

30 November 2017

## Clause 4.6 Exception to a Development Standard

### Clause 4.3 – Height of Buildings

#### 1 Request for exception to Clause 4.3 – Height of Buildings

##### 1.1 Overview

Clause 4.6 of Warringah LEP 2011 provides a mechanism to allow an exception to a development standard.

As previously identified, the proposal contravenes *Clause 4.3 Height of Buildings* development standard and an exception is sought.

As required by clause 4.6 (3) the following is a *written request* to justify this contravention for the consent authority's consideration.

The land is within building height designation Area R (Figure 1) where a building height of 21m is applicable.

##### 1.2 Extent of exception sought

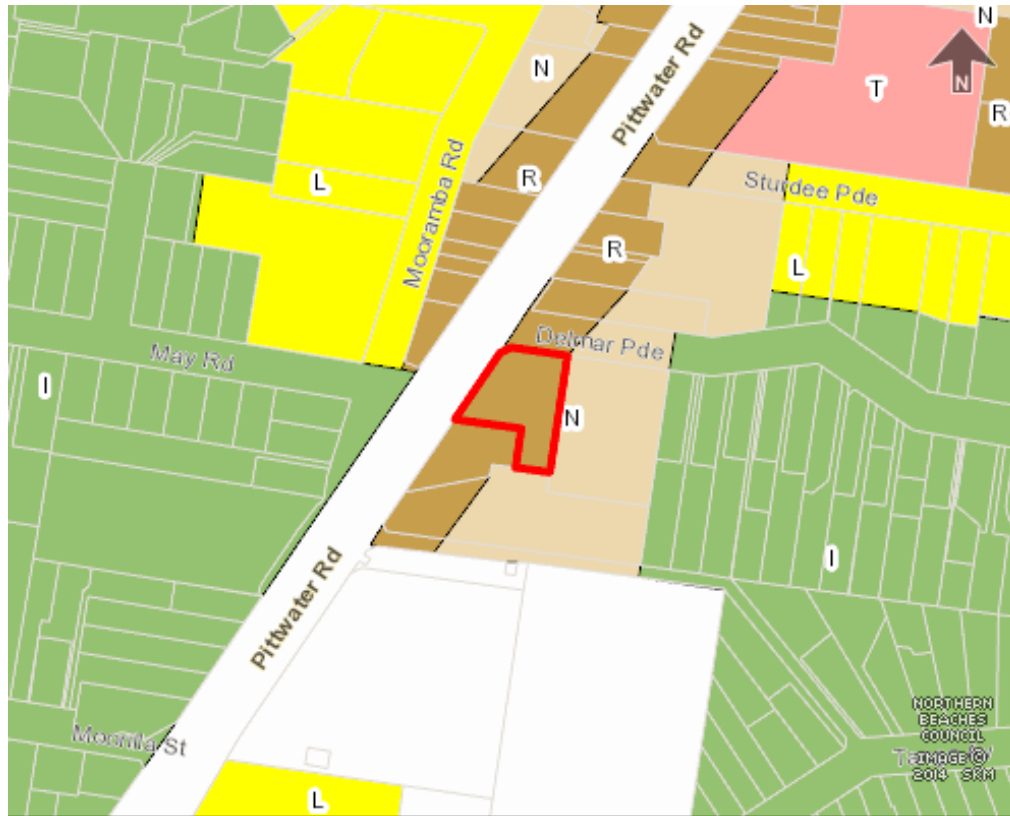
Under the LEP the land is within building height designation Area R (Figure 3) where a building height of 21m is applicable. The majority of the proposed structure falling within that maximum height limit.

The proposed development has a maximum building height of approximately 23.7m which exceeds the prescribed 21m limit under the current LEP.

The exception relates to the 7<sup>th</sup> storey of the proposed building. It displays heights of between approximately 22.2m and 23.7m (relative to the slope of the land) with a maximum RL of 51.2 for the main roof element, exceeding the standard by up to approximately 1.2m to 2.7m. The area of the roof that exceeds to building height standard is calculated to be 993.2m<sup>2</sup> or 48% of the site area.

The exception also relates to the lift overrun. It is proposed to finish at RL 52.050, displaying a height of approximately 23.78m. The area of the lift overrun is calculated to be 15.1m<sup>2</sup> or 1.5% of the roof area.

Figure 2 to 4 below provide illustrations indicating the nature and extent of the building height variation, relative to the slope of the land.



**HEIGHT OF BUILDINGS MAP**

Area 1, Refer to Clause 7.7	RL, 52.5m	N 13m
Area 2, Refer to Clause 7.8	RL, 66m	R 21m
Area 3, Refer to Clause 7.9	RL, 69m	S 24m
RL, 25m	RL, 75m	T 27m
RL, 28.5m	RL, 78m	
RL, 32m	A 0m	
RL, 38m	C 5m	
RL, 43.5m	I 8.5m	
RL, 44m	J 9m	
RL, 46.5m	L 11m	
RL, 47m	M 12m	

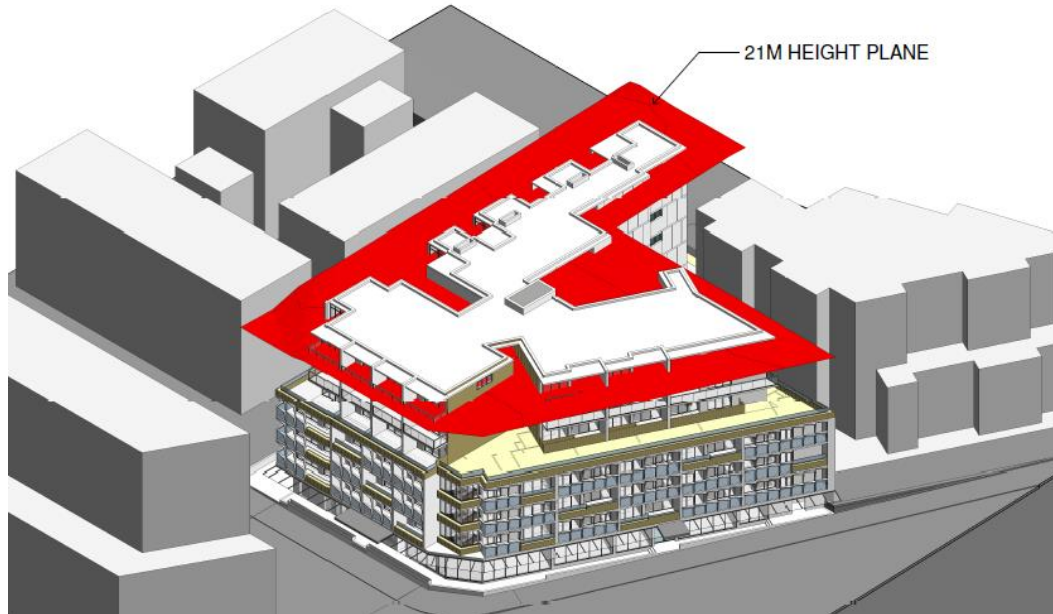
**Figure 1– building height designations on land the subject site, to the east,**



