

# **STATEMENT OF ENVIRONMENTAL EFFECTS**

Proposed Mixed-Use  
Development

22 Raglan Street, Manly

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# Statement of Environmental Effects

## Proposed Mixed-Use Development



## 22 Raglan Street, Manly

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### ANNEXURE 1 – CLAUSE 4.6 REQUEST – BUILDING HEIGHT

### ANNEXURE 2 – CLAUSE 4.6 REQUEST – FLOOR SPACE RATIO

## 1 Introduction

This Statement of Environmental Effects (SEE) has been prepared in support of a development application proposing the demolition of the existing structures and the construction of a 4 storey mixed-use development at 22 Raglan Street, Manly. The development comprises a residential flat building with 10 residential units, including 2 dedicated NDIS Specialist Disability Accommodation (SDA) apartments, and a ground floor neighbourhood shop presenting to Raglan Street, over basement carparking for 14 vehicles.

Carlisle Architects, the project architects, have responded to the client brief to design a contextually responsive building of exceptional quality with high levels of amenity for future occupants of the development. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this site having regard to the height, scale, proximity, use and orientation of surrounding development and the flood affectation of the land.

The application also responds to feedback from Council obtained through the pre-lodgement process, including the detailed commentary provided by Council's Design and Sustainability Advisory Panel.

In addition to this SEE, the application is also accompanied by the following:

- Architectural Plans by Carlisle Architects
- ADG Compliance Table and Design Verification Statement by Carlisle Architects
- Survey by Bee & Lethbridge Pty Ltd
- Landscape Plans by Space Landscape Designs
- View from the Sun Diagrams by Deneb Design
- Flood Risk Management Report by van deer Meer Consulting
- Heritage Impact Statement by Weir Phillips
- Traffic and Parking Assessment Report by Varga Traffic Planning Pty Ltd
- Geotechnical Report by JK Geotechnics Pty Ltd
- BCA Compliance Report by Jensen Hughes
- Waste Management Report by Elephants Foot Consulting Pty Ltd
- Acoustic Report by Pulse White Noise Acoustics
- Access Report by Access Link Consulting
- Stormwater Management Plans by van deer Meer Consulting
- Quantity Surveyors Report by Coutts Cost Consulting Pty Ltd
- BASIX Certificate

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act 1979 (**EP&A Act**),
- Manly Local Environmental Plan 2013 (**MLEP 2013**),
- Manly Development Control Plan 2013 (**MDCP 2013**),
- State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (**SEPP 65**)
- Apartment Design Guide (**ADG**)
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
- State Environmental Planning Policy (Resilience and Hazards) 2021,

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the EP&A Act. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The accompanying plans depict a high quality and contextually appropriate built form outcome that responds to adjacent and nearby development and the surrounding environment. The proposed development is a suitable design solution in light of the zoning of the land and the context of the site.
- The apparent height and bulk of the proposed development is compatible with that of surrounding development, and consistent with the desired future character of the locality.
- 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 apparent size of the proposed development offensive, jarring or unsympathetic in the streetscape context.
- Whilst the proposal requires the consent authority to give favourable consideration to variations to the building height and floor space ratio development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of these development standards and sufficient environmental planning grounds exist to support the variations (as outlined in the attached Clause 4.6 Variation Requests).
- The non-compliance with the wall height, number of storeys, car parking and adaptable housing requirements prescribed by MDCP 2013 has been acknowledged and appropriately justified having regard to the associated objectives. Such variations succeeds pursuant to section 4.15(3A)(b) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

- The proposed development has been amended in response to the pre-lodgement feedback from Council and the Design and Sustainability Advisory Panel from the notes of the meeting dated 3 February 2022.

## 2 Site Analysis

### 2.1 Site Description and location

#### 2.1.1 The Site

The subject property is legally described as Lot 100 in Deposited Plan 1009880 and is referred to as 22 Raglan, Manly. The site is generally rectangular in shape, with a 22.32m wide frontage to Raglan Street to the south, a maximum depth of 30.62m and a total area of 713.3m<sup>2</sup>.

The existing building on the site consists of the 'Stoke Beach House' backpackers (previously 'Manly Backpackers'), which is 2-3 storeys with ground level car-parking and covers almost 100% of the site. The existing building is constructed from side boundary to side boundary, as are its neighbouring buildings at 18 Raglan St and 2-14 Pittwater Rd, creating a strong street edge to Raglan St.

The west half of the existing front façade was a 2-storey ambulance station constructed in face brickwork in the 1930's. It was not a particularly significant or unique piece of architecture, and has since been cement rendered and painted, the original first floor timber windows removed and replaced with aluminium, the ground floor windows and sills removed and replaced with solid plain doors, the original garage entry infilled, the roof tiles entirely replaced, and the building behind the façade mostly demolished and reconstructed to create a backpackers hostel.

The east half of the existing front façade was constructed in the early 1990's in a 3-storey pastiche copy of the east half with polystyrene mouldings which are now cracking and falling away.

The internal floor levels and window sills of each side of the façade don't match due to one side being 2 storeys and the other side 3 storeys. The front façade is set back about 1.5m from the front boundary, exposing an unattractive brick blade wall at 2-14 Pittwater Rd.

At the rear (north) boundary, the existing building is constructed about 1.5m from the boundary at ground level with no landscaping at all and with a communal lounge and tv room adjacent to the rear boundary.

The first floor is set back about 5m from the rear boundary and consists of a communal kitchen, dining and bar area open to the sky which creates noise to surrounding residents. Vehicular access to the site is gained via an existing driveway to Raglan Street.



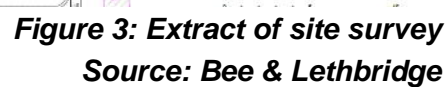
The site is highlighted in the aerial images in Figures 1 and 2.



**Figure 1: Aerial photograph of the site**  
**Source: Nearmap**

The physical and topographical characteristics of the site are depicted on the site survey extract at Figure 3, and the site images at Figures 4 and 5.









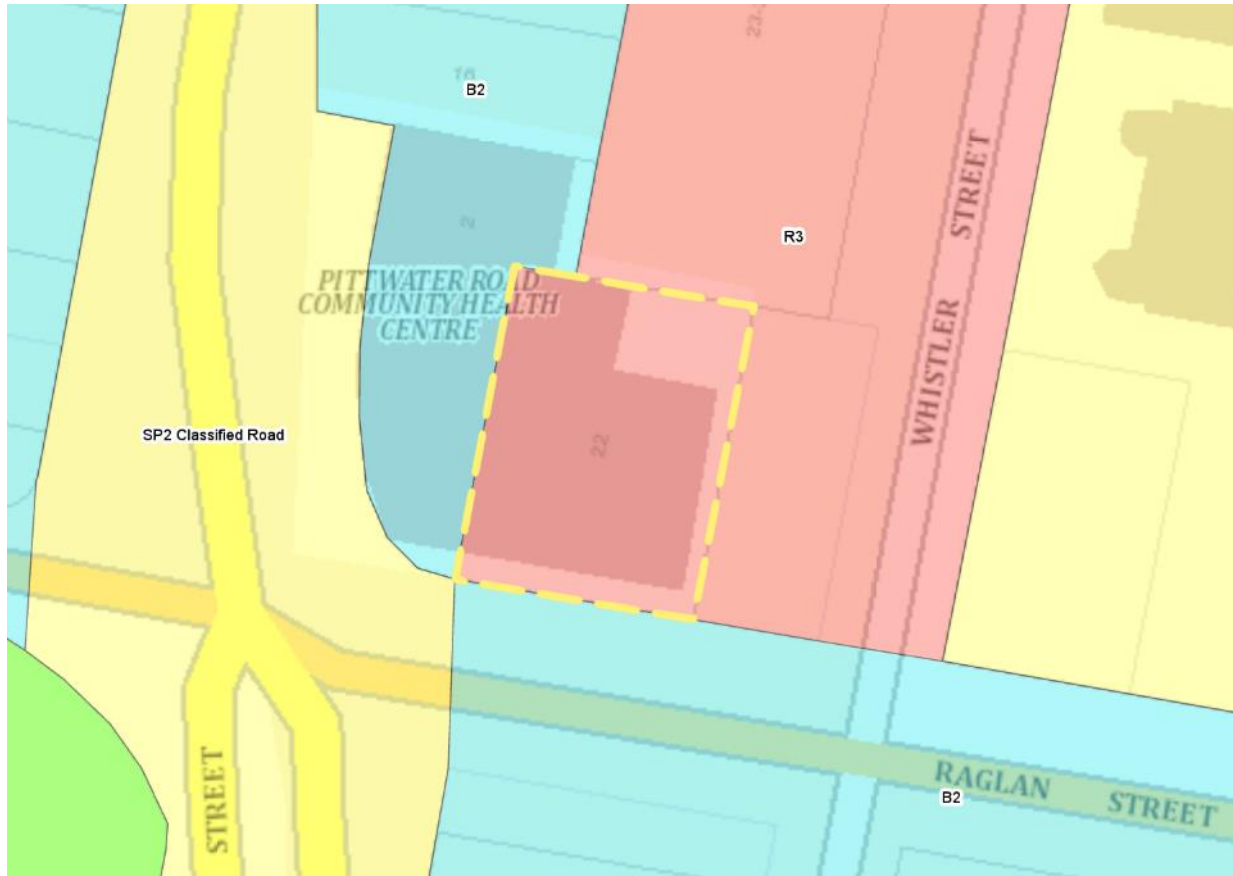
**Figure 4: The subject site as seen from Raglan Street to the south-west**



