

29th August 2022

**Updated clause 4.6 variation request – Height of buildings
Proposed shop top housing development
1105 Barrenjoey Road and 43 Iluka Road, Palm Beach**

1.0 Introduction

In the preparation of this clause 4.6 variation request consideration has been given to the following amended architectural plans prepared by PBD Architects:

DA000(B), DA001(B), DA002(A), DA003(B), DA010(B), DA011(B), DA100(B) to DA104(B), DA200(B), DA201(B), DA300(B), DA400(A) to DA402(A), DA403(B), DA500(B), DA510(B), DA520(B), D530(B), DA540(B), DA550(B), DA600(B), DA601(B), DA602(A), DA603(A), DA610(B), DA611(A) and DA700(B).

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.

It has been determined that the proposed works have a building height measured to the top of the lift overruns of between 10.96 and 10.98 metres representing a variation of between 2.41 metres (28.3%) and 2.48 metres (29.1%) with the roof parapet exceeding the standard by between 1.75 metres (20.5%) and 2 metres (23.5%). The Architect has prepared building height plane diagrams (DA550(B)) which detail the extent of the breaches extract of which are at Figures 1 below.



Figure 1 - Plan extract showing height breaching elements above the 8.5 metre height standard depicted by pink blanket layer

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 5th May 2020, attached to the Planning Circular PS 20-002 issued on 5th May 2020, 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 Is clause 4.3 of PLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision 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:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 PLEP Prescribes a fixed building height provision that seeks to control the height of certain development. Accordingly, clause 4.3 PLEP is a development standard.

4.2A 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 subject property is located within the Palm Beach Locality with the desired future character, as it relates to development within the commercial centres, identified at clause A4.12 of Pittwater 21 Development Control Plan (the DCP) as follows:

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.

Whilst “seaside village character” is not defined, design cues are able to be obtained from the architectural character established by existing 3 storey mixed use development to the south of the site, and within the same street block, at No’s 1097 - 1101 and 1073 - 1077 Barrenjoey Road together with the existing 3 storey mixed use development located on the subject property. The design characteristic shared by all 3 properties is that the 3rd storey is located predominately within a pitched roof form as depicted in Figures 2, 3, 4 and 5 below and over page.



Figure 3 – Photograph of the existing 3 storey mixed use development located on the subject allotment



Figure 3 – Photograph from Barrenjoey Road of the existing 3 storey mixed use development at No. 1097 – 1101 Barrenjoey Road located directly to the south of the subject property



Figure 4 – Photograph from Iluka Road of the existing 3 storey mixed use development at No. 1097 – 1101 Barrenjoey Road located directly to the south of the subject property



Figure 5 – Photograph from Barrenjoey Road of the existing 3 storey mixed use development at No. 1073 - 1077 Barrenjoey Road located to the south of the subject property and within the same street block.

The proposed development has adopted the design characteristic established on the above properties by maintaining a predominant 2 storey building form with the upper-level apartments contained predominantly within a pitched roof form. In my opinion, such design outcome together with the use of natural materials and finishes and the adoption of recessed verandas at both ground and first floors levels, reflects the 'seaside-village' built form character identified in the Palm Beach Locality desired future character statement for development within the commercial centre. Such outcome is reflected at Figures 6 and 7 below and over page.



Figure 6 - Photomontage of proposed development as viewed from Barrenjoey Road with the upper level contained predominantly within a pitched roof form



Figure 7 – Perspective image of the proposed development as viewed from Iluka Road with the upper level contained predominantly within a pitched roof form

In relation to the building height breaching elements, I note that even if the proposal did not incorporate a 3rd storey element that to be consistent with the desired future character of the locality a 2 storey development would need to include a characteristically pitched roof form. Given the geometry of the site and the size of the consequential floor plates, I am satisfied that any pitched roof form above a 2 storey wall height is likely to exceed the 8.5 metre building height standard consistent with the extent currently proposed.

The proposed 3 storey development with the upper level contained predominantly within a pitched roof form displays a building height and scale consistent with that established by other mixed use development within the sites visual catchment. I am satisfied that the development is 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 contained predominantly within a pitched roof form.

