

35 Ocean Road, Palm Beach

Clause 4.6 Variation to Clause 4.3(2) Height of Buildings

On behalf of
Bob and Margaret Rose
November 2020



1 Introduction

This Clause 4.6 Variation Request relates to the Development Application (**DA**) for 35 Ocean Road, Palm Beach (**subject site**), which proposes alterations and additions to the subject site and specifically to vary the development standard for maximum Height of Buildings under Clause 4.3(2) of the *Pittwater Local Environmental Plan 2014* (**PLEP 2014**).

This Clause 4.6 Variation Request demonstrates that compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such provides a better outcome on environmental planning grounds.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Achieves the objective of the development standard in Clause 4.3 of PLEP 2014;
- Achieves the objectives of the E4 Environmental Living zone under PLEP2014;
- Is consistent with the applicable and relevant State and Regional planning policies;
- Has sufficient environmental planning grounds to permit the variation; and
- Is in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the PLEP2014.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the PLEP 2014 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 enables a variation to the height standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has provided a written request that has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has provided a written request that has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objectives of Clause 4.6, which are:

1. providing flexibility in the application of the relevant control; and
2. to achieve better outcomes for and from development.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (**Wehbe**). An additional principle was established in the recent decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*) which was upheld by Pain J on appeal.

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court. It is noted, it also reflects the further finding by Commissioner O'Neill for *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSW LEC 1097 when the case was remitted back to the LEC as a Class 1 Appeal and the findings of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 as referred to in *Baron Corporation Pty Ltd v City of Sydney* [2019] NSWLEC 61 ("**Baron**").

Clause 4.6 of the PLEP 2014 reads as follows:

Clause 4.6 Exceptions to development standards

- (1) The objectives of this clause are 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.
- (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.
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
 - (a) that compliance with the development standard is **unreasonable or unnecessary in the circumstances of the case**, and
 - (b) that there are **sufficient environmental planning grounds to justify contravening the development standard**.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
 - (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately **addressed** the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be **in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out**, and

- (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (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.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (emphasis added)

3 The Development Standard to be varied

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of the maximum height of building development standard as set out in Clause 4.3 (2) of the PLEP2014. Clause 4.3 states:

4.3 Height of buildings

- (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.*

As identified on the PLEP 2014 Height of Buildings Map (see **Figure 1** below), the subject site has a maximum building height limit of 8.5 metres. The existing dwelling on site exhibits a sloped natural topography and existing non-compliance in height above the natural ground level.

