

Attachment 2

Clause 4.6 variation request – Minimum allotment dimensions

Residential flat building development

Lot 13, DP 4215, 24 Russell Avenue, Lindfield

Lot 14, DP 4215, 26 Russell Avenue, Lindfield

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 Ku-ring-gai Local Environmental Plan 2015

2.1 Clause 6.6(2)(b) - Requirements for residential flat buildings - Minimum allotment dimensions

Pursuant to clause 6.6(2)(b) development consent must not be granted for the erection of a residential flat building on a lot in a residential zone unless the lot has an area of at least 1,200 square metres and minimum dimensions (width and depth) of at least -

(a) *if the area of the land is less than 1,800 square metres—24 metres,*
or

(b) *if the area of the land is 1,800 square metres or more—30 metres.*

The stated objectives of this clause are as follows:

- (a) *to provide site requirements for development for the purposes of multi dwelling housing and residential flat buildings so as to provide for the orderly and economic development of residential land while maintaining the local character, and*
- (b) *to ensure that lot sizes and dimensions of medium and high density residential sites allow for generous landscaped areas and setbacks to ensure the amenity of adjoining properties and to support the desired future character of these areas.*

The consolidated allotment has a total area of 2104m² and accordingly a minimum dimension of 30 metres applies. The site is irregular in shape which tapers in dimension towards the Russell Avenue frontage which is 29.48 metres in width being non-compliant by 520mm or 1.7%. A survey extract is at Figure 1.

