

**PROPOSED DEMOLITION OF EXISTING STRUCTURES AND CONSTRUCTION OF A
RESIDENTIAL FLAT BUILDING
140-142 OCEAN STREET, NARRABEEN**

Clause 4.6 - Exceptions to development standards (Height of buildings)

This Clause 4.6 Submission is prepared in support of a Development Application which seeks approval for the demolition of the site's existing structures followed by the construction of a residential flat building upon the subject site.

This variation is to be read in conjunction with the following documentation:

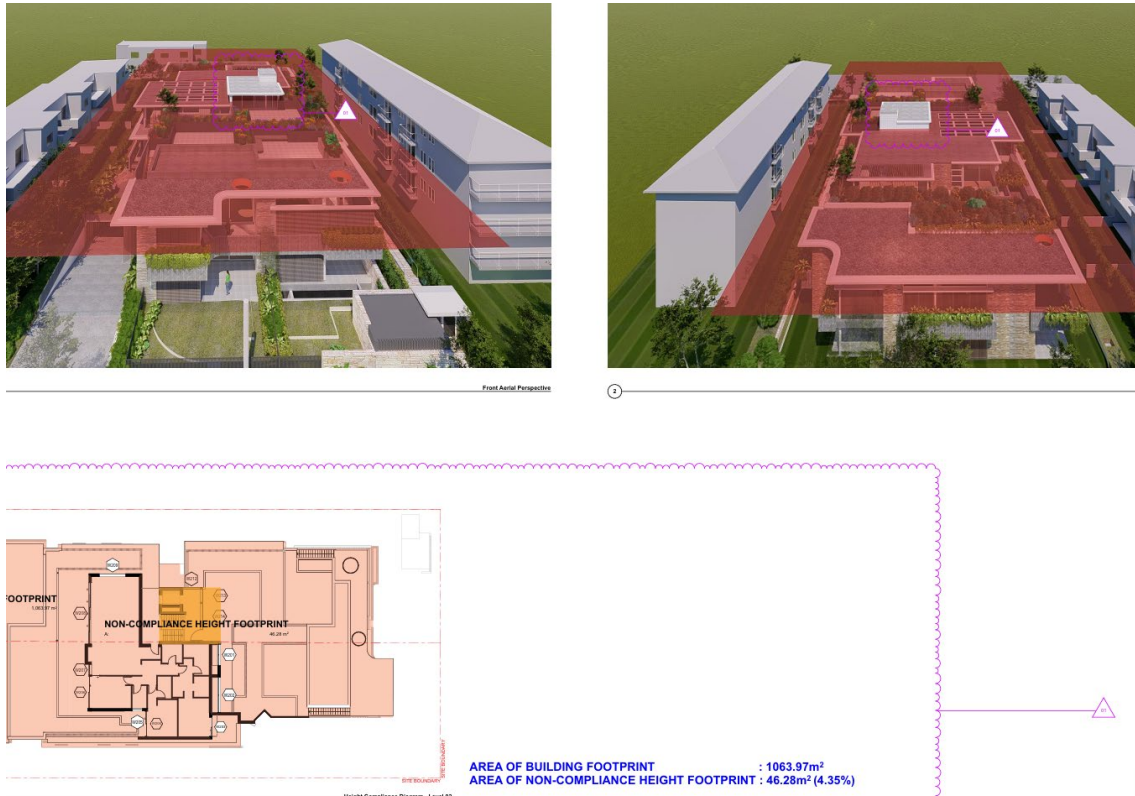
- Detail & Boundary Identification Survey Plan prepared by C & A Surveyors NSW P/L, Ref. No. 16303-21 DET/ID, Sheet 1 of 1, Revision V3 and dated 27/08/2024.
- Architectural Plans, Shadow Diagrams, Sun Eye Views, Schedule of Finishes & 3D Perspectives prepared by PopovBass Architects, Drawing No. 0649-DA100 to 0649-DA122, Revision 02 and dated 25/06/2025.
- Apartment Design Guide (ADG) Compliance Statement prepared by Popov Bass Architects, Issue C and dated 25/06/2025.
- SEPP 65 Report & Design Verification Statement prepared by PopovBass Architects, Issue 2 and dated 25/06/2025.

