Attachment C

Clause 4.6 Variation Request - Height

INTRODUCTION

The subject site is identified as No. 62 Glebe Point Road, Glebe. The site is located on the south-western side of Glebe Point Road, approximately mid-way between Derby Place to the south-east and Mitchell Street to the north-west.

The site encompasses an area of 447.6m^2, and is generally rectangular in shape with a frontage of 12.21 metres to Glebe Point Road. The site has a secondary frontage to the rear of 12.205 metres to Derwent Lane.

The site is currently occupied by a 2-storey warehouse style building. The ground floor level fronting Glebe Point Road accommodates a retail tenancy, with the remainder of the building occupied by a mix of commercial tenancies.

The proposed development comprises alterations and additions to the existing building including internal reconfiguration of the retail tenancy fronting Glebe Point Road, internal reconfiguration of the commercial tenancies, and the conservation and raising of the central portion of the roof to facilitate an internal expansion of the existing commercial floor space at the upper level.

The conserved roof over the central portion of the building has been raised 3.1 metres, and maintains the height, pitch and form of the existing roof, including the small raised element with clerestory windows.

Further, the proposed development includes the replacement of the existing cantilevered awning along the Glebe Point Road frontage with a steel framed ornamental posted verandah to match the type shown in the *Glebe Point Road Main Street Study*.

Clause 4.3 of the Sydney Local Environmental Plan (LEP) 2012 specifies a maximum building height of 9 metres. The topography of the site has been partially modified by the existing building, circumstances in which the existing ground level has been calculated in accordance with the approach set out in *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* and *Stamford Property Services Pty Ltd v City of Sydney Council & Anor [2015] NSWLEC 1189*.

On that basis, the proposed building extends to a maximum height of approximately 11.65 metres measured to the main ridgeline, and 12.58 metres measured to the raised element accommodating the clerestory windows.

Alternatively, if the lowest floor level of the existing building (being an excavated level) is adopted as *"ground level (existing)"* for the purposes of calculating building height, the proposed building extends to a maximum height of approximately 13.6 metres.

A primary objective of the proposed development is to improve the existing disabled access to the building, and *"insert"* a lift within the building to provide a continuous path of travel from the front of the site (along Glebe Road) to all levels of the building, including the rear portion of the existing upper level.

In that regard, the variation to the building height control primarily relates to the requirement to physically raise the central portion of the roof to accommodate the internal lift, and thereby provide disabled access from the front of the site to the rear of the upper level (which is not currently possible).

Further, the only alternate means of achieving disabled access to the rear of the existing upper level would be to *"insert"* two (2) separate passenger lifts, requiring a person to enter and exit the front lift, travel to the second lift, and then enter and exit the second lift. Obviously, that arrangement is very inefficient and inconvenient, and is unlikely to achieve reasonable compliance with the provisions of the *Disability Discrimination Act 1992*.

The building height control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

CLAUSE 4.6 OF THE SYDNEY LEP 2012

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that *"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"*.

Clause 4.6(3) specifies that 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 requirement in Clause 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 has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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 Secretary has been obtained.

Clause 4.6(5) specifies that in deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.

CONTEXT AND FORMAT

This *"written request"* has been prepared having regard to *"Varying development standards: A Guide"* (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130; *and*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353*.

"Varying development standards: A Guide" (August 2011) outlines the matters that need to be considered in DA's involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* states that *"… development standards are not ends in themselves but means of achieving ends"*. Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

> *As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as*

much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced

the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is *"consistent with"* the objectives of the development standard and the zone, is not a requirement to *"achieve"* those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means *"something less onerous than 'achievement'"*.

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ found that the focus should be on the element that breaches the development standard, and not on the development as a whole.

Irrespective, Preston CJ also found that it is not necessary to demonstrate that the proposed development will achieve a *"better environmental planning outcome for the site"* relative to a development that complies with the development standard.

In *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*, the Court of Appeal found that Clause 4.6(3) requires the written request to demonstrate that compliance with the development standard is *"unreasonable or unnecessary"* and that "*there are sufficient environmental planning grounds to justify"* the contravention.

Finally, in *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O'Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

ASSESSMENT

Is the requirement a development standard?

