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

11th December 2023

Updated clause 4.6 variation request – FSR
Demolition works and construction of seniors housing
52 – 54 Brighton Street, Freshwater

1.0 Introduction

This updated clause 4.6 variation request has been prepared having regard to the Revision B Architectural plans prepared by Walsh Architects.

This document has been prepared for abundant caution given the absence of case law as to whether clause 108(2)(c) of State Environmental Planning Policy (Housing) 2021 (SEPP Housing) is a development standard to which clause 4.6 applies or whether compliance with the FSR provision simply prevents the consent authority from requiring more onerous standards.

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 108(2)(c) – Density and scale (FSR)

Pursuant to clause 108(2)(c) of SEPP Housing the consent authority cannot require a more onerous standard in relation to FSR were the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less.

There are no stated objectives in relation to this standard and accordingly the objectives of the floor space ratio standard at clause 4.4 of Warringah Local Environmental Plan 2011 (WLEP), being the environment planning instrument applicable to development on the land, have been adopted as reflecting the objects or purpose of the FSR standard as it applies to development within the Northern Beaches LGA.

That said, there is no underlying FSR standard applicable to development on this particular site.

The stated objectives of clause 4.4 WLEP are as follows:

(a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,
(b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
(c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,
(d) to manage the visual impact of development when viewed from public spaces,
(e) to maximise solar access and amenity for public areas.

It has been determined that the proposal result in a total gross floor area, as defined, on the site of 1130m² representing an FSR of 0.55:1. This represents an exceedances of the FSR standard by 103.5m² or 10%.

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.

For the purpose of this variation request, and for abundant caution, it has been assumed that this clause applies to the clause 108(2)(c) SEPP (Housing) 2021 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 exceeds the floor space ratio provision at clause 108(2)(c) of SEPP (Housing) 2021 which specifies an FSR 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.

Clause 4.6(4) of WLEP provides:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the 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 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, 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) of WLEP provides:

(5) 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.

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 108(2)(c) of SEPP (Housing) 2021 from the operation of clause 4.6.

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 108(2)(c) of SEPP (Housing) 2021 a development standard?

2. Is the consent authority satisfied that this written request adequately addresses, and is the authority satisfied with, 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 implicit objectives of clause 108(2)(c) of SEPP (Housing) 2021 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 108(2)(c) of SEPP (Housing) 2021?

4.0 Request for variation

4.1 Is clause 108(2)(c) of 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:*

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Clause 108(2)(c) of SEPP (Housing) 2021 prescribes non-discretionary FSR provision that seeks to control the bulk, scale and density of certain development. Accordingly, clause 108(2)(c) 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 objectives of the floor space ratio standard

An assessment as to the consistency of the proposal when assessed against the objectives of the WLEP FSR standard is as follows:

> *(a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,*

Response: In relation to the intensity of development on land I note that the consolidated allotment is capable of being subdivided into 4 Lots each containing a large family home, as has occurred along this section of Brighton Street, with secondary dwellings also permissible on each of the allotments. Such outcome would result in an intensity of development across the subject allotments consistent with that currently proposed noting that the form of housing proposed is more likely to be occupied by couples rather than families.

In relation to traffic generation I note that the application provides a compliant quantum of car parking in accordance with the provisions at clause 108(2)(k) of SEPP (Housing) 2021. The accompanying Traffic Impact assessment prepared by prepared by Genesis Traffic concludes:

> *The proposed parking provision will comply with the SEPP 2021 criteria and will adequately serve the development.*

In relation to traffic generation and associated impacts the report contains the following commentary:

> *The traffic generation of the proposed development will not present any adverse traffic implications.*

I also note that the property is located within short accessible path of travel to a public bus services providing direct connection to Warringah Mall.

Under such circumstances, the consent authority can be satisfied that notwithstanding the FSR proposed the intensity of development and associated traffic generation will be commensurate with the capacity of existing and planned infrastructure, including transport infrastructure. This objective is achieved notwithstanding the exceedance of the FSR standard.

> *(b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*

Response: The amount of floor space proposed provides for ADG compliant apartments of exceptional design quality and amenity which will meet the anticipated floor space needs of the development for the foreseeable future. I note that the North District Plan indicates that there will be a 47% increase in the number of people aged 65 years and older in the next 15 years. In this regard, the proposal will meet a clear and increasing demand for larger 3 bedroom seniors housing apartments within the Northern Beaches LGA where seniors or people with a disability seek to downsize from larger freestanding dwelling houses to more compact forms of accommodation. This objective is achieved notwithstanding the exceedance of the FSR standard.

