



The General Manager  
Port Stephens Council

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# Nelson Bay Strategy

This is a submission on Council's document: The draft '[Progressing the Nelson Bay Town Centre & Foreshore Strategy: A revised Implementation and Delivery Program 2017](#)'; on public exhibition from 21 February to 4 April 2018. Council itself has used the shorthand - draft 'delivery program' to describe the document and we also adopt this term – *Delivery Program* in this submission.

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## Introduction

Tomaree Ratepayers and Residents Association Inc. (TRRA) welcomes further progress towards a finalised and implemented Strategy for the Nelson Bay Town Centre and Foreshore, and fully supports many of the 'actions' proposed in the draft *Delivery Program*. We share the broad consensus in the local community that the priorities for revitalising the town are to urgently address future parking needs, and associated traffic management, and to make public domain improvements and public infrastructure investments.

In relation to these latter actions, we welcome the current construction of the Yacaaba Street extension and associated public space; the announcement of a \$300,000 grant for APEX Park enhancements, and commitment of \$140,000 (including another \$70,000 grant) to planning for other public domain improvements.

We also welcome the emphasis in the *Delivery Program* on implementation of the Strategy, including regular monitoring and reporting on progress. We believe that one of the main factors in the lack of recent private sector investment in the town has been Council's failure to implement the 2012 Strategy for most of the intervening period.

We support, either in full or conditionally, 27 of the 30 proposed 'Actions' in the Implementation Plan at Attachment 1 to the draft *Delivery Program*.

TRRA remains committed to working collaboratively with other local interest groups (including through the *Nelson Bay Now* group) and Council, towards improving the attractiveness of Nelson Bay for residents and visitors alike, and seeking new business activity, investment and permanent residents.

However, TRRA **strongly opposes Council's proposals for major increases in building heights and floor space ratios (FSR)**. We believe that these proposals are fundamentally inconsistent with the aims and objectives of the Strategy, which it appears Council does not propose to change. If implemented, they would also increase rather than decrease uncertainty for investors, and irrevocably damage the unique character of the town

### What is being changed?

It is unclear what parts of the *Delivery Program* document are 'content' as opposed to 'commentary' and what relationship the content parts bear to the adopted 2012 Strategy. It appears (although it is not clear) that no change is proposed to the adopted Strategy itself, although this would mean major inconsistencies.

The 'content' appears to be mostly in Part 2 – a table in our Critique (at Attachment 2) compares it with equivalent content in the adopted Strategy. **To what extent is the new content supposed to replace parts of the Strategy and if so how?**

We submit that the draft *Delivery Program* is a very poorly presented and confusing document. It claims, on page 5, that there is no new or revised Strategy; rather that the *Delivery Program* replaces the Improvement Program which accompanied the 2012 Strategy, and adds additional detail in the form of an Implementation Plan (Table at Attachment 1, also summarised in Figure 1 on page 6).

Large sections of the adopted 2012 Strategy are not mentioned in the 'draft delivery program' – **are they to remain unchanged?**

What happens to the Recommendations chapter, with its 10 Principles, each with recommendations and proposed implementation actions, when many of these are affected by the radical new Strategy of the draft *Delivery Program*?

Overall, it is unclear what will emerge from the end of this Review Process other than some amendments to the LEP and DCP, an Implementation Plan (draft at Attachment 1), an Implementation Panel and a citizens jury on traffic and parking. **Will there still be a 'Strategy' document and what will be its status?**

Part One of the draft *Delivery Program* explains the Review and states (at p10) that the entire document 'represents' (or is?) a revised implementation and delivery program whose role is to 'update and set the implementation program for the Strategy' It states that 'It replaces the '... [2012] Improvement Program, and overrides the Strategy where any inconsistencies occur'.

Given that there would be major inconsistencies, **it is unclear whether there would any longer be 'a Strategy', as illustrated in the diagram on p11, in any meaningful sense or useful form.**

### **Building height limits are NOT the problem**

TRRA questions the document's core premise that the absence of new residential and commercial developments in the town centre since the adoption of the 2012 Strategy has been due largely to the constraints on building heights. In our view the lack of development activity is not unique to Nelson Bay. In common with many other NSW coastal towns, wider market and other economic factors such as the impact of the global financial crisis are the key underlying factors. It should be acknowledged that there has been a strong growth in residential construction in the conventional stand-alone residential housing sector, exemplified by the LandCom Vantage estate at Corlette and Council's own subdivision at Salamander Bay (next to the recycling centre). Infill especially in the form of duplexes and townhouses has also been buoyant.

Council's own consultants (HillPDA) have made the point that 'added density to existing building height will not of itself alone create project viability' (HillPDA 2016<sup>1</sup> p40). They identify a weak market for high rise apartments compared with stand alone houses (pp.14,15, 37). This market analysis is supported in the peer review undertaken by the local planning company EPS (see section 7. Target Profitability page 5, and section 12. Sales Rates, page 6).

Most importantly TRRA totally rejects the proposition that high rise residential developments will attract the hoped-for permanent residents to the Nelson Bay CBD. We cite the 70 % vacancy rates for apartment buildings of 3 or more storeys found by the ABS in the 2011 and 2016 Censuses. These findings are supported by comments on occupancy obtained from existing bodies corporate and local real estate agents, and by observation.

### **Council overstates, and is confused about, the need for new dwellings in Nelson Bay town centre**

The State Government's projections for infill residential development in the Hunter region similarly do not support the 'build and they will come' proposition relied on in the draft *Delivery Program*. In this regard, we point out that the original projections for 2036 derived by Council from the Draft Greater Newcastle Metropolitan Plan - of 1490 infill dwellings for 'Nelson Bay' were intended for the

<sup>1</sup> HillPDA, Nelson Bay Town Centre - Feasibility Testing of Residential Development Sites, September 2016

whole Tomaree Peninsula, rather than the more limited Town Centre boundary which is the subject of the current Strategy<sup>2</sup>.

It is also significant that on 13 February 2018, Council's Group Manager Development Services sent a letter<sup>3</sup> to the Department of Planning and Environment requesting a major alteration of the original projections in the Greater Newcastle Plan; reducing the *infill* target for **the whole Tomaree Peninsula** (not just Nelson Bay) from 1490 to just 235 (and for *greenfield* an increase to 1224 dwellings). This letter stated that the recommended change was based on 'our data collection and modelling'. This target of an average of only 13 new 'infill' dwellings per year over the next 18 years is entirely inconsistent with the suggestion in the Delivery Program that a major increase in apartment construction in the Nelson Bay CBD is either necessary, or will be triggered by lifting the lid on building heights and density. (Council's 'bid' is also difficult to reconcile with known approvals and trends but that is a wider issue).

The draft *Delivery Program* document also contains a number of false assertions.

We set out our criticisms of the document in a public access presentation to the 12 December 2017 Council meeting, and in a 7 page 'Critique' which we sent to the GM and Mayor before Xmas. Despite meetings in January with staff and with the Mayor and 2 Councillors, none of our criticisms have been accepted or led to either revisions<sup>4</sup> or the further explanatory material that was promised.

**We therefore append the Critique paper to this submission (Attachment 2), and request that Council staff address the criticisms in it in their report to Council on consultations.**

We next turn to substantive comments on the *Delivery Program* document on exhibition, although we also introduce, where relevant, points about aspects of the Strategy which are either missing altogether from the *Delivery Program* or are given insufficient attention.

## Part One – The Review

### Latest proposals are NOT reflective of community views

The *Delivery Program* asserts that the proposals in it are a response to submissions received and consistent with community views. As we set out in detail in our *Critique* (Attachment 2 – False assertion 1), this is completely incorrect.

- The document itself confirms continued support in submissions for the revised height limits adopted, by consensus, in 2012:
  - *'The desire to keep the unique coastal village and 'natural amphitheatre' character was also reinforced'* (p9)
  - *'.. the vast majority was against any significant increase [in height]'* (p9)
  - *'.. clear consensus that building heights should follow the natural slope of the land and view corridors should be preserved'* (p9)

<sup>2</sup> The 1490 figure comes from Council's response (b) to submission no 1 in the Summary of Submissions on the 2017 Discussion Paper - in Submissions Table attached to the Council agenda papers for Item 5 for the Council meeting on 12 December 2017, being 13.5% of the LGA wide housing projections. Council staff have confirmed to us that 'Nelson Bay' as used by State planners means the entire Tomaree peninsula.

<sup>3</sup> Attachment 1 to Information Papers Item 1 in agenda and minutes of Council meeting 13 February 2018

<sup>4</sup> other than correction of two factual errors which we had pointed out

- ‘...continually reinforced that they supported the existing Strategy’ (p10)
- No reference is made to the public forum organised by TRRA on 21 February 2017, attended by over 200 people, at which Council’s strategic planners presented on the Strategy Review and took questions. The overwhelming view of that forum was opposition to significant increases in height
- No reference is made to the Tomaree Business Chamber meeting also in February, and also addressed by a Council strategic planner, where the prevailing view was again opposed to high rise in the town centre.
- Instead, the document cites submissions received in support of a single DA, for a 32m apartment building at 11-13 Church St, as ‘*an extraordinary indication for support for increased heights where good design outcomes can be achieved*’. It is a travesty to put this forward as an ‘equivalent’ to the broad-based opposition to high rise, for several reasons:
  - Council knows very well that most of these ‘submissions’ were solicited by the developer at a stall offering ‘virtual reality’ tours of the building.
  - Many of the individuals filling in the proforma submissions would not have been aware of the height of the proposed building or the context, and it is not known how many were even local residents. They were expressing a view on the apartments as presented to them, not on an overall height limit for Nelson Bay.
  - Council ignored the opinion of an independent design panel which criticised the design.
- The 71 page Submissions Table presented to Council on 12 December 2017 does not clearly convey the overwhelming sentiment of opposition to high rise buildings. It is not until a close reading of the ‘summaries’ of the 82 submissions that the full strength of this opposition becomes clear, and the ‘Council responses’ are unconvincing, often not even addressing the substance of the submissions.
- The document cites the results of the 2012 survey (of residents, businesses and visitors) which identified that: **‘managing building heights was one of the most pressing issues facing the town and that there was a clear consensus that building heights should follow the natural slope of the land and view corridors should be preserved’** (Hunter Valley Research Foundation 2012) (p19).

