ANNEXURE 1

CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS

1 Clause 4.6 variation request – Height of Buildings

1.1 Introduction

This clause 4.6 variation has been prepared having regard to key Land and Environment Court judgements including 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, *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130, SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112, and Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582*.

It is important to note at the outset that clause 4.6 of the LEP "is as much a part of [the LEP] as the clauses with development standards. **Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome**." (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to Clause 4.3 of MLEP 2013, the height of buildings on the subject land is not to exceed 8.5m. 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.

I note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* where at paragraphs 73 and 74 O'Neill C found:

> *73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.*
>
> *74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.*

The building breaches the building height standard to a varying extent as the site falls away towards its Fairlight beach frontage. The southern façade of the building breaches the standard by between 5050mm (59%) and 3800mm (44.7%) as depicted on the building height blanket diagrams over page.

Figure 1: Building height plane diagram depicting the elements of the proposal exceeding the 8.5m building height standard as viewed from the harbour

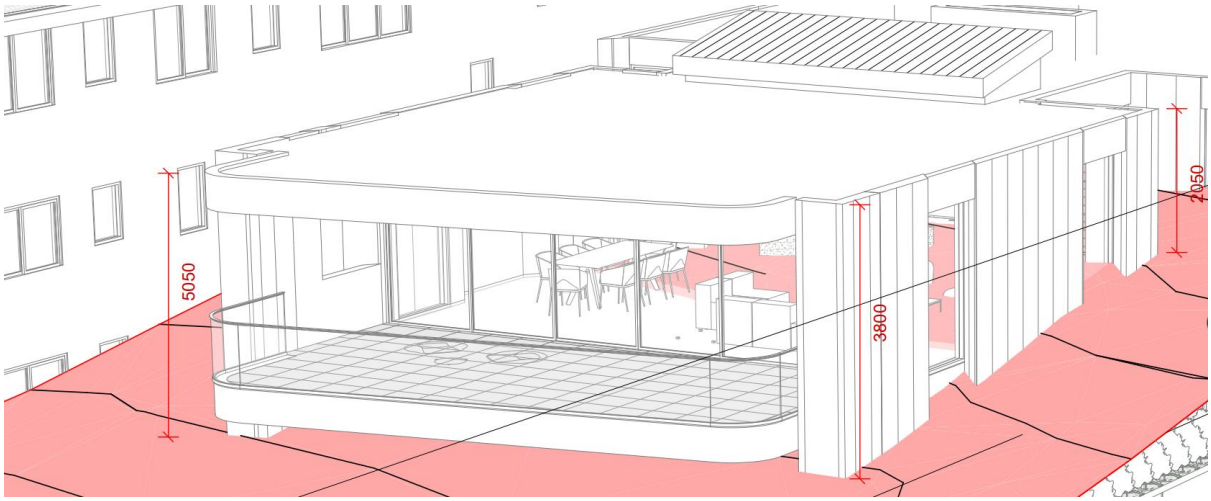

Figure 2: Building height plane diagram depicting the elements of the proposal exceeding the 8.5m building height standard as viewed from the harbour

The northern street facing façade is compliant with the height standard and sits below the standard by between 50mm (0.05%) and 419mm (4.9%) as depicted on the building height blanket diagram below.

