

APPENDIX
CLAUSE 4.6 – HEIGHT OF BUILDINGS

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

4C MINKARA ROAD, BAYVIEW

**FOR THE CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO AN EXISTING DUAL OCCUPANCY DEVELOPMENT AND
DEMOLITION OF EXISTING SWIMMING POOL AND CONSTRUCTION OF A NEW SWIMMING POOL**

For: Proposed construction of alterations and additions to an existing dual occupancy development and demolition of existing swimming pool and construction of a new swimming pool
At: 4C Minkara Road, Bayview
Owner: Nina and Kristian Reynolds
Applicant: Nina and Kristian Reynolds
C/- Vaughan Milligan Development Consulting

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 height of a building and refers to the maximum building height noted within the *"Height of Buildings Map."*

The maximum building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed development will present a maximum height of 9.088m to the southern extremity of the existing roof over the first floor, which occurs as a direct result of the fall within the site levels towards the south and with replacement of the existing roof tiles with colour bond roof sheeting, the proposal will have a maximum building height of 9.08m, which exceeds the height by 0.589m or 6.9%, which therefore does not comply with this control.

The extent of the building which exceeds the 8.5m maximum height control is noted within Figure 1 over.

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

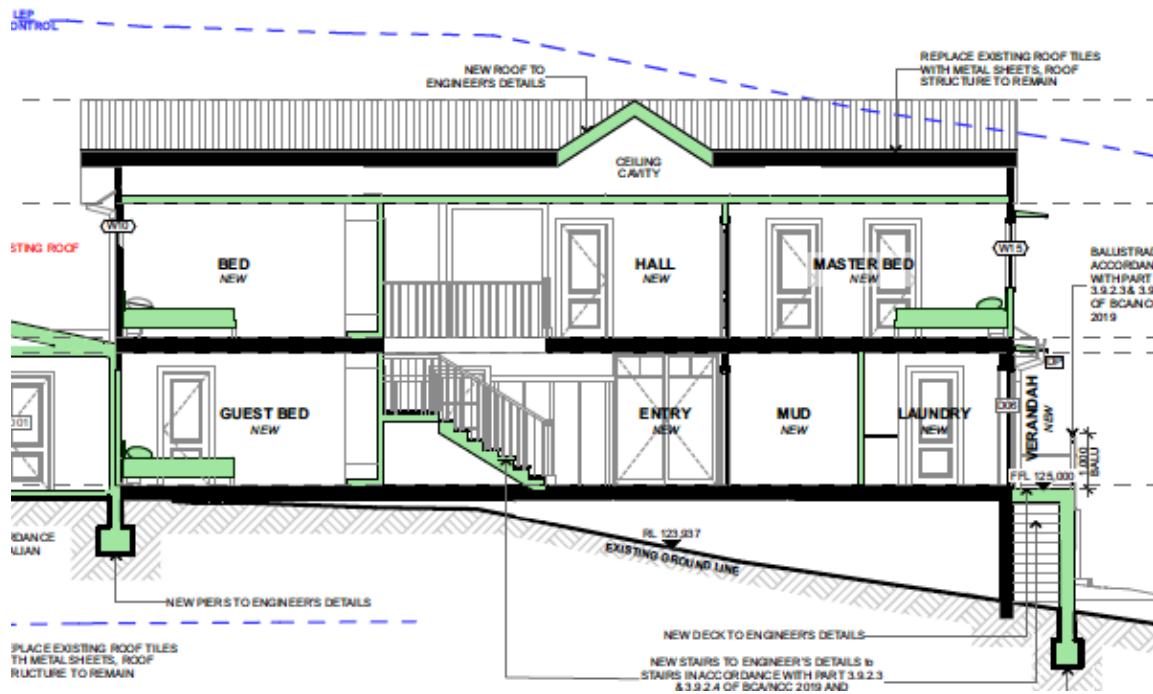


Figure 1: Extract from architectural plans prepared by Progressive Plans indicating breach of the maximum height control to the southern end of the dwelling

