

27th January 2023

The General Manager
Northern Beaches Council
Po Box 882
MONA VALE NSW 1660

Attention: Alexander Keller – Principal Planner

Dear Mr Keller,

Application Mod2022/1164
Development Application DA2022/1164
Issues response/ addendum Statement of Environmental Effects/ Updated
clause 4.6 variation request – Height of buildings
Demolition and construction of a commercial building
34-35 South Steyne, Manly

Reference is made to Council's issues letter of 1st September 2022, the subsequent Heritage, Roads and Assets and Traffic Engineering referral responses and the minutes of the Design and Sustainability Advisory Panel Meeting of 27th October 2022. This submission represents a considered response to the issues raised and is to be read in conjunction with the following amended documentation:

- Architectural plans A-DA-110-000(B) - A-DA-110-007(B), A-DA-210-001(B), A-DA-210-002(B), A-DA-310-001(B) - A-DA-310-003(B) and A-DA-710-001(B) prepared by Durbach Block Jagers,
- Amended photomontage,
- Landscape plans DA-01(01) – DA-04(01) prepared by Wyer & Co,
- Traffic and Parking Assessment Report, dated 23rd January 2023, prepared by Varga Traffic Planning Pty Limited,
- Visual Impact Assessment, dated December 2022, prepared by Urbaine Design Group,
- Waste Management Plan, dated January 2023, prepared by Dickens Solutions,
- Updated clause 4.6 variation request – Building height (Attachment 1).

We respond to the issues raised as follows.

RFI letter of 1st September 2022

1. View Impact

Response: This submission is accompanied by a detailed Visual Impact Assessment which has been prepared with the benefit of photographs taken from apartments 633 and 733, 25 Wentworth Street, Manly. The view analysis confirms that a view sharing outcome is maintained having regard to the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 noting that although minor to moderate view impact from the principal living and adjacent open space area of the adjoining apartments occurs towards the surf zone of Manly Beach that it is the front edge of the lower street facing building façade, which provides for a complimentary and compatible street wall height, causing the view affectation rather than the Level 3 built form element towards the rear of the site. Given the totality of views available and maintained, including the unobstructed views towards Manly Beach and its surf zone, the Corso and the Northern Beaches Peninsula beyond in a north-easterly direction, we are satisfied that all primary view elements are retained.

In circumstances where the development provides for a contextually appropriate built form outcome in terms of overall building height and floor space, and where the FSR bonus available to commercial development within the B2 Local Centre zone is not utilised to anywhere near its full extent, we are satisfied that the development is reasonable in the context of the view sharing outcome achieved. We also note that the development provides significant public benefit in terms of the through site link between Rialto Lane and South Steyne with the displaced floor space relocated to level 3 of the development where it contributes significantly to the utility and amenity of the development.

Under such circumstances, Council can be satisfied that the proposal provides for a view sharing outcome consistent with the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

2. Building height and bulk

Response: We rely on our previous response to the view impact issue to demonstrate that the floor to ceiling heights and internal spaces proposed are acceptable noting that they contribute significantly to the internal amenity and overall design quality of the development. Given the contextually appropriate nature of the street facing building façade height relative to that established by adjoining development we note that a reduction in floor-to-ceiling heights would reduce the internal amenity and design quality of the development without any measurable reduction in view impact given that the street facing building façade height would be retained. Such outcome would represent poor design and be inconsistent with the objectives of the Act.

In relation to the acceptability of the building height breach we rely on the accompanying updated clause 4.6 variation request to demonstrate that the non-compliant portion of the development is consistent with the zone objectives, consistent with the objectives of the standard and that there are sufficient environmental planning grounds to justify the variation sought.

Having regard to the objectives of the floor space ratio standard we note that the bulk and scale of the development is consistent with the existing and desired streetscape character, the proposal does not obscure important landscape and townscape features, the development maintains an appropriate visual relationship between surrounding development and the existing character and landscape of the area with adverse environmental impacts on the use and enjoyment of adjoining land and the public domain minimised.

The development will contribute to the viability of the business zone through the provision of a contextually appropriate quantum of floor space which does not take full advantage of the FSR bonus available pursuant to clause 4.4(2A) of Manly Local Environmental Plan 2013. The proposal satisfies the objectives of the FSR standard.

