

Attachment 1

Clause 4.6 variation request - Height of buildings

1 Clause 4.6 variation request – Height of buildings

1.1 Introduction

This clause 4.6 variation has regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

1.2 Pittwater Local Environmental Plan 2014 (PLEP 2014)

1.2.1 Clause 4.3 - Height of buildings

Pursuant to clause 4.3(2) of PLEP 2014 development must not exceed the height nominated on the Height of Buildings Map, being 8.0 metres in respect of the subject site. A copy of the Height of Buildings Map is provided in Figure 1, below.

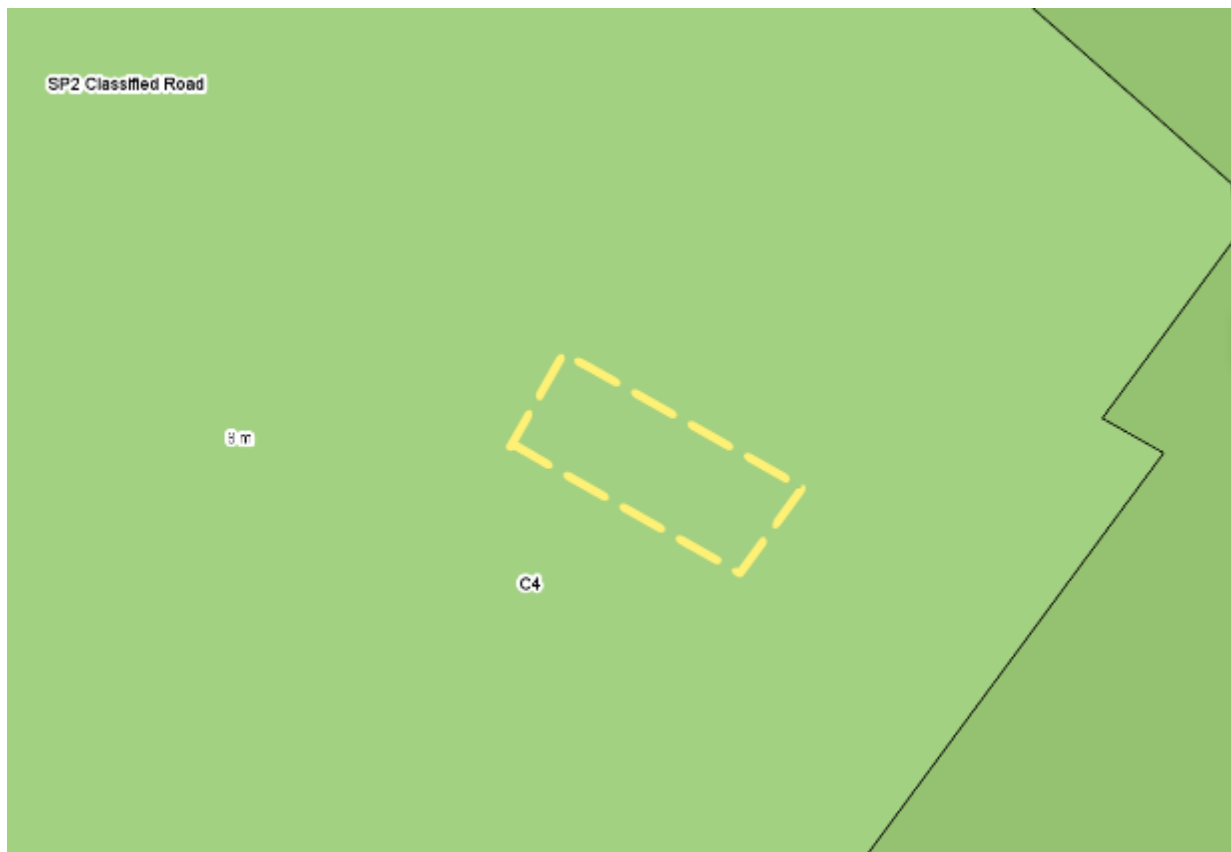


Figure 1 - Extract of the Height of Buildings Map of PLEP 2014

The objectives of the height of buildings control 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.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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.

I note that Council has recently adopted the interpretation of ground level (existing) established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 where at paragraphs 73 and 74 O'Neill C found:

73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

In this regard, it has been determined that the Level 3 terrace planter breaches the height standard by a maximum of 1.180m (14.75%) at its northern end and 1.240m (15.5%) towards its southern end. The perimeter of the Level 3 roof form breaches the standard in part by up to 540mm (6.7%) whilst the ridge breaches the standard by 830mm or 10.37%. The building height breaching elements are depicted on the building height blanket diagram over page.