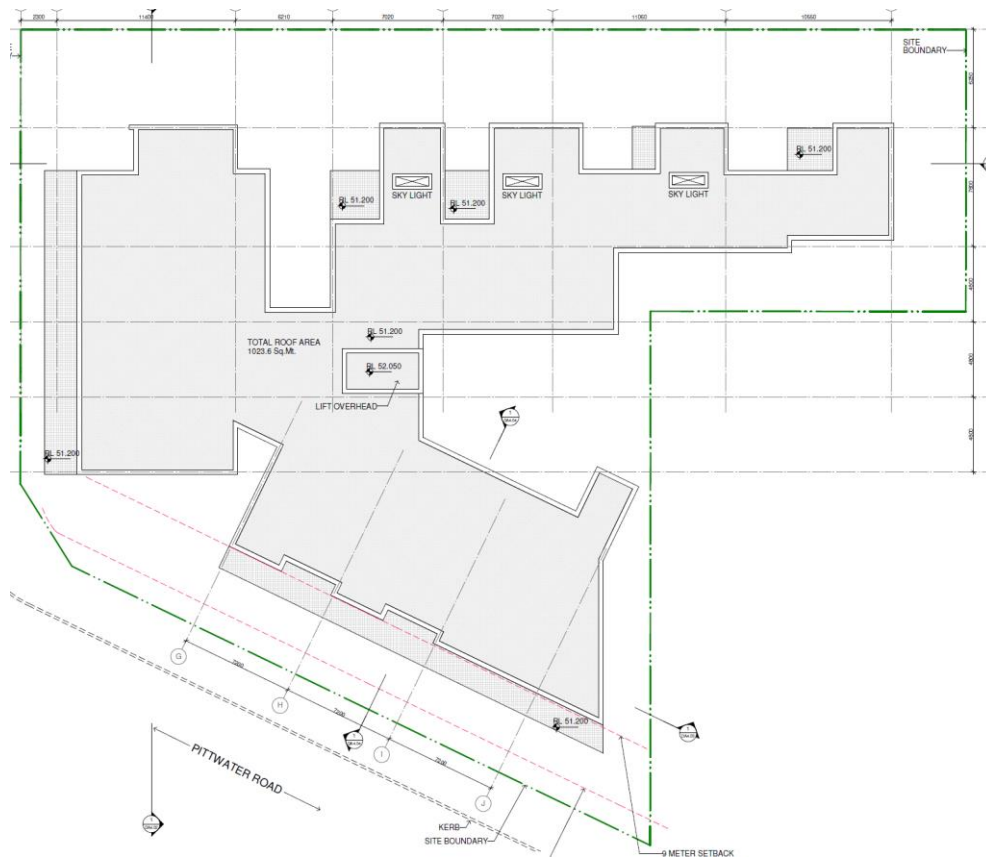
**Figure 2 - section indicating the height variation from the 21m LEP height limit in terms of RL's**



**Figure 3 - section indicating the height variation from the 21m LEP height limit in terms of RL's**



**Figure 4 – illustration of the proposal as modelled against the 21m building height plane**



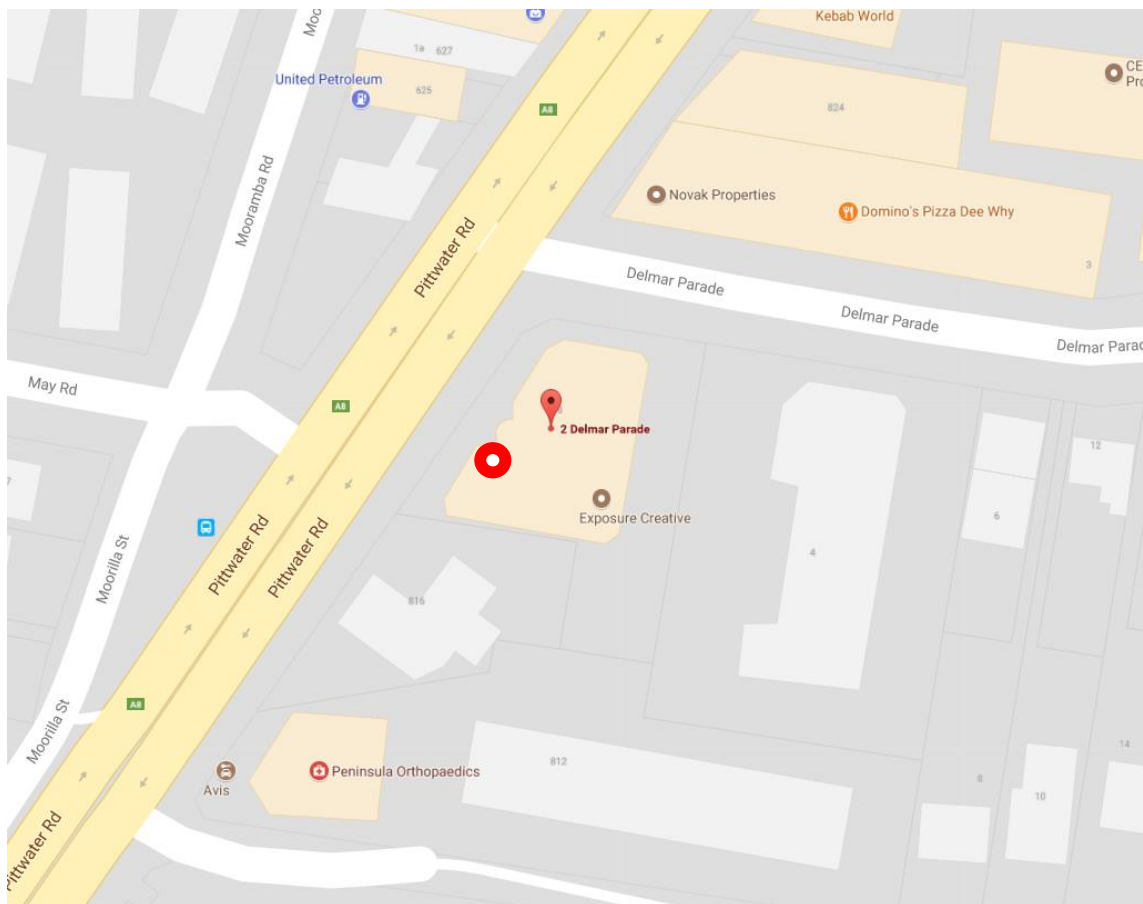
**Figure 5 – extent upper level roof area that exceeds 21m building height plane**

## 2 Site and Location

The site is at 2 Delmar Parade, Dee Why. It is legally described as, Lot 1 in Deposited Plan 710661. The site is 2,060m<sup>2</sup> in area.

