

23 Fisher Road, Dee Why

Updated Clause 4.6 variation to Height of Buildings

On behalf of
Rose Group Pty Ltd
May 2019



1 Introduction

This Clause 4.6 Variation Request relates to the Development Application (DA) for 23 Fisher Road, Dee Why (subject site), which proposes:

- Retention and re-use of Pacific Lodge for Commercial use;
- 125 Residential Apartments;
- Communal Room at corner of St David's Avenue and Civic Parade;
- Basement parking; and
- Landscaping and associated works.

This Clause 4.6 Variation request relates to Height of Buildings (Clause 4.3) in the Warringah Local Environmental Plan 2011 (WLEP 2011).

In the circumstances of the case, compliance with the development standard is considered to be unreasonable and unnecessary, as outlined below. This Clause 4.6 Variation Request demonstrates that the proposal achieves a stronger planning outcome for and from the development by varying the development standard in the circumstances of the case. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such, is justified on environmental planning grounds.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Satisfies the objectives of Clause 4.3 under WLEP 2011 (Wehbe Test 1) despite the variation to the development standard;
- Is consistent with the built form and height of previous consents issued for the site (DA2011/1274), which has resulted in the standard having been virtually abandoned and hence compliance with the standard is unnecessary and unreasonable (Wehbe Test 4);
- It has sufficient environmental planning grounds to permit the variation consistent with the Objects of the Act including:
 - To promote the orderly and economic use and development of land; and
 - To promote good design and amenity of the built environment.
- It is consistent with the applicable and relevant State and regional planning policies. The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Region Plan and District Plans ('the 30-minute city'), which is a matter of regional environmental planning significance.
- Satisfies the objectives of the B4 Mixed Use zone under WLEP 2011; and
- Provides a better outcome for the site and its surrounding uses and is therefore in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the WLEP 2011.

Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the WLEP 2011 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. Specifically, the objectives of this clause are:

- To provide flexibility in the application of a development standard
- To achieve better outcomes for and from development

Clause 4.6 enables a variation to the Height of Buildings standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with clause 4.6. In particular, it is noted that Clause 4.6(8) does not include Clause 4.3 as a provision which cannot be 'contravened'.

It is noted that Clause 4.6(8A) in the WLEP 2011 relates to Height of Building Standards specifically, and states that a variation to the height standard for key sites within the Dee Why Town Centre cannot be accepted. The subject site is not identified as a key site and therefore a variation request is permissible and Clause 7.6 of the WLEP 2011 does not apply.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a));
- That the applicant has adequately demonstrated that there are sufficient environmental planning ground to justify contravening the development standard (Clause 4.6(3)(b));
- That 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 (Clause 4.6(4)).

The Land and Environment Court has set out common ways in which an applicant might justify a clause 4.6 variation request, in relation to both the *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* and local environmental plans that adopt clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006*: see *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 per Lloyd J, *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**) per Preston CJ and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 per Pearson C which was upheld by Pain J on appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and the Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (**Four2Five**).

The principles set out in these cases were recently reiterated by Chief Judge Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118 at [14]-[29].

Accordingly, this Clause 4.6 variation request is set out having regard to the relevant principles established by the Court.

Clause 4.6 of the WLEP 2011 enables an exception to the development standard in Clause 4.3 in order to permit additional height upon consideration of a written

request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the WLEP 2011 reads as follows:

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.*

3 The Development Standard to be varied

The development standard to be varied is Clause 4.3 Height of Buildings (HOB) in the WLEP 2011. As identified on the WLEP 2011 *Height of Buildings Map*, the subject site has a maximum building height limit of 13m.

