

10 December 2018

The Chief Executive Officer
Northern Beaches Council
Village Park
1 Park Street
MONA VALE NSW 2103

Dear Chief Executive Officer

**163 RIVERVIEW ROAD AVALON BEACH
DEVELOPMENT APPLICATION
ALTERATIONS AND ADDITIONS TO DWELLING HOUSE**

We act for the owners of No 163 Riverview Road, Avalon Beach ('the site') in connection with the making of a development application (the 'development application') seeking consent to the carrying out of certain alterations and additions to the existing dwelling house situated on the site (the 'proposed development').

BACKGROUND

The development application seeks consent from Council, as consent authority, for the carrying out of the proposed development.

More specifically, the proposed development is as follows:

- the construction of:
 - a new 'butterfly' roof (to replace the existing pitched roof) on the dwelling house;
 - new balconies; and
 - a swimming pool;
- the installation of two lifts and an inclinator;
- an internal reconfiguration of the dwelling house; and
- the carrying out of extensive landscaping.

This present document is a written variation request submitted under clause 4.6 of *Pittwater Local Environmental Plan 2014* ('PLEP') in relation to the proposed development.

1.0 INTRODUCTION

Clause 4.3 of PLEP controls the height of buildings.

The site is within area 'I; as shown on, relevantly, PLEP *Height of Buildings Map – Sheet HOB_015*.

Area 1 provides for a maximum building height of **8.5m** pursuant to clause 4.3(2) of PLEP.

However, despite clause 4.3(2), development on land that has a maximum building height of 8.5m shown for that land on the Height of Buildings Map may exceed a height of 8.5m, but not be more than 10.0 metres, if (refer clause 4.3(2D)):

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of this clause are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

Thus, provided all of the requirements of clause 4.3(2D) are satisfied—in that regard, see below—the development may exceed a height of 8.5m, but not be more than 10.0m. Thus, provided all of the requirements of clause 4.3(2D) are satisfied, the relevantly applicable maximum height development standard is **10.0m**, subject to the application and operation of clause 4.6 of PLEP.

In the case of the proposed development, the proposal results, in a maximum building height of 15.54 metres.

2.0 REQUEST TO VARY A DEVELOPMENT STANDARD

This variation request under clause 4.6 of PLEP has been prepared by Turnbull Planning International Pty Limited on behalf of our client.

The development standard sought to be varied is the height of buildings control contained in, relevantly, clause 4.3(2D) of PLEP read in conjunction with clause 4.3(2) of PLEP.

The request is submitted to Council in connection with, and in support of, the development application and is to be read in conjunction with the statement of environmental effects ('SEE') prepared by our firm dated November 2018 and submitted to Council in support of, and to inform, the development application. The SEE deals with the impacts of the development proposal in detail, indicates measures to mitigate those impacts, and provides details relating to the relevantly applicable statutory planning regime and compliance with the relevant planning controls and objectives.

Clause 4.6 of PLEP allows Council to grant consent for development even though the development contravenes a development standard imposed by PLEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 of PLEP requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that 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.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court of New South Wales has provided judicial interpretation and clarification of the matters to be addressed in relation to variations to developments standards lodged under State *Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 ('Winten').

The *Winten* test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 ('*Wehbe*'). These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments. Accordingly, this clause 4.6 variation request is set out using the relevant principles established by the Court.

More recently, the NSW Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 has had some very important things to say about the use and construction of clause 4.6. That case, and some others, are discussed in section 5.2 of this document.

3.0 DEVELOPMENT STANDARD TO BE VARIED

Clause 4.3 ('height of buildings') of PLEP establishes the maximum height of a building permitted for all development.

As mentioned above:

- the maximum applicable height control with respect to which compliance would otherwise be sought to be achieved (subject to the successful invocation of clause 4.6) is 10.0 metres; and
- in the case of the development proposal, the proposal results in a maximum building height of 15.54 metres.

On its face, and looked at solely in numerical terms, the departure from the height of buildings development standard is **a significant one**. However, for the reasons, and on the grounds, set out in this document, the numerical departure should not in and of itself, be a good reason for requiring strict compliance with the standard.

Furthermore, we submit that this written request justifies the contravention of the standard by demonstrating, firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard.

Additionally, the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 Environmental Living zone in which the development is proposed to be carried out.

4.0 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD?

