

## Pittwater Local Environmental Plan 2014 - Clause 4.6: Exception to Development Standards

### Development Application for 351-353 Barrenjoey Road, Newport 2106

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#### The Development Application

1. This report relates to a development application that seeks consent for construction of mixed use development consisting of a three storey development comprising of nine retail facilities and 14 residential apartments, located at 351-353 Barrenjoey Road, Newport (the **site**) and legally described as Lot 64 in Deposited Plan 1090224 and Lot 65 and 66, Section 5 in Deposited Plan 6248.
2. The Environmental Planning Instrument to which this variation relates is the Pittwater Local Environmental Plan 2014 (the LEP).
3. The site is located in the B2 Local Centre Zone, pursuant to Clause 2.2 of the LEP and the proposed use of the site for mixed use purposes comprising of retail premises and shop top housing is permissible with development consent. Retail premises and shop top housing are defined in the LEP as follows:

**retail premises** means a building or place used for the purpose of selling items by retail, or hiring or displaying items for the purpose of selling them or hiring them out, whether the items are goods or materials (or whether also sold by wholesale), and includes any of the following –

(Repealed) ...

(n) .. vehicle sales or hire premises,

but does not include highway service centres, service stations, industrial retail outlets or restricted premises. Note - Retail premises are a type of **commercial premises**<sup>1</sup>—see the definition of that term in this Dictionary.

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

Note – shop top housing is a type of residential accommodation – see definition of that term in this Dictionary.

4. The purpose of this report is to seek a variation to the development standard at cl. 4.3 of the LEP, relating to Height of buildings, in accordance with cl. 4.6 and is to be read in conjunction with the Statement of Environmental Effects (SEE) accompanying the development application.

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<sup>1</sup> **commercial premises** means any of the following –

- (a) business premises,
- (b) office premises,
- (c) retail premises.