No new evidence has been presented to doubt that there remains the clear consensus in favour of revised, but still strict height limits as adopted in the 2012 Strategy (but not implemented by Council).

On the contrary, we submit that the clear sentiment expressed over the first few months of 2018 is overwhelmingly opposed to major height increases. More than 340 people attended a public forum we organised at the Nelson Bay Bowling Club on 12 March, where this opposition was very clear, and we understand that Council has received more than 1500 individual submissions also opposing high rise development.

We emphasise that our vision for the future of Nelson Bay, which is for a prosperous, dynamic and attractive town centre, maintaining its low rise coastal town/village character, with its economic foundations in tourism and in dining, speciality retail and commercial functions servicing both visitors and residents of the Tomaree peninsula.

We believe this vision to be widely shared including by the business community. It is also clearly a key ‘selling point’ for the tourist economy on which the town heavily relies. We cite the 2012 findings of the Hunter Valley Research Foundation (reported in the adopted 2012 Strategy):

‘Visitors felt that the marina area and low townscape should be maintained, and that the atmosphere of the town, small size and access to the water make it more appealing than other tourist destinations’ (Strategy, p14)

**TRRA submits that the report to Council on the current consultation (on the draft *Delivery Program*) must be more accurate and honest than the travesty included on pp9-10 of that document. Specifically Council should publish all submissions in full, with only necessary redaction (we had to extract the 2017 submissions through a time-consuming GIP Act request), and should more clearly and directly address the major points raised in submissions.**

## Part Two – the Way Forward

### 2.1 Design Excellence

Design excellence is put forward as a major element of the Delivery Program. While it is a worthy objective, and we support proposed Actions 1-5 in the Implementation Plan at Attachment 1, these actions will not on their own ensure quality design, which in any case cannot compensate for inappropriate height and density.

The draft *Delivery Program* repeatedly asserts that it will deliver quality design (pp 13-17, 29, 31)

As we stated in our *Critique* (Attachment 2 - False assertion 10) this is unsupported and highly contestable, based on Council’s track record

- References to design quality are mostly to existing or well established contemporary standards which should be a ‘best practice’ requirement of any new development
- The document is highly negative about the prospect of securing buildings that are of architectural significance (p30). While no-one realistically expects to secure a Sydney Opera House or Federation Square in Nelson Bay, the lengthy dismissal of any aspiration is indicative of a defeatist attitude that will settle for second rate design
- The Tomaree Peninsula has outstanding natural attributes which are recognised as having significant potential to further develop its tourist destination status. Such locations have the capacity to attract quality design in resorts and other tourist related facilities such as convention and interpretive centres and galleries
- The ‘... commitment to the Lower Hunter Urban Design Awards’ (p29) is worthless without some mandatory quality requirements
- Council has referred some recent DAs to an independent design panel, but in the recent ‘precedent setting’ case of 11-13 Church St, and in relation to 65-67 Donald St, the panel’s criticism of the designs was largely ignored, with only a few minor design changes negotiated
- Given the admission that reference to a design panel costs applicants \$3000 and adds an estimated 30 days to processing times (p16), it must be questioned why Council is making these referrals but then largely dismissing the panels’ views
- The community can have no confidence that Council is serious about requiring design excellence, especially as a condition of any variation approval – as the words ‘design’ and ‘quality’ do not even appear in the proposed LEP Clause 4.6 Policy (See discussion of this draft Policy below).



**TRRA submits that an ‘outstanding design excellence’ criterion should be carried over from the 2012 Strategy into the proposed new Exceptions to development standards policy, but as only one of the conditions that need to be met for approval of significant variations.**

We also refer to the discussion below (under Building Heights) about design guidance relating building heights to street widths.

We strongly support proposed Action 1 for activated street frontages in the commercial core of the town centre, but submit that the relevant street frontages (Figure 5 in the draft *Delivery Program*) be extended to include both sides of Yacaaba St between Donald and Tomaree Sts, the northern side of Tomaree St between Stockton and Yacaaba Sts, and both sides of Donald St east for the full frontage of both car parks.

This would effectively redefine the commercial core as including the entire block bounded by Stockton, Donald, Yacaaba and Tomaree Sts and extending approximately a hundred metres along Donald St east of Yacaaba St. In association with proposed Action 2 for appropriate vertical to horizontal proportions, and revised height and FSR limits, this should ensure that the core of the CBD is preserved for primarily retail or commercial uses or for related parking, with the larger spaces that are in demand now and likely to be attractive for future developments. The entire community, including the business representatives, appears united in opposition to allowing largely residential developments (apartment buildings) in the commercial core – with only token compliance with the activated street frontage condition.

## 2.2 Building Heights

**TRRA Inc submits that:**

- **There must be strict height and density controls to maintain the character of Nelson Bay.**
- **Height limits must meet the Strategy objective that “It is critical that the wooded ridge and headlands that surround the Bay be visible and not eclipsed by buildings”.**
- **Buildings of 10 storeys or more anywhere in the town are not compatible with this objective. A 5 storey default limit, with up to 7 storeys in exceptional circumstances, as agreed in 2012, is still appropriate.**
- **A finer grained approach to zoning, height and density limits to provide view corridors, with a stepped approach to heights will provide greater certainty and broader opportunities for investment. View sharing should be a fundamental objective.**
- **Council’s ‘exceptions’ policy must send a clear message that only modest variation to height and density controls will normally be considered for approval, with any significant variation only allowed in exchange for outstanding design excellence *and* strategic public benefit, as well as having to meet all other standards.**
- **The foreshore parkland to the east of the marina buildings must be protected.**

### **Inaccurate assertion about height increases**

The draft *Delivery Program* asserts in various places that the proposed 35m (10 storey) height limit throughout most of the town centre is only a 3 storey (10.5m) increase over the heights adopted in the current Strategy (e.g. p25, and Summary of Submissions Table - Council response 1b).

As we pointed out in our *Critique* (Attachment 2 – False Assertion 3), this is inaccurate:



- The 2012 Strategy only allowed for up to 2 extra storeys (7m) in exceptional cases, subject to strict criteria – see False assertion 7. below.
- It is wholly inaccurate to claim, as Council planners have been doing throughout the review, that the community has already accepted 7 storeys (24.5m) as a ‘default’ height limit.
- A 7-storey default height limit **has definitely not been agreed**.

### Lack of economic rationale

The draft *Delivery Program* repeatedly asserts that economic modelling commissioned by Council supports the new height limits.

As we pointed out in our *Critique* (Attachment 2 - False assertion 5), this is simply not true:

- Council planners have drawn highly selective and self-serving conclusions from the consultants’ report.
- The assumptions and inputs to the modelling are questionable (see the attachment ‘Comments on Hill PDA and EPS Reports’ to our submission dated 13 March 2017).
- Despite the limitations of the feasibility assessment, the graph on p24 clearly shows the maximum profit margin for development on 4 of the 5 identified sites at a height of 8 storeys, with the fifth site requiring 17 storeys to achieve more than 10% profit.
- The draft *Delivery Program* reports that ‘a minimum of eight storeys was required to provide confidence for investment’ (p26) and that ‘the feasibility analysis has indicated the need for a minimum of 8 storeys to see redevelopment occur’ (p30).
- Given these findings, what is the basis for a recommendation of a default 10 storey height limit (but then allowance for unlimited variation) throughout the town centre that includes these 5 sites?

Given Council’s acknowledgement that ‘*construction costs significantly increase from a level of eight storeys due to the need for increased structural materials and regulations, such as fire sprinklers...*’ (p23), setting a height limit *above* 8 storeys will necessarily result in developers seeking **significantly higher** buildings to recoup the extra costs. Council commissioned an update of the 2016 feasibility study from HillPDA<sup>5</sup> but appears to have largely ignored the updated findings.

Figure 10 in the draft *Delivery Program* (p24) is a Line graph illustrating the varying profit margins for five sites with above ground parking. This has been compiled from figures in the 2016 report but has inexplicably been included despite the fact that the 2017 update states:

‘All densities tested required parking below ground (basement) to achieve the building heights expressed by storeys and unit saleability.’ (p21)

We submit that there is no point in presenting above ground parking options if they will never be built. Also, the graph doesn’t include the latest feasibility figures which appear to have changed significantly.

For example, 36A-36F Donald St at 8 storeys in the first study showed only marginal viability with below ground parking, showing a RLV \$548,918, whereas the latest study shows it as viable at both 2.5: and 3.0:1 FSR with below ground parking, having RLV’s of \$3,020,314 and \$4,370,759

<sup>5</sup> HillPDA, Review of Feasibility Testing Completed in 2016 with Varied Options, September 2017

respectively. We question why these latest figures have not been reflected in the draft *Delivery Program*?

We also question the use of land values in the feasibility studies. The height limit has never changed over the past 20 years, so the value of the land is what you can get for it at the time given the constraints of the LEP/DCP. If a landowner or developer is willing to take a gamble on restrictions changing in the future, as some in Nelson Bay appear to have done, that is not the concern of the community and therefore the Council. As one of our members who is very experienced in the development industry has explained, it is not the role of Council to guarantee any particular commercial return to private interests.

