

STATEMENT OF ENVIRONMENTAL EFFECTS

Proposed Shop Top
Housing Development

50 Lawrence Street
Freshwater

Suite 1, 9 Narabang Way Belrose NSW 2085
Phone: (02) 9986 2535 | www.bbfplanners.com.au

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Statement of Environmental Effects

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50 Lawrence Street, Freshwater



Greg Boston

B Urb & Reg Plan (UNE) MPIA
Boston Blyth Fleming Pty Ltd
(ACN 121 577 768)

Suite 1/9 Narabang Way
Belrose NSW 2085

Tel: (02) 99862535

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ANNEXURE 1 ARCHITECT SEPP 65/ ADG/ DESIGN VERIFICATION STATEMENT

1 Introduction/ Background

On 26th May 2020 development application DA2020/0543 was submitted to Council proposing demolition works and the construction of a shop top housing development on the subject allotment.

Following initial assessment of the application an issues letter was issued by Council on 7th September 2020 with a number of issues raised including the fine grain detailing of the façades, building height, street activation, setbacks, building bulk/ massing and landscaping including the provision of deep soil zones.

Following discussions with Council, development application DA2020/0543 was subsequently withdrawn to enable a considered review of the issues raised with the development, the subject of this report, representing a highly considered and resolved response. The amended scheme has been developed and detail in consultation with Jon Johannsen the project Urban Designer and the project landscape Architect. The building height, bulk and scale have been reduced through a combination of increased setbacks and additional façade articulation. The building displays a more fine-grain approach including a greater level of streetscape activation to the retail and business tenancies. The landscape regime has also been amended to ensure that the landscape species proposed within the southern setback of the development will achieve a mature vegetation buffer to the adjoining property.

This Statement has been prepared in support of a development application proposing the demolition of the existing site structures and the construction of a shop top housing development comprising 2 x ground level commercial (retail and business) tenancies with 11 residential apartments above comprising a mix of studio, 1 and 2 bedroom apartments. Carparking for 18 vehicles is provided over 2 levels with access provided from both the Dowling and Oliver Street frontages.

The project architect has responded to the client brief to design a contextually responsive building of exceptional quality which appropriately addresses all 3 street frontages, takes advantage of the sites superior locational attributes whilst providing high levels of amenity for future occupants. In this regard the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this infill site having regard to the sites constrained size and geometry, irregular topography and prominent corner location.

Particular attention has been given the minutes arising from initial pre-DA discussions with Council and subsequent discussions regarding DA2020/0543 to ensure that the development responds to its immediate built form context and the form of development anticipated within the Freshwater Village precinct which is currently undergoing significant regeneration. This statement will demonstrate that the built form outcome proposed has been achieved whilst providing for a highly articulated, modulated and visually stimulating building form as viewed in the round and which will provide diversity in housing choice, whilst ensuring Lawrence Street remains activated through the retail and business tenancies provided at ground floor level.

In addition to this Statement of Environmental Effects, the application is also accompanied by Architectural plans, shadow diagrams, landscape plan, survey, arborist report, traffic impact assessment, stormwater management plan, access report, geotechnical report, acoustic report, traffic management plan, waste management plan, urban design response, schedule of materials and finishes, montages, BASIX certificate, cost summary report and SEPP 65 Design Verification Statement prepared by the project Architect.

Having regard to the issues previously raised by Council in relation to DA2020/0543 we have formed the considered opinion that the current development, the subject of this report, achieves the following outcomes:

- The building height, bulk and scale have been reduced through a combination of increased setbacks and additional façade articulation.
- The building displays a more fine-grain approach including a greater level of streetscape activation to the retail and business tenancies.
- The provision of an unimpeded 3.167 metre wide deep soil zone to the southern boundary of the property to facilitate appropriate landscape plantings,
- The provision of a 6 metre level 3 building façade setback to the southern boundary.
- The conversion of Unit 11 from a 3 bedroom apartment to a 2 bedroom apartment to facilitate an increased level 3 setback to Lawrence Street and a corresponding reduction of 1 car parking space.
- An increase in the size of the retail and business tenancies and the provision of a greater level of street activation to these spaces.
- The landscape regime has also been amended to ensure that the landscape species proposed within the southern setback of the development will achieve a mature vegetation buffer to the adjoining property.
- The provision of an enhanced palette of materials and finishes.
- A significant reduction in building height breach to a maximum of 300mm in the north eastern corner of the building. This represents a variation of 3.5%.

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act, 1979;
- Warringah Local Environmental Plan 2011;
- Warringah Development Control Plan 2011;
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
- State Environmental Planning Policy (Infrastructure) 2007;
- State Environmental Planning Policy No 55 – Contaminated Lands;
- State Environmental Planning Policy No.65 – Design Quality of Residential Apartment Development/ Apartment Design Guide; and
- The Apartment Design Guide.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The height, form and massing of the development are contextually appropriate and satisfy the various relevant local and state planning controls applicable to the site.
- The proposed development is consistent with the desired future character of the Freshwater Village precinct.
- The proposed development will not give rise to unacceptable natural or built form impacts including impacts to any heritage items within vicinity of the site.
- The site is assessed as suitable for the proposal having regard to the relevant considerations pursuant to the SEPP 65 - Design Quality of Residential Apartment Development and the Apartment Design Guide.
- The proposal will increase the supply and diversity of housing choice on a site ideally suited to increased residential densities.
- Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height standard strict compliance has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the irregular site topography, the attainment of an appropriate contextual fit and general paucity of streetscape impacts. Sufficient environmental planning grounds existing to support the variation proposed with the accompanying clause 4.6 variation request well founded.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

2 Site Analysis

2.1 Site Description and location

2.1.1 The Site

The subject property is located at the west end of the Freshwater Local Centre and is legally described as Lot 1 in DP 571975, No. 50 Lawrence Street, Freshwater. The site is irregular in shape having 3 frontages to Lawrence Street, Oliver Street and Dowling Street. The property has irregular frontage and address to Lawrence Street of 13.815 metres, secondary irregular/ curvilinear frontage to Oliver Street of 43.285 metres, tertiary frontage to Dowling Street of 45.72 metres and a site area of 590 square metres. The landform falls in multiple directions across its surface towards its north eastern corner by approximately 5 metres. The site does not contain any trees or significant landscape features as depicted in the site survey extract at Figure 1 below. A bus stop is located immediately adjacent to the site on Dowling Street.

