

3-7 River Terrace, Tweed heads

Clause 4.6 Request – Height of Buildings

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REQUEST FOR AN EXCEPTION TO THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

24 MAY 2024

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Tweed City Centre Local Environmental Plan 2012 (TTCLEP). The request relates to an application for a shop-top housing development at 3-7 River Terrace, Tweed Heads and associated landscaping and civil works.

1.2 Locality Description

The site is located within the town of Tweed Heads which is the regional capital of the Tweed Shire local government area. Tweed Heads is identified as a major regional centre, with the relevant strategic plans and policies encouraging the delivery of new employment opportunities, increased housing choice, quality urban precincts, and the provision of regional services and functions in the centre.

Tweed Heads is immediately to the south of the NSW and Queensland border and functions as a twin town with Coolangatta immediately to the north. Whilst the character of Coolangatta and the broader Gold Coast is formed by its beachside setting and tall scale buildings, Tweed Heads is alternatively characterised by more modest built form, green spaces and the strong presence of the waterways which embrace with the city including the Tweed River and Terranora Creek.

The Tweed City Centre is divided into a number of character precincts under the Tweed Shire Development Control Plan (TSDCP) 2008 with the site located within the 'North' part of city and specifically within the 'Boat Harbour Precinct' which is described as follows in the TSDCP:

The Boat Harbour Precinct is the southern gateway to Tweed Heads just north of the Boyds Bay Bridge and Terranora Terrace. The precinct has a distinctive character reflective of the former Monastery Hill and the adjoining intimate Boat Harbour which functions as a popular tourist destination and as the boat maintenance area. The objective for this precinct is to promote the maritime theme of the Boat Harbour and provide pedestrian access along the waterfront and to water-based tourist activities. At the land/water interface, low scale commercial activities such as restaurants, cafés and tourist activities and facilities are encouraged.

To make an entry statement as people enter the precinct over the Boyds Bay Bridge landmark buildings up to 13 storeys are encouraged on key sites on northern side of Terranora Terrace and on Monastery Hill and could accommodate a mixture of business and residential uses and tourist accommodation.

A continuation of the mixed retail and residential development from the northern end of the City Centre along Wharf Street is promoted with buildings of eight storeys stepping down to six storeys on the eastern side of Recreation Street. The site is also immediately adjacent to the

Tweed River Precinct to the east and the Jack Evans Boat Harbour Precinct to the north.

The Tweed City Centre Local Environmental Plan was gazetted in 2013 with an overarching aim of encouraging the economic revitalisation of the City Centre and promoting employment, residential, recreational, arts, social, cultural and tourism opportunities in Tweed City Centre. This outcome is to be achieved in an ecologically sustainable manner which protects and enhance the vitality, identity and diversity of Tweed City Centre as well as achieving building design excellence.

The site will be the first in the Boat Harbour Precinct to be redeveloped in accordance with the new controls.



Figure 1:

Site Location (Six Maps 2024)