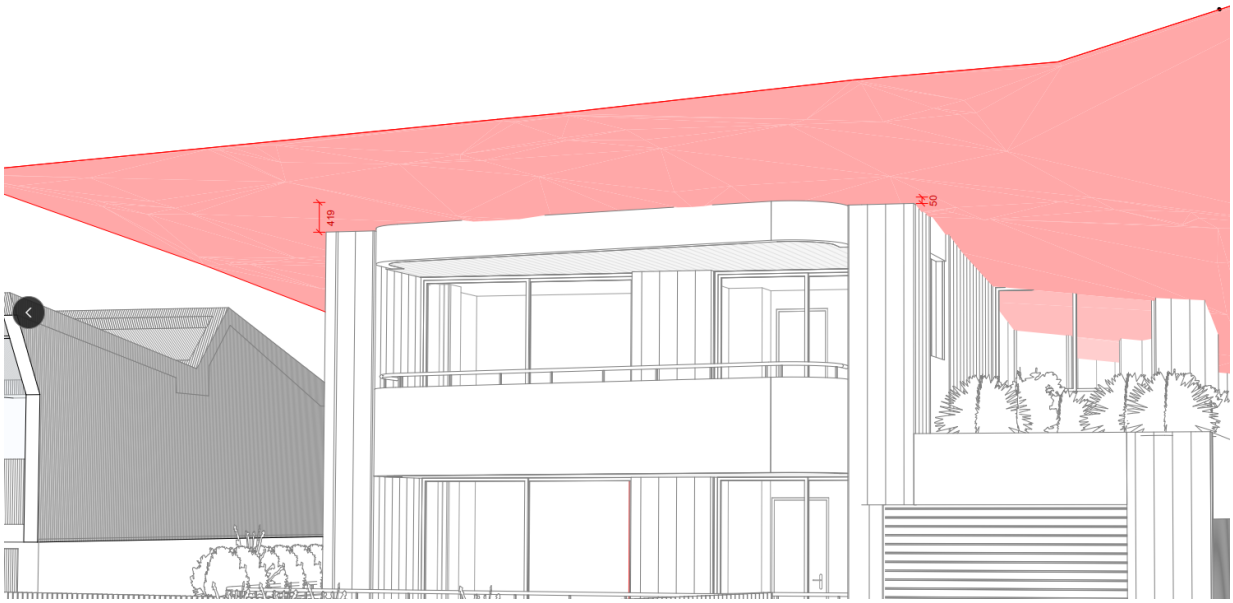

Figure 3: Building height plane diagram showing compliance with the 8.5m building height standard as viewed from the street

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 8.5m. 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, specific to the site and to its own context, to justify contravening the development standard.

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

1.3 Relevant Case Law

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

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

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

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

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

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

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

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

1. Is clause 4.3 of 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

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 building height of the proposed development is consistent with that of surrounding development and development within the visual catchment of the site. The roof form has been designed to minimise impacts upon harbour views obtained by properties upslope whilst maximising solar access into the units proposed. In this regard, the roof form of the proposed development is considered to achieve a balance between the pitched and skillion roof forms of the surrounding buildings and the flat roof forms of more contemporary buildings in the wider catchment.

The proposed development has a 2 storey presentation to Lauderdale Avenue and maintains a complimentary, compatible and compliant 8.5 metre street wall height consistent with the street wall height established by the 2 immediately adjoining buildings as depicted in Figure 4.

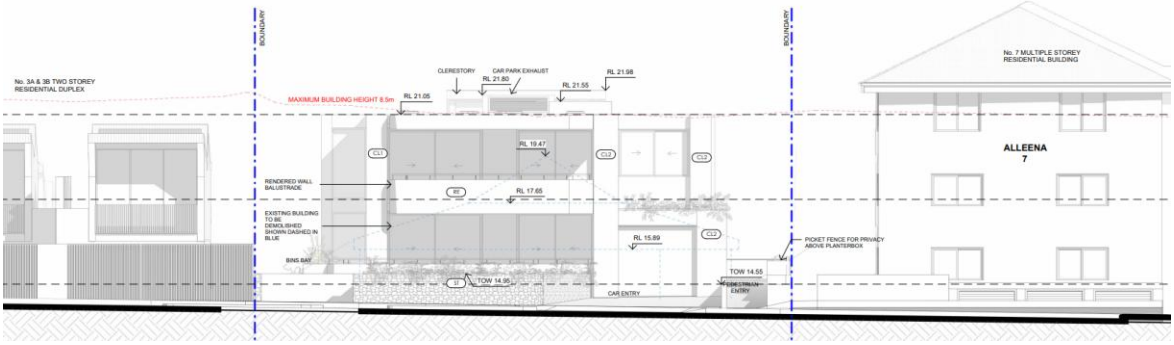

Figure 4: *Plan extract street elevation*

The subject property falls approximately 6.8 metres across its surface within the proposed building footprint resulting in a 4 storey built form presentation as viewed from the adjacent foreshore reserve. The southern façade building height and presentation is complimentary and compatible with that established by the 2 immediately adjoining properties and entirely consistent with the built form characteristics established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east as depicted in the following images.

