

State Environmental Planning Policy No.1 – Building Height

State Environmental Planning Policy No.1 provides for the mechanism by which variation to 'statutory' development standards can be both assessed and supported.

Relevantly, the policy provides for the following:-

Clause 3 of the policy states, inter alia:

"3. This policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act."

The specified objects of the Environmental Planning and Assessment Act, 1979 state inter alia:-

"to encourage:

- (i) the proper management, development and conservation of natural and man-made 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".*

Clause 6 of the policy states, inter alia:-

"6. Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection".

Section 79C(1)(a)(ii) of the Act provides for the requirement that the consent authority must take into account any draft environmental planning instrument that has been placed on exhibition of which it has been notified. In this regard, the SEPP 1 Policy has been prepared and exhibited.

It is pertinent to note that Draft Amendment No. 1 states that a SEPP No. 1 Objection must include:

- (a) a written objection that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and which specifies the grounds of the objection, and*
- (b) evidence which demonstrates that the development will be consistent with any express aims or objectives of any environmental planning instrument (including this policy) applying to the development.*

Accordingly, this objection pursuant to SEPP No.1 is made with regard to the adopted and draft versions of SEPP No.1. The objection is in respect of the planning standard identified within Clause 16 of the Tweed Local Environmental Plan 2000, specifically seeking variance to the two (2) storey development standard prescribed for the site.

Clause 7 of SEPP 1 provides the discretion and power to a consent authority to support SEPP No. 1 Objections and grant development consent. This clause states inter alia:-

"7. Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in Clause 34, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in Clause 6."

Accordingly, the applicant seeks the support of the Council in respect of the SEPP No. 1 Objection set out herein and requests that the Development Application be approved, notwithstanding non-compliance with the standard prescribed within Clause 16 of the Tweed Local Environmental Plan 2000. Specifically, this request relates to the following:-

1. That area shown within the attached plans. This element stretches for a maximum and minimum horizontal distance of 14.1m and 13.35m respectively and incorporates a partial third storey evident from Moss Street and Cudgen Creek

Please refer to the attached figures for further detail in this regard.

EXTENT OF STATUTORY VARIATION

Please also refer to the diagram above and scaled within the attached plans. The extent of three storeys extends for a maximum distance of 14.1m horizontally.

Please refer to the attached section diagrams prepared by Lightwave Architects in this regard.

ASSESSMENT OF APPLICATION FOR VARIATION

The appropriate manner of dealing with a SEPP 1 objection is found in the judgment of Lloyd J in Winten Property Group Limited v North Sydney Council (2001) NSWLEC 46, where a number of questions are posed. These are addressed below.

DEVELOPMENT STANDARD

The first question in Winten asks whether the subject planning control is a development standard.

The relevant controls are set out in Clause 16 of the Tweed Local Environmental Plan 2000 which states, inter alia:-

16 Height of buildings

(1) Objective

- *to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.*
- (2) Consent must not be granted to the erection of a building which exceeds the maximum height or number of storeys indicated on the Height of Buildings map in respect of the land to which the application relates.*
 - (3) If an application for development consent made to the consent authority prior to the commencement of Tweed Local Environmental Plan 2000 (Amendment No 46) is not determined by the consent authority before that date:*
 - (a) the amendments made to Schedule 1 to this plan by Tweed Local Environmental Plan 2000 (Amendment No 46) do not apply to the determination of the application, and*

- (b) *the application is to be determined under this plan as if those amendments had not been made (that is, having regard to the definitions of height in relation to a building and storey in force under this plan immediately before that commencement).*

Unlike many other development standards, the objective supporting the prescribed requirements of Clause 16 are defined and outlined above in bold type.

The control in relation to number of storeys is clearly a development standard.

OBJECTIVES OF THE STANDARD

The second question in Winten asks what is the underlying object or purpose of the standard.

The matters relating to the objectives of a Planning Standard are the most fundamental element to the proper consideration of a SEPP No. 1 Objection. The importance in this regard was identified by the NSW Land & Environment Court by Justice Talbot (Lavender View Regency Pty Ltd – v – North Sydney Council, unreported) in which he states, inter alia:-

“When considering an objection made pursuant to SEPP 1, it has been well established that it is necessary to have regard to a number of matters. Firstly, the aim and objective of the development standard must be understood. Once that has been appreciated, the effect of the noncompliance upon the purpose of the development standard needs to be assessed. The assessment takes account of whether the aim and objective will be achieved notwithstanding that the standard will not be complied with. In other words, it is not the standard itself that is important, but rather it is the purpose which it is designed to achieve. The circumstance of the case that renders the imposition of a development standard unreasonable or unnecessary is that the development will nevertheless meet the identified planning purposes of the standard”.

