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Advice

To	Manly Property Group No.2 Pty Ltd ATF Manly Unit Trust No.2 C/o Goran Iliev Partner I.M Advisory Goran.I@initium.com.au
Date	2 October 2025
Subject	27 East Esplanade, Manly NSW 2095 – proposed residential flat building
Questions	<p>You have asked us to provide advice regarding the proposed residential flat building at 27 East Esplanade, Manly, in particular:</p> <ul style="list-style-type: none">• whether the Low and Mid Rise provisions under Part 4, Chapter 6 of the <i>State Environmental Planning Policy (Housing) 2021</i> (NSW) (Housing SEPP) apply to 27 East Esplanade, Manly NSW 2095 (Site);• the subject proposal's compliance with the hierarchy of planning controls that will apply during assessment of the proposal.
Summary of advice	<p><i>Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.</i></p> <p>The Low and Mid Rise provisions under Part 4, Chapter 6 of the Housing SEPP apply to the Site and the Proposed Development as the Site is zoned R3 Medium Density Residential and is not excluded land under s 164 of the Housing SEPP. Relevantly, the Site is located within a 'low and mid rise housing inner area' for the purposes of Chapter 6 of the Housing SEPP.</p> <p>The Proposed Development generally complies with the relevant development standards, except for the maximum building height. In our opinion, in the circumstances, the maximum building height exceedance is justified as set out in the clause 4.6 request submitted in support of the development application for the Proposed Development (DA).</p>
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Detailed analysis

Background

1. The Site

- 1.1 The site is located at 27 East Esplanade, Manly 2095 NSW legally known as SP39838 and SP42993 (**Site**).
- 1.2 The Site is zoned R3 Medium Density Residential pursuant to the *Manly Local Environmental Plan 2013* (NSW) (**MLEP**).
- 1.3 Pursuant to clause 4.3 of the MLEP, the Site is affected by a 11 metre height of building.
- 1.4 Pursuant to clause 4.4 of the MLEP, the Site is affected by a floor space ratio (**FSR**) of 0.75:1.

2. The Proposed Development

- 2.1 Manly Property Group No.2 Pty Ltd is proposing to lodge a development application at the Site seeking consent for:

“the demolition of the existing structures and construction of a eight (8) storey residential flat building with basement parking and associated landscaping,”

(Proposed Development).

- 2.2 In particular, the Proposed Development comprises:

- 2.2.1 demolition of existing residential flat building;
- 2.2.2 tree removal;
- 2.2.3 construction of a eight (8) storey residential flat building over three (3) basement levels and associated landscaping, comprising containing eight (8) residential units of which two (2) will be affordable housing comprising the following mix;
 - (a) One (1) 1 bedroom unit;
 - (b) One (1) 2 bedroom unit; and
 - (c) Six (6) 3 bedroom units;
- 2.2.4 provision of private open space in the form of balconies;
- 2.2.5 three levels of basement car park, comprising eighteen (18) parking spaces including;
 - (a) Sixteen (16) residential car parking spaces;
 - (b) One (1) visitor car parking spaces; and
 - (c) One (1) accessible car parking space;
- 2.2.6 provision of deep soil landscaping; and

- 2.2.7 alterations to existing vehicular access and egress provided via East Esplanade.
3. Relevantly, the Proposed Development seeks to rely upon the Low and Mid-Rise Housing Policy (**LMR Policy**) within Chapter 6 of the Housing SEPP (**Chapter 6**).
- 3.1 Chapter 6 commenced on 28 February 2025. The LMR Policy offers standardised rules to streamline approvals for developments that meet location and design criteria and aims to “*encourage the development of low and mid-rise housing in areas that are well located with regard to goods, services and public transport.*”¹

Qualifications and assumptions

4. In preparing this advice, we have reviewed the following material:
- 4.1 Statement of Environmental Effects prepared by Willowtree Planning Pty Ltd dated 2 October 2025 (**SEE**);
- 4.2 Clause 4.6 Variation Request Height of Buildings dated 2 October 2025 (**Clause 4.6 Request**); and
- 4.3 Architectural plans (preliminary 3) prepared by MHNDUnion dated 20 August 2025.

