

CLAUSE 4.6 – VARIATION REQUEST  
TO MAXIMUM BUILDING HEIGHT  
(CLAUSE 4.3)

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 4.3(2) – HEIGHT OF BUILDINGS OF THE NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013**

### **1.0 INTRODUCTION**

This written request accompanies a Division 8.2 Review application requesting Council to review the decision of the North Sydney Local Planning Panel on 5 June wherein development consent was refused for the subject proposal.

Amended plans and accompanying documentation have been submitted to Council for the review.

The subject request is made under the provisions of clause 4.6 current at the date of lodgment of the subject development application for – substantial alterations and additions to lower ground floor, ground level and first floor additions and demolition of four bay garage and replacement with a three bay garage with green roof.

The architectural plans and accompanying documentation submitted with the Division 8.2 Review have been amended to address the reasons for refusal namely –

***Heritage Impacts***

***Height of Building -***

***Clause 6.6 – Dual Occupancy***

## ***Site Coverage and Unbuilt Upon Area***

### ***Public Interest***

This request is made pursuant to the provisions of Clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP 2013). A variation is sought in relation to the Height of Buildings Development Standard of Clause 4.3(2) 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.

## **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 m<sup>2</sup> with the Milson Road frontage being 15.24 m in width and the rear boundary to the west being 15.405 m.

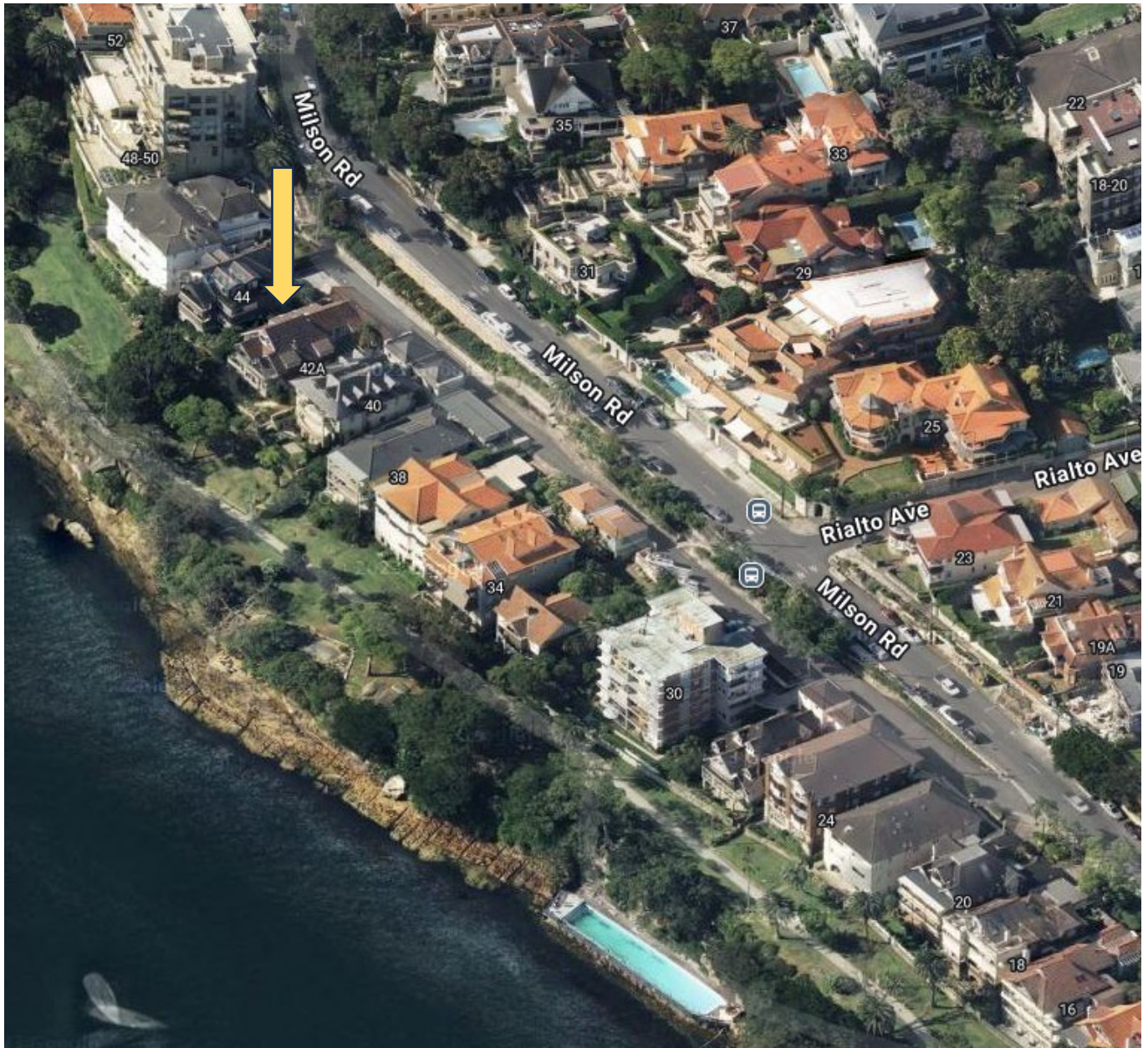
The subject site is slightly irregular in shape at the western boundary and currently contains a two storey strata-titled dual occupancy comprising one dwelling constructed over the other dwelling.

