

# **Attachment C**

<b>Clause 4.6 Variation</b>
-----------------------------

# 49-51 SHEPHERD STREET CHIPPENDALE (D/2018/195)

## AMENDED CLAUSE 4.6 VARIATION - HEIGHT OF BUILDINGS AND FLOOR SPACE RATIO

### 1.1.1. Exceptions to Development Standards

Clause 4.6 of the Sydney LEP 2012 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In accordance with Clause 4.6 of the Sydney LEP 2012, this report outlines a request to vary the height of buildings and floor space ratio development standards. The submissions have been prepared with regard to the following considerations:

- Clause 4.6 of the Sydney LEP 2012.
- *'Varying development standards: A Guide'*, published by the Department of Planning and Infrastructure in August 2011.
- The considerations for assessing development standards as set out by the following environmental case law:
  - *Wehbe v Pittwater Council* [2007] NSWLEC 827
  - *Four2Five Pty Ltd v. Ashfield Council* [2015] NSWCA 248 ('Four2five No 3')
  - *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46
  - *Zhang and Anor v Council of the City of Ryde* [2016] NSWLEC 1179
  - *Micaul Holdings Pty Ltd v Randwick City Council* [2016] NSWLEC 7
  - *Moskovich v Waverley Council* [2016] NSWLEC 1015

This section forms a Clause 4.6 objection to vary the Building Height and Floor Space Ratio development standards. Strict compliance with Clause 4.3 and Clause 4.4 is considered unnecessary in the circumstances for the following reasons:

1. There is an existing non-compliance with both the Building Height and Floor Space Ratio standards for the site.
2. The objectives of the Sydney LEP 2012 Building Height and Floor Space Ratio standards are achieved notwithstanding the non-compliance.
3. The objectives of the Sydney LEP 2012 for the General Residential (R1) zone are achieved notwithstanding the non-compliance.
4. The proposal complies with all other applicable planning policy provisions.
5. There are sufficient environmental planning grounds to support the proposed variation.

Each issue is addressed in the following sections. The assessment of the proposed variation has been undertaken in accordance with the requirements of the Sydney LEP 2012, Clause 4.6 Exceptions to Development Standards.

## 1.1.2. Assessment of Clause 4.6 Variation

### 1.1.2.1. Building Height

#### Consistency with Objectives of Height Control

This request seeks to vary the maximum height of building development standard prescribed for the subject site under clause 4.3 of the Sydney LEP 2012. The Height of Buildings Map accompanying clause 4.3 of the Sydney LEP 2012 sets a maximum height of building control of 9 metres for the site. Subclause 4.3(1) of the Sydney LEP 2012 outlines the objectives for the height of buildings development standard. These objectives are outlined in **Table 5**. This table demonstrates that the variation is consistent with the objectives of this development standard.

Table 1 – Assessment of Consistency with Building Height Objectives

Objective	Assessment
<p><i>(a) to ensure the height of development is appropriate to the condition of the site and its context,</i></p>	<p>The proposal results in a minor increase to the height of the existing warehouse building fronting Shepherd Street. The existing building height of 12.61 metres to the top of the roof exceeds the existing height standard. The proposal achieves a maximum building height of 14.26 metres. This represents a variation of 5.26 metres to the height standard. The increase in height is only to accommodate a small portion of the roof structure above the stair case/ the remaining height is within the existing building envelope.</p> <p>Despite the non-compliance with the standard, the proposal has been designed to respect the heritage and prevailing built form of the area.</p> <p>The proposed built form has been designed to provide a generally consistent scale, form and level of articulation to the existing terrace houses located adjacent to the site fronting Shepherd Street and the built form within the immediate area. To this end, despite the proposed development being three (3) storeys in height, the development is expressed at street level as a predominant two (2) storey building when viewed from adjoining properties, as the third level is setback into the roof space.</p> <p>A rooftop terrace is proposed to the building which respects the existing form and pitch of the original building. The proposed stairs leading to the rooftop terrace will be set back and located at the centre of building so to reduce the bulk of the roof and will not be visible from the streetscape.</p>

Objective	Assessment
<p><i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</i></p> <p><i>(c) to promote the sharing of views,</i></p> <p><i>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i></p> <p><i>(e) in respect of Green Square:</i></p> <p><i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p><i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p>	<p>As demonstrated within the Architectural Plans, the existing ridgeline and front parapet of the building is also to be retained.</p> <p>The proposed development retains the established built form on the site and as such there is no discernible change in the height transitions between the subject site and adjacent development. The balustrades to the proposed terrace areas are set back from the building line and therefore are not visible from Shepherd Street.</p> <p>Given the design of the building and the setback of the additional third storey element, overshadowing impacts on the adjacent properties is minimal. In particular, the proposal does not result in any additional overshadowing impacts to existing residential development along Shepherd Street.</p> <p>The variation has been informed from a detailed site context analysis and design assessment. The proposal represents a site-specific design solution that has identified, on balance, an appropriate development response for this unusual site and is expected to influence future development on adjacent sites with the same characteristics.</p> <p>The scale of the development is complimentary and compatible with the existing and planned future development in the vicinity of the site. In particular, the proposed building height and upper level setback design presents an appropriate design response to the adjacent terrace houses along Shepherd Street.</p> <p>The proposal has been designed to limit overshadowing to adjacent properties. Shadow Diagrams have been prepared which demonstrate that the additional height to the building will not create any additional impact, when compared to the existing built form of the warehouse building.</p> <p>There are no significant views available across the site. Therefore, the proposed development does not result in any loss of views of the harbour or surrounding areas.</p>

### Consistency with Objectives of R1 Zone

The Sydney LEP 2012 includes objectives for the R1 General Residential Zone. These objectives are identified in **Table 6**. This table demonstrates that the variation to height is consistent with the objectives of the zone.

Table 2 – Assessment of Consistency with Zone Objectives

Objective	Assessment
<p><i>To provide for the housing needs of the community.</i></p> <p><i>To provide for a variety of housing types and densities.</i></p> <p><i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i></p> <p><i>To maintain the existing land use pattern of predominantly residential uses.</i></p>	<p>The current use of the site for office and storage premises is prohibited under the LEP 2012. The proposed conversion of the warehouse building for residential uses will result in a more compatible land use associated with the R1 zone.</p> <p>The proposal will result in minimal impacts to the surrounding land uses and will result in the entire block of land enjoying compatible uses.</p> <p>The proposal provides for the housing needs of the future occupants, provides an appropriate level of density for the site and preserves the existing land use pattern of predominantly residential uses.</p>

### Unreasonable or Unnecessary

The objects stated in section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* are summarised as follows:

*“to encourage... the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment... and the promotion and co-ordination of the orderly and economic use and development of land...”*

The development is consistent with the objects of the Act, in respect to the following:

- The proposal is consistent with the vision for development within the Chippendale Heritage Conservation Area. The variation to the building height development standard is proposed to achieve a better urban outcome for the site when compared to the existing situation. In addition, the proposal does not result in any greater environmental impacts compared to the existing building height.
- The site is located within an established urban environment and is zoned for the intended use. The redevelopment of the site for low density residential uses contributes to urban consolidation maintains the predominantly residential land use pattern of the neighbourhood.
- The delivery of new housing within an established urban environment, located near public transport options, without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 of the LEP.
- The proposed variation to the maximum height of buildings development standard does not hinder the proposals' ability to satisfy the objectives of the R1 General Residential zone.
- The proposal includes additional building height above the development standard in a carefully considered and appropriate location within the site. The proposed variation to height is concentrated towards the middle of the site where the stair structure protrudes on the rooftop terrace.
- Any potential impacts of the development, including the building height variation proposed, have been documented and detailed in this report.
- The proposed does not contravene the environment planning objectives of the building height control, nor does it result in unreasonable impacts on adjacent land.
- The height variation does not seek to provide any additional density or gross floor area (GFA).
- The proposed height variation allows for access to the rooftop open space.
- The visual impact associated with the additional height is negligible. Rooftop structures including the stairs and balustrades are sited behind the main parapet and will not be readily visible from the public domain.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard to facilitate a better outcome than that which would result from a compliant scheme. As such it is considered that a requirement to comply with the subject standards would be neither reasonable nor necessary in the circumstances of the case.

### **Sufficient Environmental Planning Grounds**

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- A better outcome for the community with a preferred built form arrangement that aligns with the surrounding residential land uses and vision for the Chippendale Heritage Conservation area.
- The SEE demonstrates that all impacts associated with the proposed development are acceptable, particularly since there are no significant solar access impacts on neighboring properties or the public domain as a result of the height variation.
- The additional building height is setback at sensitive interfaces so as to replicate the built form and design of traditional terraces and reduce any adverse environmental impacts.
- The variation does not result in unreasonable adverse amenity impacts on adjacent land.
- The variation does not diminish the development potential of adjacent land.

The proposed development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular, the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Compliance in this circumstance would compromise the attractiveness of an adaptable re-use of the site, potentially resulting in the retention of the existing warehouse building which is not a desirable outcome having regard to the zone objectives.

It is our view that to require compliance in the circumstance would be antipathetic to the inherent flexibility provided by clause 4.6, thereby hindering the attainment of its objectives.

### Any Matter of Significance

The non-compliance will not raise any matter of State or Regional Significance.

### Public Benefit

The proposed development is not contrary to the public interest, and there would be no public benefit in maintaining the standard.

### Conclusion

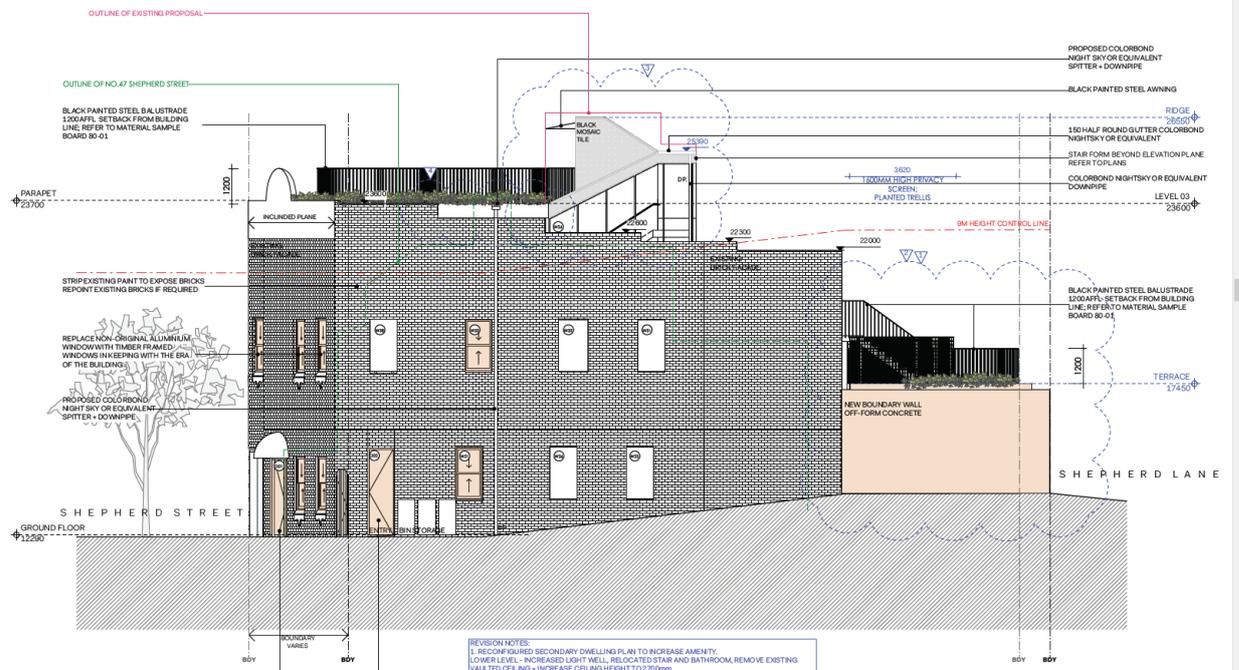
The site has an applicable building height standard of 9 metres. Notwithstanding this, the existing warehouse building on the site is 12.61 metres. The proposal results in a new building height of 14.26 metres. This represents a minor exceedance of 2.2 metres to the existing building on the site and a 5.26 metre variation to the height standard. As already stated, the increase in height is only to accommodate a small portion of the roof structure above the stair case/ the remaining height is within the existing building envelope.

Strict compliance with the height development standard is both unreasonable and unnecessary in the circumstances of the case for the following reasons:

- The proposal is consistent with the objectives of the building height standard.
- The key reason for seeking flexibility with the building height standard is to enable access to the rooftop space, with the predominant height of the building retained as existing.
- There are no unreasonable environmental impacts from the negligible variation.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.

Figure 1 - North Elevation Plan showing proposed additional height to building shaded in orange



Source: Carter Williamson

### 1.1.2.2. Floor Space Ratio

#### Consistency with Objectives of FSR Control

This request seeks to vary the maximum floor space ratio development standard prescribed for the subject site under clause 4.4 of the Sydney LEP 2012. The Floor Space Ratio Map accompanying clause 4.4 of the Sydney LEP 2012 sets a maximum floor space ratio of 1.3:1 for the site.

Subclause 4.4(1) of the Sydney LEP 2012 outlines the objectives for the floor space ratio development standard. These objectives are outlined in **Table 7**. This table demonstrates that the variation is consistent with the objectives of this development standard.

Table 3 – Assessment of Consistency with FSR Objectives

Objective	Assessment
<p><i>(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,</i></p>	<p>The proposal results in a very minor increase to the total GFA. The proposal increases the total GFA from 386.3 sqm as existing to 403.1 sqm. Notwithstanding this slight increase to GFA, the total FSR remains unchanged at 1.7:1.</p> <p>It should be noted that the original Architectural Plans contained an error related to the calculating of GFA as the two internal courtyards and lightwell were originally not counted towards the GFA. The plans and area calculations have since been amended increasing the total GFA of the proposed dwelling from 360.6sqm as originally proposed to 403.1 sqm.</p>
<p><i>(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</i></p>	<p>The proposed development will result in a slight increase to density on the site in terms of GFA but is not expected to generate any increase in vehicle and pedestrian traffic. In fact, the change in use from commercial premises to a residential dwelling will result in less traffic and pedestrian volume.</p>
<p><i>(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</i></p>	<p>The proposed use as a dwelling together with a secondary dwelling is consistent with the capacity of the local infrastructure.</p>
<p><i>(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.</i></p>	<p>The proposed development will maintain the established built form character.</p>

### Consistency with Objectives of R1 Zone

The Sydney LEP 2012 includes objectives for the R1 General Residential Zone. These objectives are identified in **Table 8**. This table demonstrates that the variation to FSR is consistent with the objectives of the zone.

Table 4 – Assessment of Consistency with Zone Objectives

Objective	Assessment
<p><i>To provide for the housing needs of the community.</i></p> <p><i>To provide for a variety of housing types and densities.</i></p> <p><i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i></p> <p><i>To maintain the existing land use pattern of predominantly residential uses.</i></p>	<p>The current use of the site for office and storage premises is prohibited under the LEP 2012. The proposed conversion of the warehouse building for residential uses will result in a more compatible land use associated with the R1 zone.</p> <p>The proposal will result in minimal impacts to the surrounding land uses and will result in the entire block of land enjoying compatible uses.</p> <p>The proposal provides for the housing needs of the future occupants, provides an appropriate level of density for the site and preserves the existing land use pattern of predominantly residential uses.</p>

### Unreasonable or Unnecessary

The objects set down in section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* are summarised as follows:

*“to encourage... the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment... and the promotion and co-ordination of the orderly and economic use and development of land...”*

The development is consistent with the objects of the Act, in respect to the following:

- The proposal is consistent with the vision for development within the Chippendale Heritage Conservation Area. The variation to the floor space ratio control is a result of the existing non-compliance with the floor space ratio.
- The site is located within an established urban environment and is zoned for the intended use. The redevelopment of the site for low density residential uses contributes to urban consolidation.
- The delivery of new housing within an established urban environment, located near public transport options, without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.4 of the LEP.



- Notwithstanding the non-compliance to the floor space ratio standard, the proposal maintains the existing FSR of 1.7:1.
- The proposed variation to the maximum floor space ratio development standard does not hinder the proposals' ability to satisfy the objectives of the R1 General Residential zone.
- Any potential impacts of the development, including the floor space ratio variation proposed, have been documented and detailed in this Report.
- The proposed does not contravene the environment planning objectives of the floor space ratio control, nor does it result in unreasonable impacts on adjacent land beyond a compliant built form.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard to facilitate a superior outcome than that which would result from a compliant scheme. As such it is considered that a complying development is neither reasonable nor necessary in circumstances of the case.

### **Sufficient Environmental Planning Grounds**

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- A superior outcome for the community with a preferred built form arrangement that aligns with the vision for development within the Chippendale Heritage Conservation area.
- The SEE and amended Architectural Plans demonstrate that any impacts associated with the proposed development are acceptable, particularly since there are no significant solar access impacts on neighboring properties or the public domain as a result of the floor space ratio variation.
- The variation does not result in unreasonable adverse amenity impacts on adjacent land.
- The variation does not diminish the development potential of adjacent land.

The objection is considered to be well founded given the proposal maintains the existing FSR of 1.7:1 and that the motivation of the variation is to create a compatible residential land use for the site. The proposed development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular, the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Strict compliance in this circumstance would result in an inferior outcome, with a development that is less responsive to the heritage characteristics of the surrounding Conservation Area. Further, compliance has the potential to erode the heritage values of the existing warehouse building. It is our view that to force compliance in the circumstance would be antipathetic to the inherent flexibility provided by clause 4.6, thereby hindering the attainment of its objectives.

### **Any Matter of Significance**

The non-compliance will not raise any matter of State or Regional Significance.

### **Public Benefit**

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

### **Conclusion**

The site has an applicable floor space ratio standard of 1.3:1. Notwithstanding this, the existing commercial warehouse building on the site has an FSR of 1.7:1. The proposal maintains the existing floor space ratio control of 1.7:1 (despite a slight increase in overall GFA from 386.3sqm to 403.1sqm).



Strict compliance with the floor space ratio development standard is both unreasonable and unnecessary in the circumstances of the case for the following reasons:

- The proposal maintains the existing FSR of 1.7:1.
- The proposal is consistent with the objectives of the floor space standard.
- There are no unreasonable environmental impacts from the negligible variation.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.