



CLAUSE 64A VARIATION REQUEST - HEIGHT

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

Prepared for
29 SHIRLEY STREET
25 August 2022



URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Patrick Hefferan
Associate Director	Melissa Griffin
Consultant	Cameron See
Project Code	P0038351
Report Number	Final

All information supplied to Urbis in order to conduct this research has been treated in the strictest confidence. It shall only be used in this context and shall not be made available to third parties without client authorisation. Confidential information has been stored securely and data provided by respondents, as well as their identity, has been treated in the strictest confidence and all assurance given to respondents have been and shall be fulfilled.

© Urbis Pty Ltd
50 105 256 228

All Rights Reserved. No material may be reproduced without prior permission.

You must read the important disclaimer appearing within the body of this report.

urbis.com.au

CONTENTS

1.	Introduction	1
2.	Site Context	2
2.1.	Site Description	2
2.2.	Existing Development	4
2.3.	Locality Context	4
3.	Proposed Development	11
4.	Variation of Height of Buildings Standard.....	13
4.1.	Development Standard	13
4.2.	Proposed Variation to Clause 40(b)(ii) Height of Buildings	13
5.	Relevant Assessment Framework.....	15
6.	Assessment of Clause 64A Variation.....	17
6.1.	Is the planning control a development standard that can be varied? – Clause 64A(2)	17
6.2.	Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? – CLAUSE 64A(3)(A)	17
6.3.	Are there sufficient environmental planning grounds to justify contravening the development standard? – CLAUSE 64A(3)(B)	19
6.4.	Has the written request adequately addressed the matters in sub-clause (3)? – CLAUSE 64A(4)(A)(I).....	19
6.5.	Is the proposed development in the public interest? – CLAUSE 64A(4)(B)(II).....	19
6.6.	Has the concurrence of the planning secretary been obtained? – Clause 64A(4)(B) and Clause 64A(5)	20
7.	Conclusion.....	22
	Disclaimer.....	23

Appendix A Appendix

FIGURES

Figure 1 – Location Plan	3
Figure 2 – Aerial Photograph of the Site.....	4
Figure 3 – Regional Context	5
Figure 4 – Local Context.....	5
Figure 5 - Architectural Plans	12
Figure 6 - LEP Height Plane	13
Figure 7 - Elevations	14
Figure 8 - Elevations	14

CLICK OR TAP HERE TO ENTER TEXT.

TABLES

Table 1 Numeric Overview of Proposal.....	Error! Bookmark not defined.
Table 2 - Assessment of consistency with clause 4.3 objectives	18
Table 3 - Assessment of compliance with land use zone objectives	20

1. INTRODUCTION

This Clause 64A Variation Request (the Request) has been prepared on behalf of *Vitale Property Group Pty Ltd* (the Applicant) and accompanies a Development Application (DA) for a development application for Residential Flat Buildings comprising 26 residential apartments at 29 Shirley Street and 2-4 Milton Street, Byron Bay.

The Request seeks an exception from the maximum building height standard prescribed for the development site under clause 40(b)(ii) of *Byron Local Environmental Plan 1988* (PLEP (1988)). The variation request is made pursuant to clause 64A of BLEP (1988).

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 22 August 2022.

The following sections of the report include:

Section 2: Description of the site and its local and regional context, including key features relevant to the proposed variation.

Section 3: Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.

Section 4: Identification of the development standard which is proposed to be varied, including the extent of the contravention.

Section 5: Outline of the relevant assessment framework for the variation in accordance with clause 64A of the LEP.

Section 6: Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.

Section 7: Conclusion.

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The site is located at 29 Shirley Street and 2-4 Milton Street, Byron Bay, which sits slightly north of the Byron Bay Town Centre, between Belongil Beach and Shirley Street. Key features of the site are summarised in **Table 1** below, with a Location Plan and Site Aerial shown below in **Figure 1** and **Figure 2** respectively.

