

## CLAUSE 4.6 REQUEST

### 89 MACQUARIE STREET, ROSEVILLE

#### 1. INTRODUCTION

- 1.1 This request (**Request**) is made in support of the development for alterations and additions to the existing dwelling at 89 Macquarie Street, Roseville.
- 1.2 It is made pursuant to clause 4.6(3) of the *Willoughby Local Environmental Plan 2012* (**LEP**) for the purpose of addressing and justifying a minor variation to the maximum height of building development standard applicable to the subject land under clause 4.3(2) of the LEP.
- 1.3 This Request has been prepared based on the architectural plans prepared by Spicer Architecture and referenced as follows (**Plans**):

Drawing Number	Drawing Title	Date Issued
001	Site Plan and Site Analysis	25 November 2020
010	Existing Ground Floor	25 November 2020
011	Existing Roof	25 November 2020
100	Proposed Ground Floor	25 November 2020
101	Proposed First Floor	25 November 2020
102	Proposed Roof	25 November 2020
200	Existing and Proposed Section AA	25 November 2020
201	Existing and Proposed Section BB	25 November 2020
210	Existing and Proposed North Elevation	25 November 2020
211	Existing and Proposed East Elevation	25 November 2020
212	Existing and Proposed South Elevation	25 November 2020
213	Existing and Proposed West Elevation	25 November 2020
251	External Finishes and Materials	25 November 2020

## 2. THE SITE AND LOCALITY

- 2.1 The land to which the subject development and this Request relates is identified as Lot 1 in Deposited Plan 210157 and known as 89 Macquarie Street, Roseville NSW 2069 (**Site**).
- 2.2 The Site is located on the eastern side of Macquarie Street, and is rectangular in shape with a frontage of 17.035 metres, has a total area of 720.8sqm (by title) and a fall in land of approximately 1.7 metres, generally from the east (frontage to Macquarie Street) to the west (to the rear boundary).
- 2.3 The Site currently comprises a single, detached dwelling in the Federation style with attached carport (to the northern side) and a detached shed. Established gardens and several trees surround the dwelling.
- 2.4 Under the LEP, the Site is:
- 2.4.1 Zoned *R2 Low Density Residential (R2 Zone)* pursuant to the Land Zoning Map.
  - 2.4.2 Subject to a maximum height of building development standard (**Height Development Standard**) of 8 metres pursuant to clause 4.3(2) and Height of Buildings Map.
  - 2.4.3 Located within the North Chatswood Heritage Conservation Area pursuant to part 2 of schedule 5 and Heritage Map.
- 2.5 The locality that surrounds the Site is generally characterised by detached dwellings of similar architectural styles, with a mixture of single and two-storey forms.
- 2.6 Many single-storey dwellings have been altered with first floor additions of similar or greater form than the subject development.

## 3. PROPOSAL

- 3.1 The proposed development (**Proposal**) involves:
- 3.1.1 New internal layout (to provide an open plan living room and kitchen to the rear) and staircase at ground floor level of the existing dwelling.
  - 3.1.2 Two bedrooms, with Juliette balconies to the eastern (rear) elevation, and a bathroom in a new first floor level, with raked ceilings and contained within a pitched roof to match the existing roof forms of the dwelling.
  - 3.1.3 A new carport, of a reduced length compared to the existing carport.

- 3.2 The Proposal provides alterations and additions to the existing dwelling, retaining the front section of the dwelling and providing contemporary accommodation behind at ground and first floor levels.

#### 4. DEVELOPMENT STANDARD AND THE PROPOSED VARIATION

- 4.1 Pursuant to clause 4.3(2) and the Height of Building Map of the LEP, the height of a building on the Site is not to exceed the maximum of 8 metres (**Height Development Standard**).

- 4.2 The Height Development Standard is a **development standard** as defined under section 1.4 of the *Environmental Planning and Assessment Act 1979 (Act)* as:

4.2.1 It is specified by clause 4.3(2), a provision of an environmental planning instrument (being the LEP) in relation to the carrying out of development.

