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## No. 4 Hungerford Lane, Kingscliff Tweed Local Environmental Plan 2014 Variation Report

### 1.1 Brief

This report has been created in support of the proposed development application for a Residential Flat Building (4 Units) on the site at No. 4 Hungerford Lane, Kingscliff. This Variation Report will form part of the Statement of Environmental Effects.

### 1.2 Variations Sought

1. Part 4 – Clause 4.3; and
2. Part 4 – Clause 4.6.

### 2.1 Part 4 – Clause 4.3 – Height of Buildings

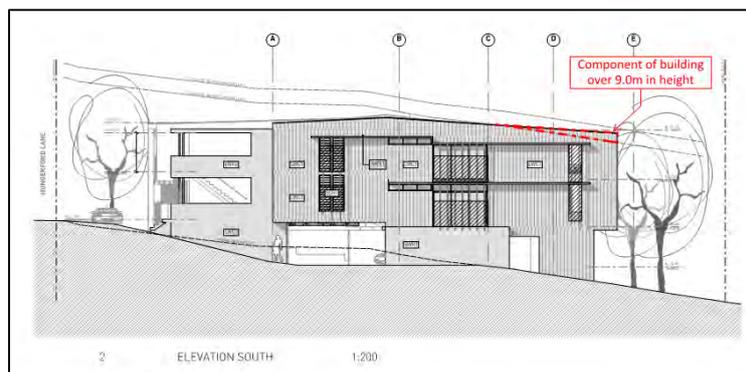
(1) *The objectives of this clause are as follows:*

- (a) *to establish the maximum height for which a building can be designed,*
- (b) *to ensure that building height relates to the land's capability to provide and maintain an appropriate urban character and level of amenity,*
- (c) *to ensure that taller development is located in more structured urbanised areas that are serviced by urban support facilities,*
- (d) *to encourage greater population density in less car-dependant urban areas,*
- (e) *to enable a transition in building heights between urban areas comprised of different characteristics,*
- (f) *to limit the impact of the height of a building on the existing natural and built environment,*
- (g) *to prevent gross overshadowing impacts on the natural and built environment.*

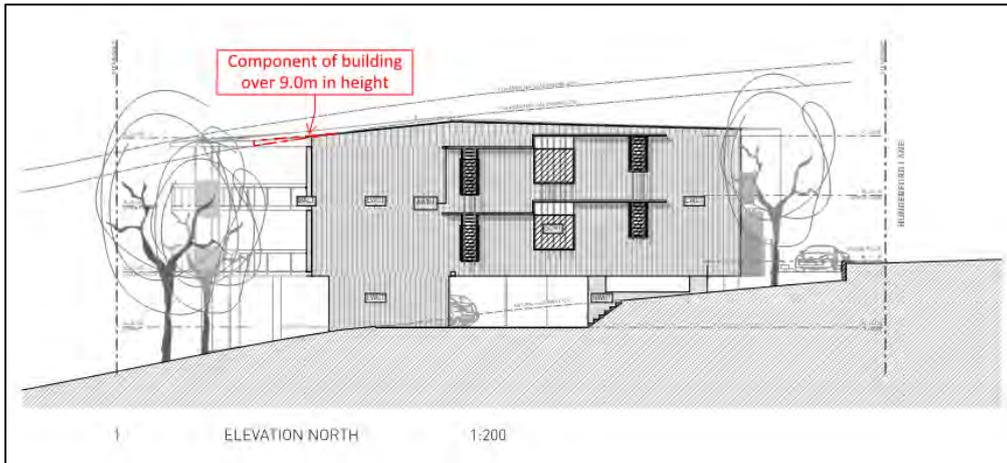
(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

### Proposal:

It is proposed that the building will have a maximum height of 9.6m in the south-west corner.



