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4th April 2022

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Land and Environment Court Proceedings 2021/00230560
Development Application No. DA2021/0008
Clause 4.6 variation request – FSR
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 the inconsistency in relation to current case law pertaining to whether a "cannot refuse" provision within a State Environmental Planning Policy (SEPP) prevails in the event of any inconsistency with a prescribed development standard contained within a Local Environmental Plan (LEP) to the extent that no clause 4.6 variation request is required where the "cannot refuse" standard is exceeded.

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 (MLEP)

2.1 Clause 4.4 – Floor space ratio

Pursuant to Clause 4.4 MLEP 2013 the maximum FSR for development on the site is 0.45:1 which based on a site area of 2023m² represents a gross floor area of 910.35m². The stated objectives of this clause are:

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

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

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

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

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

It has been determined that the proposal, as amended, result in a total gross floor area, as defined, on the site of 1096m² as depicted on plan DA11(F) at Attachment 1. This represents a floor space ratio of 0.54:1 and therefore non-compliant with the 0.45:1 MLEP FSR standard by 185.65m² square metres or 20.39%.

2.2 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 4.4 Floor Space Ratio Development Standard.

Clause 4.6(3) of MLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

The proposed development does not comply with the floor space ratio provision at 4.4 of MLEP which specifies a maximum FSR however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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

Clause 4.6(4) of MLEP provides:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 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 4.4 of MLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.4 of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

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

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

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

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

4.0 Request for variation

4.1 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 4.4 MLEP prescribes an FSR provision that seeks to control the bulk, scale and density of certain development. Accordingly, clause 4.4 MLEP 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 floor space ratio standard

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

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

Response: In relation to the existing streetscape character, development in the vicinity of the site is characterised by 1, 2 and 3 storey detached style dwellings with a 2/ 3 storey seniors housing development located directly opposite the subject property at No. 14 Ross Street and the Seaforth Kindergarten and Harbour View Children's Centre both located within the site's Ross Street visual catchment.

This objective relates to streetscape character which, given the R2 Low Density residential zoning of the land, anticipates a building displaying a height of approximately 8.5 metres and a streetscape presentation which reflects the established subdivision pattern and built form rhythm in the street with landscaped setbacks between buildings on characteristically sized allotments.

SEPP HSPD anticipates residential development displaying a different building form to that of detached style housing with the minimum allotment size provisions often necessitating/ encouraging the consolidation of allotments as is the case with the subject application. In such circumstances, buildings need to be appropriately articulated and landscaping incorporated as an integrated component of the development to achieve the desired streetscape character.

In this regard, the proposed building complies with the maximum 8 metre building height, maximum 2 storey and minimum 30% landscaped area/ 15% deep soil landscaped area provisions with 39.6% of the site area available for deep soil landscaping. The Ponsonby Parade facing façade has been articulated through the provision of a generously dimensioned and visually permeable central articulation zone which provides a significant visual break in the form and massing of the development as viewed from the street and within which substantial landscaping can be planted. Similarly, the Ross Street elevation has been appropriately articulated in both the horizontal and vertical planes with deep soil landscape opportunity facilitating significant landscaping adjacent to the street frontage.

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 in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment. The development is compatible with surrounding development with the built form and landscape outcomes enabling development to co-exist in harmony

I am satisfied that the FSR non-compliance arises from the design and floor space distribution efficiencies achieved through the consolidation of 2 allotments having dual street frontage whereby additional floor space can 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 or residential amenity consequences.

In this regard, 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 FSR proposed 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.

This objective is satisfied notwithstanding the non-compliant FSR proposed.

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

Response: The proposal complies with the prescribed landscaped area and deep soil landscape standards as expressed as a percentage of site area within SEPP HSPD with the development not obscuring any important landscape or townscape features.

As previously indicated, I am satisfied that the FSR non-compliance arises from the design and floor space distribution efficiencies achieved through the consolidation of 2 allotments having dual street frontage whereby additional floor space can 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 or residential amenity consequences.

I am satisfied that the development, notwithstanding its FSR non-compliance, achieves this objective.

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

Response: The proposal, as amended, maintains an appropriate spatial and visual built form relationship with surrounding development as detailed in response to objective (a). The proposal complies with the site landscape and deep soil landscape provisions of SEPP HSPD with the landscape regime proposed ensuring the building will sit within a complimentary and compatible landscape setting.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development by virtue of its form or landscape setting offensive, jarring or unsympathetic in a streetscape/ landscape context nor having regard to the built form and landscape characteristics established within the area.

