

30th August 2021

**Application REV2021/0014 for Review of Determination of DA2020/0824
Updated clause 4.6 variation request – Height of buildings
Demolition works and construction of a shop top housing development
and strata subdivision
No. 321, 323 - 325, 327 - 329 & 331 Condamine Street, Manly Vale**

1.0 Introduction

In the preparation of this updated clause 4.6 variation request consideration has been given to the following amended Architectural plans prepared by Gartner Trovato Architects:

DA-00	COVER SHEET	D
DA-01	SITE & SITE ANALYSIS PLAN	D
DA-02	BASEMENT B2 PLAN	F
DA-03	BASEMENT B1 PLAN	F
DA-04	GROUND FLOOR PLAN	I
DA-05	LEVEL 1 PLAN	K
DA-06	LEVEL 2 PLAN	K
DA-07	LEVEL 3 PLAN	N
DA-08	ROOF PLAN	D
DA-09	EAST & SOUTH ELEVATIONS	E
DA-10	WEST & NORTH ELEVATIONS	E
DA-11	SECTION A & B	E
DA-12	SECTION C	E
DA-13	SECTION 1 & 3	E
DA-14	SHADOW DIAGRAMS	C
DA-15	LANDSCAPE PLAN - GROUND FLOOR	D
DA-16	LANDSCAPE PLAN - LEVEL 1	D
DA-17	LANDSCAPE PLAN - LEVEL 3	D
DA-18	SCHEDULE OF EXTERNAL FINISHES	C
DA-20	VIEW 1	G
DA-21	VIEW 2	G
DA-22	VIEW 3	G
DA-23	VIEW 4	G
DA-24	VIEW 5	G
DA-25	VIEW 6	G
DA-26	VIEW 7	G
DA-27	VIEW 8	G
DA-28	VIEW 9	G
DA-40	HEIGHT CONTROL DIAGRAM - OVER VIEW	E
DA-41	HEIGHT CONTROL DIAGRAM - WEST VIEW	F
DA-42	HEIGHT CONTROL DIAGRAM - SOUTH VIEW	E
DA-43	HEIGHT CONTROL DIAGRAM - EAST VIEW	E

Consideration has also been given to the laneway dedication along Somerville Place which is the subject of a proposed Voluntary Planning Agreement (VPA). The proposed laneway dedication is depicted on Architectural plan DA-100(A) with the civil works proposed within the laneway depicted on plans C01(A), C02(A), C03(A) and to C04(B) prepared by Istruct Consulting Engineers. Copies of these plans are Attachments 1 and 2.

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 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

- a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
 - b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
 - c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
 - d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*
- Building height is defined as follows:*

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 development has a variable upper roof height as measured along its Condamine Street frontage of between 12.045 metres at its northern end and 13 metres at its southern end representing a non-compliance of between 1.045 metres (9.5%) and 2 metres (18%). The western edge of the roof form, as it presents to Somerville Place, exceeds the 11 metre height standard by between 590mm (2.2%) at its southern end and 750mm (10.9%) at its northern end with a maximum height exceedance where the roof with a gutter RL of 30.9 steps up to the roof with a gutter RL of 31.38 of 1.18 metres or 10.7%.

The roof forms then pitch up towards a centrally located circulation/ lift core and a parapeted roof mounted plant enclosure which has a maximum height of 13.950 metres representing a non-compliance of 2.95 metres or 26.8%. The extent of non-compliance is depicted on the height plane drawings DA-40(E) through to DA-43(E) as reproduced at Figures 1 – 4 below and over page.

