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Boston Blyth Fleming
Town Planners

28th January 2020

The General Manager
Northern Beaches Council
PO Box 82
Manly NSW 1655

Attention: Ms Claire Ryan – Principal Planner

Dear Ms Ryan,

Development Application DA2019/0645
Supplementary Statement of Environmental Effects
Amended plans and "without prejudice" clause 4.6 variation requests
Demolition works, construction of a residential flat building and strata subdivision
26 Whistler Street, Manly

Reference is made to Council's correspondence of 29th November 2019 pertaining to the above matter, our subsequent meetings of the 3rd and 17th December 2019 and the revised architectural, landscape and consultant report bundles forwarded to Council by emails of 23rd and 24th January 2020. We are of the opinion that the revised plans comprehensively address the issue raised.

To assist Council in its assessment as to the acceptability of the height, bulk and scale of the amended building, and in the context of the development benefiting from existing use rights, we have undertaken an assessment of the building height and FSR proposed against the clause 4.6 variation provisions. Under such circumstances the accompanying clause 4.6 variation requests are provided on a without prejudice basis to assist Council in its assessment of the proposal against the objectives of the zone and the objectives of the standards.

Having given due consideration to the matters pursuant to Section 4.15(1) of the Environmental Planning and assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to the amended proposal in this instance.

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

Yours faithfully

Boston Blyth Fleming Town Planners

Greg Boston

B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director

Attachments

1. Clause 4.6 variation request – Height of buildings
2. Clause 4.6 variation request – Floor space ratio

Attachment 1 - Clause 4.6 variation request

Height of Buildings

1.0 Introduction

This 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.

2.0 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 25 metres in height. 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.

It has been determined that the proposal, as amended, has a maximum building height of 25 metres to the underside of the ceiling of the level 7 apartments, 25.2 metres to the roof/ terrace slab, 28.9 metres to the pergola over the roof top communal open space and 30.01 metres to the top of the lift overrun. Whilst all habitable floor space complies with the standard the new roof top terrace and associated access and facilities breach the control by between 0.08% (roof/ terrace slab), 15.6% (roof top pergola) and 20% (lift overrun). The various non-compliant elements are depicted in Figure 1 over page.

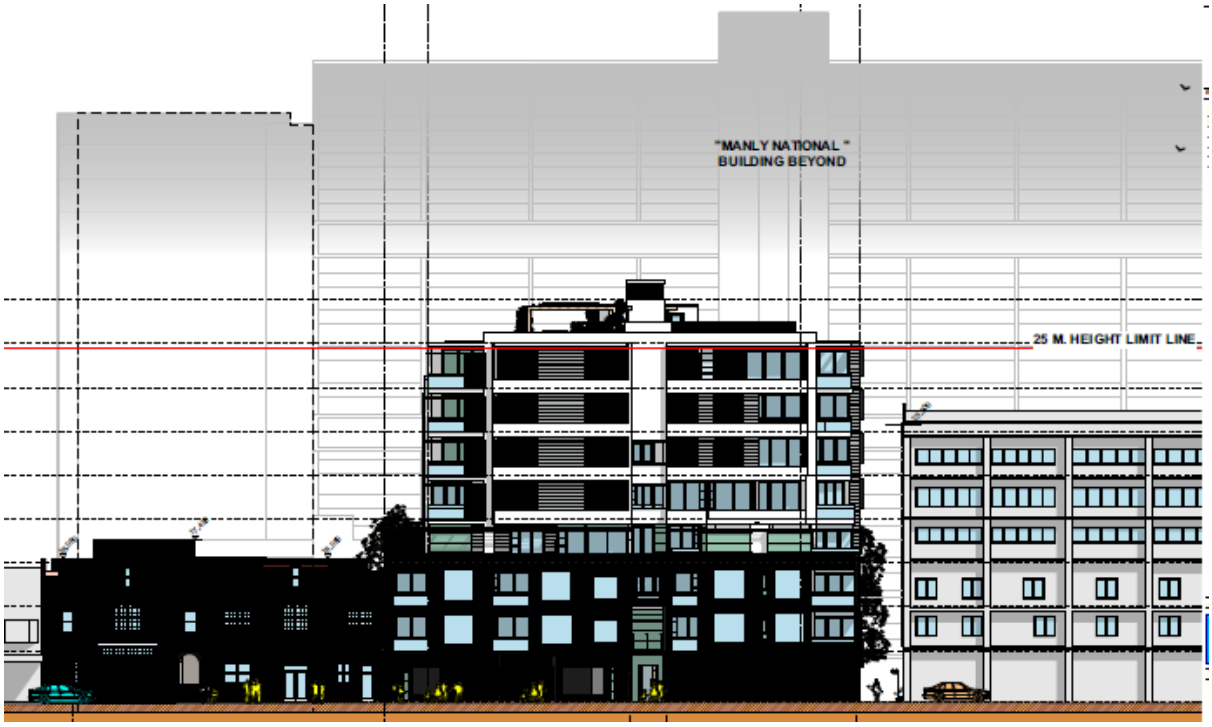


Figure 1 – Extent of 25 metre height of building breach

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 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 MLEP provides:

(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.

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the height of buildings provision at 4.3 of MLEP 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 MLEP provides:

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

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 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:

17. 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].

18. 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].

19. 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].

20. 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].

21. 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.

22. 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 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 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 4.3A of MLEP?

4.0 Request for variation

4.1 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 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,*

Response: The MLEP 2013 height standard, reflecting the desired future height of development on surrounding properties is depicted in Figure 2 over page.

