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ANNEXURE 1

Clause 4.6 variation request – Height of buildings
Residential flat building development

116 - 120 Frenchs Forest Road West and 11 Gladys Avenue, Frenchs Forest

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 State Environmental Plan Policy (Housing) 2021 (SEPP Housing)

2.1 Chapter 2, Part 2, Division 1, clause 16(3) - Affordable housing requirements for additional floor space ratio

Pursuant to clause 16(3) of SEPP Housing, if the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

I confirm that the application proposes the provision of 21 affordable housing apartments, representing a total GFA of 1937.77m² or 15% of total GFA, in accordance with the affordable housing FSR incentive provisions contained within Chapter 2, Part 2, Division 1 Infill affordable housing of SEPP Housing. As 15% of total GFA is proposed as affordable housing an additional floor space ratio of 30% applies to the maximum prescribed floor space ratio. Accordingly, the applicable building height standard is the maximum permissible building height for the land plus an additional 30%.

The stated objective of the Division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households. It is also considered appropriate to assess the proposed building height against the objectives of the height of building standard at clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP 2011) namely:

> *(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.

In this regard, I note that clause 4.3 WLEP prescribes a variable maximum building height for development across the land of between 13m and 17.5m. Applying the 30% building height incentive results in a maximum building height for development across land of between 16.9m and 22.75m.

It has been determined that the lift overrun and northern roof edge of Building B breach the 22.75m height standard by a maximum of 300mm or 1.3% with the lift overrun and north eastern roof edge of Building C breaching the 16.9m height standard by a maximum of 1m (5.9%) and 300mm (1.7%) respectively as demonstrated in the plan extracts at Figures 1 and 2.

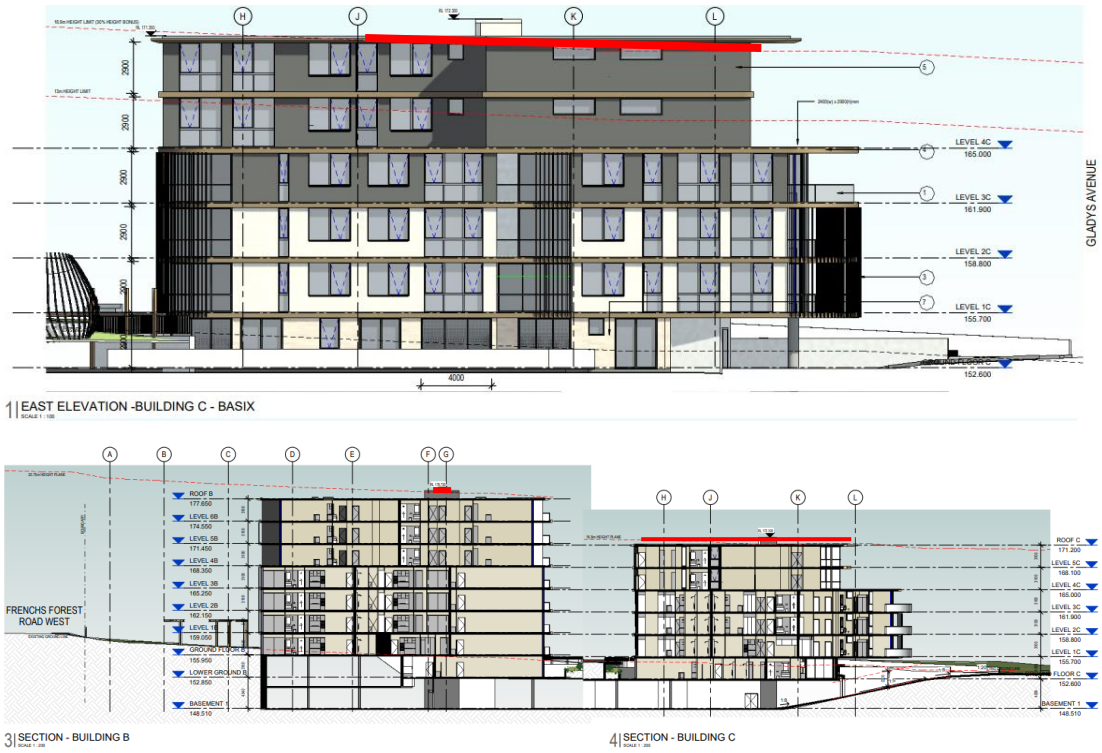

Figure 1 – East elevation Building C and Sections 3 and 4 - Buildings B and C (source: Brewster Murray)

