Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768
t (02) 9986 2535 • f (02) 99863050 • www.bbfplanners.com.au
Boston Blyth Fleming
Town Planners

27th August 2021

Land and Environment Court case number 2020/306306
Clause 4.6 variation request – Floor Space Ratio
Adaptive reuse of the Drummoyne Reservoir as a centre-based child care facility involving alterations and additions to the existing reservoir building together with the construction of a new building to the eastern component of the site with basement car parking
Lot 13, 14, 15 and 16 in DP 455626, Drummoyne Reservoir

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to Architectural plans A00.00(F) to A00.05(F), A01.01(F) to A01.22(F), A01.15b(G), A02.01(F) to A02.09(F), A03.01(F) to A03.04(F), A04.01(F) to A04.05(F), A05.01(F) to A05.07(F), A06.01(F), A07.01(F) to A07.04(F), A08.01(F) to A08.03(F) and A09.01(F) prepared by Milton Architects.

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

2.0 Canada Bay Local Environmental Plan 2013 (CBLEP)

2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of Canada Bay Local Environmental Plan 2013 (CBLEP) the maximum floor space ratio for a building on the subject land is 0.5:1. The objectives of this control are as follows:

(a) *to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality,*

(b) *to provide a suitable balance between landscaping and built form,*

(c) *to minimise overshadowing of, and loss of privacy to, neighbouring properties,*

(d) *to maximise solar access and amenity for public places,*

(e) *to manage the visual impact of development when viewed from public places, including the Parramatta River.*

In calculating the gross floor area of the development, consideration has been given to the standard template definition of gross floor area and the findings in the matter of *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney [2015] NSWLEC 1521*. In these proceedings the Court held that *the floor area inside corridors/breezeways:*

- *open at both ends, including a wall of fixed open louvers; and*
- *that were exposed to the elements such as rain during inclement weather,*

were to be excluded from the calculation of GFA.

In this regard, in calculating the gross floor area of the reservoir structure only the areas at each level of the building which are generally open to the sky, and not covered by overhanging building elements associated with the floor levels above, and therefore exposed to the elements such as rain during inclement weather, have been excluded. It has been determined that the gross floor area of the development is as follows:

The Reservoir

Level 1 (ground floor)	285m²
Level 2	66m²
Level 3 (136 + 194 + 29)	359m²
Level 4 (136 + 141 + 5)	282m²
Level 5 (136 + 138)	274m²
Total GFA	1266m²

Based on a site area of 1810m² the Reservoir component of the development has an FSR of 0.69:1.

The Annex

Level 1 (ground floor)	152m²
Level 2	145m²
Total GFA	297m²

Based on a site area of 1810m² the Annex component of the development has an FSR of 0.16:1.

In this regard, it has been determined that the overall development has a combined GFA of 1563m² representing an FSR of 0.86:1.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of CBLEP 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 CBLEP provides:

> *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 CBLEP Floor Space Ratio Development Standard.

Clause 4.6(3) of CBLEP provides:

> *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 provision at 4.4 of CBLEP which specifies a maximum floor space ratio 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 CBLEP provides:

> *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 Planning Secretary 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 CBLEP 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 CBLEP 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 CBLEP 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 CBLEP 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 CBLEP?

4.0 Request for variation

4.1 Is clause 4.4 of CBLEP a development standard?

The definition of "development standard" at section 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

Clause 4.4 CBLEP prescribes a maximum floor space ratio that seeks to control the bulk and scale of certain development. Accordingly, clause 4.4 CBLEP is a development standard.

4.2 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 objectives of the standard is as follows:

> *(a) to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality,*

Response: The existing State heritage listed reservoir and tower structures contribute to the established built form and land use character of the area and given their heritage listing reflect the desired future character of the locality as it relates to this particular site. The subject property is located within the Bourketown Heritage Conservation Area (HCA) with the statement of significance for the conservation area contained at Appendix 1, Part CA.2 of the Canada Bay Development Control Plan (CBDCP) containing the following future character statement:

> The future character for this large and mixed area is principally to retain the strong overall heritage urban character of the streets with their mix of one and two storey houses on lots of mixed size.
>
> Existing building stock is predominantly Victorian and Edwardian with some Inter-war pockets of housing and these characters should be retained. Buildings built prior to the Second World War should not be demolished and new buildings should retain the scale and overall character of the immediate area as it relates to bulk, form and use of materials. Given the large lot sizes for much of the area, additions and new buildings can be in a range of forms including good contemporary design with the emphasis on 'fit' into the setting. Garages and carports should not be added in front of the building line.

In relation to the height, bulk and scale anticipated within the HCA by the future character statement I make the following key observations:

- The future character relates principally to the retention of the strong overall heritage urban character of the streets with a mix of one and two storey buildings.

