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**URBIS**

# **CLAUSE 4.6 VARIATION REQUEST - HEIGHT**

29 Shirley Street and 2-4  
Milton Street, Byron Bay

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Project Code	P0038351
Report Number	FINAL JUNE 2024

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**We acknowledge, in each of our offices, the Traditional Owners on whose land we stand.**

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# EXECUTIVE SUMMARY

This Clause 4.6 Variation Request (**Variation Request**) has been prepared on behalf of *Vitale Property Group Pty Ltd* (the **Applicant**) and accompanies a S4.55(2) Modification Application over the sites at 29 Shirley Street and 2-4 Milton Street, Byron Bay which seeks to modify development consent for DA.10.2022.371.1 issued on 16 October 2023.

Development consent was granted for:

*“Demolition of existing development and clear the site, including existing buildings and trees to facilitate a residential flat building development comprising of 25 three-bedroom dwellings distributed across four separate two and three-storey buildings with basement car parking, associated landscaping and amenities.”*

The scope of proposed modifications is limited to the following:

- Slight reconfiguration of internal floor plans across all dwellings, with no change to total bedroom numbers per dwelling;
- Change in private-use pool shapes from rounded edges to square edges;
- External façade amendments including window scheduling and screening to align with internal reconfigurations;
- Increase in total building height for the building portion situated within the R3 Medium Density Residential zone from 10.7m to 11.21m;
- Reduction in total building height for the building portion situated within the 7(F2) Urban Coastal Land from 10.1m to 9.25m;
- Increase of floor to floor heights for the building portion situated within the R3 Medium Density Residential zone;
- Reduction and reconfiguration to rooftop trafficable areas across the building portion within the R3 Medium Density Residential zone from areas between 129.3m<sup>2</sup> – 142.8m<sup>2</sup> to 33.8m<sup>2</sup> – 42.6m<sup>2</sup>;
- Reduction and reconfiguration to rooftop trafficable areas across the building portion within the 7(F2) Urban Coastal Land zone from areas between 167m<sup>2</sup> – 205.2m<sup>2</sup> to 40.7m<sup>2</sup> – 63.5m<sup>2</sup>;
- Reconfiguration of basement level services including the fire pump room, fire services water tank, pool pump and switch room;
- Relocation of bicycle storage area within the basement level from its previous location adjacent to the main lobby, to their relocation towards the western boundary; and
- Reconfiguration to the lobby area and communal facilities within the basement level to include a wellness centre.

This Variation Request seeks an exception from the maximum building height standard prescribed for the development site under Clause 4.3 of Byron Local Environmental Plan 2014 (**BLEP 2014**). This Variation Request is made pursuant to Clause 4.6 of the BLEP 2014. This report should be read in conjunction with the S4.55(2) Modification Application prepared by Urbis Ltd (Urbis) dated 26 June 2024.

# 1. SITE CONTEXT

## 1.1. SITE DESCRIPTION

The development site is located at 29 Shirley Street and 2-4 Milton Street, Byron Bay and comprises a total of ten (10) lots. The site is located slightly north of the Byron Bay Town Centre, between Belongil Beach and Shirley Street.

Key site details and its features are provided within **Table 1** below.

**Table 1** Site Overview

<b>Feature</b>	<b>Description</b>
<b>Street Address</b>	29 Shirley Street, Byron Bay 2 Milton Street, Byron Bay 4 Milton Street, Byron Bay
<b>Formal Lot Descriptions</b>	Lot 8, Section 52 on DP758207 Lot 9, Section 52 on DP758207 Lot 2 on DP582819 Lot 7 on DP841611 Lot 12 on DP1138310 Lot 1 on DP582819 Lot 1 on DP780935 Lot 8 on DP841611 Lot 9 on DP841611 Lot 11 on DP1138310
<b>Land Area</b>	5,937m <sup>2</sup>
<b>Land Dimensions</b>	Shirley Street – 60.345 metres Milton Street – 60 metres Side Boundary (North) – 20.115 metres Side Boundary (West) – 62.095 metres Rear Boundary (Railway Corridor) – 73 metres Side Boundary (East) – 99.19 metres
<b>Topography</b>	The site has an undulating topography, summarised as follows:  <b>North-South:</b> Existing ground level increases from approximately 4.58m ADH at Shirley Street to a high point of 6.6m, decreasing to approximately 6.1AHD at the rear boundary. This results in a site

Feature	Description
	<p>difference of approximately 2m between the lowest and highest point on the site.</p> <p><b>East-West:</b> Existing ground level increase from approximately 4.52AHD at the Milton Street frontage, rising to a high point of 5.76AHD, and falling again to 4.93ADH at the eastern boundary. This results in a difference of approximately 1.2m between the lowest and highest point on the site.</p>
<p><b>Vegetation</b></p>	<p>The site is largely undeveloped with the exception of a backpackers hostel and short stay accommodation fronting Shirley Street and Milton Street.</p> <p>The remainder of the site is landscaped with maintained lawns and garden beds, with some scattered trees towards the rear of the site and one (1) mature fig tree species towards the eastern boundary.</p>

The site currently comprises of a backpacker’s hostel development and associated facilities which will be demolished to facilitate the new development, along with the dwelling fronting Milton Street which is currently used for short-term accommodation.

As illustrated below, the site has immediate frontages to both Shirley Street and Milton Street, with current vehicular access provided only from Milton Street. Pedestrian access is currently provided via the existing footpath connecting from Shirley Street. The site in its combined lot form and main access routes are shown in **Figure 1** below.

**Figure 1** Aerial Image of Site



Source: Urbis adapted from Nearthmaps 2024

The site consists of dual zoning, with a majority of the site situated within the R3 Medium Density Residential zoning that is regulated pursuant to the Byron Local Environment Plan 2014 (BLEP 2014).

The rear portion of the site is designated per the BLEP 2014 as a Deferred Matter zone and identified within the Byron Local Environmental Plan 1988 (BLEP 1988) as the 7(f2) Urban Coastal Land Use zone. The applicable zoning is demonstrated within the below mapping per **Figure 2**.

As shown in **Figure 2**, the majority of lots along Shirley Street are zoned as R3 Medium Density Residential and are adjacent to a portion of R2 Low Density Residential. The Deferred Matters zoning consists of partial portions of lots also designated as R3 Medium Density Residential, and also spans wholly along Cavanbah Street to the north-west along the SP2 Infrastructure zone.

**Figure 2** Zone Mapping - Local Environmental Plan 2014



Source: Byron Shire Council Web Map 2024

The Land Application Map in the BLEP 2014 identifies that the BLEP 2014 only applies to the part of the site identified in 'purple'. The remainder of the site is identified as a 'Deferred matter'.

