

**STATEMENT OF
ENVIRONMENTAL EFFECTS**

Proposed Shop Top Housing
Development

**1105 - 1107 Barrenjoey Road
PALM BEACH**



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Statement of Environmental Effects

PROPOSED SHOP TOP HOUSING DEVELOPMENT

1105 - 1107 Barrenjoey Road, PALM BEACH

Prepared under instructions from

PDB Architects

By

Greg Boston
B Urb & Reg Plan (UNE) MPIA

Boston Blyth Fleming Pty Ltd
Town Planners
(ACN 121 577 768)
Suite 1/9 Narabang Way
Belrose NSW 2085
Tel: (02) 99862535

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TABLE OF CONTENTS

1.0 INTRODUCTION

2.0 SITE DESCRIPTION AND CONTEXT

- 2.1 The Site
- 2.2 The Locality

3.0 DEVELOPMENT PROPOSAL

4.0 STATUTORY PLANNING FRAMEWORK

- 4.1 Pittwater Local Environmental Plan 2014
 - 4.1.1 Zoning
 - 4.1.2 Height of Buildings – Exceptions to Development Standards
 - 4.1.3 Acid Sulfate Soils
 - 4.1.4 Flood Planning
 - 4.1.5 Essential Services
- 4.2 Pittwater 21 Development Control Plan
 - 4.2.1 Palm Beach Locality
 - 4.2.2 General Controls
 - 4.2.3 Development Type Controls
 - 4.2.4 Locality Specific Controls
- 4.3 Pittwater 21 Development Control Plan - Compliance Table
- 4.4 State Environmental Planning Policy No. 55 - Remediation of Land
- 4.5 State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development
- 4.6 State Environmental Planning Policy (Infrastructure) 2007
- 4.7 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
- 4.8 Section 4.15(1) EP&A Act Considerations

5.0 CONCLUSION

Attachment 1 Clause 4.6 variation request – Height of buildings

1.0 INTRODUCTION

This document has been prepared as a component of a development application proposing the demolition of existing site structures and the construction of a multi storey shop top housing development incorporating 5 ground floor level retail tenancies with 3 x 1 bedroom serviced apartments. The upper levels comprise 8 x 3 bedroom apartments with a separate residential foyer providing access from ground level. The application also proposes basement car parking and the implementation of an enhanced site landscape regime.

The proposed development has been developed through detailed site, contextual and urban design analysis and in response to the minutes arising from formal pre-DA discussions with Council (PLM 2018/0150). The final design, the subject of this application, represents a highly considered and resolved response to the constraints and opportunities identified with the proposed development exhibiting good design not only in its architectural form, function and amenity but importantly, its success in responding to the current and desired future character as outlined within the Palm Beach Locality Statement. In this regard, the development provides for a design, scale, treatment and roof form reflecting a 'seaside-village' character with the upper-level apartments representing rooms within a roof. In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act, 1979;
- Pittwater Local Environmental Plan 2014;
- Pittwater 21 Development Control Plan 2014;
- State Environmental Planning Policy No. 55 – Remediation of Land;
- State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development;
- State Environmental Planning Policy (Infrastructure) 2007;
- State Environmental Planning Policy (Coastal Management) 2018;
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.

Architectural drawings including floor plans, elevations and sections have been prepared in relation to the development proposed. The application is also accompanied by a survey plan, landscape plan, shadow diagrams, traffic impact assessment report, accessibility report, arborist report, acoustic report, schedule of finishes, BCA report, geotechnical/ acid sulfate report, stormwater management plans, waste management plan, BASIX certificate and photomontage.

The proposal is permissible and generally in conformity with the General, Development Type and Locality Specific Controls contained within Pittwater 21 Development Control Plan (P21DCP). The application requires the consent authority to give favourable consideration to a variation of the height of buildings development standard contained at clause 4.3 of Pittwater Local Environmental Plan 2014 (PLEP 2014).

This report demonstrates that strict compliance is both unreasonable and unnecessary with sufficient environmental planning grounds to justify the variation sought. The clause 4.6 variation request is well founded.

The development satisfies the Design Principles prescribed by State Environmental Planning Policy No. 65, the associated Clause 30 standards and the objectives specified in the Apartment Design Guide for the relevant design criteria. The height and density proposed is entirely appropriate given the paucity of adverse environmental consequences and the ability to provide appropriately for off-street carparking

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the Act. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent.