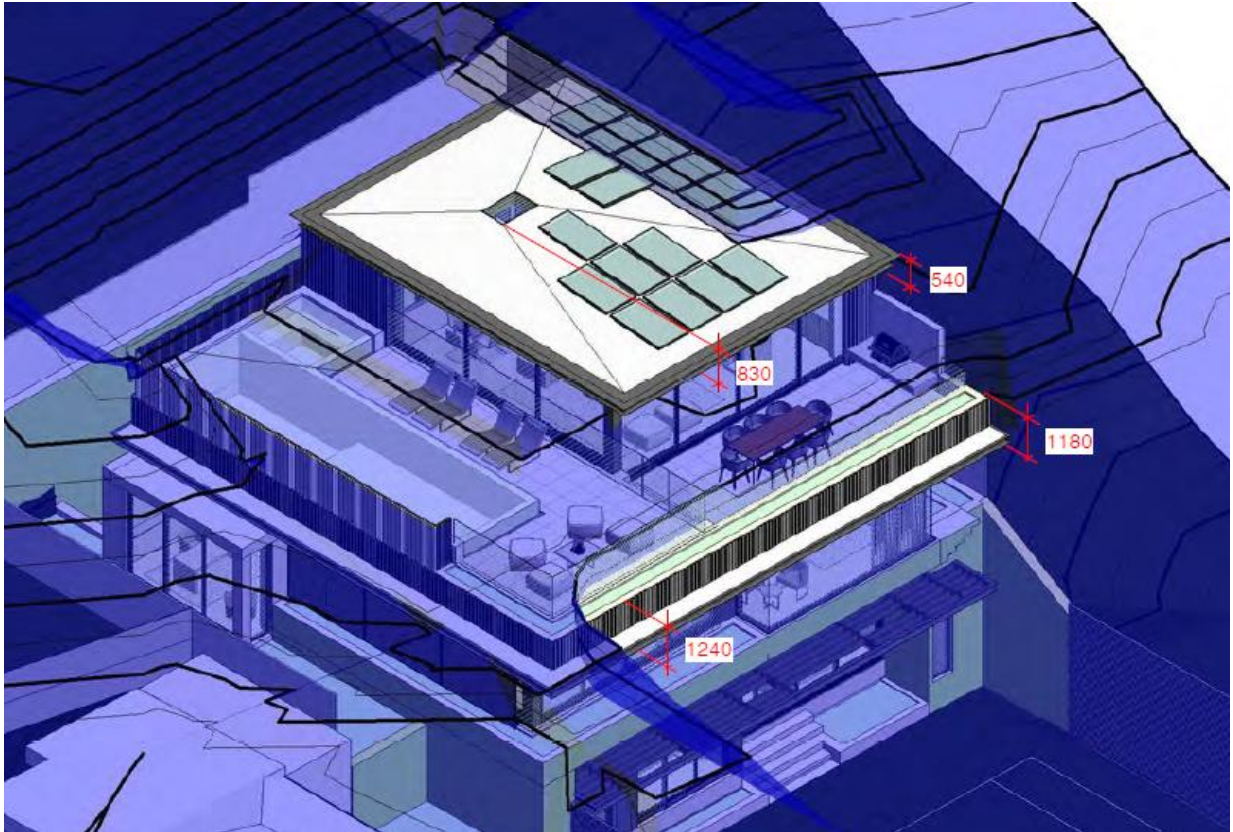


Figure 2: Plan extract showing 8 metre building height blanket (in blue) determined in accordance with Merman Investments Pty Ltd v Woollahra Municipal Council with the building height breaching elements shown uncoloured.

We note that the prior excavation of the site within the footprint of the existing building significantly distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill. Having regard to paragraph 74 Merman Investments Pty Ltd v Woollahra Municipal Council John, Low and Associates Surveyors were engaged to prepare a survey plan to identify the assumed undisturbed levels on the site being the ground level (existing) of the land prior to any development occurring. An extract of this survey is at Figure 3 over page.

