

Attachment 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 Pittwater Local Environmental Plan 2014 (PLEP 2014)

1.2.1 Clause 4.3 - Height of buildings

Pursuant to clause 4.3(2) of PLEP 2014 development the land must not exceed a height of 8.5 metres. Clause 4.3(2A) states that despite subclause (2), development on land:

- (a) *at or below the flood planning level or identified as “Coastal Erosion/Wave Inundation” on the Coastal Risk Planning Map, and*
- (b) *that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map, may exceed a height of 8.5 metres, but not be more than 8.0 metres above the flood planning level.*

The site is identified as being affected by High Hazard flooding on Council’s Flood Risk Precinct Maps. The Comprehensive Flood Information Report issued by Northern Beaches Council identifies a Flood Planning Level (FPL) of 4.4m AHD. Having regard to clause 4.3(2A) provisions, development on the land must not exceed a height of 8.0m above the FPL, being 12.4m AHD.

The objectives of the height of buildings control are as follows:

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) *to minimise any overshadowing of neighbouring properties,*
- (d) *to allow for the reasonable sharing of views,*
- (e) *to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

The proposed lift overrun reaches a maximum RL of 17.75m AHD, representative of a 5.35m (62.9%) variation of the building height development standard with the roof terrace balustrade having a maximum height of RL 15.3m AHD, representative of a 2.9m (36.25%) variation of the building height standard. The upper level roof parapet exceeds the building height standard by 2.1m or 26.25%. The extent of the non-conforming elements is depicted in the Height Plane Diagram at Figure 1.

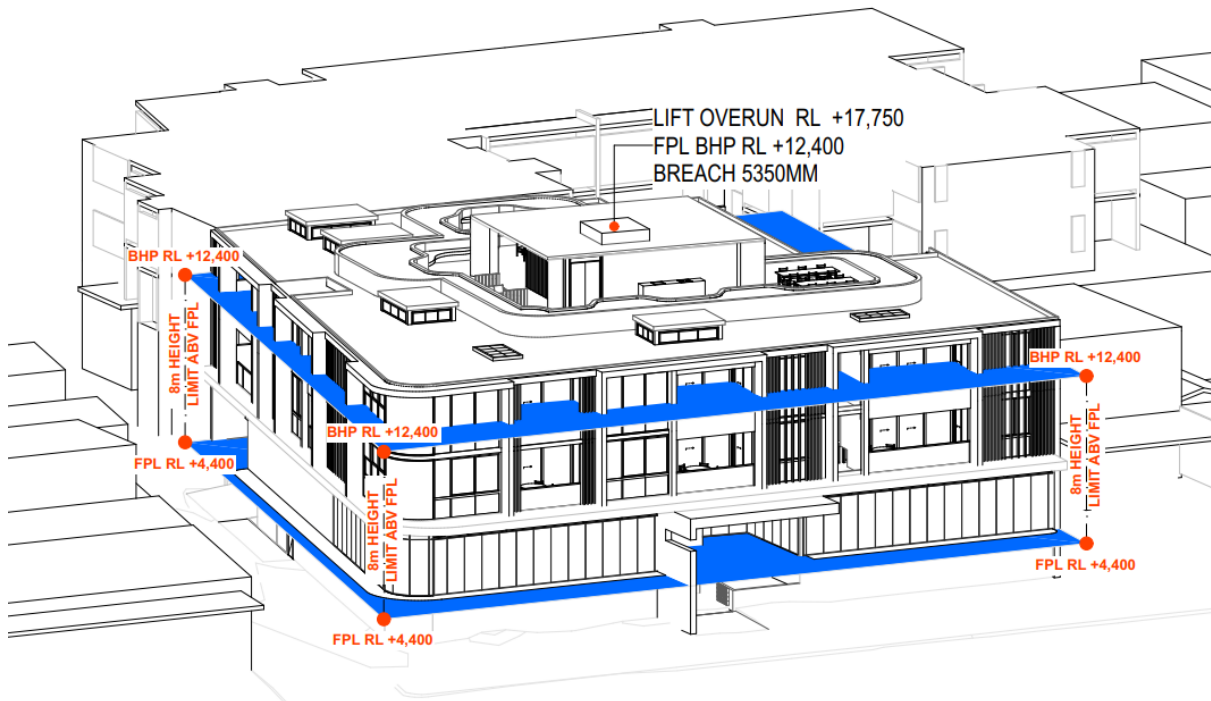


Figure 1: Height Plane Diagram

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP 2014 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 PLEP 2014 provides:

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

This clause applies to the Height of Buildings development standard in clause 4.3 of PLEP 2014.

