



11 December 2024

Amy Watson
A/Director Social & Affordable Assessments
Department of Planning, Housing and Infrastructure

via email: [REDACTED]

Dear Amy,

Mixed use development with in fill affordable housing 4 Delmar Parade and 812 Pittwater Road Dee Why (SSD-68230714) – Request for Information

I refer to the State significant development application for mixed use development with in fill affordable housing 4 Delmar Parade and 812 Pittwater Road Dee Why (SSD-68230714) (**Application**), currently before the Independent Planning Commission (**Commission**) for determination.

Following the Commission's meeting with the Applicant on 26 November 2024, the Applicant has provided the Commission with further information including a revised 4.6 variation request (**Attachment A**).

The Commission is seeking clarification from the Department of Planning, Housing and Infrastructure (**Department**) as to whether this further information changes any of the Department's recommendations set out in the Department's Assessment Report or recommended conditions of consent, dated November 2024?

The Commission requests that the Department provide a response by **5pm on Tuesday, 17 September 2024**.

Should you require any clarification in relation to the above, or wish to discuss further, please contact Brad James at [REDACTED] or at [REDACTED].

Yours sincerely,

Stephen Barry
Planning Director

5 December 2024

All correspondence to:
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135 King Street
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Contact

Partner

By Post and Email: [REDACTED]

Dear Members

**Landmark Group's State Significant Development Application No. SSD-68230714
Mixed Use Development at 4 Delmar Parade and 812 Pittwater Road, Dee Why**

1. Introduction

- 1.1. We act for Landmark Group Australia (**our Client**) in relation to the development of 4 Delmar Parade and 812 Pittwater Road, Dee Why (**the Site**).
- 1.2. The Site benefits from Development Consent No. DA2022/0145 (**Development Consent**) for the demolition and construction of a mixed-use development (comprising a residential flat building and shop top housing with 4 commercial tenancies and 219 apartments, basement parking, lot consolidation and Torrens Title subdivision) at the Site (**Approved Development**).
- 1.3. Shortly after the Development Consent was approved, an affordable housing incentive scheme was introduced under the *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**) which entitles eligible developments to additional floor space and height if certain requirements are satisfied.
- 1.4. As such, our Client has lodged State Significant Development Application No. SSD-8230714 (**SSDA**) which seeks to rely on the incentive scheme in the Housing SEPP.
- 1.5. This letter is provided in support of our Client's SSDA and specifically the four clause 4.6 written requests prepared by Sutherland & Associates (**Cl 4.6 Requests**) which seek to vary the following applicable development controls:
 - cl 7.12 of the *Warringah Local Environmental Plan 2011* (**WLEP**) relating to the promotion of retail activity;
 - cl 7.6A of the WLEP relating to the podium height;
 - cl 16(1) of the Housing SEPP relating to floor space ratio (**FSR**); and
 - cl 16(3) of the Housing SEPP relating to height of buildings (**HOB**).

2. Background

- 2.1. On 14 July 2023, the Development Consent was granted by the Sydney North Planning Panel (**SNPP**).
- 2.2. On 14 December 2023, the Housing SEPP was amended and cl16 was inserted (amongst other changes) which allowed for an 'uplift' in the maximum permissible FSR and HOB for certain in-fill affordable housing developments (such as the Proposed Development).
- 2.3. The SSDA seeks consent for the construction of a mixed use commercial and residential development comprising 3 commercial tenancies, 280 apartments including 43 affordable housing apartments, basement parking and subdivision at the Site (**Proposed Development**).

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- 2.4. The Proposed Development replicates the Approved Development. The key change between the two proposals is the increase in yield (from 219 and 280 apartments) to accommodate additional affordable housing. As a result of this, the Proposed Development seeks consent for an additional 1-2 levels (varied across the Site) to accommodate an additional unit.

We are instructed that works have already commenced at the Site in accordance with the Development Consent. As such, if the SSDA is approved, the Development Consent would require amendment in accordance with s4.17(1)(b) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* to be limited to demolition, tree removal and piling, stormwater diversion works and construction of basement slabs.

- 2.5. The Department of Planning, Housing and Infrastructure (DPHI) has provided its support of the SSDA.
- 2.6. The SSDA has been referred to the Independent Planning Commission of NSW (IPC) for determination due to the number of submissions received (including opposition from Northern Beaches Council 'Council').

3. CI 4.6 Requests

- 3.1. Although there are four CI 4.6 Requests, three of these requests have been previously varied in the Development Consent. Meaning that the SNPP have previously approved variations of these provisions for this Site.
- 3.2. We have summarised the provisions the subject of the CI 4.6 Requests in the below table, along with the differences between that currently approved and that proposed in the SSDA.

Provision	Control	Approved Development	Proposed Development
CI 7.12(1)(f) of the WLEP: Promotion of Retail Activity	(Buildings will have at least two floor levels (including the ground floor level) of employment generating space	3 commercial tenancies and 21 ground floor apartments	No change
CI 7.6A of the WLEP: Podium Height	Building A: 2 storeys Building B: 3 storeys	Building A: 4 storeys Building B: 7 storeys	Building A: 5 storeys Building B: 9 storeys
CI 16(1) of the Housing SEPP: FSR	Pittwater Rd: 4.16:1 Balance of Site: 3.12:1	See below	Pittwater Rd: 5.66:1 Balance of Site: 2.84:1
CI 4.4 of the WLEP: FSR	Pittwater Rd: 3.2:1 Balance of Site: 2.4:1	Pittwater Rd: 4.27:1 Balance of Site: 2.24:1	See above
CI 16(3) of the Housing SEPP: HOB	Area S: 31.2m (being 24m + 30% uplift) Area O: 20.8m (being 16m + 30% uplift)	N/A	Area S: 30.2m (compliant) Area O: 25.1m (20.67% exceedance).

- 3.3. As demonstrated in the above table, the Proposed Development is generally consistent with that in the Development Consent – save for the increased HOB and FSR to accommodate the additional affordable housing dwellings.
- 3.4. In the recent case in the case of *Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (AUF), Pepper J confirmed that in circumstances where multiple development standards apply for the same control, **the incentive (bonus) provision is the standard that must be varied.**
- 3.5. As such, although the development standards the subject of the CI 4.6 Requests were previously varied under the applicable WLEP provisions, the amended CI 4.6 Requests the subject of the SSDA address the most current provisions in both the WLEP and Housing SEPP – and thus seek to vary these in accordance with Pepper J's decision in AUF.
- 3.6. In our opinion, it is open to the IPC to be readily satisfied that the Proposed Development is an attractive, high-end, architecturally designed development which provides much needed affordable housing in the Northern Beaches local government area.
- 3.7. The Proposed Development is not only consistent with the Approved Development (save for achieving additional housing) but it also actively promotes and achieves the objectives of the B4 Mixed Use Zone.
- 3.8. The high quality and contextually appropriate built form responds to adjacent and nearby developments and the built form characteristics within the local context.

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3.9. Although the Proposed Development requires variations to development standards in the WLEP, these non-compliances are largely due to the site's exiting constraints and features as set out in the amended CI 4.6 Requests.

3.10. Further and in any event, as stated in the clause 4.6 variation requests, the Land and Environment Court has in recent times expressly ruled that:

"clause cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome" (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112at [73]).

Conclusion

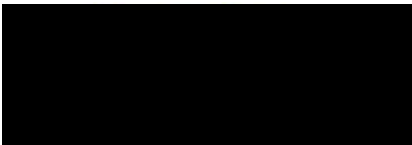
We have reviewed the amended CI 4.6 Requests for the SSDA and are of the view that:

- the objectives of each standard and zone are satisfied;
- it has been demonstrated that compliance with each development standard is unreasonable or unnecessary in the circumstances of this case; and
- there are sufficient environmental planning grounds to justify the contraventions;

For these reasons, we are of the view that the amended CI 4.6 Requests for the SSDA satisfy the jurisdictional pre-requisites, are lawful, and thus appropriately support the approval of the SSDA.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy at [REDACTED] or Caitlin Cleary at [REDACTED].

