Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768
t (02) 9986 2535 • f (02) 99863050 • www.bbfplanners.com.au
Boston Blyth Fleming Town Planners

Clause 4.6 variation request – Distance to Transport Services
Proposed Seniors Housing
25 – 27 Kevin Avenue, Avalon Beach

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 Clause 93(3)(a) - Location and access to facilities and services - independent living units

Clause 93 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing) states:

> *93 Location and access to facilities and services—independent living units*
>
> *(1) Development consent must not be granted for development for the purposes of an independent living unit unless the consent authority has considered whether residents will have adequate access to facilities and services -*
>
> *(a) by a transport service that complies with subsection (2), or*
>
> *(b) on-site.*
>
> *(2) The transport service must—*
>
> *(a) take the residents to a place that has adequate access to facilities and services, and*
>
> *(b) for development on land in the Eastern Harbour City, Central River City, Western Parkland City or Central Coast City—*
>
> *(i) not be an on-demand booking service for the transport of passengers for a fare, and*
> *(ii) be available both to and from the site at least once between 8am and 12pm each day and at least once between 12pm and 6pm each day, and*

(c) for development on other land—be available both to and from the site during daylight hours at least once each weekday.

(3) For the purposes of subsections (1) and (2), access is adequate if -

(a) the facilities and services are, or the transport service is, located at a distance of not more than 400m from the site, and
(b) the distance is accessible by means of a suitable access pathway, and
(c) the gradient along the pathway complies with subsection (4)(c).

Clause 93(3)(a) of SEPP Housing requires the transport service to be *located at a distance of not more than 400m from the site.* Consistent with the findings of Brown C in *Fobitu Pty Limited v Marrickville Council [2012]* the measurement point of the site is appropriately taken to be the most eastern end of the Kevin Road frontage being the closest part of the site as measured from the bus stops.

Architectural plans A.18(C) and A.19(D) prepared by Gartner Trovato Architects and the access report, dated 20th June 2025, prepared by Accessibility Solutions (the access report) confirm that bus stops are located on Barrenjoey Road south of the Kevin Avenue intersection where the southbound departure bus stop is 420.273 metres from the site while the return trip bus stop is 386.25 metres from the site.

In this regard, the southbound departure bus stop exceeds the 400m distance requirement by 20.273 metres or 5%. I note that the access report supports the distance to bus stop variation.

The access report confirms that the bus stops and proposed pathway works satisfy the balance of the clause 93 access to facilities and services provisions and that compliant gradients will be achieved.

Although there is no stated objective associated with this standard I am of the opinion that the implicit objective is to ensure that sites that are developed for the purpose of housing seniors and people with a disability are in a location where residents will have reasonable access to shops, bank service providers, medical practitioners and other services that residents may require and where such facilities and services are not within 400 metres of the site that walking distances are minimised to respond to the anticipated mobility of occupants.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of Pittwater Local Environmental Plan (PLEP) 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 PLEP 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 93(3)(a) SEPP (Housing) 2021 development standard.

Clause 4.6(3) of PLEP 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 clause 93(3)(a) SEPP (Housing) 2021 development 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. Is clause 93(3)(a) SEPP (Housing) 2021 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 93(3)(a) SEPP (Housing) 2021 a development standard?

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:*

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

Clause 93(3)(a) SEPP (Housing) 2021 seeks to control *the distance of any land, building or work from any specified point*. Accordingly, clause 93(3)(a) of SEPP (Housing) 2021 is a development standard.

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

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

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

Consistency with the implicit objectives of the development standard

Although there is no stated objective associated with this standard I am of the opinion that the implicit objective is to ensure that sites that are developed for the purpose of housing seniors and people with a disability are in a location where residents will have reasonable access to shops, bank service providers, medical practitioners and other services that residents may require and where such facilities and services are not within 400 metres of the site that walking distances are reasonable and reflect the anticipated mobility of occupants.

The development site is not located within 400 metres of Avalon Town Centre and accordingly relies on residents utilising the transport services (bus stops) on Barrenjoey Road to access facilities and services in accordance with the clause 93(3)(a) SEPP (Housing) 2021 provision.

In note that the southbound departure bus stop exceeds the 400m distance requirement by 20 metres or 5%.

The access report confirms that the bus stops and proposed pathway works satisfy the balance of the clause 93 access to facilities and services provisions and that compliant gradients will be achieved. The access report also acknowledges that public seating is proposed adjacent to the intersection of Central Road and Barrenjoey Road to ensure that residents utilising the southbound bus stop do not have to walk more than 400 metres without the ability to stop and rest as necessary. This seating is depicted in the plan extract below.