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*.

The existing structure currently exceeds the 8.5 m maximum building height development standard under clause 4.3 of the North Sydney Local Environmental Plan 2013. The subject proposal will breach the control to an identical degree as the current structure.



**AERIAL VIEW OF CREMORNE POINT SHOWING SUBJECT SITE**

**Surrounding development** along the western side of Milson Road (see preceding photograph) predominantly comprises medium density structures ranging from two storeys to over six storeys in height, interspersed with detached dwellings of 2 to 3 storeys, several of which are identified as items of heritage significance.

There is no prevailing architectural character within this

part of Cremorne Point apart from predominantly pitched roof forms.

The R2 Low Density Residential zoning of the locality is not reflected in the density of the western side of Milson Road which is almost exclusively medium density.

## **2.0 THE PROPOSAL (as amended)**

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%.**

### **3.0 THE DEVELOPMENT STANDARD AND THE VARIATION SOUGHT**

#### **3.1 North Sydney LEP 2013 (NSLEP)**

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

Pursuant to Clause 4.3 of North Sydney Local Environmental Plan 2013 (NSLEP) the height of a building on the subject land is not to exceed 8.5 metres in height.

The objectives of this control are as follows:

#### **4.3 *Height of Buildings***

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



(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,

(b) to promote the retention and, if appropriate, sharing of existing views,

(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,

(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,

(e) to ensure compatibility between development, particularly at zone boundaries,

(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.

(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.

**building height (or height of building)** is defined as follows under NSLEP Dictionary

(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.*

### **3.2 Variation sought**

The subject site has a prescribed maximum building height at any one point of 8.5 m above existing ground level under the provisions of the NSLEP2013.

