

22<sup>nd</sup> February 2019

The General Manager  
Northern Beaches Council  
PO Box 82  
Manly NSW 1655

Dear Sir,

**Amended Clause 4.6 variation request – Height of buildings  
Proposed Shop top housing development  
396 – 402 Sydney Road, Balgowlah**

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 the height of a building on the subject land is not to exceed 12.5 metres in height. The objectives of this control are as follows:

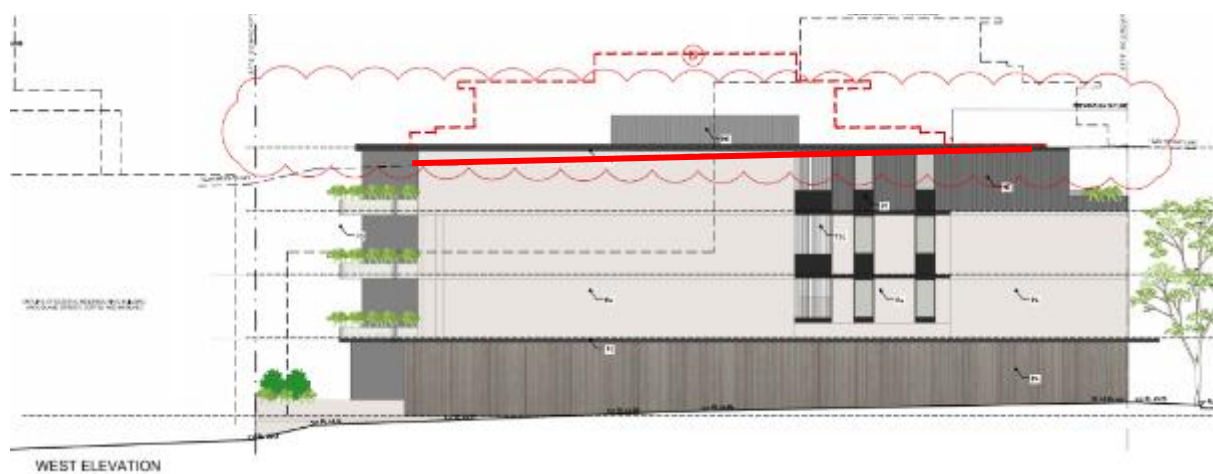
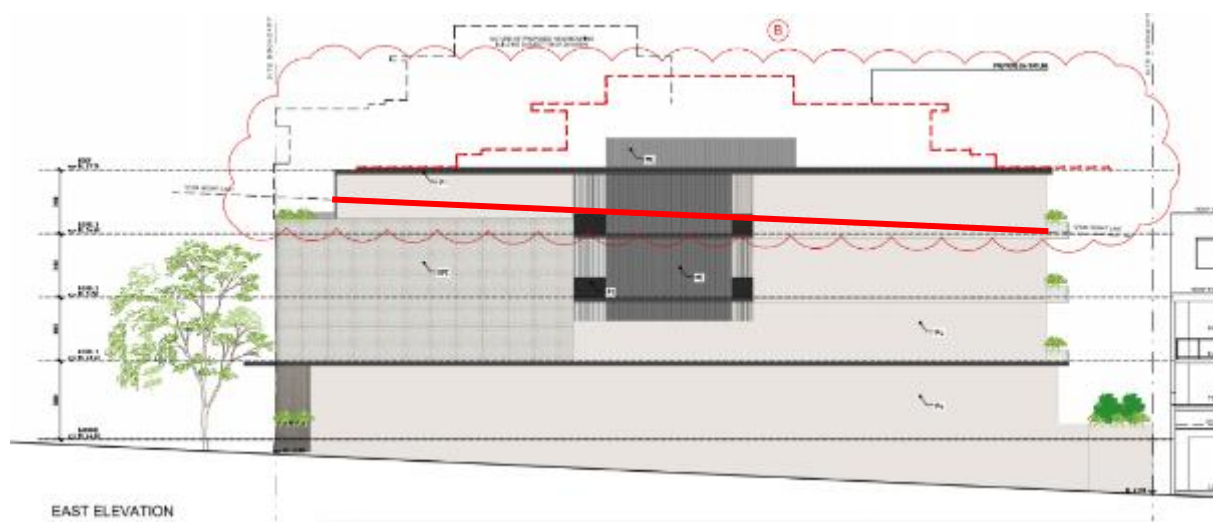
- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following:*
  - (i)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

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

The amended development has a maximum building height of 15.7 metres measure to the north eastern roof edge above Unit 303 and the lift overrun beyond. This represents a variation of 3.2 metres or 25%. The variable extent of non-compliance is diagrammatically depicted in Figure 1 over page with the recently approved shop top housing development at No. 404 Sydney Road shaded for comparative analysis.





