

23 Fisher Road, Dee Why

Clause 4.6 variation residential flat buildings in Zone B4 Mixed Use

On behalf of
Rose Group Pty Ltd
August 2018



1 Introduction

This Clause 4.6 Variation Request relates to the Development Application (**DA**) for 23 Fisher Road, Dee Why (**subject site**), which proposes three residential flat buildings including eight townhouses and a commercial component. This Clause 4.6 variation request relates to ground-floor, land use standards for residential flat buildings in Zone B4 Mixed Use (Clause 6.7) in the Warringah Local Environmental Plan 2011 (WLEP 2011).

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

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

- Satisfies the objectives of the B4 Mixed Use zone under WLEP2011 (there are no objectives for Clause 6.7);
- Is consistent with the applicable and relevant State and regional planning policies;
- Has sufficient environmental planning grounds to permit the variation; and
- Provides a better outcome for the site and its surrounding uses and is therefore in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the WLEP 2011.

2 Clause 4.6 Exceptions to Development Standards

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

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

Clause 4.6 enables a variation to the ground-floor use standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6. In particular, it is noted that Clause 4.6(8) does not include Clause 6.7 as a provision which cannot be 'contravened'.

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

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a));

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

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

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

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

Clause 4.6 of the WLEP 2011 enables an exception to the development standard in clause 6.7 in order to permit residential dwellings at ground level upon consideration of a written request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the WLEP 2011 reads as follows:

Clause 4.6 Exceptions to development standards

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

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

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

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

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

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

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

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

(a) the consent authority is satisfied that:

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

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

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

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

As outlined above, Clause 4.6 can only be applied to a 'development standard'. As such, the question of whether Clause 6.7 of the WLEP2011 acts as a 'permissibility / prohibition' provision, or whether it is a Development Standard has been considered.

Clause 6.7 of the WLEP 2011 reads:

*Development consent **must not** (emphasis added) be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level.*

There have been a number of recent Court judgements addressing this issue in recent years that have demonstrated that provisions utilising the above wording of '**must not grant consent**' can be considered as development standards.

These cases have included:

- *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153; and
- *Agostino v Penrith City Council* (2010) 172 LGERA 380.

Mecone has also acted as the planner recently on behalf of an affordable housing provider who obtained a variation to a development standard under the Affordable Rental Housing SEPP 2009, which was similarly worded to the subject clause. The recent application for a youth crisis accommodation premises at 26 City Road, Chippendale (D/2017/1552) required 15 motorcycle parking spaces under Clause 30(1) of the Affordable Rental Housing SEPP 2009.

Clause 30 of the ARH 2009 reads:

(1) A consent authority **must not** (emphasis added) consent to development to which this Division applies unless it is satisfied of each of the following:

(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.

Through the application process, the proposal only included 3 motorcycle spaces and a variation under Clause 4.6 of the SLEP2012 was requested and granted by the Local Planning Panel – who agreed that the Clause acted as a development standard rather than a prohibition.

"Development standards" is defined in the Environmental Planning and Assessment Act 1979 and includes a regulation in relation to carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any developments. There is opportunity to vary development standards

under certain circumstances; namely that there are sufficient environmental planning grounds to justify contravening the development standard.

Fundamentally, this Clause 4.6 Variation Request will demonstrate that non-compliance with Clause 6.7 of the WLEP2011 will provide a stronger planning outcome and that there are sufficient environmental planning grounds to justify the contravention and the non-compliance with the subject standard. Further, the request shows that the provision acts as a standard that is capable of being varied, rather than a prohibition.

3 The Development Standard to be varied

The development standard to be varied is Clause 6.7 Residential flat buildings in Zone B4 Mixed Use. The Clause reads 'development consent must not be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level'.