Clause 4.6(3) of PLEP 2014 provides:

Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

The proposed development does not comply with the height of buildings development standard at clause 4.3 of PLEP 2014 which specifies a maximum building height of 8.0m above the flood planning level. 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.

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 PLEP 2014 a development standard?
- 2 Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard

- 3 Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
- 4 Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
- 5 Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of PLEP 2014?

2.0 Request for Variation

2.1.1 Is clause 4.3 of PLEP 2014 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 PLEP 2014 prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 of PLEP 2014 is a development standard.

2.1.2 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.

Both 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 and because the standard has been virtually abandoned or destroyed by the Council’s own decisions in granting consent to non-conforming development within the vicinity of the site.

Consistency with objectives of the height of buildings standard

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

- (a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Comment: The property is located within the North Narrabeen Locality. The desired future character of the locality is described as:

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

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

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the North Narrabeen commercial centre on Pittwater Road will reflect the status of the centre as the 'gateway' to Pittwater through building design, signage and landscaping, and will reflect principles of good urban design.

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

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

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

The proposed design appropriately responds to the flood affectation of the site, whilst providing a development of good design quality that will positively contribute to the Gondola Road streetscape and the wider locality.

Given the significant flooding affectation within the Local Centre and the necessity to have floor levels above the Flood Planning Level the desired future character must anticipate buildings with elevated ground floor levels and which are likely to exceed the height standard to achieve the orderly and economic use and development of the land.

The height, design, scale and treatment of the proposed development is compatible with that anticipated in this precinct as reflected by recent approvals for 3 storey shop top housing at 2 – 8 Rickard Road (N0267/16), 1473 Pittwater Road (N0033/15) and the subject properties (DA2018/1210 and DA2022/0919). External materials and finishes will be consistent with the colours and materials anticipated in the locality.

The design, scale and treatment of the proposal reflect the status of the centre as the 'gateway' to Pittwater through building design and landscaping, and reflect principles of good urban design. The site is conveniently located within the Local Centre, within immediate proximity of public transport and community facilities, and is supported by adequate infrastructure. In this regard, the development is consistent with the desired future character of the North Narrabeen locality notwithstanding the building height non-compliance.

In this regard, development consents DA2018/1210 and DA2022/0919 issued with respect to development on the subject properties are entirely relevant, noting that the proposed development is consistent with the height of these approved developments.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: The findings of Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 are relevant in this instance:

There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

The 3 storey apparent size of the development is consistent with surrounding approved and/or constructed development at:

- 2-8 Rickard Road, North Narrabeen (Figure 3)
- 10 Rickard Road, North Narrabeen (Figure 4)
- 9-11 Gondola Road, North Narrabeen (Figures 5 and 6)
- 1 Gondola Road, North Narrabeen (Figure 7)
- 3 Gondola Road, North Narrabeen (Figure 8)
- 1473 Pittwater Road, North Narrabeen (Figure 9)



Figure 3: Extract of southern elevation of shop top housing development approved at 2-8 Rickard Road (N0276/16)



Figure 4: 3 storey shop top housing development at 10 Rickard Road



Figure 5: 3 storey shop top housing development at 9-11 Gondola Road



Figure 6: 3 storey shop top housing development at 9-11 Gondola Road (as seen from Verona Street)



Figure 7: Approved 3 storey shop top housing development with roof top terrace at 1 Gondola Road



Figure 8: Approved 3 storey shop top housing development with roof top terrace at 3 Gondola Road



Figure 9: 4 storey shop top housing development at 1473 Pittwater Road

The 4 storey element of the proposal associated with the communal roof top area will not be readily perceived from the public domain and are entirely consistent with the development approved at 1 Gondola Road, North Narrabeen.

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 height or bulk of the proposed development offensive, jarring or unsympathetic in the streetscape context.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: The height non-compliance does not give rise to any unreasonable impacts upon solar access of adjoining properties, as highlighted in the solar access diagrams accompanying the application. Whilst the proposed development will result in additional overshadowing of the approved development at 2-8 Rickard Road, each affected unit will retain in excess of 2 hours of direct sunlight between 9am and 3pm, consistent with the requirements of the ADG. Compliant solar access will be maintained to the western adjoining property.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: Upon review of the site and its surrounding context, there do not appear to be any view corridors obtained over the subject site and certainly not to the extent that the non-compliant building height elements will give rise to unacceptable public or private view affectation. A view sharing outcome is maintained.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

Comment: The primary driver of the proposed building height is the high hazard flood affectation that affects the flat and low-lying site. The proposed development has been sensitively designed to balance the competing factors of developing in a flood plain, whilst also providing street activation with retail presenting to Gondola Road and high-quality residential development above.