**Figure 5: The subject site as seen from Raglan Street to the south-east**

### 2.1.1 The Locality

The site is located within the R3 Medium Density Zone, as shown on the Zoning Map of MLEP 2013 (Figure 6).



**Figure 6: Extract of Zoning Map of MLEP 2013**

The surrounding area comprises development of varying use, scale, density, age and architectural style. A visual representation of the surrounding development is shown in Figures 7 and 8 over the page.



**Figure 7: View of intersection of Raglan Street and Pittwater Road, with the subject site to the far left.**



**Figure 8: Development along Raglan Street to the east of the subject site**



## 3 Description of Proposed Development

### 3.1 Details of the proposed development

The proposed development is depicted in the architectural plans set prepared by Carlisle Architects. This application provides for the following built form and land use outcomes:

- Demolition of the existing site structures,
- Construction of a 4 storey mixed-use development over 1 basement level, comprising:
  - Basement: 14 car parking spaces, storage, electrical plant room, bulky goods storage, bicycle parking, stair and lift access,
  - Ground Floor: neighbourhood shop (50m<sup>2</sup>) presenting to Raglan Street, 2 x 2 bedroom NDIS Specialist Disability Accommodation (SDA) apartments, bin room, storage, central lobby, stair and lift access,
  - Level 1: 3 x 2 bedroom apartments, central lobby, stair and lift access,
  - Level 2: 2 x 3 bedroom apartments, 1 x 1 bedroom apartment, central lobby, stair and lift access,
  - Level 3: 2 x 2 bedroom apartments, communal roof terrace with bathroom, central lobby, stair and lift access,
  - Roof: solar panels
- Driveway connecting Raglan Street to the proposed basement,
- Awning to Raglan Street,
- Landscaping, and
- Stormwater infrastructure,

The proposed development presents as a three storey building to Raglan Street, with the front facade designed to match the height of neighbouring buildings. The fourth storey is setback from the street frontages and will not be overly visible from the public domain or a dominant feature in the streetscape.

The proposed development demonstrates a superior architectural design solution for the site, providing high levels of amenity for future occupants of the development. The architectural design is complemented by deep soil landscaping at the rear of the site and upper level plantings, as shown on the Landscape Plans prepared by Space Landscape Designs.

The application is supported by a design verification statement by the project architects, inclusive of a detailed response to the design criteria of SEPP 65 and the objectives of the ADG.

The acceptability of the access and adaptable housing arrangements is detailed within the accompanying Access Report prepared by Access Link Consulting.

The proposal's readiness to comply with the relevant provisions of the BCA is detailed in the BCA Compliance Report prepared by BCA Design Assessment Report by Jensen Hughes.

Stormwater is to be collected on the site and directed to the proposed on-site detention tanks and Council's stormwater infrastructure in Raglan Street. The proposed stormwater management solution developed for the site is detailed in the Stormwater Plans prepared by van der Meer Consulting.

In light of the excavation proposed to accommodate the basement, the application is supported by a Geotechnical Report by JK Geotechnics Pty Ltd. The Geotechnical Report confirms that groundwater will be encountered during excavation for the proposed basement. Interference with the water table constitutes integrated development under the Water Management Act, with referral of the application required to Water NSW.

A Flood Risk Management Report, prepared by van der Meer Consulting, has been prepared in response to the medium risk flood affectation of the land.

The site is located within the Pittwater Road Conservation Area and in the vicinity of a number of heritage items. The suitability of the proposal with regard to the local heritage significance of the conservation area and nearby items is considered and positively confirmed in the Heritage Impact Statement prepared by Weir Phillips.

Finally, the application is supported by a Waste Management Plan prepared by Elephants Foot Consulting Pty Ltd detailing how waste is to be managed during construction and throughout the life of the development.

### 3.2 Response to DSAP

The DSAP were generally supportive of the proposal, subject to a series of amendments recommended to achieve an appropriate urban design outcome.

In response to feedback from DSAP, the proposal has been amended, as follows:

- Reduction of the number of units proposed from 14 to 10, with a significant improvement to the amenity of the apartments proposed.
- Deletion of mezzanine levels within apartments.
- Increase to the rear setback of the northern façade affording greater spatial separation to the development to the north.
- Increase in deep soil landscaped areas.
- Improved energy efficiency and additional sustainability initiatives introduced.



## 4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the EP&A Act, as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

### 4.1 Manly Local Environmental Plan 2013

#### 4.1.1 Zoning

MLEP 2013 applies to the subject site and this development proposal. The subject site is located within the R3 Medium Density Residential Zone and the proposed mixed-use building, comprising a residential flat building with a neighbourhood shop on the ground floor is permitted with consent.

The proposal is consistent with the stated objectives of the R3 Medium Density zone, as follows:

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

Comment: The proposed development comprises 10 residential apartments to provide for the housing needs of the community within a medium density environment that is ideally suited for additional residential development.

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

Comment: The proposed development comprises a range of differing sized apartments with varying layouts and compositions. The proposed development also comprises 2 adaptable units designed in accordance with AS4299.

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

Comment: The proposed development comprises 50m<sup>2</sup> of floor space for the purpose of a neighbourhood shop on the ground floor presenting to Raglan Street. This contributes to the existing range of services within the locality that meet the day to day needs of residents and also ensures appropriate activation of the street frontage.

- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*

Comment: The proposed development will provide a significant uplift for the site that is responsive to both the zoning of the land and the streetscape context.

- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

Comment: Whilst the proposed development will result in the loss of the existing backpacker's accommodation, the use of the site for this purpose is not the highest or best use of the land and is not reflective of market demand or land value.

Accordingly, there is no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

#### 4.1.2 Height of buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 11m.

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

The proposed parapet roof over Level 4 reaches a height of 13.91m, measured from the finished floor level of the existing building (RL 5.84m AHD) to the top of the parapet (RL 19.75m AHD). However, a maximum height of 14.66m occurs at the lift overrun (RL 20.50m AHD).

