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30 September 2021

General Manager
Northern Beaches Council
Pittwater Road
DEE WHY NSW 2097

Dear Sir/Madam,

WATERMARK FRESHWATER - CLAUSE 4.6 VARIATION

1. INTRODUCTION

This Clause 4.6 Variation Request has been prepared on behalf of CHROFI (**the applicant**) and accompanies a Development Application (**DA**) for minor additions to the approved Watermark Freshwater Development, adjoining Harbord Diggers Club at 68-90 Evans Street Freshwater.

The Request seeks to vary the maximum building height prescribed for the site under clause 4.3 of the Warringah Local Environmental Plan (**WLEP**) 2011. The variation request is made pursuant to clause 4.6 of the WLEP.

This report should be read in conjunction with the Statement of Environmental Effects (**SEE**) prepared by Urbis Pty Ltd and dated 30 September 2021.

The following sections of this report include:

- Description of the site and its local and regional context, including key features relevant to the proposed variation.
- Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- Identification of the development standard which is proposed to be varied, including the extent of the contravention.
- Outline of the relevant assessment framework for the variation in accordance with Clause 4.6 of the LEP.
- Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- Summary and conclusion.

2. SITE CONTEXT

2.1. SITE CHARACTERISTICS

The proposed development site is located at 68-90 Evans Street Freshwater and is legally described as Lot 20 in Deposited Plan 1242304. It is irregular in shape and has an approximate total area of 15,696m². The site is owned by Mounties Group.

The Harbord Diggers Club site is located in a prominent location on the coastal headland between Freshwater and Curl Curl Beach. It is surrounded by a mix of residential development of varying forms and density and bounded by Carrington Parade (north), McKillop Park and at grade car park (south), Lumsdaine Drive (east) and Evans Street (west). The subject site is outlined in red in the aerial context image and Building E is marked X in the Figure 1 below.

The proposed works are located along the most southern point of the site bounded by Evans Street.

Figure 1 Site aerial



Source: Sixmaps

2.2. DEVELOPMENT APPROVAL HISTORY

Multiple development applications have been approved for the site to achieve the club use and mixed use development currently on site, with the following of note:

- A development application was proposed and approved (DA2013/0412) on 16 September 2013 for stage 1 building envelope and redevelopment of the site;
- A substantial redevelopment of the Club was proposed and approved (DA2014/0875) on 1 December 2014 and modified in 2015 (MOD2015/0152) for:

Demolition and Excavation works and Construction of Seniors Housing, Registered Club, Childcare Centre and associated carparking and landscaping (Harbord Diggers Club site).

Further modified in 2017 (MOD2016/0298):

Modification of Development Consent DA2014/0875 granted for Demolition and Excavations works and Construction of Seniors Housing, Registered Club, Childcare Centre and associated carparking and landscaping (Harbord Diggers Club site).

Further modified in 2017 (MOD2017/0063):

Modification of Development Consent DA2014/0875 granted for Demolition and Excavations works and Construction of Seniors Housing Registered Club Childcare Centre and associated carparking and landscaping Harbord Diggers Club site.

Further modified in 2020 (MOD2020/0312):

A modification application was proposed and approved for demolition and excavation works for construction of seniors housing, registered club, childcare centre and associated car parking.

- A development application was approved (DA2019/1066) for the construction of awning and pergola structures for the senior housing development;
- A development application was approved (DA2020/1233) for the alteration and addition to the central open space on the Club land to formalise use of bowling green;
- A development application was approved (DA2021/0749) for the addition of a shade structure over the Porte-cochere.

3. PROPOSED DEVELOPMENT

This Clause 4.6 Variation Request has been prepared to accompany a DA for the installation of three canopy awnings on the balconies of residential apartments at Building E of the Watermark Freshwater.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 30 September 2021. The proposal is also detailed within the architectural drawings that form part of the DA.

