

18.2.25

DA2024/1501

**Updated clause 4.6 variation request – Minimum subdivision lot size
Subdivision of one lot into two, demolition works and construction of
two dwelling houses including swimming pools
90 Brighton Street, Freshwater**

1.0 Introduction

This updated clause 4.6 variation request has regard to the amended Revision F Architectural plans prepared by Watershed Architects.

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 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.1 - Minimum subdivision lot size

Pursuant to clause 4.1(3) WLEP 2011, the size of any lot resulting from the subdivision on land shall not be less than 450m². In accordance with clause 4.1(3A) the area of the access handle is to be excluded from the calculation of lot size. The objectives of this clause are as follows:

- (a) *to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,*
- (b) *to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,*
- (c) *to protect the integrity of land holding patterns in rural localities against fragmentation,*
- (d) *to achieve low intensity of land use in localities of environmental significance,*
- (e) *to provide for appropriate bush fire protection measures on land that has an interface to bushland,*
- (f) *to protect and enhance existing remnant bushland,*
- (g) *to retain and protect existing significant natural landscape features,*
- (h) *to manage biodiversity,*

- (i) *to provide for appropriate stormwater management and sewer infrastructure.*

I confirm that both proposed Lots have an area of 436.10m² a shortfall of 13.9m² or 3%. Both Lot sizes are exclusive of the area of the shared access handle.

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.*

This clause applies to the clause 4.1 Minimum subdivision lot size 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 does not comply with the minimum subdivision lot size provision at clause 4.1 of WLEP which specifies a minimum subdivision lot size 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 4.1 of WLEP 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 4.1 of WLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

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

Clause 4.1 WLEP prescribes a minimum subdivision lot size standard that relates to certain development. This standard seeks to control the size of residential allotments. Accordingly, clause 4.1 WLEP 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 minimum subdivision lot size standard

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

- (a) *to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,*

Response: I note that there are a variety of allotment sizes and geometry within immediate proximity of the site and certainly within the R2 Low Density Residential Zone within the Freshwater locality. The following zoning map extracts demonstrates that the battle-axe subdivision pattern will complement/ will not be antipathetic to the existing subdivision pattern along the length of Brighton Street and within the Freshwater locality generally. Further, the battle-axe dwelling arrangement is consistent with that established by the existing detached dual occupancy development immediately to the east at No. 88 Brighton Street.

The subdivision pattern along the southern side of Brighton Street is irregular in nature with the subdivision pattern comprising a mixture of long single frontage allotments and battleaxe allotments of various areas and configurations as depicted in the following images.

