

**Four Towns  
Planning**

*Planning and property consultant*

**WRITTEN REQUEST PURSUANT TO  
CLAUSE 4.6 OF WARRINGAH LOCAL  
ENVIRONMENTAL PLAN 2011**

**VARIATION OF A DEVELOPMENT  
STANDARD REGARDING THE HEIGHT OF  
BUILDINGS AS DETAILED IN CLAUSE 4.3  
OF WARRINGAH LOCAL  
ENVIRONMENTAL PLAN 2011**

**Alterations and Additions to an Existing  
Residential Flat Building**

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**This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.**

**Report prepared by:**

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Director – Four Towns Pty Ltd

**Report prepared for:**

The Owners – Strata Plan 3128

**21 July 2023**

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## **Introduction**

This objection is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height of a building as described in Clause 4.3 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

The following assessment of the variation to Clause 4.3 – Building Height development standard, has taken into consideration the recent judgement contained within Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582, Bettar v Council of the City of Sydney [2014] NSWLEC 1070, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.

<b>Requirement</b>	8.5m
<b>Proposed</b>	10.3m (existing 12.01m)
<b>Is the planning control in question a development standard?</b>	Yes
<b>Is the non-compliance with to the clause requirement a numerical/or performance based variation?</b>	Numerical
<b>If numerical enter a % variation to requirement</b>	21.18%

The proposal must satisfy the objectives of Clause 4.3 – Height of Buildings, the underlying objectives of the particular zone, and the objectives of Clause 4.6 - Exceptions to Development Standards under the WLEP 2011. The proposal is consistent with surrounding developments and the proposed variation is compatible and retains the existing building height with the works below that of the existing maximum for the site. The proposal is consistent with the locality and streetscape of Ocean Street.

A variation to the strict application of the Height of Building standard is considered appropriate for the subject site and is supportable for the following reasons:

- The objectives of the WLEP2011 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the WLEP2011 R2 Low Density Residential zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has an existing maximum building height of 12.01m. The proposed works relate to the replacement and refurbishment of the existing building at a maximum height of 10.3m.
- The proposed development is consistent with the existing building height for the site and the works do not increase the height any further. Further, the building falls under existing use rights and it's considered that the planning controls are not enforceable due to the variation existing and land use.
- The breach of the building is considered acceptable as it relates to the existing approved building height, bulk and scale.
- The breach will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

### **Clause 4.6 Variation Requirements**

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582, Bettar v Council of the City of Sydney [2014] NSWLEC 1070, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* and review the following:

#### **Compliance being unreasonable or unnecessary**

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council at [42] and [43]*.
2. The underlying objective or purpose of Clause 4.3(2) is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council at [45]*
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. *Wehbe v Pittwater Council at [46]*
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council at [47]*.
5. The relevance of the zoning provisions of the land to which the development is proposed.

#### **Sufficient environmental planning grounds**

1. First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard"
2. Second, 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)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]*

#### **Is the proposed development in the public interest?**

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;
- b. the zone in which the development is proposed to be carried out.

#### **Secretary's Concurrence**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

**General Provisions Relating to Clause 4.6 which will be applicable to Clause 4.3(2) Height of Building**

**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.*

**Comment:** As detailed previously in this request, Clause 4.6 of WLEP2011 is applicable to enable a variation to the Height of Building to permit Northern Beaches Council power to grant development consent to the subject development.

This proposal involves a departure from the Height of Building control of WLEP2011, a formal variation to this standard is required under *Clause 4.6 – Exceptions to Development Standards*. This provision allows consent to be granted for a development even though it would contravene a development standard imposed by this or any other planning instrument.