The details of the proposed awnings for Building E are provided below:

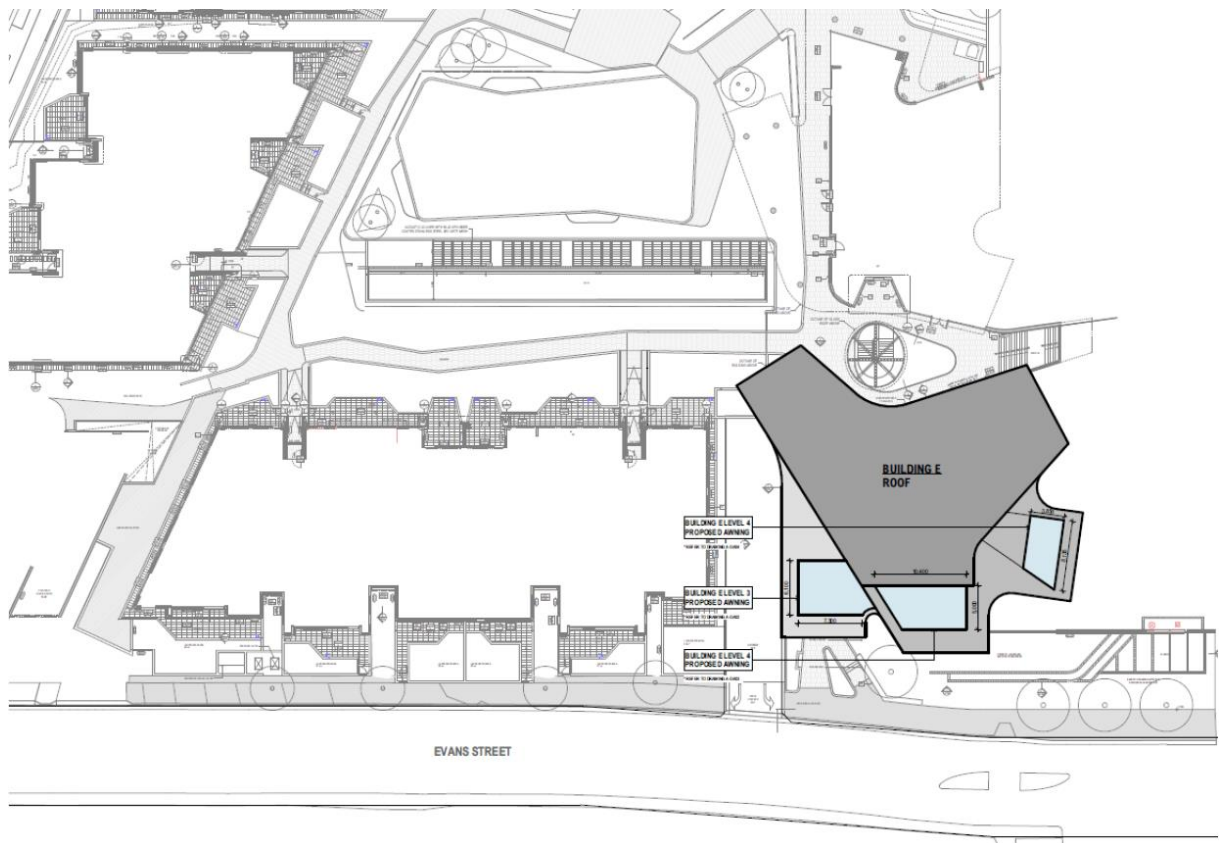
- **Level 3 West awning** – retracting from the balcony entry an area of approximately 6,100 x 7,300 with a **height of 2,940** (above FFL); The maximum height of the awning is 12m (RL 35,513), as measured from existing ground level. This represents a breach of 3.5m above the maximum height limit.
- **Level 4 South awning** – retracting from the balcony entry an area of 5,390 x 8,800 with a slanted **height of about 2,520** (above FFL); The maximum height of the awning is 15.2m (RL 38,917), as measured from existing ground level. This represents a breach of 6.7m above the maximum height limit.
- **Level 4 East awning** – placed on the balcony frontage with an area of 8,135 x 3,850 with a minimal slanted **height of 2,520** (above FFL); The maximum height of the awning is 13.6m (RL 38,092), as measured from existing ground level. This represents a breach of 5.1m above the maximum height limit.