4.2.2 Clause 4.3(2) specifies a fixed in respect of the maximum height of a building at the Site.

- 4.3 **Building height** is defined under the LEP, in relation to the height of a building in metres, as the vertical distance from **ground level (existing)** to the highest point of the building or, in relation to the **Reduced Level** of a building, the vertical distance from the Australian Height Datum to the highest point of the building.

- 4.4 The measure of the building height of the Proposal, in metres vertically above the ground level (existing), is a maximum of 8.8 metres.

- 4.5 This is based on:

4.5.1 The ground level (existing) being approximately RL91.85 in the relevant part of the Site, as shown on the survey plan reference 191241/001, revision C, prepared by RGM Property Surveys and dated 26 August 2020.

4.5.2 The highest point of the Proposal (being the level of the ridge capping) of RL100.65.

- 4.6 Given the above, the extent of the variation with the Height Development Standard sought by the Proposal equates to 0.8 metres, a 10% variation (**Variation**).

#### 5. CLAUSE 4.6 OF THE LEP

- 5.1 Clause 4.6 of the LEP (**Clause 4.6**) provides for “exceptions to development standards”.

- 5.2 Pursuant to subclause (2) of Clause 4.6, consent to development can be granted despite a contravention development standard, stating (with our emphasis):

(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.

5.3 The relevant (to the Proposal and the Variation) operative subclauses of Clause 4.6, which facilitate exceptions to development standards subject to conditions and which must be addressed prior to a consent authority having the power to grant consent to a development which contravenes a development standard, are (with our emphasis):

- (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 Planning Secretary has been obtained.*

5.4 In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**), the Land and Environment Court (**Court**) clarified the application of Clause 4.6 in stating (with our emphasis):

- 13 *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
- 14 *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii)... The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see*

*Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [28]; *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

15     *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*

...

26     *The second opinion of satisfaction, in 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).*

...

28     *The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b))...*

5.5     Based on the above extracts from Initial Action, to enliven its power to grant development consent to the Proposal the consent authority must be positively satisfied that:

5.5.1     Pursuant to subclause (4)(a)(i) of Clause 4.6, this Request demonstrates (the requirements of clause 4.6(3)) that:

- a)     Compliance with the development standard is unreasonable or unnecessary in the circumstances; and
- b)     There are sufficient environmental planning grounds to justify contravening the development standard; and

5.5.2     Pursuant to subclause (4)(a)(ii) of Clause 4.6, the Proposal will be in the public interest because it is consistent with the objectives of the Height Development Standard and the R2 Zone objectives.

**(Precondition 1)**

5.5.3 Pursuant to subclause (4)(b) of Clause 4.6, the concurrence of the Secretary has been obtained (**Precondition 2**).

**6. CONSIDERATION OF CLAUSE 4.6(3) and (4)(a)(i) OF THE LEP**

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

- 6.1 The consent authority must be satisfied that this Request demonstrates that compliance with the Height Development Standard is unreasonable or unnecessary in the circumstances.
- 6.2 In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**), the Court summarised ways of establishing that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case.
- 6.3 Whilst *Wehbe* related to a breach of a development standard under (now repealed) *State Environmental Planning Policy No. 1 – Development Standards*, the Court accepted in Initial Action (at [16]) that *Wehbe* also applies to Clause 4.6.
- 6.4 The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe* at [42] and [43].
- 6.5 The objectives of Height Development Standard, as set out under clause 4.3(1) of the LEP, are (with our emphasis):

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

- (a) *to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- (b) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (c) *to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,*
- (d) *to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
- (e) *to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*

- (f) *to use maximum height limits to assist in responding to the current and desired future character of the locality,*
- (g) *to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) *to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

