

2.10.24

Clause 4.6 variation request - Height of buildings (clause 4.3 PLEP 2014) Proposed shop top housing development No. 1112 – 1116 Barrenjoey Road, Palm Beach

1.0 Introduction

This updated clause 4.6 variation request relates to Architectural plans prepared by Koichi Takada Architects as referenced in the Supplementary Statement of Environmental Effects dated 1st October 2024.

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.

2.0 Pittwater Local Environmental Plan 2014 (PLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of PLEP the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control 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.*

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.

We note that Council has adopted the interpretation of ground level (existing) as that established in the matter of **Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582** (Merman) where at paragraphs 73 and 74 O'Neill C found:

73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

An inspection of the property has revealed that ground levels across the site are highly disturbed with levels artificially modified through previous excavation activities. Applying Merman for the purpose of calculating building height ground level (existing) has been taken to be the existing disturbed ground levels across the site.

In this regard, given the topographical characteristics of the site the western edge of the Level 2 and Level 3 roof forms and adjacent planter boxes and balustrade breach the building height standard by up to 2.8m (32.9%) with the previously disturbed nature of the site contributing, in some locations, to the extent of building height breach proposed. The building height breaching elements are depicted in the plan extract at Figure 1 over page.

The size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may permit a departure from a numerical standard under clause 4.6: see *GM Architects Pty Ltd v Strathfield Council [2016] NSE:EC 1216* at [85].

In *88 Bay Street Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1369* the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In Merman, the Court granted a variation of 2.01 metres or 19% in circumstances where the proposed residential flat building was adjoined by a state heritage listed item on one side boundary and a local heritage listed on the other side boundary.

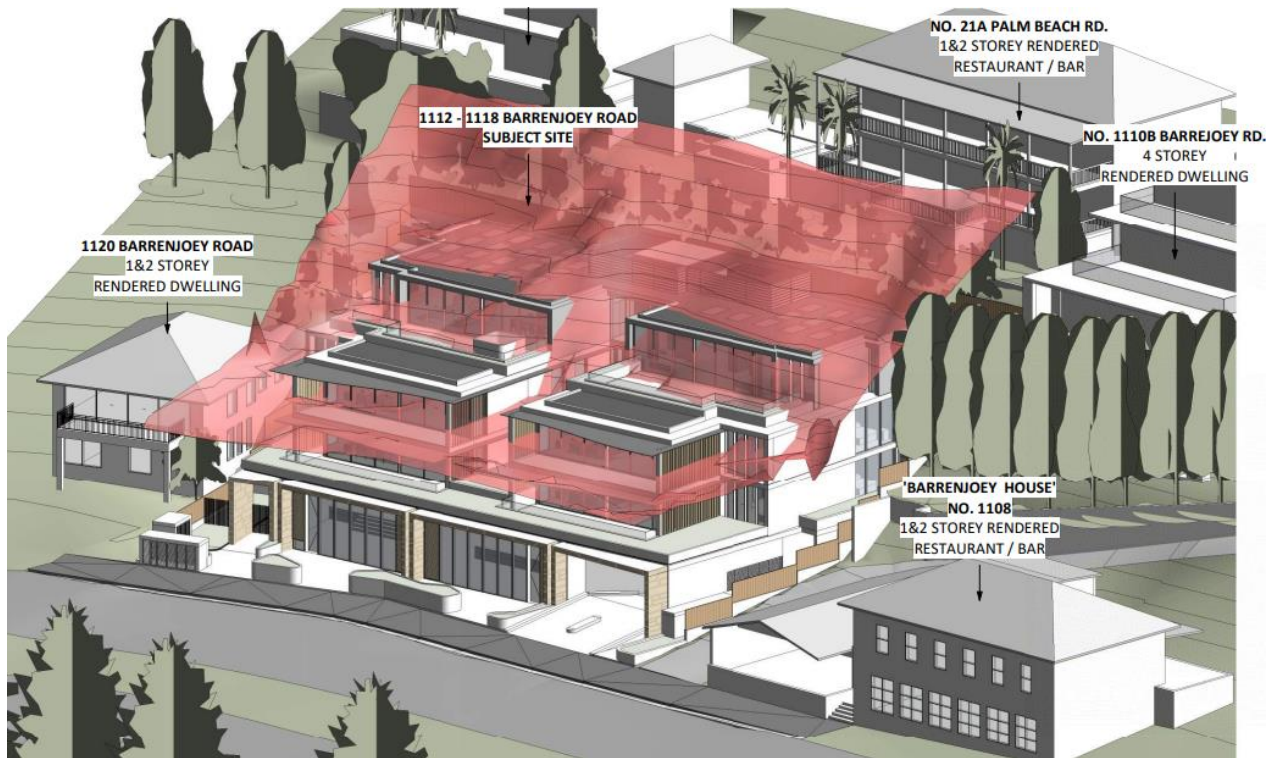


Figure 1 – Building height blanket diagram showing the location and extent of building elements located above the 8.5 metre building height standard calculated in accordance with Merman

