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## **Objection: DA 2021-703 for revised Ascent Apartments proposal for consolidated sites 11-15 Church St**

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## Objection

Tomaree Ratepayers and Residents Association Inc. (TRRA) objects to this DA.

We are happy for this submission to be made public, unredacted.

### **This DA should not be decided by this Council**

We submit that this DA should not be brought to the current Council even if the staff assessment has been completed before the caretaker period starts on 4 November.

Given the intensity of the debate in the community over building height limits, and the fact that were it not for the COVID crisis we would already have a new Council. it would be a breach of the spirit of the caretaker convention for the current Council to determine this DA.

## Introduction

We submit that this DA should be refused, on multiple grounds which we set out below, following the sequence of the Statement of Environmental Effects (SoEE) submitted by the applicant.



The main grounds for refusal, either of which should on its own be conclusive, are:

- The applicant has failed to make a case for the 29% height exceedance – see Part 2 of this submission for our critique of the Clause 4.6 Variation Report
- The applicant has failed to provide adequate evidence to support a proper assessment of the visual impact. On the contrary, the documented design of the proposed development would clearly have an adverse and unacceptable visual impact in the context of the adopted Nelson Bay Town Centre and Foreshore Strategy Delivery Program. See Part 3 of this submission for our critique of the applicant’s Visual Impact Assessment.

### ***The Proposal***

This new proposal is for an 80 unit apartment building with shop/café – 11 storeys – max height 36.157 metres, which is more than 8 metres, or **29% over the new 8 storey height limit** for the site adopted only last year after a lengthy and vigorous community debate.



Image 5: Proposed development site (existing crane included).

### ***Previous approval - DA 2016-631***

The same developer received approval in May 2017 for a 57 unit apartment building ‘Ascent Apartments’ on the smaller site 11-13 Church St. The approved design was for a building with a maximum height of 32 metres, which was more than double (131%) the height limit of 15 metres that applied at the time.

Council is however required to assess the new proposal against the *current* standards applying to the site, which include a 28 metre height limit.

As with the 2016-17 DA, TRRA welcomes the willingness of a developer to invest in the town and looks forward to the prospect of a good new development to replace the unsightly vacant site/hole that has blighted the town for too long.

We also welcome the interesting new design, which has a lot of attractive features.

But we do not welcome the attempt to effectively blackmail the Council into approving a 29% variation in height (i.e. this or nothing), which will again set a precedent for future developments, but also continue the uncertainty that has contributed to the lack of development.

Granting a variation from standards amounts to a free gift of extra value to landowners/developers. It should not be done lightly.

In this case, the applicant should be asked to reduce the height of the building so that it complies with the recently adopted limits and meets community expectations. There is no evidence that a building that complies with the height limit could not be commercially viable – it would just be less profitable.

By applying for an 11 storey building 29% over the height limit, the applicant in this case is demonstrating defiance for the clearly expressed wishes of the local community.

Council staff and Councillors should follow through on their commitment to the Nelson Bay Strategy, as implemented in the amendments last year to the Local Environmental Plan, and refuse this DA, unless the design is changed to comply with height limit.

## **Part One: TRRA response to the Statement of Environmental Effects (SoEE)**

by Perception Planning, 13 August 2021

We comment in this Part on some of the sections of the SoEE that address compliance with various planning instruments.

## ***SEPP No.65 – Design Quality of Residential Apartment Development***

Section 3.2.2, p21

Compliance with SEPP 65 is addressed in a separate supporting Design Quality report by GHD Woodhead (Appendix 10).

TRRA considers that in many respects the design of the proposed development responds well to the Design Principles and Design Guide controls in SEPP 65 and the Australian Design Guide (ADG), and has many attractive features. However, the excessive height means that it fails on several key tests.

### **Design Quality Principle 1: Context and Neighbourhood Character**

While we accept that the town centre is undergoing change, we submit that the acceptable parameters of that change have only recently been set by Council in the revised Nelson Bay Town Centre & Foreshore Strategy Delivery Program and specifically in the revised building height limits. We submit that the design of the proposed development lies too far outside those parameters and context to be acceptable.

### **Principle 2: Built Form and Scale**

We submit that as a result of the major height exceedance (29%) the overall built form and scale would be too dominant in the context of the criteria in this Principle. This is an issue also under Principle 9 – Aesthetics.

In this respect we note the observation of the UDCG in the minutes of the 13 May meeting:

*'The architect indicated that the current FSR was well within the control of 3:1 However, this is not an indication of bulk and scale, as the non-habitable car park and related circulation spaces, storage, water tanks and waste management areas are not required to be included in area calculations' (our emphasis).*

We submit that there is a specific concern about the effect of a zero setback at the northern boundary which would appear to have an unacceptable overshadowing and privacy impact on the apartments in the existing development at 9 Church St, specifically on the decks at the SE corner of that building.

### **Principle 8 Housing Diversity and Social Interaction**

We submit that the mix of dwelling sizes and types proposed for this development could also be achieved in a lower building compliant with the height limits. The assertion that the proposal will provide *'...a range of apartment design and sizes ... ensuring a diverse range of people from differing social*

*groups*' (p11) is not credible – all of the apartments in this 'luxury' development would be at the upper end of the apartment market – as confirmed on p21: *'... the proposed apartments are significantly larger to reflect the market demand'*.

