

**Updated clause 4.6 variation request – Height of buildings  
Proposed Shop Top Housing  
1010 – 1014 Pittwater Road, Collaroy**

**1.0 Introduction**

This updated clause 4.6 variation request has regard to the following plans prepared by Gartner Trovato Architects:

DRAWING No:	DRAWING TITLE	REVISION
DA-00	COVER SHEET	G
DA-01	SITE ANALYSIS PLAN	A
DA-02	SITE PLAN	F
DA-03	BASEMENT PLAN	K
DA-04	GROUND FLOOR PLAN	K
DA-05	LEVEL 1 PLAN	G
DA-06	LEVEL 2 PLAN	F
DA-07	LEVEL 3 PLAN	G
DA-08	ROOF PLAN	F
DA-09	SECTION A	F
DA-10	SECTION B	F
DA-11	SECTION C	F
DA-12	SECTION D	F
DA-13	SECTION E	F
DA-14	SECTION 2	F
DA-15	SECTION 3	F
DA-16	NORTH & EAST ELEVATIONS	F
DA-17	SOUTH & WEST ELEVATIONS	F
DA-18	SHADOW DIAGRAMS	D
DA-19	SCHEDULE OF EXTERIOR FINISHES & MATERIALS	E
DA-20	HEIGHT CONTROL DIAGRAM - OVERVIEW	E
DA-21	HEIGHT CONTROL DIAGRAM - VIEW FROM WEST	E
DA-22	HEIGHT CONTROL DIAGRAM - VIEW FROM NORTH	E
DA-23	HEIGHT CONTROL DIAGRAM - VIEW FROM EAST	E
DA-24	HEIGHT CONTROL DIAGRAM - VIEW FROM SOUTH	E
DA-25	VIEW 1	E
DA-26	VIEW 2	E
DA-27	VIEW 3	E
DA-28	VIEW 4	E
DA-29	VIEW 5	E
DA-30	VIEW 6	E
DA-31	VIEW 7	E
DA-32	VIEW 8	E

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** (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 balustrade around the roof top communal open space breaches the building height standard by a maximum of 300mm (3.5%) whilst the roof over the roof top access stairs and communal facilities breaches the standard by 2 metres or 23.5%. The lift overruns breach the standard by 2.4 metres or 28.3% with the front and rear facing building façades sitting comfortably below the prescribed height standard.

The building height breaching elements are depicted on the building height blanket diagrams over page.



**Figure 1** – Building height blanket diagram showing non-compliant building height elements



**Figure 2** – Building height blanket diagram showing non-compliant building height elements

## 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:

*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:

*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:

*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 that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

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

Clause 4.6(5) of 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.*

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 WLEP 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 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 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 1 and 2 storey commercial and mixed use buildings having been replaced with more contemporary 3 and 4 level shop top housing building forms. A predominant 3 storey building presentation has been established by recently approved and constructed shop top housing development along Pittwater Road and within Collaroy Street. The height and scale of the immediately adjacent development is depicted over page.



**Figure 3:** View towards the site from Pittwater Road

The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

- 22 *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 question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

I note that the building height breaching elements are generally limited to those elements required to provide roof top communal open space and minor roof parapet elements. All habitable floor space sits comfortably below the height standard. I also note that the non-compliant building elements as potentially viewed from Pittwater Road have been setback behind the façade alignment of the compliant building elements below such that they are recessive elements as viewed from the street. The overall height, bulk and scale the building as viewed from this street frontage is entirely consistent with that established on the immediately adjoining property to the south.

In this regard, I have formed the considered opinion that the non-compliant building elements will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and urban design context.

In relation to the zone boundary interface and the developments built form relationship with the adjoining dwelling houses to the east, I note that the rear portion of the development is compliant with the 11 metre building height standard as it presents to these properties. In this regard, the proposal maintains a complimentary built form relationship in terms of height and scale at the zone boundary interface as anticipated through strict compliance with the building height standard.

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 and scale of the development, notwithstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably be concluded that, notwithstanding the building height breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the building height breaching elements, the resultant development is compatible with the height and scale of 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: In relation to visual impact, I note that the increased setbacks proposed to the non-compliant building elements, together with the use of highly articulated characteristically pitched roof elements, ensure that the breaching elements are visual recessive as viewed from surrounding properties and in a streetscape context. Visual impacts have been minimised through the adopting of these design initiatives.

I also rely on the analysis provided in response to objective (a) to demonstrate that visual impacts have been minimised and the objective achieved in this regard.