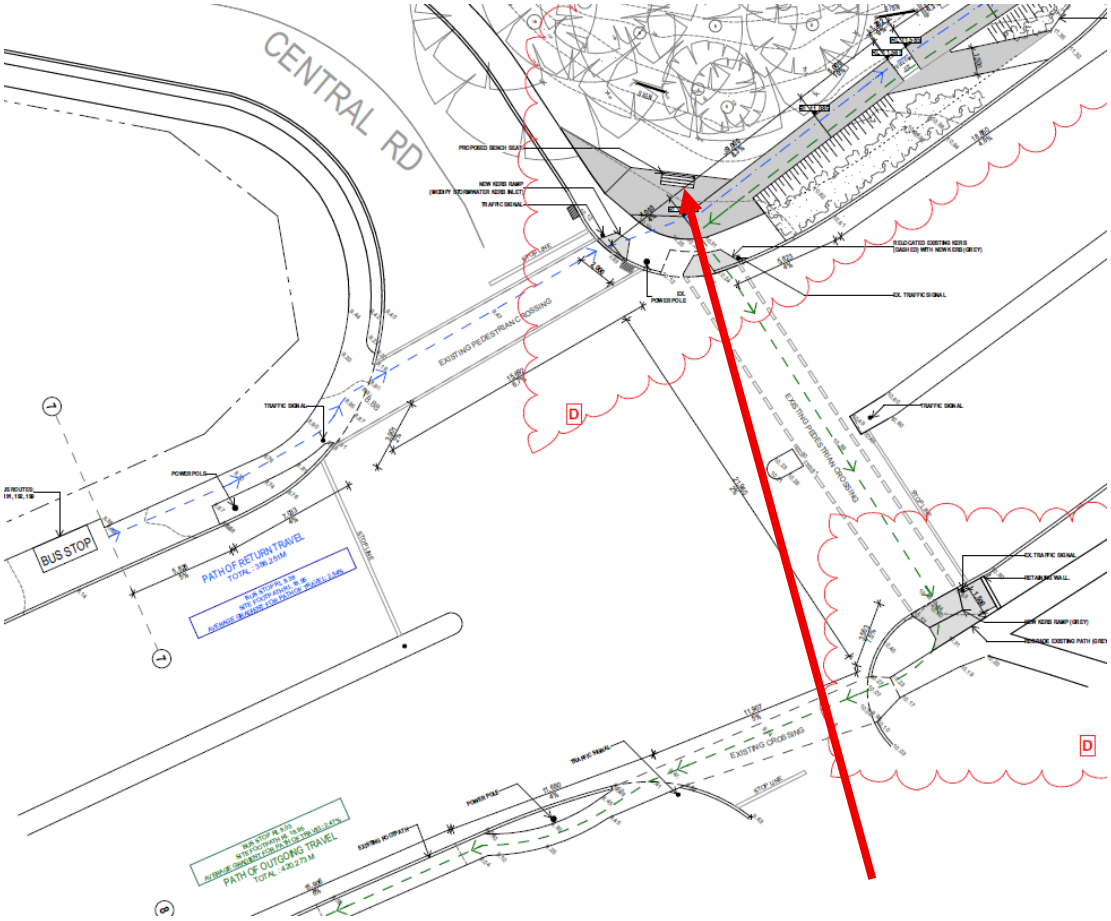

Figure 1 – Plan extract showing the location of the proposed public seating

As such, I have formed the opinion that the 5% variation to the southbound bus stop travel distance standard is acceptable given the minor nature of the variation and the introduction of public seating which will be available for use by occupants as necessary. That is, notwithstanding the variation proposed the southbound bus stop walking distance the implicit objective of the standard is achieved.

The same conclusion would be reached were the travel distances measured from the entrance gate of the development site to the south and northbound bus stops.

Having regard to the above, the proposed southbound bus stop travel distance will achieve the implicit objective of the standard to at least an equal degree as would be the case with a development that complied with the standard. Adopting the first option in *Wehbe* strict compliance with the 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 – Minor extent of breach and absence of unacceptable environmental impact

Consistent with the findings in *Eather v Randwick City Council [2021] NSWLEC 1075*, the contravention of the development standard is minor with the small departure from the standard and absence of unacceptable environmental impact as confirmed by the findings of the access report is a sufficient environmental planning ground.

Ground 2 - Public benefit

Approval of the travel distance variation will provide broad public benefit in that it will facilitate the construction of a compliant gradient footpath along Kevin Avenue to the north and south bound bus stops on Barrenjoey Road negating the need for pedestrians to cross the heavily cambered and sight line restricted Park Avenue intersection.

I also note that the existing footpath located on the northern side of Kevin Avenue adjacent to the Barrenjoey Road intersection was constructed to provide access to the north and south bound bus stops for the approved and constructed seniors housing development at 701 Barrenjoey Road, Avalon Beach. This footpath is extremely steep and non-compliant with the gradient requirements of SEPP Housing and accordingly the proposed footpath located on the southern side of Kevin Avenue will also provide compliant access to north and south bound bus stops on Barrenjoey Road for this existing seniors housing development. Such outcome is in the public interest.

Ground 3 - Objectives of the Act

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

Approval of the travel distance variation will facilitate the approval and construction of a seniors housing development of exceptional design quality which will achieve the clause 3(b) principle of SEPP Housing being to encourage the development of housing that will meet the needs of seniors and people with a disability.

Such outcome will promote the orderly and economic use and development of land.

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 variation in this instance.

Boston Blyth Fleming Pty Limited

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

26.6.25