



DA 16-2018- 386-1 - Mixed use development. 1 Yacaaba St & 35-39 Donald St, Nelson Bay - Objection

Contents

Costing is questionable - implications for approval path	1
Design Panel.....	2
Assessment must be primarily against the existing development standards	2
Risk to ratepayers of an approval based on the Clause 4.6 variation application.....	3
The Applicant’s arguments for a variation from development standards.....	4
3.1 BACKGROUND	4
3.2 ASSESSMENT	6
Comments on other sections of the Statement of Environmental Effects (SoEE).....	12
Basement Car Park.....	12
State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development	13
Coastal protection.....	13
Environmental Impact Assessment (SoEE p.55)	14
Ecologically Sustainable Development	15

Costing is questionable - implications for approval path

The application estimates the capital cost of the development (CCV) as \$18 million. This figure is highly significant because developments with a CCV of more than \$20 million cannot be approved by Local Councils – the consent authority is instead the Joint Regional Planning Panel (although the assessment will still be by Council). The applicant may or may not prefer the decision to be made by the JRPP, but it would at least provide an opportunity for a public hearing at which objectors could



voice their concerns, and involve an independent professional judgement, rather than that of elected Councillors alone¹.

We would be very surprised if this building, comprising 60 apartments and two large commercial units, with underground parking, could be built for under \$20 million. We note that the proposed Ascent Apartment building on Church St, approved by Council in 2017, had a CCV of \$19.3 million despite having only 57 apartments, no commercial space and easier carparking under the main building due to the slope of the site– and even that seemed a low estimate at the time.

We are advised that Council will seek confirmation of the CCV estimate from a quantity surveyor, based on the documentation supplied by the applicant. We submit that it is essential that this ‘second opinion’ is genuinely independent and takes into account the scale and other design features, and comparisons with other equivalent developments in the Hunter region, and does not rely just on what the applicant has asserted.

Design Panel

We understand that the proposed development will be referred to an independent Design Panel. This was an important feature of the adopted 2012 Nelson Bay Town Centre & Foreshore Strategy (‘2012 Strategy’), carried over into the 2017 Draft ‘Progressing the Nelson Bay Town Centre and Foreshore Strategy: a revised implementation and delivery program’ (‘2017 draft Delivery Program’). TRRA has consistently supported the use of an independent design panel for major DAs including all those which involve a significant variation from development standards.

As the Design Panel’s report will be a major input to the assessment and decision process we request that a copy of the report be placed on the DA Tracker, along with the other submissions received from the public and from Government authorities, as they are received (this is consistent with Council’s practice in relation to other major DAs).

Assessment must be primarily against the existing development standards

While the assessment of this DA under the EPA Act by Port Stephens Council planners can take into account both adopted and draft planning strategies, and any *draft* LEP or DCP amendments, it must primarily address the development standards in the *current* statutory instruments – the Port Stephens Local Environment Plan (LEP) 2013, and the Port Stephens Development Control Plan (DCP) 2014. The applicant must justify any variations from the existing standards (such as the more than doubling of height) under Clause 4.6 of the LEP.

We note that the applicant has provided a separate document ‘Clause 4.6 Assessment’ in support of the DA. We comment further on this below, but note here that both in this document and in the

¹ We understand that because this DA seeks a variation of height limits of more than 10%, it will, under Council’s policy, come to a full Council meeting for a decision rather than being decided by staff under delegated authority.

Statement of Environmental Effects (SoEE), the applicant places significant weight on non-statutory Council documents, specifically:

- the 2012 ***Nelson Bay Town Centre and Foreshore Strategy*** ('2012 Strategy') – which was adopted by Council in 2012 but never implemented in the form of LEP or DCP amendments.
- the 2016 '***Discussion Paper – Progress of the Nelson Bay Town Centre and Foreshore Strategy***' ('2016 Discussion Paper') – which went on public exhibition in early 2017, was reported to Council in December 2017, and which led to:
- the 2017 Draft '***Progressing the Nelson Bay Town Centre and Foreshore Strategy: a revised implementation and delivery program***' ('2017 draft Delivery Program') – which went on public exhibition in early 2018, but has yet to be reported to Council

We submit that while the 2012 Strategy represented a consensus of most interested parties (including ourselves), the building height increases proposed in the 2016 and 2017 documents are highly controversial. The Council, the successful applicant for the 11-13 Church St 'Ascent Apartments' development, and now the applicant in this case have all consistently attempted to 'verbal' the local community by asserting that significant height increases have already been accepted. This is simply not true – the only agreement reached (but even then not implemented) was to allow up to 7 storeys in the town centre and then only in exceptional circumstances of *both* 'outstanding design excellence' *and* 'strategic public benefit'.