Clause 1.3 of the BLEP 2014 states:

**1.3 Land to which Plan applies**

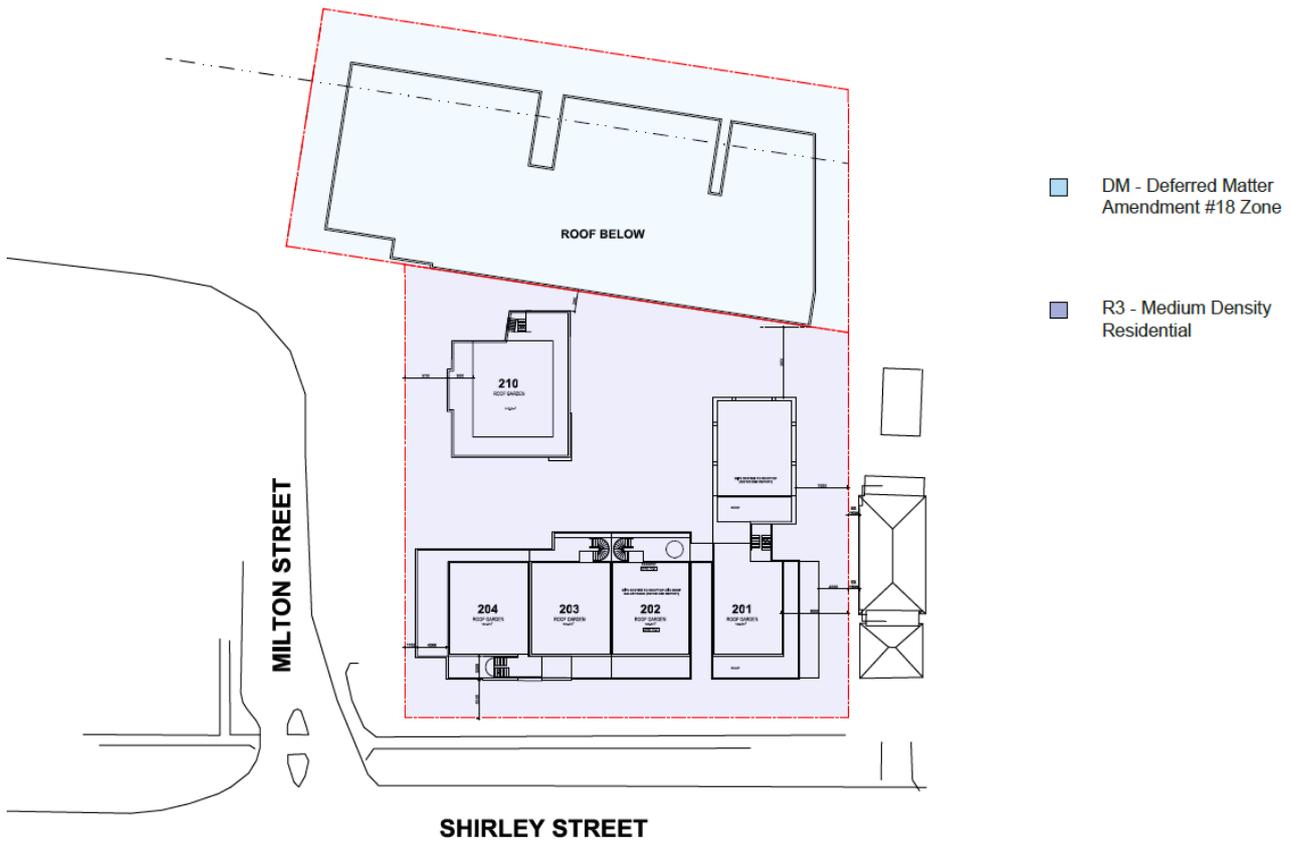
(1) This Plan applies to the land identified on the Land Application Map.

(1A) Despite subclause (1), this Plan does not apply to the land identified as "Deferred matter" on the Land Application Map.

Accordingly, the part of the site that is not identified on the Land Application Map is subject to the *Byron Local Environmental Plan 1988* (BLEP 1988). Refer to **Figure 3** below.

This Clause 4.6 request is submitted in relation to the proposed development which is subject to BLEP 2014.

Figure 3 Zoning Plan Demarcation



Source: Hayball, 2023

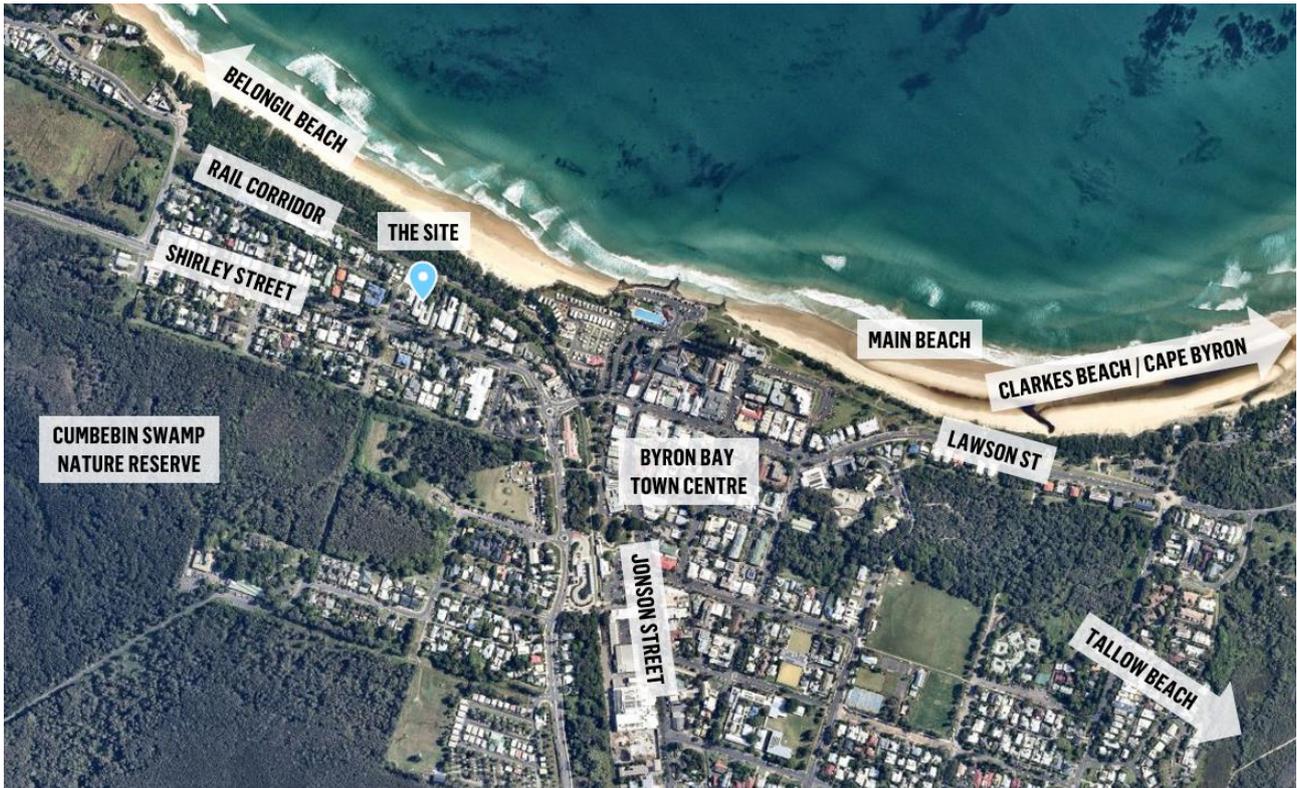
## 1.2. LOCALITY CONTEXT

The site is located within Byron Bay, within the broader Northern New South Wales region, and sits approximately 400 metres from the Byron Bay Town Centre and 5.8km from the Pacific Motorway. The site sits along the eastern approach of Shirley Street, which is a key thoroughfare for vehicles travelling into Byron Bay as they exit the Pacific Highway onto Ewingsdale Road.

