

**APPENDIX  
CLAUSE 4.6 – MAXIMUM BUILDING HEIGHT**

**Prepared February 2024**

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

**130 PRINCE ALFRED PARADE, NEWPORT**

**FOR THE CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO THE EXISTING DWELLING**

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM BUILDING HEIGHT  
CONTROL AS DETAILED IN CLAUSE 4.3 OF THE PITTWATER LOCAL ENVIRONMENTAL PLAN 2014**

**For:** Proposed alterations and additions to an existing residential flat building  
**At:** 130 Prince Alfred Parade, Newport  
**Owner:** Maggie & Johan Hundertmark  
**Applicant:** Maggie & Johan Hundertmark  
C/- VMDC Planning

**1.0 Introduction**

This written request is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. In this regard it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Pittwater Local Environmental Plan 2014 (PLEP 2014).

**2.0 Background**

The site is mapped within the C4 Environmental Living zone and within the W1 Natural Waterways Zone as per the Pittwater Local Environment Plan 2014 (see Figure 1). This results in there being two building height development standards that apply to the site.



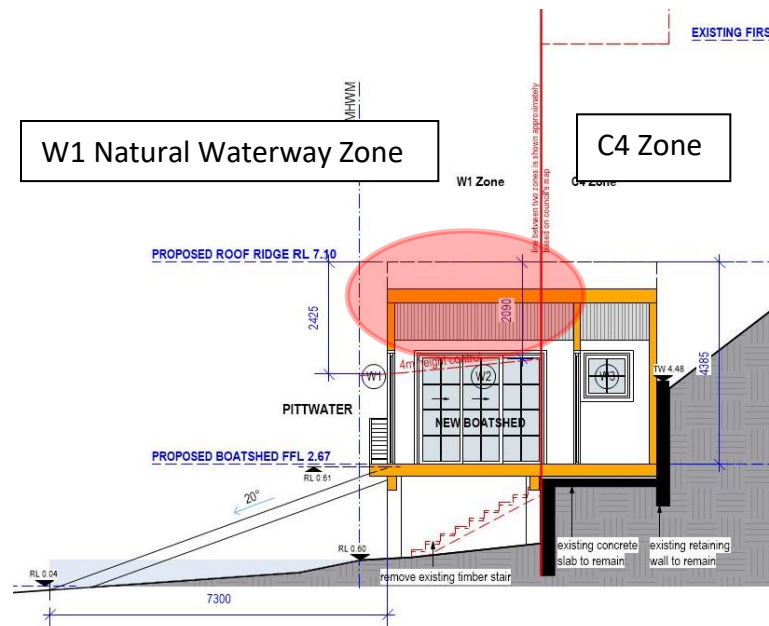
**Figure 1:** Excerpt of the LEP building height map showing the section at the rear (south-west) of the site with a 4m building height

Clause 4.3 restricts the building height of a building within this area of the Pittwater locality and refers to the maximum height noted within the “*Height of Buildings Map.*”

The proposal includes the construction of a boatshed, associated decking, ramp and access stairs located partly within the C4 Environmental Living zone and partly within the W1 Natural Waterways Zone. The portion of boatshed located within the C4 Environmental Living Zone presents a compliant building height under the 8.5 metres building height standard. However, the portion of the boatshed located within the W1 Natural Waterways Zone presents a non-compliant building height over the required 4.0 metres building height standard (see Figure 2).

The proposed works are located appropriately upon the land in terms of its topographical features noting the steep slope of the land and the location of the foreshore building line means it is not possible to locate the proposed structure outside of the foreshore area. Such an outcome would result in far greater impacts on the site's natural features and topography while also being impractical for use, being significantly setback and elevated from the site’s foreshore interface. As a result, a portion of the boatshed exceeds the height control of 4.0m by 2.1 – 2.4m which represents a non-compliance with the height standard of 60%, which is as a direct result of the ground levels at the foreshore interface.

The proposed boatshed decking responds to the physical and environmental constraints of the site, and does not give rise to any unacceptable ecological, scientific, or aesthetic impacts.



**Figure 2:** Boatshed and decking building height, portion of non-compliant building height circled in red

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

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

### Is Clause 4.3 of the LEP a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

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

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

### 3.0 Purpose of Clause 4.6

The Pittwater Local Environmental Plan 2014 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

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

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

### 4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*  
*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

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

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

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

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

Clause 4.6(2) of the LEP provides:

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

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

Clause 4.6(3) of the LEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the maximum building height development standard pursuant to Clause 4.3 of PLEP which specifies a maximum building height of 4m in this waterway area of Newport. The proposed works include a new boatshed, decking, ramp and associated access stairs that results in a logical and orderly concealed storage of marine and boating related equipment that would otherwise be visible

When measured from the seabed level (RL 0.06 AHD), rather than the building level of RL 2.67 AHD (which sets the minimum acceptable floor level for the boat shed), the proposed boat shed within the WI Natural Waterway zone exceeds the 4m building height development standard by 2.5m. The area within the C4 Environmental Living Zone complies with the required building height (see Figure 2).

