

23 Fisher Road, Dee Why

Clause 4.6 variation to Height of Buildings

On behalf of
Rose Group Pty Ltd
September 2018



1 Introduction

This Clause 4.6 Variation Request relates to the Development Application (DA) for 23 Fisher Road, Dee Why (subject site), which proposes three residential flat buildings including eight townhouses and a commercial component. This Clause 4.6 Variation request relates to Height of Buildings (Clause 4.3) in the Warringah Local Environmental Plan 2011 (WLEP 2011).

In the circumstances of the case, compliance with the development standard is considered to be unreasonable and unnecessary, as outlined below, This Clause 4.6 Variation Request demonstrates that the proposal achieves a stronger planning outcome for and from the development by varying the development standard in the circumstances of the case. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, and as such, is justified on environmental planning grounds.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Satisfies the objectives of Clause 4.3 under WLEP 2011;
- Satisfies the objectives of the B4 Mixed Use zone under WLEP 2011;
- Is consistent with the applicable and relevant State and regional planning policies;
- Has sufficient environmental planning grounds to permit the variation; and
- Provides a better outcome for the site and its surrounding uses and is therefore in the public interest.
- As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the WLEP 2011.

2 Clause 4.6 Exceptions to Development Standards

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

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

Clause 4.6 enables a variation to the Height of Buildings standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with clause 4.6. In particular, it is noted that Clause 4.6(8) does not include Clause 4.3 as a provision which cannot be 'contravened'.

It is noted that Clause 4.6(8A) in the WLEP 2011 relates to Height of Building Standards specifically, and states that a variation to the height standard for key sites within the Dee Why Town Centre cannot be accepted. The subject site is not identified as a key site and therefore a variation request is permissible and Clause 7.6 of the WLEP 2011 does not apply.

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

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a));
- That the applicant has adequately demonstrated that there are sufficient environmental planning ground to justify contravening the development standard (Clause 4.6(3)(b));
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)).

The Land and Environment Court has set out common ways in which an applicant might justify a clause 4.6 variation request, in relation to both the *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* and local environmental plans that adopt clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006*: see *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 per Lloyd J, *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**) per Preston CJ and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 per Pearson C which was upheld by Pain J on appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and the Court of Appeal in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (**Four2Five**).

The principles set out in these cases were recently reiterated by Chief Judge Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118 at [14]-[29].

Accordingly, this Clause 4.6 variation request is set out having regard to the relevant principles established by the Court.

Clause 4.6 of the WLEP 2011 enables an exception to the development standard in Clause 4.3 in order to permit additional height upon consideration of a written request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the WLEP 2011 reads as follows:

Clause 4.6 Exceptions to development standards

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

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

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

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

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

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

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

(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.

