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29th January 2021

The General Manager
Hornsby Shire Council
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Supplementary Statement of Environmental Effects
Clause 4.6 variation request – Height of buildings
Alterations and additions to an existing residential care facility
144 – 146 Beecroft Road, Beecroft

1.0 Introduction

This clause 4.6 variation request has been prepared for abundant caution noting that the subject property benefits from existing use rights.

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 Hornsby Local Environmental Plan 2013 ("HLEP")

2.1 Clause 4.3 - Height of buildings

Pursuant to clause 4.3 buildings on the land shall have a maximum height of 8.5 metres. The stated objective of this clause is:

> *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The following definitions are relevant to an assessment of building height:

building height *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

ground level (existing) *means the existing level of a site at any point*

It has been determined that the proposed works, primarily involving the pitched roof elements, breach the 8.5 metre height standard to a varying extent up to a maximum of 4 metres as nominated in the following height breach diagrams below and over page.

Figure 1. Building height breach blanket diagram as viewed from East

Figure 2. Building height breach blanket diagram as viewed from North

Figure 3. Building height breach blanket diagram as viewed from West

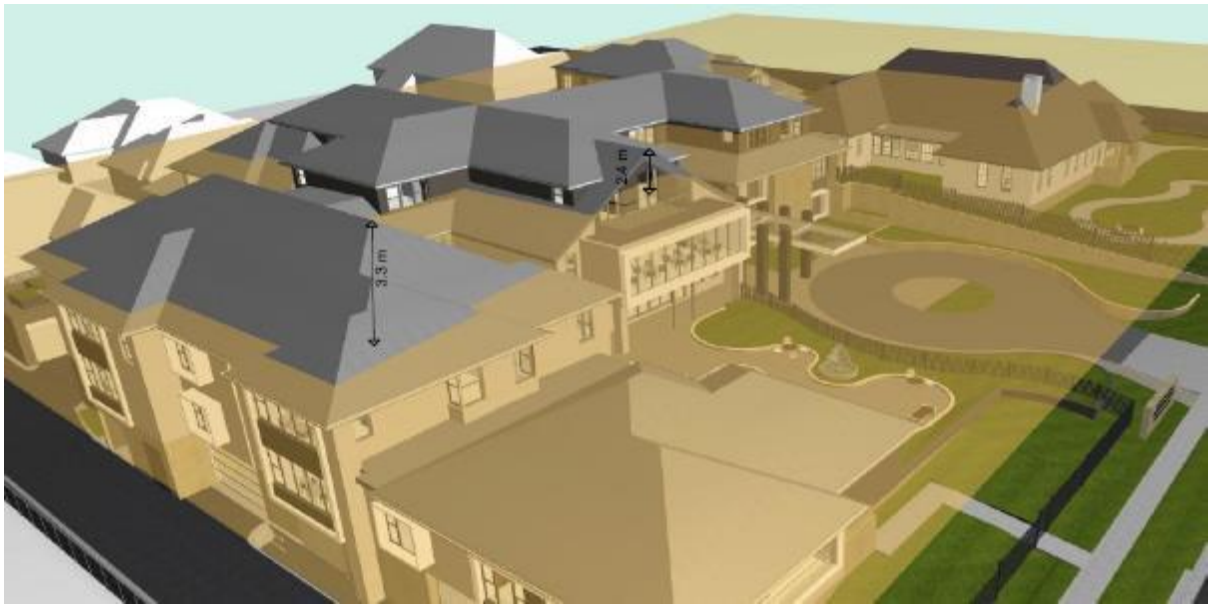

Figure 4. Building height breach blanket diagram as viewed from South

I note that a significant portion of the building height breaching elements are associated with pre-existing pitched roof forms on the site including that associated with the heritage listed Cheltenham House as depicted in Figures 5 and 6 below.

