

27<sup>th</sup> August 2021

**Land and Environment Court case number 2020/306306**

**Clause 4.6 variation request – Height of buildings**

**Adaptive reuse of the Drummoyne Reservoir as a centre-based child care facility involving alterations and additions to the existing reservoir building together with the construction of a new building to the eastern component of the site with basement car parking  
Lot 13, 14, 15 and 16 in DP 455626, Drummoyne Reservoir**

**1.0 Introduction**

This clause 4.6 variation request has been prepared having regard to Architectural plans A00.00(F) to A00.05(F), A01.01(F) to A01.22(F), A01.15b(G), A02.01(F) to A02.09(F), A03.01(F) to A03.04(F), A04.01(F) to A04.05(F), A05.01(F) to A05.07(F), A06.01(F), A07.01(F) to A07.04(F), A08.01(F) to A08.03(F) and A09.01(F) prepared by Milton Architects.

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 Canada Bay Local Environmental Plan 2013 (CBLEP)**

**2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of Canada Bay Local Environmental Plan 2013 (CBLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control are as follows:

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*
- (b) *to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—*
  - (i) *visual and acoustic privacy, and*
  - (ii) *solar access and view sharing,*

- (c) *to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*
- (d) *to ensure that buildings respond to the natural topography of the area.*

**Building height** is defined as follows:

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

**Ground level (existing)** is defined as follows:

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

In relation to the height of the development, I make the following observations.

#### Drummoyne Reservoir

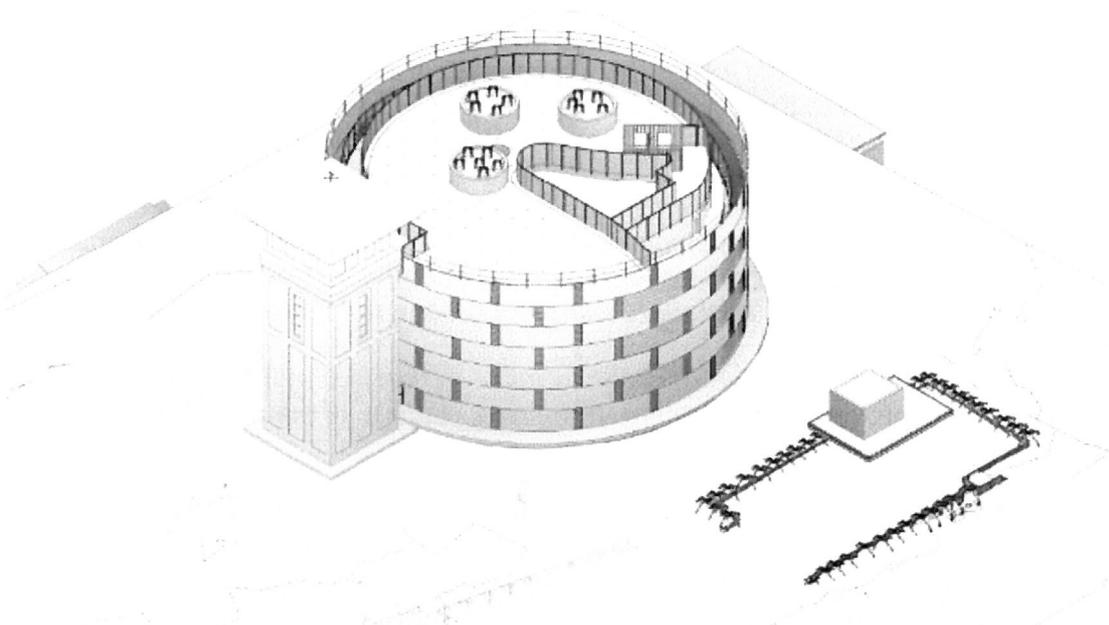
The application proposes the adaptive reuse of the existing State Heritage listed reservoir and tower structures with these existing structures having heights of 20.041 metres and 26.432 metres above ground level (existing) respectively. This represents existing building height standard exceedances of between 11.541 metres (135%) and 19.932 metres (210%).