The site is located within the area of Dee Why, commonly referred to as the Dee Why town centre (which is land within the B4 Mixed Use zone), on the eastern side of Pittwater Road adjacent to the intersection of Pittwater Road and Delmar Parade.

The site has street frontages to Pittwater Road of 40.98m and Delmar Parade of 29m.



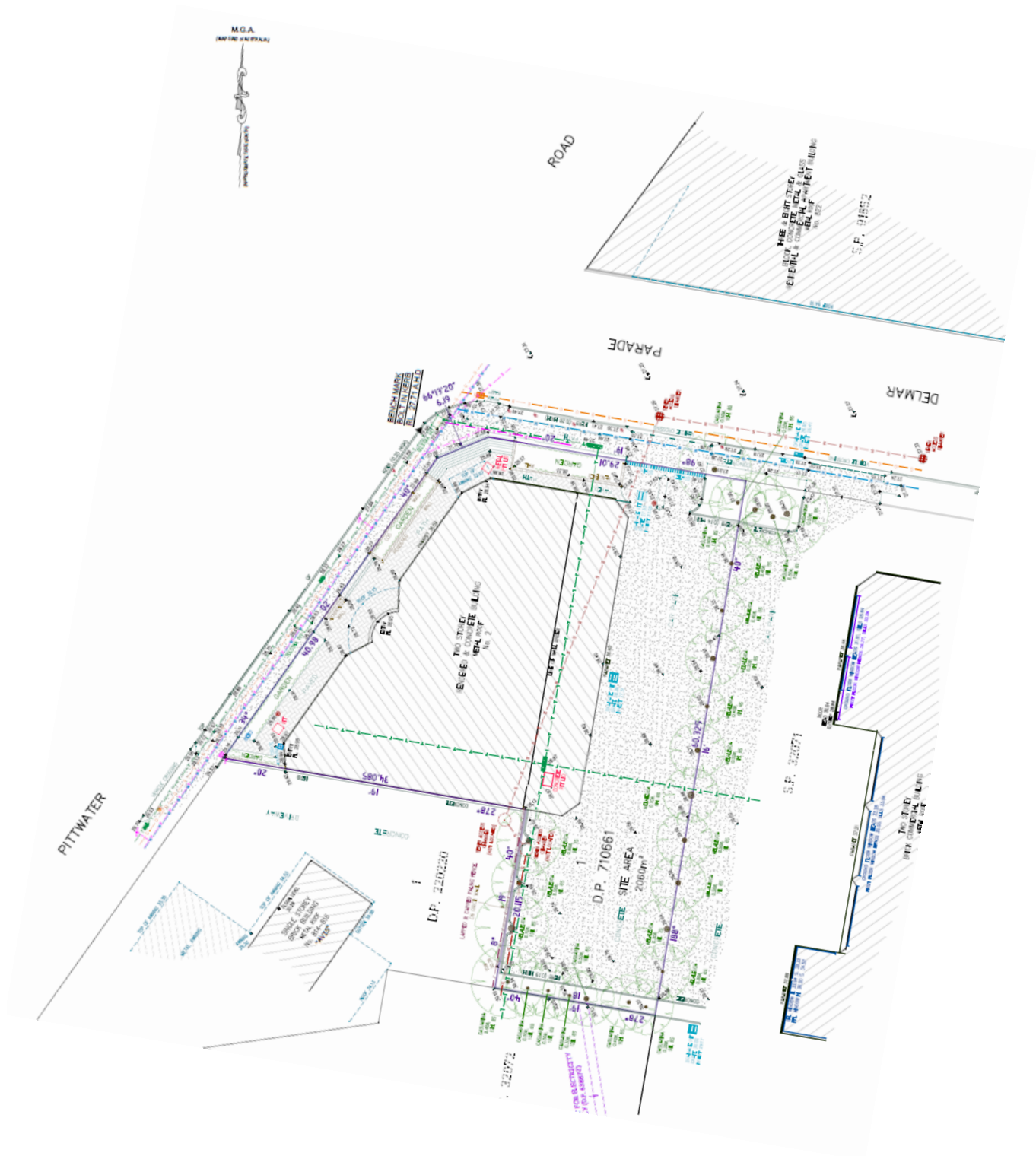
**Figure 6 - Location of the site (courtesy Google maps)**

The land is moderately sloping with a level difference of approximately 1.5m between the south w western and the north eastern boundaries – (approximately AHD RL 27.5 at the rear to RL 29 at the front).

The existing allotment is occupied by a 2-storey commercial building and associated surface car parking with vehicle access from Delmar Parade.

The proposal is designed to enhance the ongoing redevelopment and vitality of the B4 Mixed Use zone by the provision of a modern development containing a variety of dwelling sizes and unit layouts with communal open space, private recreational spaces per unit and high amenity incorporating district views.





**Figure 7 – Site Survey 2 Delmar Parade, Dee Why**

### **3 Summary of planning justifications in support of this request**

The following provides a summary of the justifications in support of this request. These matters are further considered within the framework of clause 4.6 within this submission:

1. The design provides a lesser development intensity than anticipated by the current and proposed planning controls as measured in terms of the floor plate area of both the podium and upper floor levels (Requirement 7 and 9 of the DCP), Gross Floor Area (GFA), and Floor Space Ratio (FSR) proposed to be 3.2 to 1 (proposed draft LEP) whereas the design is at 2.73 to 1.
2. The distribution of building height on the site is appropriate, achieved by reduced building height and envelope fronting the corner of Pittwater Road / Delmar Parade and no building along the 6 metre corridor adjacent to the site's eastern boundary. These areas of no building height or reduced building height are offset by what are 2 taller, slimmer, building forms: one that runs in a north south alignment through the middle of the site, the other being a relatively slim 'tower' form presenting to Pittwater Road / Delmar Parade. There are various benefits to this approach as described herein.
3. A building that is compliant with respect to the height development standard and the DCP's built form controls would have larger impacts and reduced amenity outcomes for future occupants of the proposed development and the adjoining land.
4. The proposal will be compatible with the height and scale of surrounding and nearby recently approved and developments at 627 to 635 Pittwater Road (approved on 15 February 2017) exhibits a building height of 8 storeys, Roof RL 52.140; maximum height 25.5m; 822 Pittwater Road (approved on 18 August 2014) exhibits a building height of 8 storeys. Roof RL 53.5; maximum height 26.39m. The proposal has a main roof RL 51.2; with a maximum height 23.7m lower than these other recent approvals.
5. Council has inconsistently applied the building height control and other building envelope controls within the Dee Why town centre (LEP 2000 – Locality E9 Pittwater Road) / B4 Mixed Use zone (LEP 2011). The building height control has been varied to such an extent that strict compliance with the control has been virtually abandoned.
6. The design achieves strong compliance with State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG). It achieves high solar access, high ventilation and appropriate building separation. Given the high level of compliance with the ADG the proposed development could not be reasonably concluded to be an overdevelopment of the site.
7. Council's design and streetscape objectives are satisfied by the proposal. The design provides a 'podium' form for the first four storeys and two slim line, highly articulated, recessed and 'broken-up' tower element building forms for its upper three levels. Its height and form will be consistent with the current and future development character.

