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Boston Blyth Fleming
Town Planners

27th March 2021

The General Manager
Northern Beaches Council
Po Box 82
Manly, NSW, 1655

Dear Sir,

Request for review of determination - Section 8.2(1)(a) of the Act
Development Application 2020/0824
Demolition and construction of a shop top housing development
No. 321 – 331 Condamine Street, Manly Vale

1.0 Introduction

On 16th December 2021, the subject development application was refused by the Northern Beaches Local Planning Panel (NBLPP) for the following reasons:

1. *Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of State Environmental Planning Policy 65 - Design Quality of Residential Flat Development. The development fails to comply with the provision of SEPP 65, in particular relating to the principals of context and the requirements of the Apartment Design Guide in relation to solar access, cross ventilation and building separation to the residential zoned land to the west. The development does not provide adequate floor to ceiling heights for the retail tenancies 3 and 4 and the residential lobby accessed from Sunshine Street as required by SEPP 65.*

2. ***Building Height***

   Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to Development Standards of the Warringah Local Environmental Plan 2011. In this regard, the Panel is not satisfied that the applicant's written request demonstrates there are sufficient environmental planning grounds to justify contravening the development standard.

The Panel is not satisfied that the development will be in the public interest as the development is not consistent with the objectives of the height of buildings development standard regarding compatibility with the height, bulk and scale of nearby developments and that the development will minimise visual impact of the top floor (Level 3) from the public domain and surrounding lands.

3. ***Building Setbacks (Top floor)***

   Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause B5 Side Boundary Setbacks of the Warringah Development Control Plan. The upper floor is not sufficiently setback to minimise the visual impact of level three as viewed from the surrounding lands and public domain.

4. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C2 Traffic, Access and Safety of the Warringah Development Control Plan. The development does not result in a satisfactory outcome with regards to pedestrian and vehicle safety along Somerville Place due to the width of the existing laneway and the intensity of the development proposed.*

This application seeks a review of the determination pursuant to section 8.2(1)(a) of the Environmental Planning and Assessment Act, 1979 (the Act). We note that the prescribed time in which a section 8.2(1)(a) request must be determined by the consent authority is currently 12 months from the date of determination of the application given the changes to the legislation in response to Covid 19.

This request is accompanied by amended Architectural plans dated 4th March 2021 prepared by Gartner Trovato Architects, as depicted in the schedule over page, an updated traffic and parking assessment and an amended BASIX certificate. This request is also accompanied by an updated clause 4.6 variation request in support of the building height breach.

DRAWING No:	DRAWING NAME	REVISIONS
DA-00	COVER SHEET	C
DA-01	SITE & SITE ANALYSIS PLAN	C
DA-02	BASEMENT B2 PLAN	E
DA-03	BASEMENT B1 PLAN	E
DA-04	GROUND FLOOR PLAN	G
DA-05	LEVEL 1 PLAN	G
DA-06	LEVEL 2 PLAN	G
DA-07	LEVEL 3 PLAN	K
DA-08	ROOF PLAN - LOWER	C
DA-09	ROOF PLAN - UPPER	E
DA-10	EAST & SOUTH ELEVATIONS	D
DA-11	WEST & NORTH ELEVATIONS	D
DA-12	SECTION A & B	D
DA-13	SECTION C	D
DA-14	SECTION 1 & 3	D
DA-15	SHADOW DIAGRAMS	C
DA-16	LANDSCAPE PLAN - GROUND FLOOR	C
DA-17	LANDSCAPE PLAN - LEVEL 1	C
DA-18	LANDSCAPE PLAN - LEVEL 3	C
DA-19	SCHEDULE OF EXTERNAL FINISHES	B
DA-20	VIEW 1	F
DA-21	VIEW 2	F
DA-22	VIEW 3	F
DA-23	VIEW 4	F
DA-24	VIEW 5	F
DA-25	VIEW 6	F
DA-26	VIEW 7	F
DA-27	VIEW 8	F
DA-28	VIEW 9	F
DA-40	HEIGHT CONTROL DIAGRAM - OVER VIEW	D
DA-41	HEIGHT CONTROL DIAGRAM - WEST VIEW	D
DA-42	HEIGHT CONTROL DIAGRAM - SOUTH VIEW	D
DA-43	HEIGHT CONTROL DIAGRAM - EAST VIEW	D

The amended plans represent a considered and resolved response to the reason for refusal of the original application with the amendments summarised as follows:

- A-01(E), A-05(E), A-06(E), A-07(F), A-08(E), A-11(E), A-13(E).

