

Attachment C

Clause 4.6 Variation Request

39A Elizabeth Bay Road, Potts Point – Building Height

Clause 4.6 Variation Statement – June 2018



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INTRODUCTION

1. Overview

This Clause 4.6 Variation request has been prepared in support of the development application for the proposed change of use from student accommodation to a new hotel development and provision of additional two storeys at 39A Elizabeth Bay Road, Potts Point (Lot 2 DP181132).

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Sydney LEP 2012 (SLEP 2012) which has the following aims and objectives:

- 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.*

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Building Height of the SLEP 2012. In summary the following variations are proposed:

SLEP 2012 Clause	SLEP 2012 Development Standard	Proposed Development Non Compliance	% of Variation
Clause 4.3 Building Height	Maximum Building Height 18m	The proposal results in the additions behind the existing building façade being 18.8m-20.6m in height and exceeds the existing control by up to 2.6m.	14.4%

In accordance with Clause 4.6 of the SLEP 2012 Council is required to consider the following:

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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

THE STANDARDS BEING OBJECTED TO

2. Relevant Development Standards

The development standards being requested to be varied are Clause 4.3 Building Height of the SLEP 2012.

2.1 The objectives/underlying purpose of the clause

A key determination of the appropriateness of a variation to a development standard is the proposal's compliance with the underlying objectives and purpose of the development standard. Therefore, while there is a specified numerical control for Clause 4.3 Building Height, the objectives and underlying purpose behind each of the development standards are basic issues for consideration in the development assessment process.

Section 3 of this Clause 4.6 Variation addresses the proposed variation to Clause 4.3 Building Height development standard.

2.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.3 Building Height of the SLEP 2012. In summary the following variations to development standards are proposed:

SLEP 2012 Clause	SLEP 2012 Development Standard	Proposed Development Non Compliance	% of Variation
Clause 4.3 Building Height	Maximum Building Height 18m	The proposal results in the additions behind the existing building façade being 18.8m -20.6m in height and exceeds the existing control by 2.6m.	14.4%

PROPOSED VARIATION TO CLAUSE 4.3 BUILDING HEIGHT

3. Overview

Pursuant to Clause 4.6 of SLEP 2012, we hereby seek exception to the 18m building height standard applicable pursuant to Clause 4.3 of SLEP 2012. Clause 4.6(4)(ii) requires that such a request must establish that the proposed contravention is consistent with the objectives of the standard and the zone.

The proposed variation to the building height standard is a result of the provision of new hotel rooms in the new two storey addition above the 18m height limit. The proposed new two storey addition will result in provision of a building of up to 20.6m, the equivalent of a 14.4% increase to the maximum permitted building height standard.

3.1 Objectives of the Standard

The objectives of the standard are as follows:

(1) *The objectives of this clause are as follows:*

- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
 - (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
 - (c) *to promote the sharing of views,*
 - (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
 - (e) *in respect of Green Square:*
 - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the [Height of Buildings Map](#).*

Note.

No maximum height is shown for land in Area 3 on the [Height of Buildings Map](#). The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the [Height of Buildings Map](#) is the height of the building on the land as at the commencement of this Plan.

Notwithstanding the proposed variation to the standard, the proposed development is nevertheless consistent with these objectives:

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

The proposed additional building height is appropriate to the location within the mixed use area and does not significantly exceed the existing façade of the building. The proposed additional two storeys is similar in height and scale to the adjoining buildings. DA2009/1985 for a student accommodation development of a similar scale and bulk that was approved for building heights up to 20.6m has already established that the proposed heights are appropriate to the site and location.

The additional building height is also slightly recessed back from the building façade to minimise impacts.

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

- The current proposal is especially sympathetic to the existing heritage items located nearby the site as is outlined in the Heritage Impact Statement prepared by Weir Phillips. The historical character of the conservation area will be preserved on the exterior of the building.
- The new additional two stories result in minor change to the streetscape, and ensures that in a heritage context, there is only minimal impact to the external appearance of the building.
- The proposed design of the development achieves an appropriate built form in that it enhances the public domain, character of the streetscape, including views along with providing improved internal amenity and outlook.
- The proposed massing of the development is considered acceptable with regard to the height controls and intent for the locality. The proposed massing is very similar to the recently approved student accommodation on site (DA2009/1985);
- The provision of a mix of façade treatments to the additions contribute to minimising the visual perception of bulk and scale of the building. The proposal provides a simple and elegant facade to the extension.
- The overall scale and bulk of the proposed building are similar to surrounding residential and commercial developments in the area, of high quality design and are considered appropriate to the locality.
- The proposed scale and bulk is setback from the street frontage and rear frontage where the building height exceeds maximum height provisions, and is unlikely to be visible from street level.