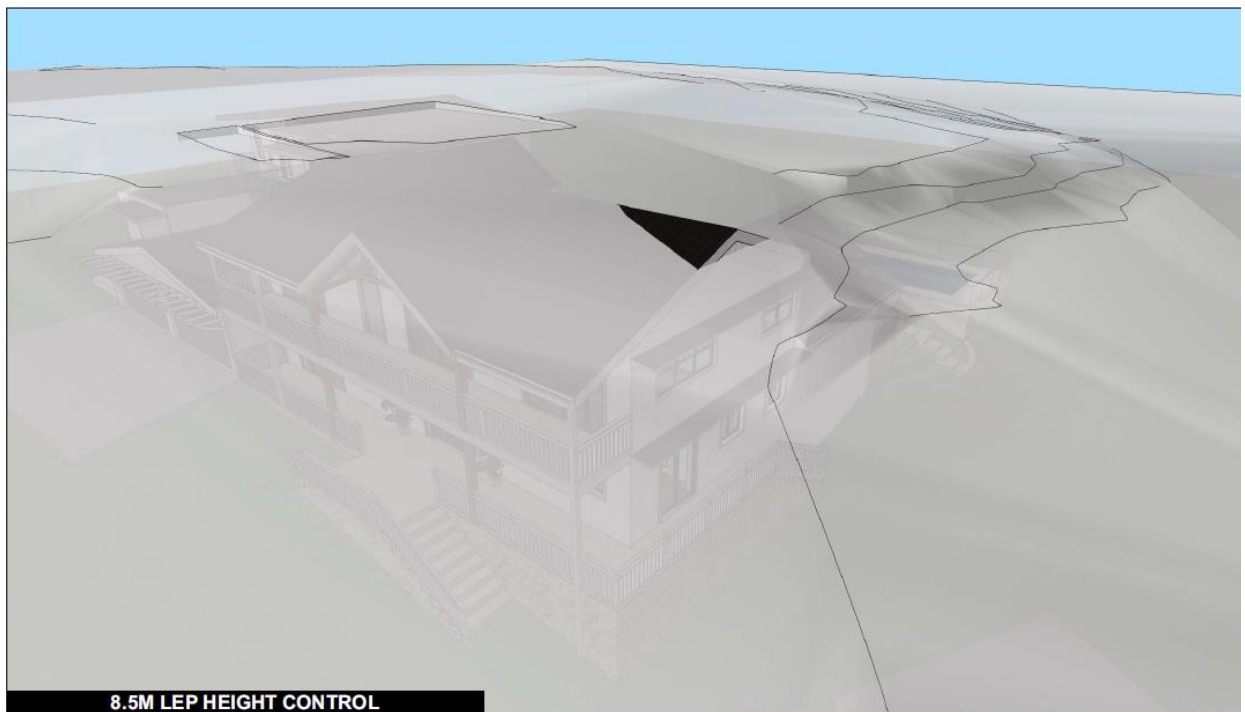


Figure 2: Extract from architectural plans prepared by Progressive Plans indicating breach of the maximum height control to the southern end of the dwelling

Is clause 4.3 of PLEP 2014 a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in relation to 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 building height of a building. Accordingly, clause 4.3 is a development standard.

3.0 Pittwater Local Environmental Plan 2014 (“PLEP”)

3.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned RU2 Rural Landscape (the RU2 zone) and the Land Use Table in Part 2 of PLEP 2014 specifies the following objectives for the RU2 zone:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To ensure that development in the area does not unreasonably increase the demand for public services or public facilities.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*

The proposed development is for the purpose of alterations and additions to an existing dual occupancy is a permissible use in the RU2 Rural Landscape zone.

3.2 Clause 4.3 – Height of buildings

Clause 4.3 of PLEP sets out the maximum height of a building 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.

(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.

The Height of Buildings Map specifies a maximum building height of 8.5m.

3.2 The Dictionary to PLEP operates via clause 1.4 of PLEP. The Dictionary defines “building height” as:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

3.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP provides:

(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.

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 PLEP 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 development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of PLEP.

Clause 4.6(3) of PLEP 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 height of buildings development standard pursuant to clause 4.3 of PLEP which specifies a maximum building height of 8.5m, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and it is considered that there are 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) of PLEP provides:

- (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.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of PLEP provides:

- (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.*

The Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters

in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b). Council should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (Initial Action at [29]).

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

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation.

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

The Nature and Extent of the Variation

- 4.0** This request seeks a variation to the height of buildings development standard contained in clause 4.3 of PLEP.
- 4.1** Clause 4.3(2) of PLEP specifies a maximum building height of 8.5m which is noted on the Height of Buildings Map for the subject site.
- 4.2** The proposal has a maximum height of 9.088m to the southern extremity of the first floor. The non-compliance is 0.588m which equates to a variation of 6.9%.

5.0 Relevant Caselaw

- 5.1** 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.*

5.2 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 in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the RU2 Rural Landscape zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the

matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of PLEP?