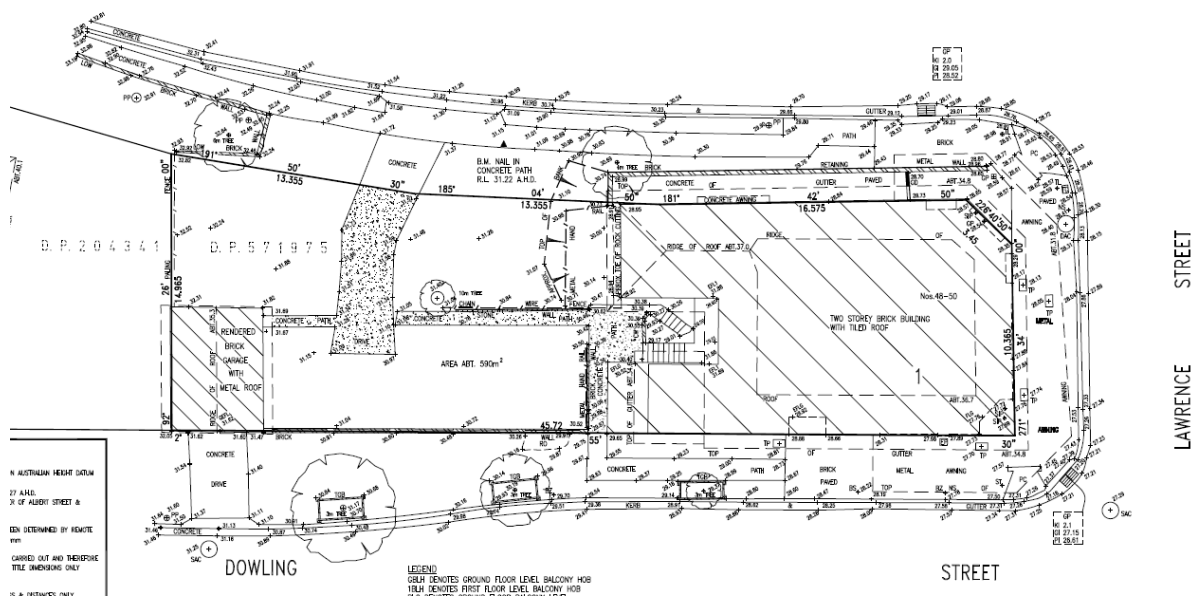


Figure 1: Site survey extract

The property is occupied by a 2 storey brick commercial building with pitched and tile roof located on the northern portion of the site and constructed to each street boundary alignment. At-grade parking is located on the southern portion of the site and accessed via a driveway from Oliver Street. A rendered brick garage is located in the south eastern corner of the property and accessed from Dowling Street.



Figure 2: Subject property as viewed from Lawrence Street



Figure 3: Subject property as viewed from the Lawrence Street/ Oliver Street intersection



Figure 4: View of the site from Oliver Street showing at grade parking accessed from this street frontage



Figure 5: Aerial location/ context photograph

2.1.2 The Locality

The property is located at the western edge of the Freshwater Village comprising a strip shopping centre with relatively narrow frontages and small-scale shops oriented to Lawrence Street.

The properties to the east are occupied by 1 and 2 storey retail/business premises orientated to the Lawrence Street frontage. An open at-grade parking area is located to the rear (south) of these properties and accessed via Dowling Street. The properties to the north, and located on the opposite side of Lawrence Street, are occupied by single storey civic buildings, with 1 and 2 storey detached dwellings located to the south and south east of the site. A 3 storey residential flat building is located on the corner of Lawrence and Oliver Streets to the west of the site. Surrounding development is depicted in the following Figures.



Figure 6: Adjoining development to the north.



Figure 7: General streetscape view looking east down Lawrence Street past subject site



Figure 8: Adjoining dwelling house to the south as viewed from Dowling Street



Figure 9: View looking north down Dowling Street past subject site



Figure 10: Adjoining development to the east as viewed from Dowling Street



Figure 11: View looking east down Lawrence Street past the residential flat building to the west towards the subject site

2.1.3 Site Analysis

There site is not affected by any known hazards.

The relationship of the proposed development to the adjacent sites provides for appropriate and anticipated built form separation. The development has no unacceptable impact on the amenity of surrounding developments and is complimentary and compatible in a streetscape context.

3 Description of Proposed Development

3.1 Details of the proposed development

The application proposes the demolition of the existing site structures and the construction of a shop top housing development comprising 2 x ground level commercial (retail and business) tenancies with 11 residential apartments above comprising a mix of studio, 1 and 2 bedroom apartments. Carparking for 18 vehicles is provided over 2 levels with access provided from both the Dowling and Oliver Street frontages. The development is depicted on plans DA-0001(D), DA-0003(D), DA-0101(D), DA-1001(D), DA-1002(D), DA-1101(D) to DA-1104(D), DA-1106(D), DA-2001(D), DA-2002(D), DA-3001(D), DA-3002(D), DA-4001(D) - DA-4003(D), DA-7001(D), DA-7101(D), DA-7102(D), SK-0003(B) and SK-0004(A), SK-0006(A) and DA-4008(B) prepared by CKDS Architects:

Specifically, the application provides for the following components:

- Demolition of the existing site structures;
- Construction of a shop top housing development that includes 11 apartments comprising the following mix:
 - 2 x Studio apartments
 - 1 x 3 bedroom apartment
 - 6 x 2 bedroom apartments
 - 1 x business tenancy 35.02m² GFA
 - 1 x retail tenancy 42.79m² GFA
- Provision of 18 car spaces over 2 levels and a loading bay catering for a small rigid vehicle;

All apartments are provided with balconies accessed directly from the living areas of each apartment. Each apartment has access to car parking with separate secure storage areas also located in the carparking areas of the development. A schedule of external building materials and colours is included on the architectural drawings together with montage images of the development.

The application also proposes the implementation of an integrated site landscape regime as depicted on the plans prepared by Conzept Landscape Architecture with all stormwater disposed of through the required OSD tank as detailed on the plans prepared by KYSU Engineers. The acceptability of the proposed excavation is detailed in the accompanying geotechnical report prepared by Crozier Geotechnical Consultants with accessibility and acoustics also addressed in the accompanying reports prepared BCA Access Solutions and Koikas Acoustics Pty Limited.

4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15(1) of the Environmental Planning & Assessment Act, 1979 as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

4.1 Warringah Local Environmental Plan 2011

4.1.1 Zoning

The Warringah Local Environmental Plan (LEP) 2011 applies to the subject site and this development proposal. The subject site is located within the B2 Local Centre zone. Shop top housing is permissible in the zone with consent. The stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area;*
- *To encourage employment opportunities in accessible locations;*
- *To provide an environment for pedestrians that is safe, comfortable and interesting;*
- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment;*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.*

Shop top housing is defined as one or more dwellings located above ground floor retail premises or business premises.

The development incorporates dwellings located above ground floor retail/ business premises and accordingly is appropriately defined as shop top housing and permissible with consent in the zone.

The proposed development meets the relevant zone objectives given the creation of a ground floor retail/ business uses and the appropriate concentration of residential densities within an established Local Centre zone. The height and scale of the development is responsive to context, compatible with that of adjoining development and will not result in unacceptable or jarring residential amenity, streetscape impacts.

Accordingly, there are no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

4.1.2 Height of Buildings – Exceptions to Development Standards

Pursuant to the height of buildings map, the site has a maximum building height limit of 11 metres.

The objectives of this control 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.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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

The proposed development has a maximum building height of 11.3 metres measured to the north eastern edge of the roof form over apartment 11 as depicted in Figures 12 and 13 over page. This represents a non-compliance of 300mm or 3.5%. The balance of the development sits comfortably below the prescribed height standard.

