



Clause 4.6 Variation Statement (cl 4.3 Height)

20 Heradale Parade, Batemans Bay

September, 2024



1. INTRODUCTION

This Clause 4.6 Exceptions to Development Standards request has been prepared by BMA Urban on behalf of Place Studio. It is submitted in support of a Development Application (DA) for a residential flat building at 20 Heradale Parade, Batemans Bay.

This request seeks approval to vary the height of buildings development standard in clause 4.3 of the ELEP 2012. Clause 4.3 prescribes a numerical building height limit of 11.5m and 12.5m over the subject site. The proposed building height departs from this standard as demonstrated in **Part 2** of this variation request.

Clause 4.6 of the *Eurobodalla Local Environmental Plan 2012* (ELEP 2012) enables consent for development to be granted even though it contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

As the following request demonstrates, flexibility may be afforded by Clause 4.6 because compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

The following sections of the report provide an assessment of the request to vary the development standards relating to “**height of buildings**” in accordance with Clause 4.6 of the *Eurobodalla Local Environmental Plan 2012* (ELEP 2012’).

Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgments issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgment is the most relevant of recent case law.

Chief Justice Preston of the Land and Environment Court confirmed (in the above judgment):

The consent authority must, primarily, be satisfied the applicant’s written request adequately addresses the ‘unreasonable or unnecessary’ and ‘sufficient environmental planning grounds’ tests:

“that the applicant’s written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ...” [15]

On the ‘Five Part Test’ established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

“The 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...” [22]

That, in establishing ‘sufficient environmental planning grounds’, the focus must be on the contravention and not the development as a whole:

“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” [26]

That 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:

“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 will have a better environmental planning outcome than a development that complies with the development standard.” [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

In accordance with the ELEP 2012 requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (**Part 2**);
- identifies the variation sought (**Part 2**);
- Summarises relevant case law (**Part 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Part 4**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Part 4**);
- Provides a conclusion summarising the preceding parts (**Part 5**).

This Clause 4.6 Exception to a Development Standard should be read in conjunction with the architectural plan detail prepared by Place Studio

2. VARIATION OF HEIGHT OF BUILDING'S STANDARD

2.1 DEVELOPMENT STANDARD

Clause 4.3(2) of ELEP sets out the maximum building height for development as shown on the Height of Buildings Map. The site is subject to a maximum building height of 11.5 metres and 12.5m as illustrated in **Figure 2**.

The objectives of clause 4.3 as set out in clause 4.3(1) of the ELEP are:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.

The definition of building height under clause 4.3 of ELEP is:

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.

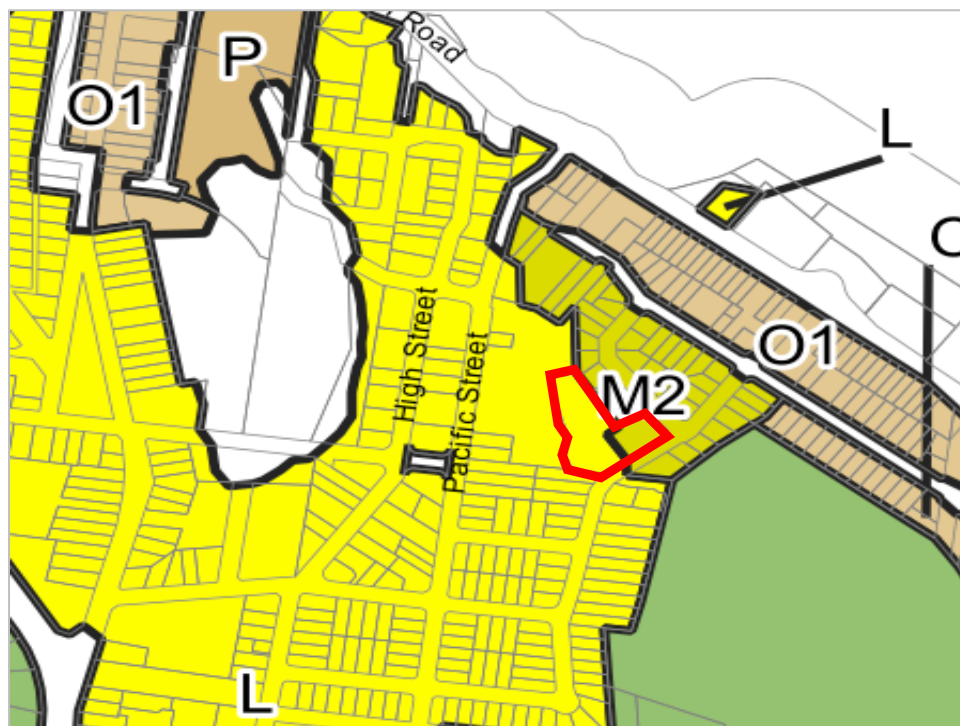


Figure1: Height Map
(Source: ELEP 2012)