Within the local context, the site benefits from its proximity to the Byron Bay Town Centre, which includes bus services, retail and restaurant offerings, as well as civic services. The Town Centre is easily accessed via a wide, sealed footpath running along Shirley Street.

The site's locality context with its surrounds is demonstrated in the below **Figure 4**.

Figure 4 Surrounding Context Map



Source: Urbis adapted from Nearmap 2024

The following notable developments and landmarks in context to the site are as follows:

- **North** – immediately north, the site adjoins the rail corridor of the former Casino-Murwillumbah line. The rail corridor is still used by the Byron Bay Train, which is a solar-powered train used largely to connect tourists from the Elements of Byron Resort to the Byron Town Centre. Beyond the rail corridor, the area transitions to the coastal environment of Belongil Beach and the Pacific Ocean.
- **East** – the site adjoins an existing two-storey Dwelling House, positioned towards the front of the lot. Further east sits a series of two-storey resort, motel and serviced apartment developments, before the character of Shirley Street transitions through civic services, such as an aged care facility and Byron Bay Police Station. Shirley Street continues east, turning into Lawson Street as it enters the Byron Bay Town Centre.
- **South** – immediately south, the site fronts Shirley Street, which adjoins an area of one- to two-storey Dwelling House developments, holiday villas, and medical and allied health uses including the former Byron District Hospital. Further south sits Cumbebin Swamp and associated Nature Reserve
- **West** – the site adjoins the intersection of Shirley Street and Milton Street. West of the subject site and north of Shirley Street is an area largely dominated by two- to three-storey resort and hotel developments. South of Shirley Street sits a cluster of single Dwelling Houses on smaller lots, interspersed by larger lots and resort developments. Further west Shirley Street transitions to Ewingsdale Road, past the Cumbebin Swamp and associated Nature Reserve.

### 1.3. DEVELOPMENT SITE APPROVAL HISTORY

On 16 October 2023, Byron Shire Council granted consent for DA.10.2022.371.1 for the demolition of existing development and construction of a residential flat building development at 29 Shirley Street and 2-4 Milton Street, Byron Bay. Key features of the development included provisions for the following:

- Demolition of existing development;
- 25 three-bedroom dwellings distributed across four separate two and three-storey buildings;
- Basement parking level containing 69 total car parking spaces, including 7 visitor spaces and bike parks with vehicle access from Milton Street;

- An integrated landscape and communal open space design concept;
- 4,843.94m<sup>2</sup> landscape area including communal open space, roof top gardens, private open courtyards, and balconies; and
- 527.32m<sup>2</sup> of deep planting on natural ground at ground level.

Pursuant to the *Byron Local Environmental Plan 2014* (BLEP 2014), a Residential Flat Building is defined as:

*“A building containing 3 or more dwellings, but does not include an attached dwelling, co-living housing or multi dwelling housing.”*

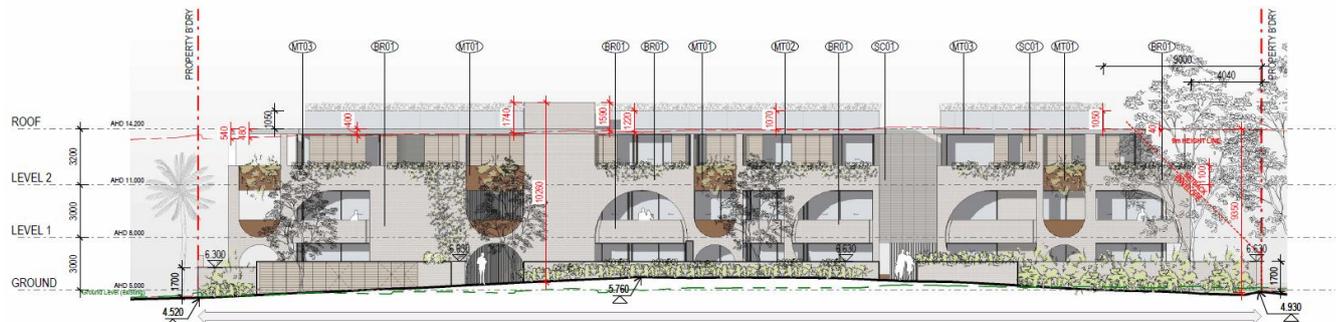
The approved ground floor plan issued as part of the development approval package from Byron Shire Council is illustrated below in **Figure 5**, with the approved elevation plan from Shirley Street shown in **Figure 6**.

**Figure 5** Approved Ground Floor Plan



Source: Hayball 2023

**Figure 6** Approved Elevation Plan from Shirley Street



Source: Hayball 2023

### 1.3.1. Variation Requests

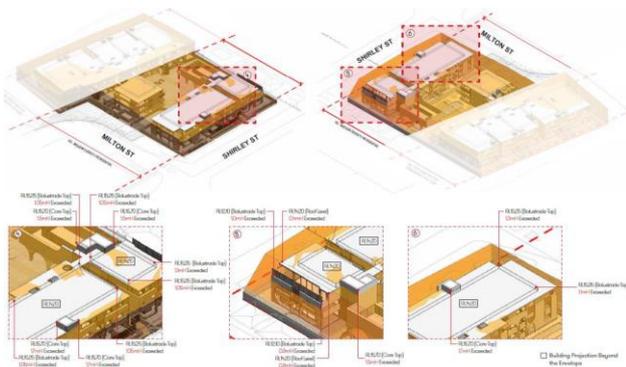
The application consisted of variation requests to Clause 4.6 for height of development within the R3 Medium Density Residential zoning, and a variation request to Clause 64A for height of development within the Deferred Matters (7f2 – Urban Coastal Land) zoning.

Specifically, the variation requests were sought and approved by Council at the following exceedances:

- R3 Medium Density Residential Zone (Clause 4.6 for height variance) – **18.9%**
- R3 Medium Density Residential Zone (Clause 4.6 for floor space ratio exceedance) – **0.06**
- 7(f2) Urban Coastal Land Zone (Clause 64A for height variance) – **13.9%**

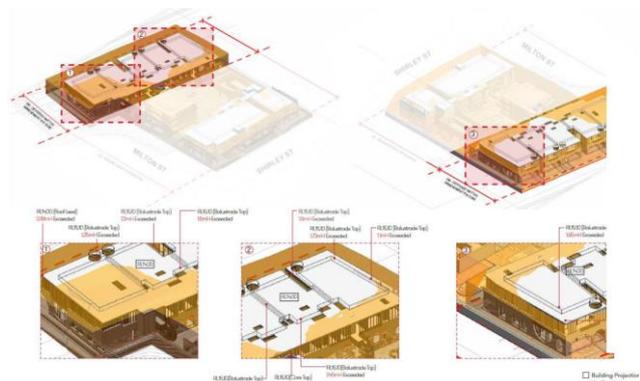
As part of the variation request process, height plane veils were provided to depict the extent of the height contravention at various positions across the proposal. Extracts of these have been included below in **Figure 7**, showing both the height exceedances in the R3 Medium Density Residential Zone and 7(f2) Urban Coastal Land Zone, shown respectively.