**Figure 1:** Elevation south of proposed development.

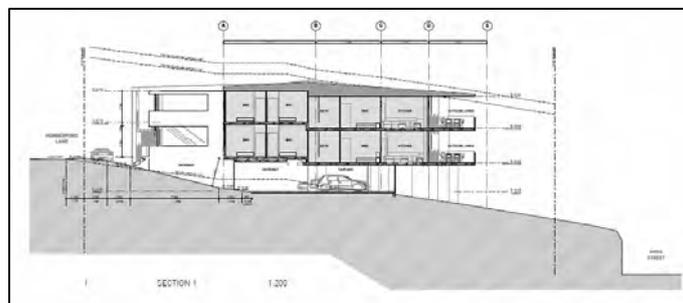


**Figure 2:** Elevation north of proposed development.

**Response:**

Firstly, to provide a context of the surrounding area, the subject site is located in a prominent location in Kingscliff, within close proximity to centre activities along the western portion of Hungerford Lane and along Marine Parade which are approximately 400m walking distance from the subject site. The subject site also has access to a bus stop located along Marine Parade which provides connections to the surrounding suburbs. Furthermore, the subject site is located on a block which has been zoned within the R3 Zone - Medium Density area. Given the zoning of the area, combined with the proximity of the site to an extensive range of physical and social infrastructure, the subject site is well suited to providing higher density residential uses around centre activities. The proposed development will promote a walkable neighbourhood given the sites proximity to the centre activities along Marine Parade.

As part of the response to further issues raised by Council, the Residential Flat Building has been re-designed to achieve a building height of 9.6m at its highest point in the south west corner of the building. It has been determined that the proposed development has exceeded the height requirement by 6.66% of the allowable height of 9.0m. As demonstrated in Figure 1 and 2 above, only a very limited portion of the building will exceed the 9.0m height limit. The proposed building has provided a stepped design which conforms to the contours of the land (refer to Figure 3). Given the site has a significant slope towards the rear boundary, combined with the requirements set for maximum access driveway grades, it has been determined that reducing the level of the car parking area would not be feasible. By lowering the car parking level further, the slope of the driveway servicing the proposed would be too significant resulting in an unsafe access arrangement for future residents.



**Figure 3:** Section 1 of proposed development.



Furthermore, we have assessed that Control 6 – Height – Building Height – d. of the Tweed DCP 2008 allows for a maximum wall plate height of 9.6m. The proposed development has been designed in accordance with this provision.

The concept plans by Refresh Design have provided additional details regarding the overshadowing impacts of the proposed development versus the impacts of a fully compliant development. As demonstrated in these drawings, the slight projection into the 9.0m building height would not result in a perceivable difference with respect to the level of overshadowing to adjoining dwellings. It is assessed that the proposed building height, although slightly more than that allowable under the Tweed LEP 2014, will ensure that all adjoining landowners will still have an adequate access to sunlight and prevailing breezes.

We have assessed that the built form along Hungerford Lane is comprised of two storey Residential Flat Buildings. It is noted that the developments at 1 and 6 Hungerford Lane have well exceeded the 9.0m height limit. With that said, the proposed development has been designed to present as being a two storey building when viewed from Hungerford Lane which reflects the prevailing building form and scale. The view to the small portion of the building encroaching above the overall height requirement is positioned at the rear of the site and will therefore have no impact on the streetscape character prevailing in the street.

It is our assessment that the impacts associated with the proposed development exceeding the height limits will be negligible. The proposed development has been designed to appropriately respond to the constraints facing the site. We have assessed that there will be minimal impacts on adjoining landowners and a high level of residential amenity will be achieved. The subject site is well suited to the proposed medium scale residential use and will be well integrated into the surrounding locality. The proposed development is assessed to be in accordance with the objectives set by Part 4 – Clause 4.3 of the Tweed LEP 2014.

