Attachment 1

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

Clause 4.6 variation request – Floor Space Ratio (clause 4.4 Lane Cove Local Environmental Plan 2009)
Alterations and additions to an existing private hospital
43-47 Kenneth Street, Longueville

Floor Space Ratio

1.0 Introduction

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

2.0 Lane Cove Local Environmental Plan 2009 (LCLEP)

2.1 Clause 4.4 – Floor space ratio

Pursuant to Clause 4.4 LCLEP the maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map. The subject property has a split floor space ratio is identified on the map as depicted in Figure 1 below:

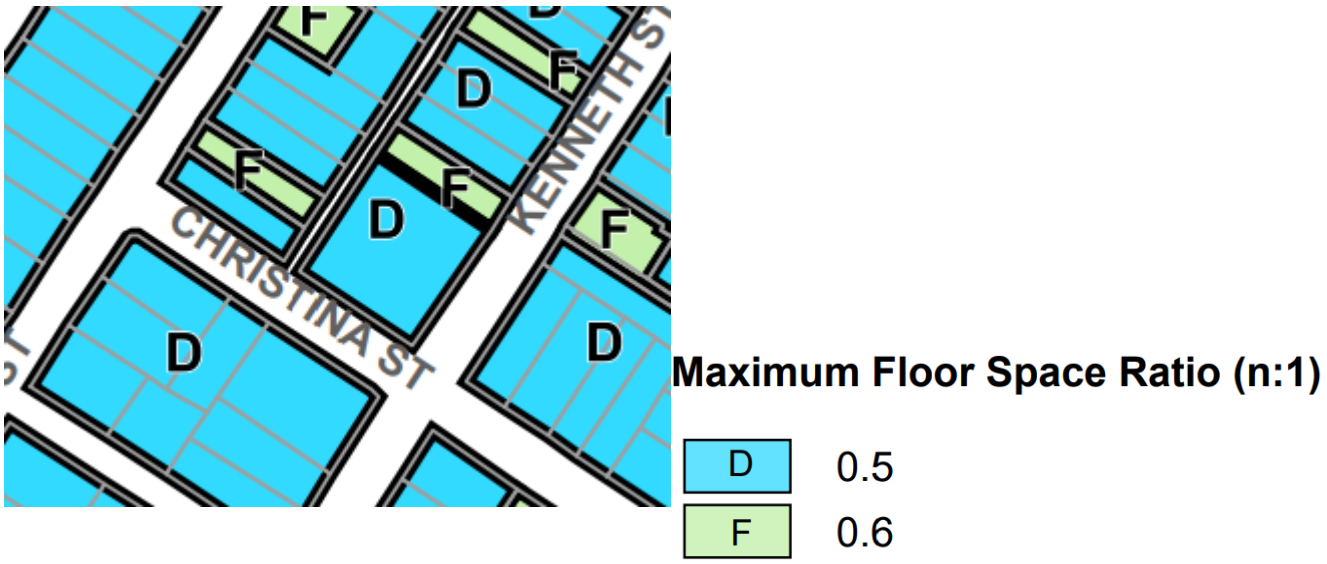

Figure 1 - FSR map extract showing split FSR ratio applying to the land.

The stated objectives of the FSR standard is as follows:

> *(a) to ensure that the bulk and scale of development is compatible with the character of the locality.*

In this regard, the northern portion of the site has a maximum prescribed FSR of 0.6:1 with the balance of the site having a maximum prescribed FSR of 0.5:1.

It has been determined that the proposed development results in the following GFA/ FSR within the 2 FSR sub zones as follows:

Proposed GFA and FSR No. 47				
Level	**Name**	**Area**	**Site Area**	**FSR**
LOWER GROUND	Proposed Lower No. 47	224.3 m²		
GROUND FLOOR	Proposed Ground No. 47	1135.0 m²		
FIRST FLOOR	Proposed First No. 47	527.2 m²		
		1886.6 m²	2090.3 m²	0.90

Proposed GFA and FSR No. 43				
Level	**Name**	**Area**	**Site Area**	**FSR**
LOWER GROUND	Proposed Lower No. 43	67.6 m²		
GROUND FLOOR	Proposed Ground No. 43	371.5 m²		
FIRST FLOOR	Proposed First No. 43	115.6 m²		
		554.8 m²	557.4 m²	1.00

Accordingly, in relation to the component of the development located on the portion of the site having a maximum prescribed FSR of 0.5:1 (1045.15m²) the development proposes 1886.6m² GFA representing an FSR of 0.9:1. This exceeds the standard by 841.45m² or 80.5%.

In relation to the component of the development located on the portion of the site having a maximum prescribed FSR of 0.6:1 (334.44m²) the development proposes 554.8m² GFA representing an FSR of 1:1. This exceeds the standard by 220.36m² or 65.8%.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of LCLEP 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 LCLEP 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 LCLEP 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 LCLEP 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 LCLEP 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 20-002 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 LCLEP 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.

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 LCLEP 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 LCLEP 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 LCLEP?

