

Attachment D

Clause 4.6 Variation Request – Height

A Clause 4.6 Request to Vary Development Standard (Clause 4.3 Height of Buildings)

Date: 13 February 2018

Introduction

Purpose

This Clause 4.6 Exception to Development Standards Request is submitted to the City of Sydney Council to accompany a Development Application (DA) for the alterations and additions to an existing pub/hotel building to incorporate three storeys of residential accommodation at 106-108 Swanson Street, Erskineville (the site).

Written justification is provided to demonstrate that compliance with development standard Clause 4.3 Height of Buildings is unreasonable or unnecessary in these circumstances.

This report specifies the grounds of the objection and has been prepared in accordance with:

- » Clause 4.6 of the Sydney Local Environmental Plan 2012 (SLEP).
- » Varying development standards: A Guide (August 2011) (the Guide).

Clause 4.6 Exceptions to Development Standards

Clause 4.6 Exceptions to development standards of SLEP states:

- (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.*
- (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.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written requires 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 Secretary has been obtained.

(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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note: When this plan was made it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Heights of Buildings Map,
- (cab) clause 4.5A (Balconies on certain residential flat buildings),
- (cb) clause 5.3A (Development below ground level in Zone RE1),
- (cc) clause 6.10 (Heritage floor space),
- (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),
- (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space)

- (ce) clause 6.17 (*Sun access planes*),
- (cf) clause 6.18 (*Exceptions to sun access planes*),
- (cg) clause 6.19 (*Overshadowing of certain public places*), except in respect of Australia Square Plaza, Chifley Square, First Government House Place and Sydney Town Hall steps,
- (cga) clause 6.26 (*AMP Circular Quay precinct*),
- (cgb) clause 6.29 (58-60 Martin Place, Sydney),
- (cgc) clause 6.33 (230-238 Sussex Street, Sydney),
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building),
- (cge) clause 6.36 (12-20 Rosebery Avenue, 22-40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- (cgf) clause 6.37 (296-298 Botany Road and 284 Wyndham Street, Alexandria),
- (ch) Division 1 of Part 7 (*Car parking ancillary to other development*).

Land and Environment Court requirements

The Land and Environment Court (LEC) reiterated in *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 per Preston CJ at [11] the four tests imposed by clause 4.6 as follows:

1. That compliance with the relevant development standard must be **unreasonable or unnecessary** in the circumstances of the case;
2. That there are **sufficient environmental planning grounds** to justify contravening the development standard;
3. That the applicant's written request has **adequately addressed the matters** required to be demonstrated by sub-clause 3;
4. That the proposed development would be in the public interest because it **is consistent with the objectives of the particular standard and the objectives for development within the relevant zone**

The test for "unreasonable or unnecessary" has also been settled by the LEC. In *Wehbe V Pittwater Council* [2007] NSW LEC 827, Preston CJ identified a five-part test that could be applied to demonstrate that an objection to a development standard is reasonable and will deliver an outcome consistent with the relevant policy framework. The five elements are identified below. For the most part, in this instance, only the first of the five elements are considered strictly applicable to this development and this has been addressed above. Nonetheless the test is as follows:

2. Objectives of the standard are achieved notwithstanding non-compliance with the standard
3. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary
4. The underlying objective of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
5. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the stand and hence compliance with the standard is unnecessary and unreasonable

- The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land that is, the particular parcel of land should not have been included in the zone.

Each of these considerations has been addressed as part of this request for variation to a development standard.