In several places, the Design Quality Report seeks to make a comparison between the proposed design and that of the approved DA for 11-13 Church St (a part of the current proposal site). We submit that these comparisons are irrelevant for the purposes of the assessment of this DA, and should be discounted.

In relation to design, the SoEE refers to the minutes of a pre-DA lodgement meeting with Council's Urban Design Consultative Group (UDCG) held on 13 May 2021 (SoEE p15).

The SoEE states that *'... subject to addressing a number of design requirements raised within the meeting and minutes, the proposed development was supported in principle.'*

The minutes of the UDCG meeting reveal that the panel had concerns about several matters, including:

- Setbacks
- Bulk at the lower levels
- Landscaping
- Solar access and overshadowing
- Privacy
- Private pool areas on the roof
- Driveway access
- Wind shelter and shade on balconies
- Building height

In relation to the height issue, the minutes state that *'The Panel considered the degree of exceedance of the height control was potentially acceptable, if the area of the development that sits above the height control plane were solely utilised as common space.* (our emphasis)

The SoEE asserts that *'Following the meeting, the architectural plans were further developed to respond to the market desires, taking the UDCG comments into consideration as part of this process.'* This falls well short of saying that the UDCG concerns were addressed, and given that the UDCG was commenting partly on hand drawn sketches which have not been made public, there is no way of assessing whether the design changes will have met, or perhaps compounded, the UDCG's reservations.

At the very least it is clear that the Panel's condition relating to excess height have not been met – most of the building that is above the 28m height limit is comprised of the private penthouses, with only a limited communal roof area.

As the SoEE predicted, and Council has confirmed, '*... the development will be referred to the UDCG as part of the assessment process.*' We submit that the minutes of that meeting should be made public before any Determination, so that the public can assess the views of the independent panel and whether they have been adequately addressed.

### ***Port Stephens Local Environmental Plan 2013 (LEP)***

Section 3.3 pp 25–33

#### **Clause 4.3 – Height of Buildings**

pp 26-29

We submit that this DA should be refused primarily because of the major (29%) exceedance of the height limit for the site, only recently set by Council and implemented in the LEP.

The assertion that the proposal meets the objectives of Clause 4.3 selectively cites sub-clause 4.3(1) and conveniently omits sub-clause 4.3(2) which imposes a specific height limit by reference to the Height of Buildings Map. It therefore ignores the inseparable relationship between these two parts of Clause 4.3.

Our detailed rebuttal of the applicant's case for the height variation is set out in our critiques of the Clause 4.6 Variation Report in Part 2 of this submission, and our objection to the visual impact in Part 3.

#### **Clause 4.4 – Floor space ratios (FSR)**

p 30

We note that while the FSR of the proposed development, at 2.82:1, is within the LEP limit of 3:1 for this site, it is at the upper end, and in combination with the design requires a very careful assessment of the overall bulk and scale of the building and its visual impact (see Part 3 of this submission).

We note again the observation of the UDCG in the minutes of the 13 May meeting:

*'The architect indicated that the current FSR was well within the control of 3:1 However, this is not an indication of bulk and scale, as the non-habitable car park and related circulation spaces, storage, water tanks and waste management areas are not required to be included in area calculations'. (our emphasis).*

## **Clause 4.6 – Variations to Development Standard**

pp 30-31

The applicant's case for the 29% height exceedance is made in a separate Perception Planning Report – Appendix 15.

TRRA's critique of the Clause 4.6 Variation Report is in Part 2 of this submission below.

We know and accept that the mandatory Clause 4.6 of the LEP has to allow developers to make a case for variations, but they are required to justify why compliance with the standard (in this case the height limit) would be 'unreasonable or unnecessary'. We do not accept that the applicant has demonstrated this.

During the long debate about building heights as part of the Nelson Bay Strategy Review, Council expressly ruled out an option (which we had supported) of setting height limits and then allowing extra height in exchange for both 'outstanding design excellence' and 'strategic public benefit'. Instead they settled on higher, but fixed, height limits and much was made of the benefits of certainty, with assurances given about being able to enforce new limits.

For their previous DA for part of this site (DA 2016-631) the developer was able to argue that the then existing 15 metre height limit was completely outdated and did not reflect current conditions, including economic realities. That argument cannot now be used – the new height limits were set less than a year ago after extensive consultation and debate, and are supported by the reports of Council's consultants.

## ***Port Stephens Development Control Plan 2014 (DCP)***

Section 3.4 pp 33-36

The SoEE briefly addresses the requirements of the DCP relating specifically to the Nelson Bay Town Centre (Chapter D5). We submit that the applicant has failed to adequately address compliance with D5.1 (Significant vistas), D5.3 (Roof design) and D5.5 (Design excellence).

We explain this further in our critiques of the Variation Report and Visual Impact Assessment – Parts 2 & 3 of this submission.