We therefore submit that while the assessment can take account of the current debate about building heights and the indications of increased height in the 2016 and 2017 Council documents, it cannot make any assumptions about whether significant changes *will* be made to the height limits.

Even if a revised Strategy is adopted with increased building height limits, Council will still then need to go through the process of submitting a planning proposal for LEP amendments to the Minister. This proposal will have to go on public exhibition. Given that the local community will continue to fight any proposal for increases in height limits of the scale proposed in the Council documents, it cannot be assumed that the Minister will necessarily approve any LEP amendments to this effect.

The assessment must therefore primarily reference the current development standards, and any arguments that the applicant makes for significant variation from those standards under Clause 4.6 of the LEP 2013 (Exceptions to development standards).

Risk to ratepayers of an approval based on the Clause 4.6 variation application

It will of course be open to Council (if it remains the consent authority for this DA²) to accept the arguments of the applicant under Clause 4.6 and grant an exception to the currently applicable development standards. However if the project is approved on this basis, then given the extent of community opposition to significant increases in the height limits, there is every possibility of a third party appeal to the Land and Environment Court. If successful, such an appeal could incur substantial legal costs for Council.

² or the JRPP if the independent valuation assesses the CCV as above the threshold for referral – see our earlier comments

The Applicant's arguments for a variation from development standards

We comment below on excerpts from the document *Clause 4.6 Assessment – Building Height*, which is Appendix H to the Statement of Environmental Effects (SoEE) for the DA ('the Clause 4.6 Assessment report'). The excerpts are italicised and are followed by our comments.

2. EXTENT OF NON-COMPLIANCE

The Clause 4.6 Assessment report states:

'The PSLEP 2013 states that the maximum building height for the site is 15m, the proposal seeks a building height of 33.2m. The proposal therefore exceeds this development standard.'

'It is our submission that the breach to the building height control, will not impact on the future amenity of the development or adjoining properties, nor will the variation compromise the architecture of the building or the bulk and scale of the development or the character of the area. As such a degree of flexibility is considered reasonable in this instance and anticipate under the LEP where justification is made.' (p.9)

See below for our detailed rebuttal of the statement that it 'will not impact on the future amenity of adjoining properties'. The loss of views and of sunshine are clearly significant.

A more than doubling of the height is much more than just 'a degree of flexibility'.

It is unclear what is meant by 'anticipate under the LEP where justification is made.'

3. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

3.1 BACKGROUND

The Clause 4.6 Assessment report is inaccurate in several references to the 2012 Strategy:

'An additional 2 stories was recommended under this strategy where the proposal exhibited 'design excellence'. (p.10)

This is a misleading selective quote - the full condition in the 2012 Strategy was 'Outstanding design excellence **and** Strategic Public Benefit (our emphasis), and was clearly intended to allow for up to 2 additional storeys only in exceptional cases, thereby reaching a maximum of 7 storeys in the town centre.

'The Nelson Bay Town Centre and Foreshore Strategy is being updated and is about to be placed on exhibition, following endorsement of Council in 2017.' (p.11)

Councillors have been at pains to explain, including in the debate at the Council meeting of 12 December 2017, that by 'endorsement' of the draft Delivery Program they did not mean supporting the content — just endorsing the document to be exhibited — and they have consistently stated that the 2017 draft Delivery Program is just a draft for consultation and that they are still open to arguments on the content.