(c) to promote the sharing of views,

The Land and Environment Court has established “planning principles” in relation to impacts on views from neighbouring properties. In *Tenacity Consulting P/L v Warringah Council* (2004) NSWLEC 140 Roseth SC, states that “the notion of view sharing is involved when a property enjoys existing views and a proposed development would share that view by taking some of it away for its own enjoyment”.

Currently the majority of north east views from 39 Elizabeth Bay Road are afforded across the neighbouring buildings and distant buildings. There is no primary loss of views to occur to those already existing partial views from the balconies and windows of 39 Elizabeth Bay Road. For the most part existing north east views are maintained due to setbacks and built form of a similar alignment to existing. Given the above it is considered that the view impact from the immediate balconies and windows is negligible, and in fact improves existing views

No views will be impacted upon by the proposed extension.

(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.

Not applicable as the site is not located in Green Square.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Noted, that is the reason for this Clause 4.6 Variation.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the [Height of Buildings Map](#) is the height of the building on the land as at the commencement of this Plan.

The site is not located within area 1 or Area 2.

3.2 Objectives of the Zone

The portion of the site where building height is exceeded is currently zoned B4 Mixed Use under the SLEP 2012. The proposed development, is considered permissible within the B4 zone, as outlined in the accompanying SEE.

The proposed new building form is consistent with the B4 zone objectives in that:

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

The proposed hotel and restaurant is compatible with surrounding residential and commercial uses. No amenity impacts are anticipated from the proposed use.

- *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 site is located within walking distance of Kings Cross railway station, and is serviced by local bus routes. This will encourage walking and cycling to gain access to the necessary facilities required by the visitors to the town.

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

The proposal will create employment opportunities through the refurbishment and redevelopment of the existing use, and the sites ongoing use as a hotel operation. An increase in tourist accommodation in a central locations is expected to assist in the patronage of the Sydney CBD retail and commercial businesses, and other suburban centres.

3.3 Establishing if the Development Standard is Unreasonable or Necessary

In *Wehbe v Pittwater Council [2007] NSWLEC 827* Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because **the objectives of the development standard are achieved notwithstanding non-compliance with the standard.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*

3.4 Establishing if the Development Standard is Unreasonable or Necessary

In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 3.1 and 3.2, the proposed development is consistent with the underlying objectives of the standard for Building Heights and the B4 zone of SLEP 2012.

3.5 Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

The variation to the development standard for Building Height is considered well founded because, notwithstanding the proposed non-compliance with Building Height standards:

- The proposed development is entirely consistent with the underlying objective or purpose of the standard as demonstrated in Section 3.1.
- The objectives of the zone are still achieved.
- The proposed additional building height is appropriate to the location within the mixed use zone and does not significantly exceed the existing façade of the building. DA2009/1985 for a student accommodation development of a similar scale and bulk that was approved for building heights up to 20.85m has already established that the proposed heights are appropriate to the site and location.
- The current proposal is especially sympathetic to the existing heritage items located nearby the site as is outlined in the Heritage Impact Statement prepared by Weir Phillips. The historical character of the conservation area will be preserved on the exterior of the building.
- The new additional two storeys result in minor change to the streetscape, and ensures that in a heritage context, there is only minimal impact to the external appearance of the building.
- The proposed design of the development achieves an appropriate built form in that it enhances the public domain, character of the streetscape, including views along with providing improved internal amenity and outlook.

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- The proposed massing of the development is considered acceptable with regard to the height controls and intent for the locality. The proposed massing is very similar to the recently approved student accommodation on site (DA2009/1985) building on site,
 - The provision of a mix of façade treatments to the additions contribute to minimising the visual perception of bulk and scale of the buildings. The proposal provides a simple facade to the extension.
 - The overall scale and bulk of the proposed building are similar to surrounding residential and commercial developments in the area, and are considered appropriate to the locality.

3.6 Overview

This exception to the development standard demonstrates that the proposed variation to Building Height standard should be supported because:

- The proposed works do not alter the built form and character of the building significantly and are consistent with the underlying objectives of the standard.
- The proposed variation allows for the adaptive reuse of the existing building for hotel use for the benefit of visitors to Sydney, and ensure provision of new employment opportunities.
- The proposed variation does not result in any unreasonable privacy, sunlight, view loss or visual impacts.
- The proposed variation to the standard does not raise any matter of significance for State or regional environmental planning.
- There is no public benefit in maintaining strict compliance with the standard.
- Strict application of the standard is therefore unreasonable and unnecessary in the circumstances of the case.

Overall, it is considered that the proposed variation to the maximum Building Height control is entirely appropriate and can be clearly justified having regard to the matters listed within SLEP 2012 Clause 4.6.

3.7 Conclusion

It is requested that council supports the proposed variation to Clause 4.3 of the SLEP 2012 for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of much needed tourist accommodation.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.