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CLAUSE 64A VARIATION REQUEST - HEIGHT

29 Shirley Street and 2-4 Milton Street, Byron
Bay

Prepared for

VITALE PROPERTY GROUP

11 September 2023

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1. INTRODUCTION

This Clause 64A Variation Request (the Request) has been prepared on behalf of *Vitale Property Group Pty Ltd* (the Applicant) and accompanies a Development Application (DA) for a development application for Residential Flat Buildings comprising 25 residential apartments at 29 Shirley Street and 2-4 Milton Street, Byron Bay.

The Request seeks an exception from the maximum building height standard prescribed for the development site under clause 40(b)(ii) of *Byron Local Environmental Plan 1988* (BLEP (1988)). The variation request is made pursuant to clause 64A of BLEP (1988).

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 11 August 2023.

The following sections of the report include:

Section 2: Description of the site and its local and regional context, including key features relevant to the proposed variation.

Section 3: Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.

Section 4: Identification of the development standard which is proposed to be varied, including the extent of the contravention.

Section 5: Outline of the relevant assessment framework for the variation in accordance with clause 64A of the LEP.

Section 6: Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.

Section 7: Conclusion.

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The site is located at 29 Shirley Street and 2-4 Milton Street, Byron Bay, which sits slightly north of the Byron Bay Town Centre, between Belongil Beach and Shirley Street. Key features of the site are summarised in **Table 1** below, with a Location Plan and Site Aerial shown below in **Figure 1** and **Figure 2** respectively.

Table 1 Site Description

Feature	Description
Street Address	29 Shirley Street, Byron Bay 2 Milton Street, Byron Bay 4 Milton Street, Byron Bay
Legal Description	Lot 8, Section 52 on DP758207 Lot 9, Section 52 on DP758207 Lot 2 on DP582819 Lot 7 on DP841611 Lot 12 on DP1138310 Lot 1 on DP582819 Lot 1 on DP780935 Lot 8 on DP841611 Lot 9 on DP841611
Full Site Area	5,937sq.m
Area of the Site subject to This Clause 64A Variation Request	2,489sq.m
Site Dimensions	Shirley Street – 60.345 metres Milton Street – 60 metres (survey to confirm) Side Boundary (North) – 20.115 metres Side Boundary (West) – 62.095 metres Rear Boundary (Railway Corridor) – 73 metres (survey to confirm) Side Boundary (East) – 99.19 metres
Easements and Restrictions	Refer to accompanying SEE.
Site Topography	The site has an undulating topography, summarised as follows: North-South: Existing ground level increases from approximately 4.58m AHD at Shirley Street to a high point of 6.6m, decreasing to approximately 6.1AHD at the rear boundary. This results in a site

Feature	Description <p>difference of approximately 2m between the lowest and highest point on the site.</p> <p>There is a large sand sports field located centrally within the northern portion of the site which has been excavated to create a depression in the site levels. It is reasonable in this area to take account of retaining walls and ground level on adjacent properties to determine the natural ground plane across this area of the site. Effectively this would result in a general level across the northern portion of the site of approximately 4.8m – 4.9m AHD.</p> <p>East-West: Existing ground level increase from approximately 4.52AHD at the Milton Street frontage, rising to a high point of 5.76AHD, and falling again to 4.93ADH at the eastern boundary. This results in a difference of approximately 1.2m between the lowest and highest point on the site.</p> <p>The east-west portion of the site has previously been excavated for the construction of the existing building and surface grade car park. This results in unnatural lowering of the site levels. Surrounding levels are relied on to determine a reasonable ground plane across these areas of the site.</p>
Vegetation	<p>The subject site contains a backpackers hostel and short stay accommodation fronting Shirley Street and Milton Street. The remainder of the site is predominantly undeveloped and landscaped with maintained lawns and garden beds. Some scattered trees are present towards the rear of 29 Shirley Street, which also contains a mature fig species.</p>

