

10<sup>th</sup> March 2022

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

Attention: Mr Adam Croft – Planner

Dear Mr Croft,

**Development Application DA2021/1341**  
**Amended clause 4.6 variation request – Height of buildings**  
**Proposed multi dwelling housing**  
**3 Brookvale Avenue, Brookvale**

This clause 4.6 variation request has been prepared in support of a building height variation pertaining to an application proposing the demolition the existing site structures and the construction of multi dwelling housing containing 4 townhouses with basement level parking. The scope of works is depicted on the following architectural drawings prepared by Barry Rush and Associates Pty Limited:

A01C	LOCATION DIAGRAM
A02A	SITE ANALYSIS PLAN
A03C	BASEMENT FLOOR PLAN
A04C	GROUND FLOOR PLAN
A05C	FIRST FLOOR PLAN
A06C	MEZZANINE FLOOR PLAN
A07C	ROOF PLAN
A08C	ELEVATIONS
A09C	SECTIONS
A10A	SHADOW DIAGRAMS
A11A	SHADOW DIAGRAMS
A12A	EXTERNAL COLOUR SCHEDULE
A13A	PLAN SHOWING RE-DEVELOPMENT OF ADJOINING LOTS
A14A	DEMOLITION PLAN

Pursuant to the height of buildings map, the site has a maximum building height limit of 8.5 metres.

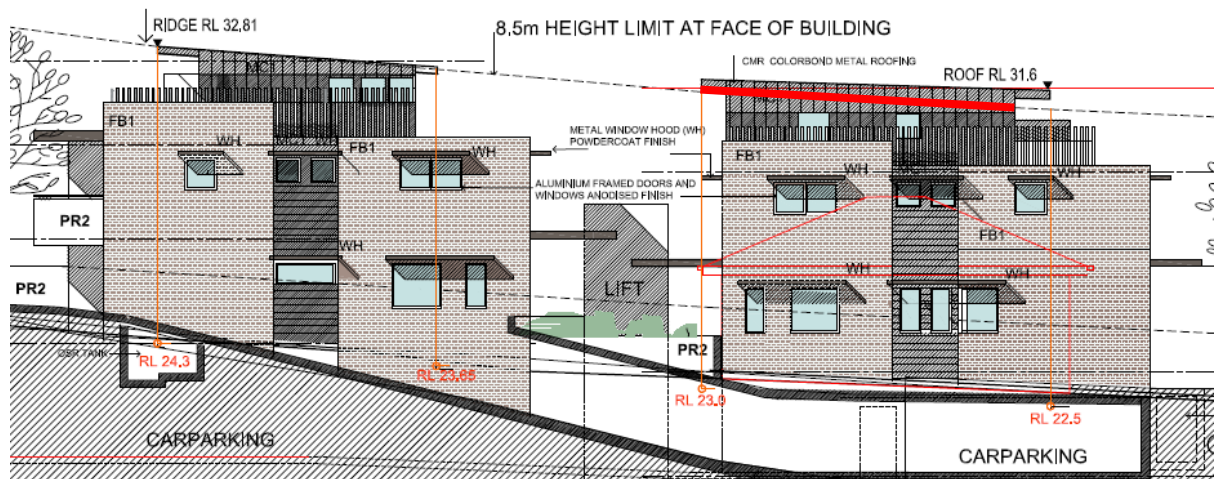
The objectives of this control are as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

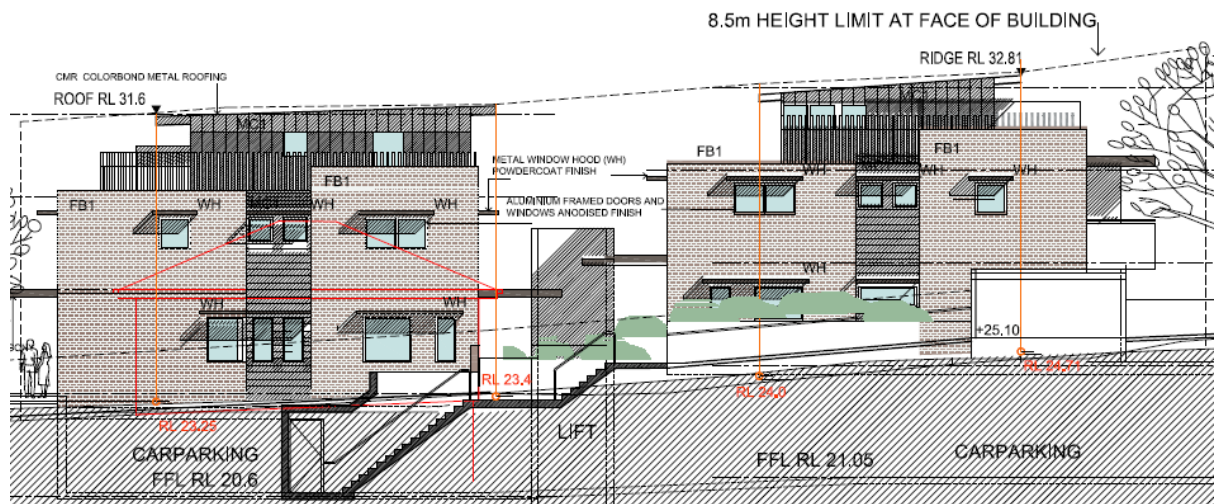
**Building height** is defined as follows:

*building height (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*

It has been determined that the front pavilion is located wholly below the 8.5 metre building height standard with the rear pavilion breaching the standard by a maximum of 300mm (3.5%) in its north-western corner 600mm (7%) in its south-western corner. I note that the eastern façade of the rear pavilion is fully compliant with the 8.5 metre height standard with the non-compliance only arising due to the sites cross fall in a westerly direction. This is depicted in Figures 1 and 2 below and over page.



