

Attachment D

4.6 request - height of buildings

APPENDIX 2

WRITTEN REQUEST SYDNEY LOCAL ENVIRONMENTAL PLAN 2012 CLAUSE 4.3 - HEIGHT OF BUILDINGS

WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

15/190 VICTORIA STREET, POTTS POINT

FOR THE CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO AN EXISTING RESIDENTIAL UNIT

For: Construction of proposed alterations and additions to an existing residential unit
At: 15/190 Victoria Street, Potts Point
Owner: Margaret & Raj Soni
Applicant: Margaret & Raj Soni
C/- Anton Kouzmin Architecture

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Sydney Local Environmental Plan 2012. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Sydney Local Environmental Plan 2012 (SLEP 2012).

2.0 Background

Clause 4.3 restricts the height of a building and refers to the maximum building height noted within the "*Height of Buildings Map.*"

The maximum building height for this locality is 12m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed development will present a maximum height of 20.250m, which presents a departure from Council's maximum building height of 8.25m or 68.75%. It is notable however that the proposal does not exceed the existing maximum ridge height of the building.

The extent of the building which exceeds the 12m maximum height control is noted within Figure 1 over.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.



Figure 1: Extract from architectural plans prepared by Anton Kouzmin Architecture indicating breach of the maximum height control

Is clause 4.3 of SLEP 2012 a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in relation to an aspect of a development and includes:

“(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work.”

- (b) Clause 4.3 relates to the maximum building height of a building. Accordingly, clause 4.3 is a development standard.

3.0 Sydney Local Environmental Plan 2012 (“SLEP”)

3.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned MU1 Mixed Use (the MU1 zone) and the Land Use Table in Part 2 of SLEP 2012 specifies the following objectives for the MU1 zone:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To ensure land uses support the viability of nearby centres.*
- *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*

The proposed development is for the purpose of alterations and additions to an existing dwelling which is a permissible use in the MU1 Mixed Use zone.

3.2 Clause 4.3 – Height of buildings

Clause 4.3 of SLEP sets out the maximum height of a building as follows:

- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
 - (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
 - (c) *to promote the sharing of views outside Central Sydney,*
 - (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
 - (e) *in respect of Green Square—*
 - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*
- (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.*

The Height of Buildings Map specifies a maximum building height of 12m.

- 3.2** The Dictionary to SLEP operates via clause 1.4 of SLEP. The Dictionary defines “building height” as:

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 proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

3.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of SLEP provides:

- (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.*

The decision of Chief Justice Preston 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 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, 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.

Clause 4.6(2) of SLEP provides:

- (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.*

Clause 4.3 (the Height of Buildings development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of SLEP.

Clause 4.6(3) of SLEP provides:

- (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.**

The proposed development does not comply with the height of buildings development standard pursuant to clause 4.3 of SLEP which specifies a maximum building height of 12m, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and it is considered that there are sufficient environmental planning grounds to justify contravening the development standard.

In the circumstances of this case, there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of SLEP provides:

- (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.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of SLEP provides:

(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.*

The Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b). Council should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its

assessment of the clause 4.6 variation.

Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of SLEP from the operation of clause 4.6.

4.0 The Nature and Extent of the Variation

- 4.1** This request seeks a variation to the height of buildings development standard contained in clause 4.3 of SLEP.
- 4.2** Clause 4.3(2) of SLEP specifies a maximum building height of 12m which is noted on the Height of Buildings Map for the subject site.
- 4.3** The proposal has a maximum height of 20.250m to the south-western extremity of the attic addition. The non-compliance is 8.25m which equates to a variation of 68.75%. As noted, the new works do not exceed the maximum height of the existing building.

5.0 Relevant Caselaw

- 5.1** In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

- 17. *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
- 18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- 19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
- 20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
- 21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate*

so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

5.2 The relevant steps identified in Initial Action (and the case law referred to in Initial Action) can be summarised as follows:

1. Is clause 4.3 of SLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the MU1 Mixed Use zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of SLEP?

6.0 Request for Variation

6.1 Is compliance with clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) In response to the first way in *Wehbe*, the objective of the maximum building height standard and the reasoning why compliance is unreasonable or unnecessary is set out below:

(a) to ensure the height of development is appropriate to the condition of the site and its context,

The Objective of Clause 4.3(1)(a) seeks to ensure buildings are compatible with the height and scale of surrounding and nearby development.