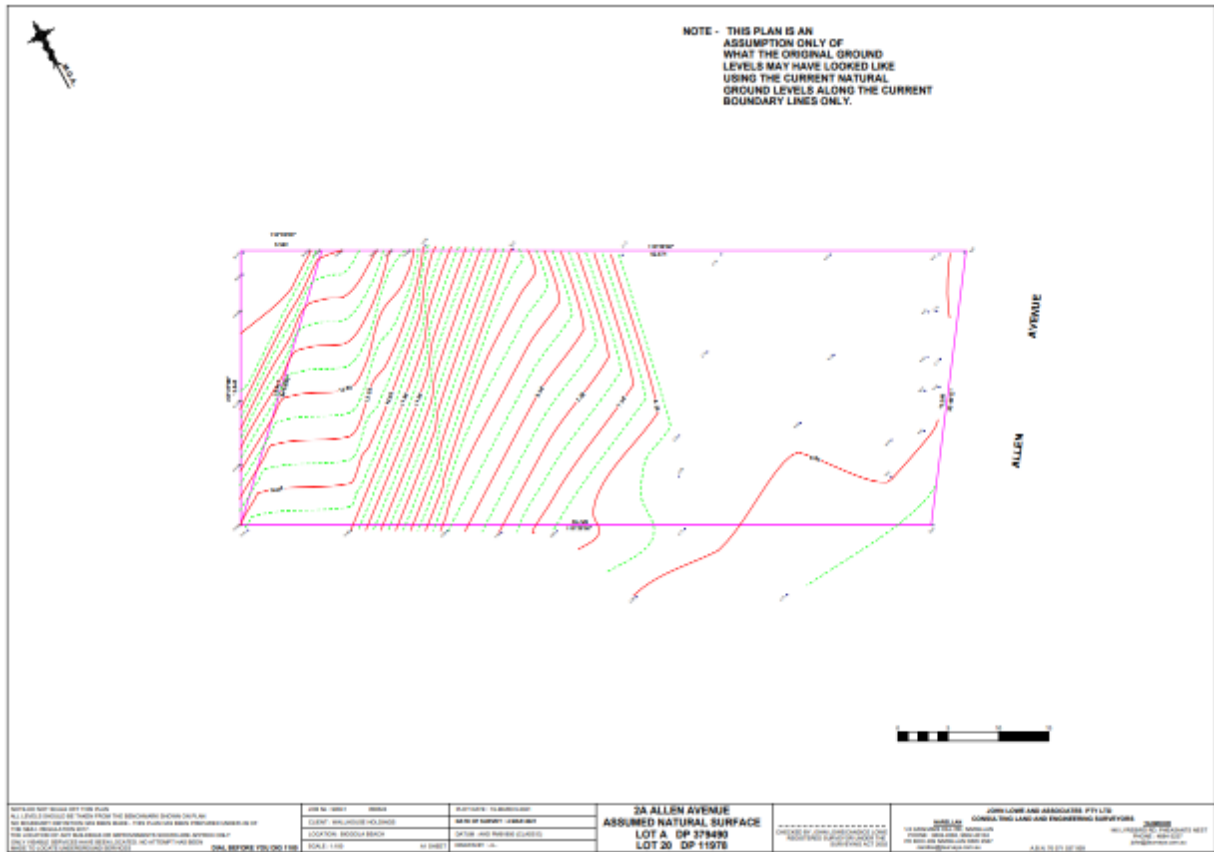


Figure 4: Survey extract showing assumed undisturbed levels on the site being the ground level (existing) of the land prior to any development occurring.

On the basis of this survey information, an 8 metre building height blanket was able to be overlaid on the plans to determine the height of the development relative to undisturbed levels being the levels of the land prior to excavation occurring to accommodate the existing dwelling house.

Whilst the majority of the proposed dwelling sits well below the 8.0m maximum building height plane there is a minor protrusion of 100mm at the south-eastern corner of the upper level roof form as depicted in the diagram is at Figure 5 over page.



Figure 5: Plan extract showing 8 metre building height blanket (in yellow blue) determined from assumed undisturbed levels on the site being the ground level (existing) of the land prior to any development occurring with the building height breaching elements shown in grey.

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP 2014 provides:

The objectives of this clause are:

- (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 clause 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 PLEP 2014 provides:

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.

This clause applies to the Height of Buildings development standard in clause 4.3 of PLEP 2014.

Clause 4.6(3) of PLEP 2014 provides:

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 height of buildings development standard at clause 4.3 of PLEP 2014 which specifies a maximum building height of 8.0m above existing ground level. However, 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.

1.3 Relevant Case Law

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:

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].

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].

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].

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].

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.

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.

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 2014 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

2.1 Request for variation

2.1.1 Is clause 4.3 of PLEP 2014 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision 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,*

Clause 4.3 of PLEP 2014 prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 of PLEP 2014 is a development standard.

2.1.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first and third approaches are relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard and because the underlying objective or purpose would be defeated or thwarted if compliance was required.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: The desired future character for the Bilgola Locality is set out in clause A4.3 of P21 DCP as follows:

The Bilgola locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape.

This statement applies to all land located within the Bilgola Locality as depicted on the map extract at Figure 4 below.