- New buildings should retain the scale and overall character of the immediate area as it relates to bulk, form and use of materials.

- New buildings can be in a range of forms including good contemporary contextually responsive building design.

Objective (a) of the FSR standard therefore seeks to ensure that buildings are compatible with the bulk, scale and streetscape of the desired future character of the locality including existing heritage items and buildings which contribute to the overall heritage urban character of the street it being noted that new contemporary buildings are anticipated where they retain the scale and overall character of the immediate area in relation to bulk, form and use of materials and where they achieve an contextually responsive built form "fit".

The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

> 22 *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

The question is whether the resultant bulk and scale, as reflected by the non-compliant FSR, contributes to the bulk and scale of the development to the extent that the resultant building forms will be incompatible with the bulk, scale and streetscape of the desired future character of the locality. That is, will the non-compliant FSR result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

In relation to the GFA/ FSR calculation I note that strict compliance with the FSR standard could be achieved by deleting the floor space proposed within the existing tank structure. The proposed development would be limited to the new building on the site "The Annex" having a gross floor area of 297m² and the floor space proposed below the existing tank structure at proposed Level 1 (285m²) and Level 2 (66m²). This would result in a total gross floor area of 648m² representing a compliant FSR of 0.35:1.

Under such circumstances, strict compliance could be achieved without any material change in the height, bulk, scale and general massing of the development proposed on the site noting that the non-compliant floor space is located wholly within the existing tank structure.

That said, the purpose-built child care "Annex" has a gross floor area of only 297m² representing an FSR of 0.16:1. This two storey contemporary building form is compatible with the strong overall heritage urban character of the streets and the buildings which establish the desired future character of the HCA. The contemporary building form retains the scale and overall character of the immediate area as it relates to bulk, form and the use of face brick.

To the extent that the purpose-built child care building contributes to the FSR non-compliance across the entire site, the bulk and scale and streetscape presentation of this new contemporary building element is compatible with the bulk, scale, streetscape and desired future character of the locality and compatible with the bulk and scale and streetscape presentation of the existing heritage listed reservoir and tower structures as depicted in figure 1 over page.

Accordingly, it can be reasonably demonstrated that the FSR non-compliance arises through the desire to adaptively reuse the existing reservoir and tower structures through the provision of floor space within the existing tank with the additional floor space associated with the purpose-built child care building facilitating the orderly and economic use and development of land.

This built form outcome is depicted in Figure 1 over page.

Figure 1 – Montage demonstrating the compatibility of the purpose-built child care facility building with the existing heritage listed reservoir and tower structures in terms of bulk and scale

Notwithstanding the non-compliant FSR, as reflected by the floor space proposed within the existing tank structure, I am satisfied that the height, bulk and scale of the existing reservoir and tower structures, together with the height bulk and scale of the proposed purpose-built child care facility building, will not be perceived as inappropriate or jarring in a streetscape or broader urban design context. In forming this opinion, I note the height, bulk and scale established by the 3 and 4 storey residential apartment buildings located in Rawson Avenue and Tranmere Street, St Marks Public School and Drummoyne Public School all of which are located within the site's visual catchment. These buildings are depicted in Figures 2 – 8 below and over page.

Figure 2 – View looking north from the intersection of Rawson Avenue and Thompson Street towards Drummoyne Reservoir. Note the flat parapeted roof neighbourhood shops to the south of the subject site.

Figure 3 – View looking north east down Rawson Avenue past the subject site with Drummoyne Public School. Note the height of the pitched roof school building

Figure 4 – View looking south east down Polding Lane past the subject site. Note the 2 storey laneway development on a nil setback to the laneway.

Figure 5 – View looking south east down South Street past the subject site. Note the 2 storey laneway development on a nil setback to South Street and Reservoir Lane.

Figure 6 – View looking south east down South Street past the subject site. Note the 3 storey residential flat development located directly opposite the subject property.

Figure 7 – View looking north east down Rawson Avenue from the subject site. Note the 3 storey residential flat development located within immediate proximity of the site including residential flat development located along Tranmere Street at the end of Rawson Avenue.

Figure 8 – View looking north west along South Street past St Mark's Public School towards the subject property with the reservoir tower visible in the distance. Note the school buildings nil setback to South Street.

In this regard, I have formed the considered opinion that the non-compliant floor space located within the existing reservoir structure will not contribute to a building form incompatible with the bulk and scale of surrounding and nearby development.

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 bulk and scale of the development, notwithstanding the non-compliant FSR proposed, offensive, jarring or unsympathetic in a streetscape and urban context. In this regard, it can be reasonably concluded that, notwithstanding the FSR non-compliance, the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the non-compliant FSR, the resultant development is compatible with the with the bulk, scale, streetscape and desired future character of the locality and accordingly the proposal achieves this objective.

