

6th December 2021

Land and Environment Court case number 2020/00354766
Amended clause 4.6 variation request – Height of buildings
Proposed mixed use development
1129 – 1131 Pittwater Road, Collaroy

1.0 Introduction

This amended clause 4.6 variation request has been prepared having regard to amended Architectural Plans A01(D) to A10(D) and A15(D) to A17(D) prepared by Barry Rush and Associates Pty Limited.

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 (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.

The variation to the 11 metre height of buildings standard occurs only in respect of the ‘manager’s residence’ at Level 3. From an analysis of available survey information, I confirm that the upper level roof parapet (RL 17.3) breaches the standard along its eastern edge by a maximum of 1.24 metres (11.2%) increasing to a maximum of 2.63 metres (23.9%) in its south-western corner in the location of the localised depression in the landform and 1.45 metres (13.1%) in its north western corner. The lift overrun exceeds the 11 metre building height standard by approximately 3 metres or 27.2%.

The extent of building height breach is depicted diagrammatically at Figures 1, 2, 3 and 4 below and over page.

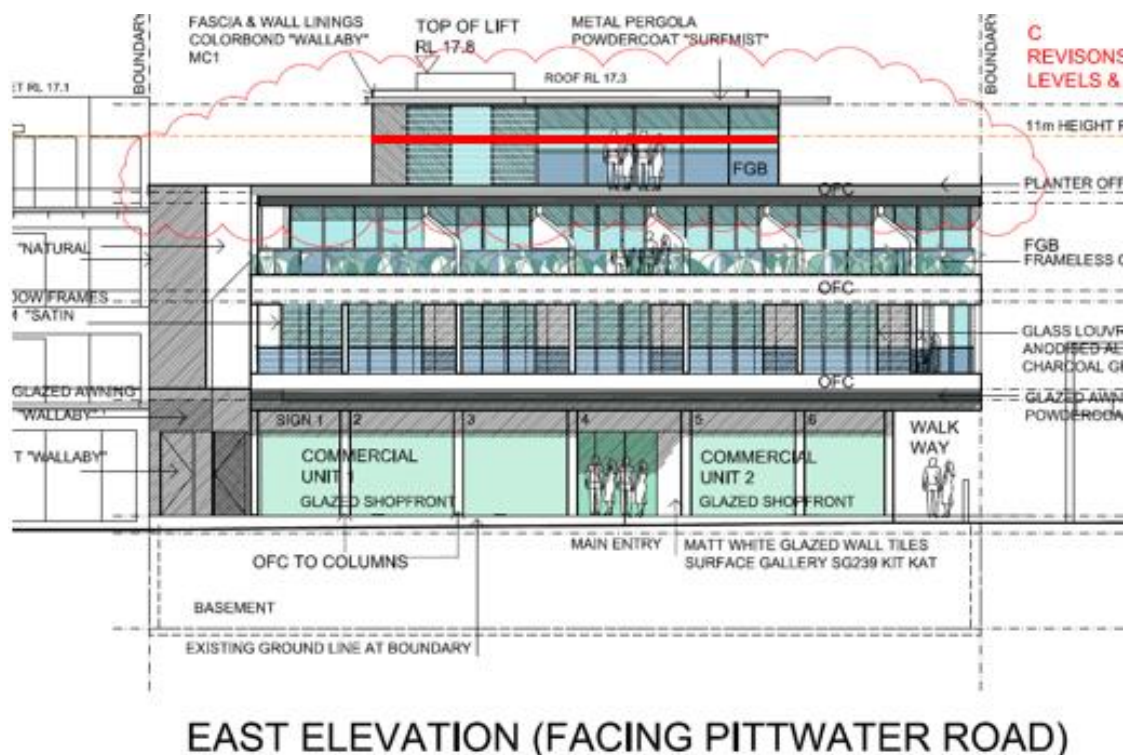


Figure 1 - Plan extract showing extent of 11 metre building height breach as viewed from Pittwater Road with the red line representing the 11 metre height standard

