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Clause 4.6 variation request – Building Planes

1.1 Introduction

This clause 4.6 variation request has been prepared to accompany the lodgement of a development application proposing the demolition of the existing dwelling and the construction of a seniors housing development incorporating seven (7) in-fill self-care housing units and basement car parking for 13 vehicles pursuant to the provisions of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).

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.

1.2 State Environmental Planning Policy (Housing) 2021

1.2.1 Clause 84 – Development Standards - General

Pursuant to clause 84(2) of SEPP Housing, development consent must not be granted for development proposed under Part 5 of SEPP Housing unless

> *(c) for development on land in a residential zone where residential flat buildings are not permitted—*
>
> *…*
>
> *iii. if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.*

Note: For ease of reference, the requirements of this clause will be referred to as the prescribed building planes.

Minor portions of the proposed upper floor protrude beyond the prescribed building planes, as shown in the Building Planes Diagrams on the following page.

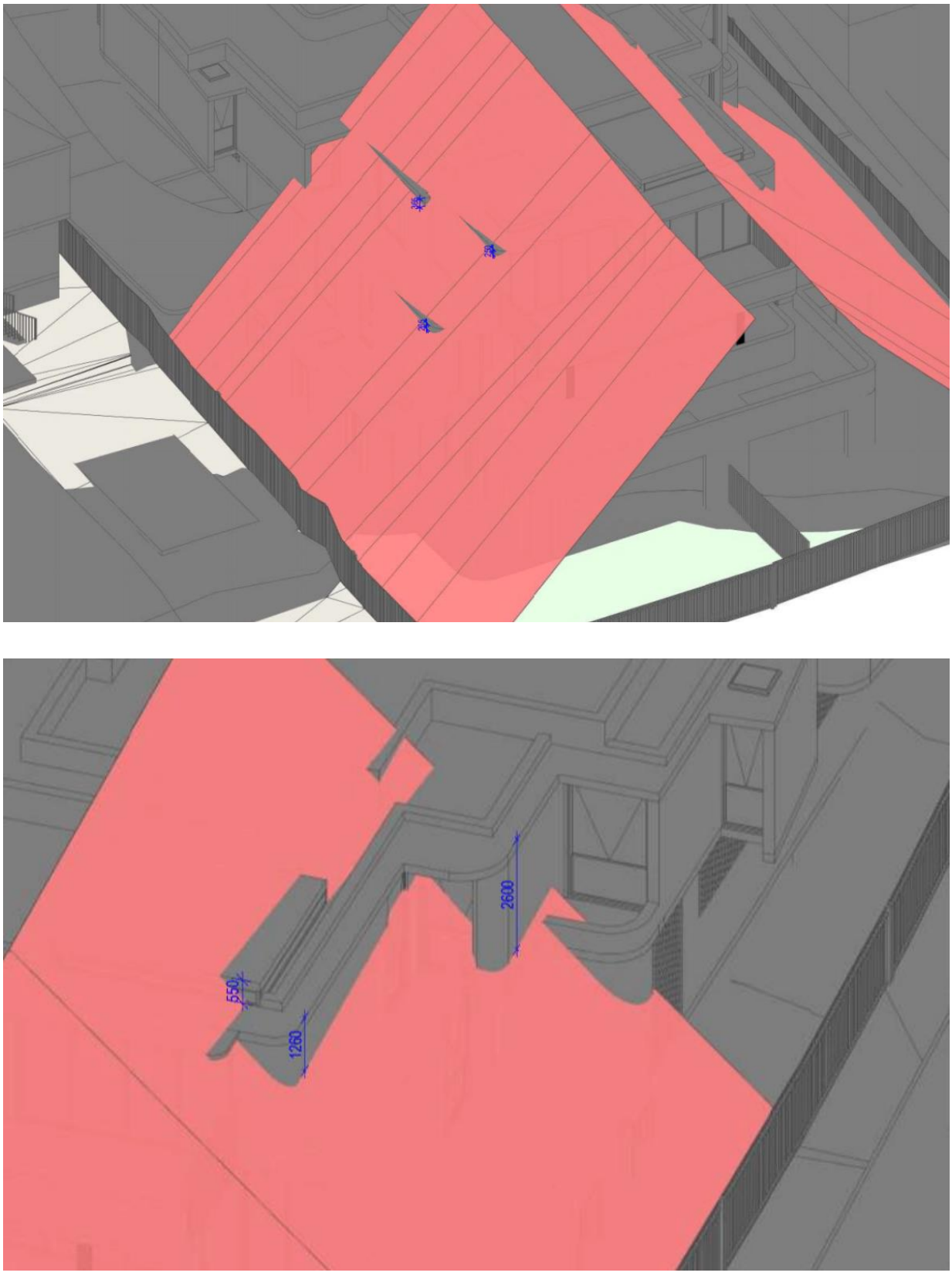

Figure 1: *Building Plane Blanket*
Source: *CD Architects*

The maximum breach occurs on the northern side of the Level 2 roof over Bedroom 3, where the roof extends approximately 2.6m above the building plane, representative of a 49% variation to the building plane at this point.

A second breach occurs on the northern side of the Level 2 roof over the living/dining room of Unit 202, where the roof extends approximately 1.260m above the building plane, representative of a 18% variation.

Minor breaches associated with the thickness of the roof slab are also present on the southern side of the Level 2 roof.

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 building plane development standard in clause 80(2) of SEPP Housing.

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 building planes development standard at clause 80(2) of SEPP Housing which specifies that the upper/third level of the development is to be maintained within the prescribed building plane . 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 2011 provides:

> *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 Planning Secretary 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]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. 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 84(2) of SEPP Housing from the operation of clause 4.6.

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 84(2) of SEPP Housing 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 84(2) of SEPP Housing 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 84(2) of SEPP Housing?

1.4 Request for variation

