



CLAUSE 4.6 VARIATION STATEMENT

Proposed six storey mixed use building comprising a supermarket, retail outlets and 50 residential apartments.

277 The Grand Parade
Ramsgate Beach

Prepared for: *Bronxx Pty Ltd*

REF: M220002

DATE: 30 September 2024





CLAUSE 4.6 VARIATION STATEMENT – MAXIMUM HEIGHT OF BUILDINGS (CLAUSE 4.3)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Bayside Local Environmental Plan (BLEP) 2021 to accompany an application for demolition of existing buildings and structures and the construction of a six (6) storey mixed-use development, including car parking and associated earthworks and landscaping at No. 277 The Grand Parade, Ramsgate Beach.

2. MAXIMUM HEIGHT OF BUILDING

Clause 4.3(2) of *Bayside Local Environmental Plan 2021* relates to the maximum building height requirements and refers to the *Height of Buildings Map*. Building height is defined as:

“building height (or height of building) means, in relation to the height of a building in metres, the vertical distance from ground level (existing) 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”.

The relevant LEP map below identifies the subject site as having a maximum height of **20.5m**.

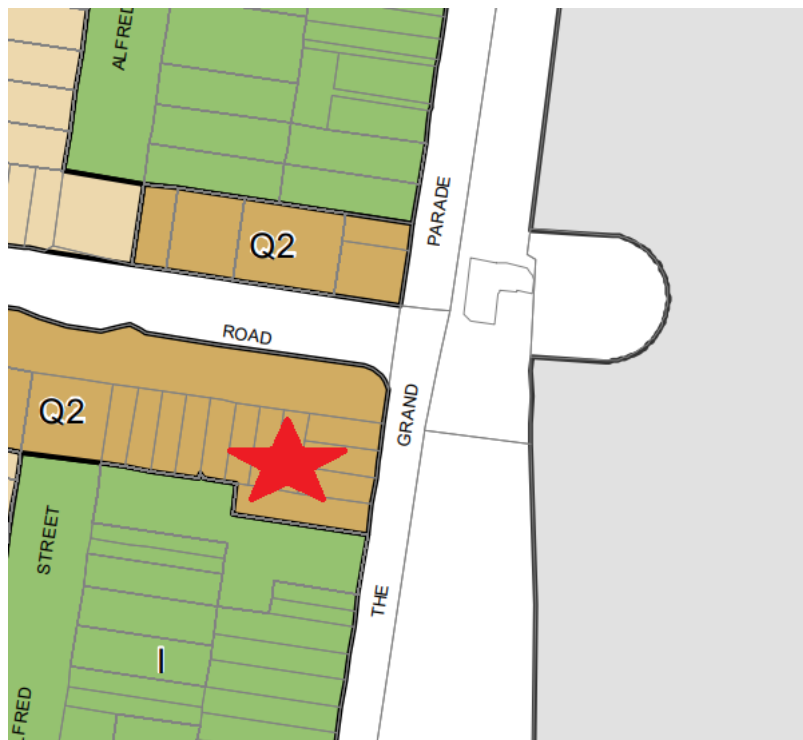


Figure 1 Bayside LEP 2021 – Height of Buildings map (site marked with a star).



3. PROPOSED VARIATION

As indicated in the section included in **Figure 2** below, the proposed upper most level and the lift overruns, central to the building will attain a height of 22.8m and exceed the maximum height. The height breach is at maximum of 2.3m. This results in a variation to the development standard of 11.21%. The building height, excluding the lift overrun, exceeds the height limit by 1.3m or 6.3%. This incorporates a portion of the upper-level apartments.

