

## Attachment 2

### Clause 4.6 variation request - Height of buildings (clause 4.3 PLEP 2014)

#### Proposed shop top housing development

#### No. 1102 Barrenjoey Road, Palm Beach

### 1.0 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.

### 2.0 Pittwater Local Environmental Plan 2014 (PLEP)

#### 2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of 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.

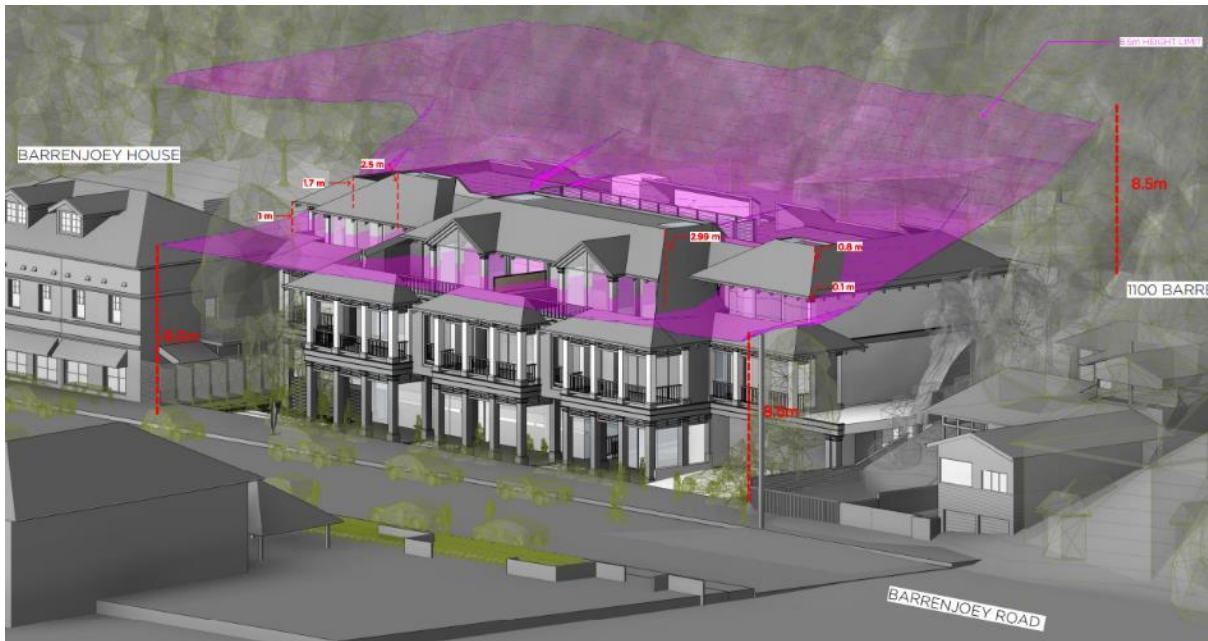
The leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In *Stamford Property Services*, the Court followed the reasoning adopted in *Bettar* and confirmed that “ground level (existing)” must relate to the levels of the site, and not to the artificially modified levels of the site as reflected by the building presently located on the land. In this regard the Court preferred the Council’s method to determining the “ground floor (existing)” from which building height should be measured. Council’s approach required that the proposed height be measured from the natural ground levels of the site where known, such as undisturbed levels at the boundary, and from adjacent undisturbed levels such as the level of the footpath at the front boundary of the site. These levels could then be extrapolated across the site reflecting the pre-development sloping topography of the land, consistent with the approach adopted in *Bettar*.

In these proceedings the Court was satisfied that even though there was limited survey information available for the site, there was enough information to determine the “ground level (existing)” for the site based on unmodified surveyed levels in the public domain (footpaths) which could be extrapolated across the site. In summary, the Court has confirmed that the definition of “ground level (existing)” from which building height should be measured:

- is not to be based on the artificially modified levels of the site such as the floor levels of an existing building. This includes the entrance steps of an existing building.
- is not to include the basement floor or the soil beneath the basement following construction of the building.
- is to be based on the existing undisturbed surveyed surface of the ground. For sites where access to the ground surface is restricted by an existing building, natural ground levels should be determined with regard to known boundary levels based on actual and surveyed levels on adjoining properties including within the public domain (footpaths).