**Figure 7** Height Exceedances in the R3 Medium Density Residential Zone and 7(F2) Zone



**Picture 1** Height plane veil in R3 Zone

Source: Hayball 2023



**Picture 2** Height plane veil in 7(F2) zone

Source: Hayball 2023

## 1.4. RECENT APPROVALS

A number of Clause 4.6 variation requests to building height and floor space ratio have recently been upheld in proximity to the subject site. These approvals inform the assessment of the proposed variation relevant to the satisfaction of the objectives of the height control pursuant to section 4.3 of the LEP and importantly, the environmental planning grounds relied upon.

**Table 2** below provides a summary of comparable approvals which have been granted with a Clause 4.6 variation to height and floor space ratio. Of note, the following points of justification have supported successful approval of these variations:

- Building height variations have been approved where the non-compliance with the applicable height control is attributed to the change in topography of the land. 10% variation were justified in this manner.
- Building height variations have been approved where the additional height is the result of roof features or structures (e.g. roof parapet safety rail). An 11% variation was justified in this manner.
- Building height variations have been approved where the variation not excessive in the context of the immediate streetscape, would not detract from the character of the area, and would not result in unacceptable overshadowing . A variation of greater than 10% was justified in this manner.

**Table 2** Summary of Approvals

<b>Application Number / Date</b>	<b>Address</b>	<b>Details</b>	<b>Extent of Variation</b>
10.2014.742.2 (16/09/2021)	33 Lawson Street Byron Bay (Lot 8 DP 758207)	Demolition of existing single-storey motel building. Erection of a three (3) storey motel accommodation building plus two (2) levels of basement parking.  S4.55 to Modify Consent to include Eight (8) Additional Motel Units, Remove the Ground and Third Floor Swimming Pools, Add a Roof Top Recreation Area comprising a Swimming Pool, Bar and Café.	Building Height >10%, FSR variation 1.6%.  <u>Justification for Variation</u>  Increase in building height is limited to stair and lift overruns and small bathroom.  The proposal for additional building height exceedance is consistent with the objectives of the development standard, in that the design of the roof-top facilities will result in minor visual impacts, do not result in significant privacy or overlooking issues, and do not noticeably change the bulk and scale of the approved building or its consistency with the character of the town centre.
10.2016.55.1 (15/12/2016)	17 Shirley St, Byron Bay 2481 NSW  19-21 Shirley St, Byron Bay 2481 NSW	Demolition of Existing Buildings and Construction of Two (2) Residential Flat Buildings, Including Swimming Pool, Landscaping and Strata Subdivision (17 units)	Building Height Variation - exceeds the 9.0m height limit by 0.55 metres  <u>Justification for Variation</u>  The proposed building height is not considered to be excessive in the immediate streetscape and should not detract from the character of the area.  The proposed portion of Building No 1 exceeding the height limit should not result in any unacceptable overshadowing of neighbouring properties.  Subject to conditions relating to privacy screens the proposed development should not result in any unacceptable loss of privacy to any neighbouring property.

Application Number / Date	Address	Details	Extent of Variation
10.2017.160.1	21 Fawcett Street, Brunswick Heads	Residential Flat Building	FSR Variation – 6%  <u>Justification for Variation</u>  Proposed variation consistent with objectives of standard and zone.
10.2017.628.1 (24/07/2019)	28 Parkes Avenue, Byron Bay (LOT: 1 & 7 DP: 271119)	60 x 1 & 2 bedroom apartments, plus subdivision to create 1 additional community lot	Building Height – between 5% and 10% variation  <u>Justification for Variation</u>  The monitor roof feature provides for natural ventilation and light to the mezzanine bedrooms of the upper floor. The roof form and building scale responds to the character of built form in the locality. The buildings will not overshadow or overlook any other development, as the land immediately to the west is retained for environmental purposes.
10.2017.678.1 (21/02/2019)	17 Shirley St, Byron Bay 2481 NSW  19-21 Shirley St, Byron Bay 2481 NSW	Demolition of existing buildings and construction of two (2) residential flat buildings, containing 17x3 bedrooms and 2 x 4 bedroom dwellings including swimming pool, landscaping, basement car parking and strata subdivision	Building Height Variation  Building No. 1 - 9.77m (8.6% variation)  Building No. 2 - 9.8% - 11%  <u>Justification for Variation</u>  Non-compliance with the building height can be largely attributed to the existing variation in the level of the land. The building is lower than the approved adjoining buildings to the east.
10.2014.398.1 (16/07/2015)	3 Shirley St, Byron Bay 2481 NSW  5 Shirley St, Byron Bay 2481 NSW  7 Shirley St, Byron Bay 2481 NSW	Motel - two storey 16 guest rooms with a roof top terrace and basement parking for 27 cars	Building Height 10% Variation  <u>Justification for Variation</u>  The proposed building has a rooftop terrace which exceeds the 9 metres building height by 10%. This relates to the entryway and roof forms is lower than adjacent buildings and does not impact in

Application Number / Date	Address	Details	Extent of Variation
	Shirley St, Byron Bay 2481 NSW		relation to overshadowing, view loss or privacy.
10.2019.616.1 (21/05/2020)	137-139 Jonson Street & 3 Browning Street Byron Bay (Lot 21 DP 247289; Lot 5 DP758207; Lots 60 & 61 DP 1256365))	Demolition of existing buildings and the construction of a mixed use development for:  Commercial premises  Café  Shop-top housing  Basement car parking; and  Infrastructure.	Building Height 9% Variation  Floor Space Ratio 9.6% Variation  <u>Justification for Variation</u>  The proposed buildings is consistent in scale to nearby buildings and establishes the desired future character of the locality consistent with the Byron Bay Town Centre Master Plan.  Varying the floor space ratio standard will enable an optimal, landmark, fully integrated development solution for a landmark site.  The proposal maximising the 'return' on a large private investment, generating new and sustaining existing employment and achieving positive social and economic outcomes within sound planning and environmental parameters, is therefore considered to be clearly in the public interest.

## 2. PROPOSED MODIFICATIONS

### 2.1. OVERVIEW

The proposed modifications to the approved development scheme seek to amend various minor components which are outlined further below.

Specifically, the Section 4.55(2) Application seeks consent for the following design changes:

- Slight reconfiguration of internal floor plans across all dwellings, with no change to total bedroom numbers per dwelling;
- Change in private-use pool shapes from rounded edges to square edges;
- External façade amendments including window scheduling and screening to align with internal reconfigurations;
- Increase in total building height for the building portion situated within the R3 Medium Density Residential zone from 10.7m to 11.21m;
- Reduction in total building height for the building portion situated within the 7(F2) Urban Coastal Land from 10.1m to 9.34m;
- Increase of floor to floor heights for the building portion situated within the R3 Medium Density Residential zone;
- Reduction and reconfiguration to rooftop trafficable areas across the building portion within the R3 Medium Density Residential zone from areas between 129.3m<sup>2</sup> – 142.8m<sup>2</sup> to 33.8m<sup>2</sup> – 42.6m<sup>2</sup>;
- Reduction and reconfiguration to rooftop trafficable areas across the building portion within the 7(F2) Urban Coastal Land zone from areas between 167m<sup>2</sup> – 205.2m<sup>2</sup> to 40.7m<sup>2</sup> – 63.5m<sup>2</sup>;
- ;
- Reconfiguration of basement level services including the fire pump room, fire services water tank, pool pump and switch room;
- Relocation of bicycle storage area within the basement level from its previous location adjacent to the main lobby, to their relocation towards the western boundary; and
- Reconfiguration to the lobby area and communal facilities within the basement level to include a wellness centre.

