

11th July 2023

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

Attention: Maxwell Duncan – Acting Manager Development Assessments

Dear Mr Duncan,

Development Application DA2022/1985
Issues response/ addendum Statement of Environmental Effects
Demolition works and construction of a residential flat building
27 Wayne Street, Freshwater

Reference is made to Council's issues correspondence of 16th March 2023 in which a number of issues were raised in relation to the application as submitted. This submission represents a considered response to the issues raised and is to be read in conjunction with the following amended/ updated documentation:

- Amended Architectural plans, Revision 3, prepared by Fuse Architects,
- Amended Landscape plans, Revision E, prepared by Taylor Brammer,
- Amended Stormwater Management Plans, Revision B, repaired by ACOR Consultants,
- Updated Traffic and Parking Assessment Report, dated 24th June 2023, Prepared by CJP Consulting Engineers,
- Updated Access Report, Issue C, prepared by Vista Access Architects,
- Amended Waste Management Plan, dated June 2023, prepared by Dickens Solutions Pty Limited,
- Addendum arborist report prepared by NSW Trees.
- Amended QS report prepared by Newton Fisher Group,
- Updated BASIX Certificate, and
- Updated clause 4.6 variation request - Height of buildings (Attachment 1).

The proposal results in a reduction in dwelling yield from 6 to 4 with the amendments summarised as follows:

Basement Level

- The reconfiguration of the basement to provide additional deep soil landscaping in the north-western corner of the property and a reduction in car parking from 12 to 9 spaces reflecting the reduction in dwelling yield from 5 to 4 dwellings.

- The amended basement also incorporates waste and bicycle storage with lift to the levels above.

Ground Floor Level

- This floor plate has been reconfigured to accommodate the entry foyer and a single level 3 bedroom apartment with north facing private open space.
- The building façade detailing and fenestration location and design have been amended to reflect the internal floor layouts.

Level 01 Plan

- This floor plate has been reconfigured to accommodate a single level three-bedroom apartment with north facing balcony.

Level 02 Plan

- This floor plate has been reconfigured to accommodate a single level three-bedroom apartment with north facing balcony.

Level 03 Plan

- This floor plate has been reconfigured to accommodate a single level three-bedroom apartment with north facing balcony.
- A communal open space area has been provided at this level to the southern side of the circulation core.

We respond to the issues raised as follows.

1. Building height

Response: The reduction in dwelling yield and the provision of single level floor plates has facilitated a reduction in overall building height and associated massing along the southern edge of the development consistent with the outcome required by Council and DSAP. The image over page demonstrates that the upper level will not be readily discernible as viewed from the south of the site with the southern façade of the development as viewed from the south fully compliant with the building height standard.

This submission is accompanied by an updated clause 4.6 variation request demonstrating that strict compliance is unreasonable and unnecessary having regard to the developments ability to satisfy the objectives of the zone and the objectives of the standard notwithstanding the non-compliance proposed. There are sufficient environmental planning grounds to justify the variation with the clause 4.6 variation request well-founded.

