

#### Clause 4.6 Variation

##### **Clause 4.6 Objection to Clause 4.3 - Height of Buildings under Byron Local Environmental Plan 2014 (BLEP14)**

###### **Introduction**

I, Kate Singleton, of PLANNERS NORTH, 6 Porter Street, Byron Bay on behalf of the owners of the subject site, object under Clause 4.6 Byron Local Environmental Plan 2014 (BLEP14) to the Development Standard relating to Building Height at Clause 4.3 of BLEP14.

I contend for the reasons set out following that the Development Standard prescribed at Clause 4.3 of BLEP14 is unreasonable and unnecessary in the circumstances of the subject case. Further, I am of the view that the proposed development raises no matters of adverse significance in Local, Regional or State terms and no public benefit will result from the maintenance of the subject standard in this case.

This objection is to be considered in conjunction with the Statement of Environmental Effects (SEE) published for a Development Application for a development comprising the demolition of existing development and construction of a three (3) storey mixed use development comprising ground floor retail and eight (8) shop top housing dwellings at Lot 8 Section 26 DP 758207, No. 9 Marvell Street Byron Bay.

###### **Structure of Objection**

This objection:

- describes the variation proposed;
- provides justification for the exemption;
- reviews the proposal with respect to the guidance provided by *Wehbe v Pittwater Council*;
- reviews the proposal in light of the guidance provided by *Winten Developments v North Sydney Council*;
- examines considerations relevant to the public interest and State and regional planning significance; and
- provides a summary justification of the objection.