**Table 3** Overview of Proposal

Aspect of Development	Approved Development under DA.10.2022.371.1	Proposed Modifications	Change
Development Area	29 Shirley Street and 2-4 Milton Street, Byron Bay Land Area: 5,937m <sup>2</sup>	29 Shirley Street and 2-4 Milton Street, Byron Bay Land Area: 5,937m <sup>2</sup>	No change
Land Uses	Residential Flat Building	Residential Flat Building – no change is proposed to the approved land use.	No change
Maximum Building Height	<b>R3 Medium Density Residential Zone – permissible 9m maximum</b>		
	A maximum of 10.7m (RL15.7) to the top of the lift overrun and fire staircase, resulting in a maximum non-compliance of	A maximum of 11.21m to the top of the lift overrun and fire staircase, resulting in a maximum non-compliance of	Variance is proposed – 2.21m

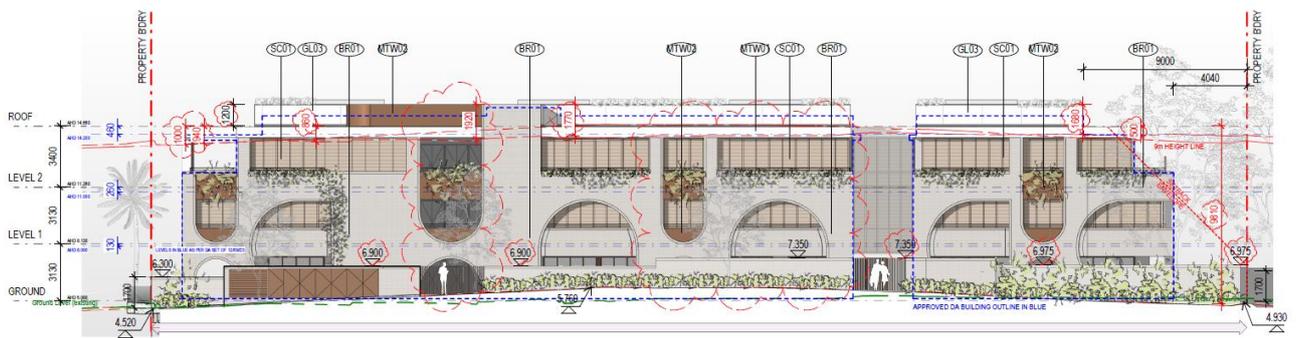
Aspect of Development	Approved Development under DA.10.2022.371.1	Proposed Modifications	Change
	1.7m equivalent to a variation of 18.9%.	2.21m equivalent to a variation of 24.56%	
	<b>7(F2) Urban Coastal Land Zone – permissible 9m maximum or 4.5m from topmost floor level</b>		
	A maximum of 10.10m (RL15.10) to the top of the balustrade, which is setback well within the building footprint, resulting in a maximum non-compliance of 1.10m equivalent to a variation of 13.9%.	A maximum of 9.25m to the top of the balustrade. The majority of the northern building is either at or below the 9m height limit, equivalent to a variation of 2.78%.	Variance is proposed – 0.25m
<b>Floor Space Ratio – R3 Zone Only</b>	0.66:1 (2,292.6m <sup>2</sup> )	0.65:1 (2,258.4m <sup>2</sup> )	No change
<b>Density – 7(F2) Only</b>	Dwellings at 1 per 300m <sup>2</sup> of site area = 8.21	No change is proposed to the approved density within the 7(F2) zoning.	No change
<b>Ground Floor Area</b>	4,810m <sup>2</sup>	4,767m <sup>2</sup>	Minor reduction in GFA by 43m <sup>2</sup>
<b>Total Communal Space</b>	1,392m <sup>2</sup>	Communal terrace on level 01 removed.	Minor reduction in communal area
<b>Dwelling No.</b>	25x 3-bedroom dwellings	No change is proposed to the approved total dwelling number or number of bedrooms.	No change
<b>Total Landscaped Areas</b>	1,392m <sup>2</sup> of landscaping including 527.32m <sup>2</sup> of deep soil zones	1,437.24m <sup>2</sup> of landscaping including 551m <sup>2</sup> of deep soil zone	Minor change to increase deep planting
<b>Trees being retained</b>	0	0 – no change	No change
<b>Trees being planted</b>	71 (90% as native and endemic species)	116 (72 on ground level, 26 on level 2 and 18 on rooftop level)	Increase of 45
<b>Car Parking Provisions</b>	69 car parking spaces including 7 visitor spaces	No change is proposed to the approved car parking provisions.	No change
<b>Setbacks</b>	North – 6.6m setback South – 5.1m setback	No change is proposed to the setbacks previously approved.	No change

Aspect of Development	Approved Development under DA.10.2022.371.1	Proposed Modifications	Change
	East – 4m setback West – 4.8m setback		

The modified elevation plan of the southern building fronting Shirley Street is illustrated below in **Figure 8** with the inclusion of the approved DA building outline shown in a dashed blue, the floor to floor levels per the approved DA set shown in a dashed red, and the 9m height line shown in a solid red line in accordance with the ground level (existing) in a dashed green line.

As shown below and within the revised architectural scheme, the southern building has been modified to marginally increase its floor to floor heights. As a result, the rooftop balustrading and lift-overrun further exceed the 9m building height line.

