



CLAUSE 4.6 VARIATION REQUEST

DENSITY CONTROLS FOR CERTAIN RESIDENTIAL ACCOMMODATION

Clause 4.5A(2) – Density controls for certain residential accommodation in Pittwater LEP 2014

35-39 Darley Street East
Mona Vale

Prepared for: The Trustee for IPG Dev 2 Unit Trust & GOP AFF 1 Unit Trust & IPG AFF 1 Unit Trust

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Clause 4.6 Variation Statement – Density Controls for Certain Residential Accommodation (Clause 4.5A(2))

1. Introduction

This Variation Statement has been prepared in accordance with Clause 4.6 of Pittwater Local Environmental Plan 2014 (PLEP 2014) to accompany a state significant development application (SSD-113872990) that seeks consent for the demolition of all buildings and associated structures, tree removal and site clearing and construction of an eight (8) storey residential flat building with in-fill affordable housing above three (3) levels of basement carparking and associated landscaping at No. 35-39 Darley Street East, Mova Vale. The proposal results in a variation to the density controls for residential accommodation development standard prescribed in Clause 4.5A(2) of PLEP 2014.

The architectural drawings prepared by *Plus Studio* form part of the Development Application and are to be read in conjunction with this variation statement.

2. Density Control

Clause 4.5A of PLEP 2014 prescribes the maximum density for certain types of residential accommodation. Specifically, subsection (2) states:

(2) Development consent must not be granted to development for a purpose specified in Column 1 of the table to this clause on land in the zone or area shown opposite that development in Column 2 of that table unless the development complies with the density requirements specified in Column 3 of that table.

Residential flat buildings proposed in the R3 Medium Density Residential zone are limited to a maximum of 1 dwelling per 200 square metres of site area, as demonstrated below.

Column 1	Column 2	Column 3
Specified development	Zone or Area	Density
Attached dwellings	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Multi dwelling housing	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Residential flat buildings	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Semi-detached dwellings	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Seniors housing	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Serviced apartments	R3 Medium Density Residential	A maximum of 1 dwelling per 200 square metres of site area.
Shop top housing	"Area 1" on the Land Zoning Map	A maximum of 1 dwelling per 150 square metres of site area.

Specifically with regard to the site, this equates to a maximum of 13.4 (13) dwellings.

3. Proposed variation to Density Controls for Certain Forms of Residential Development

In accordance with Clause 4.5A(2) to PLEP 2014, the proposed development is subject to a maximum of 13 dwellings are the site. This is based on a site area of 2,679.4m² and a rate of 1 dwelling per 200m² of site area.

The proposed development provides 53 dwellings in the form of residential apartments. This results in an exceedance of 40 dwellings and a percentage variation of 308%. Whilst this is a significant variation, Clause 4.5A(2) does not take into consideration the increased density permitted under the low and mid rise housing and infill affordable housing provisions of the Housing SEPP.

This submission contends that strict compliance with the maximum density control is unreasonable and/or unnecessary in the circumstances of the case and the variation sought can be supported.

4. Clause 4.6 to Pittwater Local Environmental Plan 2014

The objectives and provisions of Clause 4.6 are as follows:

4.6 Exceptions to development standards

(1) *The objectives of this clause are as follows—*

(a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

(b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(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.*

(3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

(b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note—

The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

(5) *(Repealed)*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

(a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

(b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note.

When this Plan was made it did not include all of these zones.

(7) *(Repealed)*

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (caa) clause 5.5.

The development standards in clause 4.5A are not “expressly excluded” from the operation of clause 4.6.

5. Compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a) is Preston CJ’s judgment in *Wehbe V Pittwater Council* (2007) NSW LEC 827 which sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- i. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- ii. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- iii. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- iv. 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;
- v. 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

The objectives and relevant provisions of Clause 4.5A are as follows:

- (1) *The objectives of this clause are as follows—*
 - (a) *to achieve planned residential density in certain zones,*
 - (b) *to ensure building density is consistent with the desired character of the locality.*

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of Clause 4.5A are addressed below:

Objective (a) – “to achieve planned residential density in certain zones”

Objective (a) seeks to ensure that future development is of an appropriate density for the specified zone.

The appropriateness of the density for the specified zone is not solely determined by clause 4.5A(2). Importantly, clause 16 and 180 of the Housing SEPP also proves crucial in defining the appropriateness of a density within a specified zone. The maximum permitted floor space ratio at the site is 2.86:1 or 7,663m² of GFA. This is as prescribed by clauses 16 and 180 of the Housing SEPP. The proposed development provides a total GFA of 7,660.4m² which equates to a FSR of 2.86:1 and complies. Through demonstrating compliance with the applicable FSR control, the planned residential density is adhered to.

It can be argued that whilst planned residential density holds significant importance in PLEP 2014, it holds even greater significance in the Housing SEPP. The Housing SEPP permits residential flat buildings of up to six (6) storeys in the low and mid rise housing *inner area* with a 30% bonus permitted for the provision of infill affordable housing. The Housing SEPP establishes the planned residential density for residential flat buildings in the R3 zone which directly overrides clause 4.5A(2).