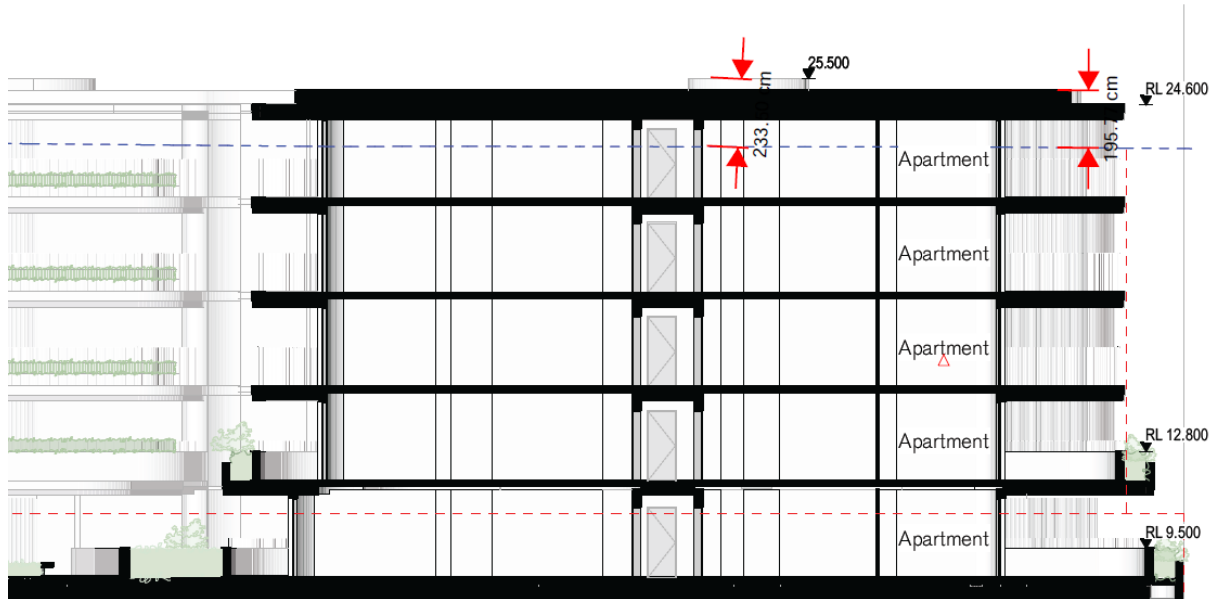


Figure 2 Section AA with max. height control shown with blue line

4. Clause 4.6 to BLEP 2021

The objectives and provisions of clause 4.6 are as follows:

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

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

(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.*

(3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

Note— The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

(5) *(Repealed)*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this Plan was made it did not include all of these zones.

(7) *(Repealed)*

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(ba) clause 4.3(2A), unless it is for a demonstrable public benefit,

(bb) clause 4.3(2B)(b),

(bc) clause 4.3A,

(bd) clause 4.4(2A), (2B), (2C), (2D), (2E), (2F) or (2G), unless it is for a demonstrable public benefit,

(be) clause 4.4(2H),

(bf) clause 4.4A, unless it is for a demonstrable public benefit,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 7.1 or 7.2.

The development standards in Clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 22.8m which equates to a numerical variation of 2.3m and a percentage variation of 11.21%, noting that the maximum height relates to the proposed lift overrun, roof line and upper level apartments, measured from existing ground level.

5. That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(A))

Of relevance to Clause 4.6(3)(a) is Preston CJ's judgment in *Wehbe v Pittwater Council* (2007) NSW LEC 827 which sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

" An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgment goes on to state that:

" The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 written request [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
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;
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

The objectives of Clause 4.3 Height of Buildings of BLEP states:

- (a) to ensure that building height is consistent with the desired future character of an area,

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

(c) to nominate heights that will provide an appropriate transition in built form and land use intensity.

In order to address the requirements of subclause 4.6(3)(a), each of the relevant objectives of Clause 4.3 are addressed in turn below.

Objective (a) - to ensure that building height is consistent with the desired future character of an area,

Objective (a) seeks to ensure that buildings are consistent with the height of the desired future character of the locality.