Table 1 Site Description

Feature	Description
Street Address	29 Shirley Street, Byron Bay 2 Milton Street, Byron Bay 4 Milton Street, Byron Bay
Legal Description	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
Site Area	5,937sq.m
Site Dimensions	Shirley Street – 60.345 metres Milton Street – 60 metres (survey to confirm) Side Boundary (North) – 20.115 metres Side Boundary (West) – 62.095 metres Rear Boundary (Railway Corridor) – 73 metres (survey to confirm) Side Boundary (East) – 99.19 metres
Easements and Restrictions	Refer to accompanying SEE.
Site Topography	The site has an undulating topography, summarised as follows: North-South: 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
Vegetation	<p>difference of approximately 2m between the lowest and highest point on the site.</p> <p>East-West: 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>The subject site contains a backpackers hostel and short stay accommodation fronting Shirley Street and Milton Street. The remainder of the site is predominantly undeveloped and landscaped with maintained lawns and garden beds. Some scattered trees are present towards the rear of 29 Shirley Street, which also contains a mature fig species.</p>

Figure 1 – Location Plan



Source: Nearmap 2021

Figure 2 – Aerial Photograph of the Site



Source: Nearmap 2021

2.2. EXISTING DEVELOPMENT

such as kitchen and dining areas, car parking area and communal open spaces. There are also two dwellings located to the rear of the site which are currently used for short-term accommodation.

Vehicle access is provided via a crossover from Milton Street, with pedestrian access via the existing footpath from Shirley Street. There are also two existing crossovers providing access to the dwellings at 2 and 4 Milton Street.

2.3. 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 broader context around the subject site is illustrated in **Figure 3** below.

Figure 3 – Regional Context



Source: Nearmap 2021

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.

Figure 4 – Local Context



Source: Nearmap 2021

Surrounding development includes:

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.

2.4. RECENT APPROVALS

A number of Clause 4.6 approvals seeking variation to building height and floor space ratio variations have been granted in proximity to the subject site. These approvals create the precedent to consider a variation to these development standards in some circumstances, where appropriate justification is provided.

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. This demonstrates that a performance based approach may be taken to building height or floor space ratio standards, where appropriate justification is provided. Of note, the following points of justification have supported successful approval of these variations:

- Building height variations have been approved where the additional height is attributed to the existing variation in the level 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

Application Number / Date	Address	Details	Extent of Variation
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

Application Number / Date	Address	Details	Extent of Variation
			<p>not detract from the character of the area.</p> <p>The proposed portion of Building No 1 exceeding the height limit should not result in any unacceptable overshadowing of neighbouring properties.</p> <p>Subject to conditions relating to privacy screens the proposed development should not result in any unacceptable loss of privacy to any neighbouring property.</p>
<p>10.2017.678.1 (21/02/2019) Modified</p>	<p>17 Shirley St, Byron Bay 2481 NSW</p> <p>19-21 Shirley St, Byron Bay 2481 NSW</p>	<p>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</p>	<p>Building Height Variation</p> <p>Building No. 1 - 9.77m (8.6% variation)</p> <p>Building No. 2 - 9.8% - 11%</p> <p><u>Justification for Variation</u></p> <p>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.</p>
<p>10.2017.160.1</p>	<p>21 Fawcett Street, Brunswick Heads</p>	<p>Residential Flat Building</p>	<p>FSR Variation – 6%</p> <p><u>Justification for Variation</u></p> <p>Proposed variation consistent with objectives of standard and zone.</p>
<p>10.2017.628.1 (24/07/2019)</p>	<p>28 Parkes Avenue, Byron Bay (LOT: 1 & 7 DP: 271119)</p>	<p>60 x 1 & 2 bedroom apartments, plus subdivision to create 1 additional community lot</p>	<p>Building Height – between 5% and 10% variation</p> <p><u>Justification for Variation</u></p> <p>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</p>

Application Number / Date	Address	Details	Extent of Variation
			immediately to the west is retained for environmental purposes.
10.2014.398.1 (16/07/2015) / Modified 11.2.2021)	3 Shirley St, Byron Bay 2481 NSW 5 Shirley St, Byron Bay 2481 NSW 7 Shirley St, Byron Bay 2481 NSW Shirley St, Byron Bay 2481 NSW	Motel - two storey 16 guest rooms with a roof top terrace and basement parking for 27 cars	Height variation 21% <u>Justification for Variation</u> Non-compliance is attributed to architectural roof structures and gables. The proposal was supported by Council on the ground that the variation in building height will have negligible impact on the surrounding area. A variation to the 4.5m upper floor level height limit outlined in the Byron Bay 1988 LEP was also justified on the ground of it being outdated policy.
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: <ul style="list-style-type: none"> • 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.

Application Number / Date	Address	Details	Extent of Variation
10.2014.417.1 (15/12/2020)	43 Lawson Street LOT: 0 SP: 16094	Demolition of existing residential flat building & construction of a new residential flat building and associated works	<p>Building Height Variation</p> <p>The extent of height variation is applies to the lift overrun (10% over the height limit) and upper storey floor level being 31% over the specified height limit under the Byron Bay LEP 1988.</p> <p>The variation was accepted by Byron Cay Shire Council on the grounds that the Local Environmental Plan 2014 no longer includes an uppermost floor level development standard. It would therefore be unreasonable and unnecessary to enforce this aspect of Clause 40 when the new Local Environmental Plan does not require it.</p>

3. PROPOSED DEVELOPMENT

The proposed development will deliver an architecturally designed development containing residential dwellings and associated amenities. It comprises:

- Demolition of existing development.
- Erection of a Residential Flat Building, comprising:
 - 26 three-bedroom dwellings distributed across three separate three-storey buildings;
 - Pedestrian entrance from Shirley Street.
 - One basement parking level containing 78 cars (3 per dwelling) with vehicle access from Milton Street.
 - 1,392sq.m of communal open space at the ground level;
 - 1,384sq.m of deep planting on natural ground at ground level;
 - Associated amenities, including four lifts.
- An integrated landscape and communal open space design concept, including:
 - Landscaping of the verge areas, including large shade trees and feature palms;
 - High quality landscaping to private terraces; and
 - Central communal open space containing communal the swimming pool and retention of established Moreton Bay Fig.

A summary of the numeric aspects of the proposal are summarised in **Table 3** below.

Table 3 Numeric Overview of Proposal

Descriptor	Proposed
Land Use Activity	Residential Flat Building
Height of Building	3 storeys Typically 9.2m height
Floor Space Ratio	0.66 (3,562.2sq.m)
Total Communal Space	1,392sq.m
Total Private Open Space (Courtyards and Balconies)	Approx. 4,700sq.m (exceeding the maximum requirement)
Total deep planting on natural ground	1,384sq.m
Percentage of Landscaping	30.5% of site area
Car Parking Spaces	78
Trees being retained	1
Trees being planted	83

The proposed development is organised around three main building forms.

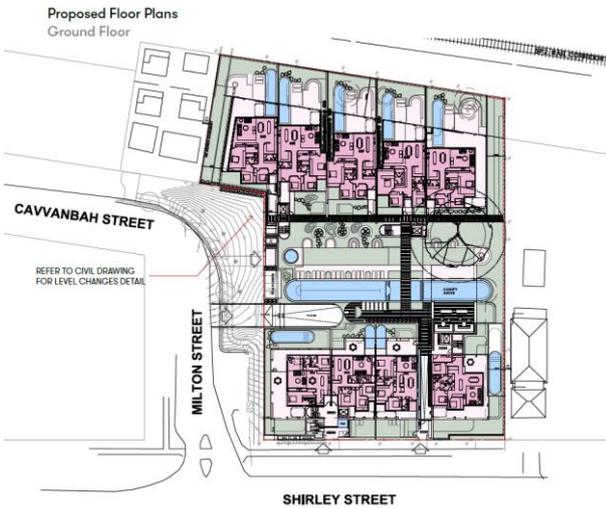
The separation of this built form assists in achieving an exceptional design outcome, where amenity and site responsive design are built form drivers. Specifically, the three tower design assists in maximising natural solar infiltration, cross ventilation, protect privacy and minimise overshadowing, through the following design initiatives:

- Apartments are oriented to have a minimum of 2 facades to allow for cross ventilation;
- Most of the apartments have 3 facades, and the living areas are oriented in different direction to allow more privacy for the residents.
- All apartments can benefit from the North East aspect in the morning.

