

**Clause 4.6 Variation Request to the
Height of Buildings Development
Standard under Clause 4.3 of
Warringah LEP 2011**

**Shop top Housing comprising 6
retail shops, 3 commercial
premises and 16 residential
apartments**

52-62 May Road, Narraweena



1 Introduction

1.1 Commission

JVUrban Pty Ltd has been commissioned by the Applicant to prepare a written request ('Variation Request') pursuant to cl4.6 of *Warringah Local Environmental Plan 2011* (the LEP) in respect of a proposed development for shop top housing development comprising ground floor retail/commercial and sixteen (16) residential apartments, at 52-62 May Road, Narrabeena (the Site).

The Proposal is described in detail in Section 3 of the Statement of Environmental Effects (SEE) prepared by *JVUrban Pty Ltd* and generally comprises construction of shop top housing above basement car parking and services.

The Proposal exceeds the 8.5m maximum Height of Buildings (HOB) development standard under cl4.3 of the WLEP having a maximum building height of RL91.25 to the top of the lift overrun. The general roof level is RL89.55m AHD or 10.23m above existing ground level.

Notwithstanding the contravention of the development standard, the development is considered to be consistent with the objectives of the development standard and the objectives of the zone within which the development is to be carried out. There are sufficient environmental planning grounds to justify the contravention in this instance including the lack of adverse amenity impacts and positive social and economic considerations as a result of the development.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the HOB development standard.

1.2 Material Relied Upon

This Variation Request has been prepared based on the Architectural Drawings prepared by Benson McCormack Architecture, Project No. 1853A.

This Variation Request should be read in conjunction with the detailed environmental planning assessments contained in the DA documentation submitted with the DA and documents appended thereto.

2 The Relevant LEP Provisions

2.1 Warringah Local Environmental Plan 2011

2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map of the LEP provide that the entire Site is zoned B1 Neighbour Centre Zone and the Land Use Table in Part 2 of the LEP specifies the objectives of this zone as follows:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*
- *To ensure that neighbourhood centres provide a village-like atmosphere and safety and comfort for pedestrians.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.*

The proposed land use is defined as a shop top housing which is permissible with development consent in the B1 Zone pursuant to the WLEP 2011.

2.1.2 Clause 4.3 – Height of Buildings (HOB)

Clause 4.3 of the W LEP 2011 sets out the HOB development standard 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 maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.”

The Height of Buildings Map designates a maximum 8.5m height limit for the Site (see **Figure 1**).

2 The Relevant LEP Provisions

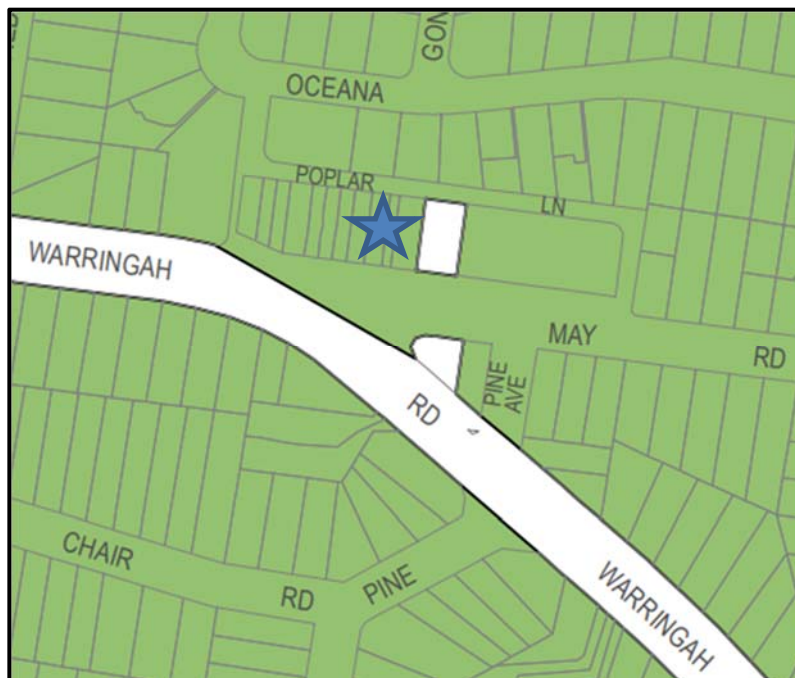


Figure 1 Extract of WLEP 2011 Map (HOB_10AA)

The WLEP Dictionary contains the following definitions:

Height of Buildings Map means the Warringham Local Environmental Plan 2011 Height of Buildings Map.

