



Minto Planning Services

Town Planning Consultants

**PROPOSED CONSTRUCTION OF A MIXED USE DEVELOPMENT COMPRISING OF  
RETAIL PREMISES, SHOP TOP HOUSING AND 3 INDEPENDENT LIVING UNITS  
PURSUANT TO PART 5 OF SEPP (HOUSING) 2021**

**142-146 PITT ROAD, NORTH CURL CURL**

**Clause 4.6 - Exceptions to development standards (Height of buildings)**

This Clause 4.6 Submission is prepared in support of a Development Application which seeks approval for the demolition of the existing structures followed by the construction of a mixed use development comprising of five (5) ground floor retail premises, shop top housing consisting of eight (8) residential units and ground floor seniors housing consisting of three (3) independent living units and basement carparking upon the subject site.

This variation is to be read in conjunction with the following documentation:

- Survey Plan prepared by Peak Surveying Services, Job No. 23-2072, Sheet 1 of 1 and dated 31/05/2023.
- Architectural Plans, Shadow Diagrams, Perspectives, Overland Flow Plan/Sections, and Overlooking Sections prepared by Warren and Mahoney, Job No. 10146, Drawing No's. A00.004 to SK.307, Revision A and dated 12/08/2024.
- Architectural Design Report, Design Verification Statement & ADG Checklist prepared by Warren and Mahoney and dated August 2024.

A variation is sought in respect of compliance with Clause 4.3 - Height of Buildings of the Warringah LEP 2011.

The site is subject to a maximum building height control of 8.5m.

The proposal as detailed on the accompanying plans will result in a maximum building height of 11.4m and which exceeds the requirements of this clause.

The proposed non-compliance relates to the proposed lift overrun and a portion of Level 2.

The following Clause 4.6 variation is provided in support of the proposed height of building non-compliance.

This Clause 4.6 variation has been prepared in accordance with the approach adopted by the Land & Environment Court of NSW in its recent Court decisions.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

**1. What are the objectives of Clause 4.6 and is the proposal consistent with them.**

The objectives of Clause 4.6(1) of the LEP 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.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

It is also considered in the circumstances, a flexible approach to the application is warranted.

**2. Is the standard to be varied a Development Standard to which Clause 4.6 applies.**

A “development standard” is defined in Section 4 of the Environmental Planning & Assessment Act as:

***development standards*** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*
- (e) *the intensity or density of the use of any land, building or work,*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*

- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.

Clause 4.3 is contained within Part 4 of the Warringah LEP 2011 and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to what matters constitute development standards.

It is also noted that Clause 4.3 does not contain a provision which specifically excludes the application of Clause 4.6 and vice a versa.

On this basis it is considered that Clause 4.3 is a development standard for which Clause 4.6 applies.

### **3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.**

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under the Warringah Local Environmental Plan 2011):

- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
  - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or

- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The first justification is applicable in this instance.

The following assessment of the proposal is provided against the objectives of Clause 4.3 of the Warringah LEP 2011.

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

The proposal as detailed on the accompanying plans will result in a three storey building having a maximum building height of 11.4m.

The proposal is surrounded by a number of properties which currently support three storey development and which would exceed the 8.5m height of building control. This includes the adjacent development at 150 Pitt Road and nearby development at 64-68 Pitt Road.

The proposal includes a similar third storey to that occurring upon 64-68 Pitt Road. The third storey has been designed and located so as to not generally be visible from the street or adjoining properties and in my view is compatible with the height and scale of nearby development.

Reference is made to the accompanying Architectural Design Report prepared by Warren and Mahoney which states the following in relation to ADG Principle 2 - Built Form and Scale:

*The Building is split into three segments with three equal parts along Pitt Road, providing a distinct legibility. This rhythm is prominently featured along the facade, contributing to a more articulated street presence, both in the upper level units, and on the retail on ground level.*

*By recessing the upper level units from the street, the prominence of the lower apartment and retail facade are made more prominent. Additionally, the recessed positioning of the balconies provides a softening to the building's outline, separating the rhythm of mass at ground level and above.*

The proposal is therefore considered to be compliant with this objective.

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

The proposal as detailed on the accompanying architectural plans is unlikely to result in any adverse visual impacts or loss of views and privacy.

Reference is made to the accompanying Architectural Design Report prepared by Warren and Mahoney which states the following in relation to ADG Principle 6 - Amenity:

*The building is laid out in a way that minimises units per level, and the number of units access per core on the level.*

*Each unit is sized to exceed ADG minimum areas, both in terms of storage and room sizes. In addition the diversity in unit design provides a product for a wide range of users. The development exceeds ADG requirements for both solar access and cross ventilation. For the units that do not meet solar access, these will still have access to daylight the rest on the summer half of the year, and will have views towards Curl Curl Beach.*

Furthermore, the proposal is provided with appropriate privacy screening and landscaping to minimise any potential loss of privacy.

Reference is also made to the accompanying Shadow Diagrams which demonstrate that the proposal will result in a minor increase in overshadowing to the property to the west. Notwithstanding, the adjoining properties will continue to receive compliant solar access.

The proposal is therefore considered to be compliant with this objective.

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

The proposal does not have any adverse impacts on the scenic quality of Warringah's coastal and bush environments.