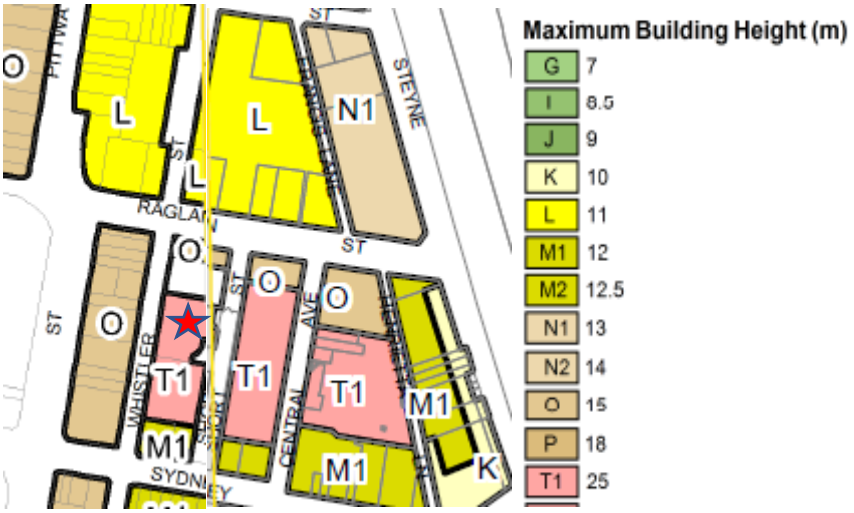


Figure 2 – Composite extract MLEP 2013 height of buildings map

This map confirms that the height anticipated for development on surrounding properties ranges between 15 and 25 metres with no height standard identified on the land to the north occupied by the State heritage listed electrical substation building. The map anticipates a stepping up of building height between Belgrave Street and South Steyne in an east-west direction and between Raglan Street and Sydney Road in a north-south direction.

We also note that in terms of prevailing building height that the Manly National Building located directly to the east of the site significantly exceeds the 25 metre height standard by approximately 24 metres with the height and scale of this building unlikely to be reduced in the foreseeable future. The MLEP 2013 height of buildings map anticipates development to west maintaining a 15 metre building height with the State Heritage Listing of the adjoining substation building and its ongoing historical use ensuring that this property is unlikely to be redeveloped in the foreseeable future. The property to the south, No. 48 – 52 Sydney Road, is currently occupied by a 6 storey mixed use building which sits approximately 5 metres below the applicable 25 metre height standard.

In this regard, we have formed the considered opinion that the development provides for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the immediate locality. In forming such opinion, we note:

- All habitable floor space is located below the 25 metre height standard with the non-compliance limited to the roof top communal open space and associated access and amenities. Such height is consistent with the 25 metre maximum height of buildings standard applicable to permissible forms of development on surrounding sites and those anticipated on the subject site noting that deletion of the communal open space would result in strict compliance with the standard.

- The development proposes complimentary and compatible roof forms consistent with those established by existing development within the Manly town centre with excavation limited to that required to accommodate a single basement level of car parking given the flat nature of the site. No excess excavation is proposed with the development consistent with the topographical landscape.

- The building height proposed provides for the transition in building heights between Belgrave Street and South Steyne in an east-west direction and between Raglan Street and Sydney Road in a north-south as anticipated by the MLEP height of buildings map as depicted in Figure 3 below.

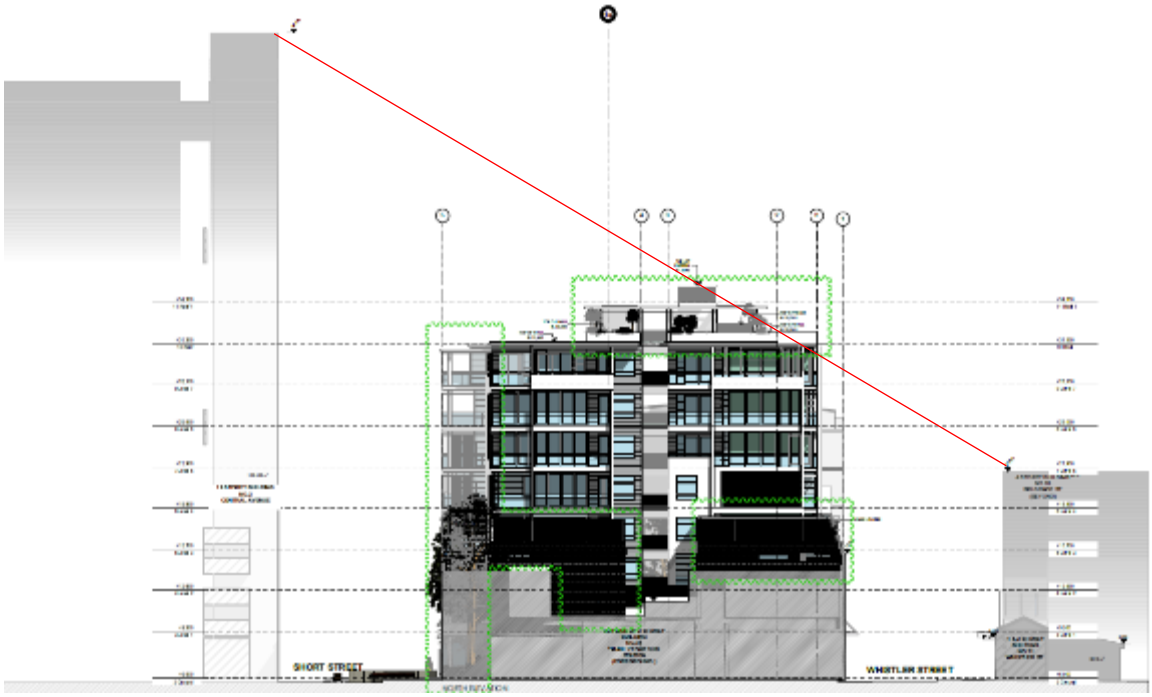


Figure 3 – Plan extract depicting transitional building height achieved

- 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 height and setbacks offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment including the Manly National Building to the east.

- In this regard, the proposed building height is consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality.

The proposal is consistent with this objective.

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

Response: For the reasons outlined in relation to objective (a) above I have formed the considered opinion that the height, bulk and scale of the building is contextually appropriate.

The proposal is consistent with this objective.

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

Response: Having undertaken a wide ranging site view I have formed the considered opinion that the areas of non-compliance, representing the roof terrace, access and amenities have been designed, located and constrained to minimise disruption of views to nearby residential development from surrounding public spaces. In fact, I was unable to identify any public space from which views to nearby residential development will be adversely impacted.

The proposal is consistent with this objective.

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

Response: Having inspected the site and its immediate surrounds I have formed the considered opinion that the proposed development will not give rise to any unacceptable view impacts from surrounding properties with view impacts clearly minimised. In forming this opinion, I rely on the accompanying view loss diagrams C06.2 and C06.3 prepared by the project Architect which drops the proposed building into the existing Manly townscape as viewed from the upper level and lower level residential balconies at No. 7 Tower Street, Manly as reproduced in Figure 4 and 5 below and over page.

