

24 June 2019

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

Dear Chief Executive Officer

**CLAUSE 4.6 PLEP WRITTEN VARIATION REQUEST
PROPERTY: 11 CRANE LODGE PLACE PALM BEACH**

We act for Jaime and Marcus Ryan ('our clients'), being the owners of the property known as No 11 Crane Lodge Place, Palm Beach ('the site').

This document is a written variation request submitted under clause 4.6 of *Pittwater Local Environmental Plan 2014* ('PLEP').

1.0 DEVELOPMENT HISTORY

Development Application (DA2018/1275) was lodged for alterations and additions to a dwelling house on 30th July 2018. The application was determined and refused on the grounds related to height exceedance and non-compliances to the building envelope.

Following the determination of DA2018/1275, a Section 8.2(1A) Review of Determination application was lodged (REV2019/0022) on 03/05/2019. Council contacted the applicant and requested that the application be withdrawn on the grounds that the Council was unlikely to be able to determine the application before the appeal timeframe expires (within 6 months of the original date of determination). The applicant was requested to relodge the application as a fresh Development Application.

The document takes into account the issues raised, and views expressed, in both the instrument of determination of the development application and the responsible officer's assessment report, insofar as those views relate to the non-compliance with the development standard the subject of this written request.

2.0 INTRODUCTION

2.1 The site

The site is legally described as Lot 16 in Deposited Plan 31294, and is commonly known as 11 Crane Lodge Place, Palm Beach.

The site has a total area of 1427.8 sqm, and is accessed by a shared driveway which extends from the cul-de-sac of Crane Lodge Place.

The site is burdened by a right of carriageway, which extends along the southern boundary of the site.

An existing two/three storey dwelling house with a swimming pool is situated immediately adjacent to the driveway and right of carriageway, and the northern portion of the site is generally free of development.

The site contains a considerable slope and features a number of significant canopy trees and rock outcrops.

The site is not classified as bush fire prone land.

The site is located within Geotechnical Hazard H1 Area.

The site has been used for residential purposes for a significant period of time with no prior land uses. Accordingly, it can be comfortably said that the site poses no risk of contamination.

The site is located in the Palm Beach Locality under *Pittwater 21 Development Control Plan 2014* ('PDCP').

2.2 The proposed development

The development proposal relates to the proposed carrying out of various alterations and additions to the existing dwelling house situated on the site.

More specifically, the proposal, as originally presented to Council, involves alterations and additions to an existing four (4) storey split level dwelling house, including as follows:

Landscaping:

- Removal of three (3) palm trees.
- New entry stairs and landscaped stairs on the eastern boundary.
- Replacement of existing retaining walls at the rear and eastern boundary.

Entry level:

- Internal reconfiguration including the creation of a rumpus room and guest bedroom. The guest bedroom has been extended over the existing deck and to include a walk-in robe and ensuite.
- New decking off the rumpus room in the eastern boundary setback.

First level:

- Internal reconfiguration.
- Extension of the existing deck to span an additional 3.8m (approximately) to the east and approximately 0.5m to the south.
- New roof structure with skylights over the new decking.

Second level:

- Internal reconfiguration of the existing master bedroom, laundry and bathroom.
- Existing rear deck to be extended and surrounded by new retaining wall.
- Remove existing entry door at the eastern wall and replace it with a window.
- Infill in roof.

2.3 Council's determination

Council's determination of the DA was made on 20 December 2018.

Insofar as this clause 4.6 request is concerned, the first reason for refusal of consent of the DA was as follows:

1. The height of the proposed works exceed [sic] 8.5m above existing ground level, resulting in inconsistency with the maximum building height development standard prescribed by clause 4.3 (Height of buildings) of PLEP 2014. The maximum building height development standard cannot be varied without the submission and consideration of a variation request under the provisions of clause 4.6 of PLEP 2014. The subject application has not addressed the proposed building height non-compliance and a submission requesting a variation to the building height development standard has not been provided.

The development proposal involves, among other things, an infill in the roof on the second level. The height exceedance (over and above 8.5m above existing ground level) is some 1.13m, but with the height otherwise being below 10m above existing ground level.