The maximum building height prescribed by clause 4.3 of MLEP 2013 is a development standard, as defined by the EP&A Act. Clause 4.6 of MLEP 2013 provides a mechanism by which a development standard can be varied.

The objectives of clause 4.6 of MLEP 2013 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.*

Having regard to these provisions, strict compliance has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the ability to satisfy the objectives of the zone and the objectives of the development standard. Sufficient environmental planning grounds exist to support the variation proposed, as outlined in the accompanying clause 4.6 variation request at **ANNEXURE 1**.

#### 4.1.3 Floor space ratio

Clause 4.4(2) of MLEP 2013 prescribes a maximum floor space ratio of 0.75:1 with respect to the subject site. The objectives of this clause are:

- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

The proposed development has a gross floor area of 713m<sup>2</sup> and a floor space ratio of 1.77:1, resulting in non-compliance with the FSR development standard prescribed by clause 4.4 of MLEP 2013.

Strict compliance with the 0.75:1 FSR development standard has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the ability to satisfy the objectives of the zone and the objectives of the development standard. Sufficient environmental planning grounds exist to support the variation proposed, as outlined in the accompanying clause 4.6 variation request at **ANNEXURE 2**.

#### 4.1.4 Controls relating to miscellaneous permissible uses

Clause 5.4(7) of MLEP 2013 restricts the retail floor area of a neighbourhood shop to 80m<sup>2</sup>. The proposed neighbourhood shop has a total floor area of 50m<sup>2</sup>, consistent with this control.

#### 4.1.5 Heritage conservation

The site is located at the south edge of the Pittwater Road Conservation Area and is in the vicinity of a number of sites of local heritage significance. The application is supported by a Heritage Impact Statement by Weir Phillips which concludes:

*The proposed removal of the existing buildings on the site will have an acceptable impact on the Pittwater Road Heritage Conservation Area (HCA) and the heritage item in the vicinity. The former Ambulance Station ceased functioning as an Ambulance Station over 26 years ago and has lost any heritage significance through extensive and intrusive alterations and additions that has removed the building association with its former use and architectural character, such that it no longer makes a positive contribution to the HCA or heritage items in the vicinity.*

*The proposed building will have an acceptable and positive impact on the HCA and heritage items in the vicinity. The proposed design has carefully considered and interpreted the original architectural character of the former Ambulance Station that once made it significant to this area of Manly. The subtlety of the proposed materials, texture and colour is enhanced by the highly articulated Raglan Street elevation and arched colonnade. The colonnade is reminiscent of the existing recessed balcony and helps to reduce large areas of glazing to the HCA and creates a solid to void ratio that is in keeping with significant buildings in the HCA and the former Ambulance Station.*

*The proposed works comply with the controls and objectives for heritage items as outlined in Section 3.2 of the Manly DCP 2013.*

Overall, Council can be satisfied that the proposed development is consistent with the requirements and objectives of clause 5.10 of MLEP 2013.

#### 4.1.6 Flood planning

The site is identified as being prone to medium risk flooding, as identified on Council's Flood Risk Hazard Map of MDCP 2013. The application is supported by a Flood Risk Management Report by van der Meer Consulting which confirms that the proposed development is consistent with the design requirements of clause 5.4.3 of MDCP 2013.

As such, Council can be satisfied that the development is consistent with the requirements and objectives of clause 5.21 of MLEP 2013, in so far as the development-

- (a) is compatible with the flood function and behaviour on the land, and*
- (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and*
- (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and*
- (d) incorporates appropriate measures to manage risk to life in the event of a flood, and*

- (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of riverbanks or watercourses.*

#### 4.1.7 Acid sulfate soils

The site is located within Class 4 as shown on the Acid Sulfate Soils Map of MLEP 2013. The Geotechnical report confirms that based on their detailed investigation, acid sulfate soils do not appear to be present at the site and an Acid Sulfate Soils Management Plan is not required.

#### 4.1.8 Earthworks

The consent authority can be satisfied that the excavation proposed to accommodate the basement will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land, consistent with the provisions of clause 6.2 of MLEP 2013.

The application is supported by a Geotechnical Report by JK Geotechnics which confirms that the proposed excavation can be undertaken safely, with minimal risk to adjoining properties.

#### 4.1.9 Stormwater management

Detailed Stormwater Management Plans prepared by van der Meer Consulting accompany the application and demonstrate a suitable stormwater management solution for the site. The consent authority can be satisfied that the proposal is consistent with the provisions of clause 6.4 of MLEP 2013.

#### 4.1.10 Foreshore scenic protection area

Clause 6.9 of MLEP 2013 identifies matters that must be considered with respect to foreshore scenic protection before consent is granted to the proposed development. These matters are considered, as follows:

- (a) impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*

Comment: The proposed development will not overshadow the foreshore. Further, noting the absence of any apparent public view corridors across the site, the proposed development will not impact upon views of the foreshore from any public places.

- (b) measures to protect and improve scenic qualities of the coastline,*

Comment: The proposed development is a high-quality architectural design response that will positively contribute to the scenic quality of the area.

- (c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,*

Comment: The proposed has been designed to sensitively respond to the context of the site. The proposed development has also had appropriate regard for the amenity of adjoining properties, ensuring that resultant impacts upon sunlight, visual privacy and views are minimal and not unreasonable.

- (d) *measures to reduce the potential for conflict between land-based and water-based coastal activities.*

Comment: The proposed development will not result in any conflict between land-based and water-based coastal activities.

The consent authority can be satisfied that the proposal is consistent with the objectives and requirements of clause 6.9 of MLEP 2013.

#### 4.1.11 Essential services

Pursuant to clause 6.12 development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

- (a) *the supply of water,*
- (b) *the supply of electricity,*
- (c) *the disposal and management of sewage,*
- (d) *stormwater drainage or on-site conservation,*
- (e) *suitable vehicular access.*

The consent authority can be satisfied that these services will be available prior to occupation, and conditions of consent can be imposed in this regard.

## 4.2 Manly Development Control Plan 2013

### 4.2.1 Townscape (Local and Neighbourhood Centres)

The proposed development is consistent with the requirements and objectives of clause 3.1.3 of MDCP 2013, as follows:

- The proposed building has been designed to sensitively respond to the context of the site, to ensure that the bulk of the development does not detract from the significance of the Pittwater Road Conservation Area or nearby items of local significance.
- The height of the development as it presents to Raglan Street responds to the height of adjoining buildings.
- An accessible path of travel is provided into and through the building.



- The front setback of the development is responsive to the setbacks of adjoining and nearby development, to positively contributes to the established streetscape setting.

#### 4.2.2 Heritage Consideration

The site is located at the southern end of the Pittwater Road Conservation Area and is in the vicinity of a number of sites of local heritage significance. The application is supported by a Heritage Impact Statement by Weir Phillips that concludes that the proposed development is appropriate with respect to the requirements and objectives of MLEP 2013 and MDCP 2013, and that the proposed development will not have an adverse impact upon the heritage significance of the Pittwater Road Conservation Area or nearby items of local heritage significance.

#### 4.2.3 Landscaping

The application is supported by detailed Landscape Plans prepared by Space Landscape Designs that demonstrate a highly considered landscape solution for the site. The landscaping complements the proposed architectural form and positively contributes to the amenity of the proposed development.

The proposed landscaping is consistent with the requirements and objectives of clause 3.3.1 of MDCP 2013.

#### 4.2.4 Sunlight Access and Overshadowing

The proposed development is supported by View from the Sun Diagrams by Deneb Design that demonstrate the overshadowing resulting from the proposed development. The diagrams confirm that the proposed development will not result in any adverse solar access impacts upon neighbouring buildings. Rather, the proposed development will result in additional sunlight received by the adjoining development to the east between midday and 3pm.

#### 4.2.5 Privacy and Security

The proposed development is oriented to the front and rear of the site and will not result in any unreasonable impacts upon the privacy of adjoining or nearby properties.

