

4th July 2023

The CEO
Northern Beaches Council
PO Box 82
MANLY NSW 2095

Development Application DA2022/2181
**Clause 4.6 variation request – Access to kitchen, main
bedroom, bathroom and toilet**
Demolition works and construction of seniors housing
69 Melwood Avenue, Forestville

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to amended plans (Revision E) prepared by CDArchitects.

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 85(1) Schedule 4, Clause 17 - Access to kitchen, main bedroom, bathroom and toilet

Pursuant to Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021 development consent must not be granted for development for the purposes of an independent living unit unless the independent living unit complies with the relevant standards specified in Schedule 4 including Clause 17 which prescribes the following:

In a multi-storey independent living unit, the kitchen, main bedroom, bathroom and toilet must be located on the entry level.

There are no stated objectives in relation to this standard. In my opinion the implicit purpose of this standard is to ensure that the demographic provided for by the policy can, where necessary, access the kitchen, main bedroom, bathroom and toilet within a multi storey independent living unit without relying on stair or lift access to levels above or below.

Apartment 301 has a private entry lobby at street level with internal stair and private lift access to the floor plate above containing the kitchen, all bedrooms, bathroom and toilets as depicted in the plan extracts below.

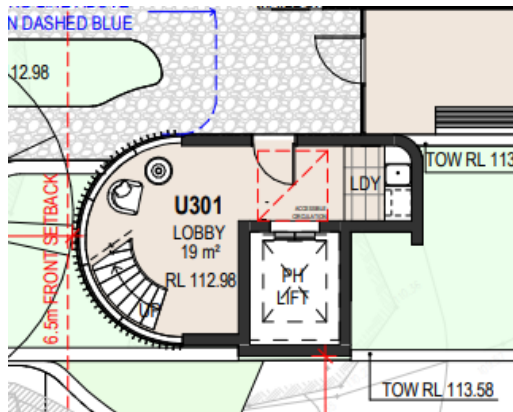


Figure 1 – Plan extract showing private street level entry foyer to Apartment 301.

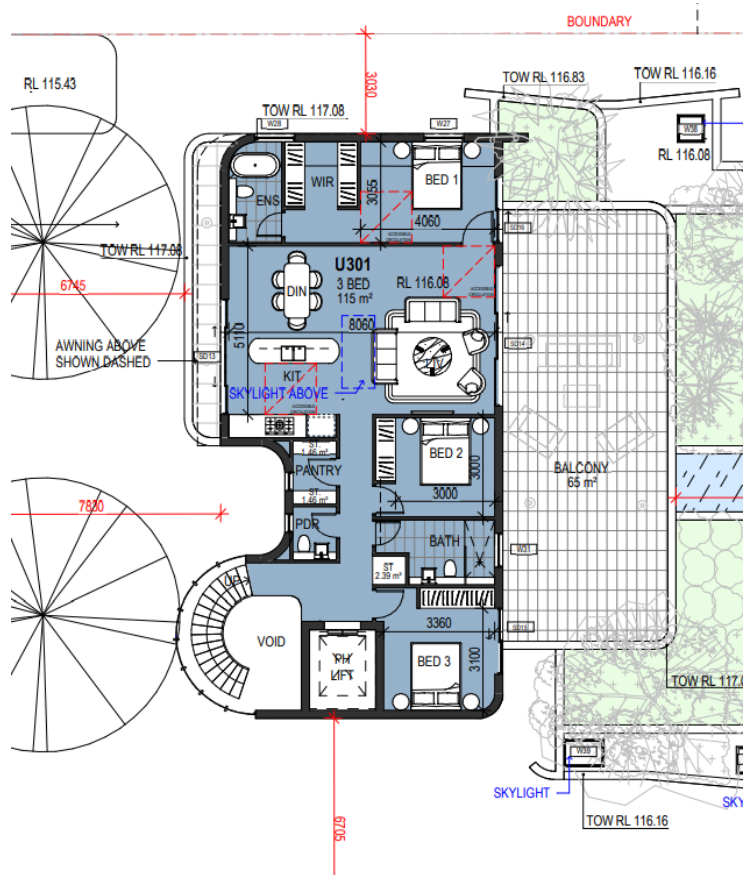


Figure 2 – Plan extract showing internal stair and lift access to the floor plate above containing the kitchen, all bedrooms, bathroom and toilets.

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.*

It has been determined that the design of Apartment 301 does not comply with Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021.

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.*

Apartment 301 does not comply with Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021 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 85(1) Schedule 4, Clause 17 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 85(1) Schedule 4, Clause 17 of 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
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the implicit objective of Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021 and the objectives for development 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 Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021.

4.0 Request for variation

4.1 Is Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021 a development standard?

Clause 85(1) Schedule 4, Clause 17 of SEPP (Housing) 2021 prescribes a design criteria relating to access to the kitchen, main bedroom, bathroom and toilet within a multi storey independent living unit. Accordingly, Clause 85(1) Schedule 4, Clause 17 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 objective of the access standard

An assessment as to the consistency of the proposal when assessed against the implicit objective of the standard is as follows:

To ensure that the demographic provided for by the policy can, where necessary, access the kitchen, main bedroom, bathroom and toilet within a multi storey independent living unit without relying on stair or lift access to levels above or below.

Response: With the exception of the laundry all habitable rooms are located on a single level floor plate accessible from street level via a private lift and stair. The non-compliance could be resolved through relocating the laundry to 1st floor level and removing the lobby door to make it common property rather than private. The entry to Apartment 108 would then be at first floor level with compliance achieved with the standard. This is the same access arrangement proposed for Apartment 101.

In my opinion, whilst strictly compliant with the standard such alternate access arrangement would result in inferior access and amenity outcomes for Apartment 108 in circumstances where the difference between compliance and non-compliance is whether the stair and lift access to the upper level floor plate is private or common.

Under such circumstances, the consent authority can be satisfied that appropriate access arrangements are provided to the kitchen, main bedroom, bathroom and toilet within the multi storey independent living unit. This objective is achieved notwithstanding the non-compliance with the standard.

Having regard to the above, the development 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. Given the developments consistency with the implicit objective of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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: 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. Notwithstanding the access arrangement to Apartment 301 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 non-compliance with the 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: Non-compliance with the standard does not impact the development's ability to satisfy this objective.

The non-compliant development demonstrates consistency with the objectives of the R2 Low Density Residential zone and the implicit objective of the standard. Adopting the first option in *Wehbe* strict compliance with the access standard has been demonstrated to be 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

Sufficient environmental planning grounds exist to justify the variation including the fact that the non-compliance could be resolved through relocating the laundry to 1st floor level and removing the lobby door to make it common property rather than private. The entry to Apartment 108 would then be at first floor level with compliance achieved with the standard. This is the same access arrangement proposed for Apartment 101.

In my opinion, whilst strictly compliant with the standard such alternate access arrangement would result in inferior access and amenity outcomes for Apartment 108 in circumstances where the difference between compliance and non-compliance is whether the stair and lift access to the upper-level kitchen, main bedroom, bathroom and toilet within the multi storey independent living unit is private or common. A variation of the standard will promote the good design and amenity of Apartment 108 consistent with objective 1.3(g) of the Environmental Planning and Assessment Act 1979.

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.*

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the implicit objectives of standard 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 5th May 2020, 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.

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 variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
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Director