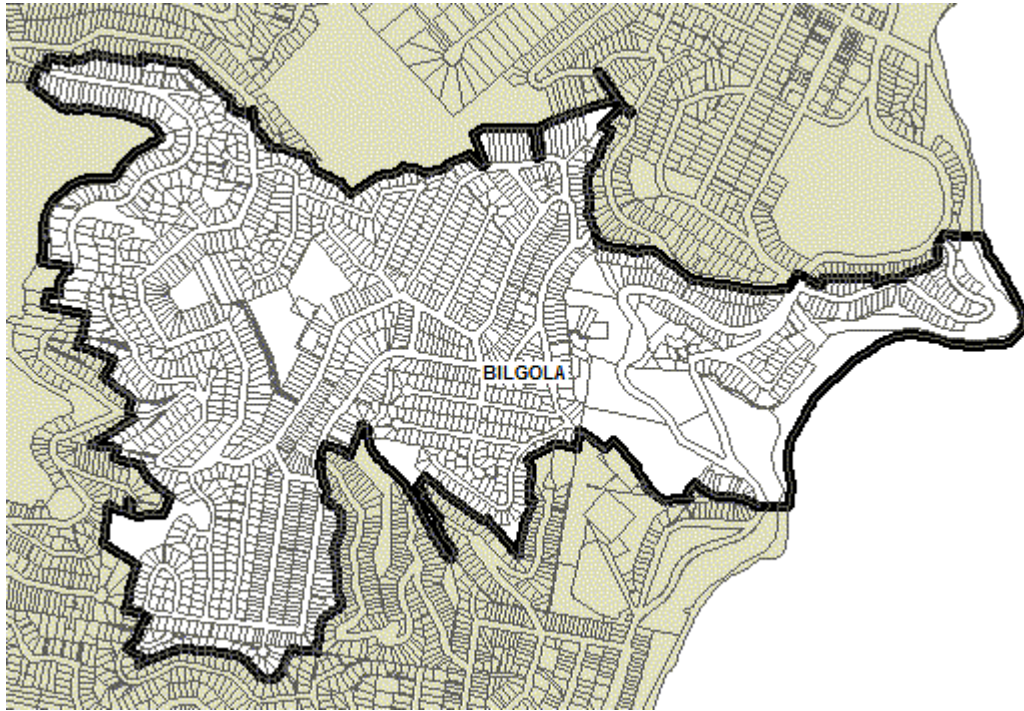


Figure 6 - Bilgola Locality map extract – Clause A4.5 PDCP.

A significant number of properties located within the Bilgola Locality are located on steeply sloping sites upon which dwelling houses of 1, 2 and 3 storeys in height have been approved and constructed pursuant to the current PLEP and PDCP provisions. This is evidenced by Council's recent approval for a new dwelling house at 2 – 4 Bilgola Avenue, Bilgola Beach, located to the south-west of the site, involving a 3 storey dwelling house with an approved maximum height of 9.5 metres (DA2018/1877).

I note this observation in relation to the flexibility which has been applied in relation to the 2 storey DFC statement as it relates to steeply sloping sites including dwelling house development within the Bilgola Beach Area.

In this regard, I notes that notwithstanding the building height breaching elements that a low density dwelling house outcome is maintained for the site with a 1 and 2 storey built form presentation achieved as viewed from the properties to the rear (west) of the site and a 3 storey articulated building form presentation to Allen Avenue consistent with the approved development at 2 – 4 Bilgola Avenue as depicted in Figure 9. Such outcome is consistent with the DFC as reasonably applied to a steeply sloping site.

Whilst it could be argued that the proposal does not integrate with the landform and landscape, I note that the proposed dwelling house utilises the excavated areas established by the existing dwelling house and does not require the removal of any significant trees or landscape elements.

The additional excavation is generally limited to that required to accommodate the proposed basement car parking level which ensures that adequate off-street carparking is provided in a manner which has minimal streetscape impacts and which responds to the general paucity of available on street parking given the high demand for parking associated with the site's proximity to Bilgola Beach.

The quantum and quality of deep soil landscaping at the rear of the property is enhanced to the extent that can be reasonably argued that the proposal appropriately integrates with the landform and landscape having regard to the established landform and landscape circumstance on the site.

Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

This statement is not applicable to the proposed application.

The three distinct areas within the Bilgola locality (as identified in Bilgola Locality Map 2) will, by their unique differences, require differing and distinct degrees of control to ensure the individual characteristics and essence of each area are maintained and enhanced:

The Bilgola Beach Area

Is a visual catchment that is environmentally significant and extremely susceptible to degradation. Its unique local and regional significance requires protection and preservation, and further investigation for listing as an environmental protection and/or conservation area.

I note that since the adoption of the DFC that the land has been zoned C4 Environmental Living.

Strict development controls will apply to this area (including a reduced building height limit to 8m) to ensure that its unique qualities are preserved through development that is sensitive to the area's characteristics.

I note that the portion of the development located above the 8 metre height of buildings standard would be generally compliant with the 8 metre height of building standard when measured above undisturbed natural ground levels. The portion of the development projecting above the height standard presents as a predominantly single storey building element relative to the ground levels established on 8 and 10 The Serpentine to the rear (west) and the immediately adjoining properties to the north 4B Allen Avenue and south 6 Bilgola Avenue. The unique quality established on this particular site is the significant front setback to the dwelling house created when the tennis court was constructed concurrently with the dwelling house some 70 years ago with the maintenance of the established dwelling house footprint preserving this particular unique setback and open streetscape characteristic notwithstanding the building height non-compliant elements proposed.

Accordingly, I am satisfied that the development achieves the DFC notwithstanding the non-compliant building height elements proposed.

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

Comment: The findings of Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 are relevant in this instance:

There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

In note that a significant number of properties located within the Bilgola Locality are located on steeply sloping sites upon which dwelling houses of 1, 2 and 3 storeys in height have been approved and constructed pursuant to the current PLEP and PDCP provisions.

In this regard, I notes that notwithstanding the building height breaching elements that a 1 and 2 storey built form presentation is achieved as viewed from the properties to the rear (west) of the site and a 3 storey articulated building form presentation to Allen Avenue consistent with the approved development at 2 – 4 Bilgola Avenue, Bilgola Beach, located to the south-west of the site, being a 3 storey dwelling house with an approved maximum height of 9.5 metres (DA2018/1877) as depicted in Figure 9.

The proposed design response where the dwelling steps back up the site to follow the slope of the land, is entirely consistent with that seen throughout the locality on sloping sites and does not result in any adverse impacts upon adjoining dwellings such that it could be said that the resultant development is not in harmony with surrounding development.