- All dwellings have a North aspect orientation with at least a secondary façade aspect with one façade with access to the communal areas.
- Apartments are orientated to the views or adjacent street to increase surveillance of the public realm, whilst protecting privacy of adjacent neighbours.
- Proposed development will feature double glazed units and aim for 8 stars environmental certification.

Refer to **Appendix A** - Architectural Package and **Figure 5** - Architectural Plans below.

Figure 5 - Architectural Plans



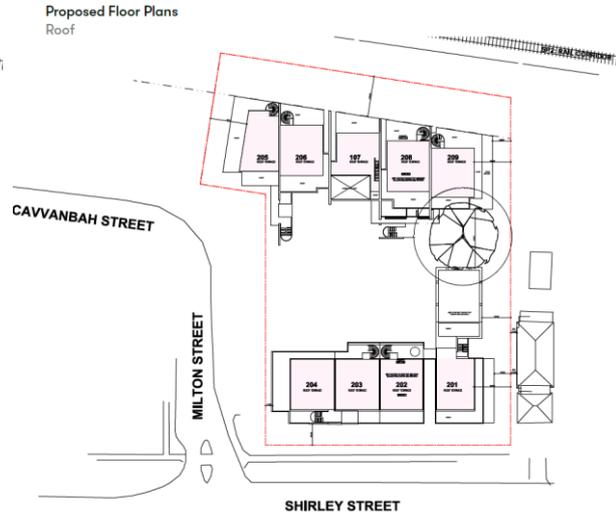
Picture: Ground Floor Plan (Source: Hayball)



Picture: Level 1 Plan (Source: Hayball)



Picture: Level 2 Plan (Source: Hayball)



Picture: Roof Plan (Source: Hayball)

4. 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 contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD

This clause 64A request seeks to vary the maximum 9 metre height of building control prescribed within clause 40(b)(ii) of BLEP 1988 and the associated Height of Buildings Map.

4.2. PROPOSED VARIATION TO CLAUSE 40(B)(II) HEIGHT OF BUILDINGS

The Site is subject to the following maximum height controls:

- (i) *the floor of the topmost floor level of the building exceeds 4.5 metres above the existing ground level, or*
- (ii) *the vertical distance between the topmost part of the building and the existing ground level below exceeds 9 metres.*

Whilst a 9m maximum building height roughly translates to a 3 storey building (as proposed), it is noted that the topmost floor level is to be no more than 4.5m above natural ground level which is roughly the equivalent of 1.5 residential storeys.

To deliver an efficient building envelope and maximise opportunities for substantial communal open space and landscaped setbacks, the proposed development is seeking to encroach into the overall building height for the purpose of roof terrace balustrades, lift over runs and minor areas of level 2.

Refer to Figure 3.