The site will be appropriately managed to maximise safety for occupants of the development and people passing through, with appropriate casual surveillance achieved from the ground floor tenancy and the upper level residential apartments.

The proposed development is consistent with the objectives and requirements of clause 3.4.2 of MDCP 2013.

#### 4.2.6 Maintenance of Views

There are no apparent view corridors obtained over the subject site, and as such, it appears unlikely that the proposed development will result in any unreasonable impacts upon views.

Development to the east of the site, closer to the beachfront, is of significantly greater size and scale which would obstruct any views to the beach from the west.

#### 4.2.7 Sustainability

The application is supported by a BASIX Certificate which confirms that the proposed development meets the relevant water, thermal comfort and energy requirements.

#### 4.2.8 Accessibility

Clause 3.6.1 of MDCP 2013 requires all new development to meet the relevant requirements of the Disability (Access to Premises – Buildings) Standards 2010 and the BCA with respect to the design of equitable access. The application is supported by an Access Report and BCA Design Assessment Report which confirm compliance in this regard.

Clause 3.6.3.1 of MDCP 2013 requires 25% of dwelling to be adaptable, in accordance with the requirements of AS4299. The proposed development provides for 2 dedicated NDIS Specialist Disability Accommodation (SDA) apartments which, whilst not compliant with 25% adaptable apartment provision, provides accommodation for persons requiring high physical support and in doing so more than adequately achieves the objectives of the control. Strict compliance is unreasonable and unnecessary under such circumstances.

#### 4.2.9 Stormwater Management

Clause 3.7 of MDCP 2013 requires the management of stormwater to comply with the provisions of Council's *Water Management for Development Policy*.

Stormwater is to be collected from the site, directed to the required on-site detention tank or piped to Raglan Street. The proposed stormwater management solution developed for the site is detailed in the Stormwater Plans prepared by van der Meer Consulting.

#### 4.2.10 Waste Management

Clause 3.8 of MDCP 2013 requires all development to comply with the appropriate sections of Council's Waste Management Guidelines, with all development applications to be accompanied by a Waste Management Plan.

The application is supported by a Waste Management Plan prepared by Elephants Foot Consulting Pty Ltd detailing how waste is to be managed both during construction and throughout the life of the development.

#### 4.2.11 Mechanical Plant Equipment

The proposed lift overrun is centrally located and is appropriately integrated into the design of the development. Plant equipment will be sited and maintained to prevent adverse acoustic impacts for future occupants of the development and adjoining properties.

The proposed development is consistent with the requirements and objectives of clause 3.9 of MDCP 2013.

#### 4.2.12 Safety and Security

The proposed commercial building has been designed to appropriately respond the CPTED design principles, providing an environment that is safe and secure for all future occupants and visitors, consistent with the provisions of clause 3.10 of MDCP 2013.

#### 4.2.13 Earthworks (Excavation and Filling)

The application is supported by a Geotechnical Investigation by JK Geotechnics which has assessed and considered the subsurface conditions of the site and provides comments and recommendations to ensure that the development is undertaken safely, with minimal impact to the surrounding environment.

#### 4.2.14 Built Form Controls Compliance Table

A table demonstrating compliance with the relevant provisions of the DCP is detailed below.

It is noted that the proposed development departs from a number of the controls applicable to the R3 Medium Density Zone. It is our position that such controls are not reasonably applied in relation to the subject site, which has the appearance and function of a local centre, with existing development built with nil setbacks to both side boundaries.

It is noted that this position was generally endorsed by Council's Design and Sustainability Advisory Panel, who advised:

*On this site the Panel is not as concerned with numerical compliance with the controls-height, FSR and site coverage (given that these are already significantly exceeded by the existing building) but rather the quality of the design in relation the public domain, its context and internal amenity of the units.*

*The proposal can be seen as part of a continuous perimeter block form over the street block as a whole. The party walls built to side boundaries on the street block is appropriate...*

Control	Requirement	Proposed	Compliance
<b>Part 4.1 – Residential Development Controls</b>			
<b>4.1.1 Density</b>	Maximum density: 1 dwelling / 150m <sup>2</sup>	1 dwelling / 71.3m <sup>2</sup>  The density of the proposed development is considered to be appropriate with regard to the individual context of the site, that has a character more akin to a local centre, with mixed use development built to nil setbacks on both sides.	Acceptable on merit
	Dwelling Size: 1 bed: 50m <sup>2</sup> 2 Bed: 70m <sup>2</sup> 3 Bed: 90m <sup>2</sup> + 5m <sup>2</sup> for additional bathrooms	Each dwelling exceeds the minimum dwelling size prescribed.	Yes
<b>4.1.2.1 Wall Height</b>	9.0m	<p>The wall height of the dominant facades is 10.3m, consistent with the wall height of immediately adjoining buildings that are built with nil setbacks to the side boundaries.</p> <p>The wall height then increases to 13.91m for the fourth floor, however this wall is setback from Level 3 below and is not a dominant element when seen from the street.</p> <p>The application satisfactorily demonstrates that non-compliance with the wall height control does not result in any adverse impacts upon the amenity of adjoining buildings.</p>	Acceptable on merit
<b>4.1.2.2 Number of Storeys</b>	3 storeys	<p>4 storeys</p> <p>The proposed development is an appropriate contextual response to</p>	Acceptable on merit

Control	Requirement	Proposed	Compliance
		<p>the individual circumstances of the subject site.</p> <p>The proposed fourth floor is sited to respect adjoining properties and does not attribute to any adverse impacts upon amenity, the natural environment or the streetscape.</p>	
<b>4.1.4.1 Street front setbacks</b>	Street Front setbacks must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity.	The proposed development has nil setbacks to Raglan Street, consistent with the alignment of adjoining buildings.	Yes
<b>4.1.4.2 Side setbacks and secondary street frontages</b>	Setbacks between any part of a building and the side boundary must not be less than one third of the height of the adjacent external wall of the proposed building.	<p>The provisions of this control derogate from the visual privacy requirements of the ADG, being the control that prescribes setbacks to boundaries and adjoining buildings.</p> <p>In accordance with clause 6A of SEPP 65, the provisions of this control are of no effect.</p>	N/A
<b>4.1.4.4 Rear Setbacks</b>	The distance between any part of a building and the rear boundary must not be less than 8m.	<p>The provisions of this control derogate from the visual privacy requirements of the ADG, being the control that prescribes setbacks to boundaries and adjoining buildings.</p> <p>In accordance with clause 6A of SEPP 65, the provisions of this control are of no effect.</p>	N/A
<b>4.1.5.1 Minimum</b>	Minimum Total Open Space: 50%	427m <sup>2</sup> or 60% of the site area is to be used for outdoor recreation and	Acceptable on merit

Control	Requirement	Proposed	Compliance
<b>Residential Total Open Space Requirements</b>		landscaping, with deep soil planting at the rear of the site, generous areas of private open space on each level, communal open space on Level 4 and integrated planters on each level.	
<b>4.1.5.2 Landscaped Area</b>	Minimum Landscaped Area: 30% of TOS	130m <sup>2</sup> of landscaping is proposed, being 30% of the total outdoor area used for recreation and landscaping. The landscaping comprises deep soil planting along the northern boundary and integrated planters on each level.	Acceptable on merit
<b>4.1.6.1 Parking Design</b>	<p>The design and location of all garages, carports or hardstand areas must minimise their visual impact on the streetscape and neighbouring properties and maintain the desired character of the locality.</p> <p>Parking is to comply with Schedule 3.</p>	<p>The location of the existing driveway is generally retained.</p> <p>The garage door is recessed behind the dominant street façade to ensure that the visual impact on the streetscape is appropriately minimised.</p> <p>The application proposes 14 off-street parking spaces, resulting in a shortfall of 2 spaces compared to that prescribed by Schedule 3 of the DCP. The suitability and acceptability of the proposed provision of off-street parking is addressed in the accompanying Traffic and Parking Assessment Report by Varga Traffic Planning Pty Ltd.</p>	Acceptable on merit
<b>4.1.6.3 Bicycle storage</b>	Secure bicycle storage is required for residential accommodation in accordance with Schedule 3 Part 2 Bicycles. Bicycle storage areas should be of sufficient	Designated bicycle storage is provided within the basement.	Yes



