

## **REQUEST PURSUANT TO CLAUSE 4.6, FOR EXCEPTION TO COMPLIANCE WITH CLAUSE 4.3(2) of HORNSBY LOCAL ENVIRONMENTAL PLAN 2013**

This Clause 4.6 Exception Submission has been prepared by Slattery Planning Group on behalf of St John's Anglican Church, Beecroft (the Applicant), in relation to the property at No. 9 Chapman Avenue, Beecroft (the site).

This Submission is made to Hornsby Shire Council in support of a Development Application (DA) for the following:

- demolition of entry porch to the rear (west) of the 1967 extension to the 1908 church building and the enlarging of the opening in the 1967 rear wall of the church;
- the relocation of the 1891-1894 weatherboard former School-church building to a location closer to Chapman Avenue and demolition of the pre-1943 creche addition to the southern side of this building;
- construction a new western extension to the existing 1967 extension of the 1908 church building, designed as a modern, part glazed, part brick and part metal clad building, including the following elements:
  - two (2) offices;
  - a meeting room;
  - kitchenette;
  - foyer area;
  - accessible WC;
  - storage area;
  - stairs and platform lift;
  - a centralised space linking the church to the new areas at the rear;
- removal of six (6) trees;
- various new external paving; and
- a fenced play area adjacent to the timber church meeting room.

### **1.0 CLAUSE 4.6 OF HORNSBY LOCAL ENVIRONMENTAL PLAN (HLEP) 2013**

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 of BLEP 2021 has the following objectives:

- (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.*

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that “*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*”.

Clause 4.6(3) specifies that 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 requirement in Clause 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 has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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.*

Clause 4.6(5) specifies that 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.*

## **2.0 APPROACH TO CLAUSE 4.6**

This request has been prepared having regard to:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248;
- NSW Department of Planning and Infrastructure’s *Varying Development Standards: A Guide* 2015;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7

- *Moskovich v Waverley Council* [2016] NSWLEC 1015;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Hansimikali v Bayside Council* [2019] NSWLEC 1353; and
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
4. The development standard has been 'virtually abandoned or destroyed' by the Councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard.

As noted by Sheahan J in *Liberty Investments Pty Ltd v Blacktown City Council* [2009] NSWLEC 7, the considerations identified by Preston CJ in *Wehbe* are not intended to be exhaustive or applied as a code, and accordingly there may be other bases for considering that compliance with a development standard is unreasonable or unnecessary.

Preston CJ, in *Wehbe* states that "... *development standards are not ends in themselves but means of achieving ends*". Preston CJ goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

*As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.*

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5 and referred to above. This is a common misconception. If the objection satisfies one of the tests,

then it may be upheld by a Council or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial variation (65%) to the FSR control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is “*consistent with*” the objectives of the development standard and the zone, is not a requirement to “*achieve*” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’. It means “*something less onerous than ‘achievement’*”.

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a “*better environmental planning outcome for the site*” relative to a development that complies with the development standard.

Finally, in *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O’Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

The following assessment is undertaken pursuant to cl 4.6 and the above principles.

### **3.0 WHAT IS THE CLAUSE SOUGHT TO BE VARIED?**

#### **3.1 Clause 4.3(2) of HLEP 2013**

Pursuant to Clause 4.3(2) of HLEP 2013, a maximum building height of 8.5m is permitted at the site.

#### **3.2 What is the extent of the non-compliance?**

The existing masonry church has a maximum height of 11.744m to crucifix above the main parapet and 10.7m to the main ridge. The existing building therefore exceeds the maximum 8.5m height of building development standard by 3.244m or 38.2%.

The proposed addition to the rear of the masonry building has a maximum height of 10.178m which, while being lower than the existing building, exceeds the maximum 8.5m permitted under Clause 4.3 of HELP 2013 by 1.678m or 19.7%.

### **4.0 CLAUSE 4.6(3)(a) - IS COMPLIANCE WITH THE STANDARD UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?**

#### **4.1 Clause 4.3 Objective is achieved**

The objective of Clause 4.3 of HLEP 2013 is as follows:

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The proposed alterations and additions to the brick church building, where the non-compliance with Clause 4.3(2) occurs, have been designed having regard to heritage input, consultation with the church congregation and discussions with Council during its assessment of DA/668/2017, as discussed in the Heritage Impact Statement accompanying the DA. The HIS notes the following in relation to the proposal:

- *“has been carefully designed with an understanding of and respect for the heritage significance of the site, in particular the 1908 brick church with its 1967 western addition, and the 1891-1894 weatherboard former School-church building;*
- *supports the ongoing use of the site for its historical use for the Church community;*
- *enables the conservation and the reinstatement of the 1894 form of the 1891-1894 weatherboard former School-church building and the reinstatement of its internal spaces with the removal of later internal walls;*
- *will enhance the ability for the public to appreciate the heritage significance of the 1891- 1894 weatherboard former School-church building through both its conservation and its relocation on the site to a location closer to Chapman Street, noting that the building was previously relocated from another site in 1905 and therefore has a history of relocation;*
- *involves only the demolition of elements which are not considered to be of high heritage significance (being a 1967 rear porch and rear wall addition to the 1908 church and a pre-1943 weatherboard classroom addition to the 1891-1894 weatherboard former School-church building, the removal of the former allowing for a link to the modern rear addition, and the removal of the*

latter allowing for the reinstatement of the 1894 form of the weatherboard former School-church building;

- involves the construction of a sympathetic modern rear addition to the 1908 church extended at the rear in 1967, which will upgrade the amenity of the site and its compliance with BCA and disabled access requirements, and which will be largely obscured from view from the surrounding streets.”

