



12-14 Rock Bath Road, Palm Beach

**REQUEST FOR VARIATION TO HEIGHT OF BUILDINGS
DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF
PITTWATER LEP 2014**

This Clause 4.6 variation relates to a proposal for demolition of the existing structures on the site and construction of a new dwelling with swimming pools on the subject site.

The proposal results in a non-compliance with clause 4.3 of the *Pittwater Local Environmental Plan 2014* (**Pittwater LEP**) which relates to height of buildings. As such, this Clause 4.6 request has been prepared in accordance with Clause 4.6 of the *Pittwater Local Environmental Plan 2014*, which applies to the subject site.

The request demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying clause 4.6(3) of the Pittwater LEP.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives for development within the C4 - Environmental Living zone under the Pittwater LEP, in which the development is proposed to be carried out.

The nature of the exceedance to the development standard relating to height is set out below, followed by consideration of the relevant matters in clause 4.6 of the Pittwater LEP.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

Zoning of the site

The zoning of the land is C4 - Environmental Living. The objectives of the C4 zone are:

- *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.*

Clause 4.3 – Building Height

The Standard

Clause 4.3 of the Pittwater LEP and the associated map prescribe a maximum building height of 8.5 metres for this site. The proposal seeks to construct a new dwelling with a maximum height of 10.66 metres, providing a non-compliance with this control. The percentage variation is 25% (2.16m).

The components of the proposed dwelling that breach the building height control are:

- the upper section of the Master Bedroom and foyer noting that this is to be provide access from the street and is comparable with the existing house
- the upper section of the living area to the rear
- part of the cabana with a green roof above the terrace

Refer to the extracts of the 3D height blanket images below demonstrating the height non-compliance of the proposed development.

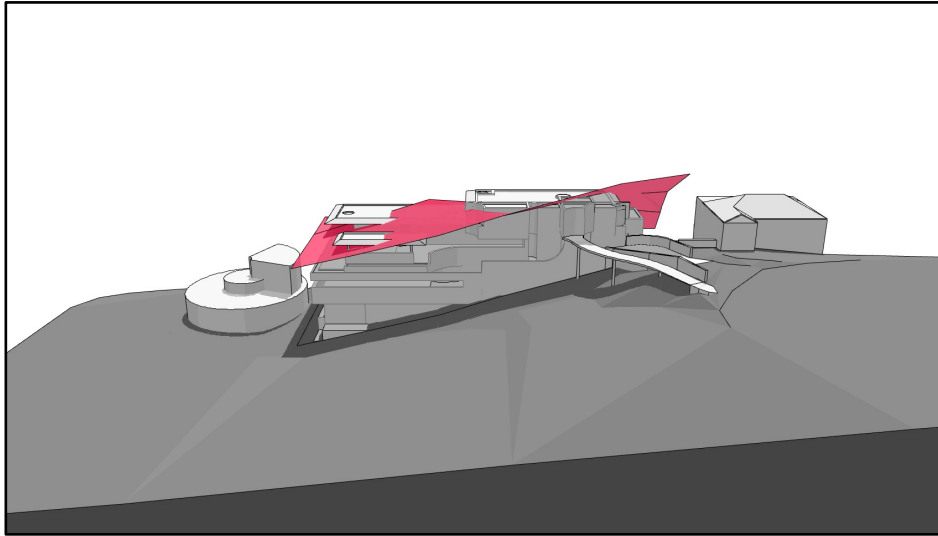


Figure 1. 3D height blanket image demonstrating the height non-compliance of the proposed development