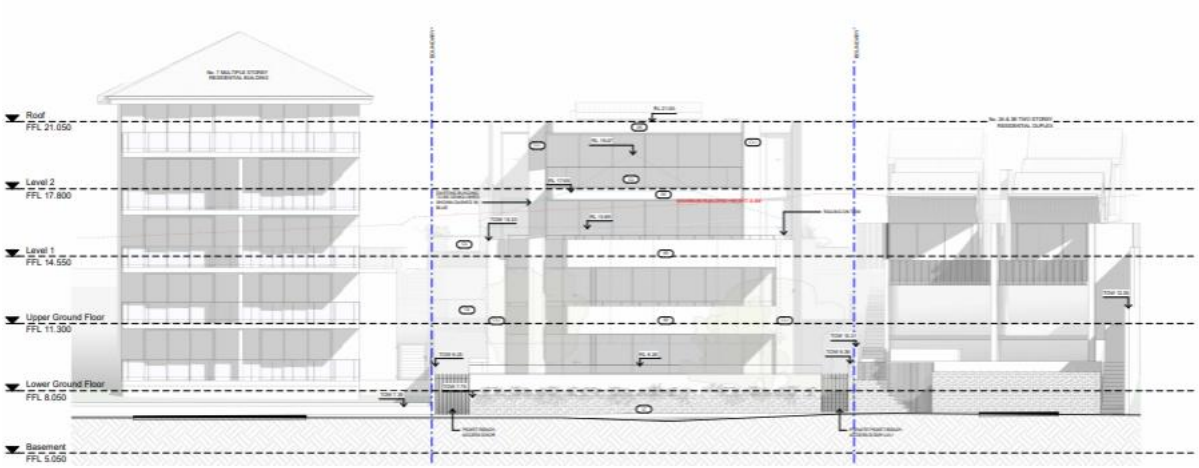

Figure 5: *Plan extract foreshore fronting elevation*

Figure 6: *Photomontage showing the built form relationship of the proposal to the foreshore and its immediate built form context*

Accordingly, the portion of the development that exceeds the height standard is consistent with prevailing building heights, including when viewed from the foreshore and Harbour, as seen in Figure 6. Further, the development is consistent with the desired streetscape character, with a 2 storey compliant height presentation to Lauderdale Avenue. This objective is achieved notwithstanding the building height breaching elements proposed.

Further, in relation to 'desired future character', this clause 4.6 request acknowledges and relies upon the Land and Environment Court's ruling in the matter of *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [42] –[44]:

> "The desired future character of any area cannot be determined by the applicable development standards for height and FSR alone…The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character. Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map.
>
> As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development.

All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (see *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (*SJD DB2*) at [62]-[63]).

For these reasons, the desired future character of an area is not defined and fixed by the development standards that determine the building envelope for a site. Development standards that determine building envelopes for a locality can only contribute to shaping the character of that locality (*SJD DB2* at [53]-[54] and [59]-[60]).

In this instance, the desired future character incorporates the built form that is within the same visual catchment of the subject site. The proposed development is 'consistent with' that character, as detailed above. The objective is therefore met.

(b) to control the bulk and scale of buildings,

Comment: The proposed development is well articulated with a 2 storey presentation to Lauderdale Avenue. To the extent that the building height breaching elements contribute to building bulk and scale the breaching elements do not contribute to unacceptable streetscape outcomes nor unacceptable physical impacts on surrounding development in terms of views, overshadowing or privacy.

As depicted in Figure 6, the non-compliant building height breaching elements do not contribute to bulk and scale to the extent that the proposal will be perceived as being entirely consistent with the built form characteristics established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east as depicted in the following images.

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 to the extent that the building height breaching elements contribute to the overall bulk and scale the building that most observers would not find the bulk and scale of the proposed development 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.

This objective is achieved notwithstanding the building height breaching elements 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:

The application is supported by a detailed Visual Impact Assessment prepared by Bonus + Associates, which demonstrates that the impacts to views currently enjoyed by adjoining properties and properties upslope to the north of the site are negligible to moderate and reasonable. This clause 4.6 variation request adopts and relies upon the findings of that Visual Impact Assessment.

