

**Clause 4.6 Variation Request to the
Height of Buildings Development Standard under
Clause 4.3 of Pittwater LEP 2014**

**Shop top Housing comprising
2 retail shops, and 8 residential apartments**

1 Bilambee Lane, Bilgola Plateau

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Dated: 19 October, 2020



2 The Relevant LEP Provisions

1.1 Commission

JVUrban Pty Ltd has been commissioned by the Applicant to prepare a written request ('Variation Request') pursuant to cl4.6 of *Pittwater Local Environmental Plan 2014* (the LEP) in respect of a proposed development for shop top housing development comprising ground floor retail and eight (8) residential apartments, at 1 Bilambee Lane, Bilgola Plateau (the Site).

The Proposal is described in detail in Section 3 of the Statement of Environmental Effects (SEE) prepared by *JVUrban Pty Ltd* and generally comprises construction of shop top housing above two basement levels containing car parking and services.

The Proposal exceeds the 8.5m maximum Height of Buildings (HOB) development standard under cl4.3 of the PLEP having a maximum building height of RL153m AHD to the top of the lift overrun and plant screen. The general roof level is RL151.55m AHD or 11.2m above existing ground level.

Notwithstanding the contravention of the development standard, the development is considered to be consistent with the objectives of the development standard and the objectives of the zone within which the development is to be carried out. There are sufficient environmental planning grounds to justify the contravention in this instance including the lack of adverse amenity impacts and positive social and economic considerations as a result of the development.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the HOB development standard.

1.2 Material Relied Upon

This Variation Request has been prepared based on the Architectural Drawings prepared by Benson McCormack Architecture, Project No. 2012A.

This Variation Request should be read in conjunction with the detailed environmental planning assessments contained in the DA documentation submitted with the DA and documents appended thereto.

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2.1 Pittwater Local Environmental Plan 2014

2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map of the LEP provide that the entire Site is zoned B1 Neighbour Centre Zone and the Land Use Table in Part 2 of the LEP specifies the objectives of this zone as follows:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*
- *To provide healthy, attractive, vibrant and safe neighbourhood centres.*

The proposed land use is defined as a shop top housing which is permissible with development consent in the B1 Zone pursuant to the PLEP 2014.

2.1.2 Clause 4.3 – Height of Buildings (HOB)

Clause 4.3 of the PLEP 2014 sets out the HOB development standard as follows:

“(1) The objectives of this clause are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) to minimise any overshadowing of neighbouring properties,*
- (d) to allow for the reasonable sharing of views,*
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.”*

The Height of Buildings Map designates a maximum 8.5m height limit for the Site (see **Figure 1**).

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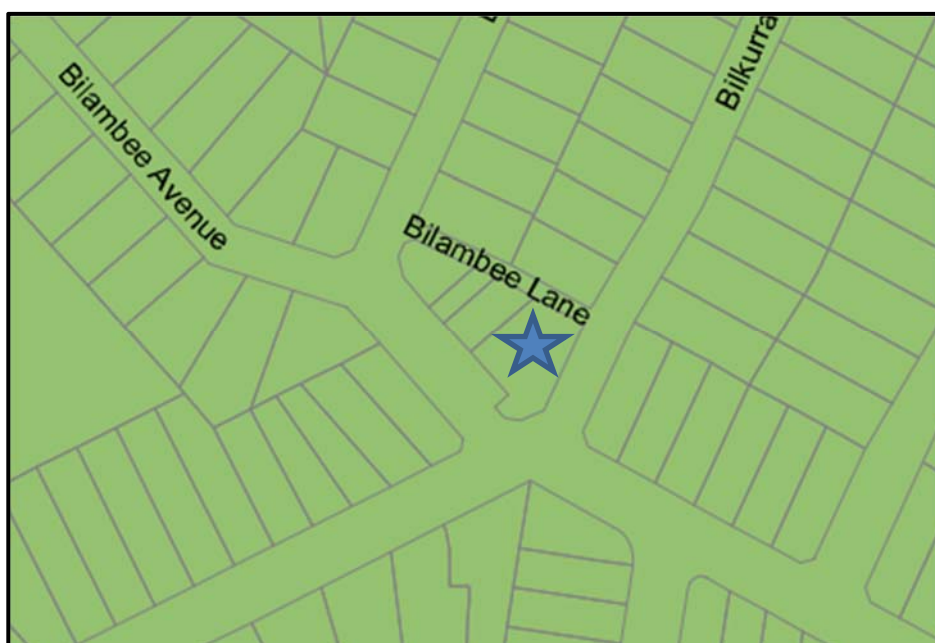


