

21 May 2019

Request for variation of a development standard pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP).

The proposed development

This clause 4.6 request accompanies a development application for demolition of the existing buildings across the site, excavation for basement parking and associated building services and construction of a mixed-use development comprising of 12 ground floor retail/commercial tenancies and 78 apartments, comprising 4 studios, 34 x 1-bed and 6 x 1-bed + study, 32 x 2-bed and 2 x 3-bed apartments. Landscaping and public domain improvement works are also proposed, including on the roof top of the building.

The variation sought

The proposed development complies with the development standards and policies of the Council, except for non-compliance with Height of Buildings standard set out in clause 4.13 of Warringah Local Environmental Plan 2011 (WLEP).

The permitted height of a building under the WLEP is 24 m; the proposed height of the building is 28.27 m (RL 46.5), including plant and lift overrun with the maximum building height at 25.670 m.

This Request will demonstrate that the variation sought meets the requirements of clause 4.6 and is appropriate for approval.

In addition, it is relevant to note that the site is subject to PP_2015_WARRI_003_02 which proposes, among other items, to increase the permitted building height to 27m. We are advised by the Council that this amendment to the WLEP was likely to be gazetted by in February 2019; however, at the time of writing this is yet to occur. The proposal therefore generally complies with the draft standard for height, but for the lift and services overrun which is set well back from the street frontages of the site and is therefore otherwise consistent with the future planning controls.

Warringah Local Environmental Plan 2011

Clause 4.3 provides that:

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- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

WLEP 2011 defines building height, in the Dictionary, as:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

Clause 4.6 of the WLEP

Clause 4.6 of WLEP provides, so far as relevant:

- (1) The objectives of this clause are as follows:*
- (a) To provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - b. that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
- a. The consent authority is satisfied that:*
 - i. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - b. The concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider:*
- a. whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - b. the public benefit of maintaining the development standard, and*
 - c. any other matters required to be taken into consideration by the Secretary before granting concurrence.*



Is height of buildings a development standard?

Clause 4.6 can only be used to vary a control that is a development standard. Development standards are relevantly defined in s 1.4 of the *Environmental Planning & Assessment Act 1979 (EP & A Act)* as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(a) ...

(b) the proportion or percentage of the area of a site which a building or work may occupy, ...

Being a provision of the WLEP in relation to the carrying out of development, under which a requirement is fixed in respect to the height of buildings in the relevant zone, clause 4.3(2) of the WLEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation of the standard.

As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development would contravene a development standard imposed by an environmental planning instrument. However, clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Clause 4.6(4)

In order for the Court to grant a variation to the development standard under clause 4.6, it must be satisfied:

1. That this clause 4.6 Request adequately addresses the matters required by clause 4.6(3), namely that compliance with the standard is unnecessary or unreasonable in the circumstances of the case and secondly that there are sufficient environmental planning grounds to justify contravening the development standard; and
2. That the proposed development will be in the public interest because it is consistent with the objectives of the standard and zone; and
3. That the concurrence of the Secretary has been obtained.



Clause 4.6(4)(a)(i) - Whether request adequately addresses requirements

This request is comprehensive in its discussion of whether compliance with the zone and objectives of the standard is unreasonable or unnecessary and whether there are sufficient environment planning grounds for varying the standard. Both issues are discussed below.

Clause 4.6(3)(a) Unnecessary or unreasonable

The common approaches 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. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the Wehbe principles remains an appropriate approach.

The first option and applicable in this case, 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.

Set out below is an extract from the judgement in *Wehbe* that explains the rationale for adopting this approach in the context of clause 4.6.