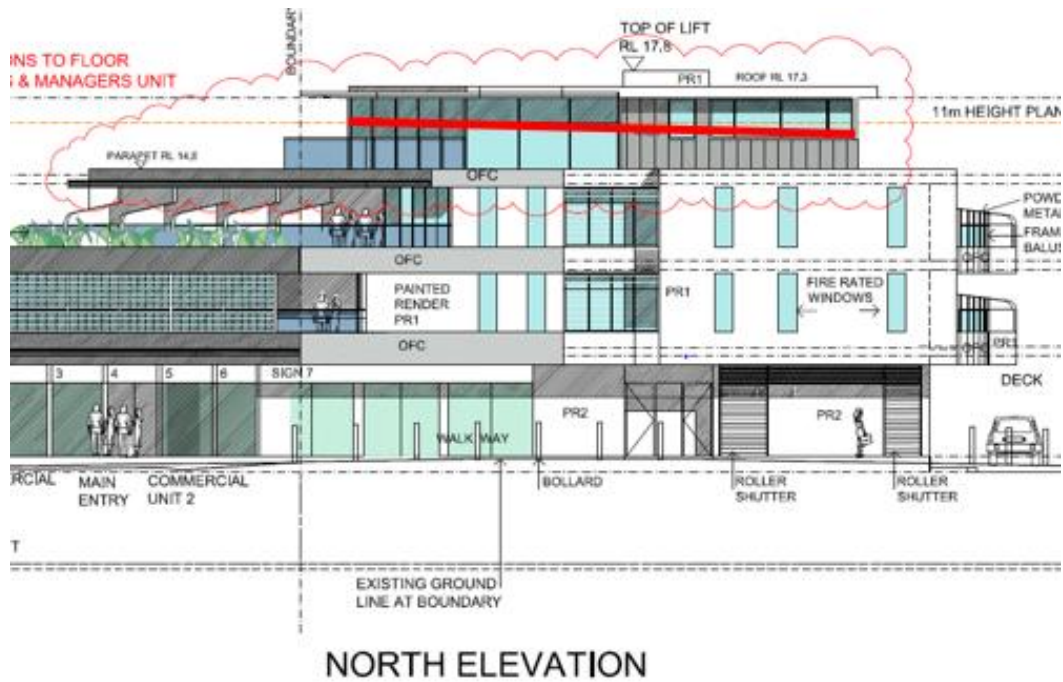


Figure 2 - Plan extract showing extent of 11 metre building height breach as viewed from the north



Figure 3 - Plan extract showing extent of 11 metre building height breach as viewed from the west (rear of site)

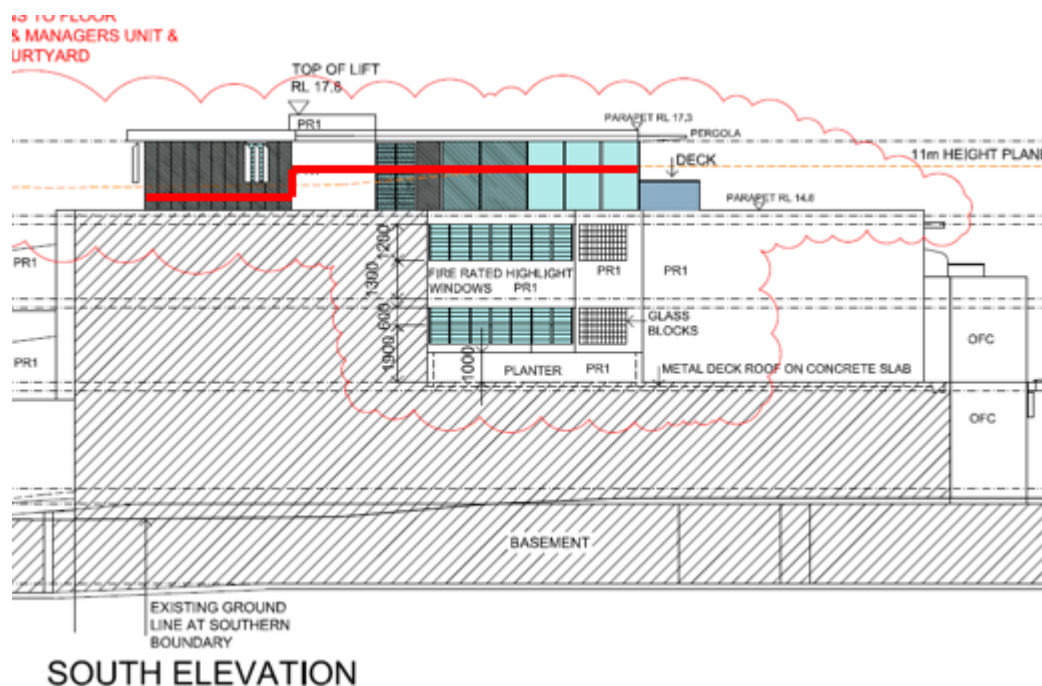


Figure 4 - Plan extract showing extent of 11 metre building height breach as viewed from the north