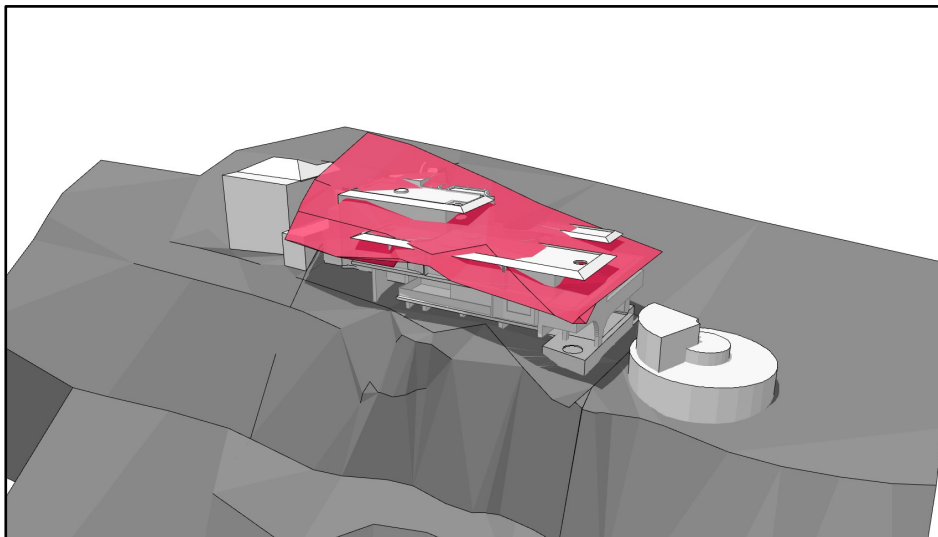


Figure 2. 3D height blanket image demonstrating the height non-compliance of the proposed development

The objectives of Clause 4.3

The objectives of Clause 4.3 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.*

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the Pittwater LEP allows for exceptions to Development Standards. The objectives of this Clause 4.6 are:

- (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.*

Clause 4.6 of the Pittwater LEP allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

- (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.*

Clause 4.6(2) provides the power for development consent to be granted even though the development would contravene a development standard, subject to that clause:

- (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 4.6(3) sets out what a clause 4.6 written request seeking to justify a contravention of a development standard must demonstrate in order for consent to be granted for development that contravenes a development standard:

- (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*

Clause 4.6(4) sets out the matters which a consent authority must be satisfied of in order to grant consent to a development that contravenes a development standard:

- (4) 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.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the height development standard and provides the necessary information for the consent authority to be satisfied of the matters in clause 4.6(4).

The matters required to be demonstrated under clause 4.6(3) are set out below as Points 1 and 2.

1. Clause 4.6(3)(a) - Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways¹:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that 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; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by the Court². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

This objection relies on the first method set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with⁴. Compliance with the objectives of the height standard is addressed under **Point 4 below**.

In addition, the following points are raised:

- Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality.

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁴ *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

- The proposed dwelling has been designed to step down the site to follow the topography of the land and avoid excessive excavation.
- The top of roof of the proposed new dwelling matches the ridge of the existing dwelling.
- The components of the development above the height control are limited to:
 - the upper section of the Master Bedroom and foyer noting that this is to be provide access from the street and is comparable with the existing house
 - the upper section of the living area to the rear
 - part of the cabana with a green roof above the terrace

The remainder of the development complies with the building height development standard. Refer to the extracts of the 3D height blanket images below demonstrating the height non-compliance of the proposed development.

- It is noted that the existing dwelling is similar in terms of building height exceedance where the foyer and Master bedroom are proposed. Refer to the extracts of the 3D height blanket image below for the existing dwelling.

