

9th August 2023

The General Manager
Northern Beaches Council
Po Box 882
MONA VALE NSW 1660

Attention: Alexander Keller – Principal Planner

Dear Mr Keller,

Application Mod2022/1164
Development Application DA2022/1164
Submission response/ addendum Statement of Environmental Effects/
Updated clause 4.6 variation request – Height of buildings
Demolition and construction of a commercial building
34-35 South Steyne, Manly

Reference is made to Council's email of 17th July 2023 and the submission received from the owner of Unit 535, No 25 Wentworth Street, Manly in relation to view impacts. This submission represents a considered response to the additional view impact concerns raised and is to be read in conjunction with the following amended documentation:

- Amended Architectural plans A-DA-110-000(D), A-DA-110-001(D), A-DA-110-003(D), A-DA-110-007(D), A-DA-210-001(D), A-DA-210-002(D), A-DA-310-001(D) - A-DA-310-003(D) and A-DA-740-001(D) prepared by Durbach Block Jaggers,
- Amended landscape plans, Revision 3, prepared by Wyer and Co,
- Addendum Heritage Impact Statement, dated 24th July 2023, prepared by Weir Phillips Heritage and Planning,
- Amended Visual Impact Assessment, dated 4 August 2023, prepared by Urbaine Design Group,
- Updated clause 4.6 variation request – Building height (Attachment 1).

The amendments can be described as follows:

Basement 2

- Nomination of a mechanical plant zone adjacent to the driveway and a minor reconfiguration around the lift and retail bin store.
- Relocation of EV charger.

Basement 1

- A minor reconfiguration of this floor plate in relation to the commercial bin store and adjacent bathroom/ EOT facilities, rear storage area and a minor reduction in the retail GFA at this level to 137.51m².

Ground Floor

- A minor reconfiguration of this floor plate in relation to the commercial lobby and internalised stair and the nomination of rises and mechanical plant adjacent to the driveway entry. The reconfiguration works have resulted in a minor increase in retail GFA at this level to 361.37m².
- The relocation of the hydrant booster and the introduction of after hours security doors.

Levels 01 and 02

- The reconfiguration of this floor plate in relation to the design of the internalised staircase and the introduction of a courtyard adjacent to the north western boundary of the property. The bathroom facilities are reconfigured as is the location of required risers and mechanical plant allowances. The detailing of the front building façade and adjacent awning are slightly amended without compromising the design quality of the building façade. This floor plate is extended in a westerly direction partially over the adjacent right of way. Such amendment complies with the terms of this right-of-way in relation to clearances.

Level 03

- The reconfiguration and redistribution of floor plate space at this level to open up a view corridor across the rear of the property and reflect the internalised access and courtyard elements on the floors below.

We hereby formally amend the development application pursuant to section 113 of the Environmental Planning and Assessment Regulation 2021.

The acceptability of the amendments is assessed against the building height and FSR development standards as follows.

Height of Buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 10m fronting South Steyne, increasing to 12m at the rear of the site.

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

Within the portion of the site that is subject to the 10 metre height limit, the proposed development has a height of approximately 11.3 metres presenting to South Steyne, being the dominant parapet height and the height of all proposed roof top planters representing a variation of 1.3 metres or 13%. The Level 3 roof has a height of 14.2 metres representing a variation of 4.2 metres or 42% but only over that portion of the site to which the 10 metre height limit applies.

Within the portion of the site that is subject to the 12 metre height limit, the proposed Level 3 roof has a height of 14.2 metres representing a variation of 2.2 metres or 18.3% with the lift overrun and integrated screened mechanical plant area having a maximum height of 14.7 metres representing a variation of 2.7 metres or 19.2%.

The extent of building height non-compliances within the 10 metre and 12 metre height limit zones is depicted in the following images.