Variation to the controls relating to floor space ratio

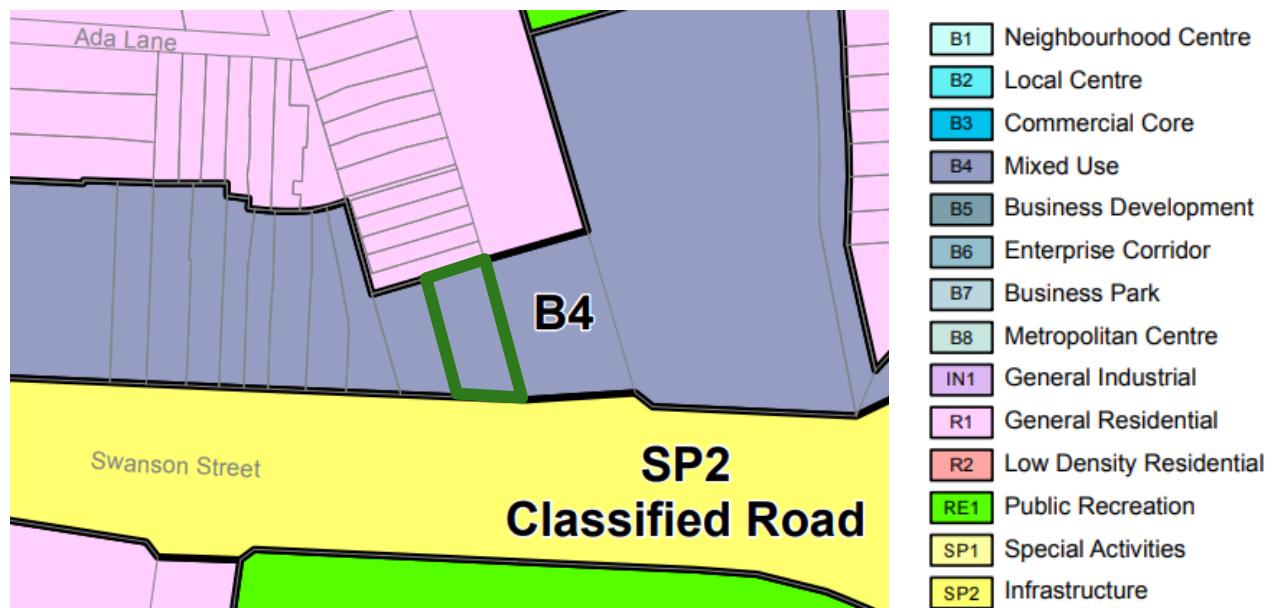
Background

According to the Zoning Map, the site is located within Zone B4 Mixed Use Zone, with the zone objectives being:

- » *To provide a mixture of compatible land uses*
- » *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling*
- » *To ensure uses support the viability of centres.*

The site is identified in Figure 1 below.

Figure 10 Land zoning map

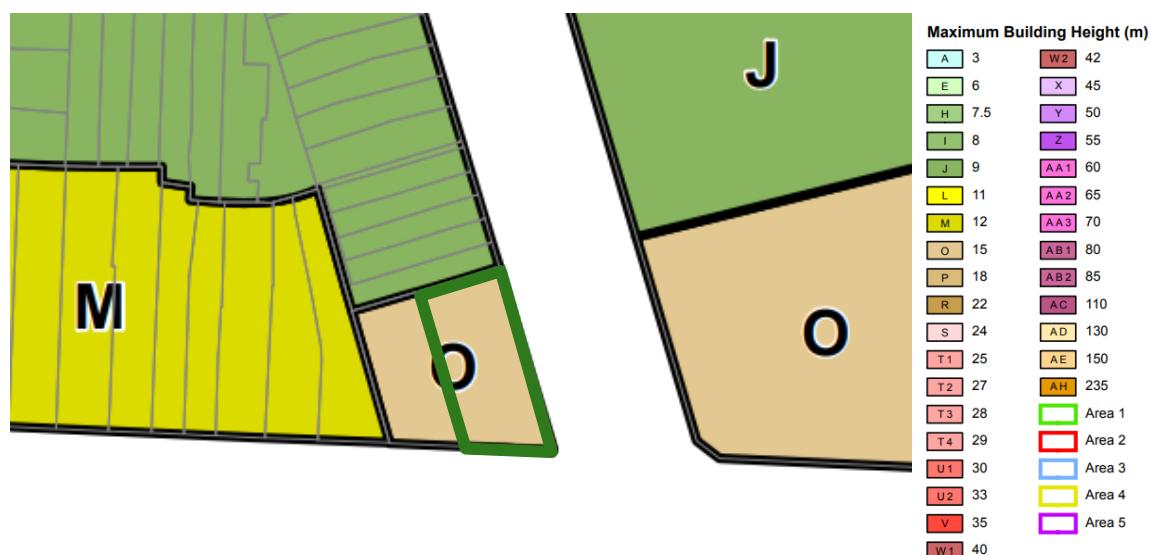


Source: SLEP 2012 Land Zoning Map 10

Explanation of development standard variation

This application seeks to vary the controls relating to clause 4.3 of SLEP. Clause 4.3 requires the Height on any land not to exceed that shown on the Height of buildings Map (excerpt provided in Figure 2), which is 15m. This Clause 4.6 request seeks a maximum height of 17.385m, which is a 2.385m exceedance of Council's controls.

