Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768
t (02) 9986 2535 • f (02) 99863050 • www.bbfplanners.com.au
Boston Blyth Fleming
Town Planners

31st March 2022

Land and Environment Court NSW proceedings No. 2021/00274989
Ted Byrne ats Northern Beaches Council
Updated clause 4.6 variation request – Height of buildings
Proposed Shop top housing development
332 – 338 Sydney Road, Balgowlah

1.0 Introduction

This updated clause 4.6 variation request has been prepared in relation to architectural plans DA01(D) to DA06(D), DA07(H), DA08(D), DA09(H), DA10(E), DA11(F) to DA14(F) and DA15(D) prepared by Wolski Coppin Architecture.

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 (MLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 12.5 metres in height. 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,*

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

(a) *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 development has a maximum building height of 15.81 metres measured to the Level 4 apartment roof with the lift overrun extending to a maximum height of 16.74 metres. This represents maximum variations to these building elements of between 3.31 metres (26.4%) and 4.24 metres (33.9%) respectively. The Level 3 awning exceeds the height control by a maximum of 670mm or 5.3% at its north-western corner with the extent of non-compliance diagrammatically depicted in Figures 1 and 2 over page.

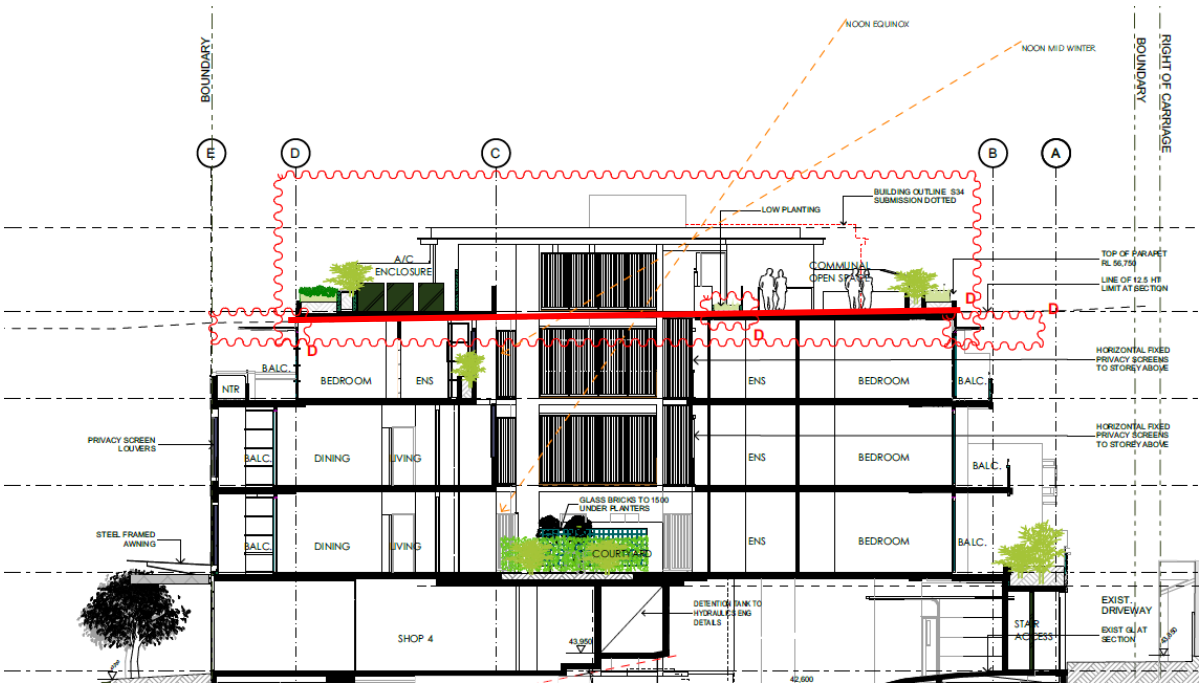

Figure 1 – Sectional plan BB extract showing building height breaching elements above 12.5 metre height standard as depicted by red line

