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Attachment 2

Clause 4.6 variation request – Floor Space Ratio
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 108(2)(c) – Density and Scale (FSR)

Pursuant to clause 108(2)(c) of SEPP Housing the consent authority cannot require a more onerous standard in relation to FSR were the density and scale of the development for the purpose of independent living units when expressed as a floor space ratio is 0.5:1 or less.

The specific wording of this clause ensures that it only applies to the independent living unit component of the development and not the Club uses.

There are no stated objectives in relation to this standard and accordingly the objectives of the floor space ratio standard at clause 4.4 of Warringah Local Environmental Plan 2011 (WLEP), being the environment planning instrument applicable to development on the land, have been adopted as reflecting the objects or purpose of the FSR standard as it applies to development within the Northern Beaches LGA. That said, there is no underlying FSR standard applicable to development on this particular site.

The stated objectives of clause 4.4 WLEP are as follows:

(a) *to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,*
(b) *to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
(c) *to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,*

(d) to manage the visual impact of development when viewed from public spaces,
(e) to maximise solar access and amenity for public areas.

I also consider an implicit objective to be to ensure that buildings, by virtue of their bulk and scale, maintain reasonable amenity to surrounding residential properties.

It has been determined that the independent living unit component of the development has a total gross floor area, as defined, of 6745m² representing an FSR of 0.75:1. This represents an exceedance of the FSR standard of 2238m² or 49.65%.

I note that 2251m² of independent living unit floor space is located immediately above the proposed registered Club. That is, the independent living unit pavilions located on the northern portion of the site provide for a compliant FSR of 0.5:1 with the non-compliant residential floor space located within the Club building.

I note that although not relevant to this particular development standard that the overall development across the site including the Club building and independent living units has a GFA of 9008m² representing an FSR of 1:1. Such FSR represents the must not refuse standard applying to a residential care facility within an R2 Low Density Residential zone.

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 108(2)(c) 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 floor space ratio provision at clause 108(2)(c) of SEPP (Housing) 2021 which specifies an FSR standard however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP provides:

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 108(2)(c) 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 108(2)(c) 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 108(2)(c) of SEPP (Housing) 2021 prescribes an FSR provision that seeks to control the bulk, scale and density of certain development. Accordingly, clause 108(2)(c) 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.

<u>Consistency with objectives of the floor space ratio standard</u>

An assessment as to the consistency of the proposal when assessed against the objectives of the standard at clause 4.4 of WLEP is as follows:

> *(a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,*

Response: The proposal provides off-street carparking for the independent living unit component of the development of 99 spaces being compliant with the minimum 69 required pursuant to the car parking provisions at clause 108(2)(k) of SEPP (Housing) 2021.

In relation to traffic generation and associated impacts the traffic report prepared in support of the application report contains the following commentary:

There is a car parking requirement to provide a minimum of 69 car parking spaces for the ILU element and 99 customer parking spaces for the registered club element based on the existing development and comparison of similar registered clubs. The development proposes a total of 99 car parking spaces for the senior's living element (including 9 spaces for visitors) and 99 for the club patrons. As a result, a total car parking provision of 198 parking spaces across the whole development. In summary, the car parking arrangement for the proposed development is supportable and ensures that all standard car parking demands will be accommodated on-site.

The traffic generation arising from the development has been assessed as a net change over existing conditions and equates to an additional 11 vehicle trips per hour during the critical Friday evening peak. Traffic impacts have been assessed using SIDRA Intersection and there are no changes in the Level of Service of each of the key intersection surveys surveyed in relation to the existing and proposed developments and traffic impacts are considered acceptable.

I also note that the property is located within immediate proximity of public bus services along Melwood Avenue and Warringah Road providing direct connection to Forestville Local Centre and Dee Why, Warringah Mall, Chatswood CBD/ Chatswood train station and Sydney CBD.

Under such circumstances, the consent authority can be satisfied that notwithstanding the FSR proposed the intensity of development and associated traffic generation will be commensurate with the capacity of existing and planned infrastructure, including transport infrastructure. This objective is achieved notwithstanding the exceedance of the FSR standard.

(b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,

Response: The amount of floor space proposed provides for ADG compliant apartments of exceptional design quality and amenity which will meet the anticipated floor space needs of the development for the foreseeable future. This objective is achieved notwithstanding the exceedance of the FSR standard.

(c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,

Response: I confirm that Warringah DCP does not identify any desired future character for the Forestville locality in relation to building bulk and scale. I also note that no FSR standard applies to development on this particular land.

As previously indicated, 2251m² of independent living unit floor space is located immediately above the proposed registered Club. That is, the independent living unit pavilions located on the northern portion of the site provide for a compliant FSR of 0.5:1 with the non-compliant residential floor space located within the Club building.

The development is relatively unique in that it involves the construction of a new RSL Club and independent living units on the same site. The non-compliant floor space is located above the Club building being a land use permissible with consent on the land and which would ordinarily display built form characteristics disparage to those anticipated for detached dwelling housing within a low density residential zone.