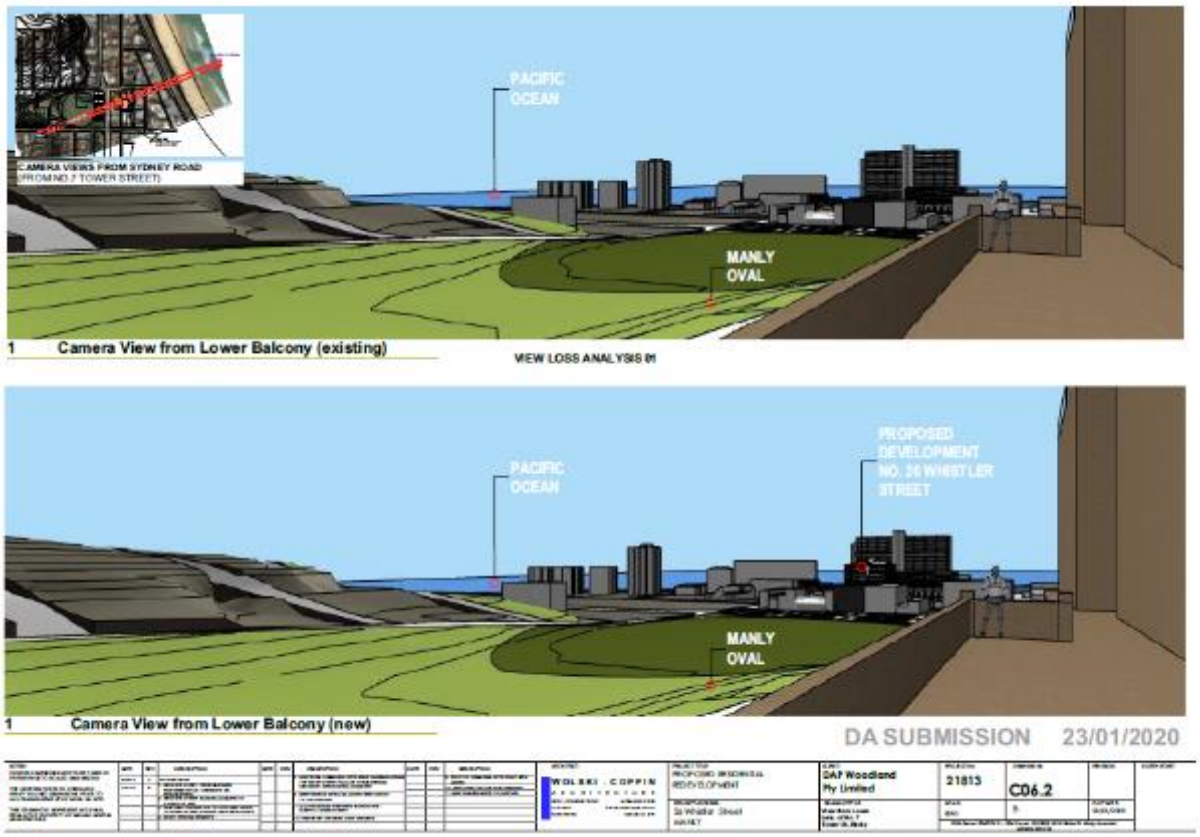


Figure 4 – View loss analysis from lower level balcony No. 7 Tower Street

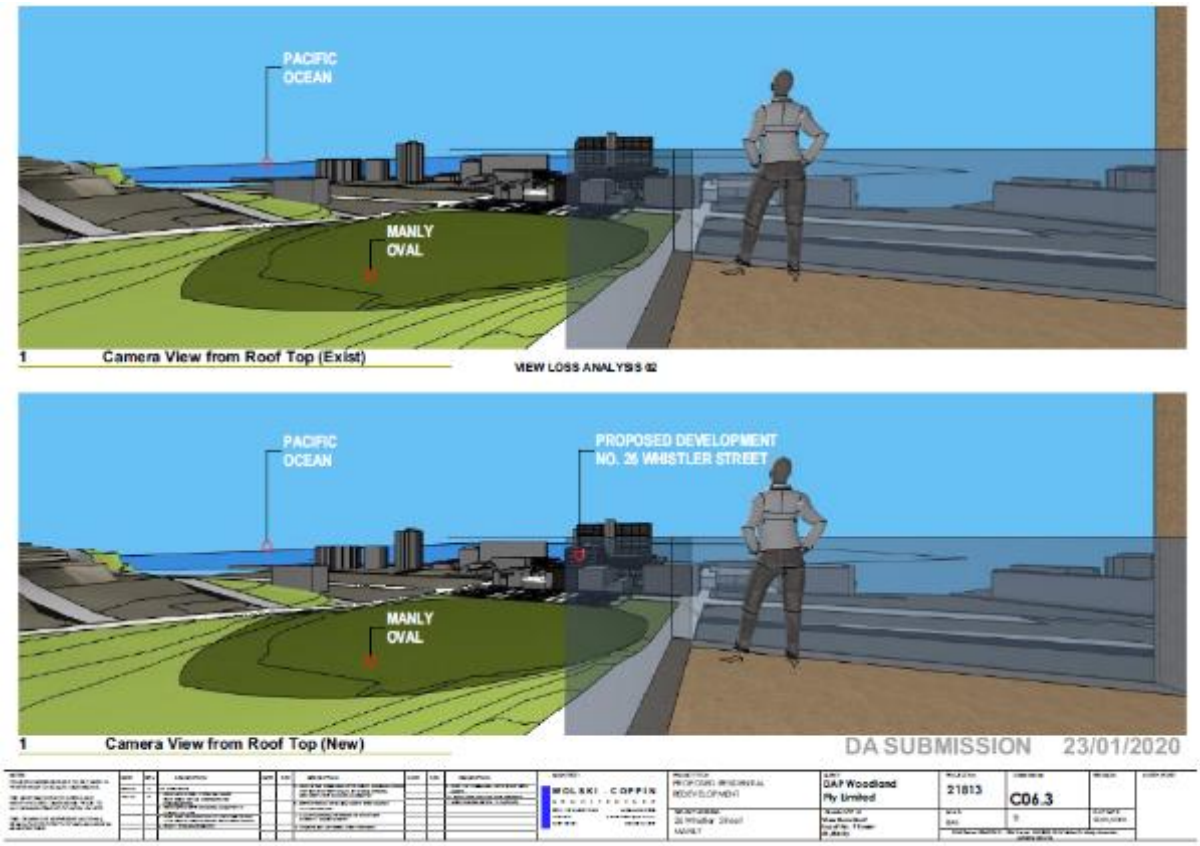


Figure 5 – View loss analysis from lower level balcony No. 7 Tower Street

This property is located at a midpoint up the western escarpment with the images clearly demonstrating that building will sit well below established building heights in the townscape and will not give rise to any particular view impact given the visual shielding afforded by the Manly National Building to the east of the site. A view sharing outcome is maintained.

We have also given consideration to the potential view impacts from the properties at Levels 5, 6, 8 and 9 of the Manly National Building located at No. 22 Central Avenue, Manly being the levels from which objections to the proposal were received. Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140 as they relate to an assessment of view impacts, I have formed the following opinion:

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

Unit 506, No. 22 Central Avenue, Manly

The partial an constrained view available from this commercial tenancy is from the west facing window in a westerly direction over the subject site and over the properties located on the western side of Whistler Street towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 6 below. There are no water views.

Figure 6 - View from Unit 505, No. 22 Central Avenue, Manly

Unit 606, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 7 below.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove as depicted in Figure 8 over page. Finally, views are also available towards Manly Beach from the east facing living room and adjacent balcony as depicted in Figure 9 over page.

Figure 7 - View from bedroom of Unit 606, No. 22 Central Avenue, Manly towards Manly Oval an predominantly over the adjacent heritage listed substation building.

Figure 8 - View from the bedroom of Unit 606, No. 22 Central Avenue, Manly in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove

Figure 9 - View from the living room and balcony of Unit 606, No. 22 Central Avenue, Manly towards Manly Beach

Unit 813, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 10 below.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove consistent with those available from Level 6. Finally, views are also available in an easterly direction towards the ocean, Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony as depicted in Figure 11 over page.

Figure 10 - View from the bedroom of Unit 813, No. 22 Central Avenue, Manly towards Manly Oval an predominantly over the adjacent heritage listed substation building.

Figure 11 - Views available in an easterly direction towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony of Unit 813, No. 22 Central Avenue, Manly

Unit 912, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 12 over page.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include views of Manly Cove and Middle Harbour. Finally, views are also available in an easterly direction towards the ocean, Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony as depicted in Figure 13 over page.

Figure 12 - View from the bedroom of Unit 912, No. 22 Central Avenue, Manly towards Manly Oval

Figure 13 - Views available in an east/ south easterly direction towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony of Unit 912, No. 22 Central Avenue, Manly

Second Step - From what part of the property are the views obtained?

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant.

Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

All views are available across either the front or rear boundary of the property, over surrounding development and from both a standing and seated position.

Third Step – Assessment of extent of the impact

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

Unit 506, No. 22 Central Avenue, Manly

The western view from this commercial tenancy towards Manly Oval and the adjacent escarpment will be completely obscured it being noted that the view impact results from the fully compliant portion of the proposed development located below the 25 metre height standard. Given this view is form a commercial tenancy I consider the view impact to be appropriately described as severe.

Unit 606, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment over the adjacent heritage listed substation building will be maintained together with the views towards Manly Cove and Manly Beach. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony towards Manly Beach I consider the view impact to be appropriately described as minor.

Unit 813, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment will be obscured however the views towards Manly Cove from the bedroom and towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony will be preserved. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony I consider the view impact to be appropriately described as moderate.

Unit 912, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment will be partially obscured by the proposed building however the views towards Manly Cove and Middle Harbour from the bedroom and towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony will be preserved. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony I consider the view impact to be appropriately described as minor.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

The property benefits from existing use rights. The majority of view impacts are created by the fully compliant elements of the building located below the 25 metre height standard. I consider the proposal to be of a skilful design which responds to the constraints imposed by the adjacent heritage listed building, the design, juxtaposition and overshadowing sensitivities associated with the southern adjoining property No. 48 – 52 Sydney Road, Manly, the need to provide a 3 metre wide through site link between Whistler Street and Short Street Plaza and the height, bulk and visually imposing nature of the Manly National Building located at No. 22 Central Avenue, Manly. In this regard, we note that Units 813 and 912 located within No. 22 Central Avenue, Manly and from which some view impact will arise are both situated above the 25 metre height standard and the overall height of the proposed development.

The development appropriately distributes floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario. Such outcome is achieved whilst realising the reasonable development potential of the land.

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the clause 3.4.3 MDCP control and the principles established in the matter of Tenacity Consulting Pty Ltd v Warringah Council [2004] NSWLEC140 and Davies v Penrith City Council [2013] NSWLEC 1141.

The proposal is consistent with this objective.

(iii) views between public spaces (including the harbour and foreshores),

Response: The building form and height has been appropriately distributed across the site to minimise disruption of views between public spaces.

The proposal is consistent with this objective.

(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,

Response: Particular attention has been given to the shadowing impacts on the mixed-use development to the south of the site No. 48 – 52 Sydney Road. In this regard, the final design has been prepared in consultation with solar access experts Walsh² Analysis to ensure the maintenance of compliant levels of solar access to the apartments within this adjoining development. Such analysis resulted in a refinement in the design and detailing and setbacks of the south eastern corner of the building to maintain at least 2 hours of solar access to the required quantum of east facing apartment on the adjoining site.

We have also produced “view from the sun” diagrams showing the amount of solar access maintained to Short Street Plaza. These are at Attachment 1. We note that on 21st June from 9:00am in the morning the Plaza starts to obtain sunlight with someone standing on the raised grassed landscape platform receiving direct sunlight on their torso at this time. The publicly accessible areas along the eastern edge of the development site obtain sunlight at this time. Significant areas of the Short Street Plaza continue to obtain direct sunlight between 9:00am and 1:30pm with some direct sunlight maintained along its eastern edge at 2:00pm.

Accordingly, we conclude that the Short Street Plaza will continue to receive some solar access between 9:00am and 2:00pm on 21st June (5 hours) with good levels of solar access maintained between 9:30am and 1:30pm (4 hours) including to the raised grassed platform. This is on the shortest day of the year.

The proposal is consistent with this objective.

(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.*

Response: This objective is not applicable.

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 developments 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 subject property is zoned B2 Local Centre pursuant to MLEP 2013. The property benefits from existing use rights for the purpose of a residential flat building. Such use is not anticipated in the zone. The developments consistency with the stated objectives of the B2 zone are 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.*

Response: This objective is not applicable given the existing use rights for a residential flat building use the property enjoys.