Under such circumstances, Council can be satisfied that notwithstanding the building height and quantum of floor space/ FSR proposed that the proposal provides for a view sharing outcome consistent with the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 as previously outlined.

3. Streetscape and Townscape

Response: In response to the concerns raised by DSAP and Council's heritage officer in relation to the design and composition of the building façade the plans have been amended to provide a higher level of solidity and to ensure that the façade composition reflects the form and rhythm of building façades established by adjoining development and development generally within the sites visual catchment as depicted in the photomontage over page.

The amended scheme provides for a building displaying exceptional design quality and one which will contribute significantly to the streetscape through the provision of a contemporary yet complimentary and compatible built form presentation. The amended building façade design recognises the predominant streetscape qualities, such as building form, scale, patterns, materials and colours which contribute to the character of the area consistent with part 3.4.1 point to of the Manly Town Centre Urban Design Guidelines. Further, the building complements the predominant building form, distinct building character, building materials and finishes and architectural styles established by commercial development in the locality consistent with the objectives of clause 3.1.3.1 Design Principles and clause 5.1.1 General Character of Manly DCP.

The proposal will not give rise to any adverse impacts on the significance of the adjacent The Corso Heritage Conservation Area.



4. Waste Bin Storage

Response: We rely on the amended Architectural plans and the accompanying Waste Management Plan to demonstrate that the commercial development will be appropriately serviced by a private waste service contractor.

Internal Referral Responses

5. Heritage

Response: We refer to our previous streetscape and townscape response to demonstrate that the amended façade design is contextually appropriate and will not give rise to any adverse heritage conservation impacts.

6. Roads and Assets

Response: Although DSAP were extremely supportive of the proposed trafficable awning it has been deleted from the current application to enable further discussions with relevant Council officers with a view of submitting it as a separate application at a later date.

7. Traffic Engineering

Response: the concerns raised by Council's traffic engineer have been addressed in detail in the accompanying Traffic and Parking Assessment Report prepared by Varga Traffic Planning Pty Limited noting the following commentary contained within the report:

It is noted however, that Clause 4.2.5.4 of the DCP allows for a reduction in the car parking requirements in the Manly town centre where the constraints of the site preclude the provision of some or all of the required parking spaces, and where the movement of vehicles to/from the site would cause unacceptable conflict with pedestrian movements.

Discussions with Council's traffic engineer have indicated that a reduction of 50% would be considered acceptable, and that the use of car share spaces would be considered equivalent to 3 parking spaces each.

The proposed development makes provision for a total of 13 parking spaces, including 2 car share spaces (which equate to 3 spaces each) plus a separate loading bay. The proposed off-street parking therefore equates to a total of 19 parking spaces (i.e., 50% of the "required" parking, as discussed with Council's traffic engineer).

In this instance, it is noted that the proposed basement car parking area provides the maximum number of parking spaces that could be accommodated within the basement floor-plate of the site, having regard for the need to provide a car park ramp, fire stairs and a lift in the basement.

Furthermore, it is proposed to allocate the car parking spaces to the employees and staff of the commercial offices and restaurant only. In particular, the proposed development avoids the introduction of traffic activity in Rialto Lane which could have been generated by customers accessing the proposed development, such as restaurant patrons.

The proposed parking arrangements would thereby minimise the level of traffic activity in Rialto Lane by restricting traffic flows to the less intensive employee and staff uses only, without the more intensive levels of traffic activity which would be generated by customer uses of those parking spaces.

Finally, the site has excellent connectivity to existing public transport services, and is ideally located to facilitate a positive shift towards sustainable and active modes of transport as demonstrated in chapter 3 of this report.

Under such circumstances, it has been demonstrated that the quantum of off-street carparking proposed has been maximised with the quantum of floor space proposed providing for the orderly and economic use and development of the land.

DSAP Recommendations

Response: The amended architectural plans and building façade design are responsive to the DSAP recommendations with the development providing for a contextually appropriate built form presentation to South Steyne and an integrated through site link displaying exceptional design quality and amenity and which provide significant public benefit. The proposed basement is likely to incorporate a future retail offering and to that extent no objection is raised to a suitably worded condition preventing this space from being used for office purposes.