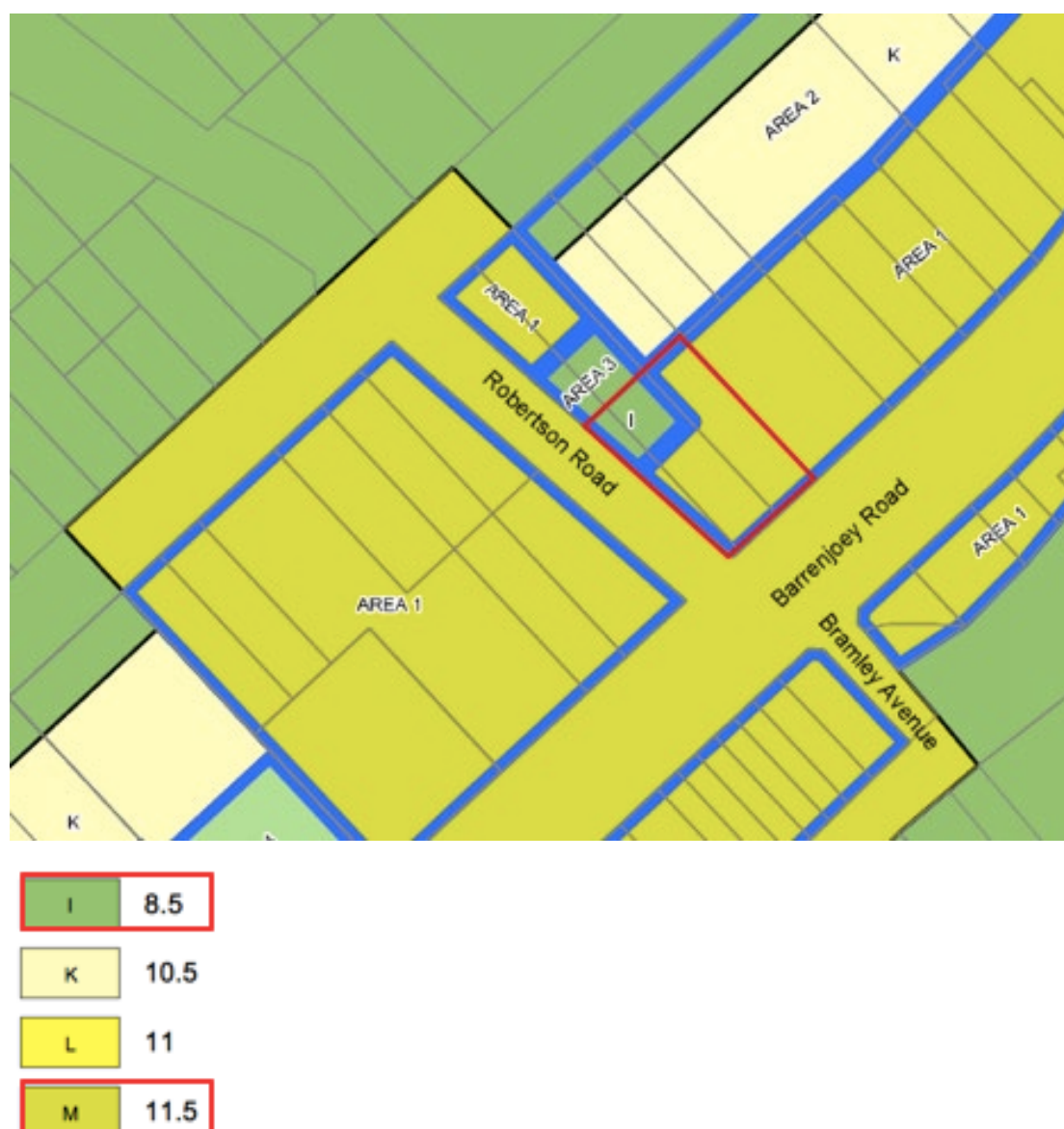


## The Variation Sought

### The Development Standard for Building Height

5. The Building Height map demonstrates that a portion of the rear part of the site is subject to a maximum building height of 8.5m above the flood planning level; the remainder of the site is subject to a maximum building height of 11.5m above the flood planning level. The flood planning level for the site is 720mm. An extract of the map is shown at Figure 1. The resulting height above the existing ground level permitted is therefore 9.22m and 12.22m, respectively.

Figure 1: Height of Building height map, site highlighted with red boundary



6. The definition of *building height* or *height of building* is contained at the Dictionary to the LEP and states as follows:

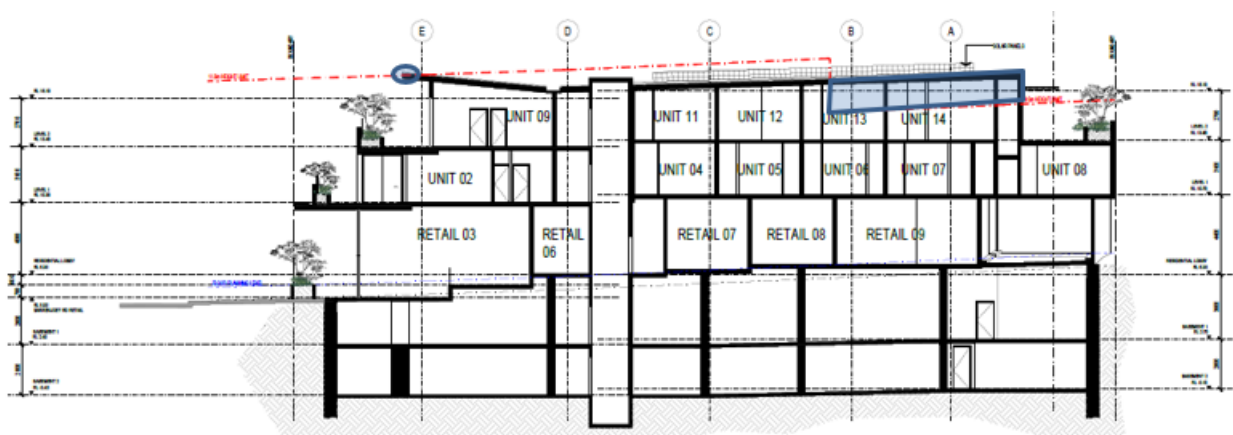
(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

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

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

7. Section C-C, prepared by Crawford Architects demonstrates those portions of the building that exceed the development standard.

**Figure 2: Extent of non-compliant building form with the development standard**



### The Proposed Building Height

8. The height of the proposed development is 10m at the south-western end of the site (being 1.5m above the permitted building height) and 11.65m (being 0.15m above the permitted building height).

### The Site and Context

9. The site is located at 351-353 Barrenjoey Road, Newport resulted through amalgamation of two lots as proposed in the accompanying SEE. The site has a total area of 1,313m<sup>2</sup> and has a primary frontage to Barrenjoey Road and secondary frontage to Robertson Road.
10. The site positioned at the intersection corner of Barrenjoey Road and Robertson Road. The site's south-eastern boundary fronts Barrenjoey Road and is approximately 26.44m in length and the north western boundary fronts Robertson Road and is 45.975m in length. There is a cross fall of approximately 2m from east to west, across the site at the Robertson Road boundary.
11. The site is located within the Newport Commercial Centre and comprises of mix of residential commercial uses, the latter of which are found predominately aligning Barrenjoey Road, as well as a smaller degree of activity along Robertson Street, which directly aligns the western boundary of the site. Built form, in the vicinity of the site, comprises single, through to three storey buildings, generally with the upper levels of higher buildings set back from the street frontage.



12. The proposal has taken into consideration the adjoining heritage item to the north and the surrounding residential developments. The proposal seeks to provide an integrated design solution to establish a holistic residential community in this location.

### **The Proposed Development & The Impact of the Non-Compliant Section of Building Height**

13. The proposed development is non-compliant with the development standard for height of buildings for the proportions of built form identified above. The non-compliance ranges between 15cm and 1.5m at the opposing ends of the proposed form.
14. The portion of the roof slab fronting Barrenjoey Road that exceeds the development standard is a result of the angular nature of the roof design, to enable a maximum degree of solar penetration into the unit which it adjoins, as well as providing a degree of articulation to the principal frontage of the site, thus improving the diversity of building form when considered from Barrenjoey Road., The design also allows for a box gutter at the lower side of the slope to ensure rainwater can be effectively drained into this.
15. The portion of building form on Level 3 that sits proud of the development standard is a direct response to the proposed layout. Compliance with the development standard could be achieved in the event that the common open space area were located in that portion of the site subject to the height of building standard of 8.5m However, if this were to occur, to realise the development potential of the site, the built form would be pushed closer to the northern boundary, thus increasing the visual presence of the proposal on the setting of the heritage listed church, to the north west of the site. the design instead allows for a degree of visual relief and separation from that item.
16. The proposal also enhances the degree of solar access that is achieved to the common open space area that would otherwise be sheltered by the apartment if these were located to the north of the common open space area.
17. Therefore, the resulting design outcome ensures that a high quality common open space area is furnished to the development. The proposed building height provides for a much more effective design outcome, consistent with the character of the locality, without causing negative impacts on surrounding developments and ensures an enhanced visual setting for the heritage listed church.
18. The proposed development provides a creative design response that is based on a clear understanding of the spatial and urban context and the neighbourhood character. Most importantly, the non-compliant portion of Level 3 provides a better design that is feasible and contributes to the economic viability of site, without overshadowing structures of surrounding developments particularly the public plaza proposed on No.349, as shown in the accompanying shadow diagrams.
19. The SEE also demonstrates that the non-compliant portions of the building do not cause any increased solar impacts below the thresholds of the NSW Apartment Design Guide (ADG) such that



