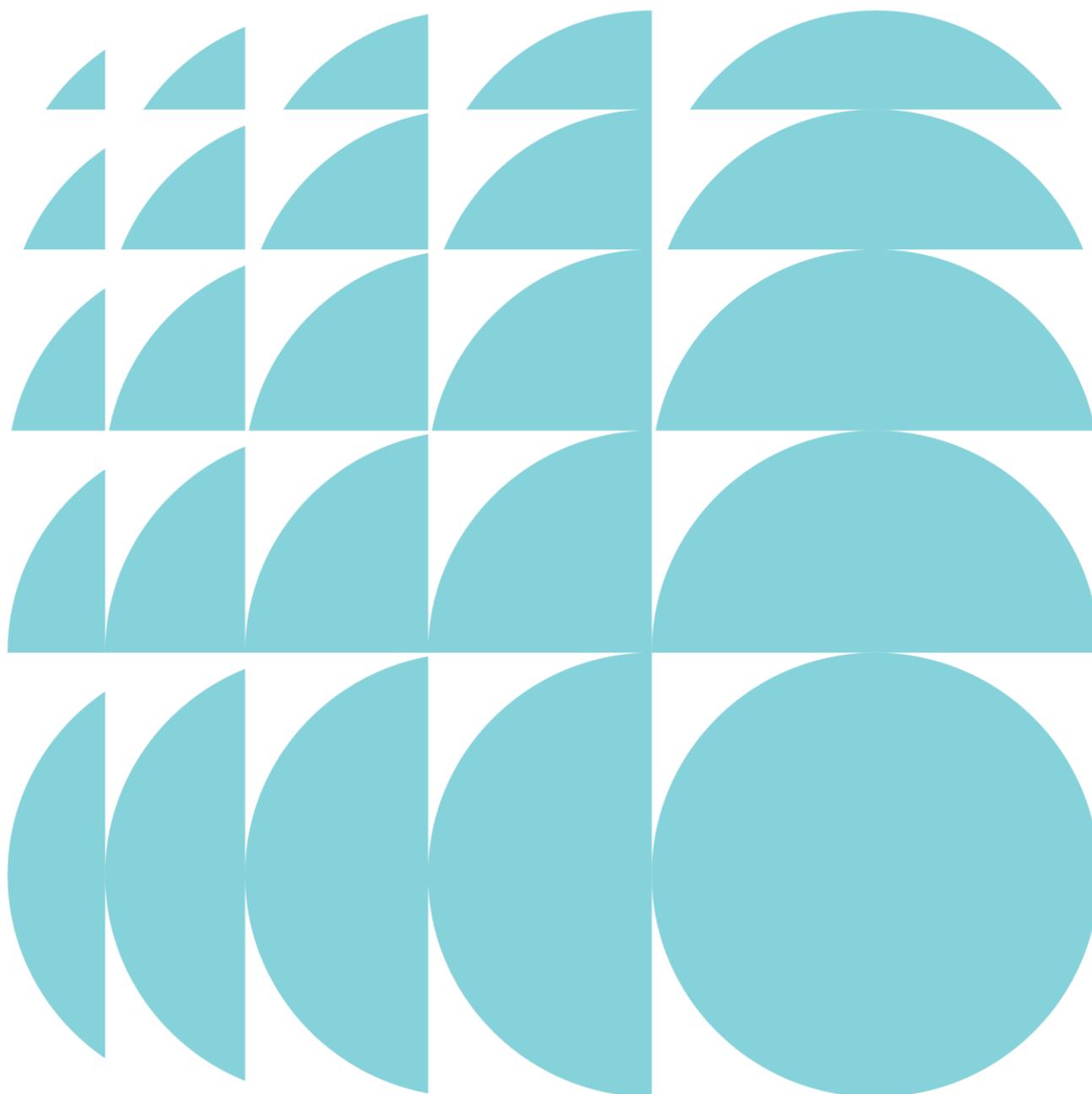


# **Attachment C**

<p><b>Clause 4.6 Variation Request - Height of Buildings</b></p>
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13 September 2018

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13 September 2018

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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of MH Chippendale Pty Ltd. It is submitted to City of Sydney (the Council) in support of a development application (DA) Council for alterations and additions to existing commercial development to create a roof terrace at 29-33 and 35-43 Balfour Street, Chippendale.

