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Attachment 3

Clause 4.6 variation request – Height
Forestville RSL club redevelopment including new Club building and seniors housing
22 Melwood Avenue, Forestville

1.0 Introduction

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

2.0 State Environmental Planning Policy (Housing) 2021

2.1 Clauses 84(2)(c)(i) and 108(2)(a) – Building Height

Pursuant to the se clauses no building shall have a height of more than 9.5 metres excluding servicing equipment on the roof. The specific wording of this clause ensures that it applies to the whole of the development.

There are no stated objectives in relation to this standard and accordingly the objectives of the height of buildings standard at clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) being the environment planning instrument applicable to development on the land, have been adopted as reflecting the objects or purpose of the building height standard as it applies to development within the Northern Beaches LGA.

The stated objectives of clause 4.3 WLEP are as follows:

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

It has been determined that the upper-level of the Club building has a maximum building height of 12.352 metres representing a maximum variation of 2.852 metre or 30%. The building height breaching elements are depicted in Figure 1. The balance of the development is compliant with the 9.5 metre building height standards.

Figure 1 - Plan extract showing 9.5 m building height breaching elements.

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 84(2)(c)(i) and 108(2)(a) SEPP (Housing) 2021 development standards.

Clause 4.6(3) of WLEP provides:

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

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

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

The proposed development exceeds the building height standards at clauses 84(2)(c)(i) and 108(2)(a) of SEPP (Housing) 2021 which specify a building height 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. Are clauses 84(2)(c)(i) and 108(2)(a) of SEPP (Housing) 2021 development standards?

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

    (a) compliance is unreasonable or unnecessary; and

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

4.0 Request for variation

4.1 Are clauses 84(2)(c)(i) and 108(2)(a) of SEPP (Housing) 2021 development standards?

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

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

Clauses 84(2)(c)(i) and 108(2)(a) of SEPP (Housing) 2021 prescribe a building height provision that seeks to control the height of certain development. Accordingly, clause 84(2)(c)(i) and 108(2)(a) of SEPP (Housing) 2021 are development standards.

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

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

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

<u>Consistency with objectives of the height of buildings standard</u>

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

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

Comment: The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

> 22 *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

I note that the non-compliant building elements are located at the southern end of the property adjacent to the public carpark and adjoining reserve. The building height breaching elements are not located immediately adjacent to any residential development with the northern end of the proposal fully compliant with the height standards.

Compatibility must also have regard to the long established and permissible RSL Club use on the site and the height reasonably anticipated for such land use given that form often follows function. The non-compliant building height element located above the Club building will not result in a building form that is inconsistent with that reasonably anticipated for an RSL Club building and to that extent will not be perceived as inappropriate or jarring have regard to the long-established and permissible RSL Club use on the land.

The extent of breach can be directly attributed to the floor to ceiling height requirements of a registered Club which are greater than those anticipated by the policy makers when developing the height standards the intention of which is to facilitate a three storey building form.

In this regard, I have formed the considered opinion that the non-compliant building height elements will not contribute to the height and scale of the development to the extent that the resultant building form will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and urban design context.

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 height 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 breaching elements, the development is capable of existing together in harmony with surrounding and nearby development.

In forming this opinion, I rely on the following images.

Figure 2 – Plan extract showing upper-level as viewed from the adjacent public carpark to the south

Figure 3 – Perspective image of the development as viewed from Melwood Avenue depicting the recessive upper level

Notwithstanding the building height breaching elements, the resultant development is compatible with the height and scale of surrounding and nearby development and accordingly the proposal achieves this objective.

> *(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

Comment: The height breaches occur at the upper-level of the Club building where the site adjoins the adjacent public carpark and reserve. The breaches are not located within immediate proximity of any residential properties or public areas used regularly for recreation. Whilst inconsistent with the prescribed height standards the portions of the development that protrude beyond the building height standard are inconsequential in terms of residential amenity impacts and recessive in relation to their proximity to allotment boundaries.

Being located immediately adjacent to the public carpark the building height breaching elements will not give rise to adverse impacts on the adjacent public domain in terms of overshadowing or unacceptable visual bulk. 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 height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

Having identified potential public and private view corridors across the site I have formed the considered opinion that the non-compliant building height elements will not give rise to any public or private view affectation given the location of the breaching elements and their juxtaposition with surrounding development.

