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CLAUSE 4.6 REQUEST TO VARY THE HEIGHT DEVELOPMENT STANDARD

132a QUEENS PARADE EAST, NEWPORT

1. 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. Pittwater Local Environmental Plan 2014

2.1. Clause 4.3: Height of Buildings

Pursuant to Clause 4.3 of the LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
(c) to minimise any overshadowing of neighbouring properties,
(d) to allow for the reasonable sharing of views,
(e) to encourage buildings that are designed to respond sensitively to the natural topography,
(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

This request seeks a variation to the 8.5m height limit standard. The nature and extent of the variation is 300mm which equates to a max building height of 8.8m at its highest points. The breach associated with the roof to the master level extends to approximately 8.7m. The 300mm breach represents a 3.5% variation to the development standard.

2.2. Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. 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.

Pursuant to clause 4.6(2) 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) states that 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 LEP 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.

Clause 4.6(4) states 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 Director-General 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]).

Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.
Clause 4.6(5) states that in deciding whether to grant concurrence, the Director-General must consider:

> *(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
> *(b) the public benefit of maintaining the development standard, and*

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council (1999)* 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.3A of LEP from the operation of clause 4.6.

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:

> *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]. Australian Company Number 121 577 768 Alterations and Additions 10 Aiken Avenue, Queenscliff | Page 40*

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 4.3A 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
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 4.3 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 4.3A of the LEP?

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. 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.*

Pursuant to clause 4.6(2) 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.

4. Request for variation

4.1. 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.

Height of Buildings Standard and Objectives

Pursuant to Clause 4.3 LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

Comment: The works are entirely commensurate with the height and scale of surrounding development and development generally in the Newport Locality. The dwelling will present as 2 storeys to the street which is characteristic of residential development.

In this 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 am of the opinion that most observers would not find the height of the breaching elements offensive, jarring or unsympathetic in a streetscape context having regard to the built form characteristics of development within the sites visual catchment. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings.

The proposal is consistent with this objective

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

Comment: As mentioned, the height and scale of the dwelling is consistent with surrounding development and the 2 storey character of residential development. The dwelling will present as 2 storeys to the street with the topography of the site facilitating a lower level storage area. We note that in comparison the immediately adjoining development to the east the proposal height and scale of this dwelling is appropriate.

(c) to minimise any overshadowing of neighbouring properties,

Comment: The development does not result in any unreasonable overshadowing and is consistent with the solar access provisions within the Pittwater DCP. Shadow diagrams have been provided.

(d) to allow for the reasonable sharing of views,

Comment: There are no existing view corridors accessed from the adjoining property to the west nor do dwelling across the street access views over the site. In this regard, there are no unreasonable view sharing outcomes associated with the minor height breach. The proposal is consistent with the principles of view sharing as stipulated in *Tenacity vs Warringah Council* judgement.

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

Comment: The dwelling seeks to retain as much of the existing footings and foundations of the existing dwelling. The retention of the existing footings and foundations are contributing to minor breach associated with the balustrade and small corner of the dwelling at the upper level. The development has been sensitive to not disturb the natural topography as much as possible with the retention of the existing foundations.

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

Comment: The development will not result in any unreasonable visual impacts on the natural environment. The development utilises a range of materials and finishes to break up the facades and provide visual interest. The existing dwelling to the east will screen the proposed dwelling when viewed from the water.

The site is not a heritage item or within a heritage conservation area.

Zone and Zone Objectives

The site is zoned C4 Environmental Living pursuant to the provisions of the Pittwater LEP. The objectives of the clause are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Comment: The development will retain the existing foundations and footing to limit the impact on the local environment. The need for excavation has been minimised in that regard. The proposal is considered to be a sympathetic design the protects the environmental quality of the area.

- *To ensure that residential development does not have an adverse effect on those values.*

Comment: The environmental value has been protected through a sympathetic design that utilises the existing development on site as much as possible.

- *To provide for residential development of a low density and scale integrated with the landform and landscape.*

Comment: The development provides a predominately 2 storey dwelling that is sensitive to the existing topography and limits its impact by retaining as much of the existing foundations. The scale is consistent with surrounding development and would not be seen as jarring within its context in the landscape.

The proposed works are permissible and consistent with the stated objectives of the zone. The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the C4 Environmental Living zone and 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. 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 exist to justify the height of buildings variation namely the design constraints imposed due to the site's sloping topography and design challenging presented by retaining the existing dwelling. Specifically, the environmental planning grounds to warrant the variation are as follows:

- The sites topography makes strict compliance with the standard challenging in this instance coupled with an east west cross fall and the retention of the existing foundations. The breaches are considered minor and relate to small section of the master level roof, glass balustrade and a small corner edge of the dwelling. Section drawing below highlight the minor breaches

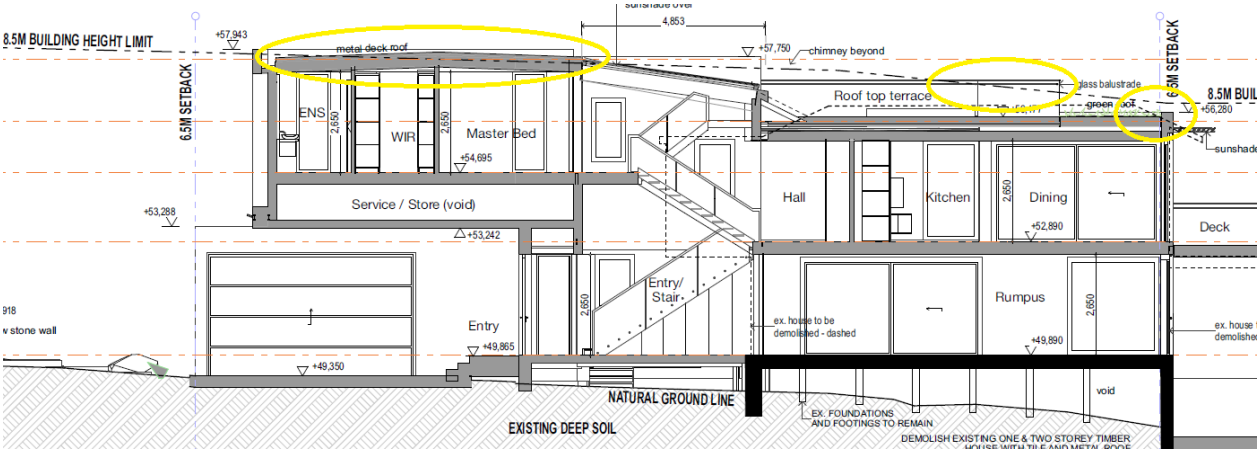

Image 1: Long section

- The areas highlighted above show that the level of breach is minor. The breach to the balustrade does not give rise to any adverse amenity impacts and will be made of glass to mitigate any visual impacts. The balustrade is centrally located in the dwelling and will not be readily seen by from the street or from the dwelling to the west. The roof gardens will provide additional screening also. The residual breaches relating to the roof and a small corner of the dwelling do not contribute to any

unreasonable bulk and scale, visual impacts or amenity impacts in relation to privacy, view loss or overshadowing.

- The retention of the existing foundations and footings which is raised above natural ground level does contribute to the minor height breach. Retention of the existing foundations is preferred to limit impacts to the natural environment and more sustainable building practice on a site that is zoned as a conservation area.

- The variation proposed is minor and within 10% of the control.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the topography with the minor breach to the roof at the rear of the site not resulting in any significant amenity impacts or unreasonable visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).

- Approval of the variation would promote good design and amenity of the built environment (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)). It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

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

4.3. 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 if the standard is varied because it is consistent with the objectives of the standard 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 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4. Secretary's concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings.
- Variations exceeding 10%; and
- Variations to non-numerical development standards. The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with

decisions made under delegation by Council staff. Concurrence of the Secretary can therefore be assumed in this case.

Concurrence of the Secretary can be assumed in this case.

5. Consclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

a) that the contextually responsive development is consistent with the zone objectives, and

b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and

c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and

e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and

f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

g) Concurrence of the Secretary can be assumed in this case.

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