

Attachment C

Clause 4.6 Variation Request

APPENDIX E

**Request to Vary the Clause 4.3
Maximum Building Height Control
Pursuant to Clause 4.6 of Sydney LEP 2012
Prepared by Ingham Planning Pty Ltd**

1. Introduction

Clause 4.6 of Sydney Local Environmental Plan 2012 (SLEP 2012) allows for flexibility in the application of certain development standards to achieve *“better outcomes for and from development by allowing flexibility in particular circumstances.”*

The existing building on the subject land extends well above the 22m maximum building height development standard prescribed in Clause 4.3 of SLEP 2012. While the proposed digital advertising wall sign will not extend above the maximum height of the existing building, it will extend above the 22m maximum building height prescribed in Clause 4.3. Accordingly, a request to contravene this development control must be made under Clause 4.6 of the LEP.

In preparing this submission for variation of the Clause 4.3 maximum building height control, regard has been had to the document *“Varying Development Standards: A Guide (August 2011)”* prepared by the NSW Department of Planning & Infrastructure (DP&I), together with relevant Land and Environment Court judgements such as *Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 90* and *Wehbe v Pittwater Council (2007) NSWLEC 827*.

2. The relevant development standard

Clause 4.3 of SLEP 2012 sets out requirements in relation to height of buildings. Sub-clause 4.3(2) requires that a building on any land is not to exceed the maximum height shown for land on the Height of Buildings Map. The maximum building height for the subject land, as shown on this Map is 22m. Building height is measured as height above existing ground level, to the highest point of the building. This includes any roof structures such as parapet walls, lift overruns, plant rooms, water tanks and the like.

3. Requested variation to the standard

The top of the digital wall sign is proposed at an RL of 52.250, which equates to a height of between 29.425m and 30.6m above existing ground level, below the proposed sign. The proponent is seeking an increase of up to 8.6m above the 22m maximum building height standard that applies to the site, pursuant to clause 4.3 to allow a maximum building height for the sign of 30.6m. The existing building on the site has a maximum building height of 38.9m, above existing ground level, as measured to the top of the rooftop water tank.

4. Requirements of clause 4.6 – Exceptions to development standards

The objectives of clause 4.6 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.”*

Clause 4.6(3) requires that a request to contravene the control, to demonstrate:

- “(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.”*

In considering whether to grant consent for a development that contravenes a development standard, a consent authority must be satisfied that:

- “(i) the applicant’s 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 to be carried out, and*
- (iii) the concurrence of the Secretary has been obtained.*

These matters are addressed below in Sections 5, 6 and 7 below.

5. Compliance with the development standard is unreasonable or unnecessary

In relation to determining whether compliance with a development standard is unreasonable or unnecessary, the DP&I Guide referred to above, outlines the following 5 part test.

- (1) The objectives of the standard are achieved notwithstanding noncompliance with the standard.*
- (2) The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*
- (3) The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.*
- (4) 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) The compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

In regard to the above 5 tests, it is considered that test No’s 1, 2 and 3 are applicable to the assessment of the proposed variation to the maximum building height standard. Test No. 4 is not relevant, as Sydney City Council has generally applied the height standard, except in circumstances where variations are justifiable. While the maximum building height standard has typically been applied with some degree of flexibility, the Council has not abandoned or destroyed the subject development standard. Test No. 5 is not applicable as the subject land is appropriately zoned as B4 Mixed Use and an alternative zoning is not warranted.

While the underlying objective or purpose of the maximum building height standard is relevant to the proposed development, it is considered that the proposal meets the objectives of the 22m maximum building height standard, having regard to the circumstances of the case, as outlined in the following assessment of the proposal against the objectives of this height control.

The proposal achieves the objectives of the height control.

The objectives of the height control are noted and commented upon below:

The objectives for the height control are:

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

- (b) to ensure an 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 the site, and*
 - (ii) To ensure the built form contributes to the physical definition of the street network and public spaces”.*

The proposal achieves these objectives as discussed below.

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

Given that the proposal is for a sign to be affixed to an existing building and the fact that the existing building on the site exceeds the 22m maximum building height control by 16.9m (or almost double the height prescribed on the Height of Buildings Map), the appropriateness of the height of the proposed wall sign should be more assessed against the height of the existing building, rather than the numerical control in the LEP. It should also be acknowledged that the existing wall sign that is to be replaced is also located entirely above the prescribed 22m maximum building height control.

The proposed wall sign is located approximately 8m below the maximum height of the existing building and the whole of the sign is located below the height of the western wall of the building and the balustrade that extends along the top of this wall.

From an aesthetic and visual impact viewpoint and in terms of optimising integration of the sign with the existing built form, the proposed location in the top northern corner of the western wall is the most appropriate location, notwithstanding the numerical non-compliance with the building height development standard. Further lowering of the sign would offer no material architectural, aesthetic or amenity benefit.

Significant lowering of the proposed sign to a maximum height of 22m would be far less compatible with the existing built form and result in the neighbouring building substantially obstructing views of the sign. The proposal could not proceed on this basis, resulting in retention of the existing horizontally aligned wall sign and associated catwalk, which have a greater visual impact than the proposed digital wall sign.

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

Objective (b) is not relevant as the existing building is not a heritage item, there are no adjacent heritage items and the site is not located in a Conservation Area. The proposed sign is not visible from the Conservation Area located to the east of the subject land, on the eastern side of Missenden Road.

(c) to promote the sharing of views,

The proposed digital wall sign, at the height proposed, has no impact on views available from the public domain or neighbouring properties. Removing the existing sign and replacing this sign with a sign with less visual impact, results in an improvement to visual outlook from the public domain and neighbouring properties. The proposal promotes the sharing of views.