**Figure 1** – Plan extract showing 8.5 metre building height breaching elements along the western façade of the rear building pavilion.



**Figure 2** – Plan extract showing full compliance along the developments eastern façade alignment with the 8.5 metre building height standard

Clause 4.6 of WLEP 2011 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.*

#### **Clause 4.6 Claim for Variation**

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 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

#### **Consistency with zone objectives**

The Warringah Local Environmental Plan (LEP) 2011 applies to the subject site and this development proposal. The subject site is located within the R3 Medium Density Residential zone. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*

Response: The development provides for the housing needs of the community within a medium density residential environment notwithstanding the minor building height non-compliance proposed. This objective is achieved.

- *To provide a variety of housing types within a medium density residential environment.*

Response: The development provides for a townhouse building topology which adds to the varieties of housing types within the established medium density residential environment. This objective is achieved notwithstanding the minor building height variation proposed.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: Not applicable.

- *To ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Response: The minor building height non-compliances do not prevent the attainment of appropriate landscape outcomes or a building height which is unable to be appropriately softened and screened by landscaping. This objective is achieved notwithstanding the minor building height non-compliances proposed.

- *To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.*

Response: The minor building height breaching elements will not give rise to a building form which will be perceived as inappropriate or jarring in a streetscape context. This objective is achieved notwithstanding the minor building height non-compliances proposed.

The consent authority can be satisfied that the proposal is consistent with the zone objectives as outlined.

### **Assessment against objectives of the height of buildings standard**

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

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

Comment: 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 forms 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.

In this regard, I note that the front building pavilion is fully compliant with the building height standard with the building height breaching elements located along the western edge of the rear pavilion where they will not be readily discernible in a streetscape context and certainly not to the extent that they would be perceived as inappropriate or jarring. The building height breaching elements are minor in nature and limited to small areas of roof form. The development reflects the height and scale of development anticipated on the land and on surrounding and nearby sites within the same R3 Medium Density Residential zone. Notwithstanding the minor building height breaching elements proposed, the development is compatible with the height and scale of surrounding and nearby development.

In this regard, I have formed the considered opinion that the non-compliant building elements, including their associated height, bulk and scale, are consistent with the height and scale anticipated on the land and that of surrounding and nearby development including the 2 and 3 storey residential flat development to the south of the 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 height offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably concluded that the development is compatible with the height and scale of surrounding and nearby development notwithstanding the minor building height breaching elements proposed. This objective is achieved.

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

Comment: Having undertaken a detailed site and context analysis and identified available view lines over the site I have formed the considered opinion that the height of the development, and in particular the non-compliant roof elements, will not give rise to unacceptable or unanticipated visual, view, privacy or solar access impacts with appropriate spatial separation maintained to adjoining properties. Notwithstanding the non-compliant building height elements, I am satisfied that the development has been designed to minimise visual impact, disruption of views, loss of privacy and loss of solar access and accordingly this objective is achieved.

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

Comment: The non-compliant building height elements will not be readily discernible as viewed from the street or coastal foreshore area. The proposal achieves this objective notwithstanding the minor building height breaching elements.

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

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



The non-compliant components of the development, as they relate to building height, demonstrate consistency with objectives of the zone and the building height standard objectives. Adopting the first option in *Wehbe* strict compliance with the building height standard has been demonstrated to be is unreasonable and unnecessary

### Sufficient Environmental Planning Grounds

In my opinion, there are sufficient environmental planning grounds to justify the variation namely the topography of the site which makes strict compliance with the building height standard difficult to achieve whilst maintaining appropriate amenity to the development in terms of roof design, ceiling heights and maintaining an appropriate relationship between the proposed ground level floor plates and ground level (existing).

While strict compliance could be achieved by reducing ceiling heights, or by reducing the height of the building relative to existing ground levels, such outcome would require additional excavation, or reduce the amenity of the development, in circumstances where the minor building height breaching elements will not give rise to unacceptable adverse environmental consequences.

The building is of appropriate design quality and represents the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

In accordance with Clause 4.6(5) the contravention of the development standard does not raise any matter of significance for State or Regional environmental planning with the public benefit maintained through compliance with the zone and building height objectives as outlined.

### Conclusions

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

- a) that the site specific and contextually responsive development is consistent with the zone objectives, and
- b) that the site specific and contextually responsive development is consistent with the objectives of the building height 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 design quality of the development, and the developments ability to comply with the zone and building height 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 considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

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

Yours sincerely

Boston Blyth Fleming

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

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