## **2.2 Part 4 – Clause 4.6 – Exceptions to development standards**

- (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.*
- (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.*
- (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 Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must 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.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
- (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
  - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note. When this Plan was made it did not include all of these zones.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
- (a) *a development standard for complying development,*
  - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
  - (c) *clause 5.4.*

**Response:**

The proposed development has applied the guidelines outlined in the document entitled, 'Varying development standards: a guide', published by the NSW Department of Planning and Infrastructure dated August 2011. Specifically, the development will be assessed against the questions outlined in Appendix 3: Application Form to vary a development standard.

**1. What is the name of the environmental planning instrument that applies to the land?**

The Tweed Local Environmental Plan 2014 (Tweed LEP 2014).

**2. What is the zoning of the land?**

The current zone under the Tweed LEP 2014 is R3 – Medium Density Residential Zone.

**3. What are the objectives of the zone?**

The objectives of the R3 zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

It is assessed that the proposed development for a Residential Flat Building will be in accordance with the objectives set for the R3 zone in that it has proposed a medium density residential use, aimed at providing a variety of housing choice to the region.

- 4. What is the development standard being varied? e.g. FSR, height, lot size; and**  
**5. Under what clause is the development standard listed in the environmental planning instrument?**

The development standard proposed to be varied is Part 4 – Clause 4.3 – Height of Building of the Tweed LEP 2014.

**6. What are the objectives of the development standard?**

The objectives of clause 4.3 are as follows:

- (a) to establish the maximum height for which a building can be designed,
- (b) to ensure that building height relates to the land's capability to provide and maintain an appropriate urban character and level of amenity,
- (c) to ensure that taller development is located in more structured urbanised areas that are serviced by urban support facilities,
- (d) to encourage greater population density in less car-dependant urban areas,
- (e) to enable a transition in building heights between urban areas comprised of different characteristics,
- (f) to limit the impact of the height of a building on the existing natural and built environment,
- (g) to prevent gross overshadowing impacts on the natural and built environment.

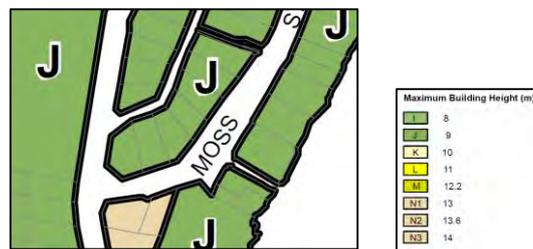
As identified above, the proposed development is seeking a variation to the height limit outlined within Part 4 – Clause 4.3 – Height of Building of the Tweed LEP 2014. As per the above assessment undertaken as part of the proposed variation to Clause 4.3, it has been determined that the proposed development will achieve compliance the relevant objectives set for building height outlined in Clause 4.3.

**7. What is the numeric value of the development standard in the environmental planning instrument?**

The building height is set by Part 4 – Clause 4.3 – Height of Building of the Tweed LEP 2014 (2) which states:

- (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.*

It has been identified that the Height of Building Map sets a standard of 'J' which is 9.0m.

