

20<sup>th</sup> November 2020

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

Attention: David Auster – Town Planner

Dear Mr Auster,

**Updated Clause 4.6 variation request – Height of buildings  
Proposed Shop top housing development  
396 – 402 Sydney Road, Balgowlah**

**1.0 Introduction**

This updated clause 4.6 variation request has been prepared  
having regard to the following revision (7) plans prepared by PBD  
Architects:

DA 000	COVER SHEET	DA 510	CROSS VENTILATION DIAGRAM
DA 001	PROJECT SUMMARY	DA 540	COMMUNAL OPEN SPACE DIAGRAM
DA 003	SITE ANALYSIS		
DA 100	BASEMENT 2 PLAN	DA 600	SOLAR STUDY - JUNE 21st 9AM - 11:00AM
DA 101	BASEMENT 1 PLAN	DA 601	SOLAR STUDY - JUNE 21st 11:15AM - 2:00PM
DA 102	GROUND FLOOR PLAN	DA 602	SOLAR STUDY - JUNE 21st 3PM
DA 103	LEVEL 1 PLAN	DA 610	SOLAR ACCESS DIAGRAM
DA 104	LEVEL 2 PLAN		
DA 105	LEVEL 3 PLAN	DA 620	SHADOW DIAGRAM - JUNE 21st 9AM - 12PM
DA 106	LEVEL 4 PLAN	DA 621	SHADOW DIAGRAM - JUNE 21st 1pm - 3pm
DA 107	ROOF PLAN	DA 700	VIEW ANALYSIS DIAGRAM 1
		DA 701	VIEW ANALYSIS DIAGRAM 2
DA 200	SOUTH & EAST ELEVATIONS	DA 702	VIEW ANALYSIS DIAGRAM 3
DA 201	NORTH & WEST ELEVATIONS	DA 703	VIEW ANALYSIS DIAGRAM 4
		DA 704	VIEW ANALYSIS DIAGRAM 5
DA 300	SECTION - A		
DA 301	SECTION - B & C	DA 800	ADAPTABLE & SILVER LEVEL UNITS
		DA 900	NATHERS COMMITMENT
DA 400	MATERIAL SCHEDULE		
DA 410	PHOTOMONTAGE 1		
DA 411	PHOTOMONTAGE 2		
DA 500	GFA DIAGRAMS		

The amendments include the removal of the rooftop terrace, and reliance on the internalised communal open space courtyard areas consistent with the previously approved development on the site, which has reduced the extent of the building height breach and retained a view sharing scenario with surrounding development.

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

## **2.0 Manly Local Environmental Plan 2013 (“MLEP”)**

### **2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 12.5 metres in height. The objectives of this control are as follows:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following:*
  - (i) *views to nearby residential development from public spaces (including the harbour and foreshores),*
  - (ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*
  - (iii) *views between public spaces (including the harbour and foreshores),*

- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Building height is defined as follows:

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

Ground level existing is defined as follows:

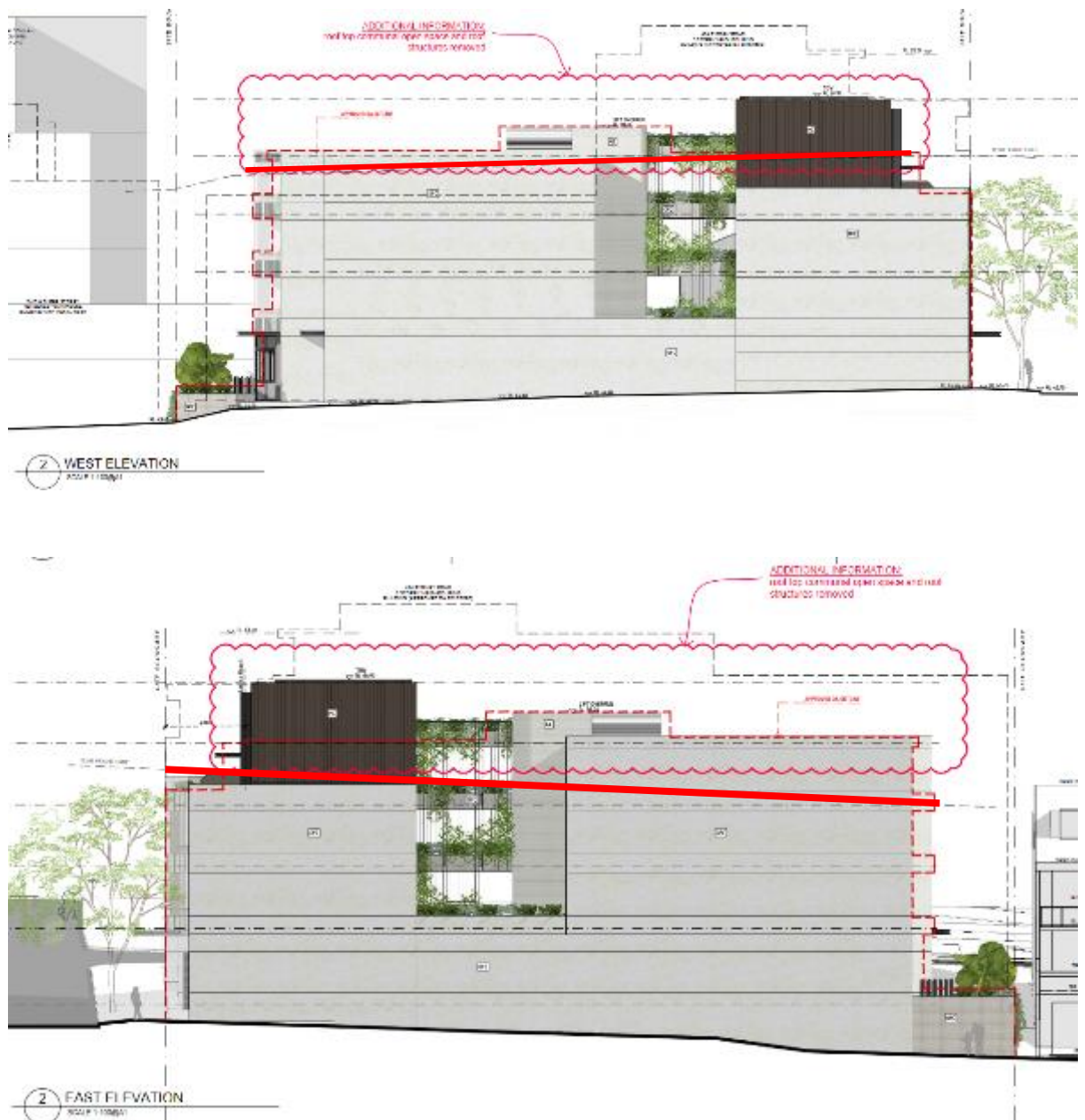
***ground level (existing)*** means the existing level of a site at any point.

It has been determined that the development has a variable building height measured along the southern edge of the roof parapet, fronting Sydney Road, of between 15.55 and 17 metres representing non-compliance of between 3.05metres (24.4%) and 4.5 metres (36%). Further, the development has a variable building height measured along the northern edge of the roof form of between 15.55 and 17 metres representing non-compliance of between 2.1 (16.8%) and 3.3 (26.4%) metres. The lift overrun has a maximum height of 16.3 metres in height representing a non-compliance of 3.8 metres or 30%.

I note that the heights proposed along the southern end of the building, and those associated with the lift overrun, are identical to those previously approved on this site pursuant to DA2018/1743 and as show dotted in red on the Architectural plans.

The variable extent of non-compliance is diagrammatically depicted in Figure 1 over page with the previously approved shop top housing development on the subject site DA2018/1743, and the recently constructed shop top housing development to the west of the site at No. 404 Sydney Road, both shown for comparative purposes. The building height proposed provides an appropriate stepped transition in bulk and scale in response to existing topography and provides for a complimentary and compatible streetscape outcome when viewed in the context of the development at No. 404 Sydney Road.





**Figure 1 – Height compliance diagrams**

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) *The objectives of this clause are:*

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of MLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of MLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5<sup>th</sup> May 2020, attached to the Planning Circular PS 18-003 issued on 5<sup>th</sup> May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

*(5) In deciding whether to grant concurrence, the Director-General must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*



- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of MLEP from the operation of clause 4.6.

### **3.0 Relevant Case Law**

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*

19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of MLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

- (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
- 3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
- 4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
- 5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP?

#### **4.0 Request for variation**

##### **4.1 Is clause 4.3 of MLEP 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 MLEP prescribes a fixed building height that seeks to control the bulk and scale of certain development. Accordingly, clause 4.4 MLEP is a development standard.