I am satisfied that the development, notwithstanding its FSR non-compliance, satisfies this objective as it maintains an appropriate visual relationship between new development and the existing character and landscape of the area.

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

Response: In responding to this objective. I have adopted views, privacy, solar access and visual amenity as environmental factors which contribute to the use and enjoyment of adjoining public and private land.

Views

Based on the objections received in response to Council's notification of the original application consideration has been given to potential view impacts from Units 2, 5 and 7 within the senior's housing development at No. 14 Ross Street and the dwelling house at No. 9 Ross Street.

Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140, as they relate to an assessment of view impacts, I have formed the following opinion:

Unit 2/14 Ross Street

Step One

Occupants of the dwelling at 2/14 Ross Street currently enjoy views of Middle Harbour and Middle Head in a south-easterly direction. The views encompass Chinaman's Beach, a portion of Balmoral Beach and Middle Head.

Step Two

The views are obtained across the side boundary from balconies on the eastern elevation of the dwelling in both a seated and standing position. The balconies are located adjacent to the primary living room and master bedroom. No other views are available to occupants of this dwelling.

Step Three

The impact of the development upon this view is demonstrated in the image below. The upper floor of the proposed development will obstruct a portion of Spit Hill with the balance of the view maintained. The impact upon the views currently enjoyed from 2/14 Ross Street is considered to be negligible.

2/14 Ross Street - View from balcony adjacent to living room

Step Four

Despite contravention of FSR standard, the proposed impact upon views currently enjoyed from 2/14 Ross Street is not unreasonable.

5/14 Ross Street

Step One

Occupants of the dwelling at 5/14 Ross Street currently enjoy views of Middle Harbour and Middle Head in a south-easterly direction. The views encompass Chinaman's Beach, a portion of Balmoral Beach and Middle Head as depicted in the photograph below.

5/14 Ross Street - View from balcony adjacent to living room (depicting superseded height poles)

Step Two

The views are obtained over the front boundary from the front south-facing balcony and the living room/dining room windows on the southern elevation. Views are also obtained over the side boundary from a balcony on the eastern side of the dwelling. Both balconies are located adjacent to the primary living/dining room. No other views are available to occupants of this dwelling.

Step Three

The impact of the development upon this view is demonstrated in the photomontage image over page. Based on this photomontage the upper floor of the development will have negligible impact upon this primary water view with overall obstruct the heavily vegetation filtered views to the right of the photograph. Such view impact is considered to be negligible.

5/14 Ross Street - Photomontage showing retained view from balcony adjacent to living room

Step Four

Despite contravention of FSR standard, the proposed impact upon views currently enjoyed from 5/14 Ross Street is not unreasonable.

7/14 Ross Street

Step One

Occupants of the dwelling at 7/14 Ross Street currently enjoy filtered views of Middle Harbour and Middle Head in a south-easterly direction.

Step Two

The views are obtained across the front boundary from the front south-facing balcony and the kitchen/dining room window on the southern elevation in a seated and standing position. The balcony is located adjacent to the primary living/dining room. Views of the North Sydney and Chatswood skylines are also available from the front south facing balcony.

Step Three

The impact of the development upon this view is demonstrated in the image over page. The timber height pole depicting the eastern elevation of the upper floor and eave is just evident to the left of the pine tree in the centre of the image.

Based upon this height pole, the enclosed floor space of the upper floor of the development will impact upon a heavily filtered portion of the view to the right of the pole, however the primary view corridor to the left will be preserved. As such, the resultant impact is considered to be minor.

7/14 Ross Street - View from kitchen/dining room window

Step Four

Despite contravention of FSR standard, the proposed impact upon views currently enjoyed from 7/14 Ross Street is not unreasonable.

9 Ross Street

Step One

Occupants of the dwelling at 9 Ross Street currently enjoy views of Middle Harbour and Middle Head in a south-easterly direction as depicted in the image over page.

9 Ross Street - View from balcony/dining room (standing)

Step Two

The views from 9 Ross Street are obtained from the dining room and balcony in the south-east corner of the upper floor over the common side boundary. The views are currently enjoyed from both a seated and standing position. Views of the North Sydney and Chatswood skylines are also available from the south-west facing windows of the upper floor living room.