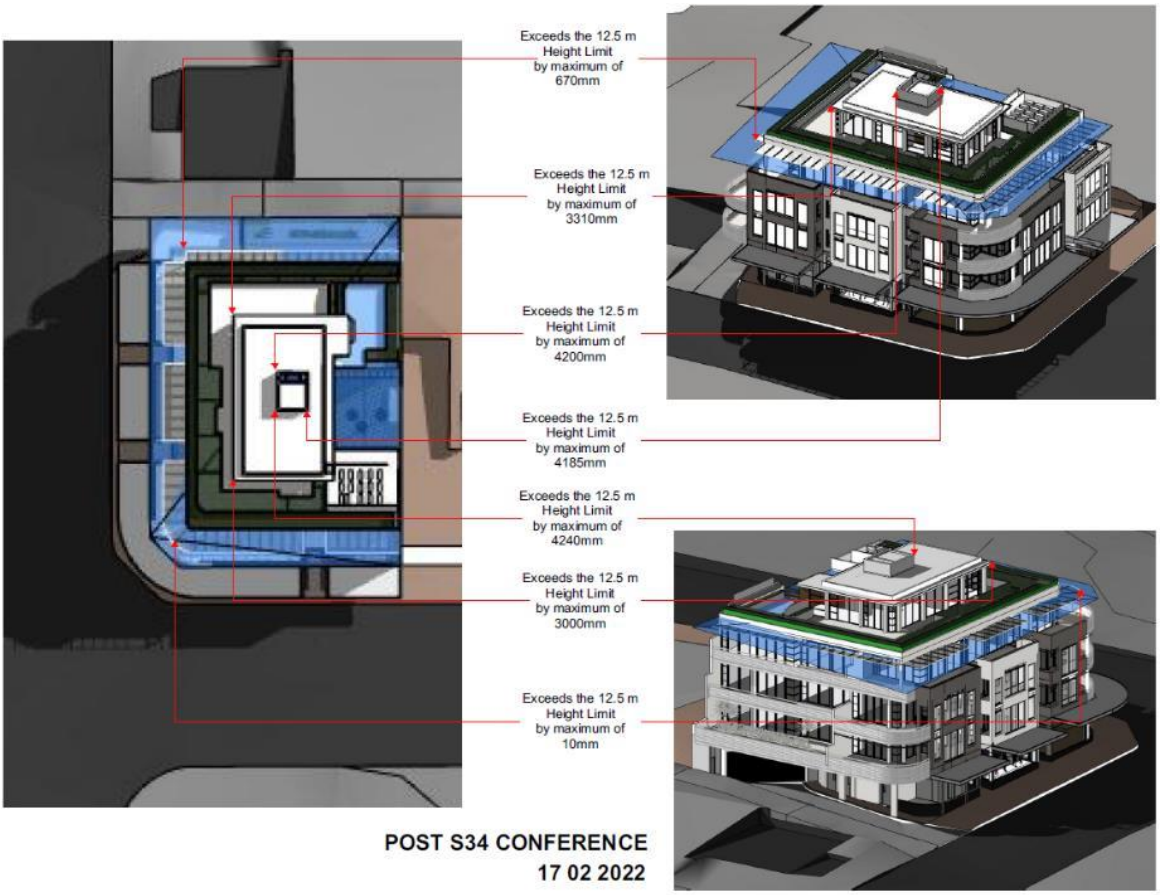

Figure 2 – Height blanket diagram showing building height breaching elements above the blue 12.5 metre height standard mesh

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 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 MLEP 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 MLEP 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 4.3 of MLEP 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 MLEP 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 2020, attached to the Planning Circular PS 20-002 issued on 5th May 2020, 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 MLEP 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.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 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].*

    The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of MLEP 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 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 MLEP?

4.0 Request for variation

4.1 Is clause 4.3 of MLEP a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

Clause 4.3 MLEP prescribes a fixed building height that seeks to control the bulk and scale of certain development. Accordingly, clause 4.4 MLEP is a development standard.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first 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 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,*

Response: I have formed the opinion that the development provides for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the immediate locality. In forming such opinion, reference is made to the townscape principles map contained at schedule 2 of the DCP as detailed below.

Figure 3 - Townscape Principles Map

This map identifies that the subject property is located within an intersection containing 3 identified important corners whereby the subject site is for some reason not identified. The DCP identifies the opportunity for additional height on the balance of the corners within this same intersection which we do not consider makes any urban design sense unless additional height is also encouraged on the subject property.

In any event, the upper level of the development has been designed with a small constrained footprint such that it is setback well beyond the landscape parapet of the level below where it is not readily discernible as viewed from the public domain within immediate proximity of the site. Such circumstance is depicted in Figures 4 and 5 over page.

I consider the distribution of floor space on this development site to be contextually responsive and appropriate having regard to the heights anticipated on the balance of the corner sites within the intersection. The additional building height proposed facilitates the appropriate distribution of a compliant quantum of floor space on the site to achieve superior streetscape and residential amenity outcomes through the provision of substantially greater setbacks to the northern boundary than those anticipated through strict compliance with the DCP nil boundary setback controls.