## **4 Clause 4.6**

Relevant to the subject matter, Clause 4.6 states:

- (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.*

In addition to the above, various court judgements provide guidance in the application of clause 4.6 to the subject matter. Regard has been had to:

- *Wehbe v Pittwater Council* [2007] NSW LEC 827
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSW LEC 7



In the 'Four2Five' judgement (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it).

In February of 2017 the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the Four2Five v Ashfield decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.

He held that the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary. In this regard, it is considered that there are sufficient environmental planning grounds to justify the variation sought.

Taking these matters into account, Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7, provides the most practical contemporary guidance in the use of clause 4.6. In this judgement Preston J, Chief Judge held that the power to allow an exception to a development standard pursuant to cl 4.6 can be exercised where the Commissioner is satisfied that:

- (1) the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)) (at [7]),*
- (2) the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)) (at [7]),*
- (3) the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) (at [38]), and*

*(4) the written request adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)) (at [38]).*

*In outlining (3) and (4) above, His Honour stated that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather “only indirectly by being satisfied that the applicant’s written request has adequately addressed” those matters.*

In response to the provisions of Clause 4.6, and with the guidance provided by the above judgements, the matters in support of the proposal are documented with this *written request* to justify this contravention of *Clause 4.3 Height of Buildings* development standard.

## **5 Compliance is unreasonable or unnecessary in the circumstances**

Subsection 3 (a) of Clause 4.6 states:

*(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*

Guidance is provided by the following court judgements in establishing what the relevant considerations are in assessing what is ‘*unreasonable or unnecessary in the circumstances of the case*’.

In addressing the requirements of Clause 4.6 (3) (a), the accepted five possible approaches for determining whether compliance is unnecessary or unreasonable were established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827. Whilst at the time, this was specific to SEPP 1, in the matter of *Four2Five* (2007) LEC 827, the Commissioner stated within the judgement the following, in reference to a variation:

*“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”*

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 has been well founded and that approval of the objection may be consistent with the aims of the policy. The five possible ways are as provided below:

*1<sup>st</sup> The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.*

- 2<sup>nd</sup> A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary. (not applicable to the subject proposal)*
- 3<sup>rd</sup> A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. (not applicable to the subject proposal)*
- 4<sup>th</sup> A fourth way is to establish that 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.*
- 5<sup>th</sup> A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary. (not applicable to the subject proposal)*

Of the 5 principles from the Wehbe judgement, it is assessed that the first, third, and fourth principles are relevant to the subject matter.

Our assessment of the proposal under Subsection 3 (a) of Clause 4.6 finds that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

## **5.1 First principle of Wehbe**

In accordance with the first principle of the Wehbe judgement it is assessed that the objectives of the Building Height development standard are achieved notwithstanding non-compliance with the standard.

The proposal will be compatible with the height and scale of surrounding and nearby recently approved developments at 822 Pittwater Road and 627 to 635 Pittwater Road.

The design achieves strong compliance with State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG). It achieves high solar access, high ventilation and appropriate building separation, both within the site and to adjoining properties. Given the high level of compliance with the ADG the proposed development could not be reasonably concluded to be an overdevelopment of the site.

Council's streetscape objectives are satisfied by the proposal. The design provides a 'podium' form for the first four storeys and two slim line, highly articulated, recessed and broken-up

building forms for its upper three levels. Its height and form will be consistent with the recent nearby developments at 822 Pittwater Road and 627 to 635 Pittwater Road approved / under construction.

In these ways the proposed design satisfies the objectives of the building height development standard. A more detailed response to the development standard's objectives is provided within section 6.1 of this submission.

## **5.2 Third principle of the Wehbe**

In accordance with the third principle of the Wehbe judgement it is assessed that the objectives of the development standard would be defeated if strict compliance with the standard was required.

In our assessment of the proposal, all 4 objectives of the development standard would be defeated if a building was designed to strictly comply.

The proposal would not be compatible with the height of recent developments at 627 to 635 Pittwater Road, opposite the site to the west, and at 822 Pittwater Road, opposite the site to the north. It would therefore be inconsistent with objective (a) of the development standard.

It is valid to consider that the standard is complemented by a suite of built form development controls under the DCP 'Area 7 for Pittwater Road which is applicable to the property. These controls include build-to-lines (street setbacks) and Building mass (floor plate areas) and the requirement for central courts.

Such a proposal would have an increased building bulk, with less articulation, less breaks in the building form, and more site coverage and increased potential for shading impacts. It would therefore be inconsistent with objective (b) relating to visual impact and solar access; objective (c) relating to the scenic quality of the area; and objective (d) relating to visual impact when viewed from public places.

Further to the above, such an outcome would not be consistent with SEPP 65 and the ADG in relation to key aspects like appropriate solar access, ventilation and appropriate building separation, both within the site and to adjoining properties. Noting that SEPP 65 and its accompanying guidelines were introduced after the introduction of the current suite of local planning controls.

For these reasons strict compliance with the building height development standard is unreasonable and unnecessary.

## **5.3 Fourth principle of the Wehbe**

In accordance with the fourth principle of the Wehbe judgement it is assessed that Council has inconsistently applied the building height control and other building envelope controls within the Dee Why town centre (LEP 2000 - Locality E9 Pittwater Road) / B4 Mixed Use zone (LEP 2011). The building height control has been varied to such an extent that strict compliance with the control has been virtually abandoned.

The current planning controls for the B4 Mixed Use zone under LEP 2011 have been in place since the late 1990s and were formalised within the Warringah LEP 2000. They pre-date the introduction of SEPP 65 and have not been revised to be compatible with the ADG. During this

time, it is evident that Council has inconsistently applied these controls with particular reference to podium height, street setbacks, building height, floor plate extents and the requirement for central courts.