## ***Likely impacts of the Development***

Section 4



## Built impacts

Section 4.1 pp 36-38

Our comments on the built impact of the proposed development are mostly contained in Parts 2 & 3 of this submission.

One impact that has not been adequately addressed is the relationship to the built form on the western side of Church St – immediately opposite this site. The land on the western side is zoned R2, and has a maximum height limit of 9 metres (allowing for up to 3 storeys).

The contrast between existing housing to the west (and any re-development under existing controls) and the proposed 36 metre apartment building on 11-15 Church St would be very dramatic.

The SoEE makes reference to this height discrepancy only indirectly: *'... forming a very defined edge to the town centre' and [the design will] '...assist in [the] building's relationship to the west including street intersections at Dalton Street...'* (p37)

The assessment by Council needs to carefully consider whether such a stark 'boundary' effect, with no transition, is an acceptable built form outcome.

## Social and economic impact on the locality

Section 4.3 pp 38-40

The SoEE asserts that the proposed development will increase the numbers of residents (pp 38,39). However, no evidence, or can be, provided as to how many of the 80 units will be occupied by permanent residents as opposed to used as holiday units. The wider debate about height limits in the town centre in recent years referenced evidence that a large proportion of apartments in medium to high rise buildings in Nelson Bay are either holiday homes or holiday rental units, and vacant for a significant proportion of each year (ABS data revealed vacancy rates of above 70% in existing Tomaree unit complexes of 3 stories or more).

While TRRA shares Council's desire to attract more permanent residents into Nelson Bay, it is far from clear what contribution a large high rise apartment building would make.

We note that despite Council's approval of two high rise apartment buildings in recent years (the earlier 32m building on 11-13 Church St and a 30 m building at 1 Yacaaba St) on a 'promise' of investment, neither project has commenced, even with record low interest rates. This would appear to confirm a lack of market interest in high rise apartments outside metropolitan centres – in contrast to the apparent success of high quality 3-4 storey developments in comparable

coastal locations such as Manly (North Steyne), Narabeen, Coffs Harbour, Kiama and Shellharbour. Also in contrast with the continued high demand in Tomaree for free-standing houses and duplexes at the upper end of the market with which these high-end apartments would be competing.

As already noted above, we dispute the assertion that the development 'Will provide the opportunity to increase housing diversity within the wider Port Stephens area and provides for greater housing choice' (p39), given that all the units are likely to be at the upper end of the apartment market.

### **Suitability of the site and the public interest, and Conclusion**

Sections 5.0 and 6.0. p40

TRRA rejects the majority of the assertions in these sections of the SoEE, which are no more than the applicant's consultants' opinions, with most of them flying in the face of clear evidence to the contrary, including the manifestly false claim that: '*... there are no anticipated negative impacts on the locality*'.

We submit that the overwhelming public interest in this case lies in ensuring that any development on the site complies with the only recently revised height limit for the site, and respects the clearly expressed views of the local community about the future of Nelson Bay.

The SoEE fails to even acknowledge the weight of community opposition to excessively high buildings in the Nelson Bay Town Centre. No assessment of a proposal for a major height variation should exclude due consideration of the lengthy community debate which culminated in the adoption of the Nelson Bay Town Centre and Foreshore Strategy Delivery Program in 2018.

The Strategy Review process included several rounds of public consultation. In one round, Council received 1674 separately submitted proforma letters and a petition with 813 signatures, all opposing excessive high rise, as well as 151 customised individual letters, also mostly opposed.

This evidence of community views is important context for assessment of this DA, and should be taken into account.

## Part Two: TRRA critique of the Clause 4.6 Variation Report

**VARIATION TO DEVELOPMENT STANDARD (CLAUSE 4.6) REPORT: CLAUSE 4.3 – BUILDING HEIGHT, by Perception Planning, prepared for client Coho Properties, v2 19/08/21**

**Referenced as Appendix 15 to the Statement of Environmental Effects (SoEE), also by Perception Planning 13/08/21**

### *Introduction*

The Report devotes significant effort to demonstrating how close the proposed height exceedance is to that of the currently approved design for an apartment building on 11-13 Church St, which forms part of the larger site, now incorporating the lot at 15 Church St.

This comparison is irrelevant. Assessment of the variation request for current proposal under the EPA Act, and the PS LEP, must be of the height of the new design set against the height limit in the LEP. As the variation report and the SoEE admit, this is a difference of 8 metres or +29% - nearly a third.

It is significant that the current LEP height limit for this site of 28 metres was finalised less than a year ago – the culmination of a lengthy and controversial debate focussed primarily on height limits.

### *Executive Summary*

The Report asserts that *'The building maintains a compliant HoB up to the RL of Level 7, with the exceedance relating to Level 8 above and the architectural roof design.'* (p3). We point out that Level 8 and roof design together add nearly 5 metres of the 8.157 metres 'exceedance', with the balance of 3.2 metres being more than half of the height of Level 7. We note that level 7 has a significantly greater floor-ceiling height (4.13m) than the other levels (mostly 3.18m), while Level 8 includes extra height at the main feature windows<sup>1</sup>. We submit that it is misleading to suggest that the height exceedance is mostly comprised of only one level (Level 8) and the roof design. It is in fact more than  $\frac{3}{4}$  of the height of the two-level penthouses that makes up the 'overheight' component of the design.