Development Standard is defined under section 4(1) of the EPA Act as follows:

development standards mean 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:

...

(c) the character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance of a building or work ... *[emphasis added]*

The height of building standard prescribed under clause 4.3(2D) of PLEP is clearly, demonstrably and unambiguously a development standard, being, relevantly, a provision of an environmental planning instrument (viz PLEP) in relation to the carrying out of development, being a provision by which a requirement is specified in respect of an aspect of that development, the *aspect* of the development being the 'height' of a building on the land upon which the development is proposed to be carried out.

An essential condition of the definition of development standard is that the requirements specified, or standards fixed in respect of any aspect of the development must be requirements or standards which, *ex hypothesi*, are **external** to the aspect(s) of that development: see *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 at 269-270 per McHugh JA. That is the case here.

Be that as it may, development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if (refer clause 4.3(2D) of PLEP):

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of clause 4.3 are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

We respectfully submit, based on the information contained in this request and in the other probative material furnished to Council as part of the development application and also the application for review, that:

- Council may be satisfied (that means in law, 'reasonably satisfied' [see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ]) that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor (refer clause 4.3(2D)(a), PLEP); and
- the preconditions set out in clause 4.3(2D)(b)-(d) of PLEP are satisfied.

5.0 JUSTIFICATION FOR CONTRAVENTION OF THE STANDARD

Clause 4.6(3) and (4) of PLEP set out the matters to be satisfied as respects any clause 4.6 written request. Those matters will now be considered and discussed, in light of the relevantly applicable case law.

5.1 Clause 4.6 of PLEP and applicable case law

Clause 4.6(3) and (4) of PLEP are as follows:

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
 - (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
 - (b) the concurrence of the Secretary has been obtained.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the Land and Environment Court and the NSW Court of Appeal in *Wehbe* and *Four2Five*.

The relevant matters contained in clause 4.6 of PLEP, with respect to the development standard contained in clause 4.3(2D) of PLEP, are each addressed below, in light of the abovementioned Court decisions.

5.2 Relevant Case Law on Clause 4.6

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248

This landmark decision of the NSW Court of Appeal was an appeal from a decision of a judge of the NSW Land and Environment Court's decision, the latter having been an appeal from a commissioner of that Court.

The case upheld Commissioner Pearson's original decision in regard to clause 4.6, however the Court of Appeal interpreted the approach taken by the commissioner differently to that of Pain J, in the land and Environment Court. In doing so, the decision largely confined Commissioner Pearson's decision to the particular facts of that case, and the particular exercise of discretion by the Commissioner.

In the original decision Commissioner Pearson had refused the request to vary the standard, principally on the basis that:

- the claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds as required by clause 4.6(3)(b) because they were *not particular to the site*; and
- the obligation on the applicant to demonstrate that *compliance with the standard was unreasonable or unnecessary* had to be fulfilled separately (i.e. in addition to) to the obligation to demonstrate that the proposed was consistent with the objectives of the standard, which Four2Five had failed to do.

Four2Five then appealed the commissioner's decision to a judge of the Land and Environment Court (Pain J), essentially arguing that the commissioner set the bar for a well-founded clause 4.6 variation request too high. However, Pain J dismissed Four2Five's appeal and endorsed the commissioner's approach to clause 4.6.

On the first ground of appeal Pain J held that the commissioner had a broad discretion under clause 4.6(4)(a)(i) and that there was no specific limitation on that discretion. The commissioner was entitled to require the variation request to identify circumstances particular to the site.

On the second ground of appeal, Pain J held that commissioner was correct in requiring the variation request to demonstrate consistency with the

objectives of the standard *in addition to* consistency with the objectives of the standard and zone.

The matter then went on appeal to the NSW Court of Appeal.

Firstly, Leeming JA in the Court of Appeal:

- did not agree that the commissioner's decision in *Four2Five* proceeded on the basis that establishing that compliance with a standard is '*unreasonable or unnecessary*' in clause 4.6(3)(a) must necessarily exclude consideration of consistency with the objectives of the development standard and the objectives for development in the zone; and
- considered that Commissioner Pearson's decision was that '*consistency with objectives remained relevant, but not exclusively so*' (at [16]).

