical Report prepared by Ideal Geotech, it is not likely that the site has experienced any

significant contamination, and further assessment under chapter 4 of the Resilience and Hazards SEPP is not required.

2.5 Section 3.42 Environmental Planning and Assessment Act 1979 - Purpose and Status of Development Control Plans

Section 3.42 of the *Environmental Planning and Assessment Act 1979* states that a DCP provision will have no effect if it prevents or unreasonably restricts development that is otherwise permitted and complies with the development standards in relevant Local Environmental Plans and State Environmental Planning Policies.

The principal purpose of a development control plan is to provide guidance on the aims of any environmental planning instrument that applies to the development; facilitate development that is permissible under any such instrument; and achieve the objectives of land zones. The provisions contained in a DCP are not statutory requirements and are for guidance purposes only. Consent authorities have flexibility to consider innovative solutions when assessing development proposals, to assist achieve good planning outcomes.

2.6 Hornsby Development Control Plan 2013

The proposed development has been assessed having regard to the relevant desired outcomes and prescriptive requirements within the Hornsby Development Control Plan 2013 (HDCP). The following table sets out the proposal's compliance with the prescriptive requirements of the Plan:

HDCP - Part 3.1 Dwelling Houses			
Control	Proposal	Requirement	Complies
Site Area	4,180m ²	N/A	N/A
Building Height	10.45m	8.5m	No
No. storeys	2	max. 2 + attic	Yes
Site Coverage	10%	30%	Yes
Floor Area	866m ²	430m ²	No
Setbacks			
- Front	Unchanged	6m	Yes
- Side			
Ground floor	>0.9m	0.9m	Yes
First floor	>1.5m	1.5m	Yes
- Side			
Ground floor	>0.9m	0.9m	Yes
First floor	>1.5m	1.5m	Yes
- Rear			

<i>Ground floor</i>	>3m	3m	Yes
<i>First floor</i>	>8m	8m	Yes
Landscaped Area (% of lot size)	77%	45%	Yes
Private Open Space			
- <i>minimum area</i>	>24m ²	24m ²	Yes
- <i>minimum dimension</i>	>3m ²	3m	Yes
Car Parking	Unchanged	2 spaces	Yes

ITEM 2

As detailed in the above table, with the exception of building height and floor area the proposed development generally complies with the prescriptive measures within the HDCP. A brief discussion on compliance with relevant performance requirements and Part 1C General Controls is provided below.

2.6.1 Scale

With regards to the height non-compliance, the application is supported by a submission pursuant to Clause 4.6 of the HLEP to contravene the maximum height of buildings development standard, which is discussed in detail under Section 2.1.3 of this report. The submission is considered well founded and is supported.

With regards to the floor area non-compliance, it is noted as follows:

- The site area is 4,180m² which could accommodate additional development.
- Given the constraints of site in terms of bushfire, trees, vegetation, biodiversity and topography of the land it is unlikely that any future intensification of land use would occur.
- The existing dwelling house itself has an already non-compliant floor area of 677m², including a 168m² basement.
- The site coverage of the site would be 10% which is significantly lower than the permitted site coverage of 30%.
- The additional 189m² floor area extension proposed under this application would have negligible environmental impacts to the site and adjoining lands, utilising the remaining cleared portion of the land within the site.
- The proposed additions would be substantially screened from the streetscape and would have minimal adverse amenity impacts to adjacent properties.

In summary, the proposed development is considered of a height, bulk and scale that is compatible with the surrounding low density residential environment and meets the prescriptive measures of Part 3.1.1 Scale of the HDCP.

2.6.2 Privacy

The desired outcome of Part 3.1.6 Privacy under the HDCP is to encourage “*development that is designed to provide reasonable privacy to adjacent properties*”.

This is supported by the prescriptive measures which state that *“decks and the like that need to be located more than 600mm above existing ground should not face a window of another habitable room, balcony or private open space of another dwelling located within 9 metres of the proposed deck unless appropriately screened”, “living and entertaining areas of a dwelling house should be located on the ground floor and orientated towards the private open space of the dwelling house and not side boundaries” and “a proposed window in a dwelling house should have a privacy screen if:*

- *It is a window to a habitable room, other than a bedroom, that has a floor level of more than 1 metre above existing ground level.*
- *The window is setback less than 3 metres from a side or rear boundary.*
- *The window has a sill height of less than 1.5 metres”.*

The application proposes living and entertaining spaces and a deck to levels within the extension that are more than 1 metre above the existing ground level.

In support of these non-compliances, it is noted that due to the large size of the site and substantial separation between neighbouring properties in terms of distance and topography, there would be no privacy impacts to adjoining properties as a result of the development. The proposal would overlook the adjoining bushland only and no additional privacy measures would be required in this regard.

The proposal meets the desired outcomes of Part 3.1.6 Privacy of the HDCP and is considered acceptable.

2.7 Contributions Plans

Hornsby Shire Council Section 7.12 Contributions Plan 2019-2029 applies to the development as the estimated costs of works is greater than \$100,000. Given the estimated cost of works is \$680,000, an appropriate condition of consent is recommended requiring the payment of a contribution in accordance with the Plan.

3. ENVIRONMENTAL IMPACTS

Section 4.15(1)(b) of the Act requires Council to consider *“the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”.*

3.1 Natural Environment

3.1.1 Tree and Vegetation Preservation and Biodiversity

The site contains Peppermint-Angophora forest to the rear which is identified as an endangered species under the NSW *Biodiversity Conservation Act 2016*.

The rear, western boundary adjoins the Berowra Valley National Park.

Four trees would be impacted by the development, none of which would be removed.

An Arboricultural Impact Assessment was requested to assess any trees that may be impacted by the development, including the unregularised retaining wall works that have already occurred on the site. The report identified trees 1, 2, 3 and 4 as *Angophora costata*, Sydney Red Gum with potential impacts by the development.

Conditions are recommended in Schedule 1 of this report that a project arborist be engaged to ensure adequate tree protection measures are implemented and monitored during demolition and construction works on the site.

In summary, it is considered that the proposal does not require the removal or modification of a significant area of vegetation or habitat, is generally consistent with the biodiversity element of the HDCP and would not have a significant impact on matters listed under the NSW *Biodiversity Conservation Act 2016*.

The proposal meets the desired outcomes of Part 1C.1.1 Biodiversity and requirements of Part 1C.6 Tree and Vegetation Preservation under the HDCP and is considered acceptable.

3.1.2 Stormwater Management

The stormwater drainage system for the development would be designed for an average recurrence interval (ARI) of 20 years and be gravity drained to a level spreader via rainwater tanks in accordance with Stormwater Drainage Plan prepared by Engineering Studio, dated 19 December 2022.

The proposal meets the prescriptive measures of Part 1C.1.2 Stormwater Management under the HDCP and is considered acceptable.

3.2 Built Environment

3.2.1 Built Form

The built form would remain substantially the same when viewed from within the streetscape with only the extension at the rear screened by the existing dwelling house. The proposal would be consistent with residential development within the locality.

3.3 Social Impacts

The alterations and additions to a dwelling house would make a positive social contribution by providing for the housing needs of the community within a low-density residential environment.

3.4 Economic Impacts

The alterations and additions to a dwelling house would not have any detrimental economic impact upon the locality.

4. SITE SUITABILITY

Section 4.15(1)(c) of the Act requires Council to consider “*the suitability of the site for the development*”.

The site is considered to be capable of accommodating the proposed development. The scale of the proposed development is consistent with the capability of the site and is considered acceptable.

4.1 Bushfire Risk

As outlined in the Bushfire Hazard Assessment Report prepared by Building Code & Bushfire Hazard Solutions, the property is located in an area with a bushfire rating of BAL FZ. As a consequence, the application was referred to the NSW Rural Fire Service who supported the proposal, subject to a number of conditions of concurrence as identified in Schedule 1 of this report to comply with Australian Standard AS3959 Construction of buildings in bush fire-prone areas and Planning for Bushfire Protection 2019.

Subject to conditions, the proposal meets the desired outcomes of Part 1C.3.1 Bushfires under the HDCP and is considered acceptable.

5. PUBLIC PARTICIPATION


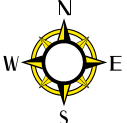
Section 4.15(1)(d) of the Act requires Council to consider *“any submissions made in accordance with this Act”*.

5.1 Community Consultation

The proposed development was placed on public exhibition and was notified to adjoining and nearby landowners between 21 December 2022 and 28 February 2023 in accordance with the Hornsby Community Engagement Plan. During this period, Council received no submissions. The map below illustrates the location of those nearby landowners who were notified, in close proximity to the development site.



NOTIFICATION PLAN

• PROPERTIES NOTIFIED	X SUBMISSIONS RECEIVED		PROPERTY SUBJECT OF DEVELOPMENT	
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5.2 Public Agencies

The development application was not required to be referred to any Public Agencies for comment.

6. THE PUBLIC INTEREST

Section 4.15(1)(e) of the Act requires Council to consider *“the public interest”*.

The public interest is an overarching requirement, which includes the consideration of the matters discussed in this report. Implicit to the public interest is the achievement of future built outcomes adequately responding to and respecting the future desired outcomes expressed in environmental planning instruments and development control plans.

The application is considered to have satisfactorily addressed Council's and relevant agencies' criteria and would provide a development outcome that, on balance, would result in a positive impact for the community. Accordingly, it is considered that the approval of the proposed development would be in the public interest.

CONCLUSION

The application proposes alterations and additions comprising a two storey rear extension to an existing dwelling house including a 36m² home business.

The development generally meets the desired outcomes of Council's planning controls and is satisfactory having regard to the matters for consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

Having regard to the circumstances of the case, approval of the application is recommended.

The reasons for this decision are:







- The request under Clause 4.6 of Hornsby Local Environmental Plan 2013 to contravene the Clause 4.3 Height of Buildings development standard is well founded. Strict compliance with the development standard is considered unreasonable and unnecessary in the circumstances of the case and sufficient environmental planning grounds have been submitted to justify the contravention to the development standard.
- The proposed development generally complies with the requirements of the relevant environmental planning instruments and the Hornsby Development Control Plan 2013.
- The proposed development does not create unreasonable environmental impacts to adjoining development with regard to visual bulk, solar access, amenity or privacy.

Note: At the time of the completion of this planning report, no persons have made a Political Donations Disclosure Statement pursuant to Section 10.4 of the Environmental Planning and Assessment Act 1979 in respect of the subject planning application.

CASSANDRA WILLIAMS
Major Development Manager - Development
Assessments
Planning and Compliance Division

ROD PICKLES
Manager - Development Assessments
Planning and Compliance Division

Attachments:

1.   Locality Plan
2.   Clause 4.6
3.   Architectural Plans

File Reference: DA/1314/2022

Document Number: D08675084

ITEM 2

SCHEDULE 1**1. Deferred Commencement**

- a) Pursuant to Section 4.16(3) of the *Environmental Planning and Assessment Act 1979*, this consent does not operate until Building Information Certificate No. BC/45/2023 is issued for the unauthorised retaining wall works.
- b) Such information must be submitted to Council within 12 months of the date of this notice.

Upon Council's written satisfaction of the above information, the following conditions of development consent apply:

Reason: To ensure the unauthorised works are regularised prior to the operation of the consent.

GENERAL CONDITIONS

The conditions of consent within this notice of determination have been applied to ensure that the use of the land and/or building is carried out in such a manner that is consistent with the aims and objectives of the relevant legislation, planning instruments and council policies affecting the land and does not disrupt the amenity of the neighbourhood or impact upon the environment.

Note: For the purpose of this consent, the term 'applicant' means any person who has the authority to act on or the benefit of the development consent.

Note: For the purpose of this consent, any reference to an Act, Regulation, Australian Standard or publication by a public authority shall be taken to mean the gazetted Act or Regulation, or adopted Australian Standard or publication as in force on the date that the application for a construction certificate is made.

2. Approved Plans and Supporting Documentation

The development must be carried out in accordance with the plans and documentation listed below and endorsed with Council's stamp, except where amended by Council and/or other conditions of this consent:

Approved Plans

Plan No.	Plan Title	Drawn by	Dated	Council Reference
A102, Rev. B	Proposed Site Plan	Design Draft Studio	14/06/23	
A110, Rev. B	Existing Remedial Slab Plan	Design Draft Studio	14/06/23	
A111, Rev. B	Lower Floor Plan	Design Draft Studio	14/06/23	
A112, Rev. B	Basement Floor Plan	Design Draft Studio	14/06/23	
A113, Rev. B	Ground Floor Plan	Design Draft Studio	14/06/23	
A120, Rev. B	South and North Elevation Plans	Design Draft Studio	14/06/23	
A121, Rev. B	West and East Elevation Plans	Design Draft Studio	14/06/23	
A125, Rev. B	Sections	Design Draft Studio	14/06/23	
A140, Rev. B	Materials and Finishes	Design Draft Studio	14/06/23	

Supporting Documentation

Document Title	Prepared by	Dated	Council Reference
BASIX Certificate No. A498003	Design Draft Studio	26/05/23	D08663841
Arboricultural Impact Assessment and Tree Protection Plan (AIA)	Mark Bury Consulting	30/04/23	D08663838
Waste Management Plan	Key Urban Planning	21/10/22	D08557800
Survey Plan Rev. C	Hammond Smeallie & Co	17/11/22	D08557799
Sediment and Erosion Control and Stormwater Drainage Plans	Engineering Studio	19/12/22	D08557798
Geotechnical Report	Ideal Geotech	16/11/22	D08557771
Bushfire Assessment Report	Building Code & Bushfire Hazard Solutions	20/10/22	D08557737

ITEM 2

3. Appointment of a Project Arborist

- a) To ensure the trees that must be retained are protected, a project arborist with AQF Level 5 qualifications must be appointed to assist in ensuring compliance with the conditions of consent and provide monitoring reports as specified by the conditions of consent.
- b) Details of the appointed project arborist must be submitted to Council and the Principal Certifier with the application for the construction certificate/subdivision works certificate.

Reason: To ensure appropriate monitoring of tree(s) to be retained.

4. Removal of Trees

No consent is granted for the removal of trees as identified in the Arboricultural Impact Assessment prepared by Mark Bury Consulting, dated 30 April 2023 as they make a positive environmental contribution to the established landscape amenity of the area.

Note: The removal of any other trees from the site requires separate approval by Council in accordance with Part 1B.6 Tree and Vegetation Preservation of the Hornsby Development Control Plan, 2013.

Reason: To identify only those trees permitted to be removed.

5. Section 7.12 Development Contributions

- a) In accordance with Section 4.17(1) of the Environmental Planning and Assessment Act 1979 and the Hornsby Shire Council Section 7.12 Development Contributions Plan 2019-2029, \$6,800 must be paid towards the provision, extension or augmentation of public amenities or public services, based on development costs of \$680,000.
- b) The value of this contribution is current as of 3 July 2023. If the contributions are not paid within the financial quarter that this consent is granted, the contributions payable will be adjusted in accordance with the provisions of the Hornsby Shire Council Section 7.12 Development Contributions Plan and the amount payable will be calculated at the time of payment in the following manner:

$$\text{\$C}_{PY} = \frac{\text{\$C}_{DC} \times \text{CPI}_{PY}}{\text{CPI}_{DC}}$$

$$\text{II} \quad \text{CPI}_{DC}$$

Where:

\\$C_{PY} is the amount of the contribution at the date of Payment.

\\$C_{DC} is the amount of the contribution as set out in this Development Consent.

CPI_{PY} is the latest release of the Consumer Price Index (Sydney – All Groups) at the date of Payment as published by the ABS.

CPI_{DC} is the Consumer Price Index (Sydney – All Groups) for the financial quarter at the date of this Development Consent.

- c) The monetary contributions shall be paid to Council:
- i) Prior to the issue of the Subdivision Certificate where the development is for subdivision.
 - ii) Prior to the issue of the first Construction Certificate where the development is for building work.
 - iii) Prior to issue of the Subdivision Certificate or first Construction Certificate, whichever occurs first, where the development involves both subdivision and building work.
 - iv) Prior to the works commencing where the development does not require a Construction Certificate or Subdivision Certificate.

Note: It is the professional responsibility of the Principal Certifier to ensure that the monetary contributions have been paid to Council in accordance with the above timeframes.

Note: In accordance with Ministerial Directions, the payment of contribution fees for development with a cost of works of over \$10 million can be deferred to prior to Occupation Certificate.

Note: The Hornsby Shire Council Section 7.12 Development Contributions Plan may be viewed at www.hornsby.nsw.gov.au or a copy may be inspected at Council's Administration Centre during normal business hours.

Reason: To address the increased demand for community infrastructure resulting from the approved development.

6. Construction Certificate

- a) A Construction Certificate is required to be approved by Council or a Principal Certifier prior to the commencement of any construction works under this consent.
- b) The Construction Certificate plans must be consistent with the Development Consent plans.

Reason: To ensure that detailed construction certificate plans are consistent with the approved plans and supporting documentation.

REQUIREMENTS PRIOR TO THE ISSUE OF A CONSTRUCTION CERTIFICATE

7. Building Code of Australia

Detailed plans, specifications and supporting information is required to be submitted to the certifying authority detailing how the proposed building work achieves compliance with the National Construction Code - Building Code of Australia. All building work must be carried out in accordance with the requirements of the National Construction Code - Building Code of Australia.

Reason: Prescribed condition - EP&A Regulation section 69(1).

8. Contract of Insurance (Residential Building Work)

Where residential building work for which the *Home Building Act 1989* requires there to be a contract of insurance in force in accordance with Part 6 of that Act, this contract of insurance must be in force before any building work authorised to be carried out by the consent commences.

Reason: Prescribed condition EP&A Regulation section 69(2).

9. Notification of Home Building Act 1989 Requirements

Residential building work within the meaning of the *Home Building Act 1989* must not be carried out unless the principal certifier for the development to which the work relates (not being Council) has given Council written notice of the following information:

- a) In the case of work for which a principal contractor is required to be appointed:
 - i) The name and licence number of the principal contractor.
 - ii) The name of the insurer by which the work is insured under Part 6 of that Act.
- b) In the case of work to be done by an owner-builder:
 - i) The name of the owner-builder.
 - ii) If the owner-builder is required to hold an owner-builder's permit under that Act, the number of the owner-builder's permit.

Note: If arrangements for doing the residential building work are changed while the work is in progress so that the information notified becomes out of date, further work must not be carried out unless the principal certifier for the development to which the work relates (not being Council) has given Council written notification of the updated information.

Reason: Prescribed condition EP&A Regulation section 71(2) and (3).

10. Sydney Water – Approval

This application must be submitted to Sydney Water for approval to determine whether the development would affect any Sydney Water infrastructure, and whether further requirements are to be met.

Note: Building plan approvals can be obtained online via Sydney Water Tap In™ through www.sydneywater.com.au under the Building and Development tab.

Reason: To ensure the development is provided with the relevant utility services.

11. Stormwater Drainage – Dwellings

The stormwater drainage system for the development must be designed for an average recurrence interval (ARI) of 20 years and be gravity drained to a level spreader via rainwater tanks in accordance with Stormwater Drainage Plan prepared by Engineering Studio, dated 19 December 2022.

Reason: To ensure appropriate provision for management and disposal of stormwater.

12. Geotechnical Requirements

- a) The development must be designed and carried out in accordance with the recommendations outlined in the submitted Geotechnical Report prepared by Ideal Geotech, dated 16 November 2022.
- b) Details are to be provided to the Principal Certifier with the application for a Construction Certificate.

Reason: To protect the stability of the land.

REQUIREMENTS PRIOR TO THE COMMENCEMENT OF ANY WORKS

13. Erection of Construction Sign

- a) A sign must be erected in a prominent position on any site on which any approved work is being carried out:
 - i) Showing the name, address, and telephone number of the principal certifier for the work.
 - ii) Showing the name of the principal contractor (if any) for any demolition or building work and a telephone number on which that person may be contacted outside working hours.
 - iii) Stating that unauthorised entry to the work site is prohibited.
- b) The sign is to be maintained while the approved work is being carried out and must be removed when the work has been completed.

Reason: Prescribed condition EP&A Regulation, section 70(2) and (3).

14. Protection of Adjoining Areas

A temporary hoarding, fence or awning must be erected between the work site and adjoining lands before the works begin and must be kept in place until after the completion of the works if the works:

- a) Could cause a danger, obstruction, or inconvenience to pedestrian or vehicular traffic.
- b) Could cause damage to adjoining lands by falling objects.
- c) Involve the enclosure of a public place or part of a public place.
- d) Have been identified as requiring a temporary hoarding, fence, or awning within the Council approved Construction Management Plan (CMP).

Note: Notwithstanding the above, Council's separate written approval is required prior to the erection of any structure or other obstruction on public land.

Reason: To ensure public safety and protection of adjoining land.

15. Toilet Facilities

- a) To provide a safe and hygienic workplace, toilet facilities must be available or be installed at the works site before works begin and must be maintained until the works are completed at a ratio of one toilet for every 20 persons employed at the site.
- b) Each toilet must:
 - i) Be a standard flushing toilet connected to a public sewer.
 - ii) Be a temporary chemical closet approved under the *Local Government Act 1993*.
 - iii) Have an on-site effluent disposal system approved under the *Local Government Act 1993*.

Reason: To ensure adequate toilet facilities are provided.

16. Erosion and Sediment Control

To protect the water quality of the downstream environment, erosion and sediment control measures must be provided and maintained throughout the construction period in accordance with the manual 'Urban Stormwater: Soils and Construction "The Blue Book" 2004 (4th edition), the approved plans, Council specifications and to the satisfaction of the principal certifier. The erosion and sediment control devices must remain in place until the site has been stabilised and revegetated.

Note: On the spot penalties may be issued for any non-compliance with this requirement without any further notification or warning.

Reason: To minimise impacts on the water quality of the downstream environment.

17. Installation of Tree Protection Measures

- a) Trees to be retained and numbered 1, 2, 3 and 4 as identified on the Overall Site Map and Tree Location Plan prepared by Mark Bury Consulting, dated 30 April 2023 must have tree protection measures for the ground, trunk and canopy installed by the project arborist for the duration of demolition and construction works in accordance with Arboricultural Management Plan (Appendix 7) of the supporting Arboricultural Impact Assessment prepared by Mark Bury Consulting, dated 30 April 2023.
- b) Tree protection fencing for the trees to be retained numbered 1, 2, 3 and 4 must be installed by the engaged AQF 5 project arborist and consist of 1.8m high temporary fencing panels installed in accordance with Australian Standard AS4687-2007 Temporary fencing and hoardings.
- c) The installation of all required tree protection fencing must include shade cloth attached to the fencing to reduce transport of dust, particulates, and liquids from entering the tree protection zone.

Reason: To minimise impacts on the water quality of the downstream environment.

REQUIREMENTS DURING CONSTRUCTION**18. Construction Work Hours**

- a) All works on site, including demolition and earth works, must only occur between 7am and 5pm Monday to Saturday.
- b) No work is to be undertaken on Sundays or public holidays.

Reason: To protect the amenity of neighbouring properties.

19. Demolition

To protect the surrounding environment, all demolition work must be carried out in accordance with Australian Standard AS2601-2001 Demolition of structures and the following requirements:

- a) Demolition material must be disposed of to an authorised recycling and/or waste disposal site and/or in accordance with an approved waste management plan; and
- b) Demolition works, where asbestos material is being removed, must be undertaken by a contractor that holds an appropriate licence issued by SafeWork NSW in accordance with the Work Health and Safety Regulation 2017 and be appropriately transported and disposed of in accordance with the Protection of the Environment Operations (Waste) Regulation 2014; and
- c) On construction sites where any building contains asbestos material, a standard commercially manufactured sign containing the words 'DANGER ASBESTOS REMOVAL IN PROGRESS' and measuring not less than 400mm x 300mm must be displayed in a prominent position visible from the street.

Reason: To ensure the appropriate removal and disposal of demolition materials.

20. Environmental Management (Air Pollution)

The Applicant must take all reasonable steps to minimise dust generated during all works authorised by this consent. During construction, the Applicant must ensure that:

- a) Exposed surfaces and stockpiles are suppressed by regular watering.
- b) All trucks entering or leaving the site with loads have their loads covered.
- c) Trucks associated with the development do not track dirt onto the public road network.
- d) Public roads used by these trucks are kept clean.
- e) Land stabilisation works are carried out progressively on site to minimise exposed surfaces.

Reason: To minimise impacts to the natural environment and public health.

21. Street Sweeping

During works and until exposed ground surfaces across the site have been stabilised, street sweeping must be undertaken following sediment tracking from the site.

The street cleaning service must utilise a 'scrub and dry' method and be undertaken for the full extent of any sediment tracking.

Reason: To minimise impacts to the natural environment.

22. Council Property

To ensure that the public reserve is kept in a clean, tidy, and safe condition during construction works, no building materials, waste, machinery, or related matter is to be stored on the road or footpath.

Reason: To protect public land.

