

**APPENDIX**  
**CLAUSE 4.6 – HEIGHT OF BUILDINGS**  
**(Clause 4.4 PLEP 2014)**

**Prepared August 2024**

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

**81 PRINCE ALFRED PARADE, NEWPORT**

**FOR PROPOSED ALTERATIONS & ADDITIONS TO AN EXISTING DWELLING**

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

**For:** Proposed alterations and additions to an existing dwelling  
**At:** 81 Prince Alfred Parade, Newport  
**Owner:** Mr & Mrs K & J Hobbs  
**Applicant:** Mr & Mrs K & J Hobbs  
c/- VMDC Planning

## **1.0 Introduction**

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

## **2.0 Background**

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

The maximum building height in this portion of Newport is 8.5m.

The proposed additions and alterations to the second floor level of the dwelling will see the construction of a new roof over the existing second floor level north facing open deck to provide for weather proofing and solar protection to the upper floor level.

The existing maximum ridge level of the dwelling will remain unchanged.

The maximum height of the new roof over the upper floor level deck will be 10.687m, which presents a 2.187m or 25.72% variation to the building height development standard, when measured to the existing ground level within the site which in this instance is the excavated garage level which is an artificially lowered level through previous excavation for the lower ground floor level.

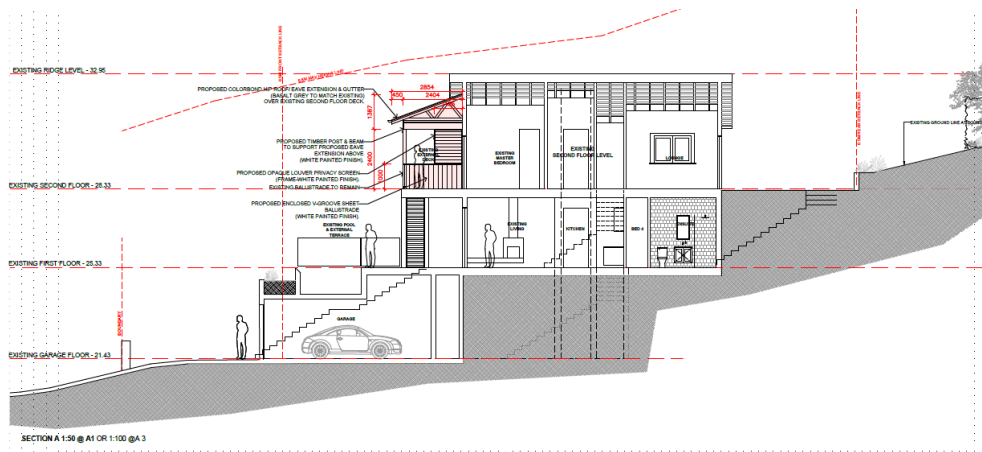
For the purposes of calculating the maximum building height, the existing excavated level within the site and in particular the excavated lower floor level has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].

When the excavated lower level is used as the reference point for the 8.5m height control, the proposed additions and alterations present a non-compliance with the maximum building height standard, having a height of up to 10.687m.

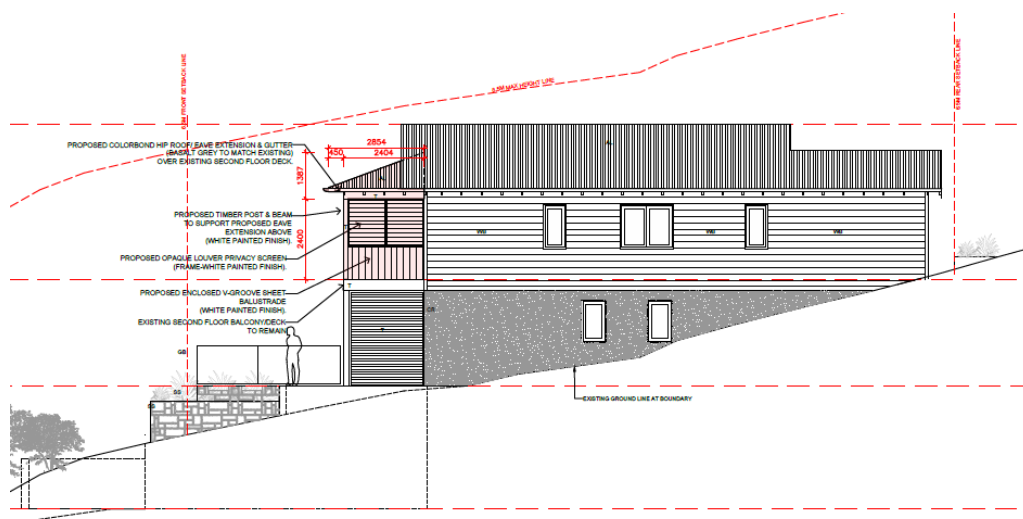
When measured above the external ground levels and in particular the western elevation where the new skillion roof rises to its highest point, the visual height of the building does not exceed 7.072m when viewed from the west and north. From the east and south, the building presents as a stepped two storey height.

