

25th October 2021

**The Trustee for My Manly Vale Unit Trust trading as My Manly
Vale Pty Ltd
Land and environment Court proceedings 2021/153523
Addendum Statement of Environmental Effects/
Updated clause 4.6 variation request – Height of buildings
Proposed Boarding House
255 Condamine Street, Manly Vale**

This addendum Statement of Environmental Effects and updated clause 4.6 variation request have been prepared in support of amended architectural plans DA01(B) to DA20(B) prepared by Gartner Trovato Architects. The amendments, when compared to the plans filed in these proceedings, are summarised as follows:

- An adjustment in the building alignment relative to the modified creek line to remove overhanging building elements.
- The modification of the floor plan layouts to accommodate the above building alignment adjustment.
- The introduction of angled columns adjacent to the creek bank.
- Modification to the layout and northern building façade alignment of rooms 9, 22 and 32 to achieve greater spatial separation to the adjoining balconies at No. 259 Condamine Street whilst maintaining an appropriate privacy interface.
- The reconfiguration of the bin storage area to accommodate 27 bins.
- The reconfiguration of the bin storage area to accommodate a passing bay within the adjacent driveway.
- The provision of increased contextually appropriate and consistent front setbacks to Condamine Street at Levels 1 and 2.
- The provision of an increased compliant 5 metre front setback to the uppermost level.
- The provision of increased setbacks to the blade walls on the northern boundary.
- The introduction of vertical concrete façade detailing and glass blocks to the south exposed boundary wall to provide visual interest and reduce perceived bulk and scale address bulk and scale.
- The provision of an increased front setback to the southern ground floor boundary wall to improve vehicular sightlines.

- The modification of floor plans and room area calculations to ensure calculations exclude a 600mm wide circulation space adjacent kitchens including the reconfiguration of the rear stairs.
- The introduction of a vehicular turntable to enable all cars to enter and exit the site in a forward direction without relying on the loading bay.
- The relocation of AC condenser to ground floor.
- The introduction of increased soil depth to the courtyard planter to achieve 800mm deep on-slab planting opportunity. This soil depth is sufficient for the establishment of screen tree plantings.
- The nomination of room No. 28 for use by the on-site manager and the renumbering of plans on Level 3 to indicate 37 not 38 rooms.

This submission is also accompanied by an updated clause 4.6 variation request in support of the building height variation at Attachment 1.

The project Architects has adopted alternative approach to the Council front setbacks of nil to ground and first floors and 5 metres to the floors above to address bulk and scale and has done so in a way that achieves high architectural merit. In this regard, the accompanying Architect design statement contains the following commentary:

- *The approach provides a more highly skilled level of façade modulation to reduce bulk and scale, by providing a significant setback to the ground floor and includes a landscaped area to soften and screen the built form over all levels. No other building on Condamine Street offers up a ground level landscaped setback. The setback also breaks the building into parts vertically, rather than a robust 2 storey elevation with a nil setback, the design gives depth, light and shade and a transparency to the lower floors.*
- *The fluctuating blades both vertically and horizontally over levels 1 and 2 break the façade into a number of smaller elements, rather than a long straight line of wall or balustrade that maximise floor area within the development. To increase the level of theatre in the façade, the angles of the slabs, blades and exterior walls all differ over the 2 mid-levels of the façade creating interest and variation, not likeness, boredom and bulk. Variation in colour completes the multi-faceted detailing and ‘fine grain’ of the façade.*
- *The top floor slab projection has minimal boundary setbacks, to create sight lines that mask the top floor setback at 5 metres. The building effectively has a 3 -storey appearance to the street which would disappear and create a fourth level if the slab edge was reduced back to the 5m setback, effectively creating a wedding cake effect and increasing the perception of bulk and scale by exposing the top storey to the streetscape.*

In relation to the shared ground floor office, we confirm that this space is provided for use by the occupants of the boarding house and to that extent represents a small office/ home office (SOHO) type use which provides for an appropriate level of street activation and office space for the use of boarding house residents. Such outcome is consistent with the zone objectives in that it provides for a ground floor use which serves the office space needs of people who live in the local area.