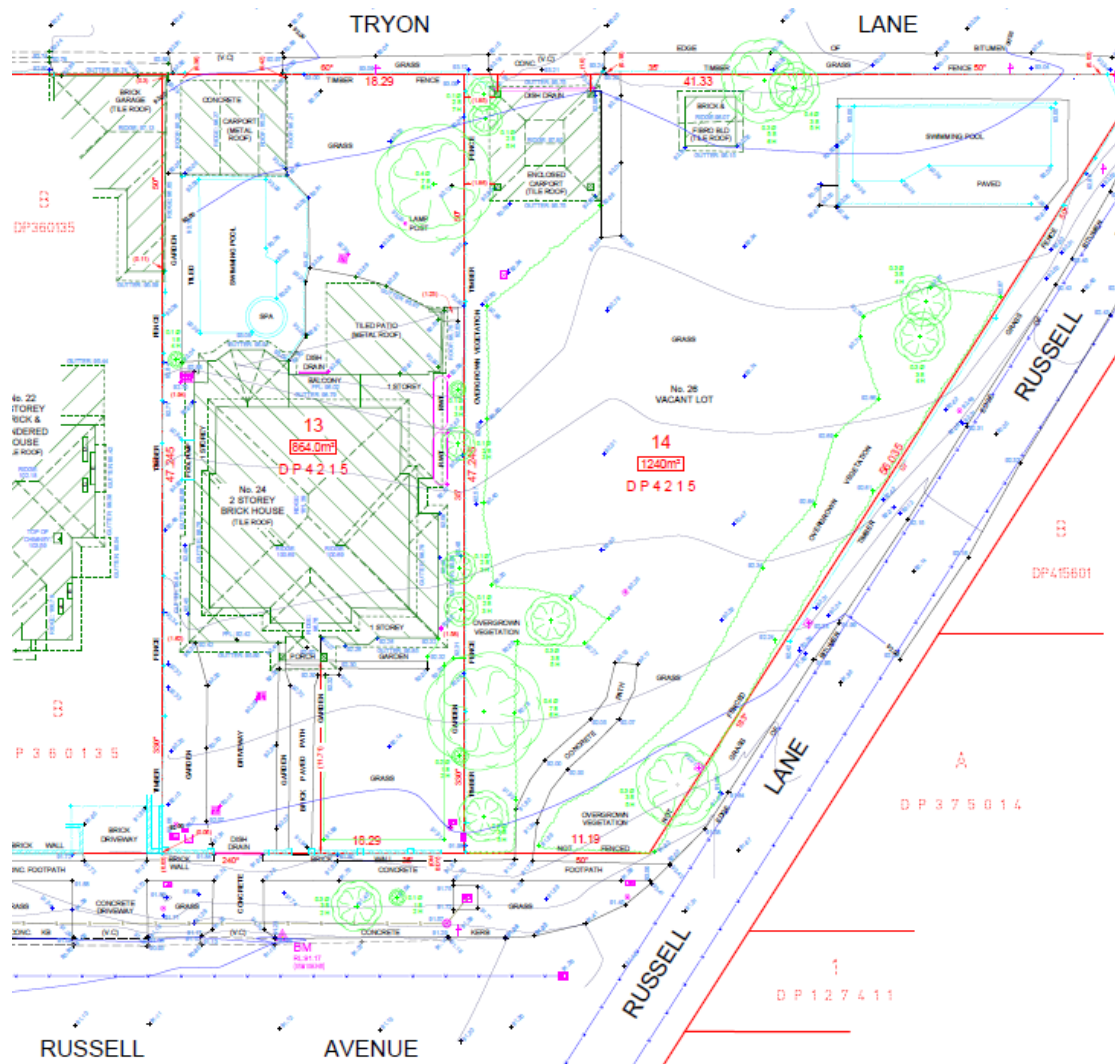


Figure 1 – Survey extract

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of KLEP 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 KLEP 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 6.6(2)(b) Minimum allotment dimension standard of KLEP 2015.

Clause 4.6(3) of KLEP 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 that:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not strictly comply with the minimum dimension provision at clause 6.6(2)(b) of KLEP 2015 which specifies a maximum site dimension however strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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 6.6(2)(b) KLEP 2015 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

4.0 Request for variation

4.1 Is clause 6.6(2)(b) KLEP 2015 a development standard?

The definition of “development standard” at clause 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 6.6(2)(b) KLEP 2015 prescribes a site dimension requirement that seeks to control the minimum size and geometry of an allotment for residential flat development. Accordingly, clause 6.6(2)(b) KLEP 2015 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 way, 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.

First way - Consistency with objectives of the standard

An assessment as to the consistency of the proposal against the stated objectives of this clause is as follows.

- (a) *to provide site requirements for development for the purposes of multi dwelling housing and residential flat buildings so as to provide for the orderly and economic development of residential land while maintaining the local character, and*

Response: The subject property is a corner allotment with triple street frontage with a width to Russell Avenue of 29.48 metres, width to Russell Lane of 56.035 metres and width to Tyron Lane of 59.62 metres and a total area of 2104m². These site dimensions are depicted in the survey extract at Figure 1.

Whilst the Russel Avenue frontage width is non-compliant with the minimum 30 metre dimension requirement by 520mm or 1.7% the balance of the allotment geometry/ dimension in both width and depth exceed the minimum 30 metre standard. That is, the geometry of the allotment which also exceeds the 1800sqm threshold to which the 30 metre dimension standard applies will facilitate the siting of a residential flat building which will provide for the orderly and economic development of residential land while maintaining the local character.

Notwithstanding the minor allotment dimension variation the proposal satisfies this objective.

- (b) to ensure that lot sizes and dimensions of medium and high density residential sites allow for generous landscaped areas and setbacks to ensure the amenity of adjoining properties and to support the desired future character of these areas.*

Response: For the reasons outlined in response to Objective (a), the minor allotment dimension variation is appropriately compensated for by the compliant geometry of the balance of the site which will ensure that the site *allows for generous landscaped areas and setbacks to ensure the amenity of adjoining properties and to support the desired future character of these area.*

Notwithstanding the minor allotment dimension variation the proposal satisfies this objective.

Having regard to the above, the non-compliant allotment geometry will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the standard. Given the developments consistency with the objectives of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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

Ground 1 - Minor nature of breach & lack of impact

The site is irregular in shape which tapers in dimension towards the Russell Avenue frontage which is 29.48 metres in width being non-compliant by 520mm or 1.7%. the balance of the site exceeds the minimum 30 metre geometry standard. The non-compliance is appropriately described both quantitatively and qualitatively as minor.

I am also satisfied that the variation will restrict development on the land to the extent that it will give rise to adverse streetscape, heritage conservation or residential amenity impacts. 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* [2021] 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.

Ground 2 – Objective of Chapter 2 SEPP Housing

The variation is quantitatively and qualitatively appropriately described as minor and does not compromise the development’s ability to achieve the objective of Chapter 2 of SEPP Housing as previously outlined.

In fact, approval of the minor variation will facilitate a development of exceptional design quality which will appropriately increase housing density within 400m of the Lindfield Station in a building form which is well designed, of appropriate bulk and scale and which provides exceptional amenity and liveability whilst also providing affordable housing to meet the needs of essential workers and vulnerable members of the community.

Ground 3 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of the minor variation will promote the delivery of housing consistent with objective 1.3(d) of the Act.

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

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 height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



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Director

9.5.25