Clause 4.6 of the *Sydney Local Environment Plan 2012* (SLEP) enables the City of Sydney Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the 'maximum height of buildings' development standard under clause 4.3 of the SLEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated September 2018.

This clause 4.6 variation request demonstrates that compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the 'maximum height of buildings' development standard, the proposed development:

- Does not alter the maximum building height of the current site; and
- Will not, as a result of the building's height, cause any additional adverse environment or social impacts.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.3 Height of Buildings of the Sydney Local Environmental Plan 2012.

The Land and Environment Court provides assistance on the approach to justifying a contravention to a development standard under State Environmental Planning Policy 1 – Development Standards (SEPP 1) through the judgement of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79 at 89*. The test was later rephrased by Chief Justice Preston in the decision of *Wehbe v Pittwater Council [2007] NSW LEC 827* (Webbe).

These judgements are also of assistance to the assessment of variations under Clause 4.6 of an LEP.

Additional assistance can be found in the recent decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (Four2Five); *Micaul Holdings Pty Ltd v Randwick City Council [2015] NSWLEC 1386* and *Moskovich v Waverley Council [2016] NSWLEC 1015* which was upheld by Pain J on appeal.

In accordance with the above requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (Section 2);
- identifies the variation sought (Section 3);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Section 4.1);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (Section 4.2); and
- provides an assessment of the matters the secretary is required to consider before providing concurrence (Section 4.3).

## 2.0 Development Standard to be Varied

The development standard to be varied as part of this application is ‘Clause 4.3 Height of Buildings’ relating to the maximum height of building permitted for development. Under the SLEP, and as shown in **Figure 1**, the site has a maximum building height of 12metres. Clause 4.3 of SLEP 2012 states:

*Clause 4.3 Height of Buildings*

*(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.*



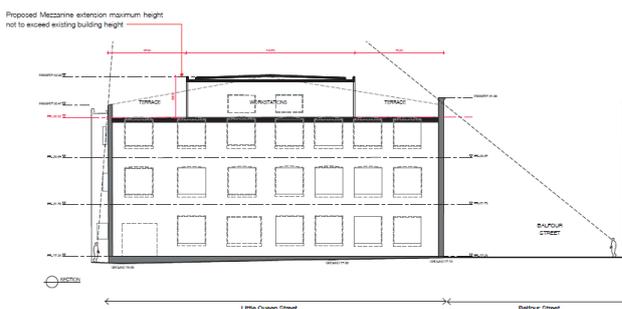
Figure 1 Extract from SLEP 7200\_COM\_HOB\_009\_005\_20120926

### 3.0 Nature of the Variation Sought

The pop out roof in the middle of the site is 17.2m in height and the highest point on the site. However, the existing mezzanine level on the site has a maximum height of RL 32.9m and the existing ground level surrounding the site is approximately RL 17 m, the existing mezzanine therefore has a maximum height of approximately 15.9m. The proposed mezzanine will also match the existing height, approximately 3.9m higher than the ‘maximum height of buildings’ development standard of 12m. The proposed development will replace an existing mezzanine structure within the existing sloped roof with a new mezzanine structure and external roof terrace. A comparison of the existing and proposed roof structure is provided as **Figure 2** and **Figure 3**.