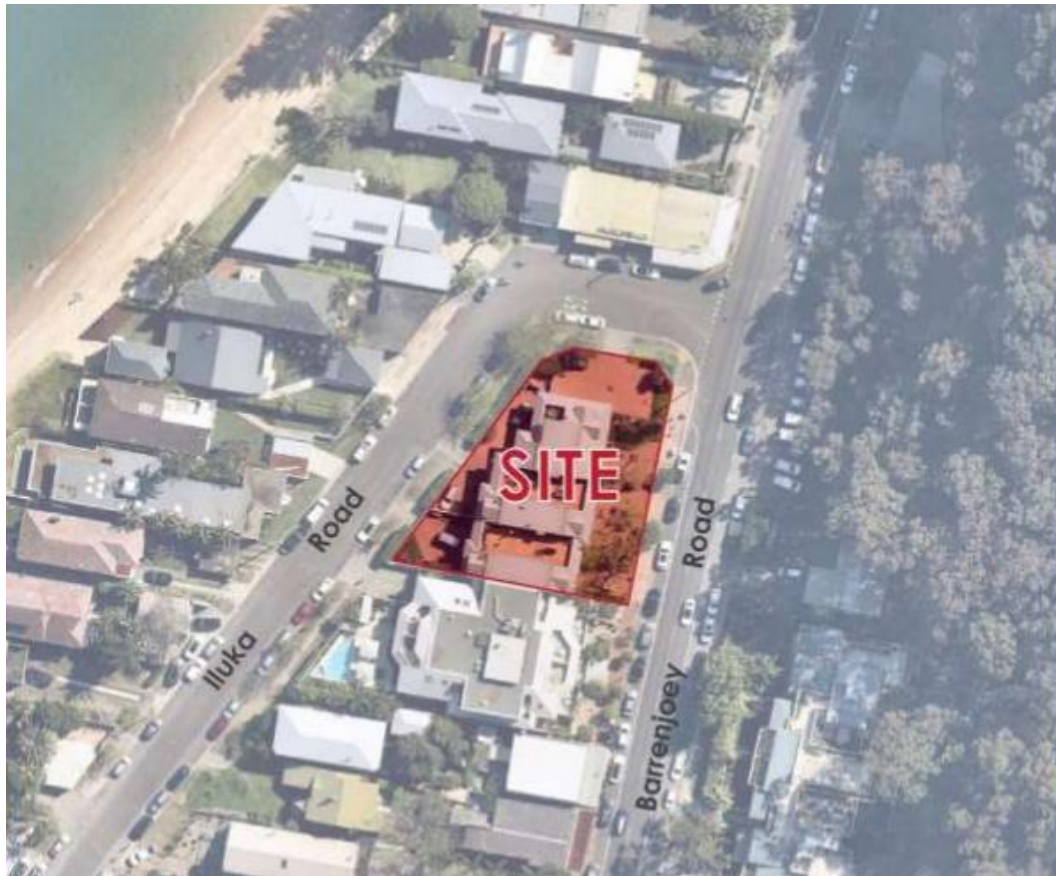


Figure 2 – Aerial location/ context photograph



Figure 3 – Subject site as viewed from Illuka Road



Figure 4: View from Barrenjoey Road

The existing development on the site comprises a 3 storey shop top housing development. Development in the immediate vicinity comprises a mixture of residential and commercial uses consistent with its local centre zoning. The site is located in close proximity to public transport routes along Barrenjoey Road as well Palm Beach ferry terminal to the north of the site.

2.2 The Locality

The Pittwater DCP provides an overview of Palm Beach Locality and is provided below:

Until the early 1900s, the locality remained a tiny settlement of isolated farms and fishermen's cottages. In 1912, land was subdivided and Palm Beach became a popular holiday destination, its popularity increasing with the development of the Palm Beach Golf Course in 1920. The Barrenjoey peninsula remained a popular camping area until it was closed in the 1960s. Residential development and permanent occupation of dwellings increased from the 1960s, although the area still remains a secluded peninsula at the northern point of Pittwater. Barrenjoey Headland at the northernmost point of Pittwater was host to a Customs House from 1843, and Barrenjoey Lighthouse from 1881, which remains today.

Since that time, the locality has developed into a predominantly low-density residential area, with dwellings built along the ridges, slopes and lowlands. The locality is characterised mainly by two-storey dwelling houses on 750-1,400 square metre allotments, with allotments of 550-650 square metres (some smaller blocks may exist) adjoining the waterfront to the west. The residential areas are of a diverse style and architecture, a common thread being the landscaped, treed frontages and subdued external finishes. In the vicinity of Ocean Rd, the informal and casual nature of the parking carriageway and pedestrian pathway adds to the relaxed beach character of the locality and should be retained. Medium density housing concentrates around the Palm Beach neighbourhood retail centre on Barrenjoey Road.

Residents and visitors are attracted to the Palm Beach Locality by its natural beauty, by the relatively unspoilt nature of the region and by the relaxed seaside atmosphere of the locality. To the west is the Pittwater waterway, to the east the ocean beaches and headlands, with a spur running north south ending in a bluff at the sand isthmus that ties Barrenjoey Headland to the mainland. Here it is an easy walk over the sand dunes from the protected water of Pittwater to the ocean beach. Due to the topography, significant views can be obtained through all points of the compass. Conversely, the slopes and ridge tops of the locality are visually prominent.

The locality is serviced by two neighbourhood retail centres at the intersect of Barrenjoey Road and Iluka Avenue, opposite the public wharf, Ocean Road; and the intersection of Whale Beach Road and Surf Road, where the bus service terminates. The public wharf provides a vital link for the Upper Western Foreshore communities, as well as a regular ferry service to these communities and further afield including Patonga and Gosford. The locality also contains Barrenjoey Lighthouse, Palm Beach RSL, Palm Beach SLSC, and recreational facilities including Palm Beach Golf Course, rock baths, beaches, Governor Phillip Park, McKay Reserve and other reserves.

Barrenjoey Lighthouse, remnants of Customs House, houses, vegetation, and other structures in the vicinity of Barrenjoey Headland, Barrenjoey Road, Bynya Road, Florida Road, Ocean Road, Northview Road, Palm Beach Road, Pacific Road, Sunrise Road, and beach and waterfront reserves, indicative of early settlement in the locality, have been identified as heritage items. Land in Florida Road, Ocean Road, and Sunrise Road, indicative of early subdivision patterns and built form, have been identified as heritage conservation areas.

The Palm Beach locality gives the impression that much of the native vegetation has been retained. Bushland reserves predominate. Native plants proliferate in private gardens. The natural fall of the land has been preserved in most cases with retaining walls and terracing kept to a minimum. A few poor exceptions to this are located at the northern end of Ocean Road. The retention of the natural features and native plants within private gardens should be encouraged, and help to reinforce the natural beauty of the area the main characteristic of the locality.

The natural features of the locality result in a high risk of bushfire, landslip, flood, coastal (bluff) hazard, and estuary wave action and tidal inundation.

The major roads within the locality are Barrenjoey Road, Florida Road, Ocean Road, and Whale Beach Road. Barrenjoey Road is the primary access road from the south. Several pedestrian links and pathways exist within the locality. The property is located within the Palm Beach Local Centre which is characterised predominantly by 1 and 2 storey commercial development fronting Pittwater Road and more contemporary 3 storey shop top housing development further to the west. The development of this Local Centre has been slowed by its high hazard flooding affectation and the fragmented nature of ownership particularly in relation to the Pittwater Road fronting properties.

3.0 DEVELOPMENT PROPOSAL

The application seeks consent for the proposing the demolition of existing site structures and the construction of a multi storey shop top housing development incorporating 5 ground floor level retail tenancies with 3 x 1 bedroom serviced apartments. The upper levels comprise 8 x 3 bedroom apartments with a separate residential foyer providing access from ground level. The application also proposes basement car parking and the implementation of an enhanced site landscape regime. The proposed works are depicted on the following Architectural plans prepared by PBD Architects:

DA 000	COVER PAGE	DA 500	GFA DIAGRAM
DA 001	PROJECT SUMMARY & AREA SCHEDULE	DA 510	CROSS VENTILATION DIAGRAM
DA 002	DEMOLITION PLAN	DA 520	STORAGE DIAGRAM
DA 003	EXCAVATION & FILL PLAN	DA 530	PRIVATE OPEN SPACE
		DA 540	LANDSCAPE DIAGRAM
DA010	SITE ANALYSIS PLAN	DA 550	HEIGHT PLANE DIAGRAM
DA011	SITE PLAN		
DA 100	BASEMENT PLAN	DA 600	SOLAR STUDY (21st JUNE 9AM - 12PM)
DA 101	GROUND FLOOR PLAN	DA 601	SOLAR STUDY (21st JUNE 1PM - 3PM)
DA 102	LEVEL 1 PLAN		
DA 103	LEVEL 2 PLAN	DA 610	SHADOW DIAGRAM (21st JUNE 9AM - 3PM)
DA 104	ROOF PLAN	DA700	SIGNAGE PLAN
DA 201	ELEVATION (EAST & WEST)		
DA 202	ELEVATION (NORTH)		
DA 301	SECTIONS		
DA 400	MATERIAL SCHEDULE		
DA 401	PHOTOMONTAGE A		
DA 402	PHOTOMONTAGE B		
DA403	SKETCHUP VIEWS		

Specifically, the proposed development incorporates the following:

Basement Level:

- 31 car spaces are provided comprises 3 spaces for the serviced apartments, 19 residential spaces and 9 retail spaces. Storage areas and bike racks are also provided in the basement.