### **Inconsistency with professional design standards and guidance — need to apply relationship between building height and street width consistently to narrower streets**

The draft *Delivery Program* refers in the Design Excellence section to 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.’ (p13) A good explanation of these issues was contained in the EPS Report in support of DA 2016-631, arguing the case for a major variation under Clause 4.6 of the LEP. This report referenced a well regarded expert text:

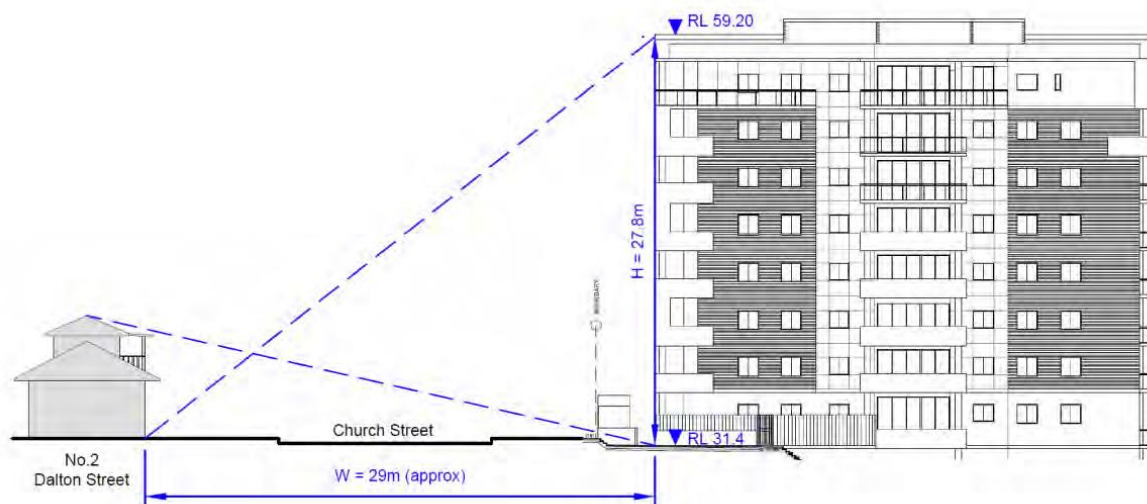
‘In terms of urban design, enclosure reinforces a spatial definition that contributes to memorable places, however the level of enclosure must be balanced to ensure it is not oppressive.’ and ‘Building heights greater than the distance to the opposite side of the street or half the distance to the opposite side of a larger open space have a more enclosed feel’ (Sheppard 2015<sup>6</sup>)

The EPS report then stated, at pp20-21:

‘In the context of Church Street, Nelson Bay, taller buildings are located on the eastern side of the street (R3 Medium Density Residential Zone) with a maximum of two storey buildings on the western side street (R2 Low Density Residential Zone). The lower scale of development to the west affords greater height for buildings on the east without compromising the public realm as this difference helps define the town centre edge, zone boundaries and reinforce the land use pattern. The proposal falls between 50-100% of the distance to the opposite side of the streets built form, meeting the criteria established by Sheppard.

It is therefore considered that the proposed building height when taken in context with the more slender, high quality architectural finishes/façade treatment and the principle of balanced spatial definition and openness, is appropriate for the location.

<sup>6</sup> Essentials of Urban Design, Mark Sheppard 2015, published by CSIRO.



**Figure 3-4: Building Scale of the Proposal in accordance with the Principle of Balanced Spatial Definition – Openness and Enclosure “**

TRRA submits that if this analysis (which Council appears to have accepted for DA 2016-636, and has included in the draft Delivery Program at p13) is applied consistently, then the narrower streets lower down in Nelson Bay town centre should only support buildings of 5-6 storeys maximum (Donald, Yacaaba, Magnus and Stockton streets are all approx. 20m wide).

### **View sharing and effect on neighbouring properties**

Any new height limits for the Town Centre and Foreshore must protect the view corridors as set out in the adopted 2012 Strategy – the current proposals would not guarantee this outcome. Controls also need to be mindful of the effect of any increased height at the edges of the town centre on adjacent properties outside the boundaries of the centre – this mainly effects properties on and to the west of Church St. Overshadowing and loss of views are particular concerns for residents in this area.

### **Experience of height controls elsewhere**

Comparable small coastal towns in NSW typically have modest building height limits

For example:

- Terrigal – maximum 7 storeys, with 6 storeys at the Foreshore and 5 storeys in the town centre core
- Toronto – maximum 22m (6 storeys) with only 6m (1 storey) at the Foreshore
- Kiama – maximum 3 storey
- Shoalhaven Council is currently proposing height limits of 11m (4 storeys) for the Ulladulla, Nowra and Huskisson CBDs
- Batemans Bay - maximum 5 storeys, with 3 storeys at the Foreshore and 4 storeys in the town centre core
- Eden - maximum 4 storeys, with only 3 storeys at the Foreshore
- Cronulla - maximum 16m (4-5 storeys), with 10m (3 storeys) at the Foreshore and 15m (4 storeys) in the town centre core
- The Entrance - maximum 25m (7 storeys), with only 8.5m (3 storey) at the Foreshore

- Camden Haven - maximum 11.5m (4 storeys) with only 8.5m (3 storeys) at the Foreshore
- Byron Bay – maximum 11.5m (4 storeys) with only 9m (2-3 storeys) at the Foreshore
- Ballina - maximum 18m (5-6 storeys), with 8.5m (2-3 storeys) at the Foreshore and 10m (3 storeys) in the town centre core
- Even Port Macquarie, a much larger town and regional capital, has a maximum height limit of 26.5m (7-8 storeys)

Of course circumstances, topography and community preferences vary and there can be no 'one size fits all' approach to height limits in coastal tourist towns. However it is striking that few such towns allow buildings of more than 7 storeys, and then usually only in very specific locations, with the norm for most areas of town centres and foreshores being in the 2-5 storey range.

Two towns which have 'rolled the dice' by allowing high rise are Forster-Tuncurry, where the maximum height limit of 33m has resulted in what many regard as very ugly 9-10 storey developments, even with no hilly backdrop to spoil, and Gosford, which has gone for broke with height limits of up to 72m (20 storey) but has had very limited success in attracting new investment in apartment towers.

### Re-introducing Floor space ratio (FSR) controls

The Building Heights section of the draft Delivery Program incidentally proposes, without much discussion, the re-introduction of Floor space ratio controls for Town Centre and Foreshore developments (pp25-27 inc. Figures 12&13). Floor space ratio controls were omitted from the Port Stephens Local Environmental Plan 2013 (LEP), despite having been adopted for the Nelson Bay Town Centre and Foreshore as part of the 2012 Strategy.

The Delivery Program proposes reducing the 2012 FSR limits from 2.5:1 to 2.0:1 for the built area of the Foreshore but increasing it from 2.5:1 to 3.0:1 for the entire town centre and Landmark/Bowling Club sites.

### Misleading assertion about FSR

The draft *Delivery Program* asserts that the proposed floor space ratio (FSR) of 3.0:1 for the whole of Areas C & D is only an increase from an already agreed FSR of 2.5:1 (Figure 12 p26).

As we pointed out in our *Critique* (Attachment 2 - False assertion 4), this is simply not true:

- As with heights, this is an attempt to 'verbal' the community into accepting that an FSR of 2.5:1 has already been accepted for the entire town centre, when it has not.
- The 2012 Strategy allowed for up to 2.5:1 FSR only for developments that could demonstrate 'outstanding design excellence' and 'significant public benefit', as part of an agreed variation policy (p65) + the possibility of an additional 0.5:1 (an FSR of 3.0:1) for 4 specific designated 'opportunity sites'.
- Moreover the Strategy stated that '*Urban design analysis ... confirmed that [a maximum FSR of 1.8:1, already in the DCP] is an appropriate level of building bulk for the Nelson Bay Town Centre*' (p64) (although the final draft slipped in 2.0:1 supposedly for 'simplification'!).

Whichever way the 2012 Strategy is read, the agreed and adopted 'default' FSR was no more than 2.1:1, and Figure 12 in the draft Delivery Program is clearly incorrect in stating 2.5:1

### **FSR proposals not supported by Council's own consultants**

The updated Feasibility study (HillPDA Sep 2017) states the "normal" FSR's for various heights,

- 'In our experience with feasibility modelling over a range of districts, we typically find the following height and FSR combinations to be common:
  - 3 to 4 storeys are often compatible with an FSR of 1.6:1 to 1.8:1;
  - 5 to 6 storeys are often compatible with an FSR of 1.8:1 to 2:1; and
  - 7 to 8 storeys are often compatible with an FSR of 2.2:1 to 2.5:1.' (p34)

This completely undercuts Council's proposals for FSRs of 2.0:1 at the Foreshore and 3.0:1 throughout the town centre (and the possibility of even greater density through 'variation' approvals under very weak proposed LEP Clause 4.6 *Exceptions Policy*. (see below).

It has been suggested to us by an experienced local architect that the proposed 3:1 FSR is excessive for a town such as Nelson Bay., and that FSR controls should be not included in any proposed changes to the planning controls. Instead building envelope and the ADG design standards and guidelines be relied upon, in conjunction with design review panels, to inform and provide quality outcomes. This would place less emphasis on achieving numerical outcomes and more emphasis on achieving quality design.

### **Experience of FSR elsewhere**

A review of the FSR controls in the same coastal towns as we looked at for height controls (see above) shows that few allow FSRs of more than 2.6:1.

We note that Waverley Council over recent times has incorporated the importance of land zoning, FSR *and* height standards working together to control building density and public amenity.

The Gosford LEP has a subclause (5) under its FSR controls which states 'Basement levels, including carparking, that are not located wholly underground are to be counted as floor space for the purposes of calculating floor space ratios'. This provides the incentive for developers to ensure carparking is completely underground whenever physically possible.

### **Height limits on the Nelson Bay Foreshore**

We have noted that the draft Delivery Program shows a proposed height limit of 2 storeys (9m) for the Foreshore land between the existing D'Albora marina buildings and the cruise booking kiosk and café east of the eastern harbour rock wall. In the 2012 Strategy this area was shown as public open space and had no height limit displayed on the Proposed Building Height Map (Figure 32, p61).

Council has tried to argue that the Delivery Program proposes no change in this respect, but that in any case no building is envisaged for this area of the Foreshore, most of which is a Crown land reserve managed by Council as public open space. While the current LEP Height of Buildings Map does indeed show this area as having a height limit of 8 metres, we question why Council has not reflected the clear intention shown in the 2012 Strategy – to preserve this land as open space with no provision for buildings of any height?

At the public forum we organised on 12 March, attended by more than 300, the following motion was passed unanimously:

*‘That Port Stephens Council change the Current LEP and all Council strategies to ensure that the Nelson Bay foreshore, from the playground to the eastern groin is protected as recreational public land.’*

### LEP Clause 4.6 Policy

An LEP Policy for the application by Council of Clause 4.6 – Exceptions to development standards (*Exceptions Policy*) has been included in the *Delivery Program*, under the building heights section for the Nelson Bay Strategy, even though it has much wider application to the entire LGA, and would apply to all development standards, not just height and FSR limits.

Council has invited submissions on the draft Exceptions Policy separately, which is confusing for interested parties.

As a result of our separate representations, Council has belatedly advertised the draft *Exceptions Policy* separately from the Nelson Bay Strategy (but only for the last week before the submission deadline). **TRRA Inc. has made a separate submission (Attachment 3)**, but also comments here in the body of this submission, because the new Policy is put forward as proposed Action 7 in the Implementation Plan at Attachment 1 to the *Delivery Program*.