Examples of recent development approvals within the B4 Mixed Use zone, provide evidence that the council has abandoned strict compliance with the Height of Buildings standard. These include:

- 627 to 635 Pittwater Road (approved on 15 February 2017) exhibits building height of 8 storeys displaying building height of up to 25.5m. A 21m height of building development standard is applicable to most of this site. The consent authority found there to be merit in supporting approval for a building 5.39 metres in exceedance of this standard). Figure 6 below.
- 822 Pittwater Road (approved on 18 August 2014) exhibits building height of 8 storeys up to RL 52.240 displaying building height of 26.39m. A 21m height of building development standard is applicable to this site. The consent authority found there to be merit in supporting approval for a building 5.39 metres in exceedance of this standard). Figure 6 below.
- 697-701 Pittwater Road (MOD 2012/0087 - approved on 12 July 2012) exhibits height of 9 storeys exceeding 27.7 metres in building height). A 24m height of building development standard is applicable to this site; council found there to be merit in approving a building 3.69 metres in exceedance of this standard).

These recent examples, all located with the Pittwater Road Area (as designated under Area 7 under the DCP) demonstrate that compliance with the building height development standard has *virtually been abandoned by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*

### **5.3.1 Dee Why Town Centre Masterplan and Planning Proposal**

Further evidence of Council's move away from the existing building height development standard (and associated suite of built form DCP controls) towards higher buildings within the Dee Why B4 Mixed Use zone is its draft planning controls (supported by a resolution of Council on 23 September 2015).

The Dee Why Town Centre Masterplan was adopted by Warringah Council at its meeting on 6 August 2013. The Masterplan 2013 promotes higher (Figure 8), slimmer buildings within the town centre, that is, buildings with increased height but reconfigured with the equivalent development potential (i.e. gross floor area) to that currently achievable under the prevailing building envelope controls (mainly DCP controls) coupled with the Height of Buildings development standard.

At its meeting on 23 September 2014 Warringah Council resolved to support the Dee Why town centre Planning Proposal containing new planning controls aimed at implementing the objectives of the Masterplan 2013.

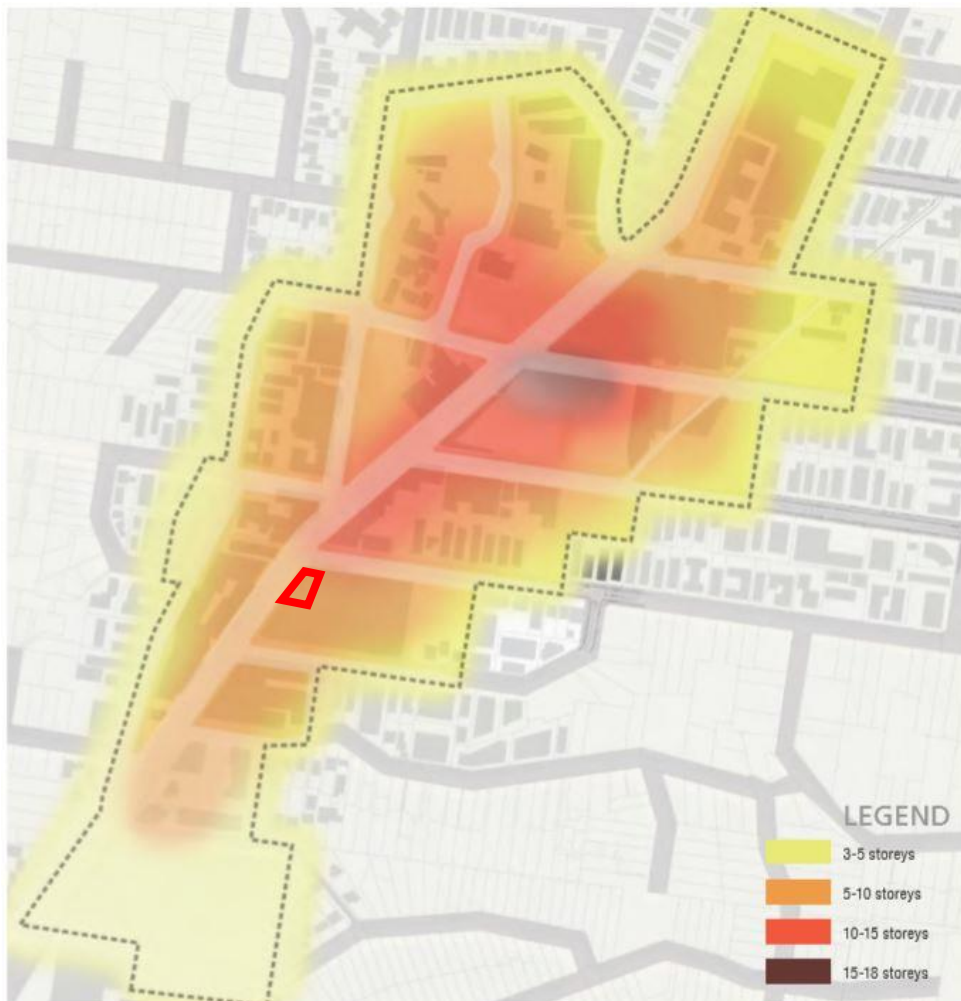
For the subject site additional 3m building height and an FSR of 3.2 to 1. The proposal complies with both of these proposed draft development standards

It is clear from the Masterplan 2013 and the Planning Proposal with its accompanying (preliminary) draft planning controls that council is moving towards a different approach that



involves buildings with increased height, within reconfigured building envelopes, that allows for increased flexibility in the siting of development.

This is further evidence that Council has abandoned strict compliance with the height of the building development standard at 627 to 635 Pittwater Road, 822 Pittwater Road and 697-701 Pittwater Road.



## BUILDING HEIGHT PRINCIPLES DIAGRAM

**Figure 8 - Building Height Principles Diagram within the Dee Why Town Centre Masterplan 2013**

## 6 Environmental Planning Grounds

Subsection 3 (b) of Clause 4.6 states:

*(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:*

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

There are sufficient environmental planning grounds to justify contravening the development standard noting the following considerations.

### 6.1 The design provides a lesser development intensity than the current and proposed planning controls anticipate for the site.

The local planning controls (LEP and DCP) establish a maximum Gross Floor Area (GFA) for the property which the proposal is significantly under.

