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29th April 2022

Land and Environment Court Proceedings 2021/00362068
Updated clause 4.6 variation request – Clause 40(3) SEPPHSPD
Proposed Seniors Housing
4 Alexander Street, Collaroy

1.0 Introduction

This updated clause 4.6 variation request has been prepared having regard to plans DA100(D), DA101(C) – DA103(C), DA200(C), DA201(C), DA300(C), DA301(A), DA504(C) - DA506(C) and DA532(A) prepared by PBD Architects.

The document has been prepared in support of a variation to the clause 40(3) SEPP HSPD development standard relating to site frontage.

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 for Seniors or People with a Disability) 2004 (SEPP HSPD)

2.1 Clause 40(3) SEPP HSPD

Pursuant to clause 40(3) SEPP HSPD the site frontage must be at least 20 metres wide measured at the building line.

Whilst there is no stated objective associated with this standard, it is considered that the implicit objective is to ensure that the property is of sufficient width, measured at the front building line, to accommodate a senior's housing development maintaining contextually compatable side boundary setbacks.

In this regard, the subject site has a width measured at the front building alignment of the development of 19.81 metres representing a non-compliance of 190mm or 2.2%.

I note that the property width increases to a compliant 24.405 metres at a point located 14.45 metres into the subject property with the non-compliant portion of the property width, measured at the front building alignment of the development, located adjacent to a driveway located on the immediately adjoining properties to the east. The location and extent of site frontage width non-compliance is depicted in Figure 1 below.