Figure 1: Extract of PLEP 2014 Map (HOB_16)

The PLEP Dictionary contains the following definitions:

Height of Buildings Map means the Pittwater Local Environmental Plan 2014 Height of Buildings Map.

building height (or height of building) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.

2.1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of the LEP states the objectives of the clause as follows:

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

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) (see Section 4.7), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives for the consent authority to be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

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Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument.

Clause 4.6(2) provides that:

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

The HOB development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the HOB development standard pursuant to cl4.3 of the PLEP 2014. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in Section 5.1.

In addition, there are considered to be sufficient environmental planning grounds to justify contravening the development standard as detailed in Section 5.2.2.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

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

Sections 5.2 and 5.3 of this written request address the matters required under cl4.6(4)(a) of the LEP and Section 5.4 addresses cl4.6(4)(b).

Clause 4.6(5) provides that:

- (5) *In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

Section 5.5 of this written request addresses the matters required under cl4.6(5) of the LEP.

Clauses 4.6(6) and (8) are not relevant to the proposed development and cl4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

The proposed shop top housing development will result in a maximum height (to the top of the roof plant screen) above existing ground level of 11.20m, constituting a non-compliance of up to 2.70m. The following **Figure 2**, **Figure 3** and **Figure 4** show the 8.5m LEP height line across the section plans of the building and the view of the building from the primary corner location.

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Figure 2: Extract of Section AA plan showing LEP 8.5m height line (Source: Benson McCormack Architecture, Project No. 2012A)



Figure 3: Extract of Section BB plan showing LEP 8.5m height line (Source: Benson McCormack Architecture, Project No. 2012A)

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Figure 4: 3D view of proposed looking from Plateau Road, with Bilkurra Avenue on right (Source: Benson McCormack Architecture, Project No. 2012A)

4.1 Introduction

The proposed variation to the development standard has been considered in light of the evolving methodology and “tests” established by the NSW Land & Environment Court (the Court) and the following subsections provide a brief summary of key Judgments in regard to variations under the former SEPP 1 and cl4.6 of the SILEP.

4.2 *Winten Developments Pty Ltd v North Sydney Council* [2001]

Through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 (“Winten”) the Court established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. The elements of this test can be summarised as:

- Is the planning control a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?
- Is the objection well founded?

The 1st ‘test’ continues to be relevant and is a precondition for the application of cl4.6 – see Section 5.1.

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The 2nd ‘test’ is required to be demonstrated under cl4.6(4)(a)(ii) – see Section 5.2.1.

The 3rd ‘test’ was specific to cl3 of SEPP 1 and has not been transferred to cl4.6 of the SILEP. Notwithstanding, in Initial Action (see below), Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act – see Section 5.2.2.

The 4th ‘test’ is required to be demonstrated under cl4.6(3)(a) - see Section 5.1. The 5th ‘test’ is analogous to cl4.6(4)(a) – see Section 5.3.

4.3 **Wehbe v Pittwater Council [2007]**

The 5-part test under Winten was later supplemented by the Judgment in *Wehbe v Pittwater Council [2007] LEC 827* (“Wehbe”) where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of SEPP 1. These included:

1. Notwithstanding the non-compliance, is the proposal consistent with the relevant environmental or planning objectives?
2. Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary?
3. Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable?
4. Has the development standard been virtually abandoned or destroyed by the consent authority’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?
5. Is the zoning of the particular land unreasonable or inappropriate such that the development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and therefore, compliance with the standard would be unreasonable or unnecessary?