##### **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 option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

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

- (a) *to 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,*

Response: I have formed the considered opinion that the development provides for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the immediate locality. In forming such opinion, I note:

- Detailed site analysis identified a number of site-specific constraints and opportunities the majority of which relate to topography, the height, proximity and orientation of adjoining development and the height established by development along this section of Sydney Road. Through such analysis appropriate setbacks, building envelopes and transitional building heights were identified providing for the highly articulated and modulated building form currently proposed.
- In this regard, I have formed the considered opinion that the proposed building heights and roof forms are consistent with the topographic landscape, prevailing building height and desired future streetscape character of this section of Sydney Road as demonstrated by the recent approval of development application DA2018/0890 proposing the construction of a 5 storey shop top housing development immediately to the west of the site at No. 404 Sydney Road and the 5 storey shop top housing development at No. 374 Sydney Road. Photographs of these developments and a photomontage of the proposal in the context of the development at No. 404 Sydney Road are at Figures 2, 3 and 4 over page.



**Figure 2** – View towards No. 404 Sydney Road directly to the west of the subject site



**Figure 3** – View towards No. 374 Sydney Road mid-block to the east of the subject site



**Figure 4** – Photomontage showing proposed development in context of approved/ under construction development at No. 404 Sydney Road

- The fall of the land towards the rear of the site and also across the site in a westerly direction contributes to the extent of building height breach.
- The proposed development is fully compliant with the 2:1 floor space ratio development standard with the additional building height reflecting the contextually responsive and appropriate distribution of floor space across this particular site.
- The height, bulk and scale of the building are entirely consistent with the built form characteristics of adjoining development and more recently constructed development along this section of Sydney Road.

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

I note in this regard, that pursuant to this planning principle consistency does not mean that development needs to be the same in terms of height formatting with consistency achieved when development is able to coexist in harmony as is the circumstance proposed.

Notwithstanding the building height breaching elements, the proposal provides for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality. This objective is achieved notwithstanding the building height breaching elements.

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

Response: I note that the proposed development is fully compliant with the 2:1 floor space ratio development standard with the additional building height reflecting the contextually responsive and appropriate distribution of floor space across this particular site. In this regard, FSR is used as a means to control the bulk and scale with compliance with the FSR standard reflecting consistency with the desired bulk and scale of buildings generally.

For the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the height, bulk and scale of the building, particularly the non-compliant building height elements, are contextually appropriate and will not be perceived as inappropriate or jarring in the context of surrounding development and development generally within the sites visual catchment.

The proposal achieves this objective.

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

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*



Response: Having undertaken a wide ranging view from surrounding public vantage points, I have formed the considered opinion that the areas of non-compliance have been designed, located and constrained to minimise disruption of views to nearby residential development from surrounding public spaces. In fact, I was unable to identify any public space from which views to nearby residential development will be adversely impacted.

The proposal achieves this objective.

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

Response: Careful consideration has been given to the impact of the proposal on existing view lines over and across the site. In this regard, I have inspected the views available from the upper levels of the adjoining shop top housing development at No. 404 Sydney Road and determined that this is the only property from which available views will be affected by the building height breaching elements in particular Units 303, 304 and 401.

Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140 as they relate to an assessment of view impacts from Units 303, 304 and 401. No. 404 Sydney Road, I have formed the following opinion:

### **First Step - Assessment of views to be affected**

*An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

### **Unit 303, No. 404 Sydney Road**

Sweeping district views are available from the internal living areas and adjacent terrace of this apartment in a westerly through to a north easterly direction. These views do not contain any water or land water interface elements or important landmark elements such as headlands. District views are also available from the eastern end of the terrace and its return in an easterly and south easterly direction with the south easterly views also including glimpses towards Sydney Harbour, North Head and its land/ water in terrace and the horizon beyond.



#### Unit 304, No. 404 Sydney Road

Sweeping district views are available from the internal living areas and adjacent south facing terrace of this apartment in an easterly through to westerly direction. The views available in a south easterly direction include restricted distant views to Sydney Harbour, North Head and its land/ water interface and the horizon beyond.

District views are also available from the south facing terrace in a north easterly direction back towards Manly and a small glimpse of ocean view including the horizon.

Sweeping district views are also available from the north facing terrace off the living room including a glimpse view in a north easterly direction towards Manly and a small area of ocean including the horizon.