1.4.1 Is clause 84(2) of SEPP Housing 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 84(2) prescribes provisions that seeks to control the height and siting of development in proximity to the boundaries. It is also noted that the clause falls under the heading 'Development Standards – General'. Accordingly, clause 80(2) of SEPP Housing 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 building planes development standard

There are no stated objectives in relation to the building plane development standard prescribed by clause 84(2) of SEPP Housing.

The clause is limited to any portion of the building that is more than 2 storeys in height and prescribes that the additional storeys are to be set back inwards from all sides and boundaries of the site.

It is reasonably assumed that this standard seeks to minimise the visual impact of the portions of the development that exceed 2 storeys in height, to ensure compatibility with the scale of surrounding development and to minimise impacts upon the amenity of adjoining properties.

Visual impact & Compatibility

The proposed development has a two storey presentation to Melwood Avenue, with minor portions of the development reaching up to three storeys where the development steps down the slope of the site. The development is highly articulated and comprises varied setbacks, materiality and integrated landscaping to reduce the apparent size of the development and to break down the massing of the development as seen from Melwood Avenue and adjoining properties.

Whilst inconsistent with the building plane prescribed, the portions of the development that protrude beyond the building planes are set further back from the level below, with no continual three storey element presenting to the street or adjoining properties.

The side setbacks comprise deep soil landscaping and integrated landscaping at the upper levels to ensure that the development is screened and softened by landscaping. As evident on the elevations, differing materials are also proposed at different levels of the building to emphasise the horizontal form over the vertical.

The visual impact of the proposed development as seen from Melwood Avenue is demonstrated in the accompanying photomontage (Figure 2). 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 plane 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.

Figure 2 - Photomontage of development as viewed from Melwood Avenue

Amenity Impacts

Despite the non-compliance with the building envelope planes proposed, the development provides generous setbacks to the side and rear boundaries, consistent with or in excess of the minimum setbacks prescribed by WDCP 2011. The generous setbacks provide sufficient spatial separation between properties and enable the implementation of high-quality landscaping in both the deep soil areas around the perimeter of the building and upper-level integrated planters along the side elevations.