23. Disturbance of Existing Site

During construction works, the existing ground levels of open space areas and natural landscape features, including natural rock-outcrops, vegetation, soil, and watercourses must not be altered unless otherwise nominated on the approved plans.

Reason: To protect the natural features of the site.

24. Survey Report

A report(s) must be prepared by a registered surveyor and submitted to the principal certifier:

- a) Prior to the pouring of concrete at each level of the building certifying that:
 - i) The building, retaining walls and the like have been correctly positioned on the site.
 - ii) The finished floor level(s) are in accordance with the approved plans.

Reason: To ensure buildings are positioned in the approved location and at the correct height.

25. Waste Management

All work must be carried out in accordance with the approved waste management plan.

Reason: To ensure the management of waste to protect the environment and local amenity during construction.

26. Prohibited Actions within the Fenced Tree Protection Zone

The following activities are prohibited within the approved fenced tree protection zones unless otherwise approved by Council:

- a) Soil cutting or filling, including excavation and trenching.
- b) Soil cultivation, disturbance, or compaction.
- c) Stockpiling storage or mixing of materials.
- d) The parking, storing, washing, and repairing of tools, equipment, and machinery.
- e) The disposal of liquids and refuelling.
- f) The disposal of building materials.
- g) The siting of offices or sheds.
- h) Any action leading to the impact on tree health or structure.

Reason: To protect trees during construction.

27. Maintaining the Health of Trees Approved for Retention

The appointed project arborist must monitor and record any and all necessary actions required to maintain tree health and condition for trees numbered 1, 2, 3 and 4 on the

approved plans as recommended in the Arboricultural Management Plan (Appendix 7) of the supporting AIA, prepared by Mark Bury Consulting, dated 30 April 2023.

Reason: To ensure appropriate monitoring of tree(s) to be retained.

28. Maintaining Tree Protection Measures

Tree Protection Measures must be maintained by the project arborist in accordance with Condition Nos. 17 and 26 of this consent for the duration of works.

Reason: To protect trees during construction.

REQUIREMENTS PRIOR TO THE ISSUE OF AN OCCUPATION CERTIFICATE

29. Fulfilment of BASIX Commitments

The applicant must demonstrate the fulfilment of BASIX commitments pertaining to the development.

Reason: Prescribed condition under section 75. EP&A Regulation.

30. Final Certification

The AQF 5 Project arborist must submit to the Principal Certifier a certificate that includes the following:

- d) All tree protection requirements complied with the as approved tree protection plan for the duration of demolition and/or construction works.
- e) All completed works relating to tree protection and maintenance have been carried out in compliance with the conditions of consent and approved plans.
- f) Dates, times, and reasons for all site attendance.
- g) All works undertaken to maintain the health of retained trees.
- h) Details of tree protection zone maintenance for the duration of works.

Note: Copies of monitoring documentation may be requested throughout the development works.

Reason: To ensure compliance with tree protection commitments.

31. Damage to Council Assets

To protect public property and infrastructure, any damage caused to Council's assets as a result of the construction or demolition of the development must be rectified by the applicant in accordance with AUS-SPEC Specifications

(www.hornsby.nsw.gov.au/property/build/aus-spec-terms-and-conditions). Rectification works must be undertaken prior to the issue of an Occupation Certificate, or sooner, as directed by Council.

Reason: To ensure public infrastructure and property is maintained.

32. Certification of RFS Requirements

A Certificate prepared by a BPAD accredited Bushfire Consultant is to be provided to the Principal Certifier (PC) certifying the completion of all works required by the NSW conditions of concurrence prior to the issue of the Occupation Certificate.

Reason: To ensure all bushfire protection measures are implemented to protect life and property.

33. Geotechnical Certification

A Certificate must be prepared by a suitably qualified geotechnical engineer confirming that all works have been constructed in accordance with the recommendations of the Geotechnical Report prepared by Ideal Geotech, dated 16 November 2022 and in accordance with the relevant Australian Standards AS2870-2011, AS1726-2017, AS3798-2007 and AS4055-2021.

Reason: To ensure the construction of the development will protect the stability of the land.

OPERATIONAL CONDITIONS

34. Use of Premises

The development approved under this consent shall be used in conjunction with the principal dwelling as a single occupancy and home business and not for any other purpose without Council's separate written consent.

- a) No approval is granted or implied for the use of any part of the dwelling house for the purpose of a secondary dwelling or separate occupancy.
 - i) Built in cooking facilities are not permitted to be installed in the approved extension.
- b) The home business must not involve the use of more than 50m² of floor area and must operate as per the definition of 'home business' under the Standard Instrument.

Reason: To ensure the use is undertaken in accordance with the terms of this consent.

35. Bushfire Protection Zones

The required bushfire protection zone(s) around the buildings must be maintained in perpetuity.

Reason: To ensure bushfire protection measures are maintained to protect life and property.

CONDITIONS OF CONCURRENCE – NSW RFS

The following conditions of consent are from the nominated State Agency pursuant to Section 4.13 of the *Environmental Planning and Assessment Act 1979* and must be complied with to the satisfaction of that Agency.

36. Asset Protection Zones

The intent of measures: to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting firefighting activities.

- a) From the commencement of building works and in perpetuity, the entire property must be managed as an inner protection area in accordance with the following requirements of Appendix 4 of Planning for Bush Fire Protection 2019:

- i) Tree canopy cover should be less than 15% at maturity.
 - ii) Trees at maturity should not touch or overhang the building.
 - iii) Lower limbs should be removed up to a height of 2 metres above the ground.
 - iv) Tree canopies should be separated by 2 to 5 metres.
 - v) Preference should be given to smooth-barked and evergreen trees.
 - vi) Create large discontinuities or gaps in the vegetation to slow down or break the progress of fire towards buildings should be provided.
 - vii) Shrubs should not be located under trees.
 - viii) Shrubs should not form more than 10% ground cover.
 - ix) Clumps of shrubs should be separated from exposed windows and doors by a distance of at least twice the height of the vegetation.
 - x) Grass should be kept mown (as a guide, grass should be kept to no more than 100 millimetres in height).
 - xi) Leaves and vegetation debris should be removed.
- b) Landscaping within the required asset protection zone must comply with Appendix 4 of Planning for Bush Fire Protection 2019. In this regard, the following principles are to be incorporated:
- i) A minimum 1 metre wide area (or to the property boundary where the setbacks are less than 1 metre), suitable for pedestrian traffic, must be provided around the immediate curtilage of the building.
 - ii) Planting is limited in the immediate vicinity of the building.
 - iii) Planting does not provide a continuous canopy to the building (i.e., trees or shrubs are isolated or located in small clusters).
 - iv) Landscape species are chosen to ensure tree canopy cover is less than 15% (IPA), and less than 30% (OPA) at maturity and trees do not touch or overhang buildings.
 - v) Avoid species with rough fibrous bark, or which retain/shed bark in long strips or retain dead material in their canopies.
 - vi) Use smooth bark species of trees species which generally do not carry a fire up the bark into the crown.
 - vii) Avoid planting of deciduous species that may increase fuel at surface/ ground level (i.e., leaf litter).
 - viii) Avoid climbing species to walls and pergolas.
 - ix) Locate combustible materials such as woodchips/mulch, flammable fuel stores away from the building.
 - x) Locate combustible structures such as garden sheds, pergolas and materials such as timber garden furniture away from the building; and
 - xi) Low flammability vegetation species are used.

37. Construction Standards

The intent of measures: to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting firefighting activities.

Construction of the proposed alterations and additions must comply with Section 3 (excluding section 3.5) and Section 9 (BAL FZ) of Australian Standard AS3959-2018 Construction of buildings in bushfire-prone area or the relevant requirements of the NASH Standard - Steel Framed Construction in Bushfire Areas (incorporating amendment A - 2015). New construction must also comply with the construction requirements in Section 7.5 of Planning for Bush Fire Protection 2019.

38. Access – Property Access

The intent of measures: to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting firefighting activities.

Unobstructed pedestrian access must be provided to the rear of the property for the life of the development.

39. Water and Utility Services

The intent of measures: to minimise the risk of bush fire attack and provide protection for emergency services personnel, residents and others assisting firefighting activities.

The provision of water, electricity and gas must comply with the following in accordance with Table 7.4a of Planning for Bush Fire Protection 2019:

- a) Reticulated water is to be provided to the development where available.
- b) All above-ground water service pipes external to the building are metal, including and up to any taps.
- c) Where practicable, electrical transmission lines are underground.
- d) Where overhead, electrical transmission lines are proposed as follows:
 - i) Lines are installed with short pole spacing (30 metres), unless crossing gullies, gorges or riparian areas.
 - ii) No part of a tree is closer to a power line than the distance set out in accordance with the specifications in ISSC3 Guideline for Managing Vegetation Near Power Lines.
- e) Reticulated or bottled gas is installed and maintained in accordance with AS/NZS 1596:2014 and the requirements of relevant authorities, and metal piping is used.
- f) All fixed gas cylinders are kept clear of all flammable materials to a distance of 10 metres and shielded on the hazard side.
- g) Connections to and from gas cylinders are metal.
- h) Polymer sheathed flexible gas supply - lines are not used.
- i) Above-ground gas service pipes are metal, including and up to any outlets.

- END OF CONDITIONS -

ADVISORY NOTES

The following information is provided for your assistance to ensure compliance with the Environmental Planning and Assessment Act, 1979, Environmental Planning and Assessment Regulation 2021, other relevant legislation and Council's policies and specifications. This information does not form part of the conditions of development consent pursuant to Section 4.17 of the Act.

Environmental Planning and Assessment Act 1979 Requirements

The *Environmental Planning and Assessment Act 1979* requires:

- The issue of a construction certificate prior to the commencement of any works. Enquiries can be made to Council's Customer Services Branch on 9847 6760.
- A principal certifier to be nominated and Council notified of that appointment prior to the commencement of any works.
- Council to be given at least two days written notice prior to the commencement of any works.
- Mandatory inspections of nominated stages of the construction inspected.
- An occupation certificate to be issued before occupying any building or commencing the use of the land.

Long Service Levy

In accordance with Section 34 of the *Building and Construction Industry Long Service Payments Act 1986*, a 'Long Service Levy' must be paid to the Long Service Payments Corporation (LSC) at www.longservice.nsw.gov.au.

Note: The rate of the Long Service Levy is 0.25% of the total cost of the work (including GST).

Note: Hornsby Council requires the payment of the Long Service Levy prior to the issue of a construction certificate.

Tree and Vegetation Preservation

Hornsby Development Control Plan 2013 Tree and Vegetation Preservation provisions have been developed under Council's authorities contained in State Environmental Planning Policy (Biodiversity and Conservation) 2021 and the *Environmental Planning and Assessment Act 1979*.

In accordance with these provisions a person must not cut down, fell, uproot, kill, poison, ringbark, burn, or otherwise destroy the vegetation, lop, or otherwise remove a substantial part of the trees or vegetation to which any such development control plan applies without the authority conferred by a development consent, or a permit granted by Council.

Fines may be imposed for non-compliance with the *Hornsby Development Control Plan 2013*.

Note: A tree is defined as a long lived, woody perennial plant with one or relatively few main stems with the potential to grow to a height greater than three metres (3m). (HDCP 1B.6.1.c).

Covenants

The land upon which the subject building is to be constructed may be affected by restrictive covenants. Council issues this approval without enquiry as to whether any restrictive covenant affecting the land would be breached by the construction of the building, the subject of this consent. Applicants must rely on their own enquiries as to whether or not the building breaches any such covenant.

Dial Before You Dig

Prior to commencing any works, the applicant is encouraged to contact Before You Dig Australia (BYDA) at www.byda.com.au for free information on potential underground pipes and cables within the vicinity of the development site.

Telecommunications Act 1997 (Commonwealth)

If you are aware of any works or proposed works which may affect or impact on Telstra's assets in any way, you are required to contact Telstra's Network Integrity Team on Phone Number 1800810443.