#### Unit 401, No. 404 Sydney Road – Penthouse apartment

Sweeping 180-degree district views are available from the internal living, bedroom and adjacent terrace areas of this apartment. These views include views in a south easterly direction include Sydney Harbour, North Head and its land/ water in terrace and the horizon beyond. These are also available in a north easterly direction towards Manly and an area of ocean view including the horizon.

#### **Second Step - From what part of the property are the views obtained**

*The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

#### Unit 303, No. 404 Sydney Road

All views are available from both a seated and standing position with all eastern and south eastern views obtained directly across the side boundary of the subject site.

#### Unit 304, No. 404 Sydney Road

All views are available from both a seated and standing position with the easterly and north-easterly views obtained directly across the side boundary of the subject site.

### Unit 401, No. 404 Sydney Road – Penthouse apartment

All views are available from both a seated and standing position with all easterly views obtained directly across the side boundary of the subject site.

### **Third Step – Assessment of extent of the impact**

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

### Unit 303, No. 404 Sydney Road

The sweeping district views are available from the internal living areas and adjacent terrace of this apartment in a westerly through to a north easterly direction are preserved as are the district views available in an easterly direction across the side boundary and over the proposed development is depicted in Figure 5 below.

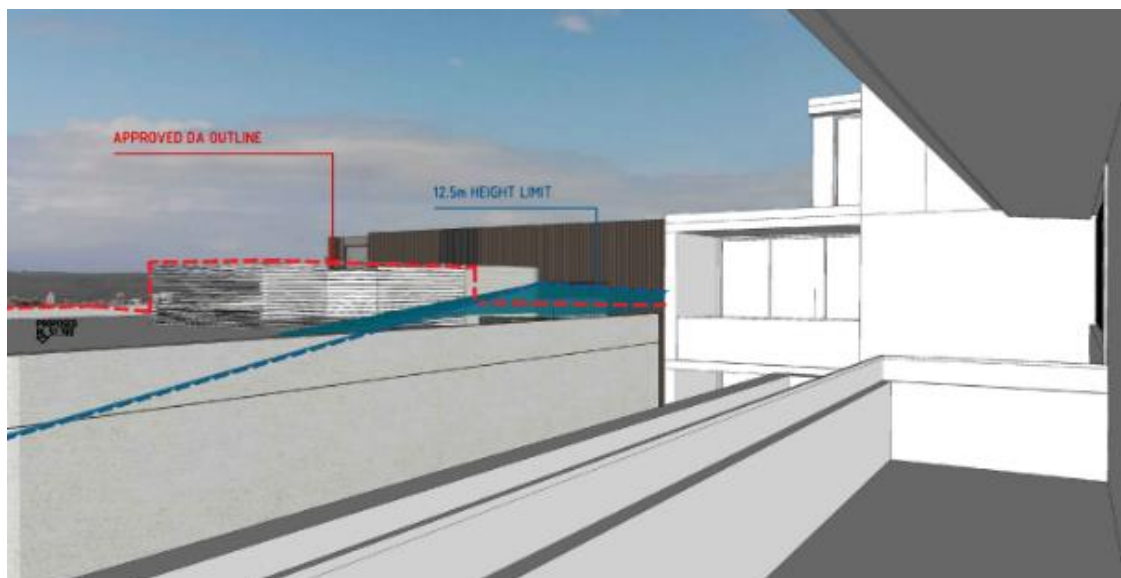


**Figure 5** - View analysis montage showing the retention of the view obtained in an easterly direction from the terrace of Unit 303 across the side boundary of the property and across the subject development site

The proposed development will impact on the existing views currently obtained in a south easterly direction directly across the side boundary and through the central portion of the development site including a glimpse towards middle harbour, North Head and its land water interface, the ocean and horizon although the views of North Head and its ridgeline are maintained as depicted in Figures 6 and 7 below.



**Figure 6** - Existing view obtained in a south easterly direction from the eastern terrace return of Unit 303 across the side boundary of the property and across the subject development site



**Figure 7** - View analysis montage showing the retained view elements obtained in a south easterly direction from the eastern terrace return of Unit 303 across the side boundary of the property and across the subject development site

I note that whilst the proposed development will impact on the existing views available in a south easterly direction from the eastern terrace return area that the extent of critical element view impact is identical to that approved on this site pursuant to DA2018/1743 with the previously approved building envelope show dotted in red on the view analysis images.

Given that these views are highly vulnerable in that they are obtained directly across the side boundary of the property, across the central portion of the subject development site and are of such a shallow nature as to be vulnerable to district vegetation growth, I consider there to be no reasonable expectation to retain the totality of this view.