**Ground level (existing)** is defined as follows under NSLEP Dictionary-

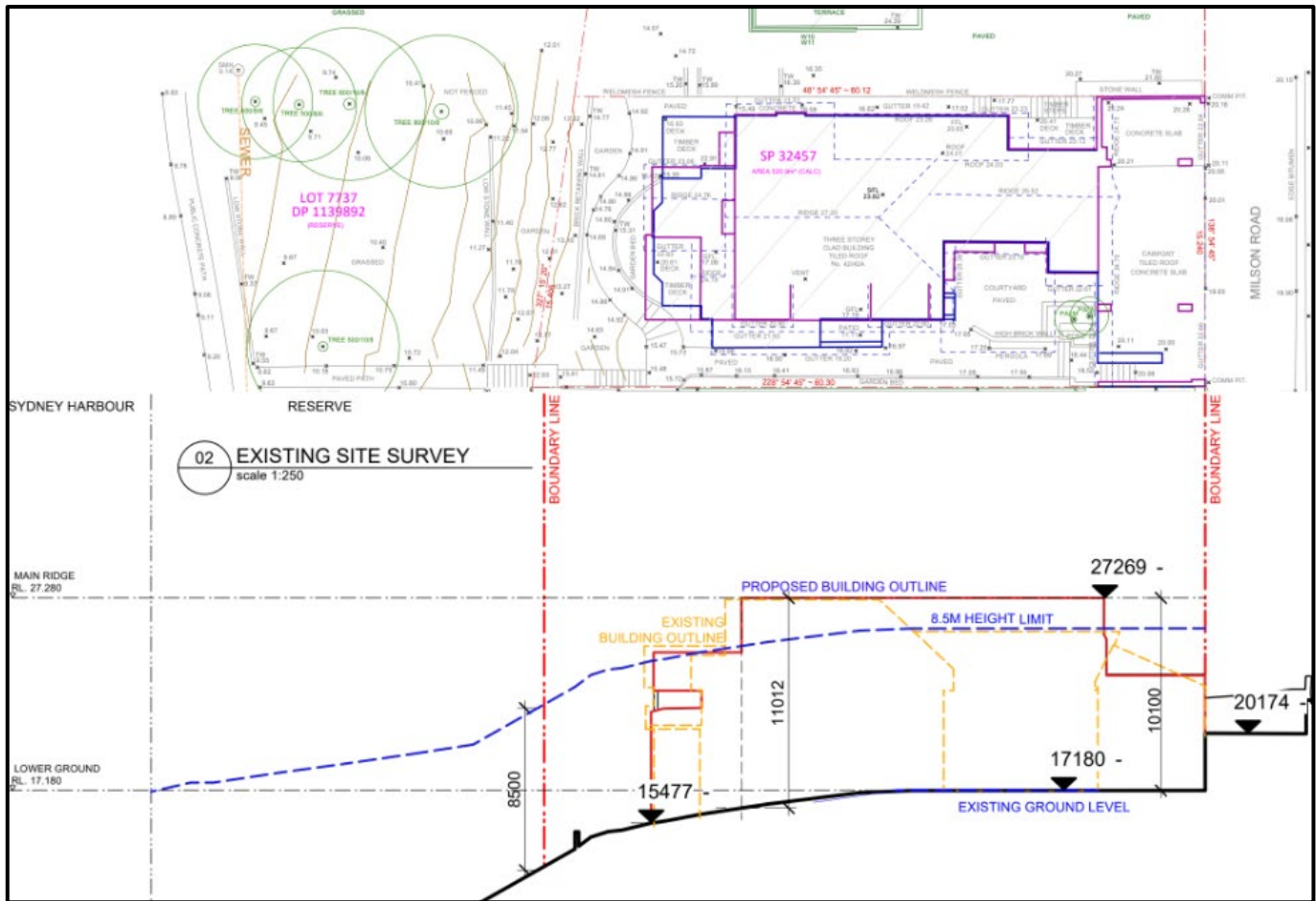
*ground level (existing) means the existing level of a site at any point.*

The submitted architectural plans accompanying the 8.2 review application (an extract of which follows) illustrates the breach of the maximum building height development standard measured from the existing ground level within the perimeter of the building and the 8.5 m building height development standard superimposed.

**The plan indicates a maximum building height of 11.012m at the highest point, a resultant breach of the 8.5m development standard of 2.512m, a breach of 29.5% at the highest point above the existing ground level at that point.**

It should be noted that the proposed building height is a minimal 80 mm taller than the existing building height of RL 27.2 m AHD.

The below extract from the architectural plans shows the survey plan and a section through the proposal illustrating relative levels.



**ARCHITECTURAL PLANS EXTRACT SHOWING SURVEY AND  
MAXIMUM BUILDING HEIGHT**

**3.3 NSLEP 2013 Clause 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.*

Chief Justice Prestons decision in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6. This was later clarified by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]*. This decision by the Court where the Court confirmed that a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of Initial Action the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a*

*development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in Initial Action is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

This Clause 4.6 request seeks flexibility in the application of the height development standard under the NSLEP to the proposed development in the circumstance of this particular case.

The circumstances of the proposal are such that the proposed building height is appropriate, primarily due to the minor extent of the height variation, particularly given the technical nature of non-compliance as the variation to the height development standard.

The completed proposal, if approved, will result in a structure that will remain one of the lowest height buildings within the locality, to a significant extent.