Clause 4.6 of WLEP 2011 provides a mechanism by which a development standard can be varied. The objectives of this clause are:

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

A clause 4.6 variation request has been prepared at Attachment 1 with such request addressing the applicable statutory requirements and confirm that strict compliance is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify the variation sought. Such request is well founded.



Figure 12: Plan extract showing extent of 11 metre building height breach in the north eastern corner of the roof form

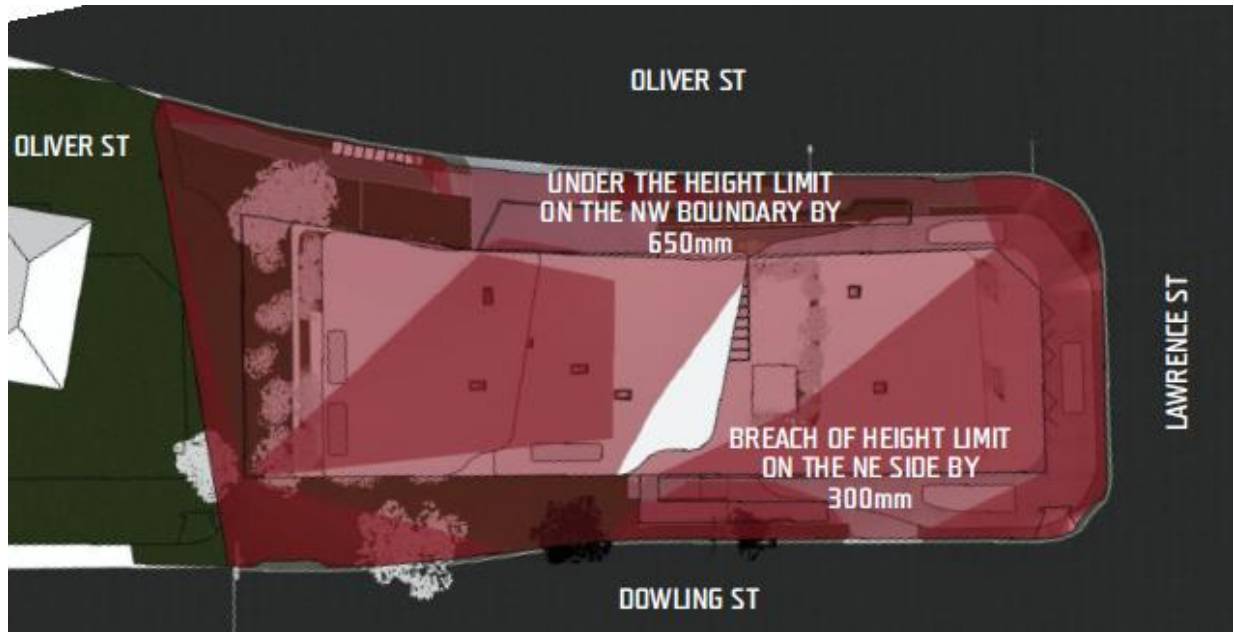


Figure 13: Plan extract showing area of maximum 300mm height breach

4.1.3 Heritage Conservation – Heritage Impact Statement

Pursuant to clause 5.10 WLEP 2011 development consent is required for any of the following:

- (a) *demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):*
 - (i) *a heritage item,*
 - (ii) *an Aboriginal object,*
 - (iii) *a building, work, relic or tree within a heritage conservation area,*

The stated objectives of this clause are as follows:

- (a) *to conserve the environmental heritage of Manly,*
- (b) *to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,*
- (c) *to conserve archaeological sites,*
- (d) *to conserve Aboriginal objects and Aboriginal places of heritage significance.*

The subject property is not heritage listed or located within a heritage conservation area however is located within the vicinity of a number of heritage items as depicted on the WLEP 2011 Heritage Map extract at Figure 15 below.

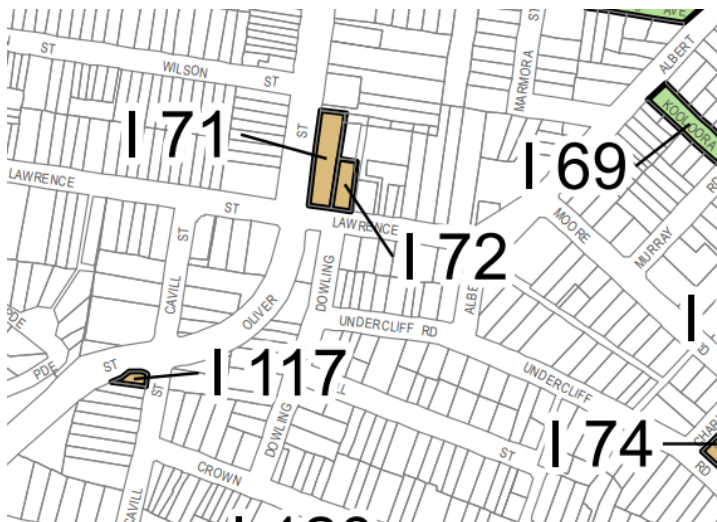


Figure 15: WLEP Heritage map extract

The identified heritage items within vicinity of the site are as follows:

I71	Building known as "Harbord Literary Institute"	Corner Lawrence Street and Oliver Street Lot 374, DP 752038
I72	Building known as "Early Childhood Health Centre"	29 Lawrence Street Lot 2, DP 864459

This Heritage Impact Statement has been prepared in accordance with the standard guidelines of the NSW Heritage Office.

Heritage Considerations

The following aspects of the proposal respect or enhance the heritage significance of the adjacent buildings for the following reasons:

- The proposed works will have no amenity impact on any adjoining heritage item in terms of privacy and overshadowing and will not impact on views to and from the items.
- The proposed building will contribute positively to the streetscape character and design quality of development located within the sites visual catchment.
- The proposed building appropriately addresses all streets with an active street frontage maintained.

The following aspects of the proposal could detrimentally impact on heritage significance.

- Nil

The following sympathetic solutions have been considered and discounted for the following reasons:

- Nil

Having given consideration to the impact of the proposed works on the significance of the adjacent heritage items I have formed the considered opinion that:

- The proposed works will have no amenity impact on any adjoining heritage items in terms of privacy and overshadowing and will not impact on views to and from the items.
- The proposed building will contribute positively to the streetscape character and design quality of development located within the sites visual catchment; and
- The proposed building appropriately addresses all streets with an active street frontage maintained.
- Accordingly, the proposed development will have a neutral impact on the significance of the heritage items and their setting.

Accordingly, there is no statutory impediment to the granting of consent to the proposed works in this instance.

4.1.4 Development on Sloping Land

Pursuant to clause 6.4 of WLEP 2011, the site is mapped as falling within a Land Slip Risk Area B. In this regard the application is accompanied by a geotechnical report prepared by Crozier Geotechnical Consultants which contains the following conclusions:

The site investigation indicated the presence of fill ($\leq 0.50\text{m}$) underlain by a sand layer ($\leq 0.40\text{m}$ thick), overlying extremely sandstone bedrock, quickly grading to sandstone bedrock of at least low strength at depths between 0.35m (BH2) to 1.20m (BH3) below the existing ground surface. The bedrock is expected to grade to medium strength at shallow depth. However, this will require confirmation at the north end of the site, following demolition of the structure and existing ground floor slabs.

