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Clause 4.6 Variation Request to the 8.5m Maximum Building Height Development Standard under Clause 4.3(2) of Pittwater LEP

Proposed Alterations and Additions to Existing Dwelling House

Lot 100 DP 509808

981 Barrenjoey Road, Palm Beach

Prepared for: Morris Symonds
February 2020

Printed: 11 February 2020
File Name: 20928A 981 Barrenjoey Road, Palm Beach/Reports/20928A_Clause 4.6.docx
Project Manager: R Player
Client: Morris Symonds
Project Number: 20928A

Document Control

Version	Prepared By	Reviewed By	Issued To	Date
Rev_1, Draft	R. Player	A. Cropley	Client and Architect	7 February 2020
Rev_2, Final	R. Player	A. Cropley	Client and Architect	11 February 2020

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1 Introduction

1.1 Commission

DFP has been commissioned by Morris Symonds ("the Applicant") to prepare a written request ("Variation Request") pursuant to cl4.6 of *Pittwater Local Environmental Plan 2014* (the Pittwater LEP) for the proposed development for alterations and additions to the existing dwelling house (the Proposal) at Lot 100 DP 509808, 981 Barrenjoey Road, Palm Beach (the Site).

The Proposal is described in detail in Section 4 of the SEE and comprises the following development:

- Minor demolition works to the existing dwelling house, carport, driveway and other improvements at the site;
- Minor earthworks involving cut and fill for the proposed development;
- Proposed alterations and additions to the existing dwelling house;
- Proposed new driveway access to an open carport with two car spaces and a vehicular turntable;
- Proposed new inclinator and pathway;
- Proposed landscaping treatment of the site;
- Stormwater drainage and other ancillary works.

The Proposal exceeds the 8.5 metre maximum building height development standard under cl4.3(2) of the Pittwater LEP having a maximum height of 9.9 metres measured from existing ground level to the roof level of the proposed dwelling house.

It is the opinion of DFP that the proposed development complies with all of the requirements of cl4.3(2D) of the Pittwater LEP which permits a development on land that has a maximum building height of 8.5 metres as shown on the Height of Buildings Map to exceed a height of 8.5 metres if it meets certain stated requirements including that the building footprint is situated on a slope that is in excess of 16.7 degrees (ie. 30%). The site in the position of the building footprint of the proposed development has a slope of about 23 to 25.6 degrees as shown on the architectural plans prepared by Architects Ink (see **Appendix 3** of the SEE report). The proposed development complies with the 10.0 metre maximum building height standard for steeply sloping sites and satisfies all of the requirements of cl4.3(2D) of the Pittwater LEP as detailed in Section 6.1.5 of the SEE report. Notwithstanding, as a precautionary measure a cl4.6 Variation Request to the 8.5 metre maximum building height development standard under cl4.3(2) of the Pittwater LEP has been prepared for the proposed development as outlined in this document.

Notwithstanding the contravention of the 8.5 maximum building height development standard, the Proposal is considered to be consistent with the objectives of the development standard and the objectives of the E4 zone within which the development is to be carried out and there are sufficient environmental planning grounds to justify the contravention in this instance including the lack of adverse amenity impacts on neighbouring residential properties, the constraints of the site particularly the steep slope and the positive environmental outcomes including maximising the deep soil site landscaped area (56% proposed compared with 55.3% existing site landscaped area); the design principle of retaining all four of the High Retention Value native and exotic trees and the majority of the Medium Retention Value trees and other established screen landscaping at the site; minimising the site disturbance including cut and fill earthworks; and providing a new vehicular access, carport and vehicular turntable so that motor vehicles can enter and leave the site in a forward direction onto Barrenjoey Road.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the 8.5 metre maximum building height development standard.

1 Introduction

1.2 Material Relied Upon

This Variation Request has been prepared by DFP based on the Architectural drawings prepared by Architects Ink (see **Appendix 3** of the SEE report) and other supporting drawings and reports which are appended to the Statement of Environmental Effects (SEE) report prepared DFP dated February 2020.

This Variation Request should be read in conjunction with the detailed environmental planning assessment contained in the SEE and documents appended thereto.

