

ANNEXURE C

Clause 4.6 – Variation Request Height of Buildings



Clause 4.6 variation statement – Height of Buildings (clause 4.3)

1. INTRODUCTION

Clause 4.3 of *Pittwater Local Environmental Plan 2014* applies to the site and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 8.5m.

Building height is defined 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.

An extract of the PLEP 2014 Height of Buildings map is provided in **Figure 1** below.

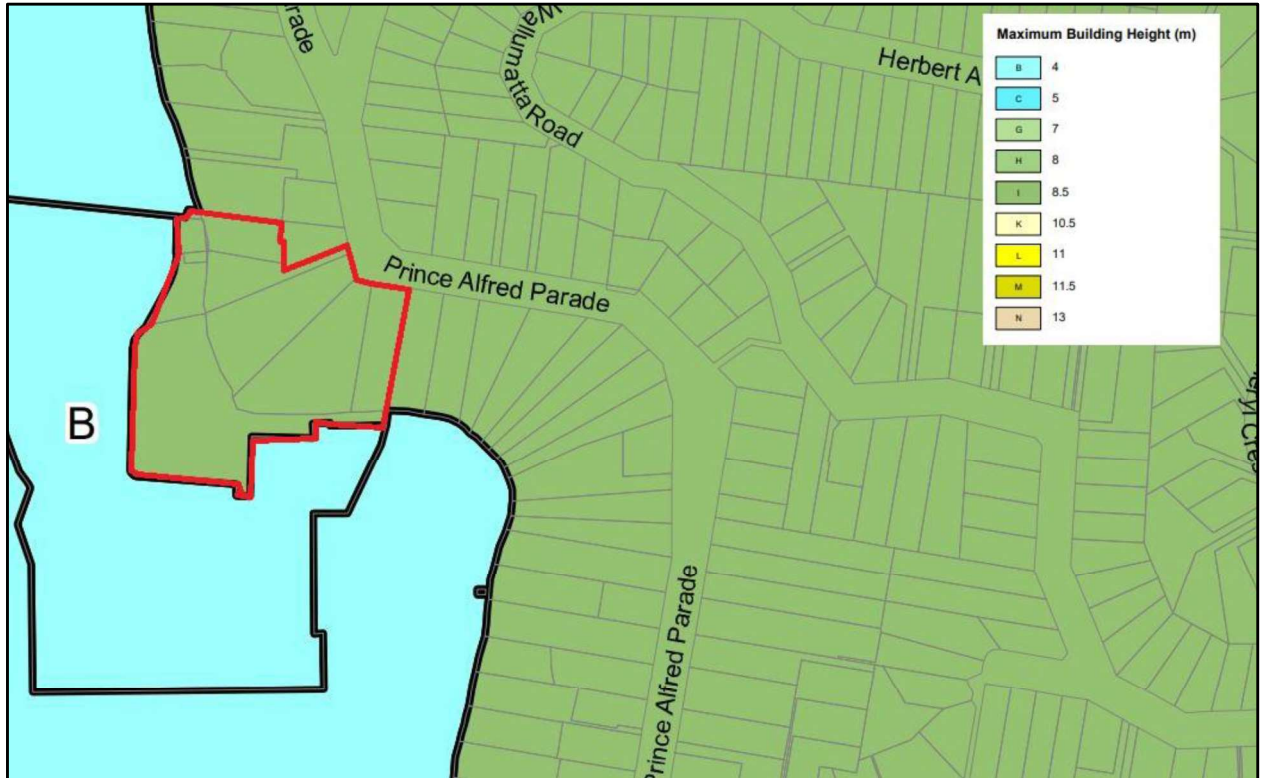


Figure 1 Extract from Pittwater LEP 2014 Height of Buildings Map (8.5m)

2. Proposed Variation

The architectural plans indicate that part of the proposed development has a maximum height of 12.5m to the upper most point of the building, being the lift shaft and associated overrun, and is therefore non-compliant. The non-compliance is a maximum of 4m or 47%. No other part of the proposed development will exceed the 8.5m LEP height limit.

As indicated in **Figure 31** below, several parts of the existing club building exceed the 8.5m height limit and are non-compliant with clause 4.3 of PLEP. These areas include the main roof of the club's 1990s era extension and the lift overrun of the 1960s club building both being higher than the current LEP height limit. The current proposal is compliant with the LEP height limit with the exception of the proposed lift overrun that provides an accessible connection between the older parts of the club and the proposed extension.

The extent of the existing and proposed height non-compliance is indicated below in **Figure 2** below.