The proposed works will require an excavation up to 5.0m depth within the southern portion of the site decreasing to 0.50m depth within the north-east corner of the site. The excavation is expected to mainly intersect sandstone bedrock. As such a crucial part of the works will be to ensure ground vibrations produced by the rock excavation equipment do not damage the neighbouring properties (including nearby services).

The geotechnical engineer should approve the proposed excavation equipment and methodologies. Based on the extension of the excavation to the site's boundaries and the depth of soils identified within the southern portion, support prior to excavation may be required along the west boundary (particularly the southwest portion) of the site. However, it might not be required along the south, east and north boundaries of the site. This should be confirmed by geotechnical inspection following demolition and prior to bulk excavation.

The risks associated with the proposed development can be maintained within 'Acceptable' levels with negligible impact to neighbouring properties or structures provided the recommendations of this report and any future geotechnical directive are implemented. As such the site is considered suitable for the proposed construction works provided that the recommendations outlined in this report are followed.

Accordingly, Council can be satisfied that the clause 6.4 WLEP have been appropriately addressed.

4.2 Warringah Development Control Plan 2011

The following relevant DCP 2011 controls have been addressed with respect to consideration of the proposed Shop Top Housing Development.

4.2.1 DCP Compliance Table

A table demonstrating compliance with the relevant provisions of the G5 Freshwater Village controls contained within Warringah DCP 2011 is detailed as follows:

Control	Requirement	Proposed	Compliance
Built Form in Freshwater	R1. Development is to evoke the coastal setting of the area through architectural expression and public art, eg murals or other external treatment of buildings	The building displays an appropriate architectural expression for its coastal location as reflected in design, detailing and materials/ finishes.	Yes
	R2. Buildings, including balconies and carpark entry points, fronting any public place must not contain any utility service pipe or conduit that is visible from the public place. Utility services including service structures, plant and equipment are to be located below ground or be designed to be an integral part of the development and suitably screened from public places including streets.	Satisfied	Yes
	R3. Locate residential uses so that noise, odour and any other adverse impacts are minimised from loading bays, garbage disposal and other service areas	Satisfied	Yes

Control	Requirement	Proposed	Compliance
	<p>R4. Retail entries are to be no more than 10m apart A minimum floor to ceiling height of 3.3m for ground floor uses</p>	<p>Retail entries satisfy control. A variation is sought to the retail ceiling height to enable the overall height of the development to be lowered relative to 11 metre height control. A minor variation is sought in this regard noting that the ceiling height proposed will not compromise the utility of these relatively small retail spaces.</p>	<p>Yes/ No Acceptable on merit</p>
	<p>R5.A minimum floor to ceiling height of 2.7m for uses above the ground floor</p>	<p>Satisfied</p>	<p>Yes</p>
	<p>R6. For any development with 10 or more shops or 500m² or more retail floor space, accessible and well signposted toilet facilities complying with AS 1428 shall be provided. These facilities shall have the same minimum opening and closing hours as the proposed development. Residential entries are to be separate and clearly distinguished from business entries.</p>	<p>N/A</p>	<p>N/A</p>
Number of Storeys	<p>Maximum 3 storeys</p>	<p>Maximum 3 storeys</p>	<p>Yes</p>
Street Activation	<p>R1. Ground floor uses are to provide active uses to streets, shareways, lanes, public areas and arcades</p>	<p>Satisfied with retail/ business frontage activation</p>	<p>Yes</p>
	<p>R2. Ground floor uses are to have direct and</p>	<p>Satisfied</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	convenient entries from streets, shareways, lanes, arcades or public areas		
	R3. The glazed area of street frontage windows at ground floor level is to be maximised	Satisfied	Yes
	R4. Street frontage windows are to be wrapped around corners into side streets, shareways, lanes, and public areas to increase the area of active frontage	Satisfied	Yes
	R5. Shopfronts at any arcade entry are required to wrap around the corner into the arcade, maximising the glazed area of windows, to a minimum distance of 6 metres from the front building line	N/A	N/A
	R6. Buildings are designed to overlook the street	Casual surveillance opportunities to all street frontages	Yes
	R7. Minimise the extent and visual impact of vehicle entrances and other building entries not associated with active uses	Vehicle access split between Oliver and Dowling Streets with visual impact considered acceptable	Yes
Street facades and shopfront design	R1. The design and proportions of the façade elements are to continue and respect the narrow lot frontages	Satisfied	Yes

Control	Requirement	Proposed	Compliance
	<p>R2. The maximum length of a shopfront is to be between 5 – 10m. Frontages greater than 10m must be broken into smaller vertical sections</p> <p>R3. Facades are to have a predominantly vertical emphasis</p> <p>R4. No blank walls are to be presented to any public domain area</p> <p>R5. Building fronts and entries are to be clearly visible from the street</p> <p>R6. Air conditioning units, exhaust vents, aerials, clothes lines, water heaters etc are not to be visible from streets or public areas</p> <p>R7. Glazed shopfronts that allow visual connection between the activities inside the development and the public domain are to be provided</p>	<p>Satisfied</p> <p>Satisfied</p> <p>Satisfied</p> <p>Satisfied</p> <p>Satisfied. Integrated into screened roof form.</p> <p>Satisfied</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>
<p>Access and Loading</p>	<p>R1. Service and loading areas should improve the amenity of the streetscape and reduce any potential for vehicle / pedestrian conflict</p> <p>R2. Locate all underground car park entries, service and loading as well as garbage collection</p>	<p>Servicing and loading will occur in the designated service vehicle bay.</p> <p>Satisfied</p>	<p>Yes</p> <p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>areas away from the primary street frontage</p> <p>R3. No additional vehicle or loading access is to be provided from Lawrence or Albert Streets</p> <p>R4. Rear or underground loading, garbage collection and access for vehicles is to be provided as part of any new development for lots fronting Lawrence and Albert Streets wherever possible via new connected laneways or through negotiation with Council for access via existing surface carparking areas</p>	<p>Satisfied.</p> <p>N/A</p>	<p>Yes</p> <p>N/A</p>
Lighting	<p>R1. Lighting is to be designed to not cause glare or unacceptable light spill to adjacent residential uses</p> <p>R2. Lighting is to be located on the underside of awnings or below awnings as wall lights to light the footpath</p> <p>R3. The use of exposed fluorescent batten lighting is not permitted.</p> <p>R4. Special effects lighting may be used to highlight key landscape design elements, major trees and significant buildings subject to compliance with other requirements of this control</p>	<p>Satisfied</p> <p>Noted</p> <p>Noted</p> <p>N/A</p>	<p>Yes</p> <p>Condition</p> <p>Condition</p> <p>N/A</p>

