

17th December 2020

Chief Executive Officer
Northern Beaches Council
725 Pittwater Road
DEE WHY NSW 2099

BY EMAIL AND POST

Dear Chief Executive Officer

**9 WANDEEN ROAD CLAREVILLE
DEVELOPMENT APPLICATION
DEMOLITION OF EXISTING DWELLING HOUSE AND ERECTION OF
NEW DWELLING HOUSE**

We act for the owners of No. 9 Wandeen Road, Clareville ('the site') in connection with the making of a development application (the 'development application') seeking consent to the demolition of the existing dwelling house and erection of the new dwelling house (the 'proposed development').

BACKGROUND

The development application seeks consent from Council, as consent authority, for the carrying out of the proposed development.

More specifically, the proposed development is as follows:

- the demolition of the existing dwelling house and garage;
- the construction of a new stone retaining wall;
- the erection of a new dwelling house including;
 - double understory garage with storage and wine cellar;
 - three first floor bedrooms with one ensuite and one shared bathroom;
 - a media room;
 - a study;
 - a laundry room and linen press;

- an open-plan living and dining room with kitchen, pantry and shared bathroom;
- a master suite with ensuite and walk-in wardrobe;
- a second-storey courtyard with plunge pool;
- planter boxes with trailing plants; and
- the carrying out of extensive landscaping.

For additional information relating to the proposed development, please refer to the architectural plans and landscaping plan that shows the proposed new dwelling house, and detailing of the proposed floor layout and which accompanies the development application.

This present document is a written variation request submitted under clause 4.6 of *Pittwater Local Environmental Plan 2014* ('PLEP') in relation to the proposed development.

1.0 INTRODUCTION

Clause 4.3 of PLEP controls the height of buildings.

The site is within Area 'I'; as shown on, relevantly, PLEP Height of Buildings Map – Sheet HOB_010.

Area 'I' provides for a maximum building height of 8.5m pursuant to clause 4.3(2) of PLEP. See below extract from PLEP.

(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.

Provided all of the requirements of clause 4.3(1) are satisfied—in that regard, the development may exceed a height of 8.5m. In this case the relevantly applicable maximum height development standard is 8.5m, subject to the application and operation of clause 4.6 of PLEP.

In the case of the proposed development, the proposal results, in a maximum building height of 9.3 metres, which is an exceedance of 9.41%.

2.0 REQUEST TO VARY A DEVELOPMENT STANDARD

This variation request under clause 4.6 of PLEP has been prepared by Turnbull Planning International Pty Limited on behalf of our client.

The development standard sought to be varied is the height of buildings control contained in, relevantly, clause 4.3(2) of PLEP 2014.

The request is submitted to Council in connection with, and in support of, the development application and is to be read in conjunction with the statement of environmental effects ('SEE') prepared by our firm dated December 2020 and submitted to Council in support of and to inform the development application. The SEE deals with the impacts of the development proposal in detail, indicates measures to mitigate those impacts, and provides details relating to the relevantly applicable statutory planning regime and compliance with the relevant planning controls and objectives.

Clause 4.6 of PLEP allows Council to grant consent for development even though the development contravenes a development standard imposed by PLEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 of PLEP 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 adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant 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 objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court of New South Wales has provided judicial interpretation and clarification of the matters to be addressed in relation to 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 ('*Winten*').

The *Winten* test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 ('*Wehbe*'). These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments. Accordingly, this

clause 4.6 variation request is set out using the relevant principles established by the Court.

More recently, the NSW Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 has had some very important things to say about the use and construction of clause 4.6. That case, and some others, are discussed in section 5.2 of this document.

3.0 DEVELOPMENT STANDARD TO BE VARIED

Clause 4.3 ('height of buildings') of PLEP establishes the maximum height of a building permitted for all development.