'... although design will be important in moving forward for any development in the town centre the current planning controls in Nelson Bay do not make it feasible to develop. As such Council have proposed changes to height limits (and potentially other controls) to ensure private investment in the town centre. This view is also endorsed through a feasibility assessment prepared by Hill PDA in 2016, that is, current height controls are in real terms not feasible.' (p.11)

No evidence has been provided that development is not feasible under current controls. On the contrary, recent approvals of 3-6 storey buildings in the town centre, such as on the corner of Donald and Church streets, suggest they are viable under current controls with a modest variation using clause 4.6.

The Hill PDA 2016 study was flawed with the updated 2017 study contradicting the 2016 findings (see our December 2017 'critique' of the draft Delivery Program). The study did note that feasibility was highly dependent on the location and size of the site, but the applicant has made no attempt to justify the requirement for extra height on this particular site.

'It is important to note that the car park to the north of the subject site was subject to an expression of interest (EOI) in 2016-2017. Although the details of the EOI are confidential, public reporting of the EOI has identified that residential apartments are to be built on top of the proposed car park by a private company with the building to be an estimated seventeen stories. Even if it is less then this site is likely to have the highest building in Nelson Bay town centre.' (p.11)

This statement is contrary to recent statements by the Mayor about the status of these negotiations, and to a motion passed by Council on 26 June 2018 to investigate the feasibility of Council itself replacing the Donald St East carpark, part funded with commercial space. Pure speculation about another site, with no firm plans, let alone approvals, cannot be used to justify a building on this site more than double the allowed height.

'The update of the Nelson Bay Strategy identifies height limits across the town centre, with heights identified for up to 35m in the main part of the town centre, in which the subject site is located. This presents the potential for feasible developments to occur in the area and provide private investment into this key centre' (p.11)

This is also a highly contentious assertion – it is entirely premature and presumptuous to assume limits will be increased to anywhere near this height or in this location.

'Also feeding into the higher density debate in Nelson Bay is the Draft Greater Newcastle Metropolitan Plan recently released which identifies some 8,300 infill dwellings will be required in Port Stephens over the next twenty years. Council have taken a strategic approach to increase densities in the key centre of Nelson Bay to make development feasible but also address strategic planning considerations of increasing dwellings in existing centres outlined in plans prepared by the NSW government.' (p.11)

'In order to meet the Greater Newcastle Metropolitan Plan targets significant time and effort are going to be needed to ensure multi-dwelling housing is an option in the LGA.' (p.12)

These assertions are either inaccurate or irrelevant.



- Nelson Bay is not even in the Metro plan area, unlike western parts of the LGA.
- In any case, Council has made a submission (Information Papers item 1 Council meeting 13 Feb 2018) to the State Government on the Draft Greater Newcastle Metropolitan Plan questioning the figure of 8,300 infill dwelling forecast for the *entire* Port Stephens area over the next twenty years. Council argued for more greenfield sites rather than infill, with a revised figure of 12,021 for greenfield sites and only 1204 infill dwellings for the entire LGA, with only 235 for the entire Tomaree area — importantly, current trends suggest that at least this number of dwellings will be supplied through low rise subdivision developments without any need for high rise apartment buildings.
- If there is a case to be made for high rise apartments it must be based on something other than spurious and inaccurate reference to State Government planning strategies.
- Council has also yet to make any decision on increasing density within the centre of Nelson Bay.
- There is no evidence that the current height limits in Nelson Bay will constrain the ability of the Tomaree peninsula to accommodate the expected growth in population or demand for dwellings.

Furthermore, the lack of progress on the approved 8 storey building on Church Street suggests the asserted demand is not there. Even the Developer expects only 25% of the units to be occupied by permanent residents (Section 4.1 in the Traffic Study – Appendix E to the SoEE), confirming what is already known about most of the apartment buildings in the town. Uncertainty over where similar size buildings might appear is scaring current and future unit owners, and there is no guarantee that another building will not be built in front of this proposal making many units potentially unsaleable.

3.2 ASSESSMENT

In this section, the Clause 4.6 Assessment report addresses in turn the parts of the ‘five part test’ established by the Land and Environment Court as the ‘grounds’ for variation in development standards³.

Before commenting on the report’s attempts to justify a variation, we submit that Council needs to recognise the underlying objectives of Clause 4.6 under State Government policy.