Control	Requirement	Proposed	Compliance
Safety and Security	<p>R1. Proposed development must incorporate the principles of Crime Prevention Through Environmental Design (CPTED),</p> <p>R2. Development is to maximise casual observation of open space areas, access ways, car parks, entries, driveways and the like</p>	<p>Satisfied. No concealment locations in basement or publicly accessible areas. All parking and circulation levels will be appropriately lit at night. Separate residential/ retail entries provided.</p> <p>Satisfied</p>	<p>Yes</p> <p>Yes</p>
Signage	<p>R1. Signage is to be appropriately located with no obscuring of architectural features</p> <p>R2. Signage is to relate to the business being carried out in the building; third party signage is not permitted</p> <p>R3. No signage is to be located above awning level</p>	<p>All noted. Subject to separate approval</p>	<p>N/A</p>
Awnings	<p>R1. Provide continuous awnings along:</p> <ul style="list-style-type: none"> • Lawrence Street • Albert Street • Moore Road • Any new or upgraded pedestrian access within Freshwater 	<p>Wrap around awning provided.</p> <p>Satisfied</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
<p>Front Setback</p>	<p><u>Ground level and second storey</u></p> <p>R1. New buildings may be built to the boundary or may be set back a maximum of 3m, for outdoor seating, display of goods, etc <u>Third storey</u></p> <p>R2. The third storey is to be set back a minimum of 5m from the property boundary</p> <p>R3. Landscaping or gardens within the 5m setback area of buildings are encouraged</p>	<p>The lower 2 storeys are compliant with the control and are aligned with the front boundary on all street frontages.</p> <p>The upper 3rd floor level has been setback 4.975 metres from the Lawrence Street frontage representing a minor 25mm variation to the setback control. The 4th level, as the building steps up the site to the south, has a variable setback of up to 19 metres from the Lawrence Street frontage.</p> <p>Increased setbacks to Dowling Street have also been provided at the upper levels noting that a variation is sought to the 3rd storey setback controls to both Dowling and Oliver Streets given the narrow and constrained nature of the site.</p> <p>The setbacks proposed are contextually appropriate and will not give rise to any adverse or jarring streetscape impacts. The building is appropriately articulated and modulated stepping down the site in response to topography. Strict compliance with the upper level setback control to both Oliver and Dowling Streets is unreasonable and unnecessary under the circumstances.</p>	<p>Yes</p> <p>No Acceptable on merit</p>
<p>Side and Rear Setbacks</p>	<p>R1. Where a side or rear boundary of the proposed development site adjoins land zoned for residential purposes, excluding roads, a minimum setback of 2m</p>	<p>The proposal provides a setback of between 3.167 and 6 metres (to the upper most level). The basement also maintains a compliant setback.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>is required</p> <p>R2. This setback area is to be landscaped and densely planted</p>	<p>The setbacks provide for an appropriate boundary interface with the overall height of the building remaining some 1.4 metres below the maximum prescribed building height in this location.</p> <p>Strict compliance is unreasonable and unnecessary under the circumstances.</p>	
<p>Other side and rear setbacks</p>	<p>R1. Where a side or rear boundary of the proposed development site does not adjoin residential zoned land other than roads, the side and rear boundary setbacks will be determined on a merit basis and will have regard to:</p> <ul style="list-style-type: none"> • streetscape • amenity of surrounding properties • setbacks of neighbouring development <p>R2. The setback area is to be landscaped, densely planted and free of any above or below ground structures, car parking or site facilities other than driveways and fences</p>	<p>N/A</p>	<p>N/A</p>
<p>Roofs and building form</p>	<p>R1. Roof forms are to be an integral response to the building design</p> <p>R2. Step building and roof forms with the topography</p>	<p>All provisions satisfied</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>R3. Services, plant rooms and lift overruns are to be integrated into the design of the roof form and screened from the public domain</p> <p>R4. Lighter roof colours are preferred</p>		
Building massing	<p>R1. Ensure that the scale, massing and proportions respond to the narrow lot pattern of Freshwater</p> <p>R2. Buildings are not to exceed a maximum building length of 20m without the provision of separate cores and entry points</p>	Both provisions satisfied	Yes
Building sustainability	<p>R1. For development greater than 2,000 square metres the proposed development is to achieve a minimum 4 star rating under the Green Star rating system under the Green Building Council of Australia or equivalent</p> <p>R2. The principles and properties of thermal mass, glazing, insulation and solar energy are to be incorporated into the design of the development</p> <p>R3. Reduce reliance on artificial lighting, heating and cooling and minimise the areas of the building</p>	<p>N/A</p> <p>Refer to BASIX</p> <p>Satisfied.</p>	<p>N/A</p> <p>Yes</p> <p>Yes</p>

Control	Requirement	Proposed	Compliance
	where such lighting, heating/cooling is required through the application of energy efficient passive design principles		
Materials and Colours	<p>R1. Use textures, tones and different natural materials</p> <p>R2. Materials and colours should relate to the context of the proposed development.</p> <p>R3. Heavier materials such as stone should be mainly located at the base of buildings</p> <p>R4. Painted surfaces must be mid-tone or darker</p>	Materials and finishes comply with provisions	Yes
Active Travel Links	<p>R1. Where appropriate, sites adjoining lanes or parking areas are to maintain existing or incorporate new through-site links for residents, customers, workers and visitors travelling on foot or by bicycle</p> <p>R2. Provide legible laneways, arcades and pedestrian / cyclist ways where appropriate</p>	These requirements were not identified as required by Council at formal pre-DA meeting	N/A
Traffic, Access and Safety DCP Controls C2	<p>To minimise:</p> <p>a) traffic hazards;</p> <p>b) vehicles queuing on public roads</p>	<p>BRS have prepared a Traffic Impact Assessment Report.</p> <p>This report demonstrates that the proposed development satisfies the on-site car parking and</p>	Yes