The current or desired future character of the locality is not defined under BLEP. In the decision of *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115*, Preston CJ held that the desired future character of the neighbourhood can be set by the existing, recently approved and proposed buildings within the neighbourhood. Therefore and with regards to the Ramsgate Beach Commercial Area, the locality is undergoing transition in accordance with the permitted planning controls, from low density commercial to higher density mixed-use developments.

Within immediate proximity to the subject site, the neighbouring properties to the west are underdeveloped and do not represent desired future character of the locality as anticipated by the relevant development standards and controls. The immediately surrounding properties are permitted a maximum building height of 20.5m to the north and west (consistent with the subject site) and 8.5m - 14.5m to the south. The built form immediately to the west of the site largely comprises 2 -storey commercial buildings and at grade carparking. Across Ramsgate Road to the north, lies built form that more closely reflects the intended density for the Ramsgate Beach Commercial Area.

In addition to the above, it is also prevalent to note that the subject site and immediate neighbours within the MU1 and R4 zone are all capable of benefitting from the recent 30% density uplift afforded by Division 1 In-fill affordable housing of the Housing SEPP. The implementation of a 30% bonus will deliver building height of 26.6m in the MU1 zone and 18.85m in the R4 zone to the south-west of the site. As described in further detail below, the subject development, including the non-compliant building height, will be entirely compatible with the desired future character of the locality, where the additional height is located on a strategic corner lot with two frontages, in a prominent location and within a highly accessible area.

The subject site is zoned MU1 Mixed Use and is within the Ramsgate Beach Commercial Area. The desired future character is defined in the Bayside DCP, specifically, the Ramsgate Beach Commercial Area, as follows:

Ramsgate Beach commercial area will grow and be revitalised in a way that takes advantage of its unique character, and become a vibrant, lively and attractive beach side centre. Redevelopment on both sides of Ramsgate Road which complements the generous and well landscaped public domain will provide a boulevard feel. As well as the redevelopment of older building stock on the southern side of Ramsgate Road, new development on the north side will expand the Centre to create additional commercial opportunities and a 'loop' for pedestrian with improved connection to the foreshore.

The Centre will be characterised by diverse buildings with a sense of openness and lightness, typical of successful beach side centres. New buildings will create a generous scale to Ramsgate Road with breaks between them to ensure sunlight penetrates to the street, and overshadowing is minimised which will improve the Centre's ambience.

The Centre will continue to be convenient to visit for pedestrians and private motor vehicle users. New developments will include sufficient carparking to meet demand, some of which will be provided at-grade to respond to the high water table which limits excavation for basement parking. Parking will be located so that

it does not detract from commercial activity within the Centre. As outlined above, this future character is supported by the applicable planning controls within the centre. These controls permit a built form far greater than what currently exists within immediate proximity to the site. Further to this, the NSW State Government has also incentivised and encouraged growth beyond that currently permitted by the BLEP, through relevant State Environment Planning Policies (namely the Housing SEPP) and a desire to deliver Transit Orientated Development.

The variation to the height of buildings development standard pertains to the building core and uppermost level of the development. As discussed in this Variation Statement, these areas of variation will not adversely affect the existing or desired future character of the locality. The proposal is designed to ensure that the non-compliant elements merge seamlessly into the compliant built form and will not appear as visually or physically obtrusive as viewed from the public domain. This approach has been undertaken to minimise environmental impact, whilst delivering a built form which is reflective of the strategic corner location of the site (with two frontages) and highly accessible nature.

Whilst the non-compliance will result in the provision of a sixth storey, this is considered to be compatible with the character of the immediate locality, as outlined above. Furthermore, should any future development neighbouring the site benefit from Housing SEPP bonuses, a greater building height would be permitted. In this regard, the location of the site, fronting The Grand Parade, and its superior characteristics, ensure the variation will not result in a form which is incompatible with the desired future character of the locality.

As such, the height variation is compatible to the varying scale of neighbouring properties, achieving objective (a).

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

This objective seeks to minimise adverse amenity impacts to the surrounding developments.