Subject site 

2.1 VARIATION TO HEIGHT OF BUILDING STANDARD

The proposed variations to building height across the development are reflected in Figure 2 (Height Overlay) and are individually itemised in the table below.

| Building | Location | Maximum height proposed | Variation range across the nominated location |
|------------|-------------------------------|---|--|
| Building A | Upper Residential /Roof Level | Building A - 12.18m to 14.141m (building peripheries). 15.25m (lift overrun) | 618mm (building peripheries) to 3.75m (lift overrun) |
| Building B | Upper Residential /Roof Level | Building B - 13.2m to 13.88m (building peripheries) 14.46m (lift overrun) | 1.7m (building periphery) to 2.96m (lift overrun) |
| Building C | Upper Residential /Roof Level | Building C - 11.92m to 14.6m (building peripheries) 15.65m (lift overrun) | 420mm (building periphery) to 4.15m (lift overrun) |

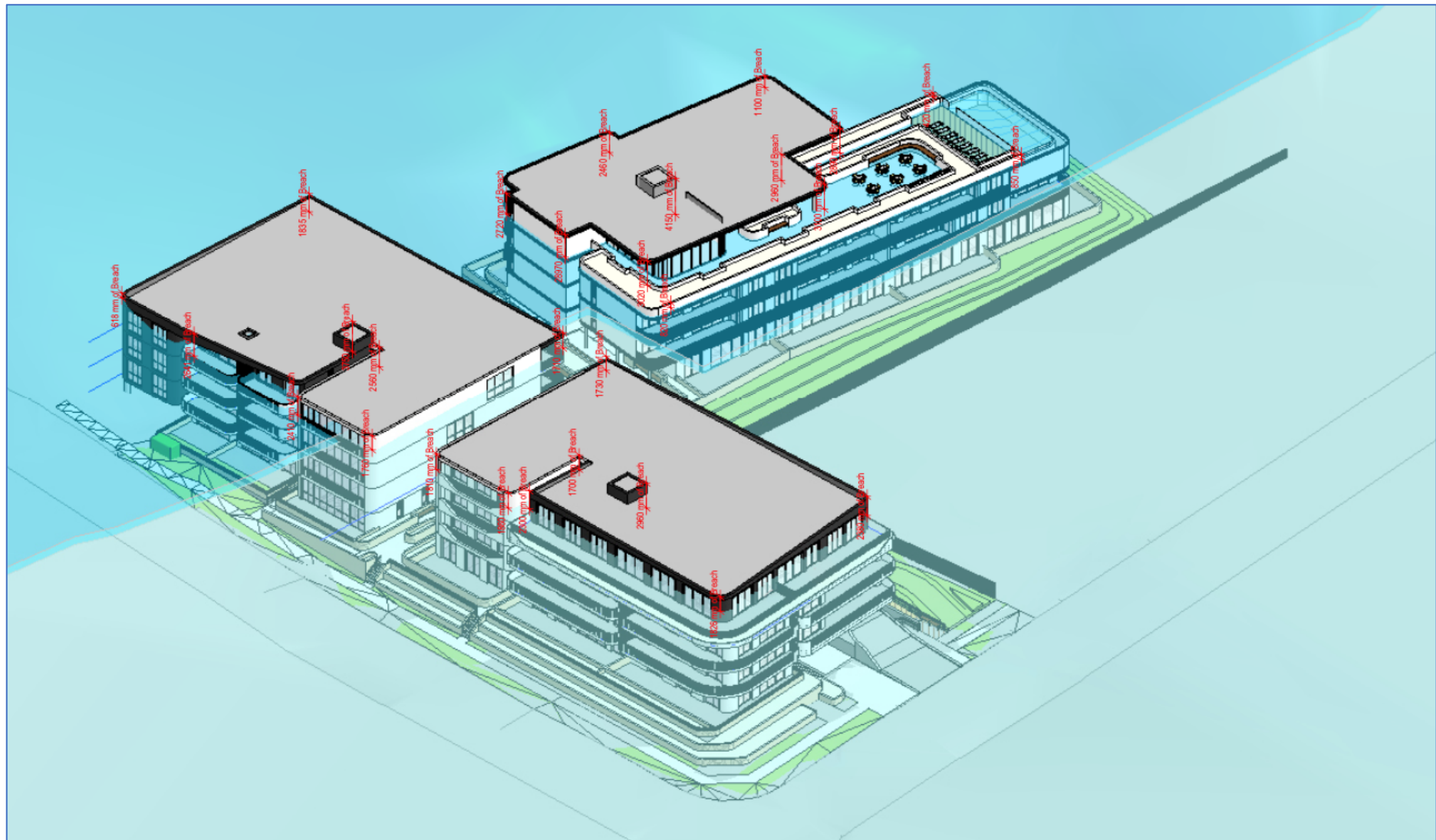


Figure 2: Height Breach Overlay
Source: Place Studio

3. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of ELEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of ELEP 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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 4.6(4) requires the consent authority keep record of its assessment under subclause (3).