The top of the existing Building E/roof level is RL 39,050 or 15.33m, which is above the maximum awning height of all three awnings.

The awning structure is of aluminium material and the retractable fabric is translucent in colour.

Figure 2 displays the location of the awnings. **Figure 3** displays the proposed works in reference to the 8.5m height plane.

Figure 2 Proposed works



Picture 1 Site Plan of Proposed awnings

Source: CHROFI

Figure 3 Height plane



Picture 2 Proposed awnings in reference to the 8.5m height plane



Picture 3 The site in reference to the 8.5m height plane

Source: CHROFI

4. VARIATION OF BUILDING HEIGHT STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD

The Height of Building development standard for the site is 8.5m, as displayed in **Figure 4**. The building height control has been measured in accordance with the WLEP 2011 definition:

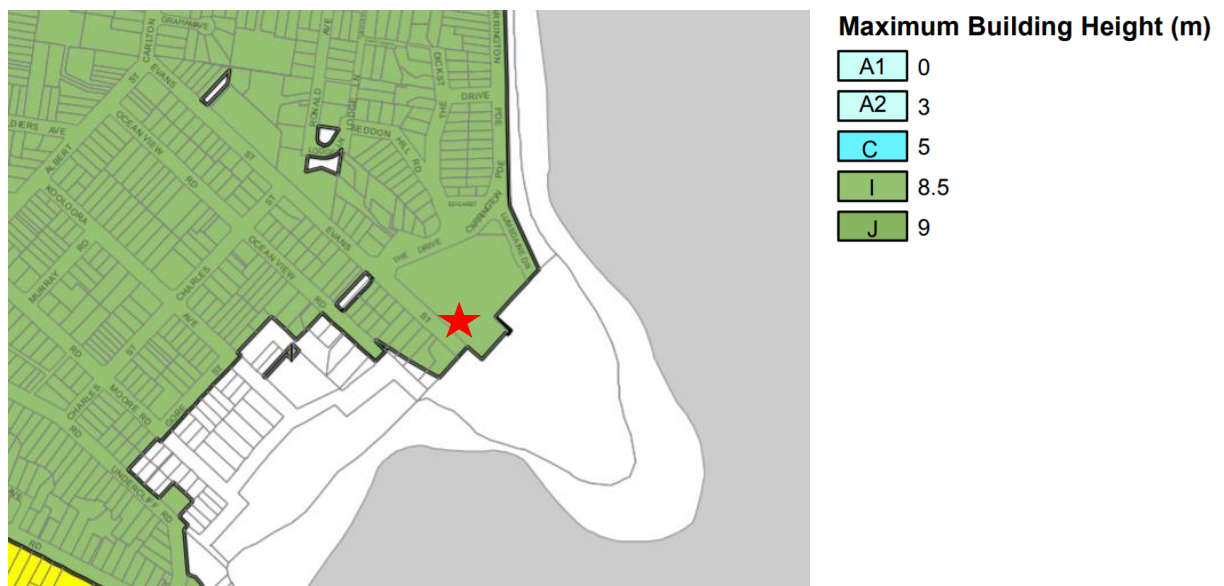
building height (or height of building) means—

(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

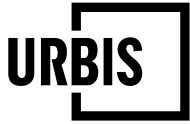
(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Figure 4 Height of Buildings Map (denoting maximum building height of 8.5m)



Source: WLEP



4.2. PROPOSED VARIATION TO CLAUSE 4.3 OF THE WLEP

The proposed development comprises additional awning structures to three existing and approved Watermark Freshwater residences in Building E.