The Report asserts that the objective of Clause 4.6 of the LEP includes to *'achieve better [planning] outcomes'* (p3) but conveniently omits the conditional second half of that objective (4.(1)(b)), which reads *'... by allowing flexibility in particular circumstances.'* (our emphasis). Those circumstances include the requirement in 4.6(3)(a) *'that compliance with the development standard is*

<sup>1</sup> Heights taken from elevations in the Architectural Plans pp35-36

***unreasonable or unnecessary in the circumstances of the case,*** (our ***emphasis***). We submit that the Report fails to establish that this test is met.

The Report asserts that the building ‘...*contributes to the transitioning nature of Nelson Bay and **desired height** and building typology within this location*’, and that ‘... *the development is consistent with the character and **desired built form of the locality.***’ (our ***emphasis***). We submit that these assertions are simply incorrect, given that the desired height for this site has only recently been set by Council at 28m.

The applicant’s self-interested opinion cannot take precedence over the democratic decision of Council about the desired height and built form.

## ***Port Stephens Local Environmental Plan 2013 (LEP)***

### **Clause 4.3 Building Heights**

The Report repeats the incorrect assertion that the proposed building only exceeds the current height limit above Level 7. As explained above, most of an entire 3 levels of the building would be over the 28m height limit.

The Report cites the opinion of the Urban Design Analysis supporting the Nelson Bay Town Centre and Foreshore Strategy revised Implementation and Delivery Programme, adopted by Council in September 2018. Whilst this analysis did support the concept of taller buildings at the edges of the town centre, the actual height limits were subsequently firmly set by Council at 28 metres, with the relevant amendments to the LEP Height of Building Maps only finalised in late 2020.

The Report seeks to use the prior approval (in 2017) of an 8 storey (34.77m) apartment building at 11-13 Church St (part of the subject site of the new DA) to argue that the new proposal is only ‘slightly’ (in fact 1.387m) higher than the approved structure. (p6)

We submit that the current DA is for a completely different proposal on a larger site, and cannot take advantage of ‘existing use rights’.

The height limit has been re-set since the 2017 approval (for a different site) and the new DA for a much larger building on a different overall site must be assessed against the new limits.

The Report also cites the relative number of submissions for and against the 2016-17 DA as an ‘an *indication of support for increased heights...*’ (p6). We submit that this is a selective, unbalanced and flawed argument – no reference is made to the more than 2500 submissions against excessive building heights that

were received by Council in relation to the wider debate about revision of the Nelson Bay Strategy that was being conducted at the same time.

### **Clause 4.6 – Exceptions to development standards**

We note that the Department of Planning is reviewing<sup>2</sup> the case for changes to the standard LEP Clause 4.6, but at the moment Council must assess applications for variations under the standard clause as incorporated in the PS LEP 2013, guided by Council's *Exceptions to Development Standards Policy*, adopted on 9 February 2021.

We observe that the applicant has chosen to present a Report justifying the Clause 4.6 variation rather than using the Clause 4.6 Application Form<sup>3</sup> that would normally be required by Council under its Exceptions to Development Standards Policy (clause 5.4.1). We assume that in carrying out its assessment, Council will ensure that all of the information requested on the standard form has in fact been provided in the Report.

### **Clause 4.6(3) Matters required to be demonstrated**

We agree with the Report's identification of three limbs or tests that the applicant must satisfy the consent authority (in this case PS Council) that it has met. We address the Report's arguments on these three limbs in turn below.

### **First limb – Clause 4.6(4)(a)(i) – Compliance 'unreasonable or unnecessary' and 'sufficient ... planning grounds' (our emphasis)**

#### **Clause 4.6(3)(a) – unreasonable or unnecessary**

The Report references the '5 ways' (of demonstrating that compliance is 'unreasonable or unnecessary') set out by Justice Preston in *Wehbe vs Pittwater Council (2007) LEC 827*

In relation to the **first way**, the Report argues that '*strict compliance with the standard is considered unnecessary in that the impact created by the proposed development will be minor and insignificant to neighbouring development and to the wider locality.*' (p11)

We submit that it is not credible that the 8 metre or 29% height variation can be considered by any reasonable person to be either minor or insignificant. This is self-evidently incorrect for the existing neighbouring developments to the north, east and south, currently approximately 18m, 20m and 12m high respectively,

<sup>2</sup> Department of Planning, Industry and Environment, March 2021, Varying Development Standards: A Case for Change – Explanation of Intended Effect

<sup>3</sup> This form does not appear to be readily available on Council's website (as at 20/9/21)

and would remain significant even if these sites were redeveloped in future to the new 28m height limit.

The Report relies almost exclusively on making a case for the proposed design being an alternative means of achieving the objective of the building height standard. We submit that this is a case that can be and is argued separately in the Report in relation to the 'second limb' – see below. Council should not accept the applicant's attempt to use the same argument for the two separate limbs.

