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Clause 4.6 variation request – Clause 41(1), Schedule 3, Clause 16(c) SEPP (Housing the Seniors or People with a Disability) 2004
Demolition works and construction of seniors housing
4 Alexander Street, Collaroy

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 for Seniors or People with a Disability) 2004 (SEPP HSPD)

2.1 Clause 41(1) Schedule 3, Clause 16(c) – Kitchen

The relevant provision as of the date of submission of the development application is as follows.

Pursuant to Clause 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP a kitchen in an independent living unit must have:

> *c) the following fittings in accordance with the relevant subclauses of clause 4.5 of AS 4299—*
> *(i) benches that include at least one work surface at least 800 millimetres in length that comply with clause 4.5.5 (a),*
> *(ii) a tap set (see clause 4.5.6),*
> *(iii) cooktops (see clause 4.5.7), except that an isolating switch must be included,*
> *(iv) an oven (see clause 4.5.8), and*

There are no stated objectives in relation to this standard. In my opinion the implicit purpose of this standard is to ensure that kitchens are capable of being used by seniors or people with disability

The accompanying access report, dated 6th June, prepared by Jensen Hughes contains the following commentary:

> *A variation is being requested with Council to allow for the fittings within the kitchen to be provided with an adaptable option for residence should they require full accessible compliance with this kitchen layout.*
>
> + *Within the design documentation, the cooktop is proposed to be located centrally (without 800mm wide work surface adjacent, 600mm provided). This location is based on practical use and design of the kitchen with bench space to both sides in lieu of only 800mm being provided to a single side.*
>
> + *Allowing for flexibility of the tap set being installed in the initial stage to not maintain the 300mm setback from the bench. Should the resident require the additional compliance it would be readily possible to replace the tap set with a compliant arrangement.*
>
> + *The main island bench will be proposed to be replaced during any adaptation of the kitchen to allow for the require work bench in accordance with Clause 4.5.5 (a) of AS4299. However, within this standard this is considered to be a replaceable item and something that may be provided at a later stage when required and therefore such adaptation would be acceptable.*
>
> *The adaptable nature of such kitchens would be in line with the requirements of AS4299-1995 for adaptable apartments with the ease of adaptation.*

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.

The application seeks a variation to the Clause 41(1) Schedule 3, Clause 16(c) – Kitchen SEPP standard.

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 kitchen will not comply with the standard 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. Is Clause 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP 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 implicit objective of Clause 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP and the objectives for development 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 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP.

4.0 Request for variation

4.1 Is Clause 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP?

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:*

****

I note that standards relating to the internal fit out of development are not specifically listed at clause 1.4 of the EP&A Act however the kitchen design requirement is a provision *by or under which requirements are specified or standards are fixed in respect of any aspect of that development.*

Under such circumstances, I am satisfied that the Clause 41(1) Schedule 3, Clause 16(c) – Kitchen of the SEPP is a development standard to which clause 4.6 WLEP 2011 applies.

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 objective of the kitchen design standard</u>

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

> *To ensure that kitchens are capable of being used by seniors or people with disability*

Response: The accompanying access report prepared by Jensen Hughes contains the following commentary:

> *A variation is being requested with Council to allow for the fittings within the kitchen to be provided with an adaptable option for residence should they require full accessible compliance with this kitchen layout.*
>
> + *Within the design documentation, the cooktop is proposed to be located centrally (without 800mm wide work surface adjacent, 600mm provided). This location is based on practical use and design of the kitchen with bench space to both sides in lieu of only 800mm being provided to a single side.*
>
> + *Allowing for flexibility of the tap set being installed in the initial stage to not maintain the 300mm setback from the bench. Should the resident require the additional compliance it would be readily possible to replace the tap set with a compliant arrangement.*
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> + *The main island bench will be proposed to be replaced during any adaptation of the kitchen to allow for the require work bench in accordance with Clause 4.5.5 (a) of AS4299. However, within this standard this is considered to be a replaceable item and something that may be provided at a later stage when required and therefore such adaptation would be acceptable.*
>
> *The adaptable nature of such kitchens would be in line with the requirements of AS4299-1995 for adaptable apartments with the ease of adaptation.*

Under such circumstances, I am satisfied that the implicit objective of the standard is able to be achieved notwithstanding the non-compliance with the standard.

Having regard to the above, the development will achieve the implicit objective of the standard to at least an equal degree as would be the case with a development that complied with the standard. Given the developments consistency with the implicit objective of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Finally, I am also satisfied that notwithstanding the non-compliance that the proposal satisfies the Aims at clause 2(1)(a), (b) and (c) of SEPP HSPD in that approval of the variation will encourage the development of housing that will meet the needs of seniors and people with a disability which provides residents with high levels of amenity and promotes the planning and delivery of housing in a location where it will make good use of existing infrastructure and services.

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

Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of WLEP. The stated objectives of the zone are as follows:

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

Response: Seniors housing is permissible pursuant to SEPP HSPD which effects a rezoning of the land and to that extent anticipates a medium density housing form and building typology in the zone.

Notwithstanding the non-compliance the proposed development will provide for the housing needs of the community within a low density residential environment consistent with the objective of the zone.

This objective is achieved notwithstanding non-compliance with the standard.

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

Response: N/A

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

Response: Non-compliance with the standard does not impact the development's ability to satisfy this objective.

The non-compliant development demonstrates consistency with the objectives of the R2 Low Density Residential zone and the implicit objective of the standard. Adopting the first option in *Wehbe* strict compliance with the access 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

Sufficient environmental planning grounds exist to justify the variation sought. In this regard, the accompanying access report prepared by Jensen Hughes contains the following commentary:

A variation is being requested with Council to allow for the fittings within the kitchen to be provided with an adaptable option for residence should they require full accessible compliance with this kitchen layout.

+ *Within the design documentation, the cooktop is proposed to be located centrally (without 800mm wide work surface adjacent, 600mm provided). This location is based on practical use and design of the kitchen with bench space to both sides in lieu of only 800mm being provided to a single side.*

+ *Allowing for flexibility of the tap set being installed in the initial stage to not maintain the 300mm setback from the bench. Should the resident require the additional compliance it would be readily possible to replace the tap set with a compliant arrangement.*

+ *The main island bench will be proposed to be replaced during any adaptation of the kitchen to allow for the require work bench in accordance with Clause 4.5.5 (a) of AS4299. However, within this standard this is considered to be a replaceable item and something that may be provided at a later stage when required and therefore such adaptation would be acceptable.*

The adaptable nature of such kitchens would be in line with the requirements of AS4299-1995 for adaptable apartments with the ease of adaptation.

That is, the variation sought provides for an outcome consistent with the implicit objective of the standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the implicit objectives of standard 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 if the standard is varied because it is consistent with the objectives of the standard 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 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary’s concurrence

By Planning Circular PS 20-002, dated 5th May 2022, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out over page:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Notwithstanding that the Court can stand in the shoes of the consent authority and assume the concurrence of the Secretary, the Court would be satisfied that the matters in clause 4.6(5) are addressed because the contravention does not raise any matter of significance for regional or state planning. Accordingly, there is no public benefit in maintaining the standard in the particular circumstances of this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is 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 variation in this instance.

Boston Blyth Fleming Pty Limited

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