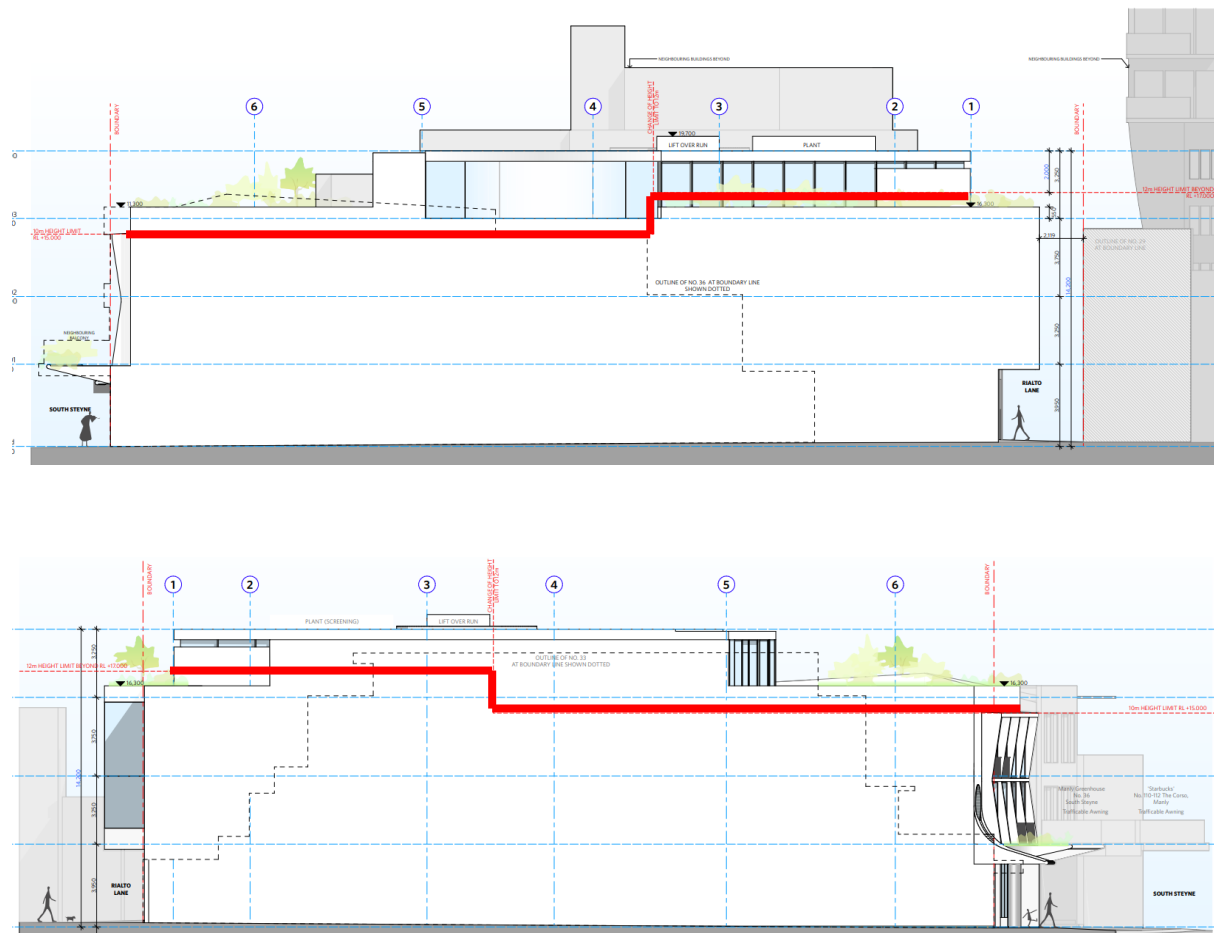
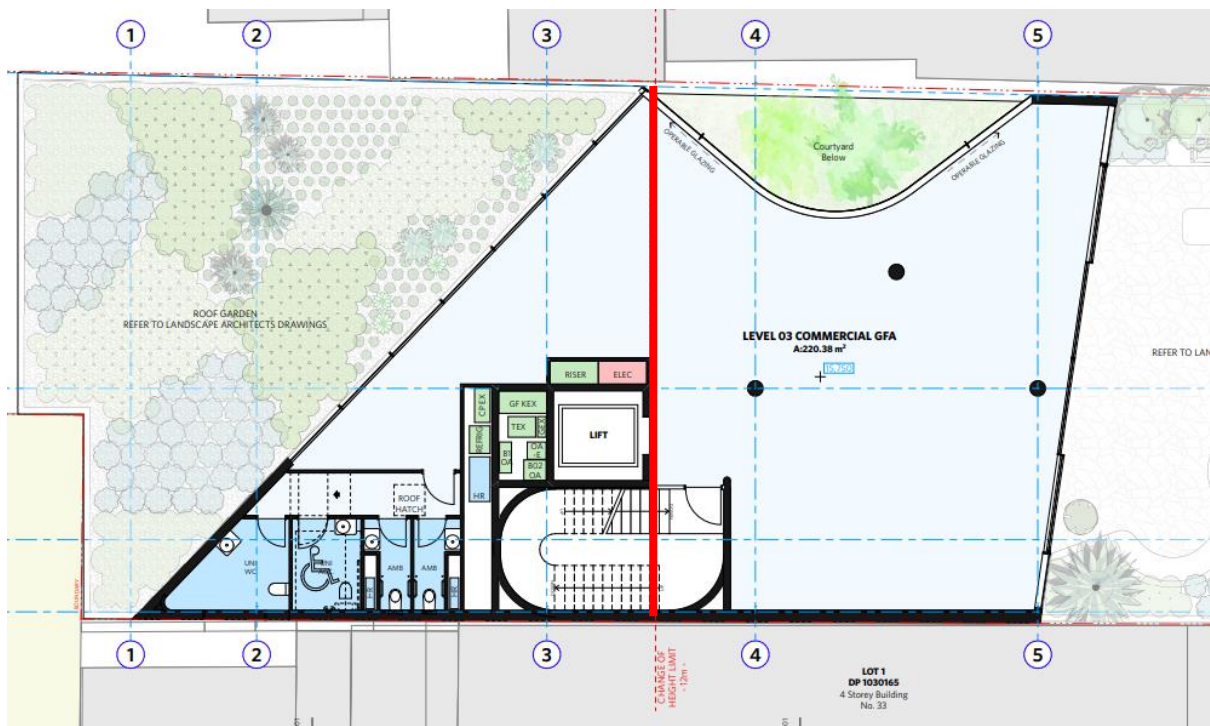
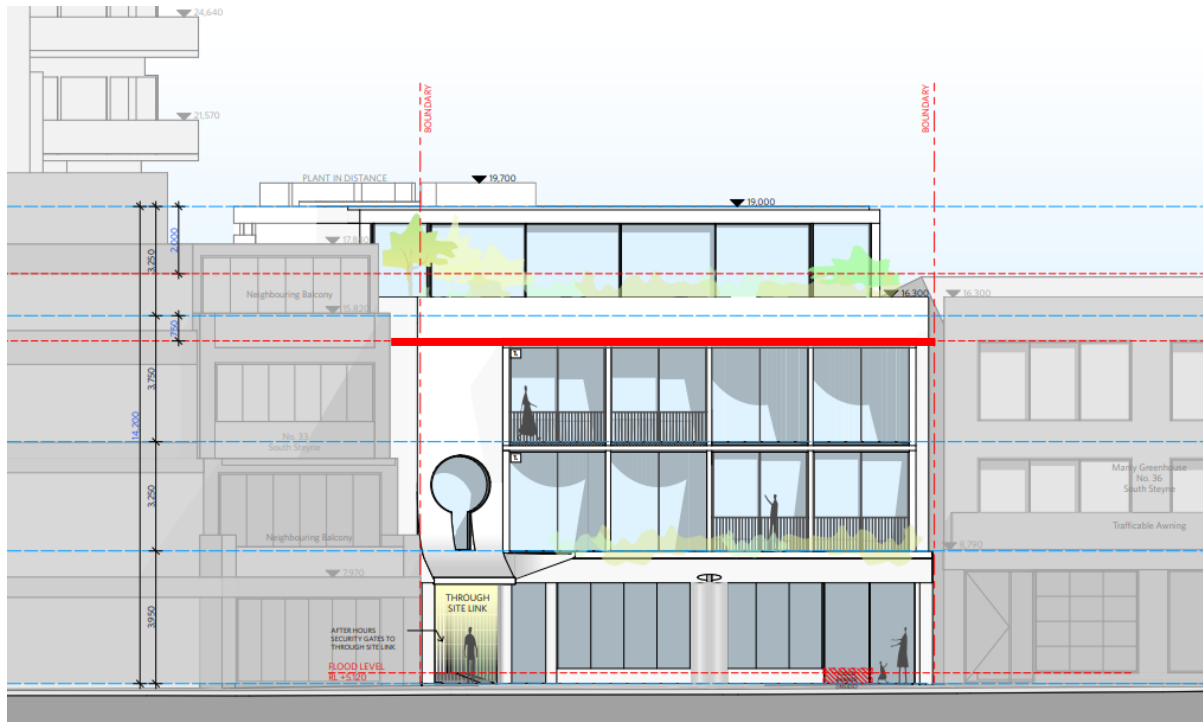