Whilst the adaptive reuse of the existing reservoir and tower structures involves works to these building elements, I note that all associated works located above the 8.5 metre building height standard are either contained wholly within the existing building envelope, involve the removal of existing reservoir fabric to create openings for light and ventilation or involve the replacement/ refurbishment/ restoration of existing building fabric. The established height of the existing reservoir and tower structures are not altered as consequence of the works proposed.

#### Purpose-built child care facility building

The application also proposes the construction of a contemporary purpose-built childcare building on the north eastern portion of the site. The passenger lift required to provide accessible access to the roof top external play area has a maximum height above ground level (existing) of 12.21 metres exceeding the height standard by 3.71 metres or 43% and limited to a footprint area of 6.28m<sup>2</sup>. The lift foyer and associated canopy has a maximum height above ground level (existing) of 9.7 metres representing a variation of 1.6 metres or 18% and limited to a footprint area of 9.33m<sup>2</sup>. The balustrade around the roof top external play area exceeds the height standard by a varying amount to a maximum of 1 metre or 11.7%.

The building height breaching elements are depicted in the isometric height blanket diagram at Figure 1 below.



**Figure 1** - Isometric height blanket diagram extract (Plan A01.15b(G)) with the building height breaching elements visible above the 8.5 metre building height standard

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of CBLEP 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 CBLEP provides:

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

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

Clause 4.6(3) of CBLEP provides:

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

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

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

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

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

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]).

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

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

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

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5<sup>th</sup> May 2020, attached to the Planning Circular PS 18-003 issued on 5<sup>th</sup> 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 CBLEP 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 CBLEP 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 CBLEP 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 CBLEP 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 CBLEP?

#### **4.0 Request for variation**

##### **4.1 Is clause 4.3 of CBLEP a development standard?**

The definition of “development standard” at section 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 CBLEP prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 CBLEP 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 ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*

Response: The existing State heritage listed reservoir and tower structures contribute to the established built form and land use character of the area and given their heritage listing reflect the desired future character of the locality as it relates to this particular site. The subject property is located within the Bourketown Heritage Conservation Area (HCA) with the statement of significance for the conservation area contained at Appendix 1, Part CA.2 of the Canada Bay Development Control Plan (CBDPC) containing the following future character statement:

The future character for this large and mixed area is principally to retain the strong overall heritage urban character of the streets with their mix of one and two storey houses on lots of mixed size.

Existing building stock is predominantly Victorian and Edwardian with some Inter-war pockets of housing and these characters should be retained. Buildings built prior to the Second World War should not be demolished and new buildings should retain the scale and overall character of the immediate area as it relates to bulk, form and use of materials. Given the large lot sizes for much of the area, additions and new buildings can be in a range of forms including good contemporary design with the emphasis on 'fit' into the setting. Garages and carports should not be added in front of the building line.

In relation to the height, bulk and scale anticipated within the HCA by the future character statement I make the following key observations:

- The future character relates principally to the retention of the strong overall heritage urban character of the streets with a mix of one and two storey buildings.
- New buildings should retain the scale and overall character of the immediate area as it relates to bulk, form and use of materials.
- New buildings can be in a range of forms including good contemporary contextually responsive building design.

