



4 Delmar Parade and 812 Pittwater Road, Dee Why

## Clause 4.6 – Podium Height 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 – PODIUM HEIGHT

## 1.1 Introduction

This request for an exception to a development standard is submitted in respect of the podium height development standard contained within Clause 7.6A(2) of the Warringah Local Environmental Plan 2011 (WLEP).

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 increase the podium height in the Approved Development by 1 storey for Building A and 2 storeys for Building.

## 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 the variations to the podium height development standard which were supported by the Sydney North Planning Panel, as follows:

Site	Compliant podium	Previously approved
Building A (facing Delmar Parade)	2 storeys	4 storeys
Building B (facing Pittwater Road)	3 storeys	7 storey tower (no podium)

## 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 7.5A of the WLEP be varied.

## 1.4 Development Standard to be varied

Clause 7.6A states:

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

(a) to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,

(b) to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain.

(2) Development consent may be granted to the erection of buildings on the following land with the following maximum podium heights–

(a) Site A–3 storeys,

(b) Site B–4 storeys,

(c) land fronting Pittwater Road (except land on Site A or Site B)–3 storeys,

(d) land not fronting Pittwater Road (except land on Site A or Site B)–2 storeys.

#### 1.5 Extent of Variation to the Development Standard

The proposed development provides the following podium heights for the development and variation to the podium heights development standards:

Site	Compliant podium	Previously approved	Proposed podium	Variation
Building A (facing Delmar Parade)	2 storeys	4 storeys	5 storeys	3 storeys
Building B (facing Pittwater Road)	3 storeys	7 storey tower (no podium)	9 storey tower (no podium)	6 storeys

#### 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 Mical 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 7.6A of the WLEP are identified below. A comment on the proposal's consistency with each objective is also provided.

(a) to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,

The proposed variation to the podium height for Building A is specifically to achieve a more consistent built form character having regard to the higher podium heights in Delmar Parade within the visual catchment of the site. Strict compliance with the 2 storey podium height control would lead to an inconsistent and incohesive built form outcome.

The proposed variation for Building B, whilst resulting in a different podium height to that of 2 Delmar Parade, is an appropriate design outcome due to the unique location of Building B in a landmark location which heralds the southern gateway into the Dee Why Town Centre. In this location it is appropriate to have a single unified vertical expression for this slim building. It is also noted that this approach is similar to that which has been approved by Council for other corner buildings along Pittwater Road, such as the building at 822 Pittwater Road which adopts a 9 storey podium height along its northern façade.

(b) to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain,

The proposed podiums for the development remains consistent with this objective in that the proposed development achieves appropriate building separations and high levels of privacy and solar access to adjoining properties notwithstanding the proposed variations to the podium heights.

**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 podium height control are relevant to determining the appropriateness of the variation to the standard.

The Proposed Development is consistent with those objectives on the basis that the development achieves a consistent outcome in relation to podium height with the emerging character of development within the Dee Why Town Centre.

**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 podium height standard would be diminished by strict compliance because it would result in an inconsistent urban design outcome and a complete lack of podium height cohesion.

**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 Council has consistently varied the podium height control, and it has been abandoned in so far as it applies to the subject and surrounding sites.

In particular:

- there are **no sites** within the visual catchment of the site along Pittwater Road which have a three storey podium;
- there are **no sites** within the visual catchment of the site along Delmar Parade which have a two storey podium; and
- the recently approved development on the subject site itself under development consent DA2022/0145 does not provide a three storey podium to Pittwater Road or a two storey podium to Delmar Parade.

Accordingly, the podium height control at Clause 7.6A of the WLEP has been unequivocally abandoned and so strict compliance with the clause is unreasonable and unnecessary.

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.**

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

- The recently approved development on the site has already varied the podium controls with more than double the podium control on both Delmar Parade and Pittwater Road.
- The Pittwater Road building is in a landmark location as it heralds the southern gateway into the Dee Why Town Centre. Accordingly, it is appropriate for Building B to adopt a strong and unified vertical language to properly celebrate this important location and as a result this building is proposed without a podium/upper levels arrangement and instead adopts a 9 storey street wall. This proposed approach for an important corner site is also consistent with the emerging character of development for similar sites within the Dee Why Town Centre, noting that the development on the northern corner of Delmar Parade and Pittwater Road also adopts a nil setback and no podium along its northern street façade. Finally, strict compliance with the 3 storey podium height would also result in an anomalous outcome given that the recently approved development at 2 Delmar Parade has a 4 storey podium.
- In relation to Building A, it is proposed to provide a 5 storey podium in order to achieve a coordinated and cohesive podium level along Delmar Parade given that the recently completed development at 2 Delmar Parade has a strongly defined 4 storey podium height which has established this datum for the southern side of Delmar Parade. Strict compliance with the 2 storey podium requirement would result in an anomalous urban design outcome and it is more appropriate in this instance to achieve a more consistent podium height for Delmar Parade.

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 environmental planning grounds that justify the proposed additional podium heights are:

- There are no sites within the visual catchment of the subject site which provide a 3 storey podium to Pittwater Road, or a 2 storey podium to Demar Parade.
- The Pittwater Road building is in a landmark location as it heralds the southern gateway into the Dee Why Town Centre. Accordingly, it is appropriate for Building B to adopt a strong and unified vertical language to properly celebrate this important location and as a result this building is proposed without a podium/upper levels arrangement and instead adopts a 9 storey street wall. This proposed approach for an important corner site is also consistent with the emerging character of development for similar sites within the Dee Why Town Centre, noting that the development on the northern corner of Delmar Parade and Pittwater Road also adopts a nil setback and no podium along its northern street façade. Finally, strict compliance with the 3 storey podium height would also result in an anomalous outcome given that the approved development which is under construction at 2 Delmar Parade has a 4 storey podium.
- In relation to Building A, it is proposed to provide a 5 storey podium in order to achieve a coordinated and cohesive podium level along Delmar Parade given that the recently completed development at 2 Delmar Parade has a strongly defined 4 storey podium height which has established this datum for the southern side of Delmar Parade. Strict compliance with the 2 storey podium requirement would result in an anomalous urban design outcome and it is more appropriate in this instance to achieve a more consistent podium height for Delmar Parade.
- The proposed variations to the podium height controls do not result in any unreasonable impacts.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed non-compliances 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 exactly the same provision of commercial floor space as previously approved under Development Consent DA2022/0145 which was agreed to by Council.
- 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 variations to the podium height development standard, 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. 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) 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 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 of Clause 7.6A notwithstanding the proposed variation to the podium heights development standard.

Requiring strict compliance with the podium heights development standard on the subject site would result in an inferior built form that would contextually be inconsistent with the established character for podiums both within the subject street block and further along Pittwater Road.

Allowing the flexible application of the podium height development standard in this instance is not only reasonable but also desirable given the objective to achieve a consistent urban design outcome.

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 podium height development standard will achieve 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 podium height development standard contained within clause 7.6A of WLEP is unreasonable and unnecessary in the circumstances, 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 of the standard and the zone.

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 podium height development standard to the extent proposed.