Figure 1 – Location Plan



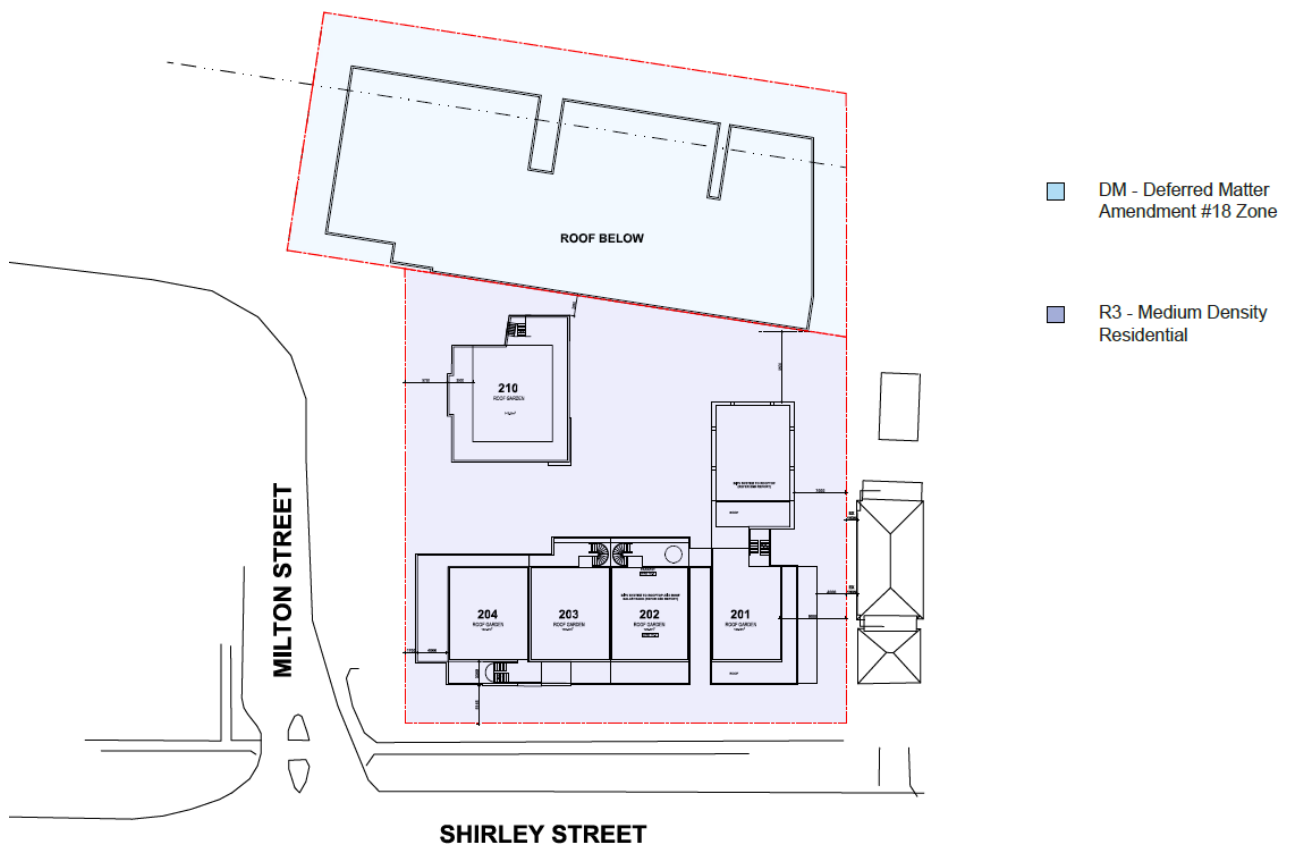
Source: Nearmap 2021

Figure 2 – Aerial Photograph of the Site



Source: Nearmap 2021

Figure 3 - Zoning Plan Demarcation



Source: Hayball, 2023

The Land Application Map in the BLEP 2014 identifies that the BLEP 2014 only applies to the part of the site identified in 'purple'. The remainder of the site is identified as a 'Deferred matter'.

Clause 1.3 of the BLEP 2014 states:

1.3 Land to which Plan applies

(1) This Plan applies to the land identified on the Land Application Map.

(1A) Despite subclause (1), this Plan does not apply to the land identified as "Deferred matter" on the Land Application Map.

Accordingly, the part of the site that is not identified on the Land Application Map is subject to the *Byron Local Environmental Plan 1988* (BLEP 1988).

This 64A request is submitted in relation to the proposed development which is subject to BLEP 1988.

2.2. EXISTING DEVELOPMENT

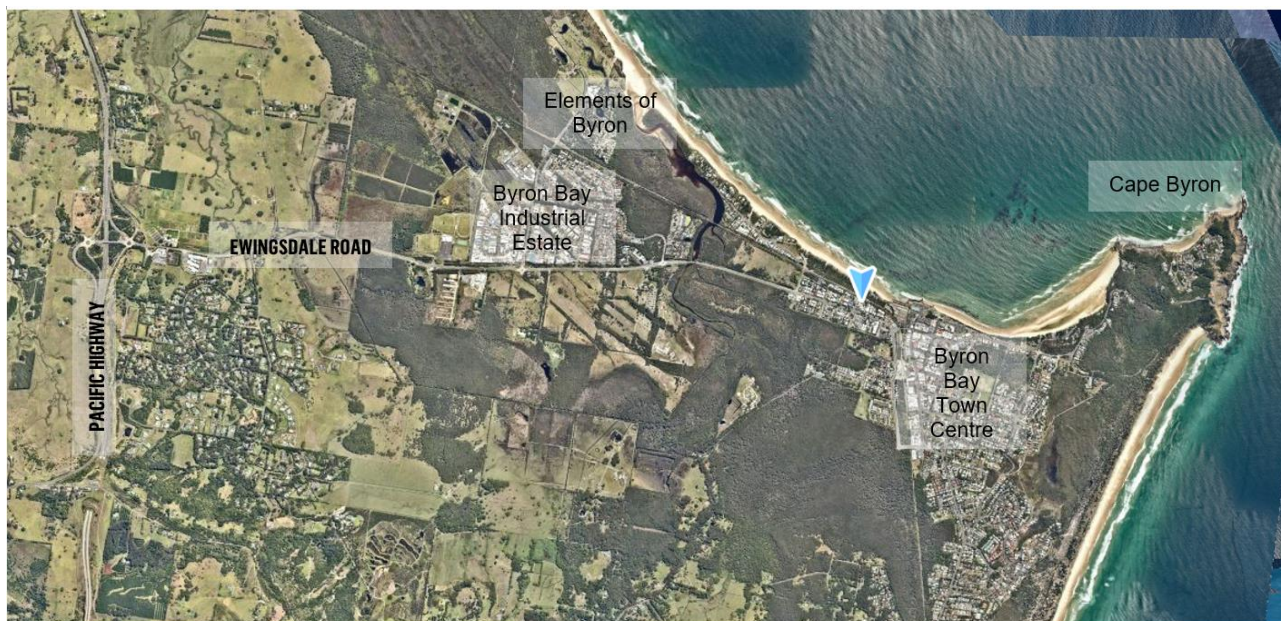
The site is currently improved by a backpackers hostel, including accommodation buildings, shared facilities such as kitchen and dining areas, car parking area and communal open spaces. There are also two dwellings located to the rear of the site which are currently used for short-term accommodation. The existing site improvements are proposed to be removed to allow the development to occur.

Vehicle access is provided via a crossover from Milton Street, with pedestrian access via the existing footpath from Shirley Street. There are also two existing crossovers providing access to the dwellings at 2 and 4 Milton Street.

2.3. LOCALITY CONTEXT

The site is located within Byron Bay, within the broader Northern New South Wales region, and sits approximately 400 metres from the Byron Bay Town Centre and 5.8km from the Pacific Motorway. The broader context around the subject site is illustrated in **Figure 4** below.

Figure 4 – Regional Context



Source: Nearmap 2021

The site sits along the eastern approach of Shirley Street, which is a key thoroughfare for vehicles travelling into Byron Bay as they exit the Pacific Highway onto Ewingsdale Road.

Within the local context, the site benefits from its proximity to the Byron Bay Town Centre, which includes bus services, retail and restaurant offerings, as well as civic services. The Town Centre is easily accessed via a wide, sealed footpath running along Shirley Street.

Figure 5 – Local Context



Source: Nearmap 2021

Surrounding development includes:

North – immediately north, the site adjoins the rail corridor of the former Casino-Murwillumbah line. The rail corridor is still used by the Byron Bay Train, which is a solar-powered train used largely to connect tourists from the Elements of Byron Resort to the Byron Town Centre. Beyond the rail corridor, the area transitions to the coastal environment of Belongil Beach and the Pacific Ocean.

East – the site adjoins an existing two-storey Dwelling House, positioned towards the front of the lot. Further east sits a series of 2-3 storey short term residential accommodation unit developments.