Ground Floor:

- 3 x 1 Bedroom serviced apartments fronting Illuka Road
- 5 x retail spaces
- 2 entry lobbies for the residential and commercial/service apartments
- Garbage storage area
- Vehicle access from Illuka Road

Level 1:

- 5 x 3 Bedroom apartments with open plan kitchen/living/dining with access to private open space balcony areas

Level: 2:

- 3 x 3 Bedrooms apartments with open plan kitchen/living/dining with access to private open space balcony areas

The landscape quality and accessibility within the public domain will be improved as a consequence of the works proposed. The modulated façade treatments and varied design elements provide a contemporary building with a high degree of visual interest whilst the proposed landscape treatments to the front of building will soften the building form in a streetscape context.

A detailed landscape plan has also been prepared by Black Beetle Landscape Architects which will allow the built form to be softened and screened from the street. An arborist report has been prepared which inspected 21 trees on the site. 7 low retention value trees are proposed to be removed with tree protection measures recommended for the remaining trees. Stormwater management plans also accompany this application.

4.0 STATUTORY PLANNING FRAMEWORK

4.1 Pittwater Local Environmental Plan 2014

4.1.1 Zoning

The subject property is zoned B2 Local Centre pursuant to the provisions of Pittwater Local Environmental Plan 2014 (PLEP 2014). Shop top housing and tourist and visitor accommodation (serviced apartments) are permissible in the zone with the proposed development satisfying such definition namely:

Shop top housing means one or more dwellings located above ground floor retail premises or business premises.

tourist and visitor accommodation means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following—

(e) serviced apartments,

With respect to the shop top housing use, the interpretation of this definition was dealt with in the matter of *Hrsto v Canterbury City Council* (No. 20 [2014] NSWLEWC 121 where Justice Sheahan adopted Council's submissions at paragraphs 33 – 36 of the judgement namely;

33. a dwelling must be in the same building as the ground floor retail premises or business premises and on a floor of that building that is at a level higher than the top most part of the ground floor retail premises or business premises in order to be characterised as "shop top housing" as defined.

34. Residential development that has a floor level that is lower than the top most part of ground floor retail premises or business premises could not be properly characterised as "shop top housing".

35. The Respondent accepts that dwellings do not need to be directly or immediately above ground floor retail premises or business premises in order to be characterised as "shop top housing". If it was intended that "shop top housing" be limited to dwellings that are directly or immediately above ground floor retail premises or business premises it is expected that those words would have been included in the definition of the term 'shop top housing'.

36. The Respondent contends that dwellings must be in the same building as the ground floor retail premises or business premises for the purposes of the term "shop top housing". However, the Respondent accepts that a broad interpretation of the word "above" in the definition should be given which would suggest that the dwellings need only be at a floor level that is higher than the top of the ground floor retail or business premises and do not need to be contained in an envelope on the higher floor level that would be intersected by a line drawn vertically from within the envelope of the ground floor retail or business premises.

In this regard, all residential apartments are located entirely above the level of the permissible ground floor retail floor space below. As such we have formed the considered opinion that the proposed development is appropriately defined as shop top housing and permissible with consent.

The stated zone objectives 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;*
- *To encourage employment opportunities in accessible locations;*
- *To maximise public transport patronage and encourage walking and cycling;*
- *To provide healthy, attractive, vibrant and safe local centres;*
- *To strengthen the role of centres as places of employment;*
- *To provide an active day and evening economy;*
- *To provide for residential uses above street level, where they are compatible with the characteristics and uses of the site and its surroundings.*

The proposed development is not antipathetic to these objectives as it provides a ground floor retail use which will serve the needs of people who live in, work in and visit the local area, is located within short walking distance of bus services, can accommodate uses which will strengthen the role of the centre as a place of employment and which is capable of providing an active day and night economy. The upper level residential apartments have a form and function which is compatible with the characteristics and uses of the site and its surroundings. The serviced apartments provide opportunities for tourist accommodation which will support the local economy.

Accordingly, the consent authority can be satisfied that the development is permissible with consent in the zone and not antipathetic to the zone objectives as outlined.

4.1.2 Height of Buildings – Exceptions to Development Standards

Pursuant to clause 4.3 of PLEP 2014 development the land must not exceed a height of 8.5 metres. The objectives of the 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.

It has been determined that the proposed works have a building height measured to the top of the lift overruns of 10.96 metres representing a variation of 2.46 metres or 28.9% with the roof parapet having a maximum height of 10.5 metres representing a variation of 2 metres or 23.5%.

The architect has provided a height plane drawing (DA550(A)) which details the extent of the breaches as depicted in Figures 5 and 6 below.



Figure 5 - Plan extract showing height non-compliance based on ground level (existing)



Figure 6 - Plan extract showing height non-compliance based on ground level (existing)

Clause 4.6 of PLEP provides a mechanism by which a development standard can be varied and to that extent this application is accompanied by a clause 4.6 variation request at Attachment 1.

Such request demonstrates that the development is consistent with the objectives of the zone, consistent with the objectives of the building height standard and as such strict compliance is both unreasonable and unnecessary. Further, sufficient environmental planning grounds exist to justify the variation sought. The 4.6 variation request is well founded.

4.1.3 Acid Sulfate Soils

Pursuant to clause 7.1 of the PLEP the subject site is identified as being class 3 on the acid sulfate soils map.

This application is accompanied by a geotechnical report and an acid sulfate soils investigation.

4.1.4 Essential Services

Pursuant to clause 6.12 of PLEP 2014 development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

- (a) the supply of water,*
- (b) the supply of electricity,*
- (c) the disposal and management of sewage,*
- (d) stormwater drainage or on-site conservation,*
- (e) suitable vehicular access.*

We confirm that essential services and access are available to the proposed development without the need for augmentation.