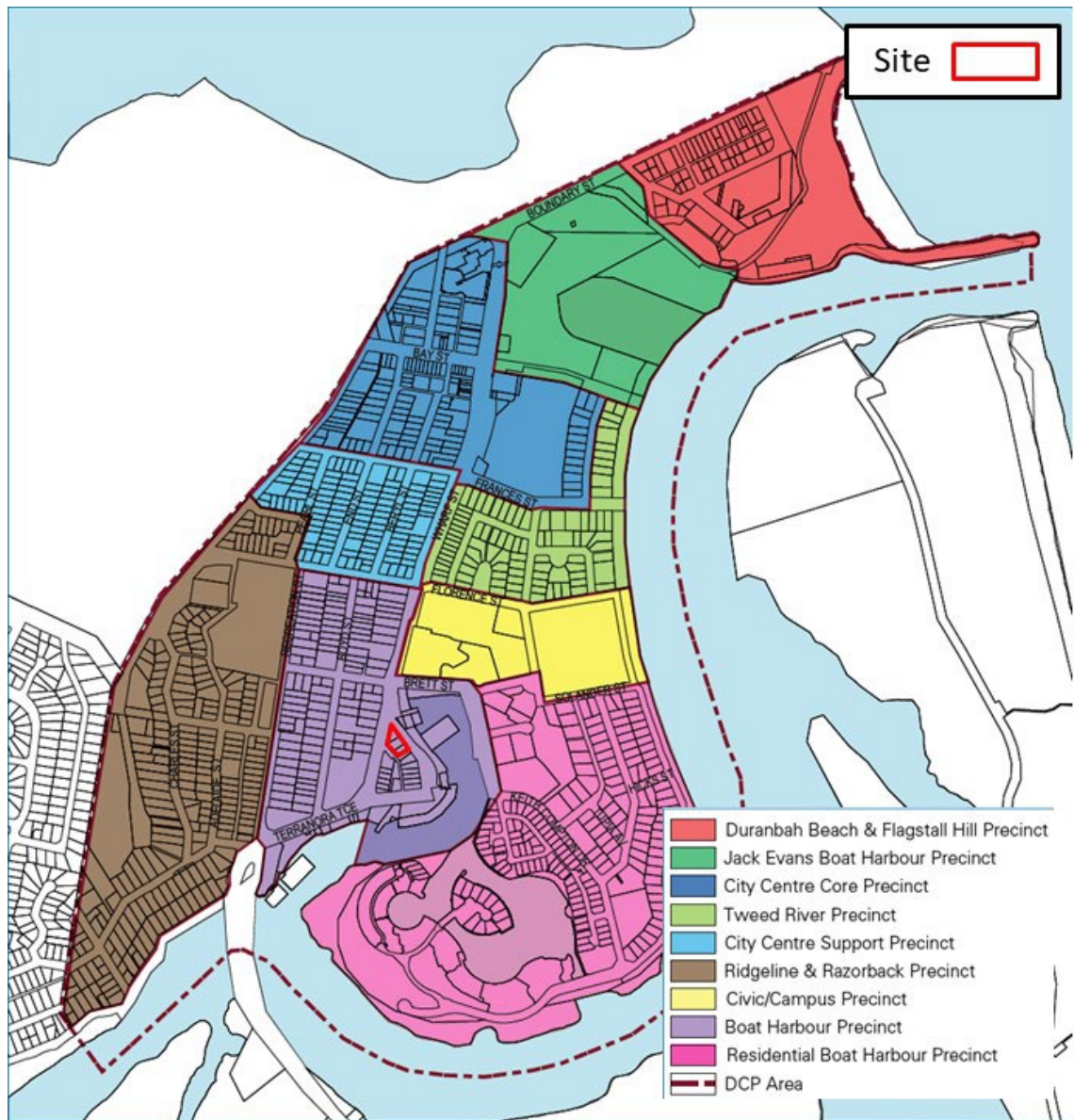


Figure 2:

Tweed City Centre – Character Precincts North

1.3 Site Description

The subject site is legally described as Lots 1 and 2 in DP 807977 and Lot 5 in DP9056 and is known as 3, 5 and 7 River Terrace, Tweed Heads Tweed Mall.

The site is located on the eastern side of Wharf Street, between River Terrace to the north and Monastery Lane to the south.

The site is an irregular shaped allotment with a combined area of 1,849 square metres. The site has a frontage of 67.78 metres to River Terrace, 47.05 metres to Wharf Street and 37.61 metres to Monastery Lane.

3 River Terrace is improved by a single storey, weatherboard dwelling with an attached carport and an outbuilding that is attached to the adjoining garage at 5 River Terrace.

5 River Terrace is improved by a two-storey dwelling with a detached garage that is accessed from Monastery Lane.

7 River Terrace is also improved by a two-storey dwelling. Vehicular access is provided to the site from Monastery Lane however there is no carport or garage located to the rear of the site.



Figure 3:

Aerial view of the site (Source: Six Maps, Department of Lands 2024)

The site is located on the northern side of Monastery Hill as the land starts to rise from the intersection of Wharf Street and River Terrace and the intersection of Wharf Street and Monastery Lane. The site has a cross fall of approximately 4.25 metres from the southern corner to the northern corner at the intersection of Wharf Street and River Terrace. The site has a fall of 3.15 metres from the south-east to the north-west along the frontage of the site to Monastery Lane. The land rises steeply within the front setback of the dwelling at 7 River Terrace.