Based on an interpolation of original undisturbed ground levels from available survey information around the perimeter of the property it has been determined that the extent of building height breach would be significantly reduced were it not for the previous excavation on the site which has distorted the application of the 8.5m building height standard. This is depicted in the interpolated undisturbed ground level height blanket at Figure 2 over page.

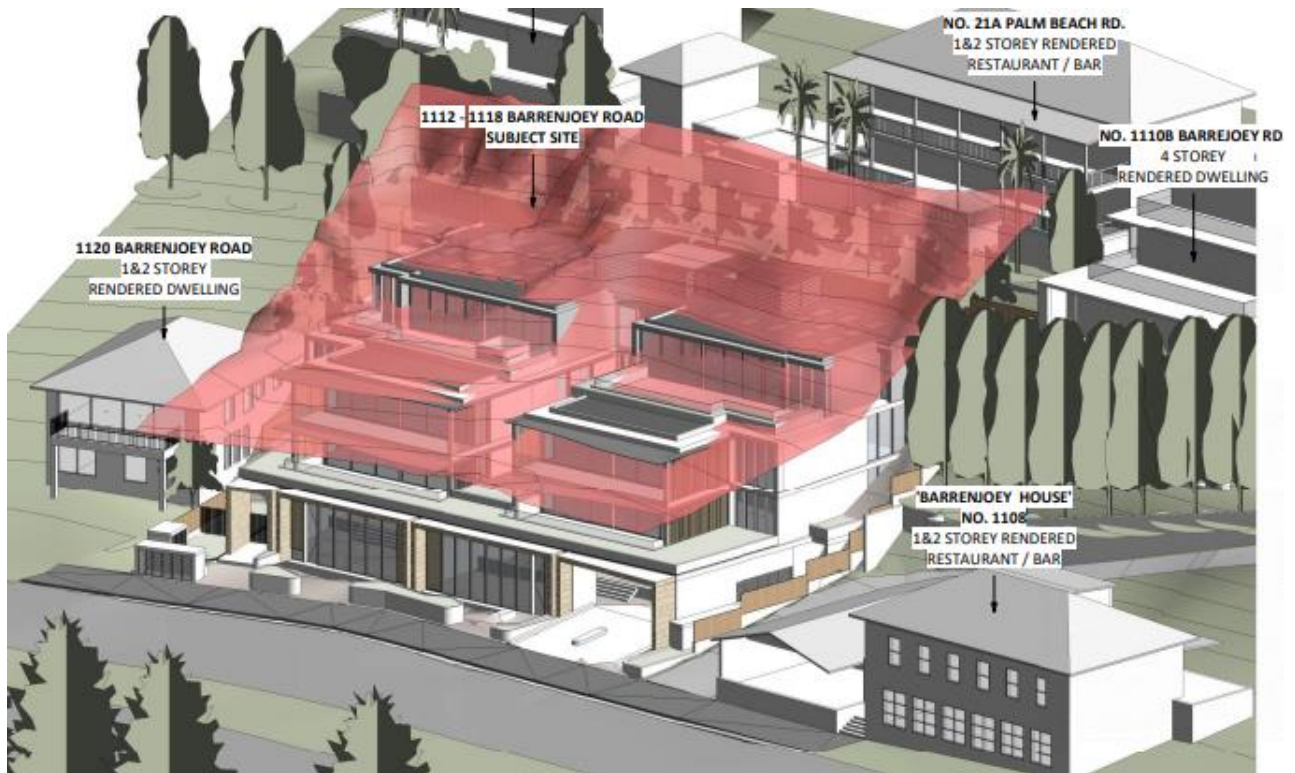


Figure 2 – Interpolated undisturbed building height blanket diagram showing the location and extent of building elements located above the 8.5 metre building height standard.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of PLEP 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 PLEP provides:

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

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

Clause 4.6(3) of PLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at clause 4.3 of PLEP 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 PLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
- (i) *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for*

development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5th May 2022, attached to the Planning Circular PS 22-002 issued on 5th May 2022, 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 PLEP 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.*

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 PLEP 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].*
22. *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.*
23. *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 PLEP 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 of PLEP 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 PLEP?