4.1.5 Terrestrial Biodiversity

Pursuant to clause 7.6 of the LEP, the subject site is mapped as being within a terrestrial biodiversity area. The vast majority of the site is not located within a biodiversity area, as shown on the map over page.

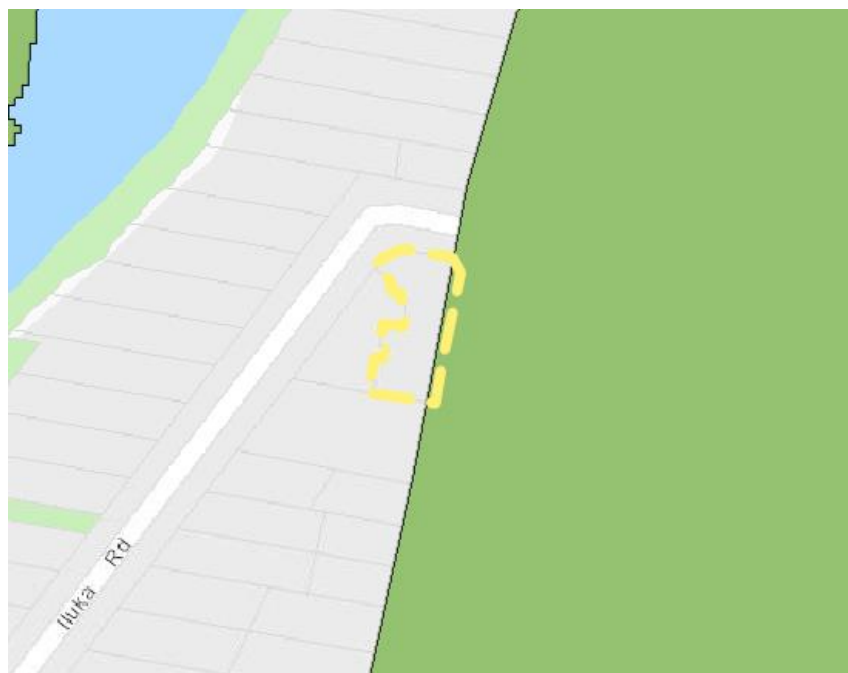


Figure 7: Biodiversity map extract

With only a minor portion of the site being a biodiversity area it is considered that the works proposed would have little impact on the flora and fauna in the local environment. An arborist report has been provided with respect of the trees on the site.

4.1.6 Earthworks

Pursuant to clause 7.2 of the LEP, some excavation is required to provide a basement level carparking area. A geotechnical report has been provided which demonstrates that the excavation proposed is acceptable in this instance and does not pose any significant risk.

4.1.7 Bushfire Prone Land

The site is mapped as vegetation buffer on the bushfire prone land map with the LEP. As such, a bushfire report has been prepared and is provided with the application.

4.2 Pittwater 21 Development Control Plan

This policy document came into effect on 1 February 2004. P21 DCP contains development controls for the design and construction of buildings and the development of land in Pittwater. The proposed development has been assessed against the relevant provisions of P21 DCP as outlined in the following sections of this report.

4.2.1 Palm Beach Locality

The property is located within the Palm Beach Locality. The desired future character of the locality described as:

The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.

Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.

Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.

Palm Beach will remain an important link to the offshore communities.

As previously indicated the architect has responded to the client brief to provide for a mixed-use development of good design quality which appropriately responds to the constraints imposed by the site geometry. The development will not only provide a quality built form outcome on the site and greater housing choice in this particular locality but also enhance the commercial and retail viability of this Local Centre. The ground floor retails will provide opportunities for potential food establishments with outdoor seating which will reinforce the 'seaside village' character.

The design, scale and treatment of the proposed development is compatible with that anticipated in this precinct and is generally consistent in scale with the existing development to be demolished on the site. External materials and finishes will be consistent with the colours and materials anticipated in the locality. The development will be safe from hazards. In this regard, the development responds positively to the desired future character of the Palm Beach locality and will contribute positively to the streetscape and visual amenity of the immediate locality.

4.2.2 General Controls

Aboriginal Heritage Significance

Having inspected the site and its immediate surrounds we confirm that it does not contain any exposed rock outcrops or evidence of middens. Accordingly, we have formed the considered opinion that the likelihood of encountering aboriginal heritage is extremely low and does not justify any further investigation at this time.

Dwelling Density and Subdivision – Shop Top Housing

Pursuant to section B2.6 of P21DCP a minimum 25% of the Gross Floor Area (GFA) of the building shall be set aside for commercial/retail purposes. The commercial/retail component is to be calculated on the Gross Lettable Area (GLA). Shop top housing development may be strata subdivided. The applicable objectives of the control are as follows:

- *An appropriate mix of residential and commercial development is provided, ensuring the functionality of commercial centres.*
- *Meet the economic and employment needs of Pittwater Community*

It has been determined that the total GFA of the proposed development is 2253m². It is proposed to provide commercial/retail floor space with a GFA of 575.1m². This represents 26% of the GFA of the building and such is compliant with control.

Contaminated Land and Potentially Contaminated Land

Pursuant to clause B3.6 Council shall not consent to the carrying out of any development on land unless it has considered the provisions of SEPP No. 55 – Remediation of Land (SEPP 55). The site has undergone a geotechnical report which assessed the existing land with respect to acid sulfate soils and potential land contamination. It has been determined that the existing use on the site, which represents shop top housing, and with the site analysis that the land has minimal risk of being contaminated.

Flood Prone Land

The site is not flood prone.

Stormwater Management

Stormwater management plans are provided with this application with stormwater appropriately disposed of to the street drainage system.

Off-street Vehicular Parking Requirements

Carparking is to be provided in accordance with the provisions of clause B6.6 as detailed in the accompanying Traffic and Parking Impacts Report prepared by Traffix. The proposed development includes 31 car spaces which will service the residents, commercial space and serviced apartments. The report concludes:

- *Proposed parking provision:*
 - *Sufficiently complies with Council's Development Control Plan requirements by providing 3 visitor spaces, 3 serviced apartment spaces, 9 retail spaces and 19 residential spaces.*
- *Traffic impacts:*
 - *The additional traffic from the proposed development will be minimal and that the traffic impacts are considered acceptable.*
- *Design of access, car parking and servicing facilities*
 - *Sufficiently complies with the relevant Standards*
- *The proposed development is supportable on traffic and parking grounds.*

Site Works Management

In accordance with Part B8 appropriate measures are to be undertaken to address the issues of construction and demolition impacts, erosion and sedimentation management, waste minimisation, site fencing and security, works in the public domain and traffic management where required.