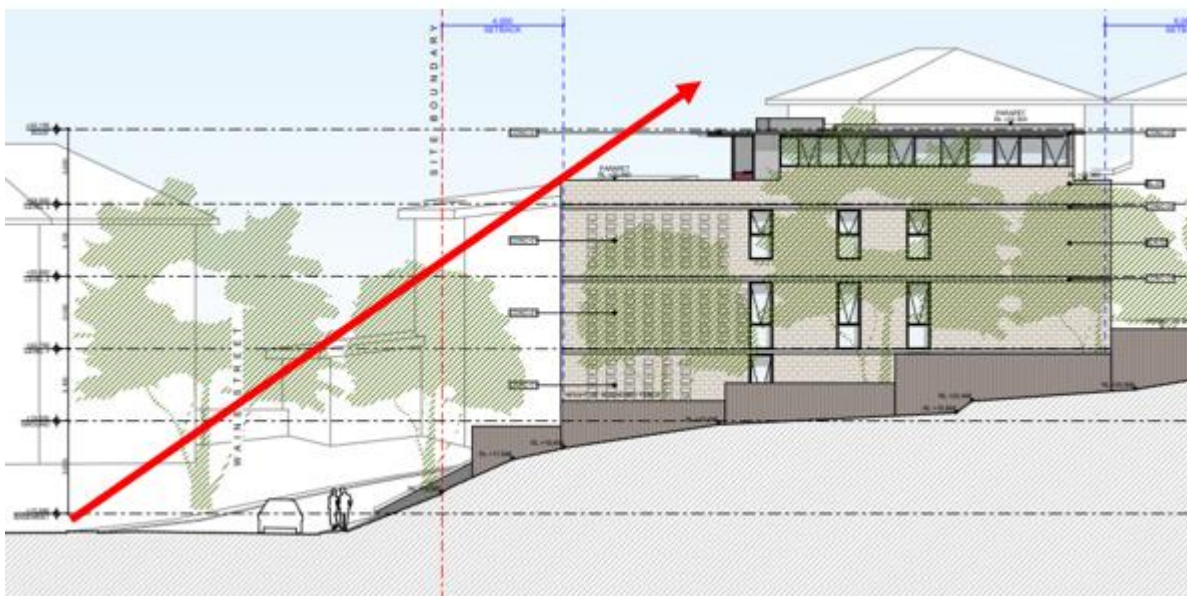


Figure 1 - Plan extract showing sightlines from Wayne Street to the south of the site.

2. Number of storeys

Response: The image at Figure 1 above demonstrates that whilst non-compliant with the storeys control that the building presents as a predominantly 3 storey stepped building form as viewed from Wayne Street given the unique topographic characteristics of the site relative to the levels established along Wayne Street and its location on a bend in the road. The upper level is a recessive element of the building both in terms of setbacks and the use of lightweight materials. We rely on the clause 4.6 variation request to demonstrate that the height of the development is acceptable have regard to the consistency of the proposed building height with that established by development within the site's visual catchment.

The amended floor plan layout provides exceptional amenity to each of the 4 apartments with 100% of apartments receiving exceptional levels of solar access throughout the day and 100% of apartments naturally cross ventilated. The building height breaching elements will not result in non-compliant or unacceptable shadowing impact to the eastern adjoining residential flat building or any other surrounding residential development. The apartments have been designed such that there are no direct overlooking opportunities into adjoining residential properties with the eastern façade appropriately detailed to provide an appropriate aesthetic presentation as viewed from the adjoining apartment building to the east.

Strict compliance with the storeys control has been found to be unreasonable and unnecessary under the circumstances.

3. Privacy

Response: The single level floor plates have been designed to minimise east facing fenestration to the extent that the only east facing windows are associated with secondary service/ circulation or home office areas. These windows are appropriately offset from those existing in the residential flat building to the east with further privacy attenuation able to be conditioned should Council consider additional privacy attenuation as being appropriate to certain windows.

4. Landscaping

Response: The subject site is constrained by its size and geometry. That said, the plans have been amended to provide additional deep soil opportunity around the perimeter of the site with a total landscaped area of 204 m² representing 36.7% of the site area. The amended landscape plans demonstrate that appropriate landscaping is able to be provided around the perimeter of the site including on slab planting adjacent to the eastern boundary. The proposed on-site landscaping is augmented by the significant street tree plantings adjacent to the Wayne Street frontage such that the development will sit comfortably within a landscaped setting.

Under such circumstances, strict compliance with the numerical control is unreasonable and unnecessary.

5. Built form non-compliance

Response: Strict compliance with the setback provisions would prevent the orderly and economic development of the land given its constrained size and geometry. That said, the plans have been amended to provide increased front and side boundary setbacks where possible with the eastern façade of the development amended to reduce its visual bulk as viewed from the east. An appropriate spatial relationship is maintained between the proposed development and the residential flat buildings to the east with the accompanying landscape plans clearly demonstrating that the eastern setback of the development is able to be landscaped to soften and screen the eastern façade and provide a visual buffer between adjoining development.