An inspection of the property has revealed that ground levels across the site are highly disturbed with levels artificially modified through previous excavation activities. Based on an interpolation of original undisturbed ground levels from available survey information around the perimeter of the property it has been determined that the upper level roof eaves breach the 8.5 metre building height standard by a maximum of 100mm (1.1%) along its southern edge and a maximum of 1 metre (11.7%) along its northern edge with the roof from breaching the height standard along its western edge by between 800mm (9.4%) and 2.99 metres (35%) as depicted on the building height blanket diagram at Figure 1 over page. The balance of the upper level roof form sits comfortably below the 8.5 metre building height standard.



**Figure 1** – Building height diagram showing non-compliant building height elements projecting through the 8.5 metre height blanket.

## 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 clause 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 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 5<sup>th</sup> May 2022, attached to the Planning Circular PS 22-002 issued on 5<sup>th</sup> May 2022, 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.*

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 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 property is located within the Palm Beach Locality. The desired future character of the locality described as:

*The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancy dwellings will be located on the lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.*

*Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.*

*Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment.*

*Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.*

*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.*

*A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.*

*Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.*

*Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.*

*Palm Beach will remain an important link to the offshore communities.*

I note that in assessing the proposed development's consistency, in terms of its height and scale, with the desired future character of the Palm Beach Locality that consideration must also be given to the height and scale of the shop top housing development previously approved by Council On 13<sup>th</sup> November 2014 pursuant to development consent N0119/14. We note that this previous application was assessed against the same Desired Future Character statement with such consent providing for the demolition of existing structures and construction of a shop top housing development comprising 3 retail tenancies, 4 residential apartments and basement parking. This consent was subsequently physically commenced as confirmed by Council correspondence of 6<sup>th</sup> November 2019 and to that extent its completion and occupation can occur without further approval.

An application seeking to modify this consent (Mod2021/0203) was submitted to Council on 17<sup>th</sup> May 2021 with the modifications seeking a refinement in the architectural detailing of the approved development to provide superior streetscape, residential amenity, heritage conservation and broader urban design outcomes, to enhance buildability and economic viability and to better meet the more contemporary design guidelines contained within the Apartment Design Guide (ADG) as they relate to floor to floor heights, room sizes and layouts.

This modification application was considered by the Northern Beaches Design and Sustainability Advisory Panel (DSAP) at its meeting of 24<sup>th</sup> June 2021 at which time concern was raised in relation to the proposals architectural style, appearance and relationship to the adjoining heritage listed Barrenjoey House with the conclusion that the development was unacceptable and inconsistent with the "seaside village" character anticipated by the Palm Beach Locality Statement. We note that the DSAP minutes also indicated that the same concerns were raised in relation to the previously approved and physically commenced development.

Following further discussions with Council staff in relation to the DSAP minutes and the community concerns raised following the formal notification of the application, the proponent was encouraged to withdraw the application and develop a new scheme responding to the DSAP feedback and incorporating pitched roof forms in favour of the flat roof forms approved pursuant to the existing physically commenced development consent (Development Application N0119/14). The modification application (Mod2021/0203) was subsequent withdrawn.



The plans submitted in support of this current application, to which this clause 4.6 variation request relates, have been prepared and refined in response to the feedback obtained from the DSAP meeting of 26th August 2021 with the height, scale and design of the development considered to be consistent with the desired character of the Palm Beach Locality the following reasons:

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement.
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.
- The provision of additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.
- The maintenance of a 3 metre setback to the rear boundary of the property.
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.