As mentioned above:

- According to clause 4.3.(2) of PLEP the property is identified to be within the 8.5m maximum permissible building height.
- In the case of the development proposal, the proposal results in a maximum building height of 9.3 metres. This results in an exceedance of 9.41% of the max HOB control.

On face value, and looked at solely in numerical terms, the departure from the height of buildings development standard is not minor or de minimis. However, for the reasons, and grounds, set out in this document, the numerical departure should not in and of itself, be a good reason for requiring strict compliance with the standard.

Furthermore, we submit that this written request justifies the contravention of the standard by demonstrating, firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard.

Additionally, the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 'Environmental Living' zone in which the development is proposed to be carried out.

4.0 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD?

Development Standard is defined under section 4(1) of the EPA Act as follows:

development standards mean provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are

fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

...

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

The height of building standard prescribed under clause 4.3(1) of PLEP is clearly, demonstrably and unambiguously a development standard, being, relevantly, a provision of an environmental planning instrument (viz PLEP) in relation to the carrying out of development, being a provision by which a requirement is specified in respect of an aspect of that development, the *aspect* of the development being the *height* of a building on the land upon which the development is proposed to be carried out.

An essential condition of the definition of development standard is that the requirements specified, or standards fixed in respect of any aspect of the development must be requirements or standards which, *ex hypothesi*, are **external** to the aspect(s) of that development: see *Woollahra Municipal Council v Carr* (1985) 62 LGRA 263 at 269-270 per McHugh JA. That is the case here.

We respectfully submit, based on the information contained in this request and in the other probative material furnished to Council as part of the development application and the application for review, that:

- Council may be satisfied (that means in law, 'reasonably satisfied' [see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ]) that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor (refer clause 4.3(1)PLEP); and
- the objectives set out in clause 4.3(1) of PLEP are satisfied.

5.0 JUSTIFICATION FOR CONTRAVENTION OF THE STANDARD

Clause 4.6(3) and (4) of PLEP set out the matters to be satisfied as respects any clause 4.6 written request. Those matters will now be considered and discussed, in light of the relevantly applicable case law.

5.1 Clause 4.6 of PLEP and applicable case law

Clause 4.6(3) and (4) of PLEP are as follows:

- (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.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the Land and Environment Court and the NSW Court of Appeal in *Wehbe* and *Four2Five*.

The relevant matters contained in clause 4.6 of PLEP, with respect to the development standard contained in clause 4.3(1) of PLEP, are each addressed below, in light of the abovementioned Court decisions.

5.2 Relevant Case Law on Clause 4.6

***Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248**

This landmark decision of the NSW Court of Appeal was an appeal from a decision of a judge of the NSW Land and Environment Court's decision, the latter having been an appeal from a commissioner of that Court.

The case upheld Commissioner Pearson's original decision in regard to clause 4.6, however the Court of Appeal interpreted the approach taken by the commissioner differently to that of Pain J, in the Land and Environment Court. In doing so, the decision largely confined Commissioner Pearson's decision to the particular facts of that case, and the particular exercise of discretion by the Commissioner.

In the original decision Commissioner Pearson had refused the request to vary the standard, principally on the basis that:

- the claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds as required by clause 4.6(3)(b) because they were *not particular to the site*; and

- the obligation on the applicant to demonstrate that *compliance with the standard was unreasonable or unnecessary* had to be fulfilled separately (i.e. in addition to) to the obligation to demonstrate that the proposed was consistent with the objectives of the standard, which Four2Five had failed to do.

Four2Five then appealed the commissioner's decision to a judge of the Land and Environment Court (Pain J), essentially arguing that the commissioner set the bar for a well-founded clause 4.6 variation request too high. However, Pain J dismissed Four2Five's appeal and endorsed the commissioner's approach to clause 4.6.

On the first ground of appeal Pain J held that the commissioner had a broad discretion under clause 4.6(4)(a)(i) and that there was no specific limitation on that discretion. The commissioner was entitled to require the variation request to identify circumstances particular to the site.

