

19.6.24

**Updated clause 4.6 variation request - Height of buildings (clause 4.3 PLEP 2014) Proposed shop top housing development No. 1102 Barrenjoey Road, Palm Beach**

**1.0 Introduction**

Pittwater Local Environmental Plan 2014 (PLEP) was amended on 26<sup>th</sup> April 2023 by State Environmental Planning Policy Amendment (Land Use Zones) (No 4) 2022. The Amending Instrument had the effect of changing the zoning of the land from B1 Neighbourhood Centre to E1 Local Centre and the adoption of additional/ amended zone objectives.

This updated clause 4.6 variation request addresses the new zoning and associated objectives and relates to Architectural plans, dated 18<sup>th</sup> June 2024, prepared by Innovate Architects.

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

**2.0 Pittwater Local Environmental Plan 2014 (PLEP)**

**2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of PLEP the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control 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.*

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.

We 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** (Merman) 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.*

An inspection of the property has revealed that ground levels across the site are highly disturbed with levels artificially modified through previous excavation activities. Applying Merman for the purpose of calculating building height ground level (existing) has been taken to be the existing disturbed ground levels across the site.

In this regard, it has been determined that the street facing dormer elements breach the 8.5 metre height of buildings standard by a maximum of 1.8 metres or 21.1% with the street facing parapet breaching the standard by a maximum of 2.65 metres or 31.1%. The clerestory windows and adjacent roof top plant enclosure breach the height standard by a maximum of 2.5 metres (29.4%) and 2.3 metres (27%) respectively. The extent of breach reduces towards the rear of the site in the location of the existing retaining wall structure where compliance with the 8.5 metre height standard is achieved. The location and extent of building height breaching elements are depicted in the 8.5 metre building height blanket diagram at Figure 1.

The size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may permit a departure from a numerical standard under clause 4.6: see *GM Architects Pty Ltd v Strathfield Council [2016] NSE:EC 1216* at [85].

In *88 Bay Street Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1369* the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In Merman, the Court granted a variation of 2.01 metres or 19% in circumstances where the proposed residential flat building was adjoined by a state heritage listed item on one side boundary and a local heritage listed on the other side boundary.



**Figure 1** – Building height blanket diagram showing the location and extent of building elements located above the 8.5 metre building height standard calculated in accordance with Merman

Based on an interpolation of original undisturbed ground levels from available survey information around the perimeter of the property it has been determined that whilst 2 of the 4 street facing dormer projections continue to breach the building height standard the balance of the development including all habitable floor space is located below the 8.5 metre building height standard as depicted in the interpolated undisturbed ground level height blanket at Figure 2 over page.



**Figure 2** – Interpolated undisturbed building height blanket diagram showing the location and extent of building elements located above the 8.5 metre building height standard.

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP provides:

(1) *The objectives of this clause are:*

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

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

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.*

*If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

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

Clause 4.6(2) of PLEP provides:

- (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.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of PLEP provides:

- (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 height of buildings provision at clause 4.3 of PLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case, and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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

Clause 4.6(4) of PLEP provides:

- (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 Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5<sup>th</sup> May 2022, attached to the Planning Circular PS 22-002 issued on 5<sup>th</sup> May 2022, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of PLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of PLEP from the operation of clause 4.6.

### **3.0 Relevant Case Law**

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

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*

19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].*
22. *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.*
23. *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 PLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 of PLEP and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of PLEP?

#### 4.0 Request for variation

##### 4.1 Is clause 4.3 of PLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

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

Clause 4.3 PLEP prescribes a building height provision which seeks to limit the height of the development. Accordingly, clause 4.3 PLEP is a development standard.

##### 4.2a Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

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

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

##### Consistency with objectives of the height of buildings standard

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

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

Response: Consistent with the observations of Commissioner O'Neill in *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [44] it is submitted that generic standards in a local environmental plan and development control plan do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. 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. 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]).

The property is located within the Palm Beach Locality. The desired future character of the locality described as:

*The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in 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.*



*Any dual occupancy dwellings will be located on the lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer 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.*

*Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.*

*Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment.*

*Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.*

*The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.*

*A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.*

*Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.*

*Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.*

*Palm Beach will remain an important link to the offshore communities.*

I note that in assessing the proposed development's consistency, in terms of its height and scale, with the desired future character of the Palm Beach Locality that consideration must also be given to the height and scale of the shop top housing development previously approved on the site by Council on 13<sup>th</sup> November 2014 pursuant to development consent N0119/14. I note that this previous application was assessed against the same Desired Future Character statement with such consent providing for the demolition of existing structures and construction of a shop top housing development comprising 3 retail tenancies, 4 residential apartments and basement parking with an overall building height of 12.75 metres. This consent was subsequently physically commenced as confirmed by Council correspondence of 6<sup>th</sup> November 2019 and to that extent its completion and occupation can occur without further approval.

