

APPENDIX

WRITTEN REQUEST - CLAUSE 4.6 SUBMISSION MAXIMUM BUILDING HEIGHT

**WRITTEN SUBMISSION PURSUANT TO CLAUSE 4.6 OF
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

95 BOWER STREET, MANLY

ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING

**VARIATION OF A DEVELOPMENT STANDARD RELATING TO COUNCIL'S MAXIMUM
BUILDING HEIGHT CONTROL AS DETAILED IN CLAUSE 4.3 OF THE
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

For: Additions and alterations to an existing dwelling
At: 95 Bower Street, Manly
Owner: Barrie and Ikuyo Feldman
Applicant: Barrie and Ikuyo Feldman
C/- Vaughan Milligan Development Consulting Pty Ltd

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum height of a building as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.3 of MLEP sets out the maximum height of a building as follows:

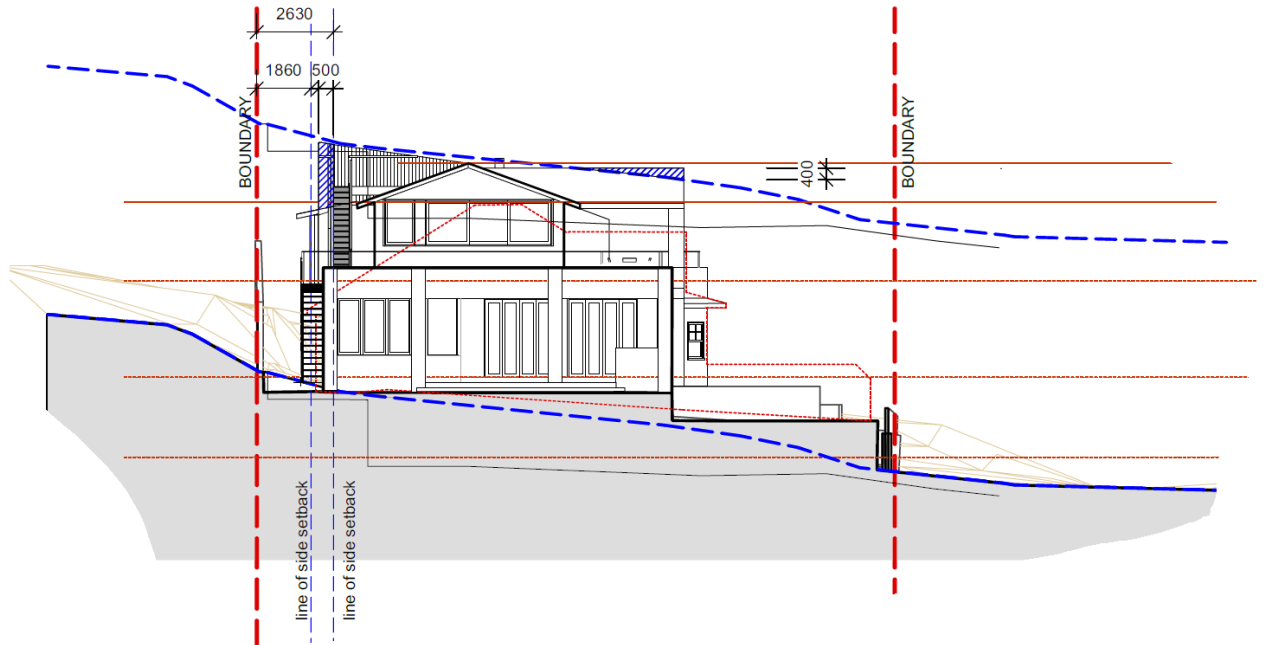
(1) The objectives of this clause are as follows:

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following—*
 - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
 - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
 - (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

- (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.

The proposed additions are up to 8.9m in height, resulting in a non-compliance of 400mm or 4.7% to the control, as noted in Figure 11.



**Fig 11: South-eastern elevation indicating proposed roof exceeding Council's Height of Buildings control
(Source: Your Beautiful Home)**

The Dictionary to MLEP operates via clause 1.4 of MLEP. 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.

Is clause 4.3 of MLEP 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 the 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 as defined in the Environmental Planning and Assessment Act, 1979.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument 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

Clause 4.6(1) of MLEP 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 MLEP 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 a building standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

Clause 4.6(3) of MLEP 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 height of a building development standard pursuant to clause 4.3 of MLEP which specifies a maximum building height of 8.5m. As a consequence of the site slope towards the front boundary and the existing built form the proposal will present a maximum height of 8.9m or exceed the height control by 0.4m or 4.7%.

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) of MLEP 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 Planning 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 the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained.

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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 MLEP 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.*

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), and 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 4.4 of MLEP from the operation of clause 4.6.