On the second ground of appeal, Pain J held that commissioner was correct in requiring the variation request to demonstrate consistency with the objectives of the standard *in addition to* consistency with the objectives of the standard and zone.

The matter then went on appeal to the NSW Court of Appeal.

Firstly, Leeming JA in the Court of Appeal:

- did not agree that the commissioner's decision in *Four2Five* proceeded on the basis that establishing that compliance with a standard is '*unreasonable or unnecessary*' in clause 4.6(3)(a) must necessarily exclude consideration of consistency with the objectives of the development standard and the objectives for development in the zone; and
- considered that Commissioner Pearson's decision was that '*consistency with objectives remained relevant, but not exclusively so*' (at [16]).

Secondly, while Leeming JA found no error in the approach taken by the Commissioner in relation to her dissatisfaction with the environmental planning grounds relied upon, that was a matter for the Commissioner *on the facts of the particular case and not a general principle*. Leeming JA said (at [16]):

It is sufficient to state that no error, and certainly no error of law, is disclosed...It is clear that the Commissioner approached the question of power posed by subclause [4.6] (3)(b) on the basis that merely pointing to the benefits from additional housing and employment

opportunities delivered by the development was not sufficient to constitute environmental planning grounds to justify contravening the development standards *in this case* ...

Moskovich v Waverley Council [2016] NSWLEC 1015

In *Moskovich* a commissioner of the Land and Environment Court applied the Court of Appeal's approach in *Four2Five*, apparently confirming a greater flexibility as respects the availability and use of the facility afforded by clause 4.6.

The case concerned an application to demolish two existing residential flat buildings and construct a single residential flat building on a site within zone R3 Medium Density Residential under Waverley LEP 2012. The application sought to vary the floor space ratio ('FSR') applying to the site. Moskovich submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. Moskovich further submitted that there were 'sufficient environmental planning grounds' to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes.

The Court approved the application and in doing so agreed with Moskovich's justification for the FSR variation. Consistent with the decision in *Four2Five* the Court agreed that the public interest test (in cl 4.6(4)(a)(ii)) is different to the 'unreasonable or unnecessary in the circumstances of the case' test (in cl 4.6(3)(a)).

The Court said that 'the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]'. The Court found that additional reasons applied in this case.

In *Moskovich*, the Court adopted the high threshold endorsed by the Court in *Four2Five* and found that Moskovich's variation request met that standard.

Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

Micaul is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Council claimed that the commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate

reasons. The Council also claimed that the commissioner failed to consider a requirement of a Development Control Plan. Essentially the Council argued that the commissioner set the bar too low for the clause 4.6 variation request.

The Court dismissed the appeal and in doing so endorsed the commissioner's approach to clause 4.6. The Court held that the commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgement that she was satisfied the proposal satisfied those tests.

The degree of satisfaction required under clause 4.6(4) was essentially a matter for the commissioner. The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the *Standard Instrument* does not require the consent authority to be satisfied directly that compliance with *each* development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed those matters.

The Court's decision in *Micaul* lessens the force of the Court's earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone. Furthermore, the decision is an example of discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the commissioner was satisfied that the variation was justified. This is by no means a criticism of the commissioner's reasons, but an example of how the satisfaction threshold may vary from one decision maker to another.

5.3 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe* Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which it is possible to demonstrate that compliance with a particular development standard is unreasonable or unnecessary. However, it was not suggested that the types of ways were a 'closed' class.

While *Wehbe* related to objections made pursuant to SEPP 1, the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 and this was accepted by the Court in the *Four2Five* case.

As the language used in subclause 4.6(3)(a) of the Auburn LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five ways (or methods) outlined in *Wehbe* are as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance were required and therefore compliance is unreasonable.
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

It is important to emphasise that *Wehbe* makes it unambiguously clear that an objection submitted – in this case, the present clause 4.6 written request – does not necessarily need to satisfy all of the tests referred to above. It is a common misconception that all 5 ways or methods must be satisfied. That is **not** the case at all. One way will suffice.