South – immediately south, the site fronts Shirley Street, which adjoins an area of one- to two-storey Dwelling House developments, holiday villas, and medical and allied health uses including the former Byron District Hospital. Further south sits Cumbebin Swamp and associated Nature Reserve

West – the site adjoins the intersection of Shirley Street and Milton Street. West of the subject site and north of Shirley Street is an area largely dominated by two- to three-storey resort and hotel developments. South of Shirley Street sits a cluster of single Dwelling Houses on smaller lots, interspersed by larger lots and resort developments. Further west Shirley Street transitions to Ewingsdale Road, past the Cumbebin Swamp and associated Nature Reserve.

2.4. RECENT APPROVALS

A number of Clause 4.6 variation requests to building height and floor space ratio have recently been upheld in proximity to the subject site. These approvals inform the assessment of the proposed variation relevant to the satisfaction of the objectives of the height control pursuant to section 4.3 of the LEP and importantly, the environmental planning grounds relied upon.

Table 2 below provides a summary of comparable approvals which have been granted with a Clause 4.6 variation to height and floor space ratio. Of note, the following points of justification have supported successful approval of these variations:

- Building height variations have been approved where the non-compliance with the applicable height control is attributed to the change in topography of the land. 10% variation were justified in this manner.
- Building height variations have been approved where the additional height is the result of roof features or structures (e.g. roof parapet safety rail). An 11% variation was justified in this manner.
- Building height variations have been approved where the variation not excessive in the context of the immediate streetscape, would not detract from the character of the area, and would not result in unacceptable overshadowing. A variation of greater than 10% was justified in this manner.

Table 2 – Summary of Approvals

Application Number / Date	Address	Details	Extent of Variation
10.2014.417.1 (15/12/2020)	43 Lawson Street LOT: 0 SP: 16094	Demolition of existing residential flat building & construction of a new residential flat building and associated works	<p>Building Height Variation</p> <p>The extent of height variation is applies to the lift overrun (10% over the height limit) and upper storey floor level being 31% over the specified height limit under the Byron Bay LEP 1988.</p> <p>The variation was accepted by Byron Bay Shire Council on the grounds that the Local Environmental Plan 2014 no longer includes an uppermost floor level development standard. It would therefore be unreasonable and unnecessary to enforce this aspect of Clause 40 when the new Local Environmental Plan does not require it.</p>
10.2014.398.1 (16/07/2015) / Modified 11.2.2021)	3 Shirley St, Byron Bay 2481 NSW 5 Shirley St, Byron Bay 2481 NSW	Motel - two storey 16 guest rooms with a roof top terrace and basement parking for 27 cars	<p>Height variation 21%</p> <p><u>Justification for Variation</u></p> <p>Non-compliance is attributed to architectural roof structures and gables. The proposal was supported by Council on the ground that the variation in building</p>

Application Number / Date	Address	Details	Extent of Variation
	7 Shirley St, Byron Bay 2481 NSW Shirley St, Byron Bay 2481 NSW		height will have negligible impact on the surrounding area. A variation to the 4.5m upper floor level height limit outlined in the Byron Bay 1988 LEP was also justified on the ground of it being outdated policy.
10.2014.742.2 (16/09/2021)	33 Lawson Street Byron Bay (Lot 8 DP 758207)	Demolition of existing single-storey motel building. Erection of a three (3) storey motel accommodation building plus two (2) levels of basement parking. S4.55 to Modify Consent to include Eight (8) Additional Motel Units, Remove the Ground and Third Floor Swimming Pools, Add a Roof Top Recreation Area comprising a Swimming Pool, Bar and Café.	Building Height >10%, FSR variation 1.6%. <u>Justification for Variation</u> Increase in building height is limited to stair and lift overruns and small bathroom. The proposal for additional building height exceedance is consistent with the objectives of the development standard, in that the design of the roof-top facilities will result in minor visual impacts, do not result in significant privacy or overlooking issues, and do not noticeably change the bulk and scale of the approved building or its consistency with the character of the town centre.
10.2016.55.1 (15/12/2016)	17 Shirley St, Byron Bay 2481 NSW 19-21 Shirley St, Byron Bay 2481 NSW	Demolition of Existing Buildings and Construction of Two (2) Residential Flat Buildings, Including Swimming Pool, Landscaping and Strata Subdivision (17 units)	Building Height Variation - exceeds the 9.0m height limit by 0.55 metres <u>Justification for Variation</u> The proposed building height is not considered to be excessive in the immediate streetscape and should not detract from the character of the area. The proposed portion of Building No 1 exceeding the height limit should not result in any unacceptable overshadowing of neighbouring properties. Subject to conditions relating to privacy screens the proposed

Application Number / Date	Address	Details	Extent of Variation
			development should not result in any unacceptable loss of privacy to any neighbouring property.
10.2017.678.1 (21/02/2019) Modified	17 Shirley St, Byron Bay 2481 NSW 19-21 Shirley St, Byron Bay 2481 NSW	Demolition of existing buildings and construction of two (2) residential flat buildings, containing 17x3 bedrooms and 2 x 4 bedroom dwellings including swimming pool, landscaping, basement car parking and strata subdivision	Building Height Variation Building No. 1 - 9.77m (8.6% variation) Building No. 2 - 9.8% - 11% <u>Justification for Variation</u> Non-compliance with the building height can be largely attributed to the existing variation in the level of the land. The building is lower than the approved adjoining buildings to the east.
10.2017.160.1	21 Fawcett Street, Brunswick Heads	Residential Flat Building	FSR Variation – 6% <u>Justification for Variation</u> Proposed variation consistent with objectives of standard and zone.
10.2017.628.1 (24/07/2019)	28 Parkes Avenue, Byron Bay (LOT: 1 & 7 DP: 271119)	60 x 1 & 2 bedroom apartments, plus subdivision to create 1 additional community lot	Building Height – between 5% and 10% variation <u>Justification for Variation</u> The monitor roof feature provides for natural ventilation and light to the mezzanine bedrooms of the upper floor. The roof form and building scale responds to the character of built form in the locality. The buildings will not overshadow or overlook any other development, as the land immediately to the west is retained for environmental purposes.
10.2019.616.1 (21/05/2020)	137-139 Jonson Street & 3 Browning Street Byron Bay (Lot 21 DP 247289;	Demolition of existing buildings and the construction of a mixed use development for: <ul style="list-style-type: none"> Commercial premises Café 	Building Height 9% Variation Floor Space Ratio 9.6% Variation <u>Justification for Variation</u> The proposed buildings is consistent in scale to nearby