Asbestos Warning

Should asbestos or asbestos products be encountered during demolition or construction works, you are advised to seek advice and information prior to disturbing this material. It is recommended that a contractor holding an asbestos-handling permit (issued by *SafeWork NSW*) be engaged to manage the proper handling of this material. Further information regarding the safe handling and removal of asbestos can be found at:

www.environment.nsw.gov.au

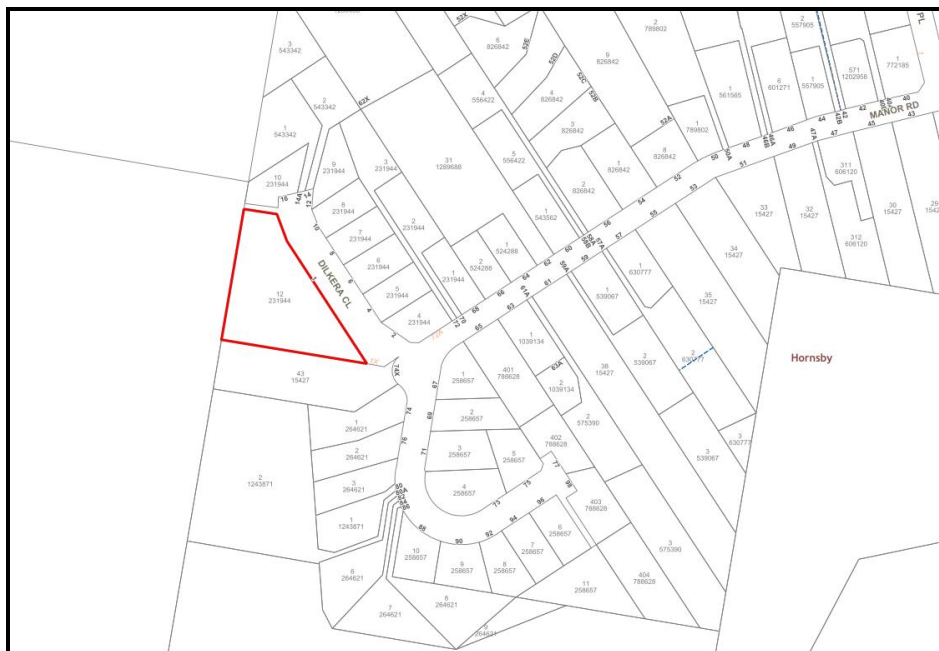
www.adfa.org.au

www.safework.nsw.gov.au

Alternatively, telephone the *SafeWork NSW* on 13 10 50.

Rain Water Tank

It is recommended that water collected within any rainwater tank as part of the development be limited to non-potable uses. *NSW Health* recommends that the use of rainwater tanks for drinking purposes not occur where a reticulated potable water supply is available.



LOCALITY PLAN

DA/1314/2022

No. 1 Dilker Close, Hornsby

ATTACHMENT 1 - ITEM 2

Clause 4.6 Variation Request



ATTACHMENT 2 - ITEM 2

Clause 4.6 – Exceptions to Development Standards

**VARIATION TO THE MAXIMUM HEIGHT OF BUILDINGS
STANDARD UNDER CL. 4.3 HORNSBY LEP 2013**

Lot 12 in DP 231944 No. 1 Dilkera Close, HORNSBY

Construction of alterations and additions to an existing dwelling house.

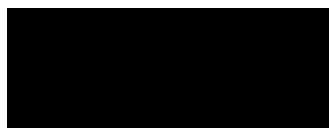
16th June 2023

Clause 4.6 Variation Request

Issue No	Amendment	Date
A	Initial draft Report	10 th October 2022
B	issue to Client	11 th October 2022
C	issue to Council	28 th November 2022
D	Amended Design	30 th May 2023
E	Final Amended Design	16 th June 2023

REPORT PREPARED BY:**Peter Fryar**

BTP (UNSW), CERT T&CP (Ord4), MPIA

**Director,****KEY URBAN PLANNING****Waiver**

This report has been prepared in accordance with and for the purposes outlined in the scope of services agreed with Key Urban Planning and the Client. It has been prepared based on the information supplied by the Client, as well as investigation undertaken by Key Urban Planning and any sub-consultants engaged by the Client for the project.

Unless otherwise specified in this report, information and advice received from external parties during the course of this project was not independently verified. However, any such information was deemed to be current and relevant prior to its use. Whilst all reasonable skill, diligence and care have been taken to provide accurate information and appropriate recommendations, it is not warranted or guaranteed and no responsibility or liability for any information contained herein or for any consequences of its use will be accepted by Key Urban Planning.

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The Client should be aware that this report does not guarantee the approval of any application by any Council, Government agency or any other regulatory authority

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Clause 4.6 Variation Request

Variation under Clause 4.6 of The Hornsby Local Environmental Plan 2013 to development standard for Maximum Height of Buildings (clause 4.3).

Peter Fryar of Key Urban Planning has prepared this clause 4.6 request (the “request”) to assist in gaining development consent for ‘Construction of alterations and additions to an existing dwelling house’.

The property is known as Lot 12 in DP 231944 No.1 Dilkeria Close, Hornsby (the “site”). The site is located at the intersection of Dilkeria Close and Manor Road.

The site is located on the southern side of Dilkeria Close and has a splayed frontage to the roadway of 87.82m/16.98m. The southern and western property boundaries are bounded by bushland. The site has a steep slope (crossfall) from east to west. The site comprises an existing two storey residential building with frontage to Dilkeria Close.

Photograph 1 – Aerial photograph (courtesy Hornsby Shire Council)



Clause 4.6 Variation Request

The proposed development detailed under the Statement of Environmental Effects prepared in support of the development application includes an assessment of the proposed works. In consideration of this matter, we have:

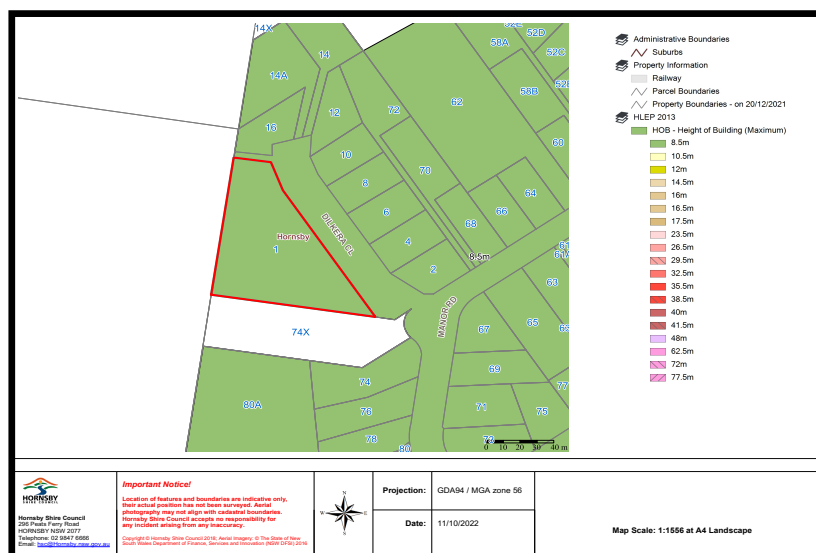
- Undertaken an inspection of the site and surrounding locality.
- Undertaken a review of the relevant provisions of the Hornsby Local Environmental Plan 2013 (the “LEP”).
- Undertaken a review of the relevant sections of the Hornsby Development Control Plan 2013 (the “DCP”); and
- Considered the relevant provisions of the Environmental Planning and Assessment Act, 1979 (the “Act”) and the Environmental Planning & Assessment Regulation, 2021 (the “Regs”).

1. INTRODUCTION & BACKGROUND**Introduction**

Key Urban Planning is providing urban planning services to the owners of the site in support of the above-described development application submitted to Hornsby Shire Council.

The purpose of this request is to seek a variation to Clause 4.3 (Height of Buildings) of the Hornsby Local Environmental Plan 2013. The proposal involves the construction of additions to the existing dwelling house on the site. Due to the steep slope of the land, the proposed works will result in a portion of the new building works along the western elevation of the building to exceed the maximum height control prescribed under the LEP.

Figure 1- Extract of the LEP height map.



Clause 4.6 Variation Request

Clause 4.3 of the LEP states:

"4.3 Height of buildings

(1) 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.

(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](#)."

The request seeks a variation to the eight and one half (8.5) metre maximum height standard prescribed under the LEP. The plans submitted as part of the development application form the basis for this clause 4.6 variation request. The maximum proposed height on the development is 10.45m (23% variation). The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath. The proposed variation to the height standard results from the steep fall of the site to the west and the desire to maintain connectivity with the main dwelling house. Furthermore, the subfloor area includes a concrete retaining wall that was constructed to retain earth following a landslide that occurred during a recent period of heavy rain. Whilst the slab is lower than the ground level prior to the landslide, the ground level (existing) has been applied to the ground level beneath to retaining wall slab. The retaining works were necessary to avoid further landslip occurring that would undermine the house as well as cause significant environmental harm to the adjacent bushland and watercourses.

Background

Revised plans have been prepared in response to correspondence received from council dated 20 April 2023. Several changes were made to the original plans to address the concerns raised by council regarding the non-compliance with the maximum height standard prescribed under the Hornsby LEP 2013. The revised plans were supported by a further clause 4.6 variation request. The maximum proposed height on the revised plans was determined to be 9.15m above the ground level (existing). Council disputed the methodology applied in the calculation of the 'height of building'.

The Dictionary contained in the LEP defines building height as follows:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.

Clause 4.6 Variation Request

NOTE: Underlining by Author.

Whilst the methodology adopted by council in the interpretation of the existing ground level is disputed, further design amendments to the plans have been made. The calculation of the height of the proposed building addition has been determined on the existing ground level currently in existence on the site and not as modified by the landslip that occurred.

2. CLAUSE 4.6 FRAMEWORK

Clause 4.6 (*Exceptions to Development Standards*) provides a mechanism for a Consent Authority to grant flexibility in Development Standards when it considers this would result in improved planning outcomes for and from a development.

Clause 4.6(3)(a) and (b) requires that a consent authority must not grant a variation to a development standard unless it is satisfied:

“(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;”

Additionally, there is Case Law precedence that must be considered prior to determining any variation request under the Clause. The Land and Environment Court Case law has set questions to be addressed in requests for variations facilitated by Clause 4.6. The relevant precedence is in:

- *Wehbe v Pittwater Council (2007)*; and, more recently
- *Four2Five Pty Ltd v Ashfield Council (2015)*.

More recently, in two recent decisions (one in the Court of Appeal and one in the Land and Environment Court), Preston CJ further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and *Al Maha*.

1. Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61

At first instance, Grey C refused development consent to the DA. One of the bases on which consent was refused was that the Commissioner was not satisfied that the Applicant's 4.6 variation request had adequately addressed the matters required to be demonstrated by cl 4.6(3).

On appeal to a judge of the Land and Environment Court (Preston CJ), Baron argued that the Commissioner had misdirected herself by asking whether she was '*directly and reasonably satisfied*' with the reasons given in the 4.6 request. The applicant made this submission in reliance on Preston CJ's statement in *Initial Action* (at [25]) that:

“...the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be

Clause 4.6 Variation Request

demonstrated by cl 4.6(3)(a) and (b)."

After a detailed consideration of the issue (at [74-81]), His Honour rejected the applicant's argument. At [78], His Honour held:

"The consent authority's consideration of the applicant's written request, required under cl 4.6(3), is to evaluate whether the request has demonstrated the achievement of the outcomes that are the matters in cl 4.6(3)(a) and (b). Only if the request does demonstrate the achievement of these outcomes will the request have "adequately addressed the matters required to be demonstrated" by cl 4.6(3), being the requirement in cl 4.6(4)(a)(i) about which the consent authority must be satisfied. The request cannot "adequately" address the matters required to be demonstrated by cl 4.6(3) if it does not in fact demonstrate the matters."

2. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130

After the decision in *Baron Corporation*, the Court of Appeal once again considered the proper construction of clause 4.6 in *RebelMH*. Preston CJ sat in the Court of Appeal and delivered the Court's reasons.

The development in question contravened the height development standard set out in the *North Sydney Local Environmental Plan 2013* ('NSLEP') and a clause 4.6 variation request was therefore required.

At first instance, Moore J dismissed the appeal as he was not satisfied that the request had adequately addressed the matters required to be demonstrated by cl 4.6(3) of the LEP. His Honour also found that the proposed development was not in the public interest because it was not consistent with objectives (b) and (f) of the height development standard. Objective (b) was to promote the retention and sharing of existing views and Objective (f) was to encourage an appropriate scale and density of development that was in accordance with the character of an area.

On appeal, the applicant argued that Moore J had misconstrued and misapplied cl 4.6 by finding that to 'adequately address' the matters required to be demonstrated in cl 4.6(3), the request had to actually demonstrate those matters, rather than merely seek to demonstrate those matters.

The Court rejected this argument. After setting out Preston CJ's conclusions in *Baron Corp*, the Court reaffirmed (at [51]):

"... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i))."

