

29<sup>th</sup> August 2023

Chief Executive Officer  
Northern Beaches Council  
725 Pittwater Road  
DEE WHY NSW 2099

Dear Sir/ Madam,

## **Proposed new dwelling house – 161B and 163 Seaforth Crescent, Seaforth**

### **Clause 4.6 variation request – Height of buildings**

#### **1.1 Introduction**

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

#### **1.2 Manly Local Environmental Plan 2013 (MLEP 2013)**

##### **1.2.1 Clause 4.3 – Height of Buildings**

Pursuant to Clause 4.3(2) of MLEP 2013, the height of a building is not to exceed the maximum height shown for the land on the Height of Buildings Map, being 8.5m with respect to the subject site. The objectives of this control are as follows:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following—*
  - i. *views to nearby residential development from public spaces (including the harbour and foreshores),*
  - ii. *views from nearby residential development to public spaces (including the harbour and foreshores),*
  - iii. *views between public spaces (including the harbour and foreshores),*
- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

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

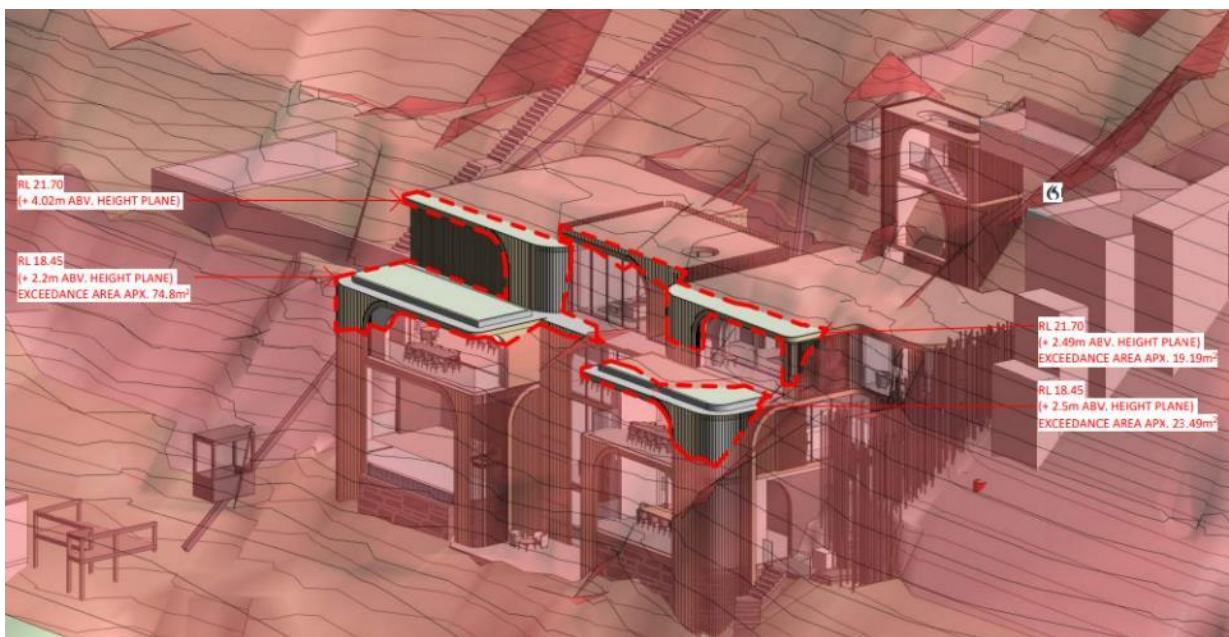
Building height is defined as follows:

**building height** (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

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 western edges of the Level 01 and Level 02 façades and roofed terraces breach the 8.5 metre building height standard by between 300mm (3.5%) and 2.5 metres (29%) as depicted in the building height blanket diagram at Figure 1 below. The balance of the development sits comfortably below the 8.5 metre height standard.



**Figure 1** - Building height blanket diagram showing 8.5 metre non-compliant building height elements

## 1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

*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 clause 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 MLEP 2013 provides:

*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 height of building development standard in clause 4.3 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

*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 development standard at clause 4.3 of MLEP 2013 which specifies a maximum height of 8.5m. 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 MLEP 2013 provides:

*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 Planning Secretary 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 the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Following advice received from the Department of Planning, Industry & Environment (letter dated 2 November 2021), development applications for Class 1 buildings (single dwelling houses) with a Clause 4.6 variation greater than 10% to building height within the Warringah Local Environment Plan 2011, Manly Local Environment Plan 2013 and Pittwater Local Environment Plan 2014 and floor space ratio under the Manly Local Environment Plan 2013, may be determined by Council staff under delegation in accordance with Council procedures.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. 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 MLEP 2013 from the operation of clause 4.6.

### 1.3 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:

*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].*

*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].*

*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].*

*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].*

*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.*

*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 MLEP 2013 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 of MLEP 2013 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 MLEP 2013?

## **1.4 Request for variation**

### **1.4.1 Is clause 4.3 of MLEP 2013 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 of MLEP 2013 prescribes provision that seeks to control the height of development. Accordingly, clause 4.3 of MLEP 2013 is a development standard.

### **1.4.2 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 approach is relevant in this instance, being 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 development standard**

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

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

Comment: The non-compliance arises as a consequence of the irregular topographical characteristics of the site. The proposed new dwelling is located over 60 metres from Seaforth crescent and well below the level of the road such that it will not be readily discernible in a streetscape context. As such, the proposed height non-compliance will not result in any adverse impact upon the streetscape.

When seen from the waterway, the proposal is highly articulated, appearing as a 2 storey dwelling that steps up the slope of the land, as shown in the photomontage, below.



**Figure 2** - Perspective image showing the visual presentation of the proposed dwelling house as viewed from the harbour.

The height of the proposed development is entirely commensurate with that of surrounding dwelling houses, the majority of which have three storeys presenting to the waterway.

I am satisfied that the objective is achieved notwithstanding the non-compliance with the building height development standard.

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

Comment: The proposed development is highly articulated and is of a scale that is consistent with that of surrounding and nearby dwellings, and that anticipated by the desired future character of the locality. The portions of the proposal that protrude above the height plane are limited to the western edges of the Level 01 and Level 02 façades and roofed terraces and not habitable floor space such that the breaching elements do not significantly contribute to the bulk and scale the building.

The proposed new dwelling is of superior architectural design and is an appropriate contextual response to the individual characteristic of the subject site and its context.

I am satisfied that the objective is achieved notwithstanding the non-compliance with the building height development standard.

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

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

Comment: The proposed development has been sensitively designed to respond to the topography of the land and the availability of views over the existing roof form. Having inspected the site and its surrounds to determine available view lines across the property I am satisfied that the non-compliant building height breaching elements will not impact existing scenic views from any surrounding property or those available from the public domain.

View impacts have been minimised and in this regard, I am of the opinion that this objective is satisfied notwithstanding the non-compliance with the building height development standard.

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

Comment: The building height breaching elements will not result in any unreasonable impacts with regard to overshadowing as depicted on the shadow diagrams.

I am satisfied that the objective is achieved notwithstanding the non-compliance with the building height development standard.

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

Comment: The proposed development has had appropriate regard to existing vegetation and topography, with no conflict arising as a consequence of the proposed development. In particular, the building height breaching elements will not result in any conflicts with bushland and surrounding land uses.

I am satisfied that the objective is achieved notwithstanding the non-compliance with the building height development standard.

### **Consistency with zone objectives**

The subject property is zoned C3 Environmental Management pursuant to MLEP 2013. The developments consistency with the stated objectives of the C3 zone is as follows:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

Comment: The proposed dwelling house is of superior architectural design, that is an appropriate response to the special aesthetic values of the subject site. The proposed development will result in the enhancement of landscaping, to complement landscaping along the foreshore. The proposed height non-compliance does not detract from consistency with this objective of the zone.

- *To provide for a limited range of development that does not have an adverse effect on those values.*

Comment: The proposed dwelling house is permissible with consent in the zone and will not result in any adverse impacts upon the special values of the site. The proposed height non-compliance does not detract from consistency with this objective of the zone.

- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Comment: The proposed development retains the existing significant trees and rock outcrops located adjacent to the foreshore. The application also proposes a significant enhancement of landscaping across the site, with a net increase in canopy resulting from the proposal. The proposed height non-compliance does not detract from consistency with this objective of the zone.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

Comment: The proposed development does not result in any adverse impacts on nearby foreshores, the geology of the site or surrounding bushland. The application is supported by a Geotechnical Report and Stormwater Management Plans to confirm that a suitable outcome will be achieved in this regard. The proposed height non-compliance does not detract from consistency with this objective of the zone.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

Comment: The application does not involve works to the immediate foreshore. However, the application is supported by Stormwater Management Plans demonstrating a suitable stormwater management solution for the site. The proposed height non-compliance does not detract from consistency with this objective of the zone.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

Comment: The building height breaching elements do not prevent the retention of existing significant trees and rock outcrops adjacent to the foreshore and will not compromise the use/development potential of surrounding land. The proposed development has been designed to step down the slope of the site and is of a scale that is commensurate with that of surrounding dwelling houses.

The height and bulk of the proposed dwelling will not have any unreasonable or adverse impacts upon surrounding dwellings or the use of the adjoining foreshore.

The non-compliant development, as it relates to building height, demonstrates consistency with objectives of the zone and the height of buildings development standard objectives. Adopting the first option in *Wehbe*, strict compliance with the height of buildings development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

#### **1.4.3 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]-[25] that:

*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.*

*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 environmental planning grounds**

#### **Ground 1 – Topography**

The steep topography of the land and the constrained nature of the available building footprint limit the ability to provide a reasonable quantum of floor space on the site whilst complying with the building height standard.

Strict compliance with the building height standard would unreasonably limit the development potential of the land and in doing so not promote the orderly and economic use and development of land Objective 1.3(c) of the Act.

#### **Ground 2 – Superior architectural design**

The apparent size of the proposed development will be compatible with dwellings in the visual catchment of the site, which features a number of buildings of comparable bulk and scale. The building is of exceptional design quality with the variation facilitating a building height that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic as seen from adjoining properties or as viewed from the waterway. The proposed development is compatible with other development in the visual catchment of the site, and the character of the wider C3 Environmental Management Zone.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

#### **1.4.4 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 C3 Environmental Management zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied 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 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.

#### **1.4.5 Secretary's concurrence**

Following advice received from the Department of Planning, Industry & Environment (letter dated 2 November 2021), development applications for Class 1 buildings (single dwelling houses) with a Clause 4.6 variation greater than 10% to building height within the Warringah Local Environment Plan 2011, Manly Local Environment Plan 2013 and Pittwater Local Environment Plan 2014 and floor space ratio under the Manly Local Environment Plan 2013, may be determined by Council staff under delegation in accordance with Council procedures.

## 1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this 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**