

## **ANNEXURE 1**

Clause 4.6 variation request - Height of buildings

November 2023

## Clause 4.6 variation request – Height of buildings

This clause 4.6 variation request has been prepared in support of a building height variation pertaining to an application proposing the construction of a residential flat building on the subject allotment.

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, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

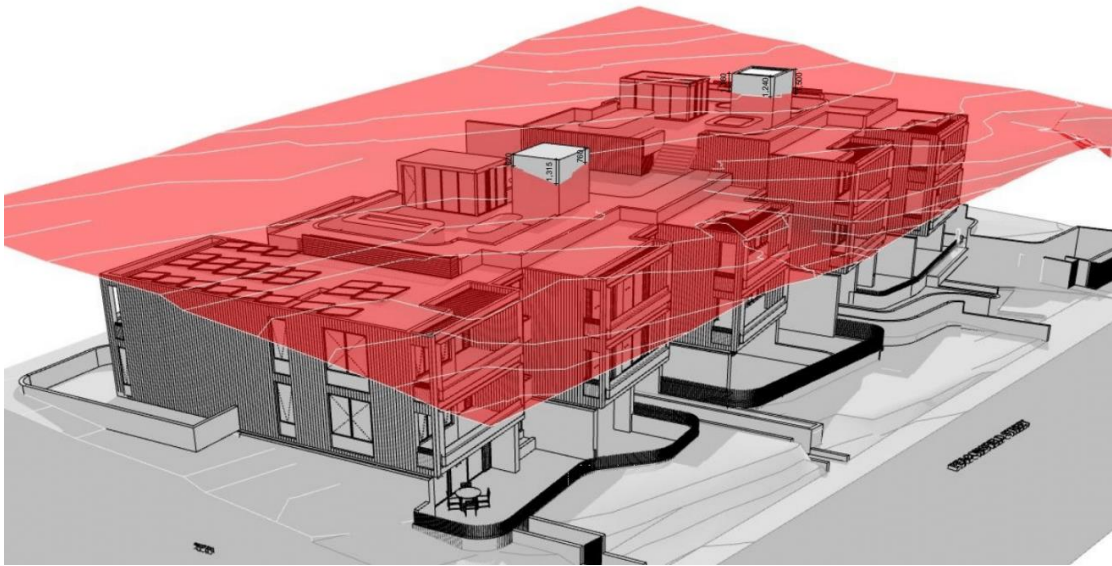
Pursuant to Clause 4.3 of Pittwater Local Environmental Plan 2014 (PLEP) the height of a buildings permissible on the site is a maximum of 8.5 metres. The objectives of this control are as follows:

(1) *The objectives of this clause are as follows—*

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

In this regard, it has been determined that all habitable floor space and roof forms sit comfortably below the 8.5 metre building height standard with the building height breaching elements confined to the upper portion of the eastern and western lift structures and associated overruns. The lifts have been extended to roof level to provide disabled access to the proposed roof top communal open space.

Architectural plan DA520 confirms that the western lift overrun breaches the height standard by between 620mm and 1.315 metres (15.4%) whilst the eastern lift overrun breaches the height standard by between 1.160 metres and 1.5 metres (17.6%). A plan extract is at Figure 1 over page.



**Figure 1** - Plan extract showing 8.5 metre building height standard breaching elements.

Clause 4.6 of WLEP 2011 provides a mechanism by which a development standard can be varied. 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.*

Pursuant to clause 4.6(2) consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

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

Clause 4.6(3) states that 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 that:

- (a) *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) states that the consent authority must keep a record of its assessment carried out under clause (3).

### **Clause 4.6 Claim for Variation**

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 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

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

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

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

Response: The subject property is located within the Newport Locality. The Desired Future Character (DFC) statement at clause A4.3 of Pittwater 21 Development Control (P21DCP) plan is as follows:

*The Newport locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a natural landscaped setting, integrated with the landform and landscape. Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations.*

*Any dual occupancy dwellings will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any multi unit housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.*

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

*Future development will maintain a height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.*

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

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

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

*Newport's coastal setting is what contributes most to the distinctive character of the commercial centre. Responsive, energy efficient buildings will support and enhance this relaxed, beachfront character and its outdoor lifestyle, contributing to a unique sense of place. Contemporary design solutions within the commercial centre will respond to Newport's climate and setting, including providing shade and shelter to streets and entries, generous private outdoor spaces, openings that capture ocean breezes, and shade elements.*

In accordance with the Newport desired future character statement the building, with the exception of the lift access to the roof top communal open space, is compliant with the 8.5 metre height of buildings development standard and which appropriately responds to the topographical characteristics of the site through the provision of a stepped floor plate design.