Of particular assistance in this matter in establishing that compliance with a development standard is unreasonable or unnecessary is the first method, namely, that the objectives of the standard are still achieved notwithstanding non-compliance with the standard. That is the method used in this request.

In accordance with the provisions of clause 4.6 of PLEP and the decision in *Wehbe*, this written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, 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.

5.3.1 The underlying objectives or purposes of the development standard

Clause 4.3(1) of PLEP is as follows:

(1) The objectives of this clause are as follows:

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

5.3.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives specified in clause 4.3(1), of PLEP will be addressed *seriatim*.

Objective 4.3(1)(a)

This objective seeks to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality.

Comment:

In terms of bulk, scale and environmental impact, the built form will not change appreciably as a result of the proposed development and will continue to be consistent with the desired character of the locality in that it provides articulation of the built form and maintains view corridors. The building itself is consistent with the desired character of the locality and is a design example that 'fits' the precinct bearing in mind designs are eclectic.

Objective 4.3(1)(b)

This objective seeks to ensure that buildings are compatible with the height and scale of surrounding and nearby development.

Comment:

The built form of the new dwelling house as proposed to be altered will be compatible with the scale of surrounding and nearby development. The new dwelling house will only be slightly above control due to the natural slope of the site. The proposed eastern balcony covering the

alfresco dining area will be the only section of the proposed dwelling that lies above the maximum building height, numerically speaking, by 0.8m. The main part of the encroachment will be parapets and built elements of the dwelling.

As this space is not fully enclosed, it will easily blend into the surrounding landscape. Also, consequent of the topography of the area, the neighbouring No 13 Wandeen Road appears significantly higher than the proposed dwelling, while No 219 Hudson Parade appears lower. Therefore, and despite its height exceedance, the proposed dwelling will reflect the slope of the streetscape and will therefore be compatible with the height and scale of surrounding development.

Objective 4.3(1)(c)

This objective seeks to minimise any overshadowing of neighbouring properties.

Comment:

As the bulk of the proposed development is mainly concentrated toward the rear boundary of the site, great care has been taken to ensure that western overshadowing impacts to neighbouring properties is minimised. The open balcony-style alfresco dining area, where the height exceedance occurs, allows light to penetrate through the house to the private open spaces of Nos 219 and 221 Hudson Road. With generous side setbacks and a compliant front setback this assists in minimising overshadowing issues on the surrounding neighbours.

A complete and detailed analysis of the potential overshadowing impacts upon neighbouring properties is presented in the shadow diagrams and perspective drawings within architectural masterplans. They highlight that the overshadowing impacts will be minimal and will not greatly undermine the amenity of neighbouring dwellings. Furthermore, the adjoining properties will receive the required amount of sunlight under the PDCP.

Objective 4.3(1)(d)

This objective seeks to allow for the reasonable sharing of views.

Comment:

The proposed development will not materially affect the views from any neighbouring properties. The design of the building is such that all existing views from adjoining properties will be maintained.

The proposed development will not materially affect views from any neighbouring properties. The nature of the sloping site, as well as the existing natural landscaping (which is to be further improved through extensive weed removal), ensures that existing views from adjoining properties are maintained.

It is important to note that due to the orientation of No 221 Hudson Parade Clareville (the property to the rear), living spaces, windows and building bulk, the current proposal is not expected to impact on the right of its residents for adequate view sharing. As the view aspect of No 221 Hudson Road faces towards the south across refuge cove whilst the view aspect of No 9 Wandeen Road looks north towards Tailors Point, there will be no impact on the view corridor.

When considering the potential impacts of the proposal on neighbouring properties at No 219 Hudson Parade and No 13 Wandeen Road, the site has been designed to have generous side setbacks and a compliant front setback to maintain view corridors to the north. The corresponding east and west aspects maintain adequate separation for appropriate view sharing of Pittwater. It is also important to note that the aspect for No 13 Wandeen Road will not be impacted as it is sited on the upper side of the slope from the subject property and, as such, views will not be affected due to the gradient variance.

The adjoining and adjacent properties will maintain their water views of Tailors point and the greater Pittwater Basin. In our opinion, the application is consistent with the planning principle established within *Tenacity Consulting v Warringah Council (2004)* NSWLEC 140 ('Tenacity').

Objective 4.3(1)(e)

This objective seeks to encourage buildings that are designed to respond sensitively to the natural topography.

Comment:

The proposed development has been designed to respond to what are demonstrably complex and challenging site constraints. The design responds to the context in which the site is located.

More importantly, the proposed development will not dominate the natural environment, being built to a scale that respects the existing remnant bushland and the Spotted Gums. Existing native landscaping has been retained wherever possible and will be reinforced with additional native planting to allow for and accommodate an integrated landscaped setting which responds to the objectives of PDCP.

The proposal reflects the established built form character of the immediate area where multi-level dwellings predominate, due to the sloping topography of the land. The new dwelling house has been set back to conform with the streetscape character, thus preserving as far as possible the natural landscape and existing ecological communities, and the carrying out of the proposed development will not alter that state of affairs.

The new development also respects the natural ground line and does not contain a ground floor below NGL.

Objective 4.3(1)(f)

This objective seeks to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Comment:

The site is not located in a heritage conservation area nor is there a heritage item on or near the site. The site is not listed in Schedule 5 ('Environmental heritage') to PLEP nor is listed within the NSW Atlas of Aboriginal Places. The design of the new building encourages the natural development of native vegetation growing around and on the house. It will therefore blend with the surrounding environment which the building takes place.

Now, what is 'minor' is a question of fact and degree. Each case must be considered as regards its own circumstances.

In paragraph 3 of Circular B1 from the former Department of Planning, the Department stated:

As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small ***in others it may be numerically large***, but nevertheless be consistent with the purpose of the standard. [*Emphasis added*]

We respectfully submit that the words of the Department quoted above are especially relevant to the numerical departure in this case. In this case, the departure could be seen to be 'numerically large'. However, in and of itself, that is *not* a good reason, in planning terms or law, for rejecting a clause 4.6 written request.

Now, there is a commonly held view to the effect that any variation of a development standard greater than 10% cannot be approved under

SEPP No 1 or clause 4.6. This view is not generally or ordinarily correct, although it does apply in respect of that category of clause 4.6 variation where subdivision into 2 or more lots is proposed in certain zones (refer clause 4.6(6) of PLEP).

In considering whether the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, regard must be had, not to the quantum of the numerical departure itself, but to the quantum (i.e. 'portion') of the building above the maximum height shown for that land on the Height of Buildings Map and whether that portion is minor.

In all the circumstances, we respectfully submit that Council can be reasonably satisfied that the *portion* of the building above the maximum height shown for that land on the Height of Buildings Map is minor.

Concluding comments as regards the relevant clause

In short, the development is consistent with all of the abovementioned objectives of the standard. In addition, the matters that need to be satisfied by virtue of clause 4.3(1) of PLEP are also satisfied.

The proposed development demonstrates a better planning outcome within the otherwise permissible planning controls, and in light of the site constraints, as the height of the build form will respect all the objectives in clause 4.3(1).

5.3.3 Consistency with the aims of PLEP

Compliance with the height of buildings development standard is also considered to be unreasonable in these circumstances given that the proposed development supports the achievement of a number of the aims of PLEP.

PLEP aims to make local environmental planning provisions for land in Pittwater in accordance with the relevant standard environmental planning instrument under section 33A of the *Environmental Planning and Assessment Act 1979* (NSW): see clause 1.2(1), PLEP.