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:

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:

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:

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 Planning Secretary 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 WLEP 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 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: I note that this objective requires consideration to be given to the proposed buildings compatibility with the height and scale of existing development rather than limiting an assessment of building compatibility to the height and scale of development anticipated through strict compliance with the standard.

In this regard, existing development within the site’s visual catchment, and within the 11 metre height precinct, is eclectic in nature and currently in transition with a number of older one and two storey commercial and mixed use buildings being replaced with more contemporary 4 level stepped shop top housing building forms. A predominant 4 storey building presentation has been established by recently approved and constructed shop top housing development along Pittwater Road and within this particular street block.

I note that the second and third levels of the building maintain contextually appropriate setbacks to Pittwater Road such that they will be recessive in a streetscape context consistent with that of other recently approved and constructed 4 storey shop top housing development to the north and south of the site as depicted in Figures 5 - 8 below and over page.

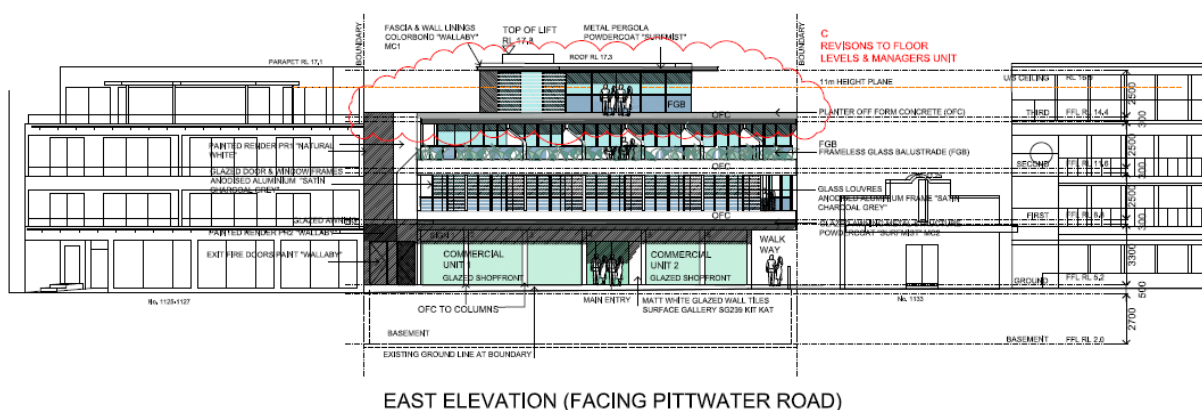


Figure 5 - Plan extract showing contextually appropriate and compatible built form and building height presentation to Pittwater Road



Figure 6 - Photograph of the 4 storey shop top housing development located along Pittwater Road to the north and south of the subject site



Figure 7 – Photograph looking west from the intersection of Pittwater Road and Collaroy Street to the south of the subject depicting 3 and 4 storey development

