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Attachment 1

Clause 4.6 variation request – Height of buildings
New dwelling house
2A Edgecliffe Esplanade, Seaforth

1.0 Introduction

This updated clause 4.6 variation request has been prepared having regard to the Revision C architectural plans prepared by Ursino Architects.

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 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control are as follows:

(a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

(b) *to control the bulk and scale of buildings,*

(c) *to minimise disruption to the following:*

(i) *views to nearby residential development from public spaces (including the harbour and foreshores),*

(ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*

(iii) *views between public spaces (including the harbour and foreshores),*

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

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.

It has been determined that southern and eastern portions of the upper level of the dwelling breaches the 8.5 metre height standard by 927mm (10.8%) in the south western corner of the upper level roof form, 3.481 metres (40.9%) at the south eastern corner of the upper level roof form reducing to a 637mm (7.4%) breach at the north-eastern corner of the upper level roof form as depicted in the height blanket diagram over page. The balance of the development sits comfortably below the prescribed height standard.

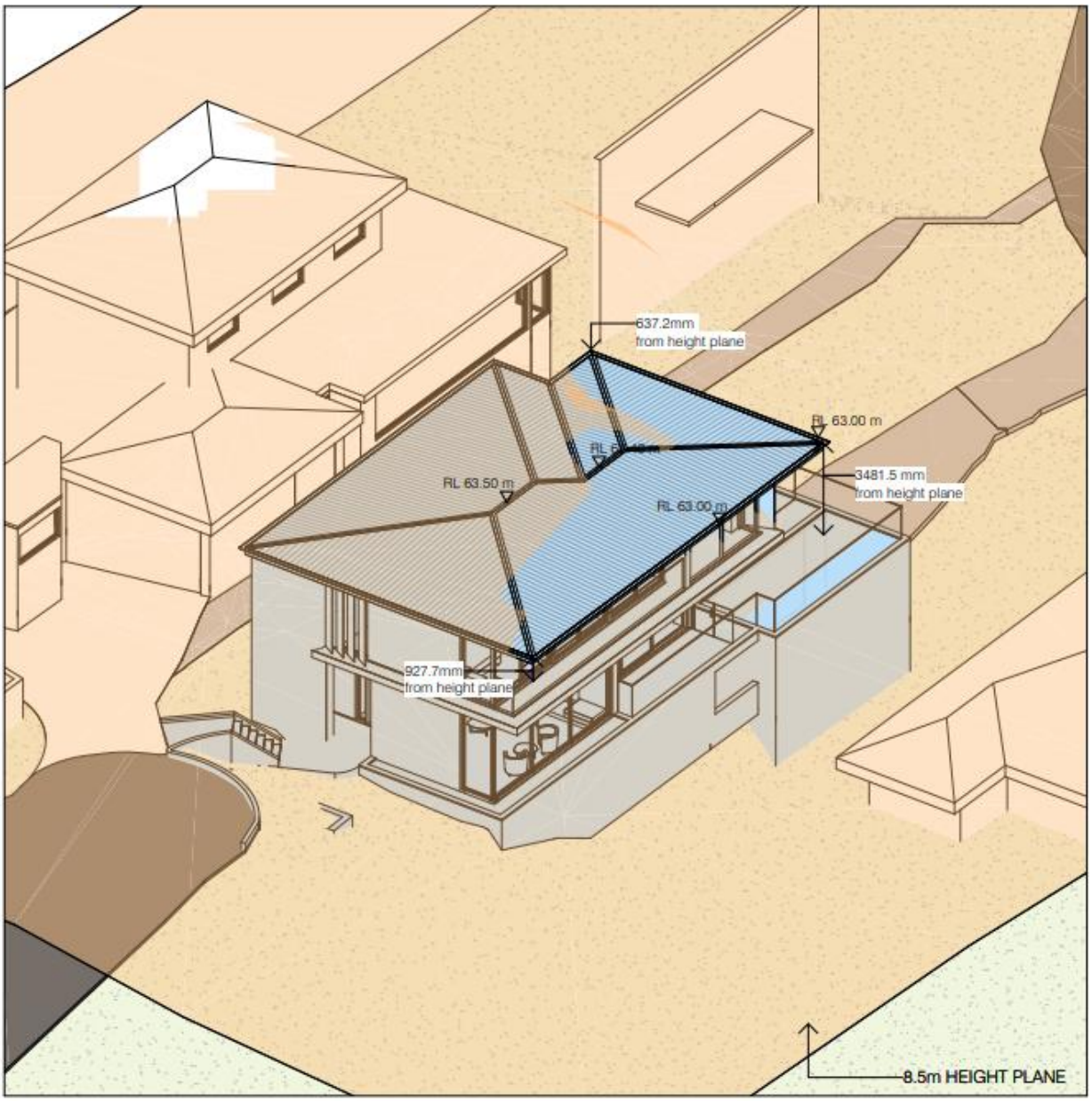

Figure 1 - Plan extract depicting the building height breaching portion of the development located above the 8.5 m height standard.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 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 MLEP 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 MLEP 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 MLEP 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 MLEP 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 MLEP 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 MLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 MLEP 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 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 provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