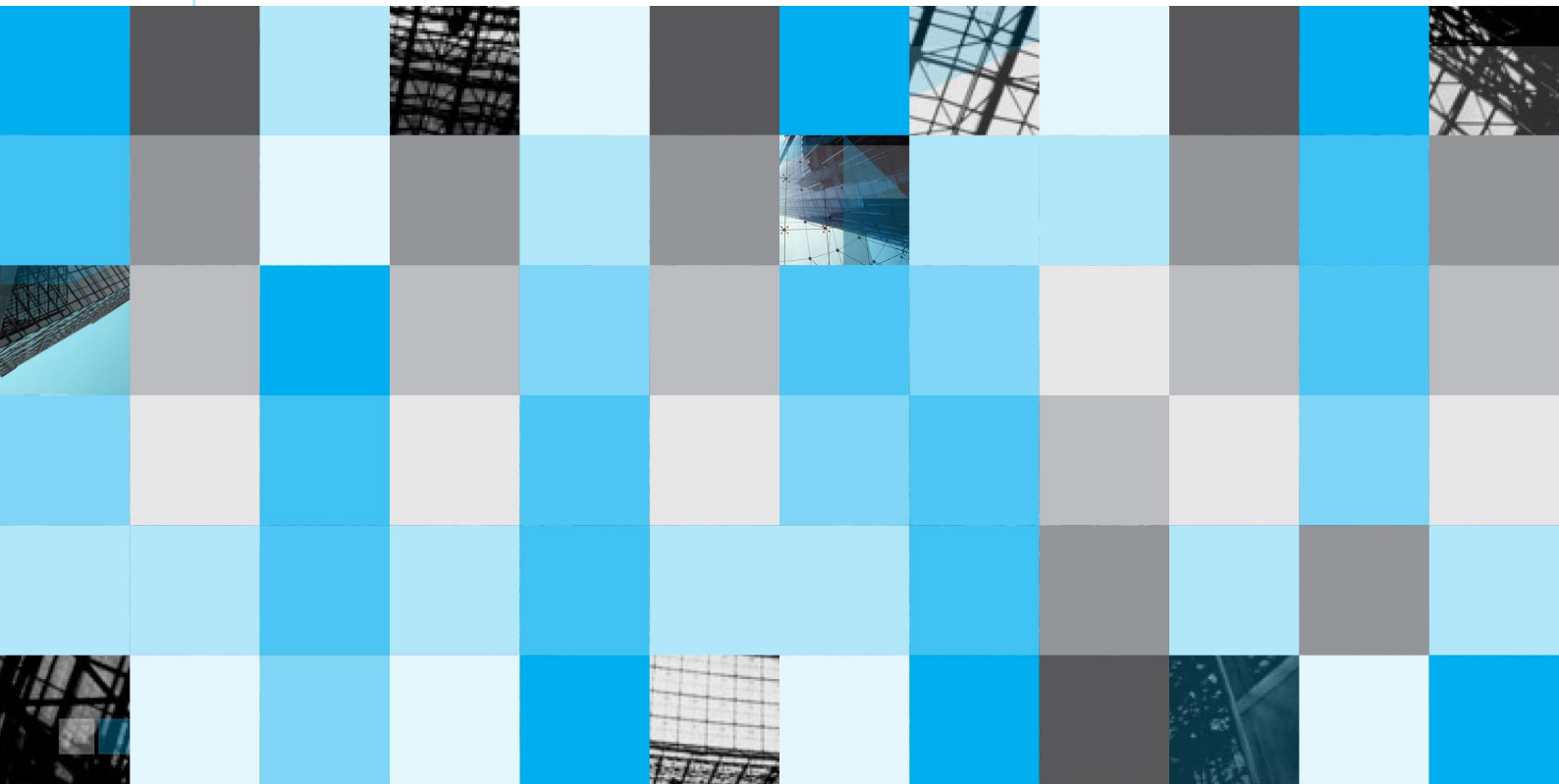
Yours sincerely



Anthony Whealy
Partner
Accredited Specialist Local Government & Planning

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4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – Podium Height Development Standard

Clause 4.6 – Podium Height Development Standard

**4 DELMAR PARADE AND 812 PITTWATER ROAD,
DEE WHY**

December 2024

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1.0 CLAUSE 4.6 REQUEST – PODIUM HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the podium height development standard contained within Clause 7.6A(2) of the Warringah Local Environmental Plan 2011 (WLEP).

The request relates to State Significant Development Application No. 68230714 (SSDA) for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing (Proposed Development) at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

Specifically, the Proposed Development seeks to increase the podium height in the Approved Development by 1 storey for Building A and 2 storeys for Building.

1.2 Background

On 14 July 2023, the Sydney North Planning Panel granted consent to development application DA2022/0145 which provided for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The Approved Development involved the variations to the podium height development standard which were supported by the Sydney North Planning Panel, as follows:

Site	Compliant podium	Previously approved
Building A (facing Delmar Parade)	2 storeys	4 storeys
Building B (facing Pittwater Road)	3 storeys	7 storey tower (no podium)

1.3 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument.

However, clause 4.6(3) goes on to say that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant of the SSDA requests that the development standard at cl 7.5A of the WLEP be varied.

1.4 Development Standard to be varied

Clause 7.6A states:

- (1) The objectives of this clause are as follows—

(a) to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,

(b) to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain.

(2) Development consent may be granted to the erection of buildings on the following land with the following maximum podium heights–

(a) Site A–3 storeys,

(b) Site B–4 storeys,

(c) land fronting Pittwater Road (except land on Site A or Site B)–3 storeys,

(d) land not fronting Pittwater Road (except land on Site A or Site B)–2 storeys.

1.5 Extent of Variation to the Development Standard

The proposed development provides the following podium heights for the development and variation to the podium heights development standards:

Site	Compliant podium	Previously approved	Proposed podium	Variation
Building A (facing Delmar Parade)	2 storeys	4 storeys	5 storeys	3 storeys
Building B (facing Pittwater Road)	3 storeys	7 storey tower (no podium)	9 storey tower (no podium)	6 storeys

1.6 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 7.6A of the WLEP are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,

The proposed variation to the podium height for Building A is specifically to achieve a more consistent built form character having regard to the higher podium heights in Delmar Parade within the visual catchment of the site. Strict compliance with the 2 storey podium height control would lead to an inconsistent and incohesive built form outcome.

The proposed variation for Building B, whilst resulting in a different podium height to that of 2 Delmar Parade, is an appropriate design outcome due to the unique location of Building B in a landmark location which heralds the southern gateway into the Dee Why Town Centre. In this location it is appropriate to have a single unified vertical expression for this slim building. It is also noted that this approach is similar to that which has been approved by Council for other corner buildings along Pittwater Road, such as the building at 822 Pittwater Road which adopts a 9 storey podium height along its northern façade.

(b) to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain,

The proposed podiums for the development remains consistent with this objective in that the proposed development achieves appropriate building separations and high levels of privacy and solar access to adjoining properties notwithstanding the proposed variations to the podium heights.

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

The underlying objectives and purpose of the podium height control are relevant to determining the appropriateness of the variation to the standard.

The Proposed Development is consistent with those objectives on the basis that the development achieves a consistent outcome in relation to podium height with the emerging character of development within the Dee Why Town Centre.

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

The underlying objectives and purpose of the podium height standard would be diminished by strict compliance because it would result in an inconsistent urban design outcome and a complete lack of podium height cohesion.

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;

The Council has consistently varied the podium height control, and it has been abandoned in so far as it applies to the subject and surrounding sites.

In particular:

- there are no sites within the visual catchment of the site along Pittwater Road which have a three storey podium;
- there are no sites within the visual catchment of the site along Delmar Parade which have a two storey podium; and
- the recently approved development on the subject site itself under development consent DA2022/0145 does not provide a three storey podium to Pittwater Road or a two storey podium to Delmar Parade.

Accordingly, the podium height control at Clause 7.6A of the WLEP has been unequivocally abandoned and so strict compliance with the clause is unreasonable and unnecessary.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Key facts that support the above reasons why strict compliance with the podium height development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The recently approved development on the site has already varied the podium controls with more than double the podium control on both Delmar Parade and Pittwater Road.
- The Pittwater Road building is in a landmark location as it heralds the southern gateway into the Dee Why Town Centre. Accordingly, it is appropriate for Building B to adopt a strong and unified vertical language to properly celebrate this important location and as a result this building is proposed without a podium/upper levels arrangement and instead adopts a 9 storey street wall. This proposed approach for an important corner site is also consistent with the emerging character of development for similar sites within the Dee Why Town Centre, noting that the development on the northern corner of Delmar Parade and Pittwater Road also adopts a nil setback and no podium along its northern street façade. Finally, strict compliance with the 3 storey podium height would also result in an anomalous outcome given that the recently approved development at 2 Delmar Parade has a 4 storey podium.
- In relation to Building A, it is proposed to provide a 5 storey podium in order to achieve a coordinated and cohesive podium level along Delmar Parade given that the recently completed development at 2 Delmar Parade has a strongly defined 4 storey podium height which has established this datum for the southern side of Delmar Parade. Strict compliance with the 2 storey podium requirement would result in an anomalous urban design outcome and it is more appropriate in this instance to achieve a more consistent podium height for Delmar Parade.

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

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The environmental planning grounds that justify the proposed additional podium heights are:

- There are no sites within the visual catchment of the subject site which provide a 3 storey podium to Pittwater Road, or a 2 storey podium to Delmar Parade.
- The Pittwater Road building is in a landmark location as it heralds the southern gateway into the Dee Why Town Centre. Accordingly, it is appropriate for Building B to adopt a strong and unified vertical language to properly celebrate this important location and as a result this building is proposed without a podium/upper levels arrangement and instead adopts a 9 storey street wall. This proposed approach for an important corner site is also consistent with the emerging character of development for similar sites within the Dee Why Town Centre, noting that the development on the northern corner of Delmar Parade and Pittwater Road also adopts a nil setback and no podium along its northern street façade. Finally, strict compliance with the 3 storey podium height would also result in an anomalous outcome given that the approved development which is under construction at 2 Delmar Parade has a 4 storey podium.
- In relation to Building A, it is proposed to provide a 5 storey podium in order to achieve a coordinated and cohesive podium level along Delmar Parade given that the recently completed development at 2 Delmar Parade has a strongly defined 4 storey podium height which has established this datum for the southern side of Delmar Parade. Strict compliance with the 2 storey podium requirement would result in an anomalous urban design outcome and it is more appropriate in this instance to achieve a more consistent podium height for Delmar Parade.
- The proposed variations to the podium height controls do not result in any unreasonable impacts.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed non-compliances in this instance.