A variation is sought in respect of compliance with Clause 4.3 - Height of Buildings of the Warringah LEP 2011.

The site is subject to a maximum building height control of 8.5m.

The proposal as detailed on the accompanying plans will result in a maximum building height of 10.75m and which exceeds the requirements of this clause.

The proposed non-compliance relates to the provision of an area of communal open space on the roof and the provision of equitable access to that space. The extent of non-compliance is illustrated on the accompanying height diagrams (Dwg No. 0649-DA116) contained within the architectural plans (extract below).



The exceedance equates to a maximum of 2.25m or 26.47%.

The Height Compliance Diagram - Level 02 (above) identifies that of the total building footprint (1,063.97m²) that only 46.28m² or 4.35% exceeds the 8.5m height of building control.

The following Clause 4.6 variation is provided in support of the proposed height of building non-compliance.

This Clause 4.6 variation has been prepared in accordance with the approach adopted by the Land & Environment Court of NSW in its recent Court decisions.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

1. What are the objectives of Clause 4.6 and is the proposal consistent with them.

The objectives of Clause 4.6(1) of the LEP 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.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

It is also considered in the circumstances, a flexible approach to the application is warranted.

2. Is the standard to be varied a Development Standard to which Clause 4.6 applies.

A “development standard” is defined in Section 4 of the Environmental Planning & Assessment Act as:

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) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.

Clause 4.3 is contained within Part 4 of the Warringah LEP 2011 and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to what matters constitute development standards.

It is also noted that Clause 4.3 does not contain a provision which specifically excludes the application of Clause 4.6 and vice a versa.

On this basis it is considered that Clause 4.3 is a development standard for which Clause 4.6 applies.

3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under the Warringah Local Environmental Plan 2011):

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that-*
- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravention of the development standard.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The first justification is applicable in this instance.

The following assessment of the proposal is provided against the objectives of Clause 4.3 of the Warringah LEP 2011.

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

The proposal as detailed on the accompanying plans will result in a part two and three storey building having a maximum building height of 10.75m.

The proposal is surrounded by a number of properties which currently support three storey development and which would exceed the 8.5m height of building control. This includes the adjacent development at 144 Ocean Street.

The proposal has been designed to present as two storeys from the street and adjoining properties and in my view is compatible with the height and scale of nearby development.

Reference is made to the accompanying SEPP 65 Report & Design Verification Statement prepared by PopovBass Architects which states the following in relation to ADG Principle 2 - Built Form and Scale:

- *The proposal achieves the bulk and scale of the desired character of the street through its well-proportioned presentation to the street, with a two-storey façade set back from the sidewalk that is 1.6m below the maximum 8.5m height at the front setback.*
- *The scale of the proposal is well below the height of the existing neighbour to the north and uses landscaping elements such as partial open fencing, native vegetation and masonry so that it does not dominate the streetscape.*

The proposal is therefore considered to be compliant with this objective.

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

The proposal as detailed on the accompanying architectural plans is unlikely to result in any adverse visual impacts or loss of views, privacy and solar access.

Reference is made to the accompanying SEPP 65 Report & Design Verification Statement prepared by PopovBass Architects which states the following in relation to ADG Principle 2 - Built Form and Scale:

- *The architectural expression of the angled feature planter creates visual interest to the street and provides an opportunity for more private areas of the front-facing apartments, to contrast with the open balcony and front garden space.*
- *The building is well articulated across the façade and all other elevations in a manner that reduces its bulk and scale where appropriate to maximise sunlight and ventilation for residents.*
- *Internal amenity and outlook towards the water is provided in both directions to residents where possible, without impacting the views of neighbours.*

Furthermore, the proposal is provided with appropriate privacy screening and landscaping to minimise any potential loss of privacy.

Reference is also made to the accompanying Shadow Diagrams which demonstrate that the proposal will result in some additional overshadowing of the adjoining property to the south between 9AM and 3PM. It is considered that the overshadowing of the adjoining property is an unfortunate and unavoidable consequence arising from the zoning of the land in combination with the orientation of the prevailing subdivision pattern and is consistent with that which would have been anticipated by the enabling legislation.