The surrounding area is predominantly characterised by a range of land uses, including building heights, many of which exceed the height control.

The proposal seeks to utilise an existing rooftop terrace by providing additional living space and amenity for the occupants. The proposed works remain well-below the existing, non-compliant building height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing for a setback from the front building edge to minimise the perceived visual bulk and additional height, as viewed from within the Victoria Street streetscape.

The proposed external colour and materials palette utilises recessive finishes and is intended to ensure that the building's visual height and scale is further minimised.

(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,

The subject development maintains consistency with the existing surrounding development within the Potts Point Conservation Area and will not detract from the significance of any nearby heritage items.

(c) to promote the sharing of views outside Central Sydney,

The proposal will not see any change to the existing overall building height of the development and will therefore not result in any loss of views for neighbouring properties.

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

This provision does not directly relate to the subject development.

(e) in respect of Green Square—

- (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and**
- (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.**

This provision does not relate to the subject development.

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

In Initial Action the Court 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].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The aspect of the development which contravenes the development standard is the roof top addition. The addition is contained well-below the height of the existing building to minimise the visual impact to adjoining properties and the streetscape along Victoria Street.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land through the efficient use of the existing infrastructure to meet the housing needs of the community (1.3(c)).
- The proposed development will maintain the general bulk and scale of the existing surrounding built environment and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed works will provide for excellent residential amenity within a built form which is compatible with the streetscape of Victoria Street, and will not alter the streetscape appearance to Victoria Street, which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed development is considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g).
- The proposed new works and in particular the inclusion of a low-profile roof form and setback to Victoria Street demonstrates good design and improves the amenity of the built environment by creating improved and functional living area and also suitably maintains the views and solar access enjoyed by neighbouring properties (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst minimising the impacts of bulk and as viewed from the public domain. These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the maximum building height control.

It is noted that in *Initial Action*, the Court 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:

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.

6.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the MU1 Mixed Use zone?

- (a) Section 4.2 of this written requests demonstrates that the proposed development meets each of the applicable objectives of clause 4.3. As the proposed development meets the applicable objectives it follows that the proposed development is also consistent with those objectives.
- (b) Each of the objectives of the MU1 Mixed Use and the reasons why the proposed development is consistent with each objective is set out below.

- ***To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.***

The proposal retains the existing retail uses at the ground level, continuing to provide a diversity of land uses that generate employment opportunities.

- ***To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.***

The proposed works located at Level 6 will not have any adverse impact on the existing street frontage with the works being largely imperceptible from the Victoria Street streetscape. The proposal will continue to provide for a diverse and active street frontage, providing for high-quality pedestrian amenity, while continuing to provide for a vibrant, diverse and functional street.

- ***To minimise conflict between land uses within this zone and land uses within adjoining zones.***

The site and development are well-removed from nearby zones with a consistency of land uses in the surrounding area. The proposed works and resulting building height encroachment will not generate unwanted conflict between land uses within the zone and other land uses within adjoining zones.

- ***To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.***

The proposed development will not alter the existing retail, business and other non-residential land uses on the ground floor of surrounding buildings with the existing retail uses on the subject site being unaffected.

- ***To ensure land uses support the viability of nearby centres.***

The existing land uses will not be altered and will continue to support viability of Potts Point and surrounding areas.

- **To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.**

The proposal will continue to provide for a suitable use of land uses, namely residential and retail uses within an accessible location located nearby to public transport. The proposal will encourage public transport patronage and encourage walking and cycling.

6.6 Has Council obtained the concurrence of the Director-General?

Under cl55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

6.7 Has the Council considered the matters in clause 4.6(5) of SLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development and for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

7.0 Conclusion

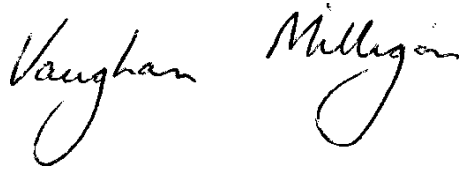
This development proposed a departure from the maximum building height development standard, with the proposed alterations and additions to provide a maximum building height of 20.250m.

This variation occurs as a result of the siting of the existing building, in particular the Unit 15 which is located wholly above the height control.

This written request to vary to the maximum building height standard specified in Clause 4.3 of the Sydney LEP 2012 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive style with a large, looping initial 'V' and 'M'.

VAUGHAN MILLIGAN

Town Planner
March 2023