2 The Relevant LEP Provisions

2.1 Pittwater Local Environmental Plan 2014

2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map of Pittwater LEP provide that the Site is zoned E4 Environmental Living (the E4 Zone) and the Land Use Table to Clause 2.3 specifies the objectives of this zone as follows:

- *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.*

The proposed dwelling house alterations and additions and other ancillary development are permissible with development consent in the E4 zone pursuant to the Pittwater LEP.

2.1.2 Clause 4.3 – Height of Buildings

Clause 4.3 of the Pittwater LEP sets out the height of buildings development standard 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.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*
- ...
- (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.”*

The Height of Buildings Map designates a maximum building height of 8.5 metres for the Site (see **Figure 1**).

2 The Relevant LEP Provisions



Figure 1 Extract of Height of Building Map Pittwater LEP 2014

The Pittwater LEP defines **building height (or height of building)** as follows:

- (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.”*

2.1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of the LEP states the objectives of the clause as follows:

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

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) (see Section 4.7), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives or that the consent authority be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument.

Clause 4.6(2) provides that:

- (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.*

The 8.5 metre maximum building development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

2 The Relevant LEP Provisions

- (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.*

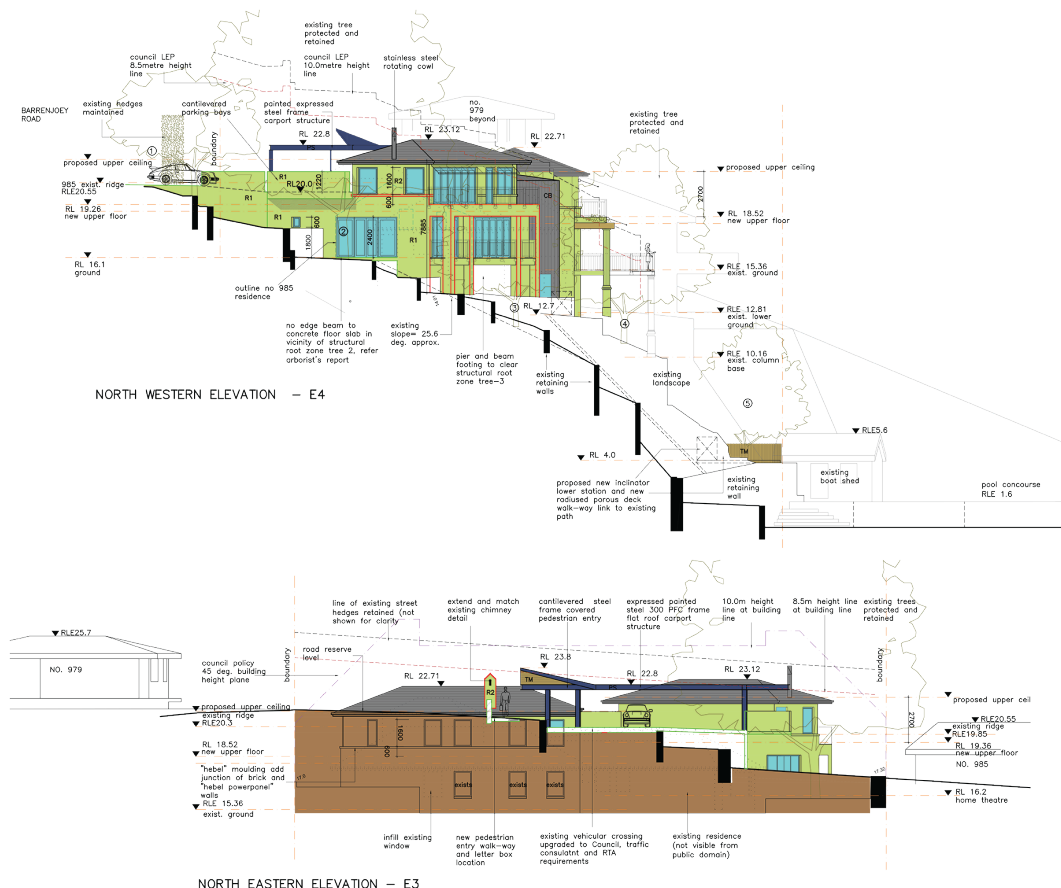
The proposed development does not comply with the 8.5 metre maximum building height development standard pursuant to cl4.3(2) of the Pittwater LEP however, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in **Section 5.2.1**.