Council claims that the proposed new *Exceptions Policy* incorporates the safeguards for variations in the 2012 Strategy, or otherwise provides safeguards against excessive height (*Delivery Program* pp7, 31), and that it is all that is permitted under the State planning law (public statements by the Mayor and Council staff).

As we stated in our *Critique* (see Attachment 2 – False Assertion 7), this is not true:

- The variation policy does not even attempt to limit the extent of any variation (e.g. by percentage, or significance criteria). Far from being an ‘innovative solution to mitigate perceived impacts’ (p28) it is in effect an open licence for increased height and bulk
- The criteria of ‘outstanding design excellence’ and ‘strategic public benefit’ have been abandoned and are not even mentioned (except to incorrectly state that they were *alternative* criteria in the 2012 Strategy (p29) when they were in fact cumulative; i.e. both criteria had to be met).
- While an independent urban design panel is still proposed, it is not linked to variation applications, and in any case Council has already shown in the 2017 approvals of 11-13 Church St and 65-67 Donald St that it can and does ignore the opinions of such a panel.
- Variations of up to 10% are virtually assured with not even peer review within Council for any variation less than 10%
- Versions of Clause 4.6 and supporting policies adopted by other Councils in NSW are much stricter, and while developers can and do appeal against implementation of strict height and bulk limits, those that have been successful are generally in the range of 20-30% variations (c.f. Port Stephens Council precedent setting 2017 approval of a 100% variation at 11-13 Church St)
- The proposed policy is so weak that it invites unlimited variation applications, and it would be very difficult to defend any refusals.



Council has been critical of our earlier suggestions that Council's proposals could allow up to 21 storey buildings as alarmist and unhelpful, yet Council has admitted discussing such heights with potential developers of the Council owned car park sites, and Council has not denied that the proposed variation policy would potentially allow such heights.

Discussion of the proposed *Exceptions Policy* overlaps with the issues of Design Excellence (see above) and Development Incentives (see below).

**Our overall conclusion on the related issues of Building Heights, Floor space ratios and Variation policy is that Council's proposals in these respects are inappropriate and unacceptable, as well as clearly contrary to the views of the local community. While we are open to a sensible discussion of a finer grained approach to town centre building heights and densities, our starting point is that the compromise position adopted in the 2012 Strategy, of a five storey default for the town centre, with the possibility of up to 7 storeys in exceptional circumstances, remains valid and should be re-stated in any new Delivery Program.**

## 2.3 Development Incentives

The draft *Delivery Program* abandons the concept of development incentives which were a centrepiece of the 2012 Strategy. While not formally expressed as an LEP Clause 4.6 variation or exception policy (see discussion above), the adopted 2012 Strategy provided for developers to gain approval for up to 2 additional storeys (7m of building height), and/or an extra 0.5:1 FSR, but only in **exceptional circumstances** where the applicant could demonstrate **BOTH outstanding design excellence AND strategic public benefit** (2012 Strategy, p65).

Outstanding design excellence was to have been tested by referral to an independent urban design panel. While this remains a proposal in the current Delivery Program (see under 'Design Excellence' above, Council has shown little respect for the opinions of the panels it has commissioned since 2012.

Strategic public benefit was explained in the 2012 Strategy as relating to implementation of works in the Improvement Program (a list of specific works that accompanied the Strategy), or provision, for example, of 4 star accommodation with a conference centre.

Regrettably, Council failed to make the LEP and DCP changes that would have given effect to this development incentive policy. We submit that this is one of the main reasons why developers may have been reluctant to invest in the Nelson Bay town centre – the height limit has remained at 15m (no longer sufficient for even 5 storeys), despite the hard won consensus in 2012 that some modest increases would be acceptable in exceptional cases.

The draft Development Program argues that removal of the development incentive element from the Strategy will reduce uncertainty (p30) and, implicitly, that Height of Building and FSR limits, together with the proposed LEP Clause 4.6 policy (*Exceptions Policy*) are a better alternative. We do not agree.

## Experience of Development incentives elsewhere

Gosford Council has clauses in its LEP 2014 allowing an extra 2.75 metres over the 'standard' height limits, and an extra 25% of floorspace in Terrigal Village Centre on larger sites and where publicly accessible open spaces such as alleyways and courtyards are provided (encouraging site consolidation)



Noosa Council in Queensland is proposing allowing an increase in the FSR from 0.8:1 to a maximum of 3.0:1 for sites over 2000m<sup>2</sup>, again encouraging site consolidation.

Mid Coast Council has a current Planning Proposal for the Forster town centre which would allow extra height (up to 33 and 26m) and FSR (up to 3.0:1) for a proposed commercial/residential development:

‘... integrated with a civic precinct which will provide community facilities ... in the form of a new library, community space including meeting rooms and visitor information centre. ... a private developer ... will construct and hand over the community facilities to Council. In return, the developer obtains development rights over the remainder of the land and airspace to develop a commercial, entertainment, tourism and seniors housing development which integrates with the community facilities’.

These provisions are notable not just for their encouragement of particular built form and design outcomes but also for the modesty of the ‘variations’ to development standards that are rewarded, when compared to the effectively unlimited variations that Port Stephens Council’s draft ‘Exceptions to development standards’ policy would allow.

**TRRA strongly opposes the removal of the development incentives element from the Strategy. We submit that far from reducing uncertainty for developers, the prospect of 10 or more storey buildings on any site in the town centre, together with an overly permissive Exceptions Policy, would in reality *increase uncertainty* and likely contribute to a further investment boycott. Development incentives need to be retained, whether in the *Exceptions Policy* (preferred) or in some other way.**

## 2.4 Public Domain

### Public Domain and Town Presentation

In previous submissions TRRA has called for a very high priority to be assigned to having a clear plan for improvement and maintenance of the public domain both in the town centre and the foreshore precincts. The importance of this is also stressed in the submissions of the Tomaree Business Chamber and Nelson Bay Now which stressed that **“this is the main game”**.

Many in the business community are convinced that the standard of our public domain is a key factor in attracting new investment to Nelson Bay. There is no question that the natural assets and setting of Nelson Bay are outstanding, but there is a consensus that major improvements to the townscape are essential to engender confidence in the community’s and Council’s commitment to the future of Nelson Bay as a Strategic Centre.

A successful town centre needs to establish a central focal or meeting point in the town and it is important to have areas for workers in the CBD to have lunch rather than the back room of the shop or going home. This adds to the image of vibrancy and active feel of the town.

We welcome the current construction of the Yacaaba Street extension and associated public space; the announcement of a \$300,000 grant for APEX Park enhancements, and commitment of \$140,000 (including another \$70,000 grant) to planning for other public domain improvements.

In the town centre there is need for a **coherent streetscape** which will establish an identity for the town and give it a sense of place. The 2012 Strategy in the section titled **Town Centre Amenity and Character** pages 56-59 provides an excellent statement of objectives and needs which should inform

the planning to be undertaken with this grant funding. Will this remain in a Strategy document? (see our questions at the start of this submission about what is actually being changed).

The current Magnus Street streetscape sets a worthy precedent for a pleasant environment attractive to pedestrians, shoppers, and for alfresco eating. TRRA believes that there is a need to progressively extend elements of this streetscape to other sections of the town centre. For example the 2012 strategy proposes a comprehensive street tree treatment throughout the entire centre.

The opportunity for this was missed when recent new developments such as the Shell fuel station and Woolworths were approved.

Landscaping, undergrounding of power supply, lighting, paving, street furniture, signage, public art and general maintenance all have a role to play in achieving the sense of place.

While the masterplan for Apex Park will offer some of the components of a town square the prospect of some public open space located centrally in the commercial hub should also be considered.

If substantially landscaped with permanent shade trees, the improvements being installed in the Yacaaba Street extension should assist in providing open space close to town. The Council's apparent longer term plan for commercial development along the eastern side (included in the plan on page 41 of the *Delivery Program* but not in design/landscape plans being exhibited in connection with the current works) would eliminate this opportunity, and should we think be withdrawn.

The proposal to remove the existing stage/bandstand in Stockton St needs careful evaluation. Its obstruction of views has been somewhat reduced by the growth of street trees and trees in Apex Park and its slowing of vehicles using Stockton Street is probably a desirable traffic calming measure. It also provides a well-used venue for adjoining food and coffee outlets and is used for performances during major events.

Similarly, the proposal to remove the Victoria Parade Bridge needs careful assessment. All infrastructure which encourages interchange between the town and the foreshore is important. Additionally, the business viability of the arcade (and its tenants) linking to Magnus Street must be considered. We do not need another row of empty shops. If the structure is structurally sound TRRA would not wish to see it removed.

Nelson Bay has a number of laneways which are currently cluttered with garbage cans, storage, air conditioners, exposed plumbing and motor vehicles. There are many examples elsewhere where these spaces have been upgraded to attractive covered walkways opened to the retail operations which they serve. These centrally located spaces have the potential to enhance overall connectivity and amenity and add to the shopping and dining experience.

There are many opportunities for partnerships between the Council and business owners to improve the public domain. Our neighbouring town of Taree has greatly enhanced its main street through such a partnership resulting in significant increase in business activity. The recently established Nelson Bay Civic Pride Group is an important initiative in this context and this needs to be acknowledged and supported by Council.

### **Teramby Road and Foreshore Precinct**

TRRA fully supports Nelson Bay Now's call for a comprehensive upgrade of this precinct.

Unfortunately, the orientation of the marina and other buildings to the foreshore has resulted in an unattractive vista for those approaching from the town centre or travelling along Teramby Road. Street frontages are marred by discontinuity of functions and substandard maintenance. In short it is a wasted opportunity.

The sewerage pumping station is frequently a source of foul odours.

The scope for a marine-themed commercial precinct including seafood outlets could create a “Fishermans Wharf” experience adding greatly to the town’s visitor attraction.

The management of parking would need to be part of any review of this precinct including the facilities for tourist coaches.