Figure 1 - Elevation extracts showing the building height breaching elements on the 10 metre and 12 metre height limit affected portions of the site.



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

The objectives of clause 4.6 of MLEP 2013 are:

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

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

Floor Space Ratio

Clause 4.4(2) of MLEP 2013 prescribes a maximum floor space ratio of 2.5:1 with respect to the subject site which based on a site area of 690.2m² represents a maximum GFA of 1725.5m². The objectives of this clause are:

- (a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) to provide for the viability of Zone E1 and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

However, clause 4.4(2A) of MLEP 2013 prescribes that the floor space ratio of a building on land is identified as “Gross Floor Area for Certain Commercial Premises” on the Key Sites Map may exceed the maximum floor space ratio allowed under subclause (2) by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises. In consideration of this clause, the potential maximum GFA for the site is 2070.6m² being an FSR of 3:1.

The subject site is identified as "Gross Floor Area for Certain Commercial Premises" on the Key Sites Map and accordingly these provisions apply.

The amended development has a gross floor area of 1791.06m² and a floor space ratio of 2.59:1. In this regard, the application takes advantage of 65.56m² of bonus floor space being significantly less than the 345.1m² anticipated by these commercial incentive floor space provisions. As the entirety of the gross floor area proposed is to be used for commercial purposes, the bonus floor space prescribed by subclause (2A) is applicable and the proposed development is maintained below the maximum floor space ratio prescribed.

We trust that this submission clearly demonstrates a view sharing outcome is achieved between development with the height and floor space proposed providing for the orderly and economic use and development of the land. The height and floor space has been distributed in a manner which provides for a complimentary and compatible streetscape and heritage conservation outcomes and which maintains reasonable amenity to surrounding properties in relation to view sharing, privacy and solar access.

Please do not hesitate to contact me to discuss any aspect of this correspondence.

Yours sincerely

BOSTON BLYTH FLEMING PTY LIMITED

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director

Attachment 1

Updated Clause 4.6 variation request – Height of buildings

1 Updated clause 4.6 variation request – Height of Buildings

1.1 Introduction

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

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 10m fronting South Steyne, increasing to 12m at the rear of the site, as shown in Figure 1, below.

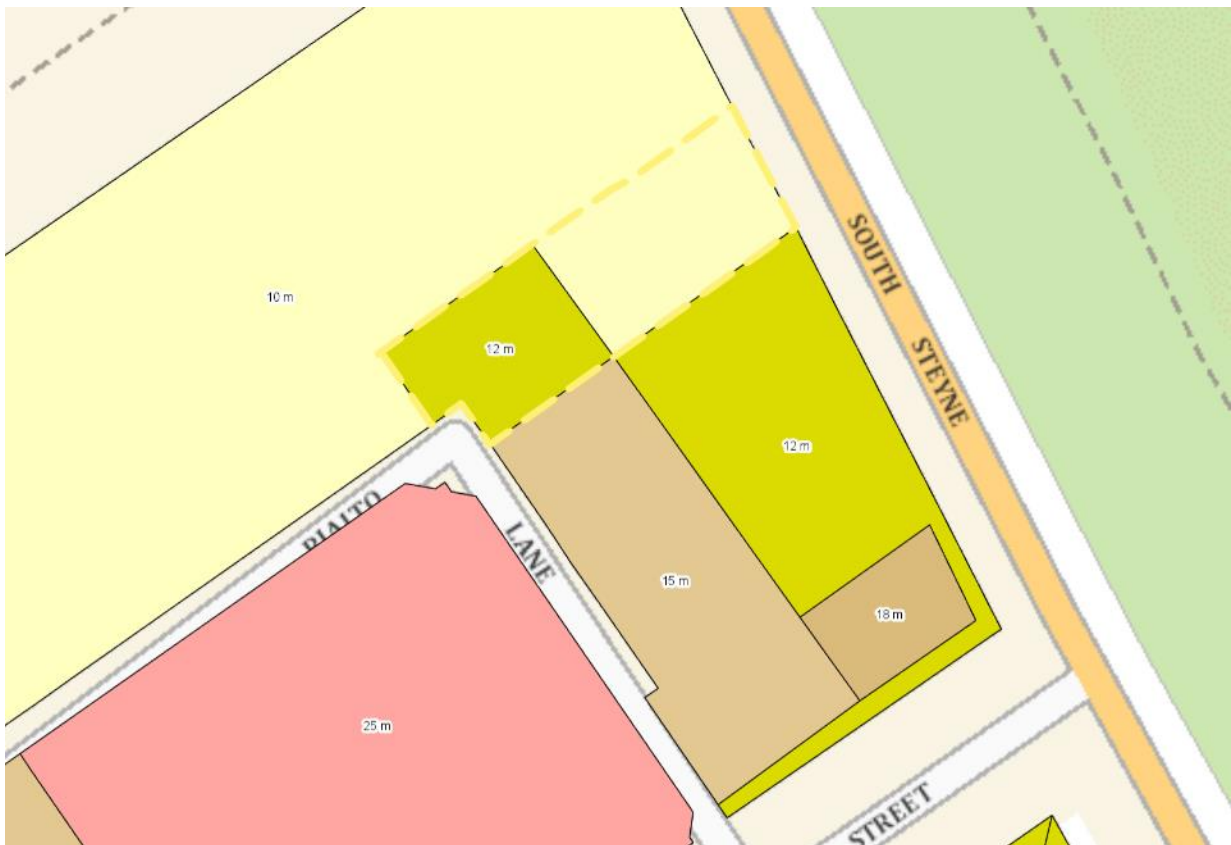


Figure 1 - Height of Buildings Map of MLEP 2013

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.*

Within the portion of the site that is subject to the 10 metre height limit, the proposed development has a height of approximately 11.3 metres presenting to South Steyne, being the dominant parapet height and the height of all proposed roof top planters representing a variation of 1.3 metres or 13%. The Level 3 roof has a height of 14.2 metres representing a variation of 4.2 metres or 42% but only over that portion of the site to which the 10 metre height limit applies.

Within the portion of the site that is subject to the 12 metre height limit, the proposed Level 3 roof has a height of 14.2 metres representing a variation of 2.2 metres or 18.3% with the lift overrun and integrated screened mechanical plant area having a maximum height of 14.7 metres representing a variation of 2.7 metres or 19.2%.

The extent of building height non-compliances within the 10 metre and 12 metre height limit zones is depicted in the following images.

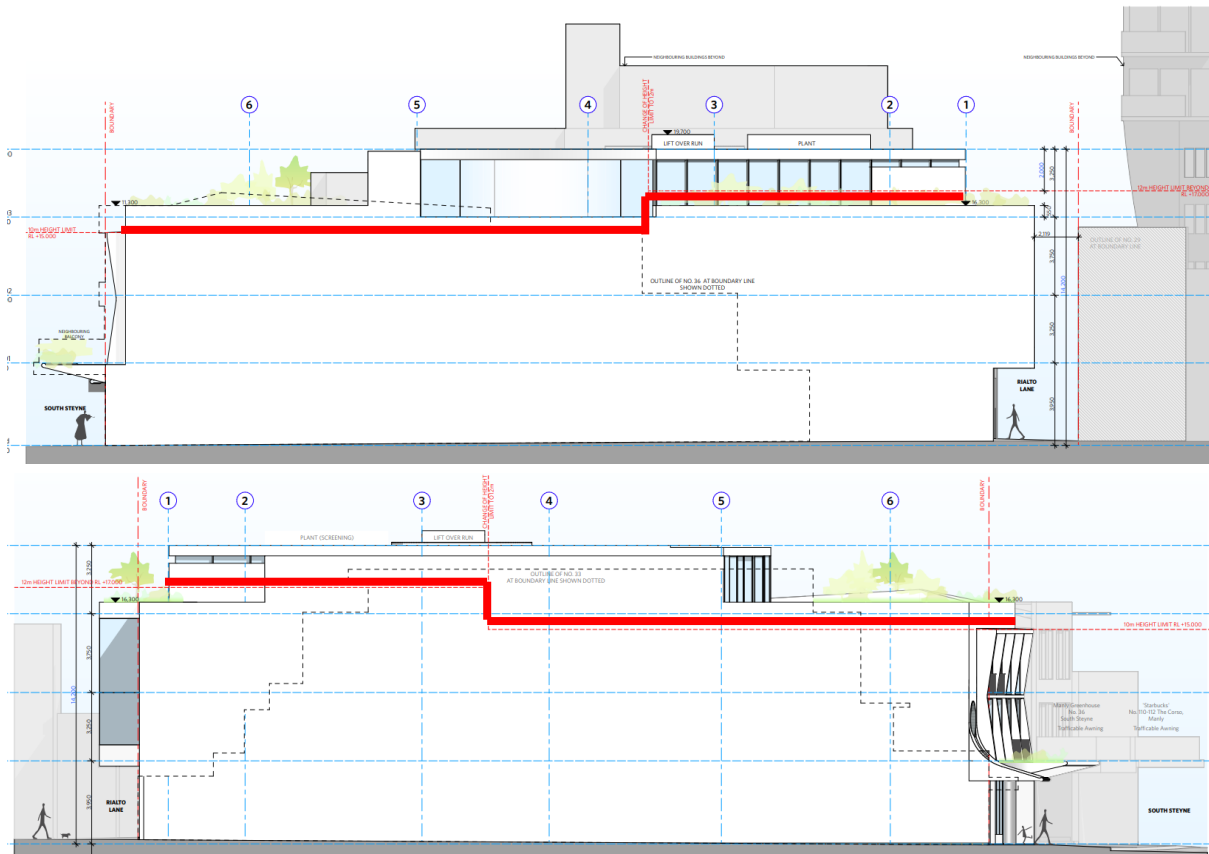


Figure 2 - Elevation extracts showing the building height breaching elements on the 10 metre and 12 metre height limit affected portions of the site.