In terms of visual impact, this is addressed within objective (a) above. As a summary, the visual impact of the non-compliant building core and uppermost level is mitigated through the distribution of building mass, in particular the presentation of non-compliant height to major street frontages, with significant setbacks being provided on the southern part of the site above podium level. The visual impact is further minimised through the urban and architectural design measures implemented. Most notably, the additional height is merged seamlessly into the compliant envelope below, and forms part of a cohesive and well-considered architectural design. The height limit anticipates a six storey built form and the variation only results from adoption of flood planning levels and the need for a generous floor to ceiling height for the ground level supermarket. Ultimately, the visual impact of the non-compliant building height is acceptable and strict compliance would not result in any benefit given the superior characteristics of the site.

With regards to views, the proposed height breach will not result in any adverse impact due to the minor nature of the non-compliance. Views of Ramsgate Beach to the east would be fully obstructed by a compliant building envelope for residential dwellings located to the south-west of the site. These buildings are not afforded any views to the wider locality and there will not be any adverse loss of views created by the development, including the non-compliant building height. As such, the view impact created by the non-compliant building height would be insignificant or nil. Buildings to the north on Ramsgate Road enjoy significant views through the unobstructed road reserve of Ramsgate Road which opens further to Grand Parade and Cook Park, retaining a significant aperture of view. The proposed height breach will not obstruct any of these views.

In terms of privacy, consideration is made for existing residential development to the south and future residential development to the west. The proposal focuses the built form, living areas, COS and POS areas to the north and east, addressing the dual frontages. Setbacks to the southern boundary above podium level are generous and meet ADG requirements. The orientation of apartments will assist in increasing passive surveillance to the streetscape whilst ensuring privacy (for any future development) to the west and south is maintained.



The upper portion of Level 5, where it is non-compliant, does not result in any privacy impacts as this pertains to a portion of the ceiling space, and is considered acceptable. To the south, the separation distances between the non-compliant building height and future neighbouring properties mitigates privacy impact. As such, the privacy impact created by the non-compliance is insignificant or nil.

Whilst the proposal results in overshadowing to the properties south of the site, the height non-compliance does not contribute to any significant additional shadow being cast. The proposal provides for additional setback to the southern elevation to parts of the site which will reduce shadow impacts on those areas, resulting on balance in a reasonable shadow outcome. It is noted that the dwellings to the south have living rooms and POS areas oriented to the south which means that those spaces are unaffected by the proposal.

As such, the development will allow adequate views, privacy and solar access to current and future neighbouring properties and achieves objective (b).

Objective (c): to nominate heights that will provide an appropriate transition in built form and land use intensity.

This objective seeks to ensure building height will transition appropriately to the surrounding locality.

As described in this Variation, land on the northern side of Ramsgate Road is permitted a maximum building height of 20.5m. Land immediately west of the site is also permitted 20.5m. Directly to the south, the site is adjoined by low and medium density residential development with a varying 8.5m-14.5m permitted maximum building height.

The proposal provides a well-designed and sensitive transition to the adjoining residential development to the south. The podium levels are well set back from the ground floor level which provides for a visual transition when viewed from Grand Parade and from the south. The built form is distributed to the two street frontages, with the eastern component of the building above podium presenting a short elevation to the boundary. These elements all contribute to an appropriate transition.

Also relevant to consideration of the permitted maximum building height are the incentives provided by the NSW State Government. These incentives, of most relevance being the 30% in-fill affordable housing bonus permitted by the Housing SEPP, will permit a density and intensity of development greater than that permitted by the BLEP. Specifically, the implementation of a 30% bonus will deliver building heights of 26.65m to the north and west and 18.85m to the south in the R4 zone. The increase in density encouraged for sites in an accessible area must be considered for the transition in built form and land use intensity.