Such design approach enables the apartments at the northern end of the building to be orientated to take advantage of solar access and available sea breezes without compromising the future development potential of the adjoining property.

Figure 4 - Perspective image showing the proposed development as viewed from the Sydney Road and Condamine Street intersection. The upper non-compliant Level 4 storey is not visible as viewed from this location with the green edge at the skyline depicting the proposed Level 3 landscaped parapet.

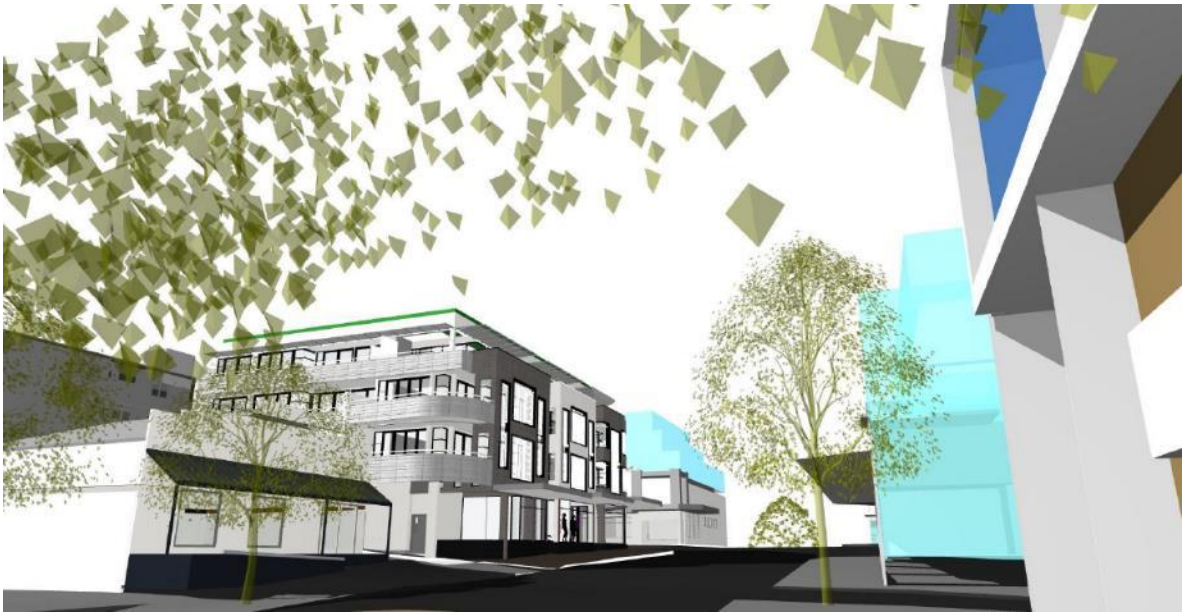

Figure 5 - Perspective image showing the proposed development as viewed along Condamine Street from north of the site. The upper non-compliant Level 4 storey is not visible from this location with the green edge at the skyline depicting the proposed Level 3 landscaped parapet.

The height, bulk and scale of the building are entirely consistent with the built form characteristics of adjoining development and more recently constructed development along this section of Sydney Road with the non-compliant upper level floor plate setback well behind the façade of the level below ensuring that it is not a prominent or readily discernible element in a streetscape context.

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

I note in this regard, that pursuant to this planning principal consistency does not mean that development needs to be the same in terms of height and roof form with consistency achieved when development is able to coexist in harmony as is the circumstance proposed.

Notwithstanding the building height breaching elements, the proposal provides for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality. This objective is achieved notwithstanding the building height breaching elements.

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

Response: I note that the proposed development is compliant with the 2:1 floor space ratio development standard with the additional building height reflecting the contextually responsive and appropriate distribution of floor space across this particular site to achieve superior streetscape and residential amenity outcomes through the provision of substantially greater setbacks to the northern boundary than those anticipated through strict compliance with the DCP nil boundary setback controls.

Such design approach enables the apartments at the northern end of the building to be orientated to take advantage of solar access and available sea breezes without compromising the future development potential of the adjoining property. As FSR is used as a means to control the bulk and scale of development compliance with the FSR standard reflects consistency with the desired bulk and scale of development on this site.

As previously indicated, the bulk and scale of the building are entirely consistent with the built form characteristics of more recently constructed development along this section of Sydney Road with the non-compliant upper level floor plate setback well behind the façade of the level below ensuring that the upper level of development does not unacceptably contribute to bulk and scale and were it will not be a visually prominent element in a streetscape context.