On the basis that the balance of the 270° views available from the principal living areas and adjacent private open spaces of this property are maintained, and noting that in the design and construction of this apartment the principal living areas are orientated in a west and northerly from which there is no view affectation, I consider the view loss to be appropriately described as minor. In forming this opinion, I also note that no objection has been received in relation to the proposed development from this property owner with the same view sharing outcome achieved through approval of DA2018/1743 maintained.

#### Unit 304, No. 404 Sydney Road

The proposed development will have no impact on the existing views currently obtained in a south easterly direction directly across the front boundary of the site including a towards middle harbour, North Head and its land water interface, the ocean and horizon as depicted in Figure 8 below.



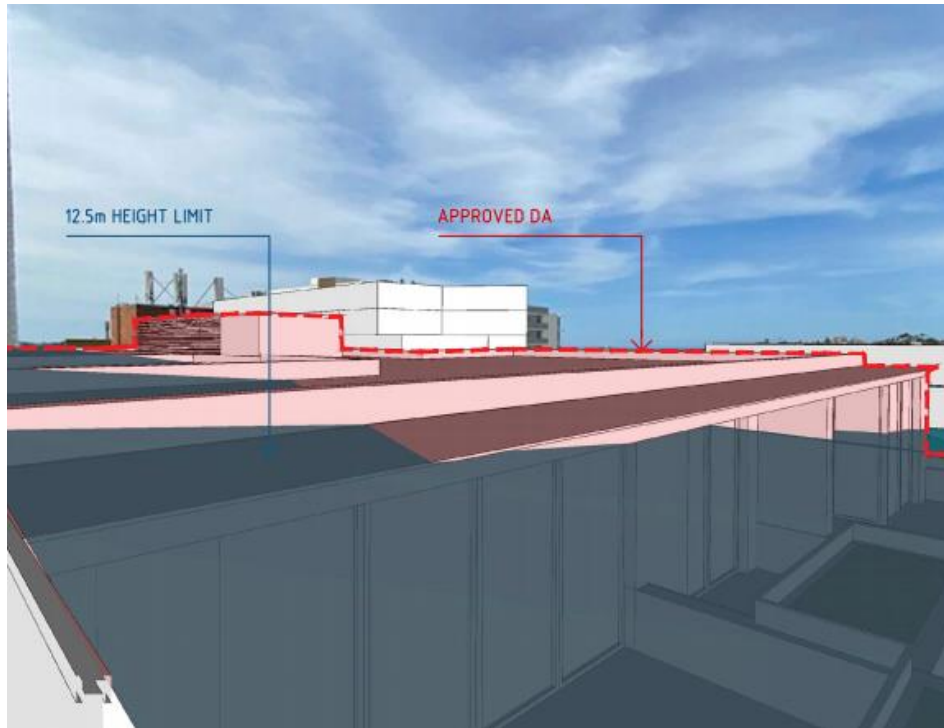
**Figure 8** - Existing view obtained in a south easterly direction from the southern terrace of Unit 304 which is preserved

The proposed development will impact on the existing view currently obtained in a north easterly direction directly across the side boundary and through the central portion of the development site and including a small glimpse towards Manly and the ocean horizon as depicted in Figures 9, 10 and 11 below and over page.