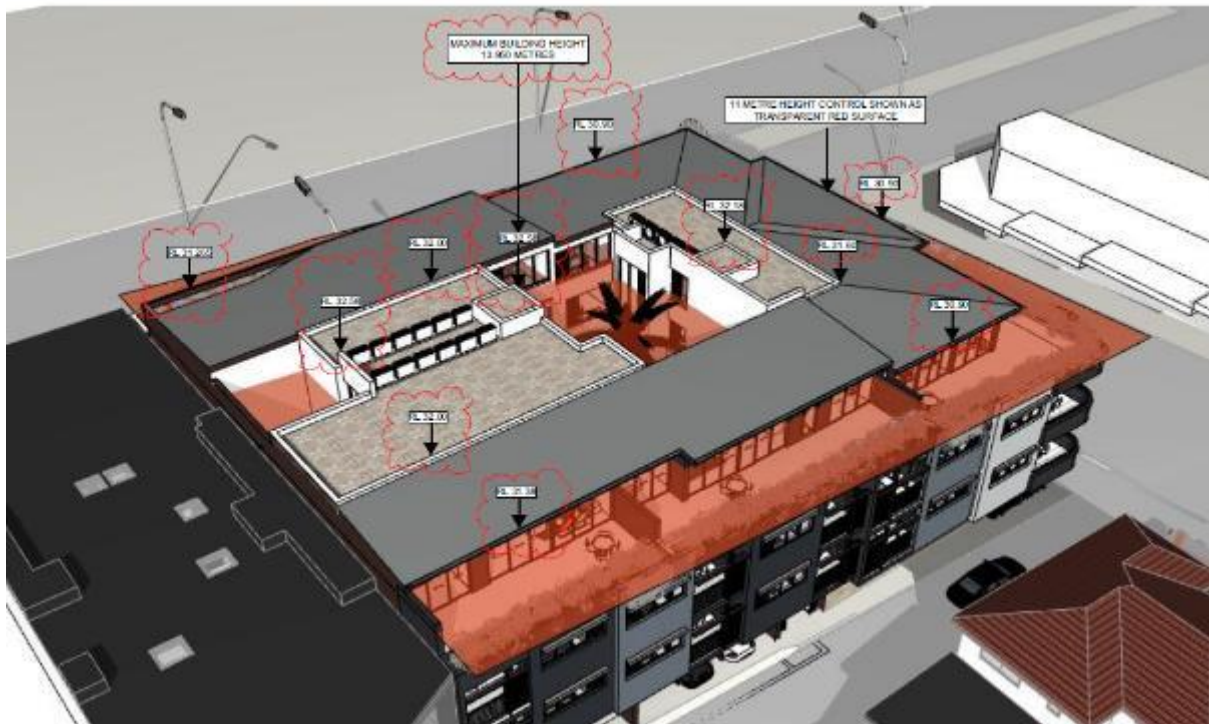


Figure 1 - Plan extract DA040(E) showing the building height breaching elements proposed above the 11 metre building height standard



Figure 2 - Plan extract DA041(E) showing the building height breaching elements proposed above the 11 metre building height standard as viewed from Somerville Place



Figure 3 - Plan extract DA042(E) showing the building height breaching elements proposed above the 11 metre building height standard as viewed from Sunshine Street



Figure 4 - Plan extract DA043(E) showing the building height breaching elements proposed above the 11 metre building height standard as viewed from Condamine Street

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP 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 WLEP 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 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP 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 WLEP 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 WLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*

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

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

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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 WLEP 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 WLEP 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 WLEP 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 WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP a development standard?

The definition of “development standard” at section 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 WLEP prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 WLEP 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 ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: Development within the site's visual catchment, and within the 11 metre height precinct, is eclectic in nature and currently in transition with a number of older one and two storey commercial and mixed use buildings being replaced with more contemporary 4/ 5 level stepped shop top housing building forms.

A predominant 4 storey building presentation has been established by recently approved and constructed shop top housing development along Condamine Street including the buildings having frontage to secondary streets including Kenneth Road and King Street.

We note that the non-compliant building height only relates to the upper portion of the upper level floor plate and roof form and centrally located circulation core and screened plant area which are appropriately setback from all 3 street frontages beyond the setbacks proposed that the levels below. Such setbacks will ensure that the breaching elements are recessive in a streetscape context with the building displaying a height and scale compatible with that of other recently approved and constructed 4 storey shop top housing development both within this street block and more broadly along this section of Condamine Street between Burnt Bridge Creek and King Street.

These upper level breaching elements are softened and screened as viewed from each public domain interface through the provision of integrated planter boxes which are capable of accommodating screen planting.

Such setback and landscape characteristics ensure that these upper level breaching elements will not be readily discernible as viewed from Condamine Street or Sunshine Street nor will they contribute, to any unacceptable or jarring extent, to the perceived bulk and scale of the development as viewed from the neighbouring properties or in a broader streetscape context.

The building and design are entirely appropriate for this prominent corner site as it reinforces the building as a strong, robust and defining element within the street block it being noted that a majority of properties have now been approved/ constructed with a 4 storey building form to Condamine Street. In this regard, we have formed the considered opinion that the height, bulk and scale of the development including its 4 storey form are compatible with the height and scale of surrounding and nearby development.