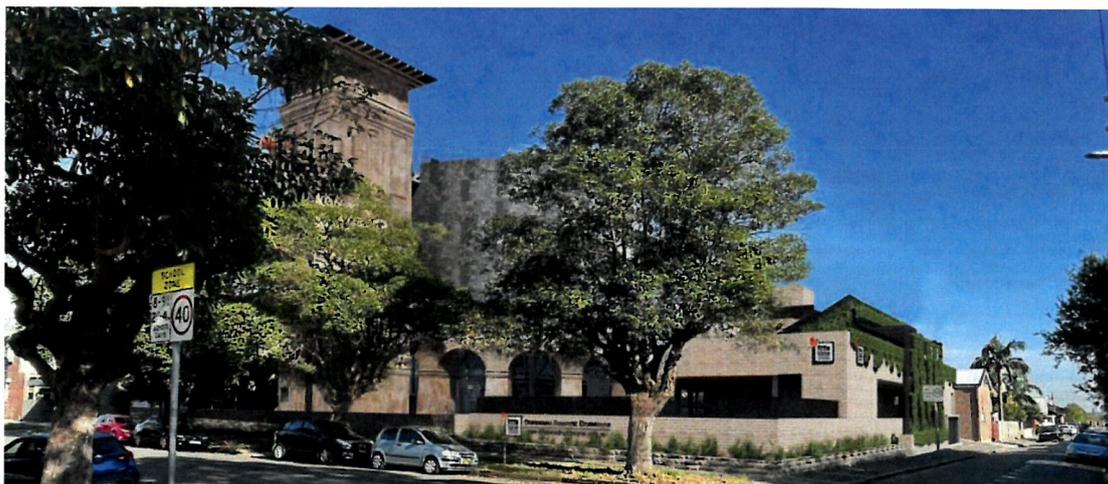
Objective (a) of the building height standard therefore seeks to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality including existing heritage items and buildings which contribute to the overall heritage urban character of the street it being noted that new contemporary buildings are anticipated where they retain the scale and overall character of the immediate area in relation to bulk, form and use of materials and where they positively contribute to the streetscape and public spaces and achieve an contextually responsive built form “fit”.

The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

*22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

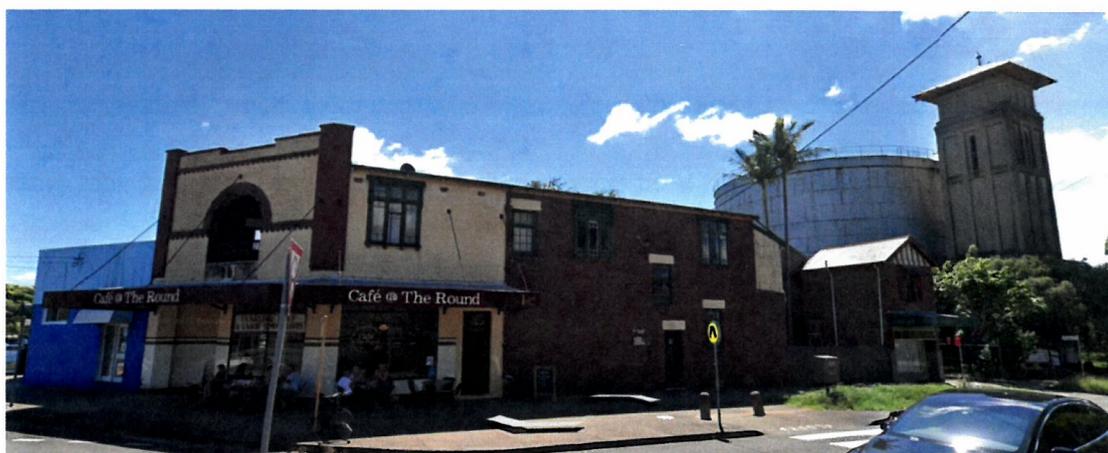
In this regard, the retention of the existing heritage listed reservoir and tank structures achieve the desired future character of the HCA given these structures will continue to contribute to the strong overall heritage urban character of the HCA and immediate streetscapes and public spaces notwithstanding their building height breaching elements.

In relation to the purpose-built child care facility building, I am satisfied that the building height breaching elements will not result in a building which is incompatible with the scale and overall character of the immediate area as it relates to bulk, form and use of materials. The height, bulk and scale of this new building element will be subservient to the height, bulk and scale of the reservoir and tank structures notwithstanding the non-compliant building height breaching elements. This built form outcome is depicted in Figure 2 over page.