An application seeking to modify this consent (Mod2021/0203) was submitted to Council on 17<sup>th</sup> May 2021 with the modifications seeking a refinement in the architectural detailing of the approved development to provide superior streetscape, residential amenity, heritage conservation and broader urban design outcomes, to enhance buildability and economic viability and to better meet the more contemporary design guidelines contained within the Apartment Design Guide (ADG) as they relate to floor to floor heights, room sizes and layouts.

This modification application was considered by the Northern Beaches Design and Sustainability Advisory Panel (DSAP) at its meeting of 24<sup>th</sup> June 2021 at which time concern was raised in relation to the proposals architectural style, appearance and relationship to the adjoining heritage listed Barrenjoey House with the conclusion that the development was unacceptable and inconsistent with the “seaside village” character anticipated by the Palm Beach Locality Statement. We note that the DSAP minutes also indicated that the same concerns were raised in relation to the previously approved and physically commenced development.

Following further discussions with Council staff in relation to the DSAP minutes and the community concerns raised following the formal notification of the application, the proponent was encouraged to withdraw the application and develop a new scheme responding to the DSAP feedback and incorporating pitched roof forms in favour of the flat roof forms approved pursuant to the existing physically commenced development consent (Development Application N0119/14). The modification application (Mod2021/0203) was subsequent withdrawn.

The plans submitted in support of this current application, to which this clause 4.6 variation request relates, have been prepared and refined in response to the feedback obtained from the DSAP and Council’s heritage, urban design and planning advisor with the height, scale and design of the development considered to be consistent with the desired character of the Palm Beach Locality the following reasons:

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement.
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.
- The provision of additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.

I also confirm that the final design detailing has been settled in consultation with Weir Phillips Heritage and Planning with the accompanying Heritage Impact Statement containing the following commentary and conclusion:

*The main roof design has been modified to read as a mansard style with dormer windows inserted as part of a third level. This reduces the visual complexity of the proposal and imparts a more appropriate scale in relation to Barrenjoey House, which follows a two-level form with dormers inset into the roof. To further minimize the perception of a third level, the design team have split the dormer on the primary bay into two forms.*

*The proposed flat roof dormer design allows the hipped roof of the proposal to remain the central element in the proposal. This differentiates the proposal from the gabled dormers at Barrenjoey House avoiding any overtly historicist reference. In addition to mitigating some of the impacts from the western sun exposure the proposed fixed sliding louvres further breaks down the scale of the dormers, to reduce their prominence in the roof plane.*

*Lowering the height of the recessed bays reduces the overall bulk of the building. Setting the bays further back from Barrenjoey Road breaks the form of the building into three distinct entities. This reduces perceived mass and length of the proposal and creates a more acceptable scale in relation to Barrenjoey House.*

*The larger public space between the site and Barrenjoey House increases the visual curtilage around the item to ensure that the view lines towards the item are preserved and its prominence along Barrenjoey Road are retained.*

*The proposed timber valances help visually humanize the scale of the square arches and soften the overall expression of the masonry building.*

*Aligning the eave line of the proposed building to the eave line of Barrenjoey House and pitching the roofline back from this point at a similarly steep pitch establishes a key reference and visual measure against of the item. This is contextually appropriate for a building adjoining a heritage item by making an obvious alignment and reinforcing the quality of the streetscape and the setting of the heritage item.*

*The design modifications developed in consultation with Northern Beaches Council now present a built form which is appropriate for the site adjoining Barrenjoey House. The proposed new building is contemporary in character but demonstrates respect for the key forms, architectural proportions and materiality of the item. The sympathetically designed modern infill supports the ongoing significance of the area as a neighbourhood precinct, will now have an acceptable impact on the Barrenjoey House.*

Accordingly, I have formed the considered opinion that, notwithstanding the building height breaching elements, the development is of exceptional design quality with the proposal appropriately responding to its immediate built form and heritage context as depicted in the perspective image at Figure 3 below. The resultant development will afford superior levels of amenity for future occupants and the community, whilst maintaining appropriate amenity to surrounding development in relation to privacy, views and solar access. The proposed development is sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement. The development will be safe from flooding hazards.