We trust that this submission comprehensively addresses the issues raised by Council and DSAP and will enable the favourable assessment and determination of the application.

Please do not hesitate to contact me to discuss any aspect of this correspondence.

Yours sincerely

BOSTON BLYTH FLEMING PTY LIMITED

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

Greg Boston

B Urb & Reg Plan (UNE) MPIA

B Env Hlth (UWS)

Director

Attachment 1

Updated Clause 4.6 variation request – Height of buildings

1 Clause 4.6 variation request – Height of Buildings

1.1 Introduction

This updated 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.

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 10m fronting South Steyne, increasing to 12m at the rear of the site, as shown in Figure 1, below.

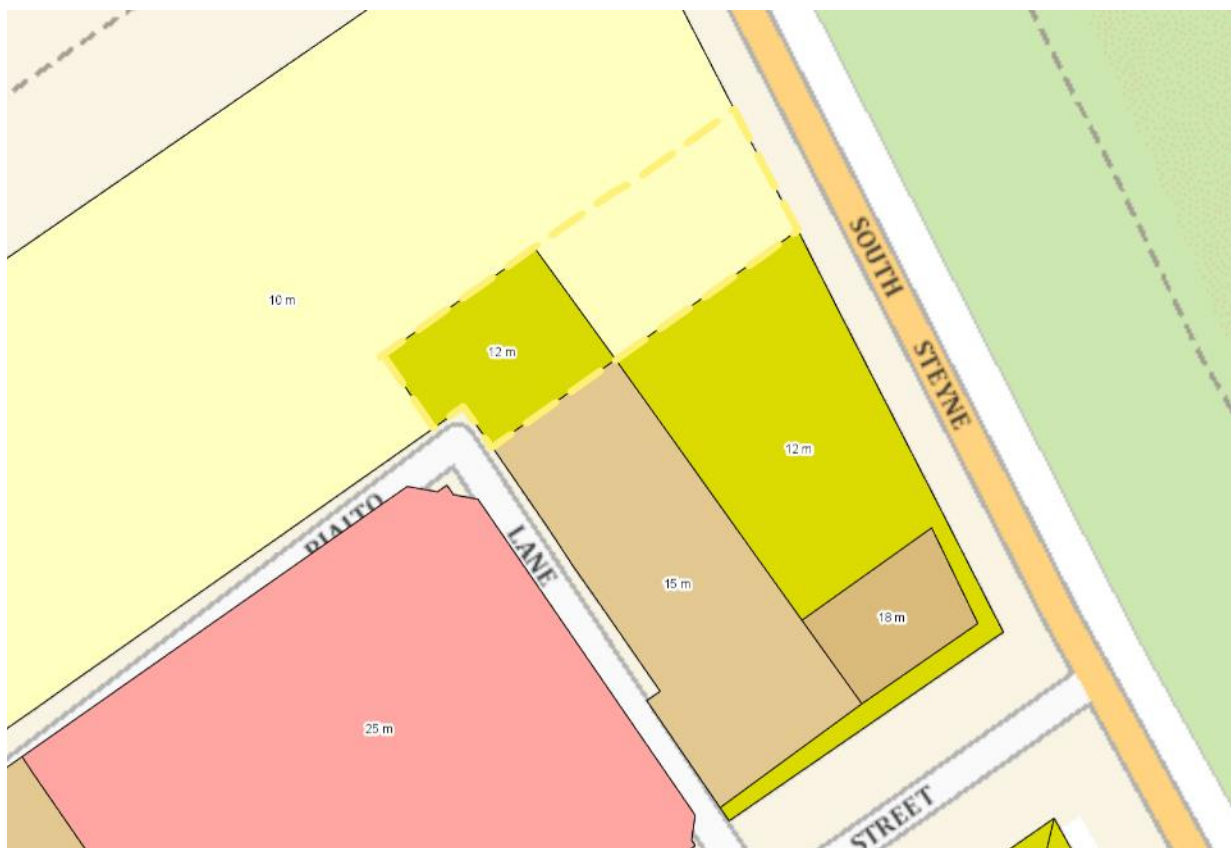


Figure 1: Height of Buildings Map of MLEP 2013

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.*

Within the portion of the site that is subject to the 10m height limit, the proposed development has a height of approximately 11.3m presenting to South Steyne, being the dominant parapet height and the height of all proposed roof top planters. The balustrade of the central staircase and the lap pool reach a maximum height of approximately 12m, with a small awning adjacent to the lift core reaching a maximum height of 13.6m.