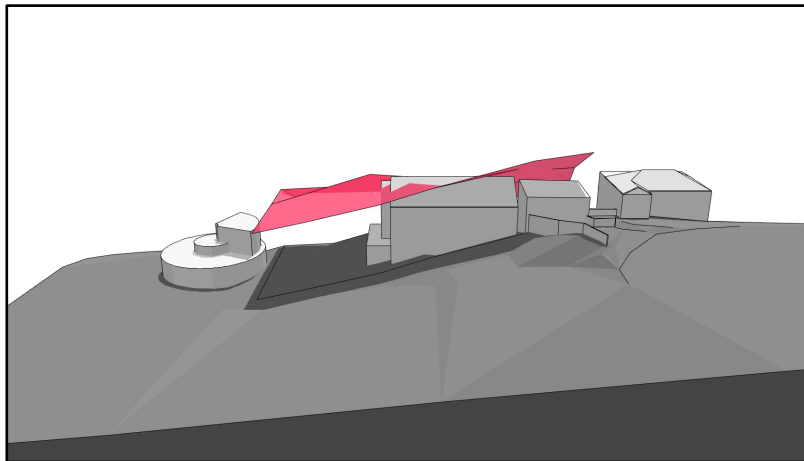


Figure 3. 3D height blanket image of the existing dwelling

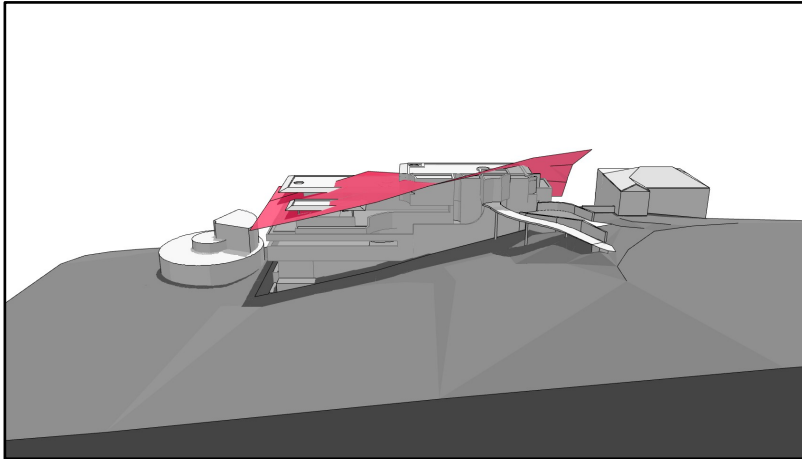


Figure 4. 3D height blanket image demonstrating the height non-compliance of the proposed development

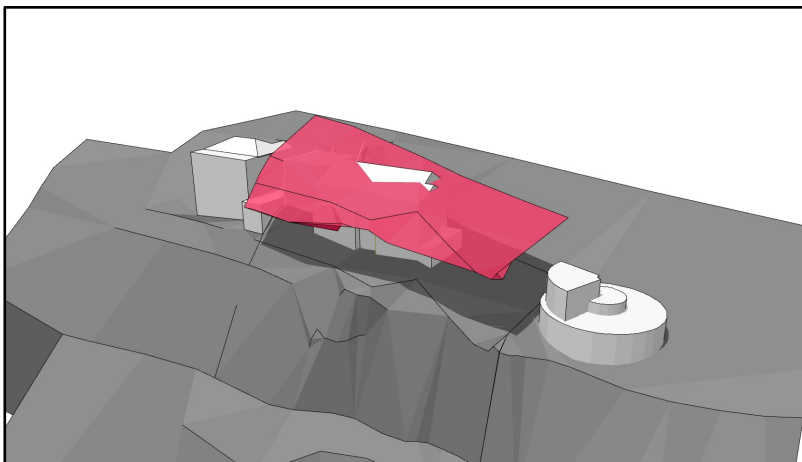


Figure 5. 3D height blanket image of the existing dwelling

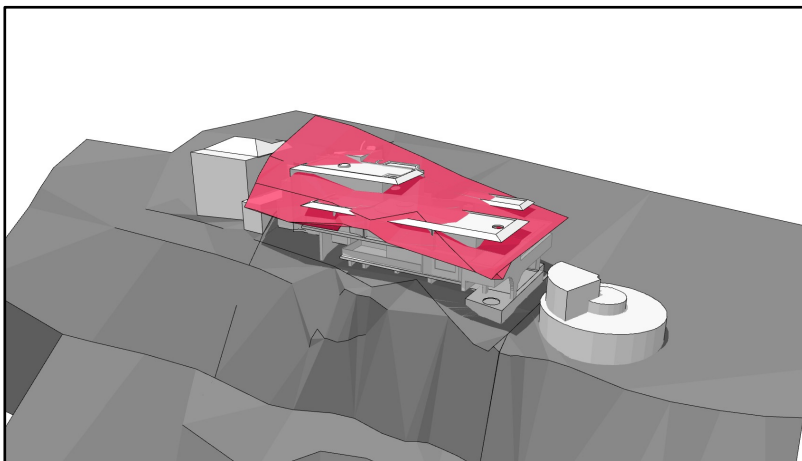


Figure 6. 3D height blanket image demonstrating the height non-compliance of the proposed development