**Figure 3** – Perspective image showing the proposed development relative to its established built form context as viewed from Barrenjoey Road

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

Under such circumstances I am satisfied that, notwithstanding the building height breaching elements, the building by virtue of its height and scale is consistent with the desired character of the Palm Beach Locality and accordingly is consistent with this objective.

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

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

22 *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

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

For the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape, heritage conservation and residential amenity outcomes. The building form maintains a contextually appropriate bulk and scale as it presents to the zone boundary and the immediately adjoining dwelling house to the south of the site.

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

Further, approval of the building height variation will facilitate development which provides far superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. In forming this opinion, I note that approval of the development will facilitate the following environment, urban design, heritage conservation and public benefit outcomes:

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the “seaside village” character anticipated by the Palm Beach Locality Statement.
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.
- The provision of additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.

Importantly, the proposed development will provide an active and diverse street frontage to attract pedestrian traffic and contribute to *vibrant, diverse, and functional streets and public spaces* in accordance with the objectives of the zone.

Further, despite the numerical departure there is no undue environmental or amenity impacts to the surrounding or adjoining properties or on the public domain in terms of overshadowing, view loss, privacy impacts or heritage impacts. Accordingly, limiting the building height to compliance with the standard would not deliver any measurable environmental or amenity benefits nor would this support the objective of enabling residential development.

The superior outcome of this development as opposed to the development that could be carried out on the site under N0119/14 and in particular the manner in which it complements the adjoining heritage item, combined with the absence of meaningful adverse environmental impacts results in a development which better meets this objective.

Notwithstanding the building height breaching elements, I am satisfied that the proposal is consistent with this objective.

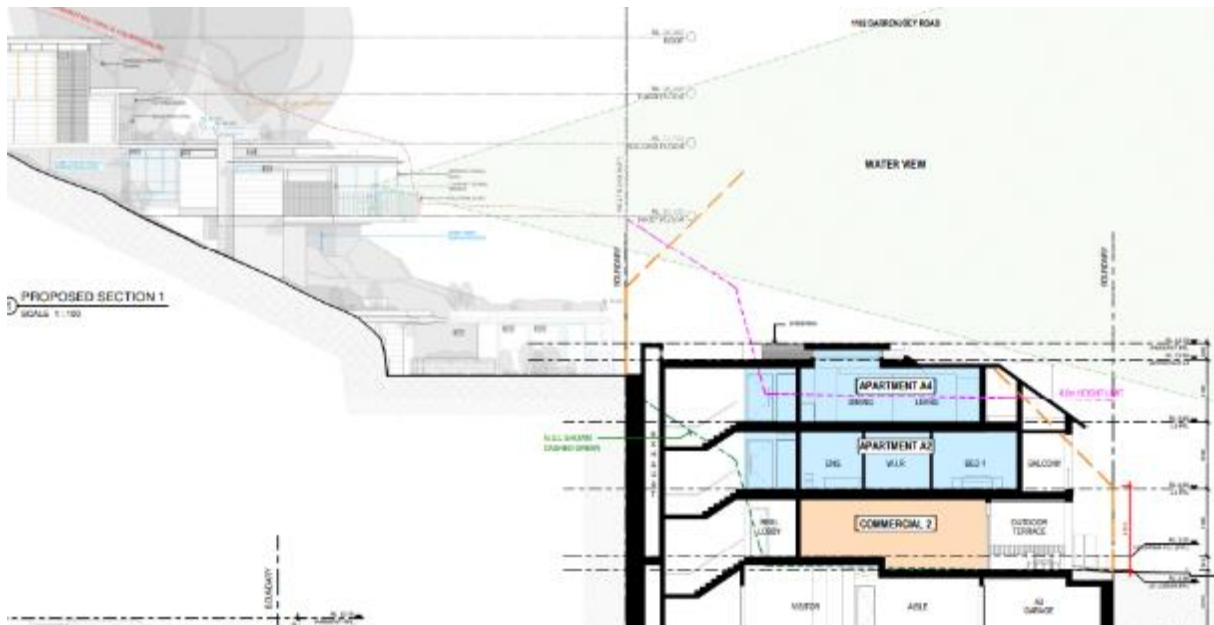
(c) to minimise any overshadowing of neighbouring properties,

Response: The shadow diagrams at Annexure 1 demonstrate that at least 3 hours of solar access will be maintained to the living areas and adjacent private open space areas of all surrounding residential properties between 9am and 3pm on 21<sup>st</sup> June with the appropriate distribution of floor space across the site minimising overshadowing of neighbouring properties.