The particular aims of PLEP are as follows (refer clause 1.2(2), PLEP):

- (a) to promote development in Pittwater that is economically, environmentally and socially sustainable,
- (b) to ensure development is consistent with the desired character of Pittwater's localities,
- (c) to support a range of mixed-use centres that adequately provide for the needs of the Pittwater community,

- (d) to retain and enhance land used for employment purposes that is needed to meet the economic and employment needs of the community both now and in the future,
- (e) to improve access throughout Pittwater, facilitate the use of public transport and encourage walking and cycling,
- (f) to encourage a range of housing in appropriate locations that provides for the needs of the community both now and in the future,
- (g) to protect and enhance Pittwater's natural environment and recreation areas,
- (h) to conserve Pittwater's European and Aboriginal heritage,
- (i) to minimise risks to the community in areas subject to environmental hazards including climate change,
- (j) to protect and promote the health and well-being of current and future residents of Pittwater.

The proposed development will be environmentally sustainable (cf clause 1.2(2)(a)), will be consistent with the desired character of Pittwater's localities (cf clause 1.2(2)(b)), provides housing in an appropriate location (cf clause 1.2(2)(f)), and protects Pittwater's natural environment by preserving the existing natural landscaping and further enhancing and embracing it (cf clause 1.2(2)(g)). The building footprint is set back to reduce the overall impression of bulk and scale and to protect the Pittwater Spotted Gum Endangered Ecological Community.

Even though the aims of PLEP are quite broad and do not provide a site-specific justification for the contravention of the building height development, that is entirely irrelevant. The question of consistency with the aims of PLEP does not require that there be an aim providing for a site-specific justification for the contravention of the building height development.

In our opinion, the proposed development is consistent with such of the aims of PLEP as are of relevance to the development.

5.4 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

At the risk of repeating ourselves, the proposed development is consistent with such of the aims of PLEP as are of relevance to the development: see section 5.3.3. of this document. That, in and of itself, constitutes a good environmental planning ground justifying a contravention of the maximum height of buildings development standard contained in clause 4.3(1) of PLEP.

Another appropriate environmental planning ground justifying a contravention of the development standard in this instance is that there is no demonstrable public benefit in maintaining the development standard (cf cl 4.6(5)(b)) in this instance.

To strictly enforce the standard in this instance would prevent the carrying out of an otherwise well-designed, sympathetic and attractive development

which is eminently suited to the site and the Avalon Beach Locality and which would result in an absence of environmental 'dis-benefits' as regards the local precinct.

Further, in line with Council recommendations to retain Spotted Gums on the site, the developable area of the site is significantly reduced, justifying the provision of additional floor space on higher levels to meet the needs of residents.

In short, we respectfully submit that there would be no practical utility in enforcing strict compliance with the development standard in this particular case.

In our opinion, all of the above constitute good environmental planning grounds to justify contravening the height of buildings development standard, in this particular instance.

5.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

The two aspects of this matter will be addressed *seriatim*.

5.5.1 Consistency with objectives of the development standard

Please refer to section 5.3.2 of this document.

5.5.2 Consistency with objectives of the zone

The E4 zone objectives under PLEP are as follows (refer land use table, E4 zone, item 1):

- 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.

In our opinion, the development proposal is consistent with such of the zone objectives as are relevance to the subject-matter of the proposal.

The objectives will be addressed *seriatim*.

Objective 1

The proposed development will be low-impact and has been designed to respond sensitively to the natural environment. The dwelling house will provide residential amenity without causing material environmental impacts to neighbours or to the site itself.

The proposal will provide tangible improvements in landscape quality and result in the construction of a high-quality dwelling house which will be integrated into the locality and will have its own unique character.

The design of the proposed dwelling house responds to the slope of the land as well as the natural environment. Amenity to adjoining properties is maintained and any view loss is kept to a minimum. The bulk and scale of the dwelling house respects the natural fall of the land and the non-compliance is considered acceptable on the merits for the reasons, and on the grounds set out above.