We agree with Council that a clause 4.6 variation request is required as a matter of law in relation to the height exceedance as respects the infill in the roof on the second level.

The planning justification for the height exceedance is set out in this variation request which forms part of this application. Essentially, the justification is as follows:

1. The dwelling house is an existing one.
2. The height exceedance as respects the roof on the second level is a present reality.
3. The development proposal involves an infill of the existing roof on the second level so as to join the two dormer-like structures into one composite structure.
4. In light of the fact that the height exceedance of the existing roof is a present reality, and that the infill of the roof will not create any additional height exceedance beyond that which already exists, except in relation to the infill itself which is minor in nature only, with the ridge of the roof not being visible from the street, we submit that the height exceedance is justifiable by reason that:
 - a. compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
 - b. there are sufficient environmental planning grounds to justify contravening the development standard;
 - c. 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;
 - d. a variation to the height of buildings development standard is acceptable in terms of significance for State and Regional planning matters;
 - e. the variance of the development standard will not contravene any overarching State or regional objectives or standards, or have any effect outside the sites immediate area;
 - f. maintaining strict numerical compliance with the 10.0 metre height of buildings development standard would not, in our opinion, result in any public benefit in this situation; and
 - g. there are no other matters that require consideration by the Director-General.

2.4 Status and purpose of this present document

As mentioned at the outset of this document, this present document is a written variation request submitted under clause 4.6 of PLEP in connection with the development application. The document takes into account the

issues raised, and views expressed, in both the instrument of determination of the previous development application and the officer's assessment report.

The various matters raised by the Council officer who wrote the assessment report pertaining to DA2018/1275, to the extent to which they are relevant to the amended plans in light of the development standard the subject of this request, are discussed in the body of this present document.

The essential purpose of this clause 4.6 request is to comprehensively address the matters required to be addressed by clause 4.6 of PLEP and to demonstrate that there would be no unreasonable impacts caused by the exceedance of the height of building development standard. In that regard, we submit, for the reasons and on the grounds set out in this document, 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.

3.0 REQUEST TO VARY A DEVELOPMENT STANDARD

This variation request under clause 4.6 of PLEP has been prepared by this firm on behalf of our client.

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

The present document is in support of the development application is to be read in conjunction with both:

- the statement of environmental effects ('SEE') prepared by our firm, dated July 2018, and submitted to Council in support of, and to inform, the development application; and
- the new SEE prepared as part of this application.

To the extent, if any, that there is an inconsistency between the SEE and the fresh SEE, the latter prevails.

The SEE deals with the impacts of the development proposal in detail, indicates measures to mitigate those impacts, and provides full details relating to the relevantly applicable statutory planning regime and compliance with the relevant planning controls and objectives. The new SEE

is primarily intended to address the stated reasons for refusal of consent to the development application as well as the issues and matters raised in the officer's assessment report.

This variation request made under clause 4.6 of PLEP has been prepared in light of the stated reasons for refusal of consent to the development application (DA2018/1275) as well as the issues and matters raised in the officer's assessment report.

Clause 4.6 of PLEP allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. 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 requires that a consent authority be 'satisfied' (NOTE: that means 'reasonably satisfied', see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407) 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 Lloyd J in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 ('*Winten*').

The *Winten* test was later rephrased by Preston CJ 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.

These judicial authorities, and some others, will be discussed further in sections 5.2 ('Relevant Case Law on Clause 4.6') and 5.3 ('Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case') of this document.

4.0 DEVELOPMENT STANDARD TO BE VARIED

Clause 4.3 ('Height of buildings') 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 what is *ordinarily* 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(2) are satisfied – in that regard, see below – the relevantly applicable *maximum* height of buildings control is 10.0 metres, being the control which, subject to the successful invocation of clause 4.6, is the relevantly applicable benchmark.

We are not in possession of probative material sufficient for us to be in a position to express a concluded view, one way or the other, as to whether, on the facts of the proposal and the site, the requirements of, relevantly, clause 4.3(2D)(c) of PLEP are satisfied as respects the slope of the site.