The rationale is that development standards are not ends in themselves but means of achieving ends...The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

Zone B4 Mixed Use	Comment
<p>1 Objectives of zone</p> <ul style="list-style-type: none">• <i>To provide a mixture of compatible land uses.</i>• <i>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i>	<ul style="list-style-type: none">• The proposal provides a mixture of residential and retail land uses that are compatible with each other and with the context of the surrounding site.• The proposal is located along Pittwater Road which is the main arterial road that links the Northern Beaches and the Sydney CBD. This will provide opportunities for vehicular access, as well as to existing public transport services, by way of bus services, that stretch from the Sydney CBD to the Northern Beaches. The integrated nature of the development provides a diverse offering of land uses and walking and



<ul style="list-style-type: none"> • <i>To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.</i> • <i>To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.</i> • <i>To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.</i> • <i>To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.</i> 	<p>cycling opportunities are presented as part of the development proposal.</p> <ul style="list-style-type: none"> • The proposed development will reinforce the role of Dee Why as a major centre, with the additional retail use proposed, to assist in local economic development, while providing an intensity of development for residential purposes that will not compromise the use of public spaces within the vicinity of the site. The proposal is designed to be of a form, scale and character that is consistent with both the existing and emerging character of surrounding development, within the vicinity of the site. This is reinforced through the amalgamation of the allotments. • The retail shops proposed on Pittwater Road and Oaks Avenue have frontages to both streets and will encourage activity to these, as will the entrance to the residential component of the development. The proposed window openings to the residential aspects of the development are well refined to contribute to the degree of the activity, while providing an extent of materials and articulation that provide a human scale to the design. • The proposal accords with this objective. • The site has been amalgamated with 874 Pittwater Road to facilitate a more effective development outcome and an efficient basement design so as not to compromise access arrangements given the site's proximity to Pittwater Road. The amalgamation of the site also provides a more consistent and effective urban design solution through the consolidation of the allotments. Therefore, this objective will be achieved.
4.3 Height of buildings	Comment
<p>The objectives of this clause are as follows:</p> <p>(a) <i>to ensure that buildings are compatible with the height and</i></p>	<p>(a) The site is located on the eastern side of Pittwater Road along the main shopping strip and commercial centre of Dee Why. While traditional 2-storey shops line both sides of the street,</p>



scale of surrounding and nearby development,

current construction activity around the area suggests more redevelopment will result in higher, mixed use and contemporary buildings emerging in the future as landowners capitalise on favourable development potential provided for under the current planning regime. The properties immediately surrounding the site have permitted buildings height of up to 21m and 24m; further, north-west of the site, the approved (and constructed) Meriton development will provide for buildings up to 18 storeys. Therefore, the proposed building height, is consistent with the height and scale of nearby and surrounding development, particularly where this is transforming to fulfil the prescribed development standards and meet the needs of the population living and working in the area.

While the proposed built form will be above that permitted, it is not considered out of context due to the recessive elements of the design, particularly building services, which are not visible from the street frontages. The purpose of the additional height is to provide a more appropriate communal open space outcome to service the development. The only other potentially viable location for communal open space on the site would be in the north-eastern corner at ground level; any other location would interfere with the active frontages required to both Pittwater Road and Oaks Avenue, which is contrary to both the WLEP and WDCP.

In the north-eastern corner, there is limited solar opportunity and daylight, with that section of the property being hemmed in by adjoining development, which, when servicing the whole building does not provide an overall benefit to the development. Instead, by allowing for the lift and services overrun to extend beyond the permitted building height to ensure that the roof top area is accessible ensures a viable approach is achieved to serving residents of the development, without being contrary to the desired scale appropriate to the context of the site, the development standard which is to be defined by a higher outcome than currently applies, setting the future inferred character.

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

In addition, the dominance of built form is positioned to the corner of the site, at Pittwater Road and Oaks Avenue, to give the building form and presence, as a bookend to this intersection. This is evident by the building having reduces setbacks to the street frontages, with the rear and side sections recessive from this. By doing so ensures that there is a refined architectural presence that makes the balance of



the building peel away from this, the additional height going unnoticed, and set well back from the street frontages for the roof top open space area, as one appreciates the quality of architecture.