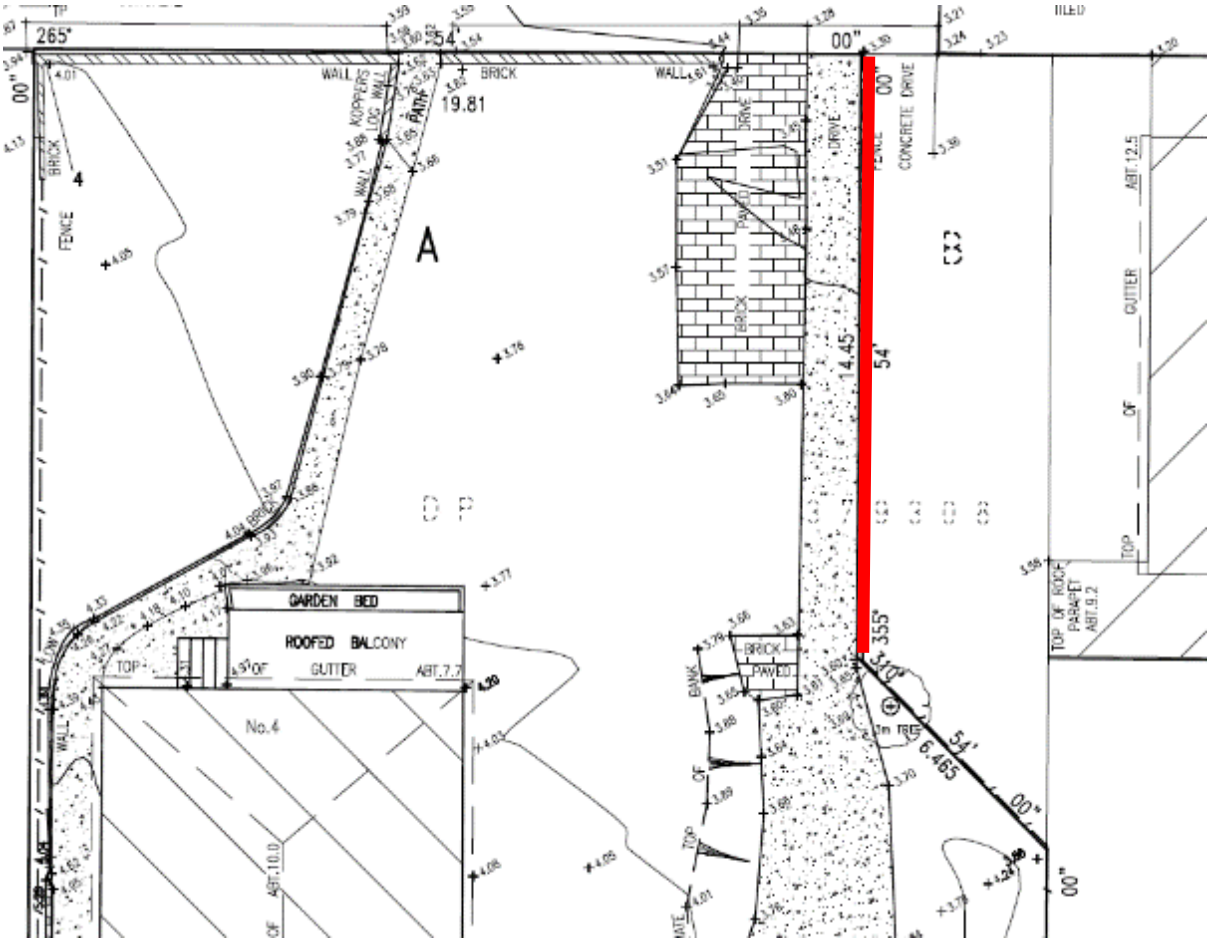

Figure 1 – Survey extract showing the extent and location of the 190mm non-compliant site frontage width where the property width is 19.81 metres instead of the required 20 metres before widening to 24.405 metres at a point approximately 14.45 metres into the site.

I note that the standard requires the site frontage to be at least 20 metres wide measured at the building line which is reasonably taken to be the front façade alignment of any proposed building located on the subject property. In this regard, the 190mm or 2.2% site frontage variation is limited to the portion of the development depicted in Figure 2 over page being the area of the site beyond the front building/façade alignment having a width of less than 20 metres.

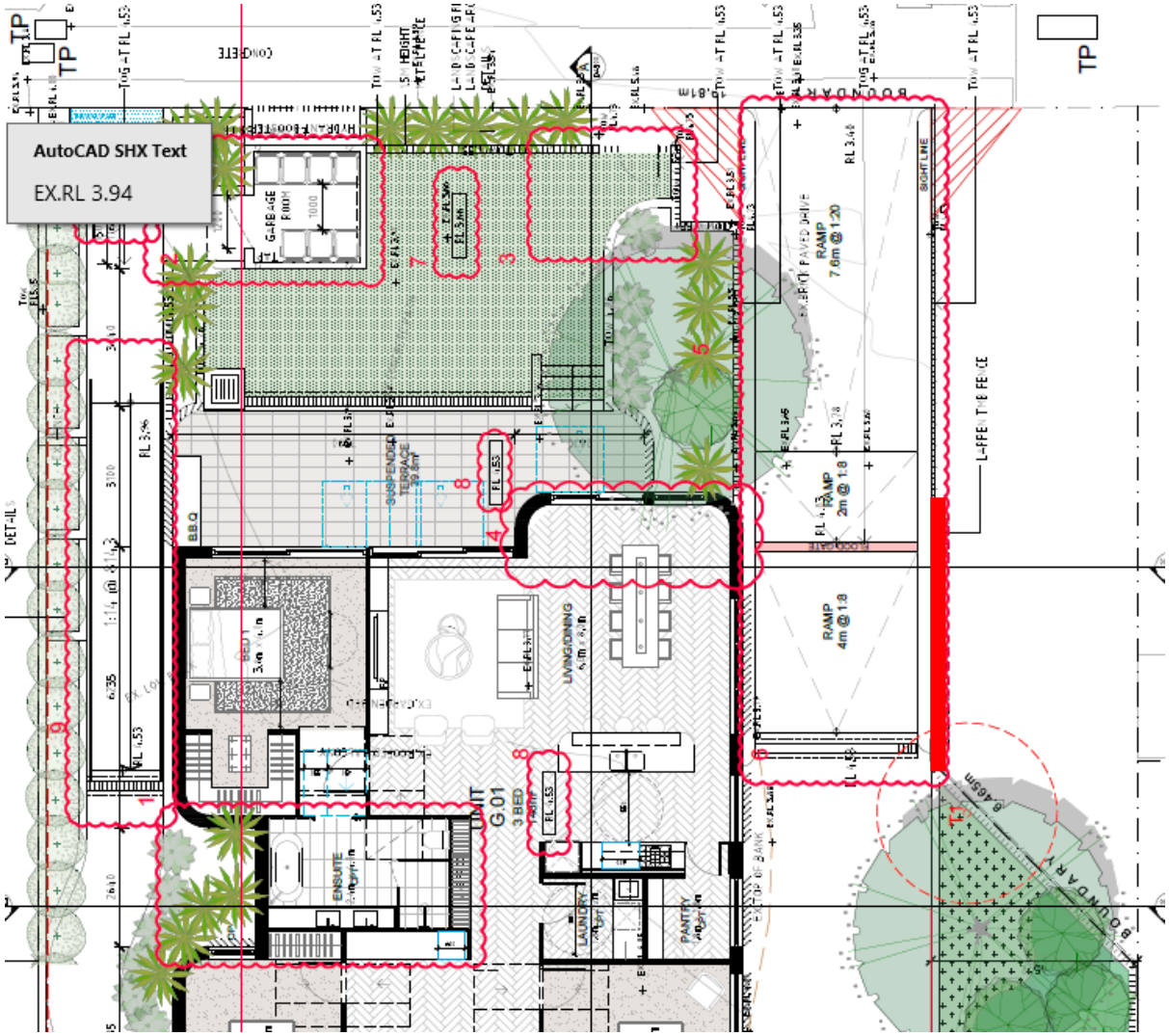

Figure 2 – Plan extract showing the extent and location of the 190mm non-compliant site frontage width being the area of the site beyond the front building/façade alignment having a width of less than 20 metres.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 40(3) site frontage development standard contained within SEPP HSPD.

Clause 4.6(3) of HLEP 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 site frontage standard at clause 40(3) of SEPP HSPD which specifies a minimum site frontage width of 20 metres measured at the building line 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:

(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 WLEP 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(3) 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(3) 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(3) 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(3) of SEPP HSPD?

4.0 Request for variation

4.1 Is clause 40(3) of SEPP HSPD 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(3) of SEPP HSPD prescribes a minimum site frontage width that relates to certain development. Accordingly, clause 40(3) 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 implicit objective of the site frontage standard

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

Whilst there is no stated objective associated with this standard, it is considered that the implicit objective is to ensure that the property is of sufficient width, measured at the front building line, to accommodate a senior's housing development maintaining contextually compatable side boundary setbacks.

I note that the standard requires the site frontage to be at least 20 metres wide measured at the building line which is reasonably taken to be the front façade alignment of any proposed building located on the subject property. In this regard, the 190mm or 2.2% site frontage variation is limited to the portion of the development depicted in Figure 2 being the area of the site beyond the front building/façade alignment having a width of less than 20 metres.

In relation to the acceptability of the proposed setbacks on the non-compliant width portion of the site the plan extracts at Figure 3 and 4 over page demonstrate that the development maintains a minimum setback of 3 metres to the western side boundary and approximately 4 metres to the eastern side boundary. These setbacks are in well in excess of the minimum 900mm side boundary setback control applicable to permissible forms of development in the R2 Low Density Residemtial zone with the proposed building form on the non-compliant site frontage width portion of the site also compliant within the applicable side boundary envelope control as depicted in Figure 5 over page.

Under such circumstances, I am satisfied that the side boundary setbacks, notwithstanding the non-compliant allotment with on this portion of the site, are contextually appropriate and will not give rise to any unacceptable or jarring streetscape or residential amenity impacts given compliance with the setback and building envelope controls and associated objectives applicable to permissible forms of development in the R2 Low Density Residemtial zone.