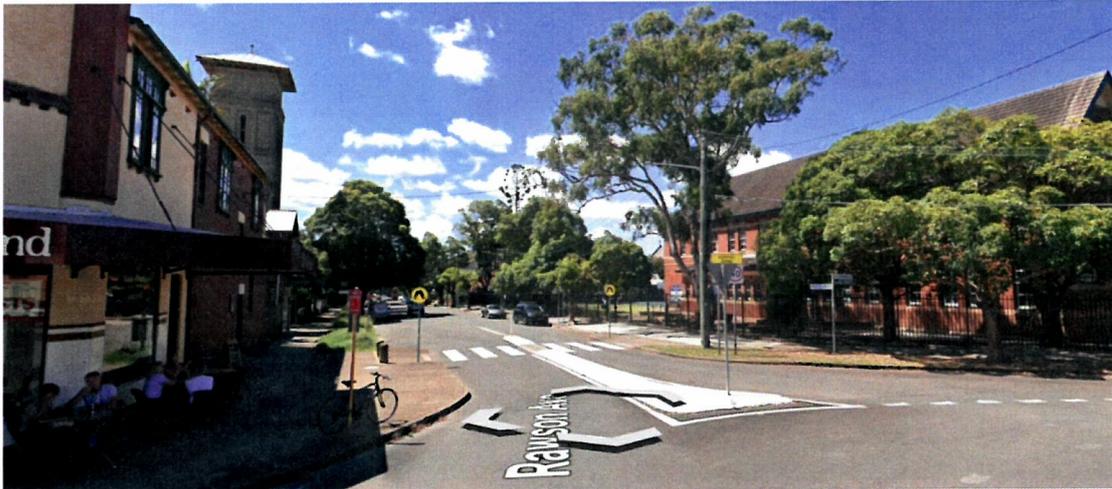


**Figure 2** – Montage demonstrating the compatibility of the purpose-built child care facility building with the existing heritage listed reservoir and tower structures in terms of height, bulk and scale and the positive contribution these buildings make to the streetscape and surrounding public spaces

Similarly, notwithstanding the non-compliant building height elements associated with the purpose-built childcare facility building, I am satisfied that the building height breaching elements will not result in a building displaying a height, bulk, scale, form or materiality which will be perceived as inappropriate or jarring when viewed in the context of the height, bulk, scale, form or materiality established in the locality, such as the 3 and 4 storey residential apartment buildings located in Rawson Avenue and Tranmere Street, St Marks Public School and Drummoyne Public School all of which are located within the site’s visual catchment. These buildings are depicted in Figures 3 – 9 below and over page.



**Figure 3** – View looking north from the intersection of Rawson Avenue and Thompson Street towards Drummoyne Reservoir. Note the flat parapeted roof neighbourhood shops to the south of the subject site.



**Figure 4** – View looking north east down Rawson Avenue past the subject site with Drummoyne Public School. Note the height of the pitched roof school building.



**Figure 5** – View looking south east down Polding Lane past the subject site. Note the 2 storey laneway development on a nil setback to the laneway.



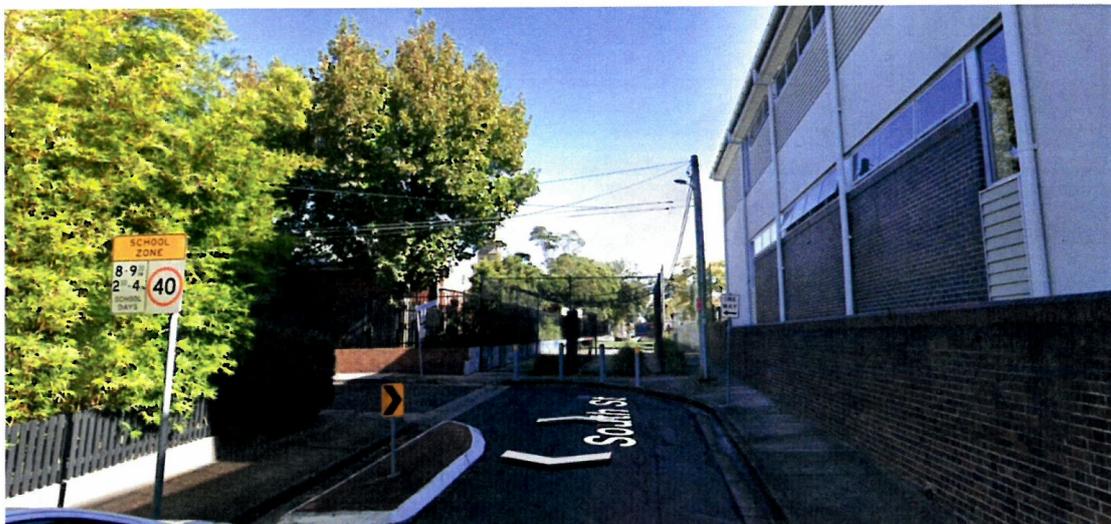
**Figure 6** – View looking south east down South Street past the subject site. Note the 2 storey laneway development on a nil setback to South Street and Reservoir Lane.



