

# **Attachment C**

## **Clause 4.6 Variations**

## 5.7.1. Variation to Height of Building Development Standard

### 5.7.1.1. Overview

Clause 4.6 of SLEP 2012 allows Council to grant consent to a development application notwithstanding a breach of development standards relating to a site. The variation can be exercised where a written request is made by the applicant justifying the contravention of the standards. Clause 4.6(3) of the SLEP 2012 outlines the requirements of a variation, which must demonstrate:

- (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.*

Under Clause 4.6(4)(a) of the LEP, consent for a development that contravenes a development standard must not be granted unless, in addition to the issues in Subclause 4.6(3), the consent authority is satisfied that:

- (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.*

In response to the above, the proposal demonstrates that compliance with the height standard is unreasonable and unnecessary under the circumstances; has sufficient grounds to justify the variation; is consistent with the objectives of the development standard; and is in the public interest.

The submission to vary the development standard has been prepared with regard to the following considerations:

- Clause 4.6 of SLEP 2012;
- The considerations for assessing development standards set out by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- 'Varying development standards: A Guide', published by the Department of Planning and Infrastructure in August 2011.

### 5.7.1.2. Proposed Height Variation

Clause 4.3 of SLEP 2012 specifies a maximum building height standard of 22m for the subject site.

The maximum height of the proposal is predominantly 22m, with the exception of the lift overruns which go up to 24.25m measured from the existing ground level to building's highest point. The height noncompliance at the highest point is therefore 2.25m.

Figure 12 - Proposed Section (non-compliance shown in red)



This section assesses the proposed variation to consider whether compliance with the Height of Building standard can be considered unreasonable or unnecessary in this case, and whether there are sufficient environmental planning grounds to justify contravening the development standard.

### 5.7.1.3. Consideration of NSW Land and Environment Case Law

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters is outlined below.

The following section addresses the local provisions of clause 4.6 of SLEP 2012 together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

### 5.7.1.4. Is the Planning Control in question a development standard?

Yes. The planning control in question is clause 4.3 of the SLEP 2012. Clause 4.3 nominates a maximum Height of Buildings of 22m for the site. The planning control as a numerical control is a development standard capable of being varied under the provisions of Clause 4.6 of the SLEP 2012.

### 5.7.1.5. What is the underlying objective of the Standard?

The objectives for Height of Buildings development standard provided at subclause 4.3(1) of SLEP 2012 state the following:

- (1) *The objectives of this clause are 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 development is considered consistent with the relevant objectives of the control for the reasons outlined in Table 11.

TABLE 11 – Consistency of the Proposed Development with the Height of Buildings Objectives

Objective	Assessment
To ensure the height of development is appropriate to the condition of the site and its context,	<p>This additional height is considered appropriate for the condition of the site given the topography of the site and the need to ensure universal access to the rooftop communal open space and improve the environmental performance of the building.</p> <p>Having consideration for adjacent development particularly to the west of the site the overall development is in context with the area.</p>
To ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas	<p>The proposed development is located within a heritage conservation area and is not adjacent to any heritage items. The proposal when viewed holistically will have a neutral impact on the heritage conservation area regardless of the identified noncompliance.</p> <p>Whilst the site is within the Surry Hills Special Character Area the proposal will not impact on the heritage significance or view corridors of the Character Area.</p>
to promote the sharing of views	<p>Due to the nature of development within Surry Hills it is not considered that the proposed development will</p>

Objective	Assessment
to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	<p>result in view loss or prohibit the promotion of the sharing of existing views.</p> <p>The height sought by the application is consistent with the predominant built form (either existing or permitted) of this area of Surry Hills. In doing this the development provides an appropriate height transition from Central Sydney.</p>

The development, despite the non-compliance with the development standard, is consistent with the objectives of the control.

**5.7.1.6. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act**

The proposed development is considered consistent with the relevant aims of the SLEP 2012.

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

- “(a) *to encourage*
  - (i) *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.*
  - (ii) *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, as follows:

- The proposed development is consistent with the strategic significance of development envisaged for the site under SLEP 2012 and SDCP 2012.
- The variation in height achieves allows for equitable access to the communal roof space, without having any unreasonable impacts on the streetscape or surrounding properties.
- The site is located within an established urban environment and is zoned for the intended use. The redevelopment of the site for higher density residential uses contributes in consistent with State, Regional and Local planning policy.

**5.7.1.7. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case**

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 SLEP 2012. Refer to discussion in section above.
- At 3:1 the proposal is fully compliant with the FSR development standard that applies to the site. Therefore, the height variation does not seek to provide any additional density or gross floor area.
- The proposed height variation allows for equitable access for residents to the communal rooftop open space.
- The predominant building height is 22m, with the lift overruns being a very minor exception to this.

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 or necessary in circumstances of the case.

#### **5.7.1.8. Is the development standard a performance based control?**

No. The development standard is not a performance based control.

#### **5.7.1.9. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.**

The proposed height breach is a direct result of the proposed lift overruns which provide equitable access to the communal open space on the roof. These isolated areas of height breaches will give rise to no additional environmental impacts.

#### **5.7.1.10. Is the objection well founded?**

The objection is considered well founded given the motivation of the variation is to provide equitable lift access to the roof-top communal area, and as the predominant building height and parapet is maintained at 22m.

The proposed exception to the Height of Building development standard will not result in a higher density compared to a compliant scheme. This is demonstrated through the compliant FSR. As such, the variation will not result in a more dense development, or intensification to what is envisaged under the planning controls.

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.

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.

#### **5.7.1.11. Would non-compliance raise any matter of significance for State or Regional Planning?**

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

#### **Is there a public benefit of maintaining the planning control standard?**

The driver of the variation is supporting the public interest. Accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

#### **5.7.1.12. Summary**

Taking into account the significance of the site, its context, and the vision for the locality, strict compliance with the numerical standard in this instance is both unreasonable and unnecessary owing to the following key points:

- The proposed variation is consistent with the objectives of the building height standard.
- The key reason for seeking flexibility with the building height standard is to enable lift access to the communal roof space, with predominant height of the building 22m in accordance with the height standard.
- There is no additional density (beyond the maximum FSR) sought with the proposed height variation.
- There are no unreasonable environmental impacts from the negligible variation.

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

## **5.8. SYDNEY DEVELOPMENT CONTROL PLAN 2012**

The Sydney Development Control Plan 2012 (SDCP2012) contains a comprehensive set of controls for Mixed Use Development such as that proposed. A complete assessment of the proposal against the relevant controls of the DCP is contained in the Town Planning Compliance Assessment attached as **Appendix A**.



## **D/2017/1131 – 23-47 FLINDERS STREET , SURRY HILLS: VARIATION TO FLOOR SPACE RATIO DEVELOPMENT STANDARD**

### **Overview**

This variation request has been prepared pursuant to Clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP 2012). The request relates to a proposed variation to the floor space ratio development standard applicable to 23-47 Flinders Street, Surry Hills (the site).

Clause 4.6 allows for an appropriate degree of flexibility to be applied to certain development standards in order to achieve better outcomes for and from development. The consent authority may grant development consent for a proposal that contravenes a development standard where a written request is provided by the applicant justifying the contravention. The request must demonstrate:

- *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- *That there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, the consent authority must be satisfied that: *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.*

This variation request confirms:

- That strict compliance with the floor space ratio development standard is unreasonable and unnecessary in the specific circumstances of the proposal, site and context;
- There are sufficient environmental planning grounds to justify the proposed variation to the floor space ratio development standard; and
- The proposal is consistent with the objectives of the floor space ratio standard and the objectives of the B2 Local Centre zone and will therefore be in the public interest.

### **Proposed Variation**

The site comprises multiple allotments (refer Statement of Environmental Effects) with a combined area of 989m<sup>2</sup>. Pursuant to Clause 4.4 of SLEP 2012 the maximum floor space ratio permitted on the site is 3:1. This results in a total gross floor area of 2,967m<sup>2</sup>.

The proposed development has a total gross floor area of 3,039m<sup>2</sup>. This represents an exceedance of the floor space ratio control by **72m<sup>2</sup> (or 2.4%)**. The floor space ratio of the proposed development is **3.07:1**.

NOTE: The proposed development provides a 'breezeway' corridor along the western elevation to maximise the opportunity for natural cross ventilation to apartments and minimise potential acoustic and visual privacy impacts on adjacent properties. The 'breezeway' corridor is treated with a perforated metal screen which provides in excess of 50% open area and therefore has been excluded from the calculation of gross floor area.

In accordance with the NSW Land and Environment Court Decision *GGD Danks Street Pty Ltd and CR Danks Street Pty Ltd v Council of the City of Sydney*, the proposed 'breezeway' corridors have been designed to have a large horizontal opening protected by a perforated metal screen, with a balustrade less than 1.4m, and will be subject to inclement weather and otherwise used as an outdoor space. Accordingly, the 'breezeway' corridor does not contain an 'external wall' and therefore cannot be characterised as internal floor space.

## Assessment of Clause 4.6 Variation

The following section addresses the local provisions of Clause 4.6 of SLEP 2012 together with the principles and findings of the relevant case law at the time of writing.

### 1. Consistency with the objectives of the floor space ratio control

The objectives for the floor space ratio control are contained in Clause 4.4 (1) of SLEP 2012. The proposed development is considered consistent with the relevant objectives of the control for the reasons outlined in Table 1.

**Table 1 - Consistency of the proposed development with the floor space ratio objectives**

Objective	Assessment
<i>To provide sufficient floor space to meet anticipated development needs for the foreseeable future,</i>	The proposal is largely commensurate with the anticipated floor space envisaged by Council for the site. The non-compliance is minor (an increase of 72m <sup>2</sup> or 2.4%) and as such is within the expectations of the scale of the future development on the site.
<i>To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,</i>	<p><u>Density, built form and land use intensity:</u></p> <p>As outlined in the Statement of Environmental Effects, the proposal achieves a high level of compliance with the site specific built form controls contained within SLEP 2012 and SDCP 2012, in particular building height (with the exception of the lift overrun), street frontage height, and setbacks. Notably, the built form proposed reflects the desired character of the locality and does not result in any adverse impacts on that locality or surrounding development.</p> <p><u>Vehicle and pedestrian traffic generation:</u></p> <p>The site benefits from exceptional access to public transport connections, including buses and trains, as well as cycle and walking paths. Further, the proposal incorporates a total of 35 bicycle parking spaces and 19 car parking spaces.</p> <p>The Traffic Impact Assessment prepared by ARUP confirms the proposed development will generate 3 vehicle movements in a peak hour. Further, the assessment confirms the traffic generation associated with the proposal is statistically insignificant and will not have any unacceptable impacts on road network capacity.</p>
<i>To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,</i>	<p>The site is well serviced by existing and planned infrastructure, including public transport, community and recreational facilities. The minor increase in floor space of 72m<sup>2</sup> will not place significant pressure on the capacity of existing and planned infrastructure in the locality.</p> <p>Further, the site is already serviced by the necessary utility infrastructure and existing services which can be extended, augmented or amplified to accommodate increased demand from the proposed development (if required).</p>

<p><i>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 proposal has been designed with regard to the existing and desired character of the locality. In particular:</p> <ul style="list-style-type: none"> <li>• The proposal achieves a high level of compliance with the relevant requirements of the SLEP 2012 and SDCP 2012 (refer Appendix A – Planning Compliance Assessment).</li> <li>• The proposal provides a high level of activation along Flinders Street, Short Street, and Maiden Lane.</li> <li>• The proposal respects the heritage significance of the Bourke Street North Heritage Conservation Area.</li> </ul> <p>Further, the proposal minimises adverse impacts on the amenity of adjacent properties. In particular:</p> <ul style="list-style-type: none"> <li>• Overshadowing to adjacent properties is reduced through an increased setback at the northern end of the development and a step in the building form on the north-west corner at levels 3, 4 and 5 – ensuring solar access is maintained to apartments within 322-340 Bourke Street and 342-344 Bourke Street.</li> <li>• Visual and acoustic privacy impacts on adjacent properties are minimised through the configuration and layout of one and two-storey apartments, and placement and orientation of windows, balconies, corridors, and common spaces.</li> </ul>
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The proposed development, despite the non-compliance with the development standard, is consistent with the objectives of the control.

## 2. Consistency with the objectives of the B2 Local Centre zone

SLEP 2012 outlines objectives for the B2 Local Centre zone. The proposed development is considered consistent with the relevant objectives of the zone for the reasons outlined in Table 2.

**Table 2 - Consistency of the proposed development with the B2 Local Centre zone objectives**

Objective	Assessment
<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</i>	The proposal incorporates two ground floor retail tenancies that will serve the needs of people who live in, work in and visit the local area. Further, the inclusion of 28 residential apartments will increase the number of residents in the local area who will contribute to and utilise surrounding retail, business, entertainment and community uses.
<i>To encourage employment opportunities in accessible locations.</i>	The proposal incorporates two ground floor retail tenancies which will create employment opportunities on the site. Opportunities for home based businesses are also provided through the inclusion of two-storey apartments with separate bedroom and bathroom on the ground floor facing Maiden Lane. The design of this ground floor space and adjacent courtyard lends itself to a potential small scale work space with separate pedestrian access from Maiden Lane.
<i>To maximise public transport patronage and encourage walking and cycling.</i>	<p>The proposal will deliver new employment and housing opportunities in an area that is well serviced by public transport, community and recreational facilities, and open space.</p> <p>The proposal incorporates a total of 35 bicycle parking spaces for residents, employees, customers and visitors of the development. Residential and staff bicycle parking is provided in a secure, enclosed area with restricted-access providing security and shelter. Visitor bicycle parking is provided at the major public entrance to the development on Flinders Street and within the retail courtyard. Limited car parking is provided on site (19 spaces) in accordance with the SLEP 2012 maximum rates.</p> <p>The proposal provides street level activation and significant upgrades to the existing public domain interface that will enhance the pedestrian experience, improve safety and further encourage foot traffic in the locality.</p>
<i>To allow appropriate residential uses so as to support the vitality of local centres.</i>	The proposal incorporates a total of 28 one, two and three bedroom apartments, in single and two-storey configurations. The mix of dwelling types and configurations will adding diversity to the social profile of the locality and contribute to the vitality of the surrounding area.

The proposed development, despite the non-compliance with the development standard, is consistent with the objectives of the zone.

### **3. Unreasonable or unnecessary**

The non-compliance with the development standard is very minor (an increase of 72m<sup>2</sup> or 2.4%), particularly in the context of the wider development and surrounding context. Strict compliance with the development standard would not result in a perceptible difference in the building bulk, scale or intensity of development on the site. Therefore, the additional floor space will not create any discernible change to the anticipated building form and scale envisaged by Council.

Further, notwithstanding the minor non-compliance with the floor space ratio development standard, the proposal substantially complies with the range of planning objectives and controls contained in SLEP 2012, SDCP 2012, and the Apartment Design Guide.

As such, it is considered that strict compliance with the floor space ratio development standard is unnecessary in the specific circumstances of the proposal, site and context.

### **4. Sufficient environmental planning grounds**

It is considered that there are sufficient environmental planning grounds to support the variation, including:

- The proposal achieves the objectives of the B2 Local Centre zone, as well as the floor space ratio development standard, notwithstanding the technical non-compliance with the metrics provided under Clause 4.4. The proposal demonstrates achievement of envelope, street frontage height, setbacks, landscape and open space provision to support the additional floor space.
- As detailed in the Statement of Environmental Effects, the proposed built form does not result in any unreasonable environment effects, in particular:
  - Overshadowing of the adjacent residential properties at 322-340 Bourke Street and 342-344 Bourke Street has been minimised through inclusion of an increased setback at the northern end of the development and a step in the building form on the north-west corner at levels 3, 4 and 5.
  - Visual and acoustic privacy impacts on adjacent properties are minimised through the configuration and layout of one and two-storey apartments, and placement and orientation of windows, balconies, corridors, and common spaces.
  - Street level activation along Flinders Street, Short Street, and Maiden Lane is maximised to enhance the pedestrian experience, improve safety and security and encourage foot traffic in the locality.
  - Façade design and materials respond positively to the surrounding context and provide a positive contribution to the character of the heritage conservation area.
- The proposal provides for a very high degree of residential amenity – consistent with the objectives of the Apartment Design Guide. In particular, 75% of apartments receive 2 hours of solar access in mid-winter, the remaining 25% received 1.5 hours, 100% of apartments are naturally cross ventilated, and all apartments meet the minimum requirements for overall size, living room and bedroom widths, and private open space.



#### **5. Any matter of significance**

The contravention of the development standard does not raised any matter of significance for State or regional environmental planning.

#### **6. Public benefit**

It is considered that the strict maintenance of the development standard in this instance is not in the public interest as the proposal will result in public benefit through the delivery of a high quality mixed-use development that will have a positive impact on the site and locality, and therefore the strict application of the standard would be contradictory to the application of Clause 4.6 of SLEP 2012.

### **Conclusion**

In conclusion, the proposed development is of a built form consistent with that envisaged through the SDCP 2012 controls for the site in terms of building height, envelopes and setbacks. The non-compliance with the control is considered to be relatively minor (an increase of 72m<sup>2</sup> or 2.4%) and will not result in any unreasonable impacts on adjacent properties or the locality.

This Clause 4.6 variation request demonstrates that strict compliance with the floor space ratio development standard in Clause 4.4 of SLEP 2012 as it relates to the site is unreasonable and unnecessary in the specific circumstances of the proposal, site and context.