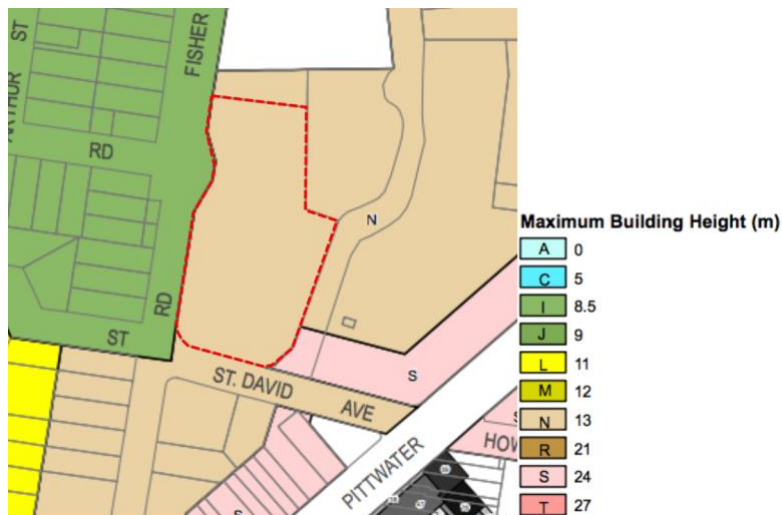


Figure 1 Height of Buildings LEP Map

Source: WLEP 2011 modified by Mecone

4 Extent of Variation to the Development Standard

The proposed development will vary the HOB control at various points due to the staggered ground levels caused by the site's topography. The areas exceeding the height plane include roof, plant equipment, upper level walls, and a small area of balcony fronting the northern boundary. The amount of area above the height plane is minor in scale and does not concentrate in any point in particular but rather is caused where there is a significant drop in elevation. The highest point above the height plane is 2.9m above the 13m height standard (22.3% exceedance). No full levels are outside of the height plane and only a very small area of habitable space is outside of the height plane (balcony fronting northern boundary).

