

Annexure 1

Clause 4.6 variation request – Podium height

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1.1 Introduction

This clause 4.6 variation has been prepared with respect to a proposed shop top housing development at 35-43 Belgrave Street, Manly, having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

1.2 Warringah Local Environmental Plan 2011 (WLEP 2011)

1.2.1 Clause 7.6A – Podium heights

Pursuant to Clause 7.6A(2)(d) of WLEP 2011, a maximum podium height of 2 storeys applies to the land. Podium is not a defined term however it is taken to mean the portion of the development constructed to a nil front boundary setback. The stated objectives of this control are as follows:

- (a) *to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,*
- (b) *to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain.*

We confirm that the proposal has a 4 storey podium height to Oaks Avenue as depicted in the plan extract over page with the non-compliant podium height depicted in red.



Figure 1: Plan extract showing 4 storey podium height

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP 2011 provides:

The objectives of this clause are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP 2011 provides:

Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the podium height development standard in clause 7.6A(2)(d) of WLEP 2011.

Clause 4.6(3) of WLEP 2011 provides:

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

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

The proposed development does not comply with the podium height development standard at clause 7.6A(2)(d) of WLEP 2011 which specifies a maximum podium height of 2 storeys. 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.

1.3 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 7.6A(2)(d) of WLEP 2011 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

1.4 Request for variation

1.4.1 Is clause 7.6(2)(d) of WLEP 2011 a development standard?

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

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

Clause 7.6A(2)(d) of WLEP 2011 prescribes a podium height limit for development on the site. Accordingly, clause 7.6A(2)(d) of MLEP 2013 is a development standard.

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

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

The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the podium height development standard

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

- (a) *to achieve a consistent built form character that features podiums that define the street edge, and to ensure upper level setbacks reduce the visual prominence of building height,*

Response: The proposal seeks a variation to the 2 storey podium height standard to achieve a consistent 4 storey podium height built form character along both sides of Oaks Avenue noting that a 4 storey podium height applies to development located along the northern side of the street. I am of the considered opinion that a 4 storey podium height not only better achieves consistency of built form character but also better defines the street edge. Informing this opinion, I rely on the following images and associated commentary.



Figure 2: Plan extract showing proposed 4 storey podium height

I note that Figure 2 also demonstrates how a 2 storey podium height would appear noting the 2 storey façade height of the adjoining property to the east.



Figure 3: Meriton Lighthouse development located on the northern side of Oaks Avenue opposite the subject site with 4 storey podium

Given that development has already occurred on the northern side of Oaks Avenue with a parapet height of 4 storeys, it is my opinion that this objective can only be achieved where a consistent 4 storey podium height is also adopted for development on the southern side of Oaks Avenue. In accordance with the objective, such outcome would *achieve a consistent built form character that features podiums that define the street edge.*

I am also of the opinion that the significant width of Oaks Avenue ensures that the additional podium height will not create an unacceptable sense of enclosure. In the alternative, I am satisfied that the provision of a consistent 4 storey podium height will in fact contribute to/enhance the streetscape character of Oaks Avenue consistent with the outcome sought by the objective of the standard.

In relation to the second part of this objective, being to ensure upper level setbacks reduce the visual prominence of building height, I am of the considered opinion that a 4 storey podium better achieves this objective in that the podium provides a greater level of visual screening to the tower beyond than a 2 storey podium.

I am of the opinion that this objective is achieved notwithstanding the non-compliant podium height elements of the development.

(b) to maximise building separation for the purposes of visual appearance, privacy and maintaining solar access to adjoining properties and the public domain.

Response: I am satisfied that the non-compliant portion of the podium will not give rise to adverse privacy impacts and being located on the southern side of Oaks Avenue will not contribute to shadowing impacts on adjoining properties or the public domain. The significant width of Oaks Avenue will ensure that an appropriate building separation is maintained to development located on the northern side of Oaks Avenue with a 4 storey podium height providing for a consistent and cohesive podium/street edge streetscape outcome.

This objective is achieved notwithstanding the non-compliant podium height proposed.

