

# 23 Fisher Road, Dee why

Updated Clause 4.6 variation residential flat buildings in Zone B4 Mixed Use

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 ground-floor, land use standards for residential flat buildings in Zone B4 Mixed Use (Clause 6.7) 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 better 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 is acceptable as:

- Council's draft LEP update relating to the Dee Why Town Centre has identified that the subject site is not suitable for non-residential uses at the ground floor and thus the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Wehbe Test 2);
- Council's own actions in previously granting consent for a development with residential uses at ground floor (DA2011/1274) on the site, as well as its historic use as an aged care facility, has resulted in the standard being 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 Objectives 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.
- It satisfies the objectives of the B4 Mixed Use zone under WLEP2011 (there are no objectives for Clause 6.7) despite the non-compliance with the development standard; 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.

## 2 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 as follows:

- a) *to provide an appropriate degree of flexibility in apply development standards to particular development*
- b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances*

Clause 4.6 enables a variation to the ground-floor use 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 6.7 as a provision which cannot be 'contravened'.

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 grounds 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].

A further recent judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

*"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard."* [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court. It is noted, it also reflects the further finding by Commissioner O'Neill for *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSW LEC 1097 when the case was remanded back to the LEC as a Class 1 Appeal.

Clause 4.6 of the WLEP 2011 enables an exception to the development standard in clause 6.7 in order to permit residential dwellings at ground level 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.

#### Consideration of Clause 6.7 as a development standard

As outlined above, Clause 4.6 can only be applied to a 'development standard'. As such, the question of whether Clause 6.7 of the WLEP2011 acts as a 'permissibility / prohibition' provision, or whether it is a Development Standard has been considered.

Clause 6.7 of the WLEP 2011 reads:

*Development consent **must not** (emphasis added) be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level.*

In considering whether the subject Clause acts as a development standard or prohibition, Mecone has considered the following Land and Environment Court findings:

- *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153; and
- *Agostino v Penrith City Council* (2010) 172 LGERA 380.

Both these cases utilised the two-step Poynting approach, which requires:

- a) *a consideration of whether the proposed development is prohibited under any circumstances pursuant to cl 26 of SEPP (HSPD) when it is read both in context, and as a whole; and*
- b) *if it is not so prohibited, a consideration of whether cl 26 of SEPP (HSPD) relevantly specifies a requirement or fixes a standard in relation to an aspect of the proposed development.*

"Development standards" is defined in the Environmental Planning and Assessment Act 1979 and includes a regulation in relation to carrying out of development, being "provisions by or under which requirements are specified or standards are fixed in respect of any developments. There is opportunity to vary development standards under certain circumstances; namely that there are sufficient environmental planning grounds to justify contravening the development standard".

In particular in Poynting, the Court found that "Control by complete prohibition on the development in question will not leave room for requirements or standards. But anything less than complete prohibition means that there can be the development in question, and provided the relevant aspect of the development is identified the control will be by imposition of a development standard (Poynting at ...[98])."

In reviewing the two-step Poynting approach, it is our view that the subject Clause acts as a development standard, as:

- Residential flat buildings are permitted within the zone, therefore the land use is not prohibited; and
- Clause 6.7 fixes a standard in relation to an **aspect** (emphasis added) of the proposed development, which in our view is capable of being amended. Namely, that residential dwellings are proposed at the ground-floor of Buildings A, B and part of Building C. Non-residential uses are proposed at the ground-floor of Pacific Lodge and the south-east corner of Building C (communal room).

It is also noted that Clause 6.7 is not identified as a Clause that is not capable of being varied under Clause 4.6(8) of the WLEP2011.

Fundamentally, this Clause 4.6 Variation Request will demonstrate that non-compliance with Clause 6.7 of the WLWP2011 will provide a **better** (emphasis added) planning outcome than would be enabled through compliance with the control. Further, the request shows that the provision acts as a standard that is capable of being varied, rather than the prohibition.

### 3 The Development Standard to be varied

The development standard to be varied is Clause 6.7 Residential flat buildings in Zone B4 Mixed Use. The Clause reads 'development consent must not be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level'.

