

## Attachment 4

### Clause 4.6 variation request – Building Planes Forestville RSL club redevelopment including new Club building and seniors housing 22 Melwood Avenue, Forestville

#### 1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

#### 2.0 State Environmental Planning Policy (Housing) 2021

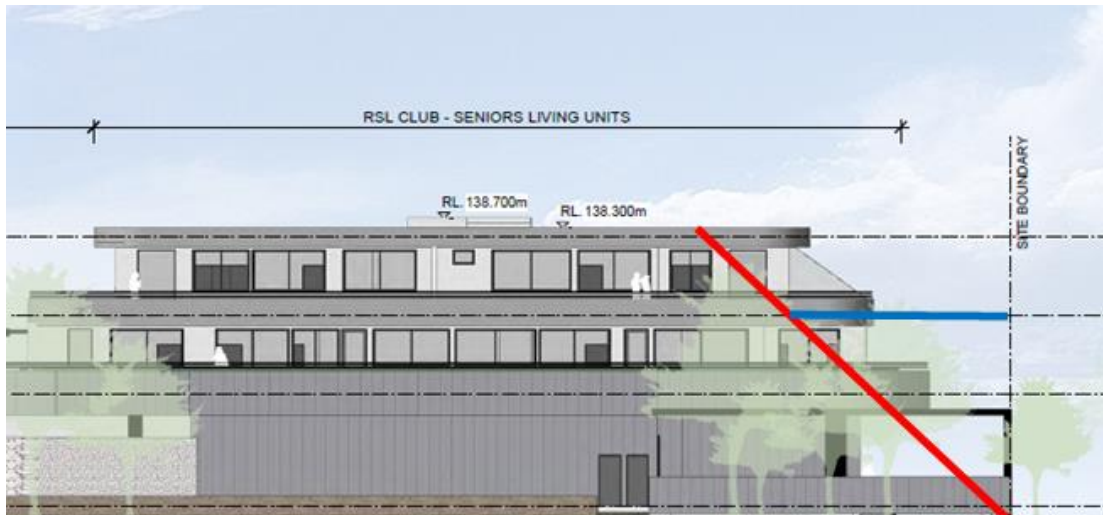
##### 2.1 Clause 84 – Development Standards – General

Pursuant to clause 84(2)(c)(iii) of SEPP Housing, development consent must not be granted for development proposed under Part 5 of SEPP Housing unless

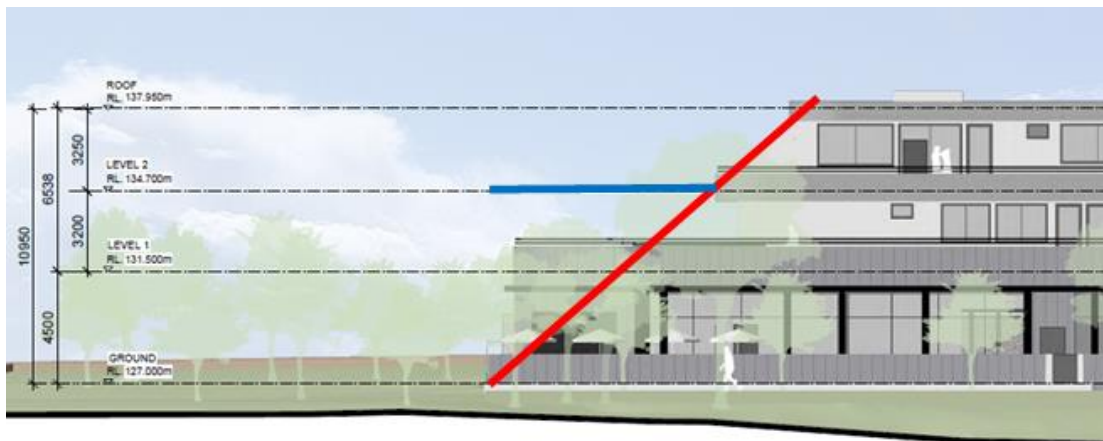
- (c) *for development on land in a residential zone where residential flat buildings are not permitted -*
  - ...
  - iii. *if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.*

Note: For ease of reference, the requirements of this clause will be referred to as the prescribed building planes.

The third storey component of the Club building protrudes beyond the prescribed building plane to a variable extent along its southern and western façades as shown on the following diagrams.



**Figure 1** - Plan extract showing southern façade third storey height plane breaching elements above the blue line and to the right of the red line



**Figure 2** - Plan extract showing western façade third storey height plane breaching elements above the blue line and to the left of the red line

I note that only a small portion of the third storey balcony and roof form breach the height plane along the western façade with the southern façade breaching elements located adjacent to the public carpark. The balance of the development including all the independent living units on the northern portion of the site are compliant with the height plane standard.

There are no stated objectives in relation to the building plane development standard prescribed by clause 84(2)(c)(iii) of SEPP Housing.

The clause is limited to any portion of the building that is more than 2 storeys in height and prescribes that the additional storeys are to be set back inwards from all side and rear boundaries of the site. In this regard, it is considered that the implicit objective of the standard is as follows:

*To minimise the visual impact of the portions of the development that exceed 2 storeys in height, to ensure compatibility with surrounding development and to minimise impacts upon the amenity of adjoining properties.*

## **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 84(2)(c)(iii) 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 height plane provision at clause 84(2)(c)(iii) 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.