- The height breach will be indiscernible from the streetscape and surrounding properties. A reduction of the proposed building height

would provide for an indiscernible benefit to the streetscape and would reduce the amenity of the development.

- The proposed multi-storey dwelling is compatible with the height and scale of surrounding dwellings. Refer to the extract of the built form analysis below.

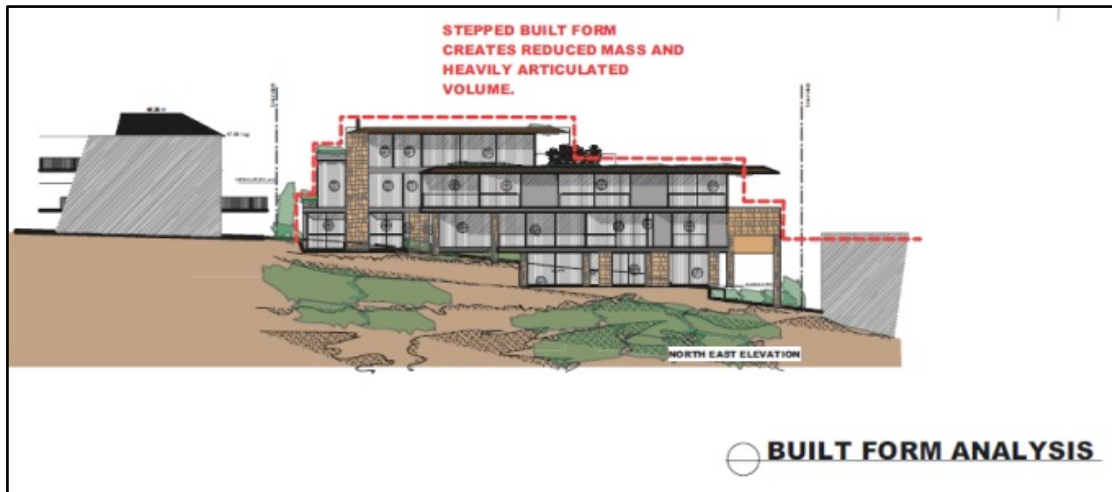


Figure 7. Extract of the built form analysis

- The development provides an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site.
- Exceedance of the height control will not create additional unreasonable environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity.
- The siting and design of the proposed dwelling minimises the obstruction of views from neighbouring dwellings and the public domain.

2. Clause 4.6(3)(b) - There are sufficient environmental planning grounds to justify contravening the development standard:

The components proposed above the height control are:

- the upper section of the Master Bedroom and foyer noting that this is to be provide access from the street and is comparable with the existing house
- the upper section of the living area to the rear
- part of the cabana with a green roof above the terrace

Refer to the extracts of the 3D height blanket images above demonstrating the height non-compliance of the proposed development.

Given the consistency of the proposal against the zone objectives and height objectives (see **Point 4 below regarding both**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard⁵.

There are sufficient environmental planning grounds which demonstrate that the proposed height can be achieved without adverse impacts for the following reasons:

- Overall, the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality.
- Exceedance of the height control will not create additional building bulk that results in unreasonable environmental amenity impacts as follows:
 - The proposed height breach will not result in the loss of views from surrounding development with views from No. 10 available over the eastern corner of the site and properties on the opposite side of the street being elevated above street level.
 - The proposed breach in height will not result in unreasonable overshadowing of adjoining properties and overall, the proposal complies with the DCP solar access controls.
 - The proposal will provide a development, which has been designed to ensure that the visual and acoustic privacy of adjoining properties is maintained.
 - The proposal will provide a development, which is consistent with the scale of the adjoining developments and is of an appropriate visual bulk for the locality.

