



Clause 4.6 Variation Request

Clause 4.3 Height of Buildings

75 The Corso & 42 North Steyne, Manly

**Submitted to Northern Beaches Council
on behalf of Iris Capital**

23 July 2024

Acknowledgment of Country



Towards Harmony by Aboriginal Artist Adam Laws

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Glossary and Abbreviations

Term/Acronym	Description
AS	Australian Standards
BCA	Building Code of Australia
BC Act	<i>Biodiversity Conservation Act 2016</i>
CEMP	Construction Environmental Management Plan
Council	Northern Beaches Council
CPTED	Crime Prevention through Environmental Design
DA	Development Application
DCP	Development Control Plan
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
The Regulations	Environmental Planning and Assessment Regulations 2021
ESD	Ecologically Sustainable Development
FSR	Floor Space Ratio
GFA	Gross Floor Area
INP	Industrial Noise Policy
LALC	Local Aboriginal Land Council
LEP	Local Environmental Plan
LGA	Local Government Area
NCC	National Construction Code
SEPP	State Environmental Planning Policy
WSUD	Water Sensitive Urban Design

1. Introduction

This is a formal request that has been prepared in accordance with Clause 4.6 of the Manly Local Environmental Plan 2013 to justify a variation to Clause 4.3(2) Height of Buildings at 75 The Corso and 42 North Steyne, Manly (the subject site).

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

The development application proposes alterations and additions to a pub and tourist and visitor accommodation including a new outdoor deck area on level 2. This requires an increase in height to facilitate a roofline over the deck area as well as a minor extension of the existing western roof. Overall, however, the changes are relatively minor, and the proposal ensures that the heritage significance of the building is maintained, view corridors are protected and visibility from the public domain is limited.

Clause 4.3(2) prescribes that the maximum height of a building on any land is not to exceed the height shown for the land on the Height of Buildings Map. The Height of Building Map nominates a maximum height of 10m and 12m for development on the subject site. The proposal has a maximum height of 12.79m at its highest point, which is 0.79m higher than the permitted 12m height. The height exceedance however will not increase the overall height of the building and is below the existing maximum building height.

This request considers that compliance with the height development standard is unreasonable and unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. It is therefore considered appropriate in this circumstance to vary the development standard.

2. Standard to be Varied

The standard that is proposed to be varied is the height of buildings development standard which is set out in clause 4.4 of the *Manly Local Environmental Plan 2013* (MLEP) as follows.

4.3 Height of buildings

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The site is in an area designated as "M1" and "K" on the height of buildings map and a 10m and 12m height control applies.