1.8 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council* [2019] NSWCA 130).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and

- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

These matters are comprehensively addressed above in this written request.

1.9 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The proposed development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains exactly the same provision of commercial floor space as previously approved under Development Consent DA2022/0145 which was agreed to by Council.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the

services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.

- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposal Development will be in the public interest notwithstanding the proposed variations to the podium height development standard, 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. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.10 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.11 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 7.6A notwithstanding the proposed variation to the podium heights development standard.

Requiring strict compliance with the podium heights development standard on the subject site would result in an inferior built form that would contextually be inconsistent with the established character for podiums both within the subject street block and further along Pittwater Road.

Allowing the flexible application of the podium height development standard in this instance is not only reasonable but also desirable given the objective to achieve a consistent urban design outcome.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the podium height development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.12 Legal Interpretation

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

At [90] of Initial Action the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

“It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome”.

1.13 Conclusion

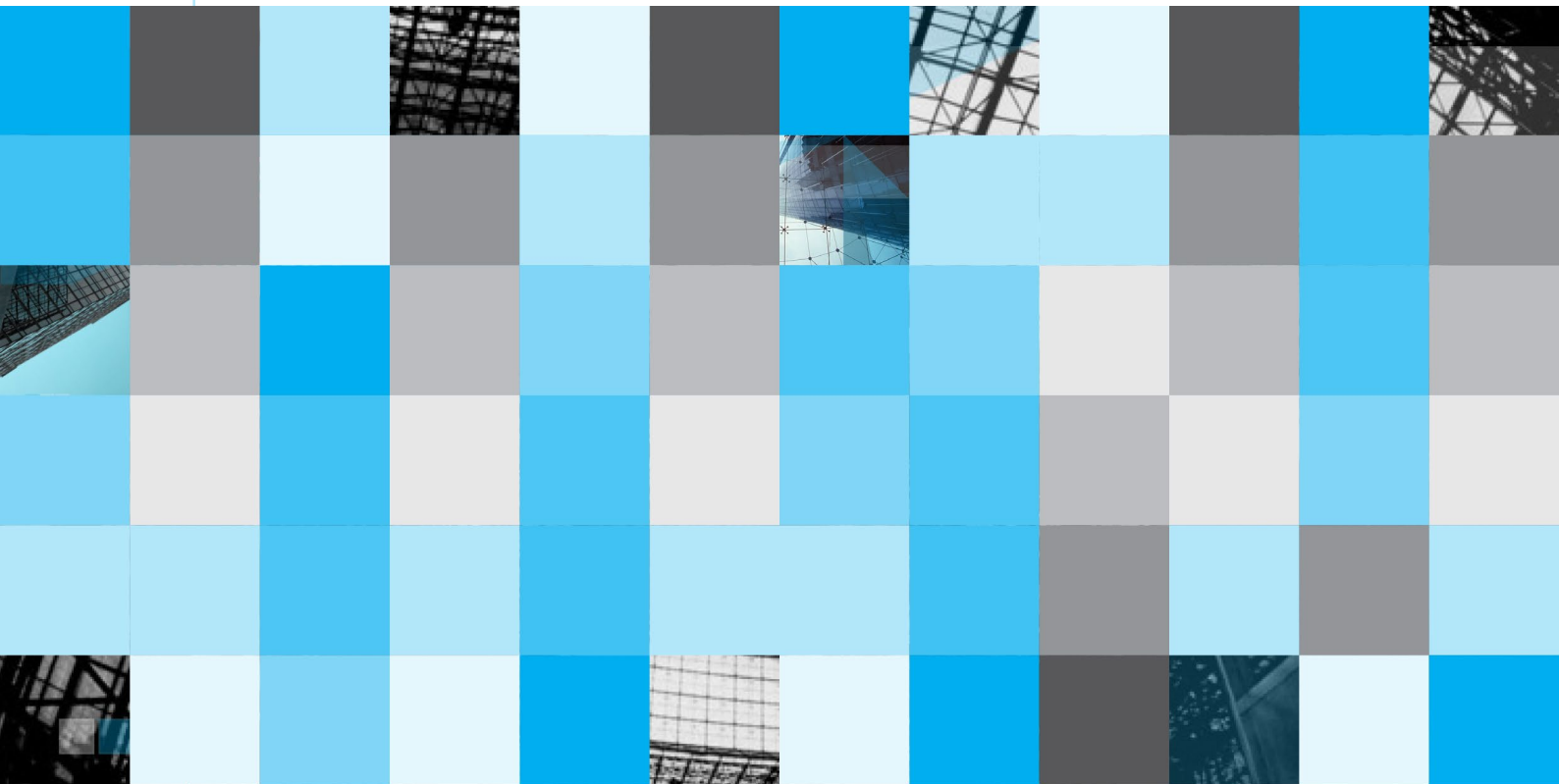
For the reasons set out in this request, it is considered that strict compliance with the podium height development standard contained within clause 7.6A of WLEP is unreasonable and unnecessary in the circumstances, and as such, there are sufficient environmental planning grounds to justify the variation.

Finally, the proposed development is in the public interest because it is consistent with the objectives of the standard and the zone.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the WLEP as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

In this regard it is reasonable and appropriate to vary the podium height development standard to the extent proposed.



4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – FSR Development Standard

Clause 4.6 – FSR Development Standard

**4 DELMAR PARADE AND 812 PITTWATER ROAD,
DEE WHY**

December 2024

Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST – FSR

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the floor space ratio (FSR) development standard contained within Clause 16(1) of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).

The request relates to State Significant Development Application No. 68230714 (SSDA) an application for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

As the Proposed Development satisfies the eligibility criteria at cl 16 of SEPP Housing, the development standard which the applicant is seeking to vary is cl 16(1) (and is not the standard FSR development control in the WLEP). This approach is consistent with *Pepper J's Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (AUF), which is detailed at Section 1.12 of this Clause 4.6 request.

1.2 Background

On 14 July 2023, the Sydney North Planning Panel granted consent to development application DA2022/0145 (Development Consent) which provided for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at the site (Approved Development).

The Approved Development included a variation to the FSR control.

There are two FSR zones which apply to the site under the WLEP, being 2.4:1 for the majority of the site and 3.2:1 for a small portion adjacent to Pittwater Road. The combination of the two FSR zones permits a total Gross Floor Area (GFA) of 19,488 square metres

The approved development had a total GFA of 19,417.5 square metres, which is less than the total combined permitted GFA under the WLEP, however, the distribution of the floor area was such that the approved development was slightly under the 2.4:1 FSR control in that part of the site, and conversely slightly above the 3.2:1 FSR control in the Pittwater Road part of the site. To be specific, the approved development involved an FSR of 4.27:1 in the 3.2:1 zone which was a variation of 33.2%. This is illustrated in the table below:

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
2.4:1	6,800 sqm	16,320 sqm	15,262.4 sqm	2.24:1	N/A
3.2:1	990 sqm	3,168 sqm	4,222.1 sqm	4.27:1	1,054.1 sqm or 33.2%
TOTAL	7,790sqm	19,488sqm	19,484.6 sqm	N/A	N/A

That application was accompanied by a Clause 4.6 request which justified the variation primarily on the basis that it was the result of redistribution of floor space on the site, which remained compliant overall, which was supported by the Sydney North Planning Panel.

The subject SSDA maintains the same approach as recently approved in the Development Consent, including an identical amount of commercial floor space.

Specifically, the Proposed Development seeks to increase the maximum FSR permitted on the Pittwater Road site of the development (pursuant to cl 16(1) of the Housing SEPP).

1.3 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument (including cl 16 of SEPP Housing).

However, clause 4.6(3) goes on to say that development consent must not be grant 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) of the WLEP the applicant of the SSDA requests that the FSR development standard at Clause 16(1) of SEPP Housing be varied.

This request has been prepared in accordance with the aims and objectives contained within cl 4.6 of the WLEP and the relevant Development Standard – cl 16(1) of the Housing SEPP.

1.4 Development Standard to be varied

As the Proposed Development satisfies the eligibility criteria at cl 16 of SEPP Housing, the development standard which the applicant is seeking to vary is cl 16(1) (and is not the standard FSR development control in the WLEP). This approach is consistent with *Pepper J's Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (AUF).

Clause 16(1) and (2) of SEPP Housing states:

16 Affordable housing requirements for additional floor space ratio

(1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).

(2) The minimum affordable housing component, which must be at least 10%, is calculated as follows–

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$

The Proposed Development provides 15% of the total floor space as affordable housing, and so Clause 16(1) of SEPP Housing provides for an increase of 30% to the two FSR zones which apply to the site being a 3.2:1 FSR along the Pittwater Road frontage of the site, and a 2.4:1 FSR for the remainder of the site, as illustrated in Figure 6 below.

This results in revised FSR controls of 3.12:1 and 4.16:1 respectively.