This application to vary a development standard is framed to provide responses to each of the heads of consideration under Clause 4.6 and to address the precedence set by the relevant Case Law. It is set out as follows:

Clause 4.6 Variation Request

1. Verification that a statutory Development Standard is proposed to be varied.
2. Description and quantification of the proposed variation.
3. Justification on merit of the validity of the variation requested (with particular attention to the current case law precedence in *Four2Five vs Pty Ltd v Ashfield Council & Wehbe v Pittwater Council (2007)*). Particularly, clause 4.6(3)(a) identifies that the request must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances.
4. Assessment against the remaining relevant statutory heads of consideration in the LEP 2013 and other relevant case law.
5. As required by clause 4.6(3)(b) the request will demonstrate that there are sufficient environmental grounds to justify contravening the development standard.

ATTACHMENT 2 - ITEM 2

Clause 4.6 Variation Request**3. DEVELOPMENT STANDARD PROPOSED TO BE VARIED**

The Development Standard to be varied by this application is Clause 4.3 (Height of buildings) of the Hornsby LEP 2013.

The building height map (Figure 1) indicates that the maximum height for a building must not exceed 8.5 metres. The request seeks a variation to the eight and one half (8.5) metre maximum height standard prescribed under the LEP. The maximum proposed height of the building addition is 10.45m (23% variation). The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath. The proposed variation to the height standard results from the steep fall of the site to the west and the desire to maintain connectivity with the main dwelling house. Furthermore, the subfloor area includes a concrete retaining wall that was constructed to retain earth following a landslide that occurred during a recent period of heavy rain. breach of the maximum height control is along the length of the western elevation being a balustrade for the roof terrace.

The purpose of this request is to seek a variation to Clause 4.3 (Height of Buildings) of the Hornsby Local Environmental Plan 2013.

The Dictionary to LEP 2013 defines "Height of Buildings Map" as:

"Height of Buildings Map means the [Hornsby Local Environmental Plan 2013 Height of Buildings Map](#)."

Building height is defined in the LEP 2013 as:

"Building height (or height of building) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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."

Section 1.4 of the Act defines a 'development standard' to mean:

"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:

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

Clause 4.6 Variation Request

- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed."*

The maximum building height identified on the 'Height of buildings map' (Figure 1) is a development standard as defined under section 1.4 of the Act.

The Land and Environment Court of NSW in *Bramley v Coffs Harbour City Council* [2014] NSWLEC 1194 considered a development proposal involving a clause 4.6 submission seeking variation to the height standard. Commissioner Brown at para. 28 to 29 described the clause 4.6 assessment framework as follows:

"28. Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

29. In considering the question of consistency, I have adopted approach of the former Chief

Clause 4.6 Variation Request

Judge, Justice Pearlman in Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21 where, Her Honour expresses the following opinion at [27]:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.”

NOTE: Bold and underlining by author.

Accordingly, the proposed alterations & additions to the existing dwelling house forming part of the DA constitutes a variation to the maximum building height development standard contained within the LEP and requires the proponent to formally seek a variation under the provisions of clause 4.6 of the LEP.

Clause 4.6 Variation Request**4. EXTENT OF VARIATION SOUGHT**

The purpose of this request is to seek a variation to Clause 4.3 (Height of buildings) of the Hornsby Local Environmental Plan 2013.

The request seeks a variation to the eight and one half (8.5) metre maximum height standard prescribed under the LEP. The plans submitted as part of the development application form the basis for this clause 4.6 variation request. The maximum proposed height on the development is 10.45m. The breach of the maximum height control is along the length of the western elevation being a portion of the roof terrace and upper floor beneath.

The extent of the variation is 1.95m or 23%.

The subfloor area includes a concrete retaining wall that was recently constructed to retain earth following a landslide that occurred during a period of heavy rain. The retaining works were necessary to avoid further landslip occurring that would undermine the house as well as cause significant environmental harm to the adjacent bushland and watercourses. The retaining wall has altered the natural profile of the ground causing difficulty in designing a two-storey addition permitted under the DCP 2013.

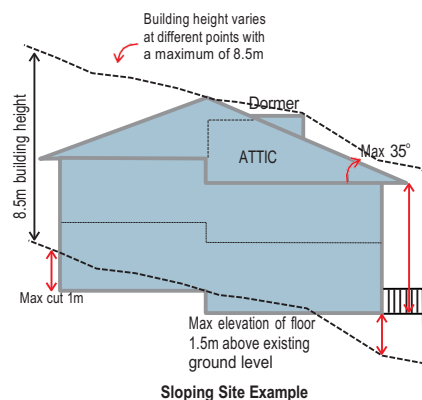
Part 3 – Dwelling Houses (3.1.1 Scale) of Hornsby DCP contains prescriptive measures regarding building height. In particular, the DCP states:

“Buildings should respond to the topography of the site by:

- *minimising earthworks (cut and fill), and*
- *siting the floor level of the lowest residential storey a maximum of 1.5 metres above natural ground level.”*

The design of the proposed addition responds to the natural topography of the site and minimises the extent of earthworks.

The DCP adopts the definition of building height contained in the dictionary of the LEP 2013. The definition refers to ‘ground level (existing)’ and at figure 3.1(a) of the DCP depicts the method for the calculation of the building height.



Clause 4.6 Variation Request

As previously discussed, the height of building control defined under the Hornsby LEP 2013 adopts the height of building control in the Standard Instrument Local Environmental Plan. The control states that:

"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."

The Hornsby LEP contains a definition of "building height (or height of a building)" which states:

"building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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".

Under this definition, it is essential to know how to correctly understand and identify the "ground level (existing)" of any development site for the purposes of maximising the development that may be undertaken. It is the term "ground level (existing)" that causes much confusion and the interpretation made by council is at odds with the opinion of the author based upon case law albeit the court has made a number of contradictory interpretations.

The Hornsby LEP 2013 defines a 'ground level (existing) to mean:

"ground level (existing) means the existing level of a site at any point."

The original and therefore leading decision on determining "ground level (existing)" on land that is sloping or completely excavated is the decision of Commissioner O'Neill in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 ('*Bettar*'). In *Bettar*, consent was sought for, amongst other things, a four and five storey residential flat building on a site where an existing building already occupied the entire site, meaning there was no longer any "ground" for determining the existing ground level. In addition, there was an existing part-basement excavated into one part of the site.

The Council's argument focused entirely on the existing building on the site and took the approach that the "ground level (existing)" should be calculated using the ground floor level of the existing building, and then dropping it down to the basement level in the part of the site where the existing basement was located.

The Commissioner determined that once the existing building is demolished, the ground levels of that prior building would no longer be discernible or relevant as a starting point for measuring the height of any new building, and that it would be conceivable that surrounding properties (with differing ground floor levels) could have starkly different height limits arising from the same development standard. The Commissioner held at paragraph [40] that this would result 'in an absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be

Clause 4.6 Variation Request

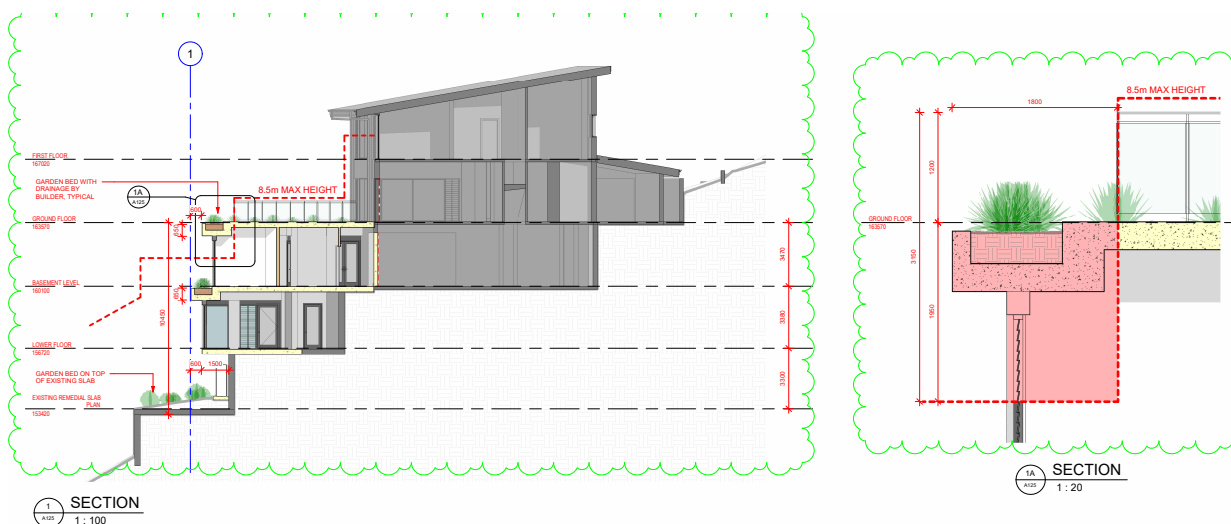
demolished and has no relationship to the context of the site.'

The Commissioner preferred the approach of the Applicant on this issue which was for the existing ground level of the site to be determined by extrapolating the ground levels found on the footpath (i.e. – outside the site) across the entire site to measure the vertical distance to the highest point of the building. The Commissioner's reasoning for this, given at paragraph [41], was that the 'level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site, and remains relevant once the existing building is demolished.' In our experience, this has become known as the *extrapolation method* for determining "ground level (existing)".

I consider that this is a practical approach to measuring height, albeit that it tends to be very reminiscent of the old 'natural ground level' approach to measuring height. In other words, it takes a non-literal approach, but rather a pragmatic and workable approach, to determining 'ground level (existing)'.

However, council has made a different interpretation of what constitutes ground level (existing) and is of the opinion that the extrapolation method should not be applied, and the existing ground level is the current state of the ground as modified. In the context of the subject site, the methodology adopted by council is of paramount importance and highly relevant where existing topography (natural or developed) would result in an absurd or at least irregular height plane, and it is a result that would not place a proposed building in its true context on the site and surrounds. That scenario suggests that using the extrapolation method for determining ground level (existing).

In accepting the council methodology in determining what constitutes existing ground level, the amended design results in a small portion of the proposed building exceeding the maximum height standard.



Clause 4.6 Variation Request**5. JUSTIFICATION FOR CONTRAVENTION OF THE DEVELOPMENT STANDARD**

The proposed variation is justified below firstly via a merit – based assessment on the recent case law and subsequently against the relevant heads of consideration in the LEP 2013. Case law (*Winten Property Group v North Sydney Council, 2001* & *Wehbe v Pittwater Council, 2007*) sets the basis for decision making on tests to assess variations to a Development Standard founded in whether the varied development would achieve the objectives of the relevant zoning and the Development Standard. In the decision in *Four2Five Pty Ltd v Ashfield Council, 2015*, Commissioner Pearson found that merely showing that the development achieves the objectives of the development standard would be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of a Clause 4.6 objection. This refined the test set in *Wehbe v Pittwater Council* to include an obligation to tie the test to outcomes specific to the proposed development and its site as opposed to grounds that would apply to any similar development on the site or in the vicinity. Consent authorities have since been applying this site & development specific test ("the *Four2Five Test*") to objections under Clause 4.6. The merit - based assessment of this variation request is based on this test.

With respect to the *Four2Five* test, there are several outcomes for the development on this site that go to justification of the variation request for maximum building height.

These include:

- The shape and locality of the site and the opportunities and constraints that arise for its development (in part) as a result.
- The potential for negative town planning and urban outcomes that may arise from strict compliance with the requirement are negligible when considering the context of the site with surrounding development namely bushland adjacent.
- The unique qualities of the site and the proposed alterations and additions will maintain and enhance these and the character of the locality.
- The need to construct retaining works due to a recent landslide that has undermined the existing dwelling and further landslip is likely to cause environmental harm if not properly retained.
- The shape and locality of the site and the opportunities and constraints that arise for its development as a result.
- The extent of the non-compliance is minor in the context of the existing built form.
- There is limited opportunity to 'step' the design due to the retaining wall required for the recent landslip that has occurred in the location on the site.
- Scale of the building as viewed from the adjoining roadway is negligible due to existing site topography. The proposed building in the context of the backdrop of the existing dwelling house is considered reasonable.
- The need to construct the additions at the heights proposed to allow the additions to integrate with the existing dwelling floor plan.

Clause 4.6 Variation Request

The objective of clause 4.3 – Heights of Buildings is as follows:

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

The height of the building is appropriate accounting for the steep topography of the land. The addition will have no impact upon the local environment of the amenity of the neighbourhood. In this regard, the proposed height satisfies the performance requirements of Part 3.1.1 of the Hornsby DCP in that the height, bulk and scale of the addition is in keeping with the surrounding low density residential environment.