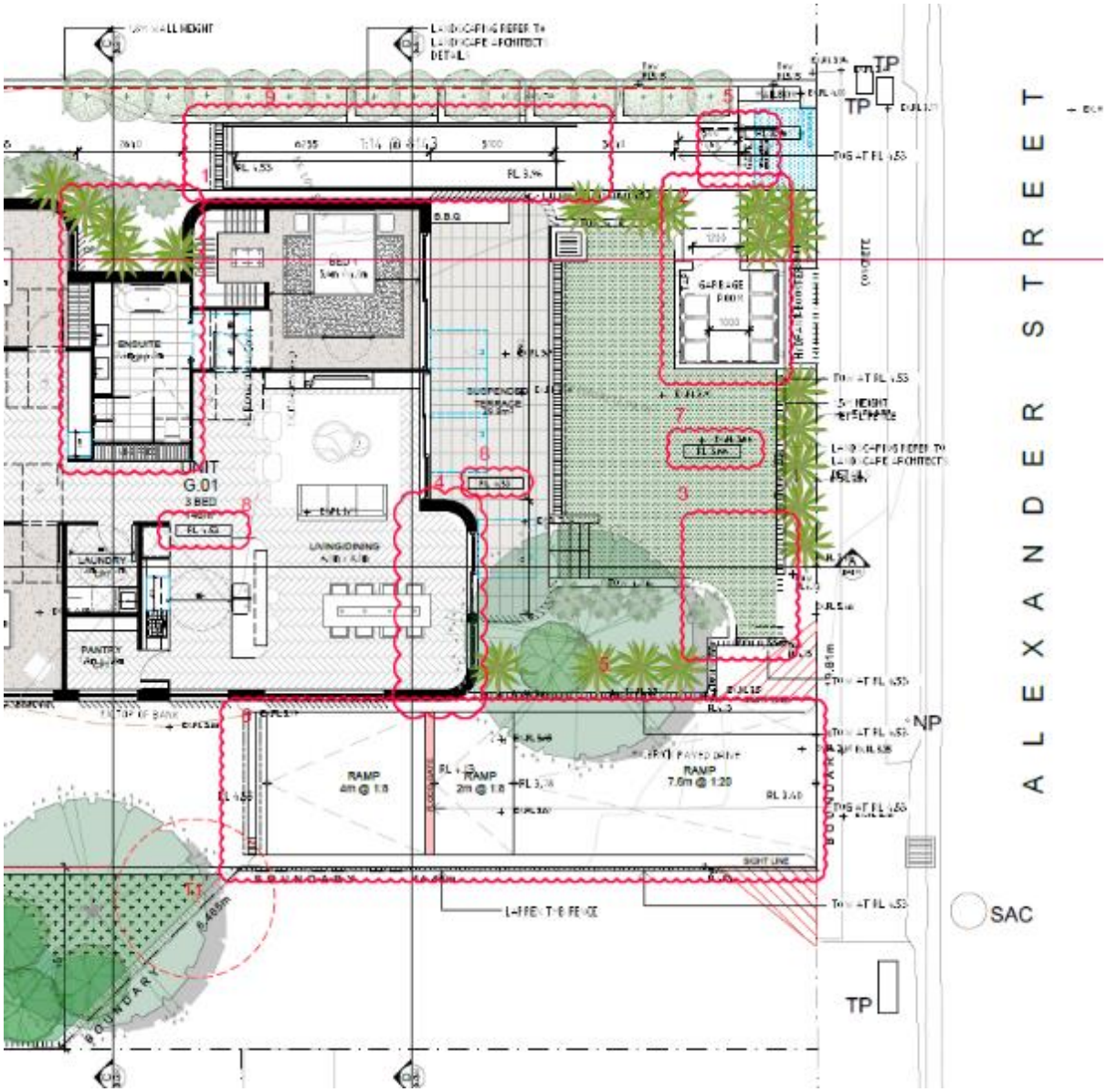

Figure 3 – Plan extract showing contextually appropriate ground floor level side boundary setbacks to both immediately adjoining properties