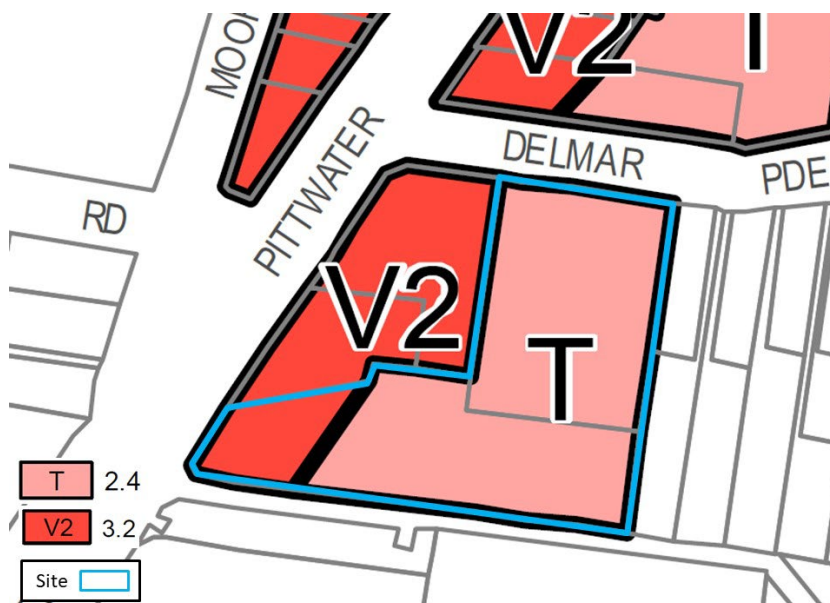


Figure 1:

Extract from the WLEP
FSR Map

1.5 Extent of Variation to the Development Standard

In relation to the calculation of FSR for the two FSR zones, in *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* [2020] NSWLEC 74, the Land and Environment Court has decided that the FSR must be evaluated separately in the two different FSR areas.

The table below provides a breakdown of the site area of each FSR zone, the compliant Gross Floor Area (GFA) within each FSR zone, the total available Gross Floor Area on a combined basis, and the variation to the FSR control in the 3.2:1 zone.

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
3.12:1	6,800 sqm	21,216 sqm	19,337.7 sqm	2.84:1	N/A
4.16:1	990 sqm	4,118.4 sqm	5,610 sqm	5.66:1	1,491.6 sqm or 36.2%
TOTAL	7,790sqm	25,334.4sqm	24,947.7 sqm	N/A	N/A

Whilst the total proposed GFA is 386.7 square metres less than the total density that can be achieved across the entire site, the proposal exceeds the maximum GFA in the 4.16:1 area by 1,491.6 square metres or 36.2%.

It is noted that under the Development Consent DA2022/0145 there is a similar situation where there is a 33% variation to the FSR control in the Pittwater Road area of the site.

1.6 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC

827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in Wehbe v Pittwater Council. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

There are no stated objectives associated with the control or Clause 16 in general. However, there is an objective for the entire Division at Clause 15A which is addressed below:

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

The overall density across the site does not exceed the maximum density which is achievable with the application of the two FSR controls, and in fact is 610.7 square metres below the maximum floor area, and the variation arises as a result of a minor increase to the density on the western part of the site which is compensated by a reduction in density on the eastern part of the site.

The proposed variation is important because it allows for the optimisation of the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households on site and within the environmental capacity of the 3.12:1 FSR zone, noting that the Pittwater Road building is compliant with the height control.

Strict compliance in the 4.16:1 FSR zone would result in the reduction of 1,491.6 square metres of floor space, or approximately 15 apartments in total, of which approximately 3 apartments would be for affordable housing.

Therefore the proposed minor variations to the FSR control are consistent with the objectives for Part 2, Division 1 of the Housing SEPP for infill affordable housing (which include the incivilities FSR control).

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

The underlying objective and purpose of the FSR control is relevant to determine the appropriateness of the proposed variation.

As such, whilst the Site is subject to a specified numerical control for FSR (cl 16(1)), the objectives and underlying purpose (at cl 15 of SEPP Housing) behind this development standards are equally important.

The proposed development is consistent with the objective at cl 15A on the basis that the overall density on the site is as anticipated by the application of the two FSR zones and the variation to the FSR control in the 4.16:1 zone will facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

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

The underlying objective and purpose of the standard relates to aims to incentivise and facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households. This objective would be thwarted by strict compliance because it would simply result in the loss of approximately 15 apartments in total, of which approximately 3 apartments would be for affordable housing.

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;**

The development standard has not been virtually abandoned.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Key facts that support the above reasons why strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- There has already been an approved 33% variation to the FSR control on the Pittwater Road area of the site, and the proposed development replicates the variation as a result of the incentivised uplift in density for the provision of 15% of the development as affordable housing.
- Whilst there is an exceedance in the 4.16:1 zone, this is more than balanced by a reduction in the 3.12:1 zone, and in fact the overall density is 386.7 square metres less than the maximum for the site when the two FSR zones are combined. Accordingly, the variation arises from the distribution of Gross Floor Area across the site and not as a result of any proposed increase in overall density for the site beyond that which is intended by the incentivised FSR controls.
- Notwithstanding that the distribution of Gross Floor Area across the site is not precisely as intended by the boundary between the two FSR zones, the proposed development nonetheless provides a distribution of mass and scale across the site generally as anticipated by the WLEP plus the incentivised FSR and height controls under SEPP Housing. In particular, the Pittwater Road building is fully compliant with the 31.2 metre height control.
- Despite the proposed FSR variation, the Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones with a higher density and scale along the Pittwater Road frontage of the site and lower density and scale for the remaining majority of the site.
- The proposed variation to the 4.16:1 FSR control does not result in any unreasonable impacts, noting that the proposed development adopts all of the fundamental design parameters established for the site under development consent DA2022/0145.
- If the variation is not permitted, the overall site will not achieve its incentivised level of density and would simply result in the loss of approximately 15 apartments in total, of which approximately 3 apartments would be for affordable housing.

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

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance is for FSR and unlike a variation to a height control for example, where there is a specific area of encroachment, there is not necessarily one specific area responsible for the FSR control.

The environmental planning grounds that justify the component of the development which results in the FSR variation are:

- The proposed development in the 4.16:1 zone where the variation is proposed is compliant in relation to height and consistent with the setbacks and massing established under development consent DA2022/0145. The removal of floor space to simply achieve numerical compliance in the 4.16:1 zone would simply result in a loss of approximately 15 apartments, or which 3 would be affordable housing, with no benefit.
- Strict compliance in the 4.16:1 FSR zone would force this area to be redeployed into Building A in the 3.12:1 zone, which could result in an anomalous outcome and significant height exceedance, as well as diminishing the ability to provide the most sensitive interface possible with the eastern adjacent site. The proposed development in the 4.16:1 FSR zone has a scale and proportions as anticipated by the planning controls such that the proposed variation does not result in any perceptible or detrimental impact or a built form outcome which differs from that which is expected on the site under SEPP Housing. Therefore, the appropriate contextual fit of the proposed development provides an environmental planning ground to support the proposed variation.
- It is noted that Preston J provides that the development is not required to demonstrate a beneficial effect relative to a compliant development, however, in this instance it is considered that strict compliance would not achieve any improved outcome for the development and would in fact result in a diminished outcome as a result of needing to redeploy the floor space into the 3.16:1 FSR zone, or simply result in less housing and in particular affordable housing than that which is capable of being provided within the demonstrated environmental capacity of the site.

- The overall density of the proposal does not exceed the total density which could be achieved across the site. Furthermore, the proposed distribution of density across the site, where more floor space is located in the western part of the site rather than the more sensitive eastern part, is entirely consistent with the core objective of the split FSR zones which instead aims to shift the majority of built form to the western part of the site and away from the sensitive interface to the east of the site. The Applicant's proposed approach towards the distribution of density on the site is entirely aligned with the objective of the split FSR zones by moving density towards the western part of the site.
- The proposed variation to the 4.16:1 FSR control does not result in any unreasonable impacts.
- If the variation is not permitted, the overall site will not achieve its planned level of density.
- The proposed FSR variation will provide for additional housing and in particular affordable housing which is an environmental benefit particularly in this location where Council is trying to encourage additional housing closer to centres due to the better access to public transport and the various facilities and amenities offered by the centres.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR non-compliance in this instance.

1.8 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council* [2019] NSWCA 130).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

These matters are comprehensively addressed above in this written request.

1.9 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail at Section 1.6 in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The Proposed Development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains approximately the same provision of commercial floor space as previously approved under Development Consent DA2022/0145.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposal Development is in the public interest notwithstanding the proposed variation to the FSR development standard, because it is consistent with the in-fill affordable housing objectives in Chapter 2, Part 2, Division 1 of SEPP Housing and the objectives for development within the MU1 zone under the WLEP in which the development is proposed to be carried out.

Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.10 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.11 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are set out in subclause (1) 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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.4 notwithstanding the proposed variation to the FSR development standard.

Requiring strict compliance with the FSR development standard in the 4.16:1 zone on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would force this floor space to be redeployed to the 3.16:1 zone which is a less desirable outcome due to the objective to reduce density in that part of the site.

Allowing the flexible application of the FSR development standard in this instance is not only reasonable but also desirable given the objective to increase density in the western part of the site.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the 4.16:1 FSR standard, and where the overall site density is not exceeded, will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.12 Legal Interpretation

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

"It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome".