## 2.5 Transport and Parking

Transport and parking have been identified in the earlier 2012 Strategy, supported by the HVRF survey (2012), as the most significant issue from the perspective of businesses. Most retail businesses within the Nelson Bay CBD have to compete directly with those located at Salamander where free parking is provided within a very short walk of the actual shopping centre. Residents who are not within a short walk or cycling distance of Nelson Bay town centre, bearing in mind the hilly terrain, will continue to have a high reliance on motor vehicles. To attract these residents to Nelson Bay, parking must also be available within a very short distance of the shops and probably at no charge. Suggestions by some Council staff that high rise apartments in Nelson Bay centre could attract residents with no need to routinely use a car are completely unrealistic and based on a ‘metro’ model which will never be applicable to the Tomaree peninsula.

We again submit that **parking and traffic management improvements are a key to revitalising the town and must be given a very high priority for immediate action.** We understand that this view is shared by the local business community.

The location of the two Council-owned carparks in Donald street (East and West) , which are community assets, have provided an ideal central location for off street parking, with easy access to the Donald Street west carpark from Church street when approaching from the south and west, and to the Donald Street east carpark via Yacaaba St and Magnus St (east) for those coming from the south and east. This reduces the amount of commuting traffic along Stockton Street and Magnus Street (west), freeing the central CBD area of vehicle movements except for through traffic which should be directed by clear signage around the town (using Dowling St). The location of the two Council-owned carparks in Donald Street ensures a generally ‘flat’ walk to the majority of businesses.

The updated 2017 GHD survey provides some more useful statistics however it is disappointing that the latest 2016 census data was presumably not available at the time the report was prepared, instead having to relying on the outdated 2011 data. 2016 statistics should now be reviewed. There is also no discussion of Nelson Bay becoming a Strategic centre as defined in the Hunter Regional Plan 2036 and draft Greater Newcastle Metropolitan Plan, with expected growth in tourism and permanent residents.

Local businesses have expressed concern that the latest survey data still doesn’t reflect the true parking situation, hence we fully support updating the Traffic and Parking Study (Action 18 in the Implementation Plan). However, we question the proposal to establish a Citizens panel to review parking (Action 20), particularly if its terms of reference, agenda, and proceedings were to be led by Council staff who appear to have closed minds on the parking problem. We submit that the Nelson

Bay Now group, comprising of local business and community groups and private individuals with a long history and knowledge of the town, would be a better nucleus for a panel along with relevant representatives from Council and perhaps one or two 'independent' citizens.

It is essential that regular community workshops are held to present updates on ideas and to obtain feedback from the wider community before planning proceeds in any one particular direction.

TRRA supports the further investigation of parking requirements as a short term priority, particularly given the potential for a medium term decrease in parking once the current leases on the two temporary car parks expire, and without any immediate plans to redevelop the Donald Street east carpark to replace the spaces lost from the closure of the upper levels.

The update of the Traffic and Transport Study should incorporate relevant proposals from the recently adopted Pedestrian Access and Mobility Plan (PAMP) (Action 26), and consider cycle-ways, public transport and the interaction of tourist transport. This update needs to be integrated with the further investigation of parking options.

The opening of the Yacaaba Street by mid 2018 will have a major effect on traffic flow in and around the CBD. Experience after the opening will need to be monitored and reviewed to feed into the review of signage and traffic flow across the entire CBD. The effectiveness of the extension will be heavily dependent on adequate signage both for vehicles and pedestrians.

We noted in our 2017 submission that there was no mention then of traffic management and inner bypass options, which the 2012 Strategy recognised as important. It may be intended not to change these aspects but it is disappointing that they are not reinforced in the *Delivery Program*.

Ideas agreed in the 2012 Strategy for encouraging alternative traffic circulation (including Shoal Bay and Fingal Bay traffic avoiding the town centre) also need to be implemented as a high priority – many of these would be low-cost, involving only minor roadworks, road marking and signage. There is no further comment in the draft *Delivery Program* on these matters apart from general proposal to update the Traffic and Transport study.

We submit that the Parking and Traffic and Transport studies should be completed prior to any significant improvements on the Public Domain infrastructure as it may be possible that some roads could end up being partially or fully closed, or the direction of flow changed. We suggest that the removal of the stage in Stockton Street (proposed Action 13) and consideration of the future of the Victoria Parade pedestrian bridge (Action 22) both be deferred pending the outcome of these wider discussions.

The use of the recently committed \$140,000 (including a \$70,000 State Government grant) to planning for other public domain improvements needs to be considered in conjunction with the further work on Parking and Traffic and Transport.

## 2.6 Implementation and Delivery

We note that Council's website shows a timeline for the Strategy Review, with the next stage being:

'a final Delivery Program will be presented to Council for adoption and consideration of public exhibition outcomes'

This appears somewhat back to front - surely 'consideration of public exhibition outcomes' must precede adoption, and implies a willingness to make further changes? Specifically, Council must not ignore community views on heights as it did in 2017.

We welcome the apparent commitment to implementation and delivery, including by adopting the SMART concept (Action 27 in the Implementation Plan at Attachment 1 to the Delivery Program). However, we have to point out that Council largely failed to implement or follow up on the 2012 Strategy after it was adopted, in particular by not making relevant amendments to the LEP or DCP. This must not be repeated.

We welcome the proposal for an Implementation Panel (Action 28) but suggest that it should meet more regularly than quarterly, at least at the start. We also have concerns about whether the proposed four local community representatives (in addition to the 3 East Ward Councillors) is sufficient to represent the range of interests<sup>7</sup>. Selection of these community members will also be critical – it is essential that the individuals appointed have broad support in the community, and commit themselves to consultation. The Nelson Bay Now group may act as a useful conduit.

In relation to infrastructure funding (Action 29), all of the sources of funding listed in the *Delivery Program* need to be investigated. However, we submit that Council must lead by investing in public infrastructure up-front, through borrowing, to be re-paid from investment contributions in due course, rather than expecting private investment first.

We strongly support the intention to Monitor, Report and Review the Strategy (Action 30). A locality strategy should not be a static document, although some important aspects, such as height limits, do need to be agreed and then 'locked in' for at least the medium term, to provide certainty and business confidence.

### Part Three – Next Steps

The *Delivery Program* document on exhibition states that 'Following the public exhibition period, The Delivery Program, Clause 4.6 Policy, LEP Amendments and recommended Implementation Panel members will be reported to Council for endorsement' (p47). As noted above, there is no mention of the prospect of significant changes following the consultation period. This seems extraordinary, and reflects the experience of Council having largely ignored many aspects of the submissions made on the 2017 Discussion Paper.

The failure to even contemplate the prospect of changes in response to submissions confirms what TRRA and many others in the community see as an inflexible determination to impose a new vision for the future of Nelson Bay which is in our view both inconsistent with the aims and objectives of the Strategy and contrary to the overwhelming desire of the community to maintain the character of the town.

The current proposals are clearly largely a legacy from the previous Council (2012-2017). Despite our efforts, and reservations expressed by three Councillors, the new Council was unwilling in December 2017 to re-assess the direction that was presented to them by officers.

<sup>7</sup> We refer to the draft terms of reference and composition for the Panel presented to Council on 12 December, but not included in the exhibited *Delivery Program*.

We urge the new Council to now take the opportunity of another round of feedback to fundamentally question and re-assess the direction in which the previous Council, and staff have taken the Strategy, specifically in relation to building heights and density.

## Attachment 1 (to the *Delivery Program*) – Implementation Plan: TRRA response

We support many of the ‘actions’ proposed in the Implementation Plan, some of them unconditionally, others subject to clarification, interpretation and conditions.

The following table indicates our response to the proposed ‘actions’, with comments where appropriate.

Recommended Action	TRRA response
<b>Design Excellence</b>	
1 LEP Clause for Activated Street Frontages	Support but extend to additional streets – see body of submission
2 LEP Clause for Appropriate Vertical to Horizontal Proportions	Support, with consideration to application to all lots rather than just less than 15m wide and less than 30m length. Support the incentive to consolidate small lots. Council should consider purchase of isolated lots for open space/parking.
3 An Independent Urban Design Panel	Support but Council must commit to give greater weight to Panel’s opinions. Applicants for DAs to bear the full cost of any Panel consultations.
4 Education Program on Urban Design	Support
5 Support for Awards that recognise Design Excellence	Support
<b>Building Heights</b>	
6 LEP Clause for FSR and increase in HoB	Oppose specific proposals – re-instate changes in 2012 Strategy
7 Adoption of LEP Clause 4.6 Policy	Oppose current draft – far too weak – a much tougher policy is required. Once LEP limits and a new Exceptions policy are confirmed, Council needs to make it clear that previous approvals of major variations will not be accepted as a precedent
8 Expansion of the Strategy Boundary to include ridgelines	Conditional support but requires further consultation on height and FSR limits to apply in these areas
<b>Development Incentives</b>	
9 Reducing the uncertainty provided by development incentives	Oppose – re-instate conditions similar to 2012 ‘development incentives’ as part of a clause 4.6 Exceptions policy
10 DCP requirements encourage design excellence	Support, subject to further consultation on detailed drafting
<b>Public Domain</b>	
11 Development of a Public Domain Plan	Support, and welcome recent commitment of \$140k inc. \$70k State grant
12 Feasibility assessment for public Wi-Fi in town centre	Support, but note no apparent progress since this was agreed last year



13 Removal the Stockton Street Stage	Defer pending outcome of wider traffic management and public domain discussions
14 Review the Nelson Bay Foreshore Plan of Management (PoM)	Support but caution re possible intentions – link to need to protect public open space to the east of the marina buildings. Link also to State government Port Strategy for Nelson Bay (2017)
15 Implement the Apex Park Masterplan	Support, and welcome recent announcement of \$300k State grant – but should consult local community (via Nelson Bay Now) to see if any aspects need updating. Bring forward timing.
16 Develop a toolkit for public events	Support
17 Audit facilities that are required to facilitate public events	Support
<b>Transport and Parking</b>	
18 Update the Traffic and Transport Study and develop an Integrated Plan	Support
19 Identification of future satellite parking locations	Support but only as a complement to town centre parking not an alternative
20 Formation of a Citizens Panel to discuss short-term and long-term parking	May have some value as an ‘add-on’ but no substitute for local knowledge and experience, via Nelson Bay Now
21 Extension of Yacaaba Street	Support work under way – subject to consultation on treatment of public space, and possible changes on western side to improve amenity and appearance of the adjacent private properties, with appropriate funding contributions from owners
22 Undertake a capacity analysis of the Victoria Street [Parade] Pedestrian Bridge	Defer pending outcome of wider traffic management and public domain discussions – would be very cautious about proposal to remove – the bridge offers an important alternative link from APEX park to Magnus St, and services the businesses in the Nelson Towers arcade
23 Review signage and parking metres [meters] on the Foreshore	Support. Replacing missing street signs throughout the town is vital for the safety and travel convenience of locals and tourists. Commission local community groups to undertake an audit across the town of missing street signs.
24 Review road speed limits in the town centre	Support
25 Design and fund intersection options based on Study	Support – priority for agreement on traffic priorities at Yacaaba/Magnus intersection
26 Implement the Pedestrian Access and Mobility Plan (PAMP)	Support
<b>Implementation</b>	
27 Re-word the existing actions to be SMART	Support, provided not just cosmetic
28 Implementation Panel that meets quarterly to discuss Strategy progress	Support, but must be more than one local community member
29 Review Infrastructure Funding	Support – major issue
30 Monitor, Report and Review the Strategy	Support