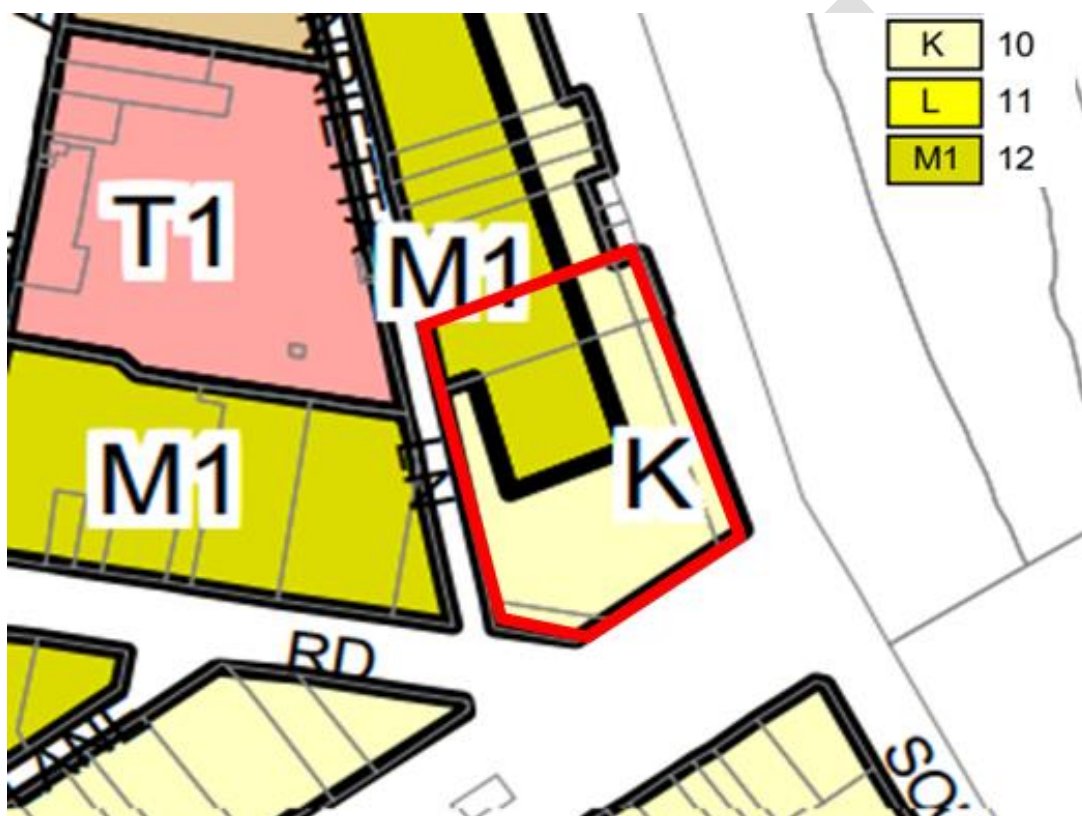


Figure 1: Height of Buildings Map (Source: NSW Legislation)

The development standard to be varied not excluded from the operation of Clause 4.6 of the LEP.

It should be noted that the height of the existing building relative to the height of building control is shown in Figure 2. It can be observed that the roof of level 2 currently breaches the height controls.

