1 Clause 4.6 variation request – Height of Buildings

1.1 Introduction

This clause 4.6 variation has been prepared with respect to a proposed shop top housing development at 35-43 Belgrave Street, Manly, 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.

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to Clause 4.3 of MLEP 2013, the height of buildings on the subject land is not to exceed 15m. The objectives of this control are as follows:

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,
(b) to control the bulk and scale of buildings,
(c) to minimise disruption to the following:
  (i) views to nearby residential development from public spaces (including the harbour and foreshores),
  (ii) views from nearby residential development to public spaces (including the harbour and foreshores),
  (iii) views between public spaces (including the harbour and foreshores),
(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,
(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

The proposed development reaches a maximum height of 18.27m, measured from existing ground level to the top of the proposed vaulted roof form at RL 27.070m AHD.

The non-compliance is representative of a 3.27m or 21.8% variation of the 15m maximum building height limit prescribed. The extent of non-compliance is demonstrated in the extract of Streetscape Elevations by SJB Architects (Figure 1) and the Height Plane Diagrams by SJB Architects (Figure 2).

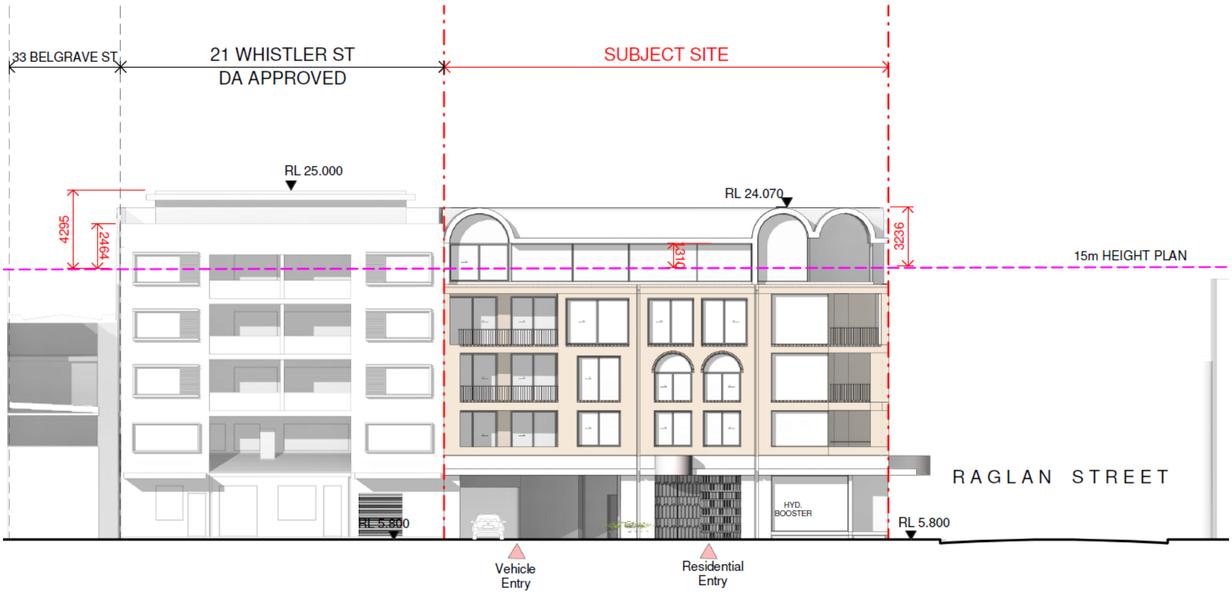

Figure 1: Extract of Street Elevation with the 15m height plane nominated in purple