Therefore, given that the additional form above the height limit is recessive in certain sections of the building, is softened with planting, and, at its full extent relevant only to building services that enable access to a quality common open space area in association with the development, it will have limited visual presence in the vicinity of the site. The benefit of open space on the roof top area also ensures that a reasonable solar access outcome is provided to the common open space, which results in a positive living environment for future residents, without adversely impacting upon the solar enjoyment of neighbouring properties. Most importantly, the additional building height, and particularly the limited extent of height that is sought under the draft height of building control, which is reflective of the desired future character of the area, will not be visible and is consistent with the built form anticipated on sites within the vicinity of the subject site.

- (b) In terms of visual impact and the effect of the non-compliant portion of the building, this has been addressed above.

In terms of potential disruption to views, the building positioned to the east of the site, adjacent on the Oaks Avenue frontage, maintains its principal vantage over Oaks Avenue, to the south of the site; the façade interfacing with the subject site generally comprises a blank wall, but for a small opening on the top floor. Therefore, the potential effect on any views is not impeded as a result of the proposed development. Further, the height of this form at No. 10 Oaks Avenue sits below the height of the proposed building; therefore, the upper floors sit above the height of that adjoining built form and the non-compliant element of the proposed structure has no effect whatsoever in terms of potential view loss, given the balance of the building which was previously deemed appropriate.



Photograph 1: View of western wall of adjoining site to the east of the subject site



Similarly, for the building to the north of the site, on Pittwater Road, the southern façade of the adjoining property is generally of a blank configuration, but for window openings contained within the light well. These windows, due to their material composition do not provide a view in a southerly direction. Therefore, the proposal will not result in a loss of view enjoyed from the building directly north of the site.

Photograph 2: View of southern wall of No. 890 Pittwater Road, which is generally comprised of a blank wall interface with only limited openings for the purpose of natural light



In terms of built form located on the southern side of Oaks Avenue that has been constructed, while the proposal will result in a change in view when considered from these properties, the effect will be no greater than the view corridor that is impeded as a result of development occurring in Howard Avenue, which is of a greater density, form and



scale than the subject site. Again, therefore, there will be no additional loss of view.

The proposal will not result in any loss of privacy to the neighbouring properties, particularly those located to the north and east of the site.

On the proposed northern side of the building, the ground floor is built to the property boundary. Above this, the western portion of the building is proposed adjacent to the boundary with 890 Pittwater Road, to mirror the same building alignment of that site. The northern wall then terminates where the building void is located at No. 890 to ensure that there is no visual intrusion, nor privacy impact, across this portion of the site.

Measured from the property boundary, the southern building portion of the proposed development is setback 9m from the boundary, which exceeds the shared separation requirement of 6m, up to a 12m building height. Beyond this, a shared separation distance of 9m complies, as the minimum requirement, despite that the adjoining property does not satisfy the minimum Apartment Design Guide separation distance for privacy purposes.

The visual corridor from the western section of the proposed development, is in an easterly direction and, given the location of walls, there is no, or very limited, opportunity to look into, or towards, the light well of No. 890. Even if this were to occur, the openings into the lightwell are constructed of glass blockwork and therefore have limited, if any, visual openings into those properties. Therefore, from that vantage, there is no adverse visual privacy conditions that will result.

There will be no adverse impacts on the western corner of the site as this interfaces with a major intersection.