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.

2.1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of the LEP states the objectives of the clause 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 The Relevant LEP Provisions

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (“Initial Action”) (see Section 4.7), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives for the consent authority to be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument.

Clause 4.6(2) provides that:

- (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.*

The HOB development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (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.*

The proposed development does not comply with the HOB development standard pursuant to cl4.3 of the WLEP2011. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in Section 5.1.

2 The Relevant LEP Provisions

In addition, there are considered to be sufficient environmental planning grounds to justify contravening the development standard as detailed in Section 5.2.2.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (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 Secretary has been obtained.*

Sections 5.2 and 5.3 of this written request address the matters required under cl4.6(4)(a) of the LEP and Section 5.4 addresses cl4.6(4)(b).

Clause 4.6(5) provides that:

- (5) In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, 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.*

Section 5.5 of this written request addresses the matters required under cl4.6(5) of the LEP.

Clauses 4.6(6) and (8) are not relevant to the proposed development and cl4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

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The proposed shop top housing development will result in a maximum height (to the top of the lift overrun) above existing ground level of 11.93m, constituting a non-compliance of up to 3.43m. The following figures show the 8.5m LEP height line across the main street frontage elevations and section plan of the building.

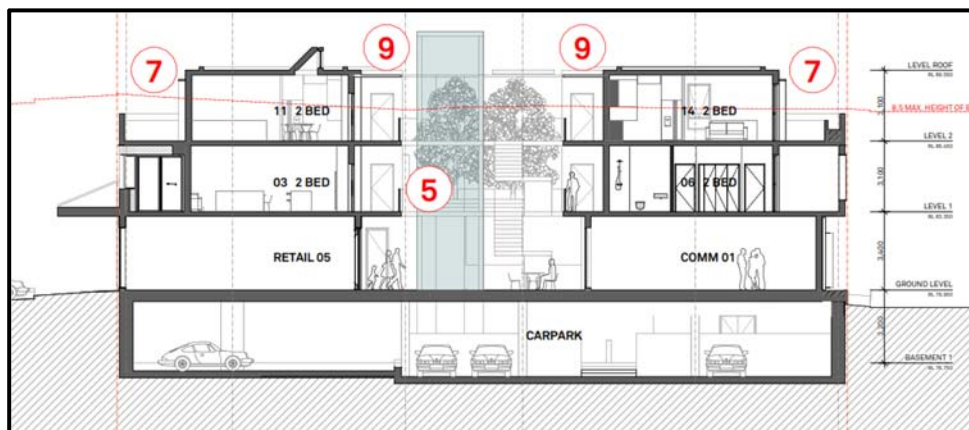


Figure 2: Extract of Section plan showing LEP 8.5m height line (Source: Benson McCormack Architecture, Project No. 1853A)

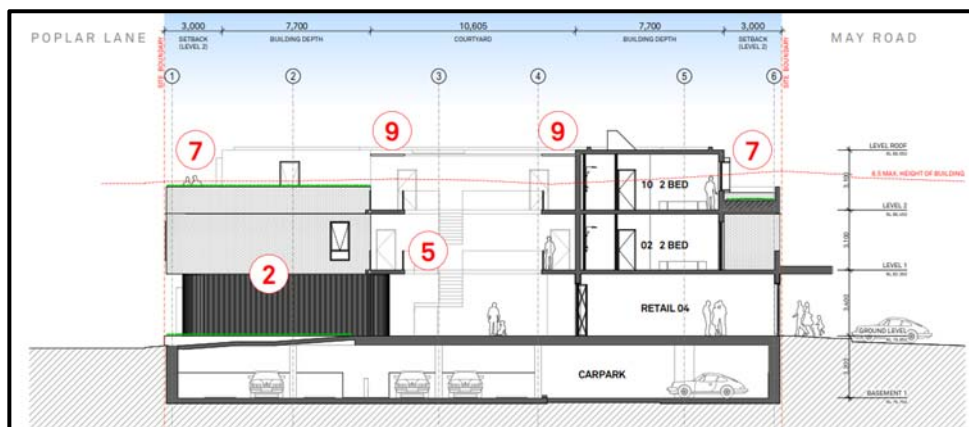


Figure 3: Extract of Section plan showing LEP 8.5m height line (Source: Benson McCormack Architecture, Project No. 1853A)



Figure 4: 3D view of proposed looking from north-east. May Road and pocket park is on the left (Source: Benson McCormack Architecture, Project No. 1853A)

4 Case Law

4.1 Introduction

The proposed variation to the development standard has been considered in light of the evolving methodology and “tests” established by the NSW Land & Environment Court (the Court) and the following subsections provide a brief summary of key Judgments in regard to variations under the former SEPP 1 and cl4.6 of the SILEP.

