

**APPENDIX
CLAUSE 4.6 – HEIGHT OF BUILDINGS**

Prepared November 2024

**WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF
PITTWATER LOCAL ENVIRONMENTAL PLAN 2014**

20 MCDONALD STREET, FRESHWATER

FOR PROPOSED ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE HEIGHT OF BUILDINGS CONTROL AS
DETAILED IN CLAUSE 4.3 OF THE WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011**

For: Proposed alterations and additions to an existing dwelling
At: 20 McDonald Street, Freshwater
Owner: Dean and Annabel Fribence
Applicant: Dean and Annabel Fribence, C/- Vaughan Milligan Development Consulting Pty Ltd

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 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 Warringah Local Environmental Plan 2011.

This submission has been prepared to address the provisions within Section 35B of the Environmental Planning and Assessment Regulation 2021, and as discussed within this Written Request, will demonstrate the grounds on which the proposal considers the matters set out in Clause 4.6(3)(a) and (b) of the WLEP 2011.

2.0 Background

For the purposes of calculating the maximum building height, the existing excavated level within the site and in particular the excavated lower ground floor level has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].

Clause 4.3 of WLEP sets out the maximum height of a building as follows:

(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.

When the excavated lower level is used as the reference point for the 8.5m height control, the new dwelling will have a building height of 8.634m and presents a non-compliance with the maximum building height standard of 0.134m or 1.57%.

The figure below notes the variation to the maximum height control and demonstrates the height levels for the additions and alterations to the dwelling based on excavated ground level shown on the plans.

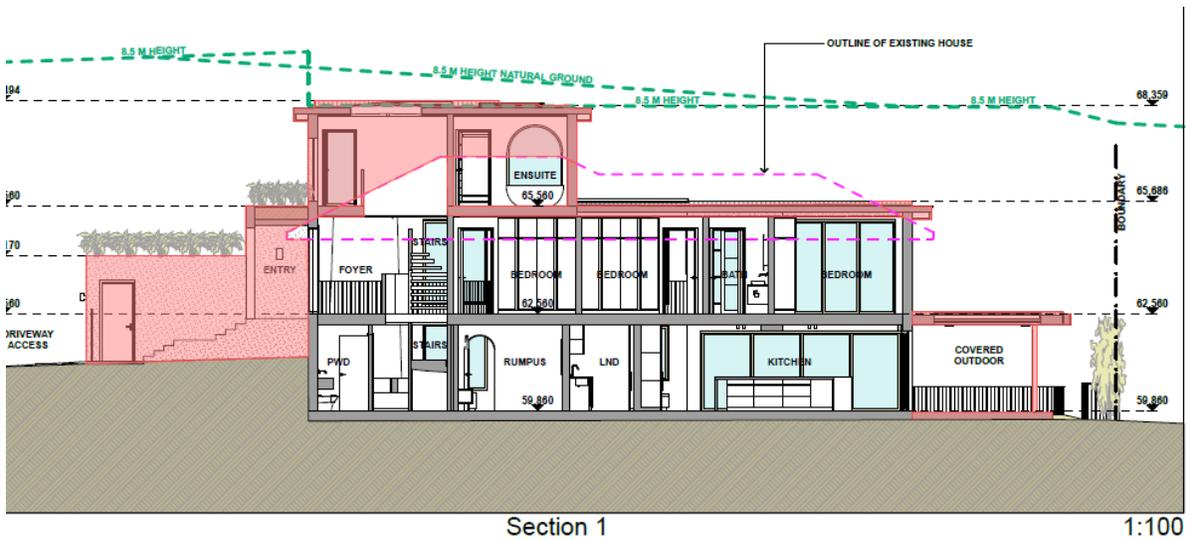


Fig 1: Building elevation indicating the height of the dwelling

The Dictionary to WLEP operates via clause 1.4 of WLEP. 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.

For the purposes of calculating the maximum building height, the newly excavated level within the site has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].

As noted in *Merman* [at 74] the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the land, is considered to be an environmental planning ground within the meaning of clause 4.6 (3)(b) of MLEP 2013.

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

Is Clause 4.3 of the LEP a development standard?

- (a) 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.”

- (b) Clause 4.3 relates to the maximum height of a building. Accordingly, Clause 4.3 is a development standard.

3.0 Authority to vary a Development Standard

In September 2023, the NSW Government published amendments to Clause 4.6 of the Standard Instrument which change the operation of the clause across all local environmental plans, including the Warringah LEP. The changes came into force on 1 November 2023.

The principal change is the omission of subclauses 4.6(3)-(5) and (7) in the Standard Instrument Principal Local Environmental Plan.