3 The Nature of the Variation

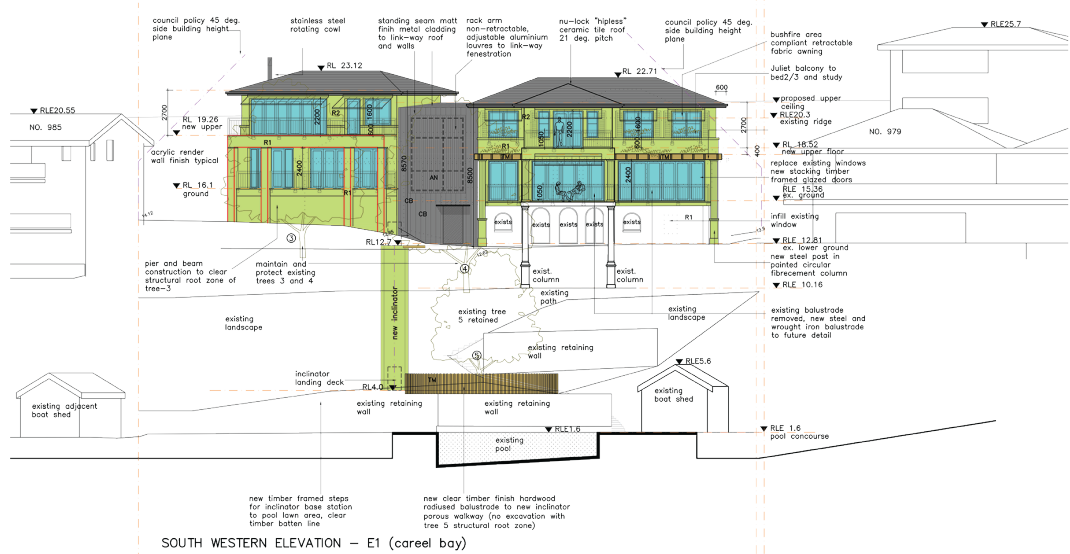
The proposed dwelling house alterations and additions at the site will have a maximum building height of about 9.9 metres. Notwithstanding, the whole of the proposed dwelling house complies with the 10 metre maximum building height standard permitted for steeply sloping sites under the provisions of cl4.3(2D) of the Pittwater LEP.

More specifically, the architectural plans for the proposed development (see **Appendix 3** of the SEE report) show that a portion of the upper floor level and roof of the north-western wing of the proposed dwelling house, the roof of the south-eastern wing of the proposed dwelling house and a small part of the roof of the carport and entry walkway will exceed the 8.5 metre maximum building height standard prescribed by cl4.3(2) of the Pittwater LEP. Furthermore, the lower ground floor level of the existing 2 storey dwelling house has been excavated by about 0.5 metres below the original natural ground level which contributes towards the non-compliance with the 8.5 metre building height standard.

