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4th April 2022

The General Manager
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Land and Environment Court Proceedings 2021/00230560
Development Application No. DA2021/0008
Clause 4.6 variation request - Clause 40(4)(c) SEPP HSPD - Height in zones where residential flat buildings are not permitted
Demolition and construction of seniors housing
12 - 14 Ponsonby Parade, Seaforth

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to amended plans DA01(F) to DA05(F), DA06(G), DA07(F), DA08(G), DA09(G) and DA10(F) to DA19(F) prepared by Gartner Trovato Architects. It has been prepared for abundant caution given that the clause 40(4)(c) building height provision prescribes that a building located in the rear 25% area of the site must not exceed 1 storey in height in circumstances where the subject development site has dual street frontage and therefore no rear boundary in the usual manner.

For the purpose of this clause 4.6 variation request the rear 25% area of the site has been identified as the rear 25% area of the site relative to the Ponsonby Parade frontage being the primary frontage of the property.

Clause 40(4) of SEPP HSPD does not contain any associate objectives. The implicit objective was considered by the Court in the matter of 'Manderrah Pty Ltd v Woollahra Municipal Council and Anor [2013] NSWLEC 1196 where the implicit objectives were considered by Tuor C. In considering the objective of the development standard, Tuor C concluded (at [70]) the following:

70 The primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties. Placing built form into the rear of a property which generally forms part of its open space and adjoins the open space of other properties to the side and rear can have significant impacts on amenity not only from loss of solar access, privacy and views but also from the presence of increased or new building bulk and the removal of landscaping.'

The conclusion reached by Tuor C has been adopted more recently by Dickson C in 'Jigari Pty Ltd v City of Parramatta Council [2018] NSWLEC 1568'. In this regard, given the consistency in the approach adopted by the Court to determining the objectives for the development standard, the primary objective adopted by Tuor C and Dickson C in the above matters has been adopted.

It has been determined that the northern half of the second storey Apartment 09, Bedroom 2 within Apartment 08 and the common circulation stair and lift at this level extend within the rear 25% area of the site relative to the Ponsonby Parade frontage. The breaching elements are depicted in Figure 1 below to the right of the red line and Figures 2 over page.

Figure 1 - Plan extract DA06(G) depicting the extent of the proposed 2 storey elements extending into the rear 25% area of the subject site, to the right of the red line, relative to the Ponsonby Parade frontage

Figure 2 – Pan extract A07(F) (Elevations) depicting the extent of the proposed 2 storey element extending into the rear 25% area of the subject site

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 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 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 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 40(4)(c) height development standard contained within SEPP HSPD.

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 height of buildings standard at clause 40(4)(c) of SEPP HSPD which specifies a maximum building height 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 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, 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 40(4)(c) SEPP HSPD 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 40(4)(c) SEPP HSPD 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 40(4)(c) SEPP HSPD 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 40(4)(c) of SEPP HSPD?

4.0 Request for variation

4.1 Is clause 4.4 of MLEP 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 40(4)(c) of SEPP HSPD prescribes a height provision that relates to certain development. Accordingly, clause 40(4)(c) of SEPP HSPD 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 height of buildings standard

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

> *The primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties. Placing built form into the rear of a property which generally forms part of its open space and adjoins the open space of other properties to the side and rear can have significant impacts on amenity not only from loss of solar access, privacy and views but also from the presence of increased or new building bulk and the removal of landscaping.*

Response: Having regard to the implicit objective of the clause 40(4)(c) SEPP HSPD standard I make the following observations:

- The Law Insider Dictionary defines Adjoining Properties as follows:

  > *Adjoining Properties means* ***any real property or properties the border of which is (are) shared in part or in whole with that of the Property,*** *or that would be shared in part or in whole with that of the Property but for a street, road, or other public thoroughfare separating the properties.*

- The adjoining properties all have dual street frontage and to that extent the rear of the properties are located adjacent to street frontages rather than the rear of other adjoining properties as generally anticipated by the standard.

- The rear 25% area of the subject site, as depicted hatched at Figure 3 below, overlaps the rear Ross Street fronting yard of No. 10 Ponsonby Parade to the east.

- Further, the rear 25% area of the subject site, at Figure 3 below, overlaps the front yard of No. 9 Ross Street to the west noting that the primary frontage and address of this property is to Ross Street and accordingly the rear boundary would be the southern boundary of this adjoining property.