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

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

Response: Having inspected the site and surrounds to determine available view lines we have formed the considered opinion there are no view impacts on surrounding development including but not limited to No's 138 – 144 Pacific Road to the rear of the site and No. 1100 Barrenjoey Road to the south with views retained from the properties to the rear depicted in the plan extract at Figure 4. The proposal is consistent with this objective.



**Figure 4** - Plan extract showing the maintenance of views from the adjoining residential properties to the rear

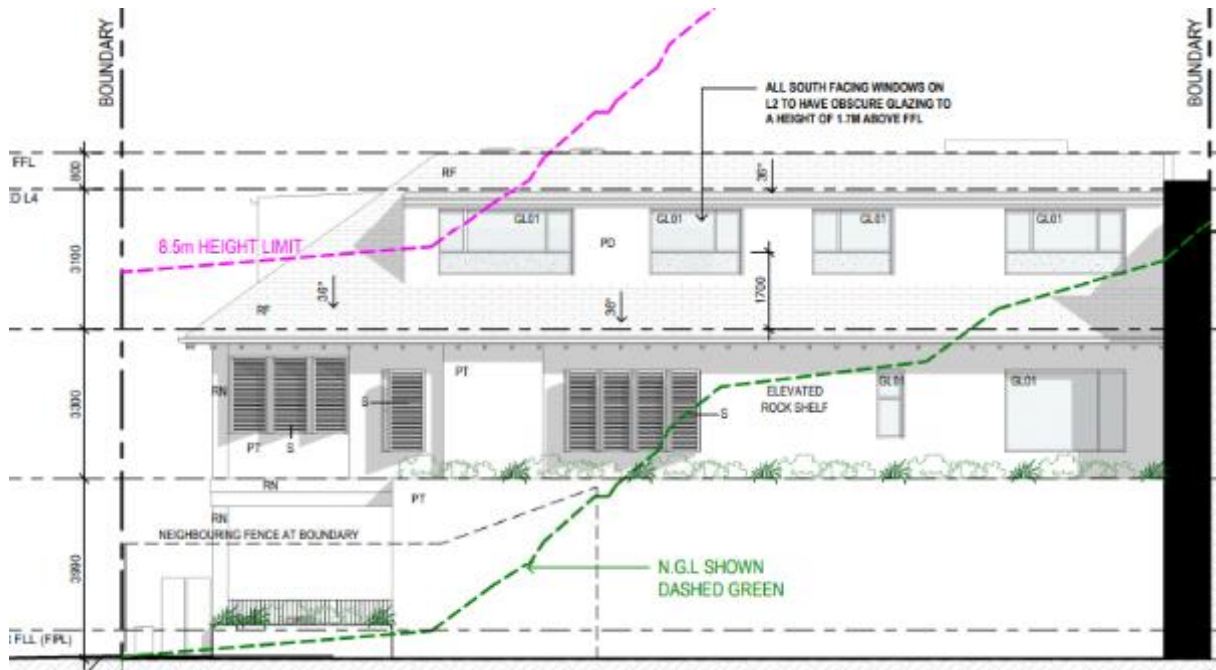
The height and massing of the development has been appropriately distributed across the site with the design outcome, notwithstanding the building height breaching elements, achieving a view sharing scenario having regard to the view sharing principles established by the Land and Environment Court in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140.

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

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

Response: The proposed works are generally located within the previously disturbed areas of site with the additional excavation primarily related to the provision of a basement level of car parking.

I note that the building has been designed with a hipped roof form to Barrenjoey Road the angle of which generally reflects the pre-existing undisturbed natural topography of the land as depicted in the extract at Figure 5.