The proposal will provide a suitable design and of suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act and the building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

3. Clause 4.6(4)(a)(i) - The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):

⁵ see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90]

Based on the above, the written request adequately addresses the matters referred to above by Clause 4.6(3).

4. Clause 4.6(4)(a)(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:

Objectives of the Standard

The proposal will be in the public interest as it meets the objectives of the height development standard as follows:

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

Comment: The proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality. The proposed dwelling has been designed to step down the site to follow the topography of the land and avoid excessive excavation.

The component of the development above the height control is limited to the rear part Level 3 and the rear part of Level 4. The remainder of the development complies with the building height development standard. The height breach will be indiscernible from the streetscape and surrounding properties, noting it at the upper level, the breach is comparable with the existing dwelling.

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

Comment: Adjoining the site to the northwest is a multi-storey dwelling at 16 Rock Bath Road. Adjoining the site to the west is a multi-storey dwelling at 2 Florida Road. Adjoining the site to the southeast is a multi-storey dwelling at 10 Rock Bath Road.

The proposed multi-storey dwelling is compatible with the height and scale of surrounding dwellings. Refer to the extract of the built form analysis above.

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

Comment: As demonstrated in the Shadow Diagrams submitted with the DA,

the proposed height will not result in unreasonable shadowing impacts on the subject site and adjoining sites.

The proposal complies with the DCP solar access controls as follows:

- The main private open space of the dwelling will receive at least 3 hours of sunlight between 9am and 3pm on June 21st.
- The main private open space of the adjoining dwellings to receive at least 3 hours of sunlight between 9am and 3pm on June 21st.
- Windows to the principal living area of the proposal will receive at least 3 hours of sunlight between 9am and 3pm on June 21st.
- Windows to the principal living area of area of adjoining dwellings will receive at least 3 hours of sunlight between 9am and 3pm on June 21st.
- Solar collectors for hot water or electricity will receive at least 6 hours of sunshine between 8.00am and 4.00pm during mid winter.

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

Comment: The proposal will not result in the loss of views from surrounding development. Views from No. 10 are available over the eastern corner of the site and properties on the opposite side of the street are elevated above street level.

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

Comment: The proposed dwelling has been designed to step down the site to follow the topography of the land and avoid excessive excavation.

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

Comment: The site does not contain a Heritage Item and is not located within a Heritage Conservation Area. There are no heritage items within the vicinity of the subject site.

Objectives of the Zone

The zoning of the property is C4 - Environmental Living and the objectives of the zone are:

- *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 proposal is consistent with the zone objectives in the following manner:

- The proposal will retain the existing residential use of the site.
- The proposed works will not have an adverse effect on ecological, scientific or aesthetic values of the subject site and surrounding land.
- The proposal will result in a low density and scale development that is integrated with the landform and landscape.

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives of the C4 zone.

The above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

5. Clause 4.6(4)(b) – the concurrence of the Planning Secretary has been obtained

Concurrence of the Planning Secretary is taken to have been obtained as a result of written notice dated 5 May 2020 attached to the Planning Circular PS 20-002.

6. Clause 4.6(5)

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

Conclusion

The consistency of the development with the zone objectives and the objectives of the height standard together with the absence of adverse

impacts arising establish that there are sufficient grounds to support the variation from the development standard and confirm that it is unreasonable and unnecessary for the development to comply. This therefore demonstrates sufficient environmental planning grounds to justify contravening the standard.

In addition, the resultant development will be in the public interest as it complies with the objectives of the zone and the objectives of the development standard.

The proposal is consistent with the objects of Section 1.3 of the EP& A Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to support the variation.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives for development within the C4 - Environmental Living zone under the Pittwater LEP, in which the development is proposed to be carried out.



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Date: 24 February 2023