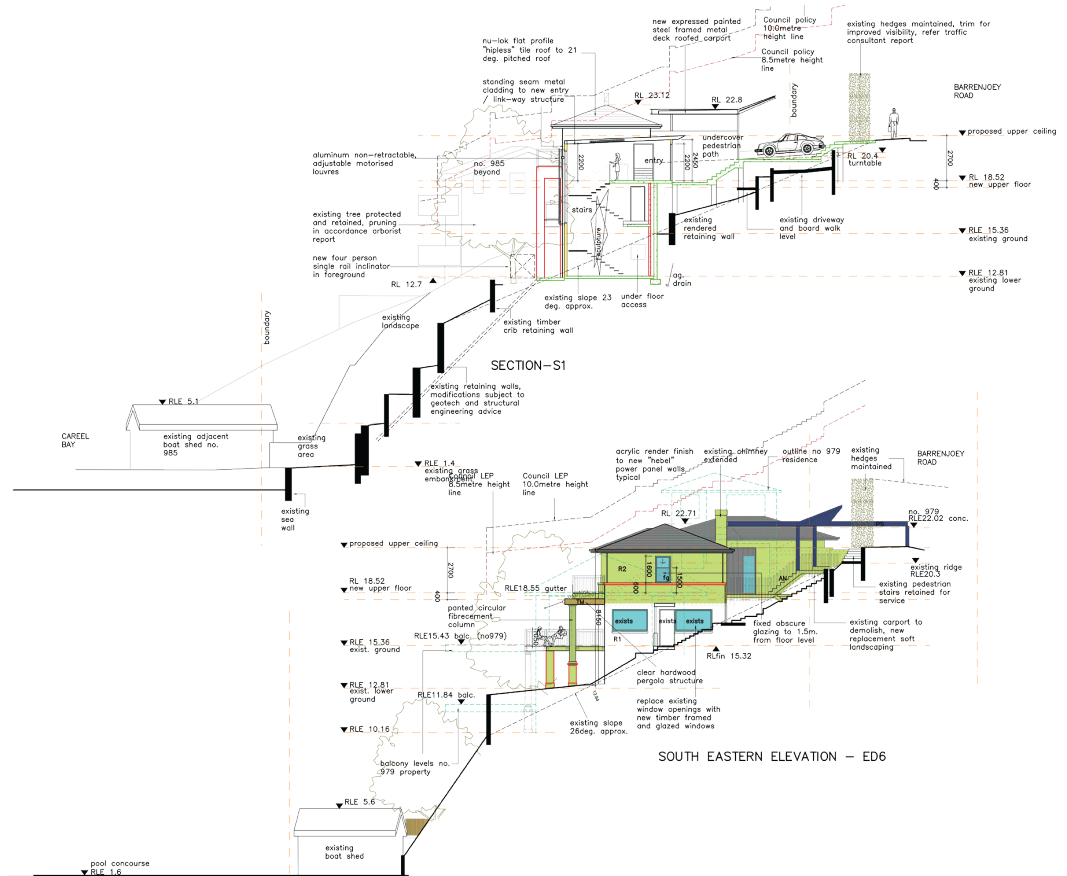
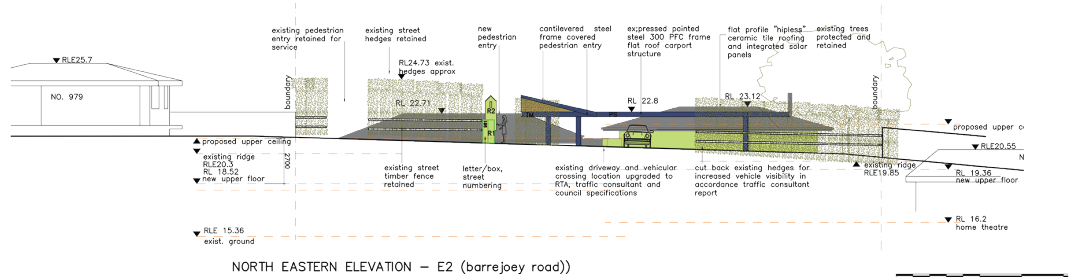
The extent of the non-compliance with the 8.5 metre maximum building height standard is shown in extracts of the elevations and sections at **Figure 2**.

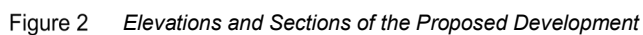


3 The Nature of the Variation



BUSHFIRE AREA COMPLIANCE:-
all works to comply with AS3859 "Construction of Buildings in Bushfire Prone Areas" (BLC)-12.5





4 Case Law

4.1 Introduction

The proposed variation to the development standard has been considered in light of the methodology established by the NSW Land & Environment Court (the Court) and the following subsections provide a brief summary of key Judgments regarding variations under the former SEPP 1 and cl4.6 of the *Standard Instrument – Principal Local Environmental Plan* (SILEP).

4.2 Winten Developments Pty Ltd v North Sydney Council [2001]

Through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 (“Winten”) the LEC established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. The elements of this test can be summarised as:

- Is the planning control a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?
- Is the objection well founded?

The 1st ‘test’ continues to be relevant and is a precondition for the application of cl4.6 – see **Section 5.1**.