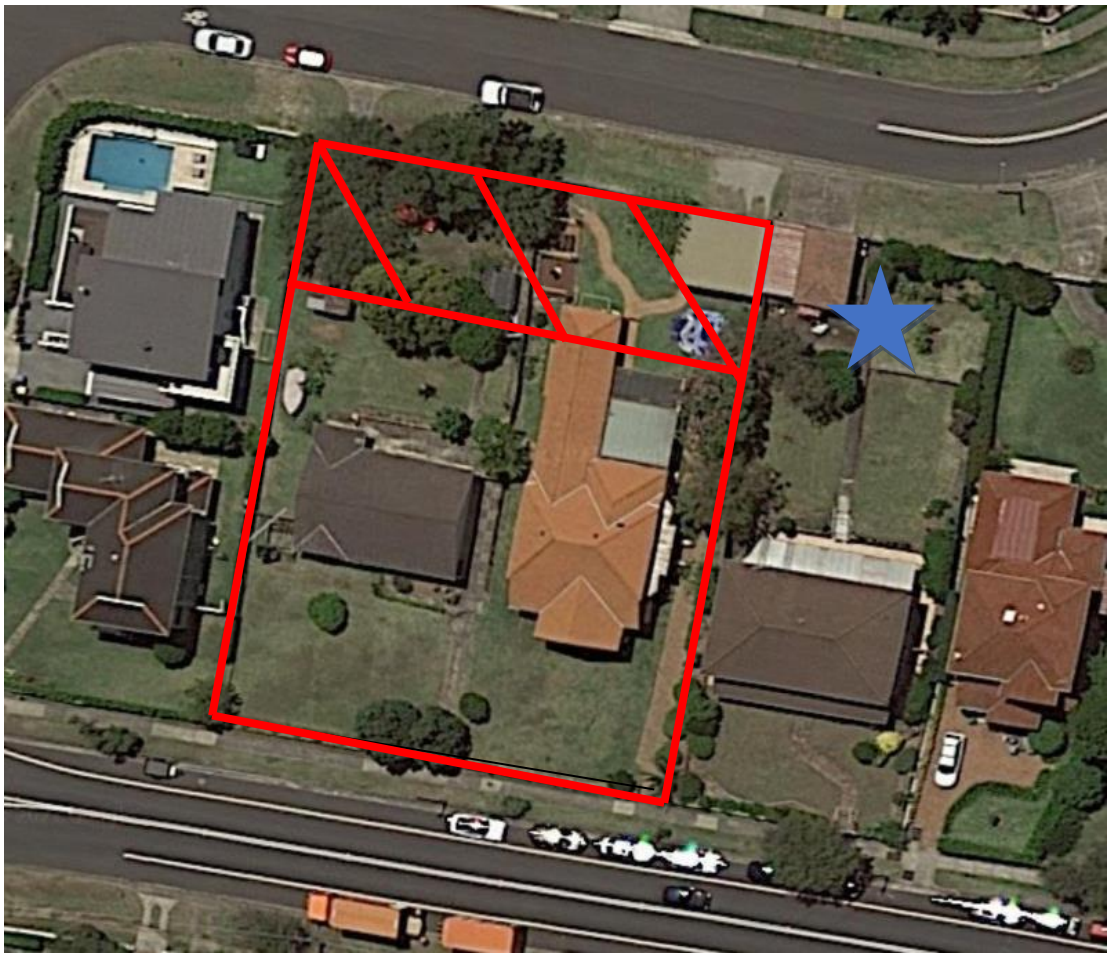


Figure 3 – Rear 25% area of subject site shown hatched together with its relationship to rear open space area of No. 10 Ponsonby Parade shown with a blue star

- I note that the rear 25% site area of No. 10 Ponsonby Parade is occupied by a brick single garage with pitched and tile roof and an adjacent carport located between the garage and the property boundary. I also note the presence of landscape elements located within the rear 25% area of this adjoining property immediately adjacent to the rear 25% area of the subject development site. These existing built form a landscape features are depicted in Figure 4 over page.

Figure 4 - Street view image looking towards the rear of No. 10 Ponsonby Parade depicting the brick single garage with pitched and tile roof, the adjacent carport located between the garage and the property boundary and the landscape elements located within the rear 25% area of this adjoining property beyond

- The shadow diagrams at Attachment 1 demonstrate that the non-compliant second storey building elements proposed within the rear 25% area of the subject property do not overshadow the rear 25% area of the adjoining property at any time between 9am and 3pm on 21st June.

- Having identified potential view corridors from the rear 25% area of the adjoining property I have formed the considered opinion that the non-compliant second storey building elements proposed will not give rise to any scenic view impacts from this portion of the adjoining site.

- In relation to privacy, the non-compliant second storey building element has been designed to maintain a setback of approximately 17 metres from the rear 25% area of the adjoining property to the east as measured from the common boundary to the eastern face of Bedroom 2 within Apartment 08.

- Given such setbacks and intervening landscape elements proposed on the subject site and existing on the adjoining property I am satisfied that the non-compliant second storey building elements located within the rear 25% area of the subject property will not result in unacceptable privacy impacts with appropriate levels of visual and aural privacy maintained.