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, withstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably concluded that notwithstanding the building height breaching elements the development is compatible with surrounding and nearby development and accordingly the proposal achieves this objective.

- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

Comment: Having attended the site and determined potential view lines over the site I have formed the considered opinion that the height of the development, and in particular the non-compliant building height elements, will not give rise to unacceptable visual or view loss impacts. In forming this opinion, I note that in relation to the dwellings located on the western side of Summerville Place that the non-complaint building height breaching elements will be screened from direct view, to a significant extent, by the compliant elements of the development including the landscaping proposed at the upper most level within the integrated planter boxes.

For the same reason, I am of the opinion that the upper level of the development, which incorporates the building height breaching elements, has been designed to minimise loss of privacy through the increased setbacks and intervening landscape opportunity proposed which will minimise direct overlooking opportunity from the upper-level of the development towards the residential properties located on the western side of Somerville Place.

In relation to solar access, I rely on the shadow diagrams at Attachment 3 which demonstrate that the non-compliant building height elements will not give rise to unacceptable loss of solar access with a recessed nature of the upper level minimising associated shadowing impacts.

Notwithstanding the non-compliant building height elements, I am satisfied that the development minimises visual impact, disruption of views, loss of privacy and loss of solar access to surrounding development and the public domain and to that extent achieves this objective.

- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

Comment: The non-compliant building height elements will not be discernible as viewed from any coastal or bushland environments. This objective is achieved withstanding the building height breaching elements proposed.

- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Comment: For the reasons previously outlined I am satisfied that the non-compliant building height elements will not be visually prominent as viewed from the street or any public area. 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, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

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 WLEP 2011. 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 tenancies which activate the Whistler Street 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 notwithstanding the building height breaching elements.

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor retail tenancies which will provide employment opportunities in an accessible location being within immediate proximity of the B Line bus service. The proposal will also encourage employment in terms of strata management and property maintenance. The proposal achieves this objective notwithstanding the building height breaching elements.

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

Response: The development provides appropriately for vehicle and bicycle parking. The proposal achieves this objective notwithstanding the building height breaching elements.

- *To provide an environment for pedestrians that is safe, comfortable and interesting;*

Response: The development provides for covered outdoor seating and pedestrian circulation space providing an environment for pedestrians that is safe, comfortable and interesting. The proposal achieves this objective notwithstanding the building height breaching elements.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment;*

Response: The proposal building scale and landscape treatments proposed provide for an urban and landscape form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. The proposal achieves this objective notwithstanding the building height breaching elements.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses.*

Response: The property adjoins the R2 Low Density Residential zone to the south of the site with particular attention given to ensuring the maintenance of appropriate amenity to the properties within this adjoining zone in relation to privacy and solar access. The design response adopted minimises conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses. The proposal achieves this objective notwithstanding the building height breaching elements.

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

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

Ground 1 – Complementary and compatible streetscape

The additional height proposed facilitates a complementary and compatible 4 storey form on this site consistent with the heights and form of recently approved and constructed shop top housing development along this section of Condamine Street.

Strict compliance would require the deletion of the entire upper floor of the development and result in a 3 storey form that would not appropriately respond to the sites prominent corner location and which would appear inconsistent with the height and cohesive streetscape established by recently approved and constructed shop top housing development along this section of Condamine Street.

Ground 2 – Public benefit

Whilst not required by any statutory planning instrument the application proposes the dedication of a 1.435 metre wide by 38.075 metre long area of land to Council to facilitate the widening of Somerville Place consistent with what has occurred along Somerville Place to the north of the site. This represents 54.6m² of private land which is proposed to be dedicated to Council by way of a Voluntary Planning Agreement.

The proposed laneway dedication is depicted on Architectural plan DA-100(A) with the civil works proposed within the laneway depicted on plans C01(A), C02(A), C03(A) and to C04(B) prepared by Istruct Consulting Engineers. Copies of these plans are Attachments 1 and 2.

Approval of the building height breaching elements facilitates the public benefit outcomes achieved through the dedication of private land to enable the widening of Somerville Place and the installation of appropriate roadway, drainage and footpath infrastructure.

Ground 3 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

Strict compliance with the building height standard would require the deletion of the entire upper floor of the development and result in a 3 storey form that would not appropriately respond to the sites prominent corner location and which would appear inconsistent with the height and cohesive streetscape established by recently approved and constructed shop top housing development along this section of Condamine Street.