Control	Requirement	Proposed	Compliance
	<p>c) the number of vehicle crossings in a street;</p> <p>d) traffic, pedestrian and cyclist conflict;</p> <p>e) interference with public transport facilities; and</p> <p>f) the loss of “on street” kerbside parking.</p>	<p>bicycle parking requirements. The site is also well serviced by public transport with bus stops within a 200m radius.</p>	
<p>Parking Facilities</p> <p>DCP Control C3</p>	<p>Application of the DCP Parking Rates yields the following requirements: Residential 14.4 spaces Residential visitor 2.4 Total say 17 Retail 4 spaces Grand total 21 spaces.</p>	<p>BRS have prepared a Traffic Impact Assessment Report.</p> <p>Compliant car parking is provided</p>	<p>Yes</p> <p>Yes</p>
<p>Stormwater</p> <p>DCP Control C4</p>	<p>To ensure the appropriate management of stormwater.</p> <p>To minimise the quantity of stormwater run-off.</p> <p>To incorporate Water Sensitive Urban Design techniques and On-Site Stormwater Detention (OSD) Technical Specification into all new developments.</p> <p>To ensure the peak discharge rate of stormwater flow from new development is no greater than the Permitted Site Discharge (PSD).</p>	<p>All stormwater disposed of through the required OSD tank as detailed on the plans prepared by KYSU Engineers. addressing these provisions</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
<p>Erosion and Sedimentation</p> <p>DCP Control C5</p>	<ul style="list-style-type: none"> •To reduce the potential for soil erosion and adverse sedimentation impacts upon the environment. •To prevent the migration of sediment off the site onto any waterway, drainage systems, public reserves, road reserve, bushland or adjoining private lands. •To prevent any reduction in water quality downstream of the development site. 	<p>Please refer to the erosion and sediment control plan prepared by KYSU Engineers.</p>	<p>Yes</p>
<p>Excavation and Landfill</p> <p>DCP Control C7</p>	<p>Excavation and landfill works must not result in any adverse impact on adjoining land.</p>	<p>The application is accompanied by a geotechnical report prepared by Crozier Geotechnical Consultants. No objection is raised to a condition requiring compliance with any recommendations contained therein.</p>	<p>Yes</p>
<p>Demolition & Construction</p> <p>DCP Control C8</p>	<p>A demolition and waste management plan must be satisfactorily completed and submitted.</p>	<p>A demolition and waste management plan accompanies the application.</p>	<p>Yes</p>
<p>Waste Management</p> <p>DCP Control C9</p>	<p>Each development must include, or have access to Waste/Recycling Storage Rooms and Areas.</p> <p>a) where the number of dwellings/units is 29 or less, the Waste/Recycling Storage Rooms or Areas</p>	<p>A waste management plan accompanies the application.</p> <p>The development provides appropriately for commercial and residential waste storage and collection.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>must be located at the front of the development within 6.5 metres walking distance to the front boundary adjacent to the roadway. If a Waste/Recycling Storage Room or Area is to be provided at another suitable location within the building, a complementary Waste/Recycling Storage Room or Area must be provided within 6.5 metres walking distance to the front boundary adjacent to the roadway; or</p> <p>b) where the number of dwellings/units is 30 or more, the waste/Recycling Storage Rooms or Areas must be located within 6.5 metres walking distance of the service area.</p>		
<p>Private Open Space</p> <p>DCP Control</p> <p>D2</p>	<p>Multi dwelling housing (not located at ground level) residential flat buildings and shop top housing, to provide 10sqm of private open space with a minimum dimension of 2.5 metres.</p> <p>Private open space is to be directly accessible from a living area of a dwelling and be capable of serving as an extension of the dwelling for relaxation, dining, entertainment, recreation and children's</p>	<p>As demonstrated on the proposed floor plans each residential unit is afforded with a terrace comprising a minimum of 10 sqm, accessed directly from the living room areas to each individual units.</p> <p>Each of the terraces have been positioned to maximise solar access and privacy between apartments. All private open space areas are accessed directly from the living rooms and are appropriately sized and dimensioned.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	<p>play.</p> <p>Private open space is to be located and designed to ensure privacy of the occupants of adjacent buildings and occupants of the proposed development.</p> <p>Private open space shall not be located in the primary front building setback.</p> <p>Private open space is to be located to maximise solar access.</p>		
<p>Access to Sunlight</p> <p>DCP Control D6</p>	<p>Pursuant to these provisions development is not to unreasonably reduce sunlight to surrounding properties. In the case of housing:</p> <ul style="list-style-type: none"> • Development should avoid unreasonable overshadowing any public open space. • At least 50% of the required area of private open space of each dwelling and at least 50% of the required area of private open space of adjoining dwellings are to receive a minimum of 3 hours of 	<p>Refer to the accompanying shadow diagrams which demonstrate that 3 hours of solar access will be maintained to the east and west facing living room windows of the southern adjoining dwelling between 9 am and 3pm on 21st June.</p> <p>Complaint levels of solar access will be maintained to all surrounding residential properties/ land uses.</p>	<p>Yes</p>

Control	Requirement	Proposed	Compliance
	sunlight between 9am and 3pm on June 21.		
Views DCP Control D7	Development is to allow for the reasonable sharing of views, encourage innovative design solutions and ensure existing canopy trees have priority over views.	Having inspected the site and its surrounds and identified available view corridors we have formed the considered opinion that existing views from neighbouring properties will be retained. In any event, any view impact will not be as a result of any non-compliant building height element. Accordingly, we have formed the considered opinion that a view sharing scenario is maintained in accordance with the principles established by the Land and Environment Court in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140.	Yes
Privacy DCP Control D8	Ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours.	The development has been designed through detailed site analysis to ensure that appropriate privacy is maintained between adjoining development through building design and orientation, the appropriate use and placement of fenestration and the inclusion of fixed privacy screen treatments where necessary. In this regard, appropriate privacy and security will be maintained between adjoining development.	Yes
Building Bulk DCP Control D9	Encourage good design and innovative architecture to improve the urban environment.	The development has been designed through detailed site context analysis to provide through a contextually	Yes

Control	Requirement	Proposed	Compliance
	Minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.	<p>responsive building form maintaining appropriate amenity to adjoining properties and a high level of amenity to future occupants.</p> <p>The development has regard to the scale, proportion and line of visible facades with the highly articulated and modulated building form providing appropriate facade treatment and visual interest to the streetscape.</p> <p>The scale and footprint of the development are entirely in keeping with the emerging built form character of Lawrence Street.</p>	
Accessibility DCP Policy D18	To ensure convenient, comfortable and safe access for all people including older people, people with prams and strollers and people with a disability.	The proposed development has been designed to ensure a convenient, comfortable and safe access for all people including wheelchair and pram accessibility as detailed in the accompanying BCA/ Access report prepared by BCA Access Solutions.	Yes

4.3 State Environmental Planning Policy No.55 – Remediation of Land

Council shall not consent to the carrying out of any development on land unless it has considered the provisions of SEPP No. 55 – Remediation of Land (“SEPP 55”). In this regard, the likelihood of encountering contaminated soils on the subject site is extremely low given the following:

- Council’s records indicate that site has only been used for commercial/ retail uses.
- The subject site and surrounding land are not currently zoned to allow for any uses or activities listed in Table 1 of the contaminated land planning guidelines of SEPP 55.
- The subject site does not constitute land declared to be an investigation area by a declaration of force under Division 2 of Part 3 of the Contaminated Land Management Act 1997.

Given the above factors no further investigation of land contamination is warranted. The site is suitable in its present state for the proposed development. Therefore, pursuant to the provisions of SEPP 55, Council can consent to the carrying out of development on the land.

4.4 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX Assessment accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

4.5 State Environmental Planning Policy No. 65 Design Quality of Residential Apartment Development

State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) aims to improve the design quality of residential flat developments to provide sustainable housing in social and environmental terms that is a long-term asset to the community and presents a better built form within the streetscape.

It also aims to better provide for a range of residents, provide safety, amenity and satisfy ecologically sustainable development principles. In order to satisfy these aims the plan sets design principles in relation to context, scale, built form, density, resources, energy and water efficiency, landscaping, amenity, safety and security, social dimensions and aesthetics to improve the design quality of residential flat building in the State.

SEPP 65 applies to new residential flat buildings, the substantial redevelopment/refurbishment of existing residential flat buildings and conversion of an existing building to a residential flat building.