The site being of adequate area and dimension does not impose any unusual construction or on-site material storage difficulties. The site works will be managed in accordance with the Protection of The Environment Operations Act 1997 with appropriate erosion and sedimentation control, construction fencing and air pollution controls being implemented. Appropriate traffic management procedures will be implemented where necessary.

4.2.3 Development Type Controls

Landscaping

Pursuant to clause C1.1 for shop top housing above ground gardens are to be incorporated into each dwelling at all levels (other than ground level) with a minimum 4 square metre or landscaped area provided as a feature at the ground level of the front building facade. Landscaping is to be provided at the front and rear of the development.

The accompanying plans nominate deep soil landscape opportunities adjacent to Illuka Road and the northern boundary. The existing significant street trees along the Barrenjoey Road frontage area to be retained and protected during construction. The landscape plan prepared by Black Beetle Landscape Architects demonstrates an enhancement of the landscaping on the site and will appropriately soften and screen the built form. Upper level balconies are also proposed to the balcony areas of each unit also.

Safety and Security

In accordance with clause C1.2 building design should allow visitors who approach the front door to be seen without the need to open the door. Buildings and the public domain are to be designed to allow occupants to overlook public places and communal areas to maximise casual surveillance. Building entrances are to be clearly visible from the street, easily identifiable and appropriately lit.

The proposed development has been designed to provide easily identifiable separate entrances to the residential and commercial floor space areas which will be appropriately lit. Internal living areas overlook public places and communal areas to maximise casual surveillance in strict accordance with the control.

View Sharing

Pursuant to clause C1.3 all new development is to be designed to achieve a reasonable sharing of views available from surrounding and nearby properties.

Due to the flat nature of the surrounding topography the proposed development will not give rise to adverse scenic view impacts. A reserve is located to the east of the site, on the opposite side of Barrenjoey Road, and the proposed development would not impact on those public views. The reserve contains dense vegetation a walking track which rises steeply up to the top of the ridge where views across Pittwater can be accessed. The images below demonstrates that the vistas enjoyed from this public reserve would not be impacted by the proposed development.



Figure 8: Westerly views from McKay Walking Track



Figure 9: 'Stairway to Heaven' walking track access from Barrenjoey Road

Solar Access

In accordance with Clause C1.4 the main private open space of each dwelling and the main private open space of any adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st. Windows to the principal living areas of the proposal and windows to the principal living area of adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st to at least 50% of the glazed area.

The application is accompanied by shadow diagrams prepared by PDB Architects which demonstrate that surrounding development will continue to receive compliant levels of solar access between 9 am and 3pm on 21st June. This application is also accompanied by a solar access report by PDB Architects which demonstrates that 70% of the apartments receive 2 hours of solar access to living areas and adjacent open space between 9am and 3pm on 21st June. 7 out of the 8 apartments are compliant with solar access requirements.

Visual Privacy

Pursuant to clause C1.5 private open space, recreation areas and living rooms of proposed and any existing adjoining dwellings are to be protected from direct overlooking within 9m by building layout, landscaping, screening devices or greater spatial separation. Elevated decks, verandas and balconies should incorporate privacy screens where necessary and should, where possible, be located at the front or rear of the building. Direct views from an upper level dwelling shall be designed to prevent overlooking of more than 50% of the private open space of a lower level dwelling directly below.

Balconies have been orientated towards both street frontages to prevent direct overlooking opportunities to adjoining properties. The location of the site, being a corner allotment, assists in mitigating any visual privacy concerns with the balconies or windows not being directly adjacent any adjoining properties. The development poses no overlooking concerns.

Acoustic Privacy

The proposed development has been designed to comply with Clause C1.6 of the policy and the relevant provisions of the Protection of the Environment Operations Act, 1997. The design elements incorporated into the development, including landscape treatments, will afford reasonable levels of acoustic privacy to the proposed and existing adjoining residential development consistent with that reasonably expected in an established urban environment.

An Acoustic Report by Acoustic Noise & Vibration Solutions concludes that the proposed development will meet the required noise reduction levels as required in the State Environmental Planning Policy (Infrastructure) 2007. Acoustic privacy of surrounding neighbours will not be adversely impacted by noise from the proposed car lift with the private open space areas of the apartments not located adjacent to any residential buildings. The communal roof top terrace will not give rise to any potential noise impacts given its height above ground and distance from neighbouring residential buildings.

Private Open Space

Pursuant to Clause C1.7, for Shop Top Housing, residential flat buildings and multi dwelling housing, private open space at upper levels in the form of front/rear or internal courtyard balconies and terraces are required. The dimension of the balcony should be sufficient so that the area can be usable for recreational purposes (ie a minimum area of 10m² and a minimum width of 2.4 metres). First floor balconies along the side boundary must be designed to limit overlooking and maintain privacy of adjoining residences.

The DCP controls cannot derogate from the provisions of the ADG and in this regard please refer to the SEP 65/ ADG assessment latter in this report. The proposal complies with such provisions with all private open space directly accessed from the adjacent living areas.

Accessibility

Pursuant to clause C1.9, 20% of units shall be adaptable pursuant to Silver Level Liveable Housing Guideline. Further, development shall include the design and construction of works in the public domain to ensure accessibility for the full frontage of the site to any public road and to ensure access to the site from the public domain.

The application is accompanied by an access report prepared by Building Control Group which details the developments compliance with the relevant provisions and standards and determines that the design of the development complies or is capable of complying with the relevant provisions.

Waste and Recycling Facilities

Clause C1.12 states that all waste and recycling receptacles are to be stored within the property boundaries. Where residential development consists of three or more dwellings a communal waste and recycling enclosure shall be provided. These are to be provided at or behind the front, side and rear setback requirements and located for convenient access for collection.

Separate retail and residential garbage storage is located at ground level adjacent to the southern boundary. The garbage store room is of an appropriate size for the proposed commercial and residential use of the building and will not be visible from a public place.

Storage Facilities

In accordance with clause C1.15, a lockable storage area of minimum 8 cubic metres per dwelling shall be provided.

All units are afforded with sufficient storage space within each of the dwelling with additional storage areas provided in the basement.

4.2.4 Locality Specific Development Controls

The subject site is located in the Palm Beach Locality. The developments performance against the relevant locality specific controls is discussed below.

Character as Viewed from Public Place

In accordance with this control buildings which front the street must have a street presence and incorporate design elements that are compatible with any design themes for the locality. Blank street facades without windows will not be permitted.

