

Attachment C

**Clause 4.6 Variation Request - Building
Height**

Justification under Clause 4.6 of Sydney Local Environmental Plan 2012
– Exceptions to Development Standards.

30 – 42 Lower Fort Street & 2 – 4 Trinity Avenue, Millers Point

Clause 4.3 Height of Buildings

Control 9m

Proposed 13.34m

Lifts general (30-40 LFS)

Top of lift RL = 30.680

Adjacent RL (new entry floor level) = 20.990

Height = 9,690mm

DDA lift (no 2 Trinity)

Top of lift RL = 30.990

Adjacent RL (new entry floor level) = 20.820

Height = 10,170mm

AC enclosure rear Trinity Roof

Top of enclosure RL = 32,425

Adjacent RL (existing corner of building as per survey) = 20.970

Height = 11,455mm

Existing building Ridge (tallest)

Existing ridge = 33.850

Existing footpath level (adjacent) = 20.510

Height = 13,340mm

Proposed rear addition (tallest)

Proposed ridge = 32.050

Existing ground level (adjacent) = 20.710

Height = 11,340mm

All of the works which are proposed above the 9m height control relate only to utilising the space which exists and incorporating a rear extension sympathetic to the building and the existing roof form. Where new windows and exterior works are proposed at the rear of the site and outside the envelope of the existing building they have been designed to respect the amenity of the neighbouring properties and not to be visible from the street or public domain.

The proposal makes efficient use of the existing building envelope and restricting the footprint of the proposed extension where the site has a floor space ratio of 2:1 and the proposal is only 1.7:1.

Clause 4.6 of the Sydney Local Environmental Plan 2012 (SLEP) enables Council to grant consent for development even though the development varies 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.

Clauses 4.6 (3) and (4)(a)(ii) require that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard, namely:

1. that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
2. that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
3. that 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.

The consent authority's satisfaction to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in

question.

The Land and Environment Court has given consideration to the matters that must be addressed in relation to whether a variation to development standards should be approved. While these cases originally referred to the former SEPP 1, the principles still remain relevant, more recently, further guidance on the approach to apply to applications to vary development standards under clause 4.6 of the Standard Instrument was provided by the Land and Environment Court. This Clause 4.6 gives consideration to the matters raised in:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Turland v Wingecarribee Shire Council [2018] NSWLEC 1511;
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386; and
- Moskovich v Waverley Council [2016] NSWLEC 1015.
- Wehbe v Pittwater Council [2007] NSW LEC 827; and
- Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79 at 89;

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

2. identifies the development standard to be varied;
3. identifies the variation sought;
4. establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
5. demonstrates there are sufficient environmental planning grounds to justify the contravention;
6. demonstrates that the proposed variation is in the public interest; and
7. provides an assessment of the matters the secretary is required to consider before providing concurrence.

This Clause 4.6 variation request relates to the development standard

for Height of Buildings under Clause 4.3 of the SLEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Mersonn dated June 2018 as well as the supplementary documentation submitted to Council since this date. 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 variation to the standard.

2.0 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of the SLEP, relating to the Height of Buildings. Under the SLEP 2012, the site is afforded Height of Buildings of 9m.

3.0 Nature of the Variation Sought

The maximum Height of Buildings on the site under the SLEP 2012 for this application is 13.34m. The existing building on the site has a height of 13.34m, therefore the existing building is already in excess of the maximum Height of Buildings development standard applicable under the SLEP 2012 and any work proposed above the 9m Height of Buildings (despite not increasing the Height of Buildings further than that which exists) requires a variation to the maximum Height of Buildings development standard through clause 4.6. The proposed development does not seek consent to increase the Height of Buildings on the site but does propose work to the fabric which occurs above 9m. The existing building exceeds the Height of Buildings development standard applicable under the SLEP 2012 by 48.2% and while works are proposed at this higher level the proposal does not increase the height of the existing building.

It is well established in case law that the extent of the numerical

variation does not form part of the test required to be exercised under Clause 4.6. Decisions in respect of *Micaul Holdings P/L V Randwick City Council* (55% exceedance of height and 20% exceedance of FSR) and *Moskovich V Waverley Council* (65% exceedance of FSR) support this.