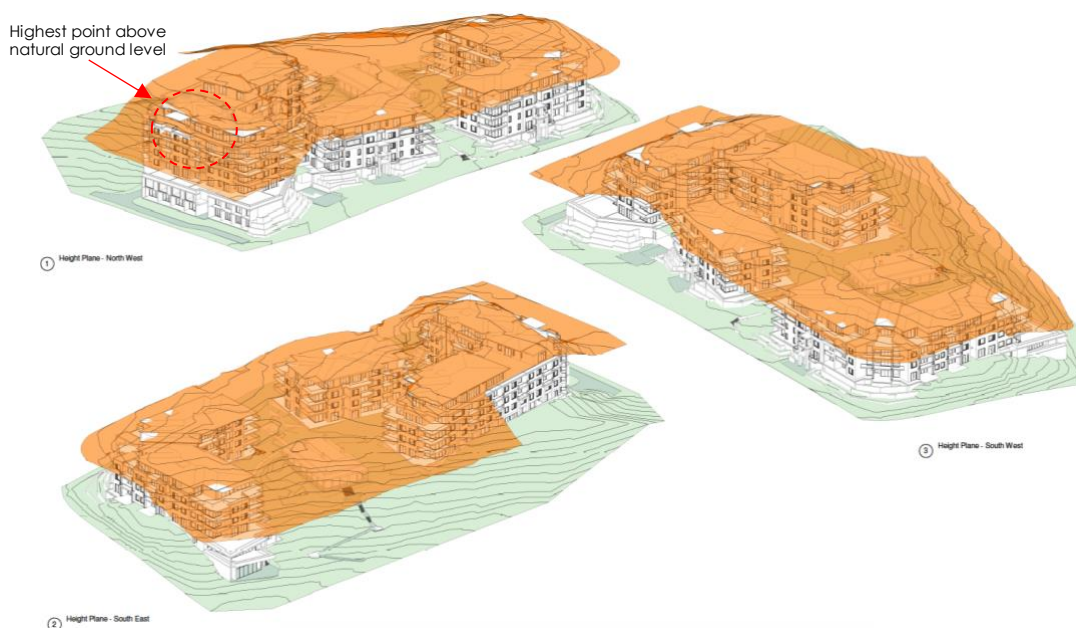


Figure 2 13m height plane overlay to proposed development

Source: Rose Architectural Design

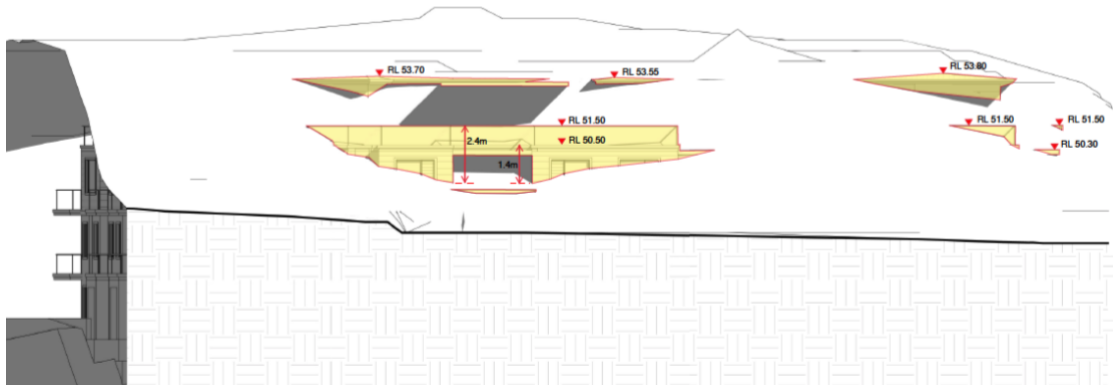


Figure 3 North elevation with key height exceedance highlighted

Source: Rose Architectural Design

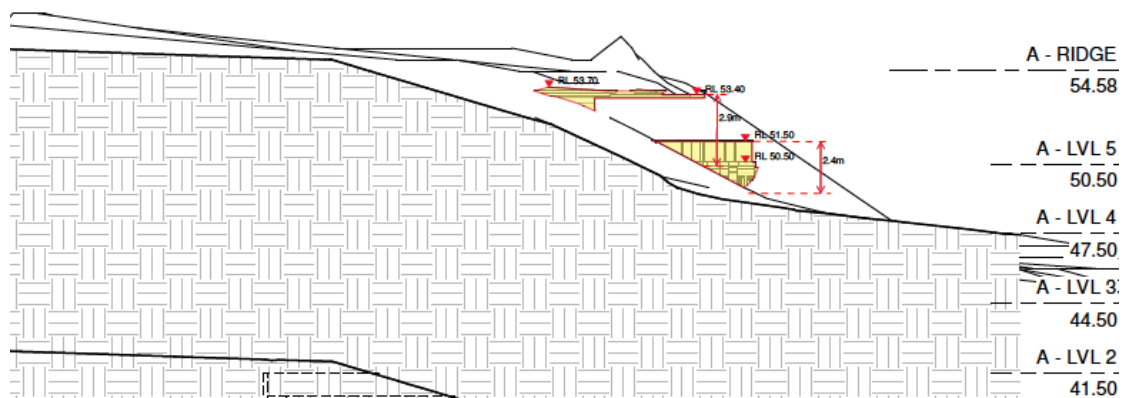


Figure 4 East elevation with key height exceedance highlighted (north side of site)

Source: Rose Architectural Design

5 Objectives of the Standard

The objectives of Clause 4.3 Height of Buildings (HOB) are as follows:

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

6 Objectives of the Zone

The objectives of the B4 Mixed Use zone are as follows:

- To provide a mixture of compatible land uses.
- 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.

- 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.
- 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.
- To promote a land use pattern that is characterized by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.
- To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.

7 Assessment

Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the height of buildings control is unreasonable and unnecessary given the following circumstances of this case:

- As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* tests 1 and 4, as described in *Williams*, are relevant to the proposed variation to the land use mix development standard:
 - *Wehbe* Test 1 – the development meets the objectives of the development standard despite its non-compliance;
 - *Wehbe* Test 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;

Wehbe 1 - Development meets the objectives of the development standard despite the non-compliance with the control

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

- The proposed development is largely compliant with the 13m height control, with variations a result of the unique topographical constraints of the land. The proposed development is compatible with the height and scale of surrounding development, including the residential flat building to the north of the site;
- The proposed 13m building height with minor exceedances (up to 53.40 RL) provides an appropriate transitional height between the low rise dwellings to the west and medium to high rise buildings within the Dee Why Town Centre to the east, including the 28.4m high development under construction at 701 Pittwater Road. The proposed six storeys on the northern side of the site provides an appropriate uplift transition with the adjoining three storey flat building to the north, following the sloping of the land along Fisher Road;
- Under the WLEP2011, the maximum building height is measured from the existing ground level (existing) to the highest point of the building. The portions of the buildings that do not comply with the height control are only in the outer corners

of roofs, or small sections of the upper walls and balconies where there is a significant drop in the ground level below. The exceeding area is not concentrated in any specific area or level but is scattered across the site following the naturally uneven topography. Accordingly, it does not create any impacts that would make the development appear out of context with the scale of surrounding and nearby development;

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

- As noted in Figures 2, 3 and 4 above, the parts of the building that breach the height control are minor building elements at the edge of the buildings and do not create any visual impacts, loss of privacy, solar access or views beyond what a compliant proposal would create;
- Furthermore, the proposed building height is lower than a scheme approved previously by Council at the subject site. The previous Stage 1 development consent granted for the site in 2012 (DA2011/1274) included a building height of up to 55.03RL. The proposed development offers a reduced height to what is approved (54.58RL). As such, the proposal will result in a net reduction of any view, privacy or solar impacts compared to the approved scheme;
- As shown below, the approved scheme included similar non-compliances at the top edges of buildings due to topographical constraints. The variation to the height control does not increase the development's intensity by increasing the amount of floor space delivered on the site;