In accordance with the above, the proposed non-compliance will be entirely compatible with the MU1 Mixed Use zone, and building heights throughout the locality. Whilst non-compliant, the site's strategic corner location (with multiple frontages), opposing the at-grade parking area, The Grand Parade and Ramsgate Road, ensures building height will transition appropriately to the surrounding locality. Importantly, the non-compliance is integrated into architectural character of the development and will not appear as visually or physically obtrusive from the public domain. The built form, including the non-compliance, will successfully address this important corner location within the Ramsgate Beach Commercial Area, and will transition appropriately to the surrounding developments. Particularly to the south, with the above podium component provided a generous southern setback.

As such, the proposal is considered to satisfy objective (c).

Summary

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out above. For the same reasons, the objection is considered to be well-founded as per the first method underlined above. On this basis, the requirements of



Clause 4.6(3)(a) are satisfied. Notably, under Clause 4.6(3)(b) a consent authority must now be satisfied that there are sufficient planning grounds for the contravention of a development standard. Clause 4.6(3)(b) is addressed in Section 5 below.

6. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The non-compliance will contribute to the character of the locality

- a. Object 1.3(g) of the EP&A Act 1979 is “to promote good design and amenity of the built environment”. The proposed non-compliance is integrated seamlessly with the overall urban and architectural character of the development and will provide a high quality, contemporary architectural design. Whilst the proposal will contravene the height standard, including habitable rooms, the visual and physical appearance of height, bulk and scale is considered to be entirely compatible with the desired future character of the Ramsgate Beach Commercial Area.
- b. As considered in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, the desired future character is subjective and can be set by the existing, recently approved and proposed buildings within the neighbourhood. The immediate locality (southern side of Ramsgate Road) does not reflect the desired character of development in the Ramsgate Beach Commercial Area and is anticipated to undergo significant transformation in accordance with the planning controls. Within the wider locality, development has taken place which is reflective of the desired character, such as the built form along the northern edge of Ramsgate Road, comprising largely six storey mixed use buildings. The proposed built form is consistent with that established in the northern extent of the Ramsgate Beach Commercial Area, comprising of six storeys.

- c. Crucial to the above is the height of surrounding development, which is as follows:
- To the west, double storey commercial buildings;
 - To the east, The Grand Parade and Ramsgate Beach;
 - To the north, Ramsgate Road and seven storey mixed use buildings; and
 - To the south, multi dwelling single and double storey development.

Per the above, the subject site is located at a unique juncture of low-rise dated commercial buildings, road infrastructure and higher density mixed-use development, reflective of the intended future character for the Ramsgate Beach Commercial Area. The proposal is generally consistent with the built form and density controls of Bayside DCP and is designed so that the height non-compliance will not create any adverse impact on the perceived bulk and scale of the development.



- d. In accordance with BLEP 2021, the Brighton Le Sands town centre along Bay Street permits building heights of up to 51m on the corner of The Grand Parade and Bay Street. Along this same street, a 28m height allowance is permitted adjacent to low/medium density residential zoned land with a maximum allowable building height of 8.5m. The impacts caused by the numeric building height exceedance of 2.3m, resulting in a total building height of 22.8m (including lift overrun), would be negligible compared to the impacts of a 28m building adjacent to single and double storey dwellings along Bay Street.
- e. In addition to the above, it is also imperative to note that the subject site and immediate neighbours are all capable of benefitting from the recent 30% density uplift afforded by *Division 1 In-fill affordable housing* of the Housing SEPP. The implementation of a 30% bonus will deliver building heights of 26.25m to the north and west and 18.85m to the south-west in the R4 zone. In this regard, the subject development, including the non-compliant building height, will be entirely compatible and will contribute to the desired future character of the locality, where the additional height is located on a strategic corner lot with dual frontages, in a prominent location and within a highly accessible area.
- f. Ultimately, the overall development including the non-compliance will contribute to the character of the locality. The variation is integrated into the overall urban and architectural design of the development and will not be visually obtrusive or jarring as viewed from the surrounding locality. The height non-compliance is not the result of an additional residential storey, but requirement for additional ceiling height due to the full line supermarket to be provided at ground level and flood affectation at the site. The proposal is consistent with the relevant controls as set out in the Bayside DCP – Ramsgate Beach Commercial Area (Section 7.3.4).