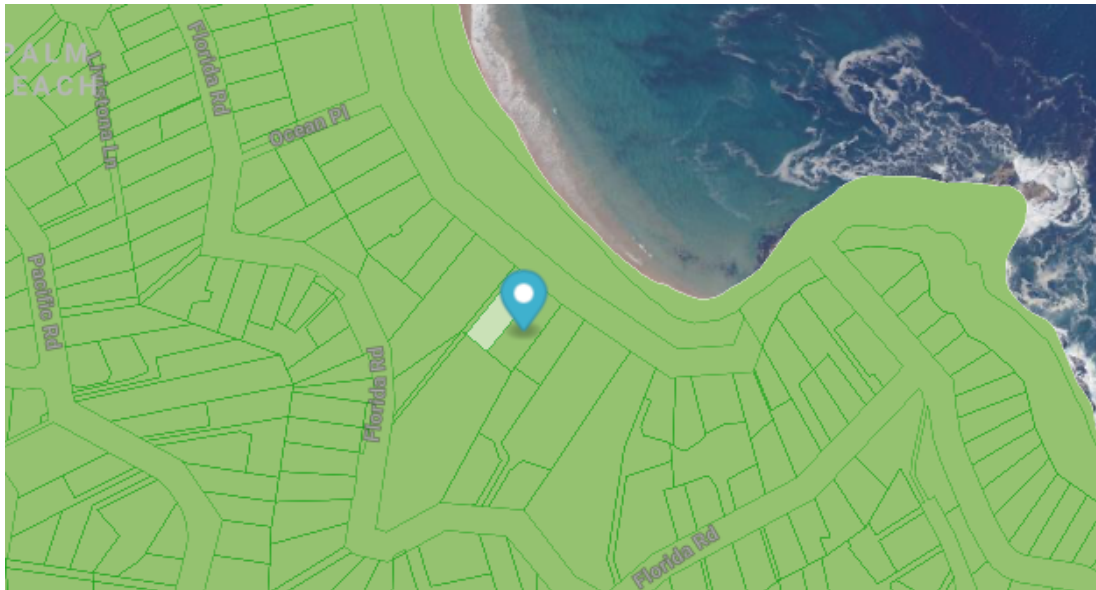


Figure 1. Height of Buildings PLEP2014 Map Extract.
Source: Mecone MOSAIC

4 Extent of Variation to the Development Standard

The proposed development largely maintains compliance with the 8.5m height control above ground level (existing). The proposed exceedance comprises works within an existing variance and will not change the existing built form. The only area of non-compliance as demonstrated on the Proposed Northern Elevation (Sheet DA.06) is the proposed extension of the copper roof associated with the enclosure of the sunroom and relocation of the existing weather-vane to the centre of the extended roof.

It is illustrated on the northern elevation plan below, that the existing roof comprises an existing non-compliance with the LEP height controls. The maximum height above natural ground level at boundary is 9.13m to the ridge of the sunroom extension. Due to the sloped nature of the site, the proposed enclosure of the sunroom will result in a maximum exceedance with the height control of by approximately 0.63m (7.14%). Despite the minor non-compliance with the control, all other works are contained within the 8.5m PLEP2014 height control and exhibit deep setbacks.

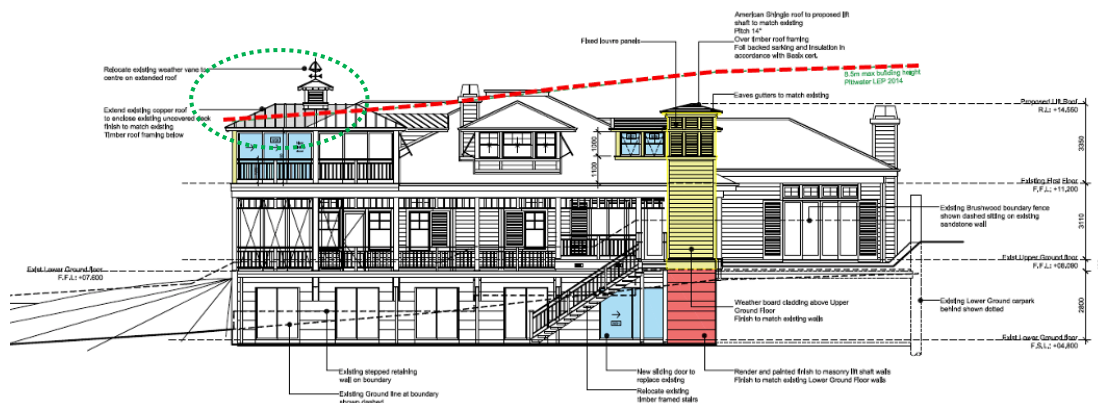


Figure 2. Proposed Northern Elevation – Red Indicating PLEP2014 height control and green indicating location of proposed exceedance (extract from DA.06)

Source: Rose Architectural Design

5 Objectives of the Standard

The objectives of the Clause 4.3 Height of Buildings are as follows:

- to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- to minimise any overshadowing of neighbouring properties,*
- to allow for the reasonable sharing of views,*
- to encourage buildings that are designed to respond sensitively to the natural topography,*
- to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

6 Objectives of the Zone

The objectives of the E4 Environmental Living zone are 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.*

7 Assessment

7.1.1 Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the height standard is unreasonable and unnecessary given the following;

- As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary.
- Furthermore, Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]–[51] outlined five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable and unnecessary which are summarised below:
 - **Test 1.** The objectives of the standard are achieved notwithstanding non-compliance with the standard;
 - **Test 2.** The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
 - **Test 3.** The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
 - **Test 4.** The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
 - **Test 5.** The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

These five ways to demonstrate that compliance is unreasonable or unnecessary are not exhaustive, and it may be sufficient to establish only one way.