4.0 Request for variation

4.1 Is clause 4.4 of LCLEP 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 LCLEP prescribes a floor space provision which seeks to limit the bulk, scale and density of the development. Accordingly, clause 4.4 LCLEP 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 that the bulk and scale of development is compatible with the character of the locality.*

Response: The subject property is not located within area identified at Part C of Lane Cove Development Control Plan (LCDCP) as being within a special residential area/ locality for which there is an identified character statement.

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.*

Health services facilities (hospitals) are prohibited in the zone however are permissible pursuant to Division 10 of State Environmental Planning Policy (Transport and Infrastructure) 2021. The key objective of SEPP (Transport and Infrastructure) 2021 is to provide greater flexibility in the location of infrastructure and service facilities.

Accordingly, there can be no realistic expectation that a hospital will display a similar bulk and scale to that of a dwelling house with form ultimately responsive to function. The same can be said for a residential care facility which is also permissible on R2 Low Density Residential zoned land pursuant to State Environmental Planning Policy (Housing) 2021. A residential care facility has similar floor space and operational needs/characteristics to that of a private hospital both of which are commonly found within low density residential localities consistent with the enabling provisions of the applicable State Environmental Planning Policies (SEPP's).

In this regard, I note that clause 107 of State Environmental Planning Policy (Housing) 2021 outlines the non-discretionary development standards applicable to residential care facilities within low density residential zones. Clause 107(2)(c) prescribes a maximum density and scale of residential care facilities when expressed as a floor space ratio of 1:1 which if complied with prevents the consent authority from requiring a more onerous standard. That is, a residential care facility having a maximum FSR of 1:1 is deemed to be acceptable in relation to density and scale and capable of being compatible with the character of the locality in which it is located subject to final design detailing.

As previously indicated, the proposal has an FSR of between 0.9:1 and 1:1 being entirely consistent with the maximum prescribed FSR standard for residential care facilities within low density residential zones pursuant to State Environmental Planning Policy (Housing) 2021.

The question is whether the non-compliant FSR contributes to the bulk and scale of the development to the extent that the resultant building form will be incompatible with the bulk and scale of surrounding and nearby development. 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 this regard, I note that the proposed building complies with the prescribed building height standard with pitched roof forms, reflecting the pitched roof forms established by detached style housing within the locality, incorporated into the alterations and additions proposed. The building form has been highly articulated and modulated to provide visual interest whilst breaking up the bulk and scale of the building as viewed from outside the site. The built form outcome as viewed from Kenneth Street is depicted in the plan extract at Figure 2 below.

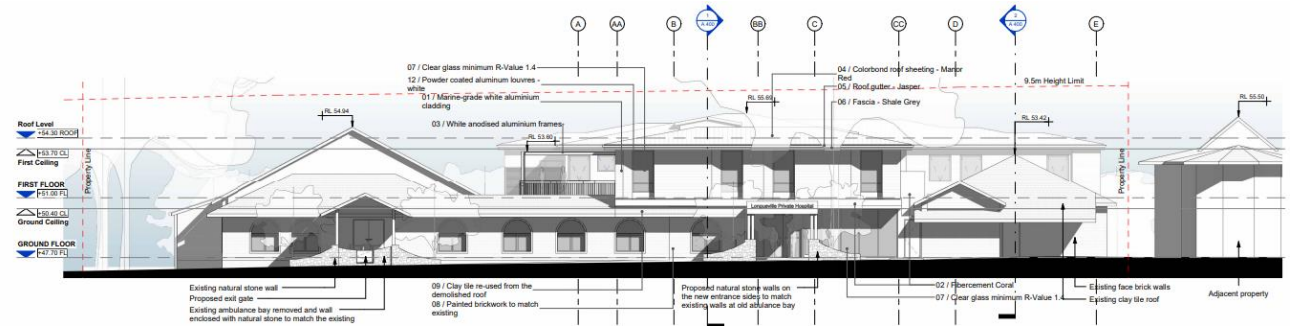

Figure 2 – Plan extract showing the built form presentation as viewed from Kenneth Street.

The adjoining property to the north-east 41 Kenneth Street is occupied by a 2 storey detached dwelling house as depicted to the far right of the attached plan extract. St Andrews Uniting Church is located directly opposite the subject site on Christina Street the built form characteristics of which are depicted in Figure 3. The balance of surrounding development is characterised by 1 and 2 storey detached dwelling houses with other development in the locality including St Aidan's Anglican Church located further to the south-east of the site along Christina Street as depicted in Figure 4.

Figure 3 - St Andrews Uniting Church is located directly opposite the subject site on Christina Street

Figure 4 - St Aidan's Anglican Church located further to the south-east of the site along Christina Street

In this regard, I have formed the considered opinion that the distribution of floor space across the site in a highly articulated and modulated fashion together with the adoption of pitched roof forms will ensure that the non-compliant FSR will not contribute to the bulk and scale of the development to the extent that the resultant building form will be incompatible with the bulk and scale of development within the locality. That is, the non-compliant FSR will not 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 or jarring in a streetscape and urban design context.

