

23 Fisher Road, Dee Why

Merit Assessment of height variation against Clause 4.6 variation

On behalf of
Hamptons by Rose Pty Ltd
February 2021



1 Introduction

This Merits Assessment against Clause 4.6 principles relates to the Section 4.55(1A) modification application to the Northern Beaches Council (Council) at 23 Fisher Road, Dee Why (subject site).

This Merits Assessment against Clause 4.6 principles relates to Height of Buildings (Clause 4.3) in the *Warringah Local Environmental Plan 2011* (WLEP 2011) in response to the proposed modification application which seeks internal reconfigurations, adjustment to levels and construction of an additional level on Buildings A, B and C to accommodate an additional 21 residential apartments.

This Merits Assessment against Clause 4.6 principles demonstrates that compliance with the development standards is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such, is justified on environmental planning grounds.

The subject application is a modification under Section 4.55 of the Act and therefore no Clause 4.6 variation request is required. For completeness, this Merits Assessment against Clause 4.6 principles has been undertaken to demonstrate that notwithstanding the non-compliance, the proposed development:

- Satisfies the objectives of Clause 4.3 under WLEP 2011;
- Satisfies the objectives of the B4 Mixed Use zone under WLEP 2011;
- Is consistent with the applicable and relevant State and regional planning policies;
- Will deliver a development that is appropriate for its context, despite the breach to development standard 4.3, and therefore has sufficient environmental planning grounds to permit the variation; and
- As a result, the modification may be approved as proposed in accordance with the flexibility afforded.

2 Clause 4.6 Exceptions to Development Standards

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

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

Clause 4.6 enables a variation to the relevant development standards in the WLEP2011 for:

- *Clause 4.3 – Height of Buildings*

In particular, it is noted that Clause 4.6(8) does not include any of the above Clauses as a provision which cannot be 'contravened'.

Clause 4.6 requires that a consent authority be satisfied of three (3) matters before granting consent to a development that contravenes a development standard:

- That the applicant has provided a written request that has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has provided a written request that has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Clause 4.6 of the WLEP 2011 reads as follows:

Clause 4.6 Exceptions to development standards

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

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

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) the concurrence of the Planning Secretary has been obtained.

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

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4.

(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the Height of Buildings Map on land shown on the Centres Map as the Dee Why Town Centre.

(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the Height of Buildings Map if the maximum height is allowable under clause 7.14.