Control	Requirement	Proposed	Compliance
	dimensions to comply with Australian Standards.		
<b>4.1.6.4 Vehicle Access</b>	All vehicles should enter and leave the site in a forward direction.	All vehicles are able to enter and exit the site in a forward direction.	Yes
<b>4.4.1 Demolition</b>	Comply with the requirements of the Northern Beaches Waste Management Policy	The application is accompanied by a Waste Management Plan.	Yes
<b>4.4.5 Earthworks</b>	A dilapidation survey report and geotechnical assessment may be required for excavation works exceeding 1m.	The application is supported by a Geotechnical Report by JK Geotechnics. There is no objection to the imposition of conditions of consent requiring the production of dilapidation reports, if deemed necessary by Council.	Yes
<b>5.2 Pittwater Road Conservation Area</b>	<p>In relation to development fronting Pittwater Road, Council must be satisfied that DAs will not:</p> <ul style="list-style-type: none"> <li>a) adversely affect the amenity of the locality;</li> <li>b) result in excessive vehicular movements to and from the site or in adjacent residential streets;</li> <li>c) involve signage or other non-structural change in the appearance of the exterior of the building that is</li> </ul>	<p>The development does not front Pittwater Road.</p> <p>Nonetheless, the site is located within the Pittwater Road Conservation Area and is in the vicinity of a number of sites of local heritage significance. The application is supported by a Heritage Impact Statement by Weir Phillips that concludes that the proposed development is appropriate with respect to the requirements and objectives of MLEP 2013 and MDCP 2013, and that the proposed development will not have an adverse impact upon the heritage significance of the Pittwater Road Conservation Area or nearby items of local heritage significance.</p>	N/A

Control	Requirement	Proposed	Compliance
	<p>inconsistent with the preservation or restoration of the heritage streetscape in the vicinity;</p> <p>d) change in the appearance of the exterior of a building without being in keeping with the preservation or restoration of the heritage streetscape.</p>		
<b>5.4.3 Flood Prone Land</b>	<p>Development must comply with the prescribed Matrix. Development on flood prone land requires the preparation of a Flood Management Report by a suitably qualified professional.</p>	<p>The site is identified as being prone to low and medium risk flooding, as identified on Council's Flood Risk Hazard Map of MDCP 2013. The application is supported by a Flood Risk Management Report by van der Meer Consulting.</p>	Yes

### 4.3 State Environmental Planning Policy (Resilience and Hazards) 2021

#### 4.3.1 Remediation of Land

Chapter 4 of SEPP (Resilience and Hazards) applies to all land and aims to provide for a state-wide planning approach to the remediation of contaminated land.

Clause 4.6(1)(a) of this policy requires the consent authority to consider whether land is contaminated. The site has been used for residential purposes for an extended period of time with no known prior land uses. In this regard, the potential for contamination is considered to be extremely unlikely. The site is not identified as a contaminated site on the NSW EPA's list of notified sites, nor is it in the vicinity of any listed sites.

The consent authority can be satisfied that the subject site is suitable for the proposed development. As such, the proposed development is consistent with the provisions of Chapter 4 of this policy.

#### 4.4 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX Assessment accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

#### 4.5 State Environmental Planning Policy No.65 – Design Quality of Residential Apartment Development

SEPP 65 aims to improve the design quality of residential flat development to provide sustainable housing in social and environmental terms that is a long-term asset to the community and presents a better built form within the streetscape.

It also aims to better provide for a range of residents, provide safety, amenity and satisfy ecologically sustainable development principles. In order to satisfy these aims, the plan sets design principles in relation to context, scale, built form, density, resources, energy and water efficiency, landscaping, amenity, safety and security, social dimensions and aesthetics to improve the design quality of residential flat building in the State.

SEPP 65 applies to new residential flat developments that are at least 3 or more storeys in height and that contain at least 4 dwellings.

As the proposed development is for the erection of a 4 storey mixed use development containing 10 dwellings, the provisions of SEPP 65 are applicable to the proposed development.

Clause 28(2)(b) SEPP 65 requires the proposal to be assessed against the 9 design quality principles contained in Schedule 1. The proposal's compliance with the design quality principles is detailed in the Design Verification Statement by Carlisle Architects provided to support this application.

Clause 28(2)(c) of SEPP 65 requires the consent authority to take into consideration the Apartment Design Guide. In this regard, an Apartment Design Guide compliance table prepared by Carlisle Architects accompanies this application.

#### 4.6 Matters for Consideration pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the EP&A Act (as amended):

(i) *any environmental planning instrument*

The proposed mixed-use development is permissible and consistent with the provisions of MLEP 2013 and MDCP 2013 as they are reasonably applied to the proposed works given the constraints imposed by the site's location, environmental and topographical characteristics.

(ii) *Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

There are no draft environmental planning instruments relevant to the proposed development.

(iii) *Any development control plan*

MDCP 2013 is applicable to this application and has been considered in detail in this report.

(iiia) *Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and*

N/A

(iv) *The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*

N/A

(v) *Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)*

N/A

(b) *The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,*

[The assessment considers the Guidelines (in italics) prepared by the Department of Planning and Environment in this regard].

#### *Context and Setting*

i. *What is the relationship to the region and local context in terms of:*

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

These matters have been discussed in the body of this report.

ii. *What are the potential impacts on adjacent properties in terms of:*

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be acceptable with regard to the relevant provisions of MDCP 2013.

*Access, transport and traffic:*

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

These issues have been discussed in detail in this report and the Traffic and Parking Assessment Report by Varga Traffic Planning Pty Ltd.

*Public Domain*

The proposed development will have no adverse impact on the public domain. Rather, the proposal will result in a significant enhancement of the public domain, by virtue of the high-quality architectural design solution proposed.

#### *Utilities*

This matter has been discussed in detail in the body of this report.

#### *Flora and Fauna*

The proposal will not result in any adverse impacts upon flora and fauna.

#### *Waste Collection*

Waste will be managed appropriately on the site.

#### *Natural hazards*

The site has been designed to be safe from natural hazards.

#### *Economic Impact in the locality*

The proposed development will generate temporary employment during construction. On-going employment will be provided through the neighbourhood shop proposed, in addition to services associated with the management of the building.

#### *Site Design and Internal Design*

i) *Is the development design sensitive to environmental considerations and site attributes including:*

- *size, shape and design of allotments*
- *The proportion of site covered by buildings*
- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the general principles, desired future character and built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation*



- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development will comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

#### *Construction*

*i) What would be the impacts of construction activities in terms of:*

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

*(c) The suitability of the site for the development*

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The adjacent development does not impose any unusual or impossible development constraints. The development will not cause excessive or unmanageable levels of transport demand.

The development responds to the topography and constraints of the site, is of adequate area, and is a suitable design solution for the context of the site.

*(d) Any submissions received in accordance with this act or regulations*

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) The public interest

The proposed works are permissible and consistent with the intent of the LEP and DCP controls as they are reasonably applied to the proposed development. The development would not be contrary to the public interest.

## 5 Conclusion

The proposal is permissible and in conformity with the objectives of MLEP 2013 as they reasonably relate to this form of development on this particular site. The proposed development appropriately responds to the guidelines contained within the MDCP 2013 and the massing and built form established by nearby developments.