Purpose of Clause 4.6

The State Government issued guidelines on the use of Clause 4.6 in 2011. These state that it is to allow ‘*an appropriate degree of flexibility*’ and to ‘*provide flexibility in applying development standards to achieve better outcomes for and from development in exceptional circumstances.*’⁴ The Standard Instrument LEP, followed by the PS LEP 2013, regrettably weakens this by substituting the word ‘*particular*’ for ‘*exceptional*’. While the applicant is entitled to address the wording of the LEP, we submit that in *applying* Clause 4.6, Council should take account of the stricter wording in the State government *policy* which underlies the standard clause. The word ‘*exceptional*’ conveys a very different meaning from ‘*particular*’.

³ In *Wehbe vs Pittwater Council (2007) LEC 827*

⁴ see NSW Government Planning and Infrastructure, *Varying development standards: A Guide*, August 2011, Introduction.

Another key word in the State government policy is *'appropriate'* — the clear message in the Guidelines is that the Clause is intended to permit an architect a small degree of flexibility in design to allow for a difficult site or to accommodate a particular roof style or setback to ensure the new development is in keeping with the surrounding area but cannot quite meet the LEP requirements. It is clearly NOT intended to allow an applicant to completely re-write the LEP requirements in their own commercial interests. The Clause properly allows for modest variations to make a building 'fit-in', but should not be used, as in this case, to make a building 'stand-out' within the streetscape.

We turn now to the arguments in the Clause 4.6 Assessment report in relation to each of the grounds for variation in the five part test.

i. The objectives of the standard are achieved notwithstanding non-compliance with the standard

...

'With respect to the building height objective, we need to acknowledge that the subject site is located within part of the Nelson Bay town centre which is identified for renewal and intensification. Future development within the immediately (sic) vicinity of the subject site, will have a height commensurate with the height proposed.' (p.13)

This statement is premature and presumptuous. Renewal and intensification does not necessarily require major height increases which are highly contentious in the community and the need for which has yet to be established by any evidence.

'... the development being consistent with the FSR of other town centres in the Hunter Region.' (p.13)

The proposed FSR of 3.3:1, is not consistent with other town centres in the Hunter apart from perhaps the centre of Newcastle, and is generally only seen in major urban centres serviced by mass transit such as Chatswood, Parramatta and Rhodes. The proposed FSR of this development is 32% greater than the limit of 2.5:1 in the adopted Nelson Bay Strategy, and exceeds even the generous 3.0:1 ratio proposed in the draft Delivery Program. (and this FSR, like the height limits proposed, is also contentious and not yet adopted). It is worth noting that the Ascent apartments in Church Street only has a FSR of 2.47:1

'In view of the site's prominent central location in the heart of the Nelson Bay town centre, the position on a corner site also promotes street activation on both Donald and Yacaaba Streets.' (p.13)

We submit that while street activation is desirable it is independent of building height.

'The proposed building height would reinforce the position of the subject site creating a development that reinforces the future urban design considerations of the area.' (p.14)

Again, this statement is premature and presumptuous – there is no evidence that a building of 5 storeys would not achieve the same result.

'It is therefore considered the proposal is in keeping with the locational attributes, consistent and in keeping with the surrounding established character of the area.' (p.14)

There is no justification for this statement. A building extending more than double isolated buildings in the area and five times the height of the majority of commercial buildings in the town centre core cannot be considered in keeping with the established character.

'... the proposed development is of a high quality urban form and responds to the constraints of the site and its location in the town centre.' (p.14)

While the applicant and their consultants are entitled to their opinion, this statement prejudices the findings of the independent Design Panel. The site being level has very few constraints and no detailed justification has been given to what elements of the design make it 'high quality'. We remind the assessors that relevant criterion for extra height in the adopted 2012 Strategy was 'outstanding design excellence'.

'The proposed development provides for a building that reflects the intended size and nature of the site, and its surrounding neighbourhood into the future. The proposal provides for consistent setbacks to the side and front boundaries enabling a clearly definable, modern form that acts as an exemplar exhibition of built form to the area.' (p.14)

Again, this statement is premature and presumptive that the neighbourhood will in the future be of similar proposed heights. The proposed building would clearly be 'definable', as demonstrated in the photo montages, but we strongly argue that it is not an 'exemplar'.