4.2 *Winten Developments Pty Ltd v North Sydney Council* [2001]

Through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 (“Winten”) the Court established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. The elements of this test can be summarised as:

- Is the planning control a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?
- Is the objection well founded?

The 1st ‘test’ continues to be relevant and is a precondition for the application of cl4.6 – see Section 5.1.

The 2nd ‘test’ is required to be demonstrated under cl4.6(4)(a)(ii) – see Section 5.2.1.

The 3rd ‘test’ was specific to cl3 of SEPP 1 and has not been transferred to cl4.6 of the SILEP. Notwithstanding, in Initial Action (see below), Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act – see Section 5.2.2.

The 4th ‘test’ is required to be demonstrated under cl4.6(3)(a) - see Section 5.1. The 5th ‘test’ is analogous to cl4.6(4)(a) – see Section 5.3.

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4.3 *Wehbe v Pittwater Council* [2007]

The 5-part test under Winten was later supplemented by the Judgment in *Wehbe v Pittwater Council* [2007] LEC 827 (“Wehbe”) where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of SEPP 1. These included:

1. Notwithstanding the non-compliance, is the proposal consistent with the relevant environmental or planning objectives?
2. Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary?
3. Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable?
4. Has the development standard been virtually abandoned or destroyed by the consent authority’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?
5. Is the zoning of the particular land unreasonable or inappropriate such that the development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and therefore, compliance with the standard would be unreasonable or unnecessary?

4.4 *Four2Five Pty Ltd v Ashfield Council* [2015]

In the Judgment of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (“Four2Five”) Pearson C expanded on the earlier Judgments of Winten and Wehbe, indicating that whilst consistency with zoning and standard objectives of the development standard is addressed specifically in cl4.6(4)(a)(ii), there remains an onus of also demonstrating that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

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The environmental planning grounds that support the proposed variation to the FSR development standard in this circumstance are detailed in the original SEE submitted with the DA, the Supplementary SEE and summarised in Section 5.2.2 of this variation request.

4.5 **Randwick City Council v Micaul Holdings Pty Ltd [2016]**

In his Judgment of *Randwick City Council v Micaul Holdings Pty Ltd [2016]* NSWLEC 7 ('Micaul') Preston CJ made it clear that development consent cannot be granted for a development that contravenes a development standard unless the consent authority:

- (a) has considered a written cl 4.6 objection seeking to vary the development standard as required by cl4.6(3) of the SILEP;
- (b) is satisfied that the cl4.6 objections adequately addressed the matters required to be demonstrated by cl4.6(3) (as required by cl4.6(4)(a)(i));
- (c) is satisfied that the 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 as required by cl4.6(4)(a)(ii).

In addition, Preston CJ elucidated that the consent authority does not have to be directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case – only that it be indirectly satisfied that the applicant's written request adequately addresses the matters in cl4.6(3) that compliance with the development standard is unreasonable or unnecessary.

Furthermore, Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

4.6 **Moskovich v Waverley Council [2016]**

Providing further guidance on the interpretation of cl4.6 compared to its predecessor SEPP 1, the Judgment in *Moskovich v Waverley Council [2016]* NSWLEC 1015 ('Moskovich') outlines that cl4.6(3)(a) is similar to cl 6 of SEPP 1 and the ways of establishing that contravention of a development standard is well founded expressed in Wehbe (e.g. "achieving" the objectives of the development standard) are equally appropriate for the consideration of cl4.6(3)(a).

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However, cl4.6(4)(a)(ii) has different wording to SEPP 1 and requires the consent authority to be satisfied that the proposed development is in the public interest because it is “consistent” with objectives of the development standard and objectives for the zone rather than “achieving” the objectives. Consequently, the considerations of cl4.6(3)(a) and cl4.6(4)(a)(ii) are different with the achievement test being more onerous and requiring justification in ‘ways’ such as those expressed in *Wehbe*.

Accordingly, whilst the Judgments in *Winten* and *Wehbe* related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to cl 4.6 with minor areas of differing interpretation.