Legal analysis

5. **Can the LMR provisions under Part 4, Chapter 6 of the Housing SEPP be applied to the Site?**
- 5.1 In summary, we are of the view that Chapter 6 applies to the Site and the Proposed Development.
- 5.2 Chapter 6 of the Housing SEPP applies to the State, other than certain land set out in ss 164 (1) and (2) of the Housing SEPP.
- 5.3 Relevant to the Proposed Development, Part 4 of Chapter 6 relates to residential flat buildings and shop top housing and provides at s 174 that (our emphasis added):
- Development for the purposes of residential flat buildings is permitted with development consent on land to which this chapter applies in a **low and mid rise housing area** in Zone R2 Low Density Residential or R3 Medium Density Residential.*
- 5.4 As such, in order for Chapter 6 to apply to the Site and for the relevant provisions of Part 4, Chapter 6 to apply to the Proposed Development:
- 5.4.1 the Site must be in NSW and not all within any of the exclusions in s 164;
- 5.4.2 the Proposed Development must be for the purposes of a “residential flat building”;
- 5.4.3 the Site must be within a “low and mid rise housing area”; and
- 5.4.4 the Site must be within Zone R2 Low Density Residential or R3 Medium Density Residential.

Does the Site fall within any of the exclusions under s 164?

¹ Section 162 of the Housing SEPP.

- 5.5 The SEE confirms that the Site is not excluded land for the purposes of section 164 of the Housing SEPP, including because:
- 5.5.1 the Site is not located on land identified as “Deferred Transport Oriented Development Areas” on the Deferred Transport Oriented Development Areas Map;
 - 5.5.2 the Site is not located within land of a public entrance to a railway, metro or light rail station listed in Schedule 12 of the Housing SEPP; and
 - 5.5.3 the Site is not located within an Accelerated TOD Precinct” on the Accelerated Transport Oriented Development Precincts Rezoning Areas Map.

Is the Proposed Development for the purposes of a “residential flat building”?

- 5.6 The dictionary in the MLEP defines residential flat building as a building containing 3 or more dwellings, but does not include an attached dwelling, co-living housing or multi dwelling housing.
- 5.7 The Proposed Development comprises 8 dwellings and satisfies this definition.

Is the Site within a “low and mid rise housing area”?

- 5.8 Yes. Section 163 of the Housing SEPP defines “low and mid rise housing area” as:

land within 800m walking distance of—

- (a) land identified as “Town Centre” on the [Town Centres Map](#), or
- (b) a public entrance to a railway, metro or light rail station listed in Schedule 11, or
- (c) for a light rail station listed in Schedule 11 with no public entrance—a platform of the light rail station.

- 5.9 The “Town Centres Map” is defined as the “State Environmental Planning Policy (Housing) 2021 Town Centres Map”.
- 5.10 Manly Town Centre is identified as Town Centre on the Town Centres Map as depicted in Figure 1:



Figure 1: Manly Town Centres Map

Source: NSW Planning Portal Spatial Viewer

- 5.11 “Walking distance” is defined at Schedule 10 of the Housing SEPP as:

Walking distance is the shortest distance between two points. This distance must be measured along a route that may be safely walked by a pedestrian using, as far as reasonably practicable, public footpaths and pedestrian crossings.

- 5.12 There is no statutory mapping or clearly defined boundaries to the LMR Housing Inner or Outer areas of the walking distances. Further, the Housing SEPP provides limited guidance on what constitutes an ‘acceptable path’.

- 5.13 Of note, the meaning of ‘walking distance’ in the context of the Housing SEPP was discussed in the decision of *Bennett v Northern Beaches Council* [2022] NSWLEC 1720. At [49], Commissioner Gray found that the ordinary meaning of the words ‘walking distance’ **does not** require:

5.13.1 “consistent lighting of the path”;

5.13.2 “a paved pathway for its full length”;

5.13.3 “the route to be flood free”; or

5.13.4 “the route to be suitable for access by means of a wheelchair or pram”

- 5.14 At [50], Commissioner Gray found that whether something can be “safely walked by a pedestrian” depends on the circumstances of the case. However, the qualification of “safely walked” is not a vehicle for creating additional requirements that do not form part of the language of the statutory definition and are not otherwise set out in the instrument.

- 5.15 The SEE identifies the Site as being within 15 metres walking distance of the Manly Local Centre. Figure 3 below illustrates the adopted pedestrian route to the Manly Town Centre from the Site (**the Adopted Path**).

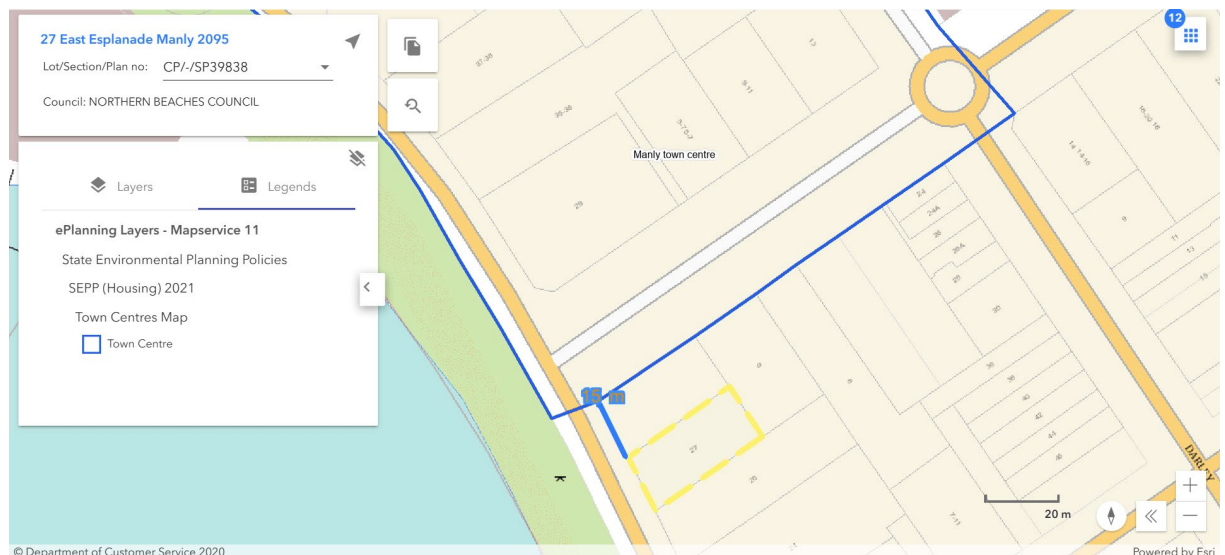


Figure 1: Map depicting the Adopted Path

Source: Planning Portal Spatial Viewer

- 5.16 The Adopted Path relies on the pedestrian footpath along East Esplanade, Manly. We consider that this route can be safely walked by a pedestrian, consistent with the definition of ‘walking distance’ under the Housing SEPP.

- 5.17 As confirmed in the above extract from the SEE, the Adopted Path is 15 metres from the Manly Town Centre and therefore the Proposed Development is permissible with development consent under s 174 of Chapter 6.
- 5.18 Having regard to the above, Chapter 6 applies to the Site and the Proposed Development.

6. Merits of the Proposed Development

Compliance with relevant development standards

- 6.1 The Proposed Development is generally compliant with the relevant standards as set out in the SEE, except for the requirement relating to maximum building height.
- 6.2 Under cl 4.3 of the MLEP, the maximum building height permissible for the Proposed Development is 11 metres. However, the DA is being lodged pursuant to the Housing SEPP which prevails over the extent of any inconsistency with the MLEP.² The maximum building height for the Proposed Development is therefore determined by sections 180 and 16 of the Housing SEPP.
- 6.3 Table 8 on page 37 of the SEE confirms that the Proposed Development's total maximum height of 26.84 metres does not comply with the maximum building height for the Proposed Development, being:
- 6.3.1 22 metres under s 180 of the Housing SEPP; plus
 - 6.3.2 an additional building height of up to 30%, based on a minimum affordable housing component calculated in accordance with subsection 16(3) of the Housing SEPP, noting that the Proposed Development uses the additional floor space ratio permitted under section 16.
- 6.4 As the Proposed Development does not comply with the maximum height determined under section 16(3) of the Housing SEPP, the Clause 4.6 Request has been prepared (see Appendix 2 of the SEE) to seek approval for the non-compliant elements, in accordance with s 4.15(3) of the EP&A Act.
- 6.5 We have considered the Clause 4.6 Request and are satisfied that it demonstrates the matters required to be demonstrated by clauses 4.6(3) and (4) of the MLEP. In particular, we note that:
- 6.5.1 The proposed variation to the height of building development standard arises solely due to the basement excavation (a function of the existing basement on the Site) which results in a technical non-compliance affecting the roof and lift overrun.
 - 6.5.2 The approach taken in the Clause 4.6 Request is consistent with the reasoning in *Merman Investments Pty Ltd v Woollahra Council* [2021] NSWLEC 1582, where the Court acknowledged that excavation within the footprint of an existing building can distort the building height plane to such an extent that reliance on inferred ground levels is no longer reasonable. In that case, the Court accepted (at [74]) that:
 - (a) the building would otherwise comply if measured from the inferred natural ground level (referred to as the "existing ground line");
 - (b) the proposal met the objectives of the height control and the zone; and
 - (c) there was an "environmental planning ground" justifying the contravention of the height standard under clause 4.6.

² Section 8(1) of the Housing SEPP.

6.5.3 Further, the technical non-compliance due to the lift overrun is not incompatible with the height, bulk and scale of the future character of the locality. As in *Chau v Georges River Council* [2023] NSWLEC 1619 at [49], the non-compliance is not antipathetic to the objectives of the height of building development standard.

6.6 In our view therefore, the consent authority has sufficient information before it to be satisfied that the clause 4.6 requirements have been met.

Compliance with MDCP

6.7 The Proposed Development has considered the applicable provisions of the MDCP, as outlined in Appendix 1 of the SEE.

6.8 However, in the context of the incentives and standards introduced by Chapter 6 of the Housing SEPP, it is anticipated that certain DCP controls may be inconsistent or incompatible with the form of development contemplated by the SEPP. This is particularly relevant where the Housing SEPP prescribes non-discretionary development standards, such as building height and FSR, which override more restrictive DCP controls.

6.9 The EP&A Act addresses the interaction between the MDCP and environmental planning instruments (**EPIs**) in section 3.43(5). This provision states:

A provision of a development control plan (whenever made) has no effect to the extent that—

- (a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or*
- (b) it is inconsistent or incompatible with a provision of any such instrument.*

6.10 In effect, this means that where a DCP provision duplicates, conflicts with, or is incompatible with a provision of an applicable EPI, such as the Housing SEPP, it will be disregarded in the assessment of a development application. This ensures that EPIs, which carry greater statutory weight, prevail over DCPs in cases of inconsistency.

6.11 Further, section 4.15(3A)(b) of the EP&A Act confirms that DCP provisions must be applied flexibly, allowing for reasonable alternative solutions where appropriate. This reinforces the principle that DCPs are guidance documents, not binding instruments, and must yield to EPIs in the event of inconsistency.

6.12 This position has been supported in case law, including *Iglesia Ni Cristo v Burwood Council* [2019] NSWLEC 1579. At [26], Commissioner Gray addressed s 3.43(5) of the EP&A Act and confirmed that provisions of a DCP, such as car parking rates, reflect the council's expectations rather than mandatory standards. The Court held that such rates cannot be considered non-discretionary development standards or be determinative of the application. Instead, DCP provisions must be applied flexibly in accordance with s 4.15(3A)(b), allowing for reasonable alternative solutions that achieve the objectives of the standards. The Court further clarified that DCP provisions are relevant matters for consideration, but they are not "inconsistent or incompatible" with the entitlement to have a development application considered on its merits under the Act. Accordingly, while the MDCP remains relevant to the merit-based assessment of the Proposed Development, its provisions must be applied flexibly in accordance with the EP&A Act.

Contact

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