The 2nd ‘test’ is required to be demonstrated under cl4.6(4)(a)(ii) – see **Section 5.2.1**.

The 3rd ‘test’ was specific to cl3 of SEPP 1 and has not been transferred to cl4.6 of the SILEP. Notwithstanding, in Initial Action (see below), Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act – see **Section 5.2.2**.

The 4th ‘test’ is required to be demonstrated under cl4.6(3)(a) - see **Section 5.2.1**.

The 5th ‘test’ is analogous to cl4.6(4)(a) – see **Section 5.3**.

4.3 Wehbe v Pittwater Council [2007]

The 5-part test under Winten was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] LEC 827 (“Wehbe”) where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of SEPP 1. These included:

1. Notwithstanding the non-compliance, is the proposal consistent with the relevant environmental or planning objectives?
2. Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary?
3. Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable?
4. Has the development standard been virtually abandoned or destroyed by the consent authority's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?

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5. Is the zoning of the particular land unreasonable or inappropriate such that the development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and therefore, compliance with the standard would be unreasonable or unnecessary?

4.4 Four2Five Pty Ltd v Ashfield Council [2015]

In the Judgment of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (“Four2Five”) Pearson C expanded on the earlier Judgments of Winten and Wehbe, indicating that whilst consistency with zoning and standard objectives of the development standard is addressed specifically in cl4.6(4)(a)(ii), there remains an onus of also demonstrating that there are “sufficient environmental planning grounds” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

The environmental planning grounds that support the proposed variation to the 8.5m development standard in this circumstance are detailed in the SEE, supported by the architectural plans at **Appendix 3** and the Photomontage of the proposed development at **Appendix 4** of the SEE. **Section 5.2.2** of this variation request includes a summary of these environmental planning grounds.

4.5 Randwick City Council v Micaul Holdings Pty Ltd [2016]

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 (‘Micaul’) Preston CJ made it clear that development consent cannot be granted for a development that contravenes a development standard unless the consent authority:

- (a) has considered a written cl4.6 objection seeking to vary the development standard as required by cl4.6(3) of the SILEP;
- (b) is satisfied that the cl4.6 objection adequately addresses the matters required to be demonstrated by cl4.6(3) (as required by cl4.6(4)(a)(i));
- (c) is satisfied that the 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 as required by cl4.6(4)(a)(ii).

In addition, Preston CJ elucidated that the consent authority does not have to be directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case – only that it be indirectly satisfied that the applicant’s written request adequately addresses the matters in cl4.6(3) that compliance with the development standard is unreasonable or unnecessary.

Furthermore, Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

4.6 Moskovich v Waverley Council [2016]

Providing further guidance on the interpretation of cl4.6 compared to its predecessor SEPP 1, the Judgment in *Moskovich v Waverley Council* [2016] NSWLEC 1015 (‘Moskovich’) outlines that cl4.6(3)(a) is similar to cl 6 of SEPP 1 and the ways of establishing that contravention of a development standard is well founded expressed in Wehbe (e.g. “achieving” the objectives of the development standard) are equally appropriate for the consideration of cl4.6(3)(a).

However, cl4.6(4)(a)(ii) has different wording to SEPP 1 and requires the consent authority to be satisfied that the proposed development is in the public interest because it is “consistent” with objectives of the development standard and objectives for the zone rather than

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“achieving” the objectives. Consequently, the considerations of cl4.6(3)(a) and cl4.6(4)(a)(ii) are different with the achievement test being more onerous and requiring justification in ‘ways’ such as those expressed in *Wehbe*.

Accordingly, whilst the Judgments in *Winten* and *Wehbe* related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to cl4.6 with minor areas of differing interpretation.

4.7 Initial Action Pty Ltd v Woollahra Municipal Council [2018]

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (‘Initial Action’), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a “test” that a development which contravenes a development standard results in a “*better environmental planning outcome*” relative to a development that complies with the development standard. In fact, there is no provision in SILEP that gives substantive effect to the objectives of cl4.6 stated in cl4.6(1)(a) and (b). That is to say, neither cl4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

4.8 Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018]

The Judgment of *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* (‘Al Maha’) makes it clear that a consent authority or the Court must, in determining a development application subject to request under cl4.6, clearly enunciate that it has satisfied itself of the matters in of cl4.6(4).