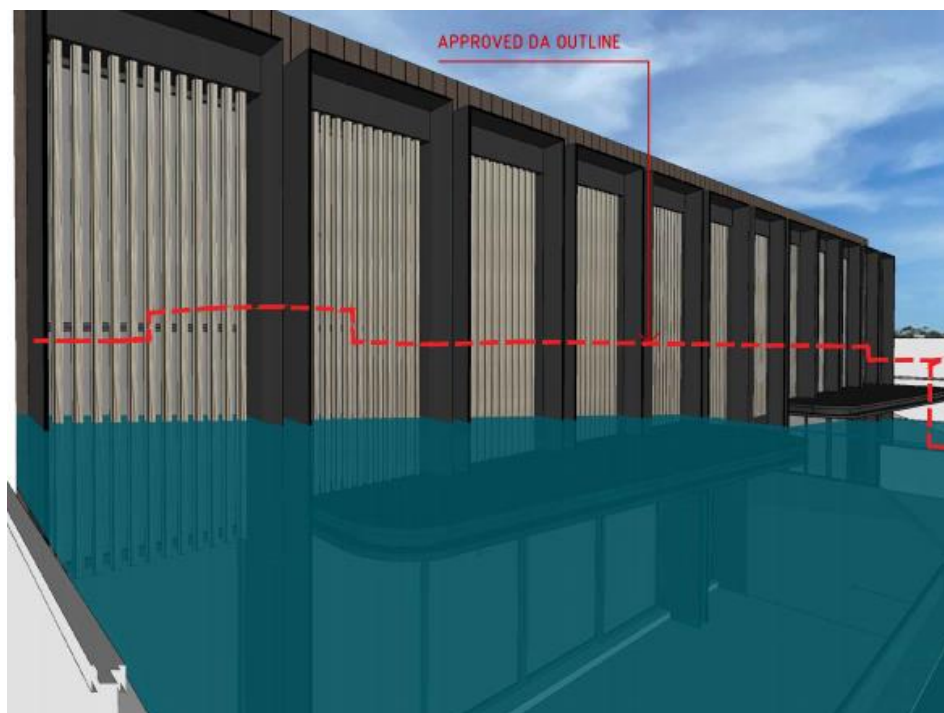


**Figure 9** - Existing view obtained in a south easterly direction from the south facing terrace of Unit 304 across the side boundary of the property





**Figure 10** - View analysis montage showing the retained view elements obtained in a south easterly direction from the south facing terrace of Unit 304 across the side boundary of the property and across the subject development through approval of DA2018/1743



**Figure 11** - View analysis montage showing the retained view elements obtained in a south easterly direction from the south facing terrace of Unit 304 across the side boundary of the property and across the subject development associated with the proposed development

I also note that the propose development will not impact existing district views available in a northerly direction from the north facing terrace area of this apartment nor the ocean and horizon glimpses available in a north easterly direction towards Manly from this balcony area as depicted in Figures 12 and 13 below.



**Figure 12** - View analysis montage showing the retained view elements obtained in a northerly direction from the northern terrace of Unit 304.



**Figure 13** - View analysis montage showing the retained view elements obtained in a northerly easterly direction from the northern terrace of Unit 304.

I note that whilst the proposed development will impact on the existing views available in a south easterly direction from the south facing terrace that the small ocean and horizon glimpse available towards Manly was obscured through approval DA2018/1743 to that extent there is no additional critical view element affectation. I note however that these view elements are maintained from the north facing balcony accessed from the same living room of this apartment.

Given that these views are highly vulnerable in that they are obtained directly across the side boundary of the property, across the central portion of the subject development site and are of such a shallow nature as to be vulnerable to district vegetation growth, I consider there to be no reasonable expectation to retain the totality of this view.

On the basis that all views available from principal living areas of the property are preserved, I consider the view loss to be appropriately described as minor. In forming this opinion, I also note that the same view sharing outcome achieved through approval of DA2018/1743 is maintained.

#### Unit 401, No. 404 Sydney Road – Penthouse apartment

The sweeping views available from this particular apartment are maintained given the height of this penthouse apartment relative to the finished heights of the proposed development.

I consider any view impact associated with the development is appropriately described as negligible.

#### **Fourth Step – Reasonableness of the proposal**

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.*

*Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*



Comment: The proposed development is fully compliant with the FSR development standard applicable to this form of development on this particular site. The proposed setbacks are also contextually appropriate noting that they are consistent with those previously approved pursuant to DA2018/1743.

The proposal is fully compliant with the FSR standard and to that extent the design provides for an appropriate distribution of floor space over the site to achieve complimentary and compatible streetscape outcomes whilst minimising impacts to surrounding development.

Strict compliance is unreasonable and unnecessary under the circumstances including the apparent flexibility applied to the building height standard pursuant to DA2018/1743 and to other development within the site's visual catchment as previously outlined.

***With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.***

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that the proposal is of good design which minimises view impacts through the appropriate distribution of floor space with a view sharing scenario maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141.

The proposal achieves this objective.