The Report also argues:

*'Given the number of taller buildings and density in the Town Centre, the proposed development is not out of character and does not create any perceived dominance. The building does not dominate the skyline and respects the scale and setting of the natural environment in which it is located' (p15)*

We refer to our separate critique of the Visual Impact Assessment in Part 3 below, and submit that any reasonable person would accept that the proposed building would indeed 'dominate'. We note that in other places, the applicant seems to admit and celebrate the impact:

*'The top of the building provides the **iconic statement**, with a bird/flight inspired **roof hovering over the** development, a wet edge pool & communal spaces, and the **township below.**' (p13), and 'aims to provide an architecturally **prominent** building in the locality' (p17). 'The building above 28m is architecturally designed and appropriately articulated to provide visual interest and **prominence** within the Gateway of Nelson Bay (p22). (our emphasis)*

We also point out that the test is unreasonable or unnecessary. The Report has nothing to say in relation to the 'first way' about reasonableness.

In relation to the second way, on pp15-16, the Report does put forward arguments about 'reasonableness' but these are not applicable to the '**second way**' which only addresses 'necessity', and requires a demonstration that the objective of the standard is not **relevant**. The Report does not even attempt to do so – instead setting out an incoherent set of arguments relating to commercial viability, housing mix, design and visual impact to suggest that strict compliance is unreasonable. These arguments have nothing to say about **relevance** of the standard and should be dismissed.

The **third way** (of meeting the test of reasonableness) is to demonstrate that 'the underlying objective or purpose would be defeated or thwarted if compliance was required'. On p17, the Report fails to make this case, initially by misrepresenting the objective of the (height) standard as being 'to present a building that is

contextually compatible with the height and character of the locality whilst ensuring the amenity of adjoining properties is retained.’ This a creative paraphrasing and embellishment of the actual statutory objective of Clause 4.3 which the Report has already cited verbatim on p5 and p10. The Report then goes on to once again assert that strict compliance would make the project, and a good design, commercially unviable.

We submit that the applicant has provided no evidence that its project will only be viable if the height exceedance is granted. Any developer can make that self-interested assertion, and it cannot be a relevant consideration for the assessment by Council. The economic analysis from the Nelson Bay Strategy Review (cited on pp15-16) has already been challenged, is out of date, and in any case concluded that 25m high 8 storey developments, which the new 28m height limit more than allows for, could be viable. We note that the new height limits explicitly allowed for 3m per storey in recognition of the need for more flexibility in design.

In relation to the **fourth way**, we note that the report does not seek to argue that Council has ‘*virtually abandoned or destroyed*’ the (height) development standard and admits that Council has only recently amended the standard for the town centre. This supports our submission that Council should not allow such a major variation from the standard.

We concur with the Report’s conclusion that the **fifth way** – inappropriate zoning – is not applicable

### **Clause 4.6(3)(b) – sufficient environmental planning grounds to justify contravening the development standard.**

This condition has to be satisfied in addition to the ‘unreasonable or unnecessary’ condition.

The Report puts forward seven specific reasons why the applicant considers it meets this condition. We submit that none of these are persuasive – they are no more than self-serving arguments for why the applicant wishes to flout the clearly expressed limits and vision for the town centre set only recently by Council. Specifically, we rebut the seven claims as follows.

1. All of the proposed units will be at the luxury end of the market and do not provide housing diversity or choice. A compliant development could provide a smaller number of similar dwellings.
2. We don’t disagree that the proposed development would provide visual interest and address the street frontage, but so could a compliant building
3. Existing and future neighbours may well disagree with the assertion that the extra height would have no effect on overshadowing – other

- submissions may make this point but Council is any case required to make its own assessment
4. Existing and future neighbours may well disagree with the assertion that the extra height would have no effect on privacy – other submissions may make this point but Council is any case required to make its own assessment
  5. The claim that ‘*The additional height will not materially impact on view sharing...*’ is not credible – we refer you to our separate critique of the Visual Impact Assessment
  6. We submit that a compliant building could also result ‘*.. in a high quality architectural design that [would] positively contribute to the locality*’. The applicant’s suggestion that only a building exceeding the height limit by 29% can be of high quality design is blatantly self-serving.
  7. All of the benefits that are asserted to flow from the proposal would also flow from a compliant design

We submit that the applicant has failed to make the required case that ‘there are sufficient environmental planning grounds to justify contravening the development standard’ and therefore fails to satisfy Clause 4.6(3)(b)

Since both clauses (a) and (b) of Clause 4.6(3) have to be satisfied, failure to satisfy either one would be sufficient to justify refusal.

### **Second limb – Clause 4.6(4)(a)(ii) – Consistent with Objectives**

The Report fails to directly address this limb of the test, which is (as correctly stated on p9) ‘*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.*’ (our emphasis)

On pp18-21, The Report instead asks and answers a **different** question ‘*How would strict compliance hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979?*’

The ‘answer’ given to this (misquoted) question largely repeats the arguments already made in relation to the ‘first limb’ of the test, and does not add any relevant new arguments. To the extent that the objectives of the Act are relevant, no evidence is provided that a building that respected the height limit could not meet all of the objectives. The repeated suggestion that strict compliance with standard would ‘not improve’ outcomes misses the point of the test – the onus is on the applicant to demonstrate how the variation is consistent with the objectives of the ‘particular standard’ (in this case the height limit), and this is not argued.

