

## **ANNEXURE 2**

Clause 4.6 variation request - Density controls for certain residential  
accommodation residential density

## **Clause 4.6 variation request – Density controls for certain residential accommodation**

This clause 4.6 variation request has been prepared in support of a variation to the residential density control applicable to the construction of a residential flat building within the R3 Medium Density Residential zone.

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, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

Pursuant to clause 4.5A(2) of PLEP 2014 for a residential flat building on land zoned R3 Medium Density Residential unless the development complies with a maximum dwelling density of 1 dwelling per 200m<sup>2</sup> of site area. The stated objectives of this control are as follows:

- (a) to achieve planned residential density in certain zones,*
- (b) to ensure building density is consistent with the desired character of the locality.*

The subject property has a site area of 2113.5m<sup>2</sup> and accordingly a maximum residential dwelling density of 10.56 dwellings, rounded up to 11 dwellings, is allowable for development on the land. The application proposes the construction of 13 dwellings which represents a dwelling density of 1 dwelling per 162.57m<sup>2</sup> of site area representing a variation to the dwelling density standard of 37.43m<sup>2</sup> per dwelling or 18.7%.

Clause 4.6 of PLEP 2014 provides a mechanism by which a development standard can be varied. 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.*

Pursuant to clause 4.6(2) 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 4.5A(2) residential density development standard.

Clause 4.6(3) states that 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.*

Clause 4.6(4) states that the consent authority must keep a record of its assessment carried out under clause (3).

#### **Clause 4.6 Claim for Variation**

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 and *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

#### **Consistency with objectives of the residential density standard**

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (a) *to achieve planned residential density in certain zones,*

Response: The subject property is zoned R3 Medium Density Residential pursuant PLEP 2014. Residential flat development is permissible with consent in the zone.

Whilst the notion of “planned residential density” could be simply tied to the 1 dwelling per 200m<sup>2</sup> of site area standard the density and yield assumptions used to determine the notional housing capacity contained within the Northern Beaches Local Housing Strategy 2021 (NBLHS), and upon which Council relies to satisfy its housing targets, are estimates which can only be indicative rather than absolute. This is confirmed on page 54 of the NBLHS where it states:

*Housing capacity estimates the quantum of housing that could be accommodated in an area, based on what would be allowed under existing planning controls and recent housing supply trends. Estimates can only be indicative rather than absolute.*

The variation to the numerical housing density standard needs to be considered in this context. That is, the variation to the density standard identified for development on the land to facilitate the provision of 2 additional apartments cannot be assumed to lead to an oversupply of housing within the R3 Medium Density Residential zone or not achieve the planned residential density for the R3 Medium Density Residential zone.

Further, in the context of increased immigration/ population and pressures on housing affordability and supply I consider the provision increased residential density on this R3 Medium Density Residential zoned allotment to be consistent with this objective particularly given its ability to be appropriately serviced, its proximity to a number of local centres and the availability of public transport.

This objective is achieved notwithstanding the minor residential density variation proposed.

*(b) to ensure building density is consistent with the desired character of the locality.*

The subject property is located within the Newport Locality. The Desired Future Character (DFC) statement at clause A4.3 of Pittwater 21 Development Control (P21DCP) plan is as follows:

*The Newport locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a natural landscaped setting, integrated with the landform and landscape. Secondary Dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations.*

*Any dual occupancy dwellings will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any multi unit housing will be located within and around commercial centres, public transport and community facilities. Retail, community and recreational facilities will serve the community.*

*Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.*

*Future development will maintain a height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.*

*A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.*

*Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.*

*Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities.*

*Newport's coastal setting is what contributes most to the distinctive character of the commercial centre. Responsive, energy efficient buildings will support and enhance this relaxed, beachfront character and its outdoor lifestyle, contributing to a unique sense of place.*

*Contemporary design solutions within the commercial centre will respond to Newport's climate and setting, including providing shade and shelter to streets and entries, generous private outdoor spaces, openings that capture ocean breezes, and shade elements.*

The only portion of the desired future character statement applicable to residential densities is where it states that *any multi unit housing will be located within and around commercial centres, public transport and community facilities*. Whilst the application does not propose multiunit housing it does proposed medium density housing within the R3 Medium Density Residential zone which is located within immediate proximity of the Kalinya Street local centre, public transport and community facilities.

To the extent that building density is tied to form and massing I note that the density standard of 1 dwelling per 200m<sup>2</sup> limits the number of dwellings able to be accommodated within an otherwise compliant building envelope. That is, it encourages the provision of oversized 3 or 4 bedroom apartments rather than facilitating the provision of a variety of apartments sizes within a compliant building envelope.

In this regard, the proposal provides for the provision of 13 x 3 bedroom apartments ranging in internal floor area of between 129m<sup>2</sup> and 160m<sup>2</sup> with a total internal area of 1870m<sup>2</sup> or an average of 143.8m<sup>2</sup>. We note that the minimum internal area for a three bedroom apartment with more than one bathroom as specified in the Apartment Design Guide (ADG) is 95m<sup>2</sup> with each of the proposed apartments already well in excess of this minimum requirement.

Given that the building envelope, with the exception of the lift overruns to the communal rooftop open space, is compliant with the applicable building envelope controls, strict compliance with the dwelling density standard (allowing for a rounding up to 11 dwellings) and noting an available internal floor area of 1870m<sup>2</sup>, would result in 11 dwellings having a floor area of 170m<sup>2</sup>. Apartments of this size would neither be affordable or economically viable to build and sell and to that extent would not provide for the orderly and economic use and development of the land.

Under such circumstances, a variation to the dwelling density standard will contribute to housing affordability and provide for the orderly and economic development of the land. The overall development displays design excellence with the building form and density reflecting that anticipated by the desired future character statement.

This objective is achieved notwithstanding the residential density variation proposed.

The non-compliant component of the development, as it relates to residential density, demonstrate consistency with objectives of the residential density standard objectives. Adopting the first option in *Wehbe* strict compliance with the building height standard has been demonstrated to be is unreasonable and unnecessary.

### Sufficient Environmental Planning Grounds

#### **Ground 1 - Objectives of the Act**

Objective (c) to promote the orderly and economic use and development of land and objective (g) to promote good design and amenity of the built environment.

As detailed within this variation request, approval of the dwelling density proposed will enable the compliant building envelope and associated floor space to be utilised for the provision of 13 apartments on a site identified as appropriate for medium density residential accommodation. The resultant dwellings are of a design and size which will reasonably cater for the floor space requirements/expectations of down sizers or young families looking for accommodation in the Newport area.

Strict compliance with the dwelling density standard (allowing for a rounding up to 11 dwellings) and noting an available internal floor area of 1870m<sup>2</sup>, would result in 11 dwellings having a floor area of 170m<sup>2</sup>. Apartments of this size would neither be affordable or economically viable to build and sell and to that extent would not provide for the orderly and economic use and development of the land.

The residential density variation provides for the orderly and economic use and development of the land consistent with planned residential density for of the zone with such outcome providing for the attainment of objectives 1.3(c) and (g) of the Act.

### **Conclusions**

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- a) that the site specific and contextually responsive development is consistent with the objectives of the residential density standard, and

- b) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- c) that having regard to (a) and (b) above that compliance with the residential density development standard is unreasonable or unnecessary in the circumstances of the case.

As such we have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a residential density variation in this instance.

Please not hesitate to contact me to discuss any aspect of this submission.

Yours sincerely

Boston Blyth Fleming

A handwritten signature in black ink, appearing to read 'Greg Boston', written over a horizontal line.

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