Further, it is considered that the bulk and scale of the club building is consistent with the desired character of the locality have regard to the permissibility of an RSL Club on the land. That is the overall bulk and scale of the Club building will not be perceived as inappropriate or jarring in a streetscape or broader urban context having regard to the long established RSL Club use on the site.

In my opinion the size and geometry of the allotment facilitates the contextually appropriate distribution of the quantum of floor space proposed ensuring that the buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality in terms of streetscape, building form, landscaping and residential amenity outcomes.

This objective is achieved notwithstanding the exceedance of the FSR standard.

(d) to manage the visual impact of development when viewed from public spaces,

Response: The public domain facing building façades been appropriately articulated and modulated to achieve a complimentary and compatible streetscape presentation consistent with that reasonably anticipated on the land given its long established RSL Club land use.

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 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.

In forming this opinion, I rely on the following montage images.

Figure 1 – Montage of Club building as viewed from Melwood Avenue

Figure 2 – Montage of ILU's as viewed from Melwood Avenue

This objective is achieved notwithstanding the exceedance of the FSR standard.

(e) to maximise solar access and amenity for public areas.

Response: The accompanying shadow diagrams demonstrate that public areas are not unreasonably overshadowed between 9am and 3pm on 21 June as a consequence of the bulk and scale the development. This is assisted through the adoption of the proposed pavilion style building typology and to that extent solar access and amenity for public areas has been maximised in the design of the development.

This objective is achieved notwithstanding the exceedance of the FSR standard.

I have also given consideration to the following implicit objective:

> *To ensure that buildings, by virtue of their bulk and scale, maintain reasonable amenity to surrounding residential properties.*

In this regard, I am satisfied that the design and orientation of apartments and associated private open space, including the privacy attenuation achieved through a combination of setbacks, fixed privacy screening and landscaping, will prevent direct and immediate overlooking opportunities into the principle living areas and adjacent private open space areas of the adjoining properties. That is the bulk and scale of the building does not contribute to unreasonable privacy impacts.

Further, the shadow diagrams prepared in support of the application demonstrate the maintenance of at least 3 hours of direct solar access to the principal living rooms and adjacent open space areas of all surrounding residential properties. That is the bulk and scale of the building does not contribute to unreasonable shadowing impacts.

I am also satisfied that the proposal, by virtue of its bulk and scale will not result in adverse public or private view affectation.

Finally, I am also satisfied that the adoption of a pavilion form building typology, which maintains generous landscaped setbacks to surrounding development, will not give rise to unreasonable visual impacts by virtue of its bulk and scale. I am satisfied that this implicit objective is satisfied notwithstanding the FSR non-compliance proposed.

Having regard to the above, the proposed building form which exceeds the FSR standard will achieve the objectives/ implicit objectives of the standard to at least an equal degree as would be the case with a development that complied with the FSR standard. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be is 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.

It has been determined that the independent living unit component of the development has a total gross floor area, as defined, of 6745m² representing an FSR of 0.75:1. This represents an exceedance of the FSR standard of 2238m² or 49.65%.

I note that 2251m² of independent living unit floor space is located immediately above the proposed registered Club. That is, the independent living unit pavilions located on the northern portion of the site provide for a compliant FSR of 0.5:1 with the non-compliant residential floor space located within the Club building.

I note that although not relevant to this particular development standard that the overall development across the site including the Club building and independent living units has a GFA of 9008m² representing an FSR of 1:1. Such FSR represents the must not refuse standard applying to a residential care facility within an R2 Low Density Residential zone being a land-use where form follows function as is the case with an RSL Club building.

In this regard, the non-compliant floor space located within/ above the Club building results in a building form not 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.

I note that the proposed overall FSR of 1:1 has been distributed across the consolidated allotment in a manner which results in a complimentary and compatible built form outcome on the site consistent with that anticipated for a residential care facility to which a must not refuse FSR standard of 1:1 would apply. Under such circumstances

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 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 – Achievement of aims of SEPP HSPD

Approval of the variation will better achieve the aims of SEPP (Housing) being to encourage the provision of housing that will:

(a) enable the development of diverse housing types, including seniors housing,
(b) encourage the development of housing that will meet the needs of more vulnerable members of the community including seniors and people with a disability,
(c) ensuring new housing development provides residents with a reasonable level of amenity, and
(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services.

Approval of the FSR exceedance will encourage the provision of housing that will increase the supply and diversity of residences that satisfy the development criteria, standards and design principles specified within SEPP HSPD and on a site that is well serviced by existing infrastructure and public transport services and suitable for this form of development.

Under such circumstances, approval of the FSR exceedance will better achieve the aims of SEPP HSPD as outlined.

Ground 4 - 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 FSR 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 removal of 2238m² of floor space from the development 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 FSR variation will achieve objective (c) of the Act.

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 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 an FSR variation in this instance.

Boston Blyth Fleming Pty Limited

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

24.9.24