The significant setback maintained to Allen Avenue ensures that the non-compliant building height elements do not result in a development that will be perceived as inappropriate or jarring in a streetscape context as depicted in the perspective image at Figure 7 over page.



Figure 7 - Perspective image depicting the building presentation as viewed from Allen Avenue

The portions of the development that protrude above the 8.0m height plane do not result in a development that is incompatible with the height and scale of surrounding development with surrounding development able to coexist together in visual harmony.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, I have formed the considered opinion that most observers would not find the height or bulk of the proposed development offensive, jarring or unsympathetic in the streetscape context with the proposed building compatible with the height and scale of surrounding and nearby development.

Accordingly, this objective is achieved notwithstanding the building height breaching elements proposed.

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

Comment: In relation to shadowing impacts on adjoining properties I note that at least 3 hours of solar access is maintained to the main private open space and windows to the principal living area of adjoining properties including the southern adjoining property at 2 Allen Avenue noting that principal living area is defined at clause A1.9 of PDCP as the living room currently benefiting from the most solar access during midwinter.

The shadow diagrams demonstrate that whilst the non-compliant building height component of the development will contribute to shadowing of the rear paved courtyard at 9:00am that a significant portion of the rear courtyard area will remain in sunlight at this time.

No shadowing impact from the non-compliant building height component of the development occurs to the principal living room glazing at any time between 9am and 3pm on 21st June with no shadowing impact from the non-compliant component of the development occurring to the paved courtyard at the rear of the property after approximately 9:30am. At least 3 hours of solar access will be maintained to the principal living room glazing and adjacent main private open space between 9am and 3pm on 21st of June in strict accordance with the applicable PDCP control.

Under such circumstances, we are satisfied that this objective is achieved notwithstanding the building height non-compliant elements proposed.

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

Comment: I note that although clause C1.3 View Sharing of Pittwater 21 DCP adopts the planning principle established by the Land and Environment Court in the matter of *Tenacity Consulting v Waringah [2004] NSWLEC 140* that such planning principle must be considered in the context of the stated outcome associated with the DCP provision namely:

A reasonable sharing of views amongst dwellings.

This outcome seeks to ensure that view sharing is not only in relation to views available from surrounding properties but also views available from the subject property.

In this regard, I note that on 24 November 2015 the Land and Environment Court upheld an appeal and granting consent to the demolition of 2 existing dwelling houses and the construction of a new dwelling house across the consolidated allotment at 7-9 Allen Avenue, Bilgola Beach (DAN0450/17).

At the time of granting of the consent views were available from the subject property including the principal living room and adjacent terrace at the northern end of the dwelling between the dwellings located on 7 and 9 Allen Avenue towards the Ocean as depicted in the photograph at Figure 8. I note that this view was obtained directly across the front boundary of the property.

The view depicted in the photograph has been completely obscured by the approved dwelling house constructed on 7-9 Allen Avenue as depicted in Figure 9.



Figure 8 - Photograph of view available from the terrace at the northern end of the subject dwelling between the dwellings located on 7 and 9 Allen Avenue towards the Ocean prior to construction of the existing dwelling house on this adjacent property.



Figure 9 - Photograph showing existing view across the front boundary of the subject property from the principal living and northern terrace of the subject property.

I consider the view loss associated with the approval of DAN0450/17 to be appropriately described as devastating given that the views impacted were the only views obtained from the principal living areas and northern terrace area across the front boundary of the property. The retained views are predominantly obtained directly across the side boundary of the property and to that extent are vulnerable to impacts associated with development on the adjoining property.

Accordingly, in considering the acceptability of the building height breaching elements and associated view impacts on 8 and 10 The Serpentine I have given consideration to objective 4.3(1)(e) of PLEP and the stated outcome of the clause C1.3 P21DCP being the reasonable sharing of views amongst dwellings. That is, it is not an unreasonable proposition for any proposed dwelling house on the subject property to be designed and sited to achieve a reasonable view sharing outcome with surrounding dwellings and in doing so seek to regain some of the view lost across the front boundary of the property as a consequence of the dwelling house constructed at 7-9 Allen Avenue pursuant to DAN0450/17.

I note that the amended plans adopt an upper floor level from which views will be achieved across the front boundary and over the roof of the dwelling house constructed at 7-9 Allen Avenue to the ocean/ sky interface/ horizon. Although the proposed dwelling is located at a lower elevation to the dwellings at 8 and 10 The Serpentine the view obtained from the proposed upper level principal living and adjacent terrace areas will be commensurate with those obtained from the upper-level principal living and adjacent terrace areas of 8 and 10 The Serpentine as depicted in the view montages on plans DA4-06 to DA4-11 within the plan bundle.

Strict compliance with the building height standard would require the Level 3 east facing planter to be deleted and a flat roof 540mm lower than the roof perimeter currently proposed to be adopted. This would not only impact the design quality of the dwelling and internal amenity of the Level 3 floor plate but would also require the Level 3 floor level to be lowered by a similar amount. This would significantly impact the views available directly across the front boundary of the subject property towards the Ocean and water/ sky horizon beyond. It is the continuum of the horizon view which results in a whole view from the principal living area and adjacent open space of the proposed development is consistent with the views available from the principal living areas and adjacent open space of 8 and 10 The Serpentine.