In relation to the loss of solar access, the solar analysis prepared by Crawford Architects demonstrates that the extent of the additional shadow over the existing situation to those properties on the southern side of Oaks Avenue is generally contained within the shadow affectation of existing built form on the northern side of Oaks Avenue, behind the subject site. Therefore, the additional impact and, in particular, the non-compliant component of the



	<p>development, does not give rise to an unnecessary level of affectation, over and above the existing situation.</p> <p>Therefore, the proposed built form, and indeed the non-compliant component of the building, will not give rise to contravening this objective of the development standard.</p>
<p>(c) <i>to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i></p>	<p>(c) No adverse impact on the scenic quality of Warringah's coastal bushland is expected to result from the proposed development, as the site is located in the Dee Why Town Centre. The proposal is nestled around existing and new urban development and poses no threat to existing views to or from neighbouring properties due to the location and size of surrounding buildings.</p>
<p>(d) <i>to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.,</i></p>	<p>(d) The additional height is located to the middle portion of the roof and punctures the maximum building height apron at selected points, with minimal footprint. Therefore, no such adverse affectation will result. Most importantly, the nett benefit of providing common open space on the roof top area to service the development is seen as an important response in a dense living environment, when other alternatives are unlikely to provide the same, or a better outcome. Therefore, any perceived visual impact of an adverse nature is outweighed by the amenity benefits that this additional space, albeit non-compliant to ensure accessibility, derives.</p> <p>Therefore, the proposal will achieve this objective.</p> <p>The proposed development will achieve all of these objectives to at least an equal degree as would be the case with a development that complied with the minimum lot width standard. By allowing for the non-compliance as it relates to building services which provide access to the roof top area of the development is a material benefit to the amenity that would be enjoyed by residents.</p>

The proposed development demonstrates consistency with the objectives of the B4 Mixed Use zone and with the height of building objectives. Adopting Preston CJ's language in *Wehbe*, development standards are means to an end, not ends in themselves. The proposed development will comprehensively achieve all of the objectives of both the height of buildings development standard and the B4 zone notwithstanding non-compliance with the prescribed. Compliance with the standard is therefore unreasonable and unnecessary.



Clause 4.6(4)(b) – Sufficient environmental planning grounds

The second element of clause 4.6(3) on which the Court must be satisfied is that there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relate to the subject matter, scope and purpose of the *Environmental Planning & Assessment Act [EP&A Act]* including the objects of the EP&A Act (*Wehbe* para 23).

As Preston CJ explains in *Wehbe*:

“.. the focus of clause 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 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. 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 clause 4.6(a)(i) that the written request has adequately addressed the matter.”

The requested variation consists of an increase to the permitted building height. This Request demonstrates that the variation sought will have no adverse environmental or other impacts, that all of the zone and standard objectives will be met, notwithstanding the variation and that there is no environmental planning reason not to vary the standard.

Further, given that the height standard sought under the draft planning control, which sets the desired future character of the area is achieved, as part of the building proper, the additional height required for building services is desirable for the purpose of creating a viable, effective and equitable common open space outcome which could not otherwise be derived on the site, due to the constraints imposed by other built form as it directly abuts the site and limits any ground floor areas. Making this area accessible to all residents within the development provides a far superior outcome that results in a more acceptable living environment than would otherwise be achieved on the site.

Therefore, given the benefit that attaches to non-compliance with the development standard, to service the development, it is considered that there are sufficient environmental planning grounds, and more importantly, benefits, associated with this outcome.

Clause 4.6(a)(ii) – public interest

The fourth element that the Court needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard's and zone's objectives.



Preston CJ in *Initial Action* (para 27) described the relevant test for this requirement as follows:

“The matter in cl 4.6(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 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 purpose of clause 4.6(4)(a)(ii).”

As demonstrated in this Request, the proposed development will comprehensively meet all of the objectives of both the height of buildings development standard and the B4 zone. Non-compliance with the development standard allows for a social benefit within the development of a quality nature, in a position, that due to the benefit of solar access, ventilation and sense of openness, will encourage positive social interaction. This then results in positive flow on benefits for residents within the development, whom form part of the broader community. Accordingly, the Court can be satisfied that it is in the public interest to vary the standard for the purpose of this development application.

Secretary’s concurrence

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests 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 non-numerical standard, because of the greater scrutiny that the LPP processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

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