The development strikes a balance between keeping the building low into the site to reduce its visual prominence and excavation with the resultant building form and height ensuring the development will sit below the height of surrounding tree canopy level. The contemporary and highly articulated building design incorporates a palette of natural materials and finishes and substantial landscaping which will enable the development to blend into the vegetated escarpment which forms a backdrop to the site.

The proposal provides for the implementation of an enhanced site landscape regime where the building will sit within a landscaped setting. To that extent the proposed dwelling will not be perceived as inappropriate or jarring in a streetscape or suburban context. The building has been designed to respect the natural features on the site consistent with the desired future character statement for the Newport Locality.

Having regard to the DFC statement, I am satisfied that that the building, displays a height and scale consistent with the desired character of the locality notwithstanding the building height breaching elements proposed.

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

Notwithstanding the building height breaching elements, the proposal is consistent with this objective.

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

Response: 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.

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 lift core extensions providing disabled access to the proposed roof top communal open space with the front parapet, as the building presents to Beaconsfield Street, compliant with the 8.5 metre building height standard. The central location of the lift shafts ensure that they will not be readily discernible in a streetscape context and will not in any measurable manner contribute to unacceptable building height, bulk or scale. The overall height, bulk and scale the building as viewed from Beaconsfield Street is entirely consistent with that established by surrounding development including the residential flat building to the west 60 Beaconsfield Street.

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. In forming this opinion, I rely on the images over page.



**Figure 2** - Photograph of recently completed western adjoining residential flat building 60 Beaconsfield Street



**Figure 3** - Photograph montage of proposed development as viewed from Beaconsfield Street confirming that the non-compliant lift overruns will not be readily discernible in a streetscape context with the overall height, bulk and scale consistent with that established by the immediately adjoining residential flat building



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.

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

Response: The accompanying shadow diagrams demonstrate that the building height breaching elements will not cast any shadowing on the adjoining property to the north with associated shadowing falling onto the roof of the proposed development.

The location of the proposed lift overruns minimise/ prevents any overshadowing of neighbouring properties and accordingly this objective is satisfied notwithstanding the non-compliant building height breaching elements.

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

Response: Having inspected the site and identified available public and private view lines over and across the site, I am satisfied that the building height breaching elements will not give rise to any unacceptable view loss with a view sharing outcome maintained in accordance with the planning principle established in the matter of *Tenacity vs Warringah Council (2004) NSWLEC 140*.

Notwithstanding the building height breaching elements, the proposal is consistent with this objective.

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

Response: The building height breaching elements do not themselves require excavation or modification of the landform.

Notwithstanding the building height breaching elements, the proposal is consistent with this objective.

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

Response: The proposed areas of non-compliance will not adversely impact on the natural environment with no site disturbance directly attributed to the building height breaching elements proposed. The site is not listed as a heritage item or within a heritage conservation area.

Notwithstanding the building height breaching elements, the proposal is consistent with this objective.

The non-compliant components of the development, as they relate to building height, demonstrate consistency with objectives of the zone and the building height standard objectives. Adopting the first option in *Wehbe* strict compliance with the building height standard has been demonstrated to be unreasonable and unnecessary.

## **Sufficient Environmental Planning Grounds**

### **Ground 1 - Objectives of the Act**

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

Approval of the variation to the building height standard will facilitate the provision of appropriately designed, located and landscape communal rooftop open space able to be accessed by all occupants including persons with a disability in accordance with Objective 3D-1 of the Apartment Design Guide. In this regard, approval will facilitate the provision of *an adequate area of communal open space to enhance residential amenity and provide opportunities for landscaping*. The provision of disabled access also satisfies the relevant provisions of the BCA/ DDA.

Approval of the building height variation will achieve this objective.

### **Ground 2 – Minor nature of breach and topography**

The extent of building height breach is confined to the upper portion of the lift extensions with the building height breaching elements quantitatively and qualitatively appropriately described as minor.

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

While strict compliance could be achieved by removing the roof top communal open space and associated lift access such outcome would significantly compromise the design quality and amenity of the development in circumstances where the building height breaching elements do not give rise to adverse streetscape, residential amenity or environmental consequences.

The building is of appropriate design quality and represents the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

## **Conclusions**

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) that the site specific and contextually responsive development is consistent with the objectives of the building height standard, and
- b) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- c) that having regard to (a) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case.

As such we 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.

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

Yours sincerely

Boston Blyth Fleming



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**Director**