

Attachment D

**Clause 4.6 Variation Request - Apartment
Size**

This Clause 4.6 has been prepared on request of City of Sydney. The applicant does not accept that Guidelines under the Apartment Design Guide are development standards which require variation under Clause 4.6 of the Sydney Local Environmental Plan.

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 4D Apartment Size and Layout

Design criteria	1 bedroom	50m ²
Proposed	Unit 42.1	44.1m ²
	