

CLAUSE 4.6 – VARIATION
REQUEST
TO CLAUSE 6.6 DUAL
OCCUPANCIES
DEVELOPMENT STANDARD –
NORTH SYDNEY LOCAL
ENVIRONMENTAL PLAN 2013
PROPOSED ALTERATIONS AND
BUILDING UPGRADE WORKS TO
CLASS 2 DUPLEX AT 42 & 42A
MILSON ROAD CREMORNE
POINT

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CLAUSE 4.6 – EXCEPTION TO A DEVELOPMENT STANDARD IN RELATION TO CLAUSE 6.6 - DUAL OCCUPANCIES OF THE NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013

1.0 INTRODUCTION

This written request is made pursuant to the provisions of Clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP 2013).

This Clause 4.6 Request is submitted to address the following issue raised by the assessing planner during the assessment of the initial DA -

The development does not satisfy subclauses in Cl. 6.6(2)(b) of NSLEP 2013 because the increase in the bulk and scale of the building is not substantially within the fabric of the existing building, and the appearance of the building would substantially change not conserving the appearance of the existing building.

The purpose of this Clause 4.6 Request is to formalise a request for Council to invoke the provisions of Clause 4.6 namely-

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

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

The assessment of the initial proposal raised concerns over the removal of the existing building fabric however the assessment did not acknowledge the following –

- The fabric to be removed was generally not part of the original building structure and exhibited little heritage value.
- Numerous components of the existing building could not be retained as their retention could not permit the proposal to comply with the Building Code of Australia (BCA).

Bulk and scale has now proposed to be further reduced by the removal of the proposed dormer on the northern roof and the removal of 5% of site coverage and expanded landscaped area. A variation is sought in relation to the performance Development Standard of Clause 6.6 and associated maps of the NSLEP 2013, in relation to structural repairs and BCA compliance works to the existing Class 2 Duplex at 42 and 42A Milson Road Cremorne Point. It should be noted that this request is being submitted for abundant caution as I am of the opinion that the development standard does not apply to the proposed alterations and additions as the development standard, in my view only applies to the construction of, or conversion to a dual occupancy.

2.0 SUBJECT SITE AND LOCALITY

The subject site is legally described as SP 32457 and known as 42 & 42A Milson Road, Cremorne Point NSW 2090 and encompasses an area of 520.9 m² with the Milson Road frontage being 15.24 m in

width and the rear boundary to the west being 15.405 m.

The subject site is slightly irregular in shape at the western boundary and currently contains a two storey strata-titled dual occupancy comprising one dwelling constructed over the other dwelling.

The Milson Road frontage is currently dominated by a four car garage with a tiled roof with the existing side setbacks and garden areas primarily comprising paving with little vestiges of landscaping.

The subject site is located within the CA06 Cremorne Point Conservation Area and is a neutral item in terms of heritage.

The existing structure on the subject site comprises an attached dual occupancy which is identified as requiring significant structural repairs and upgrading and also the necessity to bring the dual occupancy into compliance with the provisions of *clause 64 of the Environmental Planning and Assessment Regulation 2021* which requires that the existing building be brought into conformity with the *Building Code of Australia*.

3.0 THE PROPOSAL

The proposal is being submitted to Council as a consequence of significant structural failures identified throughout the building and the non-compliance with the fire safety provisions of the Building Code of Australia.

These works require removal of non-compliant elements within the structure however items of heritage significance, if able to satisfy the

BCA provisions will be preserved, repaired or rebuilt to satisfy the heritage provisions of the North Sydney LEP.

The works will include the provision of a lift to serve all three levels of the proposal.

Each floor will have unsympathetic historical elements removed and replaced with suitable elements that are compatible with the historical significance of the structure.

The lower floor area will be expanded to provide a master bedroom and subsequent reconfigurations of the remainder of the floor space including the reinstatement of the lower balcony deck.

The upper ground floor will have significant modifications to the eastern components by the removal of two car parking spaces to enhance the landscaped area available, provision of a lift and sympathetic reconfiguration of the westernmost terrace.

The top floor is to be provided with an ensuite to serve the master bedroom and terrace area located within the roof area.

The amended proposal under Section 8.2 seeks further consideration of the proposal by North Sydney Council for demolition and construction works to repair structural faults within the existing Class 2 Dual Occupancy and carry out works to the structure to achieve compliance with current building standards, particularly the BCA and NCC.