This objective is achieved notwithstanding the building height non-compliance proposed.

- (f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Comment: The proposed development has been designed with a 3 storey dominant façade, consistent with surrounding and nearby more contemporary development. The roof terrace is setback from the street frontage and will not be readily perceived from the public domain. The façade of the development is well articulated, with a variety of materials utilised to ensure that the apparent size of the development is appropriately relieved, and landscaping is proposed in the front setback to soften and screen the built form. Overall, the proposed development has been designed to ensure that the visual impact of the development is appropriately minimised, with no adverse impacts upon the natural environment.

This objective is achieved notwithstanding the building height non-compliance proposed.

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

2.1.3 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

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

Ground 1 – Flood Affectation

The site is affected by high hazard flooding. The nature of the flooding that occurs in this area is relevant, in that the water levels are likely to rise quickly, with flooding remaining over an extended period of time. Once flood waters reach a certain point, access through and around the area becomes cut off, and people cannot evacuate the site. As such, both occupants and visitors to the property may be caught unaware and may need to take shelter at the site (shelter in place) until the flood waters recede.

In accordance with the provisions of B3.11 of P21 DCP, Council requires such shelter to be located at or above the Probable Maximum Flood (PMF), which is higher than the FPL. To avoid further disparity between the height of the retail level and the street, and noting the likelihood of the PMF event, the ground floor retail tenancies have been designed at the FPL, with the proposed area of shelter located on the roof top terrace. The roof top area has been designed to provide protection from the elements and includes suitable amenities to ensure that people could comfortably remain on the site until it is safe to leave.

The proposed design solution provides for the safety of occupants and visitors to the building, consistent with Object (h) of the EP&A Act, which aims to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

The roof top area for shelter has been designed in the same manner as that previously approved for development on the subject properties and is consistent with Object (c) of the EP&A Act, in that it contributes to the amenity of the development, including during flooding events, and promotes the orderly and economic development of the land.

Ground 2 – Contextually responsive building design

Despite non-compliance with the 8.0m above the FPL building height development standard, the proposed development is consistent with and compatible with nearby 3-4 storey development (including those recently approved pursuant to PLEP 2014), as follows:

- 2-8 Rickard Road, North Narrabeen (Figure 3)
- 10 Rickard Road, North Narrabeen (Figure 4)
- 9-11 Gondola Road, North Narrabeen (Figures 5 and 6)
- 1 Gondola Road, North Narrabeen (Figure 7)
- 3 Gondola Road, North Narrabeen (Figure 8)
- 1473 Pittwater Road, North Narrabeen (Figure 9)

The 3 storey façade to Gondola Road and Minarto Lane will ensure a consistency of built form throughout the North Narrabeen Local Centre as seen in a streetscape setting. The roof top terrace is of an almost identical height and scale as that previously approved for shop top housing development on the subject properties (DA2018/1210 and DA2022/0919).

Ground 3 – Height variation facilitates the provision of communal open space

The size, geometry, orientation and zoning of the land makes the provision of ground level communal open space with appropriate amenity difficult to achieve whilst realising the orderly and economic use and development of the land.

The provision of rooftop communal open space is consistent with objective 3D-1 of the Apartment Design Guide where the design guidance indicates that where development is unable to achieve the design criteria, such as on small lots, sites within business zones, or in dense urban areas should provide communal open space elsewhere such as a landscaped roof top terrace.

Approval of a building height variation facilitates the provision of well-designed roof top communal open space which receives exceptional levels of solar access between 9am and 3pm on 21st June. The lightweight awning structure provides an appropriate level of weather protection to the BBQ facilities with the size and dimension of the communal open space facilitating a range of passive and active recreational activities.

Ground 4 – Height variation achieves objectives of the Act

Approval of height variation will promote the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by recent approvals throughout the locality, including 2 levels of residential accommodation above ground level retail uses, consistent with Objective 1.3(c) of the EP&A Act.

Approval of height variation will facilitate the provision of rooftop communal open space and in doing so promote 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.

Conclusion

Pursuant to clause 4.6(4)(a) of PLEP 2014, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

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

Boston Blyth Fleming Pty Limited



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

17.4.24