We also confirm that the final design detailing has been settled in consultation with Weir Phillips Heritage and Planning with the accompanying Heritage Impact Statement containing the following conclusion:

*The proposed works will have the opportunity to construct of the sympathetically designed modern infill building that supports the ongoing significance of the area as a neighbourhood precinct, will have an acceptable impact on the Barrenjoey House. The proposed new building is contemporary in character but demonstrates respect for the key forms, architectural proportions and materiality of the item.*

*The building demonstrates appropriate setbacks; it is similar in height and scale to Barrenjoey House. Openings are vertically proportioned which represents the vertical articulation of Barrenjoey House. The elevations articulated through to the use of timber verandah posts and modulated gabled roof form. The proposed finishes and colours of timber, masonry and tiles will sit comfortably within the vicinity of Barrenjoey House and other items in the vicinity.*

*The proposed works will have no impact on the ability to understand the significance of the nearby heritage listed items. No significant view corridors will be blocked. The building will read in the setting of nearby items as one of several buildings of a similar massing and scale.*

Accordingly, I have formed the considered opinion that notwithstanding the building height breaching elements that the development is of exception design quality with the proposal appropriately responding to its immediate built form and heritage context as depicted in the photomontage at Figure 2 over page. The resultant development will afford superior levels of amenity for future occupants whilst maintaining appropriate amenity to surrounding development in relation to privacy, views and solar access. The proposed development is sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement. The development will be safe from flooding hazards.



**Figure 2** - Photomontage showing the proposed development relative to its established built form context as viewed from Barrenjoey Road

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 scale and pitched roof forms offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

Under such circumstances I am satisfied that, notwithstanding the building height breaching elements, the building by virtue of its height and scale is consistent with the desired character of the Palm Beach Locality and accordingly is consistent with this objective.

The proposal is consistent with this objective.

- (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 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.

For the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape, heritage conservation and residential amenity outcomes. I also note that in relation to the interface with the adjoining R2 Low Density Residential zone to the south of the site that the diagram at Figure 3 below demonstrates that although the building envelope provisions of Pittwater Development Control Plan (PDCP) do not apply to development in the B1 Neighbourhood Centre zone that the building complies with the building envelope control which would apply to development in the adjoining R2 Low Density Residential zone as it presents to the southern adjoining dwelling house. Strict compliance to the southern boundary demonstrates that the building form maintains a contextually appropriate bulk and scale as it presents to the zone boundary and the immediately adjoining dwelling house to the south of the site.



**Figure 3** - Plan extract showing fully compliant building envelope to southern boundary and the maintenance of a contextually appropriate zone boundary spatial relationship with the immediately adjoining dwelling house

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.

Notwithstanding the building height breaching elements, I am satisfied that the proposal is consistent with this objective.

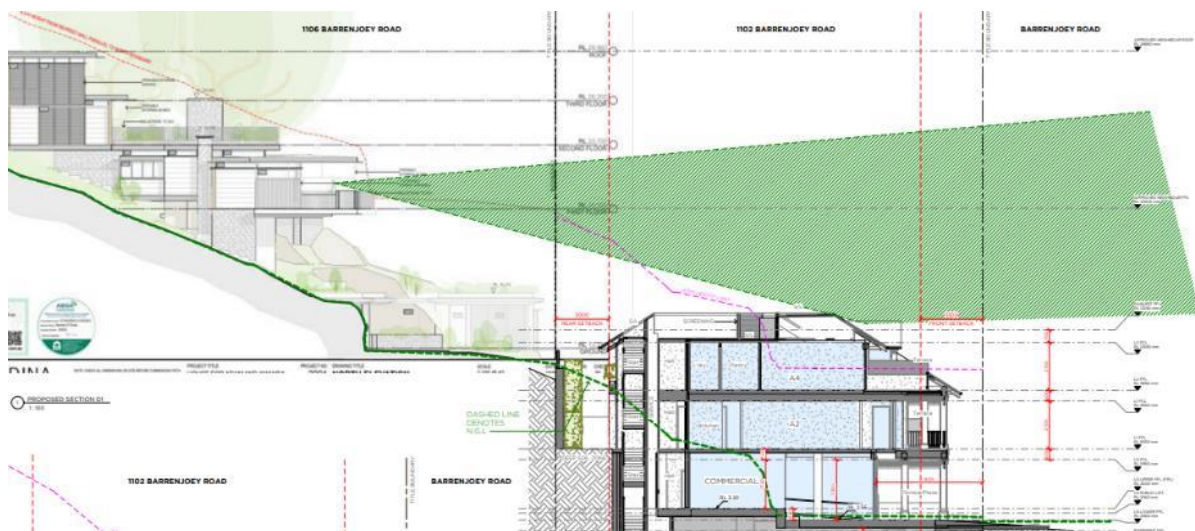
*(c) to minimise any overshadowing of neighbouring properties,*