We submit that the applicant has failed to satisfy Clause 4.6(4)(a)(ii)



### **Third limb – Clause 4.6(4)(b) – Concurrence of the Secretary**

The Report accepts on p9 that:

*‘Clause 4.6(4)(b) requires that concurrence of the Secretary of the NSW Department of Planning Industry and Environment has been obtained.’*

No attempt is made to explain how this limb of the test has or will be satisfied. There is however reference on p9 to two Dept of Planning documents, including Planning Circular 08-003 Variations to Development Standards.

This Circular confirms that the Secretary has indicated to Council that concurrence of decisions under Clause 4.6 can be ‘deemed’ without express case by case confirmation.

However, we will be raising with the Department of Planning the question of whether concurrence could reasonably be deemed for approval of the 29% height exceedance requested, given that it cannot reasonably be considered to be consistent with the clearly stated position of Council in respect of building heights in the only recently amended Nelson Bay Strategy Delivery Program and in the PS LEP Height of Building map changes finalised less than a year ago.

#### ***The public interest***

All of the arguments put forward on p22 for the proposed development being in the public interest could apply equally to a compliant building.

We submit that the greater public interest is best served by Council upholding the only recently increased greater height limit for this site, in line with the similarly updated Nelson Bay Strategy Delivery Program.

The Report also asserts that there is ‘little public benefit in maintaining the standard (in this case the height limit). This is not only insulting to the thousands of residents who contributed to the Review of the Nelson Bay Strategy but defies the clear decision of Councillors, after lengthy and controversial debate, to set new height limits for the town centre.

#### ***Conclusion relating to the Clause 4.6 Variation Report***

TRRA submits that few of the assertions in the Report’s Conclusion on p23 are persuasive and that the applicant has failed to satisfy most of the conditions and criteria in Clause 4.6.

We submit that appropriate application of the Clause 4.6 policy in this case must be limited to minor variations. The 29% height exceedance, in the context of only recently changed height limits and the new Strategy Delivery Program, is an unreasonable self-serving bid by the applicant for special treatment which should be rejected.

## Part Three: TRRA critique of the Visual Impact Assessment

Visual Impact Assessment by Perception Planning, in support of DA 2021-703 for Residential Flat Building (11 storey) 11 – 15 Church St, Nelson Bay, NSW, prepared for client Coho Properties, 13/8/21

Referenced as Appendix 11 to the Statement of Environmental Effects (SoEE), also by Perception Planning 13/08/21

### *Introduction*

We note that this Visual Impact Assessment (VIA) report is by the same consultant – Perception Planning – as has prepared both the Statement of Environmental Effects, the Clause 4.6 Variation Report and Crime Prevention (CPTED) Report for this DA. The applicant has not engaged separate specialist consultants to assess the visual impact, as is often the case with major DAs. We submit that the VIA Report in this case is highly selective – choosing to only to illustrate views from locations from which the visual impact can be shown as limited, partly by clever use of ‘unnatural’ wide angle images.

In this critique, we point out other locations from which the visual impact of the proposed development will be much greater. While we have used our own images to illustrate this, we submit that Council needs to ensure that it either makes its own independent assessment of visual impact or engages genuinely independent experts to do so, rather than relying on either the proponent’s consultants report or our alternative ‘perspective’. It is also essential that Council’s Design Panel, which will be reviewing the documentation again, is in possession of more images illustrating the visual impact from more locations. Images should be required comparing the impact of this proposal (for up to 36.157m) with a building compliant with the 28m height limit.

Towards the end of the Nelson Bay Strategy Review, we know that Council was negotiating with a supplier for provision of ‘flyaround’ 3D imaging that could illustrate the visual impact of different building heights and forms. We are aware that a demonstration of this imaging was in fact completed for Nelson Bay town centre. Did Council proceed with acquisition of this capability? If so, it should be used to illustrate the impact of this proposal before any decision is made. If not, why not, given that it would have been an invaluable tool for assessment of this and other major DAs. It would be entirely reasonable for the applicant to be asked for a financial contribution towards the cost of this tool given that they are seeking a major variation from the height standard.

## Comments on the VIA

The consultants have chosen only 3 ‘viewpoints’. This is wholly inadequate – the proposed building will be visible from many locations around the town and from remote locations including parts of Shoal Bay to the east, Nelson Head to the northeast, and higher parts of Corlette and Nelson Bay West to the west. It will also be a prominent new feature in the landscape from much further afield including ‘iconic’ views from Gan Gan lookout (Lily Hill Road) and Tomaree Head, and from almost everywhere on the north shore of Port Stephens east of the Corrie Island, and from the waterways of the Outer Port.

We submit that Council cannot assess the visual impact of the proposed building without the benefit of images showing an outline of the building profile as it would be seen from a much wider range of viewpoints.

We offer a few examples below, to illustrate the likely visual impact, and the failure of the VIA to address the full range of impacts from different viewpoints.