**EXTRACT FROM ARCHITECTURAL PLANS SHOWING INCURSION  
INTO MAXIMUM BUILDING HEIGHT LINE**

**4.0 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.

#### **4.1 Consistency with objectives of the height of buildings development standard**

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

*(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

#### **RESPONSE**

The proposed alterations and additions to the existing structure are consistent with the roof height and pitch. The existing structure is currently in exceedance of the 8.5 m maximum building height standard and the additions to the roof area are deliberately crafted to maintain the appropriate context of the roof form to

endorse the need to reasonably retain building characteristics within a Heritage Conservation Area.

*(b) to control the bulk and scale of buildings,*

**RESPONSE**

The bulk and scale of the building (if constructed) will be entirely consistent with the existing structure in terms of its building height slope and character with the completed proposal that will result in less bulk and scale than existing and significantly less bulk and scale than the majority of buildings in the immediate locality.

*(c) to minimise disruption to the following:*

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

*(iii) views between public spaces (including the harbour and foreshores)*

**RESPONSE**

The proposal has been crafted to retain views across the structure from any public or private locations surrounding the subject site.

This is clearly evidenced in the absence of any submissions from members of the public, adjoining or nearby residents or any community organisations.



*(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

**RESPONSE**

The shadow diagrams submitted with the subject proposal have been assessed against the provisions of North Sydney Development Control Plan and the resultant outcome is that adequate sunlight access is provided to private open spaces and to all habitable rooms of adjacent dwellings.

*(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

**RESPONSE**

Not applicable.

The above test under the first principle of *Wehbe* confirms the suitability of the proposal in terms of maintaining the appearance of the existing historical structure by providing a consistent roof form which importantly satisfies the objectives of the control and will not result in any material adverse impacts.

## **5.0 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 building height variation as follows.

#### **Environmental Planning Ground 1 – Topography of The Site**

The subject site slopes from a highpoint of 20.18 m AHD at the Milson Road frontage to a low point of 12.62 m AHD at the lowest point of the eastern boundary. The resultant slope of 12% is the prime contributing factor to the breach of the 8.5 m maximum building height development standard. Excavation of the subject site further contributes to the breach as illustrated in the earlier extract from the architectural plans.

This is confirmed in the plans that show the maximum building height line following the excavated contours of the site however the ridgeline remains level, not exacerbating the breach of the standard but maintaining a consistent built form.

When viewed from the adjacent public reserve, the building height if approved under the proposal will be indistinguishable

from the existing structure however the surrounding context of medium density multi-storey residential flat buildings will continue to be the dominant built form in the locality.

When viewed from the Milson Road frontage, the views across the subject site towards iconic features such as the Sydney Opera House and Sydney Harbour Bridge will be unaffected by the proposed works, despite the breach of the development standard.

### **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. 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.

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.

## **6.0 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;

- (a) the consent authority is satisfied that:*
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3),*  
*and*
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular*

*standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

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

The matters required to be addressed by subclause (3) 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.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *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.*
- *To ensure that a high level of residential amenity is achieved and maintained.*

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 is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

## **7.0 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 Maximum Building Height Development Standard is assumed by the applicant.

## **8.0 IS THE OBJECTION TO THE DEVELOPMENT STANDARD WELL FOUNDED?**

I believe that the preceding written objection is well founded and the exceedance of the standard resulting in a compatible built form compliant with the outcomes sought by the relevant planning controls and lack of environmental harm is a well-founded outcome.

The proposal does not seek to significantly raise the height of the existing ridge and incorporates the removal of significant incompatible elements of the existing structure on the harbourfront and the Milson Road frontages which result in a significantly reduced bulk of the building and retention of heritage elements when viewed from any public or private locations in the proximity of the subject site.

The proposal is worthy of support and will not result in an undesirable precedent due to the individual merits of the proposal by reflecting the need for built form that seeks to endorse the outcomes prescribed by the relevant provisions of the Cremorne Point Heritage Conservation Area.

A handwritten signature in black ink, appearing to read 'Lance Doyle', is centered on the page. The signature is fluid and cursive, with a prominent initial 'L'.

**LANCE DOYLE**

**M. PLAN (UTS) B. APP SC. (UWS) RPIA**

**Dated: 9<sup>TH</sup> NOVEMBER 2024**