4.0 Request for variation

4.1 Is clause 4.3 of PLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

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

Clause 4.3 PLEP prescribes a building height provision which seeks to limit the height of the development. Accordingly, clause 4.3 PLEP is a development standard.

4.2a 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 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 Palm Beach Locality with the applicable locality statement identifying the desired future character as follows:

The Palm Beach locality will remain primarily a low-density residential area with dwelling houses in maximum of two storeys in any one place in a 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 lowlands and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density 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 building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. 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. The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

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.

Palm Beach will remain an important link to the offshore communities.

In accordance with the desired future character statement the building, which is located within a commercial centre, has been designed to achieve a highly articulated and modulated stepped building form which responds appropriately and effectively to the topographical characteristics of the site. A balance has been achieved between excavation and the appropriate distribution of floor space the quantum of which achieves the orderly and economic development of the land.

I have formed the considered opinion that the amended proposal is consistent with the Palm Beach Locality desired future character statement as outlined being a development that steps down the site in response to topography where the development will sit below the tree canopy level established along the escarpment which forms a backdrop to the site. The building form has been distributed across the site in a manner which provides for a distinct horizontal massing broken visually into 2 pavilions through appropriate façade articulation and modulation. The development maintains an appropriate spatial relationship with Barrenjoey House to the south of the site and the dwelling house at 1120 Barrenjoey Road to the north.

Whilst seaside village character is an undefined term it is considered that an appropriate design and scale response for development on this particular site, and within this particular Local Centre, is to provide an articulated building form which engages appropriately at street level in terms of retail activation and the ability to provide informal outdoor seating within the front setback area and which then steps up the site in a highly articulated and modulated form in response to topography.

The use of wide and deeply recess balconies respond to the site's coastal location, the exceptional views available in a westerly direction towards Pittwater Waterway and the site's exposure to the harsh western sun late in the afternoon.

Landscaping has also been integrated into the design of the development with landscaping elements at each level contributing to the casual coastal character of the building with the overall design, scale and treatment of the building and landscape features reflecting the seaside village character sought by the desired future character statement.

Accordingly, Council can be satisfied that the development is consistent with the desired future character of the Palm Beach Locality.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: 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 and scale proposed will be incompatible with the height and scale of surrounding and nearby development. That is, will the proposal by virtue of its height and scale 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 relation to the proposal's built form and contextual relationship with surrounding heritage items including Barrenjoey House to the south of the site I rely on the commentary contained within the Heritage Impact Statement prepared by Urbis which includes the following:

A detailed impact assessment of the proposed works has been undertaken in Section 5 of this report. The proposed development has been assessed to have no adverse impacts on the heritage significance of the vicinity items.

Key aspects of the proposal assessment are listed below:

- *The amended proposal spans 4 levels above ground which are staggered in a recessive, terraced arrangement. This is a substantially reduced scheme from the previous scheme, which comprised 5 levels above ground. The reduced scheme provides a more modest, recessive profile and increases the visual separation between the site and the vicinity heritage items.*
- *The amended scheme has been carefully designed to avoid adverse impacts to its heritage context, as follows:*