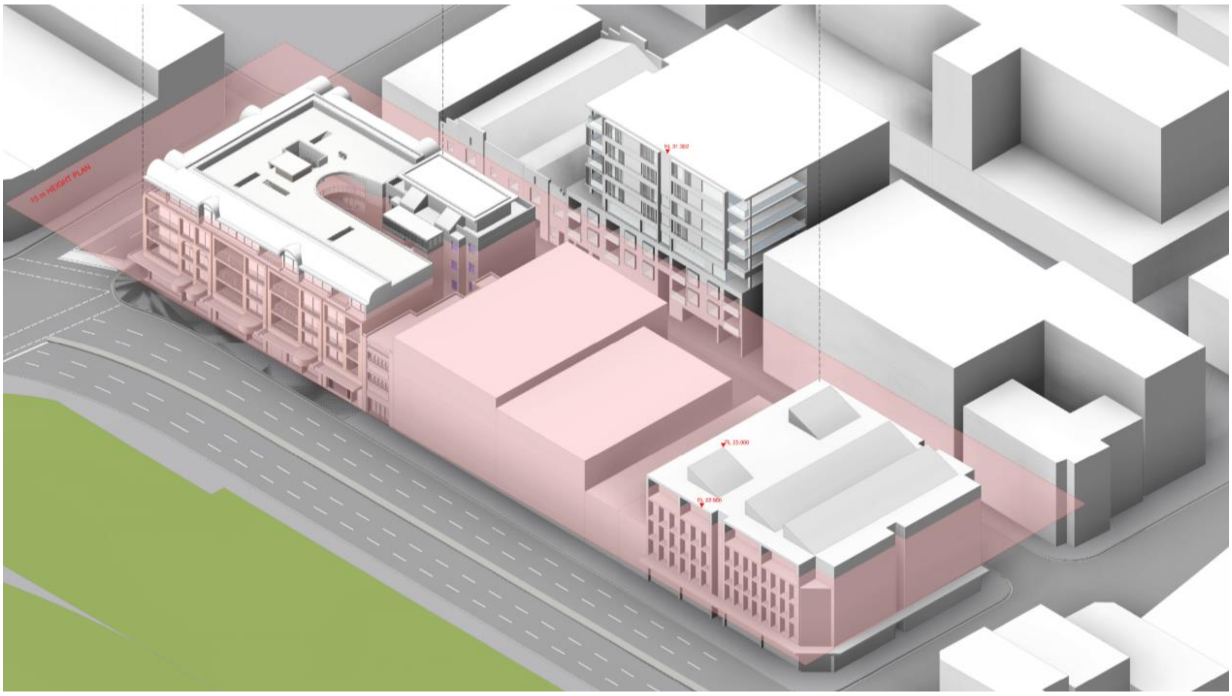

Figure 2: Height Plane Diagram

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

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 clause 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 MLEP 2013 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 building height development standard in clause 4.3 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

The proposed development does not comply with the building height development standard at clause 4.3 of MLEP 2013 which specifies a maximum building height of 15m. 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 MLEP 2013 provides:

Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:
- *(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- *(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) the concurrence of the Planning Secretary has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest *because* it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The 'Variations to development standards' Planning Circular issued by the NSW Department of Planning, Industry and Investment on 5 May 2020 confirms that the Secretary's concurrence can be assumed by the Local Planning Panel for applications involving contravention of a numerical development standard by more than 10%.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. 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 MLEP 2013 from the operation of clause 4.6.

1.3 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:

> *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].*
>
> *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].*
>
> *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].*
>
> *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].*
>
> *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.*
>
> *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 MLEP 2013 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 MLEP 2013 and the objectives for development 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 MLEP 2013?

1.4 Request for variation

1.4.1 Is clause 4.3 of MLEP 2013 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, <u>height,</u> density, design or external appearance of a building or work,*

Clause 4.3 of MLEP 2013 prescribes a height limit for development on the site. Accordingly, clause 4.3 of MLEP 2013 is a development standard.

1.4.2 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 approach is relevant in this instance, being 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 building height development standard

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

(a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

Comment: The building height of the proposed development is consistent with that of surrounding development and development within the wider E1 zone. As demonstrated in the Streetscape Elevations by SJB, the height of the development sites below the height of the approved development at 21 Whistler Street (19.295m) and 21 Belgrave Street (19.40m).

