APPENDIX 1
CLAUSE 4.6 – MAXIMUM BUILDING HEIGHT

WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

31 JOCELYN STREET, NORTH CURL CURL

PROPOSED ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING INCLUDING A NEW DOUBLE CARPORT AND PLUNGE POOL

VARIATION OF A DEVELOPMENT STANDARD REGARDING COUNCIL'S MAXIMUM BUILDING HEIGHT CONTROL AS DETAILED IN CLAUSE 4.3 OF THE WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

For: Proposed construction of alterations and additions to an existing dwelling house
At: 31 Jocelyn Street, North Curl Curl
Owner: D Burns & H Towill
Applicant: D Burn & H Towill C/- Vaughan Milligan Development Consulting P/L

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011 (**WLEP 2011**). In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the WLEP 2011.

The relevant maximum building height on this site is 8.5m, which is a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposal seeks consent for the construction of alterations and additions to an existing dwelling. Whilst primarily maintained below the 8.5m height plane, the south-east corner of the upper roof form protrudes above the 8.5m height plan as a consequence of the slope of the land, which falls across both the width and depth of the site. The new upper floor roof form will have a maximum height of up to 9.01m which exceeds the height development standard by 501mm or 5.9%.

The location and extent of the proposed breach is shown in Figure 1, over.

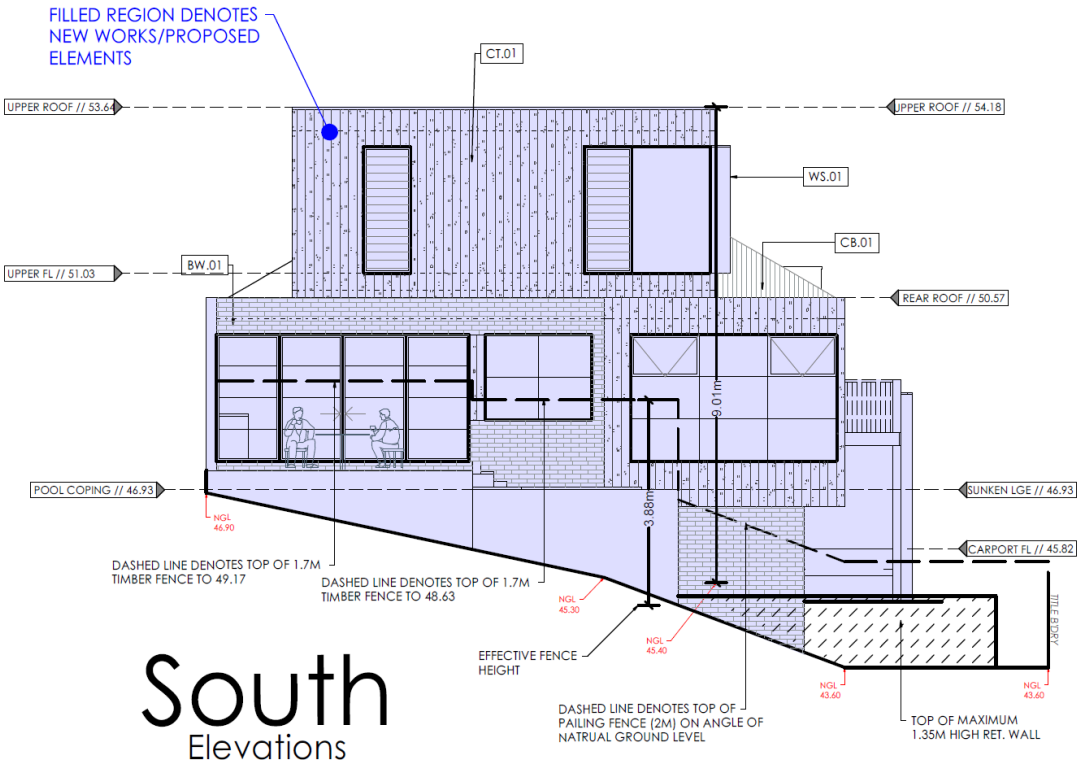


Fig 1: Extract of Southern Elevation
(Roof height at RL 54.18 – Existing Ground Level at RL 45.40 = 9.01m)

2.0 Warringah Local Environmental Plan 2011

2.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R2 – Low Density Residential (**the R2 zone**) and the Land Use Table in Part 2 of WLEP 2011 specifies the following objectives for the R2 zone:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterized by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposed development is for the alterations and additions to an existing dwelling house and is permissible with consent within the zone.

2.2 Clause 4.3 – Height of buildings

Clause 4.3 of WLEP 2011 prescribes:

> *(1) The objectives of this clause are as follows:*
>
> *(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
> *(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
> *(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
> *(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*
>
> *(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 Height of Buildings Map specifies a maximum building height of 8.5m in relation to the subject site.

The Dictionary to WLEP 2011 operates via clause 1.4 of WLEP 2011. The Dictionary defines "building height" 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.*

3.0 Is clause 4.3 of WLEP 2011 a development standard?

The definition of "development standard" in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

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

Clause 4.3 relates to the maximum building height of a building. Accordingly, clause 4.3 is a development standard as defined by the EP&A Act.

4.0 Purpose of Clause 4.6

WLEP 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the WLEP 2011 is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") have been considered in this request for a variation to the development standard.

5.0 Objectives of Clause 4.6

Clause 4.6(1) of WLEP 2011 provides:

(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.

