BBF TOWN PLANNERS

Suite 1, 9 Narabang Way Belrose NSW 2085 | Phone: (02) 9986 2535 | Fax: (02) 9986 3050 | www.bbfplanners.com.au

Attachment 1

Clause 4.6 variation request – Height of buildings

Clause 4.6 variation request - Height of buildings
Alterations and additions to a shop top housing development
638 Pittwater Road, Brookvale

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 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control 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.*

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

We note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* where at paragraphs 73 and 74 O'Neill C found:

> *73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.*
>
> *74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.*

The proposed development results in a maximum roof parapet height to Pittwater Road of 14.43 metres representing a building height variation of 3.43 metres or 31.1% with the building height breach reducing at the eastern end of the property adjacent to Charlton Lane to a maximum of 14.26 metres a variation of 3.26 metres or 29.6%.

The lifts have a maximum height of approximately 15.33 metres representing a variation of 4.33 metres or 39.36%. The non-compliant building elements are depicted in the following images.

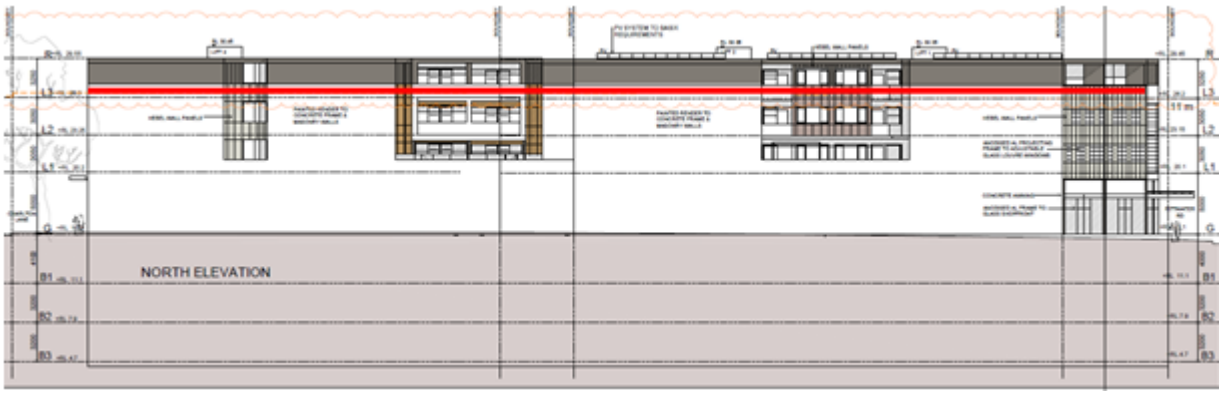

Figure 1 – Plan extract showing extent of 11 metre building height breach northern facade

Figure 2 – Plan extract showing extent of 11 metre building height breach southern façade

This application seeks to provide an additional 20 apartments through the construction of an additional storey residential accommodation noting that the shop top housing land use, height, form and residential density proposed are entirely consistent within anticipated for development on the land following the adoption of the Brookvale Structure Plan (BSP) by Northern Beaches Council at its meeting of 28 November 2023 which anticipates building heights of 30 metres or 8 storeys on the site.

The proposed works sit some 14.67 metres below the BSP anticipated building height of 30 metres.

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 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

> *(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
>
> *(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
>
> *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of WLEP 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.

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 4.3 of WLEP 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

4.0 Request for variation

4.1 Is clause 4.3 of WLEP 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 4.3 WLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 WLEP is a development standard.

4.2(a) 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 objectives of the standard is as follows:

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

Response: 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.

In relation to this section of Pittwater Road buildings do not exhibit consistency in terms of height, form or design with buildings ranging in height from 1 to 4 storeys. In this regard we note that the other 4 storey buildings are located at the northern gateway to this section of Pittwater Road at No's 517 and 694 Pittwater Road as depicted in the following images. To the extent that the proposal introduces a 4 storey form at the southern gateway to this section of Pittwater Road, and having regard to the 8 storey building height anticipated by the BSP, I have formed the considered opinion that the non-compliant building 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.

Figure 3 – Photograph of the 4 storey development at 517 Pittwater Road, Brookvale

Figure 4 – Photograph of the 4 storey development at 694 Pittwater Road, Brookvale

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 building height offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment. This objective is satisfied notwithstanding the building height non-compliance.

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

Response: Having inspected the site and its immediate surrounds I am satisfied that the non-compliant building height breaching elements will have no impacts on views, overshadowing or privacy.

This objective is satisfied notwithstanding the building height non-compliance.

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

Response: The site is not located in a coastal or bush environment.

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

Response: The resultant height is considered to be appropriate within the context of the zone and the height anticipate by the adopted BSP. The proposed development is a high-quality architectural response for the site, that will positively contribute to the streetscape and the wider Brookvale Locality as depicted in the following photomontage. The height non-compliance is associated with Level 4 of the proposed development, which is set back from the level below and is to be finished in darker materials to ensure that it is appropriately recessive in the streetscape context and not visually offensive as depicted in the photomontage over page.

This objective is satisfied notwithstanding the building height non-compliance.

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

Figure 5 – Photomontage of proposed development

This objective is satisfied notwithstanding the building height non-compliance.

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

4.2(b) 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.

25. *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 - Contextually responsive building design

Despite non-compliance with the 11m building height development standard, the proposed development is consistent and compatible with the height of contemporary development within the immediate context of the site, including development at No's 517 and 694 Pittwater Road at the northern gateway to this section of Pittwater Road.

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by other developments approved under the provisions of WLEP 2011 within the visual catchment of the site, consistent with Objective 1.3(c) of the EP&A Act. The proposed development has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of high design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Ground 2 – Brookvale Structure Plan

This application seeks to provide an additional 20 apartments through the construction of an additional storey residential accommodation noting that the shop top housing land use, height, form and residential density proposed are entirely consistent within anticipated for development on the land following the adoption of the Brookvale Structure Plan (BSP) by Northern Beaches Council at its meeting of 28 November 2023 which anticipates building heights of 30 metres or 8 storeys on the site.

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as reflects consistency with Council's own findings conveyed in the Brookvale Structure Plan, being that additional building height is appropriate along this section of Pittwater Road.

Overall, 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 is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

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

Yours Sincerely

Greg Boston
Boston Blyth Fleming Pty Ltd
Director