

Attachment C

**Clause 4.6 Variation Request
32-38 Flinders Street, Darlinghurst**



32-38 Flinders Street
DARLINGHURST NSW

Alterations and additions to residential flat building

Clause 4.6 written request seeking to justify contravention of clause 4.3(2) of Sydney Local Environmental Plan 2012

Prepared for Elk 1 Pty Ltd
Issue B – J16113
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1. Introduction

This written request provides justification under clause 4.6(3) of Sydney Local Environmental Plan 2012 (SLEP2012) for the proposed exception to clause 4.3(2) of that instrument associated with proposed alterations and additions to a residential flat building at 32-38 Flinders Street, Darlinghurst.

This clause 4.6(3) written request is to be read in conjunction with the statement of environmental effects for the proposed modification, prepared by MB Town Planning dated 1 August 2016.

Clause 4.6(1) of SLEP2012 sets out the objectives of clause 4.6, being:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6(2) of SLEP2012 provides as follows:

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.

It is noted that there are no provisions that expressly exclude clause 4.3 from the operation of clause 4.6.

Clause 4.6(3) of SLEP2012 provides as follows:

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.

Clause 4.6(4) of SLEP2012 provides as follows:

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 within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

Clause 4.6(5) of SLEP2012 provides as follows:

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.*

Clause 4.3(2) of SLEP2012 provides as follows:

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 *Height of Buildings Map* shows the site as being subject to a maximum height of 15 metres.

The proposed alterations and additions to the residential flat building include an additional storey that will increase the height of the building from the existing 18.5 metre height to the proposed height of 20.8 metres. The existing height exceeds the maximum height standard by 3.5 metres, which is 23.3 percent of a compliant height. The proposed modifications would exceed the 15 metre height standard by 5.8 metres (an additional 2.3 metres to the existing building), which is 38.7 percent of a compliant height.

The present written request is therefore being made in accordance with clause 4.6(3) so as to allow the consent authority to approve the proposed development in accordance with clause 4.6(2) notwithstanding the proposed non-compliance.

Part 2 of this written request demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case in accordance with clause 4.6(3)(a).

Part 3 of this written request demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard.

Part 4 of this written request demonstrates that the consent authority may 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 of the zone in which the development is proposed to be carried out.

Part 5 of this written request demonstrates that the proposed development is acceptable in relation to the matters that the Secretary must consider in determining whether to grant concurrence.

2. That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case

The existing residential flat building on the subject site comprises five storeys and is located in between a nine storey mixed use residential flat building at 28-30A Flinders Street and a three storey mixed use building at 40-42 Flinders Street. The context of the building in relation to those adjoining buildings is seen in Figures 1 and 2 below.

The building at 28-30A Flinders Street has a triangular footprint that comes to a point adjacent to the existing building as viewed from Taylor Street. Both of the adjoining buildings have nil side setbacks and the existing residential flat building on the site also has nil side setbacks.

Figure 3 below demonstrates the configuration of streets and property boundaries in the vicinity of the site.



Figure 1: Existing residential flat building seen from Flinders Street in the context of 28-30A Flinders Street (to the left of the building) and 40-42 Flinders Street (to the right of the building)



Figure 2: Existing residential flat building seen from Taylor Street in the context of 28-30A Flinders Street (to the right of the building) and 40-42 Flinders Street (to the left of the building)



Figure 3: Configuration of property boundaries around the subject site (Base map source: Six Maps)

It would be both unreasonable and unnecessary to require compliance with the development standard in the circumstances of this case because:

- The streetscape context of the development, in terms of the heights and setbacks of adjoining buildings, means that the proposed development will achieve an appropriate scale transition between the heights of adjoining buildings. It would therefore be unreasonable to restrict the height of the building.
- The proposed addition will not be inconsistent with the significance of the Paddington Urban Conservation Area because it will be stepped back from the street elevations to that it will have a subservient appearance to the main building, as well as involving a scale transition between adjoining buildings.
- The proposal does not cause discernible amenity impacts to adjoining properties.

The approved development is set back a minimum of 6.5 metres from Flinders Street, which is rearwards of the nil set back adjoining buildings. The proposed addition is set back 16.2 metres from Flinders Street, with a sloping roof facing Flinders Street enclosing the proposed addition. Those design aspects mean that the proposal will be practically indiscernible when viewed from Flinders Street. Even if it could be seen at a distance it would not be incompatible with the streetscape given the height of 28-30A Flinders Street.

The approved development at the upper level is set back 6.0 metres from Chisholm Street, approximately 500mm rearwards of the rear corner of 28-30A Flinders Street. The existing development at 40-42 Flinders Street is nil set back from Chisholm Street, and has a nil side setback.

The proposed addition would be stepped back 2.0 metres from the existing edge of the building, but would have a projecting eave only very marginally rearwards of the edge of the building. The eave would have an angled face in materials matching those of the main building.

The proposed addition would only be visible to a limited extent from Taylor and Chisholm Street, because of the narrowness of Chisholm Street, the angle of Taylor Street, and the locations of a substantial nil setback building on the opposite side of Chisholm Street which means that a viewer cannot get far enough back to gain an expansive view of the Chisholm/Taylor Street elevation. To the extent that the addition will be visible, it will have a consistent appearance scale stepping down from the scale of 28-30A Flinders Street. The proposed addition with the angled design of the eave will have the effect of providing a roof element to the building, whereas the existing elevation finishes somewhat abruptly. Whilst the height of the building will be greater than that of 40-42 Flinders Street, that scale difference is seen as a transition from 28-30A Flinders Street, and is also reduced in abruptness because of the stepping back of the subject building in relation to 40-42 Flinders Street. Because of that step back, the scale difference is not visually abrupt, noting again that the proposed addition is stepped back from the existing wall.