Accordingly, this request has been prepared on the basis that the relevantly applicable height of buildings development standard is that referred to in clause 4.3(2) of PLEP, namely, that development on the land comprising the site has a maximum building height of 8.5m.

In any event, we submit, on the grounds and for the reasons set out in this written request and in the supplement to the SEE, that it is largely academic and even immaterial in this case as to whether the requirements of, relevantly, clause 4.3(2D)(c) of PLEP are satisfied as respects the slope of the site. The height exceedance of the 8.5 metre height control can only be considered to be minor, on any test of reasonableness, and otherwise acceptable having regard to the matters set out below.

5.0 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD?

The expression 'development standards' is defined under section 4(1) of the EPA Act as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

...

(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(2) 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 indeed the case here.

6.0 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.

6.1 Clause 4.6 of PLEP

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.

6.2 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 Local Environmental Plan 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 *Randwick Local Environmental Plan 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 judgment that the commissioner was satisfied that the proposal satisfied those tests. The Court held that the degree of satisfaction required under clause 4.6(4) was essentially a matter for the commissioner (or the council at first instance). The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the Standard Instrument LEP 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 residential flat buildings 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.

6.3 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 a variation to a development standard had been shown as 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 clause 4.6(3)(a) of PLEP 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.

6.3.1 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.

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

The objectives specified in clause 4.3(1) 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 is consistent with the desired character of the locality for the reasons that follow.

The dwelling envelope is generally located below the 8.5 metre height limit. The development proposal involves, among other things, an infill in the roof on the second level. The height exceedance (over and above 8.5m above existing ground level) is some 1130mm, but with the height otherwise being below 10m above existing ground level.

The portions of the building above the applicable 8.5 metres maximum height are pre-existing, other than the proposed infill in the roof that will join the present two dormer-like structures together.

The dwelling house is an existing one. The height exceedance of the existing roof is a present reality and the infill of the roof will not create any additional height exceedance beyond that which already exists, except in relation to the infill which is minor in nature only, and in any event the roof is not visible from the street.

The amended plans forming part of this application make a change to the building envelope by, relevantly, a change in the setback such that the building width on the east is reduced by 0.5m. We submit that the change made as respects the side setback results in an extension beyond the building envelope control that is acceptable in all the circumstances.

The development maintains a building height limit below the tree canopy and minimises bulk and scale whilst respecting the horizontal massing of the existing built form. The development proposal involves minimal alterations to the built footprint and dwelling bulk.

In addition, the height, bulk and scale of the development comfortably fits in the precinct (i.e. other residential built elements). In that regard, and most significantly, other dwellings in the vicinity are of a similar height.

In our opinion, the building, by virtue of its height, bulk and scale, is not inconsistent with the desired character of the locality.

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:

As mentioned above, the built form is compatible with the height and scale of surrounding and nearby development.

Please refer to our comments above in relation to objective 4.3(1)(a).

Objective 4.3(1)(c)

This objective seeks to minimise any overshadowing of neighbouring properties.

Comment:

The built form minimises any overshadowing of neighbouring properties. See, in that regard, the shadow diagrams accompanying this application. Extra shadows are minor and incremental only.

Objective 4.3(1)(d)

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

Comment:

The proposal, especially in its redesigned form, will not materially affect the views from any neighbouring properties. The design of the building is such that 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 existing development was designed to respond to what are challenging site constraints. The design is open, stepped, 'organic' and responds to the natural context in which the site is located.

The existing development does not dominate the natural environment, being built to a scale that respects the existing bushland and largely reflects the established, albeit quite eclectic, built form character of the Locality 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 dwelling house has been designed to follow the natural fall of the land, thus preserving as far as possible the natural landscape and existing ecological communities.

The proposed alterations and additions will not result in the Locality no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. True, the existing dwelling house presents as a three storey structure, but so are many other dwelling houses in the Locality given the way buildings. That factor alone does not prevent the Locality from no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys.

The development proposal involves minimal alterations to the built footprint and dwelling bulk. In that regard, the existing development, in conjunction with the proposed additions and alterations, is stepped down the slope to integrate, as far as practicable, with the landform and landscape.