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 non-complaint building height elements offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

Accordingly, I am satisfied that the development, by virtue of its height and scale, is consistent with the desired character of the locality and accordingly satisfies this objective notwithstanding the building height breaching elements proposed.

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

Response: The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

22 *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted*

that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building form will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

For the reasons outlined in relation to objective (a) above, I have formed the opinion that the bulk and scale of the building is contextually appropriate with the non-compliant building elements generally comprising a pitched roof form in which habitable floor space has been introduced through the introduction of dormer style penetrations. The overall height and scale of the building as viewed from both street frontage is consistent with that established by the existing 3 storey mixed use development to the south of the site, and within the same street block, at No's 1097 - 1101 and 1073 - 1077 Barrenjoey Road together with the existing 3 storey mixed use development located on the subject property.

In this regard, I have formed the considered opinion that the non-compliant building elements will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and urban design context.

The proposal satisfies this objective notwithstanding the building height breaching elements proposed.

(c) to minimise any overshadowing of neighbouring properties,

Response: The project Architect has prepared a series of shadow diagrams in the form of "views from the sun" copies of which are at Attachment 1. These shadow diagrams demonstrate that the only neighbouring property affected by shadowing from the proposed development is the property to the south of the site No. 1097 – 1101 Barrenjoey Road.

In assessing overshadowing impact consideration must be given to the land use established on the adjoining property with a focus on the overshadowing resulting from the non-compliant building height elements. In this regard, I note that the southern adjoining property was approved for use as a serviced apartment complex comprising 25 apartments above commercial floor space (Land and Environment Court Proceedings No. 10060 of 1999).

In this regard, I note that serviced apartments fall under the definition of tourist and visitor accommodation pursuant to PLEP and accordingly do not fall under the broad definition of residential accommodation within that instrument. Further, serviced apartments/ tourist and visitor accommodation are not uses to which the clause C1.4 P21DCP solar access provisions apply nor are they uses to which the Apartment Design Guide (ADG) apply.

That said, the view from the sun diagrams at Attachment 1 confirm that the west facing private open space and adjacent living room glazing of Unit 19, No. 1097 – 1101 Barrenjoey Road will continue to receive at least 3 hours of direct solar access between approximately 12:15pm and 3:00pm on 21st June being well in excess of the minimum 2 hour solar access requirement applicable to residential apartments pursuant to the ADG.

The non-compliant building height elements do not generate overshadowing to any other serviced apartment within the adjoining development.

In this regard, I am satisfied that the non-compliant building height elements, which have been pulled back from the common boundary where they potentially cause shadowing impact on the adjoining development, do not result in unacceptable shadowing impacts with overshadowing minimised through the design approach adopted.

The proposal satisfies this objective notwithstanding the building height breaching elements proposed.

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

Response: Having inspected the site and its surrounds to determine existing view lines over the subject property from surrounding allotment, including an internal inspection from within a number of serviced apartments at No 1097 – 1101 Barrenjoey Road, I am satisfied that the only scenic views potentially affected by the non-compliant building height elements is from the west facing living room window and adjacent balcony of Unit 19 in a westerly direction towards Pittwater waterway and its western foreshores as depicted in Figure 8 below.



Figure 8 - View from the west facing living room window and adjacent balcony of Unit 19, No 1097 – 1101 Barrenjoey Road in a westerly direction towards Pittwater waterway and its western foreshores.

Having obtained an understanding of the relative level from which these views are obtained and the level of the non-compliant building height elements, I am satisfied that the non-compliant building height elements will not obstruct the view currently afforded from these west facing living room and open space areas.

Further, I am satisfied that the non-compliant building height elements will not obstruct public views with the development, notwithstanding the non-compliant building height elements, consistent with the principals of view sharing established in Tenacity vs Warringah Council.

The proposal satisfies this objective notwithstanding the building height breaching elements proposed.

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

Response: The subject site is relatively flat with the development, notwithstanding the building height breaching elements, designed to respond sensitively to the natural topography. In this regard, excavation has been limited to that required to accommodate the basement car parking accommodation with proposed ground floor levels relating sensitively to the established levels within the adjacent public domain.

The proposal satisfies this objective notwithstanding the building height breaching elements proposed.

(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 with the building height breaching elements not resulting in any adverse visual impact on the natural environment.

