

Attachment B

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Clause 4.6 Variation to Clause 4.3 Height of Buildings in Sydney Local Environmental Plan, 2012

Clause 4.3 of the Sydney LEP 2012 outlines a maximum height of 9 metres for the subject site. The proposal seeks to retain the maximum height of the existing building at 11 metres with proposed works occurring to a height of 9.6 metres, for the rear dormer.

Clause 4.6 of the City of Sydney Local Environmental Plan 2012 allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

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

Variation is therefore sought in accordance with Clause 4.6 Exceptions to Development Standards. In this regard, Council is unable to grant consent for development that contravenes a development standard, unless the consent authority has considered a written request form the applicant to justify the contravention of the development standard.

In order to assess whether strict compliance with the development standard unreasonable or unnecessary in this particular case, the proposal is considered against the five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary, as set out by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

These five ways have recently been re-emphasised by Commission Morris in *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312. It is noted that each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable:

The proposal seeks to retain the existing boarding house and improve their amenity overall, whilst also restoring the front façade of the building. Works above the height limit but below the existing ridge height will ensure an appropriate level of amenity for the boarding house within the allowable FSR and will improve the presentation of the building within the conservation area.

4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard:

Not applicable in this instance; the development standards of the LEP cover a large area and whilst the standard may not be appropriate to this site, it may be appropriate to other sites elsewhere in the City of Sydney area. There are numerous instances where consents departing from the standard have been approved and others where the standard have been upheld. This is more an indication of the inappropriateness of particular standards to some sites rather than a comment on Council's actions.

5. 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 the land:

The zoning of the land is considered to be reasonable. The site is zoned R1 in the Sydney LEP 2012. The objectives of the zone are:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maintain the existing land use pattern of predominantly residential uses.

The proposal will comply with these objectives and the proposal will allow for the long-term viability of the boarding house.

Given this, compliance with the height of buildings development standard is considered to be unreasonable and unnecessary in the circumstances of this case.

Conclusion

Compliance with the standard would hinder the attainment of the objectives of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

The proposal satisfies the LEP height of buildings objectives and the zone objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

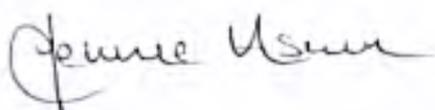
Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The proposed development is consistent with the provisions of orderly and economic development of land, in that it proposes to provide a development allowing for improved amenity and greater affordable housing choice in an accessible location. This is consistent with the promotion and coordination of the orderly use and development of land.

As demonstrated above, the proposal will be in the public interest as it is consistent with the objectives of the SEPP (Affordable Rental Housing) 2009, the objectives of the height development standard in SLEP 2012 and the objectives of the R1 zone.

In the context of other requirements of Clause 4.6, it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case.



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