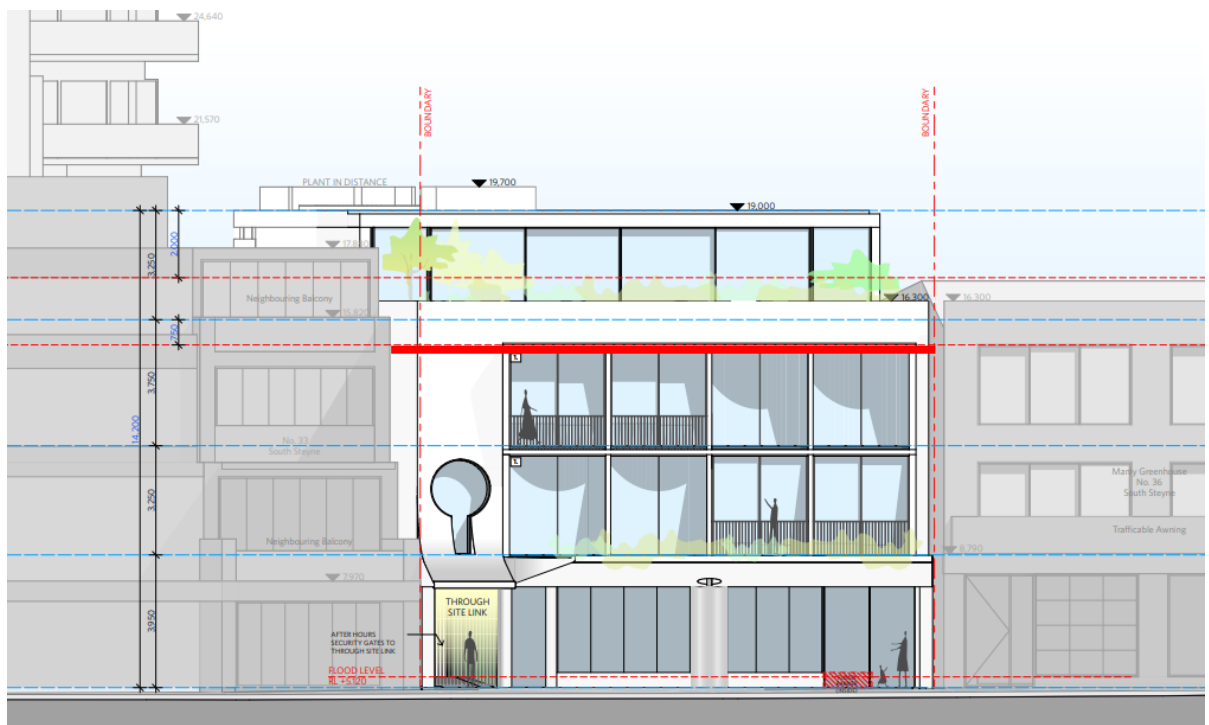


Figure 3 - Street elevation extract showing the comparative height of the proposed development with adjoining development and the extent of building height breach associated with the 10 metre height standard applying at the front of the property.