Such outcome is also consistent with the clause F1 Local and Neighbourhood Centres provisions of Warringah Development Control Plan (WDGP) relating to the Manly Vale/ Condamine Street precinct in that the ground floor office use and associated architectural and landscape detailing will enhance the streetscape with the *design of the building and the use of the land maintaining activity at street level and creating a cohesive and attractive streetscape.*

Please do not hesitate to contact me to discuss any aspect of this correspondence.

Yours sincerely

BOSTON BLYTH FLEMING PTY LIMITED

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director

Attachment 1

Updated clause 4.6 variation request – Height of buildings Proposed Boarding House 255 Condamine Street, Manly Vale

1.0 Introduction

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 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

- a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
 - b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
 - c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
 - d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*
- Building height is defined as follows:*

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.

It has been determined that the proposed development has a variable building height as measured above ground level (existing), which includes the bed of Burnt Bridge Creek, of between 14.15 and 18.7 metres representing a non-compliance of between 3.15 metres (28.6%) and 7.7 metres (70%). The extent of building height variation at each of the 8 corners of the roof forms is depicted in the following height blanket diagrams and roof plan extracts at Figures 1, 2, 3 and 4 below and over page.



Figure 1 - Height blanket diagram showing extent of 11 metre building height breach when measured above ground level (existing)



Figure 2 - Contextual height blanket diagram showing the relationship of the proposed building to the height established by the adjoining properties

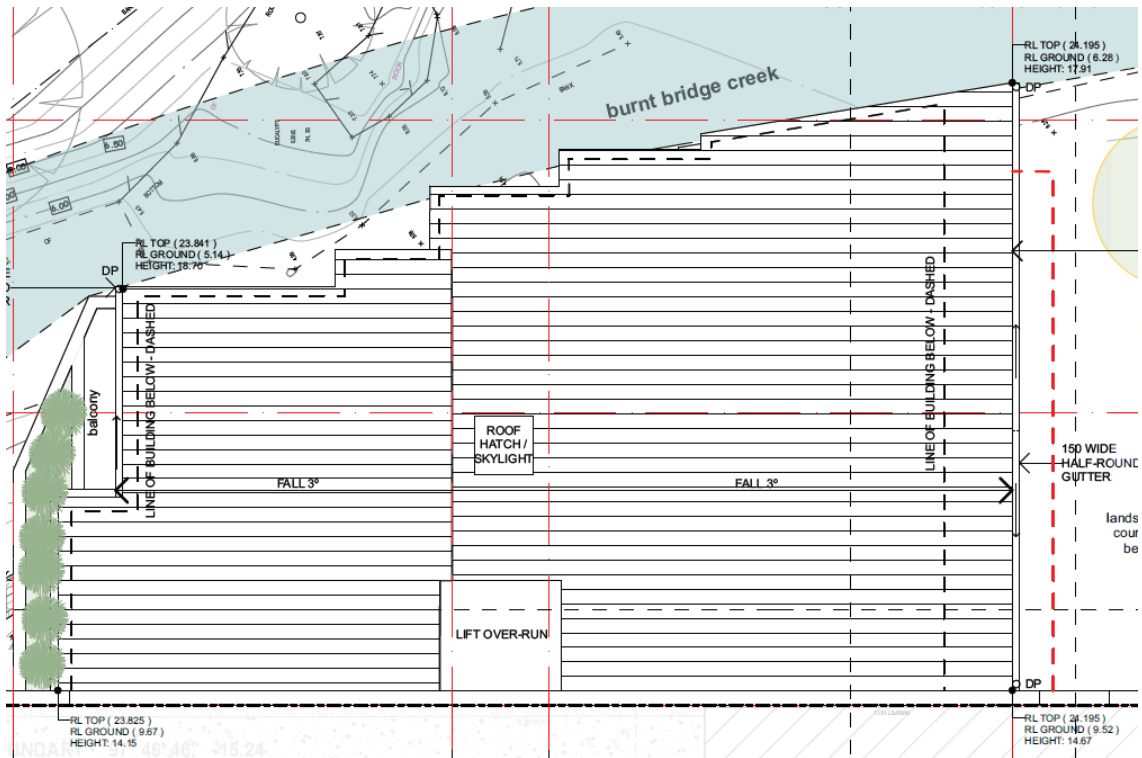


Figure 3 - Roof plan extract DA-08(B) showing height of roof form relative to ground level (existing) as established by survey levels

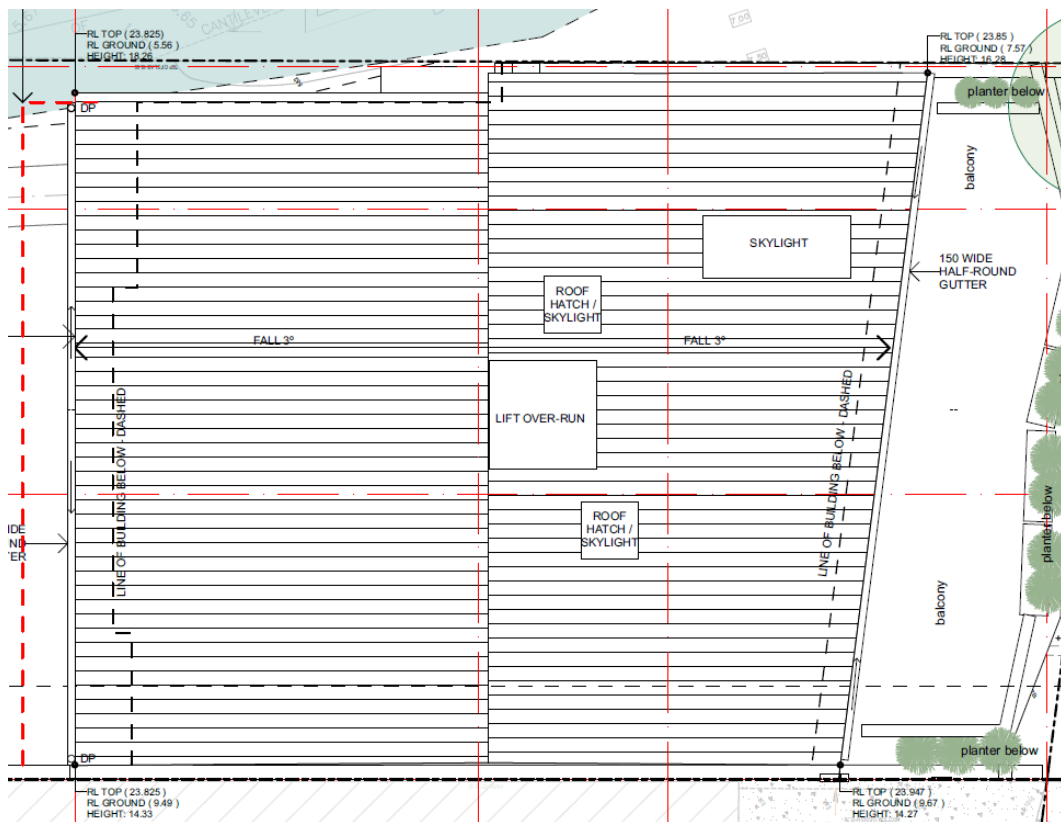


Figure 4 - Roof plan extract DA-08(B) showing height of roof form relative to ground level (existing) as established by survey levels

Whilst not itself determinative, I note that the extent of non-compliance is significantly reduced when the 11 metre building height standard is applied above the flood planning level (FPL) noting that it is the FPL that establishes the required ground floor level of the development. The extent of building height breach when assessed above the FPL is detailed in Figure 52 below.

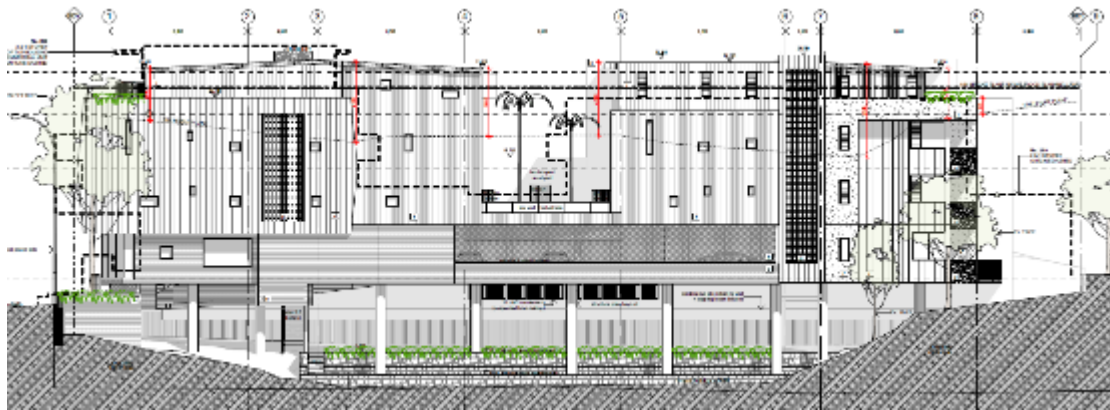


Figure 5 - Elevation showing building height breaching elements when the 11 metre height standard is projected above the FPL

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP 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 WLEP 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 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP 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 4.3 of WLEP 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 WLEP 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 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 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, 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 WLEP 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.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 WLEP 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].*

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.

22. *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 WLEP 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 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 WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

Clause 4.3 WLEP prescribes a fixed height provision that seeks to control the height of certain development. Accordingly, clause 4.3 WLEP is a development standard.

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

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

The first 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 buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: Development within the site’s visual catchment, and within the 11 metre height precinct, is eclectic in nature and in transition with a number of older one and two storey commercial and mixed use buildings being replaced with more contemporary 4 storey shop top housing building forms.

The height of development also varies significantly with 1, 2, 3 and 4 storey commercial and shop top housing development defining the visual character of the area and site context. Figures 6 and 7 depict such context it being noted that the examples of 4 storey shop top housing development are located within the 11 metre height area and are grouped in such a manner as to establish a clear street wall height and existing/ desired future character and along this section of Condamine Street.



Figure 6 – View looking north-west towards adjoining properties to the north No. 259 Condamine Street



Figure 7 – Existing 4 storey shop top housing development further to the north along Condamine Street

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 (*Project Venture*). 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.

I note that the Level 3 building facade maintains an appropriate setback to Condamine Street such that it will be recessive in a streetscape context consistent with that of other recently approved and constructed shop top housing development along Condamine Street. The upper level, representing the majority of the building height breach particularly as viewed from Condamine Street, will not be perceived as inappropriate or jarring in a streetscape context with the height consistent with that of adjoining properties to the north. The 4 storey stepped and pavilion style building form will be complimentary and compatible with development within the site's visual catchment notwithstanding the building height breach sought.

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. As indicated in *Project Venture* development does not have to be the same height to be considered compatible.

Consistent with the conclusions reached by Senior Commissioner Roseth in *Project Venture* I have formed the considered opinion that most observers would not find the proposed development by virtue of its height, particularly the building elements breaching the height standard, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that, notwithstanding the building height breaching elements, the development is compatible with the height and scale of surrounding and nearby development and accordingly the proposal achieves this objective.

- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

Comment: Having undertaken a detailed site and context analysis and identified available view lines over the site I have formed the considered opinion that the height of the development, and in particular the non-compliant height components, will not give rise to any visual privacy or solar access impacts with appropriate spatial separation maintained to adjoining properties.

In this regard, I rely on the shadow diagrams at Attachment 1 and the fact that all boarding rooms and associated balconies are orientated to the front or rear of the site, or alternatively into the internalised courtyard area, where the upper-level boarding rooms associated with the non-compliant building height will not give rise to unacceptable privacy impacts.

Having inspected the site and its immediate surrounds to identify potential view lines I am satisfied that the building height breaching elements will not give rise to any unacceptable view loss with the form and massing of the development, particularly those elements located above the height limit, will not giving rise to any inappropriate or jarring visual impacts to surrounding development.

The proposal achieves this objective.

- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

Comment: The non-compliant building height elements will not be discernible as viewed from any coastal or bushland environments. This objective is achieved.

- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Comment: The non-compliant building height will not be visually prominent as viewed from the street or any public area. Consistent with the conclusions reached by Senior Commissioner Roseth in the *Project Venture* I have formed the considered opinion that most observers would not find the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

Having regard to the above, 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 property is zoned B2 Local Centre pursuant to WLEP 2011. The developments consistency with the stated objectives of the B2 zone are as follows:

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

Response: I note that boarding houses are permissible with consent in the zone and to that extent will provide affordable rental accommodation with ancillary ground level office space that will serve the needs of people who live in the local area.

The shared ground floor office space is provided for use by the occupants of the boarding house and to that extent represents a small office/ home office (SOHO) type use which provides for an appropriate level of street activation and office space for the use of boarding house residents. Such outcome is consistent with the zone objectives in that it provides for a ground floor use which serves the office space needs of people who live in the local area.

The proposal is not antipathetic to this objective.

- *To encourage employment opportunities in accessible locations.*

Response: The proposed boarding house will generate temporary and permanent employment opportunities associated with the day-to-day management and maintenance of the facility. The proposal is not antipathetic to this objective.

- *To maximise public transport patronage and encourage walking and cycling.*

Response: The development provides appropriately for vehicle, motorcycle and bicycle parking to achieve this objective.

- *To provide an environment for pedestrians that is safe, comfortable and interesting;*

Response: the proposed building is of exceptional design quality with the ground level front façade designed to provide an appropriate level of Street level activation. The proposed breaching height elements are not antipathetic to this objective.

- *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 proposal building scale and landscape treatments proposed provide for urban and landscape form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. This objective is achieved notwithstanding the building height non-compliant elements.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses.*

Response: The property adjoins the R2 Low Density Residential zone to the west of the site with particular attention given to ensuring the maintenance of appropriate amenity to the properties within this adjoining zone in relation to privacy and solar access.

The design response adopted, including the maintenance of appropriate spatial separation and the incorporation of fixed planter box privacy attenuation measures to the upper-level of the development where the building exceeds the height standard and is orientated towards the zone boundary interface, minimises conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses. This objective is achieved notwithstanding the building height non-compliant elements.

The proposed development, notwithstanding the height breaching elements, achieve the objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the 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.

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

In Initial Action the Court found at [23]-[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 Environmental Planning Grounds

There are sufficient environmental planning grounds to justify the variation sought it being noted that the finished heights proposed, relative to the level of Condamine Street, will be complimentary and compatible with the height of adjoining development to the north and development generally along this section of Condamine Street. In this regard, the non-compliant building elements ensure that the building achieves an appropriate contextual “fit” have regard to the desired future streetscape character of 4 storey development established on the western side of Condamine Street.

The depression through the site created by the creek line distorts any reasonable assessment of building height on the site when expressed in metres above ground level (existing). Accordingly, the assessment contained within this report assesses the acceptability of the finished building heights proposed against the finished building heights established by existing and approved development along this section of Condamine Street. This represents an appropriate environmental planning consideration for development on this particular site.

It can also be argued that the 11 metre height standard has been effectively abandoned along this particular section of Condamine Street in favour of a consistent and cohesive streetscape and urban design outcome.

Strict compliance would require the deletion of the upper 2 floors of the development and result in a 2 storey form that would appear inconsistent with the height and cohesive streetscape established by recently approved and constructed shop top housing development along this section of Condamine Street. The building is of exceptional design quality with the variation facilitating a height and floor space that provides for contextual built form compatibility, the delivery of affordable housing and the orderly and economic use and development of the land consistent with objectives 1.3(c) (d) and (g) of the Act.

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.

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone; **and***
- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.

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

4.4 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 B2 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 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.

4.5 Secretary's concurrence

By Planning Circular dated 5th May 2020, 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 nonnumerical standard, because of the greater scrutiny that the LPP process and determination are subject to, compared with decisions made under delegation by Council staff.

Notwithstanding that the Court can stand in the shoes of the consent authority and assume the concurrence of the Secretary, the Court would be satisfied that the matters in clause 4.6(5) are addressed because the contravention does not raise any matter of significance for regional or state planning given that the building height breaching elements facilitate better environmental and urban design outcomes with the result that there is no public benefit in maintaining the standard in the particular circumstances of 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:

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

As such, I have formed the 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

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

Attachment 1 Shadow diagrams