Whilst portions of the proposed development protrude beyond the height standard for the reasons previously outlined within the document, the proposal achieves a contextually appropriate outcome for the subject site together with a view sharing outcome. The proposal has been designed to minimise impact on public and private views and to that extent this objective is achieved notwithstanding the building height breaching elements.

(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: Whilst the accompanying view from the sun diagrams prepared by Platform Architects demonstrate that the non-compliant building height elements contribute to overshadowing of the adjacent foreshore area, such shadowing is not considered excessive or unreasonable in the context of the shadows cast by other development along this section of Lauderdale Avenue having frontage to the foreshore area. That is, adequate sunlight access is maintained to the adjacent public open space areas. The objective requires 'adequate' solar access, and this is achieved, consistent with other neighbouring foreshore developments.

Clause 3.4.1.1 of MDCP 2013 prescribes that new development must not eliminate more than one-third of the existing sunlight accessing the private open space of adjacent properties between 9am and 3pm in midwinter. Further, clause 3.4.1.2 prescribes that the level of solar access presently enjoyed must be maintained to windows or glazed doors of living rooms for at least 4 hours between 9am and 3pm in midwinter. We note that these controls apply to dwelling houses including the adjoining semi-detached dwellings at 3A and 3B Lauderdale Avenue to the east of the site.

The solar access provisions applicable to the residential flat building at 7 Lauderdale Avenue clause 4A of the ADG whereby at least 70% of apartments in a residential flat building shall receive minimum of two hours direct sunlight between 9am and 3pm on 21 June to living rooms and private open space areas.

The view from the sun diagrams prepared by Platform Architects clearly demonstrate that existing compliant levels of solar access will continue to be received to the living areas and open space areas of 3A and 3B Lauderdale Avenue between 9am and 2pm with relatively minor overshadowing occurring to the immediately adjoining dwelling house between 2pm and 3pm on 21 June.

In relation to shadowing impacts to the adjacent residential flat building at 7 Lauderdale Avenue the view from the sun diagrams demonstrate that at least 70% of apartments in the residential flat building will continue to receive a minimum of 2 hours direct sunlight between 9am and 3pm on 21 June to living rooms and private open space areas.

In this regard, it can be demonstrated that notwithstanding the building height breaching elements the proposal maintains adequate sunlight access to the public and private open spaces and to the habitable rooms of adjacent dwellings.

This objective is achieved notwithstanding the building height breaching elements proposed.

(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: The subject property is zoned C4 Environmental Living and to the extent that such zoning is considered to be an environmental protection zone I am of the opinion that the building height breaching elements do not contribute to height and bulk to the extent that they can be directly attributed to adverse impacts on existing vegetation and topography nor do the breaching elements conflict with bushland and surrounding land uses.

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 compatible and responsive building form and design

Despite non-compliance with the 8.5m building height development standard, the proposed development is consistent and compatible with the height of adjoining buildings and other waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east as depicted in the following images.

Figure 7: *Photograph showing the built form characteristics of development within the site's visual catchment.*

Figure 8: *Aerial photograph of subject property and its immediate built form context*

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 Lauderdale Avenue 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 – Topography

The subject property falls approximately 6.8 metres across its surface within the proposed building footprint resulting in a 4 storey built form presentation as viewed from the adjacent foreshore reserve. The southern façade building height and presentation is complimentary and compatible with that established by the 2 immediately adjoining properties and entirely consistent with the built form characteristics established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east

Ground 3 - Objectives of the Act

Allowing for the height breach in response to the topography of the site is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act, which seeks to 'promote' such development. The height variation also contributes to and facilitates housing supply at a time where there is a clear public and social benefit in the delivery of more housing in appropriately zoned locations in new South Wales.

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

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 opinion that there is no statutory or environmental planning impediment to the granting of a building height variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

ANNEXURE 2

CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO

2 Clause 4.6 variation request - Floor space ratio

2.1 Introduction

This clause 4.6 variation has been prepared having regard to key Land and Environment Court judgements including 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, and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

It is important to note at the outset that clause 4.6 of the LEP "is as much a part of [the LEP] as the clauses with development standards. **Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome**." (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

2.2 Manly Local Environmental Plan 2013 (MLEP 2013)

2.2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of MLEP 2013, the floor space ratio of development on the subject land is not to exceed 0.6:1. The objectives of this control are as follows:

(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 business zones 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.