**Figure 2 Existing roof mezzanine as seen from the southern elevation**  
Source: SJB



**Figure 3 Proposed Mezzanine and roof terrace as seen in Section**  
Source: SJB

### 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP provides that:

#### 4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the Sydney Local Environmental Plan 2012 LEP provides that:

- (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 Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the Sydney Local Environmental Plan 2012 LEP, with respect to the 4.3 Height of Buildings development standard, are each addressed below, including with regard to these decisions.

#### **4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Sydney Local Environmental Plan 2012 LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).

The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).

The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).

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 (**Fourth Method**).

The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method** and **Second Method**.

##### **4.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard**

The objectives of the 'maximum height of buildings' development standard are outlined in **Section 2**.

##### **Objective (a): to ensure the height of development is appropriate to the condition of the site and its context**

As noted above in Section 3, the proposed exceedance of the 'maximum height of buildings' development standard relates only to a minor increase of part of the existing mezzanine level and will not increase the overall height of the buildings. As shown in **Figure 2** and **Figure 3** the modifications proposed to the existing roof will not be readily visible from the ground. Shadow studies have been provided within the architectural plans demonstrate that the proposed development will have no additional adverse overshadowing impact on any neighbouring building or any area of public open space. In light of the above it is clear that the proposed development, including the exceedance of the 'maximum height of buildings' development standard, is appropriate for the condition of the site and its context.

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

The site is not mapped or listed as an item of local or State heritage significance, however, the site is located within the Chippendale heritage conservation area (HCA). The proposed extended mezzanine is sympathetic to both the existing building on which it is located, and the contribution of the existing building to the local character of Chippendale and the Chippendale HCA. As shown in **Figure 2** and **Figure 3** the modifications proposed to the existing roof will not be readily visible from the ground.

Further, the proposed development demonstrates adaptive reuse with a contemporary rooftop addition, consistent with development in the immediate surrounds (including 30 Balfour Street, immediately east of the site and 2-8 Little Queen Street, immediately west of the site). The proposed development will facilitate the occupancy of a high-end commercial tenant, consistent with uses in the immediate surrounds (including 30 Balfour Street, currently occupied by the White Rabbit Gallery).

The proposed development involves minor alterations to the existing warehouse roof structure to accommodate the extended mezzanine and associated roof terraces. As the construction of the roof is masked by the warehouse's parapet, the removal of the roof structure will result in negligible change to the built form character of Chippendale. The proposed development's materiality in relation to heritage conservation has aimed to integrate the design of the roof terrace to fit with the local character of the surrounding neighbourhood.

**Objective (c): to promote the sharing of views**

The proposed development will not increase the overall height of the existing building and therefore significant impacts of the proposed rooftop addition on views past the existing building are not anticipated. As shown in **Figure 2** and **Figure 3** the modifications proposed to the existing roof will not be readily visible from the ground. The proposed mezzanine terrace has also been designed to reduce impact on views from other surrounding roof terraces or outdoor spaces. An acoustic privacy screen adjacent to the existing parapet, and the height of the existing parapet, plus the separation distances to surrounding neighbours will consequently prevent any adverse privacy impacts in relation to viewing the street or neighbouring roof terraces or outdoor spaces.

**Objective (d): to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas**

The proposed development does not alter the maximum height of the existing building and as such does not affect the overall height transition from Central Sydney and Green Square Town Centre and adjoining areas. As such, the proposed development will retain the existing height transitions.

**Objective (e): in respect to Green Square**

The proposed development is not located within the Green Square precinct and therefore Objective (e) does not apply.

**4.1.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary**

Notwithstanding the ability of the proposed development to comply with the objectives of the 'maximum height of buildings' development standard (as outlined in Section 4.1.1), these objectives are not relevant to the proposed development for the following reasons:

- The proposed development seeks consent only to alter an existing mezzanine structure, including minor alterations to the roof form of the existing building;
- No significant adverse environmental or social impact are anticipated as a result of the proposed development; and
- The overall height of the existing building is not affected by the proposed development.

In light of the above, compliance with the 'maximum height of buildings' development standard is not necessary.

## 4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the SLEP requires the departure from the development standard to be justified by demonstrating: *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed exceedance of the 'maximum height of buildings' development standard relates only to a minor increase of part of the existing mezzanine level and will not increase the overall height of the existing buildings. As shown in **Figure 2** and **Figure 3** the modifications proposed to the existing roof will not be readily visible from the ground. Shadow studies have been provided within the architectural plans demonstrate that the proposed development will have no adverse additional overshadowing impact on any neighbouring building or any area of public open space.

The proposed development seeks to improve the functionality of the entire building so that additional outdoor space is made available to the occupants of the building. Currently, the nearest open space available to occupants of the building is the nearby Chippendale Green park, which is located within 50m of the site. Because of the intended occupancy of this development by a high-end commercial tenant, there will likely be an increase to the number of users within the building. This will place additional strain on the existing green spaces and as a mitigation strategy, the proposed mezzanine terrace will provide some green space for users to occupy during building opening hours.

## 4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

### 4.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the 'maximum height of buildings' development standard, as discussed in section 4.1.1 of this report.

### 4.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the *B4 Mixed Use Zone*, as demonstrated below.

#### Objective (a): To provide a mixture of compatible land uses

The proposed development is intended to be occupied by a high-end commercial tenant which will bring additional land uses into the area. Currently uses surrounding the site include the White Rabbit Gallery, and also houses, cafes, and small retail and commercial business, which operate during the day and night. Currently, the site is leased to a retail tenant. The change of tenancy will further increase the mix of compatible land uses by adding a commercial tenant to the neighbourhood.

#### Objective (b): 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 location of the site is suitable for the occupation of a high-end retail tenant as the occupant will be have access to public transport and public open space, as well as food and beverage facilities, galleries and creative entertainment spaces. There is a wide range of these facilities within walking distance of the site and as such, the proposed development will be likely to encourage walking and cycling between facilities and work.

#### Objective (c): To ensure uses support the viability of centres

The site is located within 500m of the UTS campus and Central station is located within 1km. These centres are thriving business, educational, and transportation precincts and the addition of a high-end commercial tenant to the site will support the viability of these centres.

## 4.4 Secretary's Concurrence

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

(5) *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.*

These matters are addressed in detail below.

#### **4.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

The variation of the 'maximum height of buildings' development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, *A Metropolis of Three Cities, the Greater Sydney Regional Plan* in that it:

- Allows an existing building to be adaptively reused in a manner that does not adversely affect the environmental heritage of the surrounding HCA (Objective 13. Environmental heritage is conserved and enhanced)
- Ensures that the Harbour City remains strong and competitive by allowing for the adaptive reuse of an existing building within the Chippendale HCA (Objective 18. Harbour CBD is stronger and more competitive)
- Will facilitate investment and business activity within an existing centre (Objective 22. Investment and business activity in centres)

#### **4.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard**

As demonstrated above, there is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, due to the proposed development being located below the existing maximum height of the existing building, the proposed variation to the 'maximum height of buildings' development standard would not give rise to any adverse environmental impacts.

#### **4.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.**

There are no other matters which should be taken into consideration by the Secretary before granting concurrence.

## **5.0 Conclusion**

The assessment above demonstrates that compliance with the 'maximum height of buildings' development standard provided by Clause 4.3 of the SLEP is unreasonable and unnecessary in the circumstances of the case and the justification for the proposed exceedance is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This Clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the 'maximum height of buildings' development standard, the proposed development will not increase the existing maximum height of the building and as such:

- such will have no additional impacts on views or overshadowing;
- will comply with the relevant sections of the *Sydney City Development Control Plan 2012* (as outlined within the accompanying Statement of Environmental Effects); and
- will be consistent with the objectives of the *B4 Mixed Use* zone and the 'maximum height of buildings' development standard as they apply to the site.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the *Sydney Local Environmental Plan 2012*.