Secondly, while Leeming JA found no error in the approach taken by the Commissioner in relation to her dissatisfaction with the environmental planning grounds relied upon, that was a matter for the Commissioner *on the facts of the particular case and not a general principle*. Leeming JA said (at [16]):

It is sufficient to state that no error, and certainly no error of law, is disclosed...It is clear that the Commissioner approached the question of power posed by subclause [4.6] (3)(b) on the basis that merely pointing to the benefits from additional housing and employment opportunities delivered by the development was not sufficient to constitute environmental planning grounds to justify contravening the development standards *in this case* ...

Moskovich v Waverley Council [2016] NSWLEC 1015

In *Moskovich* a commissioner of the Land and Environment Court applied the Court of Appeal's approach in *Four2Five*, apparently confirming a greater flexibility as respects the availability and use of the facility afforded by clause 4.6.

The case concerned an application to demolish two existing residential flat buildings and construct a single residential flat building on a site within zone R3 Medium Density Residential under Waverley LEP 2012. The application sought to vary the floor space ratio ('FSR') applying to the site. Moskovich submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. Moskovich further submitted that

there were 'sufficient environmental planning grounds' to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes.

The Court approved the application and in doing so agreed with Moskovich's justification for the FSR variation. Consistent with the decision in *Four2Five* the Court agreed that the public interest test (in cl 4.6(4)(a)(ii)) is different to the 'unreasonable or unnecessary in the circumstances of the case' test (in cl 4.6(3)(a)).

The Court said that 'the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]'. The Court found that additional reasons applied in this case.

In *Moskovich* the Court adopted the high threshold endorsed by the Court in *Four2Five* and found that Moskovich's variation request met that standard.

Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

Micaul is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Council claimed that the commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The Council also claimed that the commissioner failed to consider a requirement of a Development Control Plan. Essentially the Council argued that the commissioner set the bar too low for the clause 4.6 variation request.

The Court dismissed the appeal and in doing so endorsed the commissioner's approach to clause 4.6. The Court held that the commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgement that she was satisfied the proposal satisfied those tests.

The degree of satisfaction required under clause 4.6(4) was essentially a matter for the commissioner. The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the *Standard Instrument* does not require the consent authority to be satisfied directly that compliance with *each* development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed those matters.

The Court's decision in *Micaul* lessens the force of the Court's earlier judgement in *Four2Five* that a variation request must demonstrate

consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone. Furthermore, the decision is an example of discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the commissioner was satisfied that the variation was justified. This is by no means a criticism of the commissioner's reasons, but an example of how the satisfaction threshold may vary from one decision maker to another.

5.3 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe* Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which it is possible to demonstrate that compliance with a particular development standard is unreasonable or unnecessary. However, it was not suggested that the types of ways were a 'closed' class.

While *Wehbe* related to objections made pursuant to SEPP 1, the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 and this was accepted by the Court in the *Four2Five* case.

As the language used in subclause 4.6(3)(a) of the Auburn LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five ways (or methods) outlined in *Wehbe* are as follows:

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

It is important to emphasise that *Wehbe* makes it unambiguously clear that an objection submitted – in this case, the present clause 4.6 written request – does not necessarily need to satisfy all of the tests referred to above. It is a common misconception that all 5 ways or methods must be satisfied. That is **not** the case at all. One way will suffice.

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the first method, namely, that the objectives of the standard are still achieved notwithstanding non-compliance with the standard. That is the method used in this request.

In accordance with the provisions of clause 4.6 of PLEP and the decision in *Wehbe*, this written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, that there are sufficient environmental planning grounds to justify contravening the development standard, and that 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.

5.3.1 The underlying objectives or purposes of the development standard

Clause 4.3(1) of PLEP is as follows:

- (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.

Insofar as the specific height of building controls set out in clause 4.3(2D) is concerned, clause 4.3(2D) of PLEP is as follows:

(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if:

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of this clause are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

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

The objectives specified in clause 4.3(1), as well as the matters specified in clause 4.3(2D), of PLEP will be addressed *seriatim*.

Objective 4.3(1)(a)

This objective seeks to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality.

Comment:

The built form, which in terms of bulk and scale and environmental impact, will not change appreciably as a result of the carrying out of the proposed development, is consistent with the desired character of the locality in that it provides articulation of the built form and maintains the view corridor from the public domain. The building itself is consistent with the desired character of the locality and is a design example that 'fits' the precinct (i.e. other residential built elements).

Objective 4.3(1)(b)

This objective seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development.