**Figure 8** Modified Elevation Plan from Shirley Street (South Building)



Source: Hayball 2024

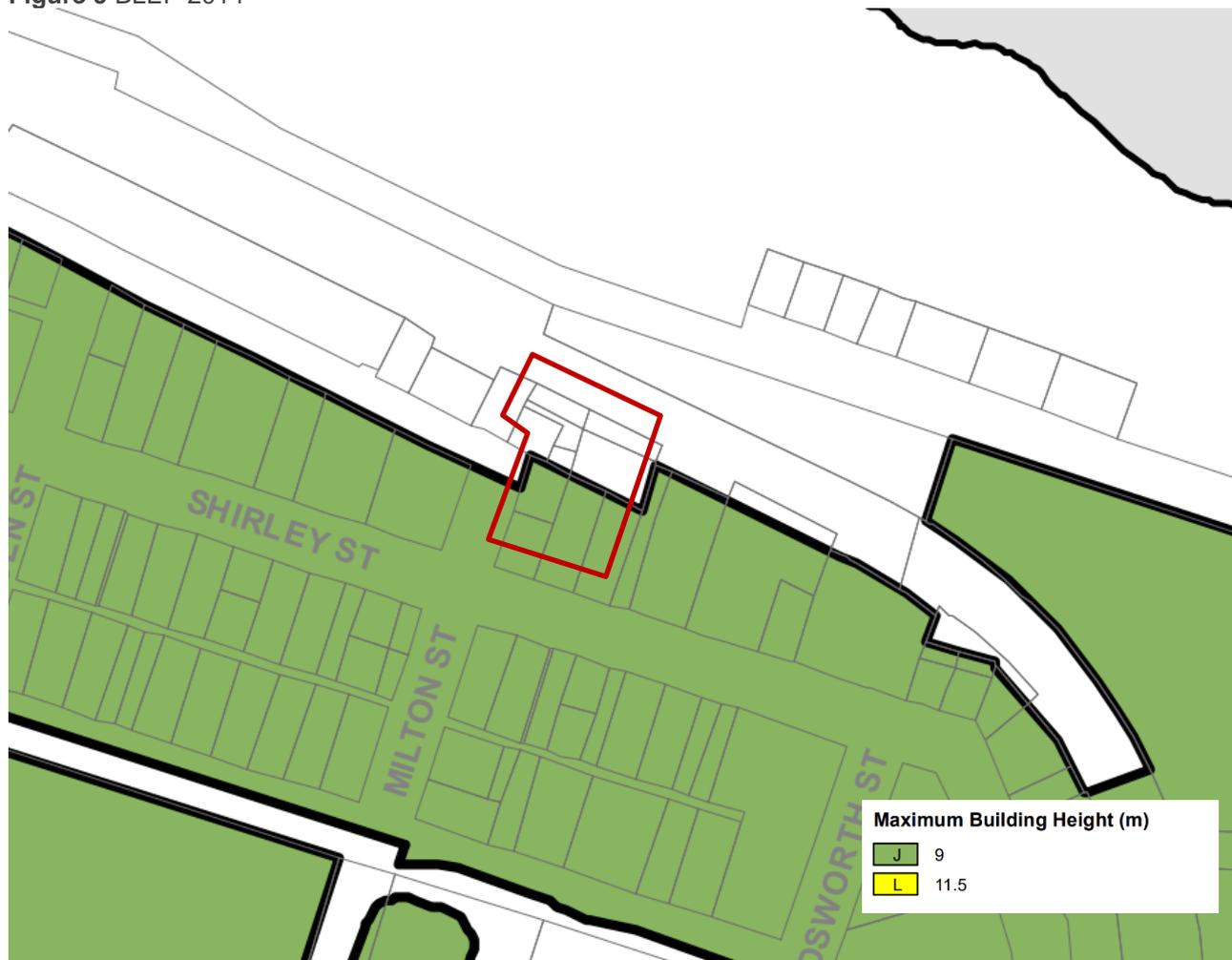
### 3. VARIATION OF HEIGHT OF BUILDINGS STANDARD

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the variation. A detailed justification for the proposed variation is provided in **Section 3.2** of the report.

#### 3.1. DEVELOPMENT STANDARD SEEKING TO BE VARIED

This Clause 4.6 variation request seeks to vary the maximum 9 metre height of building control prescribed by clause 4.3 of BLEP 2014 and the associated Height of Buildings Map (refer to map extract in **Figure 9** below).

**Figure 9** BLEP 2014



Source: BLEP 2014

As shown in Figure 9, the height control under the BLEP 2014 applies only to the part of the site shown in green in the map. The remainder of the site is nominated as a 'deferred matter' as shown in white in Figure 2. This means that this part of the site is subject to a separate height control under section 40 of the *Byron Local Environmental Plan 1988*.

Clause 4.3 states:

#### 4.3 Height of buildings

(1) *The objectives of this clause are 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,*

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

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

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

The LEP Dictionary defines building height (or 'height of building') as follows:

*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.*

In *Triple Blue Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1065 (*Triple Blue*) at [47], O'Neill CJ held that the definition of 'ground level (existing)' means that an 'historic' excavation in the location of the vertical measurement results in a building that has a greater numerical value for height than it would otherwise have had (if measured from the ground level prior to the excavation), meaning that the height of a proposed new building is measured from the natural ground level of an undeveloped site, and a future addition to the same building is measured from the lower excavated ground level 'after the building has been constructed'.

This can potentially result in an increase in the numerical value for the height of the building — with the addition being much greater than the increase in height of the addition alone, when compared to the numerical value of the height of the original building under the definition (at [47]). A similar conclusion was reached in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 where O'Neill CJ, at [73], said that the existing level of the site at a point beneath the existing building is the level of the land at that point and the 'ground level (existing)' within the footprint of the existing building is the existing excavated ground level on the site.

## 3.2. PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS

The site is subject to a 9m maximum building height which is equivalent to a 2 to 3-storey building. Prior to this modification application, the previous application (reference: DA.10.2022.371.1) sought a variation of the height control for a maximum exceedance of 1.7m, equivalent to a variation of 18.9%. The variation of height controls for the southern building, as approved, are below.

### Southern Building – Approved Scheme

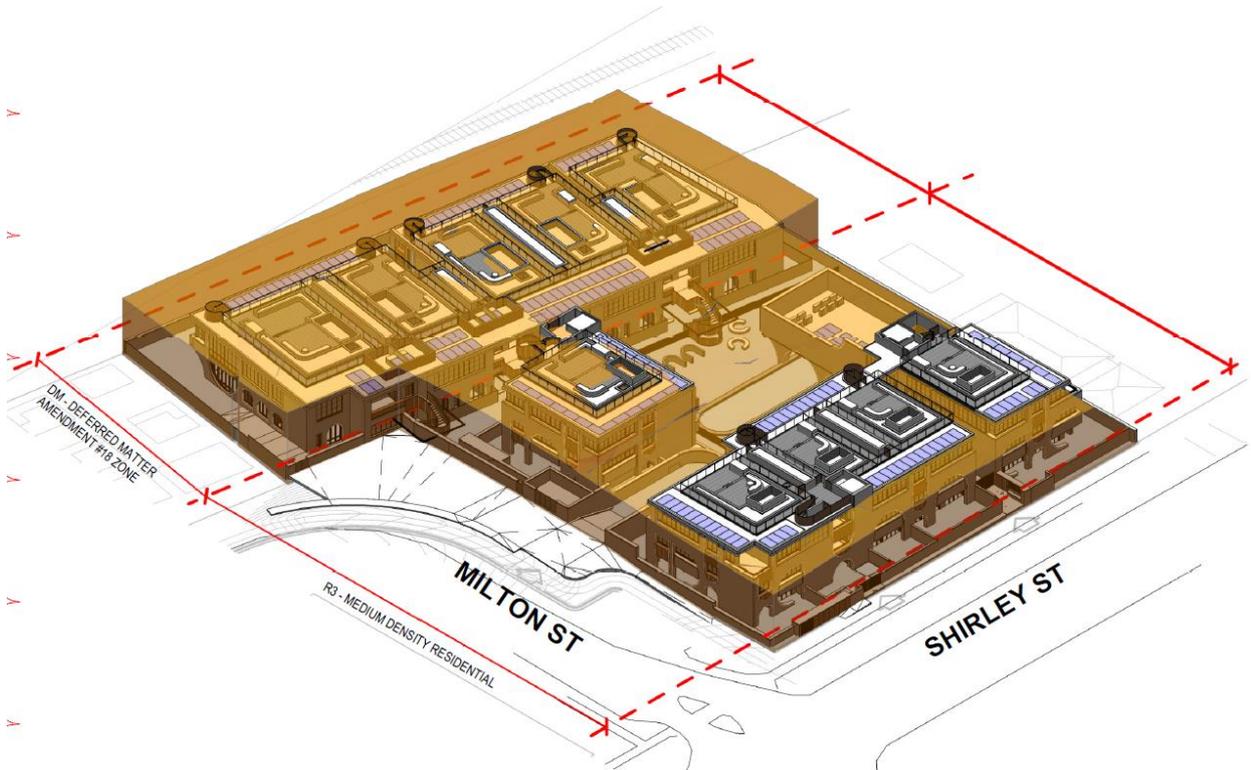
- 9.2m (RL14.2) to the top of the roof level. This results in a maximum non-compliance of 0.2m, which is equivalent to a variation of **2.00%**.
- 10.25m (RL 15.25) to the top of the balustrade which is setback well within the building curtilage. This results in a maximum non-compliance of 1.25m, which is equivalent to a variation of **13.9%**.
- 10.7m (RL15.7) to the top of the lift overrun and fire staircase. This results in a maximum non-compliance of 1.7m which is equivalent to a variation of **18.9%**.