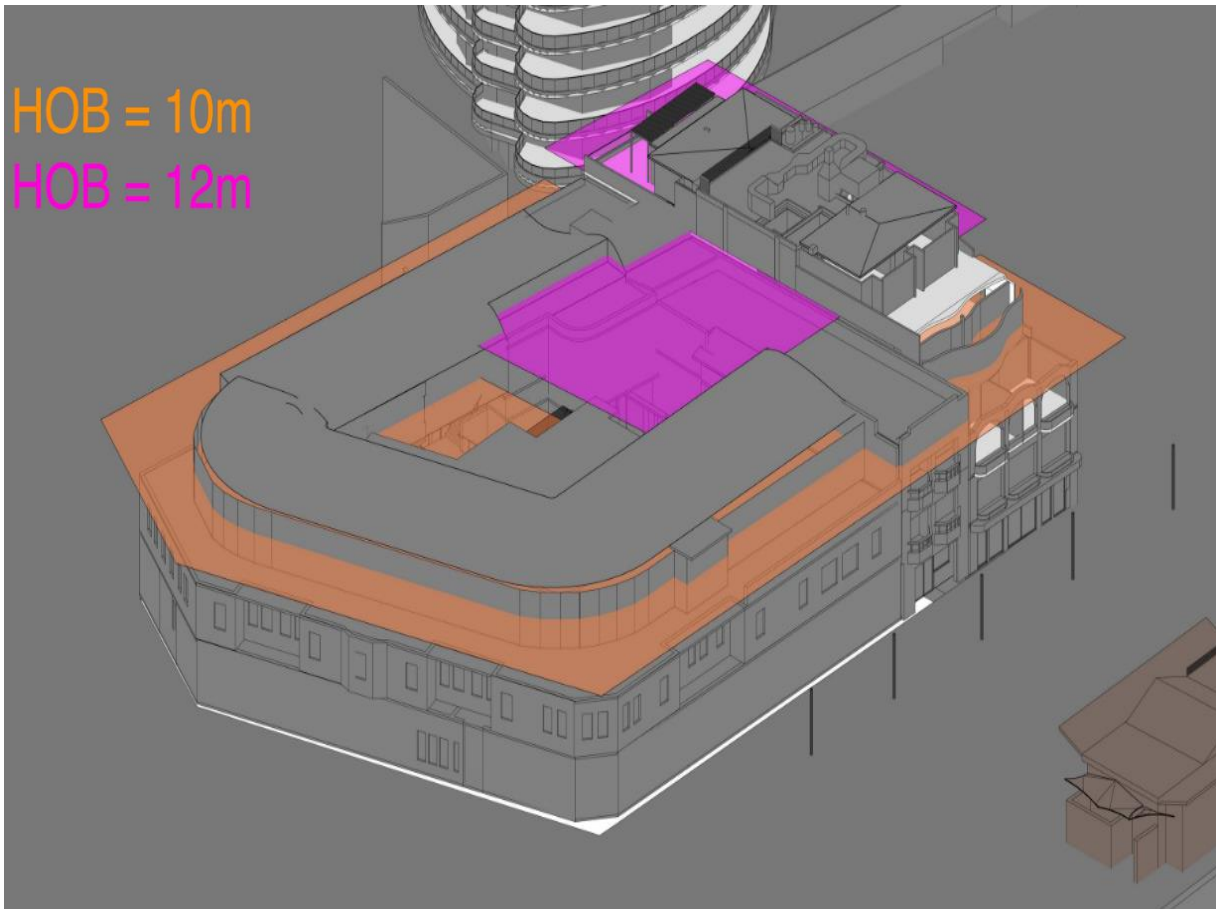


Figure 2: Height exceedance of existing building (Source: Squillace)

3. Extent of Variation

The proposed development includes minor alterations and extensions to the level 2 roof. As the existing roof is in breach of the building height control, the proposed additions will also be in breach. The proposed additions include a new roof over the proposed level 2 outdoor deck and a roof extension to the eastern roof line to facilitate the extension to the indoor floor plate. The proposed exceedances are detailed in figure 3 and 4 below. The details of the height exceedances are described in Table 1.

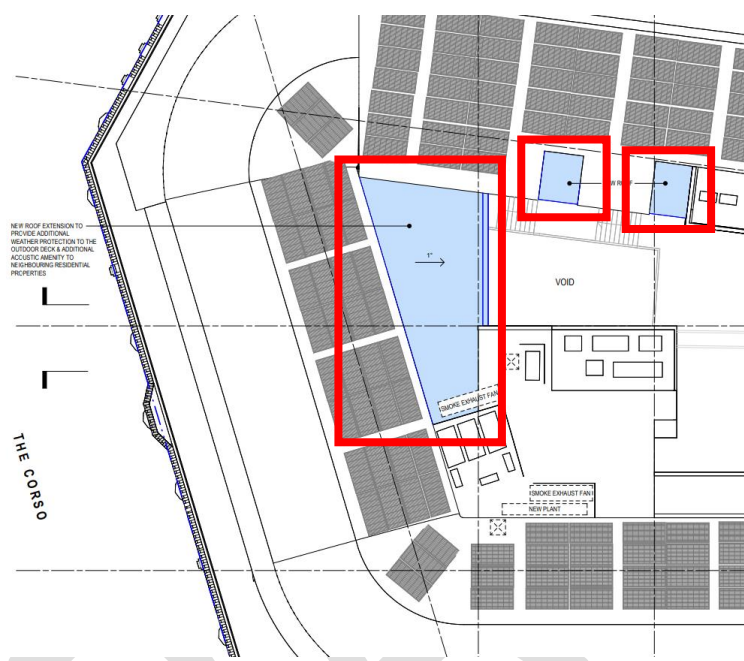


Figure 3: Roof plan showing proposed works (Source: Squillace)