As the land rises from River Terrace to the footprint of the dwellings on the site, views are available to Tweed Marina and beyond.

Landscaping on the site generally consists of low vegetation and medium sized trees in the front setback of each dwelling to River Terrace. An Arborist Report prepared by TPZ Project Arborists identifies 15 trees on the subject site and three trees in the road reserve of River Terrace. The trees on the site consists of a mix of

native and exotic species. The tree trees within the road reserve are mature specimens of *Melaleuca quinquenervia* (Broad Leaf Paperbark).

The site is zoned MU1 Mixed Use pursuant to the Tweed City Centre Local Environmental Plan 2012 (TCCLEP). The site forms part of the precinct boundary by River Terrace, Terranora Terrace and Wharf Street, which is identified as a 'Key Site' in TCCLEP.

1.4 Surrounding Development

The site is located within a precinct that is zoned MU1 Mixed Use under the TCCLEP. The zone generally extends along both sides of Wharf Street from the bridge and Tweed Apex Park in the south to Florence Street and the Tweed Heads Bowls Club (which is zoned RE2) to the north. The MU1 zone continues on the eastern side of Wharf Street to Frances Street. The MU1 zone includes land on the western side of River Terraces and land on either side of Monastery Lane.

Land to the north-east of 3 River Terrace is riverfront land that is zoned MU1 Mixed Use and is improved by a single storey, commercial building that is currently used as a fish and chip shop.

Land to the north-east of 5 and 7 River Terrace is zoned W4 Working Waterfront and is currently an at-grade Council car parking that adjoins the northern side of the Tweed Marina.

The adjoining site to the south-east is known as 9 River Terrace and is improved by a two-storey dwelling, with pedestrian access via stairs from River Terrace and rear lane access for vehicles from Monastery Lane. A single storey, triple garage occupies the majority of the site's frontage to Monastery Lane.

Opposite the site, on the south-west side of Monastery Lane is a large allotment known as 100-104 Wharf Street. The allotment has frontage to north Wharf Street and Monastery Lane and vehicular access is provided on Monastery Lane, generally opposite the common boundary of 7 and 9 River Terrace. 100-104 Wharf Street is currently improved by a two-storey dwelling which has two large advertising signs in the front setback to Wharf Street. The dwelling has a generous, landscaped setback to Monastery Lane.

1.5 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the TCCLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the TCCLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.6 Development Standard to be varied

In accordance with clause 4.3(2) 'Height of Buildings' of the TCCLEP the height of a building on any land is not to exceed the maximum height shown for the land on the 'Height of Buildings Map'. The maximum height shown for the site is RL49.5 as shown in Figure 4.