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

Notwithstanding the FSR non-compliance, the resultant development is compatible with the bulk and scale of surrounding and nearby development and development generally within the locality, with the quantum of floor space proposed consistent with the floor space anticipated for residential care facilities within low density residential zones pursuant to SEPP (Housing) 2021. Under such circumstances, I am satisfied that notwithstanding the FSR non-compliance that the proposal achieves the objective of the standard.

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 LCLEP. Health services facilities (hospitals) are prohibited in the zone however are permissible pursuant to Division 10 of State Environmental Planning Policy (Transport and Infrastructure) 2021. The key objective of SEPP (Transport and Infrastructure) 2021 is to provide greater flexibility in the location of infrastructure and service facilities.

The stated objectives of the R2 Low Density Residential zone are as follows:

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

Response: As the application relates to alterations and additions to an existing lawful hospital this objective is not applicable.

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

Response: The proposed alterations and additions facilitate a general upgrade the existing hospital having regard to the Building Code of Australia, the Ministry of Health design and construction requirements and the provisions of the Private Health Facilities Act 2007, the Private Health Facilities Regulations 2017 and the Australasian Health Facility Guidelines. The increase in bed numbers will meet a clear demand for private patient beds within the Lane Cove area.

Accordingly, the proposal achieves this objective notwithstanding the FSR non-compliance proposed.

- *To retain, and where appropriate improve, the existing residential amenity of a detached single family dwelling area.*

Response: As the application relates to alterations and additions to an existing lawful hospital this objective is not applicable.

- *To encourage new dwelling houses or extensions of existing dwelling houses that are not highly visible when viewed from the Lane Cove River or Parramatta River.*

Response: As the application relates to alterations and additions to an existing lawful hospital this objective is not applicable.

- *To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

Response: The arborist report prepared by Growing My Way Tree Consultants confirms that the proposal requires the removal of two (2) trees being Tree 1 - London Plane Tree and Tree 3 – Kaffir Plum Tree both of which are exotics and supported for removal due to their incompatibility with the health services facility use established on the site. Such tree loss is appropriately compensated for through the implementation of the site landscape regime as depicted on the landscape plans prepared by Vision Dynamics. These landscape plans incorporate deep soil landscaping adjacent to the rear yard of 41 Kenneth Street, on slab planting above the proposed hydrotherapy pool and additional tree plantings adjacent to the Kenneth Street frontage. The proposal provides for the maintenance of landscaping is a major element in the residential environment.

Accordingly, the proposal achieves this objective notwithstanding the FSR non-compliance proposed.

The non-compliant development, as it relates to FSR, demonstrates consistency with objectives of the R2 Low Density Residential zone, the objectives of State Environmental Planning Policy (Transport and Infrastructure) 2021 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].

<u>Sufficient environmental planning grounds</u>

Health services facilities (hospitals) are prohibited in the zone however are permissible pursuant to Division 10 of State Environmental Planning Policy (Transport and Infrastructure) 2021. The key objective of SEPP (Transport and Infrastructure) 2021 is to provide greater flexibility in the location of infrastructure and service facilities.

Accordingly, there can be no realistic expectation that a hospital will display a similar bulk and scale to that of a dwelling house with form ultimately responsive to function. The same can be said for a residential care facility which is also permissible on R2 Low Density Residential zoned land pursuant to State Environmental Planning Policy (Housing) 2021. A residential care facility has similar floor space and operational needs/characteristics to that of a private hospital both of which are commonly found within low density residential localities consistent with the enabling provisions of the applicable State Environmental Planning Policies (SEPP's).

In this regard, I note that clause 107 of State Environmental Planning Policy (Housing) 2021 outlines the non-discretionary development standards applicable to residential care facilities within low density residential zones. Clause 107(2)(c) prescribes a maximum density and scale of residential care facilities when expressed as a floor space ratio of 1:1 which if complied with prevents the consent authority from requiring a more onerous standard. That is, a residential care facility having a maximum FSR of 1:1 is deemed to be acceptable in relation to density and scale and capable of being compatible with the character of the locality in which it is located subject to final design detailing.

As previously indicated, the proposal has an FSR of between 0.9:1 and 1:1 being entirely consistent with the maximum prescribed FSR standard for residential care facilities within low density residential zones pursuant to State Environmental Planning Policy (Housing) 2021.

I have formed the opinion that sufficient environmental planning grounds exist to justify the variation including the compatibility of the bulk and scale of the development, as reflected by floor space, with the built form characteristics established by development within the locality. In forming this opinion, I note that the size and geometry of the site facilitates the distribution of floor space in a highly articulated and modulated manner with characteristically pitched roof forms adopted to reflect the predominant roof form in the locality.

Strict compliance with the FSR standard would fail to facilitate a general upgrade the existing hospital having regard to the Building Code of Australia, the Ministry of Health design and construction requirements and the provisions of the Private Health Facilities Act 2007, the Private Health Facilities Regulations 2017 and the Australasian Health Facility Guidelines. It would also prevent the provision of additional private patient beds for which there is a clear demand for within the Lane Cove area.

Approval of the FSR variation will achieve the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land consistent with its long-established health services facility (hospital) use (1.3(c)).

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

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.

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.

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 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