Drawing	Change
DA-01(C)	1. Increase setbacks of western elevation to boundary, increase all boundary setbacks to top floor
DA-02(E)	2. Amend layout to provide road widening setback to the western boundary to Someville Place 3. Amend parking layouts
DA-03(E)	4. Amend layout to provide road widening setback to the western boundary to Someville Place 5. Amend parking layouts
DA-04(E)	6. Amend layout to provide road widening setback to the western boundary to Someville Place 7. Revise driveway entry ramp levels, provide detail to loading bay 8. Lower floor to Retail 4 and southern Lift Lobby to increase floor to ceiling heights, adding stair to Sunshine Street elevation
DA-05(G) DA-06(G)	9. Amend layout to provide road widening setback to the western boundary to Someville Place 10. Revise unit layouts generally to suit increased setback to Somerville Lane 11. Provide cross ventilation paths and solar access lines to plans, indicate which units achieve compliant solar access and ventilation

DA-07(K),	12. Amend layout to provide road widening setback to the western boundary to Someville Place and 10m separation to boundary to 2 Sunshine Street on the lane 13. Reduce number of units from 9 to 8 on this floor 14. Increase setbacks to south and east elevations to minimum 4m to address refusal to minimise visual impact of top floor 15. Provide cross ventilation paths and solar access lines to plans, indicate which units achieve compliant solar access and ventilation
DA-08(C)	16. Amend roof to follow reduced floor layout of Level 3 (top floor) 17. Break roofs into smaller parts to address bulk and scale
DA-10(D) DA-11(D	18. General amendments to elevations to follow plan changes
DA-12(D) DA-13(D) DA-14(D)	19. General amendments to sections to show lowered entry, basement, cross ventilation and solar access
DA-16(C) DA-17(C) DA-18(C)	20. General amendments to Landscape plan to follow plan changes

Note : As a part of these amendments, there are no changes to the south boundary setback or the internal separation in the courtyards between buildings.

This submission also seeks to formally amend the development application pursuant to Section 55 of the Environmental Planning and Assessment Regulation 2000 (the Regulations) to provide for the dedication of a 1.4 metre wide x 38.075 metre long strip of land adjacent to Sumerville Place to Northern Beaches Council to provide for future laneway widening consistent with that achieved along the balance of Sumerville Place to the north of the site. This dedication also provides for improved pedestrian and vehicle safety along Somerville Place in response to the concerns expressed by Council in its refusal of the application.

We propose that this dedication occur by way of a Voluntary Planning Agreement (VPA) with the requirement to enter into a VPA with Council pursuant to section 7.4 of the Environmental Planning and Assessment Act, 1979 (the Act) dealt with by way of an appropriately worded deferred commencement condition.

This is consistent with the deferred commencement condition endorsed by the Northern Beaches Local Planning Panel (NBLPP) at its meeting of 9th December 2020 in relation to development application DA2020/0008 proposing demolition works and the construction of a senior's housing development at No. 3 Central Road, Avalon Beach.

Given the nature of the amendments sought, which go directly to responding to the stated reason for refusal of the application, Council can be satisfied that the request for review is appropriately made pursuant to section 8.2(1)(a) of the Act.

2.0 Claim for review

Having regard to the stated reasons for refusal of the application we respond as follows:

1. *Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of State Environmental Planning Policy 65 - Design Quality of Residential Flat Development. The development fails to comply with the provision of SEPP 65, in particular relating to the principals of context and the requirements of the Apartment Design Guide in relation to solar access, cross ventilation and building separation to the residential zoned land to the west. The development does not provide adequate floor to ceiling heights for the retail tenancies 3 and 4 and the residential lobby accessed from Sunshine Street as required by SEPP 65.*

Response: The plans have been amended to increase the ceiling heights for retail tenancies 3 and 4 and the residential lobby accessed from Sunshine Street consistent with the guidelines contained within the Apartment Design Guide (ADG). The plan bundle also contains detailed analysis demonstrating that the proposal satisfies the solar access and cross ventilation provisions contained within the ADG noting that solar access has been measured from 8:30am on 21st June for a number of apartments given the orientation of the land and juxtaposition of adjoining development. Such circumstance has been consistently adopted by the Court as acceptable in relation to development where strict compliance with the ADG 9am to 3pm solar access assessment criteria is difficult to achieve given the orientation of the land and juxtaposition of adjoining development.