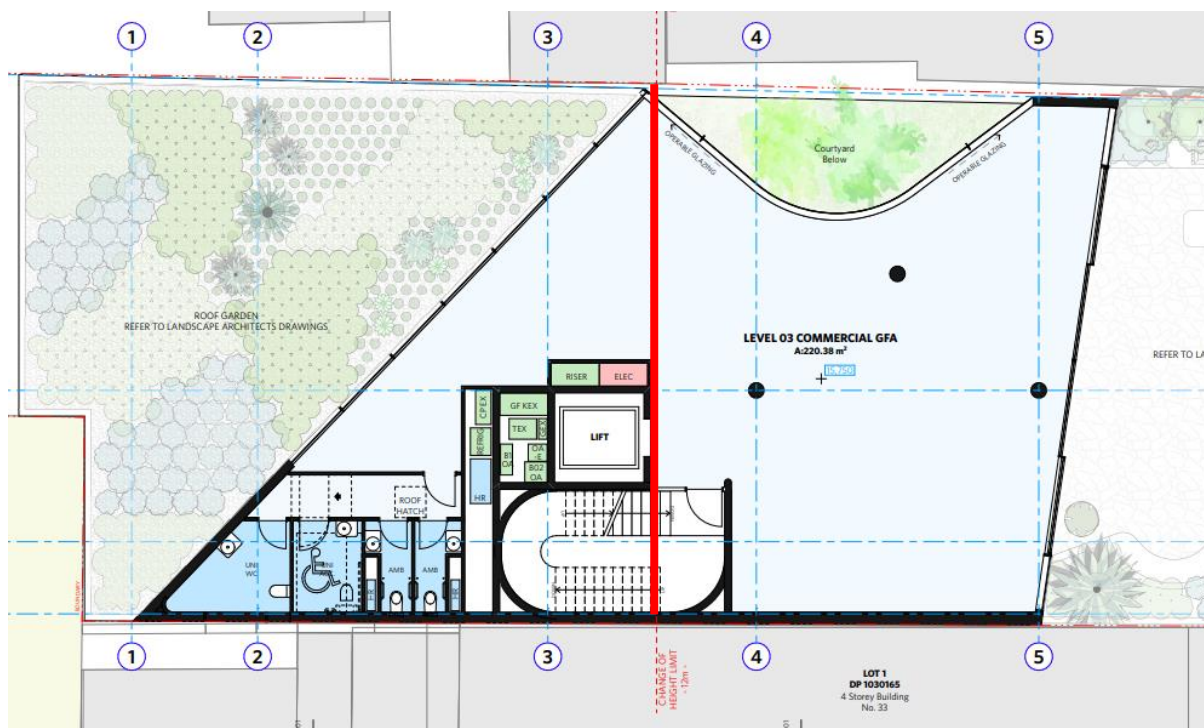


Figure 4 - Location of the boundary between the 10 metre and 12 metre building height standards with the 10 metre standard applying to the right of the red line and the 12 metre standard to the left.

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

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

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

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

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

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

Clause 4.6(2) of MLEP 2013 provides:

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

This clause applies to the building height development standard in clause 4.3 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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

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

The proposed development does not comply with the building height development standard at clause 4.3 of MLEP 2013 which specifies a building height of 10m-12m. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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

Clause 4.6(4) of MLEP 2013 provides:

Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

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

(b) *the concurrence of the Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

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

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of MLEP 2013 from the operation of clause 4.6.

1.3 Relevant Case Law

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

The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

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

1. Is clause 4.3 of MLEP 2013 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 of MLEP 2013 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP 2013?

1.4 Request for variation

1.4.1 Is clause 4.3 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 of MLEP 2013 prescribes a height limit for development on the site. Accordingly, clause 4.3 of MLEP 2013 is a development standard.

1.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the building height development standard

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

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

Comment: The height of the proposed development is consistent with that of surrounding development and development within the visual catchment of the site. In particular, the front parapet height of the development has been designed to marry with the height of adjoining buildings, as shown in Figure 3.

It is noted that this approach, where the parapet height matches that of adjacent buildings, is encouraged by clause 4.2.2 of MDCP 2013, as shown in Figure 5.

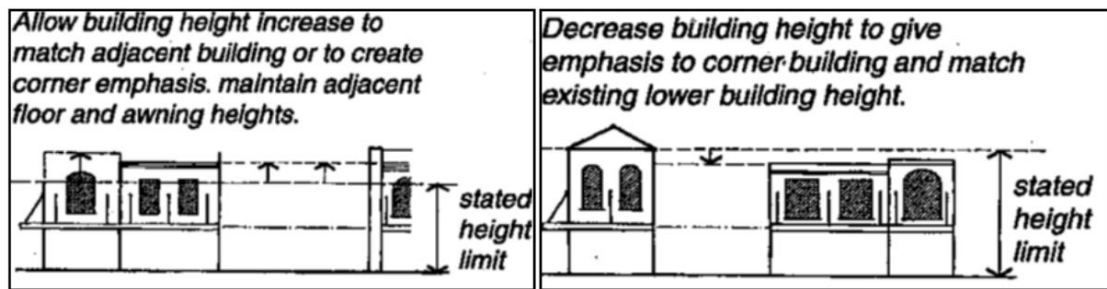
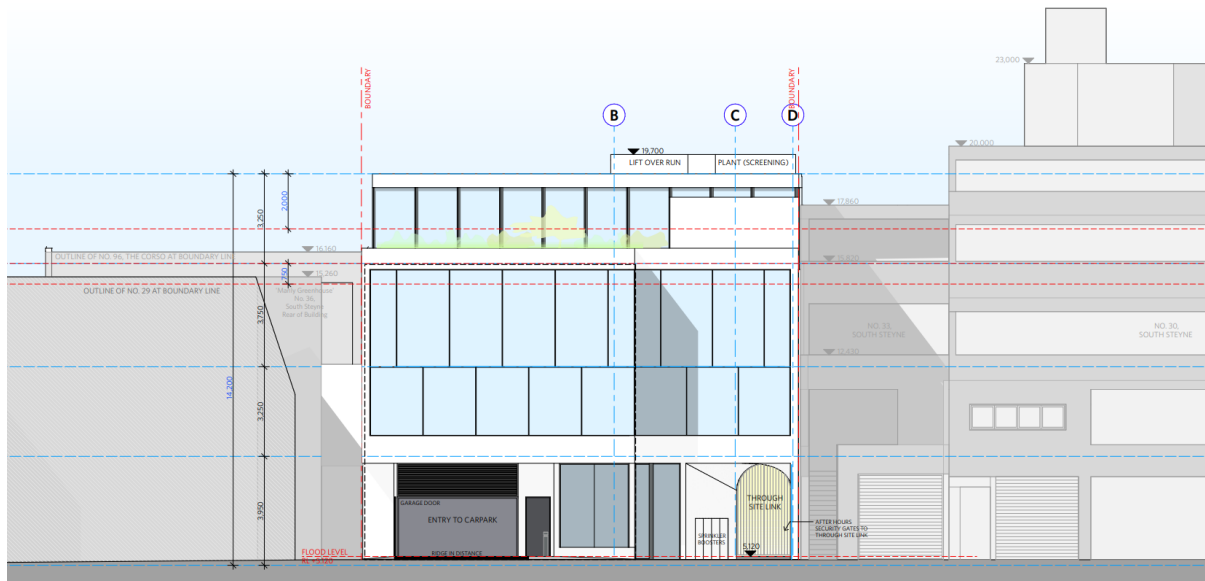


Figure 5 - Extract of clause 4.2.2 of MDCP 2013

The increased height at the rear of the development is set back from the primary street frontage and will not be readily visible as seen from South Steyne. The height of the building presenting to Rialto Lane is contextually appropriate, having regard to the increased height anticipated by MLEP 2013 and the height of surrounding and nearby development, as shown in Figure 6.