This clause 4.6 request demonstrates that compliance with the height of building prescribed for the site in Clause 4.3 of ELEP is unreasonable, and there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is consistent with the development standard.

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

4. ASSESSMENT OF THE CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the height of building standard in accordance with Clause 4.3 of ELEP.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the NSW Land and Environment Court. The following sections of the report provide detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

4.1. ABILITY TO VARY THE STANDARD

The height of building prescribed by Clause 4.3 of ELEP is a development standard capable of being varied under clause 4.6(2) of ELEP. The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of ELEP.

4.2 CONSIDERATION

4.2.1 Clause 4.6 (3)(a) – Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [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”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the height of buildings development standard as specified in clause 4.3 of ELEP are detailed in the **Table** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

| Objectives | Assessment |
|--|---|
| <p>(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,</p> | <p>The underlying purpose of this objective is to ensure that any future development is designed in a manner whereby any resulting building height will appropriately respond to both the existing and future context in a controlled manner. The proposal demonstrates that the building will visually adapt with that of neighbouring buildings both current and future and that the resulting height breach has been appropriately sited and or integrated into the built form envelope, reducing its visual prominence from both neighbouring properties and the public domain/s.</p> <p>The height breaches are of a siting, scale and form designed to subtly integrate across each respective building roof plate, thus reducing the perceivable visual volume of the height exceedances.</p> <p>It is also evident that the consent authority has been flexible in its approach to the height standard noting that numerous variations have been supported across the defining context.</p> <p><i>These are as follows:</i></p> <p>390 Beach Road, Batehaven- 14.7% variation</p> <p>1A Herarde Street, Batemans Bay – 34% variation</p> <p>50 Beach Road, Batemans Bay - 20% Variation</p> <p>13A Orient Street, Batemans Bay- 25%</p> <p>33 Beach Road, Batemans Bay- 7.2%</p> <p>Golf Links Drive, Batemans Bay – 10%</p> <p>The approval of height departures as evident across the aforementioned applications, gives rise to both an existing and desired future character that is not monotonous in terms of building forms but rather, offers a more diverse range in perceivable scales and volumes.</p> <p>That said, the height departures observed across this development are deemed to be not inconsistent with either the existing and or desired future character of either the immediate and or broader contextual setting noting it's obvious transition to more visually pronounced built forms.</p> <p>In some respect, a height compliant development would not serve to respond to this objective in the same manner that this height breaching development seeks to. A height compliant development would</p> |

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| | <p>present as visually subordinate to these more pronounced forms and would therefore, not present as compatible with the desired future character.</p> <p>In summary, the scale, nature and aspect of the site and in turn breaches, enable the proposed building/s to visually integrate with that of neighbouring building's both current and future serving as an affirmation of the objective and not that of a building that abandons height controls.</p> |
| (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development. | <p>Overshadowing</p> <p>A shadow analysis illustrating the extent of shadow cast by way of the proposed development on 21 June (Winter Solstice) has been prepared by Place Studio and is extracted below at Figure 3 below.</p> <p>This analysis makes reference to the extent of additional overshadowing that will be cast by the height breaching elements over that of a height compliant development. As observed, the extent of additional impact will not adversely impact the development internally or proximate neighbouring properties alike, to a level outside of that likely to be incurred by a wholly compliant development form.</p> <p>Visual Impact</p> <p>The height breaching elements/components of the building are of a siting, scale and aspect that will not identify as visually dominant nor jarring to the contextual character.</p> <p>The defined recesses, range in materiality alongside the dispersion of the breaching built form elements, ensures that the height departures will not give rise to an unreasonable level of development volume as perceived from the public domains and or neighbouring properties.</p> <p>Privacy</p> <p>In terms of privacy as a general observation, the proposed apartment layouts and orientations have been carefully arranged within the parameters set by the DCP to ensure appropriate privacy is achieved within the site and between existing surrounding buildings.</p> <p>Privacy between the proposed dwellings and open spaces both private and communal within the site, is achieved by appropriate building separation, offsetting principal windows of apartments and through landscaping and privacy screening.</p> |

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| | <p>With respect to privacy where specifically related to the breaching element/s of the building, this is mitigated through the siting of the floor plates, orientation of proposed fenestration and provision of blank wall facades. This outcome will ensure that no discernible impacts to the extent of privacy afforded to neighbouring properties or future residents alike will occur.</p> <p>View Loss</p> <p>The breaching elements will not give rise to an adverse levels of view loss impact to neighbouring properties.</p> |
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Figure 3: Shadow diagram
Source: Place Studio

4.3 Clause 4.6 (3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

Clause 4.6(3)(b) of the ELEP 2012, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

"That there are sufficient environmental planning grounds to justify contravening the development standard".