We rely on the additional justification outlined in the original Statement of Environmental Effects in relation to variations to the side boundary envelope and side boundary/ front boundary setback controls. Such variations succeed pursuant to section 4.15(3A) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

6. Adaptable units

Response: The accompanying access report prepared by Vista Access Architects confirms that all dwellings incorporate silver level universal design features.

7. External Referral - Design and Sustainability Advisory Panel

Response: We respond to the DSAP minutes as follows.

Strategic context, urban context: Surrounding area character

The architectural plans have been amended to reduce the visual bulk of the building as viewed from the north and south of the site as recommended. The amended landscape plans demonstrate that appropriate landscaping is able to be provided around the perimeter of the site including on slab planting adjacent to the eastern boundary. The proposed on-site landscaping is augmented by the significant street tree plantings adjacent to the Wayne Street frontage such that the development will sit comfortably within a landscaped setting.

Scale, built form and articulation

The building has been reduced to 4 storeys on the southern street frontage as recommended with roof top communal open space provided at the southern end of the upper level. The communal open space compensates for the non-compliant landscaped open space area as endorsed by DSAP.

Access, vehicular movement and car parking

Direct stair access to the basement car parking area has been provided as recommended.

Landscape

The basement footprint has been reduced in the north-western corner of the site. The accompanying addendum arboreal report reiterates their previous position that the existing *Ficus rubiginosa* should be removed as it is a retrenching tree of poor vitality and not a suitable candidate for long-term retention. The landscape plan nominates this location of the site is suitable for a featured canopy tree planting which will appropriately compensate for the removal of this street.

The architectural plans have been amended to reduce the visual bulk of the building as viewed from the north and south of the site as recommended. The amended landscape plans demonstrate that appropriate landscaping is able to be provided around the perimeter of the site including on slab planting adjacent to the eastern boundary.

Amenity

A Landscape communal open space has been provided to the roof top at Level 3 as recommended by DSAP. Sheltered stair access to the car park has also been provided with natural light and ventilation opportunities to bathrooms and kitchens adjacent to exterior walls maximised. As previously indicated, the single level floor plates have been designed to minimise east facing fenestration to the extent that the only east facing windows are associated with secondary service/ circulation or home office areas. These windows are appropriately offset from those existing in the residential flat building to the east with further privacy attenuation able to be conditioned should Council consider additional privacy attenuation as being appropriate to certain windows.

Façade treatment/Aesthetics

The recommended façade treatments have been integrated into the amended plans.

Sustainability

This submission is accompanied by an updated BASIX Certificate.

8. Internal Referral - Landscape Officer

Response: We rely on the amended landscape plans to demonstrate that the proposal satisfies the clause D1 Landscaped Open Space and Bushland Setting provisions of WDCP notwithstanding the non-compliance with the 50% landscaped area requirement. Deep soil landscape opportunity has been maximised given the need to realise the orderly and economic use and development of the land. As previously indicated, the amended landscape plans demonstrate that appropriate landscaping is able to be provided around the perimeter of the site including on slab planting adjacent to the eastern boundary. The proposed on-site landscaping is augmented by the significant street tree plantings adjacent to the Wayne Street frontage such that the development will sit comfortably within a landscaped setting.

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 Request (Height of buildings)

1 Introduction

This updated clause 4.6 variation request has been prepared in relation to amended Architectural plans, Revision 3, prepared by Fuse Architects,

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.

2 Warringah Local Environmental Plan 2011

2.1 Clause 4.3 - Height of buildings

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

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Ground level (existing) is defined as follows:

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

The upper level of the development breaches the building height standard by a variable degree as nominated on the building height blanket plan extract at Figure 1 over page. proposed development reaches a maximum height of 12.67m, representative of a 1.67m or a 15% variation of the 11m building height development standard. The extent of non-compliance is depicted in the Height Plane Diagram in Figure 1. In this regard, the north-eastern corner of the roof form breaches the height standard by 0.08mm (0.7%), the north-western corner of the roof form breaches the height standard by 500mm (4.5%), the south-western corner of the roof form breaches the height standard by 1.3 metres (11.8%) and the south-eastern corner of the roof form breaches the height standard by 1.13 metres (10.2%).

The lift overrun breaches the height standard by a maximum of 1.67 metres or 15%.

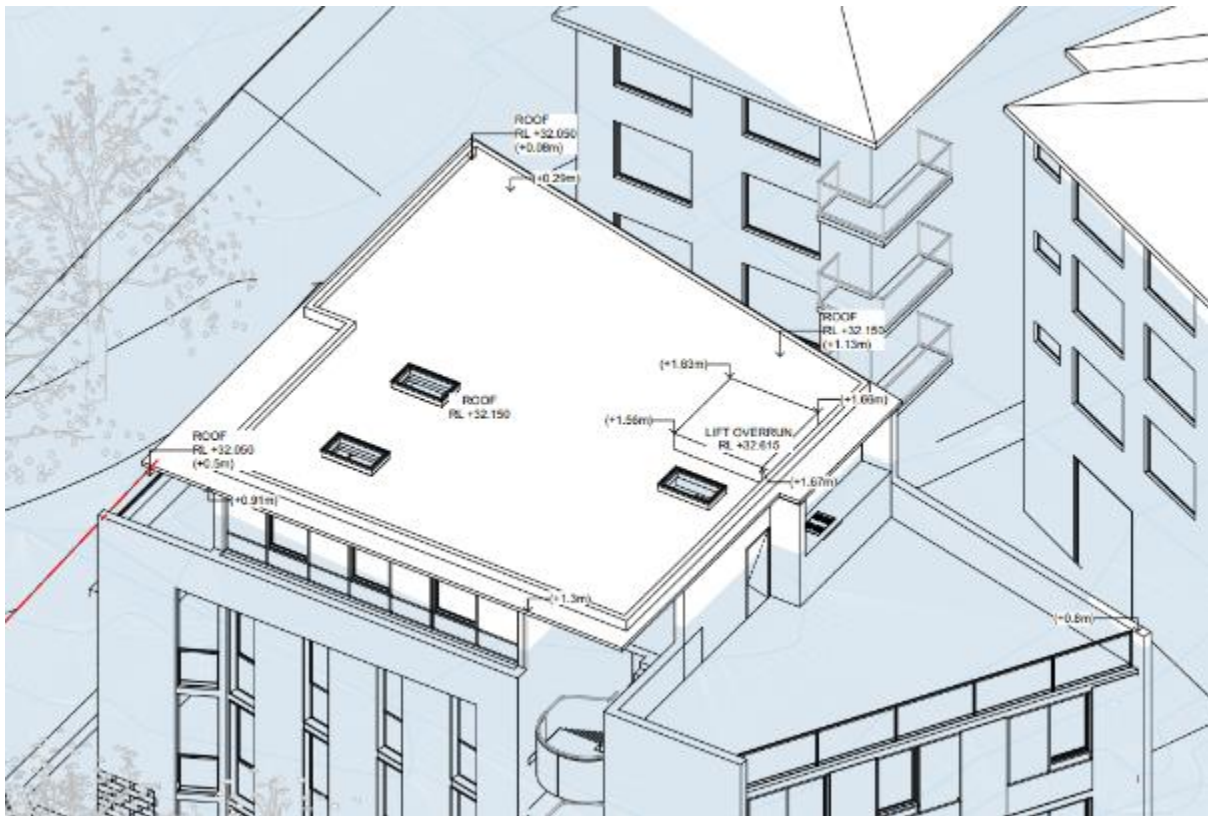


Figure 1: Height blanket diagram

2.2 Clause 4.6 – Exceptions to development standards

Clause 4.6(1) of WLEP 2011 provides:

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

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

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

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".

If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

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

Clause 4.6(2) of WLEP 2011 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 clause 4.3 of WLEP 2011 Height of Buildings Development Standard.

Clause 4.6(3) of WLEP 2011 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 height of buildings provision at 4.3 of WLEP 2011 which specifies a maximum building height. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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

Clause 4.6(4) of WLEP 2011 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% or non-numerical development standards.

Clause 4.6(5), which relates to matters that must be considered by the Planning Secretary 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 WLEP 2011 from the operation of clause 4.6.

3.0 Relevant Case Law

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

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 WLEP 2011 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 WLEP 2011 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of WLEP 2011?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP 2011 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 WLEP 2011 prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 of WLEP 2011 is a development standard.

