

25th November 2021

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Land and Environment Court of NSW Proceedings 2021/00262686
Amended Clause 4.6 variation request – Height of buildings
Proposed Shop Top Housing Development
1 Kenneth Road and 265 Condamine Street, Manly Vale

Height of Buildings

1.0 Introduction

This clause 4.6 variation request has been prepared on the basis of amended Architectural plans DA01 to DA16, Issue E, prepared by Gartner Trovato Architects.

This variation request 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 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

- a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

- b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

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.

Based on available survey information I have calculated the extent of building height breach for the Condamine Street and Kenneth Road facing building pavilions as follows.

Condamine Street facing pavilion

The 3 storey building form and associated balustrade and planter elements located immediately adjacent to the Condamine Street frontage have a building height of 11.4 metres at their north eastern corner increasing to 11.7 metres at their south eastern corner as the site falls away to the south. This represents a variation of between 400mm (3.6%) and 700mm (6.3%).

The 4th storey is setback 5 metres from the Condamine Street frontage with this recessive floor plate having a building height of 12.84 metres at its north eastern corner increasing to 13.75 metres at its south eastern corner as the site falls away to the south. This represents a variation of between 1.84 metres (16.7%) and 2.75 metres (25%%).

The building height breach reduces as the site rises towards the western boundary of the site with the rear of the Condamine Street facing pavilion breaching the height standard by approximately 550mm (5%) in its north western corner increasing to approximately 1.6 metres (14.5%) in its south western corner.

The centrally located lift overrun has a height of approximately 14.2 metres representing a variation of 3.2 metres or 29%.

The building height breaching elements are depicted on the elevations and sections prepared in support of the application and the building height blanket diagram at Figure 1 below.



Figure 1 - Building height blanket diagram showing the building height breaching elements above the 11 metre height standard and the relationship of the building height breaching elements to adjoining development

Kenneth Road facing pavilion

The 3 storey building form and associated balustrade and planter elements located immediately adjacent to the Kenneth Road frontage have a building height of 10.36 metres at their north western corner increasing to 11.3 metres at their north eastern corner as the site falls away to the east. This represents a variation of 300mm (2.7%) in the north-eastern corner of the 3 storey building form.

The 4th storey building façade is setback approximately 10.6 metres from the Kenneth Road frontage with this recessive floor plate having a building height of approximately 13 metres at its north western corner increasing to 14.6 metres at its north eastern corner as the site falls away to the east. This represents a variation of between 2 metres (22%) and 3.6 metres (32.7%).

The building height breach increases as the site falls away from Kenneth Road in a southerly direction with the rear of the Kenneth Road facing pavilion breaching the height standard by approximately 3.6 metres (32.7%) in its south western corner increasing to approximately 3.8 metres (34.5%) in its south eastern corner.

The centrally located lift overrun has a height of approximately 14.2 metres representing a variation of 3.2 metres or 29%.

The building height breaching elements are depicted on the elevations and sections prepared in support of the application and the building height blanket diagram at Figure 2 below.



Figure 2 - Building height blanket diagram showing the building height breaching elements above the 11 metre height standard and the relationship of the building height breaching elements to adjoining development

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP 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 WLEP 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 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP 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 WLEP 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 WLEP 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 18-003 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 WLEP 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 WLEP 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 WLEP 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 WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP 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 WLEP prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 WLEP 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.

The third option, which has also been adopted, 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.

The fourth option, which has also been adopted, 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.

Compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard

An assessment as to the consistency of the proposal, notwithstanding the building height breaching elements, when assessed against the objectives of the standard is as follows:

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

Comment: Development within the site's visual catchment, and within the 11 metre height precinct, is eclectic in nature and currently in transition with a number of older one and two storey commercial and mixed use buildings being replaced with more contemporary 4/ 5 level stepped shop top housing building forms. A predominant 4 storey building presentation has been established by recently approved and constructed shop top housing development along Condamine Street including the buildings having frontage to secondary streets including Kenneth Road and King Street. Figures 3 and 4 below depict such context it being noted that the examples of 4 storey shop top housing development are located within the 11 metre height precinct are grouped in such a manner as to establish a clear street wall height and existing/ desired future streetscape character and along this section of Condamine Street.



Figure 3 – View looking north-west towards properties to the south of the site along Condamine Street



Figure 4 – Existing 4 storey shop top housing development further to the north of the site along Condamine Street

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 (*Project Venture*). At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

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

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

In relation to the Condamine Street fronting building pavilion, I note that the building height breaching elements are generally limited to the upper level of the development which has been setback to comply with the 5 metre setback control applicable to building elements located above first floor level with such setback ensuring that this level is recessive in a streetscape context. The height and setback of the upper level as viewed from Condamine Street is entirely complimentary and compatible with the upper levels approved and/ or constructed on the 2 immediately adjoining properties as depicted in the plan extract and perspective images at Figures 5 and 6 below.