Figure 6 - LEP Height Plane



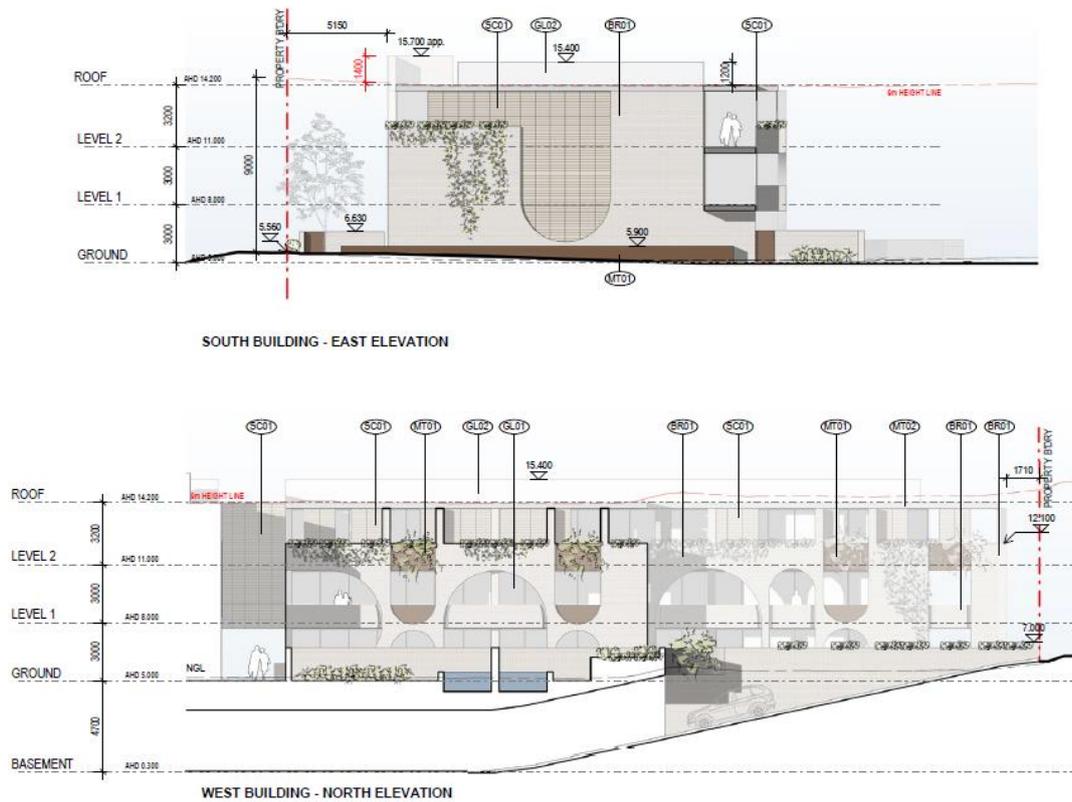
Source: Hayball

The proposed built form breaches the LEP height limit by a maximum of 1.8m or 20% however this is only for glass balustrades and lift overruns which are well setback within the curtilage of the building.

A variation is also sought for the height of the uppermost floor level in the northern building. This will enable the overall maximum building height of 9m to be achieved, consistent with the more recent requirements under the Byron Bay 2014 LEP that apply to the remainder of the Site.

The proposed building height is considered reasonable within the immediate streetscape and will not impact on the existing neighbourhood character in the area. Potential amenity implications arising from the increase

Elevations



Source: Hayball

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 64A(2) of the 1988 LEP provides the head of power for a variation to the LEP standards to be considered. Subsequent Clauses 64A(3) – 64(5) outline the circumstances and prerequisites for considering the LEP variation. The objectives of clause 64A are

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.*

Clause 64A 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 64A(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 64A(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 64A(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 64A(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 64A determinate of a local environmental plan.

This clause 64A request demonstrates that compliance with the height prescribed for the site in clause 40(b)(ii) of BLEP (1988) 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 64A(3), the applicant requests that the height development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

6. ASSESSMENT OF CLAUSE 64A 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 40(b)(ii) of BLEP (1988).

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 sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 64A of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 64A(2)

The height of buildings prescribed by clause 40(b)(ii) of BLEP (1988) is a development standard capable of being varied under clause 64A(2).

The proposed variation is not excluded from the operation of clause 64A(2) as it does not comprise any of the matters listed within clause 64A(6) or clause 64A(8) of BLEP (1988).