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

Under cl 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(4) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation.

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

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

The specific objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the site will provide additions and alterations to the existing dwelling, which is consistent with the stated Objectives of the W1 Natural Waterways Zone, which are noted as:

- To protect the ecological and scenic values of natural waterways.*
- To prevent development that would have an adverse effect on the natural values of waterways in this zone.*
- To provide for sustainable fishing industries and recreational fishing.*
- To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.*
- To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore.*

The proposed development will have appropriate impacts upon the locality as the proposed works are compatible with the nature and scale with the other foreshore interface structures within the immediate foreshore area.

The works are located logically on the site due to the steep slope of the property. It is not possible to locate the proposed structures outside of the W1 zone, as such an outcome would result in far greater impacts on the site's natural features and topography whilst also being impractical for use, being significantly setback and elevated from the site's foreshore interface. Also, the location of the works

ensures there is no significant and unnecessary earthworks or tree removal within the site and the surrounding marine environment.

Accordingly, the works are sufficiently located within the landscaped and waterfront setting, with submitted technical reports submitted with the application ensures the works does not give rise to any unacceptable ecological, scientific, or aesthetic impacts. Nor impact marine ecology or the navigation of the waterway.

Notwithstanding the non-compliance with the maximum building height control, the proposed works will provide for increased residential amenity, while providing improved and safe site access functionality, while minimising the impacts for neighbouring waterfront properties.

## **5.0 The Nature and Extent of the Variation**

- 5.1 This request seeks a variation to the maximum building height standard contained in Clause 4.3 of PLEP.
- 5.2 Clause 4.3 of PLEP specifies a maximum building height of 4m in this area of W1 Natural Waterways area of Newport.
- 5.3 The proposed boathouse will present a height of 6.5m above the mean high water (0.6 AHD). The Pittwater Development Control Plan clause D15.15 Boat sheds requires the floor height of boat sheds to be no lower than the estuarine planning level which RL 2.6m. As a result, the proposed boat shed minimum floor height is RL 2.6m, with this floor height impacting the level of building height non-compliance as the minimum floor to ceiling height is required for the structure to be functional. As a result, a portion of the boatshed exceeds the height control of 4.0m by 2.1m – 2.4m which represents a non-compliance with the height standard of 60%. However, boatshed will present as a modest marine structure of similar/compatible height to nearby boat sheds.

## **6.0 Relevant Caselaw**

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:
  17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*

18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
  19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
  20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
  21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
  22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*
- 6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:
1. Is Clause 4.3 of PLEP a development standard?
  2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
    - (a) compliance is unreasonable or unnecessary; and
    - (b) there are sufficient environmental planning grounds to justify contravening the development standard



3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives for development for in the W1 zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes Clause 4.3 of PLEP?

## **7.0. Request for Variation**

### **7.1 Is compliance with Clause 4.3 unreasonable or unnecessary?**

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum building height standard, as outlined under Clause 4.3, and reasoning why compliance is unreasonable or unnecessary, is set out below:

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

As demonstrated along the immediate area of the foreshore area boat sheds, jetties, pontoons, and their ancillary structures are common characteristic of the waterfront properties of Prince Alfred Parade.

The proposed boat shed is of a modest scale that will be compatible in its building height, design and materiality with other foreshore development along the waterfront within the immediate setting.

Based on the technical information accompanying this application, does not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

Accordingly, the development is unlikely to create unacceptable impacts to the foreshore or waterway areas and will not detract from the scenic quality of the locality, maintaining an appropriate visual relationship with the surrounding built environment.

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

The proposed building height is compatible the works are located appropriately and logically sited upon the site in terms of the topography and alongside the foreshore interface, with the height and scale compatible with the surrounding development along the foreshore. The boatshed development is considered appropriate and compatible within the locality and is therefore worthy of support.

**(c) to minimise any overshadowing of neighbouring properties,**

The works will not impact the existing solar access provision to the principal private open space or living areas of the adjacent properties.

The adjoining properties will maintain suitable solar access throughout the day in accordance with Council's provisions.

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

It is acknowledged that there are existing view lines to the Pittwater waterway to the north-west, west and south-west of the site. However, the living areas and principle private recreational spaces of nearby dwellings are significantly elevated on the sloping topography above the foreshore area, meaning it is not anticipated that the boatshed and its associated works will impact neighbouring views or public vantage points.

Given that the works are located low on the site sloping topography adjoining the foreshore area, views from the adjoining properties will be maintained and there will be no substantial change to the existing views enjoyed by the neighbouring properties.