Within the portion of the site that is subject to the 12m height limit, the proposed development has a height of approximately 14m presenting to Rialto Lane, reaching a maximum height of 14.5m at the lift core.

The extent of the proposed variations can be summarised, as follows:

- Dominant parapet height = 11.3m, 1.3m or 13% variation to 10m height limit
- Central staircase and lap pool = 12.0m, 2.0m or 20% variation to 10m height limit
- Small awning adjacent to lift = 13.6m, 3.6m or 36% variation to 10m height limit

- Level 4 commercial area = 14m, 2m variation of 16.7% variation to 12m height limit
- Lift Overrun = 14.5m, 2.5m or 20.8% variation to 12m height limit

The extent of non-compliance is highlighted in red in the extract of Section D in Figure 2, over the page.

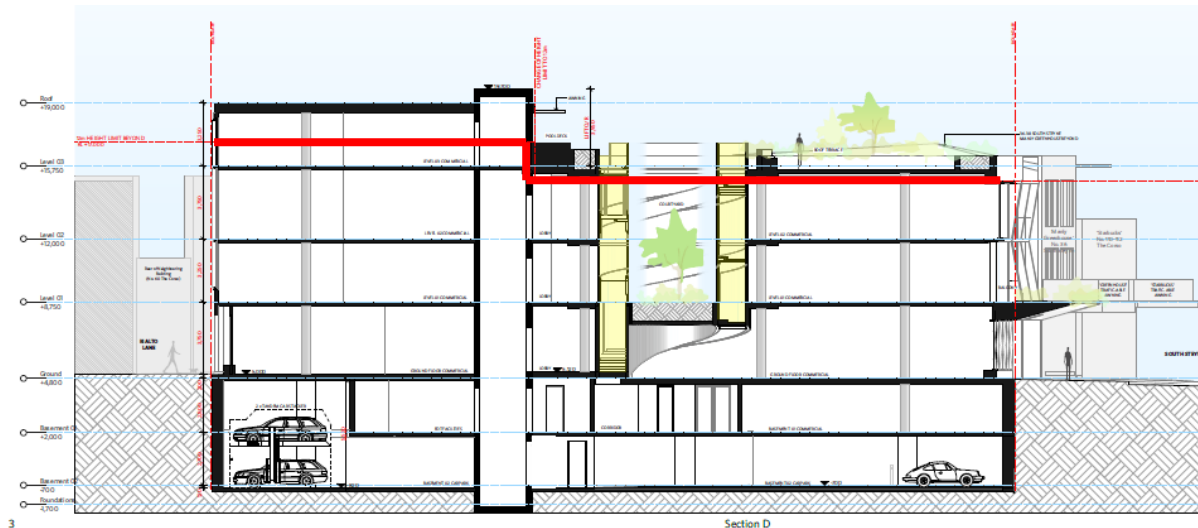


Figure 2: Extract of Section D with breaching elements located above red line

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

- to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- 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 clause 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 MLEP 2013 provides:

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 building height development standard in clause 4.3 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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 building height development standard at clause 4.3 of MLEP 2013 which specifies a building height of 10m-12m. 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 MLEP 2013 provides:

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

- (a) the consent authority is satisfied that:*
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

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

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

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 the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. 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 MLEP 2013 from the operation of clause 4.6.

1.3 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:

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].

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].

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].

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].

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.

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 MLEP 2013 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 of MLEP 2013 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 MLEP 2013?

1.4 Request for variation

1.4.1 Is clause 4.3 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

Clause 4.3 of MLEP 2013 prescribes a height limit for development on the site. Accordingly, clause 4.3 of MLEP 2013 is a development standard.

1.4.2 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 approach is relevant in this instance, being 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 building height development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is 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,*

Comment: The height of the proposed development is consistent with that of surrounding development and development within the visual catchment of the site. In particular, the front parapet height of the development has been designed to marry with the height of adjoining buildings, as shown in Figure 3 over the page.

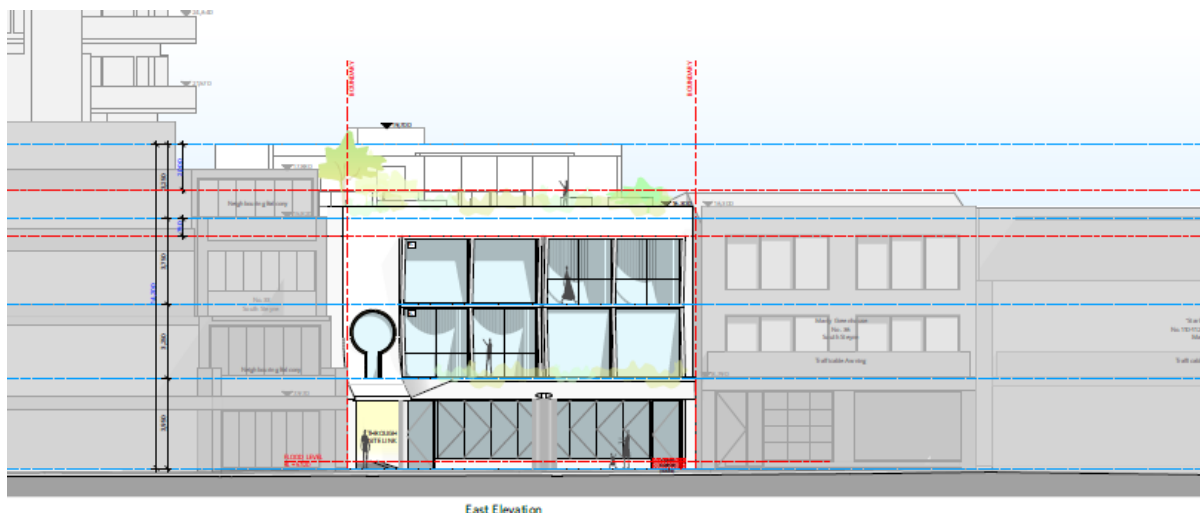


Figure 3: South Steyne Elevation

It is noted that this approach, where the parapet height matches that of adjacent buildings, is encouraged by clause 4.2.2 of MDCP 2013, as shown in Figure 4, below.

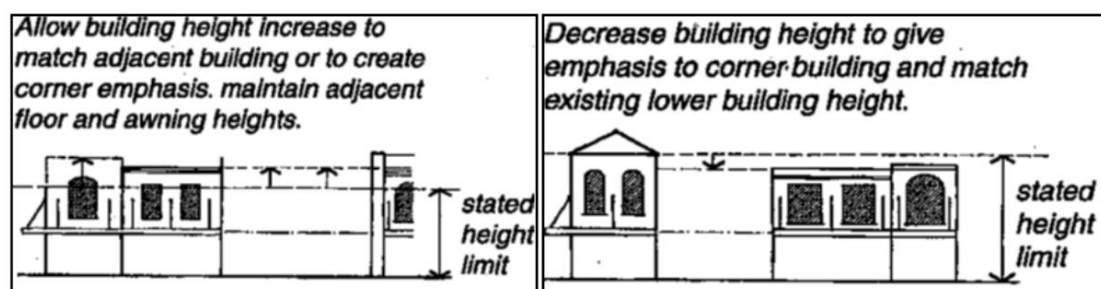


Figure 4: Extract of clause 4.2.2 of MDCP 2013

The increased height at the rear of the development is set back from the primary street frontage and will not be readily visible as seen from South Steyne. The height of the building presenting to Rialto Lane is contextually appropriate, having regard to the increased height anticipated by MLEP 2013 and the height of surrounding and nearby development, as shown in Figure 5 over the page.

It is noted that the proposal has been reviewed by Council's Design and Sustainability Advisory Panel, who raised no objection to the height of the proposed development, or the variations proposed.

The non-compliant elements of the proposed development do not detract from consistency with this objective.