Figure 5 – Plan extract DA10(E) depicting a complementary and compatible building height and presentation to Condamine Street



Figure 6 – Perspective image depicting a complementary and compatible building height and presentation to Condamine Street

In this regard, I have formed the opinion that the non-compliant building elements, as viewed from Condamine Street, will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and urban design context.

In relation to the Kenneth Road fronting building pavilion, I note that the building height breaching elements are generally limited to the upper level of the development which has been setback approximately 10.6 metres from the front boundary, well beyond the setback established by the levels below, to ensure that the non-compliant upper level is a recessive element in a streetscape context. In fact, the perspective images on plan DA 20(E) demonstrate that the upper level associated with the Kenneth Road fronting building pavilion will not be readily discernible as viewed from either Kenneth Road or Condamine Street within reasonable proximity of the site.

I am of the opinion that the height and setback of the upper level as viewed from Kenneth Road is entirely complementary and compatible with the upper level approved and currently under construction on the adjoining property to the east No. 267 – 269 Condamine Street as depicted in the plan extracts and perspective images at Figures 7, 8 and 9 below and over page.



Figure 7 – Plan extract DA10(E) depicting a complementary and compatible building height and presentation to Kenneth Road



Figure 8 – Perspective image as viewed from Kenneth Road to the west of the site demonstrating that the non-compliant upper level building height breaching elements will not be barely perceptible in a streetscape context given that they are screened by the compliant building height elements associated with the level below



Figure 9 – Perspective image as viewed from Condamine Street to the north east of the site demonstrating that the non-compliant upper level building height breaching elements will be barely perceptible in a streetscape context given that they are screened by the compliant building height elements associated with the level below.

In this regard, I have formed the opinion that the non-compliant building elements, as viewed from both Condamine Street and Kenneth Road, will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements associated with the Kenneth Road fronting building pavilion will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and urban design context.

Consistent with the conclusions reached by Senior Commissioner Roseth in *Project Venture* I have formed the considered opinion that most observers would not find the proposed development by virtue of its height, particularly the building elements breaching the height standard, 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 compatible with the height and scale of surrounding and nearby development and accordingly the proposal achieves this objective.

(b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

Comment: Having undertaken a detailed site and context analysis to determine the juxtaposition of adjoining development and identify available view lines over the site I have formed the opinion that the height of the development, in particular the non-compliant height components, will not give rise to any unacceptable visual privacy or non-compliant solar access impacts to adjoining development with appropriate spatial separation maintained to adjoining properties to minimise broader visual impacts. In this regard, I rely on the shadow diagrams at Attachment 1 and the built form spatial relationship outcome depicted on the Architectural plans.

Having inspected the site and its immediate surrounds to identify potential view lines across the site I am satisfied that the building height breaching elements will not give rise to any scenic view impacts with the form and massing of the development, particularly those elements located above the height limit, not giving rise to any inappropriate or jarring visual impacts to surrounding development.

The distribution of floor space and building height on this particular site is contextually responsive with the final design detailing minimising visual impact, disruption of views, loss of privacy and loss of solar access to surrounding development. This objective is achieved notwithstanding the building height breaching elements.

- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

Comment: Having driven around the area to identify potential view lines from coastal and bushland environments I am satisfied that the building height breaching elements will not be readily discernible as viewed from any coastal or bushland environments. This objective is achieved notwithstanding the building height breaching elements.

- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Comment: The non-compliant building height breaching elements will not be visually prominent as viewed from the street or any public area and certainly not to the extent that they will be perceived as inappropriate or jarring as previously identified in this submission.

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 portions of the building, offensive, jarring or unsympathetic in a streetscape context. This objective is achieved notwithstanding the building height breaching elements.

Having regard to the above, the non-compliant elements of the development 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 consistent with the first option in *Wehbe*.

The underlying objective or purpose would be defeated or thwarted if compliance was required

I am of the opinion that strict compliance with the building height standard, as it relates to the Condamine Street facing pavilion, would result in a 3 storey building presentation which would not provide for a complimentary and compatible streetscape building height consistent with the balance of the development within this particular street block. This would be a poor urban design outcome which would thwart consistency with objective (a) of the height of building standard namely:

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

Under such circumstances strict compliance has been found to be unreasonable as the underlying objective of the standard would be defeated if compliance was required consistent with the third option in *Wehbe*.

The development standard has been virtually abandoned along this section of Condamine Street

Given the established 4 storey building height along this section of Condamine Street, which has been established through approval and construction of development pursuant to the same building height standard contained within WLEP 2011, I am of the opinion that the development standard has been virtually abandoned along this section of Condamine Street.

Under such circumstances, the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard as it relates to development along this particular section of Condamine Street and hence compliance with the standard is unnecessary and unreasonable consistent with the fourth option in *Wehbe*.

Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to WLEP 2011. 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 tenancies which activate both the Condamine Street and Kenneth Road 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 notwithstanding the building height variation proposed.