The building height control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

What is the underlying object or purpose of the standard?

The applicable objectives of the building height control are expressed as follows:

(a) to ensure the height of the development is appropriate to the condition of the site and its context,
(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
(c) to promote the sharing of views,

In relation to objective (a), the site is located within an established mixed-use environment, characterised by a diversity of land uses and building forms. The existing building form is generally dominated by 2 – 3 storey buildings, accommodating a mix of retail, commercial and residential land uses.

The site is adjoined by 2 – 3 storey terrace houses, with the upper levels incorporating dormer windows facing Glebe Point Road. The conserved and raised roof over the central portion of the building effectively matches the alignment of the ridgeline of the adjoining terrace house to the south-east, providing a comfortable transition with the adjoining terrace houses to the north-west.

Further, the existing parapet will conceal the majority of the roof structure, and the steel framed ornamental posted verandah will materially enhance the streetscape contribution and heritage values of the existing building.

In relation to objective (b), the DA is accompanied by a detailed *Statement of Heritage Impact* which includes a series of recommendations that have been integrated into the design, and concludes that *"… the proposal will retain and enhance the signifcant fabric and qualities of the item, the conservation area and have no adverse impact on the items in the vicinity"*.

In relation to objective (c), the proposed development will have no impact on any existing public or private views.

In summary, the proposed development is generally consistent with the objectives of the building height control, notwithstanding the numerical variation.

Further, the variation to the building height control primarily relates to the requirement to physically raise the central portion of the roof to accommodate the internal lift, and thereby provide disabled access from the front of the site to the rear of the upper level (which is not currently possible).

This will promote good design and amenity of the built environment which is a recently incorporated object of the Environmental Planning and Assessment Act 1979: *"(g) to promote good design and amenity of the built environment"*.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published *"Varying development standards: A Guide"* (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

The proposed development is generally consistent with the objectives of the building height control, notwithstanding the numerical variation.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The objectives and purpose of the building height control remain relevant, and the proposed development is generally consistent with the objectives of the building height control, notwithstanding the numerical variation.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The proposed development is generally consistent with the objectives of the building height control, notwithstanding the numerical variation.

Strict compliance with the building height control would effectively eliminate the ability to modify the existing building, and restrict the ability to improve the functionality of the floor space, including the existing non-compliant access arrangements.

In that regard, the variation to the building height control primarily relates to the requirement to physically raise the central portion of the roof to accommodate the internal lift, and thereby provide disabled access from the front of the site to the rear of the upper level (which is not currently possible).

This will promote good design and amenity of the built environment which is a recently incorporated object of the Environmental Planning and Assessment Act 1979: *"(g) to promote good design and amenity of the built environment"*.

Further, strict compliance with the building height control would not produce any material benefits in terms of the amenity of surrounding properties, or the overall streetscape contribution of the building.

4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The building height control has not specifically been abandoned or destroyed by the Council's actions. Irrespective, the Council has consistently adopted an extremely flexible and orderly approach to the implementation of development standards (including the building height control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations.

In that regard, the Council's Register of Development Standard Variations identifies approximately 345 Development Consents that have

been granted by Council since 2012 (the introduction of the Sydney LEP 2012) that involved variations to the building height control.

The *"Justification of variation"* identified in the Register typically includes *"no adverse impacts"*, and *"the proposal is not considered to have unreasonable impacts on the amenity of the adjoining properties or the streetscape*.

Further, the adjoining terraces houses to the south-east and north-west both include partial variations to the building height control, and the proposed development will be read within the context of the existing built form.

Finally, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

5. Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning of the land remains relevant and appropriate. Irrespective, strict compliance with the building height control would effectively eliminate the ability to modify the existing building, and restrict the ability to improve the functionality of the floor space, including the existing non-compliant access arrangements.

In that regard, the variation to the building height control primarily relates to the requirement to physically raise the central portion of the roof to accommodate the internal lift, and thereby provide disabled access from the front of the site to the rear of the upper level (which is not currently possible).

This will promote good design and amenity of the built environment which is a recently incorporated object of the Environmental Planning and Assessment Act 1979: *"(g) to promote good design and amenity of the built environment"*.