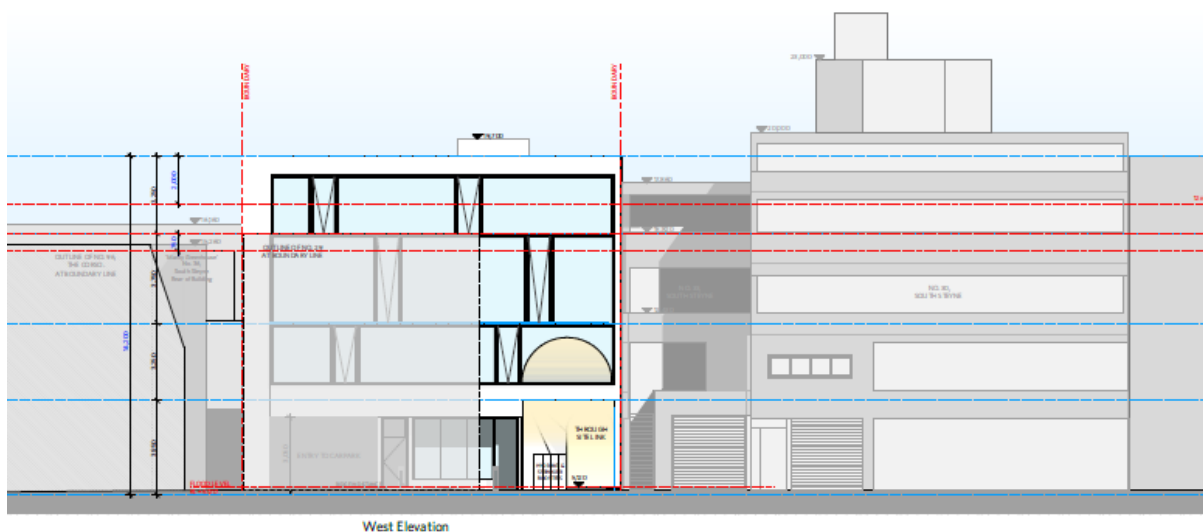


Figure 5: Rialto Lane Elevation

- (b) *to control the bulk and scale of buildings,*

Comment: The proposed development is well articulated with a height that is consistent with surrounding built form. Further, the proposed development is maintained well below the maximum permitted floor space ratio, which is the primary development standard to control the bulk and scale of development.

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 by virtue of its bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the visual catchment of the site.

Once again, it is noted that the proposal has been reviewed by Council's Design and Sustainability Advisory Panel, who raised no objection to the height of the proposed development, or the variations proposed. Of particular relevance, the panel confirmed that they are generally supportive of the bulk and scale proposed.

- (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),*

- Comment: Views of Manly Beach are available from the subject site in an easterly direction. These views are also enjoyed by upper-level apartments of buildings to the west of the subject site. As demonstrated in the Visual Impact Assessment, dated December 2022, prepared by Urbaine Design Group, the proposed development has been designed to align with the levels of adjoining buildings, with views of the ocean and the Norfolk Island Pines that line the foreshore maintained over the top of the proposed development.

The view analysis also confirms that a view sharing outcome is maintained having regard to the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 noting that although minor to moderate view impact from the principal living and adjacent open space area of the adjoining apartments occurs towards the surf zone of Manly Beach that it is the front edge of the lower street facing building façade, which provides for a complimentary and compatible street wall height, causing the view affectation rather than the Level 3 built form element towards the rear of the site. Given the totality of views available and maintained, including the unobstructed views towards Manly Beach and its surf zone, the Corso and the Northern Beaches Peninsula beyond in a north-easterly direction, we are satisfied that all primary view elements are retained.

In circumstances where the development provides for a contextually appropriate built form outcome in terms of overall building height and floor space, and where the FSR bonus available to commercial development within the B2 Local Centre zone is not utilised to anywhere near its full extent, we are satisfied that the development is reasonable in the context of the view sharing outcome achieved. We also note that the development provides significant public benefit in terms of the through site link between Rialto Lane and South Steyne with the displaced floor space relocated to level 3 of the development where it contributes significantly to the utility and amenity of the development.

Under such circumstances, Council can be satisfied that the proposal provides for a view sharing outcome consistent with the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

In consideration of the objectives of MLEP 2013 and MDCP 2013 that encourage consistency with the prevailing building height and noting the bonus floor space provisions prescribed by clause 4.4 of MLEP 2013 for commercial development in this location, Council can be satisfied that disruptions to views haven been reasonably minimised.