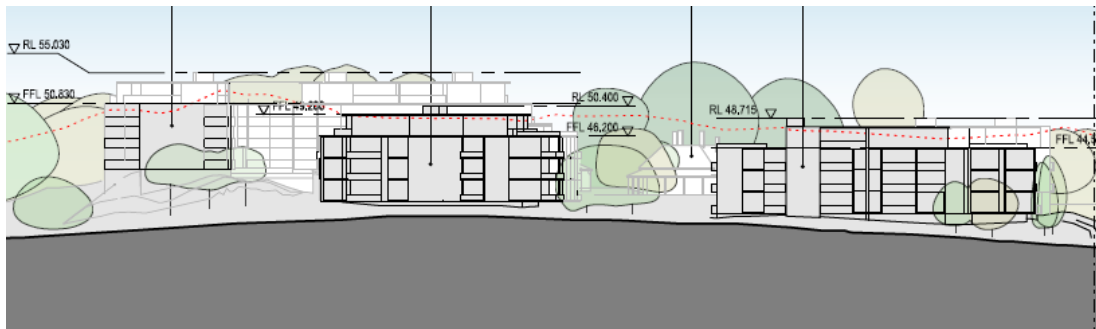


Figure 5 Approved elevation (Fisher Road frontage) (DA2011/1274)

Source: HASSELL

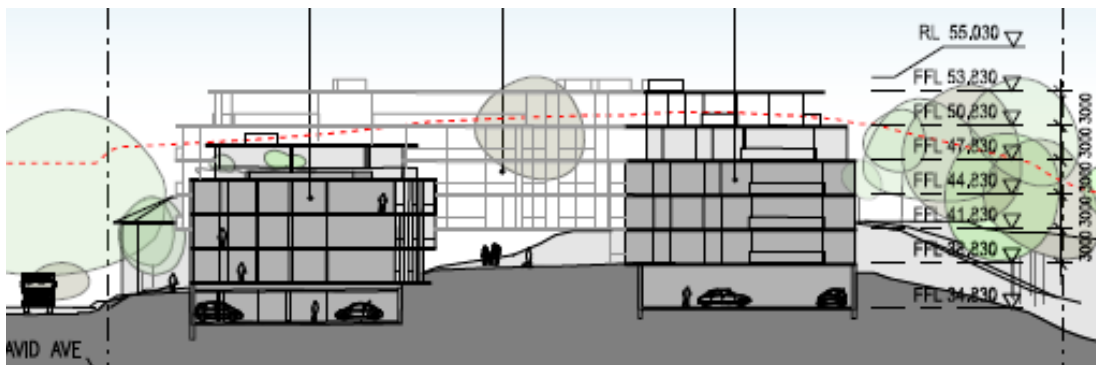


Figure 6 Approved North Facing Section (DA2011/1274)

Source: HASSELL

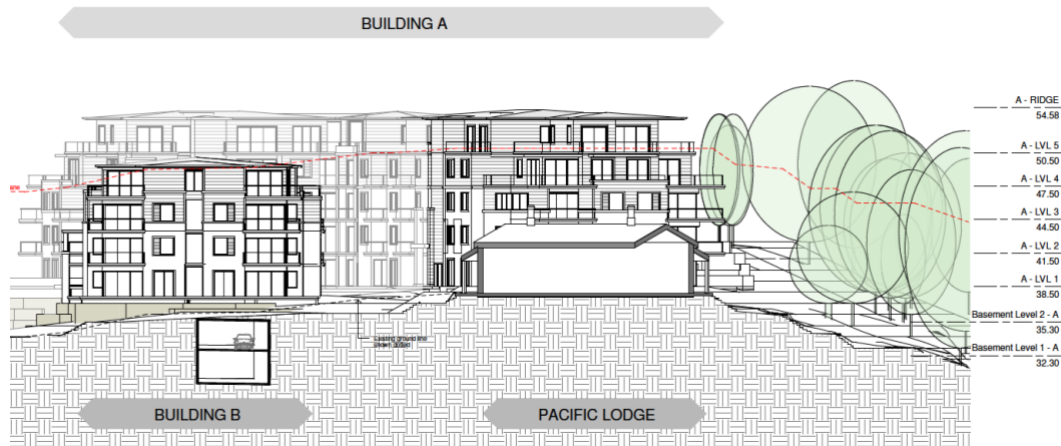


Figure 7 Proposed section (north facing, similar perspective to Figure 4)