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

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

3 The Development Standard to be varied

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

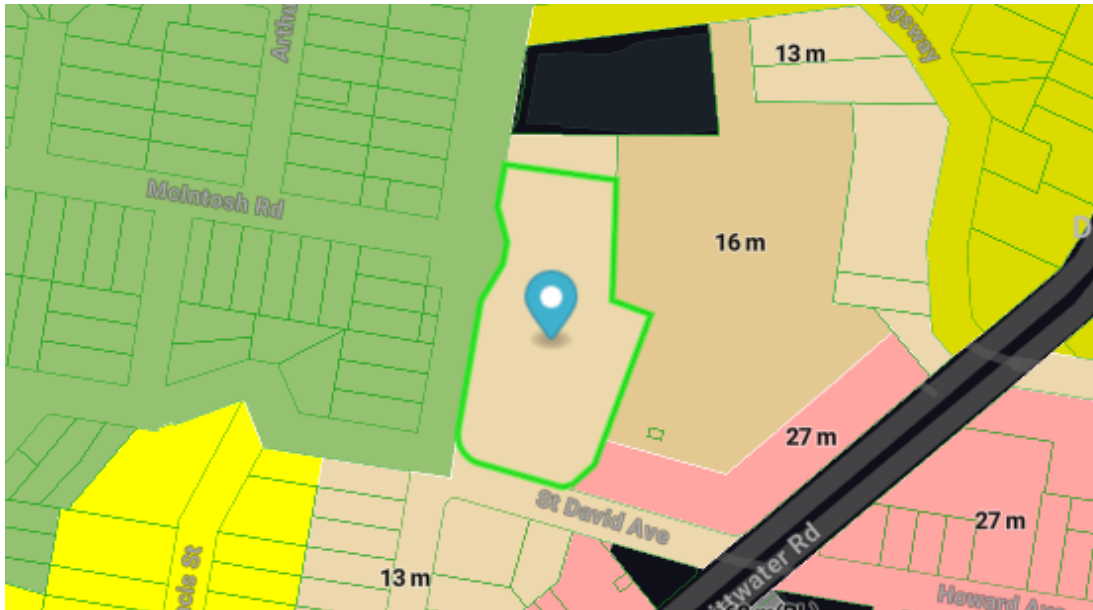


Figure 1. Height of Buildings LEP Map
 Source: Mecone MOSAIC

4 Extent of Variation to the Development Standard

The proposed modification application seeks internal reconfigurations, adjustment to levels and construction of an additional level on Buildings A, B and C to accommodate an additional 21 additional residential apartments.

The proposed modifications seek internal reconfigurations, adjustment to levels and construction of an additional level on Buildings A, B and C to accommodate an These works result in a maximum height of RL+57.38m (ridge of Building A), resulting in a maximum 2.35m over the 13m height control (or 16.6% variation). Building B and C exceed the height control (at their maximum ridge line) by 1.60m to 1.95m.

The areas exceeding the height plane include roof, plant equipment, some upper-level walls, and a small area of balcony fronting the northern boundary. The amount of area above the height plane is modest in scale and largely isolated to roof forms as a result of the undulating topography. Refer to **Figures 1** to **4** below.

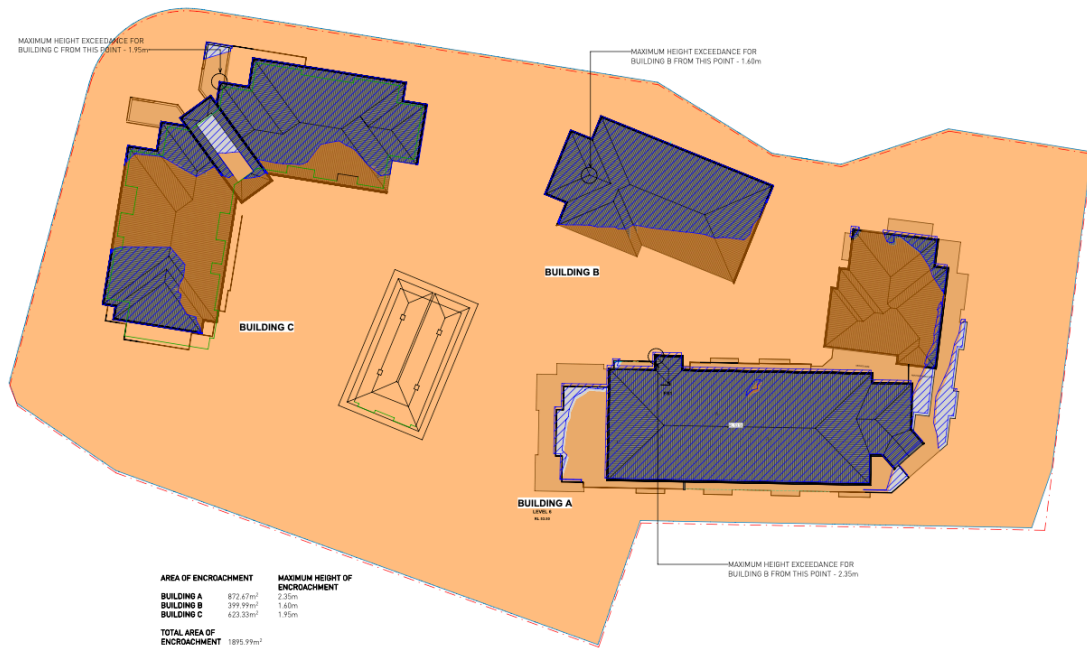


Figure 1. LEP Height Exceedance Diagram (extract from A 3.18 Rev A)
 Source: Giles Tribe