In accordance with the provisions of clause 4.5(2) of MLEP 2013, floor space ratio is defined as follows:

*The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

The proposed development has a gross floor area of 1056.33m² and a floor space ratio of 1.07:1 resulting in non-compliance with the FSR development standard prescribed by clause 4.4 of MLEP 2013 of 468.33m² or 79.6%.

2.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

> *The objectives of this clause are:*
>
> *(c) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
>
> *(d) 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 floor space ratio development standard in clause 4.4 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:*

(c) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(d) that there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development does not comply with the floor space ratio development standard at clause 4.4 of MLEP 2013 which specifies a maximum floor space ratio of 0.60:1. 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.

2.3 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:

3. Is clause 4.4 of MLEP 2013 a development standard?

4. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (c) compliance is unreasonable or unnecessary; and

   (d) there are sufficient environmental planning grounds to justify contravening the development standard

2.4 Request for variation

2.4.1 Is clause 4.4 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:

(d) the cubic content or floor space of a building,

Clause 4.4 of MLEP 2013 prescribes a bulk and scale provision that seeks to control the floor space ratio of certain development. Accordingly, clause 4.4 of MLEP 2013 is a development standard.

2.4.2 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. The fourth approach is also relevant having regard to the FSR established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east.

In this regard it is evident 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/ or have resulted in existing residential flat buildings displaying an FSR well in excess of the contemporary standard to the extent that compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47]. For the purposes of this clause 4.6 request, it is sufficient to say that the control has been virtually abandoned or destroyed only in this specific locality, being within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east, as generally shown in **Figure 5** (further below).

Informing this opinion, the proposition that an existing residential flat building (especially once strata subdivided) with non-compliant FSR would ever be demolished and replaced with a smaller building with compliant FSR is unrealistic with the existing built form characteristics established by development within the street block establishing the likely future character of the area.

Consistency with objectives of the floor space ratio development standard

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

(a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Comment: The bulk and scale of waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east and within the C4 Environmental Living zone is depicted in the following images.

Figure 1: *Photograph showing the built form characteristics of development within the sites visual catchment.*

Figure 2: *Aerial photograph of subject property and its immediate built form context*

The proposed development has a 2 storey compliant height presentation to Lauderdale Avenue. The proposed development has a front setback that aligns with neighbouring buildings with generous setbacks to both side boundaries that allow for the enhancement of landscaping across the site. The proposed development exceeds the minimum total open space and landscaped area requirements of MDCP 2013, despite the less onerous provisions of the ADG.

As evident in the photomontage and perspective image over page the proposed development, by virtue of its height bulk and scale, is **entirely consistent with** the existing character of Lauderdale Avenue., and when viewed from the foreshore and Harbour, and non-compliance with the floor space ratio development standard does not detract from consistency with the likely future/ desired streetscape character noting that all relevant streetscape character and built form controls of MDCP 2013 are nonetheless achieved. This objective is achieved notwithstanding the FSR variation proposed.

Figure 3: *Photomontage showing the proposed development within the sites visual catchment.*

Figure 4: *Photomontage streetscape image showing the proposed development within its streetscape context*

Further, in relation to 'desired future character', this clause 4.6 request acknowledges and relies upon the Land and Environment Court's ruling in the matter of *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [42] –[44]:

> "The desired future character of any area cannot be determined by the applicable development standards for height and FSR alone…The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character.
>
> Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map. As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development.
>
> All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (see *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (*SJD DB2*) at [62]-[63]).
>
> For these reasons, the desired future character of an area is not defined and fixed by the development standards that determine the building envelope for a site. Development standards that determine building envelopes for a locality can only contribute to shaping the character of that locality (*SJD DB2* at [53]-[54] and [59]-[60])."

In this instance, the desired future character incorporates the built form that is within the same visual catchment of the subject site. The proposed development is 'consistent with' that character, as detailed above. The objective is therefore met.