Further, strict compliance with the building height control would not produce any material benefits in terms of the amenity of surrounding properties, or the overall streetscape contribution of the building.

Finally, the proposed works will materially improve the functionality of the existing building, without imposing any signifcant or unreasonable impacts on the amenity of any surrounding land.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposed numerical variation to the building height control is reasonable and appropriate in the particular circumstances on the basis that:

- the conserved and raised roof over the central portion of the building effectively matches the alignment of the ridgeline of the adjoining terrace house to the south-east, providing a comfortable transition with the adjoining terrace houses to the north-west;
- the existing parapet will conceal the majority of the roof structure, and the steel framed ornamental posted verandah will materially enhance the streetscape contribution and heritage values of the existing building;
- the DA is accompanied by a detailed *Statement of Heritage Impact* which includes a series of recommendations that have been integrated into the design, and concludes that *"… the proposal will retain and enhance the signifcant fabric and qualities of the item, the conservation area and have no adverse impact on the items in the vicinity"*;
- the variation to the building height control primarily relates to the requirement to physically raise the central portion of the roof to accommodate the internal lift, and thereby provide disabled access from the front of the site to the rear of the upper level (which is not currently possible);
- the only alternate means of achieving disabled access to the rear of the existing upper level would be to *"insert"* two (2) separate passenger lifts, requiring a person to enter and exit the front lift, travel to the second lift, and then enter and exit the second lift. Obviously, that arrangement is very inefficient and inconvenient, and is unlikely to achieve reasonable compliance with the provisions of the *Disability Discrimination Act 1992*;

- strict compliance with the building height control would effectively eliminate the ability to modify the existing building, and restrict the ability to improve the functionality of the floor space, including the existing non-compliant access arrangements;
- strict compliance with the building height control would not produce any material benefits in terms of the amenity of surrounding properties, or the overall streetscape contribution of the building;
- the shadow diagrams prepared to accompany the DA demonstrate that the additional shadows cast by the proposed development (including those relating specifically to the variation to the building height control) will fall over the roof of the adjoining properties to the south-east, and therefore, will have no material impact on the amenity of those properties;
- the proposed works will materially improve the functionality of the existing building, without imposing any signifcant or unreasonable impacts on the amenity of any surrounding land;
- the Council has consistently adopted an extremely flexible and orderly approach to the implementation of development standards (including the building height control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations;
- the adjoining terraces houses to the south-east and north-west both include partial variations to the building height control, and the proposed development will be read within the context of the existing built form;
- the improved functionality of the building and the improved streetscape contribution will promote good design and the amenity of the built environment which is a recently incorporated object of the Act: *"(g) to promote good design and amenity of the built environment"*;
- the proposed development does not contribute to any signifcant or unreasonable impacts on the amenity of any surrounding land in terms of the key considerations of overshadowing, loss of privacy, and loss of views;
- the scale of the building when viewed from the public domain will not be antipathetic to the existing buildings in the locality, or visually jarring when viewed from either the public domain or the adjoining properties;
- the proposed development is consistent with, or not antipathetic to, the relevant objectives of the B2 – Local Centre zone; and

- the proposed development is generally consistent with, or not antipathetic to, the objectives of the building height control, notwithstanding the numerical variation.

Are there any matters of State or regional significance?

The proposed numerical variation to the building height control does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development is generally consistent with the objectives of the building height control, notwithstanding the numerical variation.

In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the building height control in other instances.

In that regard, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

Any other matters?

There are no further matters of relevance to the proposed variation to the building height control.

Zone Objectives and Public Interest

The site is zoned B2 – Local Centre pursuant to the Sydney LEP 2012, and the relevant objectives of the zone are expressed as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*

The proposed development is consistent with (or not antipathetic to) the relevant objectives of the zone on the basis that the existing mix of uses

will be maintained and enhanced, the improved configuration of floor space will enhance employment opportunities, and the site well serviced by public transport facilities.

CONCLUSION

The purpose of this submission is to formally request a variation in relation to the building height control in Clause 4.3 of the Sydney LEP 2012.

In general terms, strict compliance with the building height control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation.