



4 Delmar Parade and 812 Pittwater Road, Dee Why

Clause 4.6 – Clause 7.12
Development Standard

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**4 DELMAR PARADE AND 812 PITTWATER ROAD,
DEE WHY**

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1.0 CLAUSE 4.6 REQUEST – CLAUSE 7.12

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the development standard contained within Clause 7.12 of the Warringah Local Environmental Plan 2011 (WLEP), being 'Provisions promoting retail activity'.

The request relates to State Significant Development Application No. 68230714 (SSDA) for the purposes of a mixed use development comprising three commercial tenancies and 280 apartments over 3 basements levels, lot consolidation and subdivision, and 15% affordable housing (Proposed Development) at 4 Delmar Parade and 812 Pittwater Road, Dee Why (the site).

Specifically, the Proposed Development seeks to maintain the already approved ground floor and first floor tenancies at the site (being three commercial tenancies and 21 ground floor apartments).

1.2 Background

On 14 July 2023, the Sydney North Planning Panel granted consent to development application DA2022/0145 which provided for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The approved development involved a variation to Clause 7.12 of the WLEP in that the development did not provide two floor levels (including the ground floor level) of employment generating space, and instead provided three commercial tenancies facing Delmar Parade and Pittwater Road.

The subject application maintains the same approach as recently approved.

1.3 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument.

However, clause 4.6(3) goes on to say that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant of the SSDA requests that the development standard at cl 7.12 of the WLEP relating to the promotion of retail activity be varied.

1.4 Development Standard to be varied

Clause 7.12 Provisions promoting retail activity, states:

- (1) The objectives of this clause are as follows–

(a) to promote retail activity on the ground and first floors of new buildings in the Dee Why Town Centre,

(b) to promote employment generating uses in addition to retail activity.

(2) Development consent must not be granted to development in the Dee Why Town Centre unless the consent authority is satisfied that—

(a) the ground floor level of buildings on Site A, Site B, Site C, Site D or Site E will not be used for any of the following (other than the provision of access to any of the following)—

(i) residential accommodation,

(ii) medical centres,

(iii) office premises, and

(b) the first floor level of buildings on Sites A and B will not be used for residential accommodation (other than the provision of access to such accommodation), and

(c) buildings will have at least two floor levels (including the ground floor level) of employment generating space, and

(d) development on the ground floor level of buildings in the Dee Why Town Centre will contribute to an active street life in accordance with the document titled Our Greater Sydney 2056 North District Plan published by the Greater Sydney Commission in March 2018.

The provision in Clause 7.12(c) is considered to be a development standard and not a prohibition in accordance with the two step test as set out in the judgment of *Strathfield Municipal Council v Poynting* [2001] NSWCA 270 (Poynting). In particular, the two step test is:

(a) Firstly, a consideration of whether the proposed development is prohibited under any circumstances — when it is read both in context of the WLEP and as a whole.

(b) Secondly, if it is not so prohibited, a consideration of whether clause 6.7 of WLEP specifies a requirement — or fixes a standard — in relation to an aspect of the proposed development.

In relation to the first test, in considering cl 7.12 of the WLEP “as a part of the environmental planning instrument as a whole” (Poynting at [94]), there is no complete prohibition of a development with first floor non-employment generating space. Accordingly, the Proposed Development with a non-employment floor space on the first floor passes the ‘first step’ in the Poynting two-step test. In relation to the second test, clause 7.12(c) of WLEP does fix a standard that buildings will have at least two floor levels (Including the ground floor level) of employment generating space. Accordingly, the requirement of clause 7.12(c) of the WLEP is a development standard.

1.5 Extent of Variation to the Development Standard

The proposal does not provide two floor levels (including the ground floor level) of employment generating space.

Instead, the proposal provides the following employment generating space:

- Two commercial tenancies facing Pittwater Road (located on Level 1, which is ground level at that location)
- Two commercial tenancies facing Delmar Parade

This is the same variation that was recently supported by the Sydney North Planning Panel when it granted consent to development application DA2022/0145 on the site in 2023.

1.6 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 **which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.**

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

The specific objectives of Clause 7.12 of the WLEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

- (a) to promote retail activity on the ground and first floors of new buildings in the Dee Why Town Centre,

The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are critical to the success of retail across the entire ground floor and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new retail tenancies across the entire ground floor would be disconnected with the broader centre and would not succeed. Retail on the first floor in this location would suffer even more and there is no reasonable prospect of commercial success for retailing on the first floor in this location at the periphery of the town centre, with no street frontage, and elevated one level above street. There are profoundly more attractive retail offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.

Instead, the proposal provides the entirety of both street frontages for retail tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life.