The bulk and scale of development is consistent with the existing and desired/ likely future streetscape character and accordingly this objective is achieved notwithstanding the FSR non-compliance proposed.

(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,*

Comment: The height of the proposal presenting to Fairlight Street has been limited to 2 storeys compliant with the 8.5 metre building height standard.

The application is supported by a detailed Visual Impact Assessment prepared by Bonus + Associates, which demonstrates that the impacts to views currently enjoyed by adjoining properties and properties upslope to the north of the site are negligible to moderate and reasonable.

Having inspected the site and its immediate surrounds to identify important landscape and townscape features I am satisfied that the non-compliant components of the development do not obscure any identified important landscape and townscape features including the heritage listed foreshore reserve and the adjacent rock pool.

This objective is achieved notwithstanding the building height breaching elements proposed.

(c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Comment: Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development, in particular the non-compliant building floor space ratio, offensive, jarring or unsympathetic in a streetscape context or as viewed from the waterway, as demonstrated in the montages provided to support the application. To the contrary, the proposed development is visually compatible with the existing streetscape of Lauderdale Avenue and development within the site's visual catchment, including when viewed from the foreshore and Harbour, as can be seen in Figures 3 and 4 (above).

Furthermore, despite non-compliance with the maximum FSR prescribed, the proposed development achieves consistency with the total open space and landscaped area controls of MDCP 2013, enabling the provision of a high-quality landscaped outcome for the site.

This objective is achieved notwithstanding the non-compliant FSR proposed.

(d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*

Comment: The proposed development does not result in any unreasonable impacts upon neighbouring properties with regards to overshadowing, visual or acoustic privacy. In this regard, I rely on the shadow diagrams prepared by Platform Architects and the detailed Visual Impact Assessment prepared by Bonus + Associates. The proposed built form is highly articulated, by virtue of recessed elements, varied setbacks, building separation, differing materials and landscaping, and will not be overly dominant as seen from the street, the waterway or adjoining properties. The non-compliant FSR does not detract from consistency with this objective.

(e) to provide for the viability of business zones 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.

Comment: Not Applicable.

Having regard to the above, the non-compliant building in terms of FSR 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 FSR standard. Given the development's consistency with the objectives of the FSR standard adopting the first approach in Wehbe strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Further, an analysis as to the FSR established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east at Figure 5 below demonstrates that in accordance with the first approach in Wehbe 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.