- *To encourage employment opportunities in accessible locations.*

Response: This objective is not applicable given the existing use rights for a residential flat building use the property enjoys. Employment will be created in terms of strata management and property maintenance.

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

Response: The proposal does not provide any excessive carparking and as such satisfies this objective.

- *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.

Response: The development is not within proximity of any zone boundaries. No objection is raised to standard conditions pertaining to the acoustic performance of air conditioning condensers.

The proposed works and consistent with the applicable objectives of the zone so far as they can be applied to a property benefiting from existing use rights.

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 is unreasonable and unnecessary.

4.2 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:

23. 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.

24. 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 exist to justify the height of buildings variation namely the developments location within a commercial centre where communal open space is most appropriately located at roof level to achieve the desired build to boundary urban design outcome and where such open space will receive exceptional levels of solar access and amenity throughout the day.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario. Such outcome is achieved whilst realising the reasonable development potential of the land.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land benefiting from existing use rights (1.3(c)).

- The development promotes the sustainable management of built heritage by appropriately responding to the adjacent State listed heritage item (1.3(f)).

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 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 propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard 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 propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a nonnumerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

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

5.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

(a) that the contextually responsive development is consistent with the zone objectives, and

(b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and

(c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

(d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and

(e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and

(f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

(g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's 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.

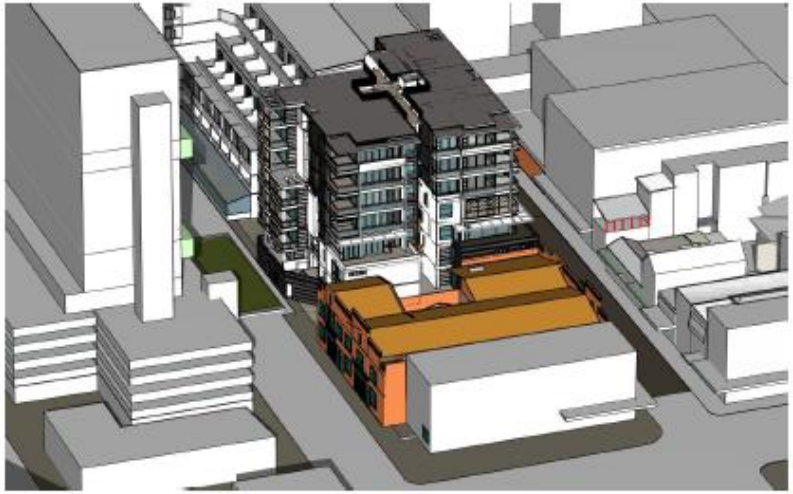
As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 – Shadow diagrams (Short Street plaza)

9.30 AM



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PROJECT TITLE
PROPOSED RESIDENTIAL
REDEVELOPMENT

PROJECT ADDRESS
26 Whistler Street
MANLY

CLIENT
DAP Woodland
Pty Limited

DRAWING TITLE
Views from Sun 9:30
(21 JUNE)

PROJECT No
21813

DRAWING No
VS01

REVISION
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SCALE
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PLOT DATE
6/06/2019

11 AM

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PROPOSED RESIDENTIAL REDEVELOPMENT

24 Whistler Street
MANLY

DAP Woodland Pty Limited

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PROPOSED RESIDENTIAL REDEVELOPMENT
26 Whistler Street
MANLY

DAP Woodland Pty Limited

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PROPOSED RESIDENTIAL REDEVELOPMENT
26 Whistler Street MANLY

DAP Woodland Pty Limited

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Attachment 2 - Clause 4.6 variation request

Floor Space Ratio

1.0 Introduction

This 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.

2.0 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.4 – Floor space ratio

Pursuant to Clause 4.4 MLEP 2013 the maximum FSR for development on the site is 3:1 representing a gross floor area of 2994 square metres. The stated objectives of this clause are:

(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,

(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,

(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,

(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.

It has been determined that the proposal, as amended, result in a total gross floor area on the site of 4225 square metres as depicted below. This represents a floor space ratio of 4.23:1 and therefore non-compliant with the FSR standard by 1231 square metres or 41%.

SCHEDULE OF GROSS FLOOR AREA AND FLOOR SPACE RATIO

24 .01 .20

	Ground	First	Second	Third	Fourth	Fifth	Sixth	Seventh
GFA (m²)	66	664	691	621	586	557	551	489
	4,225							
TOTAL SITE AREA (m²)	998							
FSR	FSR 4.23 : 1							

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are:

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

(d) 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 MLEP provides:

(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.

This clause applies to the clause 4.4 Floor Space Ratio Development Standard.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the floor space ratio provision at 4.4 of MLEP 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 MLEP provides:

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

(a) the consent authority is satisfied that:

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

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.4 of MLEP 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:

17. 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].

18. 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].

19. 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].

20. 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].

21. 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.

22. *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 4.4 of MLEP 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 4.4 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 4.4 of MLEP?

4.0 Request for variation

4.1 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 floor space ratio standard

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

> *(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Response: Whilst the proposed residential flat building has an FSR which exceeds the 3:1 standard the resultant building height, setbacks and general form of the development are entirely consistent with those anticipated for permissible forms of development on surrounding sites located within the 25 metre height subzone. The property to the south, No. 48 – 52 Sydney Road, is currently occupied by a 6 storey mixed use building which sits approximately 5 metres below the applicable 25 metre height standard however has an FSR well in excess of 4:1 with the Manly National Building at No. 22 Central Avenue, Manly siting some 24 metre above the 25 metre height standard and having an FSR of approximately 7:1.

The front and side boundary setbacks proposed are consistent with those prescribed for development within the Manly commercial precinct although the building has been pulled away from the southern boundary to accommodate a widening of the existing publicly accessible ROW between Short Street Plaza and Whistler Street. Similarly, the development has been stepped away from the northern State heritage listed electrical substation building to maintain an appropriate spatial relationship.

The contextually appropriate nature of the proposed building heights and setbacks lead to a conclusion that the resultant floor space is acceptable.

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 sites visual catchment.

In this regard, the bulk and scale of development is consistent with the existing and desired streetscape character particularly noting the anomalous nature of the FSR standard whereby the same FSR of 3:1 applies to the properties located on the western side of Whistler Street but in the much lower 15 metre building height subzone.

The proposal is consistent with this objective.