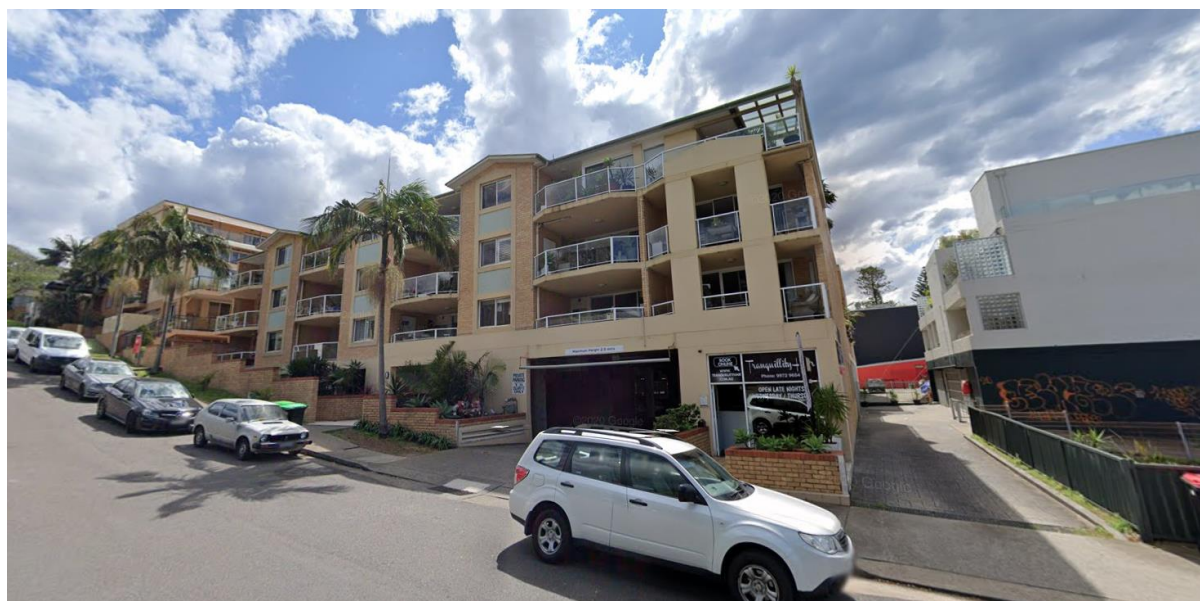


Figure 8 – Photograph looking towards the driveway entrance to the 4 storey shop top housing development located directly to the rear of the site, No. 1 – 5 Collaroy Street, and from which vehicular access to the subject site via an existing right-of-way is obtained

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 form 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.

In this regard, I note that the building height breaching elements are limited to the Level 3 'manager's residence' and associated lift overrun with the levels below compliant with the height of building standard with the uppermost level of the immediately adjoining 4 storey shop top housing development to the south of the site No. 1125 – 1127 Pittwater Road and the upper level of the 4 storey shop top housing development located to the north of the site on the corner of Pittwater Road and Fielding Street also breaching the 11 metre height standard to a similar extent as depicted in Figure 5.

I note that the non-compliant building elements as potentially viewed from Pittwater Road have been setback behind the façade alignment of the compliant building elements below with a minimum front setback of 7.5 metres provided to the non-compliant building height elements such that they are recessive elements in a streetscape context. The overall height, bulk and scale the building as viewed from Pittwater Road is entirely consistent with that established by surrounding development.

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.

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 height and scale of the development, notwithstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably be concluded that, notwithstanding the building height breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the building height breaching elements, the resultant 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: In relation to visual impact, I note that the non-compliant portion of the development has a much smaller and constrained footprint compared to the levels below and is set well back from all site boundaries such that it is visual recessive as viewed from surrounding properties and in a streetscape context.

Although the managers residence breaches the height standard, the maintenance of view corridors down both side boundaries and across the front of the property over the portion of the development which has been kept well below the maximum prescribed height standard provides for the retention of ocean and horizon views and views towards the heritage listed building located on the eastern side of Pittwater Road which would not have been available had the proposed development been designed to a compliant 11 metre building height across the width the site. Although non-compliant with the building height standard, such design approach has minimised the visual impact of the development as viewed from surrounding properties and in a streetscape context.

In relation to view loss and the view sharing principles adopted in Tenacity Consulting v Warringah [2004] NSWLEC 140, I rely on the Visual Impact Assessment, dated July 2021, prepared by Urbaine Architectural at Attachment 2. This visual impact assessment enables me to form an opinion that on balance view loss impacts have been minimised. In this regard, although the managers residence breaches the height standard, the maintenance of view corridors down both side boundaries and across the front of the property over the portion of the development which has been kept well below the maximum prescribed height standard provides for the retention of ocean and horizon views and views towards the heritage listed building located on the eastern side of Pittwater Road which would not have been available had the proposed development been designed to a compliant 11 metre building height across the width the site.

I note that the majority of land water interface view impact associated with the upper level managers residence is caused by the compliant building height components of this building element, that is, the elements located below the 11 metre height standard. Further, the impacted views are available directly across side boundaries and through the centre of the subject site and from apartments that also breach the 11 metre height standard. As such there can be no realistic expectation associated with their retention.