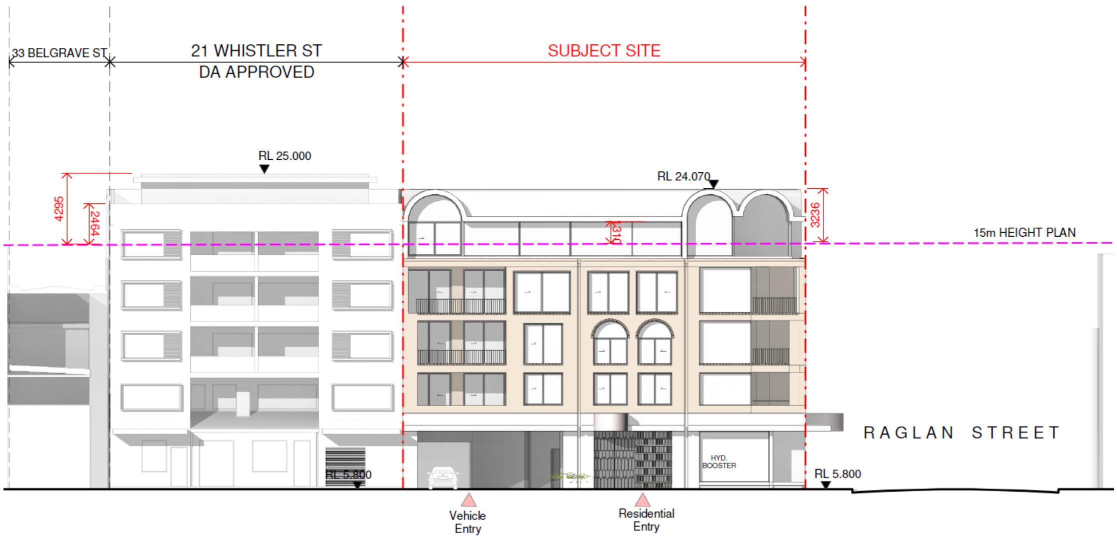

Figure 3: Extract of the East Elevation

The townscape provisions of MDCP 2013 identify the site as an 'Important Corner' and prescribe that a variation to the height plane is acceptable in circumstances where the proposal seeks to match the height of adjacent buildings or to create a corner emphasis. In light of recent approvals that breach the height plane (which contribute to the desired character of the area), and noting an intent to achieve consistent building heights, the proposal is considered to appropriately reflect the desired future streetscape character pf the locality.

(b) *to control the bulk and scale of buildings,*

Comment: The proposed development is well articulated with a bulk and scale that is commensurate with surrounding and nearby development, as demonstrated in the photomontage at Figure 4. The development has been designed in strict conformity with the maximum FSR prescribed for the site, which is the primary measure to limit the bulk and scale of development.

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 bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the visual catchment of the site.

Figure 4: Photomontage

(c) *to minimise disruption to the following:*

- *(i) views to nearby residential development from public spaces (including the harbour and foreshores),*
- *(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
- *(iii) views between public spaces (including the harbour and foreshores),*

<u>Comment:</u>

The proposed development is unlikely to result in unreasonable disruption of views, primarily due to the height of adjoining and nearby development which exceeds that of the development proposed.

Upon review of the Assessment Report for the adjoining development at 21 Whistler Street, which was approved with a greater height than that currently proposed, a view towards the ocean may be obtained over the subject site from properties upslope, including 7 Tower Street. However, it is noted that despite the marginal loss of ocean views in that instance, the non-compliant proposal was otherwise supported by Council.

(d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

Comment: The proposed development is supported by Shadow Diagrams and View from the Sun Diagrams by SJB Architects which demonstrate that the proposal will not result in any adverse impacts upon solar access to adjoining or nearby development, and that suitable levels of sunlight will be achieved to the residential apartments proposed.