The LEP building height is 21m. The DCP for Area 7, contains a suite a building envelope controls, which together with the building height establish a GFA for the property. The principle DCP built form controls include: build-to-lines (street setbacks) and Building mass (floor plate area). The application of these controls to the subject site results in a GFA of 6,592 m<sup>2</sup>, whereas the proposal displays a GFA of 5,272.9 m<sup>2</sup> or 20% under the maximum anticipated by the local planning controls. The reduced GFA provides increased flexibility in configuring the design to achieve better internal amenity and reduced amenity impacts on adjoining land.

The Draft LEP contains proposed development standards for the B4 zone and the subject site, including a Height of 24m and an FSR of 3.2 to 1. These proposed development standards are derived from the Dee Why Master plan 2013 (Master plan).

The Master plan states that there will be no additional GFA for the B4 zone, but rather the maximum building height will be increased and the bulk of buildings decreased to allow for greater flexibility in design and taller, slimmer buildings. The proposed design is consistent with these principles in that it provides a GFA that is lesser than that anticipated under the current and proposed future planning controls, will provide areas upon the site where there is no building form: car parking and manoeuvring areas along the site's eastern boundary (providing a 6.250m setback to the proposed building; space above the proposed fourth building level that are for communal recreation and no building form; various breaks, setbacks and articulations in the building footprint.

This lesser development intensity ensures that the design achieves the objectives of the development standard and the B4 zone, meaning that strict compliance with the building height development standard is unreasonable and unnecessary.

### 6.2 Redistribution of building height to achieve planning objectives

The distribution of building height on the site is appropriate, achieved by increased height to the upper section of the tower forms, which are slim-line and present a reduced scale relative to the

base (podium section) of the building, offset by reduced building height in other areas on the site.

The redistribution of building height is achieved by reduced building height and envelope fronting the corner of Pittwater Road / Delmar Parade and no building along the 6 metre corridor adjacent to the site's eastern boundary. These areas of no building height or reduced building height are offset by what are 2 taller, slimmer, building forms: one that runs in a north south alignment through the middle of the site, the other being a relatively slim 'tower' form presenting to Pittwater Road / Delmar Parade.

This reduced building height and Gross Floor Area at the site's frontage to the corner of Pittwater Road and Delmar Parade provides for an enhanced streetscape, contextually appropriate building form and a valuable communal open space with high levels of solar access that otherwise would be difficult to achieve in other locations upon the site.

The design provides a 6.250 m wide and 60.325 m long corridor, 377m<sup>2</sup> in area located adjacent to the site's eastern side boundary. It also provides a approximately 4.5 to 4.9m setbacks at the rear of the site and for a 20 m section on the western side of the site where there is a single storey building form with communal recreation area on top.

By providing no (or minimal building height / form in these locations, additional building height is sought in other areas of the site to compensate and achieve the scale of development that the planning control and B4 zone objectives are seeking.

The benefits of the size and location of this non-built upon space include the following:

- Facilitate the transition from more intense and higher building form, along Pittwater Road from to a lower height, density to the east
- Amenity impacts onto adjoining land to the east and south are reduced
- More consistent with current character which appears likely to remain in the foreseeable future
- Deliveries and collection – council requests space be made for removalist trucks / vehicle to be accommodated with in mixed use redevelopments. The space will provide this function to the property
- Provision of convenient ground level car parking, behind the building.

This lesser development intensity ensures that the design achieves the objectives of the development standard and the B4 zone, meaning that strict compliance with the building height development standard is unreasonable and unnecessary.



Figure 8 – the corner section of the proposal



Figure 9 – the corner section of the proposal provides a valuable communal landscape area with excellent solar access

### **6.3 A compliant design would have greater impacts**

A building that is compliant with respect to the building height development standard, and the DCP's built form controls, would have larger impacts and reduced amenity outcomes for future occupants of the proposed development and the adjoining land.

When applying DCP requirement numbers 7 and 8 relating to and the maximum area of the floor plate and Build-to lines respectively, the control allows for the following floor areas:

*above the topmost storey (including plant and equipment rooms, lofts etc): 30% of the area of the ground floor floorplate;*

*topmost storey: 50% of the area of the ground floor floorplate; and*

*second topmost storey: 70% of the area of the ground floor floorplate*

the first 4 storeys, including the ground floor level may be permitted to cover the entire site to form the 4 storey podium levels

When applied to the subject site, which has an area of 2,060 m<sup>2</sup>, these controls would allow a maximum gross floor area of 12,200 m<sup>2</sup> (FSR 5.9 to 1) which could conceivably be suitable for a commercial office use (permitted in the zone and established in this location). The proposed draft LEP controls allow for a 24m building height and FSR of 3.2 to 1 for the site translating to a GFA of 6,592 m<sup>2</sup>).

The proposed design presents a GFA of 5,591 m<sup>2</sup> translating to an FSR of 2.71 to 1 or 15% below the maximum achievable under the both the current DCP and proposed draft LEP controls.

Whilst a building with a height of 21m and 6 storeys, with significantly more GFA, would be compliant with the current DCP but:

- it would result in less internal amenity in terms of solar access to units and cross ventilation to units
- it would have greater bulk with less articulation and a more filled out building envelope albeit with less building height.
- it would have greater solar impact on adjoining land.
- it would have less aesthetic merits
- it would be more visually imposing when viewed from adjoining land

Instead the design provides additional building height, less building mass, reduced site coverage, a reduced building envelope, increased articulation, slimmer tower elements and a much superior design outcome.

For these reasons the strict compliance with the building height development standard is unreasonable and unnecessary.

### **6.4 Compatibility with the height, form, and scale of nearby recently approved developments**

The proposal will be compatible with the height, form, and scale of surrounding and nearby recently approved developments, noting:



- 627 to 635 Pittwater Road (approved on 15 February 2017) exhibits a building height of 8 storeys – podium of 4 storeys. Roof RL 52.140; maximum height 25.5m;
- 822 Pittwater Road (approved on 18 August 2014) exhibits a building height of 8 storeys – podium of 4 storeys. Roof RL 53.5; maximum height 26.39m;
- The proposal has a main roof RL 51.2; with a maximum height 23.7m

A detailed animated video and a series of perspective images are provided within the architectural plan set illustrating the current and proposed streetscape presentations of the site and the significant adjoining developments. These demonstrate that the proposal comparable in its overall proportions to the above referenced developments.

The additional building height relates to the upper section of the tower forms which are slim-line and present a reduced scale relative to the base (podium section) of the building.

The proposed design will be compatible in terms of its slim line upper levels and 4 storey podium form at its base. It provides consistent setbacks to its street frontages; setbacks to the tower form above the podium; articulations, materials and architectural features that will add visual interest. The proposal will provide a consistent form and scale to the abovementioned, nearby and recently approved developments.

For these reasons the strict compliance with the building height development standard is unreasonable and unnecessary.

