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20th September 2021

Clause 4.6 variation request – Clause 40(4)(b) State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004
Proposed Seniors Housing
4 Alexander Street, Collaroy

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to an application proposes the demolition of the existing dwelling located on the subject allotment and the construction of a seniors housing development incorporating 5 x 3 bedroom in-fill self-care housing units and basement car parking for 9 vehicles pursuant to the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD). The proposed development is depicted on plans DA000 – DA003, DA100 – DA103, DA110 – DA114, DA200, DA201, DA300, DA400 – DA403, DA500, DA510, DA511, DA513, DA514, DA530, DA540 and DA600 prepared by PBD Architects.

The document has been prepared in support of a variation to the clause 40(4)(b) SEPP HSPD development standard relating to building height.

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 40(4)(b) SEPP HSPD

Pursuant to clause 40(4)(b) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height.

The note to this clause identifies the associated purpose of object namely:

> ***Note.*** *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

It has been determined that the portion of the development where the second storey floor plate overlaps the ground floor level floor plate results in a 3 storey building form, as defined. This breach occurs approximately 17 metres into the site as measured from the front boundary as depicted in Figures 1 and 2 below.

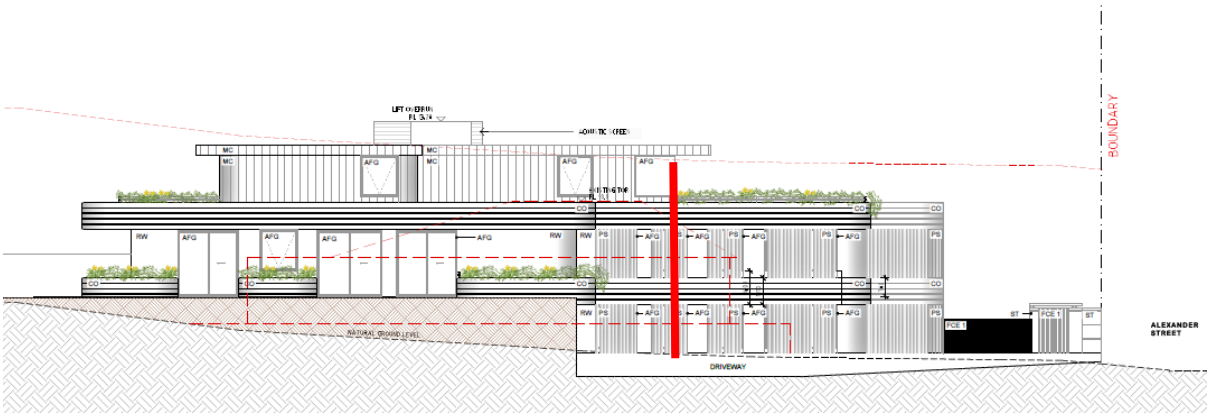

Figure 1 - Plan extract showing the 3 storey building height as viewed from the east

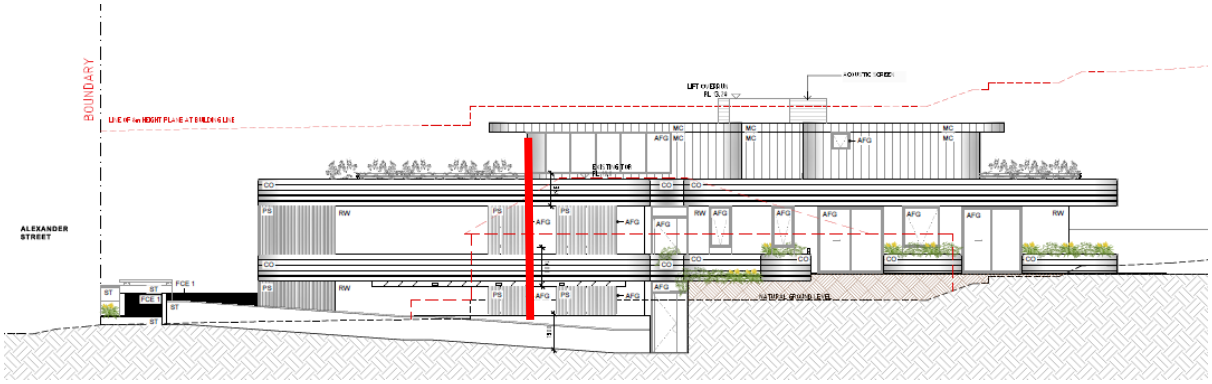

Figure 2 - Plan extract showing the 3 storey building height as viewed from the west

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 40(4)(b) height development standard contained within SEPP HSPD.