The proposed amendments address the reasons for refusal, structural

repairs and the works required for compliance with the BCA as follows-

Lift and stair have been moved to eliminate the roof dormer.

Lower ground windows now have had some fine transoms and mullions added - more in keeping with 'arts and crafts'

Upper level walls are now all shingles - more in keeping with 'arts and crafts' external finishes.

The original dormer has been retained.

Stained glass windows are being reused.

The building height from existing groundline is now identified on drawing DA-A-404 with RL's and dimensions.

The roof over the bedroom 4 has been changed to be more 'arts and crafts'

Site coverage has been further reduced by reducing the lower ground master bedroom size and reducing the garage to two spaces, whilst not achieving the 45% ratio, the proposal as amended (61%) will achieve a 5% improvement from the existing building which has a site cover of 66%.

4.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT

The Development Standard, the subject of this request is as follows-

6.6 Dual occupancies

(1) *Development consent must not be granted for the erection of a dual occupancy unless—*

(a) the form of the building will appear as a dwelling house, and

(b) the dwellings in the dual occupancy will be attached by at least 80% of the common wall or 80% of the common floor or ceiling, and

(c) the area of the lot on which the dual occupancy is to be situated is at least 450 square metres.

(2) *A dual occupancy must not be erected on land that is located within a heritage conservation area or on which a heritage item is located unless—*

(a) there is no existing building erected on the land, or

(b) the dual occupancy—

(i) will be situated substantially within the fabric of an existing building, and

(ii) will conserve the appearance of the existing building, as visible from a public place, and

(iii) will conserve the majority of the significant fabric of the existing building.

(iv)

5.0 CLAUSE 4.6(3)(a) IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Established practices for applicants to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

Wehbe sets out a five part test for an applicant to satisfy the criteria for demonstrating satisfaction of this component of Clause 4.6.

These five tests are as follows-

1. by demonstrating that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard.
2. by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary.
3. by confirming that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable.
4. by illustrating that the Council itself has granted development consent that departs from the standard and arguing from this that the development standard has been 'virtually abandoned or destroyed,' rendering it unnecessary and unreasonable.
5. by establishing that the zoning area of the proposed development was 'unreasonable or inappropriate' such that the development standard which is appropriate to that zoning is no longer reasonable or necessary for the particular area. Preston CJ has explained that the focus of this reason is that the zoning of the land in question is

unreasonable or inappropriate, rather than the standard being inappropriate in that zone.

For the purposes of this 4.6 Request, the first test under Wehbe is adopted to establish that compliance with the development standard is unreasonable and unnecessary as the objectives of the development standard are achieved despite non-compliance with the numerical development standard.

An assessment of the proposal against the Objectives of the R2 Low Density Residential Zone under the NSLEP are provided on pages 17, 18 and 19 of this request.

6.0 CLAUSE 4.6(3)(b) ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The decision of the Court in *Initial Action* 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

In my opinion, there are sufficient environmental planning grounds to justify the requested variation as follows.

Environmental Planning Ground 1 – Removal of unsympathetic elements from existing structure

The following extracts from the architectural plans illustrate the removal of unsympathetic elements from the existing structure illustrated in the current photo from Cremorne Reserve – 2023.

This elevation will be viewed by visitors, passers-by and nearby residents using the reserve and reduces the amount of built fabric to be retained however the removal of unsympathetic architectural elements whilst reduces the degree of compliance with the development standard, the outcome is twofold in that the completed proposal will be a better fit within the Heritage Conservation Area and reduces bulk and scale to endorse environmental outcomes sought by the objectives of the R2 Low Density Residential Zone.



02 CURRENT PHOTO FROM CREMORNE RESERVE - 2023
scale 1:NTS



04 PHOTOMONTAGE - FROM CREMORNE RESERVE
scale 1:NTS

Environmental Planning Ground 2 - Objectives of the EP&A Act

The proposal clearly endorses the relevant objects of Clause 1.3 of the Act as follows –

The proposal endorses the provisions of clause 1.3 (c) of the Act as it promotes the **orderly and economic use and development of land** by performing significant sympathetic renovations to an existing historical building rather than demolishing the existing structure.

The proposal maintains the **provision of affordable housing** by ensuring that the two dwellings remain on the subject site in a manner that preserves the appearance of the structure as a single dwelling.

The proposal promotes the **sustainable management** of the built heritage by proposing structural repairs and building compliance works in a manner that will retain the principal heritage values of the existing building. Removal of unsympathetic elements and extensive retention and reuse of a significant number of components of the existing building and compliance with the provisions of the Building Sustainability Index further endorse this outcome.

The proposal promotes the **proper construction and maintenance of buildings, including the protection of the health and safety of their occupants** by performing extensive structural repairs to ensure ongoing structural soundness and the

incorporation of compliant building methods to ensure ongoing compliance with the fire safety controls under the Building Code of Australia.

Further principles adopted by relevant case law are found within the following judgement.

Naddaf v Parramatta City Council [2020] NSWLEC 1254

This decision, albeit for a minimum lot size development standard has been reviewed and the relevant considerations under this decision by SC O'Neill are as follows.

Relevant consideration 1.

Maintain the appropriate density, character and development pattern within the residential area.

RESPONSE

The proposal will not disrupt the current density, character or development within the residential area of Cremorne Point As the building form proposed will endorse the retention on the existing structure however will be updated and repaired to be structurally sound and satisfy fire safety controls.

Relevant consideration 2 –

Ensure that lots have sufficient area to comfortably accommodate to smaller, attached dwellings and maintain the amenity for future residents and neighbours. Maintain a consistent subdivision, development pattern and residential

density.

RESPONSE

The proposal seeks consent for alterations and additions to an existing strata titled duplex.

No material changes are proposed to the dwellings in terms of their juxtaposition with each other being one dwelling located over the lower dwelling as originally approved under the consent granted for the strata subdivision.

In terms of amenity for both future residents and neighbours, the lack of any material impacts in terms of overlooking, overshadowing, view loss or excessive bulk and scale confirms the suitability of the proposal and its endorsement of the above consideration.

The proposal does not seek to reduce the floor area of either dwelling but seeks to carry out works to ensure compliance with the provisions of the BCA which includes requirements for light and ventilation, fire safety and accessibility. The proposed works will enable a completed proposal to be brought into compliance with the BCA which it now fails to achieve.

I am of the view that sufficient environmental planning grounds exist for the breach of the development standard to be endorsed by the consent authority.

7.0 WILL THE PROPOSAL BE IN THE PUBLIC INTEREST?

In accordance with Clause 4.6(4)(a), Development Consent must not be granted to a development that contravenes a Development Standard unless Council is satisfied in relation to certain matters as follows;

i. the consent authority is satisfied that:

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

and

2. 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

ii. the concurrence of the Director-General has been obtained.

The matters required to be addressed are addressed in Parts 4 and 5 of this submission and are consistent with the objectives of the R2 Low Density Residential Zone as follows –.

1 Objectives of zone

- **To provide for the housing needs of the community**

within a low density residential environment.

The proposal provides two dwellings within a structure that was originally designed and constructed to contain one dwelling thereby providing additional housing.

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

Not applicable to the subject proposal.

- ***To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.***

The subject proposal does not compromise the amenity of the surrounding area, will not impact upon the natural heritage of the area and will bolster the cultural heritage of the area by the removal of unsympathetic elements and replacement with sympathetic elements.

- ***To ensure that a high level of residential amenity is achieved and maintained.***

The proposal is required to satisfy the provisions of the Building Code of Australia and the Building Sustainability index by providing adequate light ventilation and solar access to living areas to the subject dwelling whilst also ensuring that there is no material adverse impact upon dwellings in the nearby locality. This is able to be achieved by the proposal if constructed.

The notification of the proposal to the public on two occasions and the lack of any submissions in response raising any concerns over the proposal indicate that the public interest is served as the proposal satisfies the objectives for development within the zone in which the development is proposed to be carried out.

8.0 CLAUSE 4.6 (4)(b) (CONCURRENCE OF THE SECRETARY)

ASSESSMENT:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument.

In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the relevant Development Standard is assumed by the applicant.

9.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL FOUNDED?

I remain of the view that the proposal is reasonable and has been sensitively crafted to endorse heritage, bulk and scale, structural soundness, amenity, solar access, views, fire safety and the provisions of Councils planning controls and for the reasons set out within this clause 4.6 request I believe that the objection to the development standard is well founded and worthy of support.

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Dated: 20 NOVEMBER 2024