The proposed development maximises and promotes retail activity to the greatest extent possible having regard to the location and constraints of the subject site, and is therefore consistent with this objective when taking into account the site constraints.

(b) to promote employment generating uses in addition to retail activity.

The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The only credible prospect for successful employment generating uses in this location are for street facing retailing tenancies. There is limited demand for other employment generating uses in this particular location. The underlying objective for additional employment floor space is not considered to be relevant to the subject site and proposal due to its location and site attributes, and also having regard to structural change in employment floor space as a result of the COVID-19 pandemic.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objectives and purpose of the control at cl 7.12 is relevant to determining the appropriateness of a variation to the standard. the proposed development

The Proposed Development maximises and promotes retail activity to the greatest extent possible having regard to the location and constraints of the subject site, and is therefore consistent with part of the purpose of Clause 7.12(2)(c).

However, the underlying objective for additional employment floor space beyond retailing to each street frontage is not considered to be relevant to the subject site and proposal due to its location and site attributes, and also having regard to structural change in employment floor space as a result of the COVID-19 pandemic.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives and purpose of the standard relates to promoting retail activity and providing employment floor space in addition to retail activity. Strict compliance would in fact render the project commercially unviable and unable to proceed, as a development with the entire ground and first floor being commercial would not be feasible. In words, strict compliance would mean that the site would be sterilised from being redeveloped and the site would stagnate.

This would paradoxically have the effect of preventing the delivery of a development with ground floor retailing to each street frontage, which is viable, and preventing the delivery of this employment floor space. Strict compliance would also have the effect of preventing the delivery of 280 additional apartments in the Dee Why town centre, of which 15% are affordable housing, and the additional patronage of the retail tenancies in the subject and nearby developments that would result from the increased population in this location.

In this regard, the underlying object and purpose of Clause 7.12 would be thwarted if strict compliance was required on the subject site.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The development standard has been abandoned on the subject site by the actions of the Sydney North Planning Panel when it granted consent to development application DA2022/0145 on the site in 2023.

That development consent set aside the control as it applies to the subject site, and so the control has been destroyed for this land.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The zoning of the land is appropriate because it permits residential flat development as well as shop-top housing and commercial development.

Key facts that support the above reasons why strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The entirety of both street frontages is proposed to contain commercial tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life. The proposed development maximises and promotes retail activity, and therefore employment floor space, to the greatest extent possible having regard to the location and constraints of the subject site.
- The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are evident further north in the centre which are critical to the success of employment floor space and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new commercial tenancies on the remainder of the ground floor and entirety of the first floor of the development are disconnected with the broader centre and would not succeed. There are profoundly more attractive commercial office offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.
- It is considered that the requirement for the entire ground and first floor to contain employment generating floor space is more specifically intended to apply to key identified sites within the Dee Why Town Centre, noting that Clause 7.12(2) reinforces that there is to be no ground floor residential use on Sites A, B, C, D or E.
- The proposed variation will support increased residential density which will contribute positively towards patronage within the proposed ground floor commercial tenancies. However, if the variation is not granted, the development would likely fail because ground floor commercial tenancies without a street frontage, and first floor commercial floorspace, will fail in this location.
- The proposed variation does not result in any unreasonable or adverse impacts.
- If the variation is not permitted, the redevelopment of the site will not be feasible as ground and first floor commercial tenancies across the entire site will not be able to be leased on commercially viable terms. This is especially relevant in light of the structural change in employment floor space as a result of the COVID-19 pandemic. This would prevent the sustainable redevelopment of the site in a manner which can deliver much needed additional housing choice in an ideal location and the achievement of an activated and engaged ground floor plane, which are all benefits associated with the subject proposal.

- 1.7 [Clause 4.6\(3\)\(b\) Are there are sufficient environmental planning grounds to justify contravening the development standard?](#)

Clause 4.6(3)(b) of the WLEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The variation to the development standard in this instance allows for 21 ground floor apartments. The environmental planning grounds that justify the component of the development which results in the non compliance to the control at 7.12 of the WLEP include:

- The entirety of both street frontages is proposed to contain commercial tenancies which are capable of accommodating retail shops, cafes or restaurants which will contribute positively to a lively street life. The proposed development maximises and promotes retail activity, and therefore employment floor space, to the greatest extent possible having regard to the location and constraints of the subject site.
- The subject site is located at the very southern edge of the town centre and is largely disconnected from the commercial core of the centre. The subject site does not benefit from the extensive street frontage and through site links which are evident further north in the centre which are critical to the success of employment floor space and instead the site has very limited street frontage, very limited exposure, and is a deep site such that new commercial tenancies on the remainder of the ground floor, and the entirety of the first floor, of the development are disconnected with the broader centre and would not succeed. There are profoundly more attractive commercial office offerings with intrinsically better attributes closer to the centre of Dee Why which will always attract tenants in preference to the subject site and development.
- It is considered that the requirement for the entire ground and first floor to contain employment generating floor space is more specifically intended to apply to key identified sites within the Dee Why Town Centre, noting that Clause 7.12(2) reinforces that there is to be no ground floor residential use on Sites A, B, C, D or E.
- The proposed variation will support increased residential density which will contribute positively towards patronage within the proposed ground floor commercial tenancies. However, if the variation is not granted, the development would likely fail because ground floor commercial tenancies without a street frontage, and first floor commercial floorspace, will fail in this location.
- The proposed variation does not result in any unreasonable or adverse impacts.
- If the variation is not permitted, the redevelopment of the site will not be feasible as ground and first floor commercial tenancies across the entire site will not be able to be leased on commercially viable terms. This is especially relevant in light of the structural change in employment floor space as a result of the

COVID-19 pandemic. This would prevent the sustainable redevelopment of the site in a manner which can deliver much needed additional housing choice in an ideal location and the achievement of an activated and engaged ground floor plane, which are all benefits associated with the subject proposal.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed variation in this instance

1.8 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3). (*Rebel MH v North Sydney Council [2019] NSWCA 130*).

These matters include:

- demonstrating the compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)); and
- demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* at [15].

These matters are comprehensively addressed above in this written request.

1.9 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Objective of the Development Standard

The proposal’s consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.

- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide an active day and evening economy encouraging, where appropriate, weekend and night-time economy functions.

The proposed development is considered to be consistent with the zone objectives for the following reasons:

- The subject site is at the periphery of the centre and is largely disconnected from the commercial core of the centre. As a result, commercial floor space on the ground floor of the internal areas of the development is not commercially viable and only commercial tenancies with a street frontage will have a chance of succeeding in this location at the edge of the centre. The proposed has maximised the provision of commercial floor space with street frontage, and maintains approximately the same provision of commercial floor space as previously approved under Development Consent DA2022/0145.
- The proposal provides additional residential accommodation in an ideal location at the southern end of the Dee Why town centre and future residents will be able to walk and cycle to all of the services, employment and recreational facilities within the central area of the town centre, including Dee Why beach. The site is also very well located immediately to the north of the Stony Range Botanic Garden.
- The proposal successfully promotes active building fronts by providing active commercial edges to both the Delmar Parade and Pittwater Road frontages which will contribute positively to the life of streets and creating environments that are appropriate to human scale as well as being comfortable, interesting and safe.
- The proposal provides an appropriate mix of residential and commercial uses having regard to its location at the southern edge of the town centre.
- The proposal amalgamates several large sites at the southern end of the town centre and provides for an integrated underground car parking arrangement with a consolidated vehicular entry and exit point.

The above discussion demonstrates that the Proposal Development will be in the public interest notwithstanding the proposed variation to the development standard in Clause 7.12(2)(c), because it is consistent with the relevant objectives for the Dee Why town centre and the objectives for development within the zone in which the development is proposed to be carried out. Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard for this particular component.

1.10 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) of the standard instrument local environmental plan are addressed below:

- (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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The Proposed Development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

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

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

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.11 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives for development in the Dee Why town centre notwithstanding the proposed variation to the development standard.

Requiring strict compliance with the development standard on the subject site would result in an unfeasible development project which would prevent the achievement of the positive attributes which can be achieved by the proposed development included activated and engaged street edges and additional housing choice in an ideal location.

Allowing the flexible application of the development standard in this instance is not only reasonable but also desirable as it will facilitate a high quality and appropriate development for this location.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the development standard will support a better urban design outcome in this instance in accordance with objective 1(b).

1.12 Legal Interpretation

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 *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where, as noted above, 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).

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);
- There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and
- One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [945(c)]). That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

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."

In the case of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston), the Court emphasised that clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves. In this case, Acting Commissioner Clay relevantly said:

"It should be noted cl 4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome".

1.13 Conclusion

For the reasons set out in this request, it is considered that strict compliance with the development standard contained within clause 7.12(2)(c) of the WLEP is unreasonable and unnecessary in the circumstances of the case and as such, there are sufficient environmental planning grounds to justify the variation.

Finally, the proposed development is in the public interest because it is consistent with the objectives for development within the Dee Why town centre.

It is requested that the consent authority exercise discretion and find that this request adequately addresses the matters required to be satisfied under subclause 4.6(3) of the WLEP as:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

In this regard it is reasonable and appropriate to vary the development standard to the extent proposed.