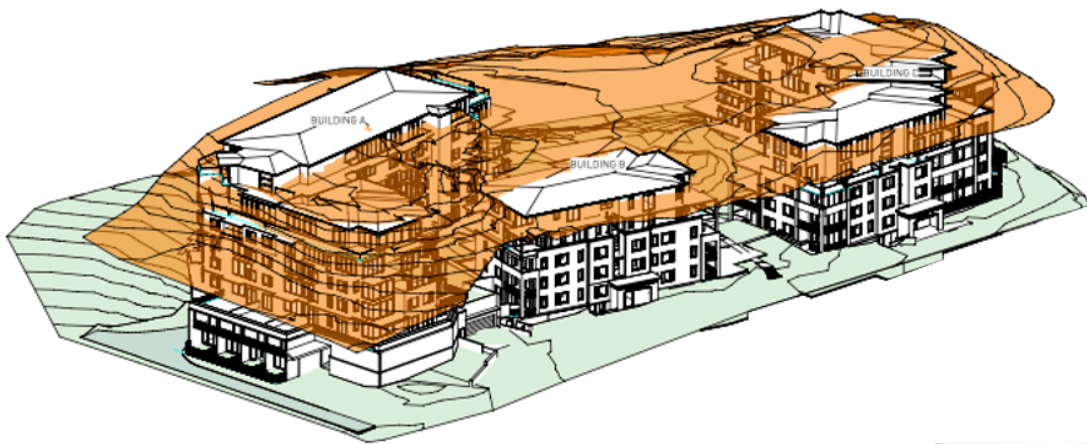


Figure 2. 13m Height Plane Diagram - North West Elevation (extract from A 3.07 Rev E)
 Source: Giles Tribe

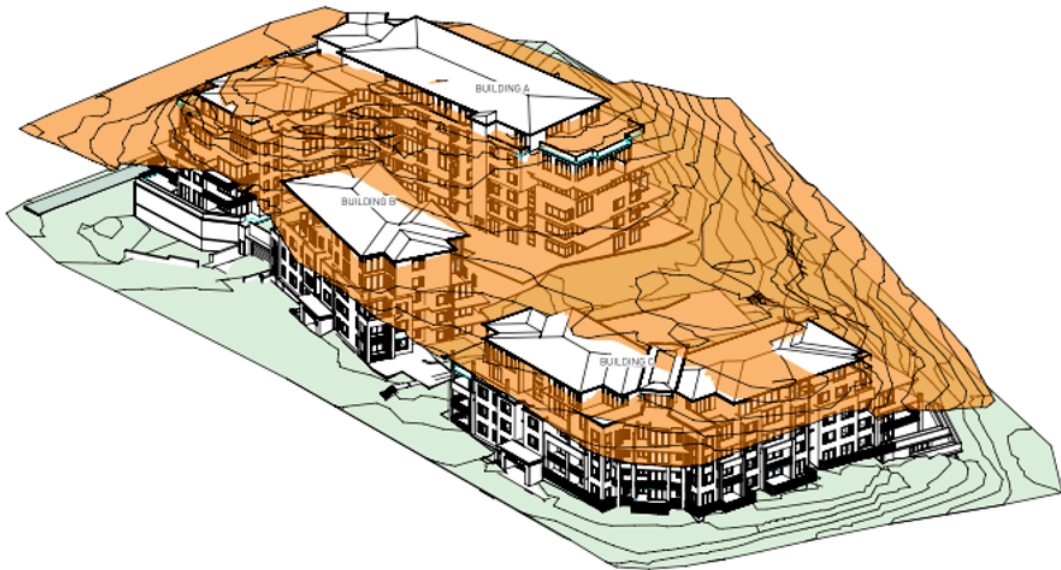


Figure 3. 13m Height Plane Diagram - South West Elevation (extract from A 3.07 Rev E)
Source: Giles Tribe