I consider that notwithstanding the building height compliance view impacts have been minimised through the adoption of a site and context specific design approach which maintains view corridors down both side boundaries and across the front and rear of the property with a view sharing outcome achieved.

In terms of privacy, the non-compliant building element has been designed to minimise privacy impacts through the maintenance of generous setbacks to all boundaries of the property, the appropriate use and location of fenestration which minimises potential viewing opportunities between adjoining development, the introduction of integrated privacy screens, where considered necessary, and the central location of the private open space area well away from residential receivers.

In relation to solar access, the shadow diagrams at Attachment 1 demonstrate that shadows from the non-compliant 4th floor building element fall predominantly onto the surrounding 3rd storey roof form with such shadow analysis also demonstrating that the design approach adopted, as outlined above, results in significantly less shadowing than a building constructed to the 11 metre height standard across the width of the site. That is, the design approach adopted minimises loss of solar access to surrounding properties.

In this regard, I have formed the opinion that the design of the development has minimised visual impacts, disruption of views, loss of privacy and loss of solar access and accordingly this objective is achieved notwithstanding the building height breaching elements.

- (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 readily discernible as viewed from any coastal or bushland environments. In the event that the non-compliant building height elements are visible from Collaroy Beach and its immediate environs I am satisfied that the recessive nature of the non-compliant building height elements as potentially viewed along the Pittwater Road frontages has ensured that any adverse impacts have been minimised.

In any event, notwithstanding the height building breaching elements, the height, bulk and scale of the building will not be perceived as inappropriate or jarring have regard to the 4 storey nature of recently constructed shop top housing development located within the same visual catchment, with the building height breaching elements not giving rise to adverse impact on the scenic quality of Warringah's coastal and bush environments. This objective is achieved notwithstanding the building height breaching elements proposed.

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

Comment: To the extent that the non-compliant building height elements are visible from public places including Collaroy Beach and Pittwater Road for the reasons previously outlined I am satisfied that the height, bulk and scale of the building will not be perceived as inappropriate or jarring have regard to the 4 storey nature of recently constructed shop top housing development located within the same visual catchment.

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, in particular the building height breaching elements of the building, offensive, jarring or unsympathetic in a streetscape context. The building height breaching elements will not give rise to unacceptable visual impacts when viewed from any public places.

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.

In this regard, notwithstanding the non-compliant building height elements the development is consistent with the objectives of the height of buildings standard and accordingly, pursuant to the first test in *Whebe*, strict compliance is 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: The proposed mixed use development provides ground floor office tenancies which activate the street frontage and which are able to accommodate uses that serve the needs of people who live in, work in and visit the local area. Notwithstanding the building height breaching elements, the proposal achieves this objective.

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor office tenancies which will provide employment opportunities in an accessible location being within immediate proximity of the B Line bus service. The proposal will also encourage employment in terms of strata management and property maintenance. Notwithstanding the building height breaching elements the proposal achieves this objective.

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

Response: The development provides appropriately for vehicle and bicycle parking to achieve this objective. The area is also well serviced by public transport. Notwithstanding the building height breaching elements, the proposal achieves this objective.

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

Response: The development accommodates the existing right of footway located down the northern boundary of the subject property and will provide for an environment for pedestrians that is safe, comfortable and interesting by appropriately activating the street frontage and this adjacent through site link. Notwithstanding the building height breaching elements, the proposal achieves 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 an urban and landscape form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment as detailed throughout this variation request. Notwithstanding the building height breaching elements, the proposal achieves this objective.

- *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 subject property is not located at a zone boundary interface. Notwithstanding, the proposal by virtue of its design and siting will maintain reasonable residential amenity to the adjoining properties in particular the apartments located to the south and west of the site. Notwithstanding the building height breaching elements, the proposal achieves this objective.

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:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental

planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

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

Ground 1 Achievement of a contextually responsive streetscape and urban design outcome to Pittwater Road

A variation to the building height standard to facilitate additional building height adjacent to the Pittwater Road frontage provides for a contextually responsive, compatible and consistent streetscape and urban design outcome for development within this particular street block. The height of the development responds appropriately to the sites immediate built form context providing for a cohesive built form streetscape outcome along this section of Pittwater Road.