The extent of the breach of the building height control is directly related to the extent and form of the existing development and the slope of the land to the north towards the road verge along Prince Alfred Parade.

The figures below notes the variation to the maximum height control and demonstrates the height levels for the new roofline based on the existing ground levels as shown on the plans.



**Fig 1: Building section indicating the height of the new works**



**Fig 2: Western elevation of new works**

The demonstrated building height variation is minor and restricted to only a small portion of the roof area of the roof over the north facing second floor level open deck and given the levels of the land, the works correspond with the sloping topography.

As noted in *Merman* [at 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 land, is considered to be an environmental planning grounds within the meaning of clause 4.6 (3)(b) of PLEP 2014.

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

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

## **2.1 Authority to vary a Development Standard**

In September 2023, the NSW Government published amendments to Clause 4.6 of the Standard Instrument which change the operation of the clause across all local environmental plans, including the Pittwater LEP. The changes came into force on 1 November 2023.

The principal change is the omission of subclauses 4.6(3)-(5) and (7) in the Standard Instrument Principal Local Environmental Plan.

The following changes have been made as a result of this:

- Clause 4.6(3) was amended such that the requirement to ‘consider’ a written request has been changed with an express requirement that the consent authority ‘be satisfied that the applicant has demonstrated’ that compliance with the development standard is unreasonable or unnecessary.
- Clause 4.6(4)(a)(ii) was amended such that the requirement that the consent authority must be satisfied that the proposed development in the public interest has been removed.
- Clause 4.6(4)(b) & 5 amended such that the requirement for concurrence from the Planning Secretary has been removed.

The objectives of clause 4.6 of the LEP, as amended, seek to recognise that in the particular circumstances of this case strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the development standard can be achieved as outlined below:

### *Clause 4.6 Exception to development standard*

*(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

**Note—**

The [Environmental Planning and Assessment Regulation 2021](#) requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

**Note—**

When this Plan was made it did not include all of these zones.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (caa) clause 5.5.

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

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

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

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

### 3.0 Purpose of Clause 4.6

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

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

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

#### 4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

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

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

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

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

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

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

Clause 4.6(2) of the LEP provides:

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

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

Clause 4.6(3) of the LEP provides:

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the maximum building height development standard pursuant to Clause 4.3 of PLEP which specifies a maximum building height of 8.5m in this area of Newport.

The proposed alterations and additions to the existing dwelling will accommodate a new roof over the existing second floor level north facing deck which will have a building height of up to 10.687m, resulting in a variation to the height standard of 2.187m. The additional roof over the existing open deck will maximise the solar protection and amenity for the owners increase weather protection to the dwelling

The proposed new roof is similar to other awnings over elevated decks in the immediate area.

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.

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

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

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

The specific objectives of Clause 4.6 are as follows:

*(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*

*(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the site will provide additions and alterations to the existing dwelling, which is consistent with the stated Objectives of the C4 Environmental Living Zone, which are noted as:

- *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.*

As sought by the zone objectives, the proposal will provide for a minor alterations and additions to an existing dwelling which are designed to accommodate the existing dwelling position, the sensitive water way location and the sloping topography of the locality.

The non-compliance with the building height control arises as a direct result of the sloping topography of the site and position of the existing dwelling over the previously excavated portions of the site. The site levels fall towards the road verge at the northern boundary, with the building height variation of the new upper floor level roof cover occurring as a direct result of the existing dwelling location over the excavated area of the site combined with the sloping nature of the site.