(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,

Response: The distribution of floor space across the site will ensure that important landscape and townscape features are not obscured as viewed from adjoining properties and the public domain. The site area coupled with the anticipated 25 metre building height ensures that the FSR proposed is able to satisfy this objective through the appropriate distribution of floor space.

The proposal is consistent with this objective.

(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,

Response: The application proposes the implementation of an enhanced site landscape regime including substantial public domain landscape improvements adjacent to Short Street Plaza, podium and roof top plantings.

The proposal is consistent with this objective.

(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

Response:

View impacts

Having undertaken a wide ranging site view I have formed the considered opinion that the areas of non-compliance, representing the roof terrace, access and amenities have been designed, located and constrained to minimise disruption of views to nearby residential development from surrounding public spaces. In fact, I was unable to identify any public space from which views to nearby residential development will be adversely impacted.

Having inspected the site and its immediate surrounds I have formed the considered opinion that the proposed development will not give rise to any unacceptable view impacts from surrounding properties with view impacts clearly minimised. In forming this opinion, I rely on the accompanying view loss diagrams C06.2 and C06.3 prepared by the project Architect which drops the proposed building into the existing Manly townscape as viewed from the upper level and lower level residential balconies at No. 7 Tower Street, Manly as reproduced in Figure 1 and 2 over page.

