

Attachment D

Clause 4.6 Variation Request

26-32 City Road, Chippendale

Clause 4.6 variation to Height of Buildings

On behalf of
SGCH Portfolio Limited³
October 2017



1 Introduction

The Development Application (DA) for 26-32 City Road, Chippendale (subject site) proposes a boarding house with a retail component. This Clause 4.6 variation to the Height of Building control in the Sydney Local Environmental Plan 2012 (SLEP 2012) accompanies the DA.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 enables an exception to the height standard upon consideration of a written request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the SLEP reads as follows:

Clause 4.6 Exceptions to development standards

(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 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 Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

3 The Development Standard to be varied

The development standard to be varied is Clause 4.3 Height of Buildings (HOB) in the SLEP 2012. As identified on the SLEP 2012 Height of Buildings Map, the subject site has a maximum building height limit of 12m as identified in the figure below.



Figure 1 Height of Buildings LEP Map

Source: SLEP 2012

4 Extent of Variation to the Development Standard

The proposal will vary the HOB control by 3.2m (or 26.6%) to the lift overrun and 1.85-2.62m (or 21.8%) to the top parapet. It is noted that the existing building exceeds the maximum building height and therefore is an existing non-compliance. The portion of the building that does not comply with the height control is setback 5m (approximately) from City Road and therefore is not highly visible from the public domain, refer to the figure below. Only a small proportion of the front façade exceeds the height variation which includes the planter boxes and brick arch feature.

7 Assessment

Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the height standard is unreasonable and unnecessary given the following circumstances of this case:

- Under Clause 29 (1)(c)(i) of the ARH SEPP, the subject proposal can achieve up to 0.5:1 additional FSR above the existing 1.5:1 FSR control for the site. The subject application seeks to utilize 0.27:1 of the additional permitted 0.5:1. The additional FSR has been permitted through a state planning policy to incentivise boarding house developments in order to improve housing flexibility and affordability within NSW. As the additional FSR has been permitted through a state planning policy, it is not possible to reflect this additional permitted yield through the existing HOB controls in the SLEP2012. This leads to a mismatch of the controls, where additional FSR is permitted, but not able to be reflected in updated HOB controls in the local instrument.
- It is noted that the existing building exceeds the maximum building height and therefore is an existing non-compliance.
- The portion of the building that does not comply with the height control is setback 5m (approximately) from City Road and therefore is not highly visible from the public domain;
- It is noted that the maximum building height is measured from the natural/existing ground level. However, the existing building is built above the footpath level on a podium. If the height were to be measured from the existing podium, the proposal will only have a 300mm variation with the 12m height limit;
- The proposal is well below the adjoining northern property (22-24 City Road), which is 6 storeys and has high floor to ceiling heights given the building was originally a warehouse. The proposal will retain a 3 storey street wall height along City Road which is consistent with the 2-3 storey development along the streetscape;
- The development has significant social benefit as it will provide additional housing in the locality for key workers and youth at risk of homelessness (as well as on-site support and services) at rents capped in accordance with state level (Family and Community Services) affordable housing policies. The additional storey that is located partially-above the height control will enable an additional 14 boarding house rooms to be provided at below market rents for key workers in the precinct. Furthermore, it is noted that the Family and Community Services and (FACS) Treasury has an interest in the project;
- The proposal will not significantly impact upon the amenity of the adjoining neighbours with regard to privacy or solar access. In particular, the proposed additional height will not cause solar or privacy impacts that would contravene Council's controls;
- The proposed development is nevertheless consistent with the objectives of the height standard and B4 Mixed Use zone as described below and delivers a better public outcome than a fully complying DCP building envelope;
- The contravention of the height standard does not raise any matter of State or regional planning significance; and
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

Therefore, strict compliance with the height control would be unreasonable and unnecessary in this circumstance.