Application Number / Date	Address	Details	Extent of Variation
	Lot 5 DP758207; Lots 60 & 61 DP 1256365))	<ul style="list-style-type: none"> • Shop-top housing • Basement car parking; and • Infrastructure. 	<p>buildings and establishes the desired future character of the locality consistent with the Byron Bay Town Centre Master Plan.</p> <p>Varying the floor space ratio standard will enable an optimal, landmark, fully integrated development solution for a landmark site.</p> <p>The proposal maximising the 'return' on a large private investment, generating new and sustaining existing employment and achieving positive social and economic outcomes within sound planning and environmental parameters, is therefore considered to be clearly in the public interest.</p>

3. PROPOSED DEVELOPMENT

The proposed development will deliver an architecturally designed development containing residential dwellings and associated amenities across the whole site, including the part of the site subject to the BLEP 2014. It comprises:

- Demolition of existing development.
- Erection of a Residential Flat Building, comprising:
 - 25 three-bedroom dwellings distributed across four separate two and three-storey buildings;
 - Pedestrian entrance from Shirley Street.
 - One basement parking level containing 69 total car parking spaces (mix of 2 or 3 per dwelling) including 7 visitor spaces, with vehicle access provided from Milton Street.
 - 1,484.36sq.m of communal open space at the ground level;
 - 527.32sq.m of deep planting on natural ground at ground level;
 - Associated amenities, including six lifts.
- An integrated landscape and communal open space design concept, including:
 - Landscaping of the verge areas, including large shade trees and feature palms;
 - High quality landscaping to private terraces; and
 - Central communal open space containing communal the swimming pool.

A summary of the numeric aspects of the proposal are summarised in **Table 3** below.

Table 3 Numeric Overview of Proposal

Descriptor	Proposed
Land Use Activity	Residential Flat Building
Height of Building the Subject of this Clause 64A Request	RL15.1 (10.1m)
Density (dwellings at 1 per 300m ² of site area)	8.21
Total Communal Space across the whole site, including the part of the site subject to the BLEP 2014	1,484.36sq.m
Total Private Open Space (Courtyards and Balconies) across the whole site, including the part of the site subject to the BLEP 2014	Approx. 4,036.7sq.m (exceeding the maximum requirement)
Total deep planting on natural ground across the whole site, including the part of the site subject to the BLEP 2014	527.32sq.m
Percentage of deep Landscaping across the whole site, including the part of the site subject to the BLEP 2014	11.57% of site area
Car Parking Spaces	69 including 7 visitor spaces
Trees being retained	0
Trees being planted	83

The proposed development on the site as a whole (including the part of the site subject to the BLEP 2014) is organised around four main building forms.

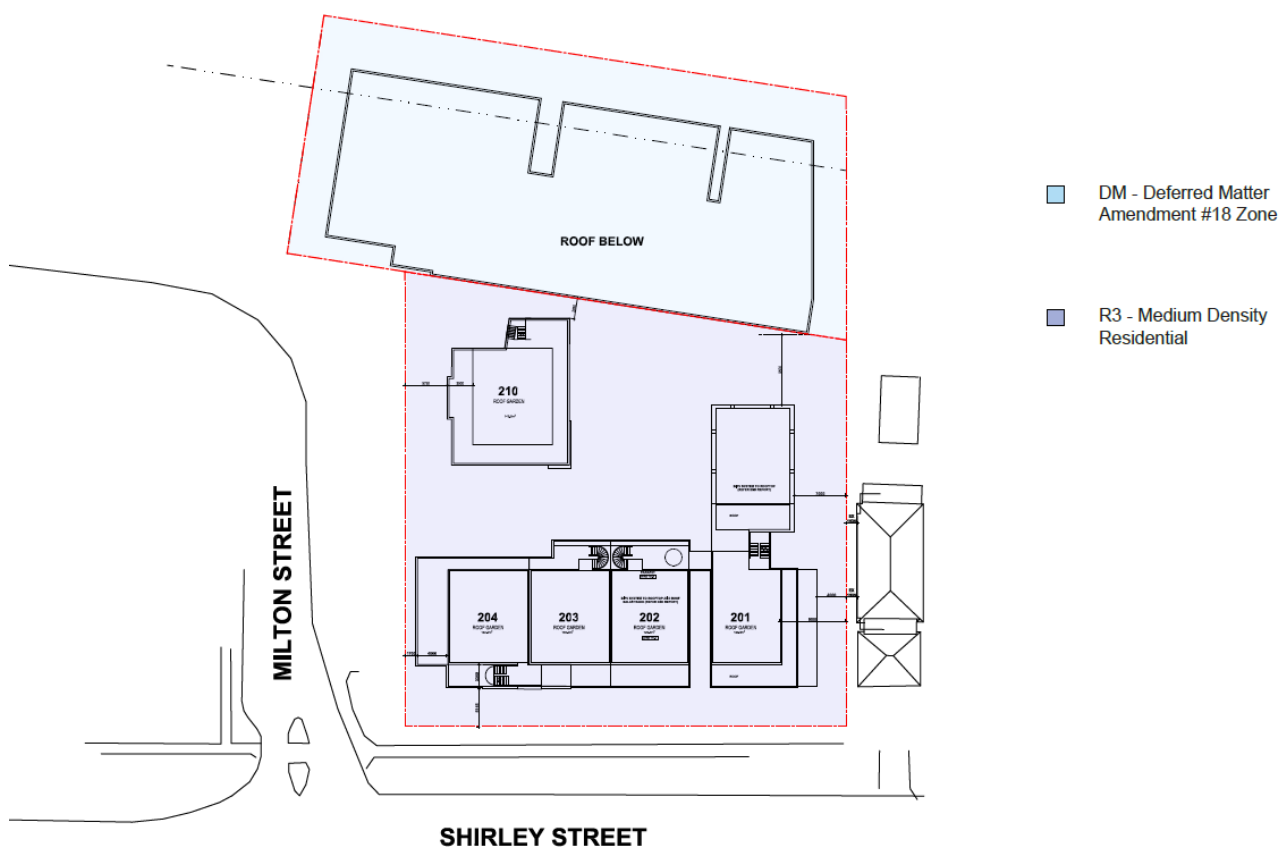
The separation of this built form assists in achieving an exceptional design outcome, where amenity and site responsive design are built form drivers. Specifically, the three tower design assists in maximising natural solar infiltration, cross ventilation, protect privacy and minimise overshadowing, through the following design initiatives:

- Apartments are oriented to have a minimum of 2 facades to allow for cross ventilation;
- Most of the apartments have 3 facades, and the living areas are oriented in different direction to allow more privacy for the residents.
- All apartments can benefit from the North East aspect in the morning.
- All dwellings have a North aspect orientation with at least a secondary façade aspect with one façade with access to the communal areas.
- Apartments are orientated to the views or adjacent street to increase surveillance of the public realm, whilst protecting privacy of adjacent neighbours.
- Proposed development will feature double glazed units and aim for 8 stars environmental certification.

Refer to **Appendix A** - Architectural Package.

The area of the proposed development subject to BLEP 1988 and the subject of this cl 64A request is depicted below. (**Figure 6: Planning Zones Demarcation**)

Figure 6: Planning Zones Demarcation



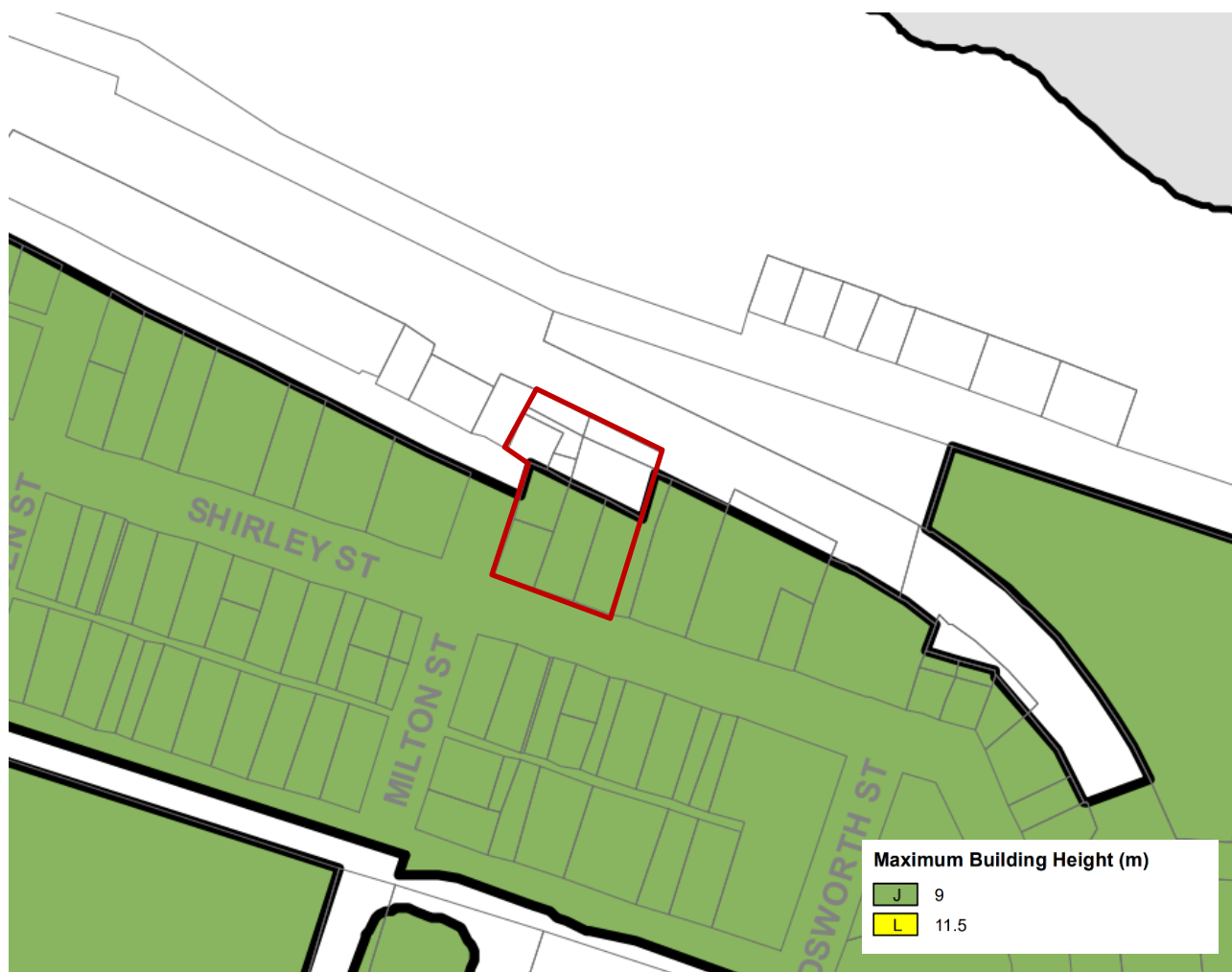
Source: Hayball

4. VARIATION OF HEIGHT OF BUILDINGS STANDARD

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the variation. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD SEEKING TO BE VARIED

This clause 64A variation request seeks to vary the height of building control prescribed within clause 40(b) of BLEP 1988 and the associated Height of Buildings Map.



Source: BLEP 2014

Figure 7 - BLEP 2014 Height of Buildings Map Extract

As shown in Figure 2, the height control under the BLEP 2014 applies only to the part of the site shown in green in the map. The remainder of the site is nominated as a 'Deferred matter' as shown in white in Figure 2. As a result the remaining part of the site is subject to a separate height control under clause 40 of the *Byron Local Environmental Plan 1988*.

The height control the subject of this Clause 64A Variation Request states:

40 Height

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

(a) *to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,*

- (b) *to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.*
- (2) *The council must not consent to the erection of any building—*
 - (a) *on land within Zone No 3 (a), if—*
 - (i) *the floor of the topmost floor level of the building exceeds 7.5 metres above the existing ground level, or*
 - (ii) *the vertical distance between the topmost part of the building and the existing ground level below exceeds 11.5 metres, or*
 - (b) *on land within any other zone, if—*
 - (i) *the floor of the topmost floor level of the building exceeds 4.5 metres above the existing ground level, or*
 - (ii) *the vertical distance between the topmost part of the building and the existing ground level below exceeds 9 metres.*

There is no definition of ‘existing ground level’ in the BLEP 1988. For the purpose of this variation request we have adopted the definition of **ground level (existing)** contained in the Standard Instrument LEP, which provides as follows:

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

The Court has considered this definition on numerous occasions recently and provided clarification on its application for the purpose of calculating building height. In *Triple Blue Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1065 (*Triple Blue*) at [47], O’Neill C held that the definition of ‘ground level (existing)’ means that an ‘historic’ excavation in the location of the vertical measurement results in a building that has a greater numerical value for height than it would otherwise have had (if measured from the ground level prior to the excavation), meaning that the height of a proposed new building is measured from the natural ground level of an undeveloped site, and a future addition to the same building is measured from the lower excavated ground level ‘after the building has been constructed’.