The planned residential density as a result of the Housing SEPP controls are beginning to come to fruition as demonstrated in the recent lodgement of DA-2026/0040 and SSD-91496958 (refer to **Figure 1**). These developments are 5-7 storey residential flat buildings that far exceed the density limitations imposed by clause 4.5A(2). It is noted that in the case of SSD-91496958, an amendment was made to clause 4.5A(3) of PLEP 2014 to exclude this site from the density restrictions of clause 4.5(2). However, the principal remains that where there is an inconsistency between the permitted density of the Housing SEPP (FSR) and the permitted density of PLEP 2014 (residential density control), the Housing SEPP should prevail.



Figure 1 Renders of proposed SSD-91496958 and DA-2026/0040, respectively

Objective (b) – “to ensure building density is consistent with the desired character of the locality”.

Objective (b) seeks to ensure that the bulk and scale of new buildings is consistent with the desired character of the locality.

With regards to the desired future character, the strict terms of clause 4.5A(2) of the PLEP 2014 do not define the desired future character. *Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115* at [53]) establishes the interplay between density and character, in relation to clause 4.4 floor space ratio. However, similar to clause 4.4, clause 4.5A is a density based control that is tied to establishing an appropriate character for the locality.

The desired future character of the locality establishes the density for buildings on land in the locality and not the other way around (cf *SJD DB2 Pty Ltd* (at [56])). This means that density controls prescribed within a local planning instrument do not establish the desired future character and can be evaluated by reference to matters other than the strict provisions of clause 4.4 and in this instance clause 4.5A (cf *SJD DB2 Pty Ltd* at [59]).

The Development Application is seeking additional density resulting in an exceedance of 40 dwellings or 308% to the development standard. The streetscape of Mona Vale and surrounds is characterised by an eclectic mix of architectural design, scale and form of dwellings, being both traditional and contemporary in form, with the predominant building form being two to three storey multi dwelling development and residential flat buildings.

The desired character of the locality is defined by the low and mid rise housing (Chapter 6 of Housing SEPP) and infill affordable housing (Chapter 2 of Housing SEPP) which permit far greater density than that of PLEP 2014. The provisions of the Housing SEPP permit a varying maximum built form of six (6) to eight (8) storeys. This is a direct reflection of the site and immediate surrounds ideal location within an accessible area with good access to public transport and in close proximity to a town centre. Thereby, the future character is the desired character as established by the Housing SEPP.

The proposed variation to the density control is relative to the increased density afforded by the Housing SEPP. That being, the maximum building height and FSR permitted at the site far exceeds that prescribed by the PLEP 2014 provisions. Consequently, the proposed building exceeds the density controls of clause 4.5A(2) in PLEP 2014. It can be argued that the building density as envisaged by clause 4.5A(2) is not consistent with the desired future character of the locality, as it is incompatible with the uplifts afforded by the Housing SEPP. The proposed development is compliant with the maximum building height and FSR controls of the Housing SEPP. If the density control of clause 4.5A(2) were to be scaled to align with the applicable uplifts, compliance could be achieved.

The additional residential density fits within a reasonably compliant building envelope and does not adversely impact the bulk and scale of the development. The proposal reflects an appropriate increase in scale, which will be compatible with the be consistent with the desired character of the locality.

Accordingly, the proposed development achieves objective (b), despite the density variation.

6. Sufficient Environmental Planning Grounds (Clause 4.6(3)(B))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above it is considered that there is an absence of any impacts of the proposed non-compliance with the Floor Space Ratio. Specifically, *Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

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].

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the minimum Floor Space Ratio requirement:

1. The FSR controls of the Housing SEPP (Section 16 and 180) should override the residential density control of PLEP 2014. The proposed density of the development is informed by the FSR control of the Housing SEPP. The site is located within the low and mid rise housing *inner area*, permitting an FSR of 2.2:1. Additionally, the site is located within an *accessible area* and is subject to a 30% bonus in FSR, equating to a permitted FSR at the site of 2.86:1. The proposed development provides a GFA 7,660.4m² which equates to a compliant FSR of 2.86:1. It is unreasonable to limit the number of residential dwellings on the site to 13, particularly given the site is permitted a GFA of 7,663m². The Housing SEPP envisages a density far greater than that of PLEP 2014 and should be considered to prevail over clause 4.5A(2) of PLEP 2015.
2. If the proposed development were to be held to the requirements within clause 4.5(2) of PLEP 2014, a total of 13 dwellings would be permitted at the site. The total permitted GFA at the site is 7,663m² which would be shared across 13 apartments and enclosed common areas. This would result in exorbitantly large apartments and a dwelling density less than what is existing on the site. It further would be contradictory to the *Northern Beaches Local Housing Strategy* which seeks to increase housing supply as opposed to reduce it. The residential dwelling control would further limit the viability of providing affordable housing at the site.
3. The Northern Beaches Comprehensive LEP (Northern Beaches LEP) Planning Proposal has been approved by gateway and is in the pre-exhibition stage. The Northern Beaches LEP intends to combine the existing Manly, Pittwater and Warringah LEPs. As outlined in the gateway determination, clause 4.5A of PLEP 2014 is to be replaced by minimum lot size and frontage controls for certain residential accommodation (refer to **Figure 2**). Clause 4.1 of the Northern Beaches LEP will require that sites intended for residential flat buildings in the R3 zone have a minimum lot size of 1,000m² and frontage of 20m. The site contains a lot size of 2,679.4m² and a frontage of 38.1m. These far exceed the minimum requirements of the future Northern Beaches LEP. Clause 4.5A is soon to be redundant and therefore strict compliance in this circumstance would be entirely unreasonable.