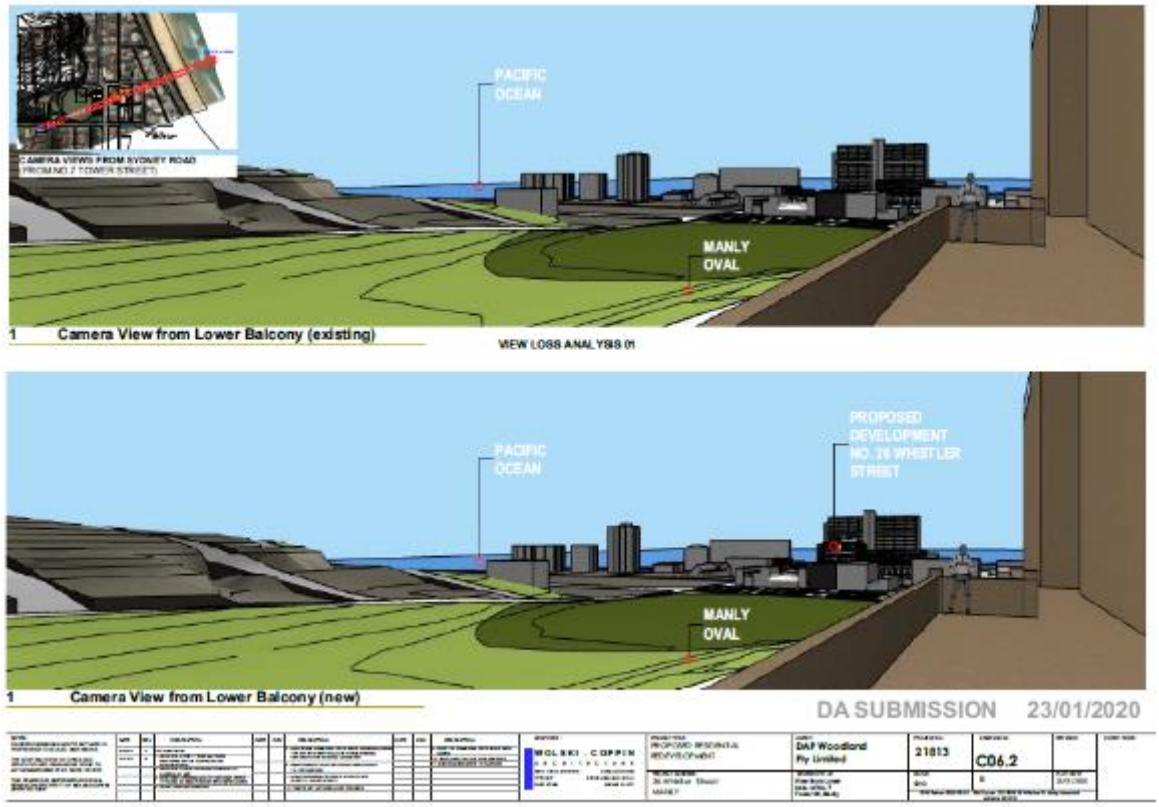


Figure 1 – View loss analysis from lower level balcony No. 7 Tower Street

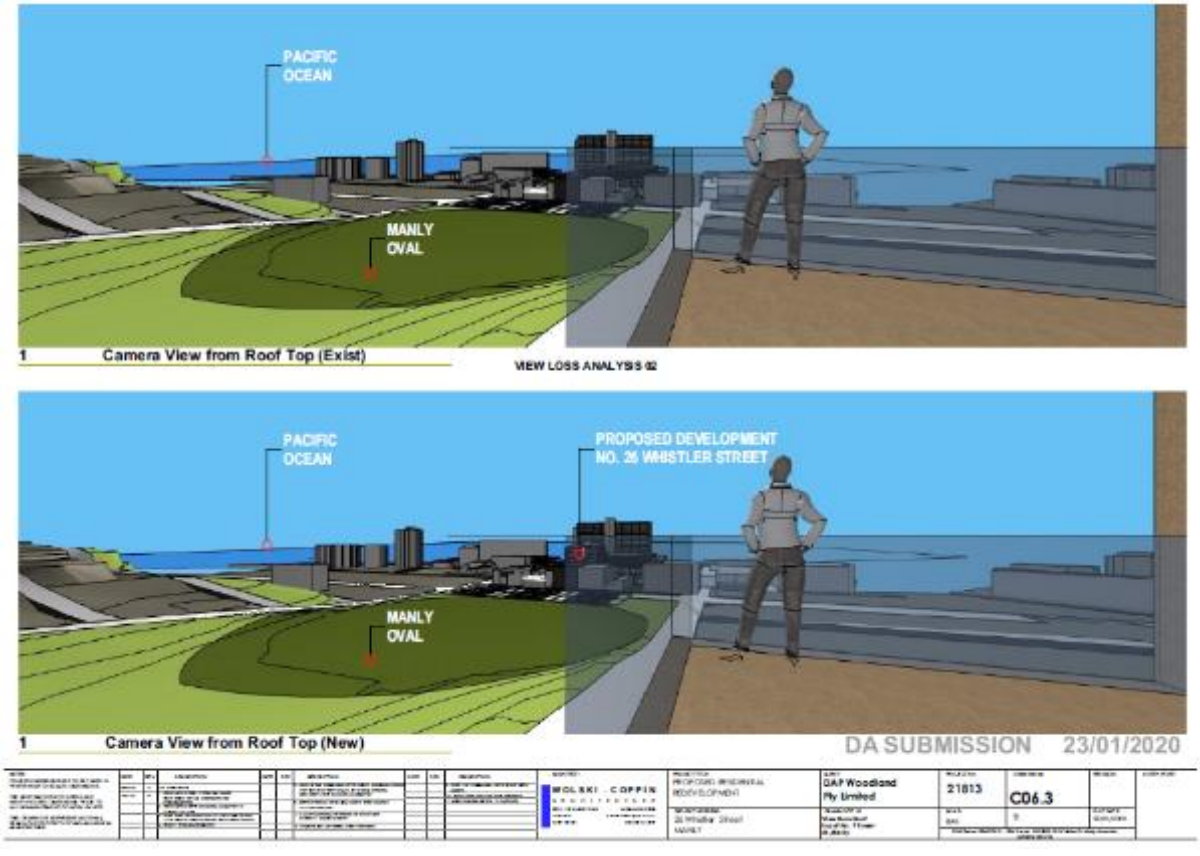


Figure 2 – View loss analysis from lower level balcony No. 7 Tower Street

This property is located at a midpoint up the western escarpment with the images clearly demonstrating that building will sit well below established building heights in the townscape and will not give rise to any particular view impact given the visual shielding afforded by the Manly National Building to the east of the site. A view sharing outcome is maintained.

We have also given consideration to the potential view impacts from the properties at Levels 5, 6, 8 and 9 of the Manly National Building located at No. 22 Central Avenue, Manly being the levels from which objections to the proposal were received. Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140 as they relate to an assessment of view impacts, I have formed the following opinion:

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

Unit 506, No. 22 Central Avenue, Manly

The partial an constrained view available from this commercial tenancy is from the west facing window in a westerly direction over the subject site and over the properties located on the western side of Whistler Street towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 3 over page. There are no water views.

Figure 3 - View from Unit 505, No. 22 Central Avenue, Manly

Unit 606, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 4 below.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove as depicted in Figure 5 over page. Finally, views are also available towards Manly Beach from the east facing living room and adjacent balcony as depicted in Figure 6 over page.

Figure 4 - View from bedroom of Unit 606, No. 22 Central Avenue, Manly towards Manly Oval an predominantly over the adjacent heritage listed substation building.

Figure 5 - View from the bedroom of Unit 606, No. 22 Central Avenue, Manly in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove

Figure 6 - View from the living room and balcony of Unit 606, No. 22 Central Avenue, Manly towards Manly Beach

Unit 813, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 7 over page.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include water glimpses of Manly Cove consistent with those available from Level 6. Finally, views are also available in an easterly direction towards the ocean, Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony as depicted in Figure 8 over page.

Figure 7 - View from the bedroom of Unit 813, No. 22 Central Avenue, Manly towards Manly Oval an predominantly over the adjacent heritage listed substation building.

Figure 8 - Views available in an easterly direction towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony of Unit 813, No. 22 Central Avenue, Manly

Unit 912, No. 22 Central Avenue, Manly

The views available from this residential apartment include views in a westerly direction over the subject site and the adjacent heritage listed electrical substation building and over the properties located on the western side of Whistler Street from the west facing bedroom window towards Manly Oval and the adjacent semi-vegetated escarpment and surrounding buildings as depicted in Figure 9 below.

Views are also available in a south westerly direction over No. 48 – 52 Sydney Road which include views of Manly Cove and Middle Harbour. Finally, views are also available in an easterly direction towards the ocean, Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony as depicted in Figure 10 over page.

Figure 9 - View from the bedroom of Unit 912, No. 22 Central Avenue, Manly towards Manly Oval

Figure 10 - Views available in an east/ south easterly direction towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony of Unit 912, No. 22 Central Avenue, Manly

Second Step - From what part of the property are the views obtained?

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant.

Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

All views are available across either the front or rear boundary of the property, over surrounding development and from both a standing and seated position.

Third Step – Assessment of extent of the impact

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

Unit 506, No. 22 Central Avenue, Manly

The western view from this commercial tenancy towards Manly Oval and the adjacent escarpment will be completely obscured it being noted that the view impact results from the fully compliant portion of the proposed development located below the 25 metre height standard. Given this view is form a commercial tenancy I consider the view impact to be appropriately described as severe.

Unit 606, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment over the adjacent heritage listed substation building will be maintained together with the views towards Manly Cove and Manly Beach. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony towards Manly Beach I consider the view impact to be appropriately described as minor.

Unit 813, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment will be obscured however the views towards Manly Cove from the bedroom and towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony will be preserved. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony I consider the view impact to be appropriately described as moderate.

Unit 912, No. 22 Central Avenue, Manly

The western view from this residential apartment towards Manly Oval and the adjacent escarpment will be partially obscured by the proposed building however the views towards Manly Cove and Middle Harbour from the bedroom and towards Manly Beach, Shelly Beach and the coastal walkway from the east facing living room and adjacent balcony will be preserved. Given the totality of the views retrained and the retention of all water views in particular the views available from the living room and adjacent balcony I consider the view impact to be appropriately described as minor.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

The property benefits from existing use rights. The majority of view impacts are created by the fully compliant elements of the building located below the 25 metre height standard. I consider the proposal to be of a skilful design which responds to the constraints imposed by the adjacent heritage listed building, the design, juxtaposition and overshadowing sensitivities associated with the southern adjoining property No. 48 – 52 Sydney Road, Manly, the need to provide a 3 metre wide through site link between Whistler Street and Short Street Plaza and the height, bulk and visually imposing nature of the Manly National Building located at No. 22 Central Avenue, Manly. In this regard, we note that Units 813 and 912 located within No. 22 Central Avenue, Manly and from which some view impact will arise are both situated above the 25 metre height standard and the overall height of the proposed development.

The development appropriately distributes floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario. Such outcome is achieved whilst realising the reasonable development potential of the land.

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the clause 3.4.3 MDCP control and the principles established in the matter of Tenacity Consulting Pty Ltd v Warringah Council [2004] NSWLEC140 and Davies v Penrith City Council [2013] NSWLEC 1141.