For the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the height, bulk and scale of the building, particularly the non-compliant building height elements, are contextually appropriate and will not be perceived as inappropriate or jarring in the context of surrounding development and development generally within the site's visual catchment.

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

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

Response: Having undertaken a wide ranging view assessment from surrounding public vantage points, I have formed the considered opinion that the areas of non-compliance have been designed, located and constrained to minimise disruption of views to nearby residential development from surrounding public spaces. In fact, I was unable to identify any public space from which views to nearby residential development will be adversely impacted.

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

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

Response: Consideration has been given to the impact of the proposal on existing view lines over and across the site. Having reviewed the detail of the application I have formed the considered opinion that the proposal is of good design which minimises view impacts through the appropriate distribution of floor space with a view sharing scenario maintained between adjoining properties in accordance with the principles established in Tenacity Consulting Pty Ltd v Warringah Council [2004] NSWLEC140 and Davies v Penrith City Council [2013] NSWLEC 1141.

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

(iii) views between public spaces (including the harbour and foreshores),

Response: The building form and height has been appropriately distributed across the site to minimise disruption of views between public spaces. In this regard, I was unable to identify any particular view impact associated with the height breaching element as it relates to views between public spaces.

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

(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,

Response: The accompanying shadow diagrams prepared by the project Architect demonstrate that due to the orientation of the site that at least 2 hours of solar access is maintained to all west facing windows in the mixed use residential development at No. 322 – 326 Sydney Road and accordingly ADG compliant levels of solar access are maintained notwithstanding the building height breach. A copy of the shadow diagram is a Figure 6 over page below.