The proposal satisfies this objective notwithstanding the building height breaching elements proposed.

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 ground floor commercial floor space with future commercial tenancies able to serve the needs of people who live in, work in and visit the local area. This objective is achieved notwithstanding the building height non-compliance.

- *To encourage employment opportunities in accessible locations.*

Response: The commercial 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. This objective is achieved notwithstanding the building height non-compliance.

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

Response: The site is easily accessible by public transport, cycling and walking. This objective is achieved notwithstanding the building height non-compliance.

- *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 commercial spaces will be a revisitation of the local centre and represents an enhancement of the existing local centre. This objective is achieved notwithstanding the building height non-compliance.

- *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 this regard, the proposal reinforces the site as place for employment opportunities. This objective is achieved notwithstanding the building height non-compliance.

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

Response: The ground floor commercial floor space will provide for greater economic opportunities in the local area throughout the day and night. This objective is achieved notwithstanding the building height non-compliance.

- *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. This objective is achieved notwithstanding the building height non-compliance.

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.

4.2B 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

Ground 1 - Contextually responsive building design

The proposed development has adopted the design characteristic established by other 3 storey mixed use development within the Local Centre, and within this street block, by maintaining a predominant 2 storey building form with the upper-level apartments contained predominantly within a pitched roof form. In my opinion, such design outcome together with the use of natural materials and finishes and the adoption of recessed verandas at both ground and first floors levels, reflects the 'seaside-village' built form character identified in the Palm Beach Locality desired future character statement for development within the commercial centre.

I note that even if the proposal did not incorporate a 3rd storey element that to be consistent with the desired future character of the locality a 2 storey development would need to include a characteristically pitched roof form. Given the geometry of the site and the size of the consequential floor plates, I am satisfied that any pitched roof form above a 2 storey wall height is likely to exceed the 8.5 metre building height standard consistent with the extent currently proposed. The building height variation provides for a contextually responsive and compatible built form outcome on this particular site.

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 non-complaint building height elements offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment. The building height variation provides for a contextually responsive and compatible built form outcome on this particular site.

Under such circumstances, I have formed the considered opinion that approval of building height variation, in circumstances where it has been demonstrated that such variation does not prevent the achievement of the zone objectives or objectives of the standard, and where it can be demonstrated that the variation satisfies the objective of clause 4.6 being to achieve better outcomes for and from development by allowing flexibility in particular circumstances, would be in the public interest.

Ground 2 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use and development of the land by facilitating a 3rd level of floor space on this site consistent with other 3 storey mixed use development within the sites visual catchment including the existing development on the subject property. Approval of the building height variation will achieve this objective.

Objective (g) to promote good design and amenity of the built environment

I note that the additional overall building height of the proposed development compared to the adjoining development immediately to the south of the site reflects compliance with the more contemporary standards relating to minimum floor to floor heights both at ground floor and at the upper levels of the development as required by the ADG.

The minimum floor to floor heights contained within the ADG promote good design and amenity and enhance buildability with approval of the building height variation facilitating a development that achieves this objective.

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 proposed 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 proposed 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 5th May 2020, 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 determination s are subject to, compared with decisions made under delegation by Council staff.

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

5.0 Conclusion

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

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

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

Boston Blyth Fleming Pty Limited



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

Attachment 1
Attachment 1

Shadow Diagrams
Shadow Diagrams









1. ALL WORK SHALL BE IN ACCORDANCE WITH THE BUILDING REGULATIONS 2011 AND THE BUILDING ACT 2006.
 2. ALL WORK SHALL BE IN ACCORDANCE WITH THE LOCAL GOVERNMENT ACT 1995 AND THE LOCAL GOVERNMENT (GENERAL PURPOSES) ACT 1996.
 3. ALL WORK SHALL BE IN ACCORDANCE WITH THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) AND THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) (AS APPLICABLE).
 4. ALL WORK SHALL BE IN ACCORDANCE WITH THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) AND THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) (AS APPLICABLE).
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GENERAL AMENDMENT ISSUES TO
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1. ALL WORK SHALL BE IN ACCORDANCE WITH THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) AND THE NATIONAL BUILT ENVIRONMENT STANDARDS (N.B.E.S.) (AS APPLICABLE).
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