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4.4 **Four2Five Pty Ltd v Ashfield Council [2015]**

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (“Four2Five”) Pearson C expanded on the earlier Judgments of Winten and Wehbe, indicating that whilst consistency with zoning and standard objectives of the development standard is addressed specifically in cl4.6(4)(a)(ii), there remains an onus of also demonstrating that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

The environmental planning grounds that support the proposed variation to the HOB development standard in this circumstance are detailed in Section 5.2.2 of this variation request.

4.5 **Randwick City Council v Micaul Holdings Pty Ltd [2016]**

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* (‘Micaul’) Preston CJ made it clear that development consent cannot be granted for a development that contravenes a development standard unless the consent authority:

- (a) has considered a written cl 4.6 objection seeking to vary the development standard as required by cl4.6(3) of the SILEP;
- (b) is satisfied that the cl4.6 objections adequately addressed the matters required to be demonstrated by cl4.6(3) (as required by cl4.6(4)(a)(i));
- (c) is satisfied that the 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 as required by cl4.6(4)(a)(ii).

In addition, Preston CJ elucidated that the consent authority does not have to be directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case – only that it be indirectly satisfied that the applicant’s written request adequately addresses the matters in cl4.6(3) that compliance with the development standard is unreasonable or unnecessary.

Furthermore, Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

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4.6 **Moskovich v Waverley Council [2016]**

Providing further guidance on the interpretation of cl4.6 compared to its predecessor SEPP 1, the Judgment in *Moskovich v Waverley Council [2016] NSWLEC 1015* ('Moskovich') outlines that cl4.6(3)(a) is similar to cl 6 of SEPP 1 and the ways of establishing that contravention of a development standard is well founded expressed in *Wehbe* (e.g. "achieving" the objectives of the development standard) are equally appropriate for the consideration of cl4.6(3)(a).

However, cl4.6(4)(a)(ii) has different wording to SEPP 1 and requires the consent authority to be satisfied that the proposed development is in the public interest because it is "consistent" with objectives of the development standard and objectives for the zone rather than "achieving" the objectives. Consequently, the considerations of cl4.6(3)(a) and cl4.6(4)(a)(ii) are different with the achievement test being more onerous and requiring justification in 'ways' such as those expressed in *Wehbe*.

The methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to cl 4.6 with minor areas of differing interpretation.

4.7 **Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118**

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action'), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and of the standard.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a "test" that a development which contravenes a development standard results in a "better environmental planning outcome" relative to a development that complies with the development standard. In fact, there is no provision in SILEP that gives substantive effect to the objectives of cl4.6 stated in cl4.6(1)(a) and (b). That is to say, neither cl4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".

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Further, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

4.8 Summary of the Case Law Methodology and Tests

The collective methodology and tests described above has been applied to the assessment at Section 5 and can be summarised in the following steps:

1. Step 1 - Is the planning control that the applicant seeks to contravene a development standard?
2. Step 2 - Is the consent authority satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required by cl 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. Step 3 - Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out?
4. Step 4 - Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Step 5 - Where the consent authority is the Court, has the Court considered the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

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5.1 Step 1 - Is the planning control a development standard?

This question is the 1st 'test' in Winten. The HOB control in cl4.3 of the PLEP 2014 is a development standard, defined in Section 1.4 of the EP&A Act as follows:

“development standards means provisions 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”

The development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted pursuant to cl4.6.

5.2 Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

To demonstrate that compliance with the height of buildings development standard is unreasonable or unnecessary, this written request relies upon:

1. The 2nd 'test' in Winten and the 1st and 2nd 'ways' in Wehbe – i.e. the underlying objectives or purpose of the standard is satisfied or the objectives are not relevant; and
2. The 4th 'way' in Wehbe - the development standard has been virtually abandoned or destroyed by the consent authority's own actions.

The underlying objectives or purpose of the standard

Clause 4.3(1) of the LEP states the objectives of the HOB development standard as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (c) to minimise any overshadowing of neighbouring properties,*
- (d) to allow for the reasonable sharing of views,*
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,*
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

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Objective (a) is to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

Pittwater 21 DCP contains Section D Locality Specific Development Controls. Part D3 Bilgola Locality. The Bilgola Desired Future Character is described as:

“The Bilgola locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.”