The development appropriately addresses both street frontages and presents an articulated built form that has been architecturally designed and enhances the current streetscape. Level 2 floorplate has been reduced in comparison to the lower levels and is designed to integrate with the roof form to be consistent with the scale of the development in the local area and limit any perceived unreasonable bulk and scale. An integrated landscape plan provides for perimeter planting treatments along the Illuka Road frontage and the northern boundary with the existing street trees being protected along Barrenjoey Road which will provide excellent softening and screening of the development.

Building Colours, Materials and Construction

The application is accompanied by a schedule of finishes. The development incorporates external colours, materials and finishes which are consistent with the predominant colours of development in the Palm Beach locality.

Front Building Line

These provisions require a 3.5 metre setback to the primary frontage and 1.75 metre setback to the secondary frontage of a corner site.

The geometry of the site is irregular making strict accordance with the front building line setback challenging. The setbacks proposed to the Barrenjoey Road frontage vary to provide appropriate articulation and on balance are consistent with the 3.5m control. The upper levels are generally consistent with the setbacks of the adjoining development to the south and follow the boundary line to the north in a stepped form.

The setbacks to the Illuka Road frontage are also variable and respond to the geometry of the site. The setback at ground level provide for ample opportunity for landscaping treatments with the upper levels providing a highly articulated façade comprising varying setbacks which minimised any perceived bulk and scale. It is considered that the setback proposed are consistent with those established in the area meet the objectives of the control.

Such variation succeeds pursuant to section 4.15(3A)(b) of the Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

Side and Rear Building Line

The site has only one adjoining development to the southern boundary. A nil setback is proposed which is consistent with the existing circumstance and with the DCP control which permits nil setbacks in the B2 local centre zone.

4.3 Pittwater 21 Development Control Plan - Compliance Table

Area 855.8m ²	Control	Proposed	Compliance
General Controls			
Housing Density	Min 25% retail/commercial	26%	Yes
Carparking	31 required	31 provided	Yes
Development Type Controls			
Solar Access	Min 2 hours	Compliant levels – refer to solar access report	Yes
Accessibility	20% of units adaptable	20% of the units are adaptable – refer to access report	Yes
Energy/ Water Conservation	BASIX Certificate	BASIX Certificate obtained	Yes
Storage	Min 8 cubic metres per unit	Exceeded for all units	Yes
Locality Specific Development Controls			
Front Building Line	3.5/ 1.75 metres	Variable setbacks proposed to primary and secondary frontage	No (achieves associated outcomes)
Side and rear Boundary Setbacks	Nil setbacks	Nil setbacks to southern boundary	Yes

4.4 State Environmental Planning Policy No. 55 - Remediation of Land

State Environmental Planning Policy No. 55 - Remediation of Land applies to all land and aims to provide for a State-wide planning approach to the remediation of contaminated land. Clause 7 of SEPP 55 requires Council to consider whether land is contaminated prior to granting consent to carrying out of any development on that land.

Given the outcomes of the geotechnical report provided the site is capable of being suitable for the proposed shop top housing development. Therefore, pursuant to the provisions of SEPP 55, Council can consent to the carrying out of development on the land.

4.5 State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development

State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development aims to improve the design quality of residential flat developments to provide sustainable housing in social and environmental terms that is a long term asset to the community and presents a better built form within the streetscape. It also aims to better provide for a range of residents, provide safety, amenity and satisfy ecologically sustainable development principles. In order to satisfy these aims the plan sets design principles in relation to context, scale, built form, density, resources, energy and water efficiency, landscaping, amenity, safety and security, social dimensions and aesthetics to improve the design quality of residential flat building in the State.

SEPP 65 applies to new residential flat buildings, the substantial redevelopment/refurbishment of existing residential flat buildings and conversion of an existing building to a residential flat building.

The proposed development is for the erection of a 3 storey residential flat building containing 10 apartments. As per the definition of a 'Residential Flat Building' and the provisions of Clause 4 outlining the application of the policy, the provisions of SEPP 65 are applicable to the proposed development.

SEPP 65 requires any development application for residential flat development to be assessed against the 9 principles contained at Schedule 1 of SEPP 65 and the matters contained in the Apartment Design Guide (ADG). The required Architect Design Verification Statement has been provided by PBD Architects together with an ADG compliance table.

4.6 State Environmental Planning Policy (Infrastructure) 2007

Clause 102 of the policy applies to development for any of the following purposes that is on land in or adjacent to the road corridor for a freeway, a tollway or a transitway or any other road with an annual average daily traffic volume of more than 40,000 vehicles (based on the traffic volume data published on the website of the RTA) and that the consent authority considers it likely to be adversely affected by road noise or vibration:

- (a) a building for residential use,
- (b) place of public worship,
- (c) a hospital,

- (d) an educational establishment or child care centre.

If the development is for the purposes of a building for residential use, the consent authority must not grant consent to the development unless it is satisfied that appropriate measures will be taken to ensure that the following LAeq levels are not exceeded:

- (a) in any bedroom in the building — 35 dBA at any time between 10 pm and 7 am,
 (b) anywhere else in the building (other than a garage, kitchen, bathroom or hallway) — 40 dBA at any time.

In this regard, the application is accompanied by an Acoustic Report prepared by Acoustic Noise & Vibration Solutions which concludes:

The study of external noise intrusion into the subject development has found that appropriate controls can be incorporated into the building design to achieve a satisfactory accommodation environment, consistent with the intended quality of the building and relevant standards and the Council's guidelines.

4.7 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX certificate accompanies the development application and demonstrates that the proposal exceeds compliance with the BASIX water, energy and thermal efficiency targets.

4.8 State Environmental Planning Policy (Coastal Management) 2018

The site is identified on the SEPP Coastal Management map as being within the Coastal Environmental Area Map and Coastal Use Area Map, as shown below:

Clause 13 (1) of the SEPP, coastal environmental area, states the following:

(1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
 (b) coastal environmental values and natural coastal processes,
 (c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
 (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*

- (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (f) Aboriginal cultural heritage, practices and places,*
- (g) the use of the surf zone.*

The proposed development will have no impact on the natural coastal processes and environment, marine flora and fauna, public access to the beach and is not within the surf zone.

Clause 14 (1) of the SEPP, Coastal Use Area, states the following:

(1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:

(a) has considered whether the proposed development is likely to cause an adverse impact on the following:

- (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,*
- (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,*
- (iv) Aboriginal cultural heritage, practices and places,*
- (v) cultural and built environment heritage, and*

(b) is satisfied that:

- (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or*
- (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
- (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and*

(c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

The proposed development does not impact on the foreshore processes, access or the amenity of the coastal area. The development has been demonstrated to be consistent with the desired future character and with the scale of development in the vicinity.