- *To encourage employment opportunities in accessible locations.*

Response: The proposed mixed use development provides ground floor retail tenancies which will provide employment opportunities in an accessible location being within immediate proximity of the B Line bus service. The proposal will also encourage employment in terms of strata management and property maintenance. The proposal achieves this objective notwithstanding the building height variation proposed.

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

Response: The development provides appropriately for vehicle and bicycle parking to achieve this objective. The area is also well serviced by public transport. The proposal achieves this objective notwithstanding the building height variation proposed.

- *To provide an environment for pedestrians that is safe, comfortable and interesting;*

Response: The development provides for covered outdoor seating and pedestrian circulation space providing an environment for pedestrians that is safe, comfortable and interesting. The proposal achieves this objective notwithstanding the building height variation proposed.

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

Response: The proposal building scale and landscape treatments proposed provide for an urban and landscape form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. The proposal achieves this objective notwithstanding the building height variation proposed.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity of any adjoining or nearby residential land uses.*

Response: The property does not directly adjoin the R2 Low Density Residential zone but it is close proximity to that zone. The design response adopted minimises conflict between land uses in the zone and adjacent zones and ensure amenity of any adjoining or nearby residential land uses. The proposal achieves this objective notwithstanding the building height variation proposed.

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, third and fourth options 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:

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 Achievement of a contextually responsive streetscape and urban design outcome to Condamine Street

A variation to the building height standard to facilitate additional building height adjacent to the Condamine Street frontage provides for a contextually responsive, compatible and consistent streetscape and urban design outcome for development within this particular street block. The height of the development responds appropriately to the sites immediate built form context providing for a cohesive built form streetscape outcome along this section of Condamine Street.

Strict compliance would require the removal of the upper level of the development from the Condamine Street facing building pavilion resulting in an inconsistent street building height compared to the immediately adjoining properties and to that extent resulting in an inconsistent and incohesive built form streetscape outcome along this section of Condamine Street. Strict compliance would result in a poor urban design/ streetscape outcome with the development being unresponsive to its immediate built form context.

Approval of the building height variation will provide for a contextually responsive streetscape and urban design outcome along this section of Condamine Street.

Ground 2 Height standard abandoned along this section of Condamine Street

As previously indicated, I am of the opinion that the development standard has been virtually abandoned along this section of Condamine Street in favour of a consistent and cohesive streetscape and urban design outcome with such circumstance representing an environmental planning ground in support of a variation on this particular site and within this particular street block.

Ground 3 Contextually responsive distribution of floor space adjacent to the Kenneth Road frontage in response to the front setbacks establish by the immediately adjoining development

Pursuant to clause B7 – Front boundary setbacks of Warringah Development Control Plan (WDCP) development on the site is to maintain a nil setback to the street frontage at ground and first floor level with the level above setback 5 metres to ensure that the upper level is recessive in a streetscape context.

Site analysis has determined that the provision of a nil front setback at ground and first floor level adjacent to the Kenneth Road frontage would not respect or appropriately respond to the setbacks established by the 2 immediately adjoining properties being the existing 4 storey commercial building at No. 3 -9 Kenneth Road, which has a setback from the front boundary of approximately 7 metres, and the shop top housing development currently under construction at No. 267 – 269 Condamine Street which has setbacks to the front boundary at ground and first floor level in excess of the WDCP provision.

In this regard, the ground floor of the Kenneth Road fronting pavilion maintains a variable front setback of between 2.5 and 5 metres responding to the setbacks established by the two immediately adjoining properties with these setbacks carried through at first floor level where setbacks of between 1.54 and 5 metres are provided. Such setbacks place the primary building façades back approximately 3 metres beyond that which would be evident were strict compliance the front setback provisions within WDCP relied upon.

The topographical characteristics of the site together with the height established by adjoining development enables additional floor space, including that displaced through the provision of contextually appropriate front setbacks to Kenneth Road, to be located within an additional partial level at the top of the Kenneth Road fronting building pavilion without giving rise to inappropriate or jarring streetscape or residential amenity consequences. The proposed upper level maintains a setback of approximately 10.6 metres to Kenneth Road consistent with the setback of the recently approved fourth level currently under construction on the adjoining property to the east of the subject site ensuring that the partial upper level, which results in the breach to the building height standard, will not be readily discernible in a streetscape context as depicted in Figures 8 and 9 of this submission.

Approval of the building height variation, as it relates to the Kenneth Road facing building pavilion, facilitates the provision of contextually responsive front setbacks, in excess of those anticipated through strict compliance with WDCP, without loss of floor space or development potential on the site.

Such outcome reflects good contextually appropriate design whilst provides for the orderly and economic use and development of the land.

Ground 4 Objectives of the Act

The building is of exceptional design quality with the variation facilitating a building height and associated floor space that provides for contextual built form compatibility and the orderly and economic use and development of the land consistent with objectives 1.3(c) and (g) of the Act.

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 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.

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 streetscape/ urban design outcomes with the result that there is no public benefit in maintaining the standard in the particular circumstances of this case.

5.0 Conclusion

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

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

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

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', written over a horizontal line.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

Attachment 1 – Shadow diagrams