As such, the development is consistent with this stated objective.

Objective 2

The development will not have an adverse effect on any special ecological, scientific or aesthetic values. The design of the proposed dwelling house responds to the slope of the land and the natural environment. The proposed dwelling has been designed to have a minimised impact on the area's values. This can be seen through a built form that has been integrated into the existing landscaping features and provides compatibility with the surrounding eclectic residential built forms. The development incorporates 'regenerative development' principles and maintains and enhances wildlife corridors and riparian areas, specifically improving the Pittwater Spotted Gum Ecological community.

Landscaping will be integrated into the building design to soften the built form when viewed from the street. The natural landscaped bushland to be brought into the subject property will ensure that the proposed dwelling house sits within a natural setting below the tree canopy, thereby reinforcing the desired character of the locality.

As such, the development is consistent with this stated objective.

Objective 3

The development will be of low density and scale, will be integrated with the landform and landscape and has been designed to respond to what are demonstrably difficult constraints. The design is open and responding to the natural context in which the site is located.

The development will not dominate the natural environment, being built to a scale that respects the existing bushland setting. Existing significant existing trees will be retained and will allow for and accommodate an integrated landscaped setting.

Privacy, amenity and solar access are provided for within the proposed development, with negligible impact on surrounding residences.

As such, the development is consistent with this stated objective.

Objective 4

The development will retain, replace and enhance riparian and foreshore vegetation and wildlife corridors on the site. The development application is accompanied by an Arboricultural Impact Assessment Report and Biodiversity Impact Assessment which details all options to avoid, minimise and offset impacts of the proposal upon the natural environment.

The proposal has been designed to avoid the removal of the listed endangered ecological community, specifically Tree 5, to maintain as much native vegetation as possible and to further enhance site landscaping by planting listed native species.

As such, the development is consistent with this stated objective.

5.6 Secretary's Concurrence

It is understood that the Secretary's concurrence under clause 4.6(5) of PLEP has been delegated to Council.

The following section provides a response to those matters set out in clause 4.6(5) which must be considered by Council under its delegated authority:

Whether contravention of the development standard raises any matter of significance for the State or Regional environmental planning (cf cl 4.6(5)(a))

This written request under clause 4.6 of PLEP demonstrates that a variation to the height of buildings development standard is acceptable in terms of significance for State and Regional planning matters.

The variance of the development standards will not contravene any overarching State or regional objectives or standards or have any effect outside the sites immediate area.

The public benefit of maintaining the development standard (cf cl 4.6(5)(b))

Maintaining strict numerical compliance with the maximum 8.5 metre height of buildings development standard would not, in our opinion, result in any public benefit in this situation. To maintain, that is, strictly enforce and apply, the standard in this instance would prevent the carrying out of an otherwise well-designed and attractive residential development which is highly suited for the site and which recognises relevant ecological and other constraints.

Any other matters required to be taken into consideration by the Secretary before granting concurrence (cf cl 4.6(5)(c))

In our opinion, no other matters require consideration by the Secretary.