An analysis of potential view impacts on surrounding having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 is as follows.

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

8 The Serpentine, Bilgola Beach

The views currently obtained from the upper-level principal living area and adjacent deck are depicted in Figure 10 below and include a whole view stretching from the headland at the northern end of Bilgola Beach in a southerly direction taking in views of the heritage listed street trees and the Ocean/ horizon over the roof of the existing dwelling house located on the subject property and further to the south across the side boundary towards Bilgola Beach and its surf zone and the heritage listed ocean pool and southern headland beyond.



Figure 10 - View available in an easterly direction from the upper-level principal living area and adjacent deck of 8 The Serpentine

Similar views are also available from the lower level lounge and bedroom and adjacent deck and rear yard as depicted in Figure 11 however the horizon view available across the rear boundary of the property is interrupted by the roof of the existing dwelling house located on the subject property.



Figure 11 - View available in an easterly direction from the lower level lounge, bedroom and adjacent deck and rear yard of 8 The Serpentine

10 The Serpentine, Bilgola Beach

The views currently obtained from the upper-level principal living area and adjacent deck are depicted in Figure 12 being a photograph contained within the Council assessment report. These views include a whole view stretching from the headland at the northern end of Bilgola Beach in a southerly direction taking in views of the heritage listed street trees, the Ocean/ horizon and wave zone over the rear boundary and over the roof of development located on the eastern side of Allen Avenue and further to the south across the side boundary and over the roof of the dwelling located on the subject property towards Bilgola Beach and its surf zone and the heritage listed ocean pool and southern headland beyond. I note that access was not made available to the upper-level principal living area of this dwelling however the views available from the deck as depicted below are likely to be consistent with those available from the principal living area of this property.

Similar views are also obtained from the lower level terrace, rear yard and adjacent internal rooms as depicted in Figure 13.



Figure 12 - View available from the upper-level deck of 10 The Serpentine



Figure 13 - View available from the lower level terrace of 10 The Serpentine

Second Step - From what part of the property are the views obtained

The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

8 The Serpentine, Bilgola Beach

The views are available from both a seated and standard position with the views impacted by the non-compliant building height elements available across the rear boundary.

10 The Serpentine, Bilgola Beach

The views are available from both a seated and standard position with the views impacted by the non-compliant building height elements available directly across the side boundary of the property from the lower level of the dwelling.

Third Step – Assessment of extent of the impact

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

8 The Serpentine, Bilgola Beach

The view montages on plans DA4-06 to DA4-11 depicted the view impact arising for the non-complaint building height elements from the upper level principal living and adjacent open space deck and the lower level of this adjoining dwelling. The relevant images are at Figures 14, 15 and 16.

These images demonstrate that the non-compliant component of the development will partially obstruct the view available across the rear boundary and over the roof of the existing dwelling house located on the subject property from the upper-level principal living area and adjacent deck with such impact limited to a small area of ocean view. The view impact is similar from a seated and standing position.

Given the totality of retained view including all critical view elements I consider the view impact to be appropriately described as negligible from a standing position and minor from a seated position.

These images also demonstrate that the non-compliant component of the development will partially obstruct the view available across the rear boundary and over the roof of the existing dwelling house located on the subject property from the lower level living, bedroom and adjacent deck with view impacts limited to an area of water/sky interface/horizon. I note that such view impact is compensated for through the opening up of the view corridor down the southern boundary of the property (given the demolition of the existing dwelling) such that there is no net loss of view.

Given the totality of retained view including all critical view elements I consider the view impact to be appropriately described qualitatively as negligible from both a standing and seated position.



Figure 14 - View impact from a standing position on the upper level balcony of 8 The Serpentine immediately adjacent to the principal living area of this property. The purple line shows the impact from the previously refused scheme.



Figure 15 - View impact from a standing position at the southern end of the upper level balcony of 8 The Serpentine. The purple line shows the impact from the previously refused scheme.



Figure 16 - View impact from a standing position on the lower level deck of 8 The Serpentine noting the view gain as consequence of the demolition of the existing pitched roof form shown in yellow. The purple line shows the impact from the previously refused scheme.

10 The Serpentine, Bilgola Beach

The view loss montages depicted the view impact arising for the non-complaint building height elements from the lower level terrace of No. 10 The Serpentine with my opinion that views from the upper level of this property are preserved.

Image 17 below confirms that from a standing position at the southern end of the lower ground floor terrace the proposal will have an impact on the views available directly across the side boundary and over the roof of the existing dwelling towards the sand at the southern end of Bilgola Beach although the view of the heritage listed rockpool is maintained.



Figure 17 - View impact from a standing position at the southern end of the lower ground floor terrace of 8 The Serpentine. The purple line shows the impact from the previously refused scheme.

I accept that the proposal will have some impact on views currently obtained across the side boundary from the ground floor level bedroom and adjacent terrace from both a standing and seated position however all critical view elements are maintained including the beach, the land water interface, the street trees and the heritage listed ocean pool.