###### **Clause 4.6 Objection**

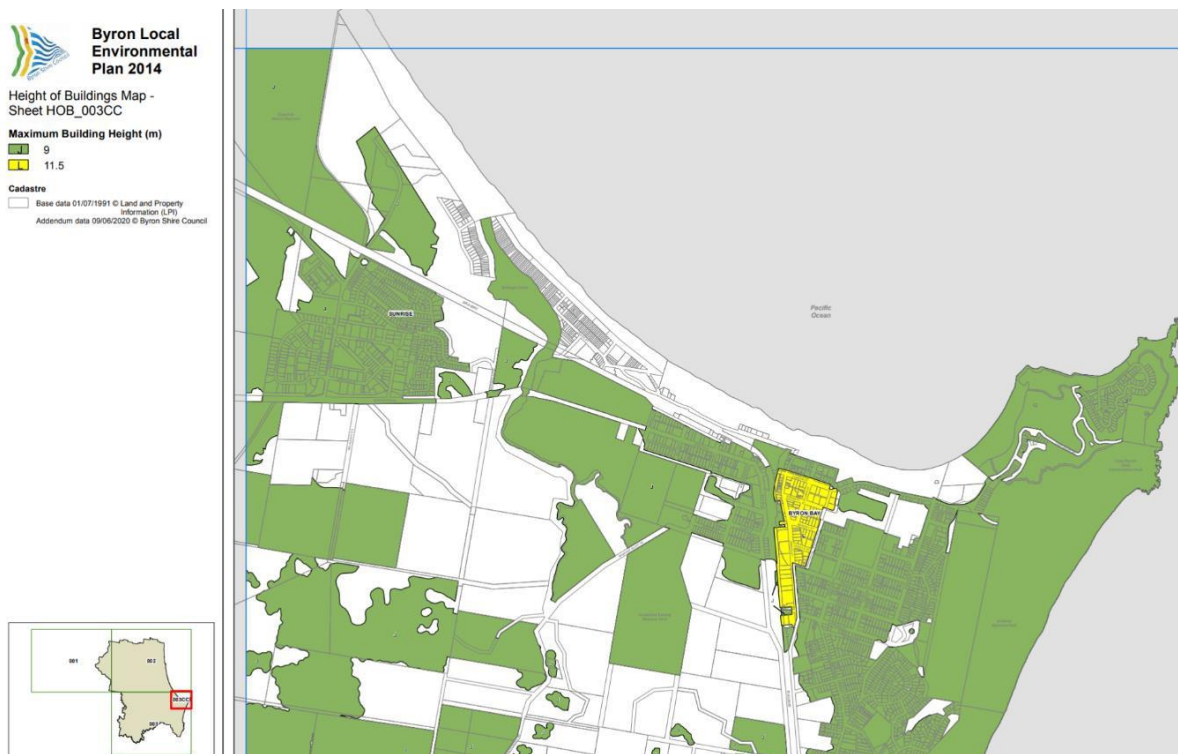
###### **Development Standard**

Pursuant to Clause 4.6 of the BLEP14, this objection seeks to vary the building height standard stipulated in Clause 4.3 which states:

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Heights of Buildings Map.*

The relevant portion of the Heights of Building Map (Sheet HOB\_003) of the BLEP14 is shown below. It specifies a maximum height of 11.5m for the site.

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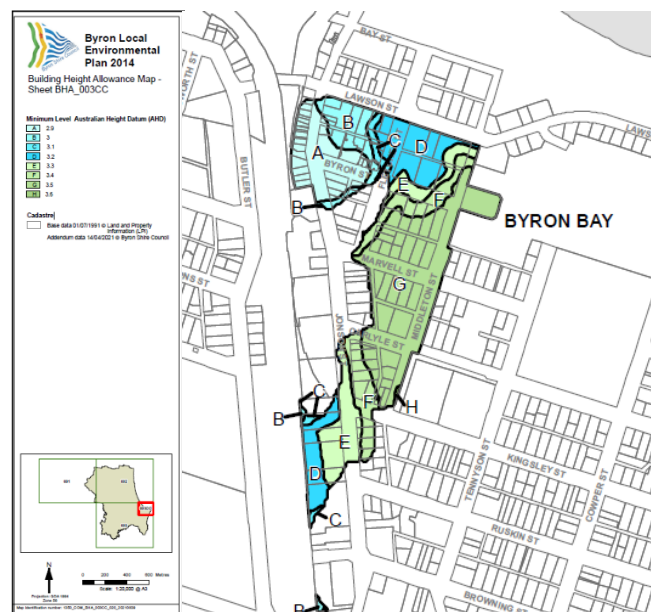
Extract from BLEP14

In addition to Clause 4.3, Clause 4.3A contains provisions in relation to the measurement of the Height of Buildings. These provisions take into account the Minimum Level Australian Height Datum to align building height and flood planning provisions within the town centre.

### 4.3A Measurement of height of buildings

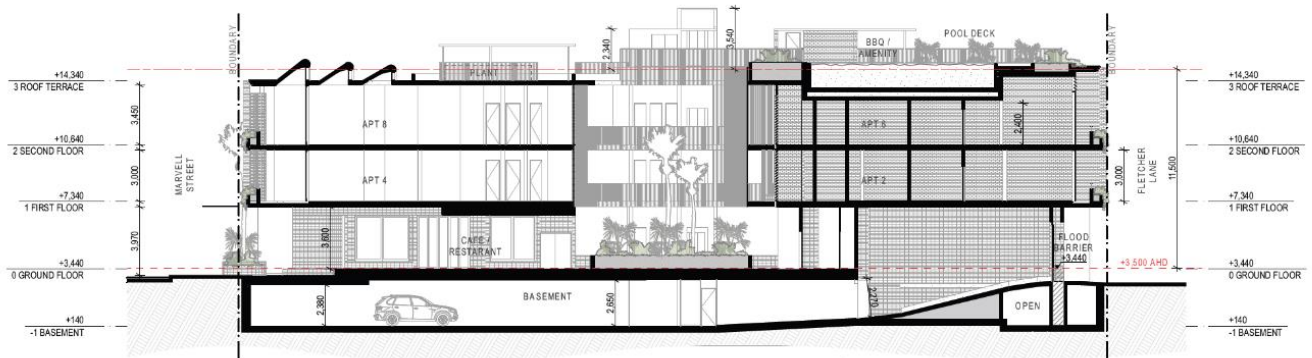
- (1) The objectives of this clause are—
  - (a) to align building height and flood planning provisions within Byron Bay town centre, and
  - (b) to provide for a consistent point of reference for the measurement of building heights in flood prone areas.
- (2) This clause applies to land identified as “Minimum Level Australian Height Datum (AHD)” on the [Building Height Allowance Map](#).
- (3) The maximum height of a building on land to which this clause applies is to be measured from the minimum level AHD permitted for that land on the [Building Height Allowance Map](#).