“the purpose of the standard may be determined from the planning instrument or from an examination of the planning considerations which led to its formulation”.

JUSTIFICATION FOR VARIATION OF THE STANDARD AND MATTERS FOR CONSIDERATION

The objective providing foundation for the three (3) storey height limit affecting the subject site states, inter alia:-

- **to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.**

As discussed above and confirmed by judgments supported by the Land & Environment Court, the ability of a proposal to attain the objective of the standard and its intent are fundamental to the appropriateness of applying the standard in the first instance. We note therefore that the variation requested is done so with particular reference to the content and wording of the objective to the standard. Accordingly, we have broken down the request for variation in to three (3) specific headings, each of which is identified within the objective proper.

An analysis in this context has been carried out as follows:-

Is the development appropriate to its location and surrounding development??

It is contended that the development responds in the positive in relation to this question. In this regard, the key elements to consider are defined as follows:-

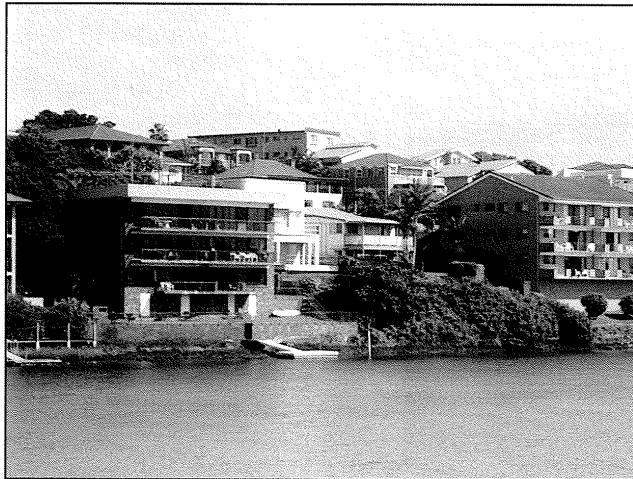
1. What is the character of the locality;
2. What elements form or shape development in the locality;
3. Will the development appear out of character with surrounding development; and

4. Will the development translate into excessive or avoidable impacts?

With reference to the above objective, it is noted that the site is located within the 2(b) zone and has therefore been identified for and previously developed as such, for the purposes of medium density residential housing. Inspection of the site confirms that the character is defined by the form and siting of existing buildings in the area and the fact that the majority of same incorporate elements if not a majority form of three and four storeys.

The fact that the area is now covered by a 2 storey height restriction has been acknowledged, with the proposal presenting largely as a 2 storey structure from Moss Street, with the architectural treatment of the building ensuring that the upper level roof level appears primarily as a roof structure as opposed to a legitimate level in its own right.

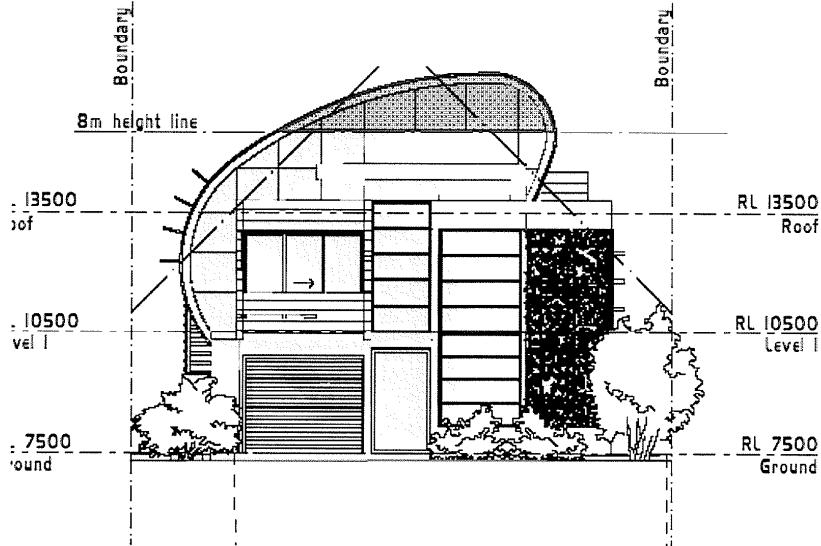
The upper level ridge cap of the proposal will be set at 17.0m AHD. This compares favourably to surrounding developments many of which incorporate a higher physical height than that proposed. Whilst there are some similarities in actual height between the proposal and the existing non conforming structures to the east and the west, it is pertinent to note that the upper level is effectively presented as a 2 storey form and does not cover the entire roof form. Likewise, the rear extent of non compliance is limited largely to balcony forms only.