The awnings range in height of 12m to 15.2m representing a non compliance with the building height control of 3.5m to 6.7m. A detailed description of each awning structure is provided in Section 3.

The proposed awning structures exceed the building height control in the WLEP 2011, yet do not exceed the existing building envelope of Building E, which is non compliant with the 8.5m control and has a maximum height of RL 39,050 or 15.33m.

We submit that the variation in height is below the existing building. It will add additional benefit to the current residence as demonstrated in our assessment in Section 6.

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of WLEP 2011 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of WLEP are:

- (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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

This clause 4.6 request demonstrates that compliance with the Building Height prescribed for the site in clause 4.3 of WLEP is unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the existing building, development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the Building Height development standard be varied.

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the maximum building height in accordance with Clause 4.6 of WLEP 2011.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The Building Height prescribed by clause 4.3 of WLEP is a development standard capable of being varied under clause 4.6(2) of WLEP.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of WLEP.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed


non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the Height of Building development standard as specified in clause 4.3 WLEP 2011 are detailed in **Table 1** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 1 Assessment of consistency with clause 4.3 (1) objectives

Objectives	Assessment
(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,	<p>The existing building has been approved (under DA2014/0875, as modified) with a height greater than the 8.5m development standard and proposed awnings. The awnings will be compatible with the building height (being less than the established building height) and the building continuity and form will remain unchanged given the awnings are light weight and subservient to the main building structure.</p> <p>The awnings are not enclosed and retract, consequently providing minimal scale and bulk. The view loss is negligible as the surrounding view remains generally the same as illustrated in the architectural drawings (Appendix A).</p>
(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,	<p>The awnings will have minimal visual impact as they are retractable, use a translucent fabric and do not enclose the space, providing minor additional bulk.</p> <p>The view impacts are minor for residence to the west, with the view remaining much the same with no obstruction of iconic views.</p> <p>Mid winter sun studies prepared by CHROFI demonstrate that the proposed awnings do not contribute to additional shadow beyond the existing building.</p> <p>The awning structures provide greater internal amenity and improved useability and potentially privacy for the residence.</p> <p>The retractable function of the awnings will allow for solar access in the cooler months. It will provide shading for the residence for the warmer months. There will be minimal shading impact to any surrounding areas.</p>

Objectives	Assessment
<p>(c) to minimise any adverse impact of development on the scenic quality of Warringah’s coastal and bush environments,</p>	<p>As the awnings are retractable, do not enclose the space, do not protrude above the existing building height and use materials that complement the building façade. They are considered to have minimal or no effect to important view lines of Warringah’s Coast.</p>
<p>(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</p>	<p>There are no adverse impacts of the proposed awnings, they do not obstruct any important view lines and adhere to the principles of view sharing especially considering they are able to retract. The Architectural Plans inform the view analysis of the proposed awnings to illustrate the impacts as displayed below. There is minimal visual impact from surrounding public locations such as Evans Street or adjoining Carrington Parade. The slight protrusion from the current built form only disrupts the sky view at a very minor scale. There are no surrounding parks, reserves or community facilities that would be impacted.</p> 

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

As table 1 outlines, the underlying purpose of the proposed development is consistent with the objectives. The existing built form is beyond the awning structure height proposed, and the proposed works are within the building envelope. The proposed awnings are therefore compatible with the approved bulk and form of the building. It is unreasonable to consider a height that is within the building height controls as the awning's sit beyond this height as illustrated in the height plane in

Figure 5.