3 The Development Standard to be varied

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

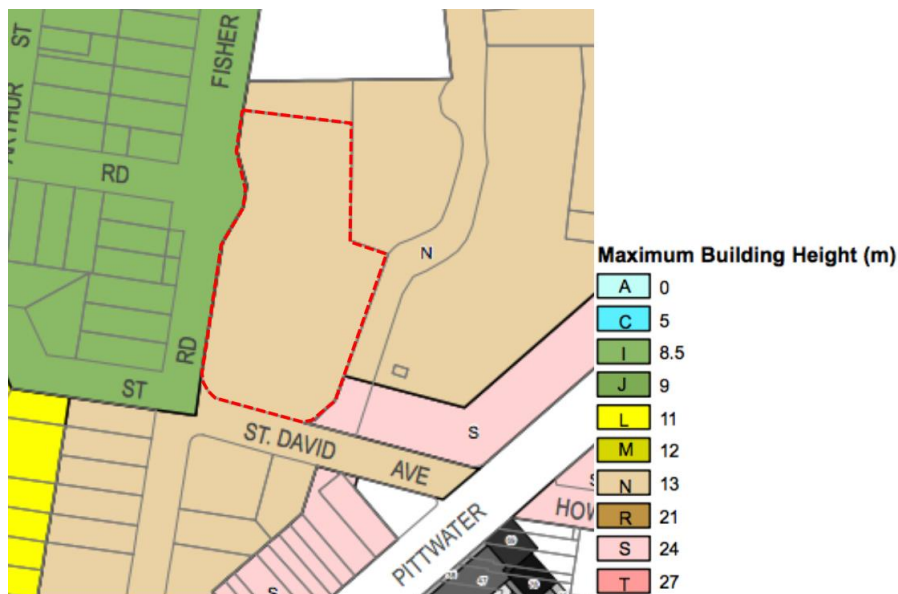


Figure 1 Height of Buildings LEP Map

Source: WLEP 2011 modified by Mecone

4 Extent of Variation to the Development Standard

The proposed development will vary the HOB control at various points due to the staggered ground levels caused by the site's topography. The areas exceeding the height plane include roof, plant equipment, upper level walls, and a small area of balcony fronting the northern boundary. The amount of area above the height plane is minor in scale and does not concentrate in any point in particular but rather is caused where there is a significant drop in elevation. The highest point above the height plane is 2.9m above the 13m height standard (22.3% exceedance). No full levels are outside of the height plane and only a very small area of habitable space is outside of the height plane (balcony fronting northern boundary).