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 proposed dwelling house is sufficiently set back from the building line of adjoining properties, thus preserving visual privacy for neighbours. The infill of the two dormer-like structures and the ridge will not be visible from the street.

Landscaping is incorporated into the development proposal. The natural environment has been preserved where possible through the construction of new retaining walls and landscaping throughout the garden. There is no proposed removal of any existing native trees. It is therefore the case that, a 'balance' (NOTE: that is the word used in the 'desired character' statement) is achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land.

The proposed alterations and additions are setback from the side building line of adjoining properties, thus ensuring that visual privacy is maintained.

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.

Concluding comments as regards the relevant clause

We submit that the development is consistent with all of the abovementioned objectives of the standard.

The expression 'building height' is defined in 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. However, a test of reasonableness must be applied as a matter of lawful administrative decision-making.

Paragraph 3 of Circular B1 from the former Department of Planning states:

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.
[emphasis added]

The words of the Department quoted above are relevant to the numerical departure the subject of this clause 4.6 request. On one view, the building height exceedance could be seen to be numerically large but regard must be had to the overall structure, much of which is existing. In that regard, when considering whether the portion of a building above the maximum height 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 and whether that portion is minor. The infill of the two dormer-like structures on the second level, which creates the only relevant new height exceedance, is minor in nature, scale and impact.

In all the circumstances, we 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 are minor, bearing in mind that the majority of that portion, and its height exceedance, are pre-existing.

6.3.3 Consistency with the aims of PLEP

We also submit that compliance with the height of buildings development standard is 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 this Plan 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 the Palm Beach Locality (cf clause 1.2(2)(b)), provides housing in an appropriate location (cf clause 1.2(2)(f)) and protects Pittwater's natural environment (cf clause 1.2(2)(g)). There will be no affectation of Pittwater's known Aboriginal heritage (cf clause 1.2(2)(h)).

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

6.4 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 6.3.3. of this document. That, in and of itself, is a good environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(2D) of PLEP.

In terms of providing a site-specific justification for the departure from the building height development standard, a 'good' reason is that, as already mentioned, the majority of the portion of the building that exceeds the stipulated 8.5m maximum height control is pre-existing. Insofar as the proposed alterations and additions are concerned, the height exceedance pertains only to the infill between the two dormer-like structures.

Another site-specific justification for the departure from the building height development standard is that the proposed infill between the two dormer-like structures will provide greater internal amenity in terms of the creation of a more useable habitable space for the occupants of the dwelling house and otherwise without creating any untoward external impacts upon the occupants of adjoining or nearby residences.

Another reasonable 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, for the reasons that:

- i. the majority of the dwelling envelope is generally located below the 8.5 metre height limit;
- ii. the objectives of clause 4.3 of PLEP (refer clause 4.3(1)) are achieved in that the built form:
 - a. will be consistent with the desired character of the Palm Beach Locality (refer clause 4.3(1)(a), PLEP and the supplement to the SEE prepared by our firm);
 - b. will be compatible for the most part with the height and scale of surrounding and nearby development (refer clause 4.3(1)(b), PLEP);
 - c. minimises any overshadowing of neighbouring property (refer clause 4.3(1)(c), PLEP) any shadow being subsumed;
 - d. allows for the reasonable sharing of views (refer clause 4.3(1)(d), PLEP);
 - e. responds sensitively to the natural topography (refer clause 4.3(1)(e), PLEP); and
 - f. minimises the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items (refer clause 4.3(1)(f), PLEP); and
- iii. the proposed development demonstrates overall a better planning outcome within the otherwise permissible planning controls by providing greater internal amenity in terms of the creation of a more useable habitable space for the occupants of the dwelling house whilst at the same time taking advantage of the sloping site, minimising loss of views, loss of privacy and overshadowing to and from adjoining properties (refer clause 4.3(2D)(d), PLEP).

The Council officer who prepared the original assessment report for DA2018/1275 opined that '[o]verall, it cannot be said that the proposal achieves consistency with the desired future character of the [Palm Beach] locality (refer p 10, assessment report). Now, in terms of the actual content of the 'desired character' statement for the Palm Beach Locality we respectfully submit to Council that:

- The proposal will not result in the Locality no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. True, the existing dwelling house is a three storey structure, but so are many other dwelling houses in the Locality.