- *Whilst the reduction in scale has improved views to elevated development on the western side of the Palm Beach peninsula, views between the subject site and the ‘Winten (house)’ (LEP Item No. 2270056) heritage item are blocked by the intervening development at 21A Palm Beach Road. There are no existing views to ‘Winten (house)’ from Barrenjoey Road. Therefore, as there is no visual relationship between the subject site and the heritage item, the amended scheme can have no impact – adverse or otherwise – on ‘Winten (house)’.*
- *The stepped form and reduced levels, coupled with a substantial ground-floor setback, ensure the proposed development does not visually intrude on the profile or character of ‘Barrenjoey House’ (LEP Item No. 2270076). Views to and from the heritage item are preserved in their entirety along the commercial strip and beachfront.*
- *While contemporary, the amended scheme has been designed to respond to the natural setting of Palm Beach, including the ‘Norfolk Island Pines’ (Item No. 1993) located adjacent to the site. The use of raised planters and landscaping in a large vertical break in the façade soften the overall form of the development and allow the structure to integrate more seamlessly into the natural setting.*
- *The subject site is considered sufficiently distanced from the ‘Palm Beach Wharf’ (Item No. 2270496) that the proposal can have no impacts, adverse or otherwise, to the item’s significance. The wharf is also viewed within a context of mixed development and the subject development will have no further impact. Views to and from the heritage item towards the vicinity heritage items will not be obscured by the amended scheme, with the reduced levels improving the visual relationships between the ‘Palm Beach Wharf’ and ‘Barrenjoey House’. The proposed development, recessed into the slope, with generous setback to the upper floor, will form part of a mixed backdrop of development along Barrenjoey Road when viewed from the wharf.*
- *Barrenjoey House is separated from the subject site by the vehicle access on its northern boundary and the single storey northern addition. The setback of the upper floor mitigates potential impacts of scale and responds to the scale of neighbouring development including Barrenjoey House.*
- *The form of the proposed development relies on a terraced form, with the bulk of the structure concentrated away from the street frontage and concealed by the heavily vegetated sloping site. The proposed façade has been carefully articulated, with fenestration increasing the visual permeability of the Barrenjoey Road elevation. The diminishing profile and articulated, stepped façade, with considerable setback to the upper floor ensures the building appears visually recessive from Barrenjoey Road and reduces the overall scale of the development.*
- *The development employs a contemporary aesthetic comprising a stone-clad ground level, glass, masonry and light-weight batten-style screening complemented by expansive raised planters with softening greenery. The proposed materials and design, while contemporary, are sympathetic to the natural setting of Palm Beach and generally contribute to the recessive, diminishing profile of the proposed development.*

The proposal demonstrates a high-quality architectural design. The proposed development is assessed to have no adverse impact on the vicinity heritage items and is acceptable from a heritage perspective.

In relation to the developments compatibility with the adjoining dwelling houses to the north of the site together with those located on the escarpment which forms a backdrop to the site consideration must be given to the fact that unlike the subject property located in the E1 Local Centre zone these adjoining properties are located in the C4 Environmental Living zone with the desired future character statement anticipating 2 storey dwelling houses of a lower density and scale to that of mixed use development anticipated in the Local Centre zone. We note that the desired future character statement contains no reference in relation to the need for a 2 storey building form in the Local Centres to ensure consistency with the desired future character statement. That is, the 2 storey reference only applies to dwelling houses.

That said, the proposal maintains a variable setback to the northern zone boundary interface of between 3 and 6 metres which are considered to be contextually appropriate in their ability to maintain appropriate spatial separation and deep soil landscape opportunity along this boundary interface. The development has been designed to step back up the site in response to topography and to maintain an overall building height entirely consistent with that established by other 2, 3 and 4 storey dwelling houses and residential flat development located on steeply sloping sites along the escarpment which forms a backdrop to the site.



Figure 3 – Southern elevation plan extract showing the highly articulated and step nature of the building form proposed.

In this regard, we are satisfied that the proposed development will be compatible with the height and scale of surrounding and nearby development as viewed from Barrenjoey Road noting the different building topologies and associated scale anticipated for development within the E1 Local Centre and C4 Environmental Living zones.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: The accompanying shadow diagrams demonstrate that the portion of the development located above the 8.5 metre height standard will not result in any additional overshadowing to any adjoining residential development on 21st June.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: Having inspected the site and its immediate surrounds to identify potential view corridors across the site we are of the opinion that the proposal, in particular the elements of the development exceeding the 8.5 metre height standard, will not give rise to any adverse public or private view affectation. In this regard, we rely on the view analysis diagrams prepared by the project Architect on plans A0481(E) to A0490(E) to demonstrate the maintenance of a view sharing outcome between adjoining development.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: As previously indicated the building, which is located within a commercial centre, has been designed to achieve a highly articulated and modulated stepped building form which responds appropriately and effectively to the topographical characteristics of the site. A balance has been achieved between excavation and the appropriate distribution of floor space the quantum of which achieves the orderly and economic development of the land.

This objective is achieved notwithstanding the building height breaching elements proposed.

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

Response: As previously indicated, we are satisfied that the proposed building will not be perceived as inappropriate or jarring in a streetscape or broader urban design context have regard to the built form and landscape outcomes proposed. The application does not propose the removal of any significant trees with appropriate plantings ensuring that the development will sit within a landscaped setting and not give rise to adverse visual impacts on the natural environment. We rely on the previous commentary in relation to the acceptability of the proposal having regard to its proximity to the adjacent heritage items.