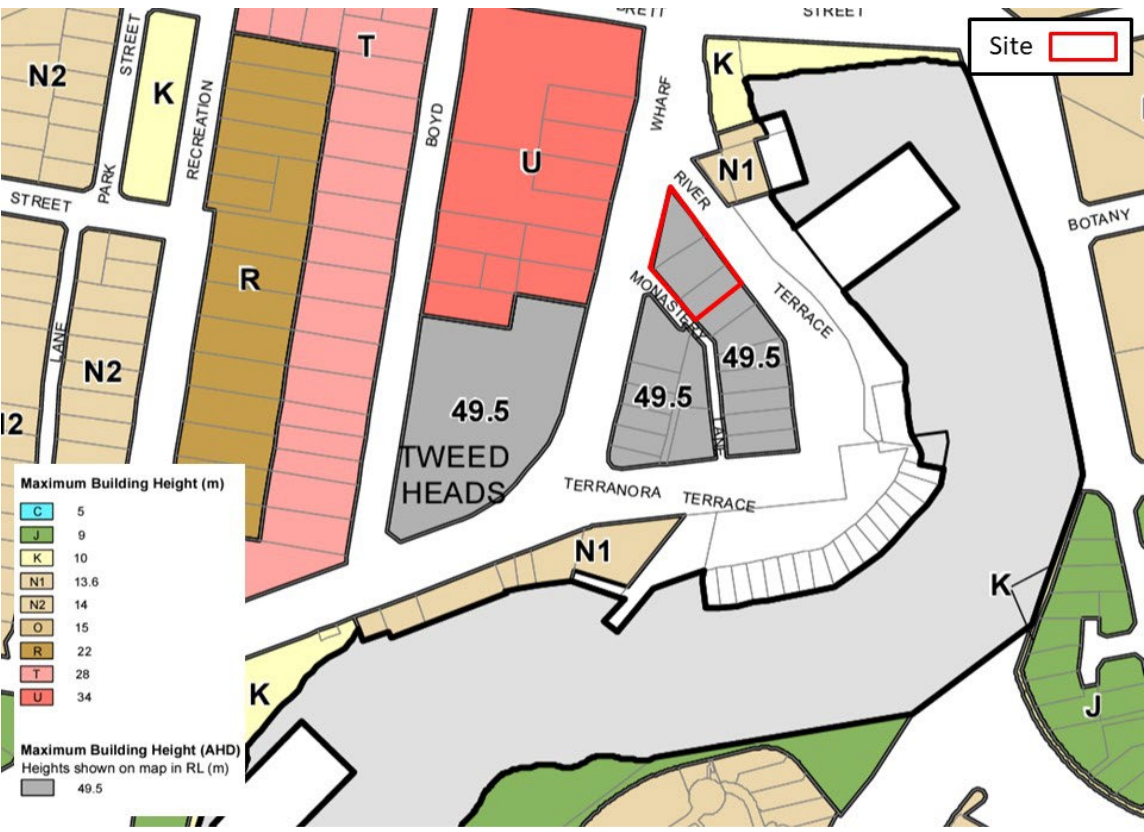


Figure 4:

Extract from the TCCLEP Height of Buildings Map

Building height (or height of building) is defined in the Dictionary of the TCCLEP as:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.

1.7 Extent of Variation to the Development Standard

The proposed development exceeds the maximum RL by up to 1.5 metres, as is clearly shown on the Height Plane Diagram prepared by Turner (Drawing DA795-001). This is a variation of 3% to the standard. An extract of the Height Plane Diagram is included as Figure 5 below.