That factor alone does not prevent the Locality from no longer being *primarily* a low-density residential area with dwelling houses being a maximum of two storeys.

- The development is located such that it is supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.
- The development maintains a building height limit below the tree canopy and minimises bulk and scale whilst respecting the horizontal massing of the existing built form. The development proposal involves minimal alterations to the built footprint and dwelling bulk.
- The development incorporates shade elements in the form of pergolas, verandahs and the like.
- Building colours and materials harmonise with the natural environment.
- The existing development, in conjunction with the proposed additions and alterations, is stepped down the slope to integrate, as far as practicable, with the landform and landscape.
- The development proposal minimises site disturbance and is designed to be safe from hazards.
- Landscaping is incorporated into the development proposal. The natural environment has been preserved where possible through the construction of new retaining walls and landscaping throughout the garden. There is no proposed removal of any existing native trees. It is therefore the case that, a 'balance' (NOTE: that is the word used in the 'desired character' statement) is achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land.
- The proposed alterations and additions are setback from the side building line of adjoining properties, thus ensuring that visual privacy is maintained. In addition, the infill of the two dormer-like structures and the ridge will not be visible from the street.
- The shadow diagrams demonstrate that there will be minimal impact in terms of solar access.
- The design of the building is such that existing views from adjoining properties will be maintained.

To strictly enforce the maximum height of buildings 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 Palm Beach Locality and which would result in an absence of environmental 'dis-benefits' as regards the local precinct.

The proposed development is consistent with the bulk and scale of newer built elements in the locality. The minor departure from the building envelope (which is further reduced from the original proposal) is acceptable, given that this is a minor built element not adding to bulk and scale and that the building footprint is situated on a slope. The height of several of the nearby dwelling houses is in excess of the stipulated height of buildings standard, which is at least in part a reflection that there are often circumstances where compliance is simply not practically possible or very difficult at the least. Where slope is pronounced (as in this case), so is there greater potential for more significant departures from the height control. Each case needs to be considered on its respective merits.

True, what is required is not consistency with other development but consistency with the desired future character of the locality. However, we do not question the importance of consistency with the desired future character of the locality. We submit that the proposal *is* consistent with the desired future character of the Palm Beach Locality. Nevertheless, in considering the merits of any development proposal, the extent or degree of consistency with surrounding development is a relevant matter for consideration to be weighed in the balance with other relevant matters for consideration.

Despite the Council officer's assertion (on p 10 of her assessment report) that the built form of the development, in terms of its impact, must be 'secondary to landscaping' is, with the utmost respect, almost risible. In an urban environment, it is virtually impossible for any built form to be 'secondary to landscaping' unless all development is in the form of discretely built miniature tree-houses that are entirely camouflaged by the surrounding native bushland. In addition, the legal reality is this—not only does the 'desired character' for the Palm Beach Locality make absolutely no reference at all to the supposed need for the built form to be 'secondary to landscaping', what it does state on the point is quite different, namely:

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. (Refer clause A4.12, PDCP.)

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 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 and regard needs to be had to the fact that the majority of that portion, and its height exceedance, are pre-existing.

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.

6.5 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*.

6.5.1 Consistency with objectives of the development standard

Please refer to section 5.3.2 of this document.

6.5.2 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 is low-impact and has been designed to respond sensitively to the natural topography. The proposed alterations and additions to the dwelling house provide greater occupant amenity without causing material environmental impacts to neighbours or to the site itself.

The proposal achieves a 'balance' between maintaining the landforms, landscapes and other features of the natural environment and the development of the site.

The 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.

Landscaping is integrated into the development proposal.

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

Objective 3

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

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 have no effect on riparian and foreshore vegetation and wildlife corridors. 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.

6.6 Director-General's Concurrence

It is understood that the Director-General's concurrence under clause 4.6(5) of the LEP 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 standard 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 8.5 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, as well as the land zoning.

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(2) of PLEP 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.

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 in the form now presented to Council 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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