**Figure 7** – View looking south east down South Street past the subject site. Note the 3 storey residential flat development located directly opposite the subject property.



**Figure 8** – View looking north east down Rawson Avenue from the subject site. Note the 3 storey residential flat development located within immediate proximity of the site including residential flat development located along Tramere Street at the end of Rawson Avenue.



**Figure 9** – View looking north west along South Street past St Mark's Public School towards the subject property with the reservoir tower visible in the distance. Note the school buildings nil setback to South Street.

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 height and scale of the development, notwithstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that, notwithstanding the building height breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

Under such circumstances, the height, bulk and scale of the purpose-built childcare facility building, notwithstanding the building height breaching elements, are compatible with the height, bulk and scale of the desired future character of the locality as identified for the HCA. The design of this contemporary building element provides for a contextually appropriate building “fit” in terms of bulk, form and materiality with the proposed building form positively contributing to the streetscape and public spaces notwithstanding the non-compliant building height elements proposed.

The adaptive reuse of the reservoir and tower structures will facilitate needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item. The conservation works will ensure that the heritage item continues to positively contribute to the streetscape and public spaces.

Notwithstanding the building height breaching elements, the resultant development is compatible with the with the height, bulk and scale of the desired future character of the locality with the buildings positively contributing to the streetscape and public spaces and accordingly the proposal achieves this objective.

(b) *to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of -*

(i) *visual and acoustic privacy, and*

Response: Having inspected the site and determined the spatial relationship of the proposed non-compliant building height elements to neighbouring residential properties and public spaces I am satisfied that the building height breaching elements will not give rise to unacceptable visual and acoustic privacy impacts. Whilst it is acknowledged that the passenger lift and balustrade breaching elements facilitates the use of the roof of the purpose-built childcare facility building for external play space where if not designed appropriately potential visual privacy impacts may arise, the height of the balustrading and use of perimeter landscaping will ensure that appropriate visual privacy is maintained.

In relation to the adaptive reuse of the reservoir and tank structures, I am again satisfied that whilst openings have been provided within the existing tank and the tank roof identified for use as external play space, the spatial relationship maintained between the reservoir and tank structures and neighbouring residential accommodation and public spaces will ensure the maintenance of appropriate visual privacy outcomes notwithstanding the building height breaching elements proposed.

In relation to acoustic privacy, I rely on the expert advice prepared in support of the application in relation to the acceptability of acoustic outcomes.

In this regard, I am satisfied that the buildings, notwithstanding the non-compliant building height elements, have been designed in such a manner as to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of visual and acoustic privacy. This objective is achieved notwithstanding the non-compliant building height elements proposed.

*(ii) solar access and view sharing,*

Response: Having inspected the site and identified potential view lines across the subject property from surrounding development, I am satisfied that the development will protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of view sharing notwithstanding the non-compliant building height breaching elements proposed.