Figure 5 Building Height Plane



Source: CHROFI

The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The impacts to the public domain and adjoining properties are negligible as the awning sits within the established built form and are a light weight structure, with translucent retractable fabric in a form that is not enclosed or bulky. It would be unreasonable to consider the outcome consequential to the surrounding community. The calculated benefit for the immediate users is far greater, providing privacy and shading for the residence, limiting the use of detrimental cooling systems such as air conditioning.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- Given the established building height (as approved in DA2014/0875) exceeds the building height control of 8.5m, and the proposed light weight form of the awnings are below the roofline of the existing Building E, the awnings are consistent and compatible with the current built form.
- The breach in building height is consistent with the existing residential building, providing essential amenity for cooling the private residential space and increasing useability in the summer months.
- The shades will be installed on the already established balcony, they can not be lowered to below the building height as the balcony surpasses the controlled height (as approved DA2014/0875).
- The awnings will enhance the liveability and privacy for the residence of the three apartments.
- The awnings will provide for natural cooling for the three apartments, potentially reducing detrimental cooling methods such as air conditioning.
- Retractable nature of the shade cloth allows for the flexibility to limit shading in the cooler months, maintaining warming of residence naturally.
- Materials used will complement the existing façade of the building.
- There is no view loss or adverse shadow impacts to adjoining properties given the scale of the structures being lightweight in form, not enclosed and submissive architecturally to the existing building form. Mid –winter sun studies prepared by CHROFI show the awnings fall within the existing shadow.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed Building Height non-compliance in this instance.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in **Table 1** above. The proposal is also consistent with the land use objectives that apply to the site under WLEP. The site is located within the R2 Low Density Residential zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 2** below.

Table 2 Assessment of compliance with land use zone objectives

Objective	Assessment
<i>To provide for the housing needs of the community within a low-density residential environment.</i>	<p>The proposed awnings will enhance the existing residential units, providing shade to cool the apartments in the warmer months.</p> <p>The shade structures are intrinsically linked and form part of the approved residential land use that provides housing for the Northern Beaches community.</p>
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposed awnings are consistent with the approved residential land use and form part of the broader mixed use development at the Harbord Diggers site.
<i>To ensure that low density residential environments are characterised by landscaped</i>	The proposed awnings will use materials to complement the built form and are of minimal

Objective	Assessment
<p><i>settings that are in harmony with the natural environment of Warringah.</i></p>	<p>bulk and scale, having minimal impact of the surrounding environment.</p> <p>The awnings are characteristics of residential apartments and also generally consistent with other awning structures at other units in the development.</p>

The above table demonstrates the proposed development will be in the public interest notwithstanding the proposed variation to the Building Height as 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.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by the consent authority in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the Building Height will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

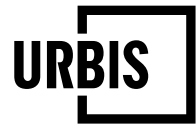
- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the building height and the land use zone objectives despite the technical non-compliance.

The awnings will provide benefit to the residence of the apartments where the awnings will be installed, providing a natural form of cooling and shade when necessary. The public will not be adversely impacted from the development (including privacy, view loss or overshadowing), yet the potential benefits from reduction in cooling could have a positive impact on the environment (through potential reduced use of air conditioning units) and therefore the public.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**



Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the Building Height contained within clause 4.3 of WLEP is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the Building Height to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposal is consistent with the objectives of the height of building development standard.
- The proposed awning structures do not protrude above the already approved built form. Importantly, Council have approved the building height beyond the 8.5m under DA2014/0875, as modified, and the awnings do not exceed this established position.
- The design complements the existing façade and is subservient to the existing built form. Appropriate colours and materials are selected to complement the coastal setting.
- The building height is acceptable and does not have any detrimental impacts to the surrounding area including solar access or view loss.
- The proposed variation will not be readily visible from the public domain and have a minimal impact from street view.
- The height noncompliance does not alter the GFA of the existing building; it makes the existing internal apartments and external private open space more liveable and functional.
- The variation enables the use of the private balcony in warmer months and potential to reduce the internal temperature of the adjacent unit.
- The variation to the development standard is supportable on environmental planning grounds including the limited environmental impact resulting from the breach to the standard, and benefits to the proposal resulting from the breach.
- Maintaining strict compliance to the building height is not considered to be in the public interest.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the Building Height should be applied.

Yours sincerely,

A handwritten signature in cursive script that reads "Kirraly Northey".



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