the amenity of neighbouring properties would be otherwise compromised as a result of this non-compliant section of the proposed building.

20. Further, there is no adverse impact in terms of view loss as a result of the non-compliant sections of the proposed building, having regard to the height of buildings surrounding the subject site.
21. Therefore, the sections of the building which do not comply with the development standard will have no impact in terms of loss of views nor solar access, such that they may otherwise be unacceptable in the context of a variation sought in accordance with cl.4.6.

## The Context and Future Character

*What is the character of the locality?*

22. Character is what makes a neighbourhood distinctive and represents the identity of a place. To this end, Section A4.10 of the Pittwater 21 Development Control Plan (the DCP) deals with Locality Statement. The subject site is located in the Newport Commercial Centre. The DCP outlines the desired development outcomes for the site as envisaged by the Northern Beaches Council (the Council).

*Is the proposal consistent/compatible with the objectives of locality /character of the Newport Commercial Centre?*

23. The DCP provides the following significant characteristics in relation to the locality. The table below provides an assessment of the proposal having regard to these objectives.

**Table 1: Assessment of the proposed development having regard to the desired character of the Newport Commercial Centre**

Provision	Comments	Compliance
<ul style="list-style-type: none"> <li>○ Diversity rather than uniformity of building type and style is a desirable part of the existing character and is encouraged to continue. Strategies to achieve this include modulating buildings in both the vertical and horizontal plane, and enabling a variety of fenestration, awning treatments and roof forms. This diversity, including the mix of new and remodelled buildings, will be unified by the streetscape and public domain treatments.</li> </ul>	The design seeks to provide a contemporary built form in a corner location which will contribute to the immediate urban context of the neighbourhood and the desired character of the locality. The proposed design contributes to the variety of development type in the locality. The proposed façade design represents a well-articulated and modulated design with appropriate materials and finishes, adding to the distinct appearance of the building in the area.	Yes
<ul style="list-style-type: none"> <li>○ At the topmost level of buildings, setbacks to front,</li> </ul>	The proposed development is setback 3.5m from the Barrenjoey Road at	Yes

Provision	Comments	Compliance
sides and rear will break down the overall scale of the street, support view sharing, and will also provide useable roof terraces and garden areas. Views from the upper slope down and across the roofscape will be significantly improved by thoughtful roof design. The permeability of the centre will be further improved by both protecting and creating views through and between buildings.	ground floor level. Additionally, Level 2 is setback 4m from both Barrenjoey Road and Robertson Road, reducing the bulky appearance of the building as well as providing visual separation between the lower and upper levels of the building. The proposed design also includes a communal terrace with adequate landscaping on Level 2 ensuring efficient use of the space while enhancing the living standard of residents occupying the site. In terms of view sharing, the building is designed to encourage view sharing through effective roof design and ensuring that the extent of bulk is appropriate to the site.	
<ul style="list-style-type: none"> <li>The architectural character will be expressed strongly through the design of facades, including shading and screening devices, lightness and transparency of materials, and elements that promote natural ventilation.</li> </ul>	The design concept indicates an acceptable level of compliance with the principles of the Apartment Design Guide and will not compromise the potential future development of the adjoining sites. The design maximises residential amenity for future occupants (views, solar access, cross ventilation), as well as ensuring that impacts on amenity to the adjoining properties are minimised, whilst allowing the site to achieve the maximum development potential.	Yes
Building orientation, internal layouts, the location and design of balcony and courtyard areas, should all optimise people's ability to use and enjoy the spaces.	The proposed development has been designed to ensure easy access is provided to facilities on site, including the balconies and communal terrace.	Yes
Shop fronts will be largely transparent, with large openings, connecting directly with the footpath areas, to contribute to a sense of permeability.	The ground floor plane will be provided with large transparent openings on both street frontages to ensure that the site provides a strong and vibrant relationship with the public domain. Activity is achieved by locating the balconies fronting the street to ensure casual surveillance over the adjoining public domain.	Yes
Building users will benefit from terraces, balconies and openings with	The upper level balconies, terraces and window openings overlook the	Yes