This can potentially result in an increase in the numerical value for the height of the building — with the addition being much greater than the increase in height of the addition alone, when compared to the numerical value of the height of the original building under the definition (at [47]). A similar conclusion was reached in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 where O’Neill C, at [73], said that the existing level of the site at a point beneath the existing building is the level of the land at that point and the ‘ground level (existing)’ within the footprint of the existing building is the existing excavated ground level on the site.

4.2. PROPOSED VARIATION TO CLAUSE 40(B) HEIGHT OF BUILDINGS

4.2.1 Overall Building Height

The Site is subject to the following development standards which provide for the following maximum height controls across the part of the Site which is subject to BLEP 1988:

- (i) *the floor of the topmost floor level of the building exceeds 4.5 metres above the existing ground level, or*
- (ii) *the vertical distance between the topmost part of the building and the existing ground level below exceeds 9 metres.*

Whilst a 9m maximum building height roughly translates to a 3 storey building (as proposed), it is noted that the provisions of cl 40(B)(i) seek to require that the topmost floor level is to be no more than 4.5m above natural ground level. The proposed building is two storeys with the topmost floor level not exceeding 4.5 metres above existing ground level.

It seeks to encroach into the overall building height control within cl 40(B) for the purpose of roof terrace balustrades minor areas of level 2 where the ground level undulates across the site. Refer to **Figure 8 - Height exceedances**.

The proposed development seeks a variation of the height control at the following locations:

North western Building

- 10.10m (RL 15.10) to the top of the balustrade which is setback well within the building curtilage. This results in a maximum non-compliance of 1.10m, which is equivalent to a variation of 13.9%.

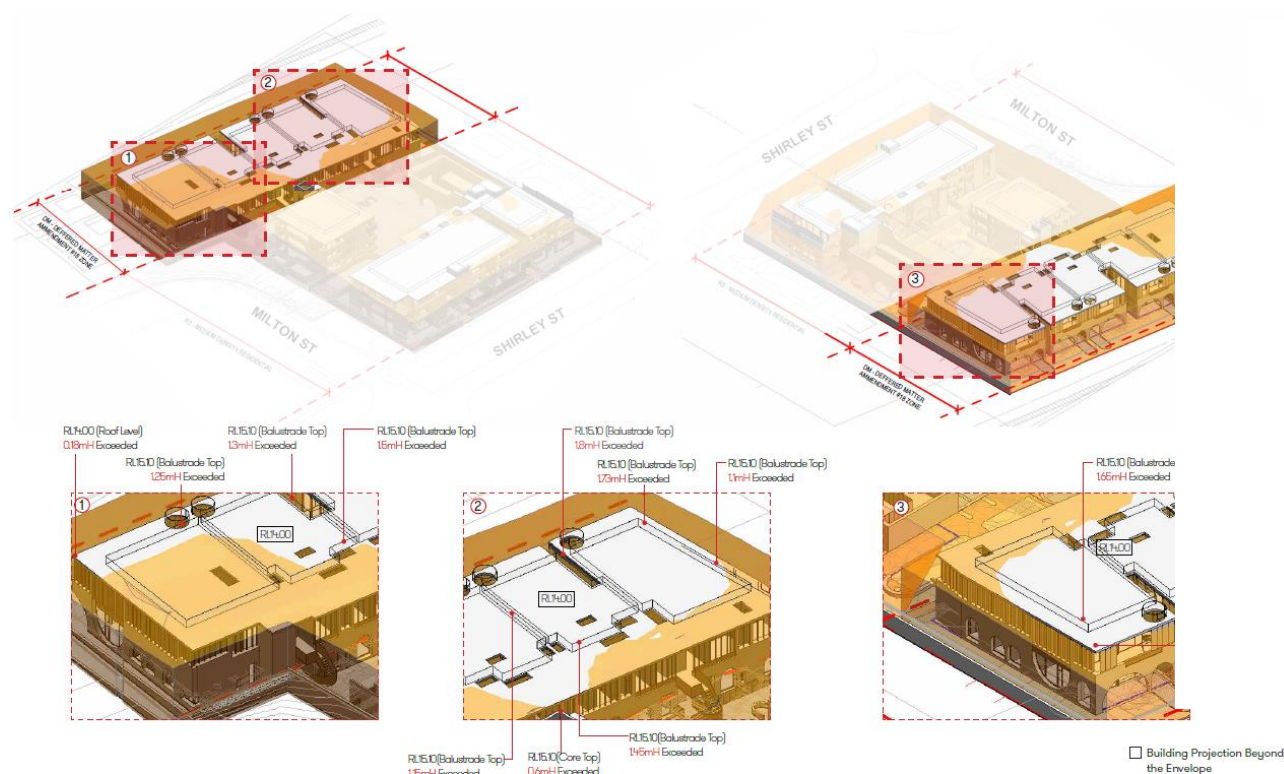
North eastern Building

- 10.10m (RL 15.10) to the top of the balustrade which is setback well within the building curtilage. This results in a maximum non-compliance of 1.10m, which is equivalent to a variation of 13.9%.

The proposed built form breaches the LEP height limit identified by cl 40(b)(i) by a maximum of 1.1m or 13.9% however this is only for glass balustrades which are well setback within the curtilage of the building.

The following extracts from the Architectural Plans prepared by Hayball illustrate the extent of the height contravention at various positions across the proposal, which are subject to BLEP 1988.

Figure 8 - Height exceedances



Source: Hayball

4.2.2 Uppermost Floor Level Requirement

It is considered unreasonable and unnecessary to require strict compliance with the height controls addressed under BLEP 1988 clause 40(b)(i) which effectively restricts the topmost floor level of the building to a maximum of 4.5 metres above the existing ground level. As demonstrated in the accompanying application material, the proposal achieves the objectives of clause 40 achieving the 4.5 metre topmost floor level requirement under this Clause. See below in **Figure 9** which illustrates this 2-storey section across the 7(f2) portion of the site..

Indicative Section for a 2 Storey Building Along Railway Corridor - N-S Section

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 64A

The objectives of this clause are as follows—

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

In determining whether to grant consent for development that contravenes a development standard, clause 64A(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 64A(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 64A(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 64A(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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 Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter relates to a Clause 64A determinate of a local environmental plan.

This clause 64A request demonstrates that compliance with the height prescribed for the site in clause 40(b)(ii) of BLEP (1988) is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

The terms of clause 64A of the LEP 1988 mirror those contained in clause 4.6 of the Standard Instrument – Principal Local Environmental Plan and accordingly the same principles have been applied.

In accordance with clause 64A(3), the applicant requests that the height development standard be varied.