4.7 Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (‘Initial Action’), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and of the standard.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a “test” that a development which contravenes a development standard results in a “*better environmental planning outcome*” relative to a development that complies with the development standard. In fact, there is no provision in SILEP that gives substantive effect to the objectives of cl4.6 stated in cl4.6(1)(a) and (b). That is to say, neither cl4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Further, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

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4.8 Summary of the Case Law Methodology and Tests

The collective methodology and tests described above has been applied to the assessment at Section 5 and can be summarised in the following steps:

1. Step 1 - Is the planning control that the applicant seeks to contravene a development standard?
2. Step 2 - Is the consent authority satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required by cl 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard?
3. Step 3 - Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out?
4. Step 4 - Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Step 5 - Where the consent authority is the Court, has the Court considered the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

5 Assessment of the Variation

5.1 Step 1 - Is the planning control a development standard?

This question is the 1st 'test' in Winten. The HOB control in cl4.3 of the WLEP 2011 is a development standard, defined in Section 1.4 of the EP&A Act as follows:

“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”

The development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted pursuant to cl4.6.

5.2 Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

To demonstrate that compliance with the height of buildings development standard is unreasonable or unnecessary, this written request relies upon:

1. The 2nd 'test' in Winten and the 1st and 2nd 'ways' in Wehbe – i.e. the underlying objectives or purpose of the standard is satisfied or the objectives are not relevant; and
2. The 4th 'way' in Wehbe - the development standard has been virtually abandoned or destroyed by the consent authority's own actions.

These aspects are discussed in the following paragraphs.

The underlying objectives or purpose of the standard

Clause 4.3(1) of the LEP states the objectives of the FSR development standard 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,

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

Objective (a) *is to ensure building is compatible with surrounding and nearby development.*

The existing built form of the May Road neighbourhood centre is single storey. However, new residential development in the immediate area – fronting Oceana Street – are two storey townhouses with pitched roofs. There are also two storey older residences fronting Oceana Street with rear yards and outbuildings onto Poplar Lane.

To be compatible the development should be able to be constructed with undue ‘conflict’ with neighbouring buildings. In this case, the upper level has increased setbacks from the boundaries, creating a significant step and articulation of the development when viewed from various ground level positions around the site, particularly from the public car park on the southern side of the site, the side playground and the rear laneway. In each case the development appears as two-storeys (refer to elevation plans submitted with the DA plan which shows the public vantage points from each direction – extracts shown in Fig 5 and 6 below). There is no undue ‘conflict’ created between buildings in the immediate area.

The building does not draw attention to itself beyond that reasonably expected of a mixed-use development within a neighbourhood centre. It is three storeys above street level. The development is respectful of its locational context and surrounding development. There is no attempt to emulate the design, colours or materials of the existing, tired development in the precinct, rather it presents a modern, fresh street appearance that is complementary to the area. It is considered that this objective is achieved by the development.

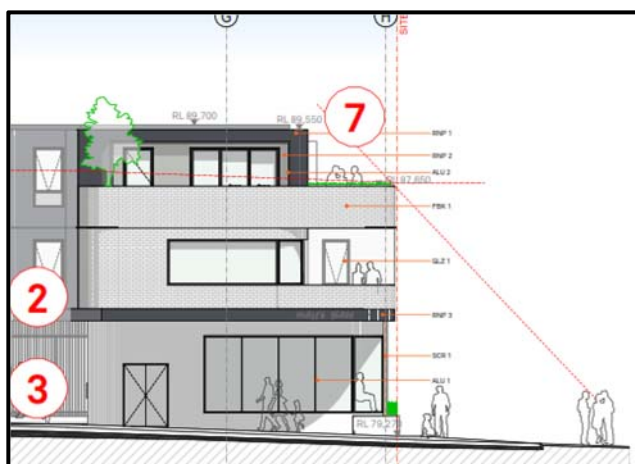


Figure 5: Extract of South Elevation showing view of development from playground
(Source: Benson McCormack Architecture, Project No. 1853A)

