ATTACHMENT A

Written Request to Vary the Rear 25% Building Height Control

INTRODUCTION

The subject site is located on the southern side of Alexander Street, approximately 145 metres to the west of Pittwater Road. The site comprises two (2) adjoining allotments with a combined area of 1,156.117m^2. The consolidated site is rectangular in shape with a frontage of 24.38 metres to Alexander Street.

The site is currently occupied by a 2 – 3 storey dwelling house, located towards the rear of the site, and a detached single storey building located towards the front of the site.

The proposed development comprises the demolition of the existing structures on the site, and the construction of a housing development for seniors or people with a disability, incorporating 5 x 3-bedroom self-contained apartments.

Off-street car parking is proposed for 15 vehicles within a basement level, accessed via a combined entry/exit driveway extending to/from Alexander Street.

Clause 40(4)(c) of State Environmental Planning Policy (SEPP) (Housing for Seniors or People with a Disability) 2004 specifies that a building located in the rear 25% of the site must not exceed 1 storey in height.

The proposed development has been carefully designed to negotiate the topographical conditions of the site, with the building form accommodating the topographical rise towards the rear (south).

The proposed development extends to a maximum height of 7.9 metres, and 2-storeys (in a vertical plane), including adjacent to the boundaries of the site.

A portion of the 2-storey building extends within the rear 25% of the site. In that location, the building has a maximum height of approximately 6.8 – 7.4 metres. The building adopts a low level skillion style roof with a 2 degree fall towards the rear.

The building height control in the rear 25% of the site is a development standard, and Clause 4.6 of the Warringah Local Environmental Plan (LEP) 2011 is the mechanism by which a variation to a development standard

incorporated within *"any other environmental planning instrument"* (in this instance the SEPP) may be varied.

CLAUSE 4.6 OF THE WARRINGAH LEP 2011

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (Initial at 87).

Clause 4.6(2) of the LEP specifies that *"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"*.

Clause 4.6(3) specifies that 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.

Clause 4.6(4) specifies that 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 Secretary has been obtained.

Clause 4.6(5) specifies that in deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.

CONTEXT AND FORMAT

This *"written request"* has been prepared having regard to *"Varying development standards: A Guide"* (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353;*
- *Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161.*
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243.*

"Varying development standards: A Guide" (August 2011) outlines the matters that need to be considered in DA's involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which

compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard.

In that regard, Preston CJ, in *Wehbe* states that *"… development standards are not ends in themselves but means of achieving ends"*. Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

> *As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.*

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is *"consistent with"* the objectives of the development standard and the zone, is not a requirement to *"achieve"* those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means *"something less onerous than 'achievement'"*.

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a *"better environmental planning outcome for the site"* relative to a development that complies with the development standard.

In *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O'Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

Finally, in *Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161*, Commissioner O'Neill found that *"The desired future character of an area cannot be determined by the applicable development standards for height and FSR alone"*.

Further, Commissioner O'Neill found that *"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character"*.

Similarly, in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243*, Commissioner O'Neill found that *"The desired*

*future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (*SJD DB2 *at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (*SJD DB2 *at [53]-[54] and [59]-[60])".*

ASSESSMENT

Is the requirement a development standard?

The building height control in the rear 25% of the site is a development standard and is not excluded from the operation of Clause 4.6(2) of the LEP.

What is the underlying object or purpose of the standard?

The objectives of Clause 40(3)(c) are not specifically expressed in the SEPP, however the aims of the SEPP are to increase the supply and diversity of residences that meet the needs of seniors or people with a disability, make efficient use of existing infrastructure and services, and be of good design.

Further, it is reasonable to assume that the underlying objective of the building height control in the rear 25% of the site is intended to minimise the impact of buildings adjacent to the rear yards of surrounding properties.

The proposed development complies with the provisions of Clause 50 of the SEPP in relation to building height, density and scale, landscaped area, deep soil zones, solar access, private open space, and parking.

The controls in Clause 50 of the SEPP are standards that cannot be used to refuse development consent for self-contained dwellings.

The proposed development complies with the controls incorporated in the Warringah Development Control Plan (DCP) 2011 in relation to the rear boundary setback, and the side boundary setbacks, including the portion of the building within the rear 25% of the site.

Further, the portion of the building within the rear 25% of the site adopts a low level skillion style roof with a 2 degree fall towards the rear.

The site is adjoined to the rear (south) by a large expanse of open space associated with the *Elizabeth Jenkins Place Aged Care Centre*. In the circumstances, the site does not have an ordinary physical relationship to the rear typical of a back-to-back row of residential allotments.

The site is currently occupied by a 2 – 3 storey dwelling house, located towards the rear of the site. The existing dwelling has a 2-storey form within the rear 25% of the site.

The adjoining buildings to the east and west similarly occupy the rear portion of the allotments, including within the rear 25% of the sites.

The proposed landscaping includes eight (8) new trees within a mature height of 4 – 20 metres. The proposed trees will be supplemented by 113 shrubs with a mature height of 1 – 4 metres, with the remainder of the landscaped areas accommodating ground cover/mass plantings.

The proposed landscaping extends around the perimeter of the site, including within the setbacks to the front, rear and side boundaries.

The proposed development will substantially maintain the amenity of the adjoining properties to the east and west in terms of the key considerations of visual bulk, overshadowing, privacy and views.