'The upper residential levels, include additional setbacks and will be broken up by glass balustrading and balconies and, potentially, mixed use materials which will provide for visual interest and creating a visual balance to the development.' (p.14)

We question the setback of the residential units from the street front. The activation at street level is desirable but with the solid design of the balconies there appears to be no setback above the second level as required by the DCP or SEPP 65, apart from the top two levels. We submit that to meet these requirements, all residential levels should be set back much further from the street frontage along with perhaps more glass to break the appearance of the building. The current appearance is uniformly monotonous.

'... the proposal will result in some additional overshadowing to the adjoining buildings, though it is considered that this is a consequence of both the orientation of the site and not the higher built form. The site frontage to Donald Street provides significant solar access opportunities.' (p.14)

We submit that there would in reality be very significant overshadowing, particularly of the adjoining property at 3 Yacaaba St which appears would be almost totally in permanent shade during winter. The applicant has not provided existing shadowing diagrams, nor the percentage increase of shadowing compared to a building that was limited to the current LEP height limit. The loss of amenity to the neighbouring properties and across Yacaaba Street cannot be so easily dismissed.

The height of the proposed development also fails to meet the requirement for Design Excellence in the 2017 draft Delivery Program in respect of the relationship between building height and street width:

'Building height should provide due consideration to human scale. That is, five storeys is between 15-20m building height, which is a 1:1 ratio with a street width of 20m.'

As the width of both Donald and Yacaaba Streets is only approximately 20m, any building on this site should not exceed the existing height limits of five storeys.

The Clause 4.6 Assessment report concludes this sub-section by asserting that:

'It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard.' (p.15)

The assessment report does not specifically address how the variation does not undermine the objectives of the Clause 4.3 Height limit, which includes 'to ensure the height of buildings is appropriate for the context and character of the area' (Clause 4.3(1)(a)).

'In particular, the strategic vision for the Nelson Bay town centre (as noted in feasibility assessments) can only be achieved by higher height limits, (p15)

The current strategic vision for the Nelson Bay Town Centre is as set out in the adopted 2012 Strategy, which quite clearly and expressly includes limitations on building height, and keeping the default height in the town centre at 5 storeys. That vision, accepted by consensus of interested parties, included an allowance for modest variations in height — of up to 2 storeys in exceptional cases, but this was never implemented in LEP or DCP amendments.

The proposed height limits in the 2016 Discussion Paper and 2017 draft Delivery Program are just that — proposals, and have been expressly and repeatedly confirmed by Councillors and staff as still subject to the outcome of the latest consultation process. Until these outcomes are reported to Council, and a revised Strategy adopted, there is no new strategic vision beyond the adopted 2012 Strategy.

To the extent that the applicant for this DA can legitimately invoke Council's strategic vision for Nelson Bay, they can only rely on the adopted 2012 Strategy and not on the still highly contentious proposals in later documents. That is, it can rely to a limited extent on the provision in the 2012 Strategy (but not yet implemented) for up to a 7 storey building, potentially, on this site if it exhibits both 'outstanding design excellence' and 'strategic public benefit', but they cannot legitimately invoke higher limits which at this time are still under vigorous debate.

ii. The underlying objective or the purpose of the standard is not relevant to the development .

The Clause 4.6 Assessment report accepts that the underlying objective or purpose of the standard is relevant to the development, and does not therefore seek to rely on this 'ground' for variation. (p.15)

iii. the underlying object or purpose would be defeated or thwarted if compliance was required ...

The Clause 4.6 Assessment report accepts that the underlying objective or purpose (of the height limit) would not be defeated or thwarted if compliance was required, but argues that *'on balance the proposed development provides a better outcome.'* (p.15)

We submit that this acceptance directly contradicts one of the applicant's primary arguments under the first part of the test above; i.e. that *'the strategic vision for the Nelson Bay town centre (as noted in feasibility assessments) can only be achieved by higher height limits, (p15)*

To argue that these assertions are not contradictory would require a disassociation of the 'strategic vision' from the 'objective of the height limit'. This makes no sense — in the hierarchy of planning instruments, the setting of height limits must surely be a tool to achieve the strategic vision?

iv. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard ...