Given the relative levels of the properties the views currently obtained from the upper-level principal living areas and adjacent balcony will not be impacted by the proposal from either a seated or standing position.

Whilst some foreground beach view impact will arise from the lower ground floor and adjacent terrace area such views are available directly across the side boundary of the property would be impacted by any development located on the subject property were it not for the previously excavated nature of the subject site.

Given the totality of views retained I consider the view impact to be qualitatively described as negligible from this level with nil impact on the views obtained from the upper-level principal living and adjacent terrace.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

Whilst I acknowledge that the view impacts are related to the non-compliant building height elements of the development, I note that the proposal would be fully compliant with the 8 m building height standard were it not for the existing excavated/disturbed levels of the land which distort the height of buildings development standard plane overlaid above the site when compared to the natural undisturbed topography of the land.

I note that the proposal does create a view corridor down the southern boundary of the property where the development sits below the 8 metre building height standard and where the existing pitched roof form which impacts views from the lower level of 8 The Serpentine is demolished.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the view sharing provisions at clause C1.3 PDCCP and the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140.

Notwithstanding the non-compliant building height breaching elements, the proposal achieves the objective of minimising view impact as demonstrated by the view sharing outcome achieved amongst development including views available from the subject property.

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

Comment: The proposed dwelling house utilises the excavated areas established by the existing dwelling house. The additional excavation is generally limited to that required to accommodate the proposed basement car parking level which ensures that adequate off-street carparking is provided in a manner which has minimal streetscape impacts and which responds to the general paucity of available on street parking given the high demand for parking associated with the site's proximity to Bilgola Beach.

It could be argued that the proposed dwelling is located wholly on the portion of the site where there is no natural topography remaining and accordingly this objective does not apply given the existing disturbed nature of the landform. That said, the design and siting of the development respond sensitively to the established topographical characteristics of the site with additional deep soil landscape opportunity established around the perimeter of the site to more closely resemble the natural/undisturbed topography of the land as it relates to landscape opportunity.

Under such circumstances, I am satisfied that this objective is achieved notwithstanding the building height non-compliant elements proposed.

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

Comment: The subject property is not located within a heritage conservation area. The façade of the development is well articulated, with a variety of materials utilised to ensure that the apparent size of the development is appropriately relieved, and landscaping is proposed around the perimeter of the dwelling and in upper level planters to soften and screen the built form. Overall, the proposed development has been designed to ensure that the visual impact of the development is appropriately minimised, with no adverse impacts upon the natural environment or nearby heritage listed street trees or ocean pool given the significant spatial separation between the building height breaching elements of the development, the street frontage and these heritage items.

Further, the building height breaching elements will not unreasonably obstruct views to and from the heritage items with any adverse visual impacts minimised through the creation of a view corridor down the southern boundary of the property. This objective is achieved notwithstanding the building height breaching elements proposed.

Having regard to the above, the non-compliant building height portions of the development will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the height of buildings standard. Adopting the first option in Wehbe, given the developments consistency with the objectives of the building height standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

The underlying objective or purpose would be defeated or thwarted if compliance was required

Objective 4.3(1)(e) of the height of buildings standard is as follows:

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

This variation request contains a detailed view analysis which demonstrates that strict compliance with the building height standard would prevent a view sharing outcome amongst dwellings.

In forming this opinion, I note that although clause C1.3 View Sharing of Pittwater 21 DCP adopts the planning principle established by the Land and Environment Court in the matter of *Tenacity Consulting v Waringah [2004] NSWLEC 140* that such planning principle must be considered in the context of the stated outcome associated with the DCP provision namely:

A reasonable sharing of views amongst dwellings.

This outcome seeks to ensure that view sharing is not only in relation to views available from surrounding properties but also views available from the subject property.

In this regard, I note that on 24 November 2015 the Land and Environment Court upheld an appeal and granting consent to the demolition of 2 existing dwelling houses and the construction of a new dwelling house across the consolidated allotment at 7-9 Allen Avenue, Bilgola Beach (DAN0450/17).

At the time of granting of the consent views were available from the subject property including the principal living room and adjacent terrace at the northern end of the dwelling between the dwellings located on 7 and 9 Allen Avenue towards the Ocean as depicted in the photograph at Figure 8. I note that this view was obtained directly across the front boundary of the property.

The view depicted in the photograph has been completely obscured by the approved dwelling house constructed on 7-9 Allen Avenue as depicted in Figure 9.

I consider the view loss associated with the approval of DAN0450/17 to be appropriately described as devastating given that the views impacted were the only views obtained from the principal living areas and northern terrace area across the front boundary of the property. The retained views are predominantly obtained directly across the side boundary of the property and to that extent are vulnerable to impacts associated with development on the adjoining property.