It is noted that the proposal has been reviewed by Council's Design and Sustainability Advisory Panel, who raised no objection to the height of the proposed development, or the variations proposed.

The non-compliant elements of the proposed development do not prevent the development from being consistent with this objective.



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

Once again, it is noted that the proposal has been reviewed by Council's Design and Sustainability Advisory Panel, who raised no objection to the height of the proposed development, or the variations proposed. Of particular relevance, the panel confirmed that they are generally supportive of the bulk and scale proposed.

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

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

Comment: Views of Manly Beach are available from the subject site in an easterly direction. These views are also enjoyed by upper-level apartments of buildings to the west of the subject site. As demonstrated in the Visual Impact Assessment, dated 4th August 2023, prepared by Urbaine Design Group, the proposed development has been designed to generally align with the levels of adjoining buildings, with views of the ocean and the Norfolk Island Pines that line the foreshore maintained over the top of the proposed development. The Level 3 floor plate has also been designed to maintain a view corridor across the rear of the property with development on this portion of the site sitting comfortably below the 12 metre height standard. The distribution of floor space in the manner proposed achieves a view sharing outcome with adjoining development particularly the apartments located within 25 Wentworth Street, Manly.

The view analysis also confirms that a view sharing outcome is maintained having regard to the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 noting that although minor to moderate view impact from the principal living and adjacent open space area of the adjoining apartments occurs towards Manly Beach that all critical view elements are maintained having regard to the totality of available views from all adjoining apartments to the extent reasonably anticipated given the juxtaposition of adjoining apartments relative to available view lines. In forming this opinion, consideration must also be given to the reasonable development potential of the site as anticipated through a combination of Council's building height and commercial floor space FSR incentive standards.

In circumstances where the development provides for a contextually appropriate built form outcome in terms of overall building height and floor space, and where the FSR bonus available to commercial development within the E1 Local Centre zone is not utilised to anywhere near its full extent, I am satisfied that the development is reasonable in the context of the view sharing outcome achieved. I also note that the development provides significant public benefit in terms of the through site link between Rialto Lane and South Steyne with the displaced floor space relocated to level 3 of the development where it contributes significantly to the utility and amenity of the development.

Under such circumstances, Council can be satisfied that the proposal provides for a view sharing outcome consistent with the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

In consideration of the objectives of MLEP 2013 and MDCP 2013 that encourage consistency with the prevailing building height and noting the bonus floor space provisions prescribed by clause 4.4 of MLEP 2013 for commercial development in this location, Council can be satisfied that disruptions to views haven been reasonably minimised.

- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

Comment: The non-compliant elements of the proposed development do not result in any adverse impacts upon the amount of sunlight received by adjoining properties.

- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Comment: Not applicable – the site is located within the E1 Local Centre zone and not within a recreation or environmental protection zone.

Consistency with zone objectives

The subject property is zoned E1 Local Centre zone pursuant to MLEP 2013. The development's consistency with the stated objectives of the E1 zone is as follows:

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

Comment: The proposed development provides 1725.5m² of commercial floor space of which 498.88m² will be available for street level activation associated with food and beverage retail offering. The proposed floor space will contribute to the existing range of retail, business, entertainment and community uses within the Manly Town Centre.

- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

Comment: The commercial floor space proposed will satisfy this objective notwithstanding the building height non-compliance.

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*

Comment: N/A

- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Comment: The ground floor commercial floor space proposed will satisfy this objective notwithstanding the building height non-compliance.

- *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.*

Comment: The commercial floor space proposed will satisfy this objective with servicing of the development occurring within the basement. This objective is achieved notwithstanding the building height non-compliance.

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

Comment: The ground floor commercial floor space and retail activation proposed will satisfy this objective notwithstanding the building height non-compliance.

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

Comment: The variation to the building height standard will facilitate achievement of this objective is the proposed urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring buildings on land uses and will sit comfortably within the natural environment. This objective is achieved notwithstanding the building height non-compliance.

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

1.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

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

Sufficient environmental planning grounds

Ground 1 – Contextually responsive building design

Despite non-compliance with the building height development standard, the proposed development is consistent and compatible with the height of immediately adjoining buildings, other development within the visual catchment of the site and other development subject to the same height provisions.

Specifically, the height of the front parapet aligns with that of adjoining and nearby development, as shown on in the photomontage in Figure 7, over page. The height and floor space has been skilfully distributed to achieve an appropriate contextual built form “fit” whilst maintaining a view sharing outcome with surrounding development.



Figure 7 - Photomontage of development as seen from South Steyne

Consistent with the provisions of clause 4.2.2.1 of MDCP 2011, consistency with the height of adjacent and adjoining buildings can be relied upon as sufficient environmental planning grounds to justify contravention of the building height development standard.

Although the site is not subject to a number of storeys control, it can be assumed that a three storey development is anticipated within the 10m portion of the site, with a four storey development anticipated within the 12m portion of the site. This assumption is confirmed by nearby and adjoining development that are subject to the same height limits including:

- The four storey street façade at 28-29 South Steyne (12m height limit) (Figure 8),
- The four storey street façade at 30-32 South Steyne (12m height limit) (Figure 8),
- The four storey street façade at 33 South Steyne (12m height limit) (Figure 8),
- The three-five storey building at 43-45 South Steyne (10m-12m height limit) (Figure 9),
- The three-five storey building at 46-47 South Steyne (10m-12m height limit) (Figure 9).