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 does not comply with the height of buildings standard at clause 40(4)(b) of SEPP HSPD which specifies a maximum building height 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 provides:

(4) 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 Director-General 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]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of WLEP provides:

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 40(4)(b) SEPP HSPD from the operation of clause 4.6.

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 40(4)(b) SEPP HSPD 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 40(4)(b) SEPP HSPD 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 40(4)(b) of SEPP HSPD?

4.0 Request for variation

4.1 Is clause 40(4)(b) of SEPP HSPD a development standard?

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

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

Clause 40(4)(b) of SEPP HSPD prescribes a height provision that relates to certain development. Accordingly, clause 40(4)(b) of SEPP HSPD is a development standard.

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.

Consistency with objectives of the height of buildings standard

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

> *The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.*

Response: Having regard to the stated objective of the clause 40(4)(b) SEPP HSPD standard we make the following observations:

- The topography of the land, which falls approximately 4 metres across its surface in a north easterly direction, facilitates a 2 storey stepped building form which, whilst overlapping into a 3 storey form as defined, complies with the 8 metre ceiling height standard. In this regard, the resultant building maintains an overall building height consistent with that anticipated through strict compliance with the overall building height provision of SEPP HSPD with the variation arising as a consequence of the irregular site topography.

- The development presents as a 2 storey compliant form as viewed from the rear of the property and from the properties western boundary where the 3rd storey component is located below the existing side boundary fence height. In this regard, the development presents as a 2 storey form as viewed from the immediately adjoining R2 Low Density Residential zoned land.

- The building will present as part 3 storeys as viewed from the eastern adjoining properties however these properties are located in the B2 Local Centre zone where an 11 metre/ 3 storey building height standard applies. Under such circumstances, a 3 storey form will not be perceived as inappropriate or jarring as viewed from these properties.

- In relation to the building's presentation in a streetscape context, I note that the 3 storey breach occurs approximately 17 metres into the site as measured from the front boundary with the development presenting as a 2 storey form which steps backup the site in response to topography consistent with the built form characteristics established by development located on both sides of Alexander Street within the sites visual catchment.

- 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 number of storeys, offensive, jarring or unsympathetic in a streetscape context nor when compared to the built form characteristics of development within the site's visual catchment as they present to the street. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings.

In this regard, I am satisfied that the height of the proposal does avoid an abrupt change in the scale of development in the streetscape and to that extent achieves the implicit objective notwithstanding the building height variation proposed.

Consistency with zone objectives

The subject property is zoned Residential R2 Low Density Residential pursuant to WLEP. An assessment as to the consistency of the development against the zone objectives as follows:

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

Response: The proposal provides housing which will meet the needs of seniors or people with a disability within the community within a low density residential environment. The proposal achieves this objective notwithstanding the minor variation to the 20 metre site frontage standard.

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

Response: Not applicable.

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

Response: 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 height variation proposed.

The non-compliant component of the development, as it relates to site frontage, demonstrates consistency with objectives of the R2 Low Density Residential zone and the implicit objective of the building height standard. Adopting the first option in *Wehbe* strict compliance with the height of buildings 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 exist to justify the variation to the height of buildings standard. Those grounds are as follows:

Ground 1

The topography of the land, which falls approximately 4 metres across its surface in a north easterly direction, facilitates a 2 storey stepped building form which, whilst overlapping into a 3 storey form as defined, complies with the 8 metre ceiling height standard.

The topography of the land makes strict compliance with the 2 storey height standard difficult to achieve whilst providing a contextually appropriate stepped building form on this particular site.

In this regard, the resultant building maintains an overall building height consistent with that anticipated through strict compliance with the overall building height provision of SEPP HSPD with the variation arising as a consequence of the irregular site topography.

Ground 2

Objective 1.3(c) of the Environmental Planning and Assessment Act 1979 is:

"to promote the orderly and economic use and development of land,"

Compliance with the height of buildings standard would necessitate a significant reduction in floor space in circumstances where the site is ideally suited to this form of development given its immediate proximity to the Collaroy Beach Local Centre and the B-Line bus service.

Under such circumstances strict compliance would not promote the orderly development of land.

Ground 3

Objective 1.3(g) of the EP&A Act is:

"to promote good design and amenity of the built environment,"

The non-compliant portion of the building is of good design as it maintains a 2 storey stepped building presentation to the street the adjoining R2 Low Density Residential zoned land.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 40(4)(b) SEPP HSPD building height development 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 is consistent with the objectives of the development standard and the objectives for development in 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 implicit objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 5th May 2020, 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 below:

- 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 determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in 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 highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of building variation in this instance.

Boston Blyth Fleming Pty Limited

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