Strict compliance would require the removal of the upper level of the development resulting in an inconsistent street building height compared to the 4 storey shop top housing development to the north and south of the site and to that extent would result in an inconsistent and incohesive built form streetscape outcome along this section of Pittwater Road. Strict compliance would result in a poor urban design/ streetscape outcome with the development being unresponsive to its immediate built form context.

Approval of the building height variation will provide for a contextually responsive streetscape and urban design outcome along this section of Pittwater Road notwithstanding that the non-compliant portion of the uppermost floor is relatively small and constrained compared to the compliant floor levels below to maintain a view sharing outcome with surrounding development.

Ground 2 Enhanced view sharing outcome

Approval of the building height variation will achieve a better view sharing outcome compared to a building of compliant height.

Although the managers residence breaches the height standard, the maintenance of view corridors down both side boundaries and across the front of the property over the portion of the development which has been kept well below the maximum prescribed height standard provides for the retention of ocean and horizon views and views towards the heritage listed building located on the eastern side of Pittwater Road which would not have been available had the proposed development been designed to a compliant 11 metre building height across the width the site.

To insist upon strict compliance would see the managers flat removed and the floor plates below adjusted in height to take advantage of the 11 metre building height standard including increased floor-to-ceiling heights particularly to the Pittwater Road fronting boarding rooms. Such design outcome would remove the view corridors available down both side boundaries and across the front of the property towards the ocean, the horizon and the heritage listed building located on the eastern side of Pittwater Road. In my opinion, although compliant with the height standard such design outcome would not represent an appropriate view sharing scenario.

Ground 3 - 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 consistent with that achieved by surrounding 4 storey development.

Objective (d) the delivery and maintenance of affordable housing

Whilst strict compliance could be achieved through deletion of the managers residence such outcome would thwart objective 1.3(d) of the Act being to promote the delivery and maintenance of affordable housing given that strict compliance has been found to be unreasonable and unnecessary having regard to the zone and building height standard objectives.

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

For the reasons outlined in this submission, approval of the variation to the building height standard will promote a contextually responsive streetscape and urban design outcome to Pittwater Road, achieve a view sharing outcome and facilitate the retention of the managers residence. The manager's residence has been designed to afford good levels of amenity for its occupants.

The deletion of the managers residence would not promote good contextually responsive streetscape and urban design outcomes and would potentially result in the proponent seeking to increase the height of the balance of the development to the 11 metre height standard where it would give rise to a greater level of view affectation than that currently proposed. Such outcome would not represent good design.

Approval of the building height variation will achieve 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.

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.

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 determinations 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 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.*