In relation to privacy, I am also satisfied that the building height breaching elements will not themselves give rise to unacceptable privacy impacts given the juxtaposition of the breaching elements to surrounding residential properties. The shadow diagrams also demonstrate that the non-compliant building height elements will not result in non-compliant shadowing impacts to any adjoining residential property between 9am and 3pm on 21st June and will not result in unreasonable overshadowing to the public domain.

In this regard, I have formed the opinion that the design of the development has minimised visual impacts, disruption of views, loss of privacy and loss of solar access and accordingly this objective is achieved notwithstanding the building height breaching elements.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment: The non-compliant building height elements will not be discernible as viewed from any coastal or bushland environments.

In any event, notwithstanding the height building breaching elements, the height, bulk and scale of the building will not be perceived as inappropriate or jarring with the building height breaching elements not giving rise to adverse impact on the scenic quality of Warringah's coastal and bush environments. This objective is achieved notwithstanding the building height breaching elements proposed.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Comment: To the extent that the non-compliant building height elements are visible from public places, for the reasons previously outlined I am satisfied that the non-compliant building height element located above the Club building will not result in a building form that is inconsistent with that reasonably anticipated for an RSL Club building and to that extent will not be perceived as inappropriate or jarring have regard to the long-established and permissible RSL Club use on the land.

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, in particular the building height breaching elements of the building, offensive, jarring or unsympathetic in a streetscape context. The building height breaching elements will not give rise to unacceptable visual impacts when viewed from any public places.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

The non-compliant component of the development demonstrates consistency with the objectives 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

Ground 1 - Design and floor space distribution efficiencies achieved through allotment size and geometry

Sufficient environmental planning grounds exist to justify the variation including the design and floor space distribution efficiencies achieved through the size and geometry of the allotment which are significantly greater than the minimum site width and lot size standards prescribed by SEPP (Housing) 2021.

In this regard, the significant allotment size and geometry facilitates the provision of a building form which whilst exceeding the building height standard will not give rise to inappropriate or jarring streetscape or residential amenity consequences.

Ground 2 - Compatibility with the building height outcome reasonably anticipated given the long-established and permissible RSL Club use of the land.

The non-compliant building height element located above the Club building does not result in a building form that is inconsistent with that reasonably anticipated for an RSL Club building and to that extent will not be perceived as inappropriate or jarring have regard to the long-established and permissible RSL Club use on the land.

The extent of breach can be directly attributed to the floor to ceiling height requirements of a registered Club which are greater than those anticipated by the policy makers when developing the height standard and which anticipates a three storey building form.

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 visual bulk and scale, in particular the building height breaching elements, offensive, jarring or unsympathetic when viewed from the surrounding public spaces and in a streetscape context having regard to the built form characteristics reasonably anticipated for development on land currently occupied by an RSL Club. The development is compatible with surrounding development with the built form and landscape outcomes enabling development to co-exist in harmony.

Ground 3 – Achievement of aims of SEPP HSPD

Approval of the variation will better achieve the aims of SEPP (Housing) being to encourage the provision of housing that will:

(a) enable the development of diverse housing types, including seniors housing,
(b) encourage the development of housing that will meet the needs of more vulnerable members of the community including seniors and people with a disability,
(c) ensuring new housing development provides residents with a reasonable level of amenity, and
(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services.

Approval of the FSR exceedance will encourage the provision of housing that will increase the supply and diversity of residences that satisfy the development criteria, standards and design principles specified within SEPP HSPD and on a site that is well serviced by existing infrastructure and public transport services and suitable for this form of development.

Under such circumstances, approval of the FSR exceedance will better achieve the aims of SEPP HSPD as outlined.

Ground 4 - Objectives of the Act

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

For the reasons outlined in this submission, approval of the building height variation will promote the orderly and economic use and development of the land and will increase the supply and diversity of residences that meet the needs of seniors or people with a disability.

Strict compliance would require the deletion of upper level residential floor space in circumstances where the size and geometry of the allotment and long established and permissible RSL Club land-use facilitates the contextually appropriate distribution of the quantum of floor space proposed ensuring that the building, by virtue of its bulk and scale, is consistent with the desired character of the locality in terms of streetscape, building form, landscaping and residential amenity outcomes.

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

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

The building is of exceptional design quality with the variation facilitating a quantum of floor space that provides for contextual built form compatibility, the delivery of housing for seniors and people with a disability and the orderly and economic use and development of the land consistent with objective (g) of the Act.

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

5.0 Conclusion

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

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

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

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

Boston Blyth Fleming Pty Limited

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

24.9.24