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

Consistency with objectives of the height of buildings standard

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

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

Response: The findings of Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 are relevant in this instance:

There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

The proposed development will present as a 3-4 storey residential flat building in amongst a raft of other existing 3 and 4 storey residential flat buildings. Examples of other 3-4 storey residential flat buildings within the vicinity of the site are demonstrated in Figures 2-5, over the page.

The context of the proposed development in amongst other 3 and 4 storey residential flat buildings is also highlighted in the detailed site and street analysis prepared by Fuse Architects (Sheets DA003, DA005 and DA006 in the architectural plan set).

Despite the proposed height non-compliance, the development is compatible with the 3-4 storey height of nearby development that is subject to the same 11m height limit, height objectives and zone objectives. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the height of the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context or as viewed from the streetscape, as demonstrated in the montages provided to support the application.



Figure 2 – Adjoining 4 storey residential flat building to the east
(low side of the street) at 25 Waine Street



Figure 3 – Nearby four and five storey residential flat building to the east
(low side of the street) at 19-23 Waine Street



Figure 4 – Four storey residential flat buildings to the south at 26-30 and 32 Waine Street



Figure 5 – Three and four storey residential flat buildings to the east (high side of Waine Street) at 25 and 29-33 Waine Street

The compatibility of the height and scale of the proposed development with the existing streetscape is also highlighted on the accompanying elevations and sections by Fuse Architects. The proposed development is not only appropriately responsive to the scale with regard to the number of storeys of the development, but also relative to the ridgelines of surrounding and nearby buildings, sitting below the ridgelines of the four storey development immediately to the east at 25 Waine Street, as shown in Figure 6.



Figure 6 – Extract of Southern Elevation

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

Response: The maximum non-compliance, being 1.67m, occurs at the south-western corner of the proposed lift overrun. The non-compliance associated with the primary roof form, ranges across the site up to a maximum of 1.3m, with the areas of greater non-compliance generally located centrally on the site.

Upon review of the context of the site and the architectural plans, it is unlikely that any non-conforming element will result in any unreasonable impacts upon views from nearby or adjoining properties. With respect to the impact upon district views available from the west-facing dwellings at 25 Waine Street it is important to note that the resultant impact to views generally arises as a consequence of development below the height plane, and it is unlikely that strict compliance with the height plane would actively preserve these views.

As evident in the solar access diagrams provided to support the application (Attachment 1), the non-conforming elements of the proposed development do not attribute to any unreasonable overshadowing of adjoining dwellings. Furthermore, the non-compliances do not adversely impact upon the amenity of adjoining building with regards to privacy.

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

Response: The resultant development will be screened by landscaping proposed within the site and established landscaping within the adjoining road reserve. The proposed development is a superior design solution, which exemplifies design excellence. The portions of the development above the height plane do not detract from consistency 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.*

Response: The proposed development is a high-quality architectural response for the site, that will positively contribute to the streetscape and the wider Freshwater Locality. The proposed residential flat building is well articulated, with varied setbacks and materiality to ensure that the apparent size of the development is appropriately reduced. Furthermore, the development will be screened by extensive landscaping around the perimeter of the site.

It is unlikely that the minor non-compliance associated with the Level 4 roof will be readily perceived from the public domain, particularly in circumstances where existing adjoining and nearby development also breach the 11m height plane.

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

Consistency with zone objectives

The objectives of the R3 Medium Density zone are considered, as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*

Response: The proposed development, comprising 4 dwellings, contributes to the housing supply within the wider R3 Medium Density zone. The proposed apartment mix has been carefully curated to meet the current market demand and the location of the site, that is saturated in 1 and 2 bedroom apartments with very few three bedroom apartments.

- *To provide a variety of housing types within a medium density residential environment.*

Response: The proposed development comprises 4 x 3 bedroom apartments to meet the demand for larger, high-quality residential units in the area. The proposed development complements existing residential unit supply, that comprises typically older buildings containing predominantly 1 and 2 bedroom apartments.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: Not applicable.

- *To ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Response: The proposed development will result in a significant enhancement of the quality and quantity of landscaping across the site, as demonstrated in the supporting Landscape Plans by Taylor Brammer. The resultant landscaped outcome will ensure that the proposed medium density development is softened by landscaping, to a degree that is commensurate with that anticipated within the R3 zone.

- *To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.*

Response: The proposed development is of exceptional quality/standard, with each façade designed to appropriately respond to the orientation and individual context. The proposed development is highly articulated in both the horizontal and vertical planes, with the skilful use of varied setbacks, materiality and deep-set balconies to ensure that the bulk and scale of the resultant development is an appropriate contextual response for the site. The architectural design solution is matched by a superior landscape solution, to ensure that the built form is softened by landscaping and to promote to the landscaped character of the area. The resultant development will positively contribute to the streetscape and the wider Freshwater locality.

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

4.3 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]-[24] 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

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

Ground 1 – Topography

The site experiences a fall of approximately 5.13m, from the upper northern boundary down towards the southern boundary, with a slope of approximately 15%. Whilst the topography of the land does not itself prevent strict compliance being achieved with the standard, it does prove challenging when trying to achieve workable floor plates throughout the building. The fall across the length of the site is considered to appropriately justify the non-compliance associated with the Level 4 element of the development including access to the roof top communal open space.

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

Ground 2 - Contextually responsive building design

Despite non-compliance with the 11m building height development standard, the proposed development is consistent with and compatible with 4 storey development within the immediate catchment of the site, including:

- 3-4 storey residential flat building at 29-33 Waine Street
- 3-4 storey residential flat building at 28 Waine Street
- 4-5 storey residential flat building at 19-23 Waine Street
- 4 storey residential flat building at 32 Waine Street

- 4 storey residential flat building at 26-30 Waine Street
- 4 storey residential flat building at 15 Waine Street
- 4 storey residential flat building at 13 Waine Street
- 3-4 storey industrial complex at 20 Waine Street

Each of the examples listed above have a 3-4 storey height with a pitched roof. The scale of the proposed development is entirely consistent with that of the buildings listed, with the proposed lift overrun otherwise contained within the volume of a pitched roof.

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 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 EP&A Act.

Ground 3 – Height variation facilitates the provision of communal open space

The size, geometry and orientation of the land makes the provision of ground level communal open space with appropriate amenity difficult to achieve whilst realising the orderly and economic use and development of the land.

The provision of rooftop communal open space is consistent with objective 3D-1 of the Apartment Design Guide where the design guidance indicates that where development is unable to achieve the design criteria, such as on small lots or in dense urban areas should provide communal open space elsewhere such as a landscaped roof top terrace.

Approval of a building height variation facilitates the provision of well-designed roof top communal open space which receives good levels of solar access between 9am and 3pm on 21st June.

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 R3 Medium Density Residential 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.

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% or non-numerical development standards.

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

5 Conclusion

Pursuant to clause 4.6(4)(a) of WLEP 2011, 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 height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

1. JUNE 21 - 9 AM
 2. JUNE 21 - 10 AM
 3. JUNE 21 - 11 AM
 4. JUNE 21 - 12 AM

LEGEND:
 1. PROPOSED BUILDING FOOTPRINT
 2. PROPOSED PARKING
 3. PROPOSED DRIVEWAY
 4. PROPOSED SIDEWALK
 5. PROPOSED LANDSCAPE
 6. PROPOSED STREET LIGHTS
 7. PROPOSED STREET FURNITURE
 8. PROPOSED STREET SIGNAGE
 9. PROPOSED STREET CLOSURE
 10. PROPOSED STREET CLOSURE

1. JUNE 21 - 9 AM
 2. JUNE 21 - 10 AM
 3. JUNE 21 - 11 AM
 4. JUNE 21 - 12 AM

1. JUNE 21 - 9 AM
 2. JUNE 21 - 10 AM
 3. JUNE 21 - 11 AM
 4. JUNE 21 - 12 AM

1. JUNE 21 - 9 AM
 2. JUNE 21 - 10 AM
 3. JUNE 21 - 11 AM
 4. JUNE 21 - 12 AM