The proposal maintains a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes which will provide for high quality development that will enhance and complement the locality.

The proposed additions to the dwelling will not introduce unreasonable impacts on the existing views enjoyed by neighbouring properties, nor create unreasonable or adverse impacts to the existing levels of solar access or privacy enjoyed by adjoining dwellings.

Notwithstanding the non-compliance with the maximum building height control, the new works will provide an attractive addition to the existing residential development that will continue to maintain the building's contribution to the character and function of the local water way residential neighbourhood.

## 5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum building height standard contained in Clause 4.3 of PLEP.
- 5.2 Clause 4.3 of PLEP specifies a maximum building height of 8.5m in this area of Newport.
- 5.3 The proposed additions and alterations to the existing building and in particular the new skillion roof form over the second floor level open northern deck will see a height of up to 10.687m when measured above the excavated garage level, exceeding the height standard by 2.187m or 25.72%.

## 6.0 Relevant Caselaw

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:
  - 17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
  - 18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
  - 19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
  - 20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
  - 21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However,*

*this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of PLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be consistent with the objectives of Clause 4.3 and the objectives for development for in the C4 zone?
4. Where the consent authority is the Court, has the Court considered the matters in clause 4.6 when exercising the power to grant development consent for the development that contravenes Clause 4.3 of PLEP?

## **7.0. Request for Variation**

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

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

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

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings are compatible with the height and scale of surrounding and nearby development and her desired future character of the locality.

The surrounding area is predominantly characterised by two and three storey development corresponding with the sloping topography.

The proposal seeks to accommodate the new works within a compatible building form, with the slope of the site towards the north resulting in the new roof cover over the north facing open deck at the second floor level displaying a building height of 10.687m.

The uneven topography and excavated levels of the land of the land influence the requirement to seek a variation under Clause 4.6.

The land has a sloping topography from the rear towards the street boundary which together with the previous excavation of the site through the construction of the dwelling, influences the building height and roof elements which exceed the corresponding height plane.

In response to the site conditions, the open nature of the new work at the second floor level and the minimal extent of the new roof cover, together with the existing maximum ridge height of the building being within sure that the built form is consistent with the existing pattern of newer development in this portion of the southern side of Prince Alfred Parade.

Detailed solar access diagrams are provided to demonstrate that the proposed height variation does not create any unreasonable impact on solar access to adjacent land.

Accordingly, the building height is acceptable with regard to the streetscape when viewed in context with adjacent and nearby dwellings and when viewed from the public road level and nearby public.

By retaining the building's contribution to the local streetscape and its building heights and setbacks, the works will be consistent with the desired character of the Newport locality.

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

The proposed development maintains consistency with the height and scale of the existing building and the surrounding dwellings in the immediate vicinity. The proposal is a site-specific design response which takes advantage of the properties superior waterway locational attributes whilst respecting the environmental characteristics of the site and the amenity of adjoining development.

Whilst compliance with the height control is constrained by the sloping topography of the site in the form and heights of the existing building on the site, the development is considered appropriate and compatible within the locality and is therefore worthy of support.

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

The extent of the proposed overshadowing is reflected in the shadow diagrams submitted with the architectural package and which note that the height of the new works will not unreasonably affect the primary living spaces and outdoor areas of the adjacent neighbour to the south, with the proposal consistent with Councils solar access requirements.

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

The adjoining properties will continue to maintain their primary views to the north and north-west towards Pittwater.

The development has no unreasonable impact upon the existing views from further up slope of the site due to the higher placement/vantage point of these properties.

The proposal is therefore not considered to result in any unreasonable view loss for neighbouring properties.

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

The proposal includes a new roof cover over the existing open second floor level north facing balcony, with no increase in the overall which height of the building. The new roof over the deck will not add significant or bulky element to the building façade and will provide for important solar protection for the owners and weather protection to the building. As the floor levels and Ridge levels of the building remain unchanged, and the primary outlook for the adjoining neighbours is retained, the building will continue to present a compatible bulk and scale the locality. The works are considered to respond sensitively to the natural topography.

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

The proposed works will not see any further site disturbance, or loss of landscaped area. The site does not join any sites of heritage significance and the proposal is considered to be reasonable in this portion of Prince Alfred Parade and Bassett Street and the Newport locality.