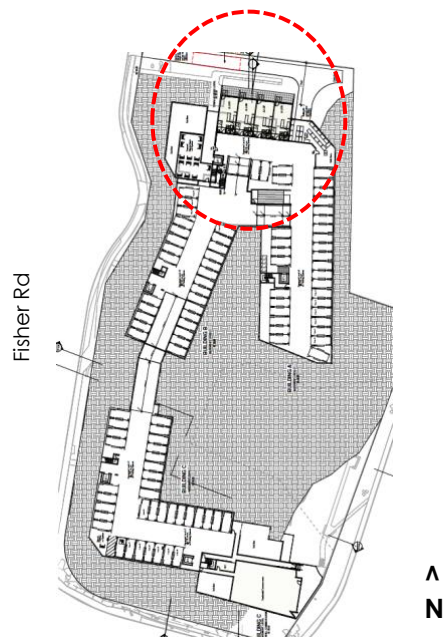


**Figure 1** WLWP 2011 Zoning Map Extract

Source: Mecone Mosaic

### 4 Extent of Variation to the Development Standard

The proposed development includes three residential flat buildings and use of Pacific Lodge for non-residential uses. The proposed development will vary the Clause 6.7 by proposing residential dwellings at the ground-floor of Buildings A, B and part of Building C. Non-residential uses are proposed at the ground-floor of Pacific Lodge and the south-east corner of Building C (communal room). Refer to Figures below showing where residential uses are proposed at the ground floor.



**Figure 2** Proposed basement parking plan

Source: Rose Architectural Design



**Figure 3** Proposed Level 1 parking plan

Source: Rose Architectural Design

## 5 Objectives of the Standard

There are no stated objectives of the standard. However, it is considered that the purpose of Clause 6.7 is to ensure that mixed use zones, including those in the Dee Why Town Centre, maintain active frontages and a mix of uses.



## 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 restriction of dwellings on ground floor level of residential flat buildings in Zone B4 Mixed Use 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 2 and 4, as described in *Williams*, are relevant to the proposed variation to the land use mix development standard:
  - Wehbe Test 2 - the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
  - 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 Test 2 – Underlying objective or purpose of the development standard is not relevant

- While zoned B4 Mixed Use, the site is located in the far corner of the Dee Why Town Centre and is opposite the R2 Low Density Residential Zone to the east and nearby to RE1 Public Recreation zone to the north. Due to the transitional nature of the site's location, the mix of ground-floor land uses on the site including residential uses to the north-west and along Fisher Road, and non-residential uses in the heritage-listed Pacific Lodge and a common area in the south-east corner of Building A provides a better integrated built form and land use mix to respond to the surrounding context;

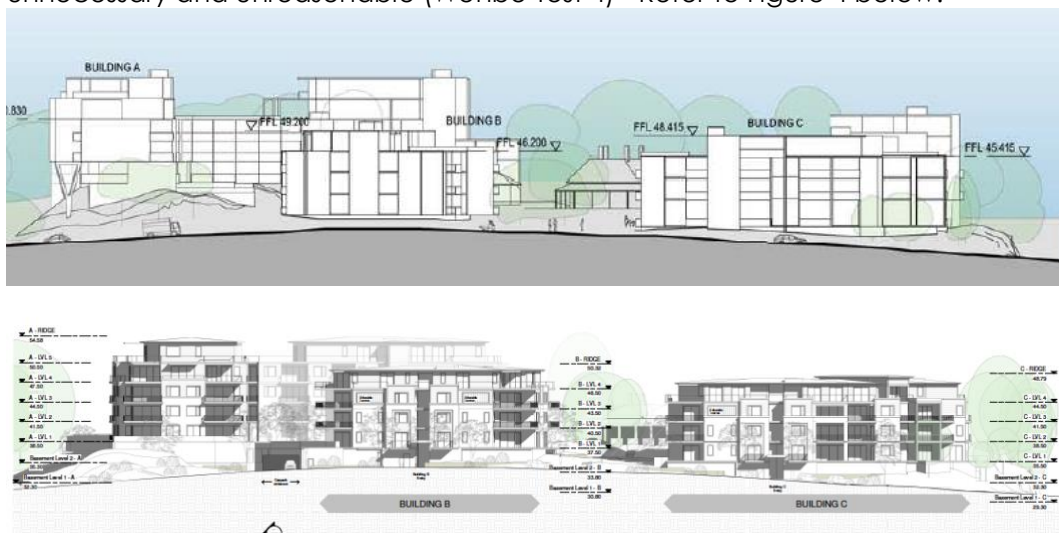


- The delivery of ground floor level non-residential uses across the entire site would be disadvantaged and unsuccessful. The site is located on the fringe of the Dee Why Town Centre, distanced from the main commercial and retail activity along Pittwater Road, and located behind the Northern Beaches Council offices and facilities. Additionally, the significantly elevated nature of the site and steep sloping discourages passive foot traffic past and through the site;
- Council's draft LEP update relating to the Dee Why Town Centre has identified that the subject site is not suitable for non-residential uses at the ground floor and thus the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Wehbe Test 2). In particular, Council's own Planning Proposal report accompanying the proposed LEP amendment states:

*This includes 15-23 Fisher Road which is currently occupied by an aged care and assisted living facility. These sites do not contain active building fronts and are not characterised by shops, restaurants and business premises on the ground floor. They are also physically and functionally separated by their topography to neighbouring civic uses. Council does not consider it necessary for commercial uses to be contained on these sites. Although it may be appropriate to rezone these sites to R3 Medium Density Residential, this may require re-exhibition of the Planning Proposal creating further delays. Consequently, it is recommended to exclude certain planning controls from these sites, namely, controls promoting retail and economic activity..."*

#### Wehbe Test 4 – Development standard has been virtually abandoned

- Council's own actions in previously granting consent for a development with residential uses at ground floor (DA2011/1274) on the site has resulted in the standard being virtually abandoned and hence compliance with the standard is unnecessary and unreasonable (Wehbe Test 4) - Refer to Figure 4 below.



**Figure 4** Approved Fisher Road elevation (above) and proposed Fisher Road elevation with sandstone terracing landscaping (below)

Source: HASSELL and Rose Architectural Design

- It is also noted that the historic use of the site has been an aged care facility with residential uses at ground-floor across the site.

Therefore, strict compliance with the restriction of dwellings at ground floor level 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:

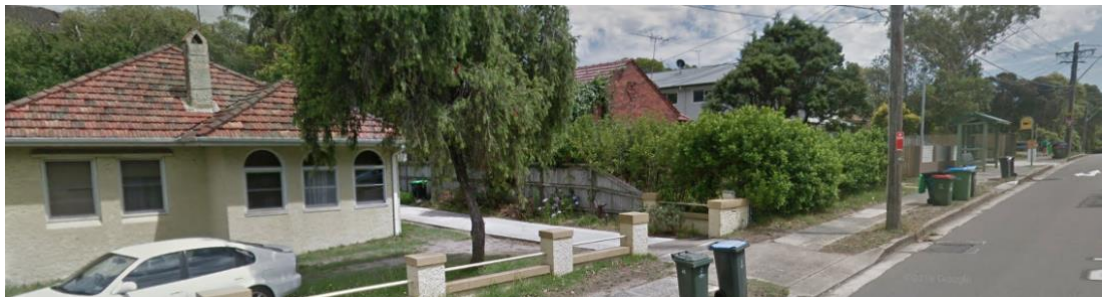
*"matters of consistency with objectives of development standards remain relevant, but not exclusively so."*

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 Objectives of the Act in the following ways:

- Fisher Road, north of St David Ave, has an established residential character, with a mix of single dwellings and residential flat buildings adjoining the site to the north and west (refer to Figure 5 below).



**Figure 5:** Western side of Fisher Road looking north

Source: Google Maps

- The proposal is consistent with the established existing residential character and the recent WLEP amendments clearly identify the intention of this precinct to remain residential in nature.
- The proposal's low impact residential nature will ensure surrounding developments are not unreasonably impacted with respect to privacy, solar access, or security;
- The development will promote the orderly and economic use of land by providing appropriate uses at ground-floor that respond to the transitional location of the site between R2 Low Density Residential and B4 Mixed Use. The proposal will provide a commercial component in Pacific Lodge, and communal room at the south-east corner of Building C, while providing residential uses at ground-floor for buildings A and B;
- To provide non-residential uses across the ground floor level of the entire site would result in isolated tenancies separated from the main commercial and retail centre along Pittwater Road by distance and topography, and would respond poorly to the established residential character along Fisher Road. It would be difficult to find long term commercial/retail tenants for commercial development in the north of the site due to its isolated location and orientation away from the main centre. Vacant and unused tenancy spaces at ground level will provide a poor outlook to the street and negatively impact on safety, security and visual quality of the overall site for vehicles, pedestrians and residents passing by, which is contrary to Objectives 1.3(c) and (g) of the EP&A Act 1979. The residential uses proposed will provide greater visual interest and passive surveillance to increase safety and security;
- Irrespective of location on the site, the proposal includes the land uses envisaged in the zone, being commercial and residential mix, in a unique layout which responds best to the site's context;
- The proposal provides further housing for the locality which is highly accessible to public transport and employment opportunities, and will support the activation and growth of the Dee Why Town Centre;
- Given the above, strict compliance with restriction of dwellings on ground floor level would hinder the attainment of the objectives of the Act, and would not result in the 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 Preston 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 below under the relevant headings:

**a) the objectives of the particular standard**

There are no objectives outlined for the particular development standard (Clause 6.7 Residential flat buildings in Zone B4 Mixed Use).