More recently in the case of *Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (*AUF*), Pepper J considered whether the exceedance of both the height control in clause 4.3 of the Penrith LEP and the bonus height control under clause 7.11 of the LEP were properly dealt with under clause 4.6. In this case **the development application exceeded the standard height control at cl 4.3 of the LEP and the alternative (bonus) height control at cl 7.11** (which only eligible developments were able to benefit

from). In summary, Pepper J ultimately held at [103]-[106] that you cannot vary the underlying development standard, but must instead seek to vary the incentive (bonus) standard – which in *AUF* was cl 7.11 of the Penrith LEP. In other words, clause 7.11 in *AUF* was held to be a development standard in its own right, capable of being varied subject to a cl 4.6 request.

In compliance with Pepper J's decision in *AUF*, as the SSDA satisfies the eligibility criteria at cl 16 of the Housing SEPP, *this written requests seeks to vary the development standard at 16(1)*.

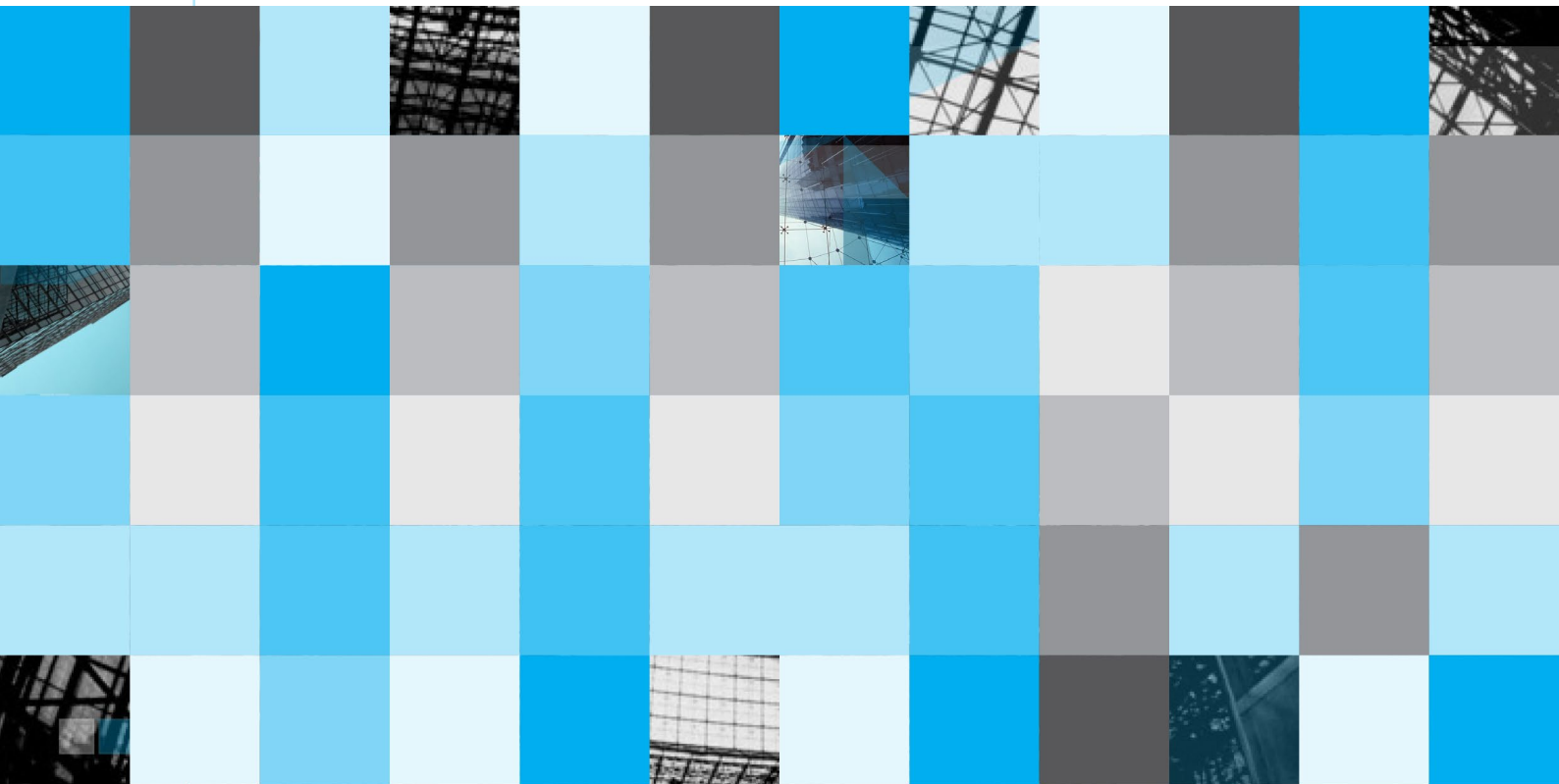
1.13 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the FSR development standard contained within clause 16 of SEPP Housing is unreasonable and unnecessary in the circumstances of the case, and as such, there are sufficient environmental planning grounds to justify the variation.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.
- Finally, the proposed development and overall site density is in the public interest because it is consistent with the objectives of the standard and the zone, and facilitates the delivery of housing and in particular affordable housing.

In this regard it is reasonable and appropriate to vary the FSR development standard to the extent proposed.



4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – Building Height Development Standard

Clause 4.6 – Building Height Development Standard

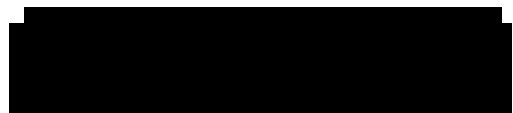
**4 DELMAR PARADE AND 812 PITTWATER ROAD,
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December 2024

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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of building (HOB) development standard contained within Clause 16(3) of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).

The request relates to State Significant Development Application No. 68230714 (SSDA) for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing (Proposed Development) at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

As the Proposed Development satisfies the eligibility criteria at cl 16 of SEPP Housing, the development standard which the applicant is seeking to vary is cl 16(1) (and is not the standard FSR development control in the WLEP). This approach is consistent with *Pepper J's Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (AUF), which is detailed at Section 1.11 of this Clause 4.6 request.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument (including cl 16 of SEPP Housing).

However, clause 4.6(3) goes on to say that development consent must not be grant 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) of the WLEP the applicant of the SSDA requests that the FSR development standard at Clause 16(1) of SEPP Housing be varied.

This request has been prepared in accordance with the aims and objectives contained within cl 4.6 of the WLEP and the relevant Development Standard – cl 16(3) of the Housing SEPP

1.3 Development Standard to be varied

Clause 16 of SEPP Housing states:

16 Affordable housing requirements for additional floor space ratio

(1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).

(2) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} + 2$$

(3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1)

The Proposed Development provides 15% of the total floor space as affordable housing, and so Clause 16(3) of SEPP Housing is triggered and allows for an increase of 30% to the two height zones which apply to the site (being 16 metres for the majority of the site and 24 metres for a small portion adjacent to Pittwater Road, as illustrated in Figure 1 below). This results in a height of 20.8 metres for the majority of the site and a height of 31.2 metres adjacent to Pittwater Road.

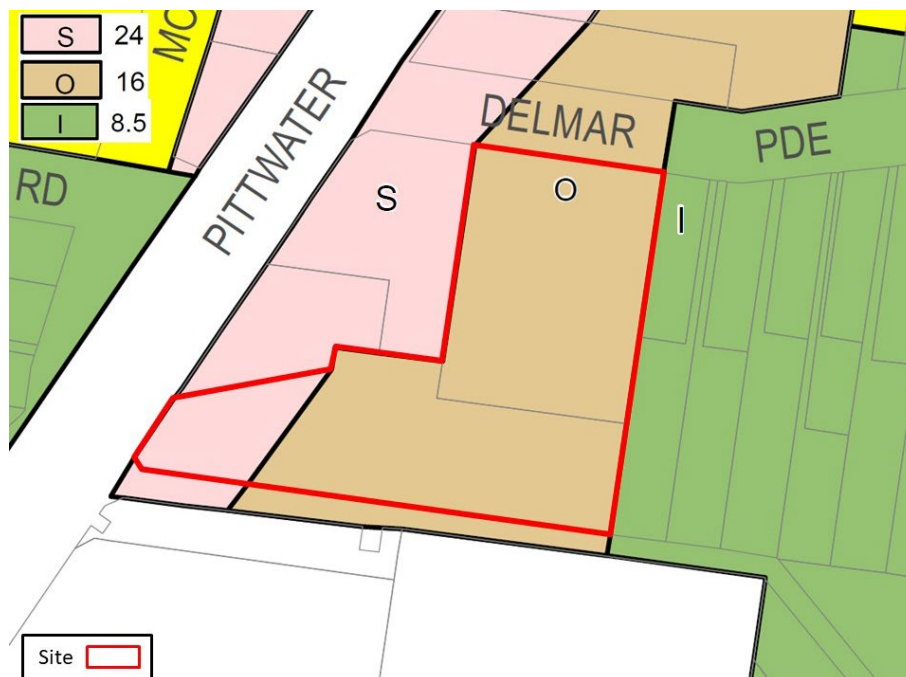


Figure 1

Extract from
the WLEP
Height of
Buildings Map

1.4 Extent of Variation to the Development Standard

The proposal has the following maximum heights (in the two height areas) as a result of the 30% uplift in height available under SEPP Housing :

- 20.8 metre height zone: 25.1 metres or a 4.3 metre / 20.67% variation
- 31.2 metres height zone: 30.2 metres

The proposal results in some minor variations to the 20.8 metre height control as a result of a small area of roof on the northern end of the top floor of the Delmar Parade building due to the fall of the site, and also due to the lift overruns which provide access to the rooftop common open space.