As evident on the Sun Angle View Diagrams by CD Architects, the proposed side boundary setbacks to the breaching elements of between 5.15 and 8.565 metres ensure that ample sunlight is maintained to the primary areas of private open space of the adjoining dwelling to the south at 71 Melwood Avenue, with direct sunlight maintained to the majority of the rear yard, the rear upper-level balcony and the lower deck during midwinter, with no impact to windows associated with the primary living area of the dwelling. Council can be satisfied that the minor building plane non-compliances along the southern elevation do not directly attribute to any unreasonable impacts upon solar access to the neighbouring dwelling at 71 Melwood Avenue.

The development has also been designed to minimise visual privacy impacts upon adjoining dwellings, with minimal openings along the side elevations and the incorporation of privacy screens and integrated landscaping, where required. The breaches to the building plane along the northern and southern side elevations do not attribute to any unreasonable impacts upon privacy afforded to the adjoining neighbouring dwellings at 67 or 71 Melwood Avenue.

Upon an inspection of the site and a review of the proposed plans, the non-compliant elements are also unlikely to result in any adverse impacts upon views, noting that no views corridors were identified over the subject site.

Overall, the portions of the development that protrude beyond the building planes do not attribute to any unreasonable impacts upon the amenity of adjoining properties.

As such, I have formed the considered opinion that the development is consistent with the assumed objectives of the building plane development standard.

Consistency with zone objectives

The subject property is zoned R2 Low Density Residential pursuant to WLEP 2011. The developments consistency with the stated objectives of the R2 zone is as follows:

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

  Comment: The proposal provides housing which will meet the needs of seniors within the community within a low density residential environment. I note that the North District Plan indicates that there will be a 47% increase in the number of people aged 65 years and older in the next 15 years. In this regard, the proposal will meet a clear and increasing demand for seniors housing on the Northern Beaches enabling existing residents to age in place. The proposal achieves this objective notwithstanding the building planes variation proposed.

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

  Comment: Not applicable.

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

  Comment: 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 planes variation proposed.

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

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 – Topography

The site experiences a fall of approximately 7.8m from the upper front boundary down towards the rear. Whilst the proposed development has been designed to step in response to the fall of the land, with greater side setbacks also employed as the height of the development increases, minor non-compliance with the building plane arises at the extremities of the upper floor.

Allowing for the height breach in response to the topography of the site is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

Ground 2 – Appropriate distribution of massing

Clause 84(2) of SEPP Housing prescribes that the any development above two stories in height is to be maintained within a building plane projected at 45 degrees from ground level at the side and rear boundaries. However, the building envelope control of WDCP 2011 provides that development must be maintained within an envelope projected at 45 degrees from a height of 4m above side boundaries.

Whilst the proposed development involves minor protrusions beyond the building plane prescribed by SEPP Housing, the proposed development is maintained well below the building envelope prescribed by WDCP 2011, with the proposed development providing far superior setbacks compared to what would be anticipated if the site was developed in accordance with WDCP 2011.

WDCP 2011 also prescribes a minimum setback of 900mm from side boundaries. The proposed development provides setbacks ranging from 1.67m – 8.1m along the northern side boundary and 4.4m – 8.5m along the southern side boundary, well in excess of the minimum side setbacks prescribed. These generous side setbacks accommodate deep soil planting zones along both side boundaries, with meaningful landscaping to screen and soften the visual impact of the proposed development.

The minor upper floor protrusions of the building plane are offset by the considerable spatial separation afforded at the lower levels, with the proposal presenting a distribution of floor space that is appropriate in the context of the subject site. The proposed development provides a superior outcome compared to a compliant scheme and promotes the orderly and economic development of the land and good design and amenity, consistent with Objectives 1.3(c) and (g) of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 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. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied 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 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.

1.4.5 Secretary's concurrence

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.

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 variation to the building planes development standard in this instance.

Boston Blyth Fleming Pty Limited

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