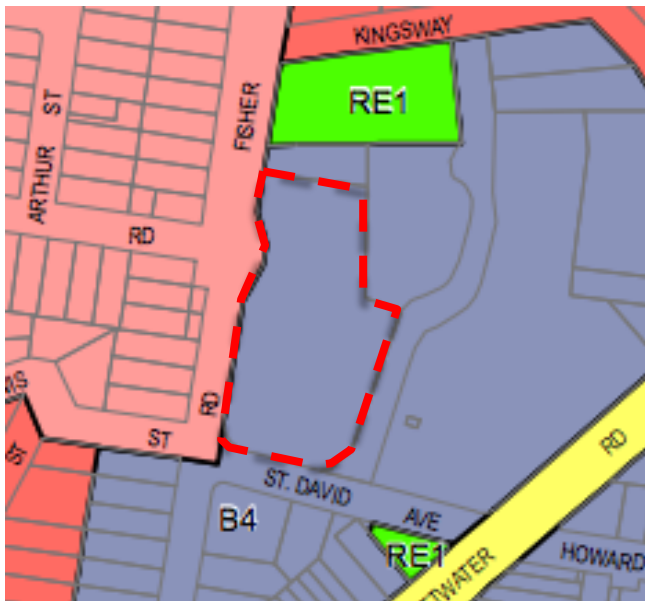


Figure 1 WLEP 2011 Zoning Map Extract

Source: NSW Legislation

4 Extent of Variation to the Development Standard

The proposed development includes three residential flat buildings including townhouses in front of Building A and a commercial component in Building C. The proposed development will vary the Clause 6.7 control by permitting the eight (8) town houses at the ground floor level of Building A, fronting towards the northern boundary of the site with vehicular access from Fisher Road. Due to the sloping nature of the site, the finished floor level of the lowest residential dwellings in the remaining buildings are elevated above ground level and accessed off shared building entrances, and therefore there are no other dwellings located directly on ground level for the remainder of the site.



Figure 2 Proposed basement parking plan (left) and Level 1 plan (right)

Source: Rose Architectural Design

5 Objectives of the Standard

There are no stated objectives of the standard. However, it is considered that the purpose of Clause 6.7 is to ensure that the Dee Why Town Centre maintains active frontages and a mix of uses.

6 Objectives of the zone

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

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.*
- *To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.*

- *To promote a land use pattern that is characterized by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.*
- *To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.*

7 Assessment

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

Compliance with the restriction of dwellings on ground floor level of residential flat buildings in Zone B4 Mixed Use is unreasonable and unnecessary given the following circumstances of this case:

- While zoned B4 Mixed Use, the site is located in the far corner of the Dee Why Town Centre and is opposite the R2 Low Density Residential Zone to the east and nearby to RE1 Public Recreation zone to the north. Due to the transitional nature of the site's location, the mix of ground floor land uses on the site including residential uses to the north and commercial space towards the Town Centre to the east provides a better integrated built form and land use mix to respond to the surrounding context;
- The delivery of ground floor level non-residential uses across the entire site would be disadvantaged and unsuccessful. The site is located on the fringe of the Dee Why Town Centre, distanced from the main commercial and retail activity along Pittwater Road, and located behind the Northern Beaches Council offices and facilities. Additionally, the significantly elevated nature of the site and steep sloping discourages passive foot traffic past and through the site;
- The historic use of the site has been for residential purposes, and it is noted that the existing development on site provides residential uses at the ground floor level;
- The previous Stage 1 development consent granted for the site in 2012 (DA2011/1274) included residential flat buildings with dwellings on the ground floor level either at street level or elevated by the partially exposed basement parking. The proposed development offers a better outcome for ground floor level plans to what is approved by elevating all units above ground level in a uniform design with shared building entrance points, and sufficient landscaping to hide any exposed blank walls (See figures below);

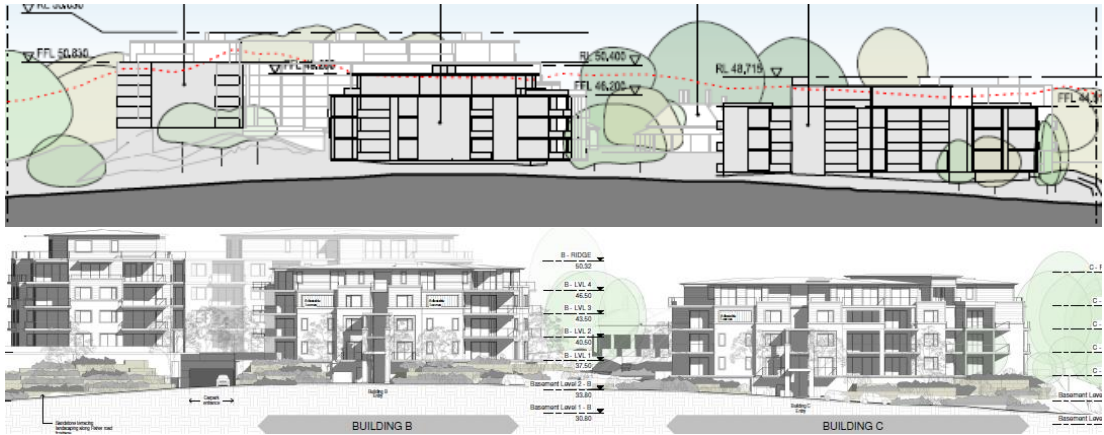


Figure 3 Approved Fisher Road elevation (above) and proposed Fisher Road elevation with sandstone terracing landscaping (below)

Source: HASSELL and Rose Architectural Design



Figure 4 Perspective of proposed Fisher Road western frontage demonstrating apartments fronting Fisher Road are elevated above ground level

Source: Rose Architectural Design

- The portion of building which provides townhouses at ground floor level is oriented away from the street and towards the northern site boundary with surrounding landscaping, and therefore is not directly oriented towards the public domain (see figure below);



Figure 5 Photomontage of proposed Fisher Road northern frontage

Source: *Rose Architectural Design*

- Dwellings at ground level are an established development pattern along Fisher Road. The properties directly north of the site on the same side of Fisher Road include a residential flat building with ground floor dwellings at No. 25 Fisher Road. Furthermore, residential flat building development at 20-34 Kingway, Dee Why also has ground floor residential uses.
- The proposal will not significantly impact upon the amenity of the adjoining neighbours with regard to privacy, solar access, or security;
- The proposed development is nevertheless consistent with the objectives of the B4 Mixed Use zone as described below and delivers a better public outcome than a fully compliant scheme with non-residential uses across the ground floor level;
- The contravention of providing non-residential uses at ground floor level in the B4 Mixed Use zone does not raise any matter of State or regional planning significance; and
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

Therefore, strict compliance with the restriction of dwellings at ground floor level would be unreasonable and unnecessary in this circumstance.

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

There are sufficient environmental planning grounds for the contravention to the ground level use as follows:

- The development will create a 'strong planning outcome' given it provides appropriate land uses at ground floor level that respond to the transitional location of the site between R2 Low Density Residential and B4 Mixed Use. The proposal will allow for the orderly and economic use of the land by providing a commercial

component in the south eastern corner of the site relating to the Town Centre, and residential uses towards the west.

- To provide non-residential uses across the ground floor level of the entire site would result in isolated tenancies separated from the main commercial and retail centre along Pittwater Road by distance and topography, and would respond poorly to the established residential character along Fisher Road;
- Challenges may arise in finding long term commercial/retail tenants for commercial development in the north of the site due to its isolated location and orientation away from the main centre. Vacant and unused tenancy spaces at ground level will provide a poor outlook to the street and negatively impact on safety, security and visual quality of the overall site for vehicles, pedestrians and residents passing by. The residential uses proposed will provide greater visual interest and passive surveillance to increase safety and security;
- Irrespective of location on the site, the proposal includes the land uses envisaged in the zone, being commercial and residential mix, in a unique layout which responds best to the site context;
- The proposal provides further housing for the locality which is highly accessible to public transport and employment opportunities, and will support the activation and growth of the Dee Why Town Centre;
- Given the above, strict compliance with restriction of dwellings on ground floor level would hinder the attainment of the objectives of the Act, and would not result in the orderly and economic use and development of land.

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

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

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

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

a) the objectives of the particular standard

There are no objectives outlined for the particular development standard (Clause 6.7 Residential flat buildings in Zone B4 Mixed Use).

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

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

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

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

The proposed development is located on the north-west corner fringe of the Dee Why Town Centre. Commercial space has been provided in the most suitable location on site (south-east corner oriented towards the civic and town centre) to assist in providing a transition between the local centre and residential zones beyond Fisher Road. Future tenants and employees will benefit from the walkable distance to the town centre's services and facilities and various bus services along Pittwater Road, less than 100 metres away to the east.

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

The proposed development allows for modern, high quality development to be introduced in the Dee Why Town Centre and creates additional employment space and housing stock which will benefit from and contribute to the centre's growth. The proposed layout plan allows for appropriate setbacks, height, and building articulation which presents well to the street with significant landscaping to maintain the natural features of the site. The proposed mix of land uses allows for an appropriate transition between the residential areas to the north west of the site and the mixed use Dee Why Town centre to the south east.

The proposed development reinforces the role of Dee Why as a major centre in the sub-region through the provision of residential development which transitions appropriately into the adjoining low density residential area to the west and is in close proximity to the civic centre, community facilities, employment opportunities and public transport.

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

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

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

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

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

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

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

Furthermore, there is no significant benefit in maintaining the non-residential uses on the ground level of the site given the proposal facilitates a significantly better planning outcome with improved land use transition, and amenity in the form of additional housing, landscaping. The contravention results in no significant adverse environmental impacts but rather a better planning outcome.

8 Any matters of significance for State or regional environmental planning

The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Greater Sydney Region Plan ('the 30-minute city') and North District Plans, which are a matter of regional environmental planning significance. By contrast, the contravention of the restriction to dwellings at ground floor level in Zone B4 Mixed Use does not raise any matter of State or regional planning significance.

9 No Public benefit in maintaining the development standard

By way of summary, there is no public benefit in maintaining the standard in Clause 6.7 due to the fact that the proposed development is consistent with the objectives of the B4 Mixed Use zone and:

- (a) Will include a mixture of uses including commercial tenancies fronting towards the Town Centre to the south-east, with townhouse dwellings fronting the residential areas to the north-west, and residential units above – which is a more appropriate transitional response;
- (b) Is located on the north-west corner fringe of the Dee Why Town Centre. Commercial office space has been provided in the most suitable location on site (south-east corner oriented towards the central mixed use area) to assist in providing a transition between the local centre and residential zones beyond Fisher Road. Future tenants and employees will benefit from the walkable distance to the town centre's services and facilities and various bus services along Pittwater Road.
- (c) Allows for modern, high quality development to be introduced in the Dee Why Town Centre, and creates additional employment space and housing stock, which will benefit from and contribute to the centre's growth. The proposed layout plan allows for appropriate setbacks, height, and building articulation which presents well to the street with significant landscaping to maintain the natural features of the site. The proposed mix of land uses allows for an appropriate transition between the residential areas to the north west of the site and the mixed use Dee Why Town centre to the south east.
- (d) Is relatively detached from the main commercial and retail activity along Pittwater Road due to topography and distance. Therefore, completely non-

residential uses at ground floor is not considered to be appropriate for the subject site, which is able to better integrate with the surrounding residential built form by providing dwellings at ground floor level. The combination of residential and commercial at the ground level on the site provides an appropriate transition on the fringe of the Dee Why Town Centre and enables a better planning outcome for the site than a compliant scheme.

10 Conclusion to variation to development standard

This is a written request for an exception to ground floor level requirements for residential flat buildings in Zone B4 Mixed Use under clause 4.6 of the WLEP 2011. It justifies the contravention to the standard restricting dwellings at the ground floor level of residential flat buildings in Zone B4 Mixed Use under clause 6.7 of the WLEP 2011, and in particular demonstrates that the proposal provides a significantly better planning outcome (compared to compliant non-residential uses at ground floor level) with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Compliance with the residential flat buildings in Zone B4 Mixed Use standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention;
- It is in the public interest in being consistent with the objectives of the zone; and
- The delivery of additional housing in local centres close to employment and transport infrastructure is consistent with the Greater Sydney Commission's Greater Sydney Region Plan and District Plans ('the 30-minute city'), which are matters of regional environmental planning significance.

Pursuant to Clause 4.6(4)(a)(i) and 4.6(4)(b), and the assumed concurrence notice made by the Secretary of the Department of Planning and Environment on 21 February 2018, concurrence for the contravention of the development standard is assumed given the variation relates to a non-numerical development standard to be determined by the Local Planning Panel.



Suite 1204B, Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au

mecone.com.au