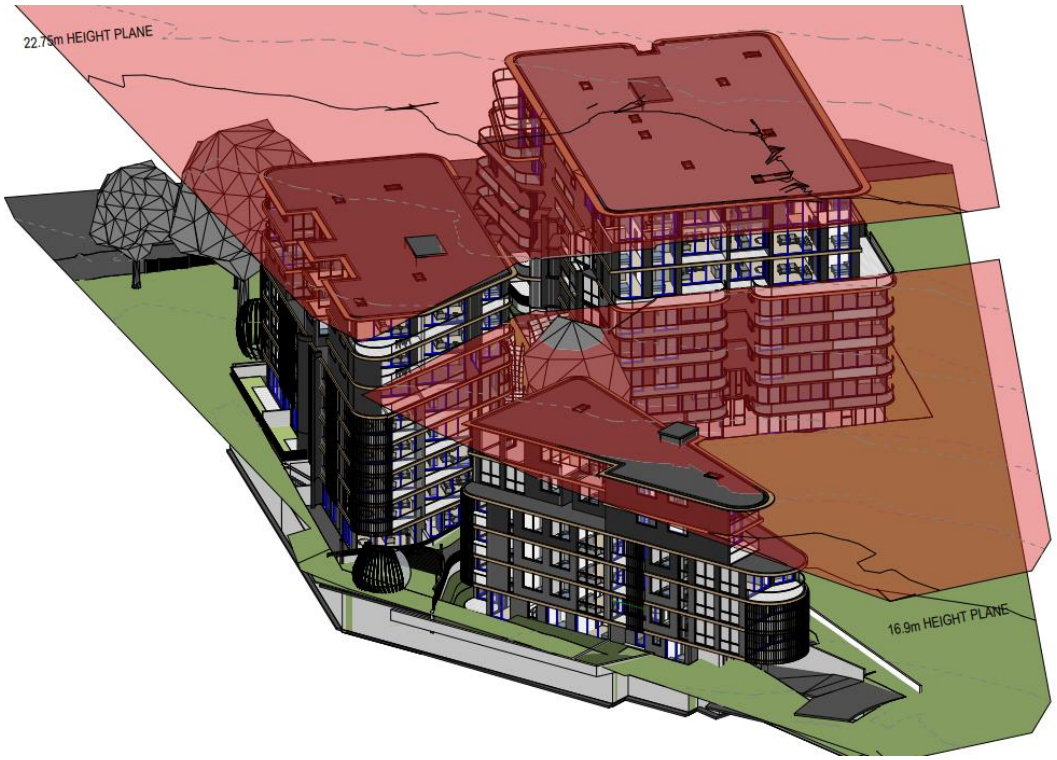

Figure 2 - Plan extract showing minor breaches to building height for Buildings B and C (source: Brewster Murray).

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

The proposed development does not comply with the height of buildings provision at clause 16(3) of SEPP Housing which specifies a maximum building height across the land however strict compliance is considered to be unreasonable and 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.

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 16(3) of SEPP Housing 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

4.0 Request for variation

4.1 Is clause 16(3) of SEPP Housing 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 16(3) of SEPP Housing prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 16(3) of SEPP Housing 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 way, 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.

The third way, which has also been adopted, is that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

First way - Consistency with objectives of the standard

Clause 15A of SEPP Housing states that the objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

To the extent that the building height breaching elements are appropriately described both quantitatively and qualitatively as minor, I am satisfied that the building height breaching elements do not contribute to building height or massing to the extent that the overall building will be incompatible with the desired future character of the precinct as anticipated through strict compliance with the applicable infill affordable housing incentive provisions which anticipate buildings having a height and floor space 30% more than the maximum prescribed by the applicable Local Environmental Planning instrument.

Accordingly, I am satisfied that notwithstanding the building height breaching elements the proposal satisfies the clause 20(3)(b) design requirements of SEPP Housing. Further, notwithstanding the non-compliant building height breaching elements the proposal facilitates the delivery of new infill affordable housing that will meet the needs of very low, low and moderate income households and to that extent achieves the objective of the standard.

I also consider it appropriate to assess the proposed building height against the objectives of the height of building standard contained at clause 4.3 WLEP to the extent that they do not derogate from the infill affordable housing objective at clause 15A of SEPP Housing.