- (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,*

Comment: The non-compliant elements of the proposed development do not result in any adverse impacts upon the amount of sunlight received by adjoining properties.

- (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.*

Comment: Not applicable – the site is located within the B2 Local Centre zone and not within a recreation or environmental protection zone.

Consistency with zone objectives

The subject property is zoned B2 Local Centre zone pursuant to MLEP 2013. The development's consistency with the stated objectives of the B2 zone is 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.*

Comment: The proposed development provides 1386.50m² of commercial floor space and 370.54m² of retail floor space to contribute to the existing range of retail, business, entertainment and community uses within the Manly Town Centre.

- *To encourage employment opportunities in accessible locations.*

Comment: The subject site is in a highly accessible location, within walking distance from Manly Wharf and a number of bus stops serviced by differing bus routes.

- *To maximise public transport patronage and encourage walking and cycling.*

- Comment: The proximity of the site to public transport options and nearby pedestrian and cycle pathways, combined with the generally flat nature of the land within the Manly Town Centre, will actively encourage public transport patronage and walking and cycling. This is further encouraged by the specific design solution proposed, which provides EOT facilities and bicycle parking within Basement Level 01.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Comment: The subject site adjoins land of the same B2 zoning. Nonetheless, the application is supported by an Acoustic Report to ensure that noise levels associated with proposed plant equipment and use of the building are acceptable.

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

1.4.3 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]-[25] that:

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.

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

Ground 1 – Contextually responsive building design

Despite non-compliance with the building height development standard, the proposed development is consistent and compatible with the height of immediately adjoining buildings, other development within the visual catchment of the site and other development subject to the same height provisions.

Specifically, the height of the front parapet aligns with that of adjoining and nearby development, as shown on in the photomontage in Figure 6, over page.



Figure 6: Photomontage of development as seen from South Steyne

Consistent with the provisions of clause 4.2.2.1 of MDCP 2011, consistency with the height of adjacent and adjoining buildings can be relied upon as sufficient environmental planning grounds to justify contravention of the building height development standard.

Although the site is not subject to a number of storeys control, it can be assumed that a three storey development is anticipated within the 10m portion of the site, with a four storey development anticipated within the 12m portion of the site. This assumption is confirmed by nearby and adjoining development that are subject to the same height limits including:

- The four storey street façade at 28-29 South Steyne (12m height limit) (Figure 7),
- The four storey street façade at 30-32 South Steyne (12m height limit) (Figure 7),
- The four storey street façade at 33 South Steyne (12m height limit) (Figure 7),
- The three-five storey building at 43-45 South Steyne (10m-12m height limit) (Figure 8),
- The three-five storey building at 46-47 South Steyne (10m-12m height limit) (Figure 8).

The proposed development is limited to 3 storeys within the portion of the site that is subject to the 10m height limit and 4 storeys within the portion of the site that is subject to the 12m height limit, consistent with the perceived height and scale of nearby and surrounding development.

