

14 October 2019

## Request for variation of a development standard pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP).

### The proposed development

This amended cl.4.6 request accompanies an amended development application for demolition of the existing buildings across the site, excavation for basement parking and associated building services and construction of a mixed-use development comprising of 12 ground floor retail/commercial tenancies and 78 apartments, comprising 3 studios, 34 x 1-bed and 6 x 1-bed + study, 32 x 2-bed and 2 x 3-bed apartments. Landscaping and public domain improvement works are also proposed, including on the roof top of the building, with a roof top terrace located on the eastern side of the floorplate.

### The variation sought

The proposed development complies with the development standards and policies of the Council, except for non-compliance with Height of Buildings standard set out in cl. 4.3 of Warringah Local Environmental Plan 2011 (WLEP).

The permitted height of a building under the WLEP is 24 m; the proposed height of the building is 27 m (RL 44.96), including plant and lift overrun.

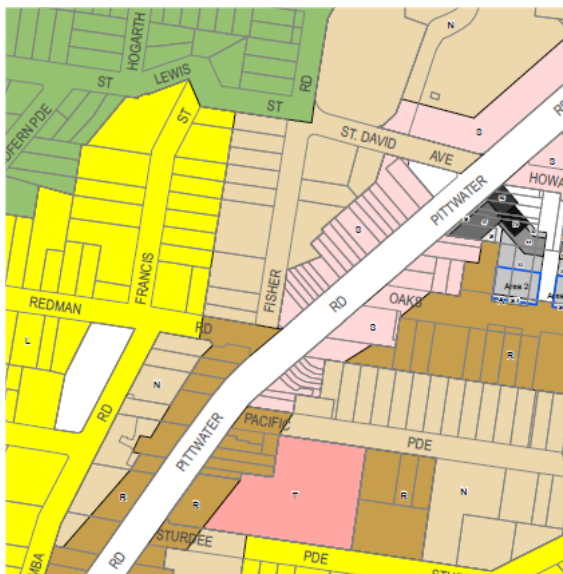


Figure 1: Height of Buildings Map, Warringah LEP 2011

This Request will demonstrate that the variation sought meets the requirements of cl. 4.6 and is appropriate for approval.

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Height of Buildings Map - Sheet HOB\_010AA  
Height of Buildings Map - Sheet HOB\_010AB

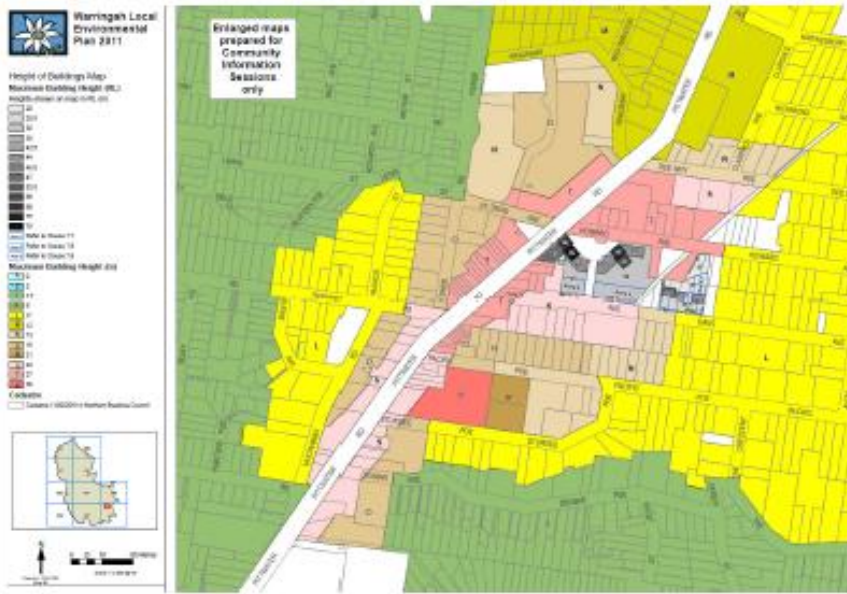


Figure 2: Proposed Height of Buildings Map, pursuant to planning proposal PP\_2015\_WARRI\_003\_02 (Source: NSW Department of Planning)

The site is subject to PP\_2015\_WARRI\_003\_02 which proposes, among other items, to increase the permitted building height to 27m. We are advised by the Council that this amendment to the WLEP was likely to be gazetted by in February 2019;

however, at the time of writing this is yet to occur. The proposal complies with the draft standard for height and is therefore consistent with the future planning controls and the inherent desired future character of the area.