The subject site and Bilgola Plateau Neighbourhood Centre are located within the Plateau Area (as identified in Bilgola Locality Map 2 of the DCP). It states the Plateau Area:

“Will provide for some dual occupancies, on land that does not have tree canopy coverage, species and habitat diversity, or other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.”

The desired future character of the Bilgola Locality is focused on its continued role as a residential area, primarily represented by a low-density residential typology with associated local services and infrastructure that support the local community. While it can be argued that a vehicle servicing centre supports the local community, it does not provide a sense of place or social meeting ground for the local community. The buildings are old, tired and generally at the end of their lifecycle. Only a portion of the community would use the service centre. The proposal on the other hand will provide the community with a local meeting place - a place for the whole community, no matter the age, stature or service need of the resident. An activated neighbourhood centre will appeal to a broad range of the community. The inclusion of the residential units on the upper levels will provide passive surveillance and sense of belonging to the community. This is consistent with the function of a modern day neighbourhood centre.

The height and scale of the development, in the context of its location and function within the Bilgola Locality is consistent and compatible with the established and likely future of character of the locality. The upper floor level is recessed and barely discernable from the

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adjoining road reserves and nearby residences. The building retains a human scale that does not dominate the prominent corner site. In this way, it is our opinion that the objective is satisfied.

Objective (b) *is to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

The existing built form of the Bilgola Plateau Neighbourhood Centre is predominantly two storey with strong alignment to the street frontages. The surrounding area, containing low density residential development predominantly two storeys with pitched roofs.

The planning principle in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 provides guidance in the assessment of compatibility. It provides inter-alia in this respect as its foundation:

*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.*

To be compatible the development should be able to be constructed with undue 'conflict' with neighbouring buildings. In this case, the upper level has increased setbacks from the boundaries, creating a significant step and articulation of the development when viewed from various ground level positions around the site, particularly from the adjoining road reserves along the two primary frontages. In each case the development appears as two-storeys (refer to elevation plans and perspectives submitted with the DA plan set which shows the public vantage points from each direction – extracts shown in **Figure 5**, **Figure 6** and **Figure 7** below). There is no undue 'conflict' created between buildings in the immediate area.

The building does not draw attention to itself beyond that reasonably expected of a mixed-use development, on a prominent corner site, within an established Neighbourhood Centre. The proposal is three storeys above street level. The development is respectful of its locational context and surrounding development. There is no attempt to emulate the design, colours or materials of the existing, tired development in the precinct, rather it presents a modern, fresh

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street appearance that is complementary to the area. It is considered that this objective is achieved by the development.

The site itself is zoned primarily for commercial purposes and hence there is an underlying expectation that it will be different from its surrounding low density residential neighbours in terms of design, form, setbacks, density, intensity, landscaping and overall appearance.

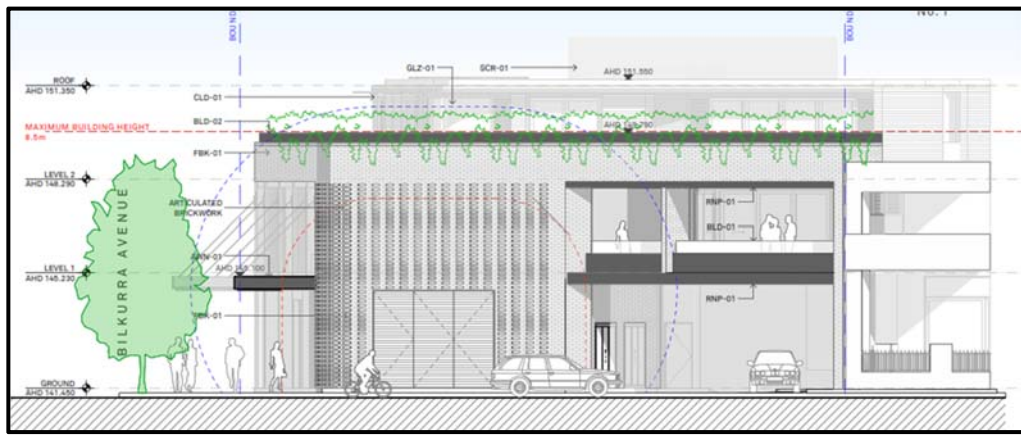


Figure 5: Extract of North Elevation showing view of development from Bilambee Lane (Source: Benson McCormack Architecture, Project No. 2012A)