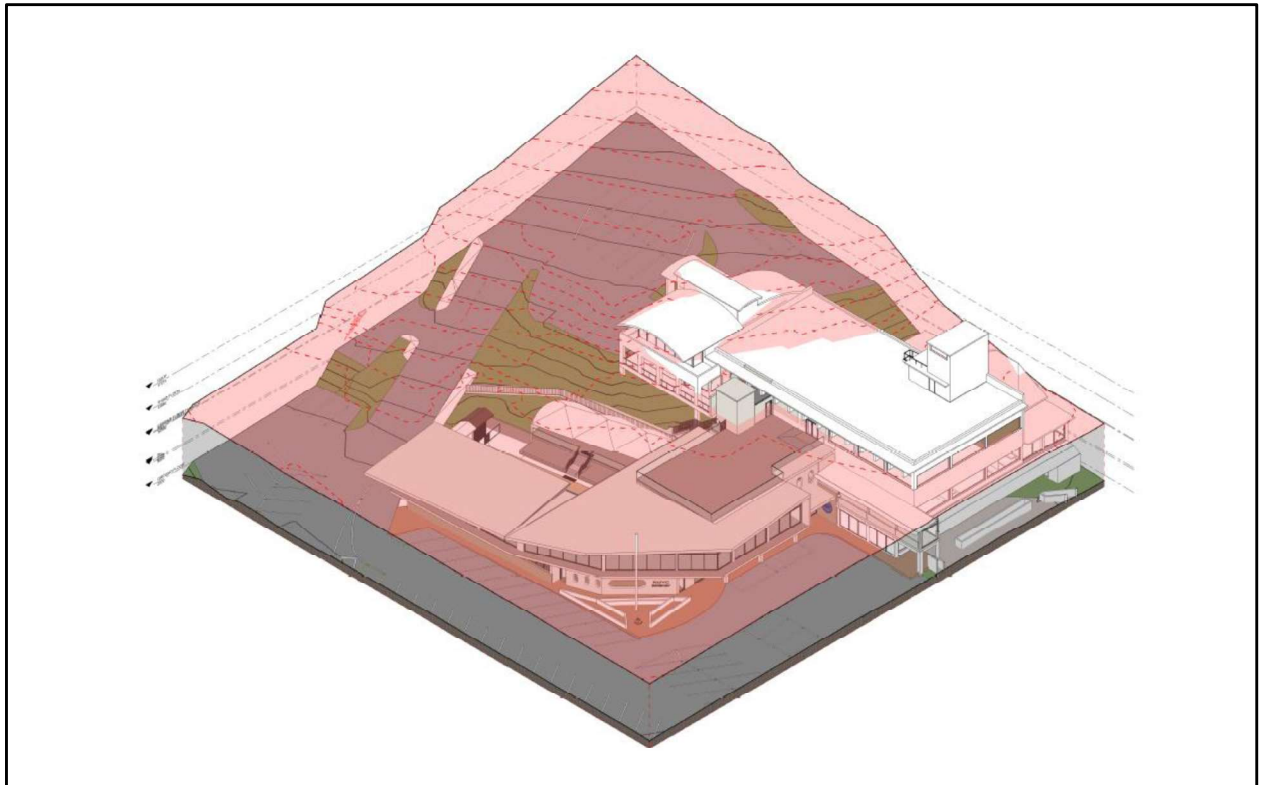


Figure 2 Height blanket indicating proposed encroachment by lift shaft and overrun

3. Clause 4.6 of PLEP 2014

The objectives and provisions of Clause 4.6 are as follows:

4.6 Exceptions to development standards

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

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

(a) the consent authority is satisfied that—

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

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

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

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

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

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

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

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

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

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

Note — When this Plan was made it did not include all of these zones.

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

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

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5.

The development standards in Clause 4.3 are not “expressly excluded” from the application of Clause 4.6.

4. Matters required by Clause 4.6(3) are required to be adequately demonstrated, (Clause 4.6(4)(a)(i))

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The Judgment goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the Judgment then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance 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 or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

5. The 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The proposed development provides a built form that is of a scale, density, landscaped setting and external appearance that is compatible with the future desired character for the local area that is anticipated by Pittwater Local Environmental Plan 2014.
- There are no additional significant adverse impacts arising from the proposed non-compliance.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient Environmental Planning Grounds, (Clause 4.6(3)(b))

Having regard to Clause 4.6 (3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd V Woollahra Municipal Council* [2018] NSW LEC 118 (paragraph 24) states:

*“The environmental planning grounds relied on in the written request under cl. 4.6 must be “sufficient”. There are two respects in which the written request need to be “sufficient”. First the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of clause 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under clause 4.6(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSW CA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify the contravention of the maximum building height:

1. The height non-compliance is associated only with the proposed lift shaft and its overrun which provides for compliant accessible movement between the building’s Ground Floor and Second Floor.
2. The height non-compliance associated with the proposed lift shaft and its overrun will be lower than the height of the existing club building.

3. The location of the non-compliance being located in the centre of the building footprint will have no greater overshadowing impact on adjoining properties compared to a compliant proposal.
4. There will be no privacy impacts for neighbouring properties associated with the proposed height non-compliance.
5. The height non-compliance will not have any adverse impact on any existing water views currently available from adjoining properties.
6. The proposed development meets the objectives of the development standard and meets the objectives of the RE2 Private Recreation zone (as further detailed in Section 7 below).
7. The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
 - a. The proposal promotes the orderly and economic use and development of land through the provision of a high quality private recreation facility for the local community (1.3((c)),
 - b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the site's steeply sloping topography which has led to the existing built form on the site stepping down from the upper parts of the site to the lower area near the foreshore. The additional height allows for compliant accessible movement between the Ground Level and Level 3 of the building.