### Southern Building – Modified Scheme

- 9.81m to the top of the roof level. This results in a maximum non-compliance of 0.81m, which is equivalent to a variation of **9%**.
- 11.21m to the top of the balustrade which is setback well within the building curtilage. This results in a maximum non-compliance of 2.21 which is equivalent to a variation of **24.56%**.
- 11.21m to the top of the lift overrun and fire staircase. This results in a maximum non-compliance of 2.21m which is equivalent to a variation of **24.56%**.

See below **Figure 10** which depicts height exceedances above 9m.

**Figure 10** Height Exceedances above 9m



Source: Hayball

## 4. RELEVANT ASSESSMENT FRAMEWORK

In considering this Clause 4.6 Variation Request, regard is to be had to the provisions of Clause 4.6 itself, as well as the latest case law.

### 4.1. CLAUSE 4.6

Clause 4.6 of the BLEP (2014) includes provisions that allow for exceptions to development standards in certain circumstances.

The objectives of clause 4.6 of BLEP 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)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- b) *the public benefit of maintaining the development standard, and*
- c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter relates to a Clause 4.6 determinate of a local environmental plan.

This clause 4.6 request demonstrates that compliance with the height prescribed for the site in clause 4.3 of BLEP (2014) is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

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

#### 4.1.1. Relevant Case Law

The principles arising from the latest authority on clause 4.6 against which this Request has been prepared is as follows:

- In *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (**Wehbe**), Preston CJ lists the 5 common ways in which an applicant might demonstrate that compliance with a development standard is ‘unreasonable or unnecessary’:

*[42] An objection under SEPP 1 [or clause 4.6] 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**:*

*[45] A second way is to establish that **the underlying objective or purpose is not relevant to the development** with the consequence that compliance is unnecessary.*

*[46] A third way is to establish that **the underlying objective or purpose would be defeated or thwarted if compliance was required** with the consequence that compliance is unreasonable.*

*[47] A fourth way is to establish that 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.*

*[48] A fifth way is to establish that **“the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land”** and that “compliance with the standard in that case would also be unreasonable or unnecessary.”*

- In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:
- ‘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... In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.’
- Preston CJ in *Initial Action* held at [15] that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- At [23] and [24] in *Initial Action*, Preston CJ held that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.
- In *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130, the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

## 5. ASSESSMENT OF 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 buildings in accordance with clause 4.3 of BLEP.

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 Land and Environment Court.

The following section of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

### 5.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The height of buildings prescribed by clause 4.3 of BLEP (2014) is a development standard capable of being varied under clause 4.6(2).

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 BLEP (2014).

### 5.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

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.

In *Wehbe*, Preston CJ establishes five potential tests for determining whether a development standard could be considered unreasonable or unnecessary.

This is further detailed by the Chief Judge in *Initial Action* where Preston CJ states at [22]:

*‘These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.’*

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*. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement however, for completeness, this variation request also addresses other practical reasons why compliance with the standard is unreasonable, as set out below.

### 5.3. THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

In addressing the first method as identified in *Wehbe* as above, the specific objectives of the height of buildings standard as specified in Clause 4.3 of the BLEP 2014 are detailed in **Table 4** below. An assessment of the consistency of the previous approved development, and updated commentary in relation to the proposed modifications are outlined below.

**Table 4** Assessment of consistency with Clause 4.3 objectives

Objectives	Assessment – Approved Scheme	Assessment – Modification
<p>(a) to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,</p>	<p>The proposed development achieves an overall building design which does not exceed the maximum height control of 9m. The building design is generally compliant with minor exceedances arising as a result of the topographical changes across of the site impacting the ground level from which the height plane is measured and minor building elements which do not impacts the design’s predominant compliance with the control.</p> <p>Generally, height exceedance is limited to elements of the roof structure, terrace balustrades and lift overruns which will not impose any increased amenity impacts for surrounding areas.</p> <p>In significant portion across the site the building design does not exceed the 9m height control to the roof and parapet and the non-compliances associated with isolated areas of parapet or roof across the proposal arise as a result of the undulating nature of the sites topography. The design provides for a consistent RL of roof tops of 14.20AHD with the eastern portions being compliant while the western areas result in a non-compliance as a result of the fall of the land and existing ground level.</p>	<p>The proposed modification incorporates a total building height of 11.21m measured from ground level to the lift-overrun, with an increase of 0.51m from the approved scheme.</p> <p>The modified scheme has increased marginally in height to increase the floor to floor heights of the living areas and bedrooms to a minimum of 2.7m.</p> <p>Consistent with the approved scheme, only minor building elements such as the lift-overrun and balustrading exceed the 9m height designation, therefore consistency is had with height exceedances being limited to elements of the roof structure.</p>
<p>(b) to ensure the height of buildings complements the streetscape and character of the area in which the buildings are located,</p>	<p>The proposed built form considers both the current and proposed context and creates a transition of scale across the site that appropriately responds to the undulating ground levels in the surrounding area.</p> <p>The built form proposed complements the streetscape character of the area</p>	<p>Consistent with the approved scheme, the modified scheme maintains the high-quality urban design outcome which complements the streetscape character of the area.</p> <p>The modification retains the approvals reflection of a high-quality product guided through the building controls</p>

<b>Objectives</b>	<b>Assessment – Approved Scheme</b>	<b>Assessment – Modification</b>
(c) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.	<p>and provides for a high quality urban design outcome which reflects the controls which apply to the site. The controls contemplate a built form of 9m scale and the minor non compliances which arise do not detract from the streetscape character but rather serve to reinforce it by providing for a consistent built form outcome of 3 storeys rather than one which awkwardly stepped to reflect topographical changes across the site.</p> <p>The proposed development fronting Shirley Street and Milton Street will complement the streetscape by providing alignment of the emerging 2-3 storey multi dwelling character of the street and locality.</p> <p>The built form has been massed, along with the use of materials and finishes to reduce the presentation of the proposed development, and the sections of the variation, from the streetscape.</p> <p>The built form is complemented by trees along the boundaries, creating natural edge between the development and its immediate context. Dwellings are also designed to front the adjacent streets providing an appropriate, pedestrian scale address.</p> <p>The proposed building predominantly complies with the 9m height control. The design of the building, its relationship to the street and the adjoining properties ensure that visual impact, disruption of existing views and maintenance of privacy and sunlight to existing development is ensured.</p> <p>The minor areas of encroachment do not generate any adverse visual impact – as they are well designed and accommodated within the high quality and consistent built form and at their highest are set back from the parapet</p>	<p>applicable to the site. Given the sites undulating ground levels, the modification retains the approvals deliverance on a product that appears consistent from the streetscape, rather than stepped down to achieve compliance.</p> <p>The proposed modified scheme is consistent with the approved development’s ability to deliver a high-quality product with height encroachments that do not generate any adverse visual impact.</p> <p>A revised shadow analysis has been included within the modified scheme to detail any shadow-related implications to the adjoining lots.</p> <p>Within the revised scheme, the shadow analysis demonstrates the portion of shadow above the 9m building envelope in red which indicates that the modified scheme will</p>

