

CLAUSE 4.6 REQUEST



For:

Request for Variation of the Height of Buildings Development Standard under Clause 4.6 of Woollahra Local Environmental Plan 2014.

At:

Lot 65 DP5139, 16 Olphert Avenue, Vacluse

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This Clause 4.6 Request was prepared by:

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Reference 19056TM

1.0 INTRODUCTION

This Clause 4.6 Request is made pursuant to Clause 4.6 of Woollahra Local Environmental Plan 2014 (LEP 2014) and seeks to justify contravention of the Height of Buildings Standard under Clause 4.3 of LEP 2014 in support of a proposed development described as *“Proposed Alterations and Additions, including Significant Internal Alterations to an Existing Dwelling, and proposed Construction of a New Swimming Pool and Cabana”* at 16 Olphert Avenue, Vaocluse (subject site).

The architectural plans to which this Clause 4.6 Request relate are the plans lodged with the current Development Application (DA), plus the attached amended drawings:

- DA400, Revision B, dated 30 January, 2020
- DA401, Revision B, dated 30 January, 2020
- DA402, Revision B, dated 30 January, 2020
- DA602, Revision B, dated 30 January, 2020

2.0 FRAMEWORK FOR ASSESSING A CLAUSE 4.6 REQUEST

Clause 4.6 of LEP 2014 provides as follows:

Clause 4.6 – Exceptions to Development Standards

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 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.*
- (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 Secretary has been obtained.*
- (5) *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.*
- (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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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.*

Comment:

It is noted that the above Clause 4.6 under LEP 2014 is a clause that is part of the Standard Instrument throughout New South Wales.

The provisions of the standard Clause 4.6 have been the subject of judicial consideration in a number of judgements of the Land and Environment Court (Court) and the NSW Court of Appeal.

A very useful summary of the framework for assessing a Clause 4.6 Request is outlined in the judgement of his Honour, Justice Moore of the Court in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 (*Rebel*). At paragraphs 44-47, Justice Moore sets out “the framework for assessing a Clause 4.6 Request” which is outlined below:

“The framework for assessing a cl 4.6 request

44. In his recent decision in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action), Preston CJ addressed the decision-making approach to be undertaken by a consent authority when assessing the adequacy of a request for a dispensation from compliance with a development standard in a local environmental plan. The power to grant such a dispensation is given by cl 4.6 of a local environmental plan. Clause 4.6 is a standard provision in local environmental plans throughout New South Wales. It takes a common form which his Honour set out, at [8], and as I also have, relevantly, earlier at [17].

45. His Honour set out (between [5] and [29]) a comprehensive analysis of the approach to be taken to determining a request made pursuant to cl 4.6.

46. For me to grant development consent for this development as it contravenes the permitted maximum building height development standard, cl 4.6(4)(a) requires me to be satisfied that:

- 1. The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposed development (cl 4.6(3)(a) and cl 4.6(4)(a)(i)); **and***
- 2. The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)); **and***
- 3. The proposed development will be in the public interest because it is consistent with the objectives of the standard in question - set out in cl 4.3 of the LEP (cl 4.6(4)(a)(ii)); **and***
- 4. The proposed development will be in the public interest because it is consistent with the objectives of the R4 High Density Residential Zone (cl 4.6(4)(a)(ii)),*

47. For the first of the above matters, Preston CJ made it clear, in Initial Action at [25], that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather that it “only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed” those matters.”

Accordingly, this Clause 4.6 Request must satisfy the following: -

- (1) That the Clause 4.6 Request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development.
- (2) That the Clause 4.6 Request adequately establishes sufficient environmental planning grounds to justify contravening the development standard.
- (3) That the proposed development will be in the public interest because it is consistent with the Objectives of the Height of Buildings Standard.
- (4) That the proposed development will be in the public interest because it is consistent with the Objectives of the Low Density R2 zone.

As noted above, Justice Moore followed the previous decision of his Honour, Chief Justice Preston in *Initial Action* in which the Chief Justice “*addressed the decision-making approach to be undertaken by a consent authority when assessing the adequacy of a request for a dispensation from compliance with a development standard in a Local Environmental Plan*”.