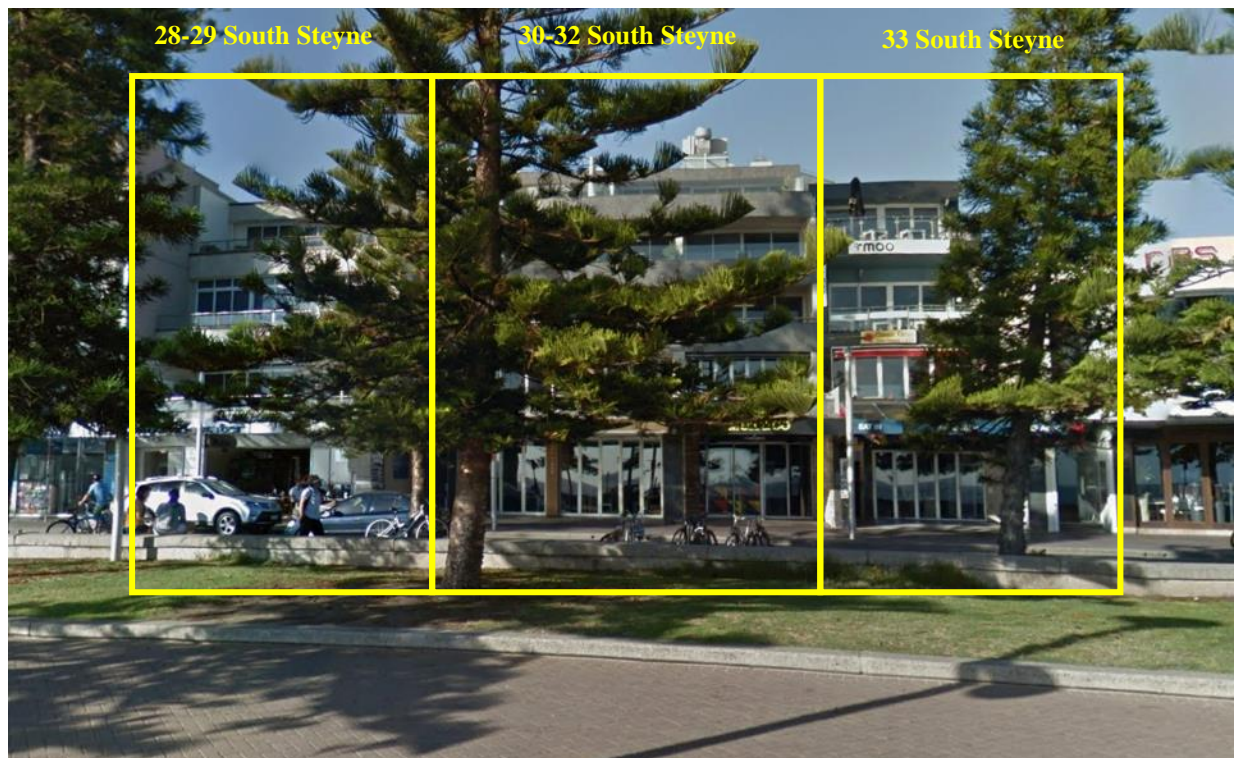


Figure 8 - Adjoining & nearby development along South Steyne



Figure 9 - Nearby development along South Steyne

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by other existing development within the visual catchment of the site, consistent with Objective 1.3(c) of the EP&A Act.

The proposed development is also compatible with the height of immediately adjacent development along South Steyne and has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of exceptional design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Ground 2 – Consistency with Council's Policies

Front Façade

The proposed breach of the building height plane at the street frontage is consistent with the provisions of clause 4.2.2 of MDCP 2013, which provide that conformity with the prevailing parapet height constitutes sufficient environmental planning grounds to justify a breach to the height plane.

Floor Space Ratio Bonus

The provisions of clause 4.4(2A) of MLEP 2013 prescribe that the floor space ratio of a building on land in the B2 Local Centre zone may exceed the maximum floor space ratio shown on the Floor Space Ratio Map by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises.

Essentially, the LEP provides a floor space bonus, above what is otherwise permitted, on sites within the E1 zone that are to be used primarily for commercial purposes. 100% of the proposed development is to be used for commercial purposes, and as such, the additional floor space is reasonably applied. The proposed development has sought to minimise the visual impact of this additional floor space by providing commercial floor space within the basement.

Strict compliance with the height of buildings development standard would detract from consistency with the specific standards and controls that apply with respect to the specific use proposed at the subject site and discourage the application of the commercial floor space bonus.

In consideration of the objectives of the E1 Local Centre zone, which emphasise the need for and importance of commercial floor space within the zone, the floor space ratio bonus is considered to hold greater determining weight than the height standard, particularly in circumstances where the development is of such an exceptionally high architectural standard and consistent with the prevailing heights of adjoining and nearby development.

Allowing for the height breach in consideration of other the application of other standards and controls is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

Ground 3 – Public Benefit

The proposed development comprises a pedestrian through-site link, that will significantly improve pedestrian connectivity throughout the town centre and the activation of Rialto Lane. The voluntary inclusion of the site link, which is highly endorsed/supported by Council, reduces the area of floor space at the ground level of the subject site, which has a premium rental return noting the site's location and outlook to Manly Beach.

The provision of additional floor space partially above the height plane is considered to be justified in consideration of the public benefit associated with the incorporation of the through-site link at the ground floor.

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

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the E1 Local Centre Zone

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

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

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

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

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

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

1.4.5 Secretary's concurrence

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

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

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

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

Boston Blyth Fleming Pty Limited



Greg Boston

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Director