**Figure 5** - Plan extract showing the hipped roof form to Barrenjoey Road the angle of which generally reflects the pre-existing undisturbed natural topography of the land

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

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

Response: The subject property is not heritage listed or located within a heritage conservation area however is located immediately adjacent to the heritage listed Barrenjoey House. In this regard, the final design detailing has been settled in consultation with Weir Phillips Heritage and Planning with the accompanying Heritage Impact Statement containing the following conclusion:

*The proposed works will have the opportunity to construct of the sympathetically designed modern infill building that supports the ongoing significance of the area as a neighbourhood precinct, will have an acceptable impact on the Barrenjoey House. The proposed new building is contemporary in character but demonstrates respect for the key forms, architectural proportions and materiality of the item.*

*The building demonstrates appropriate setbacks; it is similar in height and scale to Barrenjoey House. Openings are vertically proportioned which represents the vertical articulation of Barrenjoey House. The elevations articulated through to the use of timber verandah posts and modulated gabled roof form. The proposed finishes and colours of timber, masonry and tiles will sit comfortably within the vicinity of Barrenjoey House and other items in the vicinity.*

*The proposed works will have no impact on the ability to understand the significance of the nearby heritage listed items. No significant view corridors will be blocked. The building will read in the setting of nearby items as one of several buildings of a similar massing and scale.*

I note that the reference to “setting” relates to the natural environment surrounding the heritage items and accordingly I am satisfied that notwithstanding the building height breaching elements that the proposal is consistent with this objective which seeks to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Having regard to the above analysis, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

### **Consistency with zone objectives**

The subject site is zoned E1 Local Neighbourhood Centre pursuant to PLEP 2014 with shop top housing permissible in the zone with consent. The stated objectives of the zone are as follows:

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

Response: The development provides for 2 retail spaces at ground level. These future tenancies will be able to contain uses that serve the needs of people who live in, work in or visit the area.

The proposal achieves this objective notwithstanding the building height breaching elements.

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

Response: The development provides for 2 retail spaces at ground level. Approval of the application will achieve the objective of encouraging investment in local commercial development that generates employment opportunities and economic growth.

The proposal achieves this objective notwithstanding the building height breaching elements.

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

Response: The proposal incorporates 5 upper-level apartments which will contribute to a vibrant and active local centre not only in relation to their contribution as actively occupied residential tenancies but also through the introduction of additional population within the local centre consistent with the Council’s strategic planning for residential development in the area.

In this regard, I note that clause 4.5A PLEP prescribes a maximum density for shop top housing in the Local Centre of 1 dwelling per 150m<sup>2</sup> of site area. Based on a site area of 1138m<sup>2</sup> the density control anticipates a maximum residential density of 7 dwellings which contribute towards Council’s housing target over the next 20 years as detailed within Councils Local Strategic Planning Statement (LSPS).

Accordingly, approval of the building height variation will facilitate the provision of 5 apartments on the site consistent with the dwelling density anticipated by clause 4.5A PLEP. The proposal achieves this objective notwithstanding the building height breaching elements.

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



Response: The development provides for 2 retail spaces at ground level and to that extent achieves this objective notwithstanding the building height breaching elements.

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

Response: The ground floor retail spaces and publicly accessible forecourt area will significantly revitalise this local centre with the building design providing for an attractive and vibrant built form outcome which will contribute significantly to the built form quality of development within the centre. The active street frontage proposed will attract pedestrian traffic and contribute to a diverse and functional streetscape incorporating a publicly accessible forecourt area.

The proposal achieves this objective notwithstanding the building height breaching elements.

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

Response: The plans submitted in support of this current application, to which this clause 4.6 variation request relates, have been prepared and refined in response to the feedback obtained from the DSAP and Council's heritage advisor with the height, scale and design of the development considered to relate favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment for the following reasons:

- The 3 storey building incorporates pitched roof forms and is of a design which is both sympathetic to its context and contemporary in its use of materials and forms in response to local climate and the "seaside village" character anticipated by the Palm Beach Locality Statement.
- The adoption of a design which relates to the built form proportions, eave levels and control lines of Barrenjoey House whilst maintaining contextually appropriate setbacks.
- The creation of a publicly accessible plaza, open to the sky, at the northern end of the site to facilitate the provision of a feature tree whilst providing broader public benefit in terms of its usage and the maintenance of views to the southern façade of Barrenjoey House.
- The provision of integrated landscaping which will assist in softening and screening the building form including additional landscaping adjacent to the southern boundary of the property where the development interfaces with the adjoining dwelling house.
- The maintenance of a 3 metre setback to the rear boundary of the property.
- The provision of a deep and generously proportioned colonnade adjacent to the frontage of the property including level access to the adjacent commercial tenancies.

