

Attachment to Council Report

S4.55 10.2021.219.4 – 116 & 118 Jonson Street Byron Bay

Clause 4.6 Objection – Height of Buildings

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

Introduction

I, Kate Singleton, of PLANNERS NORTH, 6 Porter Street, Byron Bay on behalf of AIDOP No. 5 Pty Limited and AIDOP No. 6 Pty Limited object under Clause 4.6 Byron Local Environmental Plan 2014 (BLEP14) to the Development Standard relating to Building Height at Clause 4.3 of BLEP14.

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

This objection is to be considered in conjunction with the Statement of Environmental Effects (SEE) published for a Section 4.55(2) Modification Application to development consent 10.2021.291.1 for a mixed-use development comprising retail and serviced apartments at 116-118 Jonson Street.

Notwithstanding that case law establishes that a Clause 4.6 variation is not required in relation to a Modification Application, this variation request is submitted to assist in Council's assessment of the application.

Background

Development Application No. 10.2021.291.1 was approved on 4 November 2021. The application was described as:

Demolition of existing backpackers hostel and construction of a mixed use development comprising retail premises and serviced apartments.

The approved development included building elements higher than the 11.5m height limit prescribed by Clause 4.3 of BLEP14. A Clause 4.6 objection to the variation of that clause was supported in the determination of the application. The subject Clause 4.6 objection provides an updated version of the original to address the modified plans.

Modification applications were subsequently approved (Modification Application 10.2021.293.2 and 10.2021.293.3). Minor amendments to the building height were approved in accordance with Modification Application 10.2021.291.2.

Structure of Objection

This objection:

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

Clause 4.6 Objection

Development Standard

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

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

The relevant portion of the Heights of Building Map (Sheet HOB_003) of the BLEP14 is shown below. It specifies a maximum height of 11.5m for the site.



Extract from BLEP14

Section Sheet A30.02 Revision 4 dated 18 April 2023 identifies those built elements exceeding the 11.5m height limit. The following table provides a comparison of the as approved and proposed building height variation sought.

Table B1 Building Height Variations

Building component	Height (RL) Original Approval	Height (RL) As Modified	Height (RL) Proposed	Height (m) Original Approval	Height (m) As Modified	Height (m) PROPOSED	Height above 11.5m max (m) Original Approval	Height above 11.5m max (m) As Modified	Height above 11.5m max (m) PROPOSED
Pool balustrade	15.65	16.18	16.29	12.65	13.18	13.29	1.15	1.68	1.79
Terrace roof fencing	15.65	-	-	12.65	-	-	1.15	-	-
Solar array	16.75	-	-	13.75	-	-	2.25	-	-
Pool deck	-	15.18	15.24	-	12.18	12.24	-	0.68	0.74
Pool plant	-	16.18	16.18	-	13.18	13.18	-	1.68	1.68

Lift overrun	17.10	17.48	17.48	14.1	14.48	14.48	2.60	2.98	2.98
Mechanical ventilation	-	16.5	16.60	-	13.5	13.60	-	2.04	2.10

The lift overrun, mechanical ventilation and balustrade are the most significant structures in terms of the percentage of exceedance above the 11.5m. This is over a relatively small proportion of the building and will not be visible from the street. The pool balustrade comprises a minimal exceedance of 1.79 metres in comparison with the approved exceedance of 1.15 metres over a very small proportion of the building.

In relation to the lift overrun, the height of the lift overrun has not changed however an additional service lift has been added which increases the area of lift provision on the rooftop, exceeding 11.5m.

Justification for the exception and matters for consideration

Compliance to Clause 4.6 BLEP14

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

(1) The objectives of this clause are as follows:

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

Comment:

The lift overrun has been intentionally co-located directly adjacent the Mercato building services to the north to reduce any perceived solar access or visual impacts.

The mechanical ventilation has been sited to minimise potential adverse impacts as viewed from the street. The application of an appropriate degree of flexibility in relation to the building height standard provides for a greater level of amenity for the proposed development. The proposed variation is sought in relation to elements that provide for the amenity of guests and services for the building and do not result in adverse impacts. Allowing flexibility in the application of this Clause will result in a building design which provides a superior outcome in terms of amenity.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

Comment:

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

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

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

Comment:

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

unnecessary in the circumstances of the case.

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

1. The proposed encroachments are not visible from the surrounding area and will not adversely impact on the streetscape.
2. The proposed variation sought does not add to the bulk or scale of the proposed building.
3. Strict compliance with the development standard would likely result in the removal of access to amenities on the rooftop for guests but would not alter the overall design of the building.
4. The proposed variation will not adversely impact on adjoining properties in terms of views, solar access or privacy.
5. The proposed development has a maximum FSR of 1.3:1 compliant with Byron LEP 2014, demonstrating that the proposed development is not excessive in terms of the proposed intensity.
6. The design of the proposed building by locating amenities on the rooftop provides for substantial ground floor open space within the site which will be accessible to the general public and guests of the hotel. This is considered to be a superior outcome to the provision of private guest only facilities on the ground floor.