It would be unreasonable to require the building to comply with the height standard as the proposed development is consistent with the scale transition, and also because the proposed development provides a roof form in view from Taylor Street that reduces the abruptness of the top of the existing residential flat building, and indeed produces a better outcome in that regard.

For those same reasons, the proposed development does not produce any visually jarring effect in its context that might otherwise detract from the significance of the Paddington Urban Conservation Area. The proposed roof form will provide for a better integrated building as part of that conservation area.

It is demonstrated in the submitted statement of environmental effects that the approved and proposed developments do not cause unacceptable overshadowing impacts to surrounding properties. There are no significant visual privacy impacts because of the set back of the building and because the proposed new balcony area faces a public street, which is not sensitive to overlooking.

For the same reasons that a requirement for compliance would be unreasonable, it would also be unnecessary.

3. Environmental planning grounds that justify contravening the development standard

The density standard applicable to the site under *Sydney Local Environmental Plan 2012* is 2.5:1. The proposed development achieves a density of 2.27:1. The approved development has a density of around 2.06:1.

The density standard is indicative of the amount of development that is ordinarily anticipated in the locality. The maximum density cannot always be achieved. However, where that maximum density is reached without causing unacceptable impacts and without resulting in an unacceptable form of development, the outcome may be considered to be more in alignment with the town planning intent.

This particular locality is close to the iconic Taylor Square and is where there are very frequently operating bus services running along Oxford Street, with a range of shops and restaurants in the immediate locality. It is generally consistent with the vitality of the area for development to achieve the intended density. The proposed additional height allows the density of the proposed development to be closer to the maximum permitted (although still well short) and therefore better allows the proposed development to meet the planning intent of the town planning controls. That is part of the environmental grounds that justify contravening the development standard.

Part 5 of the NSW Environmental Planning and Assessment Act, 1979 sets out the objects of the Act and, amongst other things, includes the following objects:

(a)(i) To encourage the proper...development of...artificial resources, including...cities,...for the purpose of promoting the social and economic welfare of the community and a better environment,

(a)(ii) To encourage the promotion and co-ordination of the orderly and economic use and development of land.

Those objectives represent broad statements about what is intended to be achieved by environmental planning under the Act.

The proposal will promote the social and economic welfare of the community by providing additional housing in a highly accessible location. A requirement for compliance with the height control would limit the potential of the site to contribute to achieving the social and economic welfare of the community.

Enforcement of the height control would not represent the orderly and economic use of land because the control would have no beneficial effect in the particular circumstances of the subject site. Those circumstances are that:

- The proposed addition will provide an appropriate scale transition between the development at 28-30A Flinders Street and 40-42 Flinders Street, having regard to the scale and setbacks of those adjoining developments;
- The proposed development will cause no overshadowing impacts because there are no areas within adjoining properties that are sensitive to overshadowing impacts that would be affected by the proposal; and
- The proposed development will not cause any loss of privacy to surrounding properties.

There is no adverse environmental impact from the proposed additional height, and the proposed additional height does not cause the development on the site to exceed the amount of development that is planned for the site having regard to the applicable density control.

In those circumstances, a requirement for compliance would be inconsistent with the proper management of artificial resources, being the urban environment of Sydney, and would also hinder, rather than encourage, the promotion and co-ordination of the orderly and economic use of land.

4. Whether the proposed development is consistent with the objectives of the development standard and with the objectives of the zone within which the site is located

The objectives of the development standard as set out in clause 4.3(1) are:

(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...

For the reasons set out in Part 2, the proposed development satisfies objectives (a) and (b). There are no view impacts in relation to objective (c). Objectives (d) and (e) are not relevant. The proposal is therefore consistent with the objectives of the development standard.

The site is within the B4 Mixed Use zone. The objectives of that zone are:

- *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 proposal is not inconsistent with the provision of a mixture of compatible land uses, because the proposal does not introduce any new, incompatible land use.

The proposal is not inconsistent with the integration of suitable business and other uses to maximise public transport patronage, because the proposal does not affect that matter.

The proposal will, on a cumulative basis, contribute to the viability of the Darlinghurst commercial centre by providing additional potential customers for businesses in the locality.

The proposal is therefore consistent with the zone objectives.

5. Matters to be considered by the Secretary

The following matters are to be considered by the Secretary of the NSW Department of Planning:

(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.

In relation to matter (a), the proposal does not introduce any matters of State or Regional significance having regard to the scale of the proposal.

In relation to matter (b), there is a general public benefit in consistently maintaining the development standard. However, for the reasons set out in Parts 2, 3 and 4, there will be no incompatibility with the public interest.

DPE Circular PS18-003 provides that the concurrence of the Secretary is not assumed in this instance because the development standard is proposed to be varied by more than 10 percent. There are no other matters required to be taken into consideration by the Secretary.

6. Conclusion

Upon the above grounds, it is considered that the proposal satisfies the criteria for the proposed variation to be supported.

The proposed exception to clause 4.3(2) of SLEP2012 is justified having regard to the matters set out in clause 4.6 of that instrument.

A handwritten signature in black ink, appearing to read 'Matthew Benson', written in a cursive style.

Matthew Benson
Principal - MB Town Planning