These variations to the height control are illustrated in Height Plane Diagram prepared by Rothelowman Architects which accompanies this application and also as illustrated in Figure 2 below. This figure illustrates that there is a balancing of elements which are both below and above the building height control.

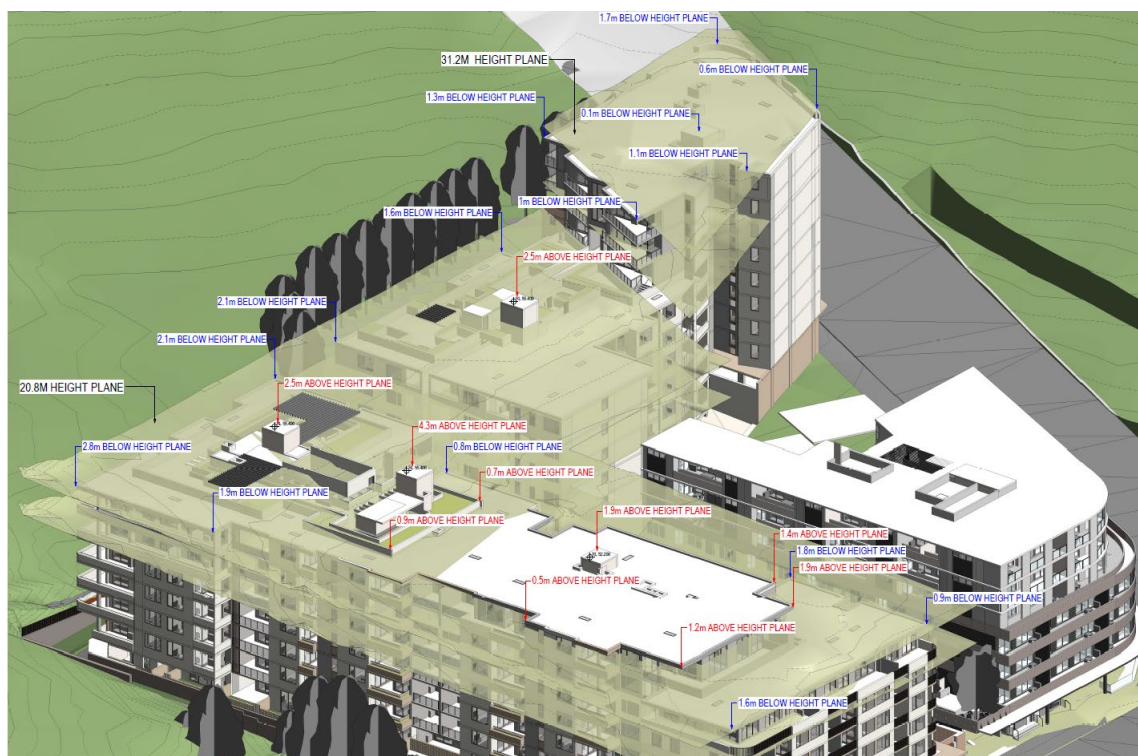


Figure 2:

3D Height Plane

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council*. [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

There are no stated objectives associated with the control or Clause 16 in general. However, there is an objective for the entire Division at Clause 15A which is addressed below:

The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Due to the fall of the site, the southern end of the Delmar Parade building is below the height control, whilst the northern end of the building is marginally above the height control. In addition, there are some height variations as a result of the lift overruns and associated building elements which provide access to rooftop communal open space for the benefit of residents.

The total proposed floor space is below the maximum achievable for the site.

The proposed variations to the height control support a balanced approach to the fall of the land and ensure that the development is able to maximise the delivery of housing supply and in particular the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Therefore, the proposed minor variations to the height control are consistent with the objectives for Part 2, Division 1 of the Housing SEPP for in-fill affordable housing (which include, the incentivised height control)

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

The underlying objectives and purpose of the height control is relevant to the proposed development.

As such, whilst the Site is subject to a specified numerical control for height (cl 16(3)), the objectives and underlying purpose (at cl 15A SEPP Housing) behind this development standard are equally important.

The proposed development is consistent with the objective at cl 15A on the basis that the variation to the height control will facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Furthermore, the Proposed Development will remain compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

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

The underlying objective and purpose of the standard is relevant to determine the appropriateness of the proposed variation.

relates to aims to incentivise and facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households. This objective would be thwarted by strict compliance because it would simply result in the loss of housing supply and in particular affordable housing, without any public benefit.

Strict compliance with the height control would not meaningfully reduce the impact of the development on the streetscape or neighbouring properties and would provide reduced amenity to occupants of the development. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the incentivised height control because it would encourage a less desirable outcome for the site.

4. **the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;**

The development standard has not been virtually abandoned.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Key facts that support the above reasons why strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The site has a depth of 100.75 metres from north to south with a fall of approximately 4.5 metres from the rear of the site to the front of the site at Delmar Parade which is the equivalent of slightly more than one storey. Due to this fall of the site, the roof at the southern end of the Delmar Parade building is below the height control, whilst the roof at the northern end is marginally above the height control. The proposal adopts a balanced approach to the fall of the site which actually reduces shadow when compared with a strictly compliant height as the roof at the southern end of the building is below the height control.
- The remainder of the breaches in height due to the desire to optimise the amenity within the development by providing multiple roof top common open space areas. The lift overruns to access these areas and the rooftop facilities are centrally located and not readily visible from the public domain. The roof top communal open space areas provide a very high level of amenity for residents that could not be achieved where the communal open space areas limited to the ground floor.
- The scale of the development as proposed is compatible with the desired future scale and character for the locality which envisages high density residential development within a town centre setting.
- The Visual Impact Assessment at **Appendix 31** demonstrates that the roof top facilities do not result in any discernible visual difference for the proposed development.
- A solar analysis prepared by Rothelowman architects accompanies the subject application and demonstrates that the proposed areas of non-compliance do not result in any meaningful difference compared to a compliant height in relation to solar access to Stony Range Reserve to the south. Similarly, the Flora and Fauna Assessment prepared by Aquila Ecological Surveys at **Appendix 19** demonstrates that the shadow cast by the proposed areas of height variation will not result in any unacceptable ecological impacts to the Reserve.
- The non-compliances with the height control ultimately improves the overall functionality and amenity of the development, as well as facilitating the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve a better outcome than a complying development.
- There are no other impacts to adjacent sites resulting from the proposed variation to the height control which would warrant strict compliance.
- The proposed variation allows for the most efficient and economic use of the land.

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, it is our expert opinion that most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

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

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 found that is not necessary to demonstrate that a development will result in a “better environmental planning outcome for the site” relative to a development that complies with the height development standard. However, in relation to this objective the consent authority must be satisfied there is a ‘preservation’ of amenity. I

In this case, the environmental amenity of the neighbouring properties is preserved by ensuring that the height variation does not generate any additional shadow impacts beyond a compliant height. This is illustrated in the Figures 3 to 5 below.



Figure 3:

21 June - 9am
shadow. The
proposed shadow
(green + red) is less
than the compliant
height (dotted orange
line)



Figure 4:

21 June - 12pm
shadow. The
proposed shadow
(green + red) is less
than the compliant
height (dotted orange
line)



Figure 5:

21 June – 3pm
shadow. The
proposed shadow
(green + red) is less
than the compliant
height (dotted orange
line)

The proposed distribution of built form and massing across the site is the result of a considered analysis of the known site constraints, understanding of the context and the desire to deliver a positive urban design outcome.

The Proposed Development has been specifically designed as a robust architectural solution for the site which will result in a high quality building in a landscaped setting that will sit comfortably within the streetscapes of Delmar Parade and Pittwater Road and be compatible with the emerging character of development within the vicinity of the site.

In particular, the proposal has been designed to respond to the significant fall north to south of approximately 4.5 metres with the competing needs of providing a high level of amenity, appropriate ground floor plane, and maximising the delivery of affordable housing. Due to this fall of the site, the roof at the southern end of the Delmar Parade building is below the height control, whilst the roof at the northern end is marginally above the height control. The proposal adopts a balanced approach to the fall of the site which actually reduces shadow when compared with a strictly compliant height as the roof at the southern end of the building is below the height control.

The remainder of the breaches in height are due to the desire to optimise the amenity within the development by providing multiple roof top common open space areas. The lift overruns to access these areas and the rooftop facilities are centrally located and not readily visible from the public domain. The roof top communal open space areas provide a very high level of amenity for residents that could not be achieved where the communal open space areas limited to the ground floor.

The Visual Impact Assessment at Appendix 31 demonstrates that the roof top facilities do not result in any discernible visual difference for the proposed development, and that the scale of the development as proposed is compatible with the desired future scale and character for the locality which envisages high density residential development within a town centre setting.