6.6 In response to the relevant objectives of the Height Development Standard:

6.6.1 Objectives (a), (b), (c), (d), (e) and (f) are achieved notwithstanding the Variation.

6.6.2 The Proposal will be in harmony with the scale and character of surrounding dwellings as:

- a) It is of a comparable scale to surrounding developments;
- b) It is *capable of existing together in harmony* with surrounding development, as the Court has held to be the meaning of compatibility in an urban design context (in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191), in terms of its physical impacts and appearance in its context;
- c) Regarding physical impacts, it will have no detrimental impacts on the residential amenity of adjoining and surrounding properties:
  - (i) No objections from adjoining or surrounding properties were received;
  - (ii) No existing views from adjoining development or the public domain are affected by the Proposal; and
  - (iii) The sensitive design of the Proposal dictates that the existing views, solar access and privacy adjoining or surrounding properties are not affected.
- d) Regarding appearance and visual impacts:
  - (i) The addition will provide a gable form (with the new accommodation contained within the roof form beyond) that is in the same architectural style as, and located to the rear of, the existing dwelling;

- (ii) There will have no detrimental impact on streetscape or the contribution of the existing dwelling on the heritage conservation area;
- (iii) Council's heritage officer acknowledged the Proposal to be satisfactory in terms of its design, scale and form.

6.6.3 The Proposal is consistent with the desired future character controls for Roseville, under to clause D.1.2.6 of the *Willoughby Development Control Plan (DCP)*, as it retains and enhances the qualities and characteristics of the locality by:

- a) Maintaining the existing front building alignment and landscaped garden to the street;
- b) Making no change to fencing;
- c) Retaining the landscape setting and not increasing paved areas in the front setback (or elsewhere);
- d) Maintaining the existing proportion of built form to open space and setbacks from the front and side boundaries;
- e) Providing a sensitively designed first floor addition that is harmonious with the scale, form, massing and external materials of the existing dwelling and surrounding dwellings in the streetscape;
- f) Refurbishing a dilapidated, existing car parking structure;
- g) Protecting existing landscaping.

6.6.4 The Proposal is also consistent with the *management policies* for the *North Chatswood Heritage Conservation Area*, under clause H.3.11 of the DCP as it:

- a) Retains the general scale, form and massing of the original dwelling and the character of the streetscape – directly relevant to the Variation;
- b) Retains the predominant single-storey form of the original dwelling, containing the first floor level within a compatible and complementary roof form such that it is not visible from the public domain – directly relevant to the Variation;
- c) Retains the landscaped setting and does not increase the existing hard surfaces of the Site;
- d) Removes the existing carport which is set forward of the façade and includes a new carport setback behind the façade;

e) Makes no change to fencing.

6.6.5 The Proposal is also consistent with the relevant *controls for future development* for the *North Chatswood Heritage Conservation Area*, under clause H.3.11 of the DCP as it:

- a) Retains the low density scale and existing detached dwelling;
- b) Provides a discrete second storey within the roof form;
- c) Is consistent with the streetscape;
- d) Retains the existing setbacks of the dwelling and landscaping and fencing of the Site;
- e) Provides a less intrusive parking structure to the side of the dwelling, setback from the façade;
- f) Provides a new roof element that is wholly consistent with the original dwelling and the locality in terms of form and materials;
- g) Generally responds to the building envelope controls, noting the retention of the original ground floor level dictates other levels of the addition (discussed further below) and results in the Variation.

6.7 A second way to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case is to demonstrate that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe* at [45].

6.8 This way is relevant to objectives (g) and (h) of the Height Development Standard as:

6.8.1 The Site is not located within the Chatswood city centre.

6.8.2 The Site is not located within a transitional area and does not adjoin higher density business and retail centres.

Sufficient environmental planning grounds to justify contravening the development standard

6.9 The consent authority must be satisfied that this Request also demonstrates that “sufficient” environmental planning grounds to justify the Variation.

6.10 The Court in *Initial Action* outlined that environmental planning grounds are:

23 ... 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.