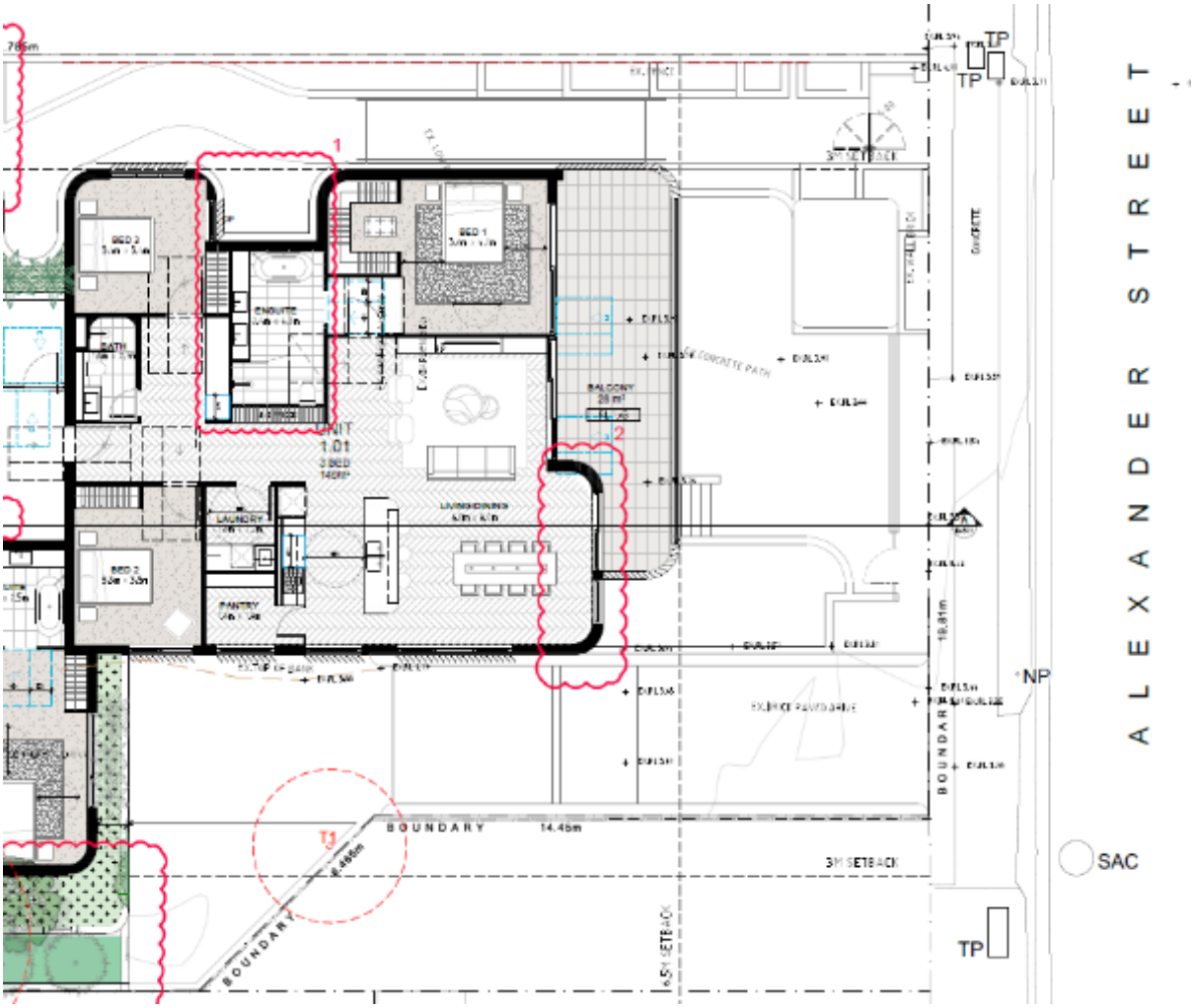

Figure 4 – Plan extract showing contextually appropriate first floor level side boundary setbacks to both immediately adjoining properties