In the case of a consent authority, this might be by way of a statement in the reasons for approval authored by the consent authority or alternatively, a statement in the Orders or Judgment of the Court.

4.9 Summary of the Case Law Methodology and Tests

The collective methodology and tests described above has been applied to the assessment at **Section 5** and can be summarised in the following steps:

1. Step 1 - Is the planning control that the applicant seeks to contravene a development standard?
2. Step 2 - Is the consent authority satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required by cl4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard?

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3. Step 3 - Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out?
4. Step 4 - Has the concurrence of the Secretary of the Department of Planning, Industry and Environment been obtained?
5. Step 5 - Where the consent authority is the Court, has the Court considered the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.
6. Step 6 – In determining the development application, has the consent authority or the Court clearly enunciated that it is has formed the necessary opinions of satisfaction under cl 4.6(4) of the LEP.

5 Assessment of the Variation

5.1 Step 1 - Is the planning control a development standard?

This question is the 1st 'test' in Winten. The 8.5 metre maximum building height control in cl4.3(2) of the Pittwater LEP is a development standard, defined in Section 1.4 of the EP&A 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”*

The 8.5 metre maximum building height development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

5.2 Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

To demonstrate that compliance with the 8.5 metre maximum building height development standard is unreasonable or unnecessary, this written request relies upon:

1. The 2nd 'test' in Winten and the 1st and 2nd 'ways' in Wehbe – i.e. the underlying objectives or purpose of the standard is satisfied or the objectives are not relevant

Three aspects are discussed in the following paragraphs.

The underlying objectives or purpose of the standard

Clause 4.3 of the Pittwater LEP states the objectives of the 8.5 metre maximum building height development standard 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.”*

The Proposal is considered to achieve the 'relevant' objectives of the development standard and therefore satisfy the 1st 'way' espoused in Wehbe for the following reasons:

- The proposed dwelling house alterations and additions including the proposed new open style carport with vehicular turntable and driveway, by virtue of its height and scale, is considered to be consistent with the desired character of the Palm Beach locality which is characterised by two (2)- three (3) storey and multi-level dwelling houses set within established landscaped gardens with mature trees, shrubs and ground cover, particularly the neighbouring waterfront residential properties on the lower south-western side of Barrenjoey Road in this Palm Beach locality.

Whilst the proposed dwelling house visually presents from the Pittwater waterway as being a part two (2) storey and part three (3) storey residential building, it is integrated into the steep site slope and existing landscaped setting with the retention of most of

5 Assessment of the Variation

the existing mature trees, shrubs and ground cover as well as additional proposed screen planting.

The design of the proposed dwelling house is well articulated, consisting of a north-west and south-east “pavilion” style dwelling connected by central linkway which integrates with the landform and landscape of the site and with minimum site disturbance and excavation. As evidenced by the photomontage of the proposed dwelling house (see **Appendix 3** in the SEE), the proposed development maintains a building height limit below the tree canopy. The design and selection of building materials and colours incorporate shade elements such as masonry and metal clad walls broken up by balconies, terraces, glazed windows and doors, louvres and retractable fabric awnings which contribute to minimise the perceived visual height and bulk of the dwelling and to highlight the high architectural quality of the proposed development.