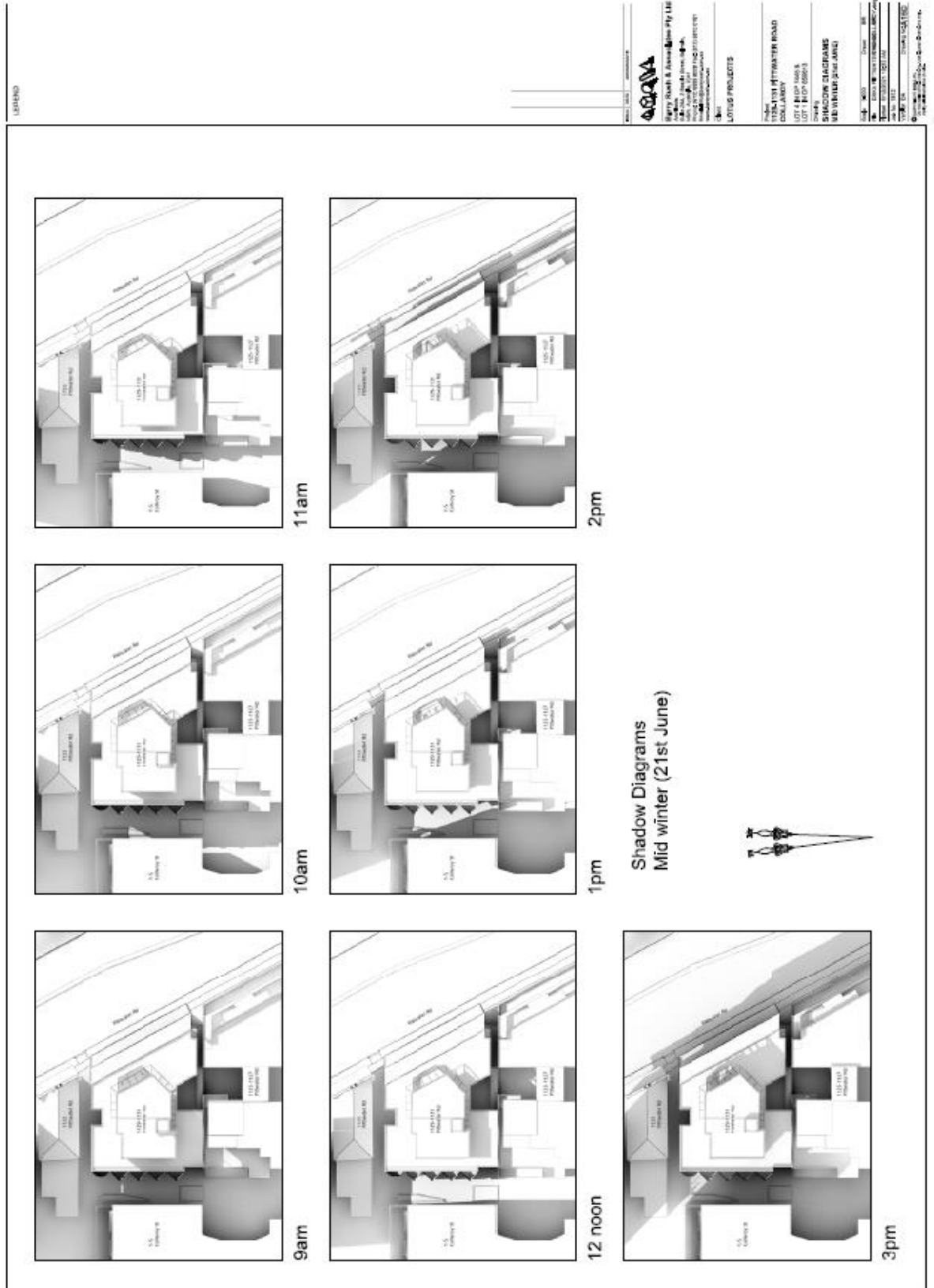
As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

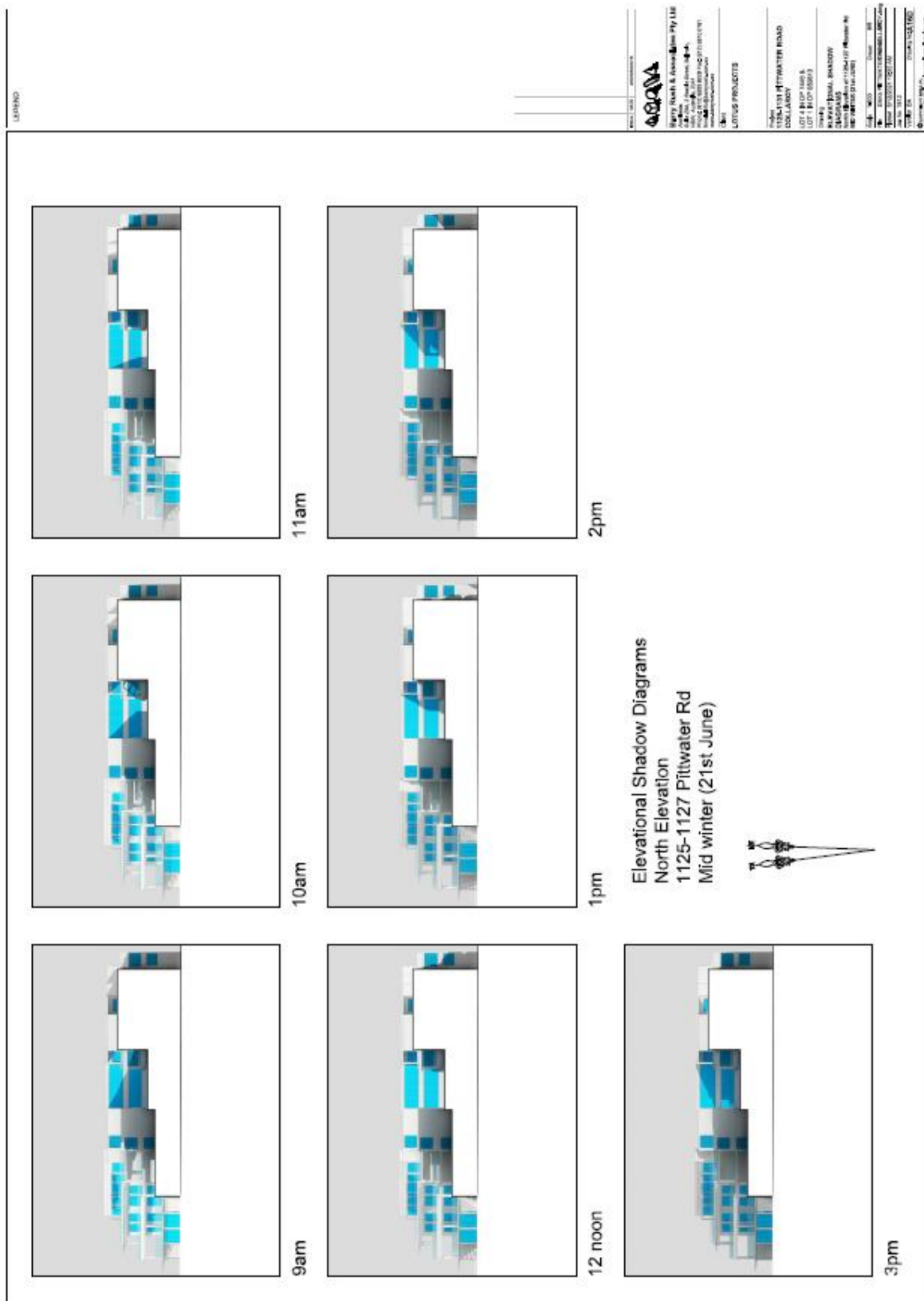
Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Shadow diagrams