Source: Rose Architectural Design

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

- The minor variations of building height will not create any adverse impact of the development on the scenic quality of the bush environment. The buildings sit appropriately within the vegetated site and will not dominate or detract from the landscaping outcomes for the site;

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

- The development responds to the natural features of the site, retaining the key features such as mature trees to the east and the rock face along St David Avenue. The development includes generous amounts of landscaping to enhance the site's natural characteristics and soften the built form, including approximately 3,700m² of deep soil on site (34.8% of site area) and additional podium planting between the buildings along Fisher Road (approximately 300m²);
- All parts of the building that exceed the height control are setback from the site boundaries to ensure the development has an appropriate visual impact when viewed from the public domain;
- The building generally follows the slope of the land and is broken down with setbacks and level changes. However, the site's significant level changes mean that the proposed future buildings breach the height control in a few instances.

Wehbe Test 4 - the development standard has been virtually abandoned

- As discussed above, the proposed building height is lower than a scheme approved previously by Council at the subject site. The previous Stage 1 development consent granted for the site in 2012 (DA2011/1274) included a building height of up to 55.03RL. The proposed development offers a reduced height to what is approved (54.58RL).
- As shown below, the approved scheme included similar non-compliances at the top edges of buildings due to topographical constraints. The variation to the height control does not increase the development's intensity by increasing the amount of floor space delivered on the site;

- As such, Council's prior actions and approvals have demonstrated that the proposed built form is considered contextually appropriate, which renders the standard virtually abandoned in this instance.

Therefore, strict compliance with the height control would be unreasonable and unnecessary in this circumstance.

Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do **more than** demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate other environmental planning grounds that justify contravening the development standard, preferably grounds that are specific to the site. Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed.

On appeal, Leeming JA in *Four2Five vs Ashfield Council* NSWCA 248 acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

"matters of consistency with objectives of development standards remain relevant, but not exclusively so."

This approach was further reinforced by Commissioner O'Neill's determination of the subsequent Initial Action Class 1 appeal (LEC 2019 1097), where she stated that *"the environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (Initial Action [24])*. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (Initial Action [24])...

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by his Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act)."

The proposed development allows for the promotion and co-ordination of the orderly and economic use and development of the land in accordance with the Objects of the Act in the following ways:

- The development will promote good design and amenity of the building environment (Object 1.3(g)). This will be achieved through a better urban design outcome for the site, than would be delivered through a compliant scheme. Given the staggered nature of the existing ground level, full compliance with the height control would require the upper level of building to be equally staggered with inconsistent building setbacks and heights in efforts to respond to points of steep descents across the site. The result would negatively impact on the overall

visual presentation of the development. The building envelope proposed creates minor height exceedances as a result of presenting a coherent and architecturally uniform development across the three buildings;

- The development of the site will not set any precedent for future development in the immediate locality as the site has such unique topography and the development only seeks to provide an appropriately-designed building form given the unique topography. The proposed development meets the objectives of the B4 Mixed Use zone without providing unreasonable impact on adjoining sites.
- The proposed development presents a high quality built form, with stepped levels and articulation to follow the slope of the land, and appropriate materials and finishes which contribute to the desired future character of the Dee Why Town Centre. The proposal is compliant with building envelope controls for the site, including the relevant setback provisions in the Warringah Development Control Plan 2011 (DCP);
- Despite the breach of the height control, the development maintains high quality amenity to surrounding properties with no overlooking or solar impacts which contravene the DCP and ADG requirements;
- Given the above, strict compliance with height controls would hinder the attainment of the objectives of the Act by promoting a built form that was inconsistent and not appropriate for the surrounding scale and landscaping, which would be inconsistent with the Objects of the Act, including the need for orderly and economic use and development of land.

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case).
2. There are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with the findings of Commissioner O'Neill in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request adequately addresses the matters in Clause 4.6(3).

Clause 4.6(4)(a)(ii) - Is the proposed development 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?