A recent decision of the NSW Court of Appeal has further considered the construction of Clause 4.6 (4)(a)(i), with particular relevance as to state of satisfaction necessary to be held by the consent authority in considering a Clause 4.6 Request (*Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 at [21]-[24]).

More recently, Commissioner Dickson in *Raissis v Randwick City Council* [2019] NSWLEC 1040 (*Raissis*) referred to the seminal decision of his Honour, Chief Justice Preston in *Initial Action*.

As noted in paragraphs 19 and 20 in *Raissis*, Commissioner Dickson advised that: “*for there to be power to grant development consent for a development that contravenes a development standard, I must be satisfied that:*

- *The proposed development will be consistent with the Objectives of the zone (cl 4.6(4)(a)(ii)),*
- *The proposed development will be consistent with the Objectives of the standard in question (cl 4.6(4)(a)(ii)),*
- *The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)), and*

- *The written request adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

20. *Further at cl 4.6(4)(a)(ii), the Court must be satisfied that the development will be in the public interest because it is consistent with the Objectives of the Building Separation standard and the Objectives of the B3 zone: Initial Action v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action) at [26].”*

Clearly, Commissioner Dickson followed the previous Court judgements in *Initial Action* and *Rebel*.

The following sections of this Clause 4.6 Request seek to address the matters listed in (1)-(4) above in the judgement of Justice Moore in *Rebel* in relation to the proposed variation of the Height of Buildings Standard for this DA.

It is also relevant to consider the Objects of Section 1.3 of the Environmental Planning and Assessment Act (the Act) which states as follows:

1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

- (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 facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State, (j) to provide*

increased opportunity for community participation in environmental planning and assessment.

3.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

Clause 4.3 Height of Buildings Standard

(1) *The Objectives of this clause are as follows:*

(a) to establish building heights that are consistent with the desired future character of the neighbourhood,

(b) to establish a transition in scale between zones to protect local amenity,

(b) to minimise the loss of solar access to existing buildings and open space,

(c) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

(d) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

(2A) *Despite subclause (2) and clause 4.3A, the maximum height of a dwelling house, dual occupancy or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.*

(2B) *Despite subclause (2) and clause 4.3A, the maximum height of a building on a battle-axe lot on land in Zone R3 Medium Density Residential is 9.5 metres.*

Comment:

Pursuant to Clause 4.3 of LEP 2014, the Height of Buildings Standard applicable to the proposed development and the subject site is 9.5m.

The term “*building height*” is defined in the Dictionary of LEP 2014 as follows:

“*building height (or height of building) means:*

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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.”

The term “*ground level (existing)*” is defined in the Dictionary of LEP 2014 as follows:

“ground level (existing) means the existing level of a site at any point.”

Based on the architectural plans referred to in page 3 of this Clause 4.6 Request, the proposed development has a proposed maximum building height of 10.091m above existing ground level which represents a 0.591m breach of the 9.5m Height of Buildings Standard.

For the reasons outlined in this Clause 4.6 Request, I consider that variation of the Height of Buildings Standard is eminently reasonable in the circumstances of the proposed development.

4.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

I consider that compliance with the Height of Buildings Standard in Clause 4.3 of LEP 2014 is unreasonable and unnecessary in the circumstances of the proposed development for the following reasons:

- Whilst there is a breach of the Height of Buildings Standard, the breach is a very minor numerical breach. The great majority of the proposed dwelling is also significantly below the 9.5m Height of Buildings Standard. Please refer to the attached architectural plans which clearly evidence the fact that the breach is only very minor and the great majority of the proposed dwelling is significantly below the 9.5m Height of Buildings Standard.
- The maximum building height is located over a minor portion of the proposed roof, located at the northern section of the proposed roof. Furthermore, the breaching portion will not be readily visible from the public domain and adjoining properties as indicated in the various view analysis drawings lodged with the current DA.
- The proposed dwelling is strongly articulated on its external facades.
- The proposed development does not create adverse unreasonable impacts on adjoining properties or the public domain as outlined in this Clause 4.6 Request and my accompanying Statement of Environmental Effects (SEE),
- I also consider that there are positive Environmental Planning Grounds and Positive Outcomes to justify contravention.
- For the reasons outlined in my SEE, the proposed development “*is of a height and scale that achieves the desired future character of the neighbourhood*” for the following reasons:
 - (i) The proposed development will present itself as a single storey structure when viewed from Olphert Avenue. In fact, the current DA will result in a reduction in the overall height of the existing dwelling when viewed from the street, despite the introduction of the proposed roof top terrace, due to the removal of the existing pitch roof to be replaced with a proposed flat roof.
 - (ii) The single storey presentation of the existing dwelling when viewed from the street will remain, but in a more visually appealing form.

- (iii)** For the reasons outlined in my SEE, the proposed development will not have an adverse impact on the public domain. On this point, I consider that the proposed dwelling will result in an improvement compared to the existing dwelling in terms of its visual aesthetics when viewed from the public domain.
- (iv)** There is no impact on the public domain in terms of public views of Sydney Harbour and surrounding areas.
- (v)** For the reasons outlined in my SEE, I consider that there is no unreasonable impact on solar access to existing adjoining buildings and their open space areas.
- (vi)** For the reasons outlined in my SEE, I consider that there are no unreasonable impacts on views, privacy, overshadowing or visual intrusion/impact on existing adjoining buildings and their open space areas.

Please refer to additional comments in my SEE in support of this Clause 4.6 Request.

5.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

In *Initial Action*, his Honour, Chief Justice Preston provides the following guidance in paragraph 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. 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 s1.3 of the EPA Act.”

The environmental planning grounds that justify contravening the Height of Buildings Standard for the current DA include, but are not limited to, the following:

- Whilst there is a breach of the Height of Buildings Standard, the breach is a very minor numerical breach. The great majority of the proposed dwelling is significantly below the 9.5m Height of Buildings Standard. Please refer to the architectural plans.
- The proposed dwelling is strongly articulated on the external facades.
- The proposed development is consistent with the Object of the Act “*to promote the orderly and economic use and development of land*” as it provides for more modern accommodation on the subject site generally within the existing footprint whilst respecting the character of the locality and adjoining premises.
- The proposed development will result in a significant increase in the area and quality of landscaping on the subject site compared to the existing situation, including the front setback area fronting Olphert Avenue.
- The visual aesthetics of the proposed development will be significantly improved compared to the existing building. Of particular note is the proposed flat roof, which will provide a more visually appealing dwelling.
- The use of attractive external finishes, particularly the proposed flat roof and modified garage door, will increase variety to the existing building and positively contribute to the streetscape and the public domain.

Please refer to additional comments later in this Clause 4.6 Request.

6.0 THE PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD.

The Objectives of the Height of Buildings Standard are:

(1) The Objectives of this clause are as follows:

(a) to establish building heights that are consistent with the desired future character of the neighbourhood,

(b) to establish a transition in scale between zones to protect local amenity,

(c) to minimise the loss of solar access to existing buildings and open space,

(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the [Height of Buildings Map](#).

(2A) Despite subclause (2) and clause 4.3A, the maximum height of a dwelling house, dual occupancy or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.

(2B) Despite subclause (2) and clause 4.3A, the maximum height of a building on a battle-axe lot on land in Zone R3 Medium Density Residential is 9.5 metres.

Comment:

Notwithstanding the breach of the Height of Buildings Standard, I consider that the Objectives of the Height of Buildings Standard are satisfied for the following reasons:

- (a)** The proposed height is consistent with adjoining buildings and the desired future character for the reasons outlined in my SEE and this Clause 4.6 Request.
- (b)** The subject site is within the R2 Low Density Residential zone and the proposal is of a height and scale which achieves the desired future character of the neighbourhood.