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

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

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

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

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

- The height non-compliance can be attributed to the prior excavation of the site within the footprint of the existing building, which has distorted the height of buildings development standard plane overlaid above the site when compared to the topography of the existing land and this is considered to be an environmental planning grounds which supports the variation to the control.
- The non-compliance primarily arises as a result of historical excavation undertaken to provide for the lower floor level of the existing dwelling. In accordance with the findings of the NSW LEC in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, 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.

- Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSW LEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.
- The proposed development will maintain the general bulk and scale of the existing surrounding development and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed development will provide for improved amenity through the introduction of additional solar protection for the building occupants and weatherproofing to the dwelling within a built form which is compatible with the streetscape of Prince Alfred Parade which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The topography has influenced the design response of maintain the existing floor levels, side and front setbacks positions, overall building height and amenity considerations for waterway views in context with surrounding houses, which is consistent with the Objective 1.3 (g).
- The proposed development improves the amenity of the occupants and respects the current levels of privacy, amenity and solar access enjoyed by the surrounding properties by largely maintaining significant majority of the existing built form (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly when considering the bulk, height, setbacks and selected elements of the proposal have been designed in consideration to minimise elements that contribute to the height and scale of the upper level to ensure non-complying elements do not contribute to unreasonable views and overshadowing.

The previous excavation of the site and the consequent distortion of the height of buildings plane over the site when compared to the external levels and natural topography of the land is considered to be a constraint which impacts on the aspect of the development that contravenes a development standard, being the minor breach to the maximum building height control that is directly above the former excavation of the site.

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

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

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6*

*does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

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

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

- (a) Section 4.2 of this written request suggests the 1<sup>st</sup> test in Wehbe is made good by the development.
- (b) Each of the objectives of the C4 Environmental Living Zone and the reasons why the proposed development is consistent with each objective is set out below.

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

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

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

It is considered that notwithstanding the variation of to the building height control, the proposal which involves additions and alterations to the existing building will be consistent with the individual Objectives of the C4 Environmental Living Zone for the following reasons:

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

The proposed height variation does not offend this objective of the zone in that the use of the dwelling remains for detached housing and is provided for within a landscape setting that is compatible with the scale, density and pattern of surrounding development.

The proposed development has been sensitively designed in response to the architectural style of the existing dwelling and with regard to the amenity of neighbouring properties. The proposed development will not be antipathetic to the visual significance of the area and is of a scale that is consistent and compatible with surrounding dwellings.



The height variation does not impact the scenic setting of the site and the surrounding steep topography. The surrounding dwellings display similar architectural treatments including patio and balcony covers to provide for solar protection, that reflect the northern aspect and waterway locality, which characterise this area with special ascetic values.

It is considered that the development satisfies this objective.

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

The proposed development does not result in any adverse impacts upon the scenic quality of the locality and has been designed to be safe from the natural hazards that affect the site. The dwelling is highly articulated, and is to be finished in earthy tones, and natural materials to blend with the surrounding environment.

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

The proposed development remains a single dwelling house, that is appropriately integrated into the slope of the land.

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

The site is not identified as being located within a wildlife corridor and there are no works proposed at the ground level, with all works over the existing building footprint. No trees will be removed to accommodate the proposed roof over the second floor level open balcony.

#### **7.4 Has the Council considered the matters in clause 4.6 of PLEP?**

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the minor additions to the existing dwelling within the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development complies with the objectives of the development standard and the objectives of the zone, there is no significant public benefit in maintaining the development standard.

## **8.0 Conclusion**

This development proposed a departure from the maximum building height development standard, with the proposed alterations and additions to the existing dwelling to provide a maximum building height of 10.687m which is a variation to the standard of 2.187m or 25.72%.

This variation occurs as a result of the existing excavation, sloping topography of the site, and the inclusion of the new roof form to the second floor level north facing open deck.

The proposed development does not adversely impact the Pittwater waterway area or neighbouring properties and will substantially improve the amenity of the existing dwelling.

The unique site constraints provide sufficient environmental planning grounds to justify contravening the development standard.

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

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

A handwritten signature in black ink, reading 'Vaughan Milligan'. The signature is written in a cursive, flowing style.

**VAUGHAN MILLIGAN**

*Town Planner*