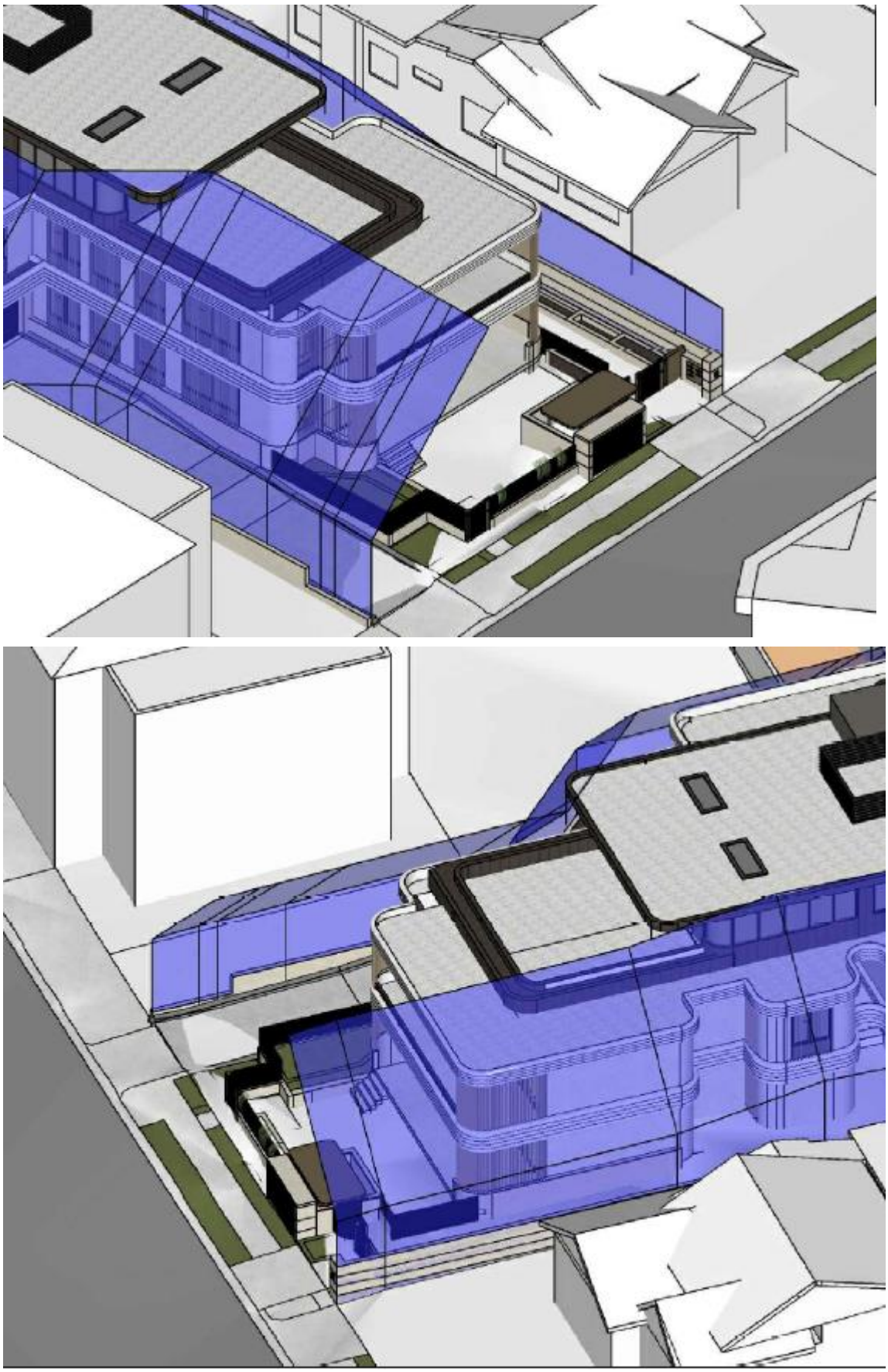

Figure 5 – Side boundary envelope blanket diagram extracts showing the developments compliance with the side boundary envelope control on the portion of the site having a width of less than 20 metres

The proposal achieves the implicit objective notwithstanding the minor variation to the 20 metre site frontage standard.

Consistency with zone objectives

The subject property is zoned Residential R2 Low Density Residential pursuant to WLEP. An assessment as to the consistency of the development against the zone objectives as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: The proposal provides housing which will meet the needs of seniors or people with a disability within the community within a low density residential environment. The proposal achieves this objective notwithstanding the minor variation to the 20 metre site frontage standard.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: Not applicable.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Response: The proposal provides a compliant quantum of landscaped area, as defined, with sufficient side boundary setbacks to provide for a landscaped setting that is in harmony with the natural environment of Warringah. The proposal achieves this objective notwithstanding the minor variation to the 20 metre site frontage standard.

The non-compliant component of the development, as it relates to site frontage, demonstrates consistency with objectives of the R2 Low Density Residential zone and the implicit objective of the site frontage standard. 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 site frontage standard. Those grounds are as follows:

Ground 1

Objective 1.3(c) of the Environmental Planning and Assessment Act 1979 is:

> *"to promote the orderly and economic use and development of land,"*

Strict compliance with the site frontage standard would require the front building alignment/ facade to be setback approximately 14.6 metres from the front boundary of the property where the site widens to a minimum width of 20 metres.

This would result in a significant reduction in floor space and an incompatibility in terms of the maintenance of a contextually appropriate front building setback alignment in circumstances where the variation is appropriately described both quantitatively and qualitatively as minor and where the site is ideally suited to this form of development given its immediate proximity to the Collaroy Beach Local Centre and the B-Line bus service.

The minor non-compliance is appropriately assessed having regard to the overall width of the allotment which increases to 24.405 metres at a point located 14.45 metres into the subject property where such width is in excess of the minimum required.

Under such circumstances, strict compliance would not promote the orderly development of the land.

Ground 2

Objective 1.3(g) of the EP&A Act is:

> *"to promote good design and amenity of the built environment,"*

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

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 the clause 40(3) SEPP HSPD site frontage development standard 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 is consistent with the objectives of the development standard and the objectives for development in 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 implicit 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.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in 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 considered opinion that there is no statutory or environmental planning impediment to the granting of a site frontage variation in this instance.

Boston Blyth Fleming Pty Limited

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Director