

20<sup>th</sup> July 2023

**Clause 4.6 variation request – Building Planes**  
**Demolition works and construction of seniors housing**  
**52 - 54 Brighton Street, Freshwater**

**Clause 4.6 variation request – Building Planes**

**1.1 Introduction**

This clause 4.6 variation request has been prepared having regard to the following plans prepared by Walsh Architects:

DA000	COVER PAGE	A
DA010	EXISTING SITE PLAN	A
DA020	SITE ANALYSIS	A
DA030	DEMOLITION PLAN	A
DA040	PROPOSED SITE PLAN	A
DA100	BASEMENT PLAN - PRE ADAPTED	A
DA101	BASEMENT PLAN - POST ADAPTED	A
DA102	GROUND FLOOR PLAN	A
DA103	LEVEL 1 PLAN	A
DA104	ROOF PLAN	A
DA200	LONG SECTIONS	A
DA201	CROSS SECTIONS	A
DA300	ELEVATIONS - SHEET 1	A
DA301	ELEVATIONS - SHEET 2	A
DA400	AREA CALCULATIONS	A
DA500	SHADOW DIAGRAMS - 9AM JUNE 21ST	A
DA502	SHADOW DIAGRAMS - 12PM JUNE 21ST	A
DA503	SHADOW DIAGRAMS - 3PM JUNE 21ST	A
DA800	9.5m HEIGHT LIMIT	A

This document has been prepared for abundant caution given the absence of case law as to whether clause 84(2) of State Environmental Planning Policy (Housing) 2021 (SEPP Housing) is a development standard to which clause 4.6 applies or whether compliance with the FSR provision simply prevents the consent authority from requiring more onerous standards.

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.

## 1.2 State Environmental Planning Policy (Housing) 2021

### 1.2.1 Clause 84 – Development Standards - General

Pursuant to clause 84(2) of SEPP Housing, development consent must not be granted for development proposed under Part 5 of SEPP Housing unless

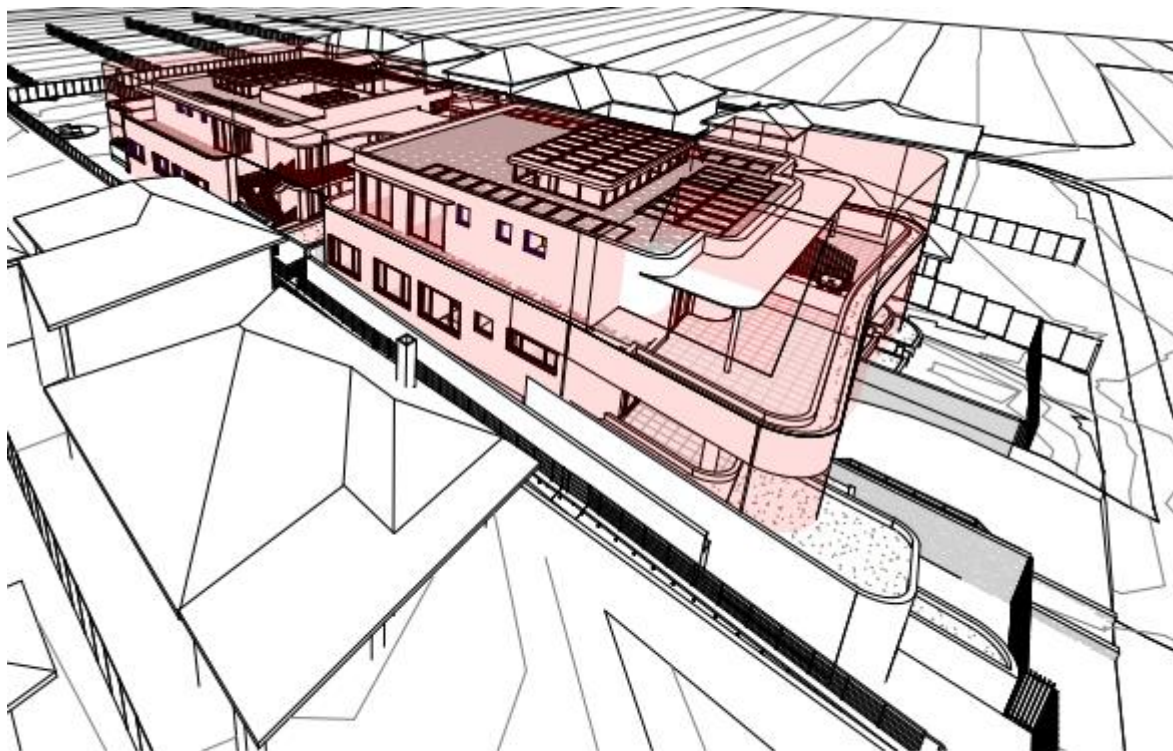
(c) for development on land in a residential zone where residential flat buildings are not permitted—

...

iii. if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.