Visual privacy

The apartments at the southern end of the building have been designed to step away from the north facing balconies in the adjoining mixed-use building at No. 48 – 52 Sydney Road to maintain appropriate visual separation with integrated privacy screens maintaining appropriate visual privacy between properties. This spatial arrangement is reproduced on all floor levels it being noted that these balconies are extremely vulnerable to privacy impacts given they are located on a nil side boundary setback to the common boundary with the subject site.

The spatial separation afforded to residential development to the east and west of the site is also such that appropriate visual privacy will be maintained in accordance with the objectives of the building separation provisions of the ADG.

Shadowing impacts

In relation to shadowing impacts, particular attention has been given to the shadowing impacts on the mixed-use development to the south of the site No. 48 – 52 Sydney Road. In this regard, the final design has been prepared in consultation with solar access experts Walsh² Analysis to ensure the maintenance of compliant levels of solar access to the apartments within this adjoining development. Such analysis resulted in a refinement in the design and detailing and setbacks of the south eastern corner of the building to maintain at least 2 hours of solar access to the required quantum of east facing apartment on the adjoining site.

We have also produced “view from the sun” diagrams showing the amount of solar access maintained to Short Street Plaza. These are at Attachment 1. We note that on 21st June from 9:00am in the morning the Plaza starts to obtain sunlight with someone standing on the raised grassed landscape platform receiving direct sunlight on their torso at this time. The publicly accessible areas along the eastern edge of the development site obtain sunlight at this time. Significant areas of the Short Street Plaza continue to obtain direct sunlight between 9:00am and 1:30pm with some direct sunlight maintained along its eastern edge at 2:00pm.

Accordingly, we conclude that the Short Street Plaza will continue to receive some solar access between 9:00am and 2:00pm on 21st June (5 hours) with good levels of solar access maintained between 9:30am and 1:30pm (4 hours) including to the raised grassed platform. This is on the shortest day of the year.

We have formed the considered opinion that the development minimises adverse environmental impacts on the use and enjoyment of adjoining land and the public domain. The proposal is consistent with this objective.

> *(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.*

Response: This objective is not applicable.

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 developments consistency with the objectives of the FSR standard, as reasonably applied to the development benefiting from existing use rights, strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject property is zoned B2 Local Centre pursuant to MLEP 2013. The property benefits from existing use rights for the purpose of a residential flat building. Such use is not anticipated in the zone. The developments consistency with the stated objectives of the B2 zone are 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.*

Response: This objective is not applicable given the existing use rights for a residential flat building use the property enjoys.

- *To encourage employment opportunities in accessible locations.*

Response: This objective is not applicable given the existing use rights for a residential flat building use the property enjoys. Employment will be created in terms of strata management and property maintenance.

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

Response: The proposal does not provide any excessive carparking and as such satisfies this objective.

- *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.*

Response: The development is not within proximity of any zone boundaries. No objection is raised to standard conditions pertaining to the acoustic performance of air conditioning condensers.

The proposed works and consistent with the applicable objectives of the zone so far as they can be applied to a property benefiting from existing use rights.

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

4.2 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:

23. 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.

24. 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 exist to justify the FSR variation namely the fact that the development benefits from existing use rights with the resultant bulk and scale consistent with the existing and desired streetscape character. We also note the anomalous nature of the FSR standard whereby the same FSR of 3:1 applies to the properties located on the western side of Whistler Street but in the much lower 15 metre building height subzone.

The distribution of floor space across the site will ensure that important landscape and townscape features are not obscured as viewed from adjoining properties and the public domain. The site area coupled with the anticipated 25 metre building height ensures that the FSR proposed is able to satisfy this objective through the appropriate distribution of floor space.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the identified site constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario. Such outcome is achieved whilst realising the reasonable development potential of the land.

Finally, the creation of a 3 metre wide pedestrian link through the site between Whistler Street and Short Street Plaza and the creation of a right of footway across the eastern edge of the site effectively widening the trafficable area of the Short Street Plaza provides significant public benefit with such outcome a relevant matter for consideration in relation to establishing sufficient environmental planning grounds to justify such variation.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land benefiting from existing use rights (1.3(c)).

- The development promotes the sustainable management of built heritage by appropriately responding to the adjacent State listed heritage item (1.3(f)).

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard 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 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.

Accordingly, the consent authority can be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a nonnumerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

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

5.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

(a) that the contextually responsive development is consistent with the zone objectives, and

(b) that the contextually responsive development is consistent with the objectives of the FSR standard, and

(c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

(d) that having regard to (a), (b) and (c) above that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case, and

(e) that given the developments ability to comply with the zone and FSR standard objectives that approval would not be antipathetic to the public interest, and

(f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

(g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's 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.

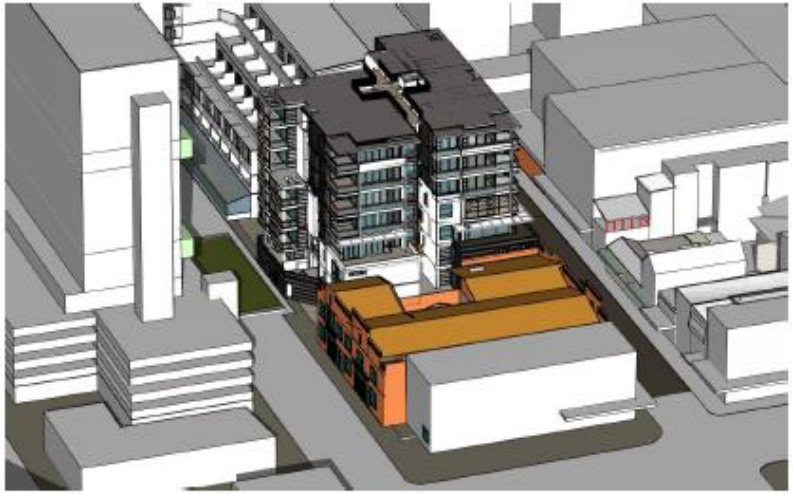
As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 – Shadow diagrams (Short Street plaza)

9.30 AM



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PROJECT ADDRESS: 26 Whistler Street MANLY	DRAWING TITLE: Views from Sun 9:30 (21 JUNE)	SCALE: 1:200@A3		PLOT DATE: 6/06/2019	

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PROPOSED RESIDENTIAL REDEVELOPMENT

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