Figure 6: Extract of South Elevation showing view of development from Bilambee Avenue (Source: Benson McCormack Architecture, Project No. 2012A)

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Figure 7: Extract of East Elevation showing recessed upper level and view of development from Bilkurra Avenue (Source: Benson McCormack Architecture, Project No. 2012A)

The design and layout of the building address each of these amenity considerations and achieves a development that respects the adjoining and surrounding development. The additional height does not create unreasonable adverse effects.

In terms of visual impacts, these are minimized through physical separation, setting back the upper level so as to be beyond the general line of sight and careful attention to articulation and selection materials and colours makes the building a strongly defined two storey building with recessed and benign upper level. .

Objective (c) (c) to minimise any overshadowing of neighbouring properties,

The subject site has three road reserve frontages. The primary street frontages have 15-20m wide road reserves and the rear lane is 6m. This creates an ‘island’ effect for the proposed development – providing large building separation distances to adjacent residences.

Shadow Diagrams are provided within the DA plan set (Dwg No.s DA-1030-1033.) The closest residence – No. 1 Bilkurra Avenue - is on the north-eastern side of Bilambee Lane and will not be overshadowed by the development. No. 112 Bilkurra Ave – south-eastern side of Bilkurra Avenue will only receive shadow at 3pm midwinter. The remainder of the day (between 9am – 2pm) will not be impacted. The objective is achieved.

Objective (d) is to allow for the reasonable sharing of views,

There are no significant views to, from or across the site to be considered in this case. The development is neutral in relation to this objective.

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Objective (e) is to encourage buildings that are designed to respond sensitively to the natural topography

The development site is generally flat for building purposes. There is specific topography, slope or site characteristic that need special design solutions in terms of topography. The development is neutral in relation to this objective.

Objective (f) is to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

The subject site is not heritage listed, is not located within a heritage conservation area and is not with close proximity to any locally listed heritage item. The development site does not contain any trees that contribute to the natural environment. The one existing street tree on the Bilkurra Avenue frontage is in poor form due to the power lines and is to be replaced with an additional four (4) street trees planted within the road reserve area. The development is neutral in relation to any impact on the natural environment or heritage considerations. The objective is achieved.

5.2.2 **Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard**

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

Preston J clarified in *Micaul and Initial Action*, that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As outlined in Section 5.2.1, there is considered to be a lack of adverse amenity impacts arising from the proposal's non-compliance, as it will not result in adverse overshadowing, overlooking, view, acoustic, privacy or traffic impacts.

The height variation to the upper edge of the roof top plant screen is 2.70m (above the 8.5m HOB line) and 1.35m maximum variation from the roof of the upper floor level.

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The roof top plant structure is located centrally within the building envelope – not readily discernible from ground level around the outside of the building or from the adjoining road reserves (as shown in the perspective drawings). The upper roof level of the building is set well back from each building alignment below making the upper level and variation not readily apparent or offensive on the streetscape when viewed from surrounding road network or public places or surrounding residential properties.

The consequence of strict compliance in the circumstances would necessitate the loss of an entire residential floor which would make the development economically unviable and be contrary to the Object of the Act at s1.3 which seeks to promote the orderly and economic development of the land. The success of the development is wholly dependent on the additional level (i.e the variation). See attached feasibility prepared by Dreambuild Pty Ltd. This is important in terms of the positive social and economic impacts that the overall development will have on the viability and sustainability of the neighbourhood centre, providing necessary active retail uses and additional residential population in the form of various housing mix contributing to the amenity and vitality of the area atmosphere and also providing additional security and surveillance.

The viability is the catalyst for the redevelopment of the site, allowing for the removal of the existing service centre which is an outdated eyesore with negative visual impacts on the amenity of the area. Further it will allow for the removal of a non conforming use with existing use rights and the conversion to a permissible land use consistent with the objectives of the zone and Council's strategic planning aims for the locality.

If the development is not viable, those community benefits will not be forthcoming.