Attachment 2 (to this submission) (separate document)

**TRRA Initial Critique of the Progressing the Nelson Bay Town Centre and Foreshore Strategy: A revised implementation and delivery program, December 2017**

Attachment 3 (to this submission) (separate document)

**Separate submission to Council on the draft policy Exceptions to Development Standards**

This document also **Attachment 2** to our submission on the Nelson Bay Strategy, 4 April 2018

## Progressing the Nelson Bay Town Centre and Foreshore Strategy: A revised implementation and delivery program, December 2017 - an initial critique

Tomaree Ratepayers and Residents Association Inc. December 2017

The document *Draft Progressing the Nelson Bay Town Centre and Foreshore Strategy: A revised implementation and delivery program* – a.k.a. ‘the draft delivery program’ and endorsed by Council on 12 December (vote 6:3) to be placed on exhibition, is in our considered view, **incoherent, not fit for purpose, and contains inaccurate and misleading material**. We will demonstrate in the following commentary on the report as tabled that its public exhibition has potential to damage the reputation of Port Stephens Council. We urge Council to read our critique carefully and to engage with TRRA and other stakeholders in discussions on what action is necessary to rectify the situation.

### What is being changed?

It is unclear what parts of the document are ‘content’ as opposed to ‘commentary’ and what relationship the content parts bear to the adopted 2012 Strategy. It appears (although it is not clear) that no change is proposed to the adopted Strategy itself, although this would mean major inconsistencies.

The ‘content’ appears to be mostly in Part 2 – the table below compares it with equivalent content in the adopted Strategy. **To what extent is the new content supposed to *replace* parts of the Strategy and if so how?**

	<b>Draft Delivery Program, December 2017</b>	<b>Adopted Strategy, 2012</b>
Design Excellence	Section 2.1	Analysis p64 + Principles 1.1, 5.2, 6.4, 8.1
Building Heights	Section 2.2	Analysis pp 60-61 + Principles 8.1-8.3 & 10
Development Incentives	Section 2.3	Analysis p64-67 + Principles 1.1 & 8.1
Public Domain	Section 2.4	Analysis pp 56-57 + Principles 6.1-6.2 & 7, 8.4
Transport and Parking	Section 2.5	Analysis pp 34-38 + Principles 2 & 3
Implementation and Delivery	Section 2.6 + Attachment 1	Section 10, pp 87-89 + Appendix 3
Providing for Variation	Separate proposed policy attached to Council report	Analysis p65 + ‘Opportunity sites’ pp 66-67 + Appendix 2 1.4 (pp 98c-98d)
Next Steps	Part 3	Section 10, p 87-90 + Appendix 3 Table pp 99-116
Implementation Plan	Attachment 1	Separate document ‘Improvement Program’

Large sections of the adopted 2012 Strategy are not mentioned in the 'draft delivery program' – **are they to remain unchanged?**

**What happens to the Recommendations chapter**, with its 10 Principles, each with recommendations and proposed implementation actions, when many of these are affected by the radical new Strategy of the 'draft delivery program'?

Overall, it is unclear what will emerge from the end of this Review Process other than some amendments to the LEP and DCP, an Implementation Plan (draft at Attachment 1), an Implementation Panel and a citizens jury on traffic and parking. **Will there still be a 'Strategy' document and what will be its status?**

Part One of the 'draft delivery program' explains the Review and states (at p10) that the entire document 'represents' (or is?) a revised implementation and delivery program whose role is to 'update and set the implementation program for the Strategy' It states that 'It replaces the '[2012] Improvement Program, and overrides the Strategy where any inconsistencies occur'.

Given that there would be major inconsistencies, **it is unclear whether there would any longer be 'a Strategy'**, as illustrated in the diagram on p11, **in any meaningful sense or useful form.**

## Inaccurate or misleading content

In the 'draft delivery program' document, there are some significant inaccuracies, and material which is misleading and/or biased/selective. There are at least 10 major false assertions:

**False assertion 1. The assertion in various places that the 2012 Strategy is unchanged, and that only a revised implementation and delivery program is proposed: '*...just a few minor, yet significant changes ...*' (p5)**

**This is NOT true:**

The 2012 strategy included the following statements and recommendations:

- Limitation of building heights is clearly a key element of the 2012 Strategy
  - '*It is critical that the wooded ridge and headlands that surround the Bay be visible and not eclipsed by buildings*' (p6)
  - '*A significant factor in managing perceptions of the intensity of development is building height*' (p60)
  - The Strategy retained a default 5 storey (17.5m) height limit for the town centre, with provision for up to 2 extra storeys (to 24.5m) but only where a developer could demonstrate **outstanding design excellence AND strategic public benefit**
- The 'delivery program' proposes lifting the default height limit from 7 to 10 storeys (35m) with a variation policy that allows 10% increase without even internal review, and places **no maximum** heights and **no criteria for approval of variations** other than a vague reference to 'achieving the environmental planning objectives'. **(The default limit in the 2012 Strategy was 5, not 7 storeys-see detailed comment in Assertion 3 below)**
- Any objective assessment would conclude that the proposal is for a **radically different new Strategy**

**False assertion 2. The repeated assertion that the proposals are a response to submissions received and consistent with community views.**

**This is NOT true:**

- The document itself confirms continued support in submissions for the revised height limits adopted, by consensus, in 2012:
  - *'The desire to keep the unique coastal village and 'natural amphitheatre' character was also reinforced'* (p9)
  - *'.. the vast majority was against any significant increase [in height]'* (p9)
  - *'.. clear consensus that building heights should follow the natural slope of the land and view corridors should be preserved'* (p9)
  - *'...continually reinforced that they supported the existing Strategy'* (p10)
- No reference is made to the public forum organised by TRRA on 21 February 2017, attended by over 200 people, at which Council's strategic planners presented on the Strategy Review and took questions. The overwhelming view of that forum was opposition to significant increases in height
- No reference is made to the Tomaree Business Chamber meeting also in February, and also addressed by a Council strategic planner, where the prevailing view was again opposed to high rise in the town centre.
- Instead, the document cites submissions received in support of a single DA, for a 32m apartment building at 11-13 Church St, as *'an extraordinary indication for support for increased heights where good design outcomes can be achieved'*. It is a travesty to put this forward as an 'equivalent' to the broad-based opposition to high rise, for several reasons:
  - Council knows very well that most of these 'submissions' were solicited by the developer at a stall offering 'virtual reality' tours of the building.
  - Many of the individuals filling in the proforma submissions would not have been aware of the height of the proposed building or the context, and it is not known how many were even local residents. They were expressing a view on the apartments as presented to them, not on an overall height limit for Nelson Bay.
  - Council ignored the opinion of an independent design panel which criticised the design.
- The 71 page Submissions Table presented to Council on 12 December does not clearly convey the overwhelming sentiment of opposition to high rise buildings. It is not until a close reading of the 'summaries' of the 82 submissions that the full strength of this opposition becomes clear, and the 'Council responses' are unconvincing, often not even addressing the substance of the submissions.
- The document cites the results of the 2012 survey (of residents, businesses and visitors) which identified that: **'managing building heights was one of the most pressing issues facing the town and that there was a clear consensus that building heights should follow the natural slope of the land and view corridors should be preserved'** (Hunter Valley Research Foundation 2012) (p19).
- No new evidence has been presented to doubt that there remains the clear consensus in favour of revised, but still strict height limits as adopted in the 2012 Strategy (but not implemented by Council).

**False assertion 3. The assertion in various places that the proposed 35m (10 storey) height limit throughout most of the town centre is only a 3 storey (10.5m) increase over the heights adopted in the current Strategy (e.g. p25, and Summary of Submissions Table - Council response 1b).**

**This is NOT true:**

- The 2012 Strategy only allowed for up to 2 extra storeys (7m) in exceptional cases, subject to strict criteria – see False assertion 7. below.
- It is wholly inaccurate to claim, as Council planners have been doing throughout the review, that the community has already accepted 7 storeys (24.5m) as a ‘default’ height limit.
- A 7-storey default height limit **has definitely not yet been agreed.**

**False assertion 4. The assertion that the proposed floor space ratio (FSR) of 3.0:1 for the whole of Areas C & D is only an increase from an already agreed FSR of 2.5:1 (Figure 12 p26)**

**This is NOT true:**

- As with heights, this is an attempt to ‘verbal’ the community into accepting that an FSR of 2.5:1 has already been accepted for the entire town centre, when it has not
- The 2012 Strategy allowed for up to 2.5:1 FSR only for developments that could demonstrate ‘outstanding design excellence’ *and* ‘significant public benefit’, as part of an agreed variation policy (p65) + the possibility of an additional 0.5:1 (an FSR of 3.0:1) for 4 specific designated ‘opportunity sites’
- Moreover the Strategy stated that ‘*Urban design analysis ... confirmed that [a maximum FSR of 1.8:1, already in the DCP] is an appropriate level of building bulk for the Nelson Bay Town Centre*’ (p64) (although the final draft slipped in 2.0:1 for ‘simplification’).
- Whichever way the 2012 Strategy is read, the agreed and adopted ‘default’ FSR was no more than 2.1:1, and Figure 12 is clearly incorrect in stating 2.5:1

**False assertion 5. The repeated assertion that economic modelling supports the new height limits.**

**This is NOT true:**

- Council planners have drawn highly selective and self-serving conclusions from the consultants’ report
- The assumptions and inputs to the modelling are questionable (see the attachment ‘Comments on Hill PDA and EPS Reports’ to our submission dated 13 March 2017)
- Despite the limitations of the feasibility assessment, the graph on p24 clearly shows the maximum profit margin for development on 4 of the 5 identified sites at a height of 8 storeys, with the fifth site requiring 17 stores to achieve more than 10% profit
- The draft delivery program reports that ‘a minimum of eight storeys was required to provide confidence for investment’ (p26) and that ‘the feasibility analysis has indicated the need for a minimum of 8 storeys to see redevelopment occur’ (p30)
- Given these findings, what is the basis for a recommendation of a default 10 storey height limit (but then allowance for unlimited variation) throughout the town centre that includes these 5 sites?
- Given Council’s acknowledgement that ‘*construction costs significantly increase from a level of eight storeys due to the need for increased structural materials and regulations, such as*

*fire sprinklers...* (p23), setting a height limit *above* 8 storeys will necessarily result in developers seeking significantly higher buildings to recoup the extra costs.