An assessment as to the consistency of the proposal when assessed against the objectives of clause 4.3 WLEP are as follows:

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

Comment: 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.*

In accordance with the above and when considering the height and scale of surrounding developments, it is important to note that the site and surrounding locality is anticipated to undergo significant change given its location within the Frenchs Forest Precinct under Part 8 Frenchs Forest Precinct of WLEP 2011. The Frenchs Forest Precinct was recently subject to rezoning and an uplift in planning controls in response to the Hospital Precinct Structure Plan and Frenchs Forest Place Strategy 2041. The locality is therefore anticipated to undergo a significant transformation, which translates to a significant increase in the height and scale of existing development.

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 and jarring in a streetscape and urban design context. I note that the relatively minor breaches in building height will not result in any significant increase in actual or perceived height, bulk or scale.

Despite non-compliance, the proposal is consistent with the objectives of the Frenchs Forest Precinct and will deliver a contemporary residential flat building development which will achieve design excellence. The proposal will provide a sustainable development with high quality residential accommodation, landscaping and open spaces. Further, the overall height of the development is consistent with that anticipated by the in-fill affordable housing FSR and building height incentive provisions contained within SEPP Housing and consistent with the building heights established by the Northern Beaches Hospital opposite the subject property. The proposed building heights, in particular the non-compliant building height breaching elements, will not be perceived as inappropriate or jarring in such 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 overall height of the development, in particular the contribution made by 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 element, the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the building height breaching element, the resultant development is compatible with the height and scale of the anticipated 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 rely on the analysis detailed in response to objective (a) to confirm that the building height breaching elements will not give rise to any unacceptable visual impact.

The proposed development represents a height, bulk and scale which is compatible with the desired future character of the locality and the height and form of development anticipated by the in-fill affordable housing height and FSR incentive provisions contained within SEPP Housing. Furthermore, when viewed from the public domain and neighbouring properties, the design and siting of the non-compliant elements provide considerable visual and physical separation thus mitigating any potential visual impact.

In relation to the disruption of views, having inspected the site and its surrounds to identify potential view corridors across the site, and noting that the building height breaching elements proposed, I have formed the opinion that the non-compliant building height elements proposed will not give rise to unacceptable view impact.

In relation to the minimisation of privacy loss, I note that the non-compliant building height elements will not give rise to any adverse privacy impacts.

In relation to solar access, shadow diagrams demonstrate that shadows from the building height breaching roof element falls predominantly within the subject site throughout the day with no unacceptable non-compliant shadowing impacts arising from the building height non-compliant elements proposed. Solar access impacts have been minimised.

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 element will not be readily discernible as viewed from any coastal or bushland environments.

In any event, notwithstanding the height building breaching elements the height, bulk and scale of the development will not be perceived as inappropriate or jarring have regard to the form of 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 element 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 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 height bulk and scale of surrounding development in the relatively minor nature of 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, in particular the building height breaching element proposed, offensive, jarring or unsympathetic in a streetscape context. The building height breaching element 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. 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.

Third way - Consistency with objectives of the standard

The third way, which has also been adopted, is that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. That is, strict compliance could be achieved through a reduction in building height and associated floor space to the extent that it would not be possible to take advantage of the 30% FSR incentive provision in circumstances where the building height breaching elements are inconsequential in relation to unacceptable streetscape or residential amenity impacts. The building height variation facilitates the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households with strict compliance defeating or thwarting this objective.

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 and third ways in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and/or 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

Ground 1 - Topography

The topographical characteristics of the site makes strict compliance with the building height standard difficult to achieve with the building height breaches associated with the northern edges of buildings B and C able to be directly attributed to the topography of the land which falls away in a northerly direction.

Ground 2 - Minor nature of breach & lack of impact

The building height breaching elements are appropriately described both quantitatively and qualitatively as minor. I am satisfied that the building height breaching elements do not contribute to building height or massing to the extent that the overall building will be incompatible with the desired future character of the precinct as anticipated through strict compliance with the applicable in-fill affordable housing incentive provisions which anticipate buildings having a height and floor space 30% more than the maximum prescribed by the applicable Local Environmental Planning instrument.

I am also satisfied that the building height breaching elements will not give rise to adverse streetscape or residential amenity impacts. 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* [2021] 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.

Ground 3 – Objectives of SEPP Housing

Approval of the minor building height breaching elements will achieve the objective of the Division 1 in-fill affordable housing provisions within SEPP Housing being to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households (clause 15A).

Ground 4 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of the minor building height breaching elements will promote the delivery of affordable housing consistent with objective 1.3(d) 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.*

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

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
10.4.24