## Warringah Local Environmental Plan 2011

Cl. 4.3 provides that:

- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

WLEP 2011 defines building height, in the Dictionary, as:

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

## Clause 4.6 of the WLEP

Cl. 4.6 of WLEP provides, so far as relevant:

- (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.*

#### **Is height of buildings a development standard?**

Cl. 4.6 can only be used to vary a control that is a development standard. Development standards are relevantly defined in s 1.4 of the *Environmental Planning & Assessment Act 1979 (EP & A Act)* as follows:

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

(a) ...

(b) *the proportion or percentage of the area of a site which a building or work may occupy, ...*

Being a provision of the WLEP in relation to the carrying out of development, under which a requirement is fixed in respect to the height of buildings in the relevant zone, cl. 4.3(2) of the WLEP is a development standard. Accordingly, cl. 4.6 can be used to approve a variation of the standard.

As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], cl. 4.6 is facultative in permitting a consent authority



to grant consent for development even though that development would contravene a development standard imposed by an environmental planning instrument. However, cl. 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

#### **Clause 4.6(4)**

In order for the Court to grant a variation to the development standard under cl. 4.6, it must be satisfied:

1. That this cl. 4.6 Request adequately addresses the matters required by cl. 4.6(3), namely that compliance with the standard is unnecessary or unreasonable in the circumstances of the case and secondly that there are sufficient environmental planning grounds to justify contravening the development standard; and
2. That the proposed development will be in the public interest because it is consistent with the objectives of the standard and zone; and
3. That the concurrence of the Secretary has been obtained.

#### **Clause 4.6(4)(a)(i) - Whether request adequately addresses requirements**

This request is comprehensive in its discussion of whether compliance with the zone and objectives of the standard is unreasonable or unnecessary and whether there are sufficient environment planning grounds for varying the standard. Both issues are discussed below.

#### **Clause 4.6(3)(a) Unnecessary or unreasonable**

The common approaches 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. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [20176] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the Wehbe principles remains an appropriate approach.

The first option and applicable in this case, 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.

Set out below is an extract from the judgement in *Wehbe* that explains the rationale for adopting this approach in the context of clause 4.6.

*The rationale is that development standards are not ends in themselves but means of achieving ends...The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However,*



*if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).*

#### Compliance with the Objectives for the Height of Buildings Standards

The proposal's compliance with the objectives for the height of buildings standard is addressed below.

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

To establish the compatibility of the proposed height and scale of the non-compliant component of the proposed development, it is important to establish the height and scale surrounding the site.

The site is located on the eastern side of Pittwater Road along the main shopping strip and commercial centre of Dee Why. While traditional 2-storey shops line both sides of the street, current construction activity and recently completed buildings within the vicinity of the site suggest that on-going redevelopment will result in higher, mixed use and contemporary buildings emerging in the future as landowners capitalise on favourable development potential provided for under the current planning regime. The properties immediately surrounding the site have permitted building height of up to 21m and 24m; further, north-west of the site, the recently constructed Meriton development provides for up to 18 storeys. Therefore, there is evidence of change within the locality, which is further reinforced through PP\_2015\_WARRI\_003\_02, which seeks to increase building height within the Dee Why Town Centre. The proposed increase, which will result in buildings fronting Pittwater Road benefiting from a height limit of 27 m, means that, from a scale and compatibility perspective, the long term intention for this Town Centre is to establish a robust approach that is defined by strong built form that reflects the attributes of a Town Centre.

As such, the non-compliant component of the building, which is 3 m above the permitted height of building standard, will be consistent with the scale and height of emerging development, as facilitated by the change in planning controls.

In addition, the non-compliant component of the building form will not be out of context due to the recessive elements of the design at the seventh and eighth building levels, to ensure that the building emulates the corner of Oaks Avenue and Pittwater Road, consistent with the desired scale, while the balance of the building at this level is set back from the street frontages to ensure its compatibility with neighbouring development.

The purpose of the additional height is to provide additional accommodation and more appropriate communal open space to service the development.



The scale of Level 7 is modest and recessive to ensure that there is a refined architectural presence that makes the balance of the building peel away from the principal corner, such that the additional, non-compliant height will not appear excessive in scale, and is set well back from the street frontage to ensure an appropriate measure of compatibility with adjoining sites as one moves away from the corner.

In terms of the compatibility of the private open space on the roof top area, this is positioned towards the rear of the development to ensure that this is not unduly present, nor dominates, the scale of the building as it fronts Pittwater Road. The only other potentially viable location for communal open space on the site would be in the north-eastern corner at ground level; any other location would interfere with the active frontages required to both Pittwater Road and Oaks Avenue, which is contrary to both the WLEP and WDCP.