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

Objective (d) is not relevant as the subject land is not located within, adjoining or adjacent to Central Sydney and Green Square Town Centre.

(e) in respect of Green Square

- (i) To ensure the amenity of the public domain by restricting taller buildings to only part of the site, and*
- (ii) To ensure the built form contributes to the physical definition of the street network and public spaces".*

Objective (e) is not relevant as the subject land is not located within Green Square.

The proposal achieves the objectives of the B4 Mixed Use Zone

The objectives of the B4 Mixed Use Zone are noted and commented upon below:

The objectives for the B4 Mixed Use 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 proposed digital wall sign, at the height proposed, is consistent with the applicable objectives of the B4 Mixed Use Zone. The existing building and proposed sign are consistent with the mixed-use character of the locality. Advertising signs of the type and location proposed are appropriate within major transport corridors that include commercial land uses. The site is highly accessible to public transport and the proposed sign adds visual interest to the locality by mitigating the visual impact of the existing large blank western wall of the building. Enhancing visual interest assist in supporting the viability of the Camperdown commercial centre that extends along Parramatta Road.

As demonstrated and assessed in the Statement of Environmental Effects (SEE) and supporting reports, the proposed sign is suitably located, compatible with existing built form, neighbourhood character and streetscape and no material impact on the amenity of the locality, notwithstanding the numerical non-compliance with the maximum building height control.

Having regard to the circumstances of the case, particularly the height of the existing building upon which the sign is proposed to be located, allowing the requested variation of the 22m maximum building height control, for the proposed sign, will not defeat or thwart the underlying object or purpose, or application of the development standard, nor create an undesirable precedent.

Having regard to the above and the fact that the proposal achieves the objectives of the maximum building height standard and the zone objectives, it is considered that it would be unreasonable and unnecessary to enforce strict compliance with this development standard, as a better outcome is achieved in relation to the height controls, by not complying.

6. There are sufficient environmental planning grounds to justify contravening the development standard

Compliance would result in poorer planning outcomes

One of the objectives of Clause 4.6 is to allow better outcomes to be achieved. In this case, as discussed above a better planning outcome is achieved by allowing a breach as requiring numerical compliance with the maximum building height standard for the proposed sign.

As noted in Section 5, From an aesthetic and visual impact viewpoint and in terms of optimising integration of the sign with the existing built form, the proposed location in the top northern corner of the western wall is the most appropriate location, notwithstanding the numerical non-compliance with the building height development standard. Lowering the sign would offer no material architectural, aesthetic or amenity benefit.

Significant lowering of the sign to a maximum height of 22m would far less compatible with the existing built form and result in the neighbouring building almost totally obstructing any view of the sign. The proposal could not proceed on this basis, resulting in retention of the existing horizontally aligned wall sign and associated catwalk, which have a greater visual impact than the proposed digital wall sign.

Lack of impact

As noted in Section 5, despite the numerical height non-compliance, there will be no adverse impact on the amenity of surrounding properties or the character of the locality, including the existing streetscape. There are no adverse environmental impacts arising from the proposed height encroachment.

As noted above, the lack of environmental impact and the reduced visual impact arising from removal of an existing wall sign with greater visual impact, which arise from not complying, justify contravention of the height standard, as proposed.

Council must also be satisfied that the proposal meets the objectives of the standard and the objectives of the subject zone. As discussed above the proposal meets the objectives of the standard also meets the objectives of the B4 zone.

In view of the above, it is considered that there are sufficient environmental planning grounds specifically related to the subject site and development that warrant support the requested variation of the maximum building height standard.

7. Other matters to be considered

It is noted that apart from considering the written request, pursuant to subclauses (4) and (5), the consent authority must also satisfy itself that the development meets the following requirements.

Is consistent with the objectives of the relevant standard

As demonstrated in Section 5 of this submission and as detailed in the submitted Statement of Environmental Effects, it is demonstrated that the proposal achieves the objectives of the maximum building height standard.

Is consistent with the objectives of the subject zone

As demonstrated in Sections 5 of this submission and as detailed in the submitted Statement of Environmental Effects, it is demonstrated that the proposal achieves the objectives of the B4 Mixed Use Zone applying to the subject land. .

In addition to the above, acting in the Secretary's concurrence role, Council 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.*

In relation to (a), the proposed breach is not of any State or regional significance.

In relation to (b), there is no public benefit from maintaining the standard as there is no adverse impact on the public domain and the proposal is generally consistent with the relevant planning controls relating to signs. As noted above enforcement of the control would result in a poorer planning outcome, which is not in the public interest.

In relation to (c), there are no other matters that require consideration.

Conclusion

Given the circumstances of the case, including the height of the existing building, the appropriate location and vertical orientation of the proposed sign and its reduced visual impact of the proposed sign, compared to the existing sign, which will be removed, a variation of the 22m maximum building height standard, as proposed is appropriate and a positive planning outcome that is also consistent with the objects of the EP&A Act.

Requiring numerical compliance is unreasonable and unnecessary in this case, as it would not result in any material benefits and in relation to urban design, architectural character, amenity and the overall quality of the public domain and the streetscape. The alternative of a fully compliant maximum building height for the sign would result in a poorer planning outcome.

The proposal achieves the objectives of the height standard and the objectives of the B4 Mixed Use Zone, despite the numerical non-compliance with this development standard.

The requested variation to the 22m maximum building height standard satisfies the requirements of Clause 4.6. The proposal represents an appropriate planning outcome for the site and the requested variation of the maximum building height control, pursuant to Clause 4.6 is worthy of support.

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