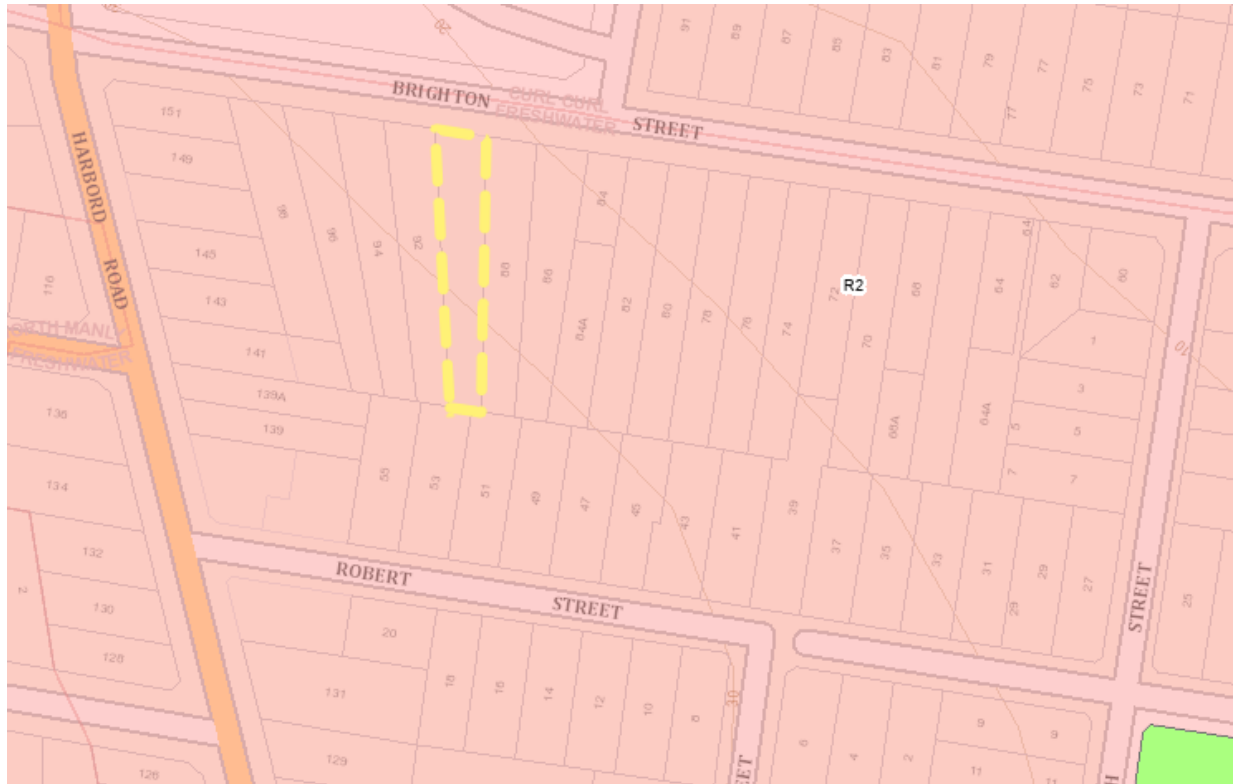


Figure 1: Map extract showing subdivision pattern along Brighton Street between Harbord Road and Waratah Street. Subject site shown in yellow.



Figure 2: Map extract showing subdivision pattern along Brighton Street between Waratah Street and Oliver Street.