2. The site characteristics support the non-compliance

- a. The subject site is strategically located and contains superior characteristics which support the proposed non-compliance. Specifically, the site is located on a prominent and strategic corner allotment with dual frontages to The Grand Parade and Ramsgate Road. The relationship of the site to these frontages, alongside the various surrounding uses, allows for the delivery of a prominent corner development which will enhance the public domain. These public domain enhancements include the integration of the bus stop along The Grand Parade. The non-compliant building height will contribute to reinforcing the strategic location of the site and will also provide for additional residential accommodation within a highly accessible and diverse location. The size of the site and its north-south depth allow for the height above the podium to be set back generously from adjoining residential development to the south which is a unique site circumstance.

3. The non-compliance will not have any adverse visual impact to the public domain or neighbouring properties

- a. The height breach is at its greatest to the lift overrun and uppermost level when measured from the existing ground level. This non-compliance will not result in any adverse impact as these elements are setback from the podium form below, and are integrated into the overall architectural and urban character of the development.
- b. In terms of the building core, this is necessary for the development to function and allow for equitable access to the uppermost level. To remove the lift overrun, which is generally concealed from the public domain and require stair access, is an inferior outcome in terms of accessibility.
- c. With regards to the non-compliances of habitable rooms, these have been designed so that they are setback from the southern boundary and are integrated seamlessly into the above podium form which complies with the development standard. The upper level (Level 5) incorporates a 2m setback to The Grand Parade and Ramsgate Road, 8.5m setback to the south-west (rear) boundary, 4.5m setback to west (side) boundary and 9m setback to the southern (side) boundary. These setbacks ensures that the variation is appropriately sited in relation to the surrounding locality and will not result in any adverse visual impact when viewed from the public domain or neighbouring properties. Furthermore, the cohesive building design and materiality ensures that the uppermost levels are differentiated from the lower levels and therefore mitigates visual impact. Ultimately and as detailed above, the proposal will be compatible with the desired character of the locality.
- d. Finally, and as detailed, the relationship of the non-compliant elements to the surrounding locality ultimately limits adverse visual impact, particularly given the site is located in a local centre undergoing significant transition. As the buildings podium and tower are well articulated, the bulk and scale of the non-compliance as perceived from the public domain is reduced. The L-shaped



design concentrates the built form to the street frontage and away from low and medium density residential land uses to the south. The remainder of the development meets the relevant Bayside DCP controls and is considered acceptable.

4. The non-compliances achieve a high level of design excellence and is compatible with the existing and desired future character of the locality

- a. The proposal delivers a high quality urban and architectural design which clearly exhibits design excellence, despite the non-compliance. Specifically, the arrangement of bulk, scale and subsequent building height non-compliance are informed by the intended future character of the locality, as outlined in Ramsgate Beach Commercial Area DCP. The non-compliance is integrated into the overall architectural design, as to limit impact. Further, given the site contains dual frontages and arterial The Grand Parade to the front, the height breach will not be visually jarring.
- b. Ultimately, the maximum building height variations as they oppose Ramsgate Road and The Grand Parade will have minimal impact given the nature of the roadways, infrastructure and relationship to surrounding properties.

5. The non-compliance is the result of flood affectation at the site

- a. The proposed development will be elevated above the existing ground level by 0.76m to accommodate a development that will be protected for all flood events up to the design flood level (1% AEP) affecting the site. Excluding the lift overrun, the height exceedance is 1.3m or 6.3%. If the habitable floor level weren't required to be raised by 0.76m, the height exceedance (excluding lift overrun) would be 0.54m or 2.6%. This is an extremely minor exceedance with negligible impacts.