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 64A(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.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

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

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

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

The specific objectives of the height of buildings standard as specified in clause 40(b)(ii) of BLEP (1988) are detailed in Table 4. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 4 - Assessment of consistency with clause 40(1) objectives

Objectives	Assessment
(a) to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet.	The proposal is seeking a minor variation to the specified maximum height, having regard to the naturally undulating nature of surrounding ground levels. 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.
(b) to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.	<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 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>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

The underlying objectives of the height of buildings development standard remain relevant and have been achieved as the proposed development has been designed to be compatible with the scale and character of the locality and the standards applicable to the site. Strict compliance with the maximum height of buildings development standard would be unreasonable and unnecessary, having regard to the circumstances of the proposed development.

The surrounding context has seen developments approved with similar height exceedances to that proposed. Of note, the following points of justification have supported successful approval of these variations:

- Building height variations have been approved where the additional height is attributed to the existing variation in the level of the land. A 10% variation was 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 0.55m was justified in this manner.

The burden placed on the community (by requiring strict compliance with the Height standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The proposal will consolidate several titles within the 7(f2) (Urban Coastal Land Zone) to create a development envelope capable of delivering a well designed and coordinated built form outcome. The proposed minor height non-compliance allows for the most efficient use of the development envelope whilst also delivering a scheme with an abundance of private and communal open space areas, without of resulting in any unreasonable impacts for surrounding areas.

Compliance with the height of buildings standard would result in a reduction to private and communal open space areas, detracting from the quality of the lifestyle offering and dwelling mix offered to the community.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 64A(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. 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”

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

The 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.

Adequate solar access to the surrounding sites will be maintained by the proposal.

The area of non-compliance resulting from the height breaches will not create any unacceptable visual privacy impacts.

The proposal is a result of broader master planning and is appropriate given its current and future context.

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.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 64A(4)(A)(I)

Clause 64A(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.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 64A(4)(B)(II)

Clause 64A(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. The proposal is also consistent with the land use objectives that apply to the site under BLEP (1988). The subject site is located within the 7(f2) (Urban Coastal Land Zone). In accordance with the zone

objectives, urban development is only permitted in the zone where due consideration is given to the matters outlined in **Table 5** below.

Table 5 - Assessment of compliance with land use zone considerations

Consideration	Assessment
<i>(i) the need to relocate buildings in the long term,</i>	As demonstrated in the Erosion and Sediment Control Plan at Appendix R , the coastal processes will not impact the structural integrity of the development, and a time limited approval is not required.
<i>(ii) the need for development consent to be limited to a particular period,</i>	As demonstrated in the Erosion and Sediment Control Plan at Appendix R , the coastal processes will not impact the structural integrity of the development, and a time limited approval is not required.
<i>(iii) the form, bulk, intensity and nature of the development, and</i>	The Civil Report provided at Appendix H demonstrates the structural integrity of the proposed built form.
<i>(iv) continued safe public access to the site, and</i>	All access points are obtained via existing streets outside the coastal land use zone.
<i>(d) to allow detailed provisions to be made, by means of a development control plan, to set aside specific areas within the zone for different land uses and intensities of development.</i>	Not required in this instance.

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.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 64A(4)(B) AND CLAUSE 64A(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 64A(5) are considered below.

Clause 64A(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 64A(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 64A(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 64A variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of buildings development standard contained within clause 40(b)(ii) of BLEP (1988) 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 1.8 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 64A 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

This report is dated 2 August 2022 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of 29 Shirley Street (**Instructing Party**) for the purpose of Clause 4.6 Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

In preparing this report, Urbis may rely on or refer to documents in a language other than English, which Urbis may arrange to be translated. Urbis is not responsible for the accuracy or completeness of such translations and disclaims any liability for any statement or opinion made in this report being inaccurate or incomplete arising from such translations.

Whilst Urbis has made all reasonable inquiries it believes necessary in preparing this report, it is not responsible for determining the completeness or accuracy of information provided to it. Urbis (including its officers and personnel) is not liable for any errors or omissions, including in information provided by the Instructing Party or another person or upon which Urbis relies, provided that such errors or omissions are not made by Urbis recklessly or in bad faith.

This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.



APPENDIX