Clause 15 of the SEPP states:

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

The consent authority can be satisfied that proposed works will not risk coastal hazards on the site or in the local area. This application is accompanied by a geotechnical report which states the risk associated with the development is acceptable.

4.8 Matters for Consideration Pursuant to Section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 (as amended):

The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations.

The proposal is permissible and generally in conformity with the General, Development Type and Locality Specific Controls contained within Pittwater 21 Development Control Plan (P21DCP). The application requires the consent authority to give favourable consideration to a variation of the height of buildings development standard contained at clause 4.3 of Pittwater Local Environmental Plan 2014 (PLEP 2014). This report demonstrates that strict compliance is both unreasonable and unnecessary given the significant floor level constraint imposed by flooding and the desirability of roof top communal open space in a mixed-use development effected by flooding where occupants will need to “shelter in place” during a flooding event. The clause 4.6 variation request is well founded.

The development satisfies the Design Principles prescribed by State Environmental Planning Policy No. 65, the associated Clause 30 standards and the objectives specified in the Apartment Design Guide for the relevant design criteria. The height and density proposed is entirely appropriate given the paucity of adverse environmental consequences, the ability to provide appropriately for off-street car parking and the developments consistency with the Department of Planning’s Sydney’s Metropolitan Strategy ‘City of Cities’ and the Subregional Strategy as it relates to the appropriate concentration of residential density.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15C of the Environmental Planning and Assessment Act, 1979. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent.

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Context and Setting

- i) *What is the relationship to the region and local context on terms of:*
 - *the scenic qualities and features of the landscape?*

- *the character and amenity of the locality and streetscape?*
- *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
- *the previous and existing land uses and activities in the locality?*

The proposed development has been developed through detailed site, contextual, flood planning and urban design analysis and in response to the minutes arising from formal pre-DA discussions with Council and the issues raised in the assessment of the previous scheme on this site. The final design, the subject of this application, represents a highly considered and resolved response to the constraints and opportunities identified during the initial site analysis with the proposed development exhibiting good design not only in its architectural form, function and amenity but importantly, its success in responding to the significant constraint imposed by flooding and the current and desired future character of the area.

ii) *What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

The proposed development incorporates appropriate design elements to ameliorate potential amenity impacts to adjoining properties. These issues have been discussed in detail in the body of this report.

Access, transport and traffic

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

The proposed development provides appropriately for commercial, resident and visitor car parking and has good access to public transport.

Public domain

The landscape quality and accessibility within the public domain will be retained as a consequence of the works proposed. The proposed development will contribute positively to the public domain.

Utilities

Existing utility services will adequately service the development.

Flora and fauna

The application is accompanied by a landscape plan which details the proposed landscape regime for the entire site.

Waste

Normal domestic and commercial waste collection applies to this development.

Natural hazards

The site is within an area mapped as bushfire prone land and a bushfire hazard assessment has been provided.

Economic impact in the locality

The proposed development will provide temporary employment through the construction phases and employment opportunities in the future ground floor commercial space.

Site design and internal design

i) *Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The impact of the proposal with respect to design and site planning is positive. The scheme is in accordance with the thrust of the planning regime and will result in a shop top housing development of exceptional design quality.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed development will comply with the provisions of the Building Code of Australia as required by Clause 98 of the Environmental Planning and Assessment Regulation 2000 as detailed in the accompanying BCA report. There will be no detrimental effects on the occupants through the building design which will achieve the relevant standards pertaining to health and safety.

Construction

- i) *What would be the impacts of construction activities in terms of:*
- *the environmental planning issues listed above?*
 - *site safety?*

The development will be carried out in accordance with the provisions of the Protection of the Environment Operations Act 1997. Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

The suitability of the site for the development.

Does the proposal fit in the locality?

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any insurmountable development constraints. The site is well located with regards to utility services and public transport. There will be no excessive levels of transport demand created.

Are the site attributes conducive to development?

The site has no special physical or engineering constraints and is suitable for the proposed development.

Any submissions received in accordance with this Act or the regulations.

It is envisaged that any submissions made in relation to the proposed development will be appropriately assessed by Council.

The public interest.

The proposed development has been developed through detailed site, contextual, flood planning and urban design analysis and in response to the minutes arising from formal pre-DA discussions with Council. The final design, the subject of this application, represents a highly considered and resolved response to the constraints and opportunities identified during the initial site analysis with the proposed development exhibiting good design not only in its architectural form, function and amenity but importantly, its success in responding to the constraint on the site and the current and desired future character of the area. The development will not only provide a quality built form outcome on the site and greater housing choice in this particular locality but also improve the commercial and retail viability of this commercial centre.

It is considered that the public interest is best served in providing certainty in the planning process through encouraging development of good design that satisfies the outcomes and controls contained within the adopted legislative framework. Accordingly, approval of the development would be in the public interest.

5.0 CONCLUSION

The proposal is permissible and generally in conformity with the General, Development Type and Locality Specific Controls contained within Pittwater 21 Development Control Plan (P21DCP). The application requires the consent authority to give favourable consideration to a variation of the height of buildings development standard contained at clause 4.3 of Pittwater Local Environmental Plan 2014 (PLEP 2014). This report demonstrates that strict compliance is both unreasonable and unnecessary given the high quality design and reduced floorplate of the upper level which integrates with the pitched roof design. The clause 4.6 variation request is well founded.

The development satisfies the Design Principles prescribed by State Environmental Planning Policy No. 65, the associated Clause 30 standards and the objectives specified in the Apartment Design Guide for the relevant design criteria. The height and density proposed is entirely appropriate given the paucity of adverse environmental consequences, the ability to provide appropriately for off-street car parking and the developments consistency with the Department of Planning's Sydney's Metropolitan Strategy 'City of Cities' and the Subregional Strategy as it relates to the appropriate concentration of residential density.

The proposed development has been developed through detailed site, contextual and urban design analysis and in response to the minutes arising from formal pre-DA discussions with Council (PLM 2018/0150). The final design, the subject of this application, represents a highly considered and resolved response to the constraints and opportunities identified with the proposed development exhibiting good design not only in its architectural form, function and amenity but importantly, its success in responding to the current and desired future character as outlined within the Palm Beach Locality Statement. In this regard, the development provides for a design, scale, treatment and roof form reflecting a 'seaside-village' character with the upper-level apartments representing rooms within a roof.

Having given due consideration to the relevant considerations pursuant to s4.15 of the Act it has been demonstrated that the proposed development is appropriate for approval.