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118).

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- The proposed development for residential flat buildings is permissible and is consistent with the objectives of the Height of Building control contained in ELEP 2012;
- The topography is a unique constraint which affects the site and results in a design that exceeds the numerical height limit. The site slope results in an inevitable variation to the extent of exceedance of the building height standard;
- The subject site is flood affected. According to council's requirements, the habitable floor levels and the basement protection level (crest level) shall be set minimum at the FPL 3.43m AHD. This land impediment has had a direct bearing with respect to the extent of height breach observed across the development.
- An identifiable extent of the site is identified as bushland area and therefore, any future development form needs to be distributed across the land in a manner that avoids the bushland. Numerically, 3,988.5m² or 47% of the site is identified as bushland. Any future development form therefore needs to be sited within the eastern/south-eastern components of the land thereby limiting any base floor plate expanse and distribution. This outcome will inevitably result in a tighter floor plate arrangement that will result in a building height increase across the areas of the land not burdened by the preservation of bushland.
- The Proposal will not result in the generation of an unreasonable extent of amenity impacts beyond that of a compliant scheme; and
- All other requirements relating to height and land use are consistent.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed non-compliance to the maximum height of buildings in this instance.

The Objects of the Act under S1.3 are also relevant to whether grounds exist to warrant a variation. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **the table below** we consider whether the proposed development is consistent with each object.

The objects of this Act and how this proposal responds to the object are as follows:

| Object | Comment |
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| (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources, | This object is not relevant to this application. |
| (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment, | The proposal will facilitate an ecologically sustainable development given that no negative impact on environmental and social considerations will arise. This in turn will serve to offer the ongoing sustainment of the economic health of the area. |
| (c) to promote the orderly and economic use and development of land, | The proposed development will promote the orderly and economic use of the land by way of providing a land use intensity consistent with that envisaged by Council. |
| (d) to promote the delivery and maintenance of affordable housing, | This object is not relevant to this development. |
| (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats, | Given the nature and character of the urban setting the proposed development is located within, no impact on threatened species or ecological communities is likely to result. |
| (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage), | This object is not relevant to this development |
| (g) to promote good design and amenity of the built environment, | <p>The proposed development promotes good design in that it serves to provide a built form and massing arrangement that serves to positively influence the future amenity of the dwelling occupants while adopting an architectural form and language, with an overall silhouette, height and land use intensity compatible with both the established and emerging development and housing typology.</p> <p>The subject site is a corner allotment. The proposed development reinforces and adds strength to this prominent position. Given the emerging scale of the built environment, a compliant design would not appropriately reinforce the site's prominence.</p> |
| (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants, | The proposed development will comply with all relevant BCA codes and will promote the health and safety of occupants. Furthermore, the breach supports the location of the rooftop communal open spaces, which in turn, reduces the impact of the new population on existing resources, As important, outdoor amenity encourages relaxation which has a |

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| | direct bearing on the physical and mental health of future building occupants. |
| (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State, | This object is not relevant to this development |
| (j) to provide increased opportunity for community participation in environmental planning and assessment. | This application will be neighbour notified in accordance with Council's DCP provisions. |

Based on the above, the consent authority can be satisfied that there the proposed development remains consistent with the Objects of the Act despite the height non-compliance.

4.3.1 Clause 4.6 (4) - The consent authority must keep a record of its assessment carried out under subclause (3).

Eurobodalla Shire Council has a current Clause 4.6 register. Any record of this development and its address of subclause (3) will be required to be uploaded on this register.

5. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of buildings development standard contained within clause 4.3 of ELEM is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the height of buildings development standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- Compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the proposed development.
- The proposal, notwithstanding the non-compliance, is consistent with the objectives of the height of building standard and the R3-Medium Density Residential Zoning.
- There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this particular case.
- There is an absence of any environmental impacts arising from the proposed variation.
- The proposed non-compliance with the height of building standard will not result in any matter of significance for State or regional environmental planning

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the height of buildings development standard should be applied.

DISCLAIMER

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