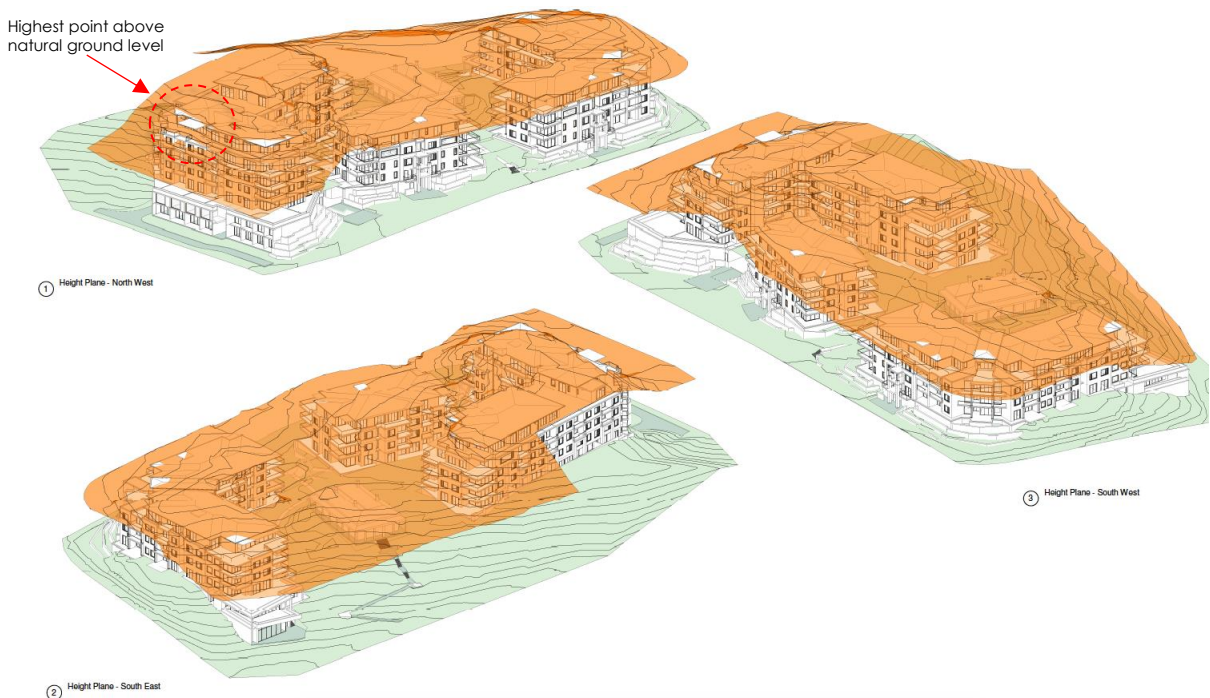


Figure 2 13m height plane overlay to proposed development

Source: Rose Architectural Design

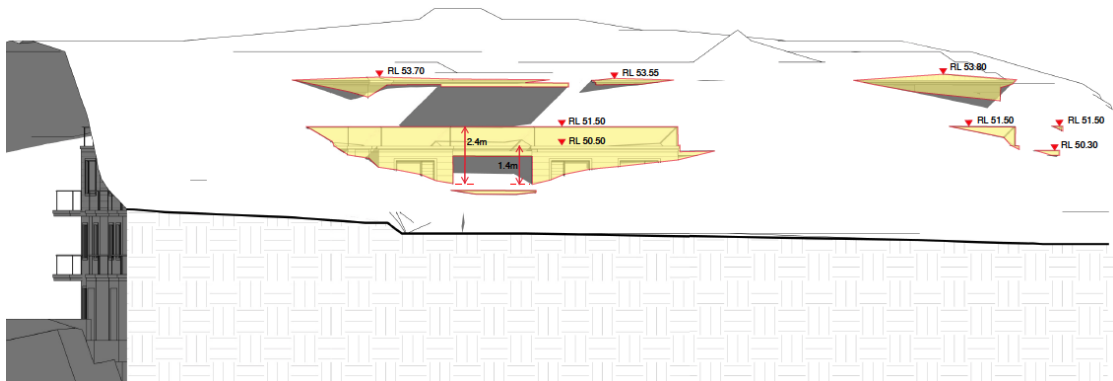


Figure 3 North elevation with key height exceedance highlighted

Source: Rose Architectural Design

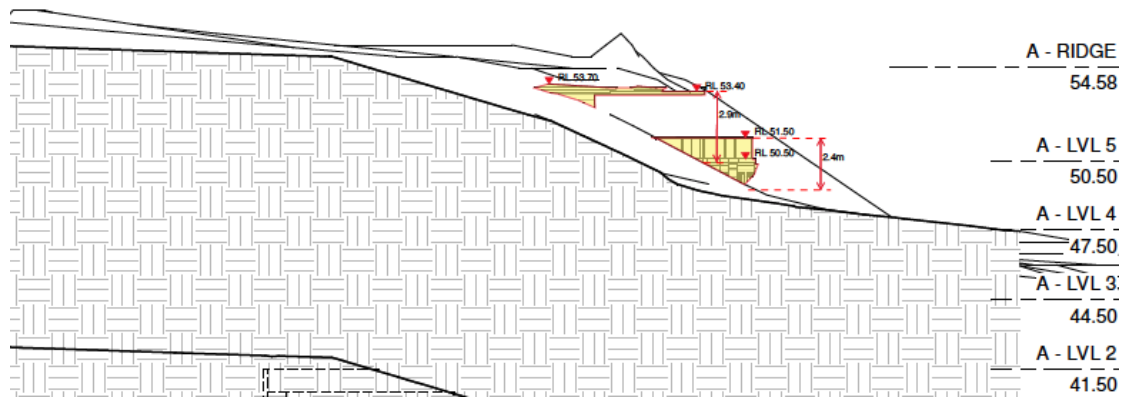


Figure 4 East elevation with key height exceedance highlighted (north side of site)

Source: Rose Architectural Design

5 Objectives of the Standard

The objectives of Clause 4.3 Height of Buildings (HOB) 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.

6 Objectives of the Zone

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

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

7 Assessment

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

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

- The proposed variation to the height control is minor anomaly in the circumstances and a result of a site with significant topographical constraints. Furthermore, the proposed building height is lower than a scheme approved previously by Council at the subject site. The previous Stage 1 development consent granted for the site in 2012 (DA2011/1274) included a building height of up to 55.03RL. The proposed development offers a reduced height to what is approved (54.58RL). As shown below, the approved scheme included similar non-compliances at the top edges of buildings due to topographical constraints. The variation to the height control does not increase the development's intensity by increasing the amount of floor space delivered on the site.

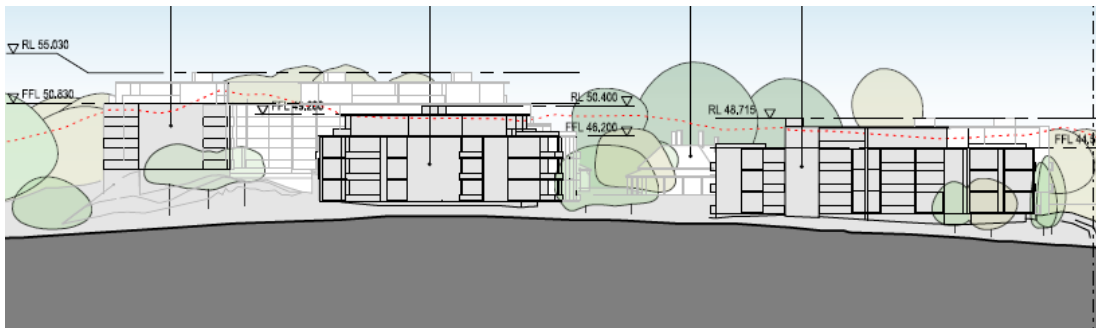


Figure 3 Approved elevation (Fisher Road frontage) (DA2011/1274)

Source: HASSELL

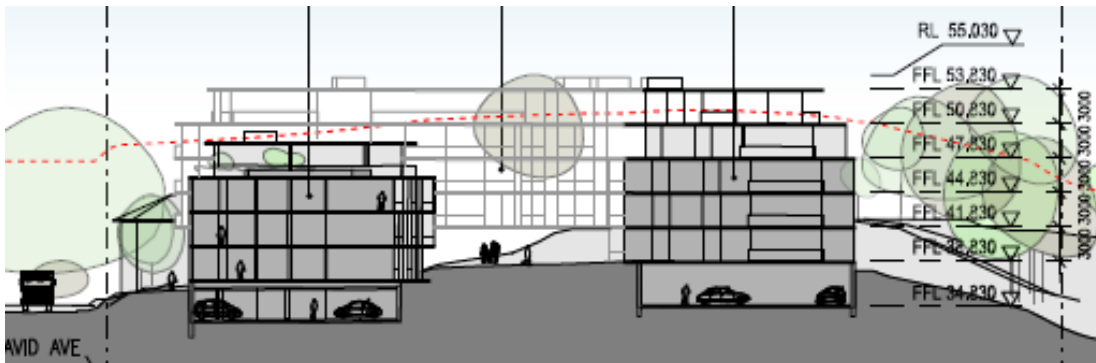


Figure 4 Approved North Facing Section (DA2011/1274)

Source: HASSELL

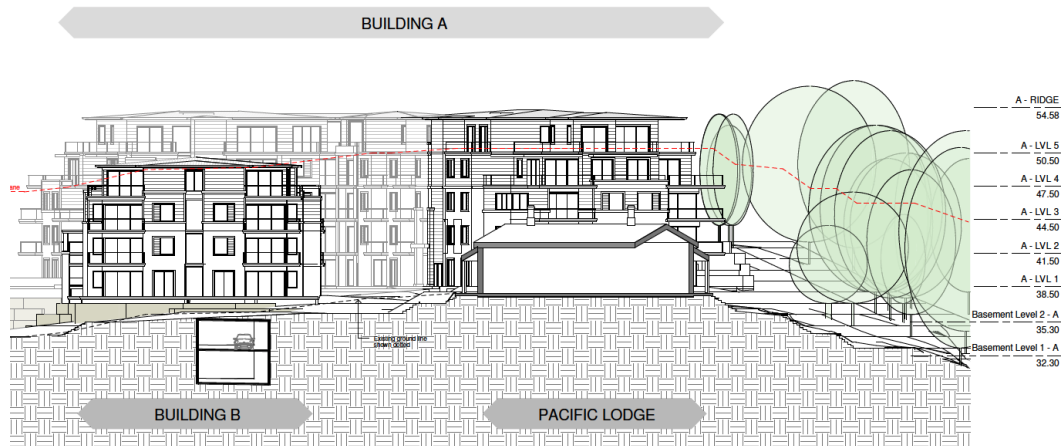


Figure 5 Proposed section (north facing, similar perspective to Figure 4)

Source: Rose Architectural Design

- Under the WLEP2011, the maximum building height is measured from the existing ground level (existing) to the highest point of the building. The portions of the buildings that do not comply with the height control are only in the outer corners of roofs, or small sections of the upper walls and balconies where there is a significant drop in the ground level below. The exceeding area is not concentrated in any specific area or level but is scattered across the site following the naturally uneven topography.
- All exceeding areas are setback from the site boundaries.
- The building generally follows the slope of the land and is broken down with setbacks and level changes. However, the site's significant level changes mean that the proposed future buildings breach the height control in a few instances.
- The development responds to the natural features of the site, retaining the key features such as mature trees to the east and the rock face along St David Avenue. The development includes generous amounts of landscaping to enhance the site's natural characteristics and soften the built form, including approximately 3,700m² of deep soil on site (34.8% of site area) and additional podium planting between the buildings along Fisher Road (approximately 300m²);
- The proposal will not significantly impact upon the amenity of the adjoining neighbours with regard to privacy or solar access. In particular, the proposed additional height will not cause any amenity impacts – such as solar or privacy - that would contravene Council's controls;
- As detailed in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* tests 1 and 2 are relevant for the subject site:
 - *Wehbe* Test 1 - the objectives of the standard are achieved notwithstanding non-compliance with the standard;
 - *Wehbe* Test 2 - the underlying objective or purpose of the standard is not relevant to the development; and

The proposed development is nevertheless consistent with the objectives of the height standard and B4 Mixed Use zone as described below and delivers a

better urban design and planning outcome than a fully complying building envelope, as discussed in further detail below;

- The contravention of the height standard does not raise any matter of State or regional planning significance; and
- There is no additional public benefit in maintaining the standard in the circumstances of the case as explained below.

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

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

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

- The development will create a strong planning outcome. This will be achieved through a better urban design outcome for the site, than would be delivered through a compliant scheme. Given the staggered nature of the existing ground level, full compliance with the height plane would require the upper level of building to be equally staggered with inconsistent building setbacks and heights in efforts to respond to points of steep descents across the site. The result would negatively impact on the overall visual presentation of the development. The building envelope proposed creates minor height exceedances as a result of presenting a coherent and architecturally uniform development across the three buildings;
- The proposed development presents a high quality built form, with stepped levels and articulation to follow the slope of the land, and appropriate materials and finishes which contribute to the desired future character of the Dee Why Town Centre. The proposal is compliant with building envelope controls for the site, including the relevant setback provisions in the Warringah Development Control Plan 2011 (DCP);
- Landscaping and deep soil is provided on site in excess of the DCP and ADG controls, softening the built form and ensuring no adverse visual impact is created;
- The development maintains high quality amenity to surrounding properties with no overlooking or solar impacts which contravene the DCP and ADG requirements;
- Given the above, strict compliance with height controls would hinder the attainment of the objectives of the Act, and would not result in the orderly and economic use and development of land.

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

In the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) *the objectives of the particular standard, and*
- b) *the objectives for development within the zone in which the development is proposed to be carried out.*

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

a) the objectives of the particular standard

The particular development standard is Clause 4.3 Height of Buildings of the WLEP 2011 and the relevant objectives are addressed below:

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

The proposed 13m building height with minor exceedances (up to 53.40 RL) provides an appropriate transitional height between the low rise dwellings to the west and medium to high rise buildings within the Dee Why Town Centre to the east, including the 28.4m high development under construction at 701 Pittwater Road. The proposed six storeys on the northern side of the site provides an appropriate uplift transition with the adjoining three storey flat building to the north, following the sloping of the land along Fisher Road.

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

The proposed development is well oriented on the site to respond to all street frontages with appropriate setbacks, building articulation, and façade treatment. The retention of existing mature trees, with substantial new podium planting and landscaping along the street frontages softens the built form and maintains privacy and streetscape character. The development meets requirements for solar access to units on site and on surrounding properties.

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

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

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

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

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

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

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

The proposed development will include a mixture of uses including commercial tenancies fronting towards the Dee Why Town Centre to the south-east, townhouse dwellings fronting the residential areas to the north-west, and residential units above.

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

The proposed development is located on the north-west corner fringe of the Dee Why Town Centre. Commercial office space has been provided in the most suitable location on site (south-east corner oriented towards the central mixed use area) to assist in providing a transition between the town centre and residential zones beyond Fisher Road. Future tenants and employees will benefit from the walkable distance to the town centre's services and facilities and various bus services along Pittwater Road, located a 300m walk from the site's main vehicle and pedestrian entrance on Fisher Road.

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

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

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

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

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

The subject site is relatively detached from the main commercial and retail activity along Pittwater Road due to topography and distance. Therefore, the desired land use breakdown outlined in this objective is not considered to be appropriate for the subject site, which is able to better integrate with the surrounding residential built form by providing dwellings at ground floor level. The combination of residential and commercial on the site provides an appropriate transition on the fringe of the Dee Why Town Centre and should be assessed on its own merit.

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

The subject site is large in size and is not identified for site amalgamation under the existing or draft future controls. Car parking is proposed to be provided across two basement levels. It is noted that the sections of protruding basement level walls created by the sloping site will be hidden with substantial landscaping, which is a better outcome than the blank walls approved in the 2012 Stage 1 DA.

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

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

8 Any matters of significance for State or regional environmental planning

The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Greater Sydney Region Plan ('the 30-minute city') and North District Plan, which are matters of regional environmental planning significance. By contrast, the contravention of the building height does not raise any matter of State or regional planning significance.

9 Conclusion to variation to height standard

This is a written request for an exception to the building height under Clause 4.6 of the WLEP 2011. It justifies the contravention to the height under Clause 4.3 of the WLEP 2011, and in particular demonstrates that the proposal provides a significantly better planning outcome, with no significant adverse environmental impacts, and therefore in the circumstances of the case:

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

Pursuant to Clause 4.6(4)(a)(i) and 4.6(4)(b), it is anticipated that the Secretary's concurrence will be required given the variation requested is greater than 10%.



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