**False assertion 6. The assertion that the current height limits are the reason for the lack of investment in the town centre (p24)**

**This is unsupported and arguable**

- The comparison with other towns is selective and has been misinterpreted – the graph on p24 shows median unit prices in Nelson Bay trending overall on a par with Forster (which **has** allowed high rise) over the last 20 years with Kiama (which **has not** – it has an 11m limit) following a similar trend over the same period from a higher base.
- The lack of investment is largely the result of the overall economic cycle in many coastal towns – Council has not pointed to any comparable town that has allowed high rise buildings that has performed significantly better
- The lack of investment may also have been influenced by Nelson Bay's unfortunate reputation for a high mortgage default rate – a legacy of the last round of approvals by Council of sub-standard apartments
- Developers will have understandably held off in anticipation of Council relaxing height and bulk controls, as it is now attempting to do
- There is recent evidence of renewed interest in town centre development in Nelson Bay town centre ***at heights in line with community expectations and the 2012 Strategy***: approvals for a 6 storey apartment building at 65-67 Donald St (6 storey) 64 Dowling St (5 storey) 53 Magnus St (5 storey) and 90 Magnus St (4 storey), and applications pending for 16 Church St (3 storey), 20 Government Road (4 storey) and the former Bunnings site
- In contrast, the development approved for the Marina Resort, 29-33 Magnus St in 2014/15 has ***not commenced despite having obtained a +46% height variation***, and we have yet to see the commencement of work on the much vaunted 'flagship' for the 'lift the lid' strategy at 11-13 Church St, which will be 32.5 m high - equivalent to 10 storeys – a 100% variation.
- We understand that sales of units in buildings that have exceeded the current height limits (including several in Nelson Bay and at Bullecourt Avenue Shoal Bay) remain very slow.

**False assertion 7. The claim that the proposed new LEP Clause 4.6 Variation Policy incorporates the safeguards for variations in the 2012 Strategy, or otherwise provides safeguards against excessive height (pp7, 31), and that it is all that is permitted under the State planning law (public statements by the Mayor and Council staff).**

**This is NOT true:**

- The variation policy does not even attempt to limit the extent of any variation (e.g. by percentage, or significance criteria). Far from being an 'innovative solution to mitigate perceived impacts' (p28) it is in effect an open licence for increased height and bulk
- The criteria of 'outstanding design excellence' and 'significant public benefit' have been abandoned and are not even mentioned (except to incorrectly state that they were *alternative* criteria in the 2012 Strategy (p29) when they were in fact cumulative; i.e. both criteria had to be met).

- While an independent urban design panel is still proposed, it is not linked to variation applications, and in any case Council has already shown in the 2017 approvals of 11-13 Church St and 65-67 Donald St that it can and does ignore the opinions of such a panel.
- Variations of up to 10% are virtually assured with not even peer review within Council for any variation less than 10%
- Versions of Clause 4.6 and supporting policies adopted by other Councils in NSW are much stricter, and while developers can and do appeal against implementation of strict height and bulk limits, those that have been successful are generally in the range of 20-30% variations (c.f. Port Stephens Council precedent setting 2017 approval of a 100% variation at 11-13 Church St)
- The proposed policy is so weak that it invites unlimited variation applications, and it would be very difficult to defend any refusals.
- The paper (and Council spokespersons) have been critical of predictions of up to 21 storey buildings as alarmist and unhelpful, yet Council has admitted discussing such heights with potential developers of the Council owned car park sites, and Council has not denied that the proposed variation policy would potentially allow such heights.

**False assertion 8. The assumption that the Hunter Regional Plan's identification of Nelson Bay as a 'strategic centre' with opportunities for high-density development necessarily involves a significant increase in new dwellings in the town centre, and that allowing higher buildings is the only alternative to greenfield development (p26, and public statements by the Mayor, some Councillors and Council staff).**

**This is NOT true:**

- No figures for expected population growth are provided to support the radical intensification of apartment building
- The modest predicted growth for the *entire* Tomaree peninsula can be readily accommodated by infill in existing residential areas (a clear market trend) and the substantial increase in town centre density that would be allowed by the 5-7 storey consensus already adopted in 2012 but never actively promoted or implemented by Council

**False assertion 9. The assumption that tower apartments buildings will lead to an increase in permanent residency**

**This is unsupported and arguable**

- Council appears to have no control levers to ensure that approved apartments are permanently occupied rather than rented short term
- Census statistics (ABS 2011) and local market surveys suggest that up to 75% of most existing apartments are not permanently occupied
- Local real estate agents report that there is limited demand for the sort of units being proposed, and that mostly from out of town investors intending to put them on the holiday rental market
- The proposed lifting of height and FSR limits represents a wishful thinking 'build it and they will come' approach which relies on hope rather than any evidence or sound strategy



**False assertion 10. The repeated assertion that the revised delivery program will deliver quality design (pp 13-17, 29, 31)**

**This is unsupported and highly contestable, based on Council's track record**

- References to design quality are mostly to existing or well established contemporary standards which should be a 'best practice' requirement of any new development
- The document is highly negative about the prospect of securing buildings that are of architectural significance (p30) – while no-one realistically expects to secure a Sydney Opera House or Federation Square in Nelson Bay, the lengthy dismissal of any aspiration is indicative of a defeatist attitude that will settle for second rate design
- The Tomaree Peninsula has outstanding natural attributes which are recognised as having significant potential to further develop its tourist destination status. Such locations have the capacity to attract quality design in resorts and other tourist related facilities such as convention and interpretive centres and galleries
- The '... commitment to the Lower Hunter Urban Design Awards' (p29) is worthless without some mandatory quality requirements
- Council has referred some recent DAs to an independent design panel, but in the recent 'precedent setting' case of 11-13 Church St, and in relation to 65-67 Donald St, the panel's criticism of the designs was largely ignored, with only a few minor design changes negotiated
- Given the admission that reference to a design panel costs applicants \$3000 and adds an estimated 30 days to processing times (p16), it must be questioned why Council is making these referrals but then largely dismissing the panels' views
- The community can have no confidence that Council is serious about requiring design excellence, especially as a condition of any variation approval – as the words 'design' and 'quality' do not even appear in the proposed LEP Clause 4.6 Policy

**Basic factual errors**

There are a number of factual errors in the 'draft delivery program'. There is presumably an opportunity to fix these before the document is formally put on exhibition and we look forward to this being done.

- Figure 12 on page 26 states that Area E (the area to the NE of the town centre extending out along the Magnus St ridgeline) currently has a 2 storey (8m) height limit. This is incorrect – the Height of Building map 005D in the PSLEP 2013 shows this area, along with the rest of the town centre (Area C in the new delivery program) having a height limit of 15m (the 'old' 5 storey height)
- We have already noted above that the document incorrectly states that the two criteria for 'extra height' in the 2012 Strategy were *alternative* criteria (p29) when they were in fact cumulative; i.e. *both* criteria had to be met. The word 'or' should be replaced by 'and'
- We suggest that it is inaccurate and misleading to refer on page 5 to the {Review Discussion} Paper as having 'recently' come off public exhibition when the consultation period closed in March 2017, which will be nearly 12 months prior to the formal release of this document

## Conclusion

**The document *Draft Progressing the Nelson Bay Town Centre and Foreshore Strategy: A revised implementation and delivery program* – a.k.a. ‘the draft delivery program’ and endorsed by Council to be placed on exhibition is not fit for that purpose and cannot form the basis of further consultation on the Strategy without major changes.**

Tomaree Ratepayers and Residents Association Inc.  
December 2017

contact [planning@trra.com.au](mailto:planning@trra.com.au)



This document also **Attachment 3** to our submission on the Nelson Bay Strategy

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4 April 2018

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## **Objection to draft policy on Exceptions to Development Standards (file no PSC2007-1204V3)**

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### **Introduction**

TRRA Inc. submits that this policy in its current form is not ‘fit for purpose’ and should be withdrawn, completely revised, and re-exhibited. If adopted in its current form, it would signal to applicants for Development Approval an almost complete surrender by Council of any intention to enforce compliance with development standards anywhere in Port Stephens.

While this policy has emerged from a community debate about building heights and densities in Nelson Bay, it is important to recognise that the policy would



apply *throughout Port Stephens and to all development standards* – not just height and floor space ratios, but also to a wide range of other LEP principal standards such as minimum subdivision and lot sizes, restrictions on dwelling houses in rural and environmental zones, and perhaps also to standards in Regulations such as building codes, and to detailed requirements in the Development Control Plan (DCP) including setback and overshadowing controls, limits on tree clearance and minimum parking provision.

The precise application of the policy to both LEP and non-LEP development standards needs to be clarified in the policy.

### **Failure to properly advertise the draft policy**

The draft policy was initially placed on public exhibition only as part of the review of the Nelson Bay Town and Foreshore Strategy, despite the fact that the policy will have broad application across Port Stephens. It was not possible for interested parties to find the document independently of the Nelson Bay Strategy. When this was pointed out to Council, a separate link was put on the website under 'What's on exhibition' but there was no new public notice or advertised in the Examiner until the 29th March, only one week prior to submissions closing.

We submit that on procedural grounds alone the policy must be properly re-advertised.

