

## **Clause 4.6 Variation to Development Standard Building Height Residential Development Application**

**Lot 55, DP874223 – 32 Marlin Circuit, Hat Head**

**October 2023**

### **1.0 Request to Vary a Development Standard**

The request to vary a development standard has been prepared under Clause 4.6 of the Kempsey Local Environmental Plan 2013 (the KLEP) and is submitted to Council as part of the Statement of Environmental Effects to the development application for a Residential Building at 'the site', land at Lot 55 DP 87423, No. 32 Marlin Circuit, Hat Head.

Clause 4.6 of KLEP allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of these matters before granting consent to the development that relies upon contravention of the development standard.

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the particular zone within which the development is proposed to be carried out.

This Clause 4.6 variation request utilises the relevant principles referred to above and should be read in conjunction with the Statement of Environmental Effects for the proposal.

### **2.0 Development Standard to be varied.**

The development standard to be varied as part of this development application is Clause 4.3 Height of Buildings. Under KLEP the mapped maximum building height is 8.50 metres.

### **3.0 Nature of Variation**

#### **3.01 Numerical summary**

Natural Surface Levels (NSL) of the site have been surveyed and the 8.5m Height of Building limit is illustrated on the Ian Bassett & Partners (IB&P) Elevation and Section plans. The NSL levels vary diagonally across and up the

site away from the relative level (northern) area of the site.

The development application proposes a front building setback of 150m with side setbacks of 20m and 25m.

The ground level at the northern boundary of the 'build area limit' (determined by the Bushfire Report) is RL 60.00 and the southern boundary of this area is RL 72.50. This equates to a 12.5m cross fall.

The height of building at the lowest ground level within the 'build area limit' is 14m and at the highest point within the 'build area limit' is 4m.

The building structure encroaches into the HoB line with the change in topography and is unavoidable within the prescribed 'build area limit' zone.

This results in a height variation ranging from -4.4m to +5.5m The exceedance does not result in additional floor space and the area below the main floor and deck levels consists of supporting structure only.

**(Refer Annexures A & B)**

### **3.02 Site Context**

Site context is a key consideration in determining whether it is reasonable and/or necessary to conform strictly to a development standard. Existing built form in the area comprises a mix of older and modern single residential buildings comprising a variety of architectural styles with mostly single storey structures.

The proposal complies with the FSR and boundary setbacks and seeks a height variation to respond to the site's steep topography.

### **3.03 Design Considerations**

The proposed development accords with the desired future character of the precinct with the bulk and scale reflecting the FSR and setback requirements.

The proposed building form, selected colours and material are a direct response to streetscape and locality as well as introducing a fresh contemporary perspective along the existing streetscape. The proposal is considered to positively contribute to the streetscape.

## **4.0 Justification for Contravention of the Development Standard**

Sub clause 3 and 4 of the *Clause 4.6 Exemptions to development standards* set forth matters which Council must consider and must be satisfied of, in order to justify the contravention of the development standard:

*(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*

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

*(4) Development consent must not be granted for development that contravenes a development standard unless—*

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

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because 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, and*

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

**4.1** *Clause 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

The case of *Whebe v Pittwater Council (2007)* outlined five ways through which a variation to a development standard has been considered unreasonable or unnecessary.

- The objectives of the standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unreasonable.
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting departures from the standard and hence compliance with the standard is unnecessary and unreasonable
- 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.

**4.1.1** The underlying objectives or purpose of the development standard are achieved notwithstanding the non-compliance.

The objectives of the development standard contained in Clause 4.3 of the KLEP are:

**4.3 Height of buildings**

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

*(a) to preserve the existing character in residential and business areas within Kempsey,*

*(b) to nominate building heights that will provide a transition in built form and land use intensity within the area covered by this Plan,*

*(c) to protect the amenity of existing and future dwellings from adverse impacts on privacy, solar access and on the urban streetscape.*

(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](#).

*(1) Objective (a) - to preserve the existing character in residential and business areas within Kempsey,*

The proposed development is consistent with the height, bulk and scale provisions of KLEP 2013. The proposal complies with Council's Floor Space Ratio and the height limit variations are considered acceptable in relation to the topography of the site.

*(1) Objective (b) - to nominate building heights that will provide a transition in built form and land use intensity within the area covered by this Plan,*

There are no transition height limits or land use intensity issues that apply to the site.