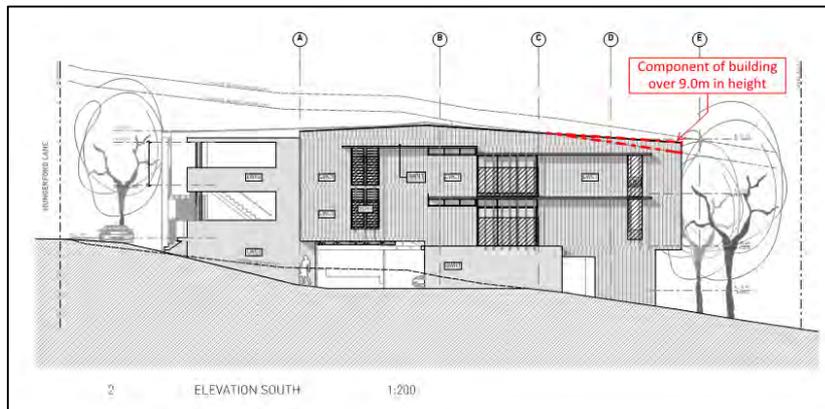


**Figure 3:** Section 1 of proposed development.

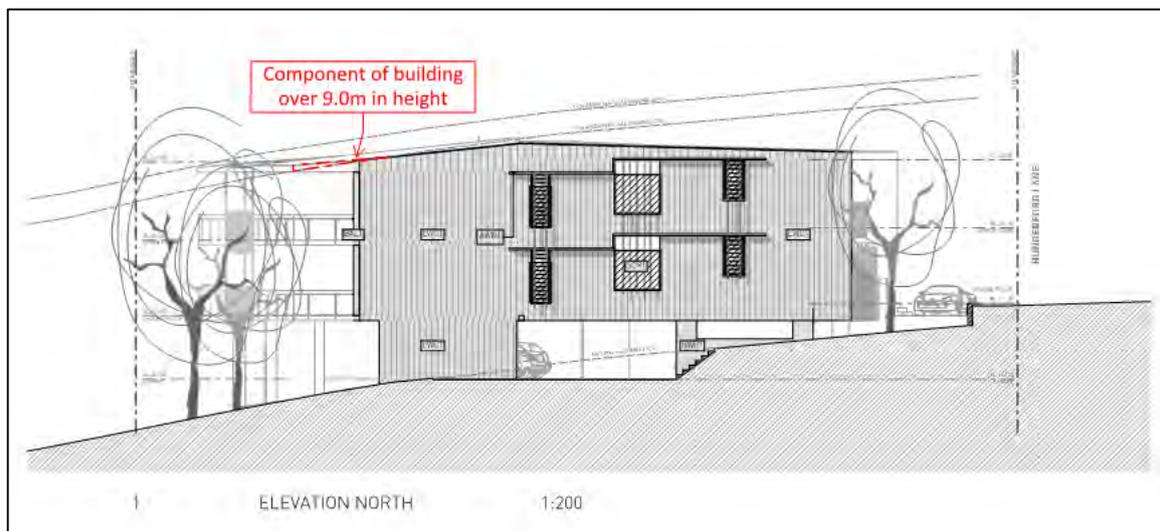
**8. What is proposed numeric value of the development standard in your development application?**

As part of the response to further issues raised by Council, the proposed Residential Flat Building has been re-designed to achieve a building height of 9.6m at its highest point in the south west corner of the building.

Given the slope of the land, the height of the building varies slightly above the 9.0m along the rear elevation, with only a slight projection resulting in the south east corner of the building.



**Figure 4:** Elevation south of proposed development.



**Figure 5:** Elevation north of proposed development.

It is assessed that the majority of the proposed building has achieved compliance with the 9.0m height requirement set by Clause 4.3 of the Tweed LEP 2014.

**9. What is the percentage variation (between your proposal and the environmental planning instrument)?**

It has been determined that the proposed development has exceeded the height requirement by 6.66% of the allowable height of 9.0m.

It is submitted that a 10% is often used as a reasonable level of variation as outlined in Recommendation 1 of the ICAC's report dealing with the use of SEPP 1.

**10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?**

The proposed development application has been designed to meet the relevant objectives set for a Residential Flat Building as set by the Tweed LEP 2014, the Tweed DCP 2008 and the SEPP No. 65 Apartment Design Guidelines.



With respect to the height of building standard applied in Clause 4.3 of the Tweed LEP 2014, the application of a pure numerical development standard is unreasonable and unnecessary in the circumstance of this case.

As outlined within the proposed variation for Clause 4.3, strict compliance with the Height of Building standard would be unreasonable or unnecessary in the case of the development at No. 4 Hungerford Lane, Kingscliff. The subject site has a significant grade which sees the site sloping down towards the rear boundary. The proposed development has been appropriately designed to conform to slope of the land by implementing a stepped design. Furthermore, the proposed access driveway servicing the proposed development has been designed to generally comply with the maximum grades set by AS2890.1.

