Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768
t (02) 9986 2535 • f (02) 99863050 • www.bbfplanners.com.au
Boston Blyth Fleming
Town Planners

Development application DA2025/0143
Clause 4.6 variation request – Landscaped area
Demolition and construction of shop top housing
1749 & 1753 Pittwater Road, Mona Vale

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 State Environmental Planning Policy (Housing) 2021

2.1 Clauses 19(2)(b) – Landscaped area and 19(2)(c) – Deep soil zone

These clauses are contained within Chapter 2 – Affordable housing, Division 2 – Infill affordable housing of SEPP Housing and prescribe the following:

> *(2) The following are non-discretionary development standards in relation to the residential development to which this division applies—*
> *……..*
>
> *(b) a minimum landscaped area that is the lesser of—*
>
> *(i) 35m^2 per dwelling, or*
>
> *(ii) 30% of the site area,*
>
> *(c) a deep soil zone on at least 15% of the site area, where—*
>
> *(i) each deep soil zone has minimum dimensions of 3m, and*
>
> *(ii) if practicable, at least 65% of the deep soil zone is located at the rear of the site,*

I note that whilst these provisions apply to *residential development* that in this case the proposed residential development forms a component of shop top housing the definition of which requires the residential component to be wholly above ground floor commercial uses. That is, it is the commercial component of the development which establishes the building footprint including landscaped area and deep soil zones.

The relevant definitions are as follows:

> ***landscaped area*** *means the part of the site area not occupied by a building and includes a part used or intended to be used for a rainwater tank, swimming pool or open-air recreation facility, but does not include a part used or intended to be used for a driveway or parking area.*
>
> ***deep soil zone*** *means a landscaped area with no buildings or structures above or below the ground.*

As the basement extends boundary to boundary along its northern, southern and western edges with required access stairs, platform lift and on slab planter boxes occupying the area between the basement and Pittwater Road frontage. Accordingly, the proposal does not provide any landscaped area or deep soil zones as defined representing a 100% variation.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause.*
> *In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 19(2)(b) – Landscaped area and 19(2)(c) – Deep soil zone of SEPP (Housing) 2021 development standards.

Clause 4.6(3) of WLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development exceeds the building height standards at clauses 19(2)(b) and 19(2)(c) of SEPP (Housing) 2021 which specify landscaped and deep soil areas however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].

The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Are clauses 19(2)(b) and 19(2)(c) of SEPP (Housing) 2021 development standards?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

    (b) there are sufficient environmental planning grounds to justify contravening the development standard.

4.0 Request for variation

4.1 Are clauses 19(2)(b) and 19(2)(c) of SEPP (Housing) 2021 development standards?

The definition of "development standard" at clause 1.4 of the EP&A Act includes *provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

> *(b) the proportion or percentage of the area of a site which a building or work may occupy,*
> *……..*
>
> *(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*

Clauses 19(2)(b) and 19(2)(c) of SEPP (Housing) 2021 prescribe landscaped area and deep soil area requirements that seeks to control the percentage of the area of the site which a building can occupy and area available for landscaped space/ tree plantings. Accordingly, clause 19(2)(b) and 19(2)(c) of SEPP (Housing) 2021 are development standards.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

<u>Consistency with the implicit objective of the standards</u>

In my opinion the implicit objective of the standards is to control the percentage of the area of the site which a building can occupy to provide adequate area for landscaped space/ tree plantings.

Given the constrained nature of the site given its size, geometry and double street frontage the basement has been constructed boundary to boundary to facilitate basement carparking. The ability to achieve basement carparking maximises the area available at ground floor level for commercial floor space which given the employment zoning of the land is highly desirable.

That said, the proposal provides appropriately for landscaping adjacent to both street frontages with on slab plantings also proposed through the central courtyard and roof top communal open space areas and on the edges of upper-level balconies. Deep soil street tree plantings are also proposed adjacent to Pittwater Road.

The proposed landscape regime will ensure that the building will sit within a contextually appropriate landscape setting.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its landscaped setting offensive, jarring or unsympathetic in a streetscape context.

Having regard to the above, the development will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the landscaped area/ deep soil area standards as reasonably applied to a mixed-use development within an employment zone.

Given the developments consistency with the implicit objective of the standards strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

The non-compliant component of the development demonstrates consistency with the objective of the standards. Adopting the first option in *Wehbe* strict compliance with the landscaped area standard has been demonstrated to be is unreasonable and unnecessary.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard".

The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient Environmental Planning Grounds

Ground 1 – Size and geometry of the site and employment zoning of the land

Given the constrained nature of the site given its size, geometry and double street frontage the basement has been constructed boundary to boundary to facilitate basement carparking. The ability to achieve basement carparking maximises the area available at ground floor level for commercial floor space which given the employment zoning of the land is highly desirable.

That said, the proposal provides appropriately for landscaping adjacent to both street frontages with on slab plantings also proposed through the central courtyard and roof top communal open space areas and on the edges of upper-level balconies. Deep soil street tree plantings are also proposed adjacent to Pittwater Road. The proposed landscape regime will ensure that the building will sit within a contextually appropriate landscape setting.

Ground 2 - Achievement of objective of the Division

Approval of the variation will better achieve the objective of Chapter 2, Part 2, Division 1 of SEPP Housing being to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Ground 3 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

For the reasons outlined in this submission, approval of the variation will promote the orderly and economic use and development of the land and will increase the supply and diversity of residences that will meet the needs of more vulnerable members of the community, including very low to moderate income households.

Strict compliance would require the basement and above ground footprint to be significantly reduced to the extent that basement parking would no longer be viable. This would require carparking to be provided at-grade with a consequential loss of ground floor commercial floor space and associated street level activation. Such outcome would be neither economic nor orderly.

Approval of the height variation will achieve objective (c) of the Act.

Objective (g) to promote good design and amenity of the built environment

The building is of exceptional design quality with the variation facilitating basement carparking and the contextually appropriate distribution of floor space on the site, the delivery of affordable housing and the orderly and economic use and development of the land consistent with objective (g) of the Act.

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a building height variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

7.8.25