The proposal is therefore considered to be compliant with this objective.

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

The proposal has been designed to provide for a third storey which is located so as to not generally be visible from the street or adjoining properties and in my view is compatible with the height and scale of nearby development.

Reference is made to the accompanying Architectural Design Report prepared by Warren and Mahoney which states the following in relation to ADG Principle 2 - Built Form and Scale:

*The Building is split into three segments with three equal parts along Pitt Road, providing a distinct legibility. This rhythm is prominently*

*featured along the facade, contributing to a more articulated street presence, both in the upper level units, and on the retail on ground level.*

*By recessing the upper level units from the street, the prominence of the lower apartment and retail facade are made more prominent. Additionally, the recessed positioning of the balconies provides a softening to the building's outline, separating the rhythm of mass at ground level and above.*

In addition, reference is also made to the accompanying Architectural Design Report prepared by Warren and Mahoney which states the following in relation to ADG Principle 9 - Aesthetics:

*Establishing a cohesive connection between the retail and residential levels, a grid of concrete bands and columns is employed. This architectural feature defines individual retail units along Pitt Road while emphasizing the upper apartment edge.*

*Complementing this approach, smaller elements like balustrades, planter boxes, and canopies establish a horizontal datum along the street. Timber louver screens and bi-folds add layering and texture to the facade.*

*Additionally, the alternating canopy recessions support the balcony setbacks above, contributing to a softer overall appearance and improving streetscape legibility.*

The proposal is therefore considered to be compliant with this objective.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

**4. Are there sufficient environmental planning grounds to justify contravening the development standard.**

Consistent with the findings of the Court in *Initial Action P/L v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC* an applicant is required to demonstrate in writing that there are sufficient environmental planning grounds to justify the variation.

In *Initial Action* at [24], Preston CJ stated, that the

*“... focus of cl. 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds”.*

Further he stated,

*“... the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl. 4.6(4)(i) that the written request has adequately addressed this matter”.*

In order to determine environmental planning grounds relevant to the non-compliance it is often accepted to relate the departure to the objects of the Act as set out at Section 1.3 - Objects of the Act.

The following objects of the Act are considered to be relevant to the proposal.

- (a) .....
- (b) .....
- (c) *to promote the orderly and economic use and development of land,*
- (d) .....
- (e) .....
- (f) .....
- (g) *to promote good design and amenity of the built environment,*
- (h) .....
- (i) .....
- (j) .....

Relevant to the proposal the following submission is provided in relation to the question as to whether there are sufficient environmental planning grounds to justify the non-compliance.

*What is the aspect or element of the development that contravenes the development standard*

The proposal as detailed on the accompanying plans will result in a maximum building height of 11.4m and which exceeds the requirements of this clause.

The proposed non-compliance relates to the proposed lift overrun and a portion of Level 2.

*What are the environmental grounds associated with the departure*

It is my opinion the environmental planning grounds associated with the proposed departure primarily relate to:

1. Achieving a floor area which is within the environmental capacity of the site and which provides for the orderly and economic development of the land having regard to the constraints applicable

to the land and which were not disclosed at the time the site was acquired.

2. These constraints include:

- i. A large 675mm stormwater pipe which traverses the subject site and which currently runs under the existing building. The existing pipe which forms part of Councils drainage network is not benefitted by a registered drainage easement or an associated overland flow path. The proposed development will allow for the creation of new drainage infrastructure, a registered easement and an overland flow path at no cost to Council or the community. The additional floor area associated with the height of building non-compliance will assist in both providing a public benefit associated with the new drainage infrastructure as well as offsetting the associated costs.
- ii. The site has recently been identified by the Council as being flood affected. The existing building as a result of it extending the width of the subject site acts as a dam and worsens the flooding impacts such that both the existing building and adjoining properties are potentially impacted. The proposed development will allow for the creation of a new overland flow path at no cost to Council or the community. The additional floor area associated with the height of building non-compliance will assist in both providing a public benefit associated with the new overland flow path as well as offsetting the associated costs.

It is my understanding that without the additional floor area associated with the height of building non-compliance that the development of the site including the creation of new drainage infrastructure, a registered easement and an overland flow path would not be financially viable.

*Are the environmental planning grounds sufficient to justify contravening the development standard*

It is my opinion given that the non-compliance is primarily associated with the provision of additional floor area and a non-compliant height of building aimed at offsetting the cost of the provision of new drainage infrastructure, a registered easement and an overland flow path at no cost to Council or the community. It is considered that the additional floor area associated with the height of building non-compliance will provide a significant public benefit which is an environmental planning ground.

It is also considered as detailed in the accompanying Architectural Design Statement that the proposal and in particular the units located upon the upper level of the building will be provided with high levels of amenity in a manner which will not unreasonably impact upon the character of the area, the streetscape or the amenity of the adjoining properties.

It is my opinion based upon the above that the proposed non-compliance will:

1. *promote the orderly and economic use and development of land, and*
2. *promote good design and amenity of the built environment.*

It is therefore my opinion based upon the above that this submission has demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by Clause 4.6(3)(b) of the LEP.

### **Conclusion**

It is therefore my opinion based upon the content of this submission that a variation of the maximum height of building control as required by Clause 4.3 of the Warringah LEP 2011 is appropriate in this instance.



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