6.11 The environmental planning grounds which, it is submitted, are sufficient to demonstrate that the Variation is justified in the circumstances are as follows:

- 6.11.1 The overall height of the Proposal, involving alterations and additions to the existing dwelling, is dictated by the existing ground floor level of the dwelling (which is to be retained as is) rather than the ground level (existing).
- 6.11.2 As nominated above, the ground level (existing) is approximately RL91.85 in the relevant part of the Site and the existing ground floor level of the dwelling is already elevated some 1.08 metres above the ground level (existing) at this point, being RL92.93.
- 6.11.3 Retaining the ground floor level and providing reasonable and sufficient ceiling heights at the ground and first floor levels results in the Variation.
- 6.11.4 Were the Proposal not dictated by the existing, elevated ground floor level, compliance with the Height Development Standard would be achieved.
- 6.11.5 Ceiling heights are not excessive and include lower wall heights at first floor level to achieve to heritage-driven form of the addition and ceiling heights of 2.4 metres for two thirds of the space (in accordance with the Building Code of Australia).
- 6.11.6 Alternatives to the Proposal, which would achieve compliance with the Height Development Standard, would be:
- a) Demolition of the rear section of the existing dwelling so that the ground floor level could be lowered for the rear section; or
  - b) The ridge be lowered, which would require an alternative roof form for the first floor addition to achieve minimal ceiling heights for the first floor level to remain (as proposed) as habitable living space.
- 6.11.7 Both of the above alternatives would result in lesser outcomes than the Proposal with respect to:
- a) Significantly increasing the scope of the Proposal and include greater demolition of the existing dwelling;
  - b) The contribution of the existing dwelling to the heritage conservation area; and
  - c) The amenity of the Proposal (particularly if a significant step in ground floor level had to be introduced mid-floor plan).
- 6.11.8 Relevantly, Council's heritage planner, in the memorandum of referral dated 15 February 2021, states (with emphasis):

*The proposal for an extension located at the rear of the principal front wing of the house, retaining the original house form, front facade and front interior layout, has*

positive merits for the Conservation Area. The style of the proposed rear extension would appear as an extra gable ended roof form and due to the proposed materials and finishes, matching the existing house, would be sympathetic to the style and largely obscured from sight due to its position some 35m from the street.

The height of the rear extension is dimensioned on the plans as 700mm higher than the main roof ridge, and has been calculated in the SEE to have an overall height of 7.7m, which would appear to comply with the LEP maximum height of 8m applying to this property. However, this calculation is made by using the Finished Floor Level, rather than using the LEP definition, which requires the height to be measured from ground level (existing), to the highest point of the building. (My calculations make it 8.4m, taken from 100.65 to 92.24 on the survey)

In the absence of a Clause 4.6 submission to justify the higher roof height, it is recommended to lower the height of the rear extension, in order for the total height to comply with the LEP requirements. A condition of consent is recommended to reduce the height of the rear extension by altering the pitch of the proposed rear roof on the southern side and lowering the eaves height on the northern side. In this way, the visible roof pitch on the northern side will not be affected, and the design would remain complimentary to the house.

6.11.9 The above demonstrates that:

- a) The Proposal is considered appropriate from a heritage conservation perspective;
- b) Where the non-compliance with the Height Development Standard occurs, at the rear of the existing dwelling, it is acknowledged that it is largely not viewable from the street and is sympathetic in style;
- c) The lowering of the height of the Proposal (to achieve compliance with the Height Development Standard) was sought for the sake of compliance and as a written request to vary the Height Development Standard was not provided, rather than being for specific heritage or other merit grounds;
- d) The implications of the lowering of the ridge were not thoroughly considered in terms of the alternative (les complementary) roof form or the restriction to the habitable area of the first floor level.

6.11.10 This Request solves the issue of there being no written request seeking to justify the Variation and compliance merely for compliance's sake is inconsistent with the objectives of clause 4.6 of the LEP to provide appropriate flexibility in the application of development standards and to

achieve better outcomes for and from development by allowing flexibility in particular circumstances.

6.11.11 No detrimental amenity impacts to adjoining properties result from the Proposal or the, in particular, the Variation.

6.12 It is considered that the above environmental planning grounds are sufficient to justify the minor contravention of the Height Development Standard.

Conclusion on Clause 4.6(3) and (4)(a)(i) of the LEP

6.13 Based on the above, I submit that the consent authority can be satisfied that this Request has satisfactorily addressed subclauses (3)(a) and (b) and (4)(a)(i) of Clause 4.6.