This objective is achieved notwithstanding the building height breaching elements proposed.

Accordingly, Council can be satisfied that the building heights proposed satisfy the objectives of the height of buildings standard as identified.

Having regard to the above analysis, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned E1 Local Neighbourhood Centre pursuant to PLEP 2014 with shop top housing permissible in the zone with consent. The stated objectives of the zone are as follows:

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

Response: The development provides for 2 retail spaces at ground level. These future tenancies will be able to contain uses that serve the needs of people who live in, work in or visit the area.

The proposal achieves this objective notwithstanding the building height breaching elements.

- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

Response: The development provides for 2 retail spaces at ground level. Approval of the application will achieve the objective of encouraging investment in local commercial development that generates employment opportunities and economic growth.

The proposal achieves this objective notwithstanding the building height breaching elements.

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*

Response: The proposal incorporates 5 upper-level apartments which will contribute to a vibrant and active local centre not only in relation to their contribution as actively occupied residential tenancies but also through the introduction of additional population within the local centre consistent with the Council's strategic planning for residential development in the area.

In this regard, I note that clause 4.5A PLEP prescribes a maximum density for shop top housing in the Local Centre of 1 dwelling per 150m² of site area. Based on a site area of 1361.5² the density control anticipates a maximum residential density of 9 dwellings which contribute towards Council's housing target over the next 20 years as detailed within Council's Local Strategic Planning Statement (LSPS).

Accordingly, approval of the building height variation will facilitate the provision of 5 apartments on the site consistent with the dwelling density anticipated by clause 4.5A PLEP. The proposal achieves this objective notwithstanding the building height breaching elements.

- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Response: The development provides for 2 retail spaces at ground level and to that extent achieves this objective notwithstanding the building height breaching elements.

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse, and functional streets and public spaces.*

Response: The ground floor retail spaces and publicly accessible forecourt area will significantly revitalise this local centre with the building design providing for an attractive and vibrant built form outcome which will contribute significantly to the built form quality of development within the centre.

The active street frontage proposed will attract pedestrian traffic and contribute to a diverse and functional streetscape incorporating a publicly accessible forecourt area.

The proposal achieves this objective notwithstanding the building height breaching elements.

- *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 amended plans, to which this clause 4.6 variation request relates, have been prepared and refined in response to the feedback obtained from Council's expert including Council's heritage advisor with the height, scale and design of the development considered to relate favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.

Accordingly, I have formed the considered opinion that, notwithstanding the building height breaching elements, the development is of exceptional design quality with the proposal appropriately responding to its immediate built form and heritage context. I am satisfied that the proposal creates an urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment and which is a better outcome to the development that could be carried out on the land under Development Consent N0102/10.

The proposal achieves this objective notwithstanding the building height breaching elements. The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the E1 Local Centre 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.

4.2b Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

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

Sufficient environment planning grounds

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

Ground 1 – Flooding

The ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.12m AHD being approximately 720mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding contributes to making strict compliance with the building height standard more difficult to achieve and to that extent is an environmental planning ground put forward in support of the extent of the building height breach proposed.

Ground 2 – Prior excavation of the site distorts extent of building height breach

The prior excavation of the site within the footprint of the recently demolished buildings distorts the height of buildings development standard plane overlaid above the site when compared to the natural undisturbed topography of the land. When the original undisturbed levels of the site are interpolated across the building footprint the extent of building height breach, particularly beyond the proposed street facing building parapet, would be significantly reduced as depicted in Figure 2.

Consistent with the finding of O’Neill C at paragraph 73 of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* such circumstance can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014 as it relates to the extent of building height breach proposed.

Ground 3 - Distribution of height

The building height has been distributed so as to ensure the bulk of the height is centred on the site, away from the adjoining properties on the northern and southern boundaries. The distribution of the building mass away from the eastern, northern and southern boundaries ensures that there are no unacceptable impacts to the adjoining properties whilst allowing a development that provides a high level of amenity to future occupants of the building and is consistent with the objective of the zone *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council’s strategic planning for residential development in the area* facilitates a development that is effective in providing high levels of amenity to occupants of the development.