6. The non-compliance is a result of the ground floor full line supermarket

- a. The height variation can be partly attributed to the need to provide adequate floor to ceiling clearance for a 2,400m² full line supermarket which has a pre-determined requirement for more than 4m clearance necessary for the functional and operational needs of the business. Typically, ground floor commercial would require a ceiling height of 3.2m. The retention of a full-line supermarket on the site provides significant benefits for the public, and economy of the surrounding locality, compared with development that does not have the same functional needs that may comply with the height limit.

7. The non-compliance is a result of the redistribution of bulk and scale

- a. The proposed development seeks to strategically redistribute bulk and scale throughout the site. That is, the proposal provides compliant street walls along the frontage and provides a narrower tower to reduce bulk and scale as perceived from the public domain. That is, strict compliance with the building height standard may be achieved through a wider tower, however, the distinct benefits provided by the current scheme would be surrendered. Importantly, the proposed non-compliance will not result in any adverse visual, physical or amenity impacts. The widening of the

tower would ultimately reduce the level of amenity achieved to existing neighbouring dwellings to the south.

- b. The additional building height allows for a significantly reduced footprint above the podium level which incorporates significant side setbacks, well in excess of the minimum requirements under the DCP. This has spatial and amenity benefits that can be directly linked to the proposed height breach.

8. Orderly and economic use of land

- a. The social benefits of providing additional infill housing within a highly sought-after location should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of additional housing within a well located and well-designed development. This is a disproportionate response to the relatively minor impacts created by these elements, as discussed throughout this Variation.
- b. The non-residential uses within the development that contribute to the height non-compliance will provide for significant jobs growth in the locality, representing a wide range of skill sets, that will contribute to local economic growth.

9. The non-compliance would not result in adverse amenity impacts

- a. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. Specifically, the accompanying shadow diagram analysis indicates the extent of non-compliance creates no unreasonable additional adverse overshadowing to neighbouring properties during the winter solstice. In essence, the additional height has enabled a massing of the built form in a manner that provides for greater than required setbacks at the mid-section of the southern part of the building. This results in a significant reduction in shadow impact. Also, the height breach does not result in any significant view impacts over and above a compliant scheme.
 - ii. The height breach does not result in any adverse additional privacy impacts. Where the non-compliance pertains to the habitable rooms on the upper levels, opposing the northern boundary, separation distances, highlight windows and solid balustrades ensure privacy will be maintained despite non-compliance. This ensures any existing residential development to the south or future development to the west will maintain adequate privacy. Accordingly, the privacy impact is considered acceptable despite non-compliance.
 - iii. The height breach does not result in adverse view loss compared to a compliant building envelope. This is due to the low rise nature of development to the south and west of the site.

10. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard and meets the objectives of the MU1 Mixed Use Zone (refer below);
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - ii. The proposal promotes the delivery and maintenance of affordable housing (1.3(d)); and
 - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The proposed development is consistent with the objectives of Zone MU1 in that:

- The proposal will provide a mixture of compatible retail and non-residential land uses suitable for the local and wider community;
- The proposal will provide for the greater activation of the Ramsgate Road frontage through the provision of several retail shops and urban design treatments.
- Conflict to adjoining land uses will be minimised in the siting, bulk and scale of the proposed development that prioritises adequate separation to adjacent low/medium density residential uses.
- The proposal incorporates a podium at the ground and first floor level that will be for non-residential land uses.
- The retail employment opportunities will complement the community needs in a highly accessible location.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the desired future character of Ramsgate Beach Commercial Area and strategic and superior characteristics of the site. Insistence on strict compliance with the height will result in the removal of vital residential accommodation within a highly accessible location, which is a disproportionate outcome given the limited impacts of the proposal. Importantly, the non-compliance does not significantly impact the amenity of the public domain or surrounding properties and has been designed in such a way to ensure the additional height is compatible with the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ 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:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

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.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7. Conclusion

This written request has been prepared in relation to the proposed variation as it pertains to the height of buildings development standard contained in Clause 4.3 of BLEP 2021.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