6.14 Therefore, in accordance with the objectives of Clause 4.6 an appropriate degree of flexibility can be used in the application of the Height Development Standard.

**7. CONSIDERATION OF CLAUSE 4.6(4)(a)(ii) OF THE LEP**

7.1 The consent authority must also be directly satisfied, under subclause 4.6(4)(a)(ii) of Clause 4.6, that the Proposal will be in the public interest because it is consistent with the objectives of the Height Development Standard and the objectives for development in the R2 Zone.

7.2 To assist the consent authority in forming the requisite direct opinion of satisfaction, matters for consideration under subclause (4)(a)(ii) of Clause 4.6 are addressed as follows:

Objectives of the Height Development Standard

7.3 The objectives of the Height Development Standard have been considered and addressed from [6.5] to [6.8] above.

Objectives for the R2 Zone

7.4 The objectives for the R2 Zone are (with my emphasis):

- *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 accommodate development that is compatible with the scale and character of the surrounding residential development.*
- *To retain and enhance residential amenity, including views, solar access, aural and visual privacy, and landscape quality.*

- To retain the heritage values of particular localities and places.
- To encourage self sufficiency with respect to energy and food supply.

7.5 The Proposal is consistent with the relevant above objectives as:

7.5.1 It will provide for the housing needs of the community by upgrading the existing accommodation of the dwelling in a manner that is sensitive to the heritage conservation area setting of the Site.

7.5.2 It will be compatible with the scale and character of surrounding dwellings as it is of a comparable scale to surrounding developments:

- a) The Proposal is commensurate or similar to the scale of developments in the vicinity;
- b) The Proposal is capable of existing together in harmony with surrounding development, as the Court has held to be the test of compatibility in an urban design context (in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191), and as outlined below is appropriate in terms of its physical impacts and appearance in its context;
- c) The proposed gable form (with the first floor accommodation contained within the roof form beyond) is in the same architectural style as, and located to the rear of, the existing dwelling and so will have no detrimental impact on the heritage conservation area;
- d) The is acknowledged in the Council's heritage assessment of the Proposal.

7.5.3 It will greatly enhance the residential amenity of existing dwelling without detrimentally impacting on the residential amenity of adjoining and surrounding properties:

- e) No objections from adjoining or surrounding properties were received; and
- f) The sensitive design of the Proposal dictates that the existing views, solar access and privacy adjoining or surrounding properties are not affected.

7.6 The above demonstrates that the Proposal is consistent with the objectives of the Height Development Standard and the objectives for the R2 Zone and, therefore, can be considered to be in the public interest.

## **8. CONSIDERATION OF CLAUSE 4.6(4)(b) OF THE LEP**

- 8.1 Precondition 2 requires the consent authority to consider whether the concurrence of the Planning Secretary to the contravention has been issued.
- 8.2 On 21 February 2018, the Planning Secretary gave written notice (**Notice**) attached to the Planning Circular PS 18-003 of the same date to each consent authority under clause 64 of the *Environmental Planning and Assessment Regulation 2000* that the Planning Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6 can be assumed.
- 8.3 The Variation complies with the conditions in the table of the Notice as it does not exceed the Height Development Standard by more than 10%.

## **9. CONCLUSION**

- 10.1 This Request has demonstrated that, in the circumstances of this case, compliance with the Height Development Standard is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify the Variation.
- 10.2 Therefore, the consent authority can form the requisite opinions of satisfaction required under clause 4.6(4)(a)(i) of the LEP.
- 10.3 This Request has also provided information to assist the consent authority to form a direct opinion of satisfaction that:
- 10.3.1 The Proposal is in the public interest because it is consistent with the objectives of the Height Development Standard and the objectives of the R2 Zone; and
- 10.3.2 The Planning Secretary has given concurrence to the Variation.
- 10.4 Therefore, the consent authority can grant consent to the Proposal and grant the Variation to the Height Development Standard.

A handwritten signature in black ink, appearing to read 'Peter George Warner', written over a horizontal line.

Peter George Warner

August 2021