Provision	Comments	Compliance
a pleasant outlook, while the space benefits from passive surveillance and from being attractively edged.	surrounding street network to ensure natural, passive surveillance over the public domain. This will assist to provide a safe, local environment and create a sense of place.	
The desired future character for the commercial centre includes an increased diversity and range of retail, commercial and community activities for the Newport community. Barrenjoey Road and Robertson Road will be consolidated as the primary retail streets, and the role of Robertson Road as an activity hub for the village will be enhanced. Further development of shop top housing will enliven the village, particularly at nights and weekends, and increase the retail customer base. The Newport Commercial Centre will have increased patronage from visitors as well as local residents, due to: <ul style="list-style-type: none"> <li>Retention and enhancement of the clusters of cafe/dining uses on Barrenjoey Road and Robertson Road.</li> <li>Active land uses on highly visible sites at the northern and southern ends of the commercial centre, with a high degree of interaction with the public domain</li> </ul>	The proposed development will provide for a range of retail and business uses that will serve the needs of the local area. Nine separate tenancies are offered of varying sizes, to accommodate a diversified combination of business interests.	Yes

24. Notwithstanding the exceedance of the height controls, the development will provide a mixed use outcome in a contemporary manner that will complement the immediate urban context of the neighbourhood and the desired future character of the locality.

*Does the proposed development make for a good design?*

25. From an architectural and urban design perspective, the proposed development will achieve a good design outcome as it:
- Responds and contributes to the built context by providing an appropriate scale in terms of the bulk and height relative to the scale of the street and surrounding buildings.



- Achieves an appropriate built form and density appropriate for a site and its context in keeping with the desired character of the area as it provides a mixed use development of a bulk, scale and scale appropriate to the site consistent with similar developments in the vicinity. The facades are designed as an integral part of the overall development and have a human scale and appearance, incorporating pattern in relation to the proportion of the building, including a balanced solid-to-void relationship and materiality that is responsive to the local context.
- Provides a communal terrace for the exclusive use of the residents, designed to optimise on the site capabilities and allowing for breaks in the building for an enhanced visual appearance. Additionally, extensive landscaping and planting is provided for greater visual interest. The proposed design includes retail facilities on the ground level providing for an opportunity for increased social interaction amongst community members.
- Capitalises on the solar access for residential apartments while mitigating overshadowing impacts on adjoining properties, most importantly the plaza located at No.349.
- Responds to its social context in terms of access to housing diversity and to services as well as optimises safety and security for internal areas and the public domain.

26. Notwithstanding the exceedance of the height controls, the development will provide much needed, residential accommodation that is consistent with the architectural integrity of the approved developments and which will contribute to the immediate urban context of the neighbourhood and the character of the locality.

Figure 3: Proposed development looking fronting Barrenjoey Road (Source: Crawford Architects)

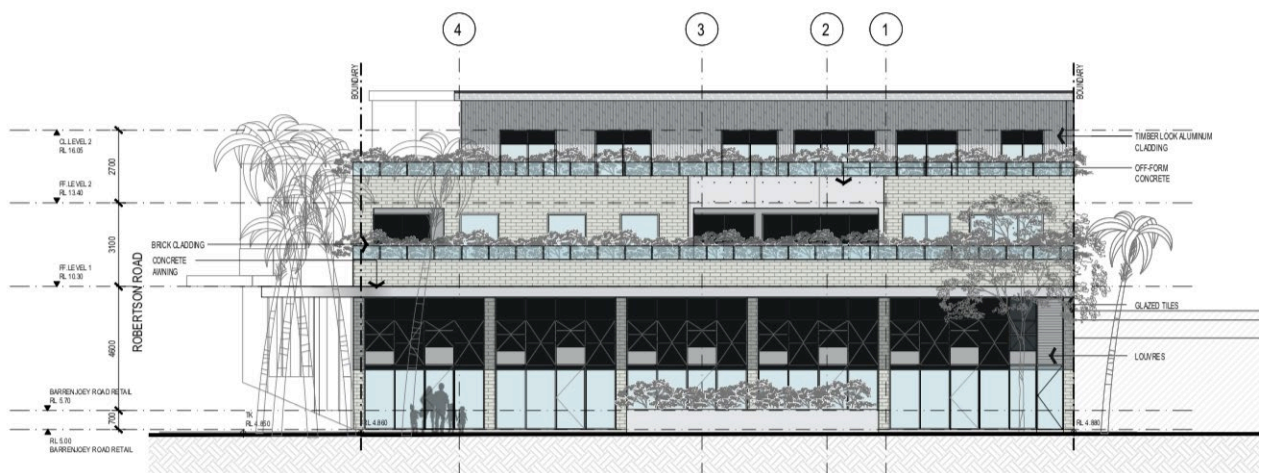


Figure 4: Proposed development looking fronting Robertson Road (Source: Crawford Architects)





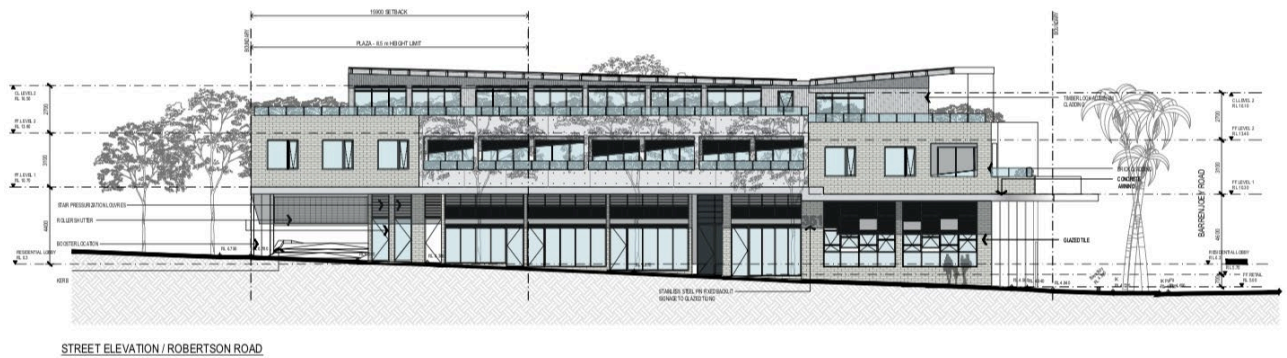


Figure 5: Proposed development north elevation (Source: Crawford Architects)