The encroachment to three storeys at the rear of the building is only visible from the creek itself and in the context of surrounding properties will present as far more compliant than that existing (refer 4 storey buildings to the east and west of site – see photo to left). Given the slope of the land to the very rear (adjacent to the creek) it is unavoidable that floor plates will continue, thus creating an extension of liveable area depicting a liveable third floor, albeit a level physically lower than the two (2) fronting Moss Street.

The future character of the area will largely be dictated by both the continued development of medium density forms, however in terms of scale, the future character will more commonly be defined by the provisions of DCP 48, which will commonly sit at a height of 8m. Given the slope of the land and the character of existing buildings, it is expected that some variation to this requirement will be required in most instances. In this regard, the proposed development largely complies with the 8m height restriction, with the obvious exceptions of where the slope to the rear arises and the central upper level roofed area. In this regard, it is noted that the upper level roof form incorporate a curved form, thereby softening the visual prominence as opposed to more conventional roof forms. The latter effort is further assisted by the fact that no podium is proposed and flat roof forms are proposed at the lower levels.

When viewed from Moss Street, the area which exceeds 8m (as viewed by the public) is limited to an area of only 6.5m². The latter represents a mere 7% of the front façade coverage, thereby further demonstrating that the proposal represents a strong consistency with a 2 storey form as envisioned in DCP 48 (refer diagram below).



With respect to the character and amenity of properties to the rear, it is pertinent to note that the subject development will result in no unreasonable impact on these lands. In this respect, all views are maintained within reason, whilst no concerns exist in relation to overshadowing, privacy or the like. No view loss is expected.

Is the development appropriate to the environmental characteristics of the land ??

The form of the proposed development and indeed the introduction of the three (3) storey elements is directly related to the slope of the land and a need to effectively keep some consistency with the forms of surrounding developments.

Significant efforts have been made to ensure that earthworks are limited, primarily by way of introducing the proposed car lift arrangement, which in turn has allowed a lowering of the building.

CONSISTENCY WITH AIMS OF SEPP1

The third question in Winten asks whether compliance with the development standard is consistent with the aims of SEPP 1. The aims state:

'This policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable and unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act.'

This question also asks does compliance with the development standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the EPA Act. These objects state:

The objects of this Act are:

- *to encourage - 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;*
- *the promotion and coordination of the orderly and economic use and development of land.*

These matters have been addressed in detail above. The proposed variation clearly satisfies these requirements.

• • • • •

Other points of relevance to this objection are outlined below:-

- a. No view loss is expected in relation to the properties to the rear or those adjacent.
- b. No overshadowing impacts are to be created on surrounding allotments.

Council's attention is also drawn to the provisions of Circular No. B1 from the Department of Planning. This circular states, inter alia:-

"As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small, in others it may be numerically large, but nevertheless be consistent with the purpose of the standard."

In order to satisfy itself as to the appropriateness of the variation sought, we believe that Council should consider the following:-

- Is the variation consistent with the aims of SEPP1?;
- Is the development consistent with the identified objectives of the standard and does the extent of variation unreasonably increase the impacts of the development on adjacent properties (over and above a compliant form);
- Does the development represent the orderly and economic use of the land;
- Is the development unfairly constrained by the current standard given the precedence that surrounding developments present;
- Does the relatively young age of surrounding non-conforming developments present a restriction on the attainment of the objectives of Clause 16?

COMPLIANCE UNREASONABLE AND UNNECESSARY

The fourth question in *Winten* asks whether compliance with the development standard is unreasonable or unnecessary in the circumstances of case

Given the analysis of this submission, we consider that to require compliance with the standard would be unreasonable and unnecessary in the circumstances of the case. Indeed, given the constraints posed by the site and surrounds and the desired future character of the area, the application of variation to the standard would be unlikely to have adverse impacts on the continued application of the control in other instances.

OBJECTION IS WELL FOUNDED

The fifth question in *Winten* asks whether the objection is well founded.

For the reasons discussed in this submission, it is considered that the objection is well founded.



It is therefore requested that the SEPP No. 1 Objection made herein for variation to the number of storeys standard relevant to the site, be supported and the concurrence of the Director General be assumed.