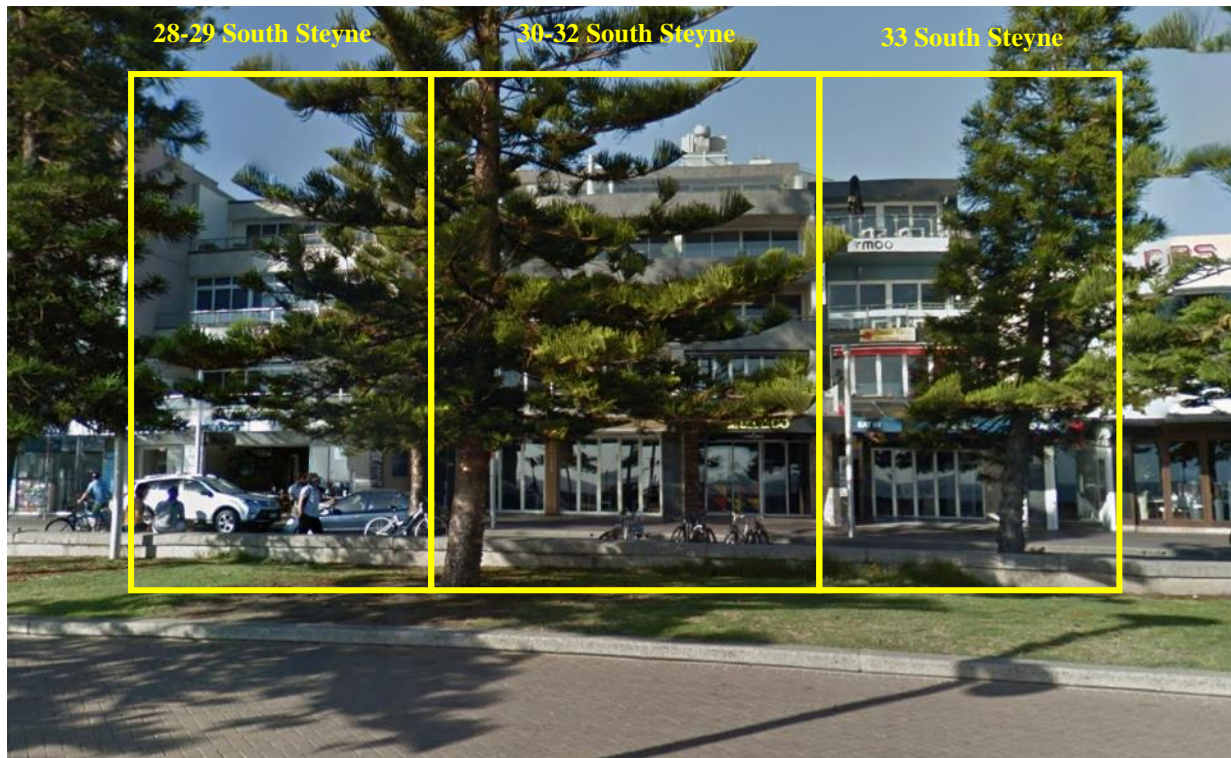


Figure 7: Adjoining & nearby development along South Steyne



Figure 8: Nearby development along South Steyne

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by other existing development within the visual catchment of the site, consistent with Objective 1.3(c) of the EP&A Act.

The proposed development is also compatible with the height of immediately adjacent development along South Steyne and has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of exceptional design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Ground 2 – Consistency with Council's Policies

Front Façade

The proposed breach of the building height plane at the street frontage is consistent with the provisions of clause 4.2.2 of MDCP 2013, which provide that conformity with the prevailing parapet height constitutes sufficient environmental planning grounds to justify a breach to the height plane.

Floor Space Ratio Bonus

The provisions of clause 4.4(2A) of MLEP 2013 prescribe that the floor space ratio of a building on land in the B2 Local Centre zone may exceed the maximum floor space ratio shown on the Floor Space Ratio Map by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises.

Essentially, the LEP provides a floor space bonus, above what is otherwise permitted, on sites within the B2 zone that are to be used primarily for commercial purposes. 100% of the proposed development is to be used for commercial purposes, and as such, the additional floor space is reasonably applied. The proposed development has sought to minimise the visual impact of this additional floor space by providing commercial floor space within the basement.

Strict compliance with the height of buildings development standard would detract from consistency with the specific standards and controls that apply with respect to the specific use proposed at the subject site and discourage the application of the commercial floor space bonus.

In consideration of the objectives of the B2 Local Centre zone, which emphasise the need for and importance of commercial floor space within the zone, the floor space ratio bonus is considered to hold greater determining weight than the height standard, particularly in circumstances where the development is of such an exceptionally high architectural standard and consistent with the prevailing heights of adjoining and nearby development.

Allowing for the height breach in consideration of other the application of other standards and controls is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

Ground 3 – Public Benefit

The proposed development comprises a pedestrian through-site link, that will significantly improve pedestrian connectivity throughout the town centre and the activation of Rialto Lane. The voluntary inclusion of the site link, which is highly endorsed/supported by Council, reduces

the area of floor space at the ground level of the subject site, which has a premium rental return noting the site's location and outlook to Manly Beach.

The provision of additional floor space partially above the height plane is considered to be justified in consideration of the public benefit associated with the incorporation of the through-site link at the ground floor.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4.4 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 proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied 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 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.

1.4.5 Secretary's concurrence

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this 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 floor space ratio variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

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Director