6.0 CONCLUSION

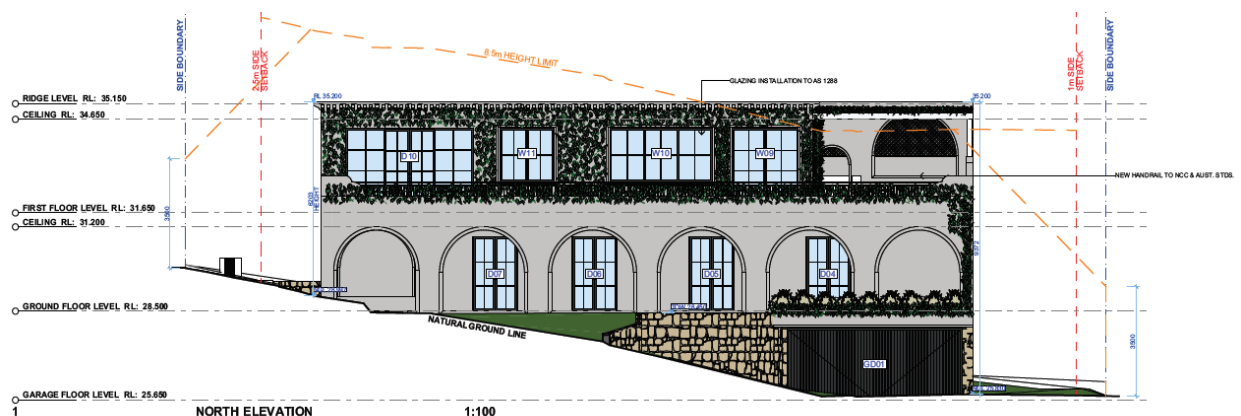
We respectfully submit that the written request justifies the contravention of the height of buildings development standard contained in clause 4.3(2) of PLEP by demonstrating that:

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

Compliance is unreasonable and unnecessary in the present circumstances as the development is consistent with height and zone objectives, is therefore in the public interest and the following planning grounds sufficiently justify the departure from the control in this case:

- In accordance with the recommendations of Council provided following the recent PLM, architectural changes, including the relocation of the building footprint behind the front building line, providing generous side setbacks and making landscaping alterations, were made.
- To address further issues raised by Council, a shadow diagram depicting the window locations of neighbouring properties also accompanies this development application. It highlights the minimal impact that the increased building height will have upon neighbouring dwellings and indeed the negligible impact the exceedance will have upon the living spaces of neighbouring dwellings.

- We respectfully submit to Council that the exceedance of the standard, in this case, is hard to avoid given the east to west slope that runs parallel to the front boundary of the site.
- Compliance with the height control could be achieved though lowering the ground level of the proposed dwelling, this would require excavation and would damage remnant vegetation that is important to the character of the site and, indeed, to the streetscape as a whole. Our clients have instead decided to protect this important feature through the erection of the proposed dwelling house using the existing ground level.
- The section of the proposed dwelling that exceeds the 8.5m height limit is merely one corner of the living and dining area and the alfresco courtyard area, which will not even have a solid roof covering. This is a minor exceedance that, we argue, will not have any noticeably different effect on the solar access, views or privacy of neighbouring residences than a building below the 8.5m height limit.
- To ensure that Tree 5 is retained, the dwelling had to be moved towards the rear setback where there is a localised depression in the site, which exacerbates the non-compliance with the HOB control.
- The below image from page 8 of the submitted plans, demonstrates that due to the natural slope of the site, the western side of the slope is depressed, as such results in the height exceedance. The main bulk of the exceedance is the parapet and roof element of the structure.



- Despite the height exceedance, the proposed bulk is not excessive, and is compatible with the streetscape.
- There are no heritage items impacted.
- The proposal has been designed to incorporate 'regenerative development' principles to ensure compatibility with the biodiversity

and natural environment elements identified within the site. The height exceedance does not impact this.

- The visual impact from the street is not adversely impacted as a result of the height exceedance. This is due to the integration of the built form with the natural landscape by virtue of design and through proposed landscaping features.

Further, the written request shows that the proposed development will be in the public interest because it is consistent with such of the objectives of the standard as are of relevance to the subject-matter of the development application and the objectives for development within the E4 'Environmental Living' zone in which the development is to be carried out.

Accordingly, we respectfully submit that the written request is well founded as the variation sought allows for the orderly and economic use of the land in an appropriate manner while also allowing for a better outcome in planning terms.

As such, the development application may be approved with the variation as proposed, in accordance with the flexibility allowed under clause 4.6 of PLEP.

On behalf of our client, we respectfully submit that a grant of development consent is eminently appropriate in this instance.

Yours faithfully



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