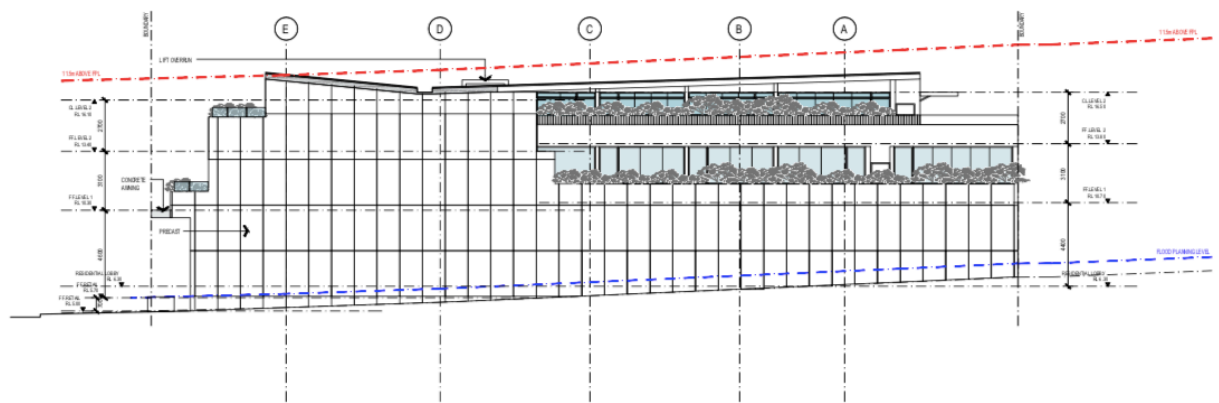
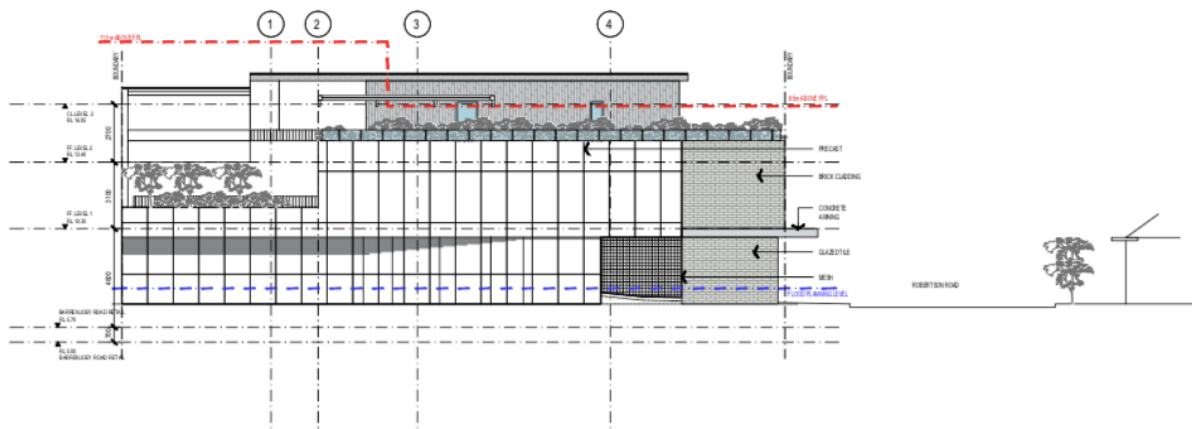


Figure 6: Proposed development west elevation (Source: Crawford Architects)



## Clause 4.6 of the LEP

27. Clause 4.6 of PLEP provides, so far as relevant:

- (1) *The objectives of this clause are as follows:*
  - (a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

- (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.
- (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.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
  - (a) the consent authority is satisfied that:
    - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
    - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
  - (b) the concurrence of the Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary must consider:
  - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
  - (b) the public benefit of maintaining the development standard, and
  - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

*Is height a development standard?*

28. Clause 4.6 can only be used to vary a control that is a development standard. Development standards are relevantly defined in s1.4 of the EP & A Act as follows:

**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) .....
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) – (o)



29. Being a provision of the LEP in relation to the carrying out of development, under which a requirement is fixed in respect to the maximum height of buildings, clause 4.3 of the LEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation of the standard.
30. As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development would contravene a development standard imposed by an environmental planning instrument. However, clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

#### Clause 4.6(4)

31. In order for the consent authority to grant a variation to the development standard under clause 4.6, it must be satisfied:
  - That this clause 4.6 Request adequately addresses the matters required by clause 4.6(3), namely that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case and secondly that there are sufficient environmental planning grounds to justify contravening the development standard; and
  - That the proposed development will be in the public interest because it is consistent with the objectives of the standard and zone; and
  - That the concurrence of the Secretary has been obtained.