Clause 3 of SEPP 65 defines a residential flat building as follows:

“Residential flat building means a building that comprises or includes:

- a) 3 or more storeys (not including levels below ground level provided for car parking or storage, or both, that protrude less than 1.2 metres above ground level), and*
- b) 4 or more self-contained dwellings (whether or not the building includes uses for other purposes, such as shops), but does not include a Class 1a building or a Class 1b building under the Building Code of Australia.”*

The proposed development is for the erection of a 3-storey building, as defined, containing 11 dwellings and 2 retail/ business premises. As per the definition of a ‘Residential Flat Building’ and the provisions of Clause 4 outlining the application of the Policy, the provisions of SEPP 65 are applicable to the proposed development.

Clause 28(2)(b) SEPP 65 requires any development application for residential flat development to be assessed against the 9 design quality principles contained in Schedule 1. The proposal’s compliance

with the design quality principles is detailed in the Design Verification Statement accompanying this application.

Pursuant to clause 28(2)(c) of SEPP 65 in determining a development application for consent to carry out residential flat development the consent authority is required to take into consideration the Apartment Design Guide. In this regard an Apartment Design Guide compliance table accompanies this application.

The application is also accompanied by a Urban Design Report prepared by Jon Johannsen which responds to the issues raised in the assessment of the previous application.

4.6 State Environmental Planning Policy (Infrastructure) 2007

Clause 102 of the policy applies to development for any of the following purposes that is on land in or adjacent to the road corridor for a freeway, a tollway or a transitway or any other road with an annual average daily traffic volume of more than 40,000 vehicles (based on the traffic volume data published on the website of the RTA) and that the consent authority considers it likely to be adversely affected by road noise or vibration:

- (a) a building for residential use,
- (b) place of public worship,
- (c) a hospital,
- (d) an educational establishment or child care centre.

If the development is for the purposes of a building for residential use, the consent authority must not grant consent to the development unless it is satisfied that appropriate measures will be taken to ensure that the following LAeq levels are not exceeded:

- (a) in any bedroom in the building — 35 dBA at any time between 10 pm and 7 am,
- (b) anywhere else in the building (other than a garage, kitchen, bathroom or hallway) — 40 dBA at any time.

Compliance with these requirements is detailed acoustic report prepared by Koikas Acoustics Pty Limited with no objection raised to a condition requiring compliance with the recommendations contained therein.

4.7 Matters for Consideration pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (in *italic*) to help identify the issues to be considered have been prepared by the Department of Planning and Environment. The relevant issues are:

4.7.1 The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations

This report clearly and comprehensively addresses the statutory regime applicable to the application pursuant to the Warringah LEP and DCP. The development has also been found to be consistent with the design quality principles of SEPP 65 and the Apartment Design Guide.

The accompanying acoustic report confirms compliance with the provisions of SEPP (Infrastructure) 2007.

4.7.2 The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality.

Context and Setting

i. What is the relationship to the region and local context in terms of:

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

These matters have been discussed in the body of this report.

ii. What are the potential impacts on adjacent properties in terms of:

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be acceptable with regard to SEPP 65 and the ADG.

Access, transport and traffic:

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *Travel Demand*
- *dependency on motor vehicles*

- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

These issues have been discussed in detail in the report. The development provides adequate carparking facilities in conformity with the policy controls.

Public Domain

The proposed development will have no adverse impact on the public domain.

Utilities

This matter has been discussed in detail in the body of this report.

Flora and Fauna

The site will introduce areas of landscaping. The planting and landscaping treatments will enhance the landscape quality of the street frontages.

Waste Collection

Retail and domestic waste collection applies to this development.

Natural hazards

The site is not identified as affected by any known hazards.

Economic Impact in the locality

The proposed development will generate temporary employment during construction. On-going employment will be provided by the business that occupies the non-residential tenancy and through the employment of building and strata managers for the building.

Site Design and Internal Design

i) *Is the development design sensitive to environmental considerations and site attributes including:*

- *size, shape and design of allotments*
- *The proportion of site covered by buildings*
- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*

- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the desired future character and built form controls of Warringah LEP and DCP.

ii) How would the development affect the health and safety of the occupants in terms of:

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development will comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

Construction

i) What would be the impacts of construction activities in terms of:

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

4.7.3 The suitability of the site for the development

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The adjacent development does not impose any unusual or impossible development constraints. The site is well located with regards to public transport and utility services. The development will not cause excessive or unmanageable levels of transport demand.

The development responds to the topography of the site, is of adequate area, and has no special physical or engineering constraints is suitable for the proposed development

4.7.4 Any submissions received in accordance with this act or regulations

It is envisaged that Council will appropriately consider any submissions received during the notification period.

4.7.5 The public interest

It is considered that the development is sensitive both to the natural and built environments and is consistent with the provisions of the Warringah LEP and DCP.

5 Conclusion

The proposal is permissible and in conformity with the intent of the development standards contained within Warringah Local Environmental Plan 2011 as they reasonably relate to this form of development on this particular site and the built form guidelines contained within Warringah Development Control Plan 2011 as they relate to the proposed shop top housing development within the B2 Local Centre zone. The proposal satisfies the design quality principles contained within SEPP 65 and the design guidance within the Apartment Design Guide.

Particular attention has been given the minutes arising from initial pre-DA discussions with Council and subsequent discussions regarding DA2020/0543 to ensure that the development responds to its immediate built form context and the form of development anticipated within the Freshwater Village precinct which is currently undergoing significant regeneration. This statement will demonstrate that the built form outcome proposed has been achieved whilst providing for a highly articulated, modulated and visually stimulating building form as viewed in the round and which will provide diversity in housing choice, whilst ensuring Lawrence Street remains activated through the retail and business tenancies provided at ground floor level.

Having regard to the issues previously raised by Council in relation to DA2020/0543 we have formed the considered opinion that the current development, the subject of this report, achieves the following outcomes:

- The building height, bulk and scale have been reduced through a combination of increased setbacks and additional façade articulation.
- The building displays a more fine-grain approach including a greater level of streetscape activation to the retail and business tenancies.
- The provision of an unimpeded 3.167 metre wide deep soil zone to the southern boundary of the property to facilitate appropriate landscape plantings,
- The provision of a 6 metre level 3 building façade setback to the southern boundary.
- The conversion of Unit 11 from a 3 bedroom apartment to a 2 bedroom apartment to facilitate an increased level 3 setback to Lawrence Street and a corresponding reduction of 1 car parking space.
- An increase in the size of the retail and business tenancies and the provision of a greater level of street activation to these spaces.
- The landscape regime has also been amended to ensure that the landscape species proposed within the southern setback of the development will achieve a mature vegetation buffer to the adjoining property.
- The provision of an enhanced palette of materials and finishes.
- A significant reduction in building height breach to a maximum of 300mm in the north eastern corner of the building. This represents a variation of 3.5%.

Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height standard strict compliance has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the irregular site topography, the attainment of an appropriate contextual fit and general paucity of streetscape impacts. Sufficient environmental planning grounds existing to support the variation proposed with the accompanying clause 4.6 variation request well founded.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', written in a cursive style.