The Clause 4.6 Assessment report accepts that '...the standard has not been abandoned or destroyed' (p.15) but then goes on to point to previous variation approvals.

This seems like an 'each way bet' – surely EITHER the previous variation approvals demonstrate that the standard has been 'virtually abandoned or destroyed' (in which case the applicant should be claiming this 'grounds' OR the applicant accepts that the standard remains in place and cannot reasonably invoke precedent decisions – this DA, like all others, must argue the case for a variation on its own merits.

If Council is inclined to consider the precedent arguments, then we point out that of the five cited, three are within an appropriate range for application of discretion and flexibility under Clause 4.6, being approval of buildings of 21-22 metres. 5 Tallean Road is a special case of site up against wooded hill with no prospect of development behind. 10-13 Church St was a highly controversial approval, which Council was at pains to suggest at the time did not create a precedent!

v. the zoning of the land is unreasonable or inappropriate ...

The Clause 4.6 Assessment report accepts that the zoning of this site is appropriate, and does not therefore seek to rely on this 'ground' for variation. (p.16)

4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

The Clause 4.6 Assessment report asserts:

'Development proposed across the road (to the north east) on the Donald Street car park is proposed to be higher in height as is the heights towards the south (near the bowling club) and future buildings in the area will be of similar height to that proposed. This is outlined in a vision for the town centre through the updated draft Nelson Bay Town Centre Strategy. The bulk and scale of development within the area will also be of a consistent density.' (p.17)

As detailed above this is inaccurate – there is no current consideration of even higher buildings on the site to the north east, and the assumption that the proposals for a ten-storey limit anywhere in the town centre is premature and presumptuous.

'The current proposal will be in the order of 3.3:1 FSR which is reasonable in a sub-regional town centre like Nelson Bay'. (p.17)

We have already pointed out above that there is no evidence for this assertion. An FSR of 3.3:1 is extraordinarily high density, generally found only in metropolitan areas adjacent to mass transit stops.

Other claims are made in this section which we have already challenged elsewhere in this submission.

5. IS THE VARIATION IN THE PUBLIC INTEREST?

We submit that the applicant has not made a convincing case to meet this criterion. See our overall comments below on ss 5-7 & 9.

6. PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

'It is considered that there is no benefit to the public or the community in maintaining the development standards.' (p.20)

On the contrary, TRRA submits that there is major public benefit in maintaining the unique character of the town as low-medium rise not impinging on the natural amphitheatre setting or on identified view corridors.

'The proposed development will allow for the creation of a high quality mixed use development which as stated above meets the desired objectives of the standard and zone objectives, and Council's current vision for the town centre.' (p.20)

We have explained earlier in this submission why we strongly disagree with this assertion. It is also the case that Council's current vision is as set out in the adopted 2102 Strategy. The visions in the subsequent 2016 Discussion Paper and 2017 draft Delivery Program remain highly contested and not yet settled.

7. IS THE VARIATION WELL FOUNDED?

We submit that the applicant has not made a convincing case to meet this criterion. See our overall comments below on ss 5-7 & 9.

8. GENERAL

Technical issue - No comment

9. CONCLUSION (of the Clause 4.6 Assessment report)

Sections 5-7 and 9 of the Clause 4.6 Assessment report are, like section 4, largely repetitive of arguments made earlier. As we have demonstrated earlier in this submission, they are a mixture of inaccurate statements, and premature and presumptive reference to proposals still being actively debated in the community with significant opposition and not yet endorsed or adopted by Council — consequently they should not be given significant weight.

To meet the criteria of Clause 4.6, the applicant must make a case for a variation from the existing standard (in this case a 15 metre height limit) on its own merits. To the extent that more recent strategies and proposals can be given weight, we submit that only the adopted 2012 Strategy should be given any significant weight.