With respect to the subject application, we consider that the proposed development meets the requirements of **Wehbe Test 1** and therefore compliance with the development standards are unreasonable and unnecessary.

Wehbe Test 1 - Objectives of the Height Control Standard

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

The PDCP2014 describes the Palm Beach locality as characterised as a low-density residential area with dwelling houses in maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. The proposed alterations and additions sit comfortably within the existing context without being visually dominant or prominent. The proposed exceedance is a result of the enclosure of the sunroom and associated extension to copper roofing. This extension to the sunroom roof shape and design will remain consistent with the existing dwelling and those in the surrounding area.

Consistent with the objectives of the DCP and locality, the works will not alter the existing approved use, density or the dwellings sympathetic contribution to the locality. The proposed exceedance comprises works within an existing variance and will not change the existing built form. Further, the works will also not alter the dwelling's portrayal as two storey dwelling from the public domain or neighbouring properties. The proposed alterations and additions are sought to improve the internal amenity and accessibility of site for the residents as so

they can age in place whilst designing around the natural constraints of the site. All building materials for the proposed works will match and complement the existing built and natural environment.

The proposed works has been carefully designed to ensure consistency in height and scale with the scale and character of the locality. The locality comprises a diverse range of architectural styles which vary in height and scale and that respond to the natural topography of the area. The proposed exceedance will not result in any additional amenity impacts to the neighbouring properties from what is currently approved on site.

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

- The proposed area of exceedance is consistent with the existing roof form and style and is largely a result of the natural sloped topography of the site.
- The area of exceedance stands below the existing development's ridgeline, will not result in any additional amenity impacts from what is approved and existing on site and will not result in loss of views.
- The proposed works will blend seamlessly with the existing built form materiality and design and will maintain the dwellings visual appearance, character and contribution as viewed from the public domain.
- The development will also maintain its appearance as a two (2) storey dwelling from the public domain consistent with the Palm Beach locality and DCP objectives.

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

The subject site comprises considerable setbacks from neighbouring properties and is surrounded by extensive and established landscaping. The proposed modest enclosure of the sunroom and its associated extension of the roofline will not result in additional overshadowing to neighbouring properties. Any overshadowing as a result of the works will be isolated to areas already shadowed or the subject dwellings existing roof. Therefore, the existing solar access to neighbouring properties will be maintained.

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

The proposed works respect views to and from the beach. The topography of the site comprises a steep gradient of slope towards the north-eastern boundary of the site and leading to the Palm Beach waterfront. The design has been carefully designed with consideration to the natural and existing topography of the site. The extension will retain the existing dwellings' two (2) storey appearance with design and materiality consistent with the existing. The works include the relocation of the existing weathervane. This will not alter the existing built form. The proposed roof extension includes works within an existing variance.

The proposed ridge of the extension remains below the primary ridgeline of the dwelling and in conjunction with the topography of the site and retention of all existing established landscaping on site, will not impact views from neighbouring properties to the south-west or east. Overall it is considered that the proposed modest works will maintain the reasonable sharing of views as is currently experienced.

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

As noted above, the topography of the site comprises a steep gradient of slope towards the north-eastern boundary of the site and leading to the Pam Beach waterfront. The design has been carefully designed with consideration to the natural and existing topography of the site. The proposed development currently exhibits minor exceedances with the 8.5m LEP height control as a result of the roof form and sloping gradient of the site. The design has minimised the extent of the exceedance with the LEP control whilst maintaining aesthetic consistency with the existing design and form.