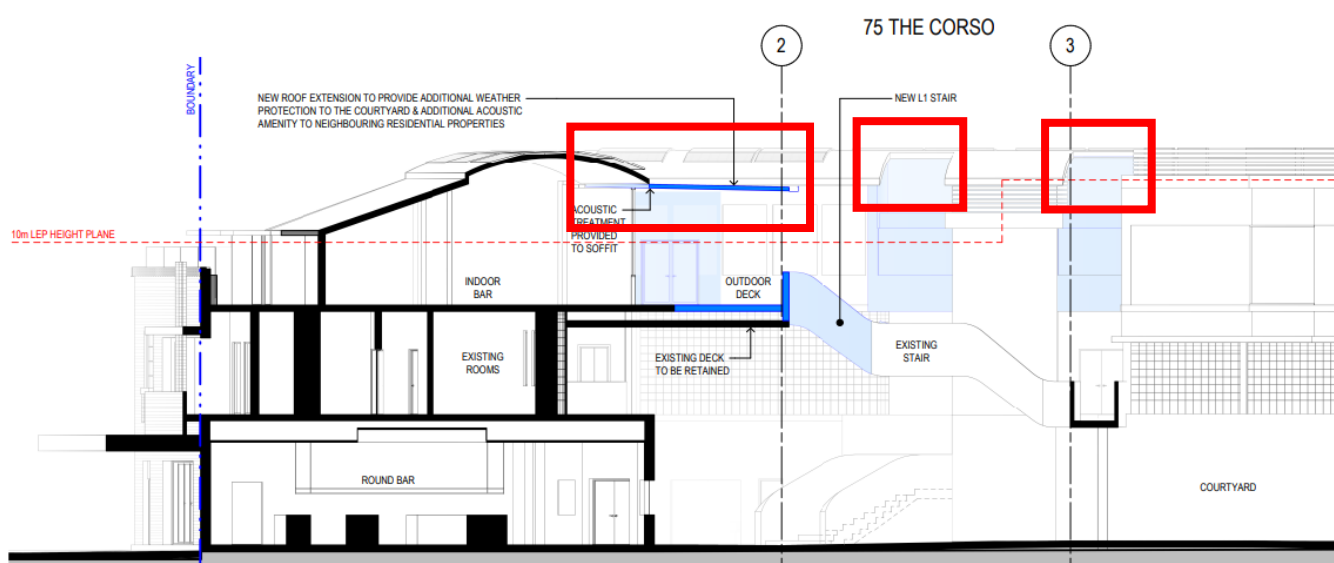
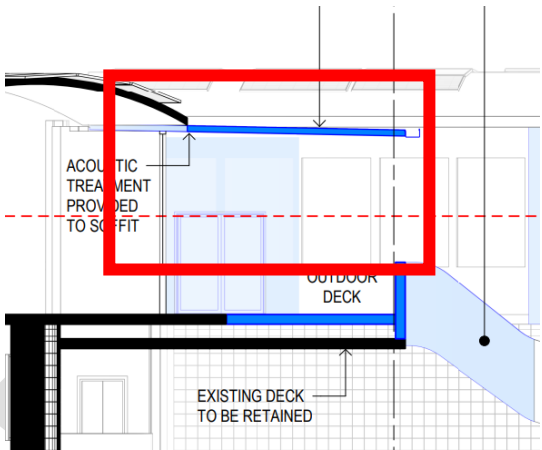
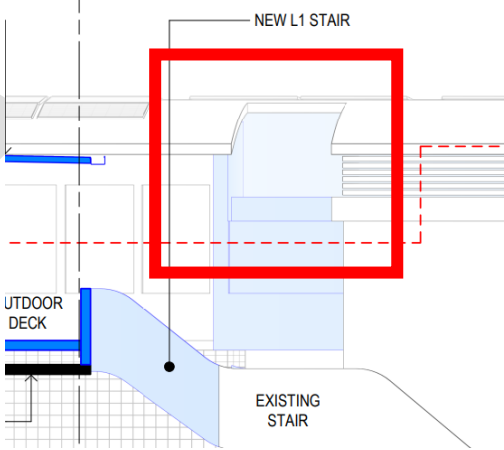
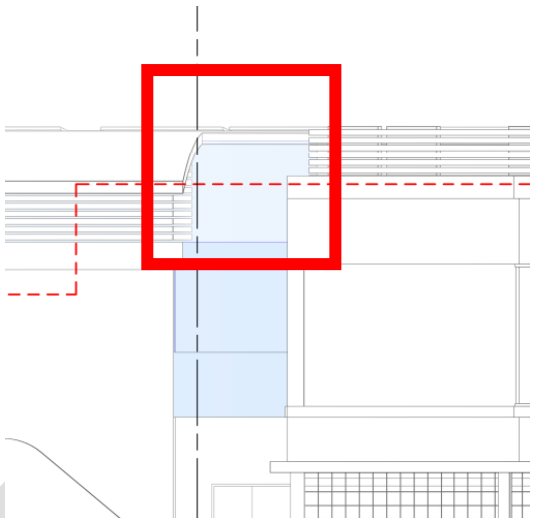


Figure 4: Section E demonstrating proposed height exceedances (Source: Squillace)

Table 1: Description of height exceedances

Location	Height Exceedance	Section Plan
Outdoor deck roof	<p>Height control: 10m</p> <p>Proposed height: 11.86m</p> <p>Proposed increase in height: 1.86m</p> <p>Proposed height breach: 18.6%</p>	 <p>Figure 5: Proposed outdoor deck roof height exceedance section E (Source: Squillace)</p>
Southern roof extension	<p>Height control: 10m</p> <p>Proposed height: 12.71m</p> <p>Proposed increase in height: 2.71m</p> <p>Proposed height breach: 27.1%</p>	 <p>Figure 6: Proposed southern roof extension along the western roof line height exceedance section E (Source: Squillace)</p>

Northern roof extension	<p>Height control: 12m</p> <p>Proposed height: 12.79m</p> <p>Proposed increase in height: 0.79m</p> <p>Proposed height breach: 6.6%</p>	 <p>Figure 7: Proposed northern roof extension along the western roof line height exceedance section E (Source: Squillace)</p>
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4. Unreasonable or Unnecessary

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the LEP.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]).

Nonetheless, we have considered each of the ways as follows.

4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First Test under *Wehbe*).

Table 2 Consistency with Objectives of clause 4.3

Objective	Demonstration
4.3 Height of buildings	
1. The objectives of this clause 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,	<p>Building forms along North Steyne and The Corso are characterised by parapets unique to each building. There is no prevailing building height along the North Steyne streetscape, but instead a diverse range of building heights and architectural features as shown in figure 8.</p>  <p>Figure 8: Existing building height and architectural roof forms along North Steyne</p> <p>Section 4.2.5.2 of the Manly Development Control Plan provides a more detailed description of the townscape principles of the Manly Town Centre to accompany the MLEP height of building standard. Consideration of this section has been made below:</p> <ul style="list-style-type: none"> • The existing level 2 breaches the building height controls. The level has been designed to be a secondary building element, having a small footprint than the lower levels, being setback from the street edges and behind the parapet, and having a low roof form. It is distinguishable as a contemporary addition and is not visually intrusive. • The parapet screens views of level 2 from the public domain in locations immediately adjacent to the site. Level 2 becomes partially visible from locations further removed from the site. • The proposed breach of the height control are minor additions to the level 2 roof that will not substantially change its form nor its visual or physical relationship to the public domain or adjoining buildings. The additions are setback from the building line to limit visibility.

Objective	Demonstration
	 <p data-bbox="715 904 1270 931">Figure 9: Existing roof form viewed from North Steyne</p>  <p data-bbox="722 1523 1262 1550">Figure 10: Existing roof form viewed from The Corso</p>
<p data-bbox="165 1592 480 1653">(b) to control the bulk and scale of buildings,</p>	<p data-bbox="555 1592 1423 1682">The bulk and scale of the development will remain largely unchanged, as the proposed additional building height is minor and will not result in any substantive change to the building envelope.</p> <p data-bbox="555 1731 1423 1883">The increases to the building height are primarily situated within the central roof area of the building with low to no visible from the public domain. The new roof sections are all located below the surrounding roof forms and as such, will have no impact upon the bulk of the building and will not cause disruptions to existing architectural roof features.</p>
<p data-bbox="153 1935 533 1991">(c) to minimise disruption to the following—</p>	<p data-bbox="555 1971 1414 2027">The proposed height increases are unlikely to have any impact upon the view corridors around the site. The roof above the outdoor deck is</p>

Objective	Demonstration
<p>(i) views to nearby residential development from public spaces (including the harbour and foreshores),</p> <p>(ii) views from nearby residential development to public spaces (including the harbour and foreshores),</p> <p>(iii) views between public spaces (including the harbour and foreshores),</p>	<p>located approximately 1.2m below the eastern roof line and approximately 1m below the southern roof line. This is to ensure that views from nearby residential developments are not impacted. The additions to the roof on the eastern roofline are also located below the adjoining roof to maintain the architectural features and reduce impacts upon view corridors.</p> <p>A view sharing assessment was undertaken by Hamptons Property Services to accompany DA2021/2257 for other works to the site. This assessment included a photo from Apartment 504 of the neighbouring residential property, Pacific Waves, towards Hotel Steyne. The location and design of the new roofing ensures that it will not impact upon view corridors for neighbouring residents from the Pacific Waves complex, particularly those on level 5. It should also be noted that since this photo was taken, there have been further modifications and DAs that have approved additional structures on the roof, increasing the building height even further. This proposal seeks to only add roof extensions in areas already below the prevailing building height.</p> <div data-bbox="563 918 1404 1507">  </div> <p>Figure 11: View of the site from Apartment 504 of Pacific Waves apartment complex (Source: Hamptons Property Services)</p>
<p>(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,</p>	<p>The height exceedance will not impact on solar access to public and private open spaces. The additional roof heights are setback from the roof edge, to ensure any potential shadowing impacts fall onto the roof of the development or within existing shadow impacts.</p>
<p>(e) to ensure the height and bulk of any proposed building or structure in a recreation or conservation zone has regard to existing vegetation and</p>	<p>Not applicable.</p>

Objective	Demonstration
topography and any other aspect that might conflict with bushland and surrounding land uses.	