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

There are sufficient environmental planning grounds for the contravention to the height standard as follows:

- The Land and Environment Court in its recent decisions in *Four2Five vs Ashfield Council* has ruled that a clause 4.6 variation must do **more than** demonstrate that the development meets the objectives of the development standard and the zone, a test commonly referred to as the Wehbe Test #1 (which are matters dealt with further below). The clause 4.6 objection must **also** demonstrate some other environmental planning grounds that justify contravening the development standard, preferably some that are specific to the site, although that is not essential, according to the Court of Appeal decision in *Four2Five vs Ashfield Council*. The decision also suggests that the requirements under clause 4.6(3)(a) and (b) must not be 'watered down' and must be adequately addressed;
- The development will create a 'better planning outcome' given it provides additional housing for the locality for key workers and youth at risk of homelessness with rents capped at a discounted market rate. The proposal will allow for the orderly and economic use of the land by providing further housing for the locality which is highly accessible to public transport and employment opportunities (being close to Sydney CBD). Given Sydney's critical lack of affordable housing, the additional 14 boarding house rooms (with appropriate rental caps) that are delivered through a permitted variation to the HOB control, is a significant positive planning impact. It is also noted that the delivery of these boarding rooms will contribute towards the City of Sydney's 'Affordable Housing Policy' and Greater Sydney Commission's 'Affordable Housing' targets;
- The proposal will comply relevant setback provisions in the SDCP 2012. The building envelope is generally a 'T' shape and the proposal has allowed for sufficient setbacks from the adjoining residential properties to the rear and side which will minimise privacy impacts. The northern side setback and rear setbacks will allow for deep soil landscaping along the elevations which will soften the built form. Along the rear there will be no windows looking directly into the terraces fronting Rose Street and furthermore, the windows along the side elevations will be at oblique angles and therefore will not create any privacy concerns;
- The proposal will improve solar access to the private open space areas to some terraces fronting Rose Street and will comply with relevant provisions in the Sydney DCP (2 hours solar access to 50% private open space at mid winter). The proposal will increase solar access to the private open space areas for no's 35, 37, 43 and 45 Rose Street, given the proposed development is further set back from these properties; and
- Given the above strict compliance with the height controls would hinder the attainment of the objects of the Act, and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a)(ii) - Is the proposed development 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 the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) *the objectives of the particular standard, and*
- b) *the objectives for development within the zone in which the development is proposed to be carried out.*

The objectives of the development standard and the zone are addressed below under the relevant headings:

a) the objectives of the particular standard

The particular development standard is Clause 4.3 Height of Buildings of the SLEP 2012 and the relevant objectives are addressed below:

- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*

The height of the proposal is well below the adjoining northern property (22-24 City Road), which is 6 storeys in height with high floor to ceiling heights. The locality predominately consists of 2-3 storey buildings. The proposal will retain a 3 storey street-wall height and while the proposal is 5 storeys to the rear - the lower level is sunken below the footpath level and not apparent from the City Road frontage. The generous side and rear setbacks will allow for an appropriate transition with the lower 2-3 storey buildings surrounding the site.

- (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*

The site falls within the Chippendale Heritage Conservation Area and adjoins a heritage item to the north (former warehouse 'Grace Bros' and its interior). The proposal will create an appropriate height transition with the adjoining northern heritage item given it is well below its 6 storey height.

- (c) *to promote the sharing of views,*

The proposal is considered to be of a reasonable height and there are no significant views that will be impacted upon. The subject application will not cause any unreasonable view loss from surrounding residential development and will largely not be visible from the public domain.

- (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.*

The proposal does not fall within Central Sydney and Green Square Centre and therefore (d) and (e) are not applicable.

b) the objectives for development within the zone in which the development is proposed to be carried out.

This falls within the B4 Mixed Use zone and the relevant objectives are addressed below:

- *To provide a mixture of compatible land uses.*

The proposed development fronting City Road will include a mixture of uses including a boarding house and retail shop, which are 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.*

The proposed development will be located in an accessible location, which is in proximity to Redfern and Central train stations and a number of bus services which will maximise public transport patronage. Furthermore the proposal incorporates bicycle parking and is surrounded by a series of footpaths which will encourage walking and cycling.

- *To ensure uses support the viability of centres.*

The proposal incorporates a retail shop to the ground floor, which will contribute to the viability of the centre.

As discussed above the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the B4 Mixed Use zone.

Furthermore, there is no significant benefit in maintaining the height standard given the proposal facilitates a significantly better planning outcome with improved amenity in the form of additional affordable housing and no significant adverse environmental impacts.

8 Any matters of significance for State or regional environmental planning

The delivery of additional boarding rooms with capped rents by SGCH Portfolio Limited (who is a Tier 1 registered Community Housing Provider) is consistent with the Greater Sydney Commission's draft District Plans, which is a matter of regional environmental planning significance. By contrast, the contravention of the height standard does not raise any matter of State or regional planning significance.

9 Conclusion to variation to height standard

This is a written request for an exception to the height standard under clause 4.6 of the SLEP 2012. It justifies the contravention to the height standard in the terms required under clause 4.6 of the LEP, and in particular demonstrates that the proposal provides a significantly better planning outcome (compared to compliant DCP building envelope) with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Compliance with the height standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention;
- It is in the public interest in being consistent with the objectives of the height standard and zone; and
- The delivery of additional boarding rooms with capped rents by SGCH Portfolio Limited (who is a Tier 1 registered Community Housing Provider) which is consistent with the Greater Sydney Commission's draft District Plans, which is a matter of regional environmental planning significance.



Suite 1204B, Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au

mecone.com.au

26-30 City Road, Chippendale

Updated Clause 4.6 variation to Motorbike parking in the ARH SEPP

On behalf of
SGCH Portfolio Limited
April 2018



1 Introduction

The Development Application (DA) for 26-30 City Road, Chippendale (subject site) proposes a boarding house with a retail component. This Clause 4.6 variation under the Sydney Local Environmental Plan 2012 (SLEP 2012) to Clause 30 (1)(h) Motorbike parking control in the State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP) accompanies the DA.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 enables an exception to the motorbike parking standard within the ARH SEPP upon consideration of a written request from the applicant justifying the contravention in the terms stated below. Clause 4.6 of the SLEP reads as follows:

Clause 4.6 Exceptions to development standards

(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 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 Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.

3 The Development Standard to be varied

The development standard to be varied is Clause 30 (1)(h) Motorbike parking control in the ARH SEPP. Clause 30 (1)(h) of the ARH SEPP stipulates that at least 1 motorbike space is provided for every 5 boarding rooms.

4 Extent of Variation to the Development Standard

The proposal is required to provide a total of 15 motorbike spaces (with a total of 73 boarding rooms) under the ARH SEPP however the proposal will only provide 4 motorbike spaces.

5 Objectives of the Standard

There are no stated objectives associated with the control or Clause 30 in general. However, it is considered that the purpose of Clause 30 of the SEPP is to ensure that boarding houses are compatible with their context, provide adequate facilities for occupants and do not result in any adverse impacts to the surrounding area, including traffic impacts. Furthermore, Council's parking controls within the SLEP2012 are maximum rates, specifically designed to reduce car and motorbike riding within the LGA and increase use of public transport, walking and cycling to improve health and environmental outcomes.

6 Objectives of the zone

The objectives of the B4 Mixed Use zone are as follows:

- 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.

7 Assessment

Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the motorbike parking requirement is unreasonable and unnecessary given the following circumstances of this case:

- The proposal will align with the objectives of the maximum parking rates in the SLEP 2012 and will promote the use of public transport, walking and cycling. The site is highly accessible with Central and Redfern train stations, a number of bus services (along Parramatta Road and City Road) and Railway Square within close proximity;

- It is considered that the future tenants (being youth and low to medium income earners) would not rely on motorbikes for transport and would rely more on cheaper forms of transport (being public transport, cycling and walking). However, the scheme has been amended to provide 4 motorbike spaces to cater for some tenants and staff who may require motorbike parking;
- If the proposal was to incorporate 15 motorbike spaces (as per the requirement) this would reduce the communal open space for the youth foyer and reduce deep soil and landscaping;
- The proposal will also provide sufficient bicycle parking which complies with ARH SEPP and SDCP 2012 minimum requirements;
- The proposal will not significantly impact upon the amenity of the adjoining neighbours;
- The proposed development is nevertheless consistent with the B4 Mixed Use zone objectives as described below;
- The contravention of the motorbike parking requirement does not raise any matter of State or regional planning significance; and
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

Therefore, strict compliance with the motorbike parking requirement would be unreasonable and unnecessary in the circumstances.

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

There are sufficient environmental planning grounds for the contravention to the height standard as follows:

- The Land and Environment Court in its recent decisions in *Four2Five vs Ashfield Council* has ruled that a clause 4.6 variation must do **more than** demonstrate that the development meets the objectives of the development standard and the zone, a test commonly referred to as the Wehbe Test #1 (which are matters dealt with further below). The clause 4.6 objection must **also** demonstrate some other environmental planning grounds that justify contravening the development standard, preferably some that are specific to the site, although that is not essential, according to the Court of Appeal decision in *Four2Five vs Ashfield Council*. The decision also suggests that the requirements under clause 4.6(3)(a) and (b) must not be 'watered down' and must be adequately addressed;
- The development will create a 'better planning outcome' given it will promote the use of more sustainable forms of transport including public transport, cycling and walking. It is also consistent with Council's approach to traffic and parking, which is to reduce private vehicle trips within the LGA and Central Sydney in particular. The proposal is in close within walking distance to Broadway Shopping Centre, Victoria Park and Sydney CBD;
- The proposal will also provide sufficient bicycle parking which complies with ARH SEPP and SDCP 2012 minimum requirements;
- The proposal will not create any additional traffic generation to the surrounding road network given only 2 car parking spaces and 4 motorbike spaces are provided; and
- Given the above strict compliance with the motorbike parking requirement would hinder the attainment of the objects of the Act, and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a)(ii) - Is the proposed development 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 the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) *the objectives of the particular standard, and*
- b) *the objectives for development within the zone in which the development is proposed to be carried out.*

The objectives of the development standard and the zone are addressed below under the relevant headings:

a) the objectives of the particular standard

It is reiterated that there are no stated objectives associated with the control or Clause 30 in general. However, it is considered that the purpose of Clause 30 of the SEPP is to ensure that boarding houses are compatible with their context, provide adequate facilities for occupants and do not result in any adverse impacts to the surrounding area, including traffic impacts. Furthermore, Council's parking controls within the SLEP2012 are maximum rates, specifically designed to reduce car and motorbike riding within the LGA and increase use of public transport, walking and cycling to improve health and environmental outcomes.

b) the objectives for development within the zone in which the development is proposed to be carried out.

This falls within the B4 Mixed Use zone and the relevant objectives are addressed below:

- *To provide a mixture of compatible land uses.*

The proposed development fronting City Road will include a mixture of uses including a boarding house and retail shop which are 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.*

The proposed development will be located in an accessible location which is in proximity to Redfern and Central train stations and a number of bus services which will maximise public transport patronage. Furthermore the proposal incorporates bicycle parking and is surrounded by a series of footpaths, which will encourage walking and cycling.

- *To ensure uses support the viability of centres.*

The proposal incorporates a retail shop to the ground floor which will contribute to the viability of the centre.

As discussed above the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the B4 Mixed Use zone.

Furthermore, there is no significant benefit in maintaining the motorbike parking requirements given the proposal facilitates a significantly better planning outcome with improved amenity and no significant adverse environmental impact.

8 Any matters of significance for State or regional environmental planning

The contravention with the motorbike standard does not raise any matter of State or regional planning significance.

9 Conclusion to variation to height standard

This is a written request for an exception to the height standard under Clause 4.6 of the SLEP 2012. It justifies the contravention to the motorbike parking requirement in the terms required under Clause 4.6 of the LEP, and in particular demonstrates that the proposal provides a significantly better planning outcome with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- compliance with the motorbike standard is unreasonable and unnecessary;
- there are sufficient environmental planning grounds for the contravention;
- it is in the public interest in being consistent with the objectives of the zone; and
- there are no matters of State or regional planning significance and no public benefits in maintaining the motorbike standard in this case.



Suite 1204B, Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au

mecone.com.au