We would accept that the applicant could legitimately *reference* the provisions in that Strategy for up to 7 storeys, provided that it could demonstrate **BOTH** outstanding design excellence **AND** strategic public benefit. This is not to say of course that even a 7 storey building on this site would necessarily be acceptable as it may not meet other development standards, particularly in respect of setbacks, bulk, overshadowing etc.

We do not accept that the applicant can rely to any significant extent on the speculative proposals in the 2016 Discussion Paper or the 2017 draft Delivery Program, particularly those for the controversial increased building height limits which cannot be assumed are likely to be implemented.

Comments on other sections of the Statement of Environmental Effects (SoEE)

This section of our submission addresses matters raised in the SoEE which we have not already covered above in our comments on the Appendix H document *Clause 4.6 Assessment – Building Height*.

Basement Car Park

'The proposed development involves the construction of a basement car park. As a result of this construction a level of excavation will occur within the development site. All disposed material will be done so according to Council's regulations and recommendations to a relevant waste management facility. The construction contractor will prepare a waste management plan prior to the commencement of works. Specific details will be provided at the Construction Certificate stage of the development.' (SoEE p.18)

The volume of soil required to be extracted is highly significant as is the method of extraction, its disposal and the associated traffic management — these are all significant concerns to the community, given that the site is in the very heart of the CBD and the works will presumably take many months. More detail should be required prior to any decision of the Development Application.

'As part of the assessment of the subject site, some geotechnical constraints have been identified. As such, a Geotechnical Assessment has been prepared and attached as Appendix D. The assessment notes that continued consideration during the design and construction of the proposed development will be required. A summary of the constraints are listed below.

- *Ground water has been identified on site between RL 4.9 and about RL 8.0. As such, dewatering will be required during the earthworks stage of construction.*
- *The proposed basement levels extend laterally to the site boundaries, and an existing multistorey building is present on the southern site boundary. The proposed excavation will therefore require pre-support and dewatering.*
- *A large volume of sand will be required to be excavated as part of the development.*
- *The site is located within a region that has a low probability of occurrence of Acid Sulfate Soils (ASS). The soils are likely to be classified as Virgin Excavated Natural Material (VENM), however, further investigations and chemical testing will be required to confirm that the soils are not ASS prior to the material being able to be classified as VENM; and*
- *Due to the proximity of neighbouring structures and pavements, and the sand profile encountered at the site, driven piles are not recommended due to the high potential for vibration induced damage to adjacent structures and assets.'* (SoEE p.18-19)

We support the concept of underground carparking but have significant concerns regarding the excavation work explained in the Geotechnical Assessment — the excavation of what appears the

entire site to the boundaries, coupled with the interference of the water table, possible Acid Sulfate Soils, and the sand profiles.

There is a clear contradiction in the SoEE between the statement on p.18 that *'the site is located within a region that has a low probability of Acid Sulfate Soils'* with the statement on p.12 that *'The site is identified as containing Class 4 and Class 5 acid sulphate soils under the Port Stephens Local Environmental Plan 2013.'*

With a five storey building at 3 Yacaaba St we can understand the concerns of the owners and residents of that building. We assert that if the proposed building was to be constructed to approved height limits, the depth and extent of the excavation across the property would be significantly reduced, thereby reducing these risks to a manageable level.

State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development

'Clause 28(2)(b) SEPP 65 requires any development application to be assessed against the 9 design quality principles contained in Schedule 1. The proposal's compliance with the design quality principles is detailed in the SEPP 65 Architectural Design/ Verification Statement at Appendix G.' (p.36)

The Apartment Design Guide compliance table (p.10 of Appendix G) relies on meeting compliance by referencing height and other standards which we have explained above are only **draft** proposals still going through a review and consultation process.

In respect of building setbacks and separation we strongly disagree that the proposal 'generally compl(ies)'.

Coastal protection

The SoEE addresses Coastal protection on pp 37-39.

The consultants appear not to have picked up on recent changes. We understand that [State Environmental Planning Policy \(Coastal Management\) 2018](#) (Coastal SEPP) commenced on 3 April 2018. The Coastal SEPP replaces three environmental planning instruments: SEPP 14 (Coastal Wetlands), SEPP 26 (Littoral Rainforests) and SEPP 71 (Coastal Protection), including clause 5.5 of the Standard Instrument – Principal Local Environmental Plan.