It has been determined that achieving a development under the 9.0m building height standard would require an increase in the current proposed grade of the driveway. Requiring this would in turn result in an impractical access arrangement which has the potential to jeopardise the safety of future residents of the subject site.

As part of our response to the further issues letter to Council, it has been demonstrated in the concept plans by Refresh Design that despite exceeding the height of building standards, the proposed development will not result in an unreasonable level of overshadowing compared to that of a fully compliant building.

The proposed development has been designed to present as being a two storey building which is well under the 9.0m height of building requirement when viewed from Hungerford Lane which reflects the prevailing building form and scale in the area. The view to the small portion of the building encroaching above the overall height requirement is positioned at the rear of the site and will therefore have no impact on the streetscape character prevailing in the street.

It is our position that there are sufficient environmental planning grounds to justify the proposed development in its current form.

It has been outlined by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827, that there are 5 different ways in which an object may be well founded and that approval of the objection may be consistent with the aims of the policy. The following provides an assessment against these tests:

*1. The objectives of the standard are achieved notwithstanding noncompliance with the standard;*

**Response:**

As demonstrated in the above assessment, the proposed development will meet the objectives set for the Height of Building, as well as for the R3 - Medium Density Residential Zone.

*2. The underlying objective of purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

**Response:**

It is assessed that the Height of Buildings standards outlined in Part 4 – Clause 4.3 are relevant to the proposed development. With that said, it is our position that the extent of the variation sought is considered minimal in the context of the proposed development.

*3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

**Response:**

As previously mentioned, we have determined that achieving a development under the 9.0m height of building standard would require an increase in the current grade of the proposed driveway. Requiring this would in turn



result in an impractical access arrangement which has the potential to jeopardise the safety of future residents of the subject site.

Based on this fact, it is assessed that lowering the height of the building would defeat and thwart the objectives set by the Tweed LEP 2014 and the Tweed DCP 2008 as the above development scenario would create a worse outcomes for the site.

*4. 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;*

**Response:**

The proposed development does not rely on recently approved applications which have received consent that have abandoned the height of building development standard.

*5. The compliance with development standard is unreasonable or in appropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

**Response:**

This is not applicable. Given the proximity of the subject site to the centre activities along Marine Parade, it is submitted that the R3 – Medium Density Residential Zoning is appropriate for the site.

***11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.***

We have undertaken an assessment of the proposed development against Section 5 Objects outlined in the *Environmental Planning and Assessment Act 1979*:

*Section 5 - Objects*

*The objects of this Act are:*

*(a) to encourage:*

- (i) 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,*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land,*

It is our assessment that the proposed development has achieved the objectives set by the *Environmental Planning and Assessment Act 1979*, based on the following reasons:

- The proposed development is a permissible use within the Medium Density Residential Zone;
- The proposed development will go towards meeting the objectives of providing a range of housing options and meeting the demand for house in the region; and
- The proposed development will not have an adverse impact on environmental values present in the area.

***12. Is the development standard a performance based control? Give details.***

The development standard outlined in Clause 4.3 is not a performance-based control, but rather it is a numerical standard.

It is our position that the application of a non-performance based height standard to be unreasonable as it does not allow a proper assessment of the site constraints.



**Summary:**

In Summary:

1. The proposed development is assessed to meet the objectives set by the relevant state and local legislation.
2. It has been determined that achieving the height standards would not necessarily result in a better design outcome as a result of the need for minimum access grades. The current proposal achieves a good design outcomes which does not result in any negative impacts on the adjoining landowners.
3. The proposed development does not offend the requirements set for the EPA Act.
4. The non-compliance does not raise any matter of State or regional significance.

We now request that Council proceed in considering the proposed development based upon its merits, taking this submission to Clause 4.6 into account.