- (c)** The proposed dwelling will continue to present itself as a single storey structure when viewed from Olphert Avenue.
- (d)** For the reasons outlined in my SEE and this Clause 4.6 Request, the proposed development will not have an adverse impact on the public domain.
- (e)** I consider that the proposed development will result in an improvement compared to the existing development in terms of its visual aesthetics when viewed from the public domain.
- (f)** For the reasons outlined in this Clause 4.6 Request and my SEE, there is no unreasonable impact on the amenity of existing adjoining dwellings and their open space areas.
- (g)** The breach is very minor in numerical terms and the great majority of the proposed dwelling is significantly below the 9.5m Height of Buildings Standard.
- (h)** The breaching portion will not be readily visible from the public domain and adjoining properties.

7.0 PROPOSED DEVELOPMENT WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE

The Objectives of the R2 Low Density zone are:

Objectives

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

Comment:

As previously advised, the zoning of the subject site is R2 Low Density Residential.

The existing dwelling, comprising a 2-3 storey dwelling, is a permissible development under the R2 Low Density zone. Accordingly, the proposed alterations and additions to the existing dwelling also constitute a permissible development.

For the reasons outlined in my SEE, I consider that the proposed development satisfies the relevant Objectives of the R2 Low Density Residential zone. I particularly note the following:

- As to the first Objective, I consider that the proposed alterations and additions assist in providing housing for the needs of the community within a low density residential environment.
- The second Objective is not applicable.
- As to the third Objective, I consider that the proposed development is compatible with the character and amenity of the surrounding neighbourhood for the reasons outlined in this Clause 4.6 Request and my SEE. I particularly note the range of positive outcomes arising from the proposed development which are outlined in this Clause 4.6 Request and my SEE.

- I consider that the proposed development, notwithstanding the breach of the Height of Buildings Standard, is of a satisfactory height and scale and achieves the desired future character of the neighbourhood for the reasons outlined in my SEE. Please also refer to additional comments provided in this Clause 4.6 Request and my SEE.
- Whilst there is a breach of the Height of Buildings Standard, the breach is a very minor numerical breach. Most importantly, the great majority of the proposed dwelling is significantly below the 9.5m Height of Buildings Standard.
- The proposed dwelling is strongly articulated on the external façades.

8.0 STATE OR REGIONAL ENVIRONMENTAL PLANNING SIGNIFICANCE AND THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

The contravention of the Height of Buildings Standard in the circumstances of this application does not raise any matter of significance for State or regional environmental planning.

9.0 POSITIVE OUTCOMES OF THE PROPOSED DEVELOPMENT

I consider that the proposed development provides positive outcomes including, but not limited to, the following:

- The visual aesthetics of the proposed development will be significantly improved compared to the existing dwelling for the reasons outlined in my SEE.
- The use of attractive external finishes will increase variety to the existing building and positively contribute to the streetscape and the public domain.
- The existing pitch roof will be replaced with a flat roof and rooftop terrace, reducing the visual impact of the front façade and reducing the existing breaches of the Building Envelope Controls.
- Whilst there is a breach of the Height of Buildings Standard, the breach is a very minor numerical breach. The great majority of the proposed dwelling is significantly below the 9.5m Height of Buildings Standard.
- The proposed dwelling is strongly articulated on the external façades.
- The replacement front fence is to be recessed back from its current location on the front boundary.
- The proposed garages will be in the same location as the existing garages, whilst providing a new façade and entry doors to provide a greater level of access.
- The area and quality of landscaping throughout the site will be increased through the removal of the existing pool and concrete slab, artificial tennis court and the implementation of additional planter beds.
- The existing landform will remain unchanged in terms of cut and fill, except for minor level changes to portions of the bedroom level and ground floor, minor works for the proposed alfresco area and minor excavation for the proposed new pool.

10.0 CONCLUSION

For the reasons outlined in this Clause 4.6 Request, I consider that variation of the Height of Buildings Standard should be supported in order to facilitate approval of the proposed development.

A handwritten signature in black ink that reads "Tony Moody". The signature is written in a cursive style with a horizontal line underneath the name.

TONY MOODY

BTP(UNSW), LL.B (UTS)(Hons.), MPIA

Dated: 31 January, 2020.