Having regard to the above, the proposed building form which is non-compliant with the height of building standard, as it relates to the rear 25% area of the site, 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 standard. Given the developments consistency with the objectives of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of MLEP. Dwelling houses are permissible in the zone with the consent of council. 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: Seniors housing is permissible pursuant to SEPP HSPD which effects a rezoning of the land and to that extent anticipates a medium density housing form and building typology in the zone. The proposed development will provide for the housing needs of the community within a low density residential environment consistent with the objective of the zone.

The proposal is consistent with this objective.

- *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 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 height standard has been demonstrated to be unreasonable and unnecessary.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objective. Adopting the first option in *Wehbe* strict compliance with the height of buildings 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

Sufficient environmental planning grounds exist to justify the variation to the height of buildings standard. Those grounds are as follows:

Ground 1 - Design and floor space distribution efficiencies achieved through the consolidation of 2 allotments

Sufficient environmental planning grounds exist to justify the variation including the height and floor space distribution efficiencies achieved through the consolidation of 2 allotments having dual street frontage whereby greater side boundary setbacks than those required through strict compliance with the applicable side boundary setback control can be provided and additional floor space able to be accommodated in the central portion of the consolidated allotment and at first floor level adjacent to Ross Street where it can be distributed in a manner whereby it does not in any significant or unacceptable manner contribute to perceive building bulk and where it will not give rise to unacceptable streetscape, residential amenity or environmental consequences.

I note that the development site has primary frontage and address to Ponsonby Parade with the clause 40(4)(c) single storey within the rear 25% of the site standard contained within SEPPHSPD not anticipating the rear boundary of the site to be a secondary frontage where the associated streetscape is characterised by 2 and 3 storey residential development including the 3 storey seniors housing development located directly opposite the subject site.

In this regard, I am satisfied that notwithstanding the non-compliant building height that the bulk and scale of the development is consistent with both the existing and desired streetscape character of both Ponsonby Parade and Ross Street with the form, massing, landscaping and streetscape presentation of the development to both street frontages reflecting the established subdivision pattern, built form and landscape rhythm in a streetscape context. Further, I am satisfied that the 2 storey portion of the development located within the rear 25% of the site area will not give rise to any unacceptable residential amenity impacts to the rear yard of the adjoining property to the east No. 10 Ponsonby Parade.

Ground 2 - Provision of a complementary and compatible 2 storey building presentation to Ross Street

The development site has primary frontage and address to Ponsonby Parade. Clause 40(4)(c) of the SEPP HSPD restricts development to a single storey within the rear 25% of a site. However, this standard does not anticipate the rear boundary of a site also constituting a secondary frontage. In relation to this development, the subject site's secondary frontage, is the primary frontage for the residential developments on the opposite side of Ross Street, and the associated streetscape on the opposite site of Ross Street is characterised by 2 and 3 storey residential development, including a 3 storey seniors housing development located directly opposite the subject site.

Where a site has a secondary frontage, to the extent that clause 40(4)(c) applies, the standard limiting building height should also be considered in the context of ensuring that the development provides for a complementary and compatible streetscape outcome to the secondary street.

In this regard, a variation to the height standard facilitates the provision of a complementary and compatible 2 storey building presentation to Ross Street with such outcome achieved without giving rise to unacceptable residential amenity impacts.

Ground 3 - Achievement of aims of SEPP HSPD

I note that the North District Plan indicates that there will be a 47% increase in the number of people aged 65 years and older in the next 15 years. In this regard, the proposal will meet a clear and increasing demand for seniors housing on the Northern Beaches enabling existing residents to age in place.

A variation to the building height standard facilitates the provision of additional bedrooms and living room floor space to apartments 8 and 9, which in turn facilitates the development’s ability to achieve the aims of the SEPP HSPD. Approval of the variation will better achieve the aims of SEPP HSPD being to encourage the provision of housing that will:

(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and

(b) make efficient use of existing infrastructure and services, and

(c) be of good design.

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 height 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 185.65m² of floor space from the development in circumstances where the consolidation of the allotments having dual street frontage enables floor space to be located within what would otherwise be the central setback area between the 2 allotments and at first floor level adjacent to Ross Street where it will not give rise to unacceptable streetscape or residential amenity consequences and does not, to any significant or unacceptable extent, contribute to building bulk and scale.

The loss of additional height in the rear 25% of the subject site would not promoted orderly development of the subject site because it is somewhat arbitrary for sites with secondary frontages, in circumstances where the secondary frontage is also a primary frontage for 2 and 3 storey buildings located directly across the road from the subject property. It is also arbitrary because the subject sites could be subdivided in a manner which results in a new lot having a frontage onto Ross Street where the effect of this control would be obsolete.