It is noted that in *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items as Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome.

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(a)(i)).

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 5 above (and furthermore in terms of meeting the objectives of the development standard this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives of the zone (CLAUSE 4.6(4)(a)(ii))

Objectives of the Height of Buildings Development Standard in Clause 4.3

The objectives and relevant provisions of Clause 4.3 of PLEP 2014 are as follows, inter alia:

(1) The objectives of this clause are as follows-

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

(c) to minimise any overshadowing of neighbouring properties,

(d) to allow for the reasonable sharing of views,



(e) to encourage buildings that are designed to respond sensitively to the natural topography,

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.3 are addressed below:

Objective (a):

Objective (a) seeks to ensure that buildings are compatible with the height and scale of the desired future character of the locality.



The desired character of the locality characterised by low density dwellings in a highly landscaped setting. The RMYC and other registered clubs and marinas in the Newport locality provide a significant contrast from surrounding residential development in terms of character. Despite this the RMYC provides large landscaped setbacks from neighbouring dwellings that contribute towards a more cohesive relationship between these contrasting land use types.

The variation of the height of buildings development standard is limited to a maximum 4m variation for the lift shaft and overrun. The visual impact of the non-compliant part of the building will be very minor as it will be located behind the upper level of the existing club building and will not look out of character with the surrounding area.

Objective (b):

Objective (b) seeks to ensure that buildings are compatible with the height and scale of surrounding development.

The subject site is surrounded by low scale residential development that is generally 2 to 3 storeys in appearance. The proposed extension of the RMYC club premises will generally comply with the LEP height limit except for the lift shaft and overrun, which will be a significant numerical non-compliance will not have any material adverse impacts on the surrounding area. Therefore, the proposal is not considered to be out of character with the form and height of surrounding development.

Objective (c):

Objective (c) seeks to minimise the overshadowing of neighbouring properties. The proposal will not have any overshadowing impact upon any neighbouring properties.

Objective (d):

Objective (d) seeks to allow for the reasonable sharing of views. The proposal, and the area of height non-compliance, does not contribute to any loss of significant water views either from a public place or a neighbouring property.

Objective (e):

Objective (e) seeks to provide for buildings that will be designed to respond sensitively to the natural topography. The proposed alterations and additions to the RMYC club building provide for a sympathetic response to the site's natural topography and will generally sit at the site's existing ground level (RL 2.5m).

Objective (f):

Objective (f) seeks to minimise adverse visual impacts of development on the natural heritage, heritage conservation areas and heritage items.

It is noted that there are no listed items of natural heritage, heritage conservation areas or heritage items in the immediate vicinity of the site. Accordingly, the proposal will not have any adverse visual impact of the location's heritage.

Objectives for Development in Zone RE2 Private Recreation

Clause 4.6(4)(a)(ii) also requires consideration of the relevant zone objectives. The objectives of the RE2 private recreation zone are as follows:

Objective: To enable land to be used for private open space or recreational purposes.

The proposed development will provide for a contemporary and high-quality facilities for recreational, entertainment and social activity by members of the Royal Motor Yacht Club, that will provide for the sustainable continuation of the site's use for private recreation purposes.



Objective: To provide a range of recreational settings and activities and compatible land uses.

The proposal will allow for the site's continued use for private recreation that will be compatible with the character of the surrounding area and involve minimal adverse impacts to surrounding properties.

Objective: To protect and enhance the natural environment for recreational purposes.

The proposal maintain the site's ecological and environmental values with no loss or reduction in biodiversity or natural features.

Objective: To allow development of a scale and character that is appropriate to the nature of its recreational use and is integrated with the landform and landscape.

The proposed development will be of a scale and character that will be appropriate both in terms of the site's use for recreational activity and compatible with the landscape features of the site.

8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

The issue of the concurrence of the Secretary of the Department of Planning and Environment is dealt with by Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 55 of the Environmental Planning and Assessment Regulation 2021. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence. The Secretary can be assumed to have given concurrence to the variation.

9. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6 (5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard.

Whilst the proposed building height exceeds the maximum permitted on the site, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.





11. Conclusion

This written request has been prepared in relation to the proposed variation to the height of buildings development standard contained in PLEP 2014.

Despite the non-compliance with the height of buildings development standard, the proposed built form is compatible with the with the character of existing development on the site and other waterfront development along Prince Alfred Parade, and the built form anticipated by the planning controls under the PLEP 2014 and Pittwater 21 DCP.

The proposed variation is limited to a small portion of the building being the lift shaft/overrun. It has been demonstrated that the proposed development will sit comfortably among the surrounding development as viewed from the waterway and surrounding area. The proposal provides an appropriate built form that is compatible with the building heights within the locality and is predominantly compliant with the 8.5m development standard. Furthermore, the proposed development will not have an adverse impact on the amenity of adjoining residential properties.

Therefore, insistence upon strict compliance with that standard would be unreasonable. This request demonstrates that there are sufficient site-specific environmental planning grounds to justify the variation, and therefore the proposal is considered to be in the public interest.