Step Three

The impact of the development upon the Middle Harbour view is demonstrated in the photomontage over page. The montage demonstrates that the majority of the view corridor is maintained from a standing position, with the obstruction of approximately half of the view corridor in a seated position. Noting that Tenacity outlines that the expectation to retain views over side boundaries and from a seated position is often unrealistic, and as the views are largely maintained from a standing position, the impact is considered to be moderate. I also note that the view sharing provisions at clause 3.4.3 of Manly Development Control Plan requires view loss to be assessed from a standing position.

9 Ross Street - Photomontage showing retained standing view living room door threshold

Step Four

Despite contravention of FSR standard, the proposed impact upon views currently enjoyed from 9 Ross Street is not unreasonable given the development's compliance with the applicable height standard and the maintenance of a generous side boundary setback to the common boundary with this particular property.

Having reviewed the detail of the application I have formed the considered opinion that, notwithstanding the FSR non-compliance, that view impacts have been minimised through skilful, contextually responsive design which appropriately distributes floorspace across the site to achieve a view sharing outcome between properties in accordance with the clause 3.4.3 MDCP control and the principles established in the matter of Tenacity Consulting Pty Ltd v Warringah Council [2004] NSWLEC140 and Davies v Penrith City Council [2013] NSWLEC 1141.

Having identified scenic views available from Ponsonby Parade and Ross Street, I have also formed the opinion that the contextually responsive and compatible 2 storey building presentation to both street frontages, which complies with the applicable building height and storeys standards, minimises adverse environmental impacts, including impacts on public views.

Notwithstanding the FSR non-compliance, the proposal achieves the objective of minimising adverse environmental impacts in terms of both public and private views.

Privacy

I note that all surrounding properties are orientated to the south to take advantage of available views with both principal living and private open space areas primarily orientated towards both street frontages and the internalised courtyard area of the development.

Given the spatial separation maintained to surrounding properties I am satisfied that the design, although non-compliant with the FSR standard, minimises adverse environmental impacts in terms of privacy and therefore achieves this objective.

Solar access

The accompanying shadow diagrams (Attachment 2) demonstrate that the building, although non-compliant with the FSR standard, will not give rise to any unacceptable shadowing impact to surrounding development between 9am and 3pm on 21st June with adverse shadowing impacts minimised to the extent that the use and enjoyment of the adjoining land is not unreasonably compromised.

The objective is satisfied notwithstanding the non-compliant FSR proposed.

Visual amenity/ building bulk and scale

As indicated in response to objective (a), I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape, landscape and residential amenity outcomes.

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 in a streetscape context nor having regard to the built form characteristics established by development within the site's visual catchment.

I have formed the considered opinion that the building, notwithstanding the FSR non-compliance, achieves this objective through skilful design that minimises adverse environmental impacts on the use and enjoyment of adjoining land and the public domain.

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

Response: This objective is not applicable.

Having regard to the above, the proposed building form which is non-compliant with the FSR standard 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 FSR standard. Given the developments consistency with the objectives of the FSR 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 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 the consolidation of 2 allotments

Sufficient environmental planning grounds exist to justify the variation including the design 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.

In this regard, 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 FSR proposed 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.

I also note that the floor space efficiencies created through the consolidation of the development sites as outlined above represents 168m² of floor space as depicted on plan DA11(F) (Attachment 1) with such quantum of floor space consistent with the 185.65m² of non-compliant floor space proposed.

Ground 2 – 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.

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.

The SEPP states that these aims will be achieved by:

(a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and

(b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form,

In this regard, the proposal satisfies the development criteria and standards specified in SEPP HSPD noting that the clause 50(b) density and scale standard, which prescribes a threshold FSR standard of 0.5:1, is a “cannot refuse” standard rather than a development standard to which clause 4.6 applies. Accordingly, SEPP HSPD anticipates development with an FSR exceeding 0.5:1 where the design principles at clause 33 – 39 of SEPP HSPD are satisfied.

I note that the proposal satisfies the Part 3 Division 2 Design Principles at clause 33 – 39 of SEPP HSPD notwithstanding the FSR variation proposed.

Approval of the FSR variation 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.

In this regard, I note that on 11th December 2019 the Land and Environment Court of New South Wales granted approval for a development application proposing seniors housing on No. 14 Ponsonby Parade having an FSR exceeding 0.5:1 when calculated pursuant to SEPP HSPD and in excess of 0.45:1 when calculated pursuant to MLEP (*Vimresh Pty Limited V Northern Beaches Council [2009] NSWLEC 1613*).