- The public domain view of the proposed development from the Barrenjoey Road site frontage is of a one (1) storey dwelling house sitting behind the open style carport, driveway and entry walkway that will largely be screened by the existing 3-4 metre high hedge along the site frontage offering glimpses of public views towards the Pittwater waterway from the road reserve.
- The proposed part 2 and part 3 storey dwelling house, through its design and siting on this steeply sloping site consists of north west and south east dwelling pavilions connected by a central linkway and with a proposed open style carport at the site frontage, consistent with the local context of 2-3 storey and multi-level dwelling houses, particularly along the steeply sloping, neighbouring properties on the south western side of Barrenjoey Road in this Palm Beach locality.
- The architectural plans at **Appendix 3** of the SEE demonstrate that the proposed development will result in minimal additional overshadowing of the principal private open space areas and the principal living areas of the adjoining multi level dwelling house to the south east at 979 Barrenjoey Road being limited to the windows in the north elevation during the afternoon period on June 21. The proposed development will have no adverse solar access/overshadowing impacts on the adjoining multi level dwelling house at No. 979 Barrenjoey Road during most of the day to the rear waterfront private open space area and the principal living area rooms and balcony of the adjoining multi level dwelling. The proposed development will have no overshadowing impacts on the adjoining three (3) storey dwelling house at No. 985 Barrenjoey Road which is located to the north west of the site.
- The siting and design of the proposed dwelling house alterations and additions fits mostly within the building envelope of the existing two (2) storey dwelling house and thereby achieves satisfactory sharing of views to the adjoining residential properties at 979 and 985 Barrenjoey Road. Indeed, the alternative design approach of extending the existing two (2) storey dwelling house in a south-westerly direction would have resulted in potentially significant view loss to the multi level dwelling house at 979 Barrenjoey Road which adjoins the development site to the south east (as well as overshadowing impacts).
- The proposed dwelling alterations and additions have been designed to respond sensitively to the steep natural topography of the site with the limitations imposed by the existing two (2) storey dwelling house. This has been achieved by the siting and design of the proposed dwelling house alterations and additions being “broken up” into a north west and south east dwelling pavilions connected by a central linkway and with a new driveway access to a open style carport with a vehicular turntable so that motor vehicles can enter and leave the site in a forward direction onto Barrenjoey Road. The proposed development has been designed to minimise the site disturbance and

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earthworks including the retention of most of the existing mature trees and other screen vegetation at the site.

- The proposed development has been designed to minimise any adverse visual impact of the development on the nature environment, particularly by maximising the deep soil site landscaped area (56% proposed compared with 55.3% existing site landscaped area) as well as the retention of all of the High Retention Value trees and most of the Medium Retention Value trees at the site. The proposed development is not a heritage item nor is it located within a heritage conservation area under the Pittwater LEP.

5.2.2 Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

The site-specific environmental planning grounds that support the proposed variation to the 8.5 metre maximum building height development standard in this circumstance are detailed in the SEE, supported by the architectural plans at **Appendix 3**, the photomontage of the proposed development as viewed from the Pittwater waterway at **Appendix 4**, the landscape design statement and plans at **Appendix 5**, the arboricultural impact assessment report at **Appendix 6** and the car parking and vehicle access assessment report at **Appendix 11** of the SEE and include:

- The topography of the site is very steep with a slope gradient well in excess of 16.7° (i.e. 30%) being between 23° to 25.6° in the location of the building footprint of the proposed dwelling.
- The proposed dwelling house alterations and additions mostly comply with the 8.5 metre building height limit under Clause 4.3(2) of the Pittwater LEP. Furthermore, the proposed development fully complies with the 10 metre maximum building height standard for steeply sloping sites and all of the requirements of Clause 4.3(2D) of the Pittwater LEP as detailed in the SEE.
- The proposed development has been designed to maximise the deep soil site landscaped area (56% proposed compared with 55.3% existing site landscaped area) and it will enable the retention of most of the existing mature native and exotic trees, shrubs and ground cover at the site with provision of additional proposed screen landscaping to soften and screen the proposed dwelling house as viewed from the Pittwater waterway and from the Barrenjoey Road site frontage.
- The proposed development has been designed to achieve minimal impacts on the residential amenity of the adjoining multi-level dwelling house at 979 Barrenjoey Road and the three (3) storey dwelling house at 985 Barrenjoey Road, particularly in respect to view sharing, solar access/overshadowing impacts, as well as visual and acoustic privacy.

In addition to the above grounds, in *Micaul and Initial Action*, Preston CJ clarified that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts.

As outlined in **Section 5.2.1**, there is considered to be a lack of adverse amenity impacts arising from the proposal as it will not result in adverse overshadowing, overlooking or acoustic impacts that would warrant refusal of the proposed development. Furthermore, view impacts have been minimised to the extent that view loss is considered to be negligible in respect to neighbouring residential properties.