## **6.5 Strong compliance with SEPP 65**

The design achieves strong compliance with State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG). It achieves high solar access, high ventilation and appropriate building separation. Given the high level of compliance with the ADG the proposed development could not be reasonably concluded to be an overdevelopment of the site.

The proposed design offers high levels of internal amenity within the development site, noting that:

- 63.5% of apartments will achieve the required cross ventilation
- 89.1% of apartments will achieve the minimum 2 hours of solar access on 22 June

668m<sup>2</sup> of communal open space is provided at levels 1 and 4 of the building. These Communal recreational spaces are elevated and offer high amenity in terms of their solar access outlook and proportions.

In terms of building separation, the proposal will relate well to the adjoining land in terms of its setbacks and interfaces. It will have an appropriate level of impact on to neighbouring properties provides compliant shading impact.

Adjoining land at 816 has an established commercial land use. It is subject to the same height limit as the subject site 21m (proposed to be 24m). A redevelopment scheme has been developed for this site to demonstrate that the proposal will have an appropriate interface and not inappropriately impact its future development potential.

Adjoining land at 4 Delmar Parade currently accommodates a range of established commercial land uses within a strata titled property. It is subject to a lower height limit than the subject site

being 13m (proposed to be 16m). Its site configuration is different to the subject site being wider to its northern Delmar Pde boundary. It is anticipated that a future mixed use development would logically orientate most apartments to the north. Notwithstanding there is ample space for any desired east west facing apartments to achieve the appropriate building separation.

Accounting for current and potential future land-use functions and development character anticipated for the adjoining land the development is assessed as providing appropriate separation and amenity interfaces.

High internal amenity is provided through the appropriate aspect and orientation of private recreation and living spaces. High amenity is maintained at the interfaces to adjoining land through the appropriate building separation, orientation of apartments / balconies and design treatments.

These characteristics are an indication that the proposal is not an 'overdevelopment of the site. That the proposal is not trying to propose excessive built upon areas and dwelling density. That the design provides a slim line building at the upper levels and an appropriate distribution of height and building form.

## **6.6 Council's design and streetscape objectives are satisfied by the proposal**

The proposed building has been defined by series of elements including the dual street frontages, orientation of the block and zoning / building height parameters. The proposed development has been modulated to fit in with these site elements and will harmonise well with the existing and future context.

The proposed building steps back from Pittwater Road / Delmar Parade at podium level in keeping within the building envelope control. The Pittwater Road frontage steps back on ground level to allow for increased pedestrian movement and landscape features.

The proposed building forms have been strongly defined by the views to the east, the desire to reinforce the streetscape along both Pittwater Road and Delmar Parade and the aim of increasing amenity by minimising the number of south facing units.

The facades are articulated to break up the form with massing & materials. The design is a subtly articulated building which offers interesting and detailed façades to the adjacent roads and surrounding properties.

The site-specific design response relates appropriately to other development within proximity of the site and represents the form of development anticipated by the zoning of the land and height standard applicable to this location. The development provides superior levels of amenity to future occupants whilst maintaining good levels of amenity to the adjoining and nearby residential properties.

Given the design and orientation of the development and its location within a mixed use setting the proposal will not result in any unacceptable or unanticipated amenity impacts in terms of privacy, overshadowing or view loss. The proposed development is contextually appropriate, will afford a high level of amenity to future occupants and will not give rise to any unacceptable residential amenity or streetscape consequences.

The height, setback and footprint proposed will not give rise to any adverse heritage, overshadowing, privacy, view or visual bulk consequences. The scale of the development is

appropriate given the spatial separation afforded to all adjoining properties, the stepping back of the upper floors and the design elements and design treatments proposed to reduce the perceived height, bulk and scale of the development.

## **7 The Public Interest**

Subsection (4)(a)(ii) of Clause 4.6 states:

- (4) Development consent must not be granted for development that contravenes a development standard unless:*
- (a) the consent authority is satisfied that:*
- (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*

### **1.1 Objectives of the height of buildings development standard**

In accordance with 4.6 (4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the Height of buildings development standard which are stated as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

The following responses are made to these objectives.

The proposal is assessed as being consistent with objective (a) noting that:

The proposal will be compatible with the height, form, and scale of surrounding and nearby recently approved developments, noting:

- 627 to 635 Pittwater Road (approved on 15 February 2017) exhibits a building height of 8 storeys – podium of 4 storeys.
- 822 Pittwater Road (approved on 18 August 2014) exhibits a building height of 8 storeys – podium of 4 storeys.

The proposal is assessed as being consistent with objective (b) noting that:

- The site has a small, immediate visual catchment as a result of being located at a lower level relative to land and development located to the east, south, and west of the site.
- Views to the proposed development will be from adjacent roads including Delmar Parade, Pittwater, May and Mooramba Roads.
- The site is visible as a view termination when viewed from the west, along May Road in the vicinity of the Painters Parade. Views from this elevated location to the subject site include a foreground characterised by residential-commercial context, taller contemporary development to the north and a background of hillside development to the east and south.
- Within this visual context the proposal presents a highly articulated design that will be compatible with both the established and future 7 storey building form that will front Pittwater Road within the B4 mixed use zone / Dee Why town centre. Within this visual context the proposal provides an appropriate building form and visual impact.

Relevant to privacy, Objective (b) of the building height development standard states:

*‘(b) to minimise ... loss of privacy’*

In response, the proposal is assessed as being consistent with the objective for the reasons provided below.

The Apartment Design Guide establishes planning provisions for building separation relevant to the proposed development under Section 2F. The proposed development addresses these requirements and provides:

- Separation to its south western boundary ranging from 4 to 4.5 m.
- Separation to its eastern boundary ranging from 6 to 6.250m

The majority of balconies are set within the floor plate of the building rather than projecting out of the building, thereby reducing the prominence of these outdoor areas, maximising their setbacks and reducing the potential for overlooking from these spaces.

The balconies are appropriately orientated within a stepped and articulated floor plate. There are no living areas or balconies orientated to the south or the west where these physical separation is less. They are also co-ordinated not to directly oppose other apartment living spaces. In these ways the proposed design addresses privacy and minimises privacy impacts.

In these ways the proposal is assessed as satisfying objective (b) of the building height development standard as it relates to privacy.

Relevant to overshadowing, Objective (b) states:

*‘(b) to minimise ... loss of solar access’*

In response, the proposal is assessed as being consistent with this objective for the reasons provided below.

Close consideration has been given to the shading impacts of the development. The proposal is accompanied by:

- a ground plan shadow analysis for the times of 9AM, 12PM and 3PM on 21 June;
- elevational shading analysis in a 3-dimensional graphic

- elevational shading analysis in a 3-dimensional graphic based on the proposed development on the site.