BOSTON BLYTH FLEMING TOWN PLANNERS



Greg Boston

Attachment 1

Clause 4.6 variation request - Height of buildings (clause 4.3 PLEP 2013)

1.0 Introduction

This clause 4.6 variation 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 Pittwater Local Environmental Plan 2014 (“PLEP”)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Pittwater Local Environmental Plan 2013 (PLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control 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.*

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 leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In *Stamford Property Services*, the Court followed the reasoning adopted in *Bettar* and confirmed that “ground level (existing)” must relate to the levels of the site, and not to the artificially modified levels of the site as reflected by the building presently located on the land. In this regard the Court preferred the Council’s method to determining the “ground floor (existing)” from which building height should be measured. Council’s approach required that the proposed height be measured from the natural ground levels of the site where known, such as undisturbed levels at the boundary, and from adjacent undisturbed levels such as the level of the footpath at the front boundary of the site. These levels could then be extrapolated across the site reflecting the pre-development sloping topography of the land, consistent with the approach adopted in *Bettar*.

In these proceedings the Court was satisfied that even though there was limited survey information available for the site, there was enough information to determine the “ground level (existing)” for the site based on unmodified surveyed levels in the public domain (footpaths) which could be extrapolated across the site. In summary, the Court has confirmed that the definition of “ground level (existing)” from which building height should be measured:

- is not to be based on the artificially modified levels of the site such as the floor levels of an existing building. This includes the entrance steps of an existing building.
- is not to include the basement floor or the soil beneath the basement following construction of the building.
- is to be based on the existing undisturbed surveyed surface of the ground. For sites where access to the ground surface is restricted by an existing building, natural ground levels should be determined with regard to known boundary levels based on actual and surveyed levels on adjoining properties including within the public domain (footpaths).

It has been determined that the proposed works have a building height measured to the top of the lift overruns of 10.96 metres representing a variation of 2.46 metres or 28.9% with the roof parapet having a maximum height of 10.5 metres representing a variation of 2 metres or 23.5%.

The architect has provided a height plane drawing (DA550(A)) which details the extent of the breaches as depicted in Figures 1 and 2 below.



Figure 1 - Plan extract showing height non-compliance based on ground level (existing)



Figure 2 - Plan extract showing height non-compliance based on ground level (existing)

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP 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 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.*

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

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 provision at 4.3 of PLEP 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 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 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 PLEP 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 PLEP 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 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 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?

4.0 Request for variation

4.1 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 any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Response: The height and roof form proposed are consistent with that established by other shop top housing development within the sites visual catchment and consistent with the desired character of the locality in relation to maintaining a predominant 2 storey building form reflecting a 'seaside-village' character with the upper-level apartments representing rooms within a roof.

The upper level includes a smaller floorplate and stepped in from the boundaries to minimise any potential bulk and scale concerns. It has also been designed to integrate with the roof form to give the appearance of a 2 storey form within the streetscape.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its roof form and building height offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

The proposal is consistent with this objective.

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

Response: For the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes. The development will be consistent with existing 3 storey development within this local centre.

The proposal is consistent with this objective.

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

Response: The shadow diagrams demonstrate that the development will not result in any unreasonable overshadowing impacts and that adjoining development will continue to receive compliant levels of solar access, as stipulated in the DCP control.

The proposal is consistent with this objective.

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

Response: the development will have no impact on public and private views. The public views enjoyed from the public reserve to the east of the site will be maintained by virtue of the steep topography. The walking track rises up steeply from Barrenjoey Road and the view vantage points sit well above development site and will have no impact on these public views.

No private views will be impacted and the development is consistent with the principals of view sharing established by *Tenacity vs Warringah Council*.

The proposal is consistent with this objective.

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

Response: The subject site is relatively flat.

The proposal is consistent with this objective.

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

Response: The application is not located within vicinity of heritage items or heritage conservation area. This site is located within the established local centre. The existing significant street trees are to be retained and protected along Barrenjoey Road which provides for softening and screening of the built form. It is considered that the building height breach does not result in any unreasonable visual impact concerns on the natural environment with the building to be highly articulated and stepped in at the upper level. Landscaping treatments to upper level balconies will provide additional softening and screening while ensuring the development sits within a landscaped setting.

The proposal is consistent with this objective.

Consistency with zone objectives

The subject site is zoned B2 Local Centre pursuant to PLEP 2014 with dwelling houses permissible in the zone with consent. The stated objectives of the 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 development provides for 5 retail spaces and 3 serviced apartments at ground level. These future commercial tenancies will be able to support the local community. The serviced apartments will allow for greater economic stimulation for these businesses by providing added tourist accommodation.

- *To encourage employment opportunities in accessible locations.*

Response: The retail spaces will provide for small business and employment opportunities. Barrenjoey Road is well serviced by public transport with bus stops in close proximity to the site as well as Palm Beach Ferry connecting to the Central Coast.

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

Response: The site is easily accessible by public transport, cycling and walking.

- *To provide healthy, attractive, vibrant and safe local centres.*

Response: The development has been designed in accordance with safety provision with regard to the ability for casual surveillance. The ground floor retail spaces will be a revisitation of the local centre and represents an enhancement of the existing local centre.

- *To strengthen the role of centres as places of employment.*

Response: The development meets the requirement for at least 25% GFA for retail spaces. In that regard, it reinforces the site as place for employment opportunities.

- *To provide an active day and evening economy.*

Response: The ground floor retail and tourist accommodation provides for greater economic opportunities in the local area throughout the day and night.

- *To provide for residential uses above street level where they are compatible with the characteristics and uses of the site and its surroundings.*

Response: The application is for a shop top housing development which is considered to be consistent with the desired future character of the Palm Beach locality. The development does not give rise to any unreasonable amenity impacts with regard to overshadowing, privacy or view loss.

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the B2 Local Centre 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 unreasonable and unnecessary.

4.2 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].*

Sufficient environment planning grounds

Sufficient environmental planning grounds exist to justify the height of buildings variation namely that the design has incorporated a high articulated façade with the upper level being stepped in further than the lower levels. Furthermore, the upper level has been designed to integrate with the roof form to present as a 2 storey development within in the streetscape. This is consistent with development in the local centre zone which is typically 3 storeys with the upper level been stepped to minimise any potential visual impact or perceived bulk and scale.

In this regard, I consider the proposal to be of a skilful design which appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes. Such outcome is achieved whilst realising the reasonable development potential of the land.

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 (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

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.

4.3 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 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.

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.

4.4 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 non-numerical standard, because of the greater scrutiny that the LPP process and determinations 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