Further, the Hornsby DCP 2013 (Part 3.1.1) contains prescriptive requirements that include both height in metres and the maximum number of storeys. The height of the addition complies with the maximum number of storeys prescribed under the DCP (2 storeys plus attic). The building works will minimise earthworks (cut and fill) by siting the addition on top of the retaining wall. An excavation into the natural ground will result in greater environmental harm by causing further land instability.

Part 3.1.1 contains a table 3.1.1(c) that specifies a maximum floor area for a dwelling house and ancillary building. For lots greater than 900m² the maximum total floor area should be 430m². This is an arbitrary figure that does not provide proper consideration for a site of a size that is well more than the 900m². The maximum floor area requirement for large sites that are well in excess of the 930m² should be considered in context of the maximum site coverage requirement under the DCP.

The site has an area of 4,179,9m². The proposed addition is a modest floor area of 148.96m² when considered in the context of the large site area. The total site coverage is 23.71% (30% allowable).

The development is within the environmental capacity of the site as demonstrated by the supporting documentation that forms part of the DA.

Clause 4.6 Variation Request**6. ASSESSMENT AGAINST THE STATUTORY HEADS OF CONSIDERATION**

The proposed variation is assessed below against the relevant sub-clauses in Clause 4.6 of the LEP.

6.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl.4.6(3)(a))

In his decision in *Wehbe v Pittwater Council [2007] NSW LEC 827* (relating to the now repealed State Environmental Planning Policy No.1), Chief Justice Preston expressed the view that there are 5 different ways in which a Development Standard may be shown to be unreasonable or unnecessary (and so that an objection to the development standard may be well founded). In accordance with this precedent, the proposed variation is tested below against each of these.

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*

The relevant objective underpinning the building height development standard is:

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

The additional height proposed (above the retaining wall) contributes to the delivery of a high-quality development on this site. The zoning of the site and surrounding residential lands includes land of relatively steep topography that may be considered in some respects unsuitable for residential development. Consequently, several dwelling houses in the locality have been approved by Council in contravention of the current LEP height standard. The proposed building works are consistent with the height and scale of the building constructed on the site.

The lateral expansion of the building by ‘stepping’ the design will have no impact upon the amenity of the surrounding low density residential environment. The natural topography of the site will result in unreasonable impacts by way of excavation should the additional floor space be provided by an excessive lateral extension of the existing building envelope.

The objectives of the standard can be achieved, notwithstanding the additional height, and that a superior development outcome would result.

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary*

The underlying objective or purpose of the standard is relevant to this development but, as illustrated in the plans submitted with the development application, it is achieved through the height variation with a higher quality urban planning and urban design outcome. This also accounts for the natural/modified topography of the land.

- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable*

The underlying object or purpose of the standard would not be defeated or thwarted if compliance was

Clause 4.6 Variation Request

required. However, strict compliance with the development standard would result in a missed opportunity specific to this site to develop a high-quality development that will present in a positive manner to the adjacent roadway and avoid any disturbance to the adjacent bushland. The proposed additions will not result in any additional land disturbance beyond the footprint of the retaining wall.

- *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*

Council has departed on the development standard in historic planning circumstances on the site and on surrounding sites due to the steep topography of the sites that adjoin the bushland.

It is considered that compliance with the standard in the circumstances is unreasonable and unnecessary when considering historic approvals by the council in the locality.

- *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

The zoning of the site and surrounding residential lands includes land of relatively steep topography that may be considered in some respects unsuitable for residential development. Consequently, several dwelling houses in the locality have been approved by Council in contravention of the current LEP height standard. The proposed additions are consistent with the height and scale of the dwelling house constructed on the site.

The proposed variation is consistent with the heads of consideration set by the decision of *Wehbe v Pittwater Council [2007]* and thus that for this particular case it would be unreasonable to strictly apply the numerical height standard for the development.

6.2 There are sufficient environmental planning grounds to justify contravening the development standard (Cl.4.6(3)(b))

The merit - based justification above in this request provides strong evidence that the proposed height variation would have clear positive outcomes including the protection and enhancement of identified values specific to the site and provision of high-quality residential development in the locality.

The additional height is a negligible issue within the context of the greater planning benefit, including opportunities for the protection and enhancement of local values and provision of high-quality residential development that would result from the variation to the height standard. The proposed works will not extend beyond the footprint of the retaining wall constructed to manage landslip occurring on the site.

In this regard, there are sufficient environmental planning grounds specific to this site to justify the proposed departure from the development standard.

The underlying objective of the height standard is to minimise potential adverse environmental impacts of development of the site on the surrounding area.

Clause 4.6 Variation Request

Although the proposal breaches the height of buildings control, the development achieves appropriate building envelopes and separation to the adjacent bushland. It is also worth noting that the development does comply with solar access, site coverage and other similar requirements adopted by Council.

6.3 The proposal will be in the public interest because it is consistent with the objectives of the relevant development standard and the objectives for development within the relevant zone (Cl.4.6(4)(a)(ii))

The analysis previously in the SEE indicates that the proposed height variation will result in a development that is consistent with the objectives of the R2 Low Density Residential zone and the Height Standard clause within the LEP 2013. The development proposal will result in a gross floor area that will effectively match the resultant development potential of the site.

In *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130

- Case concerned a DA for a 5 storey residential flat building that did not comply with the applicable development standard for height under North Sydney Local Environmental Plan 2013.
- One of the issues raised in the appeal to the Court of Appeal was whether, in order for a consent authority to be satisfied that an applicant's request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated.
- The appellant contended that clause 4.6(4)(a)(i) should be read as requiring the consent authority to be satisfied that the written request covers or deals with the required matters and that it was not necessary for the consent authority to agree with the conclusions of a request, nor the accuracy of the factual assertions contained within it. In other words, the appellant asserted that the consent authority only needed to be satisfied that the written request contained an argument about each of the matters required to be demonstrated by cl 4.6(3).
- Justice Payne said:

"Clause 4.6(3) requires the consent authority to have "considered" the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is "unreasonable or unnecessary" and that "there are sufficient environmental planning grounds to justify" the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced."

- Justice Preston (sitting in the Court of Appeal) said at 51:

"...in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i))."

Clause 4.6 Variation Request

It is considered that the public benefit will not be undermined by varying the height development standard. The proposed development is generally consistent with the adopted planning controls for the site.

ATTACHMENT 2 - ITEM 2

Clause 4.6 Variation Request**7. SECRETARY'S CONCURRENCE**

Under Clause 4.6(5) of the LEP, the Secretary's concurrence is required prior to any variation being granted. The proposal is assessed below against the matters to be considered by the Secretary.

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

The variation to the minimum lot area development standard will raise no matters that could be deemed to have State or Regional Significance. The proposed variation will have no potential for impacts outside the immediate vicinity of the site.

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

Maintaining the development standard in this case will not compromise that development form envisaged by the planning controls adopted by council.

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

We know of no other specific matters that would require the Secretary's consideration prior to granting concurrence.

Clause 4.6 Variation Request**8. CONCLUSION**

The proposed development satisfies the test established by the Land and Environment Court of NSW in *Wehbe -v- Pittwater Council* [2007] NSW LEC 827 as being appropriate for consideration of "unreasonable or unnecessary" circumstances in the application of Clause 4.6 variation request because:

- the objectives of the standard are achieved notwithstanding non-compliance with the standard.
- the underlying objective or purpose of the standard is not relevant to the development therefore compliance is unnecessary in the context of the facts of this case.
- the underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable - it would not result in the orderly and economic development of the land.

In the circumstances set out above there are sufficient environmental planning grounds to vary the numerical standard in this matter. Requiring strict compliance with the standard would hinder attainment of the relevant objects of the Environmental Planning and Assessment Act 1979.

Peter Fryar

BTP(UNSW), CERT T&CP(Ord4), MPIA

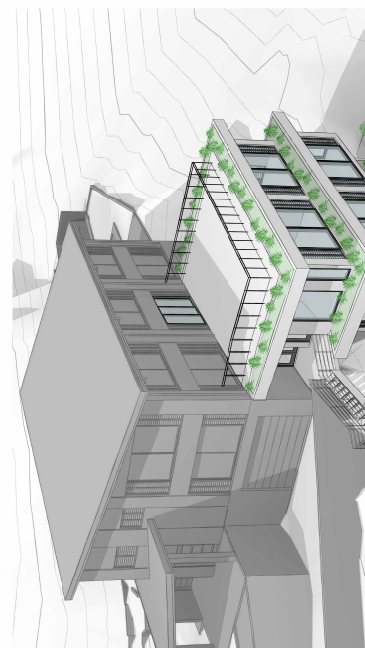


Director,

KEY URBAN PLANNING

TACHMENT 3 - ITEM 2

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BUILDING SPECIFICATIONS

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BUILDING SPECIFICATIONS FOR CLASS 1 AND 10 BUILDINGS

All works to be completed in accordance with the current version of the National Construction Code Series, including Building Code of Australia (BCA), Volume 2 and the Plumbing Code of Australia (PCA), Volume 3 as applicable.

Any Australian Standards listed are the versions that have been adopted by the relevant version of the National Construction Code Series at the time of Construction Certificate or Complying Development Certificate Application.

STRUCTURAL PROVISIONS
 (Southland District Municipalities – in satisfaction for compliance with:

a) 3.0, 3.0, 4, 3.0, 5 of the BCA or

0.0.5 - Structural Software - Must comply with the Australian Building Codes Board (ABCB) Protocol for Industrial Software

SITE PREPARATION

Earthworks - Earthworks are to be undertaken in accordance with Part 3.1.1 of the BCA. Earth Retaining structures (i.e. retaining walls & batter) to be in accordance with AS 4678. Drainage - Stormwater drainage is to be undertaken in accordance with AS/NZS 3500.3, or the Acceptable Construction

Practice as detailed in Part 3.1.3 of the BCA.
Item 6 Risk Management - Where a primary building element is considered susceptible to terrorist attack the building shall be constructed in accordance with the following:

a) AS 3600-1, and
b) A durable notice is permanently fixed to the building in a prominent location, such as in a meter box or the like, including

c) The Acceptable Construction Practice as detailed in accordance with Part 3.1.4 of the BCA.

The footing or slab is to be constructed in accordance with AS 2870, except that for the purposes of Clause 5.3.3.1 of AS 2870, a damp-proofing membrane is required to be provided, or the Acceptable Construction Practice detailed in Part 3.2 of

the BCA. Field footings are to be designed in accordance with AS 2519.

MASSOWRY
Unreinforced Masonry – to be designed and constructed in accordance with;
1. A.S. 3230: m2

b) AS 4773 Parts 1 and 2
Reinforced Masonry – to be designed and constructed in accordance with;

to be constructed and installed in accordance with:

a) AS 37 07, 07
b) AS 47 73 Parts 1 and 2
Weatherproofing of Masonry

This Part does not apply to any Class 30 building except where its construction contributes to the weatherproofing of the Class 1 building.

The weatherproofing of masonry is to be carried out in accordance with:

- a) AS 3700, except as provided for by Part 3.3.2.0 (a), or
- b) AS 4773, Parts 1 and 2

FRAMING
Shells, ribs, floor, ceiling, ventilation — see in connection with the acceptable construction practices of Part 3.4.4 of the BCA.

Steel Framing — is to be designed and constructed in accordance with the Acceptable Construction Practices of Part 3.4.2 of the BCA, or one of the following manuals:

a) open structures: AG 4 100.
b) Cold-formed steel structures: AS/NZS4000.
c) Residential and bar-rise steel framing: NASM Standard.

a) AS 9034.2
b) AS 9034.4

Structural Steel Members – is to be designed and constructed in accordance with the Acceptable Construction Practice of Part 3.4.4 of the BCA or, one of the following manuals:

Part 3.4.4 of the BCA or, one of the following manuals:

(i) Steel Structures – AS 4100.

ROOF AND WALL CLADDING

Roof/Glazing — is to comply with the Acceptable Construction Practices of Part 3.5.1 of the BCA, or, one of the following:

- Roofing from Part 3.5.1 BCA - AS2050.
- Roof/Glazing from Part 3.5.1 BCA - AS2050.

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Part 3.3.3 of the BCA, AS/NZS 3602.3 – *Drainage*, Timber & Composite Wall Cladding – to be designed and constructed in accordance with *Acceptable Construction Practice of* Part 3.5.4 of the BCA.

Metall wall cladding to be designed and constructed in accordance with AS 1562.1

GLAZING - to be designed and constructed in accordance with the Acceptable Construction Practices of Part 3.6.1 of the BCA. Glazing - one of the following materials as acceptable under Part 3.6.0 BCA.

a) AS 2047.
b) AS 1286.