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

The subject site is not listed as a Heritage Item. The site is located in the Ocean Road Heritage Conservation Area. These modest works will maintain the existing landscaping on site and will not impact the natural environment. A *Heritage Impact Statement* has been prepared and is attached in **Appendix 7** of the SEE.

The proposed works are modest in nature the very minor exceedance as a result of the roof extension will be of a materiality and design that is consistent with the existing on site as well as those in the vicinity. The works will set comfortably and seamlessly within the existing design and local context. The works will retain all existing landscaping on site and will not result in any significant or detrimental visual impacts of the development on the natural environment, and heritage conservation area and items.

In accordance with **Wehbe Test 1**, it is clearly demonstrated that the proposed development is able to comply with the objectives of the height of building control, notwithstanding the minor noncompliance with the numerical controls.

7.1.2

Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

As discussed above, *Pain J* held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate other environmental planning grounds that justify contravening the development standard, preferably grounds that are specific to the site. *Pain J* also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed.

On appeal, Leeming JA in *Four2Five vs Ashfield Council* NSWCA 248 acknowledged *Pain J*'s approach, but did not necessarily endorse it, instead restating *Pain J* and saying:

"matters of consistency with objectives of development standards remain relevant, but not exclusively so."

This approach was further reinforced by Commissioner O'Neill's determination of the subsequent *Initial Action Class 1 appeal* (LEC 2019 1097), where she stated that *"the environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (Initial Action [24]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (Initial Action [24]) ..."*

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by his Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act)."

The environmental planning grounds in support of the proposed development include that the proposed development allows for the orderly and economic use and development of the land (in accordance with the Objects of the *Environmental Planning and Assessment Act 1979*). Despite the existing breach of the numerical height controls, the proposed development is appropriate for its context in that:

- i. Similar to the findings of Commissioner O'Neill in Initial Action one of the justifying aspects of the proposal is that it maintains the existing scale of the development, which is consistent with the neighboring developments.
- ii. The proposed enclosure and extension to the rood will maintain the existing setbacks from the street and will not appear as another floor when viewed from the public domain. The sunroom space on this floor and the proposed windows will not create any additional visual, privacy or solar impacts on surrounding development when compared to the existing development and the balcony;
- iii. The enclosure of the existing balcony and resultant proposed sunroom space will not impact upon the character of the surrounding locality as the development is consistent with the building envelope and will maintain the existing appearance from Ocean Road;
- iv. The proposed exceedance comprises works within an existing variance and will not change the existing built form;
- v. The deep setbacks, ensure the proposal will not create any significant impacts with regard to overshadowing, privacy and view loss whilst accomplishing appropriate amenity and massing outcomes consistent with the streetscape when viewed from Palm Beach;
- vi. The proposed sunroom exhibits a ridge line lower than the existing development with deep setbacks and therefore will not be prominent when viewed from the public domain and neighbouring properties.
- vii. The proposed works are well considered and pay due respect to the heritage conservation areas, heritage items in the vicinity of the site and the natural environment;
- viii. The proposed modest works, which are not extensive, will provide improved utilisation, amenity and by offering a workable plan for the house as so the residents can age in place comfortably;
- ix. The proposed windows ensure that the dwelling utilises and maintains economically and environmentally sustainable methods of lighting;
- x. The design has been carefully designed with consideration to the natural and existing topography of the site;
- xi. The extension will retain the existing dwellings' two (2) storey appearance with design and materiality consistent with the existing;
- xii. The works include the relocation of the existing weathervane. This will not alter the existing built form. The proposed roof extension includes works within an existing variance.