The following changes have been made as a result of this:

- Clause 4.6(3) was amended such that the requirement to ‘consider’ a written request has been changed with an express requirement that the consent authority ‘be satisfied that the applicant has demonstrated’ that compliance with the development standard is unreasonable or unnecessary.
- Clause 4.6(4)(a)(ii) was amended such that the requirement that the consent authority must be satisfied that the proposed development in the public interest has been removed.
- Clause 4.6(4)(b) & 5 amended such that the requirement for concurrence from the Planning Secretary has been removed.

The objectives of clause 4.6 of the LEP, as amended, seek to recognise that in the particular circumstances of this case strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the development standard can be achieved as outlined below:

Clause 4.6 Exception to development standard

(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(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) (Repealed)

(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,*
- (ba) clause 4.4, to the extent that it applies to land identified on the [Key Sites Map](#) as Site F, Site G, Site H or Site I,*

- (c) clause 5.4,*

- (caa) clause 5.5.*

- (d) (Repealed)*

- (8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the [Height of Buildings Map](#) on land shown on the [Centres Map](#) as the Dee Why Town Centre.*

- (8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the [Height of Buildings Map](#) if the maximum height is allowable under clause 7.14.*

4.0 Purpose of Clause 4.6

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP 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 recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument 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 have been relied on in this request for a variation to the development standard.

5.0 Objectives of Clause 4.6

The objectives of Clause 4.6 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 Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“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 any other clause of the LEP.

Clause 4.6(3) of the LEP 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 development standard pursuant to Clause 4.3 of WLEP which specifies a maximum building height of 8.5m in this area of Freshwater. The proposed additions and alterations to the assist in dwelling will provide for a new first floor level over a portion of the existing dwelling, together with alterations to the existing roof which will improve views through the removal of a pitched roof over the southern half of the dwelling. The resulting bulk and scale of the building and its general two story stepped height, is consistent with more modern developments within the immediate area.

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.

As discussed in *Merman* [at 74] the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the land, is considered to be an environmental planning ground within the meaning of clause 4.6 (3)(b) of WLEP 2011.

Council 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(3), and should consider the matters in cl 4.6(3) 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(4) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

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

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

The development will achieve a better outcome in this instance as the site will provide additions and alterations to the existing dwelling, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted over as:

- *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 characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

As sought by the zone objectives, the proposal will provide for additions and alterations to the existing dwelling which are designed to accommodate the outlook and amenity for the neighbouring properties and views towards the coast, whilst managing the topography of the locality.

The non-compliance with the building height control arises as a result of the sloping topography of the site as the site levels fall towards the east and the height and form of the upper level.

The proposal maintains a bulk and scale which is in keeping with the extent of surrounding development and with a consistent palette of materials and finishes which will provide for high quality development that will enhance and complement the locality.

The proposed additions and alterations to the dwelling will not see any unreasonable impacts on the existing views enjoyed by neighbouring properties, nor create unreasonable or adverse impacts to the existing levels of solar access or privacy enjoyed by adjoining dwellings.

Notwithstanding the non-compliance with the maximum building height control, the new works will provide an attractive addition to the existing residential development that will continue to maintain the building's contribution to the character and function of the local coastal residential neighbourhood.

6.0 The Nature and Extent of the Variation

- 6.1 This request seeks a variation to the maximum building height standard contained in Clause 4.3 of WLEP.
- 6.2 Clause 4.3 of WLEP specifies a maximum building height of 8.5m in this area of Freshwater.
- 6.3 The proposed additions and alterations the dwelling will see a height of up to 8.634 m above the existing excavated lower ground floor level. The proposed first floor addition with a height of up to 8.634m will exceed the height standard by 0.134m or 1.57%. Importantly, when measured above the external ground level immediately along the western boundary will have a height of up to 7.774m which is visually compliant with Council's 8.5m height control.

7.0 Relevant Caselaw

- 7.1 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:
 17. *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].*
 18. *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].*
 19. *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].*
 20. *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].*
 21. *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.

22. *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.*

7.2 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 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 consistent with the objectives of Clause 4.3 and the objectives for development for in the R2 zone?

8.0. Request for Variation

8.1 Is compliance with Clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum building height standard, as outlined under Clause 4.3, 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 surrounding area is predominantly characterised by two and three storey development corresponding with the sloping topography.

The sloping topography of the site and excavated contours of the land influence the requirement to seek variation under Clause 4.6.

The proposed variation to the building height is not readily distinguished when viewed from the McDonald Street frontage due to the scale and form of surrounding development. The variation sought to the height of buildings standard is not inconsistent with the magnitude of variations existing on other surrounding dwelling houses which similarly traverse the topography of the site.