The provisions of Clause 4.6, which the consent authority must have regard to in determining whether a development that contravenes a development standard should be supported, includes the following:

- *That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case; Cl 4.6 (3)(a)*
- *That there is sufficient environmental planning grounds to justify contravening the development standard; Cl 4.6 (3) (b)*
- *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: Cl 4.6 (4)(a)(ii)*
- *The public benefit of maintaining the development standard, and Cl 4.6 (5)(b)*
- *Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence Cl 4.6 (5)(c)*

#### **4.3 Height of buildings**

*(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.*

**Comment:** It is acknowledged that the proposed development does not comply with clause 4.3 (2) and accordingly there is a requirement to submit a Clause 4.6 Variation. This Clause 4.6 seeks an exemption to the development standard as prescribed under the WLEP2011 and demonstrates that

compliance with the provisions of clause 4.3 (2) is both unreasonable and unnecessary and the proposed development meets the required steps that are set out in the relevant NSW Land and Environment Court decisions to justify that the standard can be varied to achieve the subject proposal.

The development standard in Clause 4.3 (2) of the WLEP2011, is amendable to variation. The purpose of this Clause 4.6 is to vary the Height of Building as a building height referable to the building to give Council the power to grant development consent to the non-compliant purposes. This proposition is reinforced by the following:

Clause 4.3 (2) states:

*(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.*

The Height of Building Map sets a maximum Height of Building control of 8.5m. For the purpose of calculating Height of Building, the WLEP2011 provides the following definition:

Building height is defined as follows:

**building height (or height of building)** means—

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

**ground level (existing)** means the existing level of a site at any point.

In this regard, it has been determined that the proposed works have a maximum building of 10.3m which exceeds the building height standard by 1.8m or represents a 21.18% variation to Council's development standard.

The Height of Building in clause 4.3(2) of the WLEP2011 is a development standard in accordance with the definition set out below:

Development standards' is defined in section 1.4 of the EP&A Act 1979 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:

*(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Despite the variation to the Height of Building control which occurs as a result of the existing building height for the site, the proposed alterations are considered to be in keeping with the desired future character of the locality. The proposed works relate to the replacement and refurbishment of the building which are consistent with that existing and within the existing building

footprints and bulk and scale of Ocean Street, therefore the proposed development will not result in any unreasonable visual impact on the streetscape.

The proposed development will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing. Therefore, this written submission is considered to be compliant with the Statutory Provisions prescribed both under WLEP2011 and the provisions of Clause 4.6 which permit a variation to a development standard.

### Objection to Development Standard – Height of Building (Clause 4.3(2))

#### Compliance being unreasonable or unnecessary

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the stand: *Wehbe v Pittwater Council at [42] and [43]*.

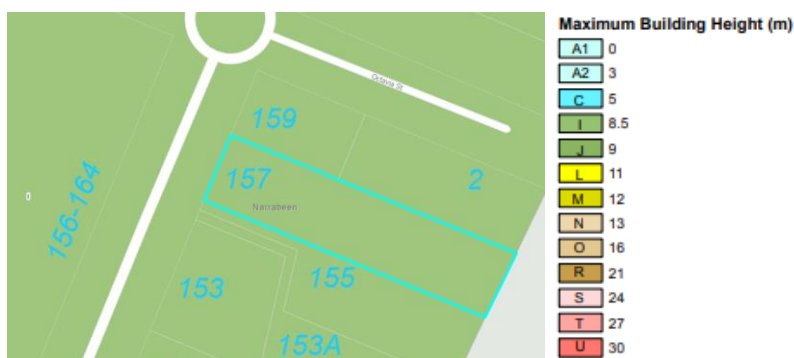
**Comment:** Clause 4.6(3)(a) of the WLEP2011 states that the proposed variation to the development standard must demonstrate that compliance with the development standard is ‘*unreasonable or unnecessary in the circumstances of the case*’.

In determining a merits-based assessment for the Height of Building of the development due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – *Veloshin v Randwick Council [2007] NSWLEC 428*.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types and the consistent bulk and scale built form along Ocean Street. Given the proposed application is considered to be minor and consistent with similar approvals granted in the area, and noting the proposal is below the maximum height of the existing building, Council’s assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the Narrabeen precinct.