6.0 Request for Variation

6.1 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) In response to the first way in *Wehbe*, the objective of the maximum building height standard and the 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 character of the locality,

The proposed works retain the predominately low-scale character of the site and wider Locality. The works that encroach on the maximum height control are minimal and do not change the existing built form with the proposed works being the replacement of roof tiles with metal sheeting. The existing roof structure and form remains unchanged. In this regard, the proposal is considered to retain the desired character of the locality.

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

As mentioned, the proposed works above the height control are minimal and will be indiscernible when viewed from within the site and from adjoining properties. The works to the dwelling will retain the low-density character of the site and surrounding area with the overall height of the existing dwelling not changing, therefore preserving the height and scale of surrounding and nearby development in accordance with the objective.

(c) to minimise any overshadowing of neighbouring properties,

As the height of the existing dwelling is not altering, but rather the material of the roof is changing, the extent of overshadowing of neighbouring properties, including the property to the south will not change. The works will not present an unreasonable impact to neighbouring properties in relation to solar access.

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

The works to the existing dwelling will retain existing views from within the site and from adjoining private and public property.

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

The proposed works are largely confined to the existing building footprint with all trees, except for three trees (exempt species) being removed. All other trees will be safely retained, ensuring the visual impact of the dwelling on the natural environment is minimised.

6.2 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 aspect of the development which contravenes the development standard is the southern extent of the roof above the first floor. The works do not seek to alter the existing roof height with the roof structure remaining unchanged.

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

- The proposal promotes the orderly and economic use and development of

land through the efficient use of the existing infrastructure to meet the housing needs of the community (1.3(c)).

- The proposed development will maintain the general bulk and scale of the existing surrounding newer dwellings 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 works will provide for excellent residential amenity within a built form which is compatible with the streetscape of Minkara Road which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed development is considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g).
- The proposed alterations to the existing dual occupancy dwelling and in particular the replacement of the existing roof sheeting with new colour bond roof sheeting to the existing roof profile demonstrates good design and improves the amenity of the built environment by creating improved and functional living area and also suitably maintains the views enjoyed by neighbouring properties and will retain their primary views to the north-east, east and south (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst maintaining a commensurate height and bulk when viewed from neighbouring properties. These are not simply benefits of the development as a whole, but are benefits emanating from the 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.

6.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the RU2 Rural Landscape zone?

- (a) Section 4.2 of this written requests demonstrates that the proposed development meets each of the applicable objectives of clause 4.3. As the proposed development meets the applicable objectives it follows that the proposed development is also consistent with those objectives.
- (b) Each of the objectives of the RU2 Rural Landscape and the reasons why the proposed development is consistent with each objective is set out below.

(a) To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.

The proposal retains the existing residential use of the land and will not affect existing surrounding primary industry production.

(b) To maintain the rural landscape character of the land.

The proposed works are predominately located within the extent of the existing building footprint, thereby minimising the extent of site disturbance, including clearing of vegetation. In this regard, the proposal is considered to maintain the rural landscape character of the land.

(c) To provide for a range of compatible land uses, including extensive agriculture.

The proposal retains the existing residential land use, which is compatible and anticipated by the land zoning.

(d) To ensure that development in the area does not unreasonably increase the demand for public services or public facilities.

The proposed works will not result in an unreasonable demand for public services or public facilities.

(e) To minimise conflict between land uses within this zone and land uses within adjoining zones.

The proposal is not expected to result in conflict between land uses within this zone. The site does not directly adjoin other zones.

6.6 Has Council obtained the concurrence of the Director-General?

Under cl 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

6.7 Has the Council considered the matters in clause 4.6(5) 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 proposed development and for 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 is in the public interest because it 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.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

7.0 Conclusion

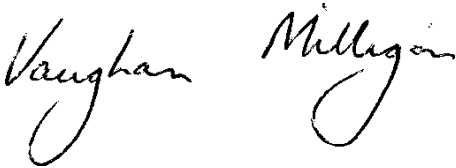
This development proposed a departure from the maximum building height development standard, with the proposed new alterations and additions to provide a maximum building height of 9.088m to the proposed southern extremity of the First Floor Level roof.

This variation is minimal and is a result of the existing dwelling and roof structure already presenting a non-compliance. The proposal does not alter the existing ridge height or roof structure, but simply proposes to change the roof material.

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.

The bulk and scale of the proposed development is appropriate for the site and locality.

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



VAUGHAN MILLIGAN
Town Planner