Relevant case law

The principles arising from the latest authority on clause 4.6 against which this Request has been prepared is as follows:

- In *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (**Wehbe**), Preston CJ lists the 5 common ways in which an applicant might demonstrate that compliance with a development standard is ‘unreasonable or unnecessary’:

*“[42] An objection under SEPP 1 [or clause 4.6] may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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**:*

*[45] 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.*

*[46] 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.*

*[47] A fourth way is to establish that the **development standard has been virtually abandoned or destroyed** by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*

*[48] A fifth way is to establish that **“the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land”** and that “compliance with the standard in that case would also be unreasonable or unnecessary.”*

- In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

‘Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development... In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.’

- Preston CJ in *Initial Action* held at [15] that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).

- At [23] and [24] in *Initial Action*, Preston CJ held that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.
- In *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130, the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

6. ASSESSMENT OF CLAUSE 64A VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the height of buildings in accordance with clause 40(b)(ii) of BLEP (1988).

Detailed consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure* dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 64A of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 64A(2)

The height of buildings prescribed by clause 40(b)(i) and (ii) of BLEP (1988) is a development standard capable of being varied under clause 64A(2).

The proposed variation is not excluded from the operation of clause 64A(2) as it does not comprise any of the matters listed within clause 64A(6) or clause 64A(8) of BLEP (1988).

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 64A(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

In *Wehbe*, Preston CJ establishes five potential tests for determining whether a development standard could be considered unreasonable or unnecessary.

This is further detailed by the Chief Judge in *Initial Action* where Preston CJ states at [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 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.

Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement however, for completeness, this variation request also addresses other practical reasons why compliance with the standard is unreasonable, as set out below.

6.3. THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

In addressing the first method as identified in *Wehbe*, the specific objectives of the height of buildings standard as specified in clause 40(b)(i) and (ii) of BLEP (1988) are detailed in Table 4. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 4 - Assessment of consistency with clause 40(1) objectives

Objectives	Assessment
(a) to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet.	<p><u>Overall building height</u></p> <p>The proposed development achieves an overall building design which does not exceed the maximum height control of 9m. The building design is generally compliant with minor exceedances arising as a result of the topographical changes across of the site impacting the ground level from which the heigh plane is measured and minor building elements which do not impacts the design’s predominant compliance with the control.</p> <p>Generally, height exceedance is limited to elements of the roof structure and terrace balustrades which will not impose any increased amenity impacts for surrounding areas.</p> <p>In significant portion across the site (namely the eastern portion) the building design does not exceed the 9m height control to the roof and parapet and the non compliances associated with isolated areas of parapet or roof across the proposal arise as a result of the undulating nature of the sites topography. The design provides for a consistent RL of roof tops of 14.00 AHD with the eastern portions being compliant while the western areas result in a noncompliance as a result of the fall of the land and existing ground level.</p> <p><u>Uppermost Floor Level</u></p> <p>The uppermost floor level requirement is noted is compliant.</p>
(b) to ensure that the height and scale of development is appropriate to its location, surrounding development and	<p>The proposed built form considers both the current and proposed context of the site. It creates a transition of scale</p>

Objectives	Assessment
the environmental characteristics of the land.	<p>across the site that appropriately responds to the undulating ground levels in the surrounding area.</p> <p>The built form proposed complements the streetscape character of the area and provides for a high quality urban design outcome which reflects the controls which apply to the site.</p> <p><u>Overall Building Height</u></p> <p>The controls contemplate a built form of 9m scale and the minor non compliances which arise do not detract from the streetscape character but rather serve to reinforce it by providing for a consistent built form outcome of 9 metres rather than one which awkwardly stepped to reflect topographical changes across the site.</p> <p>Importantly the areas in which the noncompliance (both to the 9m control and upper floor level control) occur are located well within the site boundary of the overall development.</p> <p>The majority of the Site is covered by the Byron LEP 2014 which also provides for a 9m height control but does not require any upper floor to be 4.5m in height. In that context, the proposed development complements the streetscape character of the surrounding area, which is currently defined and importantly, will be defined by the redevelopment of the majority of the Site under the BLEP 2014.</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

It would be unreasonable to require strict compliance with cl 40(b)(i) in circumstances where the majority of the development across the consolidated site will provide for contemporary residential levels and ceiling heights.

The development application proposed a redevelopment of the consolidates for the purpose of residential accommodation over 2 levels in the 7(f2) Zone. The proposal is seeking minor height variations in relation to the overall building height to allow for balustrades to be provided at roof top level.

It would be unreasonable to require strict compliance with the standard contained at cl 40(b)(ii) in circumstances where the topography of the site is undulating, and strict compliance would require a contorted and inefficiently stepped building in order to comply.

There is a large sand sports field located centrally within the northern portion of the site which has been excavated to create a depression in the site levels. The extent of the depression is approximately 0.5M below surrounding ground levels. It would be unreasonable to require strict compliance with the height control in circumstances where development on the sunken level would create partially subterranean residential accommodation and would result in a built form with a maximum height above the surrounding ground levels of 2m.

It would be reasonable to take account of retaining walls and ground level on adjacent properties to determine the natural ground plane across this area of the site. Effectively this would result in a general level across the northern portion of the site of approximately 4.9m AHD.

6.4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 64A(3)(B)

In relation to sufficient environmental planning grounds, in Initial Action, Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

The strength of the relevant grounds ought to be a balancing factor when assessing the reasonableness of the variation to a standard. This is because the word “sufficient” is included in clause 4.6(3)(b). Environmental planning grounds will be “sufficient” having regard to the circumstances of each case such that matters will have different weight in different circumstances.

A large breach with many impacts must have weighty and strong environmental planning grounds. Similarly, a relatively minor breach without real amenity impacts, such as that proposed in this application, will require a different weighing of factors and therefore a different approach to what may constitute that which is “sufficient” (see Initial Action at paragraphs 23 and 24).