The land has a sloping topography from the rear western boundary towards the east and as consequence, when combined with the previous excavation for the lower ground floor level, the height of the proposed first floor level will be up to 8.634m above the existing ground floor level.

The styling of the building is consistent in terms of streetscape and general landscape elements. The built form is consistent with the existing pattern of development in the Freshwater. Therefore, the building height is acceptable with regard to the streetscape when viewed in context with adjacent dwellings along this portion of McDonald Street.

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

The proposed development maintains consistency with the height and scale of the existing dwellings in the immediate vicinity.

The roof form is of a varied form and includes a new flat roof which will minimise the bulk and scale and also see view improvements over the southern portion of the current dwelling through the lowering of the existing roof and removal of the pitched roof element.

Detailed solar access diagrams are provided to demonstrate that the proposed height variation does not create any unreasonable impact on solar access to adjacent land. Suitable view corridor opportunities are retained along the southern boundary for the properties to the west to enjoy views towards the east, resulting in reasonable view sharing being maintained.

Whilst compliance with the height control is considered constrained by the sloping topography and excavation of the site for the lower ground floor level, the development is considered appropriate and compatible within the locality and is therefore worthy of support.

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

The site is not in a location where principal public views lines are gained across the site from a public reserve or similar. It is considered that the proposed height variation maintains 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 new additions and alterations to the existing dwelling and their overall building height is acceptable with regard to the streetscape when viewed from McDonald Street view in context with the surrounding dwellings. It is considered that the proposed minor building height variation maintains 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 non-compliance primarily arises as a result of historical excavation undertaken to provide for the lower floor level of the existing dwelling. In accordance with the findings of the NSW LEC in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2011.
- The proposed development will maintain the general bulk and scale of the existing surrounding development and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed development will provide for improved amenity within a built form which is compatible with the streetscape of McDonald Street which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The height non-compliance can be partly attributed to the excavation of the site within the footprint of the existing building, which has distorted the height of buildings development standard plane overlaid above the site when compared to the topography of the existing land and this is considered to be an environmental planning ground which supports the variation to the control.
- The proposed development improves the amenity of the occupants and respects the current levels of privacy, amenity and solar access enjoyed by the surrounding properties (1.3(g)).
- Consistent with the findings of Commissioner *Walsh in Eather v Randwick City Council* [2021] NSW LEC 1075 and Commissioner *Grey in Petrovic v Randwick City Council* [2021] NSW LEC 1242, the departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly when considering the bulk, height, setbacks and selected elements of the proposal have been designed in consideration to minimise elements that contribute to height and style the upper level to ensure non-complying elements do not contribute to unreasonable views and overshadowing.

These are not simply benefits of the development as a whole, but are benefits emanating from a breach of the maximum building 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 consistent with the objectives of Clause 4.3 and the objectives of the R2 Low Density Residential zone?

- (a) Section 4.2 of this written request suggests the 1st test in *Wehbe* is made good by the development.
- (b) Each of the objectives of the R2 Low Density Residential zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard to the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ also found that *"The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone"*.

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of the building height control, the proposal which involves the construction of additions and alterations 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 proposed height variation does not offend this objective of the zone in that the use of the remains (for detached housing) is provided within an improved landscape setting that is

compatible with the scale, density and pattern of surrounding development. It is considered that the development satisfies this objective.

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

This clause is not relevant to the proposal as no other (non-residential services or facilities) are proposed. It is considered that the development satisfies this objective.

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

The height variation does not impact the landscape setting or any significant natural features of the site. The surrounding dwellings are similar in scale and form and on this basis, the proposal is consistent with the pattern of surrounding development in the landscape.

8.4 Has the Council considered the matters in clause 4.6 of WLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the additions and alterations to the existing dwelling house within 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 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.

9.0 Conclusion

This development proposes a departure from the maximum building height development standard, with the proposed alterations and additions to the existing dwelling to provide a maximum building height of 8.634m when measured above the existing excavated lower ground floor level, exceeding the height control by 0.134m or 1.57%.

As discussed, the height breach can be largely attributed to the sloping topography of the site and location of the existing development and specifically in relation to the prior excavation of the site to provide for the lower ground floor level, which is generally below the external ground level surrounding the side and rear of the dwelling. The existing ground level within the site presents a constraint to designing for a new roof form which fully maintains the maximum building height control.

Importantly, when measured above the external ground level to the western elevation where the works are most prominently viewed from the closest neighbouring properties, the proposal will present a height of 7.774m which results in the building appearing to be visually compliant with Council's 8.5m height control.

This objection to the maximum building height specified in Clause 4.3 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

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

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.



VAUGHAN MILLIGAN

Town Planner