(b) to provide a suitable balance between landscaping and built form,

Response: The non-compliant floor space does not impact on the ability to provide appropriate landscaping on the site as required by this objective. In forming this opinion, I note that a significant amount of floor space is located within the existing tank structure where it is arranged over a number of storeys in a vertical manner with a relatively small footprint. This objective is achieved notwithstanding the non-compliant FSR proposed.

(c) to minimise overshadowing of, and loss of privacy to, neighbouring properties,

Response: The non-compliant floor space does not contribute to overshadowing of, and loss of privacy to, neighbouring properties. In forming this opinion, I note that appropriate spatial separation and associated privacy protection is maintained between non-compliant building height breaching elements namely the openings proposed within the tank structure to facilitate light and ventilation to the floor space proposed as well as the lift shaft and lift lobby associated with the purpose-built child care facility building and the neighbouring properties. I also rely on the shadow diagrams at Attachment 1. This objective is achieved notwithstanding the non-compliant FSR proposed.

(d) to maximise solar access and amenity for public places,

Response: The non-compliant floor space does not contribute to unacceptable overshadowing impacts on the public domain or broader impacts to public places. In forming this opinion, I rely on the shadow diagrams at Attachment 1. This objective is achieved notwithstanding the non-compliant FSR proposed.

(e) to manage the visual impact of development when viewed from public places, including the Parramatta River.

Response: The non-compliant floor space does not alter the 3-dimensional form or visual appearance of the reservoir structure as viewed from any public place with the two storey nature of the purpose-built child care facility building ensuring no unacceptable visual impacts as viewed from any public place including the Parramatta River. This objective is achieved notwithstanding the non-compliant FSR proposed.

Having regard to the above, the non-compliant FSR proposed 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 property is zoned R2 Low Density Residential pursuant to CBLEP. The developments consistency with the stated objectives of the R2 Low Density Zone are as follows:

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

Response: Whilst the application does not propose a residential use on the site, I note that centre-based child care facilities are permissible with consent in the zone and to that extent are deemed to be consistent with, not antipathetic to, the zone objectives.

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

Response: The application proposes the adaptive reuse of the existing heritage listed reservoir and tower structure and the construction of a purpose-built child care facility building on the subject property. In this regard, the development proposes a land use that will provide child care facilities and services to meet the day to day needs of residents within the local government area and beyond. Notwithstanding the FSR non-compliance, the proposal achieves this objective.

The non-compliant component of the development, as it relates to FSR, demonstrates consistency with objectives of the 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.

4.3 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:

> *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.*
>
> *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

In my opinion, there are sufficient environmental planning grounds to justify the FSR variation as outlined below.

Ground 1 - Heritage conservation

The adaptive reuse of the building as proposed will provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item.

Approval of the FSR variation will facilitate such outcome noting that FSR has been distributed on the site in a contextually appropriate and sympathetic manner to ensure the development will not give rise to adverse heritage conservation outcomes.

Ground 2 - Public benefit

Drummoyne Reservoir is a State heritage listed item. The adaptive reuse of the building as proposed will provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item.

Approval of the FSR variation will facilitate the ongoing conservation of the item and to that extent provide significant public benefit.

Ground 3 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

Strict compliance with the FSR standard could be achieved through deletion of the proposed floor space within the existing tank structure. Such outcome would not materially alter the height, bulk or scale of development proposed on the subject property however would render the development economically unviable.

For the reasons outlined in this submission, approval of the variation to the FSR standard will facilitate the adaptive reuse and ongoing conservation of Drummoyne Reservoir, promote the orderly and economic use and development of the land and facilitate the provision of significant public benefit. Approval of the FSR variation will achieve this objective.

Objective (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)

For the reasons outlined in this submission, approval of the variation of the FSR standard will facilitate the adaptive reuse of the building and in doing so provide for needed conservation works and ongoing maintenance and site security with the continued use of the place facilitating the ongoing management and conservation of the item. Approval of the FSR variation will achieve this objective.

Objective (g) to promote good design and amenity of the built environment

For the reasons outlined in this submission, approval of the variation of the FSR standard will promote good contextually appropriate and heritage sensitive design which will facilitate enhanced amenity outcomes to and from the development. Approval of the FSR variation will facilitate the appropriate adaptive reuse and conservation of Drummoyne Reservoir. Approval of the FSR variation will achieve this objective.

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 NSW 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.

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

4.4 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 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.

4.5 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 nonnumerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

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 variation facilitates better environmental and public benefit outcomes 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 considered opinion that there is no statutory or environmental planning impediment to the granting of a FSR variation in this instance.

Boston Blyth Fleming Pty Limited

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

Attachment 1 Shadow diagrams