Response: The shadow diagrams at Annexure 1 demonstrate that at least 3 hours of solar access will be maintained to the living areas and adjacent private open space areas of all surrounding residential properties between 9am and 3pm on 21<sup>st</sup> June with the appropriate distribution of floor space across the site minimising overshadowing of neighbouring properties.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: Having inspected the site and surrounds to determine available view lines we have formed the considered opinion that a view sharing outcomes is maintained to surrounding development including but not limited to No's 138 – 144 Pacific Road to the rear of the site and No. 1100 Barrenjoey Road to the south with views retained from the properties to the rear depicted in the plan extract at Figure 4 below. The proposal is consistent with this objective.



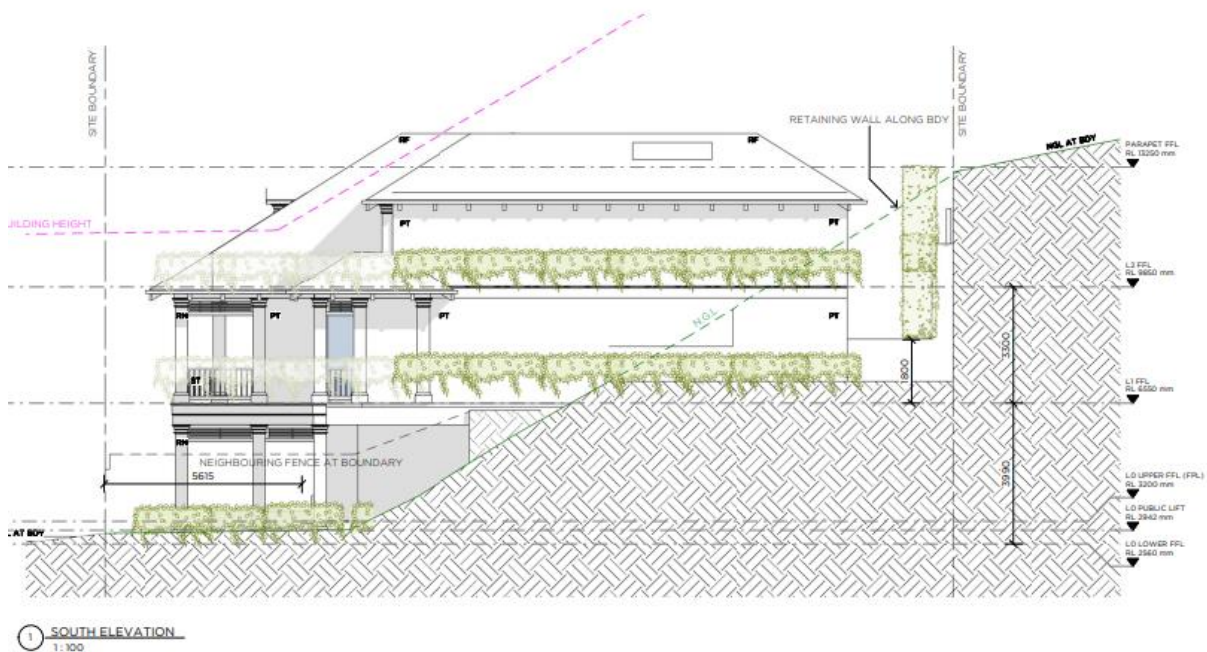
**Figure 4** - Plan extract showing the maintenance of views from the adjoining residential properties to the rear

The height and massing of the development has been appropriately distributed across the site with the design outcome, notwithstanding the building height breaching elements, achieving a view sharing scenario having regard to the view sharing principles established by the Land and Environment Court in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: The proposed works are generally located within the previously disturbed areas of site with the additional excavation primarily related to the provision of a basement level of car parking. I note that the building has been designed with a hipped roof form to Barrenjoey Road the angle of which generally reflects the pre-existing undisturbed natural topography of the land as depicted in the plan extract at Figure 5 below.