I also confirm that the final design detailing has been settled in consultation with Weir Phillips Heritage and Planning with the accompanying Heritage Impact Statement containing the following commentary and conclusion:

*The main roof design has been modified to read as a mansard style with dormer windows inserted as part of a third level. This reduces the visual complexity of the proposal and imparts a more appropriate scale in relation to Barrenjoey House, which follows a two-level form with dormers inset into the roof. To further minimize the perception of a third level, the design team have split the dormer on the primary bay into two forms.*

*The proposed flat roof dormer design allows the hipped roof of the proposal to remain the central element in the proposal. This differentiates the proposal from the gabled dormers at Barrenjoey House avoiding any overtly historicist reference. In addition to mitigating some of the impacts from the western sun exposure the proposed fixed sliding louvres further breaks down the scale of the dormers, to reduce their prominence in the roof plane.*

*Lowering the height of the recessed bays reduces the overall bulk of the building. Setting the bays further back from Barrenjoey Road breaks the form of the building into three distinct entities. This reduces perceived mass and length of the proposal and creates a more acceptable scale in relation to Barrenjoey House.*

*The larger public space between the site and Barrenjoey House increases the visual curtilage around the item to ensure that the view lines towards the item are preserved and its prominence along Barrenjoey Road are retained.*

*The proposed timber valances help visually humanize the scale of the square arches and soften the overall expression of the masonry building.*

*Aligning the eave line to the eave line of Barrenjoey House and pitching the roofline back from this point at a similarly steep pitch establishes a key reference and visual measure against of the item. This is contextually appropriate for a building adjoining a heritage item by making an obvious alignment and reinforcing the quality of the streetscape and the setting of the heritage item.*

*The design modifications developed in consultation with Northern Beaches Council now present a built form which is appropriate for the site adjoining Barrenjoey House. The proposed new building is contemporary in character but demonstrates respect for the key forms, architectural proportions and materiality of the item. The sympathetically designed modern infill supports the ongoing significance of the area as a neighbourhood precinct, will now have an acceptable impact on the Barrenjoey House.*

Accordingly, I have formed the considered opinion that, notwithstanding the building height breaching elements, the development is of exceptional design quality with the proposal appropriately responding to its immediate built form and heritage context as depicted in the perspective image at Figure 3. I am satisfied that the proposal creates an urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment and which is a better outcome to the development that could be carried out on the land under development consent N0119/14.

The proposal achieves this objective notwithstanding the building height breaching elements. The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the E1 Local Centre zone and the height of building standard objectives.

Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

#### 4.2b Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

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

23. *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.*
24. *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 environment planning grounds**

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

#### **Ground 1 – Flooding**

The ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding contributes to making strict compliance with the building height standard more difficult to achieve and to that extent is an environmental planning ground put forward in support of the extent of the building height breach proposed.

#### **Ground 2 – Prior excavation of the site distorts extent of building height breach**

The prior excavation of the site within the footprint of the existing building distorts the height of buildings development standard plane overlaid above the site when compared to the natural undisturbed topography of the land. When the original undisturbed levels of the site are interpolated across the building footprint the extent of building height breach, particularly beyond the proposed street facing building parapet, would be significantly reduced as depicted in Figure 2.

Consistent with the finding of O'Neill C at paragraph 73 of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* such circumstance can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014 as it relates to the extent of building height breach proposed.

### Ground 3 - Distribution of height

The building height has been distributed so as to ensure the bulk of the height is centred on the site, away from the adjoining properties on the northern and southern boundaries. This has been achieved by setbacks and the design of the inclined roof on the southern and northern aspects of the building.

The distribution of the building mass away from the eastern, northern and southern boundaries ensures that there are no adverse impacts to the adjoining properties whilst allowing a development that provides a high level of amenity to future occupants of the building and is consistent with the objective of the zone *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area* facilitates a development that is effective in providing high levels of amenity to occupants of the development.

Further, the development is well under the height of building control at the eastern portion of the site, see below:



### Ground 4 - Objectives of the Act

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

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use and development of the land through achieving superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0119/14. It will also facilitate the delivery of much needed housing stock consistent with Council's LSPS.