As demonstrated in Table 2 above, the objectives of Clause 4.3 development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118*, *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170*; *[2018] NSWCA 245* and *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* at [31], therefore, compliance with the Height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

Whilst it may not be one of the 5 'tests' outlined in *Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*, we are of the opinion that compliance is unreasonable or unnecessary because the existing building at the subject site already exceeds the standard (and the proposal will remain below the existing maximum height). We are of the opinion that this reason is sufficient in itself to demonstrate that compliance is unreasonable or unnecessary.

4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

The standard has not been abandoned by Council in this case and so this reason is not relied upon. It is nevertheless worth noting that the existing development at the subject site already exceeds the development standard in question due to previous Development Consents issued by Council.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the Height of buildings development standard are as follows:

- **Object 1.3(c) and 1.3(d) of the EP&A Act** - The development assists in promoting "the orderly and economic use of land" by using land that contains built infrastructure and services.
- **Object 1.3(f) of the EP&A Act** - the development considers the heritage significance of the site and ensures the proposed variation does not have any adverse impacts on this character.
- **Satisfies the objectives of the E1 Local Centre zone:**

Table 3: Consistency with objectives of the E1 Zone

Objective	Demonstration
E1 Local Centre The objectives of this zone are as follows –	
<ul style="list-style-type: none"> • To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area. 	The height exceedance is required to facilitate weather protection and acoustic treatment for the additional outdoor setting for the pub. This seeks to improve the amenity of the Hotel Steyne and continue to assist in providing a retail use that serves the needs of people who live in, work in and visit the area.
<ul style="list-style-type: none"> • To encourage investment in local commercial development that generates employment opportunities and economic growth. 	The additional height supports enhancements to Hotel Steyne to provide diverse offerings for patrons and in turn generate economic growth both for the venue and the Manly town centre. This will create further employment opportunities at the site for members of the community.
<ul style="list-style-type: none"> • 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. 	Not applicable.
<ul style="list-style-type: none"> • To encourage business, retail, community and other non-residential land uses on the ground floor of buildings. 	Not applicable – the height variation relates to level 2 of the building.
<ul style="list-style-type: none"> • To minimise conflict between land uses in the zone and adjoining zones and ensure 	The proposal provides a roof over the outdoor awning to minimise and mitigate noise emissions to the surrounding locality. This roof was not proposed above the outdoor deck in the original approved DA350/2011. It is therefore

Objective	Demonstration
amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.	considered that this proposal will provide enhanced amenity for surrounding land uses, in particular residential dwellings.
<ul style="list-style-type: none"> 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. 	Not applicable - the height variation relates to level 2 of the building. Notwithstanding, the development as existing provides a diverse and active street frontage.
<ul style="list-style-type: none"> To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. 	<p>Urban forms along North Steyne and The Corso are characterised by parapets unique to each building. There is no prevailing building height along the North Steyne streetscape, but instead a diverse range of building heights and architectural features. The existing building breaches the building height controls. The level has been designed to be a secondary building element, having a small footprint than the lower levels, being setback from the street edges and behind the parapet, and having a low roof form. It is distinguishable as a contemporary addition and is not visually intrusive.</p> <p>The proposed structures in breach of the height control are minor additions to the level 2 roof that will not substantially change its form nor its visual or physical relationship to the public domain or adjoining buildings. The architectural features and character of the site will continued to be protected and maintained.</p>

- Importantly, the variation to the height development standard does not result in any amenity impacts to the Corso, North Steyne or adjoining properties.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

6. Conclusion

This submission requests a variation, under clause 4.6 of the *Manly Local Environmental Plan 2013*, to the maximum building height development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard (Webhe Test 1) and is consistent with the objectives of the E1 Zone;
- There are sufficient environmental planning grounds to justify the contravention.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.

DRAFT