3BF TOWN PLANNERS

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RE: CLAUSE 4.6 REQUEST TO VARY THE FLOOR SPACE RATIO
30 ABERNETHY STREET, SEAFORTH

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 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of Manly Local Environmental Plan 2013 (MLEP) the floor space ratio control applicable to the site is 0.4:1. The objectives of this control are as follows:

> *(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
>
> *(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
>
> *(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
>
> *(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
>
> *(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

It has been determined that the proposed gross floor area is calculated at 300m² representing an FSR of 0.43:1. This represents a non-compliance of 22.88m² or 8.25%.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are:

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 4.4 FSR 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 FSR provision at 4.4 of MLEP which specifies a maximum FSR 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 MLEP 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 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP 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.*

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

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP 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 4.4 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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP?

4.0 Request for variation

4.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary.

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

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 standard is as follows:

a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

Response: The dwelling have been designed to be consistent with the existing streetscape character. The street has many parking structures built close to the front boundaries due to the sloping topography. When viewed from the street the development will present as a part 1 and 2 storey dwelling which is consistent within the streetscape. The front elevation drawings is shown below:

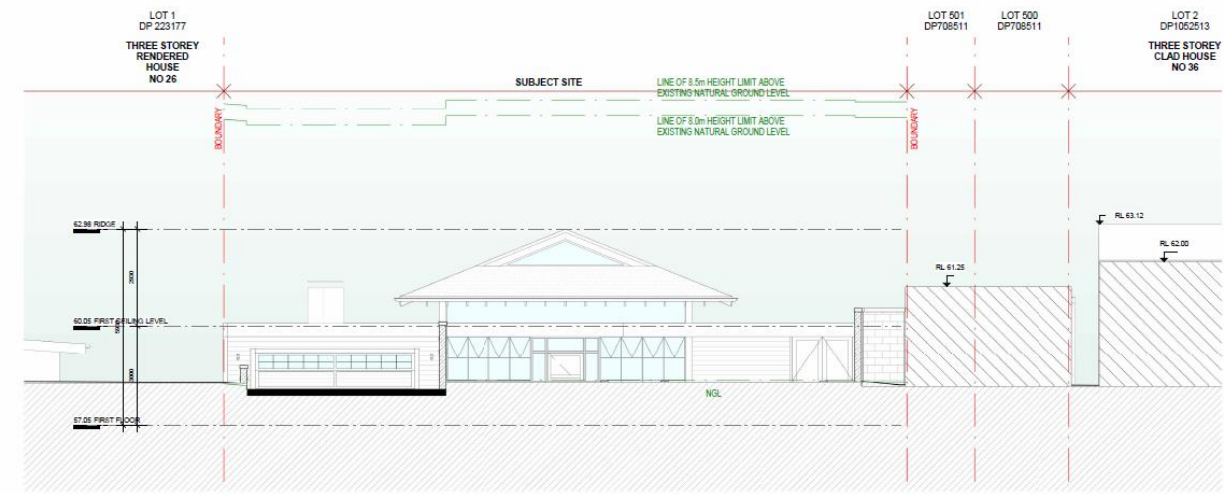

Figure 1: *Streetscape evelation*

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 form, massing or scale (as reflected by FSR), offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

This objective is achieved as the bulk and scale of development is entirely consistent with the existing and desired streetscape character.

b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*

Response: The proposal does not result in any obstruction of important landscape or townscape features. All significant trees within the vicinity will be preserved and protected. In this regard, it is considered that the non-compliance to FSR does not contribute to any unreasonable bulk and scale concerns.

The proposal meets this objective.

c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Response: The development maintains an appropriate visual relationship with the character of development in the area. Landscaping treatments are proposed to provide a softening and screening of the built form when viewed from the street. Furthermore, the dwelling has been designed to be highly articulated, and include generous side setbacks to maintain an appropriate visual relationship.

d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

Response: The works would not result in any impact on the use or enjoyment of adjoining land and the public domain. The proposal maintains appropriate levels of amenity with regard to view loss, overshadowing and privacy despite the FSR variation.

e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

Response: N/A

Consistency with zone objectives

The subject site is zoned R2 Low Residential pursuant to MLEP 2013 with dwelling houses permissible in the zone with consent. 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 development relates to a new single dwelling which maintains the existing use.

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

Response: N/A

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to FSR, demonstrates consistency with objectives of the R2 Low Density Residential zone and the FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be is unreasonable and unnecessary.

4.2 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl

4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds exist to justify the FSR variation. Specifically, the environmental planning grounds consist of the following:

- The proposed FSR is reasonable within its context of the locality whilst the proposed built form is considered to be reasonable when compared to existing development within the streetscape. The subject site is consistent with the undersized lot provisions (cl: 4.4.3.1) with the Manly DCP which states that Council may consider exceptions to the maximum FSR under LEP clause 4.6 when both the relevant LEP objectives and the provisions of this DCP are satisfied. In this regard, we note that the minimum lot size applicable is 750m² resulting in a maximum GFA of 300m². The proposed GFA is compliant with the 300m² control and this report has demonstrated consistency with the FSR and zone objectives within the LEP.

- The works have been designed to maintain a predominately 2 storey form to the street to ensure consistency with established development. Significant side setbacks to the ground and first floor provides relief from any visual impact with the proposed wall heights also being compliant. Total open space and landscaping are also compliant with the DCP control. Compliance with the numerical controls within the LEP and DCP is reflective of the considered design approach to limit any potential bulk and scale and visual impact concerns despite the FSR variation.

- The development does not raise any unreasonable amenity impacts with regard to overshadowing, privacy and view loss. As outlined in the statement of environmental effects view loss assessment, views will be maintained from the immediately adjoining properties. The developments across the road to

the rear will be unaffected as they sit well above the subject site and will still access views over the proposed dwelling.

- We note that Council has applied the FSR development standard flexibility in this locality and have approved variations provided that the undersized lot provisions within the DCP can be met.

I have formed the considered opinion that sufficient environmental planning grounds exist to justify the variation including the compatibility of the height, bulk and scale of the development, as reflected by floor space, with the built form characteristics established by adjoining development and development generally within the site's visual catchment, and the fact that the existing GFA/FSR is reduced as a consequence of the works proposed.

The developments compliance with the objectives of the FSR standard and the general paucity of adverse environmental impact also giving weight to the acceptability of the variation sought.

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

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

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

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

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

that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

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

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R2 Low Density Residential zone

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

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

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

4.4 Secretary's concurrence

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

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

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

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

(b) that the contextually responsive development is consistent with the objectives of the FSR standard, and

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

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

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

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

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

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

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

Yours Sincerely

William Fleming
BS, MPLAN
Boston Blyth Fleming Pty Ltd
Director