Greg Boston

Director

ANNEXURE 1

CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS

Clause 4.6 variation request - Height of buildings (clause 4.3 WLEP 2012)

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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.

2.0 Manly Local Environmental Plan 2013 (“MLEP”)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following:*
 - (i) *views to nearby residential development from public spaces (including the harbour and foreshores),*
 - (ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*
 - (iii) *views between public spaces (including the harbour and foreshores),*
- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and 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 is defined as follows:

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

The proposed development has a maximum building height of 11.3 metres measured to the north eastern edge of the roof form over apartment 11 as depicted in Figures 1 and 2 below. This represents a non-compliance of 300mm or 3.5%. The balance of the development sits comfortably below the prescribed height standard.



Figure 1: Plan extract showing extent of 11 metre building height breach in the north eastern corner of the roof form

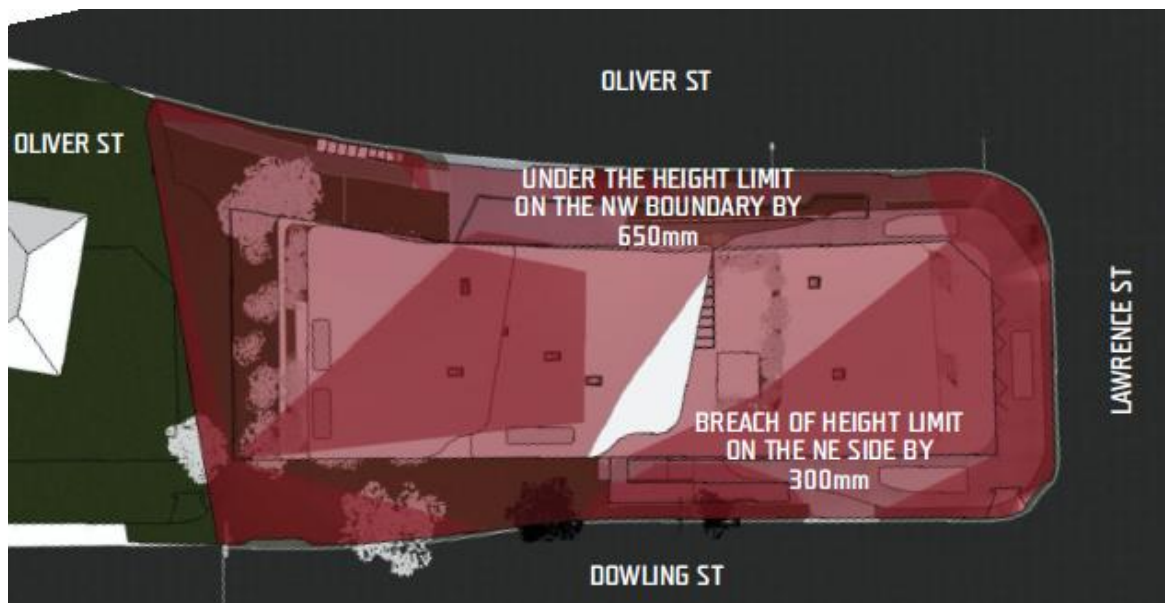


Figure 2: Plan extract showing area of maximum 300mm height breach

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

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

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

- (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.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

- (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 height of buildings provision at 4.3 of WLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP provides:

- (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 Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it 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 (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of WLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of WLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

- 17. *The first and most commonly invoked way is to establish that 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].*
- 18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- 19. *A third way is to establish that 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].*

20. *A fourth way is to establish that 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].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 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. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of MLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

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

Clause 4.3 WLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 WLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

The development responds to the building height objectives as follows:

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

Comment: The proposed development provides for a compliant 3 storey building height presentation to each street frontage with the building stepping down the site in response to topography. The area of non-compliance is appropriately described as minor and located in the north eastern corner of the building. The surrounding area is in transition with older 1 and 2 storey commercial buildings being replaced with more contemporary 3 storey shop top housing building forms consistent with the adopted medium density planning regime applicable to the Freshwater Village precinct.

In this regard, I have formed the opinion that the height, bulk and scale of the development including its 3 storey stepped form are entirely consistent with the height and scale of development anticipated site and within the precinct generally. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 we have formed the considered opinion that most observers would not find the proposed development by virtue of its height offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that the development is compatible with surrounding and nearby development and accordingly this objective is achieved.

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

Comment: Having undertaken a detailed site and context analysis and identified available view lines over the site I have formed the considered opinion that the height of the development, and in particular the non-compliant height component, will not give rise to any visual, view, privacy or solar access impacts with appropriate spatial separation maintained to the existing residential development further to the north. The proposal achieves this objective.

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

Comment: The non-compliant building height elements will not be readily discernible as viewed from the coastal foreshore area or from any bushland area. The proposal achieves this objective.

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

Comment: The non-compliant building height elements will not compromise the amenity of any public places due to inappropriate or jarring visual impacts.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

I have formed the considered opinion that the non-compliant building height elements will not compromise amenity in terms of solar access and privacy and will not give rise to any adverse public or private view affectation. Further, the areas of non-compliance will not adversely impacted development potential of the adjoining properties. In this regard, the development satisfies the objectives of the height of buildings standard and accordingly strict compliance is unreasonable and unnecessary under the circumstances.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is located within the B2 Local Centre zone. Shop top housing is permissible in the zone with consent. The stated objectives of the B2 zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area;*

Response: The proposed shop top housing provides both retail and business tenancies that are capable of accommodating uses that serve the needs of people who live in, work in and visit the local area. This objective is achieved;

- *To encourage employment opportunities in accessible locations;*

Response: The proposed shop top housing provides both retail and business tenancies that are capable of accommodating uses that serve the needs of people who live in, work in and visit the local area. This objective is achieved.

- *To provide an environment for pedestrians that is safe, comfortable and interesting;*

Response: The development activates all 3 site frontages, incorporates a wraparound awning and affords a safe, comfortable and interesting environment for pedestrians. This objective is achieved.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment;*

Response: the form, scale and massing of the development are complimentary and compatible with the existing and desired future character of the B2 Local Centre zone and the Freshwater Village generally and appropriately addresses the zone boundary interface to the south. The proposal reflects an urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment. This 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.*

Response: the proposal, through its design and setback to the southern zone boundary interface, minimises conflict between land uses in the zone and adjoining zones and ensures the maintenance of appropriate amenity of adjoining and residential land uses in terms of privacy, solar access and views. This objective is achieved.

The proposed works are permissible and achieve the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the B2 Local Centre zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. 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].

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the design constraints imposed due to the sites area, irregular geometry and irregular topography.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes.

Such outcome is achieved whilst realising the reasonable development potential of the land.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the B2 Local Centre zone

The consent authority needs to be satisfied that the propose 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.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it 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. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”

As demonstrated in this request, the proposed development it 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.

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.

4.4 Secretary’s concurrence

By Planning Circular dated 21st February 2018, 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 determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', written in a cursive style.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director