I am of the opinion that the development is of exceptional design quality with the FSR proposed distributed in a contextually appropriate manner and where it will not give rise to unacceptable streetscape, residential amenity or environmental consequences.
Under such circumstances, approval of the FSR variation will better achieve the aims of SEPP HSPD as outlined.

Ground 3 - 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 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.

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.

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.

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone;* ***and***

- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.

That is, approval of the variation will increase the supply and diversity of residences of good design that meet the needs of seniors or people with a disability in circumstances where additional floor space is able to be distributed on this particular consolidated allotment in a manner where the bulk and scale of the development is consistent with both the existing and desired streetscape character 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.

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

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

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

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

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

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

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

4.4 Secretary's concurrence

By Planning Circular dated 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 FSR 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.

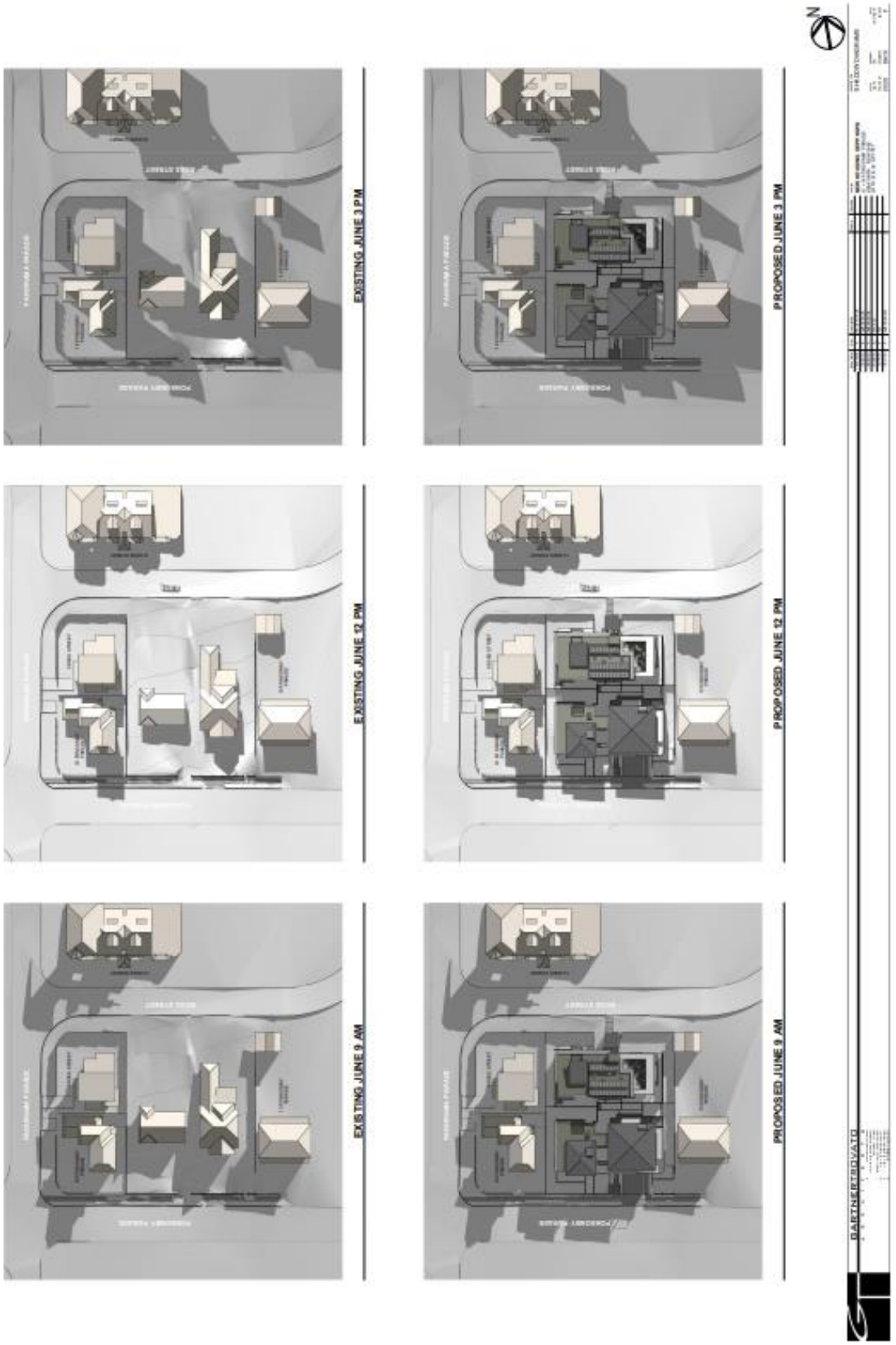
As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