We also observe that the VIA Report seeks to ‘re-open’ earlier arguments in favour of increased height limits which we submit were conclusively resolved with the adoption of the current limits, which must now be considered the appropriate benchmark.

## Effect on view corridors

The Nelson Bay Town Centre & Foreshore Strategy Delivery Program, adopted in 2018 includes multiple reference to protection of view corridors. Subsequent changes to the DCP confirmed some ‘significant vistas’ to be protected. (Chapter D5 – Nelson Bay – specifically D5.1 and Figure DJ)



At least 5 of these ‘significant vistas’ – two looking SW from the marina breakwall, two from the junction of Church and Tomaree Sts (looking N & NE) and one from the junction of Tomaree and Stockton Sts (looking north) – will take in the proposed new building at 11-15 Church St

The VIA does not reference the DCP but makes reference to Urban Design Analysis tabled by Council in 2020 in support of the Strategy Review. This in turn makes reference to Figure 4 in the draft Nelson Bay 2030 Strategy (2008), which is cited, and Figure 4 shown, in the VIA:

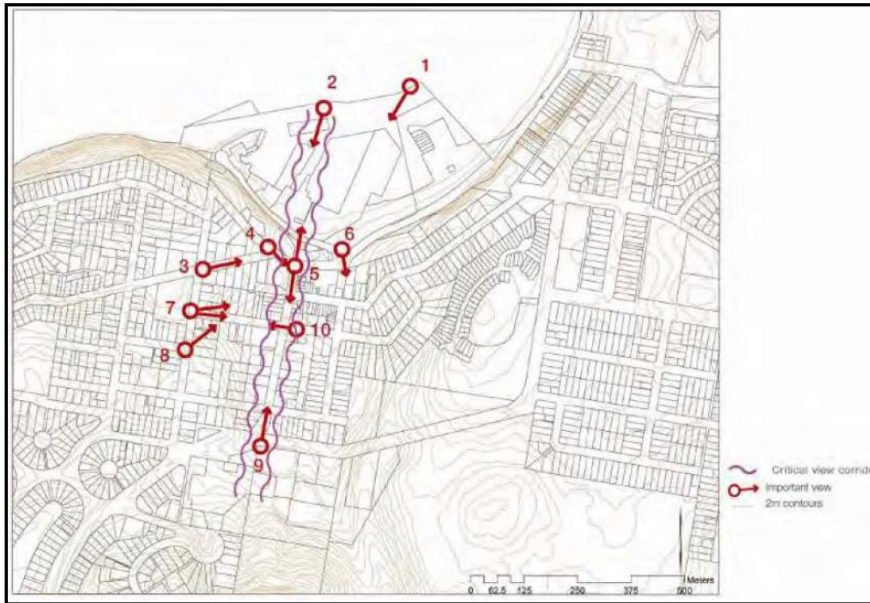


Figure 4 - Important view map (NB Town Centre and Foreshore Strategy)

At least 3 of these ‘important views’ – 1, 2 & 8 – are directly impacted by the proposed new building at 11-15 Church St.

Of all of the ‘significant vistas’ and ‘important views’, in these two figures, the VIA only directly addresses the views from the marina breakwall (Viewpoints 1 & 2 pp12-13 and Images 1-4 pp14 & 16)

We submit that the VIA significantly downplays the impact of the proposed new building on the views from the marina, as illustrated in Figure 1 below.

Figure 1: Comparison of likely views from Nelson Bay marina breakwall



Image 1: View towards the site (existing crane included).

Image: VIA – wide angle base photo



More likely impact – ‘normal’ 50mm base photo  
Image: Ivan Glaser

We reject the assertion that the proposed development would not impact on the view towards Gan Gan Hill from this and other vantage points – it would clearly ‘break’ the skyline (tree-line) which form a much-valued backdrop to the town centre ‘amphitheatre’. We refer to Chapter D5 of the DCP and in particular D5.1 (Significant vistas), D5.3 (Roof design) and D5.5 (Design excellence)

The only other view selected and presented in the VIA is one from the junction of Donald and Church Sts (Viewpoint 3 p13 and Images 5&6 p17). While a useful additional perspective, this should not be confused with ‘important view’ 3 or the nearby significant vista in the DCP both of which look east along Government Rd from the roundabout junction with Church St, and are not impacted at all by the proposed development at 11-15 Church St.

Figure 2: View corridor 8 - Important view map - VIA shows but does not address this view corridor or show an image of the proposed building from this viewpoint.



Church St looking NE across site 11-15 Church – Lure apartments to right of picture

While the Port Stephens Development Control Plan (DCP) is not referenced at all in the VIA, it is addressed in one short paragraph in the Statement of

Environmental Effects (SoEE). But even there, compliance with clause D5.1 of the DCP is not addressed.

We submit that the applicant should be required to provide additional information about how the proposed development complies with the requirement to *'...preserve the important vistas identified by Figure DJ.'*

### Missing views

The VIA appears to have been written on the assumption that the main categories of people affected by the visual appearance of the proposed development are immediate neighbours and transient passing motorists. This completely misses the point of the intense debate about building heights in Nelson Bay over many years. The wider community is concerned about the character and appearance of the town, and we also know from surveys that this is also a major concern for the tens of thousands of annual visitors.