2. The underlying objective or purpose of Clause 4.3 is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council at [45]*

**Comment:** The underlying objective and purpose of Clause 4.3 is not relevant as the proposal and variation to the building height meets the purpose and objectives of Clause 4.3:





(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.*

**Comment:** The site has a maximum building height provision of 8.5m. The existing building has a maximum building height of 12.01m with the proposed works below the existing maximum building height at 10.3m which requests a variation by 1.8m (or 21.18%). The Development Application is supported by a Clause 4.6 Variation to Development Standard report. The breach is existing and relates to refurbishment works for the building such as the replacement of balcony’s, gutters etc. The proposal does not increase the building footprint, nor does it extend the building height as existing. The proposal is supported and in our opinion is consistent with the objectives of the Clause, as outlined below:

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

The proposed development is compatible with the height and scale of surrounding and nearby development. It is noted that notwithstanding the existing breach to the building height, the proposal is below the existing maximum building height for the building, therefore the works are inconsequential to that existing and purely relate to the replacement of sliding doors and a new nib wall. It is noted that notwithstanding the existing breach to the building height, adjoining properties have similar breaches, and the approval would not result in significant impacts to the bulk and scale of Ocean Street. It is important for Council to acknowledge the existing streetscape and built form of 157 Ocean Street. The proposal meets this objective.

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

The proposal has been strategically designed by the project architect to be the replacement of the existing balcony’s and cosmetic/refurbishment works. The proposal will not have a visual impact, will not adversely disrupt views, will not increase privacy or amenity impacts to neighbouring properties.

The excerpt below shows the proposed works and the existing building height of the entire building. The proposal has been strategically designed to maintain the existing bulk and scale of the streetscape. The proposal meets this objective.



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

The project architect has strategically designed the proposal to be the replacement of the existing balcony's and cosmetic/refurbishment works. The proposal in our opinion integrates seamlessly into the existing streetscape of Ocean Street and Narrabeen Beach which promotes facets of Warringah's coastal and bush environments through high quality finishes and design. The proposal meets 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 visual impact of the proposal will be consistent with that existing from the existing bulk and scale with refurbishment and replacement of derelict components of the building which will enhance the visual impact when viewed from public places. The proposal meets this objective.

It is our professional opinion that the building, by virtue of its height, bulk and scale, is consistent with the locality and desired character of the area. We have formed the considered opinion that the project is a sympathetic design and development with no impact to existing bulk and scale and is consistent with the existing and future character of the area. The proposal is not offensive, or unsympathetic in a streetscape context nor the context from Narrabeen, and therefore the variation can be supported by Northern Beaches Council.

3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. *Wehbe v Pittwater Council at [46]*

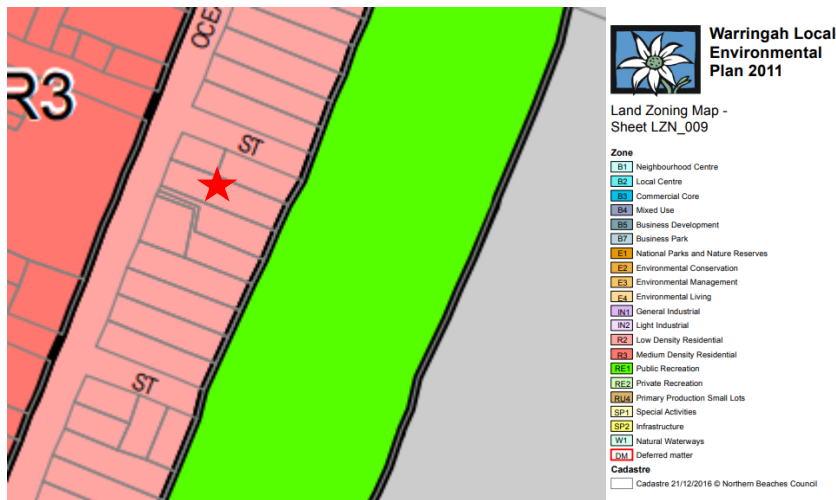
**Comment:** It would indeed be unreasonable for Council to refuse the development that is proposed by way of relatively minor variation considering the existing bulk and scale along Ocean Street as the development does not have any adverse impacts on the immediate amenity of the area. The development has been designed with the necessary sensitivity to complement existing buildings and the natural landform of the area. There is no adverse visual impact associated with the form and structures proposed with the alterations and addition to enhance the built form of the locality.