**Figure 1 – Height compliance diagrams**

Clause 4.6 of MLEP 2013 provides a mechanism by which a development standard can be varied. 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.*

Pursuant to clause 4.6(2) 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) states that 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.*

Clause 4.6(4) states 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.*

Clause 4.6(5) states that 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.*

## **Claim for Variation**

### **Zone and Zone Objectives**

The subject property is zoned B2 Local Centre pursuant to Manly Local Environmental Plan 2013 ("MLEP 2013") with commercial premises and shop top housing permissible in the zone with consent. The stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Shop top housing is defined as one or more dwellings located above ground floor retail premises or business premises.

The development incorporates dwellings located above ground floor retail/business premises with all residential apartments located within a single building form and above basement car parking incorporating both retail and commercial car parking spaces. Accordingly, the development is appropriately defined as shop top housing and permissible with consent in the zone.

The proposed development meets the relevant zone objectives given the retention of ground floor retail/business uses and the appropriate concentration of residential densities within an established business zone. The height and scale of the development is responsive to context, compatible with that of adjoining development and will not result in unacceptable or jarring residential amenity, streetscape or broader urban design impacts.

Accordingly, there are no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

### **Height of Buildings Standard and Objectives**

The standard, objectives and proposed building height variation have been previously identified. Having regard to the stated objectives it is considered that strict compliance is both unreasonable and unnecessary for the following reasons:

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

Comment: Detailed site analysis identified a number of site-specific constraints and opportunities the majority of which relate to the height, proximity and orientation of adjoining development and the heights approved/ established by development along this section of Sydney Road. Through such analysis appropriate setbacks, building envelopes and transitional building heights were identified providing for the highly articulated and modulated building form currently proposed.

In this regard, we have formed the considered opinion that the proposed building heights and roof forms are consistent with the topographic landscape, prevailing building height and desired future streetscape character of this section of Sydney Road as demonstrated by the recent approval of development application DA2018/0890 proposing the construction of a 5 storey shop top housing development immediately to the west of the site at No. 404 Sydney Road and the 5 storey shop top housing development at No. 374 Sydney Road. The fall of the land towards the rear of the site also contributes to the extent of building height breach. The proposal is consistent with this objective.

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

Comment: The proposed development, as amended, is compliant with the 2:1 floor space ratio development standard with the additional building height reflecting the contextually responsive and appropriate distribution of floor space across this particular site. The height, bulk and scale of the building are entirely consistent with the built form characteristics proposed by adjoining development and more recently constructed development along this section of Sydney Road as depicted in Figures 2 and 3 over page.





**Figure 2** – Perspective showing proposed development in context of approved/constructed development at No's 374 and 404 Sydney Road



**Figure 3** – Perspective showing subject development in context of the recently approved development at No. 404 Sydney Road

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the height of the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of existing and approved development within the sites visual catchment. A compliant 3 storey podium height is maintained to the street with the upper level highly recessive and set well back from the street, rear and eastern boundaries such that it will not be readily discernible in a streetscape context or as viewed from adjoining properties.

Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings and able to co-exist in harmony with surrounding development.

The proposal is consistent with objectives (a) and (b).

(c) *to minimise disruption to the following:*

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

Comment: Careful consideration has also been given to the impact of non-compliant portion of the development on existing public and private view lines over and across the site. In this regard, the juxtaposition of adjoining development relative to the subject site and available view lines ensures that the development will not give rise to any unacceptable public or private view impacts

Accordingly, we have formed the considered opinion that a view sharing scenario is maintained in accordance with the principles established by the Land and Environment Court in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140.

The proposal is consistent with this objective.

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

Comment: The accompanying shadow diagrams on plan DA560(A) prepared by the project Architect demonstrate that due to the orientation of the site and position to the south of the adjoining town house development that there will be



no additional shadowing impact on these northern adjoining properties at any time between 9am and 3pm on 21st June.

Further, the solar gain diagrams on plans DA550(A) and DA551(A) demonstrate that at least 70% of apartments within the recently approved shop top housing development at No. 404 Sydney Road will receive a minimum of 2 hours of solar access between 9am and 3pm on 21<sup>st</sup> June in strict accordance with the ADG requirement. The building height variation will not give rise to unacceptable shadowing impact on the public domain.

The proposal is consistent with this objective.

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

Comment: N/A

In the recent 'Four2Five' judgement (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

In this regard, we have formed the considered opinion that there are sufficient environmental planning grounds to justify the variation sought namely the topography of the land which falls away in multiple directions towards the rear of the site making strict compliance difficult to achieve and the contextually appropriate building height proposed which is consistent with the existing and desired future streetscape as demonstrated through Council's approval of the 4/5 storey shop top housing development at No. 374 Sydney Road to the east of the site and No. 404 Sydney Road immediately to the west of the site. The exceptional design quality of the development and absence of any unreasonable or unacceptable streetscape or residential amenity impacts also gives weight to the acceptability of the variation sought.

We have formed the considered opinion that a better environmental planning/ built form/ urban design outcome is achieved through approval of the variation proposed with enforcement of strict compliance resulting in a development unable to achieve anywhere near the anticipated FSR of 2:1 on a site located in an established centre and ideally suited to increased residential densities. As such, we 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.

## **Conclusions**

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning.

As such, we 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**