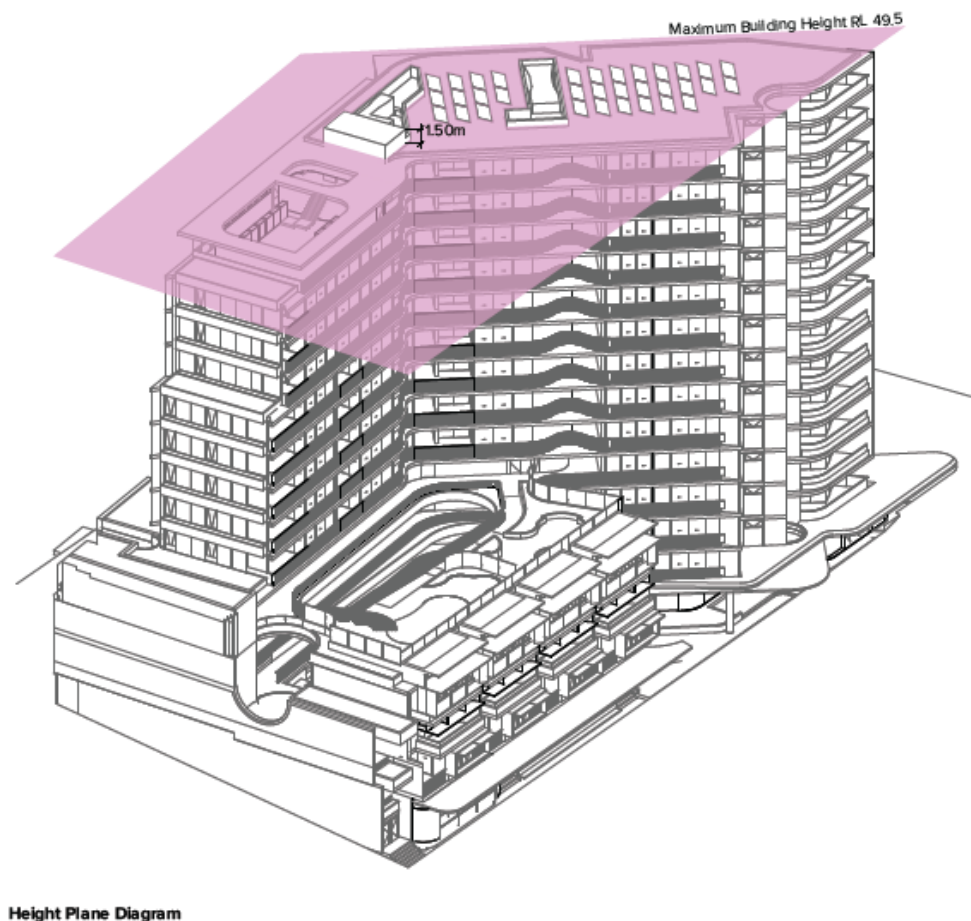


Figure 5:

Extract from Drawing DA-795-001 prepared by Turner

1.8 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

This was re-affirmed in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is

consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

Whilst it is only necessary to address the first method of the five-part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, which alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement, all five tests are addressed below followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of the building height development standard, as specified in clause 4.3 of the TCC LEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

(a) to establish the maximum height for which a building can be designed,

Clause 4.3 establishes a maximum height of RL49.5 for the site.

Clauses 6.10(6) and (7) of the TCCLEP relate to clause 4.3 and permit a building that has a height of not more than 10% higher than allowed by the Height of Buildings map, in certain circumstances and where the design of the building is the winner of a competitive design process. If the building was the winner of a competitive design process, an additional 4.95 metres would be permitted which is equivalent to an RL54.45.

Whilst competitive design process has not been undertaken for the site, a design competition waiver was granted on the basis that a reputable design team had been engaged with demonstrated experience in achieving high quality design outcomes and design excellence. The waiver was also granted on the basis that a staged design review process would result in a more efficient and effective process to ensure design excellence is achieved across each stage of the process. As the design has been the subject of a thorough design review process, it is considered that a similar, if not better outcome has been achieved than if the design was the winner of a design competition, and therefore it is reasonable to take into consideration the 10% bonus height that could be permitted on the site.

The proposed variation of up to 1.5 metres or 3%, is significantly less than would be permitted if the design was the winner of an architectural design competition.

(b) to ensure that building height relates to the land’s capability to provide and maintain an appropriate urban character and level of amenity,

The proposed variation to the standard does not relate to any habitable floor space and the variation only relates to a small part of the site, with other parts of the building (the four-storey element) sitting well below the maximum height permitted.

The proposed variation to the height limit only relates to roof top structures, including plant and solar panels. The structures are all setback from the parapet of the building and will generally not be visible from the public domain, as is demonstrated by the various 3D views of the development prepared by Turner. The proposed variation will therefore not result in any impact on the character of the locality or the amenity of the surrounding land.



Figure 6:

3D View of the Development from the River (DA-910-002 prepared by Turner)



Figure 7:

3D View of the Development from the River (DA-910-004 prepared by Turner)

(c) to ensure that taller development is located in more structured urbanised areas that are serviced by urban support facilities,

The proposed tower form is supported by the character statement for the Boat Harbour Precinct in which the site is located. The character statement in Section B2, Part 2 of the Tweed DCP indicates that landmark buildings, up to 13 storeys, will be encouraged on key sites on the northern side of Terranora Terrace and on Monastery Hill. The site is on Monastery Hill and the part of the building in the northern corner of the site has a height of up to 14 storeys. The 14 storeys of the building comply with the maximum RL of 49.5, with only roof top plant and solar panels exceeding the height limit.