In accordance with the Provisions of Clause 4.3A, the height of the building is measured from RL 3.5m AHD.



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The plan extract below illustrates the proposed building and those elements that exceed 11.5m as measured from RL 3.5m AHD. As indicated on the plans accompanying the development application, the components of the building exceeding 11.5m comprise the lift overrun, lift core and amenities, pool coping, pool deck, services, solar array and pop out roof.



In terms of the extent of the encroachment, the following plan extract and table detail the extent of the variation to the development standard.

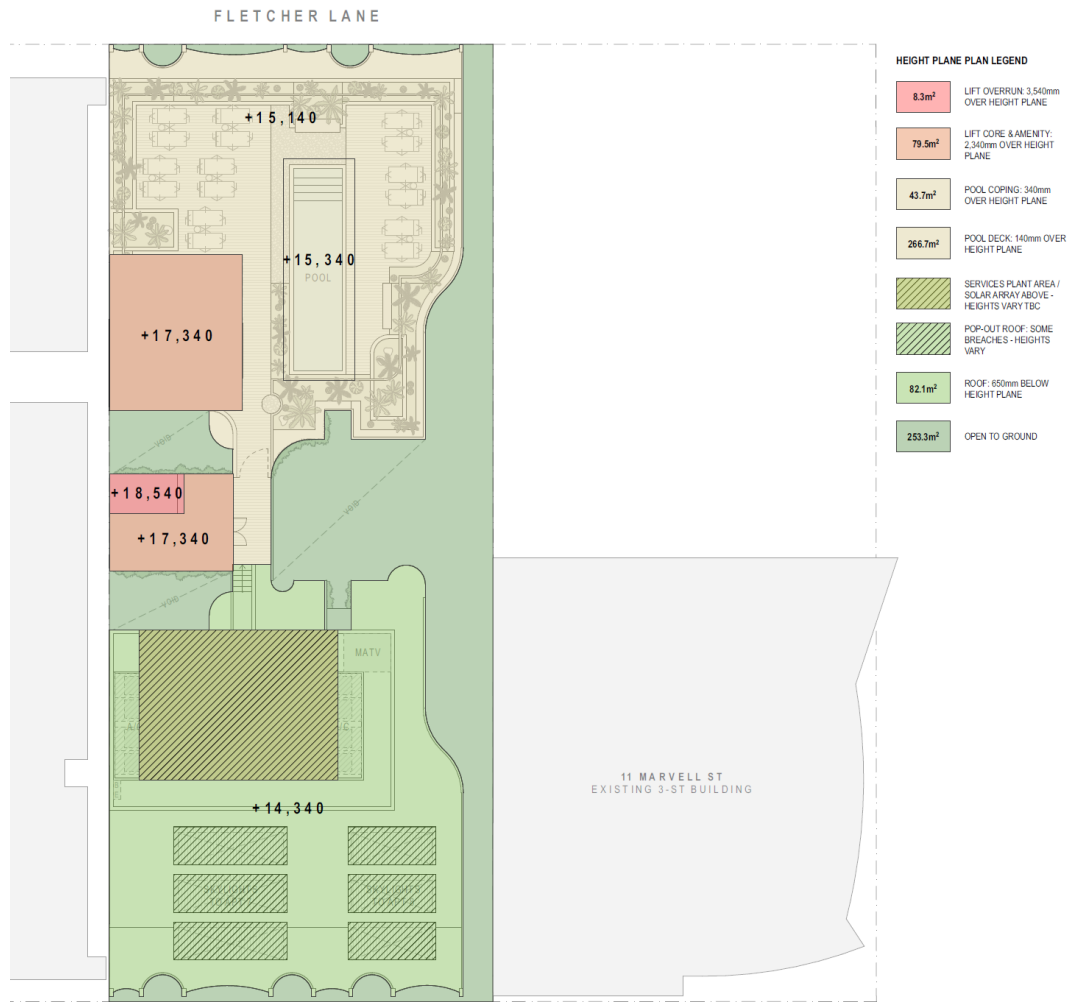
**Table B1 Building Height Variations**

| Building component                      | Height (RL) | Height above 11.5m max (m) as measured from RL3.5m AHD |
|-----------------------------------------|-------------|--------------------------------------------------------|
| Lift Overrun                            | 18.54 AHD   | 3.54                                                   |
| Lift Core & Amenities                   | 17.34 AHD   | 2.34                                                   |
| Pool Coping                             | 15.34 AHD   | 0.34                                                   |
| Pool Deck                               | 15.14 AHD   | 0.14                                                   |
| Services Plant Area / Solar Array Above | 16.74 AHD   | 1.74                                                   |
| Pop out roof                            | 15.57 AHD   | 0.57                                                   |

The lift overrun and the lift core and amenities are the most significant structures in terms of the percentage of exceedance above the 11.5m. This is over a reasonably small proportion of the building and site and will not be visible from the street. The solar array is 1.74m above the height limit but has been centrally located to minimise potential visibility. The pool coping and pool deck comprise a relatively minimal exceedance of 340mm and 140mm, respectively and again, will not be visible from the streetscape.

In terms of the extent of the building exceeding the 11.5m, the following roof plans shows those elements exceeding the permitted height limit shaded.

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### Justification for the exception and matters for consideration

#### Compliance to Clause 4.6 BLEP14

The following provides the justification with regard to the objectives of Clause 4.6 of BLEP14:

(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*

#### Comment:

The proposed variation sought is generally 30.8% in relation to the lift overrun which comprises only 8.3m<sup>2</sup>. The lift core and amenities comprise 20.3% over an area of 79.5m<sup>2</sup>. These elements are positioned in the central part of the site so as not to be visible from either Marvell Street or Fletcher Lane.

The application of an appropriate degree of flexibility in relation to the building height standard provides for a greater level of amenity for the proposed development. The proposed variation is sought in relation to elements that provide for amenity for the facility in terms of access and privacy and do not result in adverse impacts. Allowing flexibility in the application of this Clause will result in a building design that provides a superior outcome in terms of amenity.

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- (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.*

**Comment:**

The proposed building height standards is not expressly excluded from the operation of this clause.

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

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

**Comment:**

This submission seeks to detail our written request to justify the contravention of the development standard and demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Compliance with the development standard is considered to be unreasonable or unnecessary for the following reasons:

1. The proposed encroachments will not adversely impact on the streetscape.
2. The proposed variation sought does not add to the bulk or scale of the proposed building.
3. Strict compliance with the development standard would likely result in the removal of access to amenities on the rooftop for residents but would not alter the overall design of the building.
4. The proposed variation will not adversely impact on adjoining properties in terms of views, solar access or privacy.

Given the above, it is submitted that compliance with the 11.5m building height is unreasonable and unnecessary in the circumstances of the case. The proposed variation is consistent with the objectives of the Environmental Planning and Assessment Act 1979 (the Act) and promotes the orderly and economic use and development of the land.

Clause 4.6 of the BLEP14 allows a proponent to seek approval from the Council for consent to be granted to an application that contravenes a development standard. As outlined in this SEE, the proposed development complies with all other standards of BLEP14 and BDCP14 will create a minimal impact on the locality and its surrounds.

The consistency with the objectives of Cl. 4.3 Height of buildings as described above satisfies the "Wehbe test" and the absence of any environmental impacts, demonstrates that strict compliance with the building height standard is both unreasonable and unnecessary in this instance.

- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

**Comment**

The proposed variation to the building height will not result in adverse impacts on adjoining properties in terms of solar access or views. The proposed elements in relation to which variations are sought are sited as such as to not disrupt views from surrounding properties or the public street. The provision of rooftop amenities for residents is reasonable in the circumstances and provides the opportunity for the provision of additional communal open space. It is noted that the provision of an open outdoor courtyard provides the opportunity for pedestrian connectivity rather than the provision of resident amenities on the ground floor. It is also noted that 253.3m<sup>2</sup> or approximately 25% of the site is unroofed and open above courtyard areas.

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*(4) Development consent must not be granted unless:*

*(a) the consent authority is satisfied that:*

*(i) the written request has addressed sub clause (3)*

### **Comment**

This Appendix is our formal written request.

*(ii) the proposed development is in the public interest (consistent with the objectives of the standard and the zone)*

### **Comment**

The objectives of the Building Height standard are provided as follows:

*(a) to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,*

The proposed finished roof does not exceed the 11.5m as detailed in this submission with the exception of some "pop out" elements that slightly protrude beyond this height.

*(b) to ensure the height of buildings complements the streetscape and character of the area in which the buildings are located,*

The proposed height of the building complements the streetscape and character of the area. The general height of the building proposed is consistent with development in the immediate vicinity. The elements of the building that do not comply are set back to minimise their visibility from the surrounding streetscape.

The objectives of Zone B2 are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- To encourage employment opportunities in accessible locations.*
- To maximise public transport patronage and encourage walking and cycling.*
- To encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises.*

The above objectives of the zone are met by the proposal in the following ways:

The proposed mixed use development is consistent with the objectives of the B2 Local Centre, providing for retail uses to serve the B2 Local zone needs of people who live in and visit the local area.

The proposal provides for employment opportunities in an accessible location with the development located in the Byron Bay Town Centre.

The site is within walking distance to many of Byron Bay's retail and recreational offerings, including the beach, lighthouse and town centre facilities. The provision of residential accommodation on this site will contribute to the vibrancy of the town centre.

*(c) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.*

The proposed variation will not result in significant adverse visual impact with elements designed to minimise their visibility. There will be no disruption of views or loss of privacy resulting from the proposed variation.

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*(b) the concurrence of the Secretary has been obtained.*

### Comment

We understand that the Council enjoy assumed concurrence from the Planning Secretary in relation to this matter.

*(5) The Secretary must consider:*

*(a) whether contravention raises any matter of significance for State or regional environmental planning.*

### Comment

It is submitted that no issues of State or Regional Environmental Planning arise from the proposed variation. The proposed development is considered to be consistent with relevant objectives and directions of the *North Coast Regional Plan 2041* particularly in relation to the following:

- Objective 1: Provide well located homes to meet demand
- Objective 5: Manage and improve resilience to shocks and stresses, natural hazards and climate change
- Objective 6: Create a circular economy

Objective 7: Promote renewable energy opportunities **Wehbe v Pittwater Council**

In his decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827, Preston CJ expressed the view that there are five 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.

Those five tests are considered in the table below.

|                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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| <i>(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard</i>                                         | <p>The BLEP14 Clause 4.3 Height of Buildings and corresponding responses are as follows:</p> <p><i>(1) The objectives of this clause are as follows:</i></p> <p><i>(e) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,</i></p> <p><b>Comment</b></p> <p>The proposed height of the development is compatible with the character, amenity and landform of the area. All elements exceeding the height limit are set back to minimize their visibility from the adjoining street. The proposed variation provides for the appropriate use of the rooftop for residents.</p> |
| <i>(ii) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i>      | <p>Not applicable The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <i>(iii) the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i> | <p>Not applicable The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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| <i>(iv) 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; and</i>                                                                                                                                    | This objection to the development standard requested does not rely on this reason. |
| <i>(v) 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.</i> | This objection to development standard requested does not rely on this reason.     |

### Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46

The objection to development standards request is assessed below against the accepted test for the assessment of development standard variation established by *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

|                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>A Is the planning control in question a development standard?</i>                                               | Yes, Cl. 4.3(2) of BLEP14 is a development standard.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <i>B What is the underlying object or purpose of the standard?</i>                                                 | <p>The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> <li>• <i>to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,</i></li> <li>• <i>to ensure the height of buildings complements the streetscape and character of the area in which the buildings are located, and to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</i></li> </ul>                                                                                                                                                                                                                                                                  |
| <i>C Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?</i> | <p>Compliance with the development standard is unnecessary or unreasonable in the circumstances of the case because:</p> <ul style="list-style-type: none"> <li>• The proposed non-conforming elements of the building comprise lift overrun and structures associated with the use of the rooftop of the building and will not impact on the overall presentation of the building to the street and surrounding area.</li> <li>• The project is consistent with the general height of development in the locality.</li> <li>• The building articulation and massing seeks to reduce the perception of a single large building to Marvell Street.</li> <li>• There is no disruption to views or loss of privacy or significant solar access resulting to the proposed variation.</li> </ul> |

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><i>D. Is compliance with the development standard consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?</i></p> | <p>The arguments contained in this Clause 4.6 variation support the case to allow flexibility in the application of the standard.</p> <p>The non-compliance with the development standard allows for an orderly use of the land and has been designed with consideration to the desired future character of the area.</p> <p>Additionally, the Objects of the Act are satisfied as:</p> <ul style="list-style-type: none"> <li>• The departure from the height standard in BLEP14 will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and</li> <li>• The departure from the height standard in BLEP14 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.</li> </ul> |
| <p><i>E. Is the objection well founded?</i></p>                                                                                                                                                                                                                                                                                                                                        | <p>As my Clause 4.6 exception to development standards request appropriately addresses <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827, I submit that the proposed variation is well founded.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

### Public interest and matters of State or regional significance

#### Is the proposal in the public interest?

Clause 4.6 exception to development standards request and the accompanying plans and technical reports contained within the SEE demonstrate the public advantages of developing the site. In summary:

- Strict compliance with the height variation will result in an amended building design which merely restricts access to the rooftop. This amendment would have no material effect on the presentation of the building to the street, apart from reducing the permeability of the development with the likely removal of the courtyard and pedestrian connection at the ground floor.
- The proposal provides for optimal utilisation of the site within the town centre and is consistent with Council's plans and strategies for Byron Bay town centre.
- The proposal provides for employment both during and post construction.
- No unreasonable public disadvantages result from the proposed variation.

#### Matters of State or Regional Significance

The non-compliance with Cl 4.3 Height of buildings standard does not raise matters of significance for State or regional planning. The proposed development is consistent with the aspirations of the *North Coast Regional Plan 2041*.

#### The public benefit of maintaining the standard

There is no public benefit in maintaining strict compliance with the development standard in this instance.

#### Summary justification

A summary of the matters set out in Clause 4.6 exceptions to development standards request to vary the height of building and wall standards are as follows:

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- The proposed height of the building is consistent with that of existing surrounding development in the locality.
- The proposed variation to the height limit does not result in a materially different presentation to Marvell Street.
- The proposed variation does not significantly impact on the bulk or scale of the proposed built form.
- The proposed development will not adversely impact on existing or future surrounding development in terms of view, privacy or solar access.
- The proposed variations satisfy the tests and considerations established in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

In summary, compliance with the development standard restricting building height is unreasonable and unnecessary. This is because the objectives of the development standard can still be achieved notwithstanding non-compliance. The development standard is not an end in itself but rather a means of achieving desired outcomes.

The consent authority is therefore urged to support this Clause 4.6 objection.



**Kate Singleton RPIA**  
Partnership Principal  
**PLANNERS NORTH**