Note: For ease of reference, the requirements of this clause will be referred to as the prescribed building planes.

The accompanying Overland Flow Study and Flood Impact Risk Assessment and Report prepared by RTS Civil Consulting Engineers recommends a minimum flood planning level of RL 12.9 to the ground floor level of the development. Given the topography of the site this has resulted in the basement level of the development projecting more than 1.2 metres above ground level (existing) such as to be 3 storeys as defined in a number of locations. When the 3 storey 45° height blanket is applied to these areas of the development a number of breaches are evident as depicted in the building plane diagrams below and over page.



1 SIDE ENVELOPE 1  
4/22 @ A1



**Figure 1: Building Plane Blanket**  
**Source: Walsh CD Architects**

Were it not for the flooding affectation across the site the ground floor level would be lowered to ground level (existing), the proposal storeys as defined with this standard not applicable to the proposed development.

### 1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP 2011 provides:

*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 clause 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 2011 provides:

*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 building plane development standard in clause 80(2) of SEPP Housing.

Clause 4.6(3) of WLEP 2011 provides:

*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 does not comply with the building planes development standard at clause 80(2) of SEPP Housing which specifies that any 3 storey element of the a proposed development is to be sited within the prescribed building plane . 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.

Clause 4.6(4) of WLEP 2011 provides:

*Development consent must not be granted for development that contravenes a development standard unless:*



- (a) *the consent authority is satisfied that:*
- (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) *the concurrence of the Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 84(2) of SEPP Housing from the operation of clause 4.6.

### **1.3 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:

*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].*

*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].*

*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].*

*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].*

*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.*

*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. Is clause 84(2) of SEPP Housing a development standard?
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
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 84(2) of SEPP Housing and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 84(2) of SEPP Housing?

## 1.4 Request for variation

### 1.4.1 Is clause 84(2) of SEPP Housing a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision 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:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 84(2) prescribes provisions that seeks to control the height and siting of development in proximity to the boundaries. It is also noted that the clause falls under the heading ‘Development Standards – General’. Accordingly, clause 80(2) of SEPP Housing is a development standard.

### 1.4.2 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 approach is relevant in this instance, being 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.