The proposal is setback from the boundaries to create a generous wide verge and improved public domain and hence whilst there is an argument that some additional floor space could be accommodated at ground floor level, it would be strictly limited to retail or business premises which would generate additional traffic impacts and parking demands and additional exaction for carparking. Further the first floor could have been cantilevered to extend to the boundaries. In lieu the building is setback so as to provide greater separation and buffer to surrounding residential properties. It also allows for outdoor dining opportunities, improved connectivity of the footpath and generous landscaped areas and additional on street parking.

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Importantly also there are negligible impacts from the additional height in terms of impacts on solar access, views. Privacy or visual impact on neighbouring properties.

In summary, the contravention of the HOB development standard is considered to have positive social and economic outcomes for the Site and the locality, together with positive amenity outcomes for existing residences and businesses in the immediate area, whilst not creating any adverse impacts to an acceptable level.

5.3 Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?

As outlined in Section 5.2.1, the Proposal achieves and is therefore consistent with the relevant objectives of the height of buildings development standard.

However, the consent authority must also be satisfied that the development will be consistent with the objectives of the B1 Neighbourhood Centre Zone which are expressed in the Land Use Table to cl2.3 of the LEP as follows:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*

that serve the needs of people who live or work in the surrounding neighbourhood. The development includes 2 retail outlets – one large, one small. The floor plates are capable of further subdivision to create smaller tenancies to serve the needs of the local community. These could include butcher shop, take away food premises, restaurants; general stores, pharmacies, hairdresser/barbers; post shops, etc. The objective is satisfied.

- *To provide healthy, attractive, vibrant and safe neighbourhood centres.*

The second objective is to ensure that neighbourhood centres are healthy, attractive, vibrant and safe. The building is designed to wrap around the corner of the site, activate the ground level and provide passive surveillance of each of the road reserve frontages via the upper level units and glazed shopfronts.

5 Assessment of the Variation

The proposal seeks to develop both primary street frontages with a strong built form facing the main intersection of Bilambee and Bilkurra Avenue. Both street frontages are activated by the development, with improved pedestrian access around the corner and along the ground level frontages of the new building. This increases the passive surveillance around all areas of the site. There is a continuous awning to be provided along the two primary street frontages for the comfort of pedestrians together with an improved public domain verge and landscaping (street tree planting within landscape planters). The upper level units will provide passive surveillance in three directions (east, south and west) achieving CPTED of the area. The activated ground floor corner and outdoor dining opportunity creates a pleasant village atmosphere for interaction of residents and customers.

The site will enhance the attractiveness, viability and health of the centre, particularly in marked contrast to the existing use.

The objective is achieved.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the HOB development standard under the PLEP 2014 and the objectives of the B1 Neighbourhood Centre Zone under the PLEP 2014.

5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

As PLEP 2014 adopts cl4.6 of the SILEP and the conditions of the Notice are not relevant in this instance, the consent authority for the Proposal may assume concurrence in respect of the variation requested to the HOB development standard under the LEP.

In addition, the Court has power to grant development consent to the proposed development even though it contravenes the HOB development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

5 Assessment of the Variation

5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under s39(6) of the Court Act, the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the HOB development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in Section 5.3, the proposed contravention of the development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the Court.

6 Conclusion

The proposed development contravenes the Height of Building development standard under cl4.3 of Pittwater LEP 2014.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the reasons outlined above and in summary:

- Notwithstanding the contravention of the development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl4.3 of the PLEP 2014 and is consistent with the relevant objectives of the B1 Neighbourhood Centre Zone and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the development standard, the proposed shop top housing development will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse impacts on the amenity of the locality will be minimised to a reasonable level;
- There are direct social and economic benefits for the property owner and the local residents with new shops replacing the old, tired premises, activation of the street frontages, an attractive contemporary development, increased passive surveillance and the opportunity for small businesses in the area to occupy new, fresh and modern premises.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018. Alternatively, the Court can use its powers under s39(6) of the Court Act and be satisfied that contravention of the development standard does raise any matter of significance for State or regional environmental planning, there is no public benefit of maintaining the development standard and there are no other relevant matters required to be taken into consideration.

Accordingly, the consent authority can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.