Comment:

The built form of the dwelling house as proposed to be altered will be compatible with the height and scale of surrounding and nearby development. The building steps with the site slope, to the maximum extent possible. The alterations result in less building bulk and a lower absolute height.

Objective 4.3(1)(c)

This objective seeks to minimise any overshadowing of neighbouring properties.

Comment:

The built form will minimise any overshadowing of neighbouring properties. See, in that regard, the shadow diagrams accompanying the application for review.

Objective 4.3(1)(d)

This objective seeks to allow for the reasonable sharing of views.

Comment:

The proposed development will not materially affect the views from any neighbouring properties. The design of the building is such that all existing views from adjoining properties will be maintained.

Objective 4.3(1)(e)

This objective seeks to encourage buildings that are designed to respond sensitively to the natural topography.

Comment:

The proposed development has been designed to respond to what are demonstrably complex and challenging site constraints. The design is open, stepped, 'organic' and responds to the natural context in which the site is located.

More importantly, the proposed development will not dominate the natural environment, being built to a scale that respects the existing bushland. The theme adopted by the architectural/planning team is 'bush over building'. Existing landscaping has been retained where ever possible and will allow for and accommodate an integrated landscaped setting which responds to the objectives of PDCP. The existing building footprint is respected.

The proposal reflects the established built form character of the immediate area where multi-level, variably stepped houses are noted to predominate, due to the steep topography of the land and difficulty with pedestrian and vehicular access. The alterations to the dwelling house have been designed to follow the natural fall of the land, thus preserving as far as possible the natural landscape and existing ecological

communities, and the carrying out of the proposed development will not alter that state of affairs.

Objective 4.3(1)(f)

This objective seeks to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Comment:

The dwelling house is suitably set back from adjoining properties, thus preserving visual privacy for neighbours.

Active living spaces are located towards the rear of the dwelling house and away from the street, thus maintaining acoustic and visual privacy for occupants. Bedrooms are located away from noise sources from the road, parking areas, living areas and recreation areas, thus assisting in the maintenance of privacy levels for the dwelling house itself.

The site is not located in a heritage conservation area nor is there a heritage item on or near the site. The site is not listed in Schedule 5 ('Environmental heritage') to PLEP nor is listed within the NSW Atlas of Aboriginal Places.

The matter specified in clause 4.3(2D)(a)

The consent authority is to be satisfied (NOTE: that means 'reasonably satisfied', see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407) that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor.

Comment:

The portion of the building above what would otherwise be the applicable sought-after 10.0 metres maximum height occurs as respects to the proposed new roof design. The butterfly design will significantly reduce the overall bulk of the building and building height.

The expression 'building height' is defined in the Dictionary to PLEP 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.

Now, what is 'minor' is a question of fact and degree. Each case must be considered as regards its own circumstances.

In paragraph 3 of Circular B1 from the former Department of Planning, the Department stated:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small ***in others it may be numerically large***, but nevertheless be consistent with the purpose of the standard. [*Emasis added*]

We respectfully submit that the words of the Department quoted above are especially relevant to the numerical departure in this case. In this case, the departure could be seen to be 'numerically large'. However, in and of itself, that is *not* a good reason, in planning terms or law, for rejecting a clause 4.6 written request.

Now, there is a commonly held view to the effect that any variation of a development standard greater than 10% cannot be approved under SEPP No 1 or clause 4.6. This view is not generally or ordinarily correct, although it does apply in respect of that category of clause 4.6 variation where subdivision into 2 or more lots is proposed in certain zones (refer clause 4.6(6) of PLEP).

In considering whether the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, regard must be had, not to the quantum of the numerical departure itself, but to the quantum (i.e. 'portion') of the building above the maximum height shown for that land on the Height of Buildings Map and whether that portion is minor.

In all the circumstances, we respectfully submit that Council can be reasonably satisfied that the *portion* of the building above the maximum height shown for that land on the Height of Buildings Map is minor when considering the reduction in height from that of the existing.

The matter specified in clause 4.3(2D)(b)

The objectives of clause 4.3 of PLEP are to be achieved.

Comment:

The objectives of clause 4.3 are set out in clause 4.3(1) and have been addressed above. In our respectful submission, all of those objectives are achieved.

The matter specified in clause 4.3(2D)(c)

The building footprint is to be situated on a slope that is in excess of 16.7 degrees (that is, 30%).

Comment:

The slope of the site in which the building footprint is located exceeds 30%.