#### **Consistency with objectives of the building planes development standard**

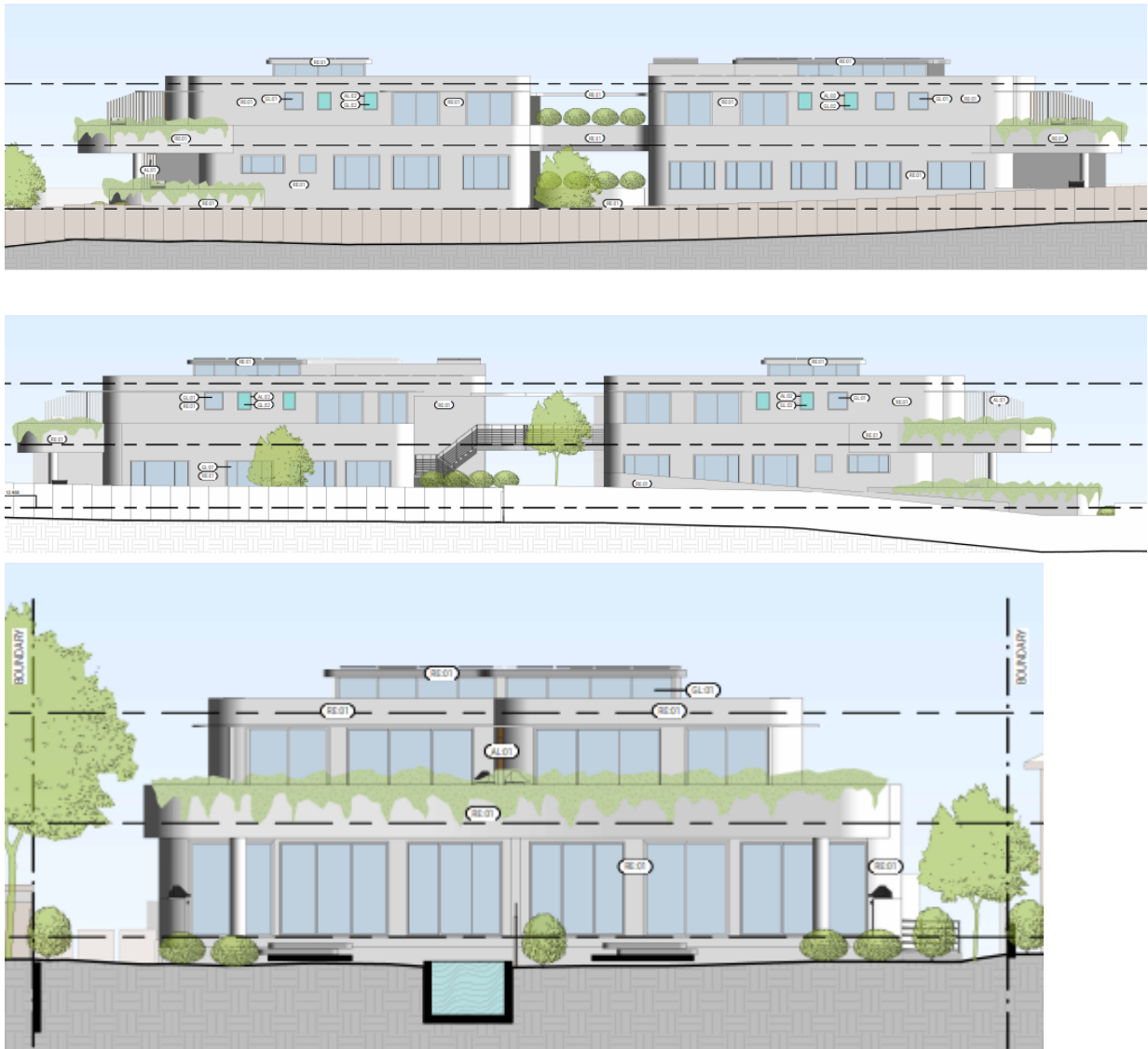
There are no stated objectives in relation to the building plane development standard prescribed by clause 84(2) of SEPP Housing.

The clause is limited to any portion of the building that is more than 2 storeys in height and prescribes that any 3 storey element of the proposal must be setback within a 45° plane projected from the side and rear boundaries of the site.

It is reasonably assumed that this standard seeks to minimise the visual impact of the portions of the development that exceed 2 storeys in height, to ensure compatibility with the scale of surrounding development and to minimise impacts upon the amenity of adjoining properties.

Visual impact & Compatibility

The proposed development has a two storey presentation to Brighton Street, with minor portions of the development reaching up to 3 storeys where the basement projects more than 1.2 m above ground level (existing). Although the basement is defined as a storey pursuant to the definition within SEPP 65 the development will read as a 2 storey building as viewed from the side and rear boundaries of the property as depicted in the images at Figure 2 below.



**Figure 2: Side and rear elevations**  
**Source: Walsh CD Architects**

The non-complying building elements are setback 4.932 metres from the western boundary and 6.050 metres from the eastern boundary of the property and a fully compliant with the applicable building envelope control prescribed by Warringah DCP.



Whilst inconsistent with the building plane prescribed, the portions of the development that protrude beyond the building planes are set further back from the level below, with no continual 3 storey element presenting to the street or adjoining properties. The side setbacks comprise deep soil landscaping to ensure that the development is screened and softened by landscaping.

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 height and scale of the development, notwithstanding the building plane breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably be concluded that, notwithstanding the building height plane breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

#### Amenity Impacts

Despite the partial non-compliance with the building envelope planes proposed, the development provides generous setbacks to the side and rear boundaries, consistent with or in excess of the minimum setbacks and building envelope provisions within WDCP 2011. The generous setbacks provide sufficient spatial separation between properties and enable the implementation of high-quality landscaping in both the deep soil areas around the perimeter of the building.