At the north-eastern corner of the ground floor, there is limited solar opportunity and daylight, with that section of the property being hemmed in by adjoining development, which, when servicing the whole building does not provide an overall benefit to the development. Instead, by allowing for the lift and services overrun to extend beyond the permitted building height to ensure that the roof top area is accessible ensures a viable approach is achieved to serving residents of the development, without being contrary to the desired scale appropriate to the context of the site. The draft development standard also defines a higher outcome than currently applies, setting the future inferred character of the locality. If this open space area were lowered, having regard to the desired scale and character underpinned by the draft planning controls, this space may become underutilised if hemmed in by surrounding buildings. Therefore, to raise this to the maximum point possible ensures that it is compatible with future development on surrounding sites and is not unfairly impeded, nor does it unfairly impede, future development on neighbouring sites.

Therefore, given that the non-compliant component of the building is recessive in certain sections, softened with planting to its street frontages, and enable access to a quality common open space area in association with the development, the outcome is acceptable in terms of scale and compatibility. The benefit of open space on the roof top area also ensures that a reasonable solar access outcome is provided to the common open space, which results in a positive living environment for future residents, without adversely impacting upon the solar enjoyment of neighbouring properties. Most importantly, the non-compliant component of the building reflects the desired scale of buildings in the Dee Why Town Centre; as such, the proposal will be consistent with the built form anticipated on sites within the vicinity.

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

In terms of visual impact and the effect of the non-compliant portion of the building, this has been addressed above.







In terms of potential disruption to views, the building positioned to the east of the site, adjacent on the Oaks Avenue frontage, maintains its principal vantage over Oaks Avenue, to the south of the site; the façade interfacing with the subject site generally comprises a blank wall, but for a small opening on the top floor. Therefore, the potential effect on any views is not impeded as a result of the non-compliant built form. Further, the height of this form at No. 10 Oaks Avenue sits below that part of the proposed building that exceeds the development standard; therefore, the upper floors of the proposed building sit above the height of that adjoining built form and the non-compliant element of the proposed structure has no effect whatsoever in terms of potential view loss.



Similarly, for the building to the north of the site, on Pittwater Road, the southern façade of the adjoining property is generally of a blank configuration, but for window openings contained within the

light well. These windows, due to their material composition do not provide a view in a southerly direction. Therefore, that part of the building which does not comply with the development standard for height, will not result in a loss of view enjoyed from the building directly north of the site.

In terms of built form located on the southern side of Oaks Avenue that has been constructed, while the proposal will result in a change in view when considered from these properties, the effect of the non-compliant component of the building will be no greater than the view corridor that is impeded as a result of development along Howard Avenue, which is of a greater density, form and scale than that proposed subject site above the development standard. Again, therefore, there will be no additional loss of view.

Therefore, the non-compliant component of the building will not result in any view loss from surrounding properties.



The non-compliant section of the proposed built form will not result in any loss of privacy to the neighbouring properties, particularly those located to the north and east of the site.

On the northern side of the site, Level 7, which is the non-compliant component of the building, is constructed adjacent to the boundary with 890 Pittwater Road, to mirror the same building alignment to the street. That wall then terminates where the building void is located at No. 890 to ensure that there is no visual intrusion, nor privacy impact, across this portion of the adjoining site as a result of the non-compliant form.

Measured from the property boundary, the southern building portion at Level 7 and 8 complies with the shared separation distance of 9m, as the minimum requirement, despite that the adjoining property does not satisfy the minimum Apartment Design Guide (ADG) separation distance for privacy purposes.

The visual corridor from the western section of the upper floors, is in an easterly direction and, given the location of walls, there is no, or very limited, opportunity to look into, or towards, the light well of No. 890. Even if this were to occur, the openings into the lightwell are constructed of glass blockwork and therefore have limited, if any, visual openings into those properties. Therefore, from that vantage, there is no adverse visual privacy conditions that will result from the non-compliant component of the building.

There will be no adverse impacts on the western corner of the site from the non-compliant section of the building as this interfaces with a major intersection.

In relation to the loss of solar access, the solar analysis prepared by Crawford Architects demonstrates that the extent of the additional shadow to those properties on the southern side of Oaks Avenue is generally contained within the shadow affectation of existing built form on the northern side of Oaks Avenue, behind the subject site. Therefore, the additional impact caused by the non-compliant component of the development, does not give rise to an unnecessary level of affectation, over and above the existing situation.

Therefore, the non-compliant component of the building, will not give rise to contravening this objective of the development standard.

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

No adverse impact on the scenic quality of Warringah's coastal bushland is expected to result from the non-compliant component of the proposed development, as the site is located in the Dee Why Town Centre. Levels 7 and 8 are nestled around existing and new urban development and pose no threat to existing views to or from neighbouring properties due to the location and size of surrounding buildings.

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





The composition of Levels 7 and 8 of the building are consistent with the prescribed setbacks for built form which dictate the visual expectations of the development when viewed from the road network surrounding the site. The architectural composition of the building is consistent in materials and features with the principal building form such that it does not result in an adverse visual impact that is befitting to the balance of the site.