Carlisle Architects, the project architects, have responded to the client brief to design a contextually responsive building of exceptional quality with high levels of amenity for future occupants of the development. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this site having regard to the height, scale, proximity, use and orientation of surrounding development and the flood affectation of the land.

It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The accompanying plans depict a high quality and contextually appropriate built form outcome that responds to adjacent and nearby development and the surrounding environment. The proposed development is a suitable design solution in light of the zoning of the land and the context of the site.
- The apparent height and bulk of the proposed development is compatible with that of surrounding development, and consistent with the desired future character of the locality.
- 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 apparent size of the proposed development offensive, jarring or unsympathetic in the streetscape context.
- Whilst the proposal requires the consent authority to give favourable consideration to variations to the building height and floor space ratio development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of these development standards and sufficient environmental planning grounds exist to support the variations (as outlined in the attached Clause 4.6 Variation Requests).
- The non-compliance with the wall height, number of storeys, car parking and adaptable housing requirements prescribed by MDCP 2013 has been acknowledged and appropriately justified having regard to the associated objectives. Such variations succeeds pursuant to section 4.15(3A)(b) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.
- The proposed development has been amended in response to the pre-lodgement feedback from Council and the Design and Sustainability Advisory Panel from the notes of the meeting dated 3 February 2022.

Having given due consideration to the matters pursuant to Section 4.15(1) of the EP&A Act as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

**Boston Blyth Fleming Pty Limited**



**Greg Boston**

**Director**

## **ANNEXURE 1**

### **CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS**

## 1 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 the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 11m.

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

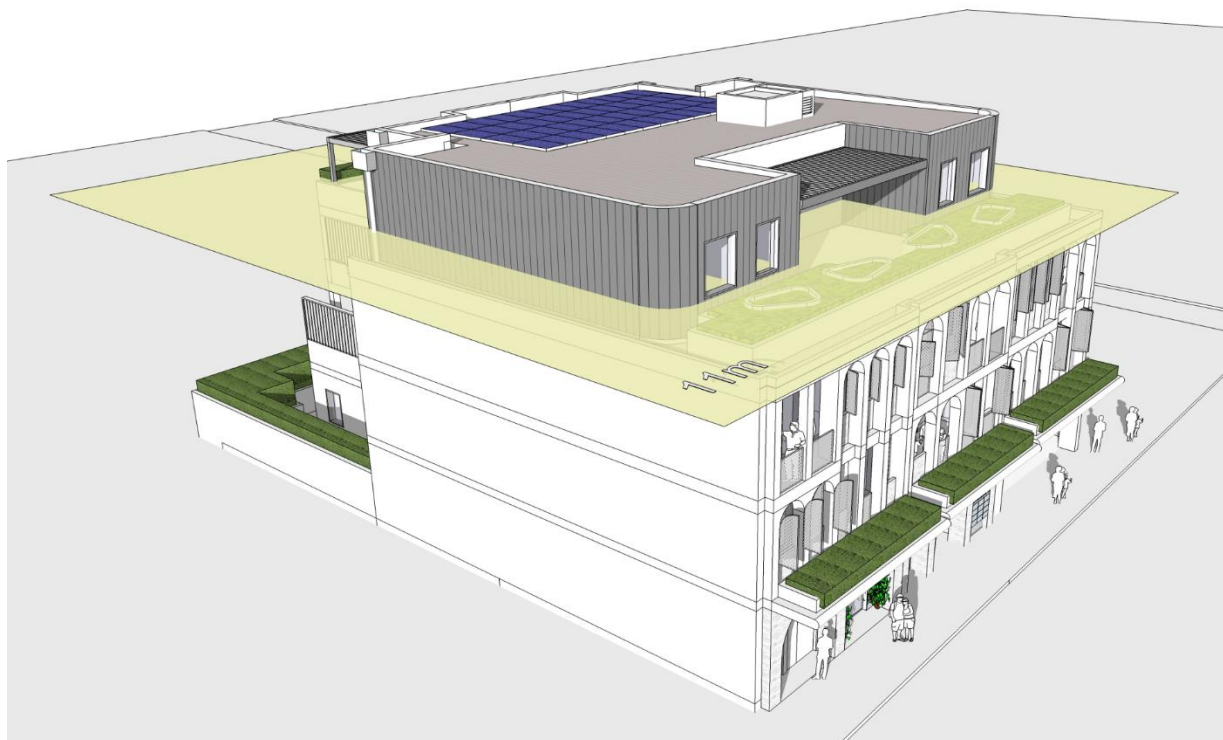
Ground level existing is defined as follows:

**ground level (existing)** means the existing level of a site at any point.

The proposed parapet roof over Level 4 reaches a height of 13.91m, measured from the finished floor level of the existing building (RL 5.84m AHD) to the top of the parapet (RL 19.75m AHD). This represents a variation of 2.91m or 26.5%.

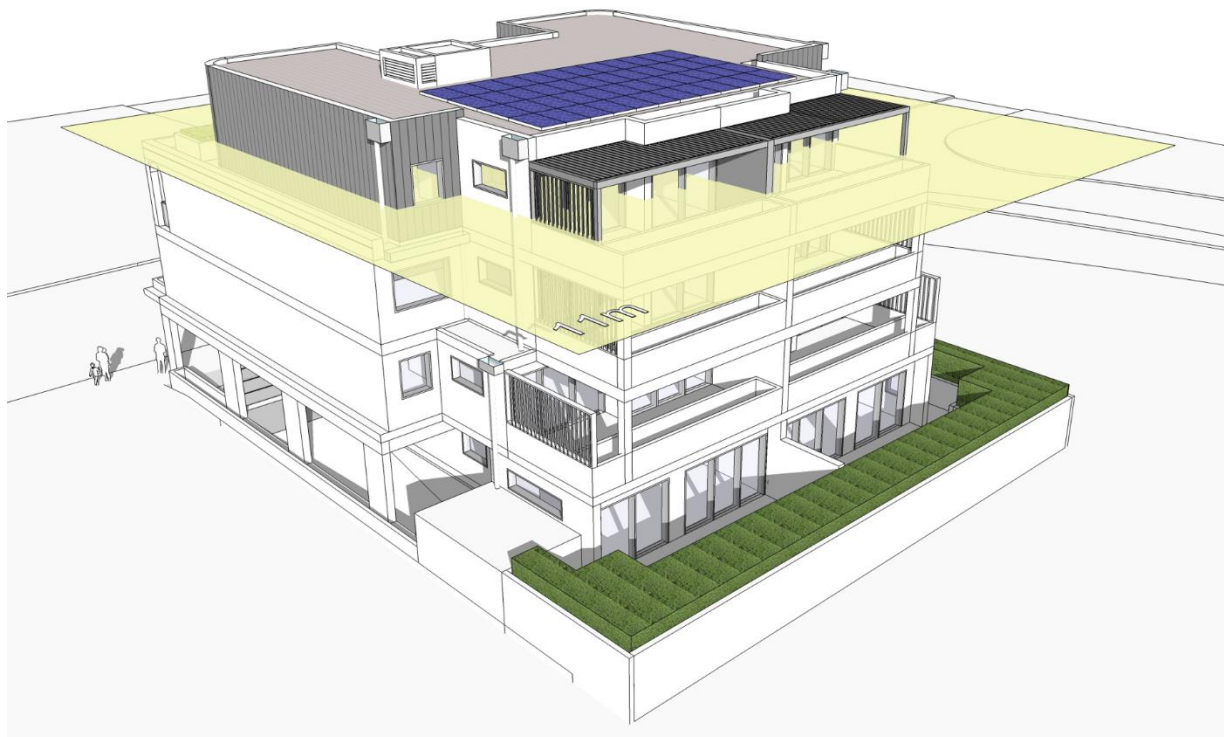
A maximum height of 14.66m occurs at the lift overrun (RL 20.50m AHD), which represents a variation of 3.66m or 33.3%.