4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the stand is unnecessary and unreasonable: *Wehbe v Pittwater Council at [47]*.

**Comment:** Whilst the proposal seeks a variation to Councils numerical Height of Building standard, it is consistent with the relevant objectives (as outlined previously in this report).

A review of other developments within the immediate area and the existing streetscape of Ocean Street shows that the development standard for Height of Buildings has been virtually abandoned or destroyed by Council's own decisions in granting development consents, hence compliance with this development standard is unnecessary and unreasonable.

5. The relevance of the zoning provisions of the land to which the development is proposed. Source: Land Use Zoning Map of the WLEP2011



### Zone R2 Low Density Residential

#### 1 Objectives of zone

- To provide for the housing needs of the community within a low-density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

#### 2 Permitted without consent

Home-based child care; Home occupations

#### 3 Permitted with consent

Bed and breakfast accommodation; Boarding houses; Boat sheds; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; Dwelling houses; Educational establishments; Emergency services facilities; Environmental protection works; Exhibition homes; Group homes; Health consulting rooms; Home businesses; Hospitals; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture; Veterinary hospitals

#### 4 Prohibited

Any development not specified in item 2 or 3

#### Comment:

The relevance of the zone objectives are assessed below:

Clause 4.6(4)(a)(ii) states that a request for exemption from a development standard must establish that the proposed variation is consistent with both the objectives of the zone and standard.

The site is zoned R2: Low Density Residential. Residential Flat Buildings are a prohibited land use within the R2: Low Density Residential Zone. The residential flat building is currently operating under existing use rights as it was constructed before the commencement of the Warringah Local Environmental Plan 2011.

In considering the above, the relevant objectives of the R2: Low Density Residential Zone are not applicable to the proposed development. Nevertheless, an assessment has been carried out on the proposed development against the relevant objectives to demonstrate that the proposal is an acceptable form of development:

- *To provide for the housing needs of the community within a low-density residential environment.*

**Comment:** The proposal seeks to upgrade the existing facades, balconies, driveway, garages and balustrades of the building to create a more visually pleasing building and increase safety. The proposed works will increase the amenity that is expected under SEPP no. 65, specifically the Apartment Design Guide, and provide increased safety through the provision of upgraded balustrades and balconies.

- *To provide other land uses that provide facilities or services to meet the day to day needs of the residents.*

**Comment:** The proposal will provide an appropriate resolution to the deteriorating elements of the existing elements that will meet the day-to-day needs of the residents.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

**Comment:** The proposal does not involve any changes to the existing landscape setting or the natural environment of Warringah. In considering the above, the proposal is acceptable in being consistent with the above objective.

### **Sufficient environmental planning grounds**

1. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”

**Comment:** Sufficient environmental planning grounds exist to justify the height of buildings variation namely the existing streetscape and the topography of the land which makes strict compliance difficult to achieve whilst appropriately distributing height and floor space, in the form of legitimate building footprints whilst minimising cut and fill, on this particular site. Further justification to support the proposed variation is provided below:

- The proposed development is for a minor variation to the building height and is within the parameters of the existing streetscape in terms of bulk and scale, which have set the ground rules for the bulk, scale and mass of the proposal.
- The LEC planning principles on Height of Building relating to the height, bulk and scale, including compatibility between subject buildings and its surrounding context to ensure the proposal is compatible with its context. The planning principle seeks qualification of the following:

*Planning principle: assessment of height and bulk*

*· The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:*

*Are the impacts consistent with impacts that may be reasonably expected under the controls? (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)*

*How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?*

*· Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:*

*Does the area have a predominant existing character and are the planning controls likely to maintain it?*

*Does the proposal fit into the existing character of the area?*

*· Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:*

*Is the proposal consistent with the bulk and character intended by the planning controls?*

*· Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:*

*Does the proposal look appropriate in its context?*

*Note: the above questions are not exhaustive; other questions may also be asked.*

In addressing the above planning principals, the benefits of the proposed development, represents a new functional design which enhances the site through the replacement and refurbishment works which repair existing derelict elements of the building. Not only does this provide improved amenity for the occupants of the building, it complies with the objectives of the zone.