(d) to encourage greater population density in less car-dependant urban areas,

The proposed variation to the height limit does not result in any inconsistency with this objective. The site is well located in terms of access to local bus routes operating along Wharf Street and it is noted that Transport for NSW are investigating a potential light rail corridor connecting Tweed Heads South with the Tweed-Coolangatta airport.

e) to enable a transition in building heights between urban areas comprised of different characteristics,

The building complies with the height of buildings standard of RL49.5, with the exception of rooftop plant and solar panels. The elements above the height limit will generally not be visible from the public domain and will therefore have no impact on the transition in building heights.

(f) to limit the impact of the height of a building on the existing natural and built environment,

The proposed variation will not result in any material impact on the natural and built environment having regard to: the minor extent of the variation, the setback of the elements that exceed the height limit from the parapet of the building, and the limited visibility of the elements that exceed the building height limit.

(g) to prevent gross overshadowing impacts on the natural and built environment.

Having regard to the minor exceedance of the height limit, of a maximum of 1.5 metres (or 3% of the standard) for a building that has a height above natural ground level of over 45 metres, and considering the substantial movement of the shadow throughout the day so that no one site is unduly burdened by the shadow cast by the building, the non-complying elements of the building will have no material impact on the surrounding natural and built environment as demonstrated by the shadow diagrams prepared by Turner (refer to Figure 8).



Figure 8:

21 June Shadow Diagram (Extract from DA-790-003 prepared by Turner)

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the height control is relevant to the proposed development. The proposed development is consistent with those objectives as detailed above.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objective of the height standard is to achieve an appropriate height on the site which is compatible with the context of the site and preserves the amenity and privacy of adjacent properties. Due to the design, location and configuration of the proposed development the proposal successfully achieves these objectives.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The development standard has not been abandoned or destroyed by the Council's actions.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and

compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the building height control is unreasonable and unnecessary under the circumstances for the following reasons:

- The proposed development consistent with the TCCLEP objectives for building height as detailed above.
- The proposed development is consistent with the objectives of the MU1 Mixed Use zone.
- No habitable floor space exceeds the height limit.
- The proposed height non-compliance does not result in any material impacts on the amenity of the surrounding properties.
- In the absence of any unreasonable impacts arising from the variation, compliance with the standard is unnecessary and unreasonable.

1.9 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018*, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.

Further guidance is also provided in *Eather v Randwick City Council [2021] NSWLEC 1075* and *Petrovic v Randwick City Council [202] NSW LEC 1242* which indicates that the small departure from the actual numerical standard and the lack of any material impacts are environmental grounds.

The environmental planning grounds that support the proposed variation are as follows:

- The proposed variation to the height standard is numerically only a minor variation, being a maximum variation of only 3% of the standard.
- If the design was the winner of a design competition an additional 10% of the building height would be permitted. Whilst competitive design process has not been undertaken for the site, a design competition waiver was granted on the basis that a reputable design team had been engaged with demonstrated experience in achieving high quality design outcomes and design excellence. The waiver was also granted on the basis that a staged design review process would result in a more efficient and effective process to ensure design excellence is achieved across each stage of the process. As the design has been design has been the subject of a thorough design review process, it is considered that a similar, if not better outcome has been achieved than if the design was the winner of a design competition, and therefore it is reasonable to take into consideration the 10% bonus height that could

be permitted on the site. The proposed variation of up to 1.5 metres or 3%, is significantly less than would be permitted if the design was the winner of an architectural design competition.

- The massing and design of the building has been the subject of a thorough design review process. The varied height of the building, and design of the tower element, is the result of a detailed site analysis and has been refined through several revisions of the scheme. The variation to the height standard is therefore not the result of a poor design.
- The proposed variation does not result in any material adverse impacts on the amenity of the surrounding properties.

For the reasons given there are sufficient environmental planning grounds to justify contravening the development standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

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

The development application and clause 4.6 request demonstrate that it is appropriate in this circumstance to provide flexibility in the application of the height of buildings development standard because it will allow for a form of development which is consistent with desired scale of developments in the precinct. The development also does not result in any material impacts on the amenity of the surrounding properties.

1.11 Conclusion

The proposed variation to the height of buildings development standard contained within clause 4.3 of the Tweed Heads City Centre Local Environmental Plan 2012 has been found to be reasonable and appropriate in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.