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

The five methods outlined in *Wehbe* include:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
- 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 (Fourth Method).*
- 5. 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).*

In this instance, the First Method is of particular assistance in establishing that compliance with a development standard is unreasonable or unnecessary.

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development

that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (Initial Action v Woollahra Municipal Council [24] and Turland v Wingecarribee Shire Council [42]).

In this instance the whole of the proposed development is the aspect of the development that exceeds the development standard further than the existing built form on the site, because the existing building already exceeds the relevant maximum Height of Buildings development standard and therefore any work proposed above the 9m height would require a further variation to that standard.

4.1 The objectives of the development standard are achieved notwithstanding the non-compliance (First Method)

The objectives of Clause 4.3 Height of Buildings in SLEP 2012 are;

(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.*

The height of the proposal is considered to be consistent with and appropriate to the condition of the site and its context. The desired

character of the locality and the surrounding buildings and public areas will continue to receive satisfactory exposure to sky and sunlight. The proposal provides an appropriate built form and land use intensity consistent with the objectives of this clause.

The proposal maintains the height transition between the heritage items and new development.

It is demonstrated in the plans that the proposal minimises any overshadowing, loss of privacy and visual impacts for the neighbouring properties consistent with the objectives of this clause. The proposed external works to the building are at the rear of the site and located to minimise any view impacts.

The SEE details that the proposal is largely consistent with the relevant environmental planning instruments and does not give rise to any adverse environmental impacts in respect to overshadowing, traffic, heritage, wind, reflectivity, stormwater, flooding, noise, waste, economic and social impacts.

It is considered that these objectives are met by the proposal.

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

Clause 4.6(3)(b) of the SLEP 2012 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.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the Height of Buildings control as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

The applicable circumstances that relate to the site are discussed below.

The proposal makes efficient use of the existing building envelope and restricting the footprint of the proposed extension where the site has a floor space ratio of 2:1 and the proposal is only 1.7:1. It is considered that this is a better planning outcome to utilise the existing volume and restricted footprint rather than an attempt to extend the property to the rear where greater amenity impacts may occur.

A consideration of the application and the submitted shadow diagrams demonstrate that no significant overshadowing, privacy, view or bulk and scale amenity impacts arise from the proposal. It is considered that the proposal is the better planning outcome encouraged by the provisions of Clause 4.6.

While a Clause 4.6 exemption application is required for the works above the 9m height control all of these works are considered complimentary to the heritage status of the building and where external are benign and with no environmental or amenity impact where they occur within the existing envelope.

The proposed works above the height have no view impact and cause no overshadowing, nor bulk or scale changes to the existing dwelling. In the circumstances where there are sound environmental and site specific sufficient environmental planning grounds reasons for the breach to the height control it is considered to justify contravention of the control and consequently the exception to the height control standard under Clause 4.6 is considered acceptable.

Further because the existing building exceeds the Height of Buildings development standard, any addition of height (or work above the height control to existing fabric) to the existing building will require a variation to this development standard under Clause 4.6. By allowing a variation to the Height of Buildings development standard in this instance, an

opportunity is presented for the proposed development to achieve the benefits of the adaptive reuse of the heritage item and improve the existing building's relationship with the surrounding development, and the relevant ADG and DCP controls. In this regard, there are sufficient environmental planning grounds to justify contravening the development standard. The proposed additional height sought in this Clause 4.6 better allows the built form on the site to achieve the desired future character of the locality, as expressed under the DCP, as compared to the do nothing scenario.

6.0 It is in the public interest because it is consistent with the objectives of the particular standard and the zone.

6.1 Consistency with the objectives of the development standard.

The proposed development is consistent with the objectives of the FSR development standard, for the reasons discussed in Section 4.1 of this report.

6.2 Consistency with the Zoned R1 – General Residential Zone objectives.

The objectives for development in this zone are;

1 *Objectives of zone*

- *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 proposed development improves the provision of housing for the needs of the community without compromising amenity of the surrounding area. The proposal is consistent with the desired pattern

of land use and density achieves a reasonably high level of residential amenity.