()

()

Addendum to Council report 24/06/2008

Section B18–Tweed Coast Building Heights

The previous report to Council contained an error with regards to the acceptable solution standard for heights for 3 storey residential developments. As the site is nominated as 2 storeys, the heights as per Section B18 have been amended accordingly.

Standard	Requirement	Proposed
Building Height	External Wall Height: 6m (finished ground level to the uppermost ceiling or top plate of the highest external wall)	9.9m
	Maximum Height: 8m (finished ground level to the highest point on the ridge of the roof and including ancillary structures)	11.8m

In determining the application consideration should also be given to performance provisions within the DCP. The performance criteria relates to the minimisation of impacts on surrounding developments particularly overshadowing, privacy and the obstruction of views. New developments should be sympathetic to existing developments in scale and bulk.

As discussed previously in this report the development is not considered to result in unreasonable environmental impacts particularly with regards to overshadowing and privacy. Some views from adjoining properties across the subject site will be reduced, however these properties will retain the uninterrupted views of Cudgen Creek (refer to Council report 3 June 2008).

Views from surrounding properties such as those from the elevated side of Moss Street will not be significantly affected as a result of the proposal. The elevated side of Moss Street is heavily vegetated with mature trees and shrubs. This vegetation and the steep topography, results in physical screening of views of Cudgen Creek adjacent to the subject site. Distant views of the Creek and views of the ocean are visible from surrounding properties. It is considered that immediate views of the Creek would not be visible even if the proposal was consistent with the acceptable solution overall height of 8m as detailed above. To achieve the 8m overall height a significant redesign of the proposal would be required.

The applicant has advised the 8m height should not be taken from the proposed subterranean area rather it should taken from the finished ground level as demonstrated on the submitted plans. This interpretation is not considered to be consistent with the definition of the finished ground level as per the Tweed Local Environmental Plan 2000.



16th June 2008

Our ref: 00317

The General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Attn: Rebecka Groth

RE: DA 07/0471 – Proposed Dual Occupancy, No.14 Moss Street, Kingscliff

Dear Rebecka,

We refer to the above and our recent discussions regarding Council's latest resolution. Please note that as an appeal is underfoot in relation to this matter, this correspondence should be treated as 'Without Prejudice'.

In this regard, we advise that we have liaised with our client and we are confident that the building as proposed and in the context of the significant amendments made to date, cannot be reduced in height any further.

In this regard the following notes are relevant:

1. The building now has a flush surface podium and therefore the basement level cannot be reduced any further without introducing significant drainage and construction concerns. Likewise, any additional depth of excavation will result in unnecessary disturbance to acid sulfate soils and the need for dewatering.
2. The top most component of the building now sits consistent with the 8m (2 storey) building height requirement when viewed from Moss Street and importantly, other surrounding properties. In this regard, the top most portion incorporates a barely minimal floor to roof height of only 2.3m (less internally), which can only be pursued given that it is non habitable space. Accordingly, no further reductions in building height can be pursued.
3. Having regard to the concerns of the neighbour opposite, who we note has both properties on the market and has shown no desire to develop the site at all, we can comfortably state that his concerns are unwarranted. In this regard we note with reference to the attached section diagrams, that the view opportunities from his development to the creek will be largely unhindered, whilst those views (being the primary views of utmost value) to the creek entrance and ocean and those to the Byron Bay lighthouse (iconic views) will not be disturbed at all. The development opposite incorporates a total of six dwellings, four of which front Hungerford Lane and will be unable to physically see the proposed development in any form. The two (2) remaining dwellings front Moss Street incorporate levels that see the highest point of the proposed building well below that of the living area levels of the neighbours approved development (at least 2.5m below) and at least 5.72m below that of the neighbours so called viewing platforms (both of which in the case the neighbours development) incorporate a three (3) storey form.

Reference in this regard is drawn to the attached section diagrams which show the level differences discussed.

Reference is also drawn to the view loss principles adopted by the Land & Environment Court and to which both Council and the concerned neighbour are well aware. In this regard it is demonstrated quite easily by way of the attached rudimentary sketch that the concerned neighbour and all those around on Hungerford Lane will retain iconic and primary view lines from two of the three proposed levels in the adjacent development and that these can and will be still enjoyed from both a sitting and standing orientation. Some view disturbance is expected from the lower level. However when cross referencing this level with the existing vegetation within Moss Street, much of which is good quality littoral rainforest species, there is no possible way that this level will enjoy any views at any time. In this regard we are certain that Council will not permit the wholesale clearance of vegetation in this area at any time.