### **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 84(2)(c)(iii) 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.

#### **4.0 Request for variation**

##### **4.1 Is clause 84(2)(c)(iii) 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 84(2)(c)(iii) of SEPP (Housing) 2021 prescribes a provision that seeks to control the bulk, scale and density of certain development. Accordingly, clause 84(2)(c)(iii) 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 building planes development standard**

There are no stated objectives in relation to the building plane development standard prescribed by clause 84(2) of SEPP Housing.

The clause is limited to any portion of the building that is more than 2 storeys in height and prescribes that the additional storeys are to be set back inwards from all sides and boundaries of the site. In this regard, it is considered that the implicit objective of the standard is as follows:

*To minimise the visual impact of the portions of the development that exceed 2 storeys in height, to ensure compatibility with the scale of surrounding development and to minimise impacts upon the amenity of adjoining properties.*

#### **Visual impact & Compatibility**

The height plane breaches occur at the upper-level of the Club building where the site adjoins the adjacent public carpark and reserve. The breaches to the southern and western building façade are not located within immediate proximity of any residential properties or public areas used regularly for recreation. Whilst inconsistent with the prescribed building plane the portions of the development that protrude beyond the building planes are appropriately described as minor in the context of the overall building form and inconsequential in terms of residential amenity impacts an recessive in relation to their proximity to allotment boundaries.

Being located immediately adjacent to the public carpark the building plane breaching elements will not give rise to adverse impacts on the adjacent public domain in terms of overshadowing or unacceptable visual bulk. 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 height and scale of the development, notwithstanding the building plane breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably be concluded that, notwithstanding the building height plane breaching elements, the development is compatible with surrounding development and capable of existing together in harmony. In forming this opinion, I rely on the following image.



**Figure 3** – Plan extract showing upper-level as viewed from the adjacent public carpark to the south



**Figure 4** – Perspective image of the development as viewed from Melwood Avenue depicting the recessive upper level

### Amenity Impacts

Despite the non-compliance with the building planes the development provides the contextually appropriate setbacks to the side and rear boundaries, consistent with or in excess of the minimum setbacks prescribed by WDCP 2011. The setbacks provide sufficient spatial separation to the adjacent public domain with the non-compliant elements recessive in a streetscape and broader urban context.

Given that the building plane breaching elements are not located within proximity of any adjoining residential property the breaching elements will not give rise to adverse residential amenity impacts in terms of views, privacy or shadowing.

Upon an inspection of the site and a review of the proposed plans, the non-compliant elements are also unlikely to result in any adverse impacts upon public views noting that no views corridors were identified over the subject site. Overall, the portions of the development that protrude beyond the 3<sup>rd</sup> storey building planes do not attribute to any unreasonable impacts upon the amenity of adjoining public or private properties.

As such, I have formed the opinion that the development is consistent with the assumed objectives of the building plane development standard. That is, the visual impact of the portions of the development that exceed 2 storeys in height have been minimised to the extent that they do not render the building incompatible with surrounding development nor do they result in unacceptable amenity impacts to adjoining properties.

Having regard to the above, the proposed building form which exceeds the building plane standard will achieve the implicit objective of the standard to at least an equal degree as would be the case with a development that complied with the standard. Adopting the first option in *Wehbe* strict compliance with the standard has been demonstrated to be 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, the significant allotment size and geometry facilitates the provision of floor space within a series of detached building pavilions which will sit within a landscaped setting and will not give rise to inappropriate or jarring streetscape or residential amenity consequences.

### **Ground 2 - Compatibility with the built form and floor space outcome reasonably anticipated given the long-established and permissible RSL Club use of the land.**

The non-compliant building plane element located above the Club building do not result in a building form that is inconsistent with that reasonably anticipated for an RSL Club building and to that extent will not be perceived as inappropriate or jarring have regard to the long-established and permissible RSL Club use on the land.

The extent of breach can be directly attributed to the floor to ceiling height requirements of a registered Club which are greater than those anticipated by the policy makers when developing the subject 3<sup>rd</sup> storey building plane standard and which in this instance result in a 3 storey mixed use built form outcome.

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, in particular the building plane breaching elements, offensive, jarring or unsympathetic when viewed from the surrounding public spaces and in a streetscape context having regard to the built form characteristics reasonably anticipated for development on land currently occupied by an RSL Club. The development is compatible with surrounding development with the built form and landscape outcomes enabling development to co-exist in harmony.

### **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 building plane 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 deletion of upper level residential floor space in circumstances where the size and geometry of the allotment and long established and permissible RSL Club land-use 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 variation will achieve objective (c) of the Act.

#### **Ground 4 – Minor extent of breach and absence of environmental impact**

Consistent with the findings in *Eather v Randwick City Council [2021] NSWLEC 1075*, the contravention of the development standard is minor with the small departure from the standard and lack of any material impacts a sufficient environmental planning ground.

#### 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.

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

#### **5.0 Conclusion**

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height plane variation in this instance.

#### **Boston Blyth Fleming Pty Limited**



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

**24.9.24**