The extent of development above the 11m height plane is demonstrated on the Architectural Plans and in the Height Blanket Diagrams in Figures 1 and 2.



**Figure 1: 11m Height Blanket Diagram**





**Figure 2: 11m Height Blanket Diagram (north-east)**

### 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 building height 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 building height development standard at clause 4.3 of MLEP 2013 which specifies a building height of 11m. 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]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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 a height limit for development on the site. 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 building height 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: At RL16.12m AHD, the proposed dominant parapet height presenting to Raglan Street is consistent with the dominant parapet height of the adjoining development to the west at RL16.12m AHD and to the east at RL16.36m AHD and is wholly maintained below the 11m maximum height limit.

The fourth floor is then setback from the dominant façade, is appropriately recessive and is not readily visible or perceived from the public domain. The visual impact of the development is demonstrated in the accompanying photomontage (Figure 3).





**Figure 3: Photomontage of the proposed development**

A pre-lodgement meeting was held with Council and Council's Design and Sustainability Advisory Panel (DSAP). DSAP recommended the redistribution of floor space to the third floor level to facilitate the provision of increased side and rear boundary setbacks which have been incorporated into the design now before Council.

*"On a third floor provide a generous communal open space with accessible toilet. This space is to be accessible from the lift and stair core, which may be extended up to this level. Provide 2 apartments opening up to the north, with their private open space on the same level as, but screened from, the communal open space. These apartments must be set back a minimum of 4m from the Raglan Street frontage to minimise their visibility from the street. Their roof will be higher than the proposal, however the 4m setback will limit their visibility from the street. The proposed street frontage height, relating to the R.L. of the office building to the west, is to be retained."*

We also note the following DSAP comments in relation to the building height breach:

*"On this site the Panel is not as concerned with numerical compliance with the controls- height, FSR and site coverage (given that these are already significantly exceeded by the existing building) but rather the quality of the design in relation the public domain, its context and internal amenity of the units."*

Notwithstanding the building height breaching elements, the proposal is consistent with the topographic landscape, prevailing building height and desired future streetscape character having regard to the sites immediate built form context.

The non-compliant elements of the proposed development do not detract from consistency with this objective.

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

Comment: The proposed development is well articulated with a bulk and scale that is consistent with surrounding built form.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development by virtue of its bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the visual catchment of the site.

This is particularly relevant in consideration of the character of the locality, which is characterised by an eclectic mix of development of varying architectural styles, heights and densities.

The non-compliant elements of the proposed development do not detract from consistency with this objective.

- (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: There are no apparent view corridors obtained over the subject site, and as such, it appears unlikely that the proposed development will result in any unreasonable impacts upon views.

Development further to the east of the subject site is of a significantly greater height and scale which would obstruct any views that would otherwise be available over the roof of the existing building.

The non-compliant elements of the proposed development do not detract from consistency with this objective.

- (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 non-compliant elements of the proposed development do not result in any adverse impacts upon the amount of sunlight received by adjoining properties. Rather, the redevelopment of the site will result in the enhancement of solar access received by the adjoining development to the east at 18 Raglan Street.

- (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: Not applicable – the site is located within the R3 Medium Density Residential zone and not within a recreation or environmental protection zone.

### **Consistency with zone objectives**

The subject property is zoned R3 Medium Density Residential pursuant to MLEP 2013. The development's consistency with the stated objectives of the R3 zone is as follows:

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

Comment: The proposed development comprises 10 residential apartments to provide for the housing needs of the community within a medium density environment that is ideally suited for additional residential development.

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

Comment: The proposed development comprises a range of differing sized apartments with varying layouts and compositions. The proposed development also comprises 2 adaptable units designed in accordance with AS4299.

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

Comment: The proposed development comprises 50m<sup>2</sup> of floor space for the purpose of a neighbourhood shop on the ground floor presenting to Raglan Street. This contributes to the existing range of services within the locality that meet the day to day needs of residents and also ensures appropriate activation of the street frontage.

- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*

Comment: The proposed development will provide a significant uplift for the site that is responsive to both the zoning of the land and the streetscape context.

- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

Comment: Whilst the proposed development will result in the loss of the existing backpacker's accommodation, the use of the site for this purpose is not the highest or best use of the land and is not reflective of market demand or land value.

The non-compliant development, as it relates to building height, demonstrates consistency with objectives of the zone and the building height development standard objectives. Adopting the first option in *Wehbe*, strict compliance with the height of buildings 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**

Despite non-compliance with the 11m building height development standard, the proposed development is compatible with the height of development within the visual catchment of the site. The proposed development has been designed with a three storey dominant façade presenting to Raglan Street that is consistent with the heights of immediately adjacent development. The proposed upper level is then setback from all boundaries and is finished in dark materials to ensure that it is visually recessive as seen from the public domain (see Figure 3).

The proposed design solution is generally consistent with that recommended by Council’s Design and Sustainability Advisory Panel who confirmed that the proposal demonstrated an acceptable urban and architectural design character, and who were generally supportive of a four storey built form at the subject site.

The proposed height breach also provides for an appropriate distribution of floor space across the subject site, noting that the proposal essentially seeks to relocate existing floor space from

the rear of the site to a new upper level, where it will not result in any adverse impacts upon the amenity of adjoining properties. Rather, this redistribution of floor space has a positive impact upon the amenity of adjoining development to the east at 18 Raglan Street, who will receive significantly more direct sunlight in the afternoon during midwinter and who will be afforded with a greater sense of openness as a consequence of the increased rear setbacks proposed.

Allowing for a height breach associated with development that is compatible with the nearby development is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act. Furthermore, the proposed development is a high-quality design that provides for enhanced amenity for adjoining properties, which promotes good design and amenity of the built environment, consistent with Objective 1.3(g) of the EP&A Act.

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 R3 Medium Density Residential 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

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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

## **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 building height variation in this instance.

**Boston Blyth Fleming Pty Limited**



**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**

## **ANNEXURE 2**

### **CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO**



## 2 Clause 4.6 variation request – Height of Buildings

### 2.1 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.

### 2.2 Manly Local Environmental Plan 2013 (MLEP 2013)

#### 2.2.1 Clause 4.4 – Floor Space Ratio

Pursuant to the Floor Space Ratio Map of MLEP 2013, the site has a maximum floor space ratio of 0.75:1.

The objectives of this control are as follows:

- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

In accordance with the provisions of clause 4.5(2) of MLEP 2013, floor space ratio is defined as follows:

*The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

The proposed development has a gross floor area of 1260m<sup>2</sup>. Based on the area of the site (713m<sup>2</sup>), the proposal has a floor space ratio of 1.77:1. This represents a variation of 725.25m<sup>2</sup> or 135%.

I note that existing development on the site has a total GFA of 1080 representing an FSR of 1.514:1.

## 2.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

*The objectives of this clause are:*

- (c) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (d) *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 floor space ratio standard in clause 4.4 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:*

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

The proposed development does not comply with the floor space ratio development standard at clause 4.4 of MLEP 2013 which specifies a maximum floor space ratio of 0.75:1. 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:*

- (c) 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*
- (d) 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]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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 4.4 of MLEP 2013 from the operation of clause 4.6.

## 2.3 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 4.4 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 4.4 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 4.4 of MLEP 2013?

## **2.4 Request for variation**

### **2.4.1 Is clause 4.4 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 cubic content or floor space of a building,*

Clause 4.4 of MLEP 2013 prescribes a floor space ratio for development on the site. Accordingly, clause 4.4 of MLEP 2013 is a development standard.

### **2.4.2 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 building height development standard**

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

- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Comment: The proposed development has a three storey dominant appearance to Raglan Street, and has been designed so that the primary façade aligns with that of neighbouring buildings to the east and west, as demonstrated in the accompanying photomontage (Figure 1).