- xiii. Utilising the existing balcony spaces within the development encourages the sustainable management and maintenance of built and cultural heritage; and
- xiv. Will promote good design and amenity of the built environment.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify contravening the development standards, as the development will deliver one of the key Objects of the Planning Act, by allowing for the promotion and coordination of the orderly and economic use and development of the land. In addition, it is noted that the proposed development will still produce a contextually appropriate outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions.

7.1.3 Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

1. As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;
 - i. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
 - ii. There are sufficient environmental planning grounds to justify contravening the development standard.
2. In accordance with the findings of Commissioner Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request adequately addresses the matters in Clause 4.6(3).

7.1.4 Clause 4.6(4)(a)(ii) - Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out?

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings:

1. Objectives of the particular standard
It has been demonstrated elsewhere in this report that the development achieves the objectives of Clauses 4.3, within the PLEP2014 notwithstanding the non-compliance with the standards.
2. The objectives for development within the zone in which the development is proposed to be carried out.

The site falls within the *E4 Environmental Living zone*. As outlined below the proposed development is in the public interest because it is consistent with the objectives of the *E4 Environmental Living zone*;

- i. *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The proposed development includes modest alterations and additions and utilization of existing building envelope in a manner that is respectful to the surrounding residential land uses and maintains the existing heritage conservation area value. The development will maintain the existing low impact residential development on site, aesthetic contribution and will not impact on the amenity of neighbouring properties or the natural environment.

- ii. *To ensure that residential development does not have an adverse effect on those values.*

The proposed alterations and addition will not have an adverse impact on the abovementioned values. The proposed modest alterations and additions are solely to improve the existing dwelling utilisation, accessibility and amenity for its residents to enable them to age in place. No changes are proposed to the existing landscaping. The works also will not result in additional amenity impacts such as overshadowing and view loss, compared to the existing. A *Heritage Impact Statement* has been prepared and attached in **Appendix 7** of the SEE, which demonstrates that the residential dwelling retains its contribution to the heritage conservation area and its associated values.

- iii. *To provide for residential development of a low density and scale integrated with the landform and landscape.*

The proposed development carefully considered then natural and existing topography on site. The alterations and additions have been carefully located respect the topography of the site, setbacks, overshadowing, views and landscape. The residential density, existing use and landscaping on site will remain unchanged as a result of the proposal.

- iv. *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.*

The proposed works will maintain all landscaping on site. Therefore, it is considered that the development retains and maintains the existing riparian and foreshore vegetation and wildlife corridors and presently comprised on site. The proposed alterations and addition will result in negligible impacts to the natural environment or the reserve on the northern boundary.

For all of the above reasons, the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the *E4 Environmental Living zone*.

8 Any matters of significance for State or regional environmental planning

The contravention of the height standard does not raise any matter of State or regional planning significance.

9 Secretary's concurrence

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). The PLEP2014 is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council unless the Council has requested it.

10 Conclusion to variation to height standard

This written request is for a variation to the height standard under Clause 4.6 of the PLEP 2014. The request justifies the contravention to the height standard in the terms required under Clause 4.6 of the PLEP 2014, and in particular demonstrates that the proposal provides a significantly better planning outcome with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Compliance with the height standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention, including;
 - Achieves the objectives of the development standards in Clause 4.3 of the PLEP2014;
 - It is in the public interest in being consistent with the objectives of the height standard and *E4 Environmental Living zone* under the PLEP2014;
 - It will deliver a development that is appropriate for its context despite the breaches to development standards and therefore has sufficient environmental planning grounds to permit the variation;
 - The building works proposed will largely maintain the existing scale and envelope and will remain consistent in scale with adjoining developments buildings;
 - The proposal will retain the heritage fabric contribution to the Conservation Area;
 - The proposal will increase the utility and amenity of the building and will increase the longevity of the residential dwelling whilst allowing the owners to age in place;
 - The proposal will not result in environmental impacts; and
 - There are no matters of State or regional planning significance and no public benefits in maintaining the height standard in this case.