#### *Clause 4.6(4)(a)(i) - Whether request adequately addresses requirements*

32. This request is comprehensive in its discussion of whether compliance with the zone and objectives of the standard is unreasonable or unnecessary because the development will comply with the zone and height standard objectives and whether there are sufficient environment planning grounds for varying the standard. Both issues are discussed below.

#### *Clause 4.6(3)(a) Unnecessary or unreasonable*

33. The common approaches 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. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.



34. The first option and the applicable in this case, 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.
35. Set out below is an extract from the judgement in Wehbe that explains the rationale for adopting this approach in the context of clause 4.6.


*The rationale is that development standards are not ends in themselves but means of achieving ends...The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)*

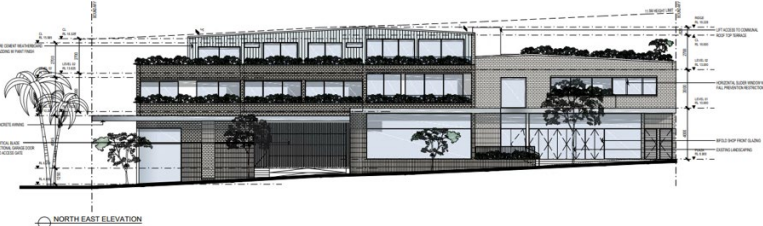
### Assessment of the Proposed Variation

#### Consistency with objectives of the standard (clause 4.6.4(a)(ii))

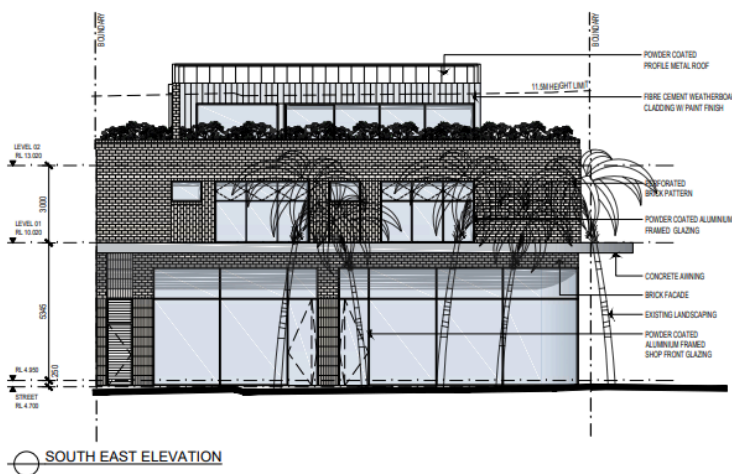

36. The proposed variation is assessed having regard to the development standard as set out in the below table.

**Table 2: Assessment of the proposed variation having regard to the objectives of the development standard for the building height**


Objective of the Development Standard	Comment
(a) to ensure that any building by virtue of its height and scale, is consistent with the desired character of the locality,	<p>The proportion of built form that results in a non-compliant outcome enables a design that will provide a contemporary built form which will contribute to the immediate urban context of the neighbourhood and the desired character of the locality. As outlined previously, the proportion of non-compliance has designed based on a clear understanding of the spatial and contextual considerations of the site. Most importantly, the elements of the building that do not comply seek provide an integrated response in relation to building separation, amenity and compatibility with the design, bulk and scale of the approved developments adjoining the subject site.</p> <p><b>Figure 7: Building sections indicating what areas of the building that are above the height standard (Source: Crawford Architects)</b></p> 

Objective of the Development Standard	Comment
	<p>As shown in the figure above, the roof structure on the south-eastern side of the site, fronting Barrenjoey Road has a minor encroachment into the 12.22m height limit. The remaining section of the roof is under the height limit and is compliant.</p> <p>The portion located at the rear of the site has a height limit of 9.22m. It is a portion of Level 3 which encroaches into the height limit. As detailed above, this section of the building could otherwise be located closer towards the northern boundary of the site simply for the sake of compliance. However, in doing so would result in a communal open space area that is underutilised, due to poor amenity outcomes forced upon it by compliance with the development standard.</p> <p>Instead, the outcome provides for a continuity of building form to the street frontage of Robertson Road, resulting in a compatible relationship with this frontage and the broader public domain. It negates an ad hoc appearance of built form where the building height in this section of the site was recessed from the street frontage, creating an adverse visual form when viewed from Robertson Road.</p> <p>Further, the recessive design of the form, through the use of landscape treatment and private open space, further reduces the presence of building form to the street.</p>
<p>(b) <i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i></p>	<p>The height and scale of the proposed development is consistent with that of surrounding developments as the site is located in an area comprising of a mixture of residential and commercial uses of building height varying from two to three storeys, generally with upper levels of higher building setback from the street frontage, similar to the proposed development.</p> <p>The development proposed at No.349 which is currently under assessment, too, forms a similar design to this proposal, as shown in the figures below.</p> <p><b>Figure 8: Building elevation of the Proposed Development on No. 349 Barrenjoey Road (north-east elevation) (Source: Crawford Architects)</b></p> 