FIRE SAFETY
Fire Hazard properties of materials to comply with Part 3.7.1 of the BCA.
The concentration of available smoke for materials with Part 3.7.2 of the BCA.

Fire Separation of garage top dwelling to comply with Part 3.7.3 of the BCA.

BUSHFIRE AREAS

Consider Alarms & Evacuation lighting to comply with 3.7.5 of the B Co.

Guideline Areas – This section relates to:

- A Class 1 building, or
- A Class 1 building or deck associated with a Class 1 building, if it is constructed in accordance with the following:

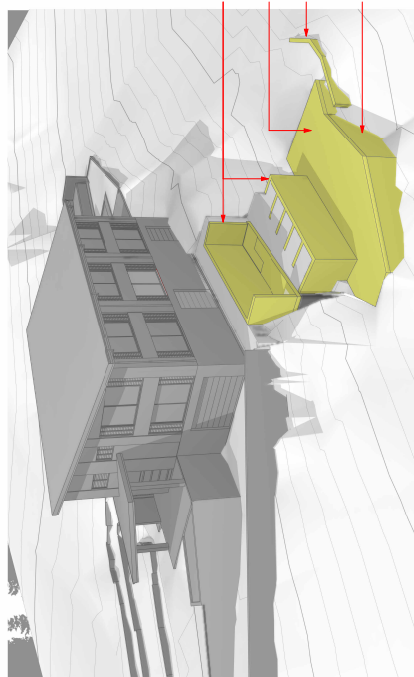
AS 3569, except as amended by planning for bushfire protection and, except for Section 9 Construction for Bushfire Attack Level FZ (BAL-FZ) Buildings subject to BAL-FZ must comply with specific conditions of development consent for construction at this level; or

(d) The requirements of (c) above as modified by the development consent following consultation with the NSW Rural Fire Service under section 78BA of the Environmental Planning and Assessment Act, 1979; or

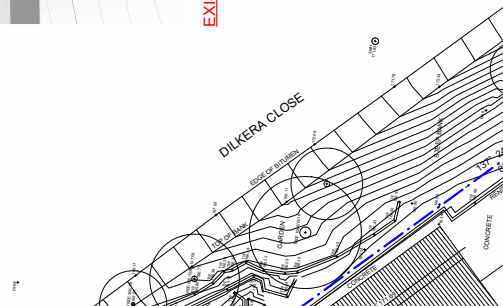
the) and requirements of (c) above administered by the Government of Ontario with a quarterly security advisory issued under section 100B of the Rural Fire Act for the purposes of integrated development.

TACHMENT 3 - ITEM 2

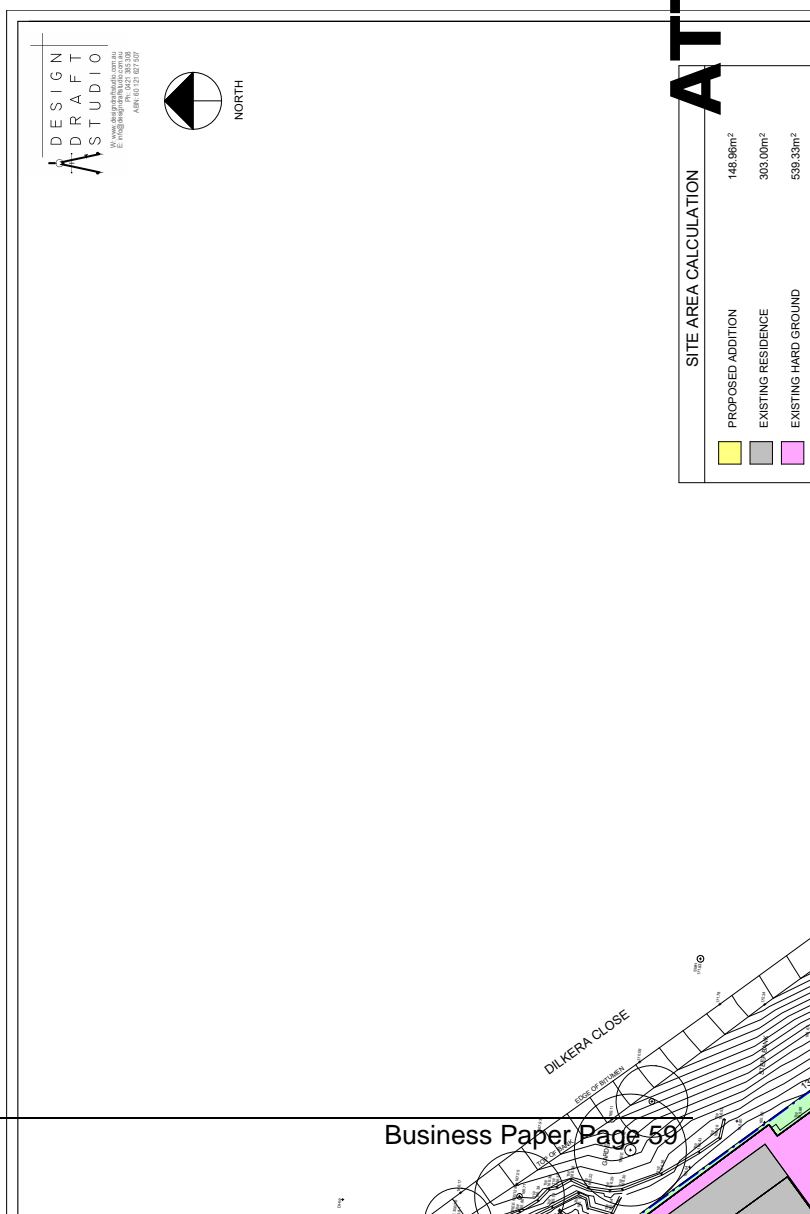
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EXISTING ENVIRONMENTAL PROTECTION WORKS

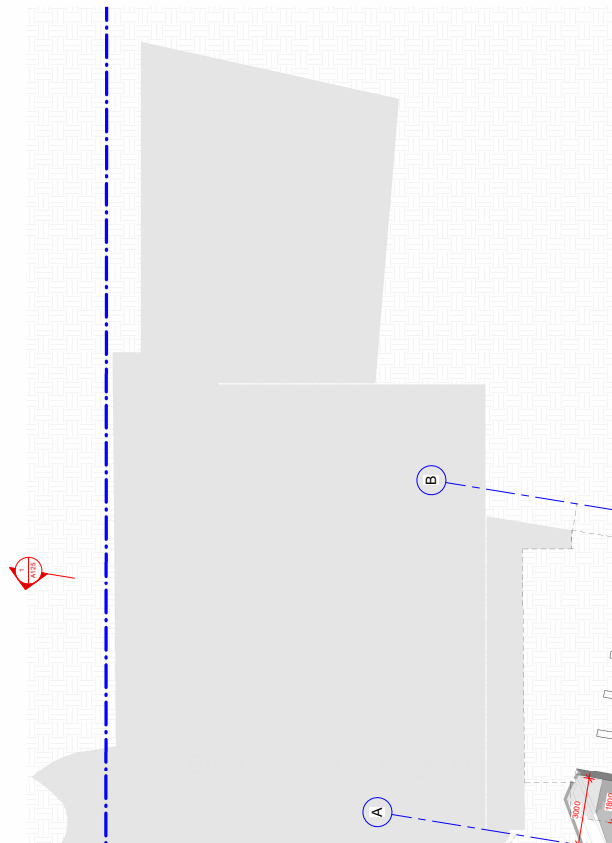


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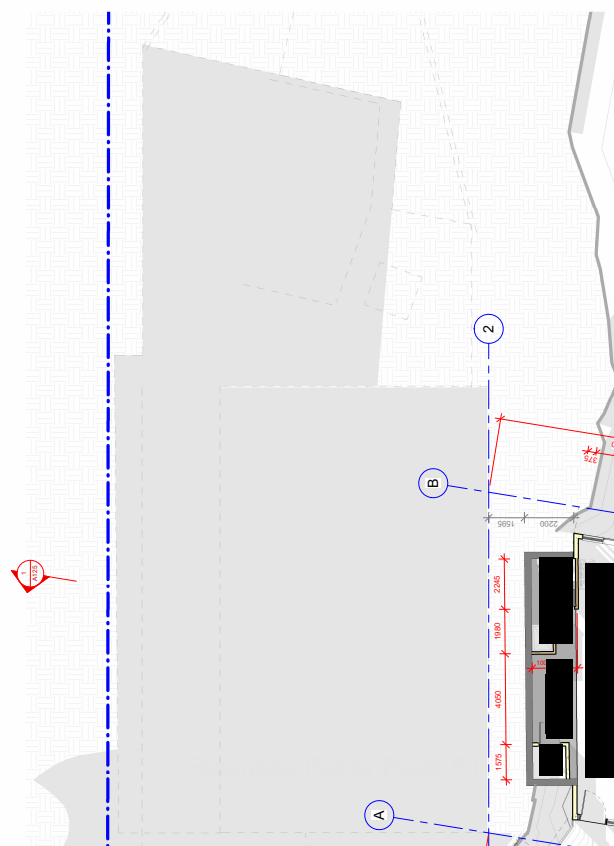
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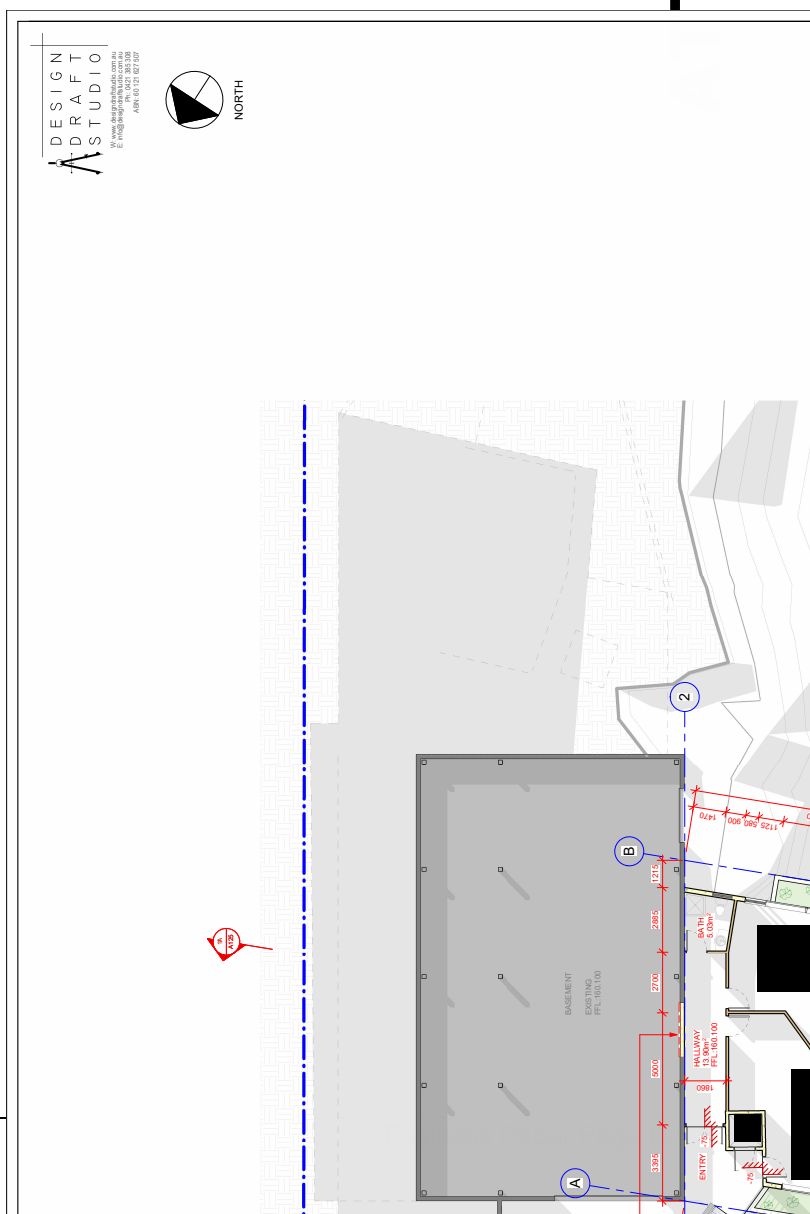