**Figure 5** - Plan extract showing the hipped roof form to Barrenjoey Road the angle of which generally reflects the pre-existing undisturbed natural topography of the land

This objective is achieved 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 subject property is not heritage listed or located within a heritage conservation area however is located immediately adjacent to the heritage listed Barrenjoey House. In this regard, the final design detailing has been settled in consultation with Weir Phillips Heritage and Planning with the accompanying Heritage Impact Statement containing the following conclusion:

*The proposed works will have the opportunity to construct of the sympathetically designed modern infill building that supports the ongoing significance of the area as a neighbourhood precinct, will have an acceptable impact on the Barrenjoey House. The proposed new building is contemporary in character but demonstrates respect for the key forms, architectural proportions and materiality of the item.*

*The building demonstrates appropriate setbacks; it is similar in height and scale to Barrenjoey House. Openings are vertically proportioned which represents the vertical articulation of Barrenjoey House. The elevations articulated through to the use of timber verandah posts and modulated gabled roof form. The proposed finishes and colours of timber, masonry and tiles will sit comfortably within the vicinity of Barrenjoey House and other items in the vicinity.*

*The proposed works will have no impact on the ability to understand the significance of the nearby heritage listed items. No significant view corridors will be blocked. The building will read in the setting of nearby items as one of several buildings of a similar massing and scale.*

I note that the reference to “setting” relates to the natural environment surrounding the heritage items and accordingly I am satisfied that notwithstanding the building height breaching elements that the proposal is consistent with this objective which seeks to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Having regard to the above analysis, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

#### Consistency with zone objectives

The subject site is zoned B1 Neighbourhood Centre pursuant to PLEP 2014 with shop top housing permissible in the zone with consent. The stated objectives of the zone are as follows:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*

Response: The development provides for 2 small scale retail spaces at ground level. These future tenancies will be able to contain uses that serve the needs of people who live or work in the surrounding neighbourhood.

The proposal achieves this objective notwithstanding the building height breaching elements.

- *To provide healthy, attractive, vibrant and safe neighbourhood centres.*

Response: The ground floor retail spaces and publicly accessible forecourt area will significantly revitalise this neighbourhood centre with the building design providing for an attractive and vibrant built form outcome which will contribute significantly to the built form quality of development within the neighbourhood centre. The casual surveillance opportunities afforded from the upper-level residential apartments will contribute to safety of the neighbourhood centre with the redevelopment of the site providing for a healthy, attractive, vibrant and safe neighbourhood centre.

The proposal achieves this objective notwithstanding the building height breaching elements.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the B1 Neighbourhood 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.

#### **4.2 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**

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

#### **Ground 1 - Better environmental planning, urban design, heritage conservation and public benefit outcomes**

Approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. In forming this opinion, I note that approval of the development will facilitate the following environment, urban design, heritage conservation and public benefit outcomes

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement.
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.

- The provision of additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.

## **Ground 2 – Flooding**

The ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding contributes to making strict compliance with the building height standard more difficult to achieve and to that extent is an environmental planning ground put forward in support of the extent of the building height breach proposed.

## **Ground 3 - 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 through achieving superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14.

Strict compliance would require the deletion of the entire upper level of the development, representing 2 Apartments, with such outcome neither orderly nor economic have regard to the development consent already physically commenced on the site. Strict compliance would likely result in the previously approved development being completed and occupied which, given the detailing of the previous approval, would result in inferior environmental outcomes to and from development and not represent the orderly development of land.

Approval of the building height variation will promote the achievement of this objective.

### Objective (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)

For the reasons outlined in this submission, approval of the variation to the building height standard will promote superior heritage conservation outcomes having regard to the development's immediate built form relationship with the heritage listed Barrenjoey House.

Approval of the building height variation will promote the achievement of this objective.