The shading impacts from the proposed development are summarised as follows:

At 9AM, shading will be cast over the rear adjoining property to the south at 818 Pittwater Road and the roadway itself. The property currently has a commercial function and is 2 stories in height. It may be redeveloped for multi storey mixed use development up to 24 metres in height. The redevelopment of the property for multi-storey development will provide an opportunity to gain access to additional sunlight. The time of shading impact, being between 9AM and approximately to 12PM is assessed as acceptable and within the DCP's requirements.

Between 12 PM and 3 PM , the shading impact on moves onto the property at 4 Delmar Pde. The proposal will not have a shading impact on this property between p Am and 12 PM. The property may be redeveloped for multi storey mixed use development up to 16 metres in height. This level of shading impact is assessed as acceptable and within the limitations of the planning requirements.

Based on the above considerations of the proposed building height we have formed the opinion that the proposal will have a satisfactory shading impact on the surrounding land.

In these ways, the proposal is assessed as being consistent with objective (b) of the building height development standard as it relates to minimising overshadowing.

The proposal is assessed as being consistent with objective (c) noting that:

- The site is not identified as a sensitive scenic location. It is well distanced from sensitive scenic locations. It is not within a coastal or bushland setting, but rather one of the area's most significant regional centres.
- It will not have a significant, inappropriate unplanned or unanticipated visual impact *on the scenic quality of Warringah's coastal and bush environments,*

The proposal is assessed as being consistent with objective (d) noting that:

A series of perspective images are provided within the architectural plan set illustrating the current and proposed streetscape presentations of the site and the significant adjoining developments. An animated model of the site and the nearby buildings of relevance also accompanies the application. The model is effective in communicating the height form and context of the proposal as it relates to surrounding land, nearby buildings and the streetscape from both birds-eye perspective and a pedestrian (or motorist moving along the nearby streets).

The site is located within one of the area's most significant regional centres. Within this visual context the proposal presents a highly articulated design that will be compatible with both the established and future 7 storey building form that will front Pittwater Road within the B4 mixed use zone / Dee Why town centre. Within this visual context the proposal provides an appropriate building form and visual impact.

The proposed design presents a high quality building that will improve the land's streetscape presentation in a manner that is consistent with the zone objectives that relate to the renewal of the town centre.



### **4.3 Objectives for development within the B4 Mixed Use zone**

The proposed development will be in the public interest because it is consistent with the objectives for development within the B4 Mixed Use zone in which the development is proposed to be carried out. These are stated as follows:

- a) *To provide a mixture of compatible land uses.*
- b) *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- c) *To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.*
- d) *To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.*
- e) *To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.*
- f) *To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.*

The proposal is assessed as being consistent with objective (a) noting that:

- The proposal will provide a suitable *a mixture of compatible land uses*. The proposal will provide commercial areas within the ground floor level; additional apartment housing and an appropriate mix of housing sizes for which there is strong demand within the area.
- In these ways, the proposal is consistent with objective (a) of the Mixed Use zone.

The proposal is assessed as being consistent with objective (b) noting that:

- The proposal is a mixed use development with commercial uses and high density residential housing within convenient walking and cycling distance to public transport, services and employment opportunities that exist within the Dee Why town centre. In these ways, the proposal is consistent with objective (b) of the Mixed Use zone.

The proposal is assessed as being consistent with objective (c) noting that it:

- is for a mixed use development containing commercial and residential apartment housing;
- is of appropriate height and scale to reflect the status of Dee Why as a major centre serving the subregion;
- is of appropriate height and scale to be complementary to the built form that has been recently constructed on the property to the north known as 822 Pittwater Road (2014) and that is under construction opposite the site at 627 to 635 Pittwater Road (approved on 15

February 2017). Both of these contemporary multi-storey, mixed use developments are within the subject proposal's visual and streetscape context. Collectively it is important that these buildings are compatible in their height, scale and form in order to present an appropriate streetscape that satisfies the zone objectives.

- is of appropriate height and scale to be complementary to the desired and foreshadowed building character within the B4 Mixed Use zone;
- will be an appropriate scale and intensity to meet the established planning objectives and likely future character of the Mixed Use zone;

In these ways the proposal is consistent with objective (c) of the B4 Mixed Use zone.

The proposal is assessed as being consistent with objective (d) noting that:

- The building design addresses the range of improvements sought for the renewal of the town centre.
- It is a large site, compared to other land within the B4 zone and does not require its amalgamation with other land to enable its redevelopment.
- It provides commercial premises at ground level, connecting to Pittwater Road and Delmar Pde. The design incorporates glazed edges to the street frontage to facilitate future 'activation' to this main road / principle street frontage.
- will result in improvement to the land use function and urban design quality of the land;

Whilst the proposal does not provide offices at the upper floors of the building it does not limit this future potential.

The proposal is assessed as being consistent with objective (e) noting that:

- In order to *'reinforce the role of Dee Why as the major centre in the subregion'* mixed use development of increased *'scale and intensity'* is desired. The proposal is consistent with this objective (e) because the proposal:
- The proposal provides suitable provision for commercial premises at the ground level. Features of the commercial premises include: sufficient flexibility to enable different configurations of the commercial space to accommodate different business types and scales and glazed edges to the street frontage to facilitate future 'activation'.

In these ways, the proposal is consistent with objective (e) of the Mixed Use zone.

The proposal is assessed as being consistent with objective (f) noting that the subject site is a significant 2,060m<sup>2</sup> in area and therefore does not require amalgamation with other land to enable its redevelopment in a multi-storey, mixed-use form.

## 8 Secretary's considerations

With regards to the Secretary's considerations the proposed variation of the development standard:

- Does not raise any matter of significance for State or regional environmental planning, consistent with 4.6 (5)(a) except to note that the proposal involves growth and urban renewal of a strategic centre consistent with State planning policy.
- The public benefit is not served by maintaining the development standard consistent with 4.6 (5)(b).

## **9 Conclusion**

The exceedance proposed to the *building height* development standard has been appropriately acknowledged and the circumstances assessed, having regard to the objectives of the control.

In conclusion, Council can be satisfied that:

- This written request has adequately addressed the matters required to be demonstrated by 4.6 (3) & 4.6(a)(i);
- Is well founded and adequately address the matters required in accordance with & 4.6(a)(i);
- The exception is appropriate taking into account the range of relevant environmental planning considerations and the circumstances of the case.
- The proposal succeeds when assessed against the Heads of Consideration pursuant to clause 4.6. There is no statutory planning impediment to the assessment and approval of the application.

Yours sincerely,



Michael Haynes  
**Director - BBF Town Planners**