Objective of the Development Standard	Comment
	<p><b>Figure 9: Development at No.349 currently under assessment (south elevation)</b> (Source: Crawford Architects)</p> 
(c) to minimise any overshadowing of neighbouring properties,	<p>The non-compliant component of the building does not result in any overshadowing impact on surrounding development as shown in the shadow diagram below.</p> <p><b>Figure 10: Shadow diagram</b> (Source: Crawford Architects)</p> 
(d) to allow for reasonable sharing of views,	<p>The non-compliant component of the building does not result in any impacts to existing views enjoyed within the vicinity of the site.</p>
(e) to encourage buildings that are designed to respond sensitively to the natural topography,	<p>The proposed development is designed to be sensitive to the natural topography and retain natural features around the site.</p>
(f) to minimise the adverse visual impact of development on the natural environmental, heritage conservation areas and heritage items.	<p>The subject site does not contain any heritage items, nor is it located within a heritage conservation area. However, the site is adjoining a heritage item known as St Michael's Anglican Church (#2270471). While compliance could be achieved by locating the common open space area on the south-western corner of the site, thus pushing what is proposed as non-compliant building form towards the northern boundary, this would not provide the more preferred approach which is to set the building form back from the setting of the heritage item, such that there is a greater degree of building separation that does not dominate the back drop of St Michael's Church.</p>



Objective of the Development Standard	Comment
	<p>Given that an outcome can be achieved that provides sufficient solar access to the plaza spaces with the proposed non-compliant form, to provide a greater relief to visual sensitivity of the heritage-listed church site allows for a greater degree of compliance to be achieved with this objective.</p> <p><b>Figure 11: Heritage Items within the vicinity of the site highlighted in red</b></p> 

*Consistency with Zone Objectives – clause 4.6(4)(a)(ii)*

37. In relation to whether a proposal is consistent with the objectives of a zone, the test for consistency is set out in *Coffs Harbour Environment Centre v Coffs Harbour City Council (1991) 74 LGRA 185* (the Coffs Harbour case). The principles for determining what is meant by consistent are as follows:
- a development that is consistent with zone objectives does not need to promote the objective concerned strictly, but also encompasses development which may be complementary or ancillary to development and promotes the objective concerned; and
  - a development is not consistent with zone objectives if it is antipathetic development to those objectives, irrespective of whether efforts have been made to minimise the extent to which it is antipathetic
38. Thus, development will be consistent with zone objectives if it is not antipathetic to them. It is not necessary to show that the development promotes, or is ancillary to, those objectives, nor even show it is compatible, *Schaffer Corporation v Hawkesbury City Council (19s92) 77 LGRA 21*.



39. The building height above the development standard is consistent with the objectives of the B2 Local Centre zone objectives as set out in the Table below.

**Table 3: Assessment of the proposal having regard to the B2 zone objectives**

Zone Objective	Comment
<ul style="list-style-type: none"> <li>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.</li> <li>To provide for residential uses above street level where they are compatible with the characteristics and uses of the site and its surroundings.</li> </ul>	<p>The proposed development will provide for a range of retail and businesses uses that will serve the needs of the local area. Nine separate tenancies are offered of varying sizes, to accommodate a diversified combination of business interests.</p> <p>The residential component of the site will be able to utilise those facilities and services which are available and further enhance their economic viability.</p> <p>The proposed residential use, above street level, will be compatible with the characteristics surrounding the site. The proposed number of dwellings is moderate and designed and orientated such that interference with ground floor uses will not result, particularly given the intended setback distances from the street frontages, as well as materials treatment that will ensure adequate acoustic provision.</p> <p>The intention of the zone is to combine living and working environments and this site provides a suitable opportunity to achieve this.</p>
To encourage employment opportunities in accessible locations.	The <i>in-situ</i> population will support the creation of new jobs in the locality, driven by additional demand for goods and services in the immediately surrounding vicinity.
To maximise public transport patronage and encourage walking and cycling.	<p>As outlined previously, the proposal is near public transport facilities. The development encourages alternative transport modes and avoids private car use.</p> <p>Given the proximity to the general commercial and retail facilities, the opportunity for walking and/or cycling is easily maximised in association with this development.</p>
To provide healthy, attractive, vibrant and safe local centres.	The proposed development will provide a significant outcome in terms of attractive, vibrant and safe communities. The architectural design will provide a contemporary response and, in particular, the ground floor level provides a good urban design response with the provision of retail tenancies and public domain improvements to ensure a degree of vibrancy is promoted and the extensive openings of the retail tenancies that allow for an understanding of activity therein. The proposal maximises opportunities for passive surveillance over the

	surrounding street frontages, which is a substantial improvement over the existing situation.
To strengthen the role of centres as places of employment.	The proposed retail tenancies will provide new employment opportunities within the commercial centre.
To provide an active day and evening economy.	The introduction of tenancies that will be attractive to food and drink premise operators which will assist to provide an active day and evening economy.

40. Given the circumstances of the case, the provision of strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the zone and the standard.

*Environmental Planning Grounds to Justify Contravening the Development Standards (clause 4.6(3)(b)?*

41. The second element of clause 4.6(3) on which the Court must be satisfied is that there are sufficient environmental planning grounds to justify contravening the development standard. The environmental planning grounds relate to the subject matter, scope and purpose of the *Environmental Planning & Assessment Act [EP&A Act]* including the objects of the EP&A Act (*Wehbe* para 23).