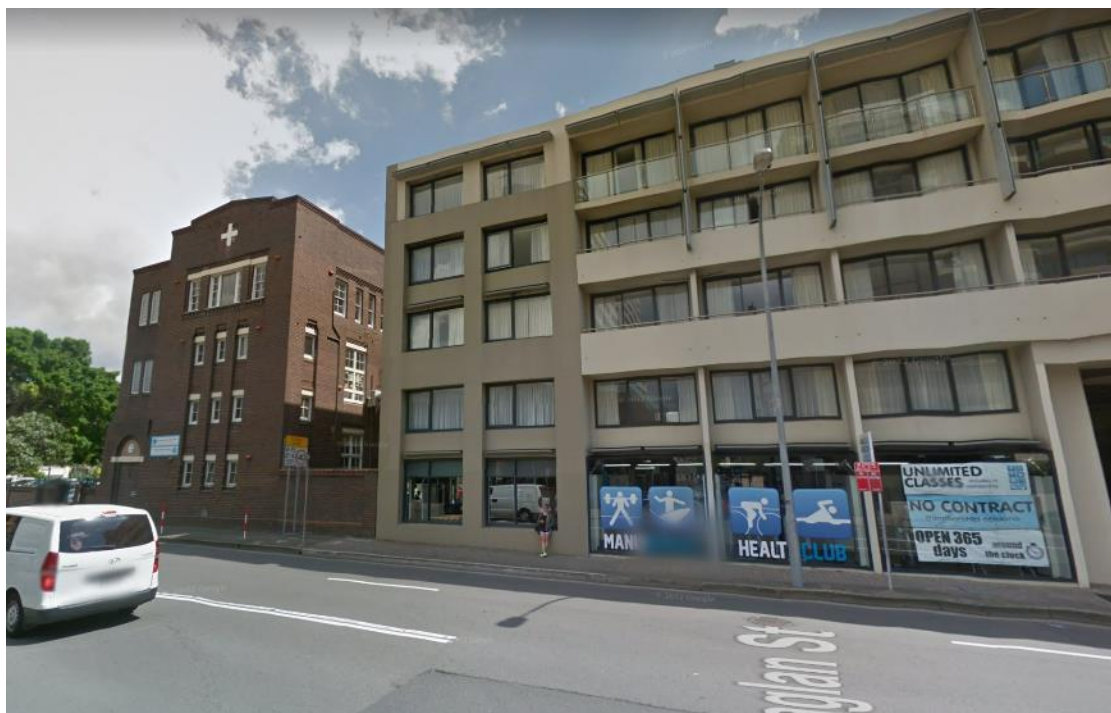
**Figure 1: Photomontage of the proposed development**

The bulk and scale of the proposed development is also consistent with that of nearby development, which features an eclectic mix of development of differing architectural style, height and scale. Figures 2-3 demonstrate development within the Raglan Street streetscape.

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



**Figure 2: Development on the northern side of Raglan Street to the east of the subject site.**



**Figure 3: Development on the southern side of Raglan Street to the east of the subject site**

- (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*

Comment: There are no apparent view corridors obtained over the subject site, and as such, it appears unlikely that the proposed development will result in any unreasonable impacts upon views.

Development further to the east of the subject site is of a significantly greater height and scale which would obstruct any views that would otherwise be available over the roof of the existing building.

There are no important landscape or townscape features to the north or south of the site that would be obstructed as seen from the street or from existing development to the north.

The non-compliant elements of the proposed development do not detract from consistency with this objective.

- (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Comment: The proposed development is a high-quality architectural design solution that positively contributes to the Raglan Street streetscape. The proposed development has been designed to respond to the existing context of Raglan Street, with an emphasis on the existing pattern of development in the streetscape and alignment with neighbouring buildings at the street edge.

The proposed development is compatible with the existing streetscape of Raglan Street and the wider locality. The non-compliant FSR does not detract from consistency with this objective.

- (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*

Comment: The proposed development does not result in any unreasonable impacts upon neighbouring properties with regards to overshadowing, visual or acoustic privacy. The proposed built form is highly articulated, by virtue of recessed elements, varied setbacks, differing materials and landscaping, and will not be overly dominant as seen from the street or adjoining properties.

The non-compliant FSR does not detract from consistency with this objective.

- (e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

Comment: The proposed development incorporates a neighbourhood shop which will contribute to activation of the street and the retention of local services and employment opportunities.

### **Consistency with zone objectives**

The subject property is zoned R3 Medium Density Residential zone pursuant to MLEP 2013. The development's consistency with the stated objectives of the R3 zone is as follows:

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

Comment: The proposed development comprises 10 residential apartments to provide for the housing needs of the community within a medium density environment that is ideally suited for additional residential development.

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

Comment: The proposed development comprises a range of differing sized apartments with varying layouts and compositions. The proposed development also comprises 2 adaptable units designed in accordance with AS4299.

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

Comment: The proposed development comprises 50m<sup>2</sup> of floor space for the purpose of a neighbourhood shop on the ground floor presenting to Raglan Street. This contributes to the existing range of services within the locality that meet the day to day needs of residents and also ensures appropriate activation of the street frontage.

- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*

Comment: The proposed development will provide a significant uplift for the site that is responsive to both the zoning of the land and the streetscape context.

- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

Comment: Whilst the proposed development will result in the loss of the existing backpacker's accommodation, the use of the site for this purpose is not the highest or best use of the land and is not reflective of market demand or land value.

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

#### **2.4.3 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**

Raglan Street is characterised by multistorey buildings built with nil setbacks to both the front and side setbacks to achieve continual, unbroken runs of built form, ensuring active street frontages and a vibrant pedestrian experience. The existing building at the subject site contributes to this character, with a cohesive streetscape outcome achieved on both sides of the street, as shown in Figure 4, over the page.

For whatever reason, the subject site was not zoned to reflect adjoining and nearby development along Raglan Street, but was zoned R3 Medium Density Residential with an associated floor space ratio of 0.75:1. The existing built form outcome at the subject site is not reflective of the R3 Medium Density Residential zoning of the site or the floor space ratio, with an existing floor space ratio of approximately 1.514:1, well in excess of the 0.75:1 floor space ratio prescribed.

The 0.75:1 floor space ratio assumes compliance with the built form controls that would typically be applicable to medium density residential development, with generous side setbacks to each boundary and a higher proportion of at-grade landscaping. However, it is my opinion that compliance with such controls is unreasonable in the circumstances of the subject site, noting the established character of the streetscape and the presence of development built with nil setbacks to both side boundaries.

In fact, compliance with the 0.75:1 floor space ratio development standard and associated built form controls would likely be detrimental to this character, creating gaps in the streetscape and exposing the unarticulated blank facades of the adjoining buildings.





**Figure 4: Raglan Street as seen from Pittwater Road, with the subject site to the left.**

The proposed development provides an appropriate distribution of floor space on the site that is contextually appropriate and responsive to the massing and form of surrounding development.

High levels of amenity are achieved for future occupants of the development, with no adverse impacts upon the amenity of nearby or surrounding properties. Despite the non-compliance proposed, the development enhances the amenity of the adjoining development to the east, with a reduction of massing at the rear of the site providing for improved solar access throughout the afternoon.

Allowing for a breach of the floor space ratio to provide for a development consistent with the scale of the existing development on the site and that is compatible with the nearby development is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act. Furthermore, the proposed development is a high-quality design that provides for enhanced amenity for adjoining properties, which promotes good design and amenity of the built environment, consistent with Objective 1.3(g) of the EP&A Act.

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

#### 2.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R3 Medium Density Residential 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.

#### 2.4.5 Secretary's concurrence

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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



## **2.5 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:

- (c) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (d) *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 floor space ratio variation in this instance.

**Boston Blyth Fleming Pty Limited**



**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**