Development type	Zone	Minimum lot size	Minimum frontage
Dual occupancy	R1, R3	400 m ²	15 m
	R2	800 m ²	18 m
Manor house	R1, R3	800 m ²	18 m
Multi-dwelling housing / residential flat building / seniors housing	R1, R3	1,000 m ²	20 m

Figure 2 Northern Beaches Comprehensive LEP Planning Proposal Cl. 4.1

4. The non-compliant density fits within a reasonably compliant building envelope. Despite the additional 40 dwellings above that permitted at the site, the development is compliant in terms of building height and FSR. The non-discretionary development standards of clause 19 and requirements in Chapter 6 of the Housing SEPP are adhered to. In addition, the proposal achieves reasonable compliance with the ADG with only minor non-compliances noted with regard to visual privacy pertaining to a series of balconies and splayed windows. Despite the significant exceedance in residential density, a reasonably compliant building is achieved.
5. There is an emerging precedence in the immediate area for the contravention of clause 4.5A(2) of PLEP 2014. As outlined in **Figure 1**, recent examples which are currently under assessment include DA-2026/0040 and SSD-91496958. Developments approved with a contravention to clause 4.5A(2) include Macri v Northern Beaches Council (2021) NSWLEC1685. Importantly, the Clause 4.6 to clause 4.5(2) was upheld as the Clause 4.6 Variation demonstrated that (26(2)) *the Proposed Development will be in the public interest because it is consistent with the objectives of the dwelling density development standard and the objectives for development within the B1 Neighbourhood Centre zone in which the development is proposed to be carried out*. When applied in this instance, it has been thoroughly demonstrated that the proposed development remains aligned with the objectives of Clause 4.5A. Alignment with the R3 zone objectives is demonstrated in Planning Ground (7).
6. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - a. The extent of the variation creates no adverse additional overshadowing impacts to adjoining properties. The density breach is identifiable and will not result in any significant additional loss or non-compliance with the solar access requirements for adjoining properties. When considering the overshadowing, the overshadowing caused by the proposed development is not intensified by the residential density non-compliance;
 - b. The variation results in no adverse additional privacy impact.
 - c. The variation will not result in any significant view loss.
7. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone as it will provide for the housing needs of the community and improve both diversity and affordability of housing in the region. The proposed development also achieves the objects in Section 1.3 of the EPA Act, specifically:
 - (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
 - (b) *to promote the supply, delivery and maintenance of housing, including affordable housing,*
 - (c) *to promote productivity through the development and management of the State and its resources,*
 - (d) *to protect the environment, including the conservation of threatened species of native animals and plants and ecological communities and their habitats,*
 - (e) *to promote resilience to climate change and natural disasters through adaptation, mitigation, preparedness and prevention,*
 - (f) *to promote the sustainable management of built and cultural heritage, including Aboriginal cultural heritage,*

- (g) *to promote good design, amenity and the proper construction and maintenance of built environments, including the protection of the health and safety of the occupants of buildings,*
- (h) *to provide opportunities for participation in environmental planning and assessment,*
- (i) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (j) *to promote a proportionate and risk-based approach to environmental planning and assessment,*
- (k) *to promote the orderly and economic use and development of land.*

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the fact that the variation proposed by this application is minor, does not introduce a new variation and does not have any material additional impacts on the amenity of surrounding properties. The additional residential density does not significantly impact the amenity of the neighbouring properties and has been designed in such a way to ensure the proposal is aligned with the character of the area and results in reasonable amenity impacts. These are not simply benefits of the development as a whole but are benefits emanating from the proposed Variation.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ 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:

"86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

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."

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard to provide a more usable, functional and accessible development. There are sufficient environmental planning grounds to justify contravening the development standard in the circumstances of this case, as required in Clause 4.6(3)(b).

7. Conclusion

This written request has been prepared to support a Development Application made to Northern Beaches Council in relation to the proposed variation to clause 4.5A(2) of PLEP 2014. This request has adequately addressed the matters required to be demonstrated under Clause 4.6(3) in order for any consent authority to be satisfied that compliance with the residential density development standard is unreasonable or unnecessary in the circumstances of this case, and



that there are sufficient environmental planning grounds to justify contravening the development standard. On that basis, the request to vary Clause 4.5A(2) of PLEP 2014 should be upheld.

For these reasons, the proposal sits within the threshold of warranting an “appropriate degree of flexibility” to be applied to “achieve a better outcome for and from development”, being the specific aims of Clause 4.6.