As illustrated in the solar analysis prepared by Rothelowman architects which accompanies the subject application (and shown in Figures xx above) the proposed areas of non-compliance do not result in any shadow beyond a compliant height in relation to Stony Range Reserve to the south. In fact, the proposal has less shadow when compared with a compliant height. Similarly, the Flora and Fauna Assessment prepared by Aquila Ecological Surveys at Appendix 19 demonstrates that the shadow cast by the proposed areas of height variation will not result in any unacceptable ecological impacts to the Reserve.

The non-compliances with the height control ultimately improves the overall functionality and amenity of the development, as well as facilitating the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve a better outcome than a complying development.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the incentivised height control as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any significant adverse impact to adjacent sites.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council* [2019] NSWCA 130).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

These matters are comprehensively addressed above in this written request.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard (cl 16 of SEPP Housing) have been addressed in detail at Section 1.5 in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The Proposed Development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains approximately the same provision of commercial floor space as previously approved under Development Consent DA2022/0145.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposed Development is in the public interest notwithstanding the proposed variation to the building height development standard, because it is consistent with the in-fill affordable housing objectives in Chapter 2, Part 2, Division 1 of SEPP Housing and the objectives for development within the MU1 zone under the WLEP in which the development is proposed to be carried out

Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

- (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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are set out in subclause (1) 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.

The architectural package prepared by Rothelowman architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high quality outcome for the site which will result in the delivery of a residential development which is compatible with the emerging character of high density residential development in the Dee Why Town Centre.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form by forcing the building lower into the site and eliminating a large consolidated area of common open space on the rooftop, that would contextually be essentially no different from the proposed development and would not result in any benefit to the streetscape or the amenity of adjoining properties. Alternatively, if the proposed levels are retained, strict compliance would simply result in a loss of much needed housing supply and in particular affordable housing.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the height of buildings development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.11 Legal Interpretation

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);

- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

At [90] of Initial Action the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1) (a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

"It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome".

More recently in the case of *Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council* [2023] NSWLEC 49 (*AUF*), Pepper J considered whether the exceedance of both the height control in clause 4.3 of the Penrith LEP and the bonus height control under clause 7.11 of the LEP were properly dealt with under clause 4.6. In this case **the development application exceeded the standard height control at cl 4.3 of the LEP and the alternative (bonus) height control at cl 7.11** (which only eligible developments were able to benefit from). In summary, Pepper J ultimately held at [103]-[106] that you cannot vary the underlying development standard, but must instead seek to vary the incentive (bonus) standard – which in *AUF* was cl 7.11 of the Penrith LEP. In other words, clause 7.11 in *AUF* was held to be a development standard in its own right, capable of being varied subject to a cl 4.6 request.

In compliance with Pepper J's decision in *AUF*, as the SSDA satisfies the eligibility criteria at cl 16 of the Housing SEPP, *this written requests seeks to vary the development standard at 16(3)*.

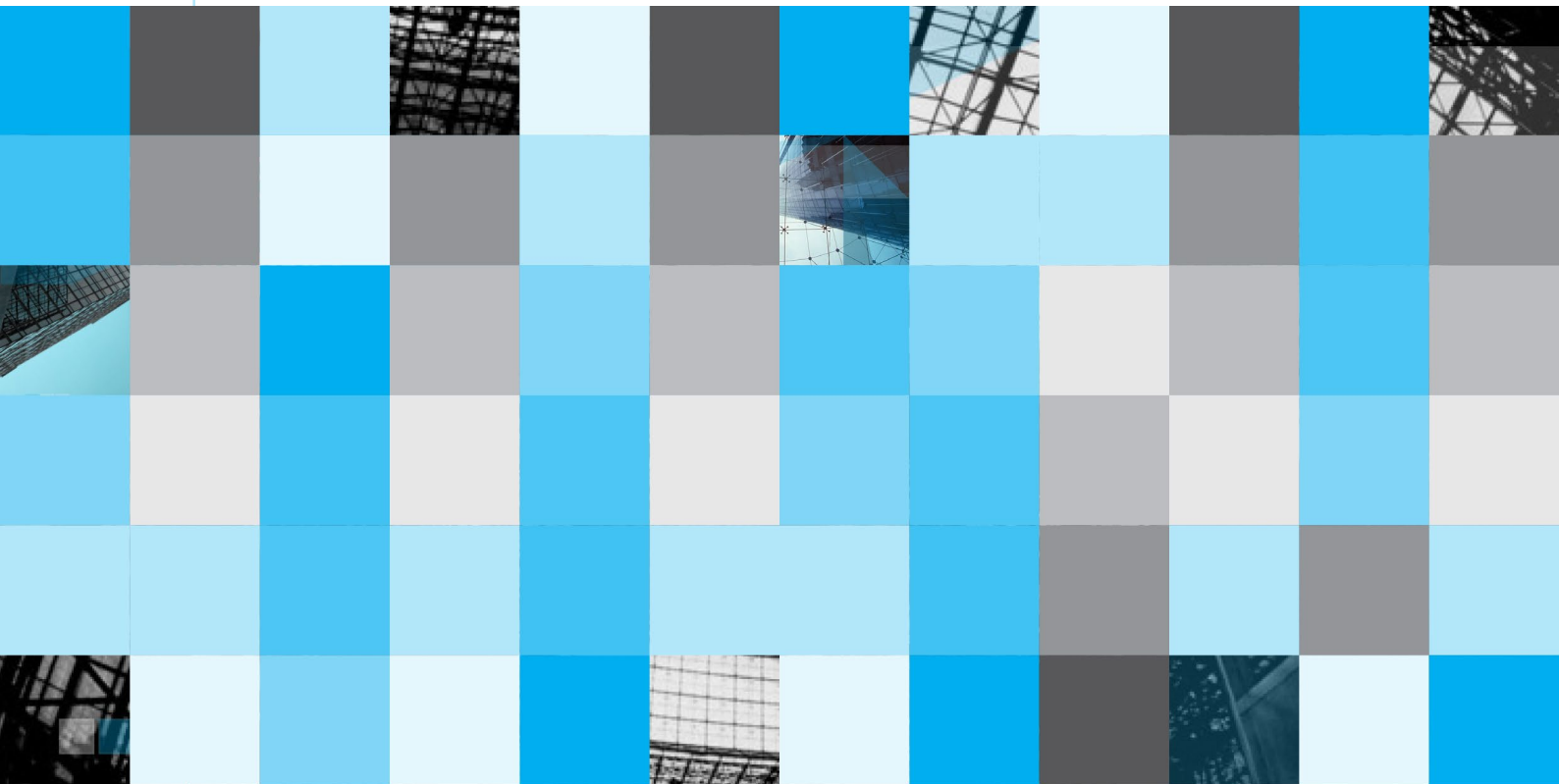
1.12 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the height of buildings development standard contained within clause 16 of SEPP Housing is unreasonable and unnecessary in the circumstances of the case and as such, there are sufficient environmental planning grounds to justify the proposed variation.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.



4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – Clause 7.12 Development Standard

Clause 4.6 – Clause 7.12 Development Standard

**4 DELMAR PARADE AND 812 PITTWATER ROAD,
DEE WHY**

December 2024

Prepared under instructions from
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1.0 CLAUSE 4.6 REQUEST – CLAUSE 7.12

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 7.12 of the Warringah Local Environmental Plan 2011 (WLEP), being 'Provisions promoting retail activity'.

The request relates to State Significant Development Application No. 68230714 (SSDA) for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing (Proposed Development) at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

Specifically, the Proposed Development seeks to maintain the already approved ground floor and first floor tenancies at the site (being three commercial tenancies and 21 ground floor apartments).

1.2 Background

On 14 July 2023, the Sydney North Planning Panel granted consent to development application DA2022/0145 which provided for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The approved development involved a variation to Clause 7.12 of the WLEP in that the development did not provide two floor levels (including the ground floor level) of employment generating space, and instead provided three commercial tenancies facing Delmar Parade and Pittwater Road.

The subject application maintains the same approach as recently approved.

1.3 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument.

However, clause 4.6(3) goes on to say that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant of the SSDA requests that the development standard at cl 7.12 of the WLEP relating to the promotion of retail activity be varied.

1.4 Development Standard to be varied

Clause 7.12 Provisions promoting retail activity, states:

- (1) The objectives of this clause are as follows—

- (a) to promote retail activity on the ground and first floors of new buildings in the Dee Why Town Centre,
 - (b) to promote employment generating uses in addition to retail activity.
- (2) Development consent must not be granted to development in the Dee Why Town Centre unless the consent authority is satisfied that—
- (a) the ground floor level of buildings on Site A, Site B, Site C, Site D or Site E will not be used for any of the following (other than the provision of access to any of the following)—
 - (i) residential accommodation,
 - (ii) medical centres,
 - (iii) office premises, and
 - (b) the first floor level of buildings on Sites A and B will not be used for residential accommodation (other than the provision of access to such accommodation), and
 - (c) buildings will have at least two floor levels (including the ground floor level) of employment generating space, and**
 - (d) development on the ground floor level of buildings in the Dee Why Town Centre will contribute to an active street life in accordance with the document titled Our Greater Sydney 2056 North District Plan published by the Greater Sydney Commission in March 2018.