Accordingly, in considering the acceptability of the building height breaching elements and associated view impacts on 8 and 10 The Serpentine I have given consideration to objective 4.3(1)(e) of PLEP and the stated outcome of the clause C1.3 P21DCP being the reasonable sharing of views amongst dwellings. That is, it is not an unreasonable proposition for any proposed dwelling house on the subject property to be designed and sited to achieve a reasonable view sharing outcome with surrounding dwellings and in doing so seek to regain some of the view lost across the front boundary of the property as a consequence of the dwelling house constructed at 7-9 Allen Avenue pursuant to DAN0450/17.

I note that the amended plans adopt an upper floor level from which views will be achieved across the front boundary and over the roof of the dwelling house constructed at 7-9 Allen Avenue to the ocean/ sky interface/ horizon. Although the proposed dwelling is located at a lower elevation to the dwellings at 8 and 10 The Serpentine the view obtained from the proposed upper level principal living and adjacent terrace areas will be commensurate with those obtained from the upper-level principal living and adjacent terrace areas of 8 and 10 The Serpentine as depicted in the view montages.

Strict compliance with the building height standard would require the Level 3 east facing planter to be deleted and a flat roof 540mm lower than the roof perimeter currently proposed to be adopted. This would not only impact the design quality of the dwelling and internal amenity of the Level 3 floor plate but would also require the Level 3 floor level to be lowered by a similar amount. This would significantly impact the views available directly across the front boundary of the subject property towards the Ocean and water/ sky horizon beyond. It is the continuum of the horizon view which results in a whole view from the principal living area and adjacent open space of the proposed development is consistent with the views available from the principal living areas and adjacent open space of 8 and 10 The Serpentine.

Adopting the third option in Wehbe, strict compliance with the building height standard would defeat or thwarted objective (d) of the building height standard being to allow for the reasonable sharing of views. Under such circumstances strict compliance has been found to be unreasonable.

2.1.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

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.

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].

Sufficient environmental planning grounds

In my opinion, there are sufficient environmental planning grounds to justify the variation, as outlined below.

Ground 1 - Steep and artificially modified topography of the land

Sufficient environmental planning grounds exist to justify the height of buildings variation including the steep and artificially modified topography of the land which makes strict compliance difficult to achieve whilst distributing height and floor space in a contextually appropriate manner on this particular site.

In this regard, I note that the prior excavation of the site within the footprint of the existing building distorts the height of buildings development standard plane overlaid above the site when compared to the natural undisturbed topography of the land. When the original undisturbed levels of the site are interpolated across the building footprint the proposed development would generally comply with the 8 metre height standard as depicted in Figure 5.

Consistent with the finding of O'Neill C at paragraph 73 of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* such circumstance can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

Ground 2 - Appropriate distribution of building height to achieve a view sharing outcome amongst development

The proposed development has been designed to have a predominantly single storey appearance as viewed from the western adjoining properties to the rear of the site and to provide a view corridor down the southern side of the site where the proposal sits comfortably below the 8 m building height standard. The proposed Level 3 floor level facilitates a view sharing outcome amongst surrounding development from the principal living areas and adjacent open spaces.

Approval of the building height variation will allow for the reasonable sharing of views in accordance with objective 4.3(1)(d) of PLEP.

Ground 3 - The application of a reasonable degree of flexibility in relation to building height on a steeply sloping site within the Bilgola Beach Area

I note that the Bilgola Beach Area is the only area in which dwelling houses are permissible pursuant to PLEP where a maximum prescribed building height of 8 metres applies. That is, an 8.5 metre building height standard applies to dwelling houses located on land outside the Bilgola Beach Area with clause 4.3(2D) of PLEP providing a mechanism to enable dwelling houses to extend to a height of 10 m under certain circumstances including where the slope of the land exceeds 16.7 degrees or 30% as is the case with the subject property.

The combination of an 8 metre maximum building height and no concession for development on steeply sloping sites makes strict compliance with the building height standard more difficult than in other areas of the LGA.

I note that although a more onerous building height standard applies to development in the Bilgola Beach Area that Council has applied the standard with a degree of flexibility on sloping sites as demonstrated by Council's approval on 12 April 2019 of a new 3 storey dwelling house and detached workshop at 2 – 4 Bilgola Avenue, Bilgola Beach (DA2018/1877). This property is located to the south-west of the site and involved a building height breach of 1.5 metres or 18.75%. This dwelling was also approved with a roof terrace with the buildings three storey built form presentation to Bilgola Avenue depicted in the photograph at Figure 18.



Figure 18 - Photograph of the dwelling house under construction at 2 – 4 Bilgola Avenue with a 3 storey presentation and 9.5 metre maximum building height.

I confirm that this is not a comprehensive review of development data relating to surrounding properties however it does clearly indicate that Council has historically applied a reasonable degree of flexibility in relation to its application of the building height standard in its assessment of proposed development located on relatively steeply sloping sites within immediate proximity of the subject development site and within the Bilgola Beach area of the Bilgola Locality to which the 8 metre building height standard applies.

In expressing this opinion, I do not suggest the development standard has been abandoned but rather that building height has historically been assessed on a site-specific basis having regard to the topographical characteristics of the site and the acceptability of the proposal when assessed against the objectives of the standards.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

2.2 Conclusion

Pursuant to clause 4.6(4)(a) of PLEP 2014, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

28.11.24