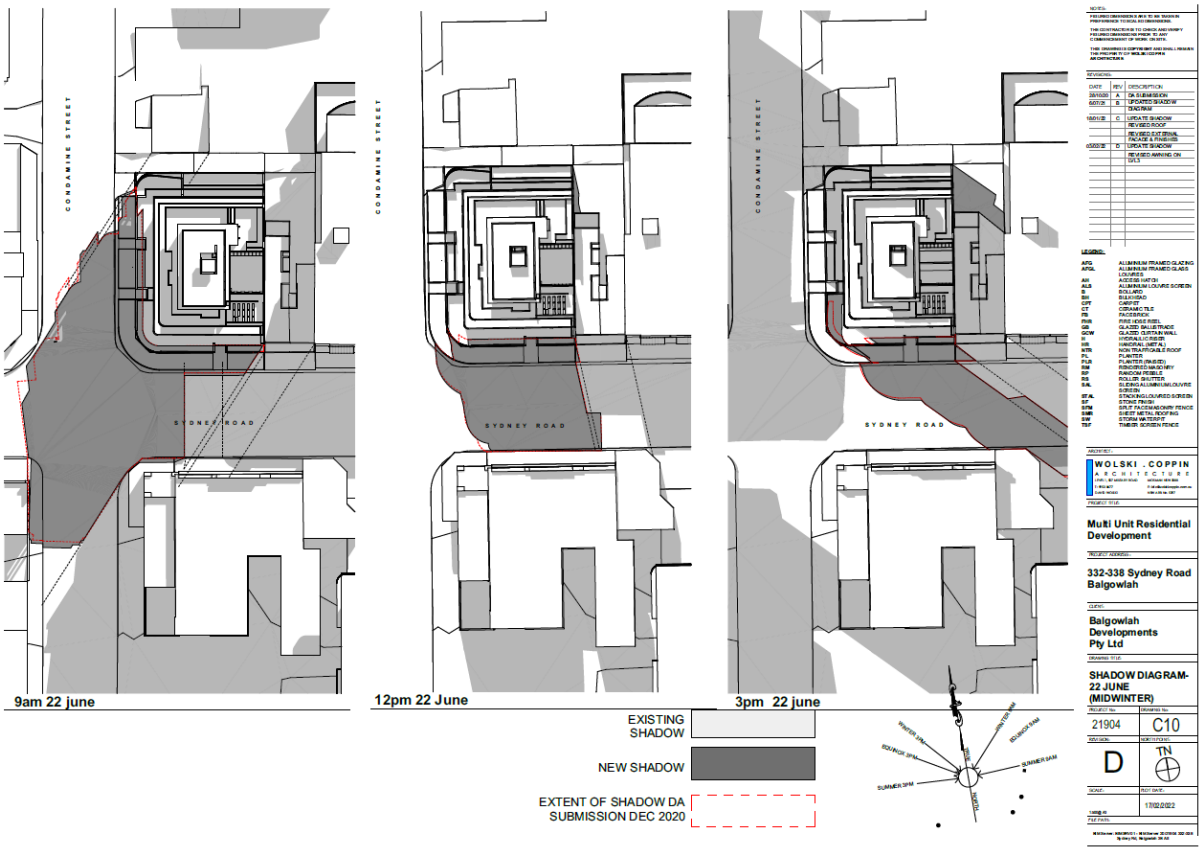

Figure 6 - Shadow diagrams

The proposal achieves this objective, notwithstanding the building height breach, as it does not unreasonably impact solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings/ surrounding residential properties.

> *(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.*

Response: This objective is not applicable.

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

Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to MLEP 2013. The developments consistency with the stated objectives of the B2 zone are 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.*

Response: The proposed mixed-use development provides ground floor retail/ business tenancies which activate both the Sydney Road and Condamine Street frontages and which are able to accommodate a range of retail uses that serve the needs of people who live in, work in and visit the local area. The proposal achieves this objective.

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor retail/ business tenancies which will provide employment opportunities in an accessible location. The proposal will also encourage employment in terms of strata management and property maintenance. The proposal achieves this objective.

- *To maximise public transport patronage and encourage walking and cycling.*

Response: The proposal does not provide any excessive carparking and as such achieves this objective.

- *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.*

Response: The development is not within proximity of any zone boundaries. No objection is raised to standard conditions pertaining to the acoustic performance of air conditioning condensers. The proposal achieves this objective.

The proposed development, notwithstanding the height breaching elements, achieve the objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the zone and the height of building standard objectives.

Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

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

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

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 environmental planning grounds

Ground 1 – Contextually responsive and skilful distribution of floor space

The additional building height proposed facilitates the appropriate distribution of a compliant quantum of floor space on the site to achieve superior streetscape and residential amenity outcomes through the provision of substantially greater setbacks to the northern boundary than those anticipated through strict compliance with the DCP nil boundary setback control with such setback enabling the development to take advantage of northerly aspect and prevailing sea breezes whilst not compromising the future development potential of the adjoining property.

In this regard, the floor space which could have otherwise extended to a nil setback to the northern boundary has been redistributed to the top of the building in a manner where it is setback beyond the wall alignment of the levels below to the extent necessary such that it is not readily discernible as viewed from the public domain within immediate proximity of the site and to the extent that where it may be visible it will not be perceived as inappropriate or jarring in the context of the height of development located within the sites visual catchment and the height anticipated by the applicable DCP provisions for future development located on the other three corner sites at the Sydney Road and Condamine Street intersection.

In my opinion, a better environmental planning/ built form/ urban design outcome is achieved through approval of the building height variation proposed with enforcement of strict compliance resulting in either a development which extends to within immediate proximity of the northern boundary whereby the development is unable to take advantage of the site's northern orientation, and which results in increased amenity impacts on the northern adjoining property, or alternatively the deletion of the entire upper level floor plate resulting in a development unable to achieve the anticipated FSR of 2:1 on the site located within an established centre, and ideally suited to increased residential densities. Such outcome would be neither orderly or economic have regard to the zoning of the land and the site's location within the established Balgowlah mixed use precinct.

The proposal represents skilful contextually responsive building design.

Ground 2 – Enhance safety and utility afforded to adjacent ROW through

The redistribution of floor space in the manner proposed has facilitated a widening of the existing right of carriageway located adjacent to the northern boundary to enhance its safety and utility and to enable it to remain open to the sky rather than potentially enclosed through the construction of the upper floor levels of the development to the northern boundary of the property. Public and private benefit is achieved through enabling the redistribution of a compliant quantum of floor space in the manner proposed.

Ground 3 - 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 attainment of the maximum anticipated FSR of 2:1 on a site located within an established centre and ideally suited to increased residential densities. Approval of the building height variation will achieve this objective.

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

For the reasons outlined in this submission, approval of the variation to the building height standard will promote good contextually appropriate design and facilitate enhanced amenity outcomes to and from the development in relation to the natural and built environment.

There are sufficient environmental planning grounds relative to this particular site to justify the variation sought.

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.*

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone;* ***and***

- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning/ urban design outcome when compared with what would have been achieved if the development standard was not contravened.

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

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 B2 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 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.

4.5 Secretary's concurrence

By Planning Circular dated 5th May 2020, 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 nonnumerical 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.

Concurrence of the Secretary can therefore be assumed in 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 considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director