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum height of a building development standard contained in clause 4.3 of MLEP.
- 5.2 Clause 4.3 of MLEP specifies a maximum building height of 8.5m for development in this part of Manly.
- 5.3 The proposed alterations and additions to the dwelling will present a maximum height of 8.9m or a non-compliance of 0.4m or a variation of 4.7%.

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 MLEP 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 R1 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 MLEP?

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 and reasoning why compliance is unreasonable or unnecessary is set out below:

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by two – three storey development.

The proposal seeks to accommodate the additions within a complimentary building form, with the slope of the site towards the street resulting in a portion of the roof being up to 8.9m in height.

The overall building height respects the surrounding character and the design seeks to minimise the visual impact through the modest roof form and articulated wall lines.

The proposed external colour and materials palette utilises darker finishes to the building façades and is intended to ensure that the building's visual height and scale is further minimised.

The proposal has been architecturally designed to complement the streetscape. The desired future character is not defined in the planning controls, but the proposal is consistent with topographical landscape, the prevailing building height and the LEP & DCP controls which form the future character in the area.

This objective is achieved.

(b) to control the bulk and scale of buildings,

The proposed additions and alterations to the existing dwelling will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

Consistent with the decision of Roseth SC in *Project Ventures Developments v Pittwater Council [2005] NSWLEC 191*, it is my opinion that “most observers would not find the proposed building offensive, jarring or unsympathetic”.

Further, the modulation of the front façade and building elevations where visible from the public domain minimises the visual impact of the development.

The proposal presents a compatible height and scale to the surrounding development and the articulation to the building facades and low profile roof form will suitably distribute the bulk of the new floor area.

(c) to minimise disruption to the following:

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),***
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),***
- (iii) views between public spaces (including the harbour and foreshores),***

Due to the general slope of the site towards the north-east, the neighbouring properties enjoy views towards Cabbage Tree Bay.

The proposal will provide for a low profile roof form which will allow for suitable views to be maintained through and over the site.

Views from the surrounding public spaces are not adversely affected.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

As the proposal will see the construction of alterations and additions to an existing dwelling, the shadow analysis prepared by Your Beautiful Home details the proposed shadow impacts.

The assessment confirms that the proposed alterations and additions will not result in any change to the existing solar access available to neighbouring properties.

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

The new works are contained within an existing disturbed area of the site, and maintain suitable separation from the foreshore. The site is not within a conservation area, and will not detract from the significance of any nearby heritage items.

The proposal is intended to reflect the predominant scale and form of the surrounding development in Bower Street and will reflect the existing single dwelling uses in the vicinity.

A suitable area of soft landscaping is maintained.

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 low pitch roof form maintains modulation and architectural relief to the building’s facade, and distributes any sense of visual bulk.

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

- The proposed alterations and additions introduce modulation and architectural relief to the building’s facade, whilst maintaining a modest bulk and scale, which promotes good design and improves the amenity of the built environment (1.3(g)).
- The proposed addition will maintain the general bulk and scale of the existing surrounding 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 additional floor area will provide for improved amenity within a built form which is compatible with the Bower Street locality which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed new works are 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) of the EPA Act.

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 reducing the maximum building height and manages the bulk and scale and maintains views over and past the building from the public and private domain.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the floor space ratio 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 in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R1 General Residential zone?

- (a) Section 4.2 of this written request suggests the 1st test in *Wehbe* is made good by the development.
- (b) Each of the objectives of the R1 General Residential 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 found also 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 to the building height control, the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R1 General Residential zone for the following reasons:

- ***To provide for the housing needs of the community***

The proposal provides for alterations and additions to an existing dwelling, which is permissible development within the R1 zone.

The proposal will maintain a generous area of soft landscaping. The existing vegetation on site will be retained and assist with softening and screening the built form of the development.

The proposed alterations and additions maintain a similar bulk and scale to the existing development on site, and will therefore not be overbearing within the foreshore locality.

The new works are therefore considered to be in keeping with the ecological and aesthetic values within the locality.

- ***To provide for a variety of housing types and densities***

As outlined above, the proposal maintains a detached single dwelling, which is suitable for the subject site.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

This control does not directly relate to the subject development.

7.4 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?

- (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 additions to the dwelling house 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.

8.0 Conclusion

This development proposes a departure from the maximum height of a building control, with the proposed additions to the existing dwelling to provide a maximum overall height of 8.9m. The new works will respect and complements the site's location.

This written request to vary to the maximum building height specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that that the objectives of the standard will be met.

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

In summary, the proposal satisfies all of the requirements of clause 4.6 of MLEP 2013 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.



VAUGHAN MILLIGAN
Town Planner