Further, the development has been pulled away from the western boundary of the property, adjacent to its zone boundary interface, to achieve a minimum setback of 6 metres between the proposed development and the boundary of the adjacent R2 Low Density Residential zoned properties at the lower levels of the building increasing to 10 metres to the building façade at the uppermost level of the development. Integrated privacy attenuation measures have been provided to all west facing apartments including fixed privacy screens, appropriate use and placement of fenestration and integrated planter boxes and landscaping at the upper level of the development.

We have formed the considered opinion that the amended development comp pensively addresses this reason for refusal with the development maintaining appropriate residential amenity to the zone boundary interface through the adoption of contextually appropriate setbacks and residential amenity outcomes to adjoining development and to the apartments located within the proposed building.

2. ***Building Height***

   Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to Development Standards of the Warringah Local Environmental Plan 2011. In this regard, the Panel is not satisfied that the applicant's written request demonstrates there are sufficient environmental planning grounds to justify contravening the development standard.

   The Panel is not satisfied that the development will be in the public interest as the development is not consistent with the objectives of the height of buildings development standard regarding compatibility with the height, bulk and scale of nearby developments and that the development will minimise visual impact of the top floor (Level 3) from the public domain and surrounding lands.

Response: The amended plans have reduced the building footprint by providing additional setbacks to the western boundary of the property and to the adjacent zone boundary interface. Setbacks to the uppermost level have also been adjusted with the roof form also broken into small elements to reduce its visual bulk and visual appearance as viewed from the public domain and surrounding lands. We consider that the height bulk and scale of the development is compatible with that established by adjoining development with the Level 3 portion of the development visually recessive as sought by the NBLPP in its determination of the application.

We rely on the accompanying amended clause 4.6 variation request in support of the building height variation proposed with such variation well-founded have regard to the environmental planning grounds put forward in support of the variation sought.

3. *Building Setbacks (Top floor) Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause B5 Side Boundary Setbacks of the Warringah Development Control Plan. The upper floor is not sufficiently setback to minimise the visual impact of level three as viewed from the surrounding lands and public domain.*

Response: As previously indicated, the development has been pulled away from the western boundary of the property, adjacent to its zone boundary interface, to achieve a minimum setback of 6 metres between the proposed development and the boundary of the adjacent R2 Low Density Residential zoned properties at the lower levels of the building increasing to 10 metres to the building façade at the uppermost level of the

development. Integrated privacy attenuation measures have been provided to all west facing apartments including fixed privacy screens, appropriate use and placement of fenestration and integrated planter boxes and landscaping at the upper level of the development.

We have formed the considered opinion that the amended development comp pensively addresses this reason for refusal with the development maintaining appropriate residential amenity to the zone boundary interface through the adoption of contextually appropriate setbacks and residential amenity outcomes to adjoining development and to the apartments located within the proposed building. We consider the setbacks proposed adequately minimise the visual impacts of the uppermost level of development when viewed from surrounding lands and the public domain and accordingly this reason for refusal has been appropriately addressed.

4. *Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause C2 Traffic, Access and Safety of the Warringah Development Control Plan. The development does not result in a satisfactory outcome with regards to pedestrian and vehicle safety along Somerville Place due to the width of the existing laneway and the intensity of the development proposed.*

Response: As previously indicated, this submission also seeks to formally amend the development application pursuant to Section 55 of the Environmental Planning and Assessment Regulation 2000 (the Regulations) to provide for the dedication of a 1.4 metre wide x 38.075 metre long strip of land adjacent to Sumerville Place to Northern Beaches Council to provide for future laneway widening consistent with that achieved along the balance of Sumerville Place to the north of the site. This dedication provides for improved pedestrian and vehicle safety along Somerville Place in response to the concerns expressed by Council in its refusal of the application.