### ***Legal context***

In the NSW planning system, Council Local Environmental Plans (LEPs) are required to include a standard clause 'Exceptions to development standards (clause 4.6<sup>1</sup>). It is open to Councils to add additional sub-clauses elaborating on their approach to 'Exceptions'<sup>2</sup>. Port Stephens Council chose to include only the minimum 8 standard sub-clauses in its LEP 2013<sup>3</sup>, and until now has had no formal written policy on the application of the clause.

The then NSW Department of Planning & Infrastructure issued guidance on the use of Clause 4.6 in 2011: ***Varying development standards: A Guide, August 2011. (The Guide)***. Point 3 in the draft Policy Statement refers to this *Guide* as the basis for assessment of variation applications.

<sup>1</sup> We are aware that the Environmental Planning and Assessment Act (EPA Act) has recently been amended and has been re-numbered. We have not been able to ascertain if the re-numbering carries over to the standard LEP clauses. In this Objection we have therefore used the terminology and numbering in place until recently, and rely on Council to interpret the application of our submissions to any new terminology or references.

<sup>2</sup> 'Direction: Additional exclusions may be added' – Standard Instrument Clause 4.6 at Appendix 1 of the *Guide*

<sup>3</sup> with only one small addition to sub-clause 8

The *Guide* clearly states :

‘The planning system provides flexibility to allow these objectives to still be met by varying development standards ***in exceptional cases*** ‘ (***our emphasis***). (p2)

The Guide also makes the point that Councils are:

‘required to take into consideration ... the public benefit of maintaining the planning controls adopted by the environmental planning instrument’ (p2)

It is clear that the State Government intends that clause 4.6 should be used judiciously and that there should be a clear presumption in favour of maintaining development standards.

The Guide makes reference to the ‘five part test’ established by the NSW Land and Environment Courts in relation to the use of Clause 4.6 (*Guide*, p6). Four of the five ‘tests’ generally support a narrow use of the Clause. The other test (part 4) allows applicants to argue that:

‘the development standard has been virtually abandoned or destroyed by the council’s own actions in granting consents departing from the standard’.

Unfortunately, recent consents by Port Stephens Council for major height variations in Nelson Bay could provide future applicants with a strong case, and several recent and pending DAs have made exactly that argument.

However, TRRA submits that it is not too late to repair this damage by adopting a much stricter policy for application of Clause 4.6 in future. This would allow it to argue, in any appeal against refusal, that Council had, after and in response to community consultation, drawn a line under past decisions and now intends to more strictly enforce compliance with development standards. A stricter policy would provide Council with a defence against claims based on part 4 of the five-part test, as well as a sounder basis for refusing other significant variations which did not meet the other 4 tests (see below under the ‘Repeated variations...’ heading).

In November 2017, the Department of Planning and Environment published a *Report on the audit of council use of State Environmental Planning Policy No.1 – Development Standards and clause 4.6 of the Standard Instrument Local Environmental Plan*.

Twelve Councils across the state were audited, the results can be found at:  
<http://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning/~media/2A85D0336A99403A9F8E0B3B0A100251.ashx>

From the results it is clear that most Councils are only using Clause 4.6 for height and density variations of less than 10%, with a number of around 20 to 30%, the highest being 50%.

Clearly the approval by Port Stephens Council of DA 2016-631 (11-13 Church St, Nelson Bay) of an apartment building with a height variation of over 100% is totally out of kilter with the rest of the State. In contrast, the current DA 2018-147, ironically from the same developer, is a good example of an appropriate use of clause 4.6, where a persuasive case is made for a modest 9% height variation.

Following the audit the Department issued a Planning Circular PS 17-006, with a number of instructions. The draft Policy only references earlier Circulars which have been replaced by 17-006. We refer below to the instructions in this Circular, where applicable.

### **Other context – financial windfalls resulting from variation approvals**

This policy also needs to be seen in the context that approval of any variation from a development standard represents a free gift of monetary value to landowners and/or developers. In the market for land and property, prices adjust to reflect the constraints imposed by development standards embodied in Local Environmental Plans (LEPs), Development Control Plans (DCPs) and other rules such as building standards.

To the extent that local Councils, as consent authorities, approve variations to those development standards in their LEPs and DCPs, this gives the applicant a 'windfall' gain (applications for tougher standards leading to a loss of value are unlikely!). We draw attention to a 2017 Sydney Morning Herald report on exactly this issue in the Canterbury area of Sydney.<sup>4</sup>

Given this context, it is reasonable for ratepayers to expect that their local Council should be very circumspect in approving variations, and in relation to significant variations, only doing so in *rare circumstances* where strong arguments can be made. Consistent with the State government guidance, such arguments may be based on 'impracticability'; on the need to 'trade off' competing objectives or on overall public interest. TRRA accepts that it will sometimes be appropriate to grant variation applications based on these criteria.

<sup>4</sup> See <https://www.smh.com.au/national/nsw/a-local-council-a-developer-and-an-empty-block-of-land-worth-50m-20170123-gtx2ji.html>

## ***Comment on text of the draft policy***

### **Objectives**

In 'context and background' Council has paraphrased the objective as:

'Clause 4.6 aims to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for and from development in [particular] circumstances.'

Leaving aside the spelling error, this appears to be a deliberate departure from the text of the State government Guide which refers to '**exceptional**' circumstances (*Guide*, page 1).

The Policy Statement appears to set only limited objectives:

'This policy aims to create opportunities for greater transparency and community participation when decisions are made to vary development standards and to achieve better decision making through robust assessments.'

While transparency and participation are commendable objectives, they are surely secondary to the main purpose of an Exceptions policy which should be to set out clearly Council's criteria for assessing applications for variations from development standards.

Those criteria should be designed to ensure that, in line with the law and State government policy, variations are only approved in exceptional circumstances, where:

'compliance with [that] development standard is unreasonable or unnecessary in the circumstances of the case' (*Guide*, page 2) or

'where 'strict compliance would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act'. (*Guide*, Appendix 2)

### **Selective content**

The Policy Statement largely just re-states elements of Clause 4.6, but selectively, in that it omits the various exclusions in sub-clauses (6) and (8). If the Policy is to re-state or summarise Clause 4.6 it should reflect all sub-clauses.

### **Notification and advertising of variation applications**

Point 2 in the Policy Statement states that:





‘Council will exhibit the Clause 4.6 Variation Form accompanying a Development Application when advertising or notifying an Application’.

However, the value of this provision will depend on its interaction with the provisions in the Port Stephens DCP that set out when DAs will be notified and/or advertised. (Part A12). Many DAs are not notified to neighbours and even fewer are publicly advertised.

While it may not be proportionate to require *all* DAs which include a Clause 4.6 variation application to be advertised, we submit that the policy should set some clear thresholds. Particularly in relation to applications for variations from building height or density standards, we submit that most such applications should trigger notification and advertising, even where that would not otherwise be required under Part A12 of the DCP.

### **Peer review and full Council consideration**

Following the Department of Planning audit in 2017, the Department issued a Planning Circular PS 17-006, which includes the following instruction:

‘Councils are notified that only a full council can assume the Secretary’s concurrence where the variation to a numerical standard is greater than 10%, or the variation is to a non-numerical standard. The determination of such applications cannot be made by individual council officers unless the Secretary has agreed to vary this requirement for a specific council. In all other circumstances, individual council officers may assume the Secretary’s concurrence.’

As it stands, Point 4 in the draft policy allows for a variation of 10% without any form of review even within the planning section – this would have the effect for example of a 10 storey height limit as proposed for Nelson Bay becoming in effect a 11 storey limit without even any peer review.

We submit that the policy should require that proposed approval of any Clause 4.6 variation should be peer reviewed. It should also set criteria for referral of significant variations, with all applications for greater than 10% variation of numerical standards (which should be rare) to be presented to full Council, in line with the guidance in Circular PS 17-006.

### **Repeated variation applications should trigger a review of the development standards**

The Guide states:

‘Councils should consider whether the cumulative effect of similar approvals will undermine the objective of the development standard or the planning objectives for the zone. If the council considers that the decision should be made not to approve others like it [missing text?].

‘If the development standard is clearly inappropriate in general terms, the council should review its planning controls by means of a local environmental plan. The new Standard Instrument LEPs which are being prepared by councils should include a review of any development standards that are the subject of frequent [variation] applications.’ (p9)

Point 6 in the draft policy goes some way towards this. However, we submit that rather than the permissive and even encouraging approach to variation applications taken in the draft policy, Council should adopt a strict policy that also advises applicants seeking major variations to submit planning proposals for changes to the relevant development standards, such as for re-zoning or changes to height limits. These proposals would then be subject to the Gateway process and involve a guaranteed high level of transparency and public consultation.

We draw Council’s attention to a 2016 Land and Environment Court judgement, as reported by the Sydney Morning Herald:

‘In December 2016, the NSW Land and Environment Court Judge Susan O'Neill delivered a stern verdict on the generous application of clause 4.6 to subvert height restrictions, throwing out a bid by Kolpos Pty Ltd to add an extra two floors to his two, six-storey apartment blocks between 418-426 Canterbury Road. "If it is council's intention to increase the height of buildings along the Canterbury Road corridor, then the proper mechanism for doing so is a planning proposal," Judge O'Neill said.”<sup>5</sup>

We note that this damning judgement related to an application for only a 30% height variation – Port Stephens Council has already approved height variations of more than 50% and in the recent case of the Ascent Apartments at 11-13 Church St, Nelson Bay, of more than 100%.

## Reporting

Point 5 in the draft policy loosely implements the advice in the Guide and instruction in Planning Circular 17-006 about reporting (p1), but should expressly commit to the online reporting and regular reporting to Council required by the

<sup>5</sup> SMH 2 February 2017 - <https://www.smh.com.au/national/nsw/a-local-council-a-developer-and-an-empty-block-of-land-worth-50m-20170123-gtx2ji.html>

Circular. We note that the Council's Register of Registers lists as available a register of approved variations to the public but we cannot find any online link.

### ***Conclusion***

On the multiple grounds set out above, the current draft policy is manifestly not 'fit for purpose' and must be withdrawn, revised and re-exhibited to reflect both the intent of the legislation and State government guidance, and the clear desire of the Port Stephens community to have Council strictly enforce development standards, with a very high bar for approval of significant variations.

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