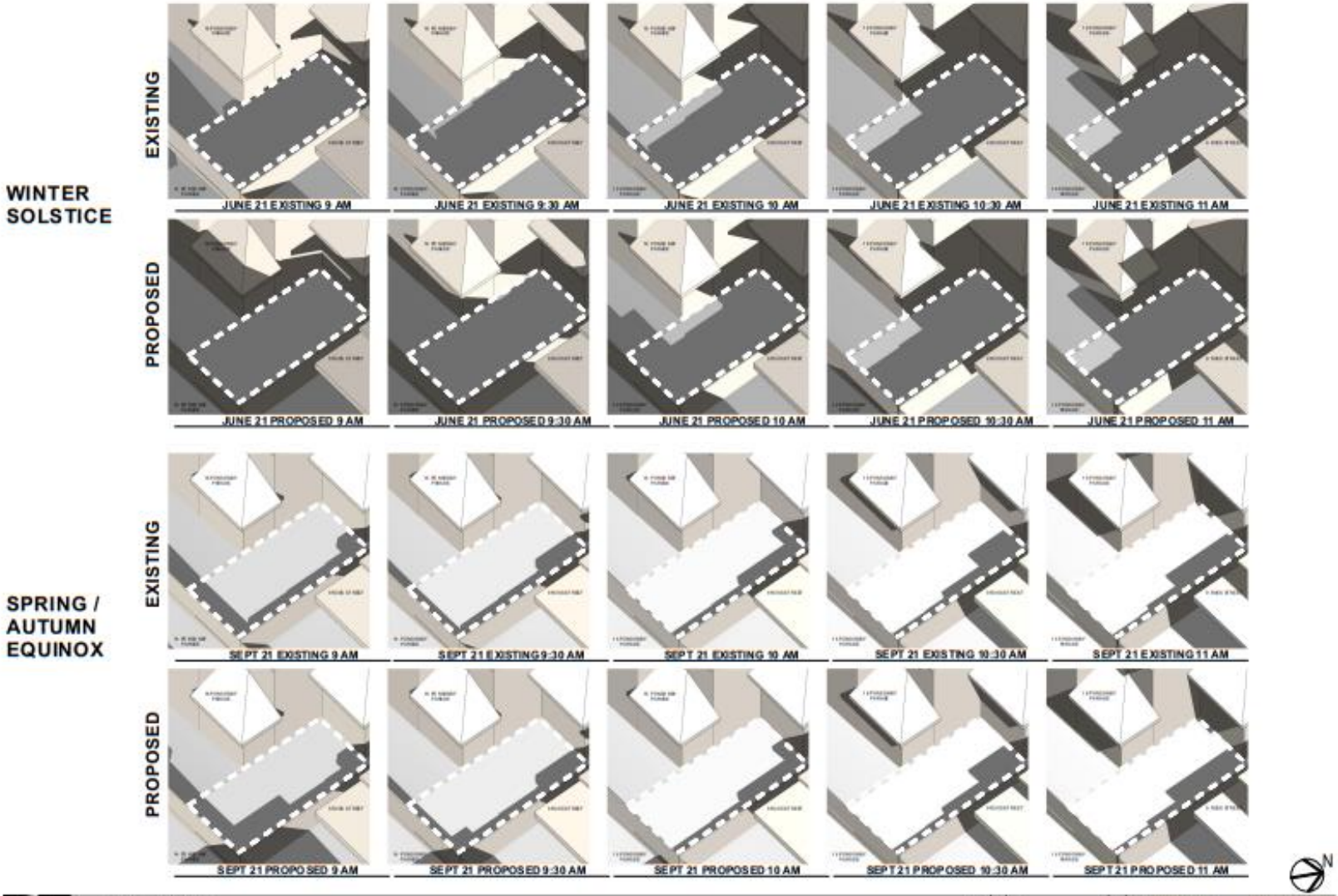
Boston Blyth Fleming Pty Limited

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

Attachment 1 GFA/FSR calculation plan

Attachment 2 Shadow diagrams

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