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

Clause 4.6 of the BLEP14 allows a proponent to seek approval from the Council for consent to be granted to an application that contravenes a development standard. As outlined in this SEE, the proposed development complies with all other standards of BLEP14 and BDCP 2014 will create a minimal impact on the locality and its surrounds.

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

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

Comment

The proposed variation to the building height will not result in adverse impacts on adjoining properties in terms of solar access or views. The proposed elements in relation to which variations are sought are sited as such as to not disrupt views from surrounding properties or the public street. The provision of rooftop amenities for serviced apartment guests provides the opportunity to incorporate significant open space on the ground floor and make this publicly accessible. This area is some 650m² and will provide an "oasis" within the existing town centre. It is submitted that given the lack of environmental impact and arguable positive impact on the built environment there are sufficient planning grounds to justify the proposed contravention.

(4) Development consent must not be granted unless:

(a) the consent authority is satisfied that:

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

Comment

This Appendix is our formal written request.

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

Comment

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

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

The proposed finished roof or parapet does not exceed the 11.5m as detailed in the submission however several elements protrude beyond this.

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

The proposed height of the building complements the streetscape and character of the area. The proposed built form has been designed to present as three separate elements. The general height of the building is consistent with existing surrounding development and the elements of non compliance are set well back and not visible from the surrounding streetscape.

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

The proposed variation will not result in significant adverse visual impact with elements designed to minimise their visibility. There will be no disruption of views or loss of privacy resulting from the proposed variation. As indicated in the solar access diagrams, the proposed variation does not increase the impacts of overshadowing on existing surrounding developments.

The objectives of Zone B2 are:

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

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

The proposed mixed use development is consistent with the objectives of the B2 Local Centre, providing for a range of retail uses to serve the B2 Local zone needs of people who live in and visit the local area. The restaurant/café and retail premises on the ground floor will have an outlook to the internal courtyard and this substantial area of open space comprising some 650m².

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

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

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

Comment

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

(5) The Secretary must consider:

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

Comment

It is submitted that no issues of State or Regional Environmental Planning arise from the proposed variation. The proposed development is considered to be consistent with relevant objectives and directions of the *North Coast Regional Plan 2036* particularly in relation to the following:

- Direction 6: Develop successful centres of employment;
- Direction 14: Provide great places to live and work;
- Direction 15: Develop healthy, safe, socially engaged and well-connected communities; and
- Direction 20: Maintain the region's distinctive built character.

Wehbe v Pittwater Council

In his decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827, Preston CJ expressed the view that there are five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy.

Those five tests are considered in the table below.

(i) <i>The objectives of the standard are achieved notwithstanding non-compliance with the standard</i>	<p>The BLEP14 Clause 4.3 Height of Buildings and corresponding responses are as follows:</p> <p>(1) <i>The objectives of this clause are as follows:</i></p> <p>(e) <i>to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,</i></p> <p>Comment</p> <p>The proposed height of the development is compatible with the character, amenity and landform of the area. All elements exceeding the height limit are set well back within the site and will not be visible from the adjoining street. The proposed variation provides for the appropriate use of the rooftop for guests of the facility only and enables the provision of a substantial area of ground floor space for the local community.</p> <p>The proposed building has been broken into 3 distinct forms to alleviate the presentation to the streetscape.</p>
(ii) <i>the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i>	Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.
(iii) <i>the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	Not applicable. The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.
(iv) <i>the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and</i>	This objection to the development standard requested does not rely on this reason.

<i>(v) the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	This objection to development standard requested does not rely on this reason.
---	--

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

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

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

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

Public interest and matters of State or regional significance

Is the proposal in the public interest?

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

- Strict compliance with the height variation will result in an amended building design which merely restricts access to the rooftop. This would result in the loss of ground floor open space available for the broader community and have no material effect on the presentation of the building to the street.
- The proposal provides for optimal utilisation of the site within the town centre and is consistent with Council's plans and strategies for Byron Bay town centre.
- The proposal provides for employment both during and post construction.
- No unreasonable public disadvantages result from the proposed variation.

Matters of State or Regional Significance

The non-compliance with CI 4.3 Height of buildings standard does not raise matters of significance for State or regional planning. The proposed development is consistent with the aspirations of the *North Coast Regional Plan 2036*.

The public benefit of maintaining the standard

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

Summary justification

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

The proposed height of the building is consistent with that of existing surrounding development in the locality.

- The proposed variation to the height limit does not result in a materially different presentation to Jonson Street or the western elevation of the building.
- The proposed variation does not impact on the bulk or scale of the proposed built form which has been designed to present three distinct elements to Jonson Street.
- The proposed development will not adversely impact on existing or future surrounding development in terms of view, privacy or solar access.
- The proposed variations satisfy the tests and considerations established in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

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

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



Kate Singleton RPIA
Partnership Principal
PLANNERS NORTH