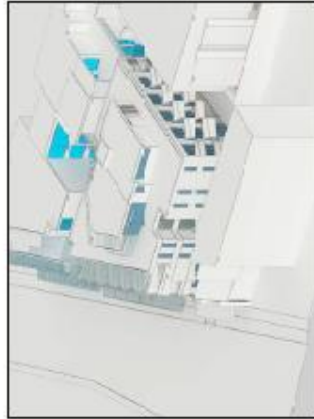
LETING

PROJECT NAME	1125-1127 PITTWATER ROAD
CLIENT	COLLINSKY
DATE	10/11/2023
SCALE	1:100
DRAWN BY	ANNA
CHECKED BY	ANNA
DATE	10/11/2023
PROJECT NO.	1125-1127 PITTWATER ROAD
PROJECT NAME	1125-1127 PITTWATER ROAD
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LEGEND



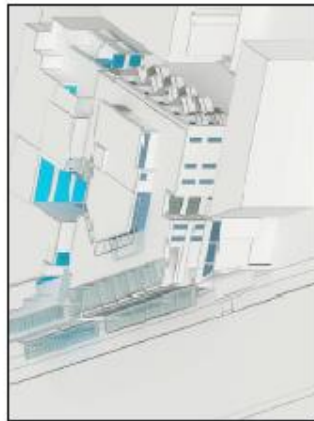
11am



2pm



10am



1pm

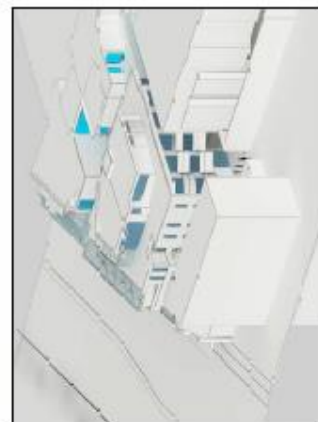
Views from the sun Diagrams
Mid winter (21st June)



9am



12 noon



3pm

PROJECT NO. 15-0000000000
 DATE 08/20/15
BBFA
 Blyth Fleming Architects
 100 State Street, Suite 200
 Boston, MA 02109
 TEL: 617.552.3333 FAX: 617.552.3334
 WWW.BBFA.COM

LOTUS PROPOSALS
 100 STATE STREET
 COLLABORATION
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Attachment 2 Visual Impact Assessment

Refer to separate Attachment