**b) the objectives for development within the zone in which the development is proposed to be carried out.**

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 uses in Pacific Lodge fronting towards the 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 uses have been provided in the most suitable location on site in Pacific Lodge to assist in providing a transition between the local 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, less than 100 metres to the east.

- *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 centre's growth. The proposed layout plan allows for appropriate setbacks, height, and building articulation which presents well to the street with significant landscaping to maintain the natural features of the site. The proposed mix of land uses allows for an appropriate transition between the residential areas to the north west of the site and the mixed use Dee Why Town centre to the south east.

The proposed development reinforces the role of Dee Why as a major centre in the sub-region through the provision of residential development which transitions appropriately into the adjoining low density residential area to the west and is in close proximity to the civic centre, community facilities, employment opportunities and public transport.

- *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 upper level setbacks, staggered frontages, 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 and is not identified for site amalgamation. 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 in the public interest as it is consistent with the objectives of the B4 Mixed Use zone.

Furthermore, there is no significant benefit in maintaining the non-residential uses on the ground level of the site in the north-west corner given the proposal facilitates a significantly better planning outcome with improved land use transition, and amenity in the form of additional housing, landscaping. The contravention results in no significant adverse environmental impacts and a better planning outcome.



## 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 Plans, which are a matter of regional environmental planning significance. By contrast, the contravention of the restriction to dwellings at ground floor level in Zone B4 Mixed Use does not raise any matter of State or regional planning significance.

## 9 No public benefit in maintaining the development standard

By way of summary, there is no public benefit in maintaining the standard in Clause 6.7 due to the fact that the proposed development is consistent with the objectives of the B4 Mixed Use zone and:

- (a) Will include a mixture of uses including commercial tenancies fronting towards the Town Centre to the south-east, with townhouse dwellings fronting the residential areas to the north-west, and residential units above – which is a more appropriate transitional response;
- (b) 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 local 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.
- (c) 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 centre's growth. The proposed layout plan allows for appropriate setbacks, height, and building articulation which presents well to the street with significant landscaping to maintain the natural features of the site. The proposed mix of land uses allows for an appropriate transition between the residential areas to the north west of the site and the mixed use Dee Why Town centre to the south east.
- (d) Is relatively detached from the main commercial and retail activity along Pittwater Road due to topography and distance. Therefore, completely non-residential uses at ground floor 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 at the ground level on the site provides an appropriate transition on the fringe of the Dee Why Town Centre and enables a better planning outcome for the site than a compliant scheme.

## 10 Conclusion to variation to development standard

This is a written request for an exception to ground floor level requirements for residential flat buildings in Zone B4 Mixed Use under clause 4.6 of the WLEP 2011. It justifies the contravention to the standard restricting dwellings at the ground floor level of residential flat buildings in Zone B4 Mixed Use under clause 6.7 of the WLEP 2011,

and in particular demonstrates that the proposal provides a significantly better planning outcome (compared to compliant non-residential uses at ground floor level) with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Council's draft LEP update relating to the Dee Why Town Centre has identified that the subject site is not suitable for non-residential uses at the ground floor and thus the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Wehbe Test 2);
- Council's own actions in previously granting consent for a development with residential uses at ground floor (DA2011/1274) on the site has resulted in the standard being virtually abandoned and hence compliance with the standard is unnecessary and unreasonable (Wehbe Test 4);
- Has sufficient environmental planning grounds to permit the variation consistent with the Objectives 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.
- It satisfies the objectives of the B4 Mixed Use zone under WLEP2011 (there are no objectives for Clause 6.7) despite the non-compliance with the development standard; and
- Provides a better outcome for the site and its surrounding uses and is therefore in the public interest.

Pursuant to Clause 4.6(4)(a)(i) and 4.6(4)(b), and the assumed concurrence notice made by the Secretary of the Department of Planning and Environment on 21 February 2018, concurrence for the contravention of the development standard is assumed given the variation relates to a non-numerical development standard to be determined by the Local Planning Panel.





Suite 1204B, Level 12, 179 Elizabeth Street  
Sydney, New South Wales 2000

[info@mecone.com.au](mailto:info@mecone.com.au)

[mecone.com.au](http://mecone.com.au)