(c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,

Response: I confirm that Warringah DCP does not identify any desired future character for the Freshwater locality in relation to building bulk and scale. I also note that no FSR standard applies to development on this particular land and accordingly the desired future character in terms of bulk and scale is determined through compliance with the applicable building height, setbacks, building envelope and landscaped area controls.

In this regard, the proposed development is generally compliant with the height, setbacks, building envelope and landscaped area controls applicable to dwelling house development on the land noting that the senior's housing provisions contained within SEPP (Housing) 2021 anticipates residential infill development displaying a different building form to that of detached style housing. That said, the proposal is fully compliant with the building height, building setbacks and landscaped area standards contained within SEPP (Housing) 2021 and to that extent the bulk and scale of the proposal, established through compliance with the envelope controls, is consistent with that anticipated through strict compliance with the applicable standards.

The 27.43 metre frontage/ width and 2053m² site area of the allotment exceed the minimum 20 metre frontage and minimum 1000m² development standards within SEPP (Housing) 2021 with the size and geometry of the allotment facilitating the contextually appropriate distribution of the quantum of floor space proposed ensuring that the building, by virtue of its bulk and scale, is consistent with the desired character of the locality in terms of streetscape, building form, landscaping and residential amenity outcomes.

This objective is achieved notwithstanding the exceedance of the FSR standard.

(d) to manage the visual impact of development when viewed from public spaces,

Response: The building is compliant with the front setback and building height provisions as it presents to the street with the proposal designed to present as a complementary and compatible 2 storey element as viewed from the street. The street facing building façade has been highly articulated and modulated ensuring a contextually appropriate streetscape presentation. Landscaping has integrated into the front façade of the development to soften and screen the building as viewed from the street.

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 visual bulk and scale 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 development is compatible with surrounding development with the built form and landscape outcomes enabling development to co-exist in harmony as depicted in the streetscape perspective image below.

Figure 1: *Perspective streetscape image*
Source: *Walsh CD Architects*

This objective is achieved notwithstanding the exceedance of the FSR standard.

(e) to maximise solar access and amenity for public areas.

Response: The accompanying shadow analysis demonstrates that the proposal will not give rise to any shadowing impacts to the public domain. No public recreation areas are overshadowed by the proposed development and to that extent solar access and amenity for public areas has been maximised in the design of the development.

This objective is achieved notwithstanding the exceedance of the FSR standard.

Having regard to the above, the proposed building form which exceeds the FSR standard 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 FSR standard. Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Finally, I am also satisfied that notwithstanding the FSR non-compliance that the proposal satisfies the relevant principles at clause 3(b), (c), (d) and (f) of SEPP (Housing) 2021 in that approval of the variation will encourage the development of housing that will meet the needs of seniors and people with a disability which provides residents with high levels of amenity and promotes the planning and delivery of housing in a location where it will make good use of existing infrastructure and services. The proposal is of good architectural design which responds to/ reflects and enhances the built form and landscape quality of the locality in which the development is located.

Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of WLEP. The stated objectives of the zone are as follows:

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

Response: The proposal provides housing which will meet the needs of seniors within the community within a low density residential environment with the overall form of the development reflecting the scale and rhythm of development within this particular street block which includes battleaxe dwelling house arrangements. Seniors housing is permissible pursuant to SEPP (Housing) 2021 which effects a rezoning of the land and to that extent anticipates a medium density housing form and building typology in the zone. The proposed development will provide for the housing needs of the community within a low density residential environment consistent with the objective of the zone.

This objective is achieved notwithstanding the exceedance of the FSR standard.

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

Response: N/A

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

Response: The application proposes the implementation of an enhanced site landscape regime as depicted in the accompanying landscape plans.

The proposal incorporates deep soil landscaping including canopy trees together with on slab planting and green roof elements. The landscape regime proposed will ensure that the low density residential environment in which the development is located remains characterised by landscaped settings that are in harmony with the natural environment of Warringah.

I also note that the proposal provides in excess of the minimum landscaped area required pursuant to SEPP (Housing) 2021 and deep soil side boundary setbacks greater than those anticipated where the consolidated site subdivided and occupied by detached style dwellings located to within 900mm of side boundaries.