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

The proposed boatshed and overall development works have been located and designed to avoid unnecessary altering of the existing topography, landscaping and seawall structures which could result in detrimental environmental impacts to the marine environment and/or established canopy trees of significant biodiversity value. Accordingly, the boatshed is located appropriately to access the site's foreshore interface.

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

There are no adjacent heritage items in the site is not within a heritage conservation area.

The works location on the site are supported by a range of technical studies. Accordingly, it can be determined that the proposed works will not adversely affect the natural coastal processes and coastal environmental values, nor Aboriginal Culture significance. Therefore, the proposal is assessed as satisfactory in relation to this consideration.

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

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

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

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

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

- The proposed development will facilitate a development that supports safe and orderly access to the waterway from the lands water frontage, storage of marine and boating related equipment that would otherwise be visible, unsecured, an impediment to orderly access. The works will maintain the general bulk and scale of the existing marine based surrounding development and maintains architectural consistency with the prevailing foreshore development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed development will provide for improved amenity within a built form which is compatible with the immediate foreshore area which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The location of the boatshed is logical and considers the sloping topography and required interface with the site interface to the foreshore water’s edge. To move the proposed boatshed outside the W1 Natural Waterway Zone would require in harm to the environment,

including unnecessary additional excavation, adverse impact/removal landscaping, significant site disturbance and need to remove sections of the existing seawall (1.3(g)).

- The proposal is compatible with the height and scale of development, (similar boat shed structures) within the property's visual catchment; and achieve a development on the property that is characteristic of the foreshore. The proposed development improves the amenity of the occupants and respects the current levels of privacy, amenity and solar access enjoyed by the surrounding this replicating the existing built form (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a marine structures that are comparable with surrounding marine structures and supports safe and orderly access to the waterway from the lands water frontage, storage of marine and boating related equipment that would otherwise be visible, unsecured, and potentially impede orderly access.

These are not simply benefits of the development as a whole, but are benefits emanating from breach of the maximum building height control.

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

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

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

### **7.3 Is the proposed development consistent with the objectives of Clause 4.3 and the objectives of the C4 Environmental Living Zone & W1 Natural Waterways Zone ?**

- (a) Section 4.2 of this written request suggests the 1<sup>st</sup> test in Wehbe is made good by the development.
- (b) Each of the objectives of the W1 Natural Waterways Zone and the reasons why the proposed development is consistent with each objective is set out below.

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

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

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

It is considered that notwithstanding the variation of to the building height control, the proposal which involves additions and alterations to the existing building will be consistent with the individual Objectives of the W1 Natural Waterways Zone following reasons:

- ***To protect the ecological and scenic values of natural waterways.***

The proposal includes the construction of various waterway structures located entirely seaward of the mean high water mark which are permitted with consent within the W1 Natural Waterways Zone.

The proposed works have been minimised through siting and appropriate design and remain consistent with the location of adjoining and surrounding development of this type.

The proposed development has also been designed to facilitate the existing access provisions along the foreshore area.

The application is accompanied by several environmental technical reports that are satisfied that the structures will not unreasonably harm the marine ecosystem raising no objections.

- ***To prevent development that would have an adverse effect on the natural values of waterways in this zone.***

Based on the expert assessment reports submitted as part of the development application, there are no unreasonable impacts on the natural values of the waterways associated with the proposed structure’s location.

- ***To provide for sustainable fishing industries and recreational fishing.***

The proposed structures will allow for recreational fishing options for the occupants and their guests.

- ***To ensure development does not adversely impact on the natural environment or obstruct the navigation of the waterway.***

The proposed development will not inappropriately obstruct the navigation of the waterway.

- ***To provide opportunities for private access to the waterway where these do not cause unnecessary impact on public access to the foreshore***

Presently there is no public access along the foreshore. The proposed boathouse, nor the associated works will compromise future opportunities to provide continuous public access along the foreshore and to the waterway.

#### **7.4 Has council obtained the concurrence of the Director-General?**

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

#### **7.5 Has the Council considered the matters in clause 4.6(5) of PLEP?**

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is particular to the site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be considered by the secretary before granting concurrence.

## 8.0 Conclusion

This development proposes a departure from the maximum building height development standard, as a consequence of the boatsheds logical location responding to the physical and environmental constraints of the land. The boatshed is located on a part of the site that will not require significant earthworks or modifications to the surrounding adjacent marine environment.

The boatshed will provide low-impact development ancillary to the dwelling house compatible with the other foreshore interface structures within the immediate area. Based on the information accompanying the development application the boatshed and its associated structures do not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

This written request to vary to the maximum building height standard specified in Clause 4.3 of the Pittwater LEP 2014 adequately demonstrates that that the objectives of the standard will be met.

The area of the proposed boatshed which exceeds the 4 m height above the foreshore level is up to 2.1m to 2.4m above the height control and is a direct result of the existing levels at the foreshore interface.

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

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



**VAUGHAN MILLIGAN**

*Town Planner*