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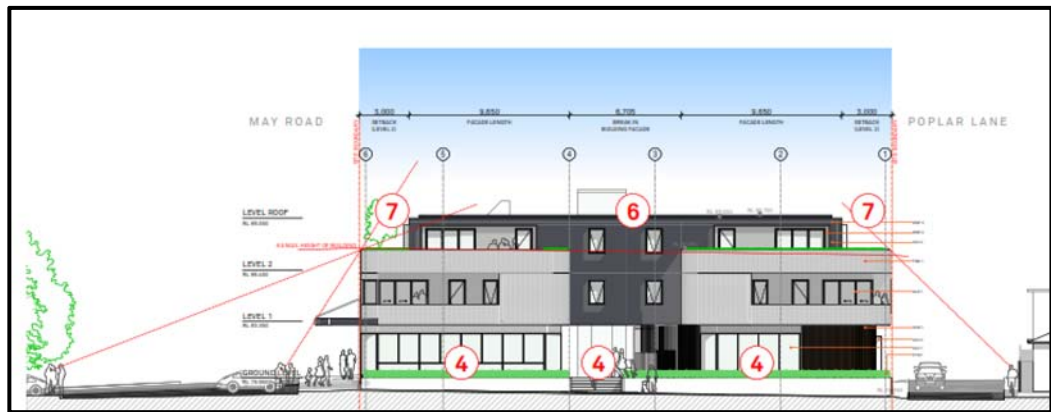


Figure 6: East Elevation showing recessed upper level and view of development from the front and rear of the development (Source: Benson McCormack Architecture, Project No. 1853A)

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

The design and layout of the building address each of these amenity considerations and achieves a development that respects the adjoining and surrounding development. The additional height does not create unreasonable adverse effects.

Shadow diagrams similarly confirm that no living areas or private open space areas of adjoining properties are unreasonably overshadowed by the non-compliant elements. In terms of visual impacts, these are minimized through physical separation, setting back the upper level and careful attention to articulation and selection materials and colours.

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

The subject site is located within a highly urbanized environment. There will be no impact on the coastal or bush environment. The proposal is neutral in terms of this objective.

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

The proposal is located adjacent to a busy arterial road within a designated neighbourhood centre. The development will be visible from the surrounding street system. The proposal is a fresh, contemporary building that will rejuvenate the small service centre. The addition of residential accommodation on this site is considered a positive outcome in terms of passive surveillance of the front car park, rear laneway and adjoining public park. The development activates the centres through the integration of residential activity during and outside of business hours. The external appearance of the new development is modern, varied and

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interesting. The palette of materials, colors and finishes, together with the strong podium and recessed upper level ensure that the visual impact when viewed from surrounding public places is not intrusive.

5.2.2 Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

Preston J clarified in *Micaul and Initial Action*, that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts. As outlined in Section 5.2.1, there is considered to be a lack of adverse amenity impacts arising from the proposal's non-compliance, as it will not result in adverse overshadowing, overlooking, view, acoustic, privacy or traffic impacts.

The height variation to the top of the lift overrun is 11.93m and to the roof varies between 9.34m and 10.5m. The lift overrun is located in the central courtyard – barely discernible from ground level around the outside of the building. The upper level is well setback from the building alignment below making the upper level and variation not readily apparent or offensive on the streetscape when viewed from surrounding road network or public places or surrounding residential properties.

The consequence of strict compliance in the circumstances would necessitate the loss of an entire residential floor which would make the development economically unviable and be contrary to the object of the Act at s1.3 which seeks to promote the orderly and economic development of land. The success of the development dependent on the additional level (i.e the variation) is important in terms of the positive social and economic impacts that it will have on the viability and sustainability of the local centre, providing necessary active retail uses and additional residential population in the form of various housing mix contributing to the atmosphere and also providing additional security and

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surveillance of the open carpark and also integrating by providing a visual and physical link and access to the public open space area to the east.

The existing buildings are extremely tired and at the end of their useful life requiring substantial capital to provide lettable area of necessary minimum standards to comply with the BCA and other occupational and health standards. The rebuilding based on land value and necessity to provide a basement carpark to accommodate any additional floor space can only be viable and possible with the addition of the third level. Absent this, the development is unviable as is any upgrade of the centre which will fall into disrepair and decay which would be contrary to the public interest.

Whilst there is argument that the additional floor space could be accommodated at ground floor, it would be strictly limited to retail or business premises which would generate additional traffic impacts and be counter to the village atmosphere advocated by the creation of smaller scale retail spaces. Further it would deprive the opportunity of the internal courtyard which is a pleasant space with a high quality amenity as a landscaped communal open space for the use of both residents and also patrons.

In addition the void (the volume of which is displaced to the upper level) through the building allows for improved solar access and cross ventilation to the building interior and courtyard.

The environmental benefits outweigh any technical necessity or benefit of the deletion of an entire residential floor.

In summary, the contravention of the HOB development standard is considered to have positive social and economic outcomes for the Site and the locality and positive amenity outcomes for existing residences and businesses in the immediate area, whilst minimising adverse amenity impacts to an acceptable level.

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5.3 Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?

As outlined in Section 5.2.1, the Proposal achieves and is therefore consistent with the relevant objectives of the height of buildings development standard.

However, the consent authority must also be satisfied that the development will be consistent with the objectives of the B1 Neighbourhood Centre Zone which are expressed in the Land Use Table to cl2.3 of the LEP as follows:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*
- *To ensure that neighbourhood centres provide a village-like atmosphere and safety and comfort for pedestrians.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.*

The Proposal is consistent with the objectives of the B1 Zone for the following reasons:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*

The first objective is to provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood. The development includes 6 retail outlets and 3 commercial premises. Each is sized to focus on small community services and the needs of locals. The objective is achieved.

- *To ensure that neighbourhood centres provide a village-like atmosphere and safety and comfort for pedestrians.*

The second objective is to ensure that neighbourhood centres provide a village-like atmosphere and safety and comfort for pedestrians. The building is designed with a strong two storey podium with recessed upper level which maintains a human scale.

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The proposal seeks to maintain and improve the activation of the May Road Neighbourhood Centre. Both the car park and Poplar Lane frontages are activated by the development, with improved pedestrian access through the site and passive surveillance of all areas within and around the site. There is a continuous awning to be provided along the car park frontage for the comfort of pedestrians and landscaping (including decorative larger shrubs and trees) to be planted. The upper level units will provide passive surveillance in three directions (north, south and east) achieving CPTED of the area. An internal courtyard provides a pleasant village atmosphere attractive for interaction of both residents and customers. The objective is achieved.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.*

The third objective is minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses. The design, layout, materials and finishes of the building have taken into account the adjoining and adjacent landuses, addressing each element of amenity – privacy, overlooking, overshadowing to a satisfactory level.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the HOB development standard under the WLEP 2011 and the objectives of the B1 Neighbourhood Centre Zone under the WLEP 2011.

5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

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As WLEP 2011 adopts cl4.6 of the SILEP and the conditions of the Notice are not relevant in this instance, the consent authority for the Proposal may assume concurrence in respect of the variation requested to the HOB development standard under the LEP.

In addition, the Court has power to grant development consent to the proposed development even though it contravenes the HOB development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, 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.*

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under s39(6) of the Court Act, the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the HOB development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;

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- As indicated in Section 5.3, the proposed contravention of the development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the Court.

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The proposed development contravenes the Height of Building development standard under cl4.3 of Warringah LEP 2011.

The height of building control under cl4.3 of the WLEP is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for reasons including inter-alia:

- Notwithstanding the contravention of the development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl4.3 of the WLEP 2011 and is consistent with the relevant objectives of the B1 Neighbourhood Centre Zone and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the development standard, the proposed shop top housing development will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse impacts on the amenity of the locality will be minimised to a reasonable level;
- There are direct social and economic benefits for the property owner and the local residents with new shops replacing old, tired premises, activation of the street frontages, an attractive contemporary development, increased passive surveillance and the opportunity for small businesses in the area to occupy new, fresh and modern premises.

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the HOB development standard including:

- a lack of adverse environmental amenity impacts;
- providing a variety of unit types and sizes at the upper levels and allowing for generous setbacks of the upper level that is not readily apparent or offensive;
- constructing a new contemporary building of a scale and proportion that will enhance the built form and appearance of neighbourhood centre, particularly when viewed from Warringah Road and May Road;
- the provision of high-quality residential living within the small centre which will increase surveillance and perceived safety in the area and increased housing to assist

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in the viability and vitality of the centre.

- provision of basement parking for residents and commercial premises – not seeking to consume additional spaces in the existing car park (except as existing retail floor credits).
- Creation of a landscaped internal communal courtyard at ground floor for use by both residents and customers to create a village atmosphere.
- The scale of the building provides a positive bench mark on a unique island site that has no adverse impact on neighbouring residential and its context is able to absorb the additional height comfortably.

Accordingly, this written request can be relied upon by the consent authority in accordance with cl4.6(4) of the LEP.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018. Alternatively, the Court can use its powers under s39(6) of the Court Act and be satisfied that contravention of the development standard does raise any matter of significance for State or regional environmental planning, there is no public benefit of maintaining the development standard and there are no other relevant matters required to be taken into consideration.

Accordingly, the consent authority can exercise its power pursuant to cl4.6 (2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.

Joe Vescio

1 October, 2020