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

Further, in adopting the third option in *Wehbe* it can be demonstrated that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

1.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

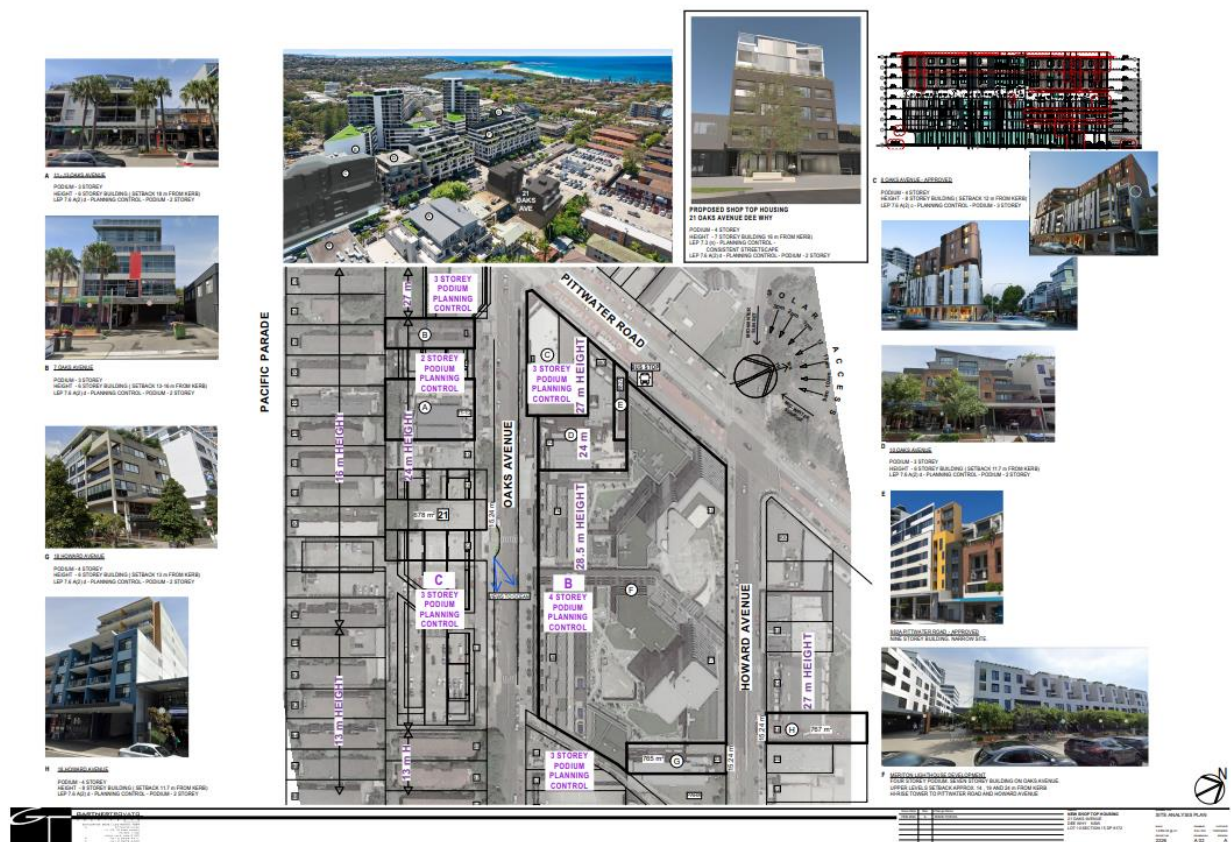
The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Ground 1 - Enhanced streetscape and urban design outcomes

I am of the considered opinion that approval of the 4 storey podium height better achieves the objective of the standard by providing a consistent and cohesive 4 storey podium/street edge to Oaks Avenue. I also note that Council has applied the podium standard with a degree of flexibility within the Dee Why Town Centre as depicted on the site analysis plan A02(A) prepared by Gartner Trovato Architects an extract of which is below. This includes 3 storey podium heights at No's 7 and 11-13 Oaks Avenue to the west of the subject site within the same street block.



A variation to the podium height standard will provide for enhanced streetscape and urban design outcomes and better achieve the objectives of the standard.

Ground 2 - Promotes the objectives of the EP&A Act

In circumstances where the objectives of the standard are better achieved through approval of the variation sought such outcome will promote the orderly development of the land. The building is of high design quality with the variation facilitating a podium height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Approval of the variation will also promote good design and amenity of the built environment consistent with objective 1.3(g) of the Act.

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of WLEP 2011, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

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

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