In particular, the non-compliant height of the development does not reduce sunlight to the living rooms or primary balconies of units under construction at 21 Whistler Street, which are oriented to the east.

(e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Comment: Not applicable – the site is not in a recreation or environmental protection zone.

Consistency with zone objectives

The subject property is zoned E1 Local Centre pursuant to MLEP 2013. The developments consistency with the stated objectives of the E1 zone is as follows:

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

  Comment: The proposed development provides 447m² of retail floor space to contribute to the existing range of retail, business, entertainment and community uses within the Manly Town Centre.

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

  Comment: The proposed development represents a significant investment in the revitalisation of the site, generating employment opportunities and economic growth as a consequence of the ground floor retail tenancies, in addition to the management and maintenance of the upper floor residential apartments.

- *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.*

  Comment: The proposed development provides high-quality residential apartments on a site that is perfectly suited for increased residential development. Future residents of the proposed development will contribute to the vibrancy of the Manly Town Centre.

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

  Comment: The proposed development provides retail tenancies on the ground floor, strategically oriented with maximum presentation to Belgrave Street and Raglan Street, with primary residential access and service arrangements from Whistler Street, to minimise disruption to the primary street frontages.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

  Comment: The proposed development is informed by a detailed site analysis, which confirms that there are no adjoining or nearby land uses that cause conflict in relation to the residential floor space proposed. Furthermore, the development has been designed to ensure acceptable noise levels for all residences in light of the ground floor retail tenancies and traffic noise associated with Belgrave Street (as confirmed in the accompanying Acoustic Report).

- *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.*

  Comment: The proposal includes four retail tenancies on the ground floor presenting to Belgrave Street, Raglan Street, and the northern end of Whistler Street, with a total retail floor space of 447m². The retail spaces are designed with large, glazed frontages, strategically designed planters, high ceilings and projecting awnings to maximise activation and amenity along the footpath and at street level in general. The proposal has also been designed with the residential access, driveway access and service areas to Whistler Street, which acts as more of a rear laneway, to maximise retail presence along the higher order streets.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.*

  Comment: The proposed development appropriately responds to the scale and form of surrounding and nearby development throughout the town centre, most notably that of recent approvals at 21 Belgrave Street, 26 Whistler Street and 21 Whistler Street (which immediately adjoins the site).

  It is noted that the FSR development standard is the primary control to limit the bulk and scale of development in the Manly Town Centre, and in this regard, the proposal is maintained below the maximum prescribed.

The non-compliant development, as it relates to building height, demonstrates consistency with objectives of the zone and the building height development standard objectives. Adopting the first option in *Wehbe,* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

1.4.3 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]-[25] 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].*

<u>Sufficient environmental planning grounds</u>

Ground 1 - Contextually responsive building design

Despite non-compliance with the 15m building height development standard, the proposed development is consistent and compatible with the height of development within the immediate context of the site, including:

- The 5 storey shop top housing development at 21 Whistler Street (DA2018/1669), with a maximum height of 19.295m,
- The 5 storey shop top housing development at 21 Belgrave Street (DA230/2015), with a maximum height of 19.4m, and
- The 10 storey residential flat building at 26 Whistler Street (DA2019/0645), with a maximum height of 29.71m.

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by other existing development within the visual catchment of the site, consistent with Objective 1.3(c) of the EP&A Act. The proposed development has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of high design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Ground 2 – Consistency with the DCP

The proposed height breach will ensure consistency with the Manly Townscape Principles prescribed by MDCP 2013, including:

- Clause 3.1.3.1, which prescribes that important corner sites, as identified on the Townscape Map at Figure 5, shall be maintained, with strongly defined corner buildings that set the street frontage, and
- Clause 4.2.2.1, which prescribes that an increase in building height should be permitted to match adjacent development or to create corner emphasis (Figure 6).