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

For the reasons outlined in this submission, approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. In this regard, I note that the extent of building height non-compliance is increased through the provision of characteristically pitched roof forms with the variation able to be significantly reduced through the adoption of a flat roof form consistent with that previously approved pursuant to Development Consent N0119/14. Such outcome would not, in my opinion, represent good design nor promote the amenity of the built environment.

Approval of the building height variation will promote the achievement of this objective.

### Objective (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants

As previously indicated, the ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640 mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding constraint contributes to making strict compliance with the building height standard more difficult to achieve. The floor levels adopted provide for the protection of the health and safety of their occupants.

Approval of the building height variation will promote the achievement of 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 5<sup>th</sup> May 2022, 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**

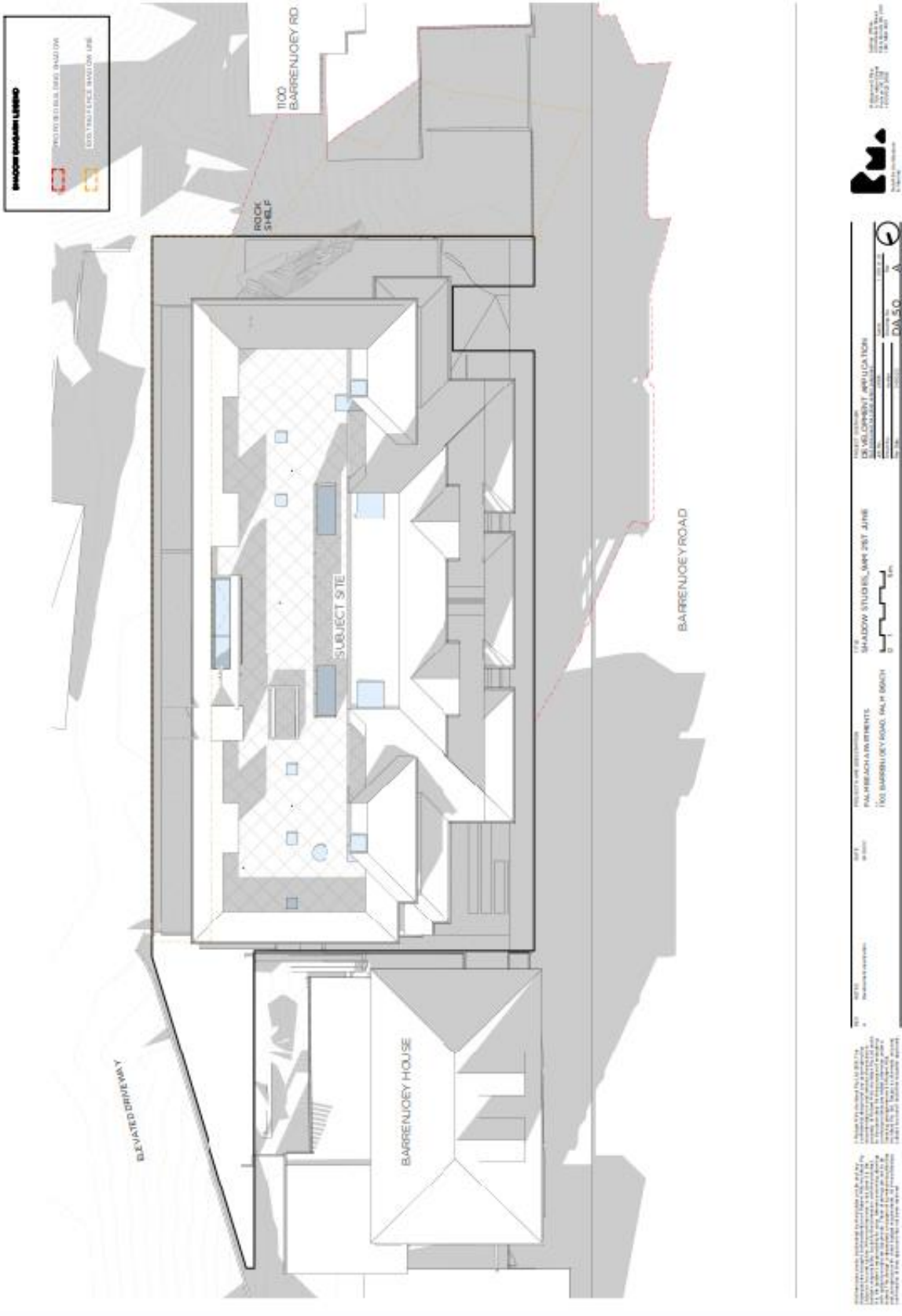


**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

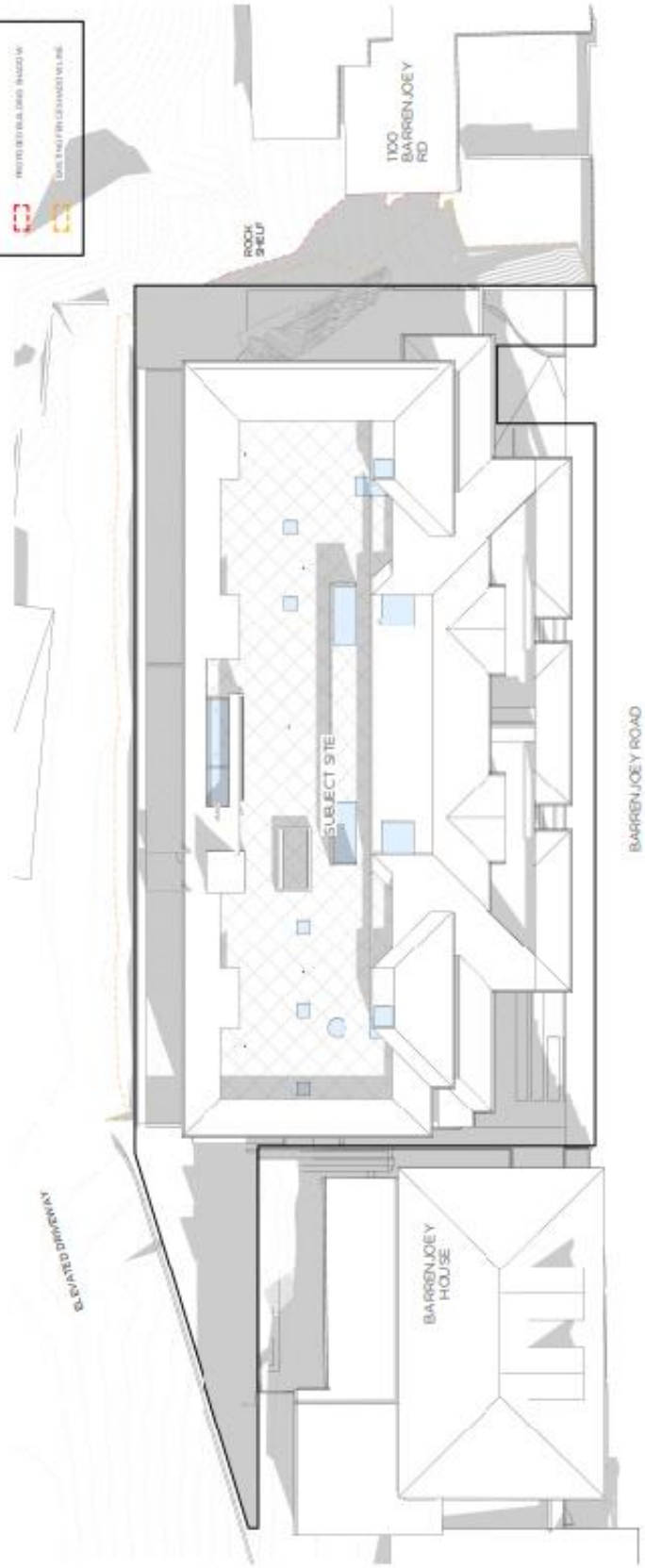
**Director**

**Annexure 1**    Shadow diagrams



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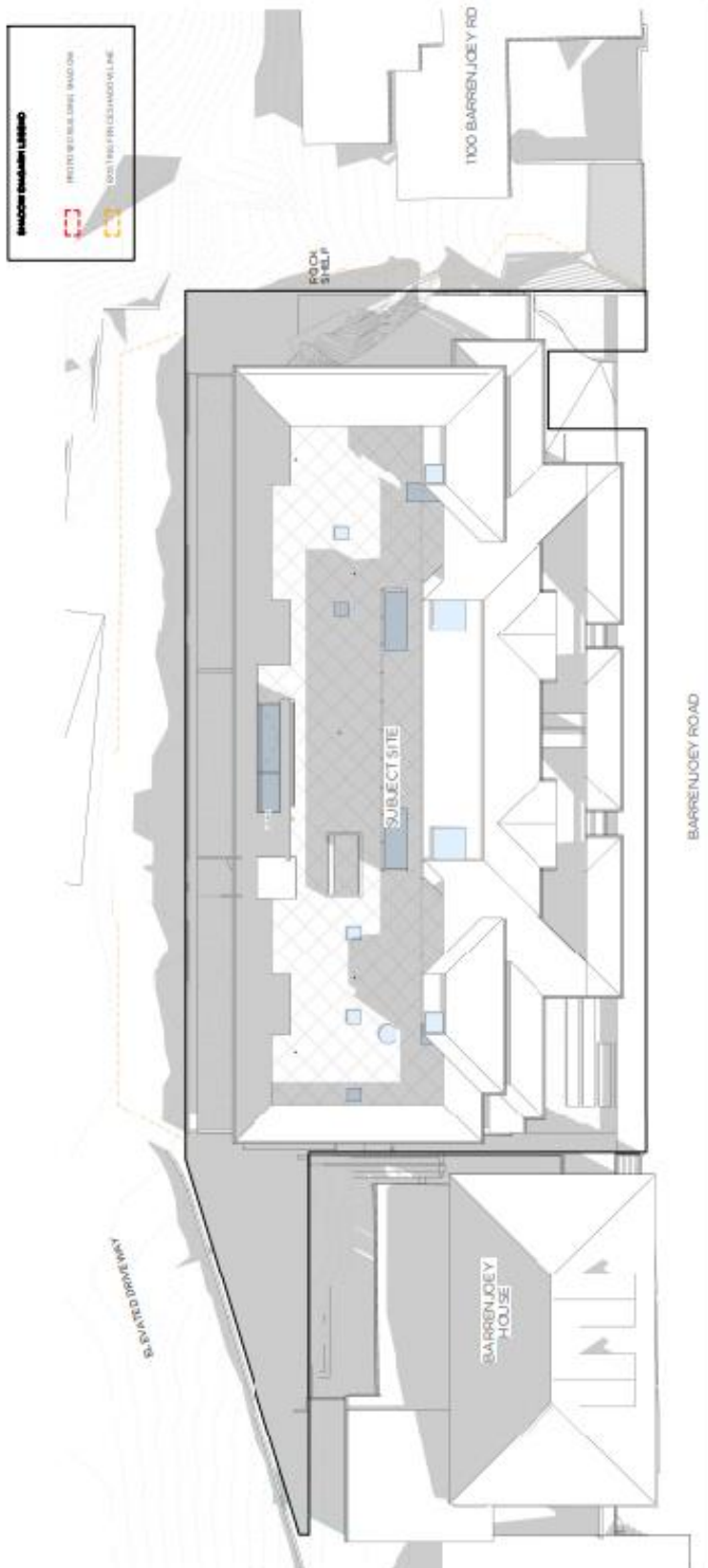
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 DATE: 10/12/2011 BY: [Redacted]

PROJECT LOCATION: DEVELOPMENT APPLICATION  
 PROJECT NAME: SHADOW STUDIOS, 1100 BARRENJOEY ROAD, PALM BEACH

PROJECT ADDRESS: PALM BEACH, FLORIDA 33480  
 PROJECT NUMBER: 2011-0032

SCALE: 1" = 10'-0"  
 DATE: 10/12/2011

DRAWN BY: [Redacted]  
 CHECKED BY: [Redacted]

PROJECT NUMBER: 2011-0032