Objectives	Assessment – Approved Scheme	Assessment – Modification
	<p>edge to the public domain and adjoining properties.</p> <p>The minor areas of non compliance do not generate any adverse impacts to views or loss of privacy.</p> <p>The solar access diagrams included with the amended application confirm that the building does not generate any unreasonable overshadowing impacts which arise as a result of the non compliance.</p> <p>The design of the building elements provide for large breaks and open space between building elements which serve to minimise visual impact and provides for an open streetscape addressing the corner of Milton and Cavvanbah street.</p>	<p>not generate any unreasonable overshadowing as a result of the height non-compliances.</p>

## 5.4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

In relation to sufficient environmental planning grounds, in Initial Action, Preston J observed:

*“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

*...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”.*

The strength of the relevant grounds ought to be a balancing factor when assessing the reasonableness of the variation to a standard. This is because the word “sufficient” is included in clause 4.6(3)(b). Environmental planning grounds will be “sufficient” having regard to the circumstances of each case such that matters will have different weight in different circumstances.

A large breach with many impacts must have weighty and strong environmental planning grounds. A relatively minor breach without real amenity impacts, such as that proposed in this application, will require a different weighing of factors and therefore a different approach to what may constitute that which is “sufficient” (see Initial Action at paragraphs 23 and 24).

It is considered that the following environmental planning grounds are sufficient to justify the non-compliances with the development standard proposed:

- The non-compliance facilitates a high quality and consistent built form across the Site’s Street frontages to Milton and Shirley Streets. The topography of the Site and existing ground levels, defined by the current development on the Site and fall from east to west dictate that a consistent and level built form from the eastern edge of the Site will become non-compliant at the corner of Shirley and Milton Street simply as a result of the existing ground level.

The minor non-compliance provides for an improved planning outcome by facilitating the consistent floor levels and building frontage addressing Shirley Street. In circumstances where strict compliance was required the building would need to step and create odd breaks in order to provide strict compliance. Such a design would be inefficient, uneconomical and provide for a poor streetscape outcome and address. It is considered that the minor non-compliances attributable to the existing ground level on Site provides for a superior planning outcome and is sufficient to justify the extent of non-compliance proposed.

- The majority of non-complaint elements of the proposal are attributable to the balustrade and minor building elements on roof top private open space. These elements are barely perceptible from the streetscape and facilitate the delivery of high quality and high amenity private open space for occupants of the development. The delivery of such high-quality open space relieves pressure on communal areas within the development by providing private space for occupants at the upper levels of the building and it is considered the increased amenity and relieving of pressure on common areas is a planning ground which is sufficient to justify the minor breaches to the height control proposed.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane. In order to provide high quality and spatially generous areas of common open space at ground level the building proposes to accommodate the floor area of the proposed development across 3 storeys which results in minor and inconsequential non-compliance with the HOB standard. The provision of the high quality landscaped open space at ground level provides for a superior planning outcome both spatially, in terms of built form, and also in terms of amenity for future occupants. It is considered that the provision of high quality open space at ground level is a material planning benefit associated with the non-compliance and offsets the imperceptible impacts associated with the technical non-compliance of the upper portion of the building.
- The non-compliance with the provisions of cl 4.3 provides for a superior development outcome on the Site which facilitates the delivery of an appropriate residential density which reflects the environmental capacity of the site having regard to its location, surrounding development and Site characteristics.
- The non-compliance with the development standard at cl 4.3 allows for the orderly and economic development of the Site by facilitating consistent floor levels, construction methodology and rational built form outcome across the Site and large separation distances between built forms. If compliance with the height standard was required, the built form and building design would be significantly compromised and require further loss of the high amenity open space to accommodate the residential GFA across the Site.
- The site is located on the corner of Milton Street and Shirley Street. The proposed variation enables the rationalisation of the floor plate so that the proposed development provides a strong presentation to corner which reflects the three storey scale proposed and able to be accommodated within the 9m height plane at the eastern end of the Site.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane. The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land. The development is compliant with the intent of the control.
- The proposed height noncompliance facilitates an improved master planning outcome for the Site by allowing the contemplated 3 storey massing to address the primary street frontages and provides for a high quality urban design response to its current and future context.

Having regard to the minor building elements which contravene the 9m control, their extent and context within the overall built form, including lack of any material environmental impacts associated with them, it is considered that the above planning grounds and demonstrable benefits associated with the areas of breach to the height control proposed are sufficient to justify the non-compliance.

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

## 5.5. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

## 5.6. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in **Table 4** above. The proposal is also consistent with the land use objectives that apply to the site under BLEP (2014). The site is located within the R3: Medium Density Residential zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 5** below.

**Table 5** Assessment of compliance with land use zone objectives

Objective	Assessment
To provide for the housing needs of the community within a medium density residential environment.	<p>The proposal will provide additional medium density housing options for the growing Byron community which is delivered in a well design architectural form which respects the distinct local character in the area.</p> <p>There is a current housing shortage in the Byron Bay area. The redevelopment of the Site is consistent with the express objective of the R3 zone in that it provides for the housing needs of the community within the existing and established medium density environment. Having regard to the existing development on the Site, the proposal will provide an additional 25 dwellings directly addressing the communities housing needs.</p>
To provide a variety of housing types within a medium residential environment.	The proposal will contribute additional housing typologies within the neighbourhood.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	N/A The proposal is for residential uses.

The above table demonstrates the proposed development will be in the public interest notwithstanding the proposed variation to the height of buildings development standard as it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

It is also noted that the proposed development will deliver upgrades to associated infrastructure around the site including roads, sewer, footpath upgrades and public realm landscape improvements. This will improve the existing amenity along the street frontages of the Site for the broader public benefit.

## **5.7. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)**

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The matters for consideration under clause 4.6(5) are considered below.

- Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?

The proposed non-compliance with the height of buildings development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

- Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?

The proposed development achieves the objectives of the height of buildings development standard and the land use zone objectives despite the technical non-compliance.

Limited height exceedances over the 9m height limit is proposed to deliver a consistent scale of the buildings across the site and deliver GFA organised over three levels to maximise communal open space areas within the development.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

- Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

## 6. 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 BLEP 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:

- An additional 2.21 metre over the 9m height limit is proposed to balance the scale of the buildings across the site.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane and retention of an existing tree.
- The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land.
- The proposed development provides for compliant dwelling design provisions against the SEPP65, demonstrating suitability.
- The design is deliberately sympathetic to the site topography throughout resulting in minor encroachment on building upper extremities in response, as shown in the minor areas identified in Figure 3, above. The rooftop treatment has been a regular variation endorsed in other approval precedent.
- The increased building height ensures provision of generous setbacks to the street frontages and adjoining sites allowing for amenity protection through landscape provision, setback distances, and upper floor setbacks to ensure maintenance of solar access and mitigating of shadow impacts.
- The increased building height proposed does not increase perceived building bulk and scale.
- The increased building height proposed is consistent with objectives of standard and zone.

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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