The provision in Clause 7.12(c) is considered to be a development standard and not a prohibition in accordance with the two step test as set out in the judgment of *Strathfield Municipal Council v Poynting* [2001] NSWCA 270 (Poynting). In particular, the two step test is:

- (a) Firstly, a consideration of whether the proposed development is prohibited under any circumstances — when it is read both in context of the WLEP and as a whole.
- (b) Secondly, if it is not so prohibited, a consideration of whether clause 6.7 of WLEP specifies a requirement — or fixes a standard — in relation to an aspect of the proposed development.

In relation to the first test, in considering cl 7.12 of the WLEP “as a part of the environmental planning instrument as a whole” (Poynting at [94]), there is no complete prohibition of a development with first floor non-employment generating space. Accordingly, the Proposed Development with a non-employment floor space on the first floor passes the ‘first step’ in the Poynting two-step test. In relation to the second test, clause 7.12(c) of WLEP does fix a standard that buildings will have at least two floor levels (Including the ground floor level) of employment generating space. Accordingly, the requirement of clause 7.12(c) of the WLEP is a development standard.

1.5 Extent of Variation to the Development Standard

The proposal does not provide two floor levels (including the ground floor level) of employment generating space. Instead, the proposal provides the following employment generating space:

- Two commercial tenancies facing Pittwater Road (located on Level 1, which is ground level at that location)
- Two commercial tenancies facing Delmar Parade

This is the same variation that was recently supported by the Sydney North Planning Panel when it granted consent to development application DA2022/0145 on the site in 2023.

1.6 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 **which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.**

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 7.12 of the WLEP are identified below. A comment on the proposal's consistency with each objective is also provided.

- (a) to promote retail activity on the ground and first floors of new buildings in the Dee Why Town Centre,

The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are critical to the success of retail across the entire ground floor and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new retail tenancies across the entire ground floor would be disconnected with the broader centre and would not succeed. Retail on the first floor in this location would suffer even more and there is no reasonable prospect of commercial success for retailing on the first floor in this location at the periphery of the town centre, with no street frontage, and elevated one level above street. There are profoundly more attractive retail offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.

Instead, the proposal provides the entirety of both street frontages for retail tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life.

The proposed development maximises and promotes retail activity to the greatest extent possible having regard to the location and constraints of the subject site, and is therefore consistent with this objective when taking into account the site constraints.

- (b) to promote employment generating uses in addition to retail activity.

The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The only credible prospect for successful employment generating uses in this location are for street facing retailing tenancies. There is limited demand for other employment generating uses in this particular location. The underlying objective for additional employment floor space is not considered to be relevant to the subject site and proposal due to its location and site attributes, and also having regard to structural change in employment floor space as a result of the COVID-19 pandemic.

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

The underlying objectives and purpose of the control at cl 7.12 is relevant to determining the appropriateness of a variation to the standard. the proposed development

The Proposed Development maximises and promotes retail activity to the greatest extent possible having regard to the location and constraints of the subject site, and is therefore consistent with part of the purpose of Clause 7.12(2)(c).

However, the underlying objective for additional employment floor space beyond retailing to each street frontage is not considered to be relevant to the subject site and proposal due to its location and site attributes, and also having regard to structural change in employment floor space as a result of the COVID-19 pandemic.

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

The underlying objectives and purpose of the standard relates to promoting retail activity and providing employment floor space in addition to retail activity. Strict compliance would in fact render the project commercially unviable and unable to proceed, as a development with the entire ground and first floor being commercial would not be feasible. In words, strict compliance would mean that the site would be sterilised from being redeveloped and the site would stagnate.

This would paradoxically have the effect of preventing the delivery of a development with ground floor retailing to each street frontage, which is viable, and preventing the delivery of this employment floor space. Strict compliance would also have the effect of preventing the delivery of 280 additional apartments in the Dee Why town centre, of which 15% are affordable housing, and the additional patronage of the retail tenancies in the subject and nearby developments that would result from the increased population in this location.

In this regard, the underlying object and purpose of Clause 7.12 would be thwarted if strict compliance was required on the subject site.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The development standard has been abandoned on the subject site by the actions of the Sydney North Planning Panel when it granted consent to development application DA2022/0145 on the site in 2023.

That development consent set aside the control as it applies to the subject site, and so the control has been destroyed for this land.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The zoning of the land is appropriate because it permits residential flat development as well as shop-top housing and commercial development.

Key facts that support the above reasons why strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The entirety of both street frontages is proposed to contain commercial tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life. The proposed development maximises and promotes retail activity, and therefore employment floor space, to the greatest extent possible having regard to the location and constraints of the subject site.
- The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are evident further north in the centre which are critical to the success of employment floor space and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new commercial tenancies on the remainder of the ground floor and entirety of the first floor of the development are disconnected with the broader centre and would not succeed. There are profoundly more attractive commercial office offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.
- It is considered that the requirement for the entire ground and first floor to contain employment generating floor space is more specifically intended to apply to key identified sites within the Dee Why Town Centre, noting that Clause 7.12(2) reinforces that there is to be no ground floor residential use on Sites A, B, C, D or E.
- The proposed variation will support increased residential density which will contribute positively towards patronage within the proposed ground floor commercial tenancies. However, if the variation is not granted, the development would likely fail because ground floor commercial tenancies without a street frontage, and first floor commercial floorspace, will fail in this location.
- The proposed variation does not result in any unreasonable or adverse impacts.
- If the variation is not permitted, the redevelopment of the site will not be feasible as ground and first floor commercial tenancies across the entire site will not be able to be leased on commercially viable terms. This is especially relevant in light of the structural change in employment floor space as a result of the COVID-19 pandemic. This would prevent the sustainable redevelopment of the site in a manner which can deliver much needed additional housing choice in an ideal location and the achievement of an activated and engaged ground floor plane, which are all benefits associated with the subject proposal.

- 1.7 [Clause 4.6\(3\)\(b\) Are there are sufficient environmental planning grounds to justify contravening the development standard?](#)

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance allows for 21 ground floor apartments. The environmental planning grounds that justify the component of the development which results in the non compliance to the control at 7.12 of the WLEP include:

- The entirety of both street frontages is proposed to contain commercial tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life. The proposed development maximises and promotes retail activity, and therefore employment floor space, to the greatest extent possible having regard to the location and constraints of the subject site.
- The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are evident further north in the centre which are critical to the success of employment floor space and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new commercial tenancies on the remainder of the ground floor, and the entirety of the first floor, of the development are disconnected with the broader centre and would not succeed. There are profoundly more attractive commercial office offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.
- It is considered that the requirement for the entire ground and first floor to contain employment generating floor space is more specifically intended to apply to key identified sites within the Dee Why Town Centre, noting that Clause 7.12(2) reinforces that there is to be no ground floor residential use on Sites A, B, C, D or E.
- The proposed variation will support increased residential density which will contribute positively towards patronage within the proposed ground floor commercial tenancies. However, if the variation is not granted, the development would likely fail because ground floor commercial tenancies without a street frontage, and first floor commercial floorspace, will fail in this location.
- The proposed variation does not result in any unreasonable or adverse impacts.
- If the variation is not permitted, the redevelopment of the site will not be feasible as ground and first floor commercial tenancies across the entire site will not be able to be leased on commercially viable terms. This is especially relevant in light of the structural change in employment floor space as a result of the

COVID-19 pandemic. This would prevent the sustainable redevelopment of the site in a manner which can deliver much needed additional housing choice in an ideal location and the achievement of an activated and engaged ground floor plane, which are all benefits associated with the subject proposal.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed variation in this instance

1.8 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council* [2019] NSWCA 130).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

These matters are comprehensively addressed above in this written request.

1.9 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.

- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The proposed development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains approximately the same provision of commercial floor space as previously approved under Development Consent DA2022/0145.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposal Development will be in the public interest notwithstanding the proposed variation to the development standard in Clause 7.12(2)(c), because it is consistent with the relevant objectives for the Dee Why town centre and the objectives for development within the zone in which the development is proposed to be carried out. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.10 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) of the standard instrument local environmental plan are addressed below:

- (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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The Proposed Development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

- (5) In deciding whether to grant concurrence, the Secretary must consider:

- (b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.11 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives for development in the Dee Why town centre notwithstanding the proposed variation to the development standard.

Requiring strict compliance with the development standard on the subject site would result in an unfeasible development project which would prevent the achievement of the positive attributes which can be achieved by the proposed development included activated and engaged street edges and additional housing choice in an ideal location.

Allowing the flexible application of the development standard in this instance is not only reasonable but also desirable as it will facilitate a high quality and appropriate development for this location.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the development standard will support a better urban design outcome in this instance in accordance with objective 1(b).

1.12 Legal Interpretation

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

At [90] of Initial Action the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

"It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome".

1.13 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the development standard contained within clause 7.12(2)(c) of the WLEP is unreasonable and unnecessary in the circumstances of the case and as such, there are sufficient environmental planning grounds to justify the variation.

Finally, the proposed development is in the public interest because it is consistent with the objectives for development within the Dee Why town centre.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the WLEP as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

In this regard it is reasonable and appropriate to vary the development standard to the extent proposed.