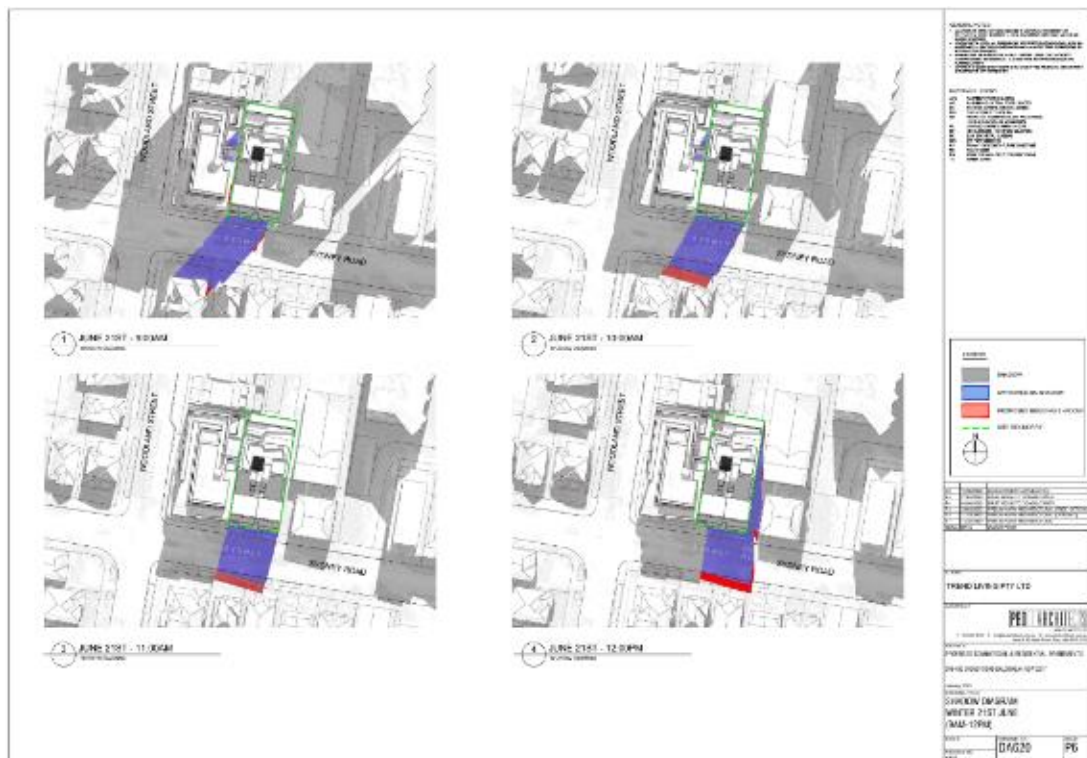
*(iii) views between public spaces (including the harbour and foreshores),*

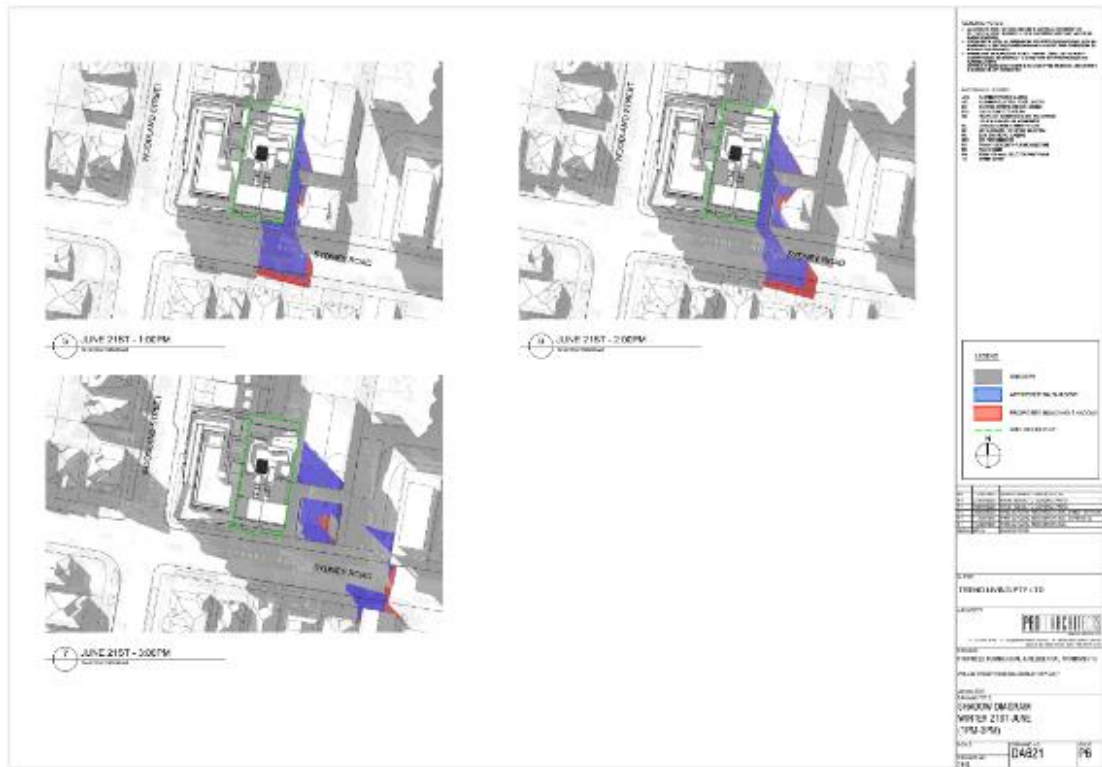
Response: The building form and height has been appropriately distributed across the site to minimise disruption of views between public spaces. In this regard, I was unable to identify any particular view impact associated with the height breaching element as it relates to views between public spaces.