*(1) Objective (c) - to protect the amenity of existing and future dwellings from adverse impacts on privacy, solar access and on the urban streetscape.*

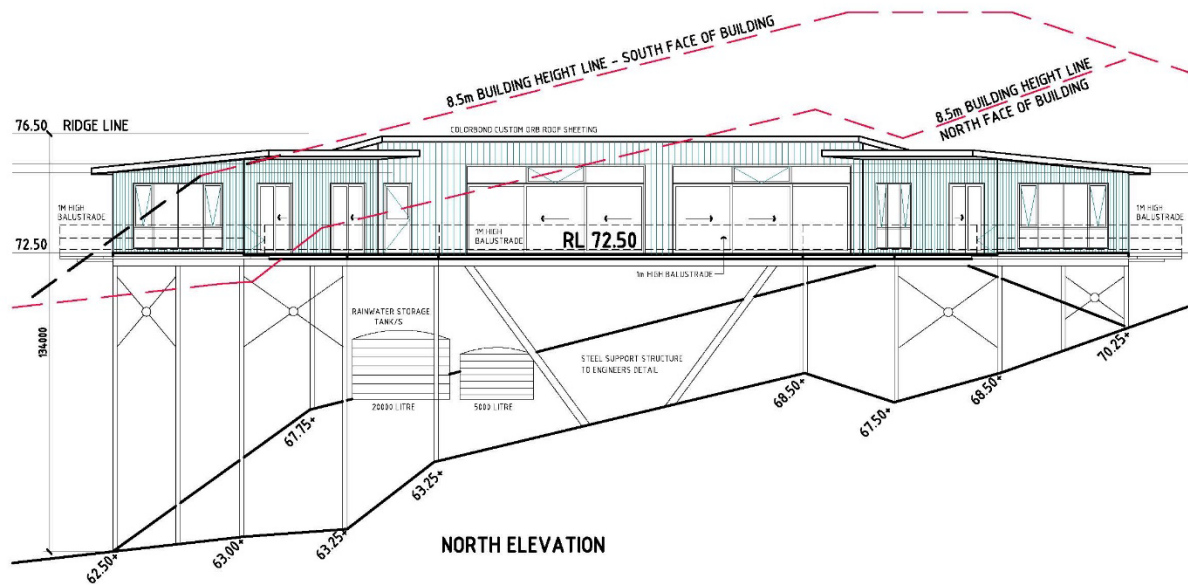
The visual impact of the height variation is minimal from the street front. No water views or other vistas available to adjacent properties have been identified as impacted. Potential overshadowing impacts attributable to the height variation are non-existent and there are no privacy issues to be considered.

(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](#).

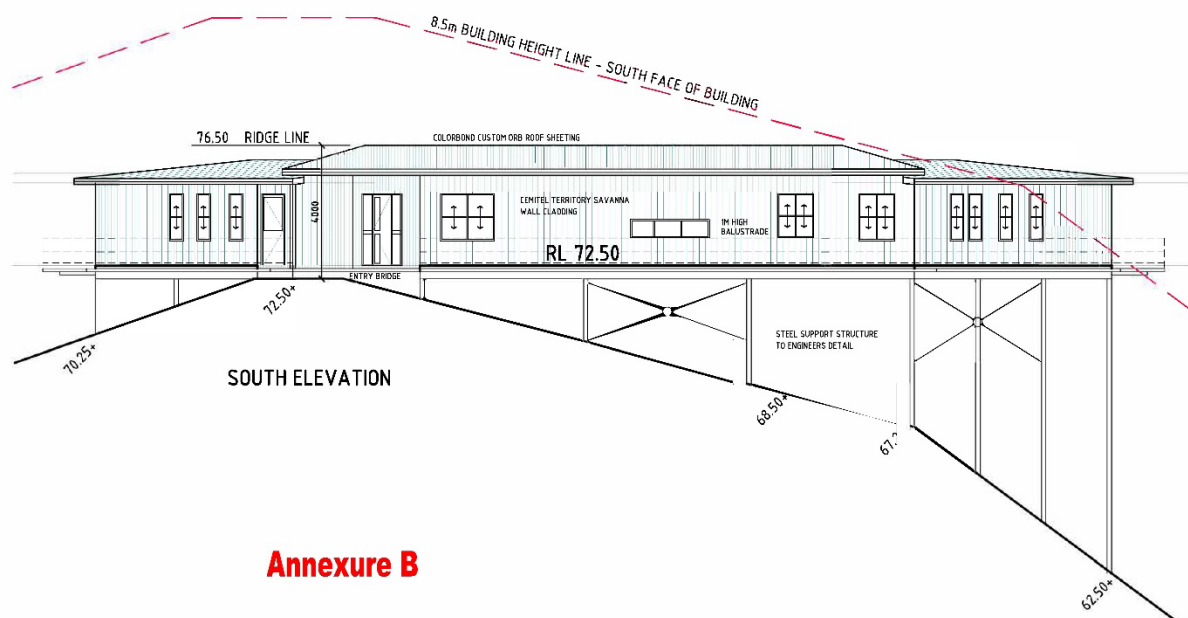
This 4.6 application seeks to amend this objective.

## **Conclusion**

In conclusion, the underlying objectives or purpose of the development standard are achieved notwithstanding the non-compliance with the numerical standard.



## Annexure A



## Annexure B