It is considered that the following environmental planning grounds are sufficient to justify the non-compliances with the development standard proposed:

- The non-compliance with the 9m control provided at cl 40(b)(ii) facilitates the delivery of a contemporary and consistent design across the site containing a rational floor plate and provision of a high-quality urban design and streetscape outcome. In circumstances where strict compliance with the 9m control was to be required, the building would need to provide for a stepped and staggered built form east to west to reflect the undulating and stepped topography of the Site attributable to the existing ground levels and excavation for the existing back packer development.
- The minor non-compliances associated with the upper levels of the building facilitate a high quality and consistent built form outcome across the Site. This is clearly depicted in the 3d images contained above which clearly show that a consistent roof level of RL 14.00 is maintained across the development however, the changes to existing ground levels across the site lead to some areas of that roof space breaching the 9m control. The non-compliances ensure that a rational and consistent built form outcome is achieved across the Site.
- Redistribution of bulk to provide a compliant 2 storey form to facilitate the provision of a high amenity internal communal open space for occupants responsive to the site's constraints.
- The minor non-compliances required for the provision of lightweight building elements facilitate the high-quality streetscape outcome and consistent design across the Site, with minor non-compliant elements arising as a result of the fall of the land and existing modifications to ground level caused by the current development on site.
- The majority of non-complaint elements of the proposal are attributable to the balustrade and minor building elements on roof top private open space. These elements are barely perceptible from the streetscape and facilitate the delivery of high quality and high amenity private open space for occupants of the development. The delivery of such high-quality open space relieves pressure on communal areas within the development by providing private space for occupants at the upper levels of the building and it is considered the increased amenity and relieving of pressure on common areas is a planning ground which is sufficient to justify the minor breaches to the height control proposed.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane. In order to provide high quality and spatially generous areas of common open space at ground level the building propose to accommodate the

floor area of the proposed development across 2 storeys which results in minor and inconsequential non-compliance with the HOB standard. The provision of the high quality landscaped open space at ground level provides for a superior planning outcome both spatially in terms of built form and also in terms of amenity for future occupants. It is considered that the provision of high quality open space at ground level is a material planning benefit associated with the non-compliance and offsets the imperceptible impacts associated with the technical non-compliance of the upper portion of the building.

- The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land. The area of the building which does not comply with the 9m height requirement is located at the northern, rear of the Site and does not create any overlooking, overshadowing and perception of bulk issues for neighbours or adjoining properties. The majority of any non-compliance addresses the rail corridor, the view of which will only be available by passengers of the train moving past the Site. The scale of the non-compliance is minor and accordingly, unlikely to be even perceived by those looking back at the site from the north.
- The non-compliance with the provisions of cl 40(b) provides for a superior development outcome on the Site which provides for an appropriate residential density which reflects the environmental capacity of the site having regard to its location, surrounding development and Site characteristics.
- The non-compliance with the development standards contained at cl 40(b) allows for the orderly and economic development of the Site by facilitating consistent floor levels, construction methodology and built form outcome across the Site. If compliance with the controls was required, the built form and building design would be disjointed and provide for oversized residential levels to the northern portion of the Site which would be unrelated to the high quality and contemporary design provided to the Milton and Shirley Street frontages.
- Adequate solar access to the surrounding sites will be maintained by the proposal.
- The area of non-compliance resulting from the height breaches will not create any unacceptable visual privacy impacts.
- The proposal is a result of broader master planning and is appropriate given its current and future context.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height of buildings non-compliance in this instance.

6.5. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 64A(4)(A)(I)

Clause 64A(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.6. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 64A(4)(B)(II)

Clause 64A(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in Table 4. The proposal is also consistent with the land use objectives that apply to the site under BLEP (1988). The subject site is located within the 7(f2) (Urban Coastal Land Zone). In accordance with the zone

objectives, urban development is only permitted in the zone where due consideration is given to the matters outlined in **Table 5** below.

Table 5 - Assessment of compliance with land use zone considerations

Consideration	Assessment
<i>(i) the need to relocate buildings in the long term,</i>	N/A - As demonstrated in the Erosion and Sediment Control Plan, the coastal processes will not impact the structural integrity of the development, and a time limited approval is not required.
<i>(ii) the need for development consent to be limited to a particular period,</i>	A condition of consent will be accepted to ensure that if the 'coastal escarpment' comes within 50m of the development footprint, the consent will cease and all buildings are to be removed.
<i>(iii) the form, bulk, intensity and nature of the development, and</i>	The proposal provides a 2 storey building which is generally compliant with the 1988 LEP controls. It also provides a density generally commensurate with that set out in the BDCP 2010 which allows 8.21 dwellings to be delivered on the Site.
<i>(iv) continued safe public access to the site, and</i>	All access points are obtained via existing streets outside the coastal land use zone.
<i>(d) to allow detailed provisions to be made, by means of a development control plan, to set aside specific areas within the zone for different land uses and intensities of development.</i>	Not required in this instance.

The above table demonstrates the proposed development will be in the public interest notwithstanding the proposed variation to the height of buildings development standard as 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.

It is also noted that the proposed development will deliver upgrades to associated infrastructure around the site including roads, sewer, footpath upgrades and public realm landscape improvements. This will improve the existing amenity along the street frontages of the Site for the broader public benefit.

6.7. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 64A(4)(B) AND CLAUSE 64A(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The matters for consideration under clause 64A(5) are considered below.

Clause 64A(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?

The proposed non-compliance with the height of buildings development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

Clause 64A(5)(b) - is there a public benefit of maintaining the planning control standard?

The proposed development achieves the objectives of the height of buildings development standard and the land use zone objectives despite the technical non-compliance.

Limited height exceedances over the 9m height limit is proposed to deliver a consistent scale of the buildings across the site and deliver GFA organised over 2 storeys to maximise communal open space areas within the development.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

Clause 64A(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 64A variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of buildings development standard contained within clause 40(b)(ii) of BLEP (1988) is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the height of buildings development standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- A maximum of 1.1 metres over the 9m height limit is proposed to balance the scale of the buildings across the site.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane and retention of an existing tree.
- The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land.
- The proposed development provides for compliant dwelling design provisions against the SEPP65, demonstrating suitability.
- The design is deliberately sympathetic to the site topography throughout resulting in minor encroachment on building upper extremities in response, as shown in the minor areas identified in Figure 3, above. The rooftop treatment has been a regular variation endorsed in other approval precedent.
- The increased building height ensures provision of generous setbacks to the street frontages and adjoining sites allowing for amenity protection through landscape provision, setback distances, and upper floor setbacks to ensure maintenance of solar access and mitigating of shadow impacts.
- The increased building height proposed does not increase perceived building bulk and scale.
- The increased building height proposed is consistent with objectives of standard and zone.

For the reasons outlined above, the clause 64A request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the height of buildings development standard should be applied.

DISCLAIMER

This report is dated 31 August 2023 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of Vitale Property Group (**Instructing Party**) for the purpose of Clause 64A Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

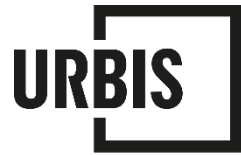
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This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.



APPENDIX A –

**ARCHITECTURAL DRAWINGS DATED
30 AUGUST 2023**