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In summary, the constraints of the site particularly in respect to the steep slope and the building footprint of the existing dwelling house which limits the design options for the proposed dwelling house alterations and additions and the design principle of maximising the site landscaped area and retention of existing mature trees contributes to the contravention of the 8.5 metre maximum building height development standard and notwithstanding the contravention, the proposal minimises significant adverse amenity impacts.

5.3 Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?

As outlined in **Section 5.2.1**, the Proposal achieves and is therefore consistent with the relevant objectives of the 8.5 metre maximum building height development standard.

However, the consent authority must also be satisfied that the development will be consistent with the objectives of the E4 Zone within which the development is to be carried out as outlined below:

- The proposed development has been primarily confined to the existing building footprint with minimal excavation of the site and retention of all four (4) High Retention Value trees and the majority of the Medium Retention Value trees and other existing screen vegetation at the site and, accordingly, the development is considered to be a low-impact residential development which will have minimal impact on the ecological, scientific or aesthetic values of the site in the Palm Beach locality.
- The proposed dwelling house alterations and additions is of a low residential density and scale being a part two (2) and part three (3) storey dwelling house which is designed to integrate with the steeply sloping landform and existing established landscape context of the site consistent with the character of neighbouring 2-3 storey and multi level dwelling houses in this Palm Beach waterfront residential locality.
- The proposed development, by retaining 56% of the site as deep soil landscaped area and retaining most of the existing mature trees, shrubs and ground cover will protect and enhance the riparian and foreshore vegetation and wildlife values of the site in the locality.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the 8.5 metre maximum building height development standard under the Pittwater LEP and the objectives of the E4 Zone under the Pittwater LEP.

5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

As Pittwater LEP adopts cl4.6 of the SILEP and the conditions of the Notice are not relevant in this instance, the consent authority for the Proposal may assume concurrence in respect of the variation requested to the 8.5 metre maximum building height development standard under Pittwater LEP.

5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

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

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under s39(6) of the Court Act, the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the 8.5 metre maximum building height development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed alterations and additions for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in Section 5.3, the proposed contravention of the 8.5 metre maximum building height development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the consent authority.

5.6 Step 6 - Clause 4.6(4) – Statement of Satisfaction

This is a matter for the consent authority or the Court to address in its written reasons for determining the subject development application.

6 Conclusion

The proposed development contravenes the 8.5 metre maximum building height development standard under cl4.3(2) of Pittwater LEP but complies with the 10.0 metre maximum building height standard for steeply sloping sites under the requirements of cl4.3(2D) of the Pittwater LEP.

The 8.5 metre maximum building height control under cl4.3(2) of the Pittwater LEP is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- Notwithstanding the contravention of the 8.5 metre maximum building height development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl4.3 of the Pittwater LEP and is consistent with the relevant objectives of the E4 Zone and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the 8.5 metre maximum building height development standard, the proposed height of the proposed dwelling house alterations and additions will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse environmental impacts on the Palm Beach locality will be minimised to a reasonable level; and
- Notwithstanding the contravention of the 8.5 metre maximum height development standard, the proposed height of the proposed dwelling house alterations and additions relates to a steeply sloping site, well in excess of 16.7% (i.e. 30°) which fully complies with the 10 metre maximum building height standard for steeply sloping sites and all of the criteria under Clause 4.3(2D) of the Pittwater LEP as detailed in the SEE.
- In addition to the site being steeply sloping, the lower ground floor level of the existing two (2) storey dwelling house has been excavated by about 0.5 metres below the original natural ground level which contributes towards the non-compliance with the 8.5 metre building height standard under Clause 4.3(2) of the Pittwater LEP.

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the 8.5 metre maximum building height development standard including:

- a lack of significant adverse environmental amenity impacts on neighbouring residential properties in the locality;
- The siting and design of the proposed development integrates with the steeply sloping landform by being broken up into north west and south east dwelling pavilions connected by a central linkway with a new driveway and open style carport and by achieving retention of all four (4) High Retention Value trees and most of the Medium Retention Value trees as well as other existing vegetation and additional proposed screen landscaping of the site.

Accordingly, this written request can be relied upon by the consent authority when documenting that it has formed the necessary opinions of satisfaction under cl4.6(4) of the LEP.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018.

Accordingly, the consent authority can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.