Further, the development is well under the height of building control at the eastern portion of the site, see below:

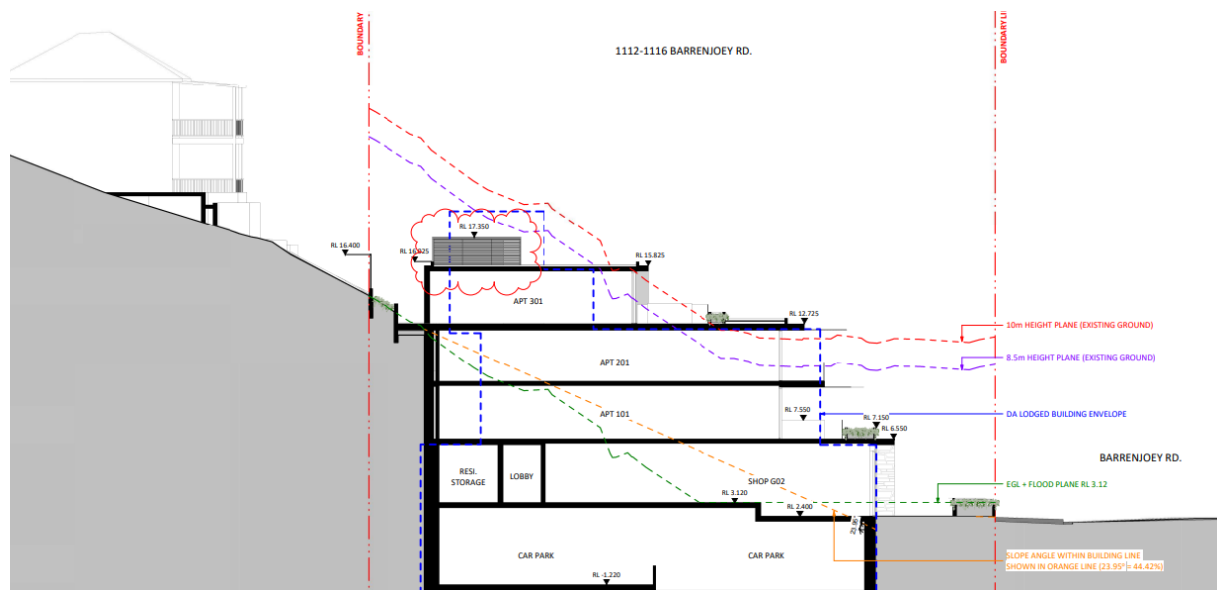


Figure 4 – Plan extract showing building sitting well below height standard at eastern edge of the site.

Ground 4 - 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 through achieving superior environmental, urban design, heritage conservation and public benefit outcomes compared to the development approved and physically commenced pursuant to Development Consent N0102/10. It will also facilitate the delivery of much needed housing stock consistent with Council's LSPS.

Strict compliance would require a significant reduction in floor space with such outcome neither orderly nor economic.

Further, I note that clause 4.5A PLEP prescribes a maximum density for shop top housing in the Local Centre of 1 dwelling per 150m² of site area. Based on a site area of 1361.5² the density control anticipates a maximum residential density of 9 dwellings which contribute towards Council's housing target over the next 20 years as detailed within Council's Local Strategic Planning Statement (LSPS). Approval of the building height variation will facilitate the provision of 5 well designed and appropriately sized dwellings on the subject property consistent with the dwelling density anticipated by clause 4.5A Pittwater LEP and in doing so appropriately contribute towards the housing target identified within the LSPS.

Approval of the building height variation will promote the achievement of this objective.

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

For the reasons outlined in this submission, I have formed the considered opinion that the proposal exhibits design excellence in its ability to appropriately respond to desired future character of the Palm Beach Locality whilst achieving appropriate streetscape, residential amenity, heritage conservation streetscape and broader urban design outcomes.

Approval of the building height variation will promote the achievement of this objective.

Objective (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants

As previously indicated, the ability to lower the height of the development is frustrated by localised flooding which occurs adjacent to the front boundary with such flooding requiring a Flood Planning Level (FPL) of RL 3.12m AHD being approximately 720mm above the ground level at the front of the property. This has necessitated the raising of the rear of the retail floor space relative to the levels established along the front boundary to achieve acceptable flood mitigation outcomes in accordance with the flood planning provisions within PDCP.

The flooding constraint contributes to making strict compliance with the building height standard more difficult to achieve. The floor levels adopted provide for the protection of the health and safety of their occupants.

Approval of the building height variation will promote the achievement of 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.

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

4.3 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 E1 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 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.

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.

4.4 Secretary’s concurrence

By Planning Circular dated 5th May 2022, 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 non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

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

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

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

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', is written over a faint, illegible stamp or background.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director