This objective is achieved notwithstanding the exceedance of the FSR standard.

The non-compliant development, as it relates to FSR, demonstrates consistency with objectives of the R2 Low Density Residential zone and the implicit FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR 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 - Design and floor space distribution efficiencies achieved through allotment size and geometry

Sufficient environmental planning grounds exist to justify the variation including the design and floor space distribution efficiencies achieved through the size and geometry of the allotment which are significantly greater than the minimum site width and lot size standards prescribed by SEPP (Housing) 2021. In this regard, greater side boundary setbacks than those required through strict compliance with the applicable side boundary setback controls have been provided and additional floor space able to be accommodated whereby it does not in any significant or unacceptable manner contribute to perceive building bulk and scale and where it will not give rise to unacceptable streetscape, residential amenity or environmental consequences.

Ground 2 – Achievement of aims of SEPP HSPD

Approval of the variation will better achieve the aims of SEPP (Housing) being to encourage the provision of housing that will:

(a) enable the development of diverse housing types, including seniors housing,
(b) encourage the development of housing that will meet the needs of more vulnerable members of the community including seniors and people with a disability,
(c) ensuring new housing development provides residents with a reasonable level of amenity, and
(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services.

I note that the North District Plan indicates that there will be a 47% increase in the number of people aged 65 years and older in the next 15 years. In this regard, the proposal, incorporating three bedroom apartments, will meet a clear and increasing demand for seniors housing on the Northern Beaches enabling existing residents to age in place. Approval of the FSR exceedance will encourage the provision of housing that will increase the supply and diversity of residences that satisfy the development criteria, standards and design principles specified within SEPP HSPD and on a site that is well serviced by existing infrastructure and public transport services and suitable for this form of development.

I note that Council has applied the FSR standard with a degree of flexibility as demonstrated by the recent approvals seniors housing development involving FSR exceedances as outlined below:

DA2020/1320 - 681 Warringah Road, Forestville: 0.59:1
DA2020/1172 - 54 Bardo Road, Newport: 0.569:1
DA2021/1901 - 21 Mona Street, Mona Vale: 0.56:1
DA2021/1841 - 7 Coronation Street, Mona Vale: 0.63:1
DA2021/1805 - 4 Alexander Street, Collaroy: 0.65:1
DA2022/1431 - 633-635 Warringah Road Forestville 0.54:1
Under such circumstances, approval of the FSR exceedance will better achieve the aims of SEPP HSPD as outlined.

Ground 3 - Objectives of the Act

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

For the reasons outlined in this submission, approval of the variation to the FSR standard will promote the orderly and economic use and development of the land and will increase the supply and diversity of residences that meet the needs of seniors or people with a disability.

Strict compliance would require the removal of 103.5m² of floor space from the development in circumstances where the size and geometry of the allotment facilitates the contextually appropriate distribution of the quantum of floor space proposed ensuring that the building, by virtue of its bulk and scale, is consistent with the desired character of the locality in terms of streetscape, building form, landscaping and residential amenity outcomes.

Approval of the FSR variation will achieve objective (c) of the Act.

Objective (g) to promote good design and amenity of the built environment

The building is of exceptional design quality with the variation facilitating a quantum of floor space that provides for contextual built form compatibility, the delivery of housing for seniors and people with a disability and the orderly and economic use and development of the land consistent with objective (g) of the Act.

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.

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone;* ***and***

- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.

That is, approval of the variation will increase the supply and diversity of residences of good design that meet the needs of seniors or people with a disability in circumstances where additional floor space is able to be distributed on this particular consolidated allotment in a manner where the bulk and scale of the development is consistent with both the existing and desired streetscape character with the form, massing, landscaping and streetscape presentation of the development to both street frontages reflecting the established subdivision pattern, built form and landscape rhythm in a streetscape context.

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 108(2)(c) SEPP Housing 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 PS 20-002, dated 5th May 2022, 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.

I confirm that the variation does not exceed 10% and accordingly concurrence can be assumed.

Notwithstanding that the Court can stand in the shoes of the consent authority and assume the concurrence of the Secretary, the Court would be satisfied that the matters in clause 4.6(5) are addressed because the contravention does not raise any matter of significance for regional or state planning given that the FSR non-compliance facilitates better environmental and public benefit outcomes with the result that there is no public benefit in maintaining the standard in the particular circumstances of this case.

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 highly considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

Boston Blyth Fleming Pty Limited

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