Figure 5: Extract of the Manly Town Centre Townscape Principles Map

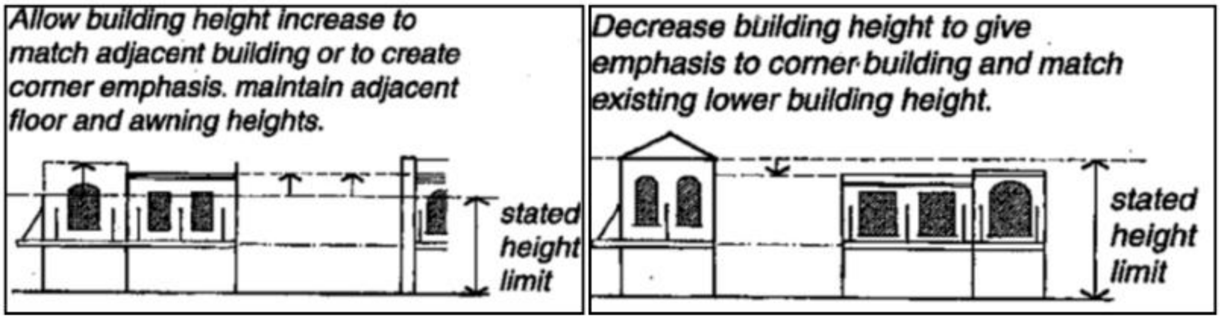

Figure 6: Extract of Figure 39 of MDCP 2013.

As demonstrated in Figure 7, the proposed development is consistent with the height and scale of the development at 21 Belgrave Street, acting as a bookend to this particular stretch of buildings. If strict compliance was to be enforced, the proposed development would not achieve the built form outcomes prescribed for the Manly Town Centre, with an unbalanced street frontage, and with a central building (21 Whistler Street) that inappropriately dominates over the adjacent important corner site.

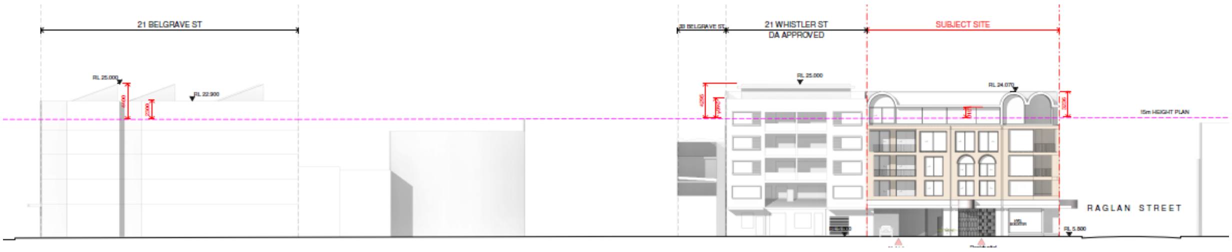

Figure 7: Extract of Whistler Street Streetscape Elevation

As prescribed by clauses 3.1.3.1 and 4.2.2.1 of MDCP 2013, consistency with the townscape principles and a desire to ensure the dominance of importance corner sites constitutes sufficient environmental planning grounds to warrant variation of the maximum height prescribed.

Ground 3 – Compliance with the FSR

The proposed development has a FSR of 2.98:1, compliant with the 3:1 maximum FSR prescribed by clause 4.4 of MLEP 2013. Strict compliance with the height control would require the removal of an entire level of the proposed development, further reducing the proposed FSR to approximately 2.39:1, being 626m² less than the maximum prescribed.

Allowing for the height breach in consideration of the application of other standards and controls is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the E1 Local Centre Zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.*
>
> *It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

1.4.5 Secretary's concurrence

The 'Variations to development standards' Planning Circular issued by the NSW Department of Planning, Industry and Investment on 5 May 2020 confirms that the Secretary's concurrence can be assumed by the Local Planning Panel for applications involving contravention of a numerical development standard by more than 10%.

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this 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 variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director