However, the SoEE was correct in stating on p.38 that the draft SEPP referred to (and now in force) *'will likely be subject to assessment against the same matters and development controls as are set out in current SEPP 71'*. We therefore comment below on the SoEE's response to SEPP71.

A Table on pp 37-38 of the SoEE addresses the criteria in Section 8 of SEPP71. The SoEE responses on the most relevant criteria are as follows (in italics, with our comments following each excerpt):

'Suitability of Development: The development is considered suitable for this location. It is consistent with other development and the future character of the locality.' (p.38)

We strongly disagree, for reasons explained elsewhere in this submission.

'Impacts on Amenity: Adjoining uses are predominately residential apartments and commercial uses predominately street facing. The development contains generous setbacks to adjoining properties. The proposed development minimises impacts from shading and loss

of amenity. The proposal will provide and enhanced streetscape pedestrian connection and overall provides a positive outcome.’ (p.38)

Clause 8 of SEPP71 (now replicated in Clause 14 of the 2018 SEPP) does not use the general term ‘impacts on amenity’ — rather it uses the more detailed and specific criteria: ‘overshadowing, wind funnelling and loss of views from public spaces to the foreshore’ and ‘the visual amenity and scenic quality of the coast’.

We submit that the SoEE could not so readily dismiss this constraint if these specific issues were confronted. The proposed development clearly raises important issues in relation to overshadowing, wind funnelling, loss of views, visual amenity and scenic quality.

‘As outlined above, the proposed development has been assessed against the matters for consideration listed under Section 8 of SEPP 71. It is concluded that the proposed development will not contravene the aims of the SEPP.’ (p.39)

We strongly disagree, and submit that there is no reasonable basis for this assertion. The applicant should be required to address in more detail the specific criteria in Clause 14 of the SEPP (Coastal Management) 2018 (formerly in SEPP71 Clause 8).

We note that Clause 14 requires that the consent authority must:

- (b) [be] satisfied that:
 - (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or
 - (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
 - (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and
- (c) has taken into account the surrounding coastal and built environment, and **the bulk, scale and size of the proposed development**. (our emphasis)

Environmental Impact Assessment (SoEE p.55)

5.1 Built Form and Public Domain

‘The locality is currently undergoing a strategy review which will allow for the effective development of the town centre and foreshore. The scale and height of the proposal is generally consistent and aligns with the recommendations of the strategies.’

‘The proposed built form will not create any negative overshadowing impacts over and above that which could occur with a fully compliant development. The proposal will have limited privacy impacts to the adjoining neighbours. Appropriate setbacks, window positions and balcony locations have also been incorporated into the design.’

‘The topography and proposed built form combine to provide vistas and view corridors. Vistas from outside the area will not be impacted by the proposal. The proposed development is consistent with the character of the streetscape and positively contributes to the identity of the locality.’

The photo-montages lodged by the applicant do not support the assertion that the vistas from across the township will not be impacted. On the contrary it will be very obvious from all directions.

All of the assertions in this section are subjective opinions, not objective judgements based on evidence. However, even subjective opinions should have some basis in truth. The opinions summarised in this section of the document are completely contrary to local community sentiment.

Repeated assertions of these propositions by the applicant and their consultants do not make them any more convincing. Council should be aware that those propositions are rejected by most of those in the community who have made submissions to the various rounds of consultation on the Nelson Bay Strategy.

Ecologically Sustainable Development

The SoEE asserts that:

'The principles of ESD have been considered in the preparation of this SoEE and development design. The proposed development is considered to be able to comply with the ESD objectives for the site.' (p.61-62)

We submit that the proposal fails to comply with that aspect of ESD that relates to environmental impact:

'... In the application of the precautionary principle, public and private decisions should be guided by: - i. Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment ...'

We submit that if a building of this size and bulk is allowed on this site, both the character of the built environment in Nelson Bay Town Centre and the overall character of the natural environment of Port Stephens will be seriously and irreversibly damaged.