### Missing long distance views

The VIA offers no images or discussion of the impact on views from outside the town centre, including which would be impacted by the proposed building, including from Shoal Bay and Nelson Bay West.

Figure 3: Long distance perspectives from east and west.



View of site (crane) from Ronald St Shoal Bay looking west, September 2021



View of site (crane) from Wahgunyah Road west looking east, September 2021

The VIA provides no images, and no discussion, of the impact of the proposed development on long-distance views from the waterway of the Outer Port, or from the north shore of Port Stephens.

We submit that the impact on these views will be significant.

## Missing views from other parts of the town centre

The VIA offers no images or discussion of the impact of the proposed development on views from other parts of the town centre.

Figure 4: Likely impact from Magnus St near Yacaaba St – with ‘normal’ 50mm lens – no image from this viewpoint is offered in VIA



Image: Ivan Glaser

## Missing views from the ‘top’ of the town

No images are provided to show the visual impact of the proposed development from the ‘top’ of the town. We were criticised in the earlier debates for showing ‘mock-up’ images of 10 storey buildings as seen from the highest rooms in the Bowling Club. We submit that at the very least, Council must be provided with evidence of the impact on views from the vicinity of the Bowling Club, used by thousands of locals and visitors on a regular basis.

Figure 5: Views from Bowling Club



View of site (crane) from Nelson Bay Bowling Club entry level (Sept 2021)



View of site from Bowling Club entry road off Dowling St (Sept 2021)

## Missing views from adjacent sites

While any new building on this site will unavoidably impact the views from neighbouring properties – both from existing buildings and from any subsequent

developments, and the impact will be addressed mainly through controls over setbacks, overshadowing and privacy. However, we submit that to be credible, the VIA should have made some attempt to show visually the likely impact on neighbouring properties, which will inevitably be dramatic.

Figure 6: views from adjacent sites for which no image shown in VIA



View north from pool area of 'Lure' apartments = proposed building on 11-15 Church St would obscure most of the sky visible in this photo



View south from Donald St = proposed building on 11-15 Church would obscure most of the sky visible in this photo

### ***Contradictions between the VIA and other DA documents***

The assertions in the VIA about low visual impact are directly contradicted by the 'boasts' in the Clause 4.6 Report and SoEE about the prominence and high visibility of the building:

*'The top of the building provides the **iconic statement**, with a bird/flight inspired **roof hovering over the** development, a wet edge pool & communal spaces, and the **township below.**' (p13); 'aims to provide an architecturally **prominent** building in the locality' (p17), and 'The building above 28m is architecturally designed and appropriately articulated to provide visual interest and **prominence** within the Gateway of Nelson Bay (p22)<sup>4</sup>. The proposed development will assist in framing the Nelson Bay Town Centre and provides a **visually significant** and interesting development on entrance to the Town (SoEE p40) (**our emphasis**)*

### ***Conclusion relating to Visual Impact Assessment***

We submit that Council must reject the self-serving assertions in the VIA report that:

*'... the proposed development would have a low to medium visual effect...'; that 'visibility quickly decreases when stepping away from the*

<sup>4</sup> The first three page references in this paragraph are to the Clause 4.6 Report



*site' (p2), and that 'Sensitivity to change and the degree of change to visual amenity are in turn, low – negligible.' (p16)*

It is very clear that the proposed new building would dominate the town centre and significantly intrude on views from many locations both in the town centre and further afield.

Visual impact of high buildings was at the heart of the lengthy and intense debate over the Nelson Bay Strategy which led to the adoption of a revised Delivery Program in 2018 and in subsequent changes to the LEP and DCP, finalised in late 2020. The new height limits included in these changes – for this site a 28 metre limit – were primarily a compromise between the ambitions of the planners and developers to go higher, and the overwhelming concern of the local community to protect the character of the town, and in particular to preserve the 'natural amphitheatre' with buildings staying below the tree lined ridges surrounding the town centre.

The VIA concludes by asserting that '*The development contributes to the transitioning nature of Nelson Bay and desired height and building typology within this location...*' (p19). This is clearly incorrect – the 'desired' parameters have only recently been set by Council through a democratic process.

It is clear that the visual impact of this proposed building – reaching more than 36 metres – 29% over the recently adopted height limit, would **not** be compatible with the vision set by the revised Strategy Delivery Program, LEP and DCP.

The DA should be refused on these grounds alone.

## Conclusion

We submit that this DA should be refused, on multiple grounds which we have set out in this submission.

The main grounds for refusal, either of which should on its own be conclusive, are:

- The applicant has failed to make a case for the 29% height exceedance – see Part 2 of this submission for our critique of the Clause 4.6 Variation Report
- The applicant has failed to provide adequate evidence to support a proper assessment of the visual impact. On the contrary, the documented design of the proposed development would clearly have an adverse and unacceptable visual impact in the context of the adopted Nelson Bay Town Centre and Foreshore Strategy Delivery Program.

We look forward to this highly controversial proposal being debated at a future Council meeting, and to Councillors upholding the height limits only recently set.

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