Strict compliance would require the deletion of the entire upper level of the development, representing 2 Apartments, with such outcome neither orderly nor economic have regard to the development consent already physically commenced on the site. Further it would detract from the outcomes sought in the Council's LSPS. Strict compliance of the height of building development standard would likely result in the previously approved development being completed and occupied which, given the detailing of the previous approval, would result in inferior environmental outcomes to and from the development, particularly in relation to the adjoining heritage item. and not represent the orderly development of land.

Further, I note that clause 4.5A PLEP prescribes a maximum density for shop top housing in the Local Centre of 1 dwelling per 150m<sup>2</sup> of site area. Based on a site area of 1138m<sup>2</sup> the density control anticipates a maximum residential density of 7 dwellings which contribute towards Council's housing target over the next 20 years as detailed within Council's Local Strategic Planning Statement (LSPS). Approval of the building height variation will facilitate the provision of 5 dwellings on the subject property consistent with the dwelling density anticipated by clause 4.5A Pittwater LEP and in doing so appropriately contribute towards the housing target identified within the LSPS.

Approval of the building height variation will promote the achievement of this objective.

Objective (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)

For the reasons outlined in this submission, approval of the variation to the building height standard will promote superior heritage conservation outcomes having regard to the development's immediate built form relationship with the heritage listed Barrenjoey House.

Approval of the building height variation will promote the achievement of this objective.

Objective (g) to promote good design and amenity of the built environment

For the reasons outlined in this submission, the development does promote good design and amenity of the built environment and has been skilfully designed with specific consideration given to generating view impacts less than that caused by development consent No119.V/14 in terms of environmental, urban design, heritage conservation and public benefit outcomes. In this regard, I note that the extent of building height non-compliance is increased through the provision of characteristically pitched roof forms with the variation able to be significantly reduced through the adoption of a flat roof form consistent with that previously approved pursuant to Development Consent N0119/14. Such outcome would not, in my opinion, represent good design, promote the amenity of the built environment and would not detract from the heritage item adjoining the site.

Approval of the building height variation will promote the achievement of this objective.

Objective (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants

As previously indicated, the ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.2m AHD being approximately 640 mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding constraint contributes to making strict compliance with the building height standard more difficult to achieve. The floor levels adopted provide for the protection of the health and safety of their occupants.

Approval of the building height variation will promote the achievement of this objective.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

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

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

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

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

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

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

#### 4.4 Secretary's concurrence

By Planning Circular dated 5<sup>th</sup> May 2022, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

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

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

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

#### 5.0 Conclusion

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

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

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

#### **Boston Blyth Fleming Pty Limited**

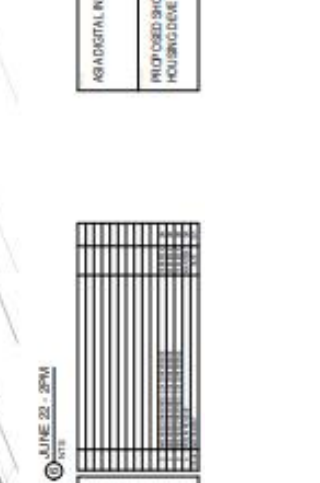


**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**

Annexure 1 Shadow analysis – View from the sun diagrams



**REAGRIDAL INVESTMENTS**  
1103 BARRIE BOULEVARD  
PILMBURGH

**PROPOSED SHOP TOP HOUSING DEVELOPMENT**

**Innovate**  
1103 BARRIE BOULEVARD  
PILMBURGH, ONTARIO  
L4Y 4H4  
TEL: 416-291-1111  
WWW.INNOVATEARCHITECTS.COM

**Architects**

2906  
DIA 71

NO.	DATE	DESCRIPTION
1	2023.06.22	PRELIMINARY SHADOW ANALYSIS
2	2023.06.22	FINAL SHADOW ANALYSIS

THE SHADOW ANALYSIS HAS BEEN CONDUCTED USING THE SUN PATH ANALYSIS SOFTWARE. THE RESULTS OF THE ANALYSIS ARE SHOWN IN THE SHADING ON THE PLAN. THE SHADING IS BASED ON THE ASSUMPTIONS THAT THE SUN IS AT AN ALTITUDE OF 30 DEGREES AND A BEARING OF 135 DEGREES. THE RESULTS OF THE ANALYSIS ARE SHOWN IN THE SHADING ON THE PLAN. THE SHADING IS BASED ON THE ASSUMPTIONS THAT THE SUN IS AT AN ALTITUDE OF 30 DEGREES AND A BEARING OF 135 DEGREES.