As evident within the solar analysis prepared by Walsh Architects, the proposed side boundary setbacks to the breaching elements between 4.932 and 6.050 metres ensure that sunlight is maintained to the primary areas of private open space of the adjoining dwellings. Council can be satisfied that the minor building plane non-compliances do not directly attribute to any unreasonable impacts upon solar access to the neighbouring dwellings.

The breaches to the building plane along the eastern and western side elevations do not attribute to any unreasonable impacts upon privacy afforded to the adjoining neighbouring dwellings. Upon an inspection of the site and a review of the proposed plans, the non-compliant elements will also not result in adverse impacts upon views, noting that no views corridors were identified over the subject site.

Overall, the portions of the development that protrude beyond the building planes do not attribute to any unreasonable impacts upon the amenity of adjoining properties.

As such, I have formed the considered opinion that the development is consistent with the assumed objectives of the building plane development standard notwithstanding the non-compliance proposed.

### **Consistency with zone objectives**

The subject property is zoned R2 Low Density Residential pursuant to WLEP 2011. The developments consistency with the stated objectives of the R2 zone is as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment: The proposal provides housing which will meet the needs of seniors within the community within a low density residential environment. I note that the North District Plan indicates that there will be a 47% increase in the number of people aged 65 years and older in the next 15 years. In this regard, the proposal will meet a clear and increasing demand for seniors housing on the Northern Beaches enabling existing residents to age in place. The proposal achieves this objective notwithstanding the building planes variation proposed.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment: Not applicable.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Comment: The proposal provides a compliant quantum of landscaped area, as defined, with the proposed landscaping achieving a setting that is in harmony with the natural environment of Warringah. The proposal achieves this objective notwithstanding the building planes variation proposed.

The non-compliant development, as it relates to building planes, demonstrates consistency with objectives of the zone and the assumed objectives of the standard. Adopting the first option in *Wehbe*, strict compliance with the building planes development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

#### **1.4.3 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]-[25] that:

*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.*

*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 – Flooding and topography**

The accompanying Overland Flow Study and Flood Impact Risk Assessment and Report prepared by RTS Civil Consulting Engineers recommends a minimum flood planning level of RL 12.9 to the ground floor level of the development. Given the topography of the site this has resulted in the basement level of the development projecting more than 1.2 metres above ground level (existing) such as to be 3 storeys as defined in a number of locations. Were it not for the flooding affectation on the site the basement would not project more than 1.2 m above ground level existing with the development to storeys as defined. Under such circumstances the 3 storey building plane standard would not apply. The irregular topography of the site also contributes to the extent of building height plane breach.

Allowing for the height plane breach in response to the flooding affectation and topographical characteristics of the site is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

### **Ground 2 – Appropriate distribution of massing**

Clause 84(2) of SEPP Housing prescribes that the any development above 2 stories in height is to be maintained within a building plane projected at 45 degrees from ground level at the side and rear boundaries. However, the building envelope control of WDCP 2011 provides that development must be maintained within an envelope projected at 45 degrees from a height of 5m above side boundaries.

Whilst the proposed development involves minor protrusions beyond the building plane prescribed by SEPP Housing, the proposed development is maintained well within the building envelope prescribed by WDCP 2011, with the proposed development providing far superior setbacks compared to what would be anticipated if the site was developed in accordance with WDCP 2011.

WDCP 2011 also prescribes a minimum setback of 900mm from side boundaries. The proposed development provides setbacks at its upper level of between 4.932 and 6.050 metres which are well in excess of the minimum side setbacks prescribed. These generous side setbacks accommodate deep soil planting zones along both side boundaries, with meaningful landscaping to screen and soften the visual impact of the proposed development.

The minor upper floor protrusions of the building plane are offset by the considerable spatial separation afforded at the lower levels, with the proposal presenting a distribution of floor space that is appropriate in the context of the subject site. The proposed development provides a superior outcome compared to a compliant scheme and promotes the orderly and economic development of the land and good design and amenity, consistent with Objectives 1.3(c) and (g) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

#### 1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 84(2) of SEPP Housing and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.*

*It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

#### 1.4.5 Secretary's concurrence

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.



## 1.5 Conclusion

Pursuant to clause 4.6(4)(a) of WLEP 2011, the consent authority can be satisfied that this 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 highly considered opinion that there is no statutory or environmental planning impediment to the granting of a variation to the building planes development standard in this instance.

**Boston Blyth Fleming Pty Limited**



**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**