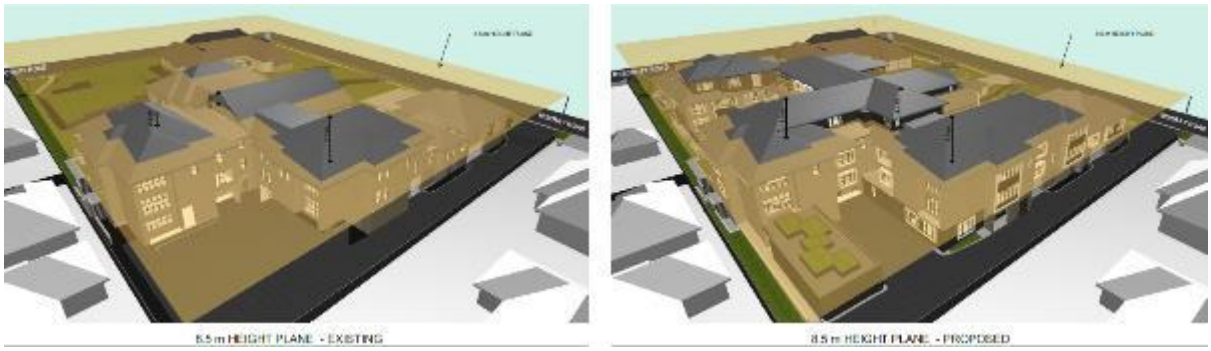

Figure 5. Comparison between existing and proposed height breaching elements

Figure 6. Proposed new building height breach elements in blue to which this clause 4.6 variation request relates

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of HLEP 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 HLEP 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 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of HLEP provides:

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

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

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

The proposed development does not comply with the height of buildings provision at 4.3 of HLEP which specifies a maximum building height 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 HLEP provides:

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

(a) the consent authority is satisfied that:

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

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

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

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

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

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of HLEP 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 4.3A of HLEP 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 4.3 of HLEP 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 4.3 HLEP 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 4.3 of HLEP?

4.0 Request for variation

4.1 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 permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

Response: I note that existing development on the site is already part 3 storeys in locations with a number of existing pitched roof forms already exceeding the 8.5 metre height standard including the roof associated with the heritage listed Chiltenham House. The proposed development seeks to take advantage of the existing pitched roof forms through the introduction of attic style accommodation. Noting that the upper level breaching elements are located predominantly within characteristically pitched roof forms I consider that the resultant development will not be perceived as inappropriate or jarring in the context of the establish building heights.

An identified constraint on the site is the heritage listed Chiltenham House and the properties location within a heritage conservation area. In accordance with clause 5.10 of HLEP 2013, as the subject property contains a heritage item and is located within a heritage conservation area, the application is accompanied by a Heritage Impact Statement prepared by Wier Phillips Heritage. This report assesses the acceptability of the proposal having regard to the applicable heritage considerations and contains the following conclusions:

> *This Heritage Impact Statement has been prepared to accompany a development application for alterations and additions to No. 144-146 Beecroft Road. The large site consists of the Federation Art and crafts dwelling 'Brunoy' and a disused aged care facility constructed in the 2000.*
>
> *Brunoy was built in 1916 for Herbert Leslie Arnott of the famed Arnotts biscuits family and designed by Robin Dods of Spain Cosh and Dods. On Arnotts death, in 1955 Brunoy was sold and substantially modified and extended for conversion into a Nursing home.*
>
> *In 2000 the site was redeveloped with the construction of a purpose-built aged care facility connected to Brunoy, during which Brunoy underwent further modification primarily to return the building to its original plan form.*
>
> *The facility was closed in 2019, due to the changed patient expectations and noncompliance with current aged care facility codes. This proposal seeks the redevelopment of the site and retention of Brunoy to provide a replacement aged care facility that acknowledges the heritage significance of the site and is in accordance with today's standards.*\

Brunoy has a 65 year history of substantial alterations and additions that has dramatically eroded the significance of the heritage fabric of the building. Much of the external form was reproduced during the rectification works undertaken in 2000.