View from the sun diagrams have been prepared in support of the proposal. Those diagrams indicate that the proposal complies with the ADG objectives as 72.7% of the apartments receive a minimum of 2 hours of direct sun to living rooms and private open space.

The proposal is therefore considered to be compliant with this objective.

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

The proposal does not have any adverse impacts on the scenic quality of Warringah's coastal and bush environments.

The proposal is therefore considered to be compliant with this objective.

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

The proposal has been designed to present as two storeys from the street and adjoining properties and in my view is compatible with the height and scale of nearby development. The majority of the proposal complies with the maximum building height requirement with the area of non-compliance considered to be minor and is not considered to be a visually dominant element when viewed from public places.

Reference is also made to the accompanying SEPP 65 Report & Design Verification Statement prepared by PopovBass Architects which states the following in relation to ADG Principle 9 - Aesthetics:

- *The scale, mass and materiality take into consideration both the predominant existing character of the streetscape as well as the desired future character of the area.*

The proposal is therefore considered to be compliant with this objective.

On this basis it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

4. Are there sufficient environmental planning grounds to justify contravening the development standard.

Consistent with the findings of the Court in *Initial Action P/L v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC an applicant is required to demonstrate in writing that there are sufficient environmental planning grounds to justify the variation.

In Initial Action at [24], Preston CJ stated, that 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”.

Further he stated,

“... 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)(i) that the written request has adequately addressed this matter”.

In order to determine environmental planning grounds relevant to the non-compliance it is often accepted to relate the departure to the objects of the Act as set out at Section 1.3 - Objects of the Act.

The following objects of the Act are considered to be relevant to the proposal.

- (a)
- (b)
- (c) *to promote the orderly and economic use and development of land,*
- (d)
- (e)
- (f)
- (g) *to promote good design and amenity of the built environment,*
- (h)
- (i)
- (j)

Relevant to the proposal the following submission is provided in relation to the question as to whether there are sufficient environmental planning grounds to justify the non-compliance.

What is the aspect or element of the development that contravenes the development standard

The proposal as detailed on the accompanying plans will result in a maximum building height of 10.75m and which exceeds the requirements of this clause.

The proposed non-compliance relates to the provision of an area of communal open space on the roof and the provision of equitable access to that space.

The exceedance equates to a maximum of 2.25m or 26.47%.

The Height Compliance Diagram - Level 02 (above) identifies that of the total building footprint (1,063.97m²) that only 46.28m² or 4.35% exceeds the 8.5m height of building control.

What are the environmental grounds associated with the departure

It is my opinion the environmental planning grounds associated with the proposal are as follows:

- The proposal relates to the provision of an area of communal open space on the roof and the provision of equitable access to that space.
- The communal open space will ensure that all residents have access to an outdoor area with high levels of amenity and solar access.
- The proposal will provide for a total roof area of 1,063.97m² and of which only 46.28m² or 4.35% exceeds the 8.5m height of building control.
- The proposal will therefore result in a built form which is consistent with the predominant height of development located within the visual catchment of the site.



A photomontage showing the consistency of the proposal with the adjoining development to the north and south

- The proposed building height variation do not result in a loss of view to an adjoining property.

In addition to the above it is submitted that:

- (i) the development despite the exceedance of the height control does not result in any significant adverse impact on the surrounding land (*Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34]).
- (ii) The development, despite the exceedance of the building height control achieves the objectives of the EPA Act.

Are the environmental planning grounds sufficient to justify contravening the development standard

It is my opinion for the reasons as set out within this submission that there are sufficient environmental planning grounds to justify contravening the development standard.

It is my opinion based upon the above that the proposed non-compliance will:

1. *promote the orderly and economic use and development of land, and*
2. *promote good design and amenity of the built environment.*

It is therefore my opinion based upon the above that this submission has demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by Clause 4.6(3)(b) of the LEP.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the maximum height of building control as required by Clause 4.3 of the Warringah LEP 2011 is appropriate in this instance.



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