On 24 April 2020, Council granted Development Consent (REV2020/001) for *"Boundary adjustment part demolition for alterations and additions to a dwelling house construction of a detached dwelling house and a Secondary dwelling"*. The approved dwellings included 2-storey components within the rear 25% of the site.

On 29 March 2021, the Land and Environment Court upheld two (2) appeals against the refusal of two (2) separate DA's for the site (*Waights v Northern Beaches Council [2021] NSWLEC 1153*).

The approved development comprises the construction of two (2) boarding houses. The approved boarding houses both include 2-storey components within the rear 25% of the site.

In the circumstances, the proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published *"Varying development standards: A Guide"* (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

The proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The assumed objectives of the building height control in the rear 25% of the site remain relevant, and the proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

Further, the proposed development will provide additional residential accommodation within an established residential environment, offering a

very good level of internal amenity without imposing any significant or adverse impacts on the amenity of the surrounding land.

In the circumstances, strict compliance with the building height control in the rear 25% of the site would be unreasonable and unnecessary to the extent that the amenity of the proposed apartments would be unnecessarily reduced within a development that is consistent with the overarching objectives of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of the surrounding land.

4. *The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

The building height control in the rear 25% of the site has not specifically been abandoned or destroyed by the Council's actions. Irrespective, Council has historically adopted a relatively flexible approach to the implementation of development standards in circumstances where the objectives of the control are achieved, notwithstanding a numerical non-compliance.

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

Strict compliance with the building height control in the rear 25% of the site would be unreasonable and unnecessary to the extent that the amenity of the proposed apartments would be unnecessarily reduced within a development that is consistent with the overarching objectives of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of the surrounding land.

<u>Are there sufficient environmental planning grounds to justify contravening the development standard?</u>

The proposed variation to the building height control in the rear 25% of the site is reasonable and appropriate in the particular circumstances on the basis that:

- the proposed development complies with the provisions of Clause 50 of the SEPP in relation to building height, density and scale, landscaped area, deep soil zones, solar access, private open space, and parking;
- the proposed development complies with the controls incorporated in the Warringah DCP 2011 in relation to the rear boundary setback, and the side boundary setbacks, including the portion of the building within the rear 25% of the site;
- the site is adjoined to the rear (south) by a large expanse of open space associated with the *Elizabeth Jenkins Place Aged Care Centre*. In the circumstances, the site does not have an ordinary physical relationship to the rear typical of a back-to-back row of residential allotments;
- the site is currently occupied by a 2 – 3 storey dwelling house, located towards the rear of the site, and the existing dwelling has a 2-storey form within the rear 25% of the site;
- the adjoining buildings to the east and west similarly occupy the rear portion of the allotments, including within the rear 25% of the sites;
- the proposed landscaping includes eight (8) new trees within a mature height of 4 – 20 metres, with the proposed trees supplemented by 113 shrubs with a mature height of 1 – 4 metres, with the remainder of the landscaped areas accommodating ground cover/mass plantings, including within the setback to the rear boundary;
- proposed development will substantially maintain the amenity of the adjoining properties to the east and west in terms of the key considerations of visual bulk, overshadowing, privacy and views;
- the Council and the Court have recently approved developments that include 2-storey components within the rear 25% of the site;
- strict compliance with the building height control in the rear 25% of the site would be unreasonable and unnecessary to the extent that the amenity of the proposed apartments would be unnecessarily reduced within a development that is consistent with the overarching objectives of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of the surrounding land;

- the proposed development is consistent with, or not antipathetic to, the objective of the R2 – Low Density Residential zone; and
- the proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

Are there any mattes of State or regional significance?

The proposed variation to the building height control in the rear 25% of the site does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the building height control in the rear 25% of the site, notwithstanding the numerical variation.

In the circumstances, the proposed development does not affect the public benefit of maintaining the building height control in the rear 25% of the site in other instances.

Any other matters?

There are no further matters of relevance to the proposed variation to the building height control in the rear 25% of the site.

Zone Objectives and Public Interest

The site is zoned R2 - Low Density Residential pursuant to the Warringah LEP 2011, and the objectives of the zone relating to residential development are expressed as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposed development is permissible on the site pursuant to the provisions of SEPP (Housing for Seniors or People with a Disability) 2004, and the SEPP prevails to the extent of any inconsistency with the LEP.

In the circumstances, the proposed development will provide a very high standard of residential accommodation within an established residential precinct. Further, the proposed development includes extensive new landscaping that will materially enhance the landscaped setting of the site and surrounds.

The proposed development serves the public interest by providing substantially improved residential accommodation within an established residential environment, offering a very good level of internal amenity without imposing any significant or unreasonable impacts on the amenity of surrounding land.

Finally, the very minor variation to the building height control in the rear 25% of the site does not raise any signifcant matters of public interest.

CONCLUSION

The purpose of this submission is to formally request a variation to the building height control in the rear 25% of the site incorporated in Clause 40(3)(c) of SEPP (Housing for Seniors or People with a Disability) 2004.

In this instance, strict compliance with the control is unreasonable on the basis that the objectives are achieved anyway, and unnecessary on the basis that no beneficial planning purpose would be served.

In the circumstances, there are sufficient environmental planning grounds to justify the variation to the building height control in the rear 25% of the site.