The proposal provides a variety of housing types in an area which is undergoing a rapid transition in housing stock from apartments to single dwellings.

The proposal maintains the pattern of predominantly residential uses.

The proposal is considered to meet the objectives for development in the zone.

The proposal is considered consistent with the objectives of the standard and for development in this zone as required by this subclause.

7.0 Secretary's Concurrence.

Under Clause 4.6(5) of SLEP 2012, the Secretary's concurrence is required prior to any variation being granted. The following section provides a response to those matters set out in Clause 4.6(5) of the SLEP, which must be considered by the Secretary.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning
The variation to the Height of Buildings standard of SLEP 2012 will not raise any matter in which could be deemed to have State or Regional significance. The extent of variation sought is minor in the context of the existing building height and the works do not increase the existing height.

The public benefit of maintaining the development standard.

Maintaining the development standard would not result in any public benefit in this situation. As detailed within the SEE, the height and bulk of the existing building is predominantly unchanged and the proposal

responds to the surrounding urban context and the requirements of the Sydney DCP 2012 and ADG.

The current built-form provided by the existing building is generally consistent with the bulk and scale of the surrounding buildings, and requiring compliance with the Height of Buildings standard would result in an inconsistent building form.

The proposed development would allow the building as a whole to better meet the objectives of the DCP by physically responding to the form of the heritage item and its context and reinforcing the character of the surrounding heritage buildings. The proposed variation to the Height of Buildings standard therefore allows the site to better meet the objectives of the DCP, ADG and the desired future character of the area. DCPs are guiding documents prepared to express the desired future character; protect the public interest and are prepared through an extensive public exhibition process.

Therefore, to better meet the objectives of the DCP can be said to improve the development's presentation to the public domain and is in the public interest.

Any other matters to be taken into consideration by the Secretary
None.

In accordance with PS 18-003 (Variations to Development Standards), the Secretary's concurrence will need to be sought as the variation proposal is greater than 10%.

8.0 Conclusion

The assessment above demonstrates that compliance with the maximum Height of Buildings development standard contained in Clause 4.3 of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded on environmental planning grounds.

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 superior outcome in planning and design terms. This Clause 4.6 variation demonstrates, notwithstanding the non-compliance with the maximum building height development standard, that:

- The development as proposed will deliver a superior built-form outcome in consideration of the site's heritage significance and its location amongst the surrounding heritage buildings;
- The development as proposed will provide environmental benefits particular to the site through the provision of improved amenity for future occupants of the development and for the surrounding area generally; and
- Compliance with the development standard would be both unreasonable and unnecessary in the instance because the development is able to fully satisfy the objectives of the R1 – General Residential Zone and the objectives of the Height of Buildings development standard.

The SLEP 2012 applies a maximum Height of Buildings development standard for the site of 9m. The existing development has been lawfully constructed and comprises 13.34m, therefore the existing building is already in excess of the maximum Height of Buildings development standard allowable under the SLEP 2012.

This variation therefore seeks consent for the proposed works as consistent with the character and form of the heritage item and the surrounding heritage buildings and does not result in an over development of the site or any adverse impacts on the public domain. The proposed additional height is commensurate with surrounding developments and the built form that characterises the locality. It is also consistent with the design approach applied to other heritage buildings within the immediate vicinity.

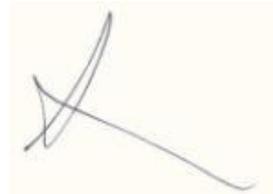
Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, a departure from the Height of Buildings development standard is

considered appropriate in these circumstances.

Despite the numerical non-compliance with the Height of Buildings development standard, the proposed development is considered to satisfy the objectives of the development standard and the R1 – General Residential Zone.

The proposal will provide environmental benefits particular to the site through the provision of improved amenity for future occupants of the development and for the surrounding area generally. On this basis, the Clause 4.6 variation is considered well founded and should be supported.

In this instance it is considered appropriate to make an exception to the Height of Buildings development standard under the provisions of Clause 4.6 for the reasons outlined in the preceding discussion.



Signature:

Name:

Andrew Darroch

Date:

March 2019