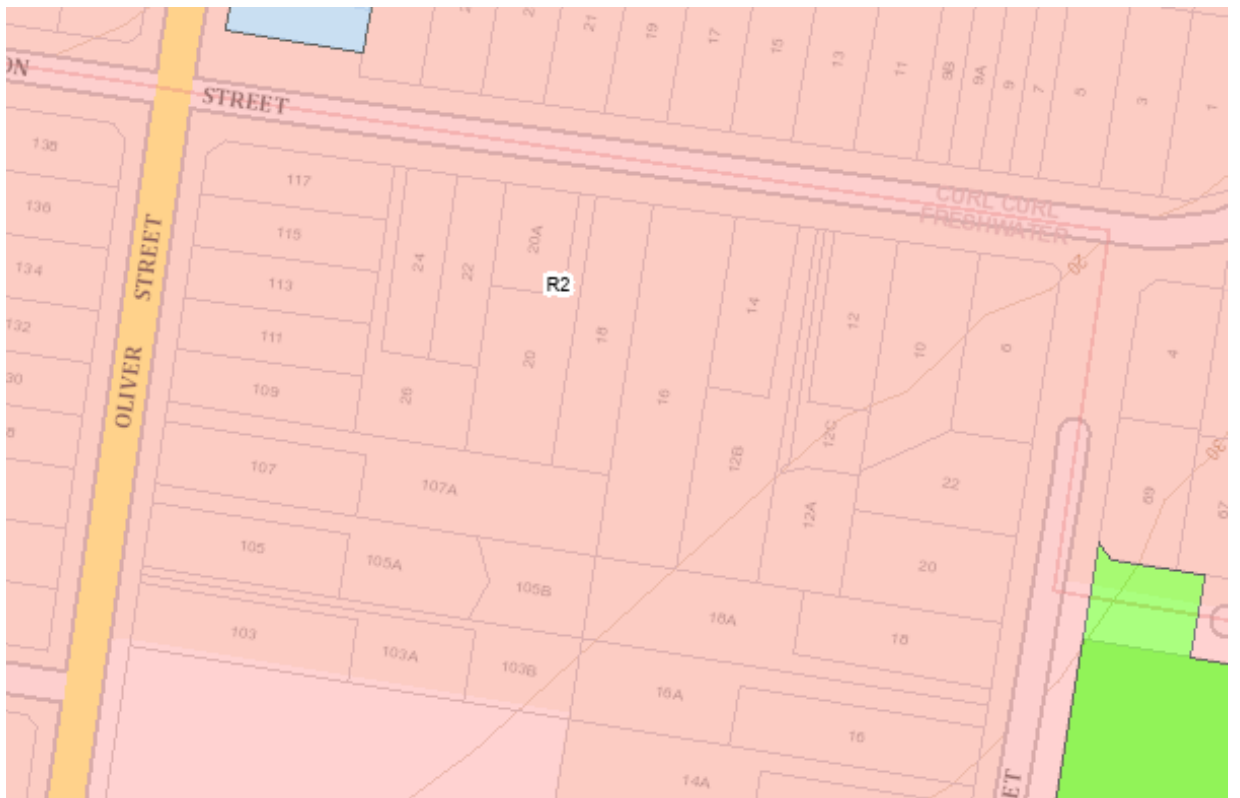


Figure 3: Map extract showing subdivision pattern along Brighton Street between Oliver Street and Park Street.



Figure 4: Map extract showing detached dual occupancy development to the east No. 88 Brighton Street.

Notwithstanding the minor Lot size variation proposed the geometry of the existing lot as viewed from Brighton Street is unaltered with the battle-axe configuration accommodating a single dwelling house presentation to the street consistent with the residential character of dwellings in a streetscape context.

Based on the previous images, I am satisfied that notwithstanding the minor Lot size variations that the resultant Lots are consistent with the pattern, size and configuration of existing lots in the locality and accordingly this objective is achieved.

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

Response: N/A. Such land uses are prohibited in the R2 Low Density Residential Zone.

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

Response: N/A. The property is not within a rural locality.

(d) *to achieve low intensity of land use in localities of environmental significance,*

Response: The subject property is not within a Conservation Zone and is instead zoned R2 Low Density Residential reflecting the absence of identified environmental significance/ sensitivities. The minor subdivision lot size variation does not prevent consistency with this objective.

(e) *to provide for appropriate bush fire protection measures on land that has an interface to bushland,*

Response: N/A. The site is not bushfire prone land nor located adjacent to bushland.

(f) *to protect and enhance existing remnant bushland,*

Response: The existing vegetation on the site is not appropriately described as remnant bushland and accordingly this objective is achieved notwithstanding the minimum subdivision lot size variation proposed.

(g) *to retain and protect existing significant natural landscape features,*

Response: The minor variation to the minimum subdivision lot size does not prevent attainment of this objective notwithstanding that some impact is unavoidable to realise the orderly and economic use and development of the land.

(h) *to manage biodiversity,*

Response: The minor variation to the minimum subdivision lot size does not prevent attainment of this objective given that the site is not mapped/ identified as having biodiversity constraints.

(i) *to provide for appropriate stormwater management and sewer infrastructure.*

Response: The minor variation to the minimum subdivision lot size does not prevent attainment of this objective given that both proposed lots can gravity drain to Brighton Street with sewer available to the existing allotment.

This objective is achieved notwithstanding the non-compliant subdivision lot size proposed.

Having regard to the above, the non-compliant lots sizes will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the minimum subdivision lot size standard. Given the developments consistency with the objectives of the minimum subdivision lot size standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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 - Minor nature of breach and lack of impact

I confirm that both proposed Lots have an area of 436.10m² a shortfall of 13.9m² or 3%. Both Lot sizes are exclusive of the area of the shared access handle.

The variations are quantitatively and qualitatively appropriately described as minor.

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

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

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

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 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 minimum subdivision lot size variation in this instance.

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