In any respect, Council should (in the absence of reason from the adjacent neighbour) closely consider the view loss principles adopted by the L&E Court and replicated in Council's new Part A1 of the consolidated DCP. In this regard it is clear that the proposed development meets this test and that scanty regard would be had to the concerns raised by the neighbour, which are predominantly baseless at best and vindictive at worst.

We also note council's concerns in respect of the underground or subterranean area proposed. We note in this regard that the area is not habitable and is proposed as a basement store and functional area at best. This use sits consistent with the definition of Storey as contained in the LEP, with particular reference to the exclusions granted by point (c) of the definition. Of course some this area sits proud of the finished ground level as shown in the plans and it is acknowledged that this area is three storeys, however the remaining areas subterranean of the FGL cannot be counted as a storey. This interpretation sits consistent with that contained within the repealed Section B18 (Tweed Coast Building Heights), which also adopts finished ground level as the commencement point. Of course this interpretation limits the extent of area outside of the 8m (2 storey) requirement to that area immediately adjacent to the creek.

Should Council wish to meet further in relation to this matter and or discuss any other associated issues, please do not hesitate to contact our office at any time.

Kind regards



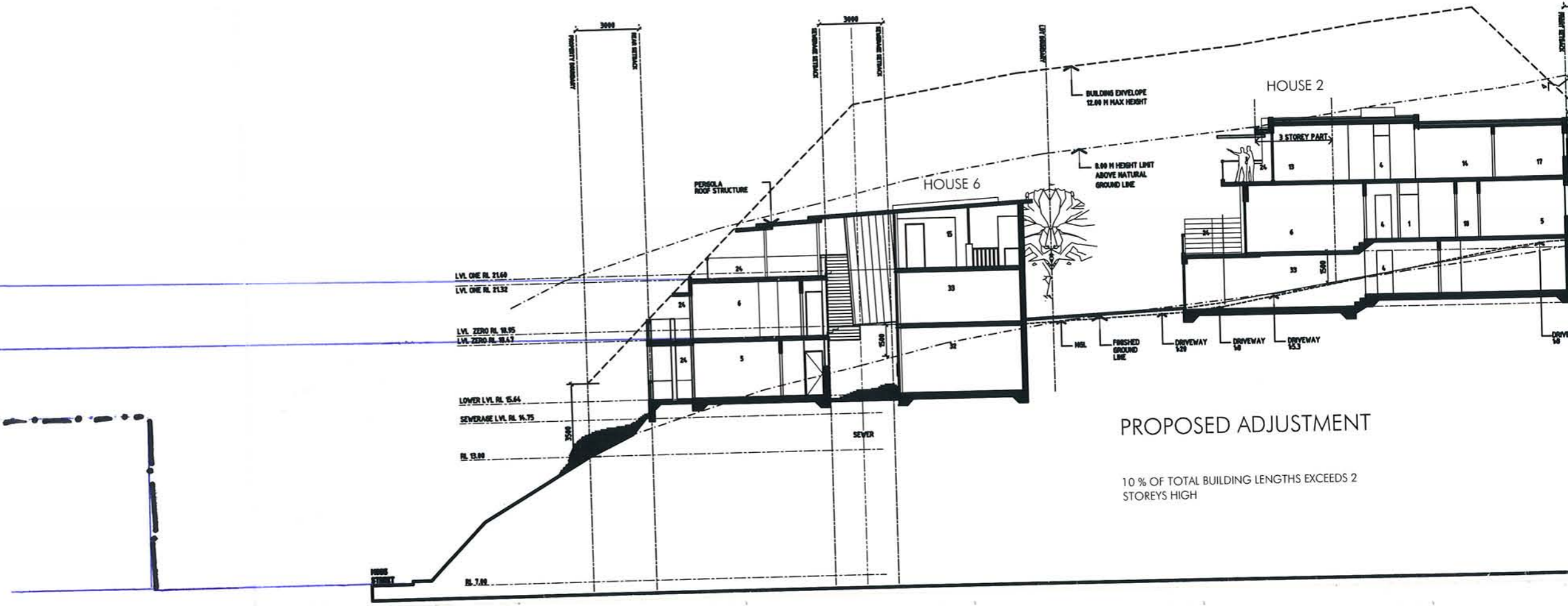
Adam Smith
Director
PLANIT CONSULTING

21.32m AHD

18.47m AHD

15.60m AHD

Proposal.



PROPOSED ADJUSTMENT

10 % OF TOTAL BUILDING LENGTHS EXCEEDS 2 STOREYS HIGH