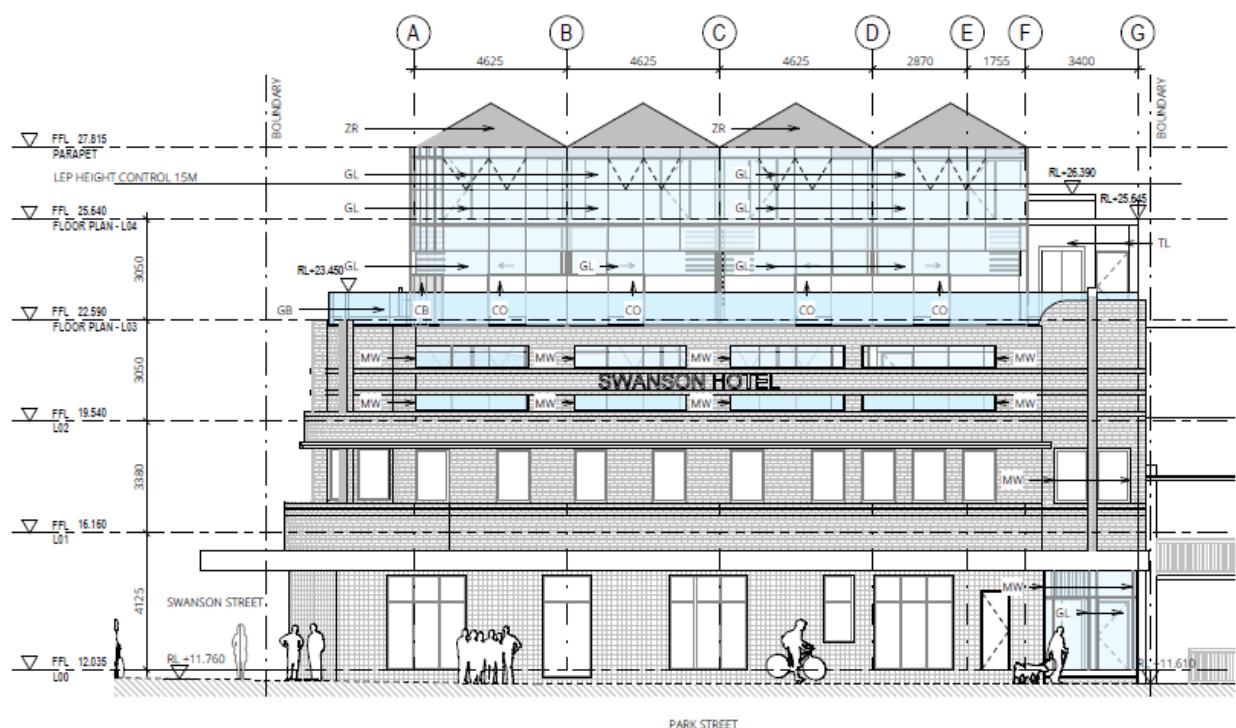
Figure 11 Maximum Height of Buildings



Source: SLEP 2012 Height of Buildings Map 10

This breach in the height control occurs due to the inclusion of the four 2 bedroom maisonette apartments on levels three and four of the proposed development. This is illustrated in the excerpt of the Section provided at **Figure 3** below.

Figure 12 Extent of the height control breach



Source: Sydney Architecture Studio

Relevant clauses and definitions

The development standard to which this clause 4.6 request relates is clause 4.3 Height of Buildings of SLEP. Clause 4.3 states:

- (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;*
 - (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 objectives of Clause 4.3 Height of Buildings and how the proposed development responds to these objectives is discussed in Table 1 below.

Table 4 Clause 4.3 Objectives

Assessment of compliance against Clause 4.3 Objectives	
<i>(a) To ensure that the height of development is appropriate to the condition of the site and its context</i>	
	The proposal will retain the street frontage height of the existing building, with the proposed additional storeys being located behind the existing parapet. This design measure reduces the impact of the additional storeys on the streetscape and distant views of the property from nearby public places.
Visual impacts and disruption of views	No significant views will be impacted as a result of the proposed development. The proposal does not affect views to and from the public open spaces of Harry Noble Reserve and Erskineville Oval.
Solar access	The proposed apartments achieve the minimum solar access and natural ventilation requirements as stipulated within the SDCP as well as the Apartment Design Guide. The proposal does not cause any overshadowing impact on the Harry Noble Reserve, which is immediately south of the site. Surrounding development comprises only retail/commercial development and therefore implications to solar access on surrounding development is not applicable.
<i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas</i>	A Heritage Impact Statement, prepared by Tropman & Tropman Architects accompanies the DA.