42. As Preston CJ explains in *Wehbe*:

*“.. the focus of clause 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 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. 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 clause 4.6(a)(i) that the written request has adequately addressed the matter.”*

43. The environmental planning grounds which support departure from the development standards are as follows:
- The proposal satisfies the objectives of the B2 zone and the objectives of the building height standards.
  - The proposed variation to the standard relates to the roof slab fronting Barrenjoey Road and the portion of Level 3 at the rear of No. 351. The roof slab has a minor extension of 15cm over the height limit that is 12.22m and will not lead to any adverse impact on surrounding developments, nor the public domain.
  - The portion of building form on Level 3 that sits proud of the development standard is a direct response to the proposed layout. Compliance with the development standard could be achieved



in the event that the common open space area was located in that portion of the site subject to the height of building standard of 8.5m. However, if this were to occur, to realise the development potential of the site, the built form would be pushed closer to the northern boundary, thus increasing the visual presence of the proposal on the setting of the heritage listed church, to the north west of the site. The design instead allows for a degree of visual relief and separation from that item.

- The proposal also enhances the degree of solar access that is achieved to the common open space area that would otherwise be sheltered by the apartment if the apartments were located to the north of the common open space area.
- Therefore, the resulting design outcome ensures that a high quality common open space area is furnished to the development. The proposed building height provides for a much more effective design outcome, consistent with the character of the locality, without causing negative impacts on surrounding developments and ensures an enhanced visual setting for the heritage listed church.
- From a site context perspective, the developments located along Barrenjoey Road such as the one at No.332 and the proposed development at No.349 (Figure 2) are of similar heights and comprise of retail facilities on the ground floor and residential units above, such that the upper levels are setback to create separation along each level as well as provide articulated building design. Both buildings have the same development standard for building height, that is, a maximum of 11.5m above the flood planning level. As such there is not a marginal difference between the proposed building height and the building height of these developments and is considered appropriate.
- The non-compliant sections of the building will not be out of context within the streetscape, particularly that of Robertson Road. The non-compliant portion of Level 3 provides desirable internal amenity without impacting on the enjoyment of the public plaza area below on the southern side of the street. Given that this will be not compromised by the non-compliant section of this design, and a better environmental planning outcome is achieved for residents of the development, by providing a quality common open space area, this is considered to be far more desirable than achieving compliance for the sake of compliance.
- The outcome also provides a far improved visual relationship with the heritage listed church, such that a better environmental planning outcome is achieved by setting the building form back from this relationship to ensure that adverse visual crowding does not occur.
- The proposed development including the non-compliance does not result in adverse impact to neighbouring properties, particularly in terms of bulk, scale and overshadowing. This is



demonstrated in that a better design response to the broader context can be achieved, without compromising the public plaza to the south, providing a more balanced urban outcome.

- In relation to the portion of the roof slab that is non-compliant, the proposal will provide a better outcome in terms of drainage conditions, while ensuring that the actual visual imposition of that non-compliant section of the building would not be discernible.

44. As such, there are sufficient environmental planning grounds for justifying contravention of the development standard in this case.

*Matters of state or regional significance (cl. 4.6(5)(a))*

45. There is no prejudice to planning matters of Regional significance resulting from varying the development standard as proposed by this application. The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the nature of a control applied across an area that supports viable use of the site while being sympathetic to the character of the locality and surrounding uses.

*Is the proposed variation in the public interest?*

**Clause 4.6(a)(ii) – Public Interest**

46. The fourth element that the Council needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard's and zone's objectives. Preston CJ in Initial Action (para 27) described the relevant test for this requirement as follows:

*"The matter in cl 4.6(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 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 purpose of clause 4.6(4)(a)(ii)."*

47. As demonstrated in this Request, the proposed development will comprehensively achieve the objectives of the development standards for height of building, as well as the objectives of the B2 zone.
48. The bulk and scale of the proposed built form, including the non-compliant section of the building, is appropriate to the contextual considerations of the site. Most importantly, the proposed height



does not impact the heritage item located towards the north at 33 Foamcrest Avenue and the pedestrian plaza located at 349 Barrenjoey Road, as well as residential development in the vicinity of the site.

49. There is public interest in maintaining a degree of flexibility in specific circumstances. In this case, strict compliance with the height control would result in reduced supply of units on site, therefore, unable to supply for the growing housing needs in an area that is highly accessible, facilitated by local services and suitable for young families. The non-compliant portion of Level 3 is setback 4m from Robertson Road, ensuring overshadowing on the public domain and surrounding developments, particularly No.349 is reduced. Additionally, the non-compliant portion of the roof slab is minor and setback from the Barrenjoey Road and does not cause any negative impacts. Therefore, the proposal does not affect the public domain.
50. There is no adverse consequence as a result of the non-compliant sections of the building from the public domain as it is set well back from the street frontages to ensure that it has limited visual effect, while also providing an attractive and contemporary response in this location. There is no adverse consequence as a result of this proposal from the public domain.
51. Overall, the proposal responds to its social context in terms of access to housing diversity and to services. Further, the proposed built form incorporates the CPTED principles which will help to activate and improve the safety and security of the local area.
52. Therefore, the proposed development, at the height proposed, is well within the public interest and will open the site up to broader public opportunity and interest, as it will provide a high-quality residential accommodation in close proximity to public transport opportunities that will ultimately result in tangible social benefits.
53. Accordingly, the Council can be satisfied that, it is in the public interest to vary the standard for the purpose of this development application.