The matter specified in clause 4.3(2D)(d)

The buildings are to be sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

Comment:

Excavation will be minimal by reason of the sloping nature of the site and continued use of existing built elements. The existing dwelling house step downs the sloping site and responds to its natural context. Nothing will change in that regard.

Concluding comments as regards the relevant clause

In short, the development is consistent with all of the abovementioned objectives of the standard. In addition, the matters that need to be satisfied by virtue of clause 4.3(2D) of PLEP are also satisfied.

The proposed development demonstrates a better planning outcome within the otherwise permissible planning controls, and in light of the site constraints, as the height of the proposed new butterfly roof will be less than that of the existing pitched roof on the dwelling house.

5.3.3 Consistency with the aims of PLEP

Compliance with the height of buildings development standard is also considered to be unreasonable in these circumstances given that the proposed development supports the achievement of a number of the aims of PLEP.

PLEP aims to make local environmental planning provisions for land in Pittwater in accordance with the relevant standard environmental planning instrument under section 33A of the *Environmental Planning and Assessment Act 1979* (NSW): see clause 1.2(1), PLEP.

The particular aims of PLEP are as follows (refer clause 1.2(2), PLEP):

- (a) to promote development in Pittwater that is economically, environmentally and socially sustainable,
- (b) to ensure development is consistent with the desired character of Pittwater's localities,
- (c) to support a range of mixed-use centres that adequately provide for the needs of the Pittwater community,
- (d) to retain and enhance land used for employment purposes that is needed to meet the economic and employment needs of the community both now and in the future,
- (e) to improve access throughout Pittwater, facilitate the use of public transport and encourage walking and cycling,
- (f) to encourage a range of housing in appropriate locations that provides for the needs of the community both now and in the future,
- (g) to protect and enhance Pittwater's natural environment and recreation areas,
- (h) to conserve Pittwater's European and Aboriginal heritage,
- (i) to minimise risks to the community in areas subject to environmental hazards including climate change,
- (j) to protect and promote the health and well-being of current and future residents of Pittwater.

The proposed development will be environmentally sustainable (cf clause 1.2(2)(a)), will be consistent with the desired character of Pittwater's localities (cf clause 1.2(2)(b)), provides housing in an appropriate location (cf clause 1.2(2)(f)), and protects Pittwater's natural environment by preserving the existing natural landscaping and further enhancing and embracing it (cf clause 1.2(2)(g)). The building footprint will be largely retained, and the overall height of the building reduced. In addition, the proposal will significantly reduce the bulk and scale of the building as a result of the redesign of the roof line to a 'butterfly' design.

Even though the aims of PLEP are quite broad and do not provide a site-specific justification for the contravention of the building height development, that is entirely irrelevant. The question of consistency with the aims of PLEP does not require that there be an aim providing for a site-specific justification for the contravention of the building height development.

In our opinion, the proposed development is consistent with such of the aims of PLEP as are of relevance to the development.

5.4 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

At the risk of repeating ourselves, the proposed development is consistent with such of the aims of PLEP as are of relevance to the development: see section 5.3.3. of this document. That, in and of itself, constitutes a good environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(2D) of PLEP.

Another good environmental planning ground justifying a contravention of the development standard in this instance is that there is no demonstrable public benefit in maintaining the development standard (cf cl 4.6(5)(b)) in this instance.

To strictly enforce the standard in this instance would prevent the carrying out of an otherwise well-designed, sympathetic and attractive development which is eminently suited to the site and the Church Point Locality and which would result in an absence of environmental 'dis-benefits' as regards the local precinct.

In addition, the majority of the surrounding dwelling houses are also over 10.0 metres and this demonstrates that there are indeed circumstances where compliance is simply not practically possible. Where slope is extreme (as in this case), so is there greater potential for more significant departures from the height control.

In short, we respectfully submit that there would be no practical utility in enforcing strict compliance with the development standard in this particular instance.

The site is a most difficult one, topographically, and every effort has been made to create a responsible and sensitive development in light of those constraints and the natural environment.

In our opinion, all of the above constitute good environmental planning grounds to justify contravening the height of buildings development standard, in this particular instance.

5.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

The two aspects of this matter will be addressed *seriatim*.

5.5.1 Consistency with objectives of the development standard

Please refer to section 5.3.2 of this document.

5.5.2 Consistency with objectives of the zone

The E4 zone objectives under PLEP are as follows (refer land use table, E4 zone, item 1):

- To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
- To ensure that residential development does not have an adverse effect on those values.
- To provide for residential development of a low density and scale integrated with the landform and landscape.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

In our opinion, the development proposal is consistent with such of the zone objectives as are relevance to the subject-matter of the proposal.

The objectives will be addressed *seriatim*.

Objective 1

The proposed development will be low-impact and has been designed to respond sensitively to the natural topography. The dwelling house will provide occupant amenity without causing material environmental impacts to neighbours or to the site itself.

The proposal will provide tangible improvements in landscape quality and result in the construction of a high-quality dwelling house which will be integrated into the locality and will have its own unique character.

The design of the proposed dwelling house responds to the slope of the land as well as the natural environment. Amenity to adjoining properties is maintained and any view loss is kept to a minimum. The bulk and scale of the dwelling house respects the natural fall of the land and the non-compliance is considered acceptable on the merits for the reasons, and on the grounds, set out above.

As such, the development is consistent with this stated objective.

Objective 2

The development will not have an adverse effect on any special ecological, scientific or aesthetic values. The design of the proposed dwelling house responds to the slope of the land and the natural environment.

The landscaping of the site will preserve as many of the existing trees on the site as possible and minimise any impact on the established gardens and native trees that are located on the site, in particular, at the northern end.

Landscaping will be integrated into the building design. The landscaping softens the built form when viewed from the foreshore. The natural landscaped bushland to be brought into the subject property will ensure that the proposed dwelling house sits within a natural setting and below the tree canopy, thereby reinforcing Pittwater's special treed context.

As such, the development is consistent with this stated objective.

Objective 3

The development will be of low density and scale, will be integrated with the landform and landscape and has been designed to respond to respond to what are demonstrably difficult constraints.

The design is open and responding to the natural context in which the site is located.

The development will not dominate the natural environment, being built to a scale that respects the existing bushland setting. Existing landscaping has been retained and will allow for and accommodate an integrated landscaped setting.

Privacy, amenity and solar access are provided for within the proposed development, with negligible impact on surrounding residences.

As such, the development is consistent with this stated objective.

Objective 4

The development will retain and enhance riparian and foreshore vegetation and wildlife corridors. The development application is accompanied by an extensive flora and fauna report and survey which details all options to avoid, minimise and offset impacts of the proposal.

The proposal has been designed to minimise the removal of the listed endangered ecological community and maintain as much native vegetation as possible.

As such, the development is consistent with this stated objective.

5.6 Director-General's Concurrence

It is understood that the Director-General's concurrence under clause 4.6(5) of PLEP has been delegated to Council.

The following section provides a response to those matters set out in clause 4.6(5) which must be considered by Council under its delegated authority:

Whether contravention of the development standard raises any matter of significance for the State or Regional environmental planning (cf cl 4.6(5)(a))

This written request under clause 4.6 of PLEP demonstrates that a variation to the height of buildings development standard is acceptable in terms of significance for State and Regional planning matters.

The variance of the development standards will not contravene any overarching State or regional objectives or standards or have any effect outside the sites immediate area.

The public benefit of maintaining the development standard (cf cl 4.6(5)(b))

Maintaining strict numerical compliance with the maximum 10.0 metre height of buildings development standard would not, in our opinion, result in any public benefit in this situation. To maintain, that is, strictly enforce and apply, the standard in this instance would prevent the carrying out of an otherwise well-designed and attractive residential development which is highly suited for the site and which recognises relevant ecological and other constraints.

Any other matters required to be taken into consideration by the Director-General before granting concurrence (cf cl 4.6(5)(c))

In our opinion, no other matters require consideration by the Director-General.

6.0 CONCLUSION

We respectfully submit that the written request justifies the contravention of the height of buildings development standard contained in clause 4.3(2D) of PLEP by demonstrating that:

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

Further, the written request shows that the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 Environmental Living zone in which the development is to be carried out.

Accordingly, we respectfully submit that the written request is well founded as the variation sought allows for the orderly and economic use of the land in an appropriate manner while also allowing for a better outcome in planning terms.

As such, the development application may be approved with the variation as proposed, in accordance with the flexibility allowed under clause 4.6 of PLEP.

On behalf of our client, we respectfully submit that a grant of development consent is eminently appropriate in this instance.

Yours faithfully



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