In relation to the disruption of views, I am satisfied that the non-compliant building height elements will not give rise to any public or private view impacts. Notwithstanding the building height breaching elements, view disruption has been minimised and the objective achieved in this regard.

In relation to the minimisation of privacy loss, the non-compliant building elements have been designed to minimise privacy impacts through the more recessive upper-level setbacks adopted and the provision of integrated privacy attenuation measures in the form of upper-level planter boxes.

In relation to solar access, the shadow diagrams demonstrate that shadows from the building height breaching building elements do not preclude the maintenance of at least 3 hours of solar access to the north facing living areas and adjacent open space areas of surrounding residential properties on 21<sup>st</sup> June in strict accordance with the control. Solar access impacts have been minimised.

In this regard, I have formed the opinion that the design of the development has minimised visual impacts, disruption of views, loss of privacy and loss of solar access and accordingly this objective is achieved notwithstanding the building height breaching elements.

- (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 readily discernible as viewed from any coastal or bushland environments

In any event, notwithstanding the height building breaching elements, the height, bulk and scale of the building will not be perceived as inappropriate or jarring have regard to the shop top housing development located to the south of the site with the building height breaching elements not giving rise to adverse impact on the scenic quality of Warringah's coastal and bush environments. This objective is achieved notwithstanding 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: To the extent that the non-compliant building height elements are visible from public places, for the reasons previously outlined I am satisfied that the height, bulk and scale of the building will not be perceived as inappropriate or jarring have regard to the adjoining shop top housing development to the south of the site and located within the same visual catchment.

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 building height breaching elements of the building, offensive, jarring or unsympathetic in a streetscape context. The building height breaching elements will not give rise to unacceptable visual impacts when viewed from any public places.

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 E1 Local Centre 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 both street frontages 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. Notwithstanding the building height breaching elements, the proposal achieves this objective.

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

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

- *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.*

Response: The proposal incorporates a mixture of ground level retail and upper level residential accommodation which collectively will contribute to a vibrant and active local centre notwithstanding the building height breaching elements proposed.

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

Response: The proposal incorporates a mixture of ground level retail and upper level residential accommodation which collectively will contribute to a vibrant and active local centre notwithstanding the building height breaching elements proposed.

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

Response: The proposal incorporates active street frontage which will achieve this objective notwithstanding the building height breaching elements proposed.

- *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 development achieves this objective notwithstanding the non-compliant building height breaching elements proposed.

In this regard, the consent authority can be satisfied that the design and distribution of building height across the site minimises conflict between land uses in the zone and within adjoining zones and to that extent ensures the maintenance of appropriate amenity to adjoining and nearby residential land uses. Notwithstanding the building height breaching elements, the proposal achieves this objective.

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

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

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

In Initial Action the Court found at [23]-[24] that:

*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 building height variation as outlined below.

#### **Ground 1 - Contextually responsive building design**

Despite non-compliance with the 11m building height development standard, the proposed development is consistent and compatible with the height of contemporary development within the immediate context of the site including the 1008 Pittwater Road directly to the south of the development site.

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will facilitate the provision of rooftop communal open space in a location where it will receive exceptional levels of amenity without adverse streetscape or residential amenity impacts.

Such outcome is consistent with Objective 1.3(c) of the EP&A Act. The proposed development 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 high design quality with the variation facilitating enhanced residential amenity, informal rooftop communal open space, consistent with Objective 1.3(g) of the Act.

## **Ground 2 - Objectives of the Act**

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

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use and development of the land and will facilitate enhanced residential amenity. 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 to the building height standard will promote good contextually appropriate design and facilitate enhanced amenity outcomes to and from the development in relation to the natural and built environment.

Approval of the building height variation will achieve this objective.

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.*



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.*

#### **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 if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

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

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

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

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

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

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

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

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

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

Notwithstanding that the Court can stand in the shoes of the consent authority and assume the concurrence of the Secretary, the Court would be satisfied that the matters in clause 4.6(5) are addressed because the contravention does not raise any matter of significance for regional or state planning given that the building height breaching elements facilitate better environmental and public benefit outcomes with the result that there is no public benefit in maintaining the standard in the particular circumstances of this case.

#### **5.0 Conclusion**

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

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

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

**Boston Blyth Fleming Pty Limited**

A handwritten signature in black ink, appearing to read 'Greg Boston', written over a horizontal line.

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

**28.10.24**