Response: The building height and shallow pitched roof from proposed are consistent with the built form characteristics established by surrounding development and development generally within the site's visual catchment.

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 roof form and 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. In forming this opinion, I note that a majority of the street facing façade is compliant with the 8.5 metre height standard with the non-compliance predominantly associated with the roof form.

The development achieves this objective as it displays a building height and roof form that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality. The proposal achieves this objective notwithstanding the building height breaching elements.

(b) to control the bulk and scale of buildings,

Response: This objective is explanatory of the purpose of the height of building standard. The objective is not an end in itself. The objective is explanatory of the central purpose of the standard. By fixing different upper limits for the height of buildings on land in different areas by means of the building height map the clause does seek to control bulk and scale of buildings.

The establishment of upper limit for height is not the end to be achieved by the clause rather it is a means to achieve the other objectives of the standard that are dealt with above and below (*Baron Corporation Pty Limited –v- the City of Sydney Council [2019]* NSWLEC 61 at [48]-[49]).

In any event, for the reasons outlined in relation to objective (a) above I have formed the considered opinion that the bulk and scale of the building, having regard to the elements of the building exceeding the 8.5 metre height standard, is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes.

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 non-compliant building height elements offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

The proposal achieves this objective notwithstanding the building height breaching elements.

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

Response: Having viewed the subject property from number of vantage points I am satisfied that the building height breaching elements will not disrupt views to nearby residential development from public spaces.

The proposal achieves this objective notwithstanding the building height breaching elements.

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

Response: The siting of the new dwelling is considered to be consistent with the principal of view sharing pursuant to the planning principal known as *Tenacity vs Warringah Council.* The dwelling at 2B Edgecliffe Esplanade currently obtains views across the eastern portion of the site with the proposal carefully designed to maintain this view corridor towards The Spit and Clontarf.

Having reviewed the detail of the proposal I have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the view sharing provisions at clause C1.3 PDCP and the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140.

Notwithstanding the building height breaching element non-compliant FSR, the proposal achieves the objective of minimising view impact as demonstrated by the view sharing outcome achieved.

(iii) views between public spaces (including the harbour and foreshores),

Response: The building form and height has been appropriately distributed across the site to minimise disruption of views between public spaces. The proposal achieves this objective notwithstanding the building height breaching elements.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

Response: The accompanying shadow diagrams demonstrate that the building, although non-compliant with the FSR standard, will not give rise to any unacceptable shadowing impact to the existing living room and open space areas of the adjoining residential properties with compliant levels of solar access maintained.

I am also of the opinion that the extent of overshadowing cast by the building height breaching element will not prevent the orderly and economic use and development of any adjacent and nearby properties with skilful design ensuring compliant levels of solar access are able to be achieved should any surrounding properties be redeveloped notwithstanding that the primary living and private open space areas are likely to be orientated to the south to take advantage of available views.

The proposal achieves this objective notwithstanding the building height breaching elements.

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

Response: This objective is not applicable.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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

Sufficient environmental planning grounds exist to justify the height of buildings variation including the design constraints imposed due to the sites undersized area, irregular geometry, irregular topography and double street frontage/ public pathway interface.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by appropriately distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario.

Such outcome is achieved whilst realising the reasonable development potential of the land.

Whilst strict compliance could be achieved by reducing ceiling heights and reducing building height, such outcome would not represent good design and would result in an inferior amenity outcome for occupants. Such outcome would thwart compliance with objective 1.3(g) of the Act. Such outcome would also not represent the orderly development of the land given the reduced design quality and amenity afforded should struct compliance be enforced and to that extent would also thwart compliance with objective 1.3(c) of the Act.

Such outcome would also not represent the orderly development of the land given the reduced design quality and amenity afforded should strict compliance be enforced and to that extent would also thwart compliance with objective 1.3(c) of the Act.

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.

Boston Blyth Fleming Pty Limited

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Director

18.12.24