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed earlier in this Request, with the development's compliance with the zone objectives outlined below under the relevant headings:

The site falls within the B4 Mixed Use zone and the relevant objectives are addressed below:

- *To provide a mixture of compatible land uses.*

The proposed development will include a mixture of uses including commercial tenancies fronting towards the Dee Why Town Centre to the south-east, townhouse dwellings fronting the residential areas to the north-west, and residential units above.

- *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.*

The proposed development is located on the north-west corner fringe of the Dee Why Town Centre. Commercial office space has been provided in the most suitable location on site (south-east corner oriented towards the central mixed use area) to assist in providing a transition between the town centre and residential zones beyond Fisher Road. Future tenants and employees will benefit from the walkable distance to the town centre's services and facilities and various bus services along Pittwater Road, located a 300m walk from the site's main vehicle and pedestrian entrance on Fisher Road.

- *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.*

The proposed development allows for modern, high quality development to be introduced in the Dee Why Town Centre and creates additional employment space and housing stock which will benefit from and contribute to the town centre's growth. The proposed layout plan allows for appropriate setbacks, height, and building articulation which presents well to the street frontages with significant landscaping to maintain the natural features of the site. The proposed mix of land uses allows for an appropriate transition between the low rise residential areas to the north west of the site and the higher density mixed use Dee Why Town centre to the south east. The development is able to reinforce the role of Dee Why as a major centre by increasing residential population in close proximity to local civil services, including the new Northern Beaches PCYC, Dee Why Library and shops on Pittwater Road.

- *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.*

The proposed development includes appropriate design elements such as setbacks, stepped levels, and balconies to provide interesting and well-integrated buildings which respond to the fall of the site and address the street. Pedestrian movement on the site has been designed with consideration of site topography to ensure comfortable, direct routes are provided between buildings with adequate passive surveillance.

- *To promote a land use pattern that is characterized by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.*

The subject site is relatively detached from the main commercial and retail activity along Pittwater Road due to topography and distance. Therefore, the desired land use breakdown outlined in this objective is not considered to be appropriate for the subject site, which is able to better integrate with the surrounding residential built form by providing dwellings at ground floor level. The combination of residential and commercial on the site provides an appropriate

transition on the fringe of the Dee Why Town Centre and should be assessed on its own merit.

- *To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.*

The subject site is large in size and is not identified for site amalgamation under the existing or draft future controls. Car parking is proposed to be provided across two basement levels. It is noted that the sections of protruding basement level walls created by the sloping site will be hidden with substantial landscaping, which is a better outcome than the blank walls approved in the 2012 Stage 1 DA.

As discussed above the proposal is considered to be in the public interest as it is consistent with the objectives of the development standard and the B4 Mixed Use zone.

Furthermore, there is no significant benefit in maintaining the building height on the ground level of the site given the proposal facilitates a significantly better planning outcome with improved built form, and amenity in the form of additional housing and landscaping. The contravention results in no significant adverse environmental impacts but rather a better planning outcome to what is currently approved.

8 Any matters of significance for State or regional environmental planning

The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Greater Sydney Region Plan ('the 30-minute city') and North District Plan, which are matters of regional environmental planning significance. By contrast, the contravention of the building height does not raise any matter of State or regional planning significance.

9 Secretary's concurrence

The Planning Circular PS 18-003, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). The WLEP2011 is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council. This restriction however does not apply to decisions made by a Sydney planning panel, as they are not legally delegates. The proposed development will be assessed by a Sydney Planning Panel, and as such the 10% limit does not apply.

10 Conclusion to variation to height standard

This is a written request for an exception to the building height under Clause 4.6 of the WLEP 2011. It justifies the contravention to the height under Clause 4.3 of the WLEP 2011, and in particular demonstrates that the proposal provides a significantly

better planning outcome, with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Satisfies the objectives of Clause 4.3 under WLEP 2011 (Wehbe Test 1) despite the variation to the development standard;
- Is consistent with the built form and height of previous consents issued for the site (DA2011/1274), which has resulted in the standard having been virtually abandoned and hence compliance with the standard is unnecessary and unreasonable (Wehbe Test 4);
- It has sufficient environmental planning grounds to permit the variation consistent with the Objects of the Act including:
 - To promote the orderly and economic use and development of land; and
 - To promote good design and amenity of the built environment.
- It is consistent with the applicable and relevant State and regional planning policies. The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Region Plan and District Plans ('the 30-minute city'), which is a matter of regional environmental planning significance.
- Satisfies the objectives of the B4 Mixed Use zone under WLEP 2011; and
- Provides a better outcome for the site and its surrounding uses and is therefore in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the WLEP 2011.



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