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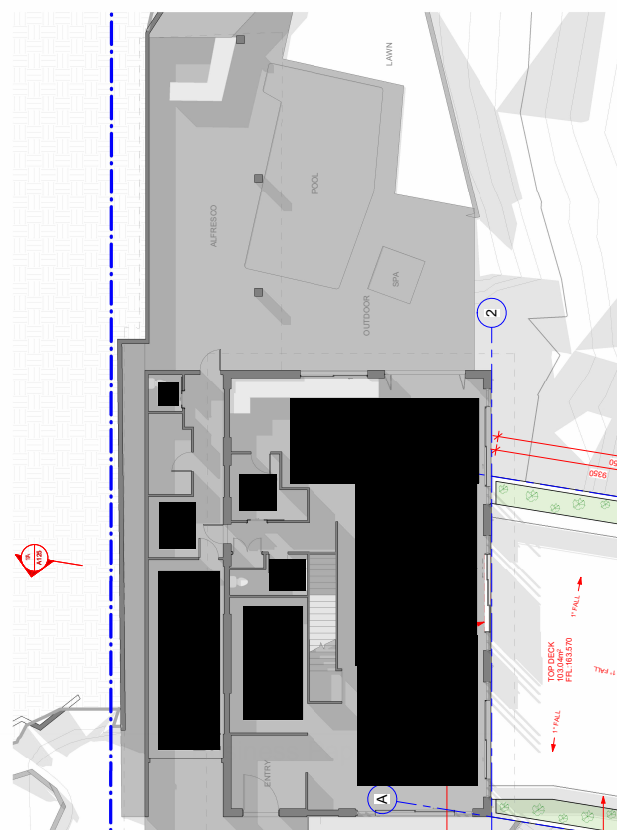
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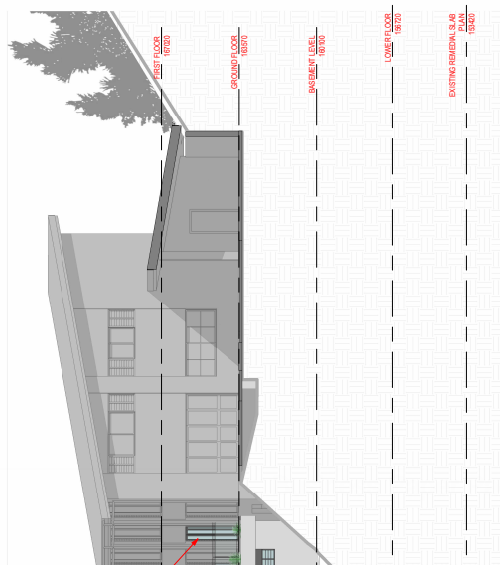


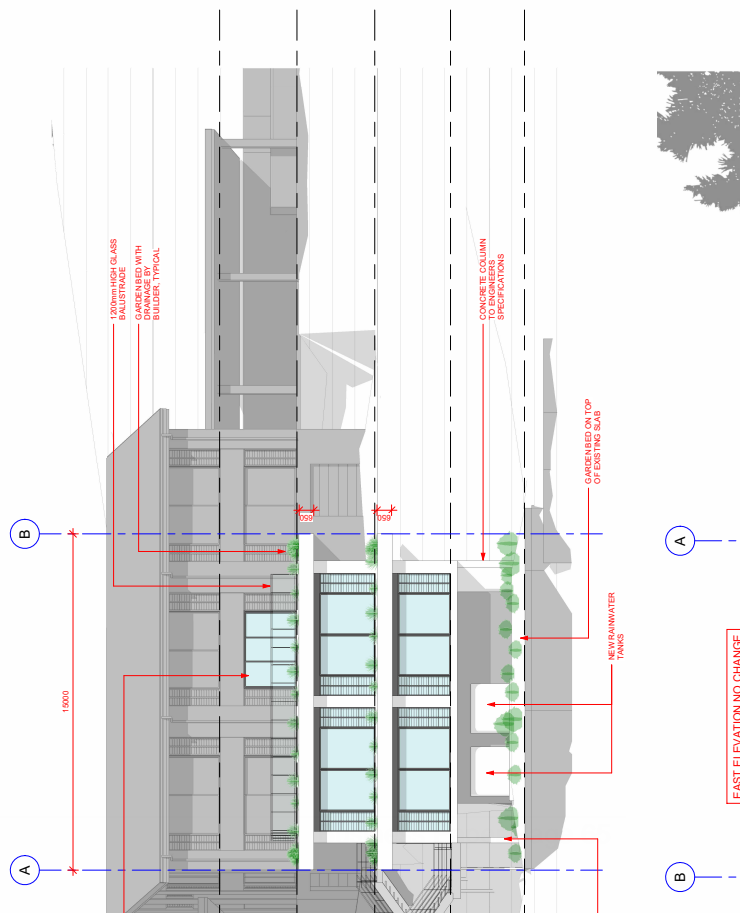
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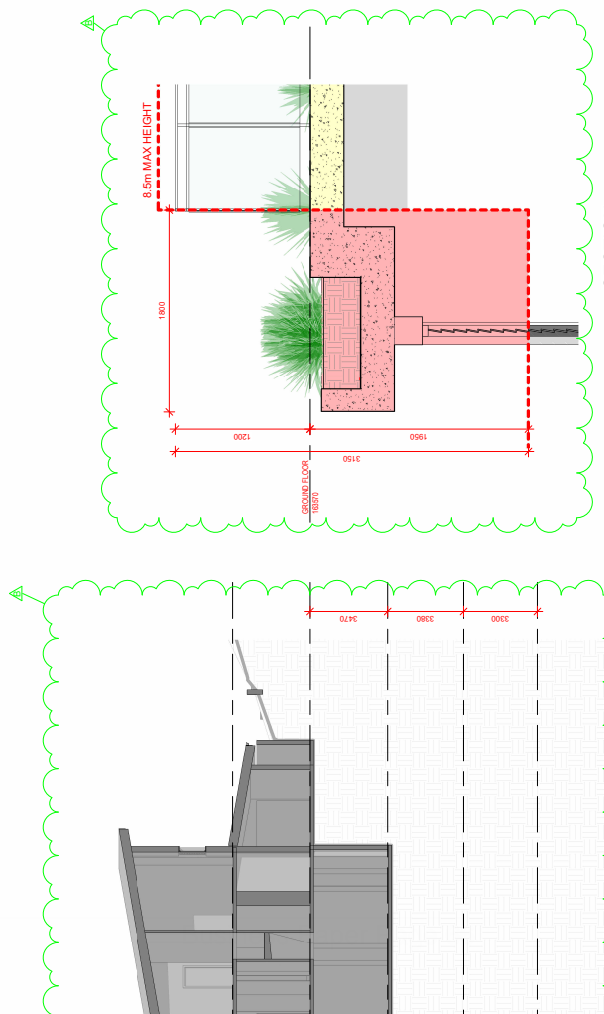




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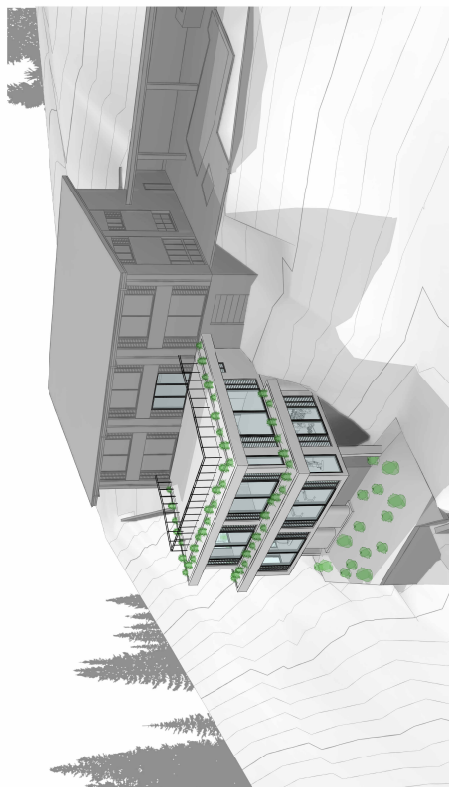
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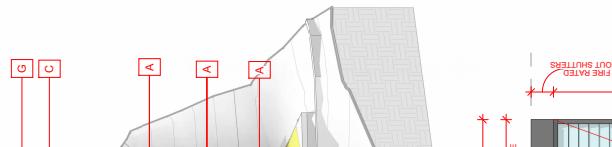
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TACHMENT 3 - ITEM 2



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**3 REPORTING DEVELOPMENT APPLICATIONS FOR DETERMINATION BY THE HORNSBY
LOCAL PLANNING PANEL OVER 180 DAYS**

EXECUTIVE SUMMARY

- In accordance with the Local Planning Panels Directions - Operational Procedures, Council is required to monitor development applications to be determined by the Panel that may be experiencing unreasonable delays of over 180 days from lodgement.
- A list of out outstanding development applications in excess of 180 calendar days from lodgement is attached for the Hornsby Local Planning Panel's advice.

RECOMMENDATION

THAT the contents of LPP Report No. LPP24/23 be received and noted.

PURPOSE

The purpose of this report is to advise the Hornsby Local Planning Panel of development applications required to be determined by the Panel that are over 180 calendar days from lodgement.

DISCUSSION

In 2019 the NSW Productivity Commission conducted a review of the Independent Planning Commission (IPC). The review recommended several actions to streamline processes to optimise efficiency, output and performance.

The planning panel changes were implemented on 1 August 2020 to incorporate a number of the NSW Productivity Commission 's recommendations to the way Local Planning Panels work to make them more efficient and to improve the assessment and determination times of development applications and maintain panel oversight of sensitive and contentious applications.

These changes were made as part of the Planning Acceleration Program to support the State's immediate and long-term economic recovery from the COVID-19 crisis.

The changes will speed up panel determinations by:

1. Reducing the need to conduct public panel meetings for non-contentious matters by applying a '10-or-more' objection trigger for public meetings.
2. Reducing the amount of modifications going to panels.
3. Obliging panel chairs to more actively manage development applications (DAs) coming to the panels to reduce panel deferrals and assessment timeframes.
4. Allowing chairs to bring forward determination on DAs that are experiencing unreasonable delays of over 180 days from lodgement.
5. Introducing panel performance measures.

The Local Planning Panels Directions - Operational Procedures has been amended to:

- Require panels to make determinations within two weeks of being provided an assessment report.
- Require panels to hold a public meeting only where the Development Application has attracted 10 or more unique submissions by way of objection.
- Allow, at the Chair's discretion, applicants to attend a briefing, along with council staff, to explain complex matters or present confidential or commercially sensitive material.
- Oblige panel chairs to work with council to ensure key issues are addressed during assessment in order to minimise deferrals by the panels at determination stage.
- Require the panels to provide reasons for deferring a decision and set timeframes in which any additional information must be provided in order to finalise the determination.
- Give panel chairs the ability to require council to report a DA to the panel within four weeks for determination if the application has experienced unreasonable delays in excess of 180 calendar days from lodgement.

In accordance with Point 6 of the Local Planning Panels Directions - Operational Procedures, attached is a list of development applications required to be determined by the Panel that are over 180 calendar days from lodgement.

CONCLUSION

Council is required to monitor development applications to be determined by the Panel that are over 180 calendar days from lodgement. This report provides advice to the Local Planning Panel on DAs that are experiencing unreasonable delays of over 180 days from lodgement.

RESPONSIBLE OFFICER


The officer responsible for the preparation of this report is the Major Development Manager, Cassandra Williams.

JAMES FARRINGTON

Director - Planning and Compliance

Planning and Compliance Division

Attachments:

1.  DAs over 180



days

File Reference: F2013/00295-004

Document Number: D08682480

List of development applications required to be determined by the LPP that are over 180 calendar days from lodgement

DA No.	Proposal	Address	Ward	Reason	Est. Date to LPP	Advice to Chair	No. Days at 26/7
DA/1146/2020	Torrens title subdivision of 1 into 10	90-92 Franklin Road Cherrybrook	C	VPA	Aug	VPA on exhibition until 20 July 2023. Report being prepared for the next available LPP meeting following the report to Council on the VPA.	947
DA/1022/2021	Torrens title subdivision of 1 lot into 60	36-56 David Road Castle Hill	C	VPA >10 submissions	Feb	Response to RFI due 31 August in conjunction with draft VPA wording for Council review prior to exhibition.	664
DA/121/2022	Demolition and construction of 5 storey RFB - 64 units	23-27 Balmoral Street Waitara	B	SEPP 65 >10 submissions	Aug	Amended plans on notification until 31 July and a report to be prepared for the August LPP meeting.	534
DA/75/2023	Demolition and construction 5 storey RFB - 15 units	10 Bouvardia Street, Asquith	A	SEPP 65	Aug	Amended plans received and referred to internal branches for comment. A report to be prepared for the August LPP meeting.	184

ATTACHMENT 1 - ITEM 3