Assessment of compliance against Clause 4.3 Objectives

The Statement concludes that the proposed work complies with the requirements of the City of Sydney Heritage Development Control Plan 2006 and would not be detrimental to the integrity of the Kingsclear Road Conservation Area or of the contributory nature of the building.

(c) to promote the sharing of views

N/A

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

N/A

(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

N/A

Overall, it is considered that the proposed development is in the public interest by complying with the relevant objectives of Clause 4.3.

Justification for variation to development standard

Clause 4.6(3) and (4) of SLEP 2012 allows the consent authority to consider a contravention to a development standard as stated below.

(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 Secretary has been obtained.*

The following section provides a justification for the proposed exceedance of the Height of Buildings, based on the above-mentioned matters.

Assessment

Clause 4.6(3)(a) – Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Strict compliance with the height standard is considered both unreasonable and unnecessary in this instance.

The proposed exceedance in height is due to the inclusion of four 2 bedroom maisonette apartments on levels 3 and 4 of the proposed development. As a result of the setbacks and the transition in height the breach in height is unlikely to be perceivable from the street and would result in no additional overshadowing.

Given the minimal environmental impacts which will result from this breach in height, compliance is considered to be unnecessary.

Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposal seeks approval to retain the existing pub/hotel use on the ground floor, convert the existing first floor level to residential use, construct an additional three levels of residential apartments and undertake internal alterations at the rear of the building to facilitate access to these new apartments.

Four 2 bedroom maisonette apartments are proposed on the third and fourth floors. The additional third and fourth floors are required in order to provide an adequate variety of studio, one and two bedroom apartments. The reason for the non-compliance with the 15m height control is predominantly due to the roof and part of the fourth storey. No additional storeys are proposed as a result of the height variation.

Any impacts which may occur as a result of the proposed height breach would be negligible due to the following:

- » The existing building has a high parapet above the second storey so that it presents as a three storey building already, within the streetscape and its local context
- » As a result of the setbacks, the transition in height the breach in height is unlikely to be perceivable from the street
- » There would be no overshadowing impacts on any surrounding development (refer to Architectural plans)

The locality statement for Erskineville, Alexandria (west) and Newtown (south) states "*Neighbourhood nodes providing a mix of uses located along the main vehicular routes of Swanson/Park Street and Henderson/Mitchell Road will provide local services, food, retail and commercial opportunities for Alexandria, Erskineville, Australian Technology Park (ATP) and Eveleigh communities*".

The proposed development is compliant with the locality statement in that it aims to provide a mix of uses along Swanson Street and Park Street.

Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest?

The proposed development is considered to be in the public interest as:

- » The zone allows for mixed use development
- » The proposal is consistent with the Locality Statement and the Kingsclear Road Conservation Area
- » The proposal provides an opportunity for a different type of housing product within Erskineville

- » The proposal provides additional residential accommodation in an accessible location, near to employment, educational, social and recreational facilities.

LEC 'five part test'

The following table sets out a response to the questions in the five part test.

Table 2 LEC Five Part Test

LEC five part test	Response
Objectives of the standard are achieved notwithstanding non-compliance with the standard	Yes, refer to discussion above.
The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is not necessary	The exceedance of the development control is minimal and would result in an improved use of the land, providing additional residential accommodation within Erskineville.
The underlying objective of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable	Yes, refer to discussion above.
The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the stand and hence compliance with the standard is not unnecessary and unreasonable	N/A
The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land that is, the particular parcel of land should not have been included in the zone	N/A

Conclusion

This request for a Clause 4.6 variation demonstrates that compliance with the Height of Buildings development standard contained in the Clause 4.3 of the SLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The proposed development presents an orderly and economic use of the land in providing additional residential accommodation in an area identified for renewal.

The requested variation shows that the proposed development:

- » Facilitates a high-quality development that is responsive to the local context, topography and landscape setting
- » Seeks an exceedance to Council's FSR control to a maximum of 17.385m
- » Ensures a development outcome that is generally compatible with, and reflective of, the scale of development envisaged for the future of the site and the surrounding area
- » Will not result in any adverse impacts on significant views or have any significant visual, privacy or overshadowing
- » Is consistent with the aims of the SLEP 2012 and the underlying B4 Mixed Use zone objectives

» Ensures an appropriate built form outcome is achieved by generally complying with ADG.

As such, it is requested that the development application be approved, with the proposed minor variation, in accordance with the flexibility allowed under Clause 4.6 of the SLEP.