From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the WLEP2011 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the WLEP2011 R2 Low Density Residential zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has an existing maximum building height of 12.01m. The proposed works relate to the replacement and refurbishment of the existing building at a maximum height of 10.3m.
- The proposed development is consistent with the existing building height for the site and the works do not increase the height any further. Further, the building falls under existing use rights and its considered that the planning controls are not enforceable due to the variation existing and land use.
- The breach to the building is considered acceptable as it relates to the existing approved building height, bulk and scale.
- The breach will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

The non-compliance does not result in any unacceptable environmental consequences in terms streetscape, or residential amenity. In this regard, I consider the proposal to be of a skilful design which responds appropriately to the existing building height for the site and environmental constraints on the site. Such an outcome is achieved whilst realising the reasonable development potential of the land.

2. Second, 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)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31]

**Comment:** This report demonstrates that there is sufficient environmental planning grounds to justify contravening the development standard for Clause 4.3(2). The proposal has assessed the relevant impacts (if any) and has assessed the bulk, scale and mass of Ocean Street and the proposed development and associated components which will breach the development standard. This report finds that a merit assessment is applicable and determines that there is sufficient grounds to justify the breach to the Height of Buildings. The proposal has been skilfully designed and strategically located to not have an adverse impact to neighbouring properties. Therefore, the development as proposed is sufficiently justified to contravene the development standard.

#### **Is the proposed development in the public interest?**

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;
- b. the zone in which the development is proposed to be carried out.

**Comment:** As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. The proposal is in the public's interest as there is very little public benefit in maintaining the development standard of Height of Building applicable to this site. Additionally, the proposal adds significant social and healthy benefits through a new functional design. Council should encourage such building upgrades via support of positive intention to upgrade old residential buildings within the Northern Beaches LGA.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

#### **Secretary's Concurrence**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

**Comment:** The contravention of the development standard will not result in any consequences for State or regional environmental planning.

There would be no public benefit in maintaining the development standard in this instance for the following reasons:

- The variation to the Height of Building development standard does not give rise to any adverse environmental impacts. As such, the maintenance of the development standard in this specific instance would not provide any public benefit and would hinder the orderly and economic development of the site.
- Maintaining the development standard, in the context of this site, would be inconsistent with the objectives of the zone, and the Act, as it would be inconsistent with the surrounding developments.

By Planning Circular dated 5<sup>th</sup> May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case. There are no other relevant matters required to be taken into account by the Secretary.

### ***Summary and Conclusion***

It is therefore submitted that Clause 4.6 is applicable to the subject development in respect to the variation to clause 4.3(2) Height of Building and this statement verifies that compliance with the provisions of clause 4.3(2) would be both unreasonable and unnecessary in the circumstances of this case. The development is consistent with the objectives of Clause 4.6 as per below:

*1(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*1(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

A variation to the strict application of Council's Height of Buildings development standard is considered appropriate for the site at 157 Ocean Street, Narrabeen.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the site's constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor, below the existing building height for the site and consistent with the streetscape of Ocean Street, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of

achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the Narrabeen precinct. As noted under the review of Clause 4.3 within the Statement of Environmental Effects, the proposal is consistent with the objectives of Clause 4.3. From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the WLEP2011 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the WLEP2011 R2 Low Density Residential zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has an existing maximum building height of 12.01m. The proposed works relate to the replacement and refurbishment of the existing building at a maximum height of 10.3m.
- The proposed development is consistent with the existing building height for the site and the works do not increase the height any further. Further, the building falls under existing use rights and its considered that the planning controls are not enforceable due to the variation existing and land use.
- The breach to the building is considered acceptable as it relates to the existing approved building height, bulk and scale.
- The breach will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposed development does not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

In addition to the above justifications, the proposal is considered to meet the intent of Council's controls relating to Height of Building, and the desired future character of this precinct. It is therefore submitted that the non-compliance with the Height of Building Clause 4.3(2) is acceptable, and flexibility should be exercised by Council as a better outcome is achieved for the site and the immediate locality. The variation under Clause 4.6 is to vary the Height of Building control to give Northern Beaches Council the power to grant development consent to the proposed development.