In relation to solar access, I rely on the shadow diagrams prepared by the project Architect A01.22(F) which demonstrate that no additional shadowing impact will be generated as a consequence of the works to the reservoir and tower structures with shadow cast by the non-compliant building height elements associated with the new purpose-built childcare facility building predominately falling within the site or within the adjacent road reserve.

Under such circumstances, I am satisfied that that the non-compliant building height elements will not result in unacceptable impacts on the amenity of residential accommodation, neighbouring properties and public spaces in terms of solar access.

In this regard, I am satisfied that the buildings, notwithstanding the non-compliant building height elements, will maintain appropriate amenity to adjoining residential accommodation, neighbouring properties and public spaces in terms of visual and aural privacy, solar access and view sharing. This objective is achieved notwithstanding the non-compliant building height elements proposed.

- (c) *to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*

Response: The subject site is not located within a medium or high density centre or located adjacent to an open space zone. The subject land is zoned R2 Low Density Residential pursuant to CBLEP and accordingly this objective does not apply.

- (d) *to ensure that buildings respond to the natural topography of the area.*

Response: The site is relatively flat with excavation limited to that required to accommodate basement car parking on the site with such excavation not influencing the overall building heights proposed. I am satisfied that this objective is achieved notwithstanding the building height breaching elements proposed.

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 R2 Low Density Residential pursuant to CBLEP. The developments consistency with the stated objectives of the R2 Low Density Zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: Whilst the application does not propose a residential use on the site, I note that centre-based child care facilities are permissible with consent in the zone and to that extent are deemed to be consistent with, not antipathetic to, the zone objectives.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: The application proposes the adaptive reuse of the existing heritage listed reservoir and tower structure and the construction of a purpose-built residential care facility building on the subject property. In this regard, the development proposes a land use that will provide child care facilities and services to meet the day to day needs of residents both within the local government area and beyond. Notwithstanding the building height breaching elements, the proposal achieves this objective.

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

*As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

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

#### **Sufficient environmental planning grounds**

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

##### **Ground 1 - Heritage conservation**

The adaptive reuse of the building as proposed will provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item.

Approval of the building height variation will facilitate such outcome noting that building height has been distributed on the site in a contextually appropriate and sympathetic manner to ensure the development will not give rise to adverse heritage conservation outcomes.

Strict compliance would require the demolition of a significant portion of the existing State heritage listed reservoir and tower elements with such outcome overriding the protection afforded by the heritage listing.

### **Ground 2 - Public benefit**

Drummoyne Reservoir is a State heritage listed item. The adaptive reuse of the building as proposed will provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item.

Approval of the building height variation will facilitate the ongoing conservation of the item and to that extent provide significant public benefit.

### **Ground 3 - Objectives of the Act**

#### Objective (c) to promote the orderly and economic use and development of land

Strict compliance with the building height standard would require the demolition of a substantial portion of the heritage listed reservoir and tower structures.

For the reasons outlined in this submission, approval of the variation to the building height standard will facilitate the adaptive reuse and ongoing conservation of Drummoyne Reservoir, promote the orderly and economic use and development of the land and facilitate the provision of significant public benefit. Approval of the building height variation will achieve this objective.

#### Objective (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)

For the reasons outlined in this submission, approval of the variation of the building height standard will facilitate the adaptive reuse of the building and in doing so provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item.

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

For the reasons outlined in this submission, approval of the variation of the building height standard will promote good contextually appropriate and heritage sensitive design which will facilitate enhanced amenity outcomes to and from the development. Approval of the building height variation will facilitate the appropriate adaptive reuse and conservation of Drummoyne Reservoir.

Approval of the building height variation will achieve this objective.

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

The building height variation to the purpose-built child care facility building will facilitate disabled access to the rooftop outdoor play space which in this location will afford superior levels of amenity to children utilising the centre. Given the heritage sensitivities on the site there are limited opportunities for the relocation of this play space to ground level where the same level of amenity is able to be achieved. Whilst the lift overrun and foyer could be removed through the installation of a platform lift, and in doing so remove these building height non-compliant elements, a platform lift would not afford the same safety for the users of the development and to that extent would not promote the protection of the health and safety of the building occupants/ users. Approval of the building height variation will achieve this objective.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

*87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test.*

*The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the NSW 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 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 R2 Low Density Residential 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 5<sup>th</sup> 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 determinations are subject to, compared with decisions made under delegation by Council staff.