The proposed alterations and additions will have positive streetscape and heritage impacts, as discussed in the HIS accompanying this DA. The works are subservient to the main masonry church building on the site and will complement its form and function (see **Figures 1** and **2** below).



**Figure 1:** Perspective showing the proposed development when viewed from Beecroft Road (Source: Paul Davies Pty Ltd)



**Figure 2:** Perspective showing the proposed development when viewed from the intersection of Beecroft Road and Chapman Avenue (Source: Paul Davies Pty Ltd)

The proposed non-compliant elements are lower than the main church roof and will be subservient to the existing form and scale. Furthermore, the location of the works towards the rear of the building ensures that there is a minimal level of visibility from the public domain in the vicinity of the site.

The height of the works are appropriate having regard to the site conditions and constraints as they do not create any significant overshadowing impacts in relation to nearby properties. The church is a heritage item and the proposed development seeks to alter and add to the building in order to address compliance issues with the existing building, to ensure its ongoing functionality to the benefit of parishioners and the local community.

Having regard to the preceding discussion, it is considered that the proposal is consistent with objective (a) despite the non-compliance with Clause 4.3(2) of HLEP 2013.

**4.3 Would the underlying object or purpose of the standard be defeated or thwarted if compliance was required, such that compliance is unreasonable or unnecessary?**

It is not considered that the underlying objective of the Standard is irrelevant to the proposal, however, as demonstrated herein, it is submitted that the proposal is able to achieve consistency with the intent of the Standard, despite the non-compliance.

**4.4 Has the development standard been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?**

It is not considered that the Standard has been virtually abandoned or destroyed by Council's actions, however, having regard to the particulars of this Application, and the heritage conservation and amenity gains resulting from the non-compliance, it is considered that flexibility in the application of the Standard is warranted.

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

**5.1 What is the aspect or feature of the development that contravenes the development standard?**

As discussed previously, it is the proposed extensions to the rear of the existing masonry church building which contravenes Clause 4.3(2) of HLEP 2013.

The remainder of the proposed works are compliant with Clause 4.3(2).

**5.2 Why is contravention of the development standard acceptable?**

The proposed height non-compliance is associated with the roof extension to the rear of the masonry church building.

The addition to the rear of the church has been designed as a modern, part glazed, part brick and part metal clad building. The section linking into the rear (west) of the main church building (i.e. the element with the non-compliant building height) is setback in width and height, to create a respectful link into the main church building.

The works will be partly obscured from view from Chapman Avenue due to the relocated former School-church building and it will have limited visibility from Beecroft Road.

The proposed contravention is considered acceptable given the sensitive design of the proposed works, heritage gains achieved by the proposal and the significant benefits to the functionality of the existing church which will occur as a result of the proposal. The works will enable the ongoing use of the church in a manner which complies with relevant accessibility standards, to the benefit of all people.

## **6.0 The Proposed development is in the public interest because it is consistent with the objectives of the particular standard and the zone objectives (cl4.6(4)(a)(ii))**

Having regard to the acceptable environmental impacts, and the merits of the proposed development, it is considered that the public interest is being met by the proposed development, despite the non-compliance. Indeed, incorporation and conservation of the heritage item within the site is a public benefit associated with the proposal.

### **6.1 Objectives of the Standard**

The objectives of the standard and the consistency of the proposal with those objectives are considered in detail above

### **6.2 Zone objectives**

Pursuant to LEP 2013, the site is located within the R2 Low Density Residential zone. The objectives of the zone are as follows:

- *“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.”*

The proposed development is consistent with the relevant zone objective as it maintains church-related uses which meet the day to day needs of local residents. The proposal maintains a form which is subservient to the existing masonry church building and will not detract from the low-density residential environment in the locality.

To this end, the proposal is consistent with the relevant objective of the zone despite the non-compliance with the height of buildings development standard.

## **7.0 Requirements for Planning Secretaries concurrence**

The Planning Secretaries concurrence may be assumed pursuant to Planning Circular PS18\_003 issued 21 Feb 2018. Nevertheless the proposal is considered against the matters to which the Secretary is required to have regard below.

### **7.1 Clause 4.6(5)(A) - Matters of State or Regional Environmental Planning**

The proposed contravention of the Standard does not raise any matter of significance for State or regional environmental planning.



### **7.2 Clause 4.6(5)(B) - The Public benefit of maintaining the standard**

The proposal could be amended to comply with Clause 4.3(2) of HLEP 2013 however this would result in a poor amenity and heritage outcome as the proposed form has been designed to respect the form and scale of the existing building. For all of the reasons outlined above, and the absence of environmental harm, there is greater public benefit in permitting the contravention than in maintaining the standard.

### **7.3 Clause 4.6(5)(C) – Any Other Matters Required to Be Considered**

There are no other known matters required to be taken into consideration by the Director-General before granting concurrence.

As can be seen from the discussion herein, the proposed development is consistent with the objectives of the development standard and R2 Low Density Residential zone pursuant to HLEP 2013 despite the non-compliance with the building height development standard.

It is considered that the proposal has adequately addressed the matters outlined in Section 4.6(3) – (5) of HLEP 2013.

## **8.0 CONCLUSION**

Having regard to the discussion contained herein, it is considered that the matters required to be addressed, pursuant to Clause 4.6 of HLEP 2013, the five-part test established in the Land and Environment Court and the Varying Development Standards: A Guide, have been fully canvassed herein.

Having regard to the particulars of the proposal, as outlined above, it is considered that there would be no material benefit to requiring the proposal to comply with Clause 4.3(2) of HLEP 2013 and on this basis, an exception to Clause 4.3(2) of HLEP 2013 is considered well-founded, and worthy of Council's support.