Therefore, the non-compliant component of the building will have no adverse visual impact and is consistent with this objective.

Having regard to the above, the non-compliant component of the building will achieve all of these objectives to at least an equal degree as would be the case with a development that complied with the building height standard. By allowing for the non-compliance provides additional accommodation and useable communal open space by all residents, consistent with the draft development standard for building height.

#### Compliance with the Zoning Objectives

The non-compliant component of the proposal achieves the objectives of the zone as set out below.

Zone B4 Mixed Use	Comment
<p>1 Objectives of zone</p> <ul style="list-style-type: none"> <li>To provide a mixture of compatible land uses.</li> <li>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.</li> <li>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.</li> <li>To promote building design that creates active building fronts, contributes to the life of streets</li> </ul>	<ul style="list-style-type: none"> <li>The non-compliant component of the building provides for residential use that will complement not only the site itself, which contains both residential and retail land uses, but also the locality surrounding the site.</li> <li>The provision of residential accommodation in the non-compliant component of the development provides for additional dwellings in a highly accessible location that is close to public transport availability, such that reliance on private motor vehicles can be potentially reduced.</li> <li>The intensity of the non-compliant component of the development is relative to the site and will assist to reinforce the role of Dee Why as a major centre, particularly that which is encouraged by the additional height that is sought under the planning proposal.</li> <li>The non-compliant component of the development will accord with the balance of the building form and contribute to the life of the surrounding street network through</li> </ul>



<p>and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.</p> <ul style="list-style-type: none"> <li>• To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.</li> <li>• To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.</li> </ul>	<p>additional opportunities for passive surveillance as a result of the additional accommodation proposed. The non-compliant component of the building does not affect the human scale of the lower levels of the building and will be consistent with the overall visual interest that is attributable to the architectural design of the site.</p> <ul style="list-style-type: none"> <li>• Housing is proposed in the non-compliant section of the building, consistent with this objective.</li> <li>• The site has been amalgamated with 874 Pittwater Road to facilitate a more effective development outcome and an efficient basement design so as not to compromise access arrangements given the site's proximity to Pittwater Road. The amalgamation of the site also provides a more consistent and effective urban design solution through the consolidation of the allotments. Therefore, this objective will be achieved.</li> </ul>
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The non-compliant component of the development, as it relates to building height, demonstrates consistency with the objectives of the B4 Mixed Use zone and the height of building objectives. Adopting Preston CJ's language in *Wehbe*, development standards are means to an end, not ends in themselves. The non-compliant component of the development will comprehensively achieve all of the objectives notwithstanding non-compliance. Compliance with the standard is therefore unreasonable and unnecessary.

#### **Clause 4.6(4)(b) – Sufficient environmental planning grounds**

The second element of clause 4.6(3) on which the Court must be satisfied is that there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relate to the subject matter, scope and purpose of the *Environmental Planning & Assessment Act [EP&A Act]* including the objects of the EP&A Act (*Wehbe* para 23).

As Preston CJ explains in *Wehbe*:

*".. the focus of clause 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 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. 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 clause 4.6(a)(i) that the written request has adequately addressed the matter.”*

The requested variation consists of an increase to the permitted building height. This Request demonstrates that the variation sought will have no adverse environmental or other impacts, that all of the zone and standard objectives will be met, notwithstanding the variation and that there is no environmental planning reason not to vary the standard.

Further, given that the height standard sought under the draft planning control, which sets the desired future character of the area is achieved, as part of the building proper, the additional height proposed is desirable for the purpose of providing additional accommodation in a highly accessible location, while creating a viable, effective and equitable common open space outcome which could not otherwise be derived on the site, due to the constraints imposed by other built form as it directly abuts the site and limits any ground floor areas. Making this area accessible to all residents within the development provides a far superior outcome that results in a more acceptable living environment than would otherwise be achieved on the site.

Therefore, given the benefit that attaches to non-compliance with the development standard there are sufficient environmental planning grounds, and more importantly, benefits, associated with this outcome.

#### **Clause 4.6(a)(ii) – public interest**

The fourth element that the Court needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard’s and zone’s objectives.

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

*“The matter in cl 4.6(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 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 purpose of clause 4.6(4)(a)(ii).”*

As demonstrated in this Request, the proposed development will comprehensively meet all of the objectives of the height of buildings development standard and the B4 zone objectives. Non-compliance with the



development standard allows for additional residential population and social benefit within the development of a quality nature, in a position, that due to the benefit of solar access, ventilation and sense of openness, will encourage positive social interaction. This then results in positive flow on benefits for residents within the development, whom form part of the broader community. Accordingly, the Council can be satisfied that it is in the public interest to vary the standard for the purpose of this development application.

### **Secretary's concurrence**

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests 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 processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

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