Such loss of floor space would make the development unviable based on the cost of the land relative to the height and density of development able to be achieved by recently approved and constructed shop top housing development along this section of Condamine Street. Such outcome would not promote the orderly and economic use and development of the land. Approval of the building height variation will achieve this objective.

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

For the reasons outlined in this submission, approval of the variation of the building height standard will promote good contextually appropriate design which will facilitate enhanced amenity outcomes to and from the development.

The building is of good design quality with the variation facilitating a height and floor space that provides for contextual built form compatibility and the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

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.

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the NSW Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone; **and***
- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.

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 21st February 2018, 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 determinations are subject to, compared with decisions made under delegation by Council staff.

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

5.0 Conclusion

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

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

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

Boston Blyth Fleming Pty Limited



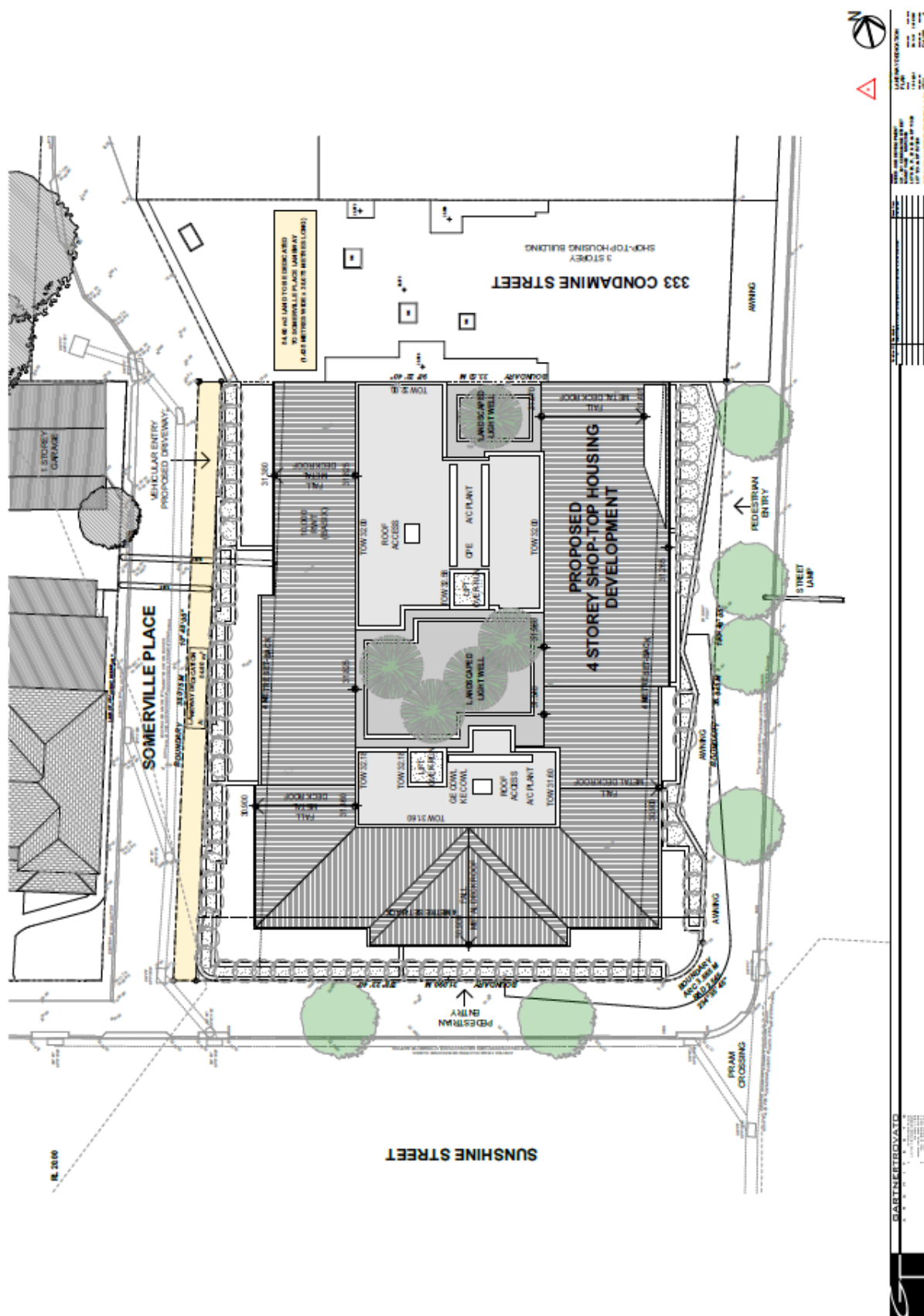
Greg Boston

B Urb & Reg Plan (UNE) MPIA

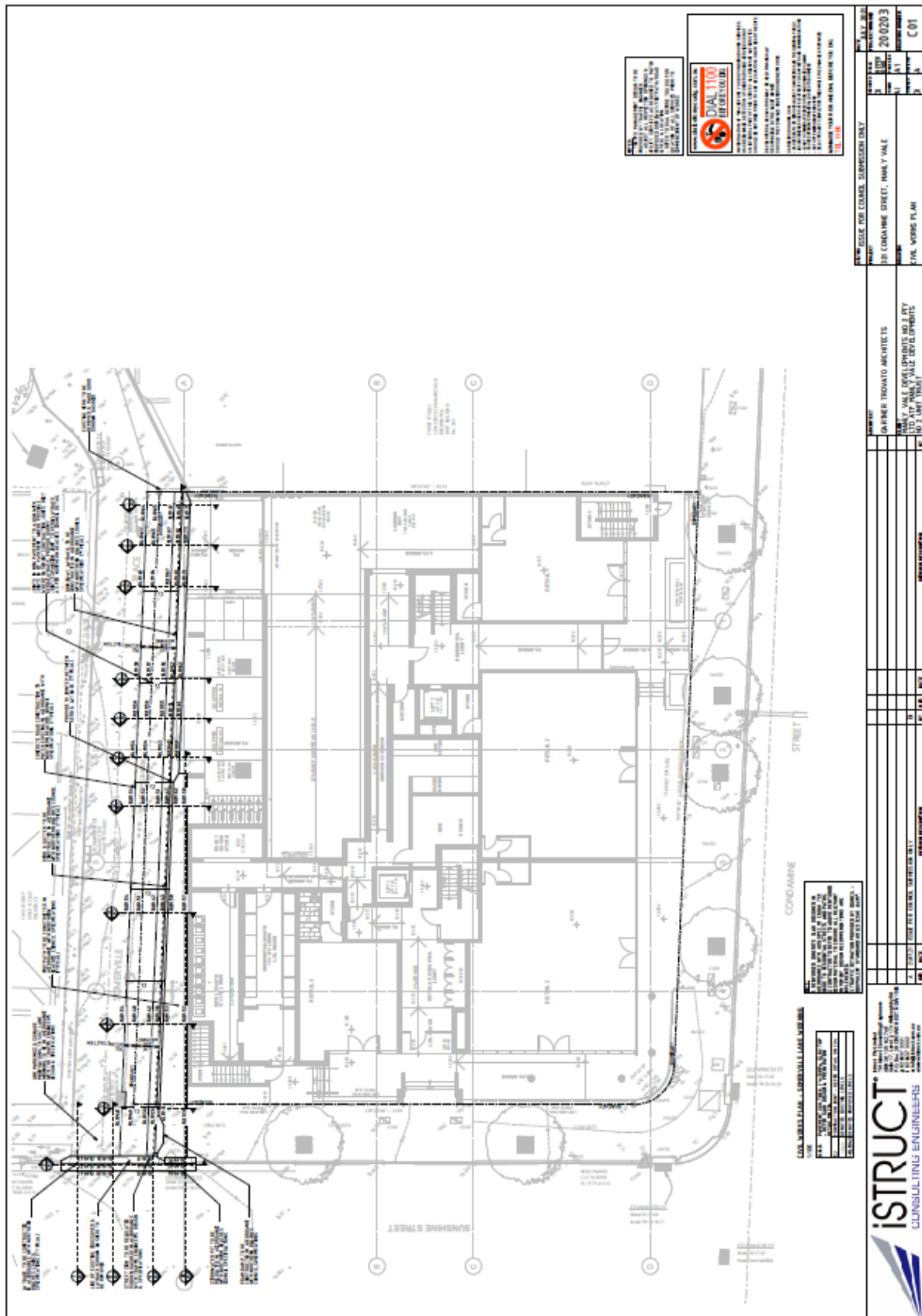
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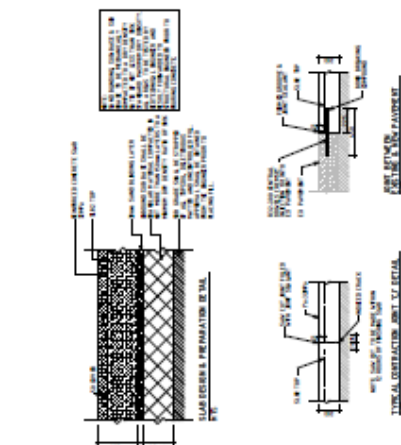
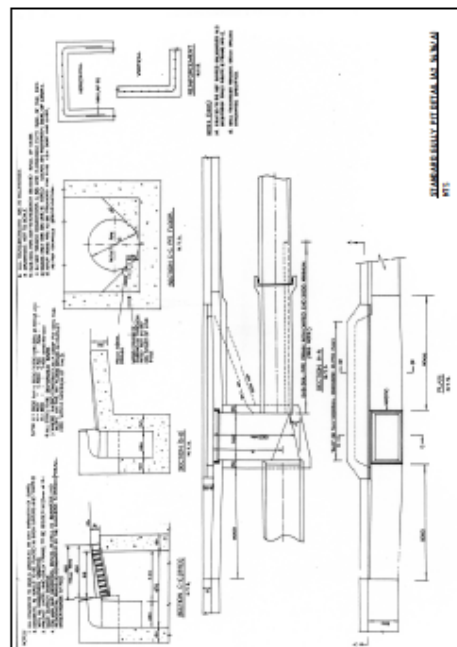
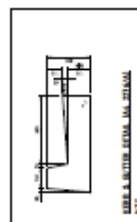
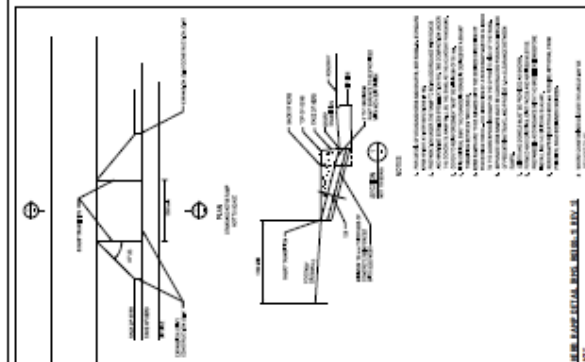
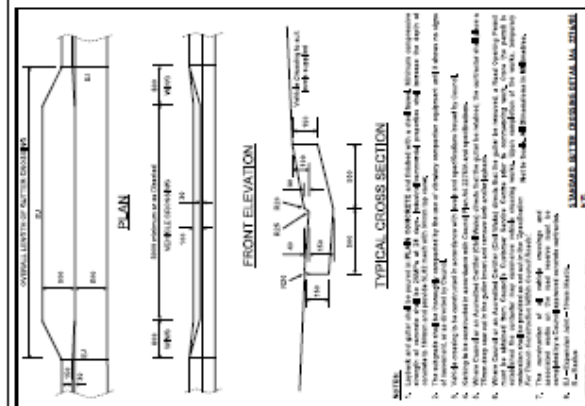
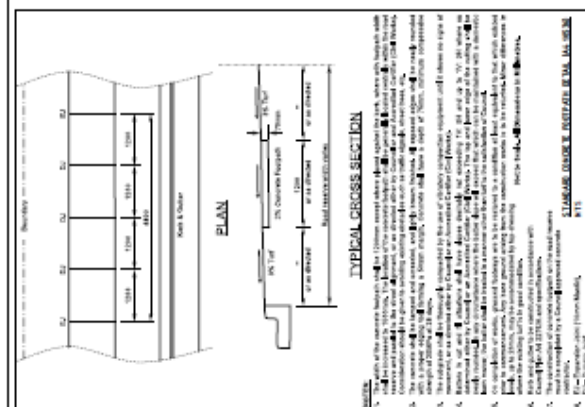
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|---------------------|---|
| Attachment 1 | Proposed laneway dedication plan |
| Attachment 2 | Plans showing civil works proposed within the laneway |
| Attachment 3 | Shadow diagrams |

Attachment 1 Proposed laneway dedication plan



Plans showing civil works proposed within the laneway



[illegible]

Attachment 3 Shadow diagrams