Due to its compromised interior, the principal significance of Brunoy lies is its external form, scale and finish as a significant Federation Arts and Crafts dwelling by recognised architect Robin Dods for Herbert Leslie Arnott, as read from Beecroft Road and the Heritage Conservation Area.

The proposed works will have an acceptable impact on the significance of the Heritage Conservation Area and the heritage items in the vicinity as most of the works are internal and do not alter the eternal form and its understanding from these items. The proposed works will have no impact on the heritage items in the vicinity as they physically and visually removed from the site by distance and dense landscape.

The proposed works will have an acceptable impact on the Heritage item as most of the proposed work is to the internal fabric which is not original. The modification and removal of walls is necessary to enable the use of the building for aged care in accordance with current codes. The proposed works will retain wall nibs, and ceiling bulkheads to enable an understanding of the older plan.

Without an active, financial and ongoing use, the heritage item stands to fall into long term disuse and disrepair. The proposed works will enable the ongoing use and retention of the building in its current form and will enable ongoing and cyclical repair and maintenance of the item.

Conservation Area because; the existing primary view corridors will not be affected by the proposal; and the proposal is consistent with other developments within the vicinity. The extant carport and verandah, to be removed, do not date from the key period of development of the Conservation Area. The proposed works will have a minimal and acceptable impact on the prominent garden setting associated with the Conservation Area and The Gullies Precinct because the bulk of the mature trees on the site will be retained.

The proposal fulfils the objectives for alterations and additions to buildings located within the Beecroft – Cheltenham Heritage Conservation Area, as set out by the Hornsby LEP 2013 and the Hornsby DCP 2013, and addresses the Council comments made at the Pre-DA meeting held in December 2017.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council [2005] NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development, by virtue of the building height breaching pitched roof elements offensive, jarring or unsympathetic having regard to the existing and desired future built form characteristics of development on the site and that of development generally within the sites visual catchment.

Further, the minor height of building variation does not lead to a development that is inappropriate having regard to the infrastructure capacity of the locality which is well serviced as reflected by its R2 Low Density Residential zoning. Existing services are capable of accommodating any additional capacity generated by the proposed works.

The building heights proposed are consistent with the established built form circumstance on the site, appropriately respond to the constraints imposed by the heritage listing of the property and its location within a heritage conservation area, and facilitate the provision of a quantum of floor space that reflects the reasonable development potential of the land, have regards to its established residential care facility used, and result in a building form which does not exceed the infrastructure capacity of the locality.

The proposal is consistent with this objective.

Having regard to the above, the non-compliant height components of the building 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 building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

<u>Consistency with zone objectives</u>

The subject site is zoned R2 Low Density Residential pursuant to the Land Use Table of the HLEP 2013. The stated objectives of the zone area as follows:

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

Response: The subject application proposes alterations and additions to an existing residential care facility with such works providing for the housing and residential care needs of seniors and people with a disability.
The upgrading works proposed will bring the quality of accommodation up to contemporary standards and in doing so enhance the residential amenity of the established residential care facility. The proposal is consistent with this objective.

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

Response: Not applicable.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

4.2 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the appropriate distribution of floor space on the site, within characteristically pitched roof forms, which facilitates the upgrading of the existing residential care facility to contemporary standards and in doing so significantly enhancing the residential amenity and operational efficiency of the existing facility.

The location of floor space within the non-compliant pitched roof building elements responds appropriately to the heritage listing of the subject property and its location within a heritage conservation area. To distribute the floor space and alternate manner would result in unacceptable heritage conservation outcomes and prevent the upgrading of the existing facility.

I consider the proposal to be of a skilful design which responds appropriately and effectively to the heritage constraints of the site. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).

- The proposal promotes the sustainable management of built and cultural heritage by providing additional floor space within characteristically pitched roof forms exceeding the building height standard (1.3(f))

- 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 4.3A and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the propose 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 propose 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 determinations 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

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

(a) that the contextually responsive development is consistent with the zone objectives, and

(b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and

(c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

(d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and

(e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and

(f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

(g) Concurrence of the Secretary can be assumed in this case.

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 a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

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