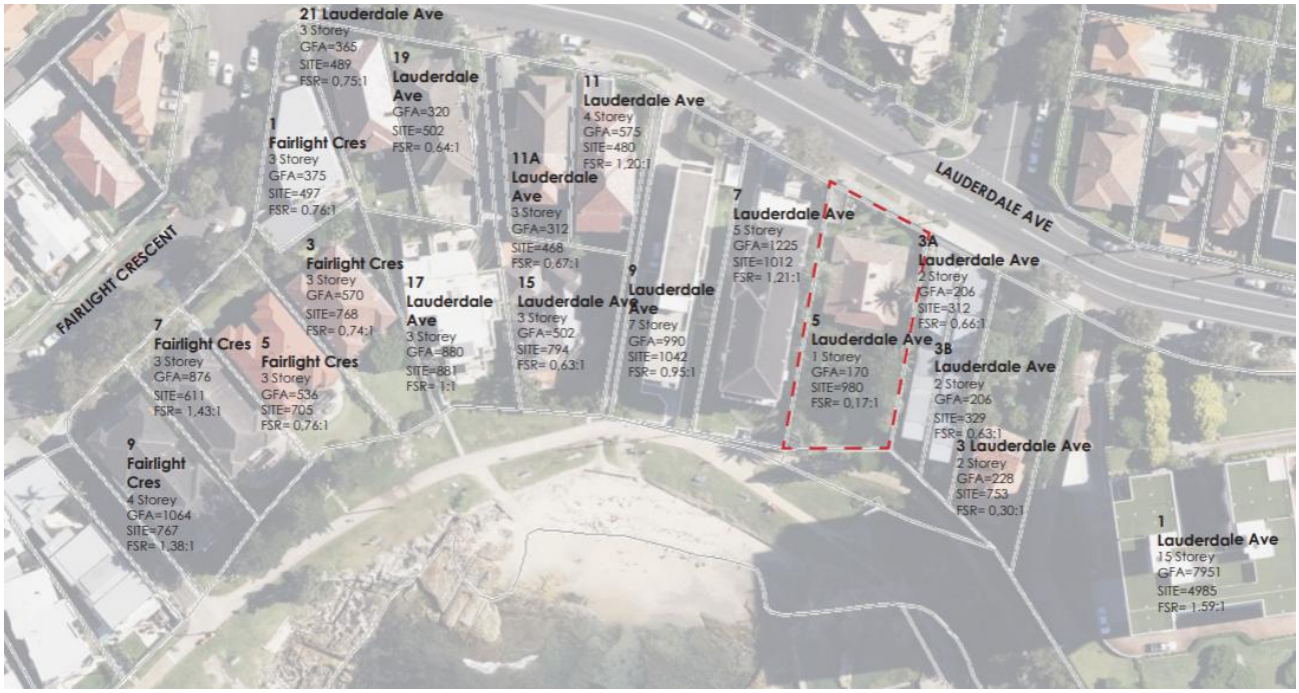

Figure 5: *Analysis of FSR established by waterfront development within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east*

In this regard it is evident 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/ or have resulted in existing residential flat buildings displaying an FSR well in excess of the contemporary standard to the extent that in accordance with the fourth approach in Wehbe compliance with the standard is unreasonable.

Again, for the purposes of this clause 4.6 variation request, it is it is sufficient to say that the control has been virtually abandoned or destroyed only in this specific locality, being within the street block between Fairlight Crescent/ Arlington Drive to the west and Margarett Street to the east, as generally shown in Figure 5 (above). Area-specific or limited abandonment of controls is a matter that has been accepted by the land and Environment Court on numerous occasions, for example:

- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (12 March 2020) where the FSR control was held to have been abandoned in a specific area of Double Bay, as follows: "*The abandonment is confined to this block of Cross Street on the southern side. That much is plain from the approvals and the configuration and uses in Cross Street between Bay Street and Knox Lane."*
- *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 the Court held that the height control had been abandoned in one part of a locality only, as follows:

  "Wehbe test 4", is that the development standard has virtually been abandoned by the Council's own actions in departing from the standard. I accept that the request demonstrates that this is what has occurred ***west of the site along Weyland Street, and on the site to the north east*** *where the Council not only approved a 6-storey development that breached the height control but also required a communal open roof space to be constructed on part of the otherwise non-trafficable roof as a condition of development consent.* ***In circumstances where the Council has not applied the standard to adjacent sites, and has twice varied the standard*** *to allow additional height to accommodate a 6th storey and a roof terrace, and there has been no change to the controls or the standard, it would be unreasonable to require compliance with the standard on this site".*

2.4.3 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 compatible and responsive building form and design

The bulk and scale of the proposal as reflected by FSR is compatible with the bulk and scale established by development within the site's visual catchment. Consistent with the findings of O'Neill C in the matter of *30 Fairlight Pty Limited v Northern Beaches Council [2022] NSWLEC 1615* the proposal's compatibility with the existing bulk and scale of the built form in the context of the site was properly described as an environmental planning ground within the meaning identified by his Honour in Initial Action at [23].

Ground 2 - Topography of the site

The topography of the site facilitates the provision of approximately 80.78m² of GFA floor space predominantly below ground level (existing) where it does not contribute to actual or perceived above ground bulk and scale. Accordingly, the extent of non-compliance as it relates to above ground GFA is only 387.55m² representing a variation of 69%.

Ground 3 - Objectives of the Act.

The apparent size of the proposed development will be compatible with the existing streetscape of Lauderdale Avenue which features a number of buildings of significantly greater bulk and scale, both when viewed from the street and from the foreshore and Harbour. The building is of exceptional design quality with the variation facilitating a floor space that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act.

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

2.5 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:

(c) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(d) that there are sufficient environmental planning grounds to justify contravening the development standard.

As such, I have formed the 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

B Urb & Reg Plan (UNE) MPIA

Director