Approval of the height 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 and streetscape compatibility, a complementary and compatible 2 storey streetscape presentation to Ross Street consistent with the height of the 2 and 3 storey development located directly opposite the site in Ross Street, the maintenance of appropriate residential amenity in terms of views, privacy and solar access and the delivery of housing for seniors and people with a disability consistent with objective (g) of the Act.

For the above reasons 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 40(4)(c) of the SEPP HSPD 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 5th May 2020, 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.

Notwithstanding that the Court can stand in the shoes of the consent authority and assume the concurrence of the Secretary, the Court would be satisfied that the matters in clause 4.6(5) are addressed because the contravention does not raise any matter of significance for regional or state planning given that the height breach does not result in a building form that will give rise to inappropriate or jarring streetscape or residential amenity consequences with the result that there is no public benefit in maintaining the standard in the particular circumstances of this case.

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

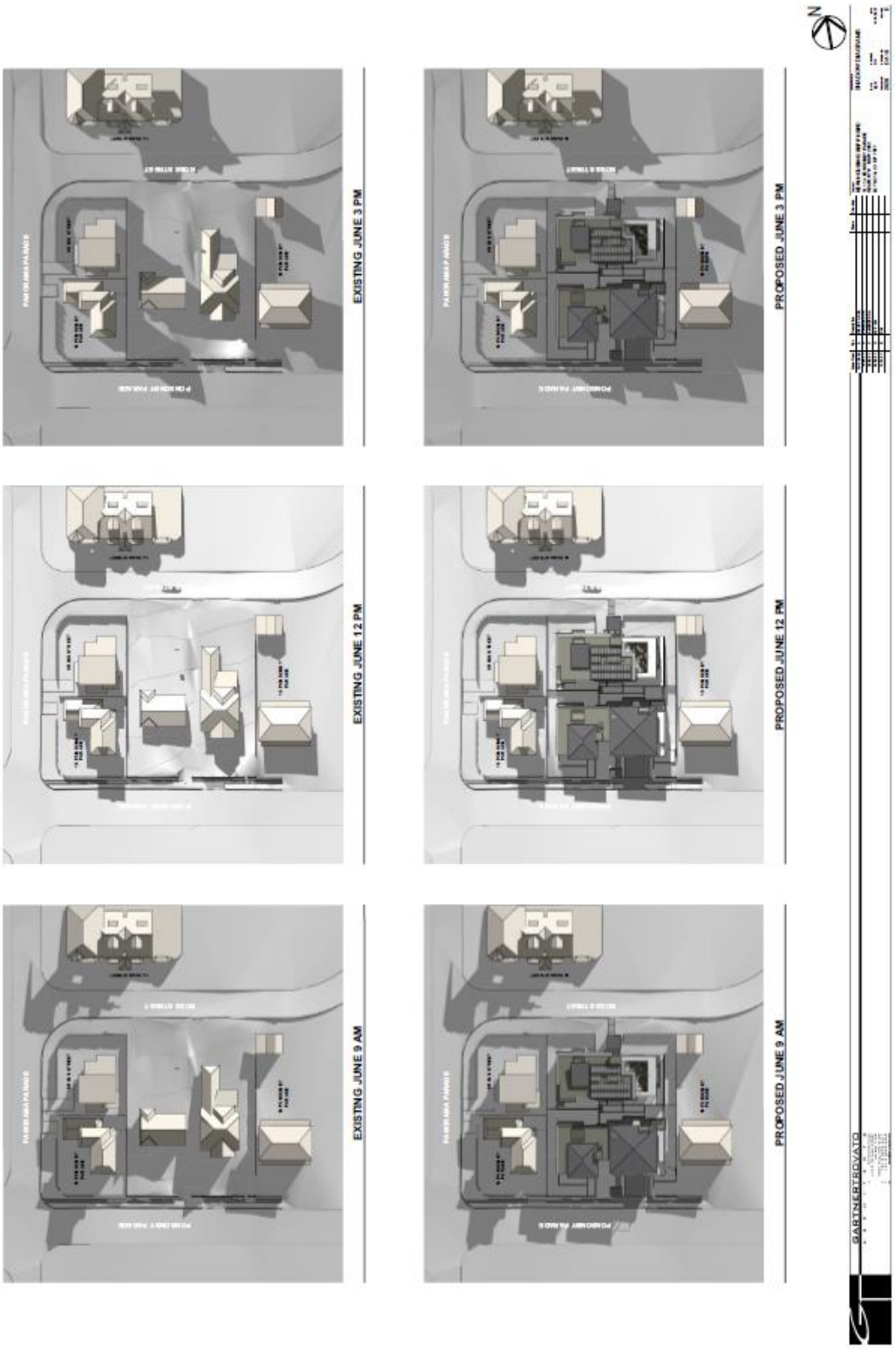
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

Boston Blyth Fleming Pty Limited

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

Attachment 1 Shadow diagrams



Attachment 2 GFA/FSR calculation plan