The amended vehicular access and circulation outcomes have been addressed in the accompanying Traffic and Parking Assessment Report prepared by Terrafic Pty Limited with the application not relying on the landscaping proposed within road widening dedication area in terms of visual privacy to the adjoining properties to the west. In this regard, we are in Council’s hands as to whether they want the proponent to provide this landscaping as an interim measure prior to Council formally widening the laneway in the future it been noted that the laneway is currently a one-way laneway from north to south.

We propose that this dedication occur by way of a Voluntary Planning Agreement (VPA) with the requirement to enter into a VPA with Council pursuant to section 7.4 of the Environmental Planning and Assessment Act, 1979 (the Act) dealt with by way of an appropriately worded deferred commencement condition.

This is consistent with the deferred commencement condition endorsed by the Northern Beaches Local Planning Panel (NBLPP) at its meeting of 9th December 2020 in relation to development application DA2020/0008 proposing demolition works and the construction of a senior's housing development at No. 3 Central Road, Avalon Beach.

We consider that the road widening proposed as a component of the VPA comprehensively addresses this reason for refusal.

3.0 Conclusion

This submission demonstrates that the amended plans appropriately address the reason for refusal of the original application. Having given due consideration to the relevant matters pursuant to section 4.15(1) of the Act it has been demonstrated that the proposed development, as amended, succeeds on merit and is appropriate for the granting of consent.

Please do not hesitate to contact me to discuss any aspect of this submission.

Yours sincerely
Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Clause 4.6 variation request – Height of buildings

Updated clause 4.6 variation request – Height of buildings

321 Condamine Street, Manly Vale

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to the amended Architectural plans dated 4th March 2021 prepared by Gartner Trovato Architects.

This document has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

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

b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Building height is defined as follows:

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and 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*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

The proposed development has a variable upper roof height as measured along its Condamine Street frontage of between 11.30 and 13.06 metres representing a non-compliance of between 300mm (2.7%) and 2.06 metres (18.7%). The western edge of the roof form, as it presents to Somerville Place, exceeds the 11 metre height standard by between 250mm (2.2%) and 1.2 metres (10.9%). The roof pitches up towards a centrally located circulation/ lift core a parapeted roof mounted plant enclosure which has a maximum height of 13.770 metres representing a non-compliance of 2.77 metres or 25%. The extent of non-compliance is depicted on the height plane drawings DA-40(D) through to DA-43(D) as reproduced at combined Figure 1 below and over page.

REV B:
ROOF LEVELS RAISED TO ALLOW FOR
HICLE CLEARANCE TO GROUND FLOOR.

REV C:
HEIGHTS UPDATED TO SUIT REVISED
DESIGN WITH 6 M SET-BACK TO
SOMERVILLE PLACE.

REV D:
ROOF REDESIGNED TO ALLOW FOR
HIGH LEVEL GLAZING.
ROOF LEVELS REVISED TO SUIT.

Figure 1: *Height Plane Compliance Drawings*

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) The objectives of this clause are:

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

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

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

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

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

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

Clause 4.6(2) of WLEP 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.

This clause applies to the clause 4.3 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP 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 provision at 4.3 of WLEP which specifies a maximum building height however 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 WLEP 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 Director-General 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 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 WLEP provides:

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court 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), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still 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 WLEP from the operation of clause 4.6.

3.0 Relevant Case Law

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.

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 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 WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP a development standard?

We are of the opinion that this provision is a development standard to which clause 4.6 applies.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: Development within the site's visual catchment, and within the 11 metre height precinct, is eclectic in nature and currently in transition with a number of older one and two storey commercial and mixed use buildings being replaced with more contemporary 4/ 5 level stepped shop top housing building forms. A predominant 4 storey building presentation has been established by recently approved and constructed shop top housing development along Condamine Street including the buildings having frontage to secondary streets including Kenneth Road and King Street.