The proposal achieves 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,

Response: The accompanying shadow diagrams DA620(P7) and DA621(P7) prepared by the project Architect demonstrate that due to the orientation of the site and position to the south of the adjoining town house development that there will be no additional shadowing impact on these northern adjoining properties at any time between 9am and 3pm on 21st June. These diagrams are at Figure 14 below and over page.





**Figure 14 - Shadow diagrams**

Further, the solar gain diagrams on plans DA600(P7) to DA602(P7) demonstrate that at least 70% of apartments within the proposed shop top housing development at No. 404 Sydney Road will continue to receive a minimum of 2 hours of solar access between 9am and 3pm on 21<sup>st</sup> June in strict accordance with the ADG requirement. These plans are at Figure 15 below and over page.





**Figure 15** – Solar analysis plans

The proposal achieves this objective.

- (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.*

Response: This objective is not applicable.

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

### Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to MLEP 2013. The property benefits from existing use rights for the purpose of a residential flat building. Such use is not anticipated in the zone. The developments consistency with the stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Response: The proposed mixed use development provides ground floor retail/ business tenancies which activate the Sydney Road frontage and which are able to accommodate a range of retail uses that serve the needs of people who live in, work in and visit the local area. The proposal achieves this objective

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor retail/ business tenancies which will provide employment opportunities in an accessible location. The proposal will also encourage employment in terms of strata management and property maintenance. The proposal achieves this objective.

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

Response: The proposal does not provide any excessive carparking and as such achieves this objective.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Response: The development is not within proximity of any zone boundaries. No objection is raised to standard conditions pertaining to the acoustic performance of air conditioning condensers. The proposal achieves this objective.

The proposed development, notwithstanding the height breaching elements, achieve the objectives of the zone.

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

#### **4.3 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]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

#### Sufficient environmental planning grounds

The topography of the site, which falls in both directions, and the built form characteristics established by the immediately adjoining property to the west No. 404 Sydney Road, provide a site specific and unique opportunity to distribute a compliant quantum of floor space across the site to achieve superior streetscape outcomes whilst maintaining appropriate levels of residential amenity to adjoining properties including a view sharing scenario.



Such outcome is achieved whilst realising the reasonable development potential of the land.

The contextually appropriate building height proposed is consistent with the existing and desired future streetscape as demonstrated through Council's approval of 5 storey shop top housing development at No. 374 Sydney Road to the east of the site, No. 404 Sydney Road immediately to the west of the site and the building heights previously approved on the site pursuant to DA2018/1743.

Further, in my opinion a better environmental planning/ built form/ urban design outcome is achieved through approval of the variation proposed with enforcement of strict compliance resulting in the deletion of a significant percentage of floor space resulting in a development located in an established centre, and ideally suited to increased residential densities, unable to achieve the anticipated FSR of 2:1. Such outcome would be neither orderly or economic have regard to the zoning of the land and the sites location within the established Balgowlah mixed use precinct.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land through achieving the FSR anticipated for this form of development on this particular site consistent with that able to be achieved by other recently constructed shop top housing development within the street block (1.3(c)).
- The reasons previously outlined, the development represents good design and provides superior levels of residential amenity to future occupants (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:



87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

**4.4 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 B2 Local Centre zone**

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

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.*

*It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

#### **4.5 Secretary's concurrence**

By Planning Circular dated 5<sup>th</sup> May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a nonnumerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

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

#### **5.0 Conclusion**

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

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

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

**Boston Blyth Fleming Pty Limited**



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