The decision of Chief Justice Preston in *Initial Action* provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]*** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

> *(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.*

Clause 4.3 (the Height of buildings control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of WLEP 2011 provides:

> *(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.*

The proposed development does not comply with the maximum building height control development standard pursuant to clause 4.3 of WLEP 2011 which specifies a maximum building height of 8.5m at the site. The additions to the existing dwelling will result in a maximum building height of 9.01m, which exceeds the height development standard by 501mm or 5.9%.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP 2011 provides:

> *(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.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 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 development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

As confirmed in Planning Circular PS20-002 dated 5 May 2020, the Secretary has given written notice to each consent authority, confirming that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6.

Clause 4.6(5) of WLEP 2011 provides:

> *(5) In deciding whether to grant concurrence, the Secretary must consider:*
>
> *(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
>
> *(b) the public benefit of maintaining the development standard, and*
>
> *(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Council and the Court on appeal has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of WLEP 2011 from the operation of clause 4.6.

6.0 The Nature and Extent of the Variation

This request seeks a variation to the maximum building height standard contained in clause 4.3 of WLEP 2011.

Clause 4.3 of WLEP 2011 specifies a maximum building height of 8.5m for this site.

The new upper level roof form will have a maximum height of up to 9.01m which exceeds the height development standard by 501mm or 5.9%.

7.0 Relevant Caselaw

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

> *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
>
> *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
>
> *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
>
> *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

> *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP 2011 a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the R2 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of WLEP 2011?

8.0. Request for Variation

8.1 Is compliance with clause 4.3 unreasonable or unnecessary?

This request relies upon the 1st way identified by Preston CJ in Wehbe.

The first way in Wehbe is to establish that the objectives of the standard are achieved.

Each objective of the maximum building height standard and reasoning why compliance is unreasonable or unnecessary is set out below:

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

The area is in transition, with an increasing prevalence of 2-3 storey dwelling houses. The proposed development has a one and two storey presentation to Jocelyn Street, with the non-compliant height occurring where the development is limited to two storeys in height.

The development is well articulated and appropriately stepped to respond to the slope of the land and the height of the adjoining dwellings.

As seen from Jocelyn Street, the height of the resultant development will sit harmoniously in the streetscape.

The proposed area of non-compliance does not detract from consistency with this objective.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access

The non-compliant portion of the development will not result in any unreasonable impacts the amenity of adjoining properties.

The non-compliant element of the upper floor roof does not result in unreasonable overshadowing of the downslope property, particularly in circumstances where the non-compliance is setback 6.22m from the common side boundary. Further, there are no privacy impacts associated with the 501mm non-compliance.

The proposed development will result in impacts to views currently enjoyed from the adjoining upslope property at 33 Jocelyn Street. However, any impact is likely to be associated with the most proximate part of the development, which complies with the 8.5m maximum height plane. As such, the non-compliant element is not considered to attribute to the resulting impact and the primary views to the south-east will remain unobstructed.

The proposed area of non-compliance does not detract from consistency with this objective.

c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

The proposed development has a two storey presentation to the public domain. The development is well articulated and steps in response to the fall of the land. The proposal does not result in the removal of any tree canopy and will provide for the enhancement of landscaping across the site to soften the visual impact of the development.

The minor height non-compliance will not be readily visible or discernible from the public domain and does not result in an adverse visual impact.

The proposed area of non-compliance does not detract from consistency with this objective.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities,

The proposed works will maintain a bulk and scale that is in keeping with that of existing surrounding development. The proposal is not considered to present an excessive appearance to the public domain.

The proposed area of non-compliance does not detract from consistency with this objective.

8.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *24. 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 needs 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 cl 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 cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed additions will maintain the general bulk and scale of the existing surrounding residential development and are consistent with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).

- The proposed new development is considered to promote good design and enhance the residential amenity of the building's occupants and the immediate area, which is consistent with the Objective 1.3 (g).

- The proposed development improves the amenity of the occupants of the subject site and respects surrounding properties by locating the development where it will not unreasonably impact upon the amenity of adjoining properties (1.3(g)).

- The non-compliance arises as a direct result of the slope of the land, with the majority of the development maintained well below the 8.5m height plane.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development and the elements which breach the maximum height control.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *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.

8.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R2 Low Density Residential Zone?

Section 7.1 of this written request suggests the 1st test in Wehbe is made good by the development.

It is considered that notwithstanding the modest breach of the maximum building height by 501mm, the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R2 Low Density Residential Zone for the following reasons:

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

  The application proposes alterations to an existing dwelling house, which is a permissible form of development on the land. The resultant development that will retain the nature and character of a single dwelling. The proposed additions provide enhanced amenity to existing and future occupants of the dwellings and will continue 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***

  Not Applicable – the proposal relates to residential development.

- ***To ensure that low density residential environments are characterized by landscaped settings that are in harmony with the natural environment of Warringah.***

  The proposal will not require the removal of any significant vegetation and maintains a suitable area of soft landscaping. The proposal provides for the enhancement of landscaping on the site and maintains the dominance of landscaping over the built form.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control whilst maintaining consistency with the objectives of the R2 Low Density Residential all Zone.

8.4 Has the Council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

8.5 Has the Council considered the matters in clause 4.6(5) of WLEP 2011?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is specific to the design of the proposed development for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) there are no other matters required to be taken into account by the secretary before granting concurrence.

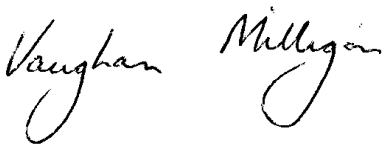
9.0 Conclusion

This development proposes a departure from the maximum height of a building control, with the proposed additions to the existing dwelling to provide a maximum overall height of 9.01m above existing ground level.

This written request to vary to the maximum building height specified in Clause 4.3 of the WLEP 2011 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

In summary, the proposal satisfies all the requirements of clause 4.6 of WLEP 2011 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.



VAUGHAN MILLIGAN
Town Planner