We note that the non-compliant building height only relates to the upper portion of the upper level floor plate and roof form and centrally located circulation core and screened plant area which are appropriate setback to all 3 street frontages. Such setbacks will ensure that the breaching elements are recessive in a streetscape context, and as viewed from the surrounding development, with the building displaying a height and scale compatible with that of other recently approved and constructed 4 storey shop top housing development both within this street block and more broadly along this section of Condamine Street between Burnt Bridge Creek and King Street.

That said, these upper level breaching elements maintain significant setbacks from all boundaries of the property, including the adjacent zone boundary interface to the west, with such integrated landscape treatments provided at the upper level of the development adjacent to the building height breaching elements.

Such setback and landscape characteristics ensure that this upper level breaching elements will not be readily discernible as viewed from Condamine Street or Sunshine Street nor will it contribute, to any unacceptable or jarring extent, to the perceived bulk and sale of the development as viewed form the neighbouring properties or in a broader streetscape context.

The building and design are entirely appropriate for this prominent corner site as it reinforces the building as a strong, robust and defining element within the street block it being noted that a majority of properties have now been approved/ constructed with a 4 storey building form to Condamine Street. In this regard, we have formed the considered opinion that the height, bulk and scale of the development including its 4 storey form are compatible with the height and scale of surrounding and nearby development.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its height offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that the development is compatible with surrounding and nearby development and accordingly the proposal achieves this objective.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

Comment: Having undertaken a detailed site and context analysis and identified available view lines over the site I have formed the considered opinion that the height of the development, and in particular the non-compliant height components, will not give rise to any visual, view, privacy or solar access impacts with appropriate spatial separation maintained to adjoining properties. In this regard, I rely on the shadow diagrams at Attachment 1.

The proposal achieves this objective.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment: The non-compliant building height elements will not be discernible as viewed from any coastal or bushland environments. This objective is achieved.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Comment: The non-compliant building height will not be visually prominent as viewed from the street or any public area. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to WLEP 2011. The developments consistency with the stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Response: The proposed mixed use development provides ground floor retail tenancies which activate the Whistler Street frontage and which are able to accommodate a rage of retail uses that serve the needs of people who live in, work in and visit the local area. The proposal achieves this objective

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor retail tenancies which will provide employment opportunities in an accessible location being within immediate proximity of the B Line bus service. The proposal will also encourage employment in terms of strata management and property maintenance. The proposal achieves this objective.

- *To maximise public transport patronage and encourage walking and cycling.*

Response: The development provides appropriately for vehicle and bicycle parking to achieve this objective.

- *To provide an environment for pedestrians that is safe, comfortable and interesting;*

Response: The development provides for covered outdoor seating and pedestrian circulation space providing an environment for pedestrians that is safe, comfortable and interesting.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment;*

Response: The proposal building scale and landscape treatments proposed provide for an urban and landscape form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. This objective is achieved.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses.*

Response: The property adjoins the R2 Low Density Residential zone to the south of the site with particular attention given to ensuring the maintenance of appropriate amenity to the properties within this adjoining zone in relation to privacy and solar access. The design response adopted minimises conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses. This objective is achieved.

The proposed development, notwithstanding the height breaching elements, achieve the objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

4.3 Clause 4.6(4)(b) – 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].

In our opinion, there are sufficient environmental planning grounds to justify the variation. The additional height proposed facilitates a complimentary and compatible 4 storey form on this site consistent with the heights and form of recently approved and constructed shop top housing development along this section of Condamine Street.

It can also be argued that the 11 metre height standard has been effectively abandoned along this particular section of Condamine Street in favour of a consistent and cohesive streetscape and urban design outcome.

Strict compliance would require the deletion of the entire upper floor of the development and result in a 3 storey form that would not appropriately respond to the sites prominent corner location and which would appear inconsistent with the height and cohesive streetscape established by recently approved and constructed shop top housing development along this section of Condamine Street. The building is of exception design quality with the variation facilitating a height and floor space that provides for contextual built form compatibility, the maintenance of appropriate amenity to surrounding development and the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

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.*

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

4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the B2 Local Centre zone

The consent authority needs to be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it 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.*
>
> *It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.5 Secretary's concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;

- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a nonnumerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA

Director

Attachment 1