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

#### 5.0 Conclusion

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

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

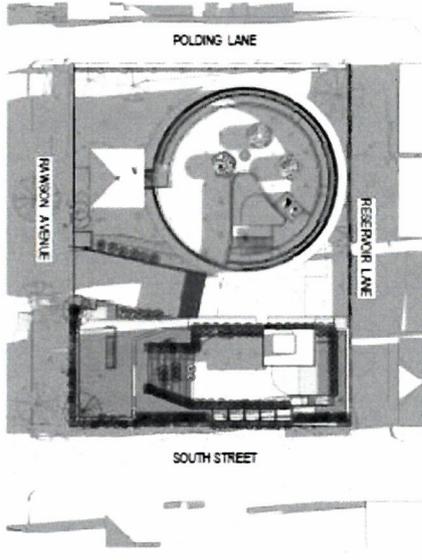
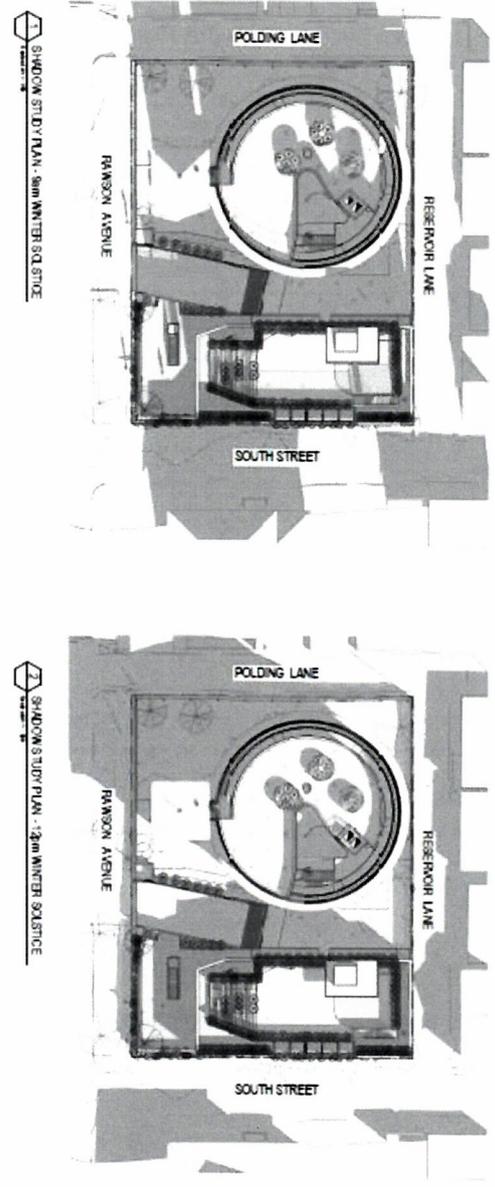
As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

**Boston Blyth Fleming Pty Limited**



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

Attachment 1 Shadow diagrams



Legend

1	2nd Floor of Building
2	1st Floor of Building
3	0.5m in shadow
4	1m in shadow
5	2m in shadow
6	3m in shadow
7	4m in shadow
8	5m in shadow
9	6m in shadow
10	7m in shadow
11	8m in shadow
12	9m in shadow
13	10m in shadow
14	11m in shadow
15	12m in shadow
16	13m in shadow
17	14m in shadow
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100	97m in shadow

Early Learning Centre  
Lab, Library, Classroom, Classroom with  
Classroom, Classroom, Classroom with

SHADOW STUDY PLAN - WINTER  
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FOR P & E COURT DRAWING NOT TO BE USED FOR BUILDING APPLICANT, OR CONSTRUCTION PURPOSES