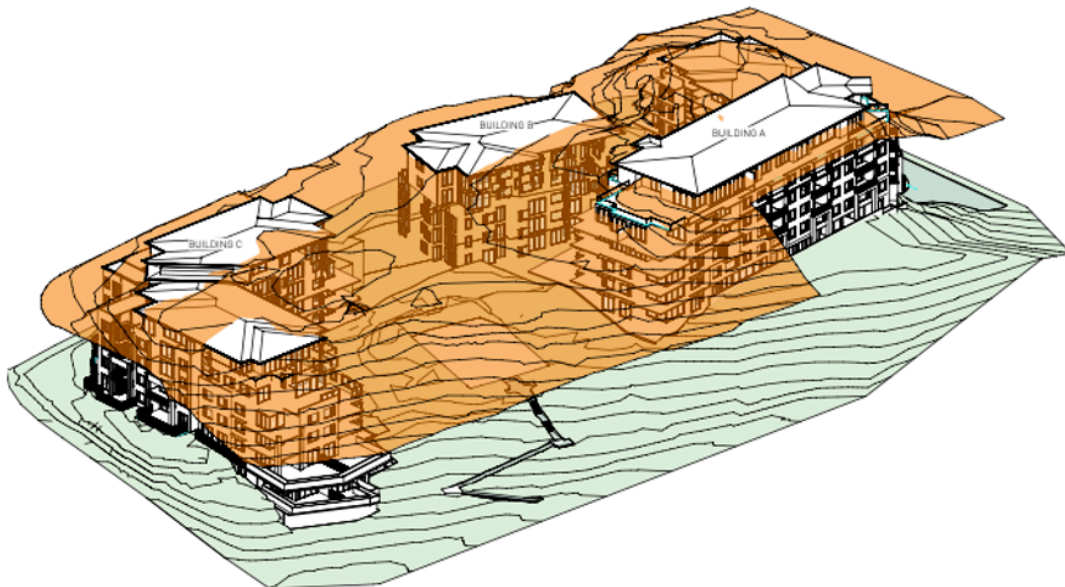


Figure 4. 13m Height Plane Diagram – South East Elevation (extract from A 3.07 Rev E)
Source: Giles Tribe

5 Objectives of the Standard

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

- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
 - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
 - (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

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

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

(2A) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

6 Objectives of the Zone

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

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

7 Assessment

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

Compliance with the Height of Building control is unreasonable and unnecessary given the following circumstances of this case:

- The proposed variation to the height control is can be attributed to the provision of an additional 21 residential apartments to better realise the site's FSR potential, and to the undulating topography on site. The proposed exceedance in height is modest and maintains compliance with the maximum permissible Floor Space Ratio of 1.45:1 with the modified scheme resulting in a total FSR of 1.43:1.
- The increased building height will enable the construction of an additional 21 apartments which will provide additional housing in close proximity to both the town centre and public transport.
- Under the WLEP2011, the maximum building height is measured from the existing ground level (existing) to the highest point of the building. The portions of the buildings that do not comply with the height control are largely isolated to the roof form and where there is a significant drop in the ground level below.
- All exceeding areas are setback from the site boundaries.
- The building generally follows the slope of the land and is broken down with setbacks and level changes. However, the site's significant level changes mean that the proposed future buildings and roof forms breach the height control areas.
- The development continues to respond to the natural features of the site, retaining the key features such as mature trees to the east and the rock face along St David Avenue. The development includes generous amounts of landscaping to enhance the site's natural characteristics and soften the built form, including approximately 2,899m² of deep soil on site (27.3% of site area).
- The application is supported by a SEPP65 Report in **Appendix 6**, which demonstrates the modified development's consistency with the Apartment Design Guide.
- The proposal, in particular the additional height, will not create any additional impact upon the amenity of the adjoining neighbours with regard to privacy or solar access. In particular, the proposed additional height will not cause any additional amenity impacts – such as solar or privacy - that would contravene Council's controls;
- As detailed in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* test 1 is relevant for the subject site:
 - *Wehbe* Test 1 - the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The proposed development is nevertheless consistent with the objectives of the height standard and B4 Mixed Use zone as described below and delivers a better urban design and planning outcome than a fully complying building envelope, as discussed in further detail in the section below;

- The contravention of the height standard assists in contributing to the local economic and housing market for the Northern Beaches Council, a matter that is of state and regional planning significance due to the impacts of Covid19; and

- There is no additional public benefit in maintaining the standard in the circumstances of the case as explained below.

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

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

There are sufficient environmental planning grounds for the contravention to the height standard as follows:

- The development will continue to create a strong planning outcome. This will be achieved through a better urban design outcome for the site and provides an additional 21 apartments whilst maintaining a compliant FSR under the WLEP2011;
- Given the previous approval granted a FSR of 1.26:1, the site is capable of achieving a maximum FSR of 1.45:1. As such, there is a particular environmental ground for this proposal, which relates to maximising the site's economic and housing potential while ensuring no additional amenity impacts;
- Given the exceedance is largely isolated to the roof forms and balconies and considering the staggered nature of the existing ground level, full compliance with the height plane would require the upper level of building to be equally staggered with inconsistent building setbacks and heights in efforts to respond to points of steep descents across the site. To accommodate the additional apartments, an amended design that follows the height control would negatively impact on the overall visual presentation of the development;
- The proposed development continues to present a high-quality built form, with stepped levels and articulation to follow the slope of the land, and appropriate materials and finishes which contribute to the desired future character of the Dee Why Town Centre.
- The additional apartments will comprise balconies around the perimeter of the upper level, which contributes to significant setbacks from the building edge, screening the proposed additions from the public domain;
- Landscaping and deep soil continues to be provided on site in excess of the DCP and ADG controls, softening the built form and ensuring no adverse visual impact is created;
- The development maintains high quality amenity to surrounding properties with continued compliant overlooking or solar impacts;
- Given the above, strict compliance with height controls would hinder the attainment of the objectives of the Act, and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a)(ii) - Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out?

The objectives of the development standard and the zone are addressed below under the relevant headings:

a) the objectives of the particular standard

The particular development standard is Clause 4.3 Height of Buildings of the WLEP2011 and the relevant objectives are addressed below:

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

The amended building height results in modest exceedances (up to a maximum of RL57.38) that maintain appropriate transitional heights between the low-rise dwellings to the west and medium to high rise buildings within the Dee Why Town Centre to the east. In particular, the buildings along Pittwater Road are permitted to heights of up to 27m under the WLEP2011 as demonstrated in pink in **Figure 5** and significantly greater than the subject site. The proposed additional height on site will provide a better transition to these tall buildings. The proposed six to seven storeys on the northern side of the site provides an appropriate uplift transition with the adjoining three storey flat building to the north, following the sloping of the land along Fisher Road. The proposed additional storey are setback from the building edge and will be minimally visible from the public domain.

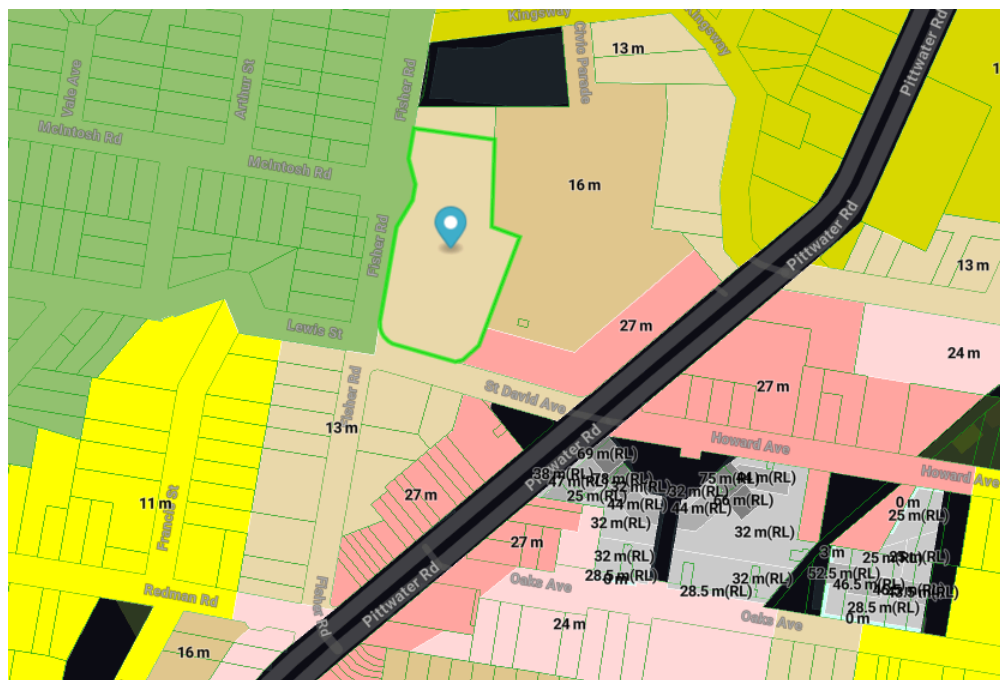


Figure 5. Height of Buildings LEP Map under WLEP2011

Source: Mecone MOSAIC

To minimise visual impact, disruption of views, loss of privacy and loss of solar access

The proposed development is well oriented on the site to respond to all street frontages with appropriate setbacks, building articulation, and façade treatment. The retention of existing mature trees (excluding two low retention trees to be removed to accommodate increase to basement parking), with substantial planting and landscaping along the street frontages act to soften the built form and maintain privacy and streetscape character. The proposed extension to the upper levels is setback from the building edge by balconies. This setback in conjunction with the natural topography of the site will largely screen the additions from the public domain. The development continues to meet the requirements for daylight access to units on site and on surrounding properties as well as natural ventilation as per the ADG and SEPP65, with the elements of height breach causing no additional unacceptable impact.

- (b) To minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments

The proposed development is not considered to have any adverse impact on coastal and bush environments. The site is not identified within the DCP to be in close proximity to any native vegetation, endangered species, or wildlife corridors, and is outside the coastal zone.

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

The proposed development is visible from the public domain on Fisher Road, St David Avenue, and Civic Parade due to its corner site location. Sight lines have been considered in the orientation of building footprints on site. The visual impact of the development is minimised by breaking the built form into three buildings, consistent with that approved, with appropriate setbacks, stepping of levels, and building articulation which is further softened by the retention of mature trees and addition of new landscaping and podium planting.

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

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

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

The proposed residential development will include a mixture of uses including commercial uses, townhouse dwellings fronting the residential areas to the north-west, and residential units above as per the approved DA. The proposed additional residential apartments remain consistent with the approved use on site.

- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposed development is located on the north-west corner fringe of the Dee Why Town Centre. Commercial office space has been approved on site within Pacific Lodge, to assist in providing a transition between the town centre and residential zones beyond Fisher Road. The modification does not seek to amend this commercial uses or structure. The proposed additional 21 apartments have been integrated within the maximum permissible FSR control and will aid in further stimulation of the local community and town centre.

- *To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.*

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

- *To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.*

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

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

The subject site is relatively detached from the main commercial and retail activity along Pittwater Road due to topography and distance. The proposed modifications do not seek to significantly alter the approved land use breakdown. The continued combination of residential and commercial on the site provides an appropriate transition on the fringe of the Dee Why Town Centre and should be assessed on its own merit. The proposed integration of the additional 21 apartments on the upper floors of the structures is consistent with the objective.

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

The subject site is large in size and is not identified for site amalgamation under the EPI controls. The modification seeks some additional excavation to include an additional 34 residential parking spaces within the basement levels in response to the additional residential apartments proposed. Car parking under the proposed modification will continue to be provided across two basement levels. No change to access points is sought.

The integration of these parking spaces will largely be contained within the existing footprint, with internal reconfigurations and some additional excavation required. The design will utilise tandem parking spaces to minimise the extent of this excavation. No change to the vehicular access points or servicing from the approved is sought. The additional basement parking spaces will remain consistent with the condition in that all parking spaces will be maintained free of obstruction and will ensure off-street parking is maintained for the life of the development and used solely for the parking of vehicles.

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

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

8 Any matters of significance for State or regional environmental planning

The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Regional Plan and the North District Plan, which are matters of regional environmental planning significance.

Additionally, the contravention of the height standard assists in contributing to the local economic and housing market for the Northern Beaches Council, a matter that is of state and regional planning significance due to the impacts of the Covid19 pandemic.

9 Secretary's concurrence

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

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

10 Conclusion to variation to height standard

This is a written merits test against the principles applied for Clause 4.6 of the WLEP 2011, despite not being technically required for a 4.55 modification. It justifies the contravention to the height under Clause 4.3 of the WLEP2011, and, in particular, demonstrates that the proposal provides an acceptable planning outcome, with no significant adverse environmental impacts despite the breach, and therefore, in the circumstances of the case:

- Full compliance with the 13m building height control is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention;
- It is in the public interest in being consistent with the objectives of the standard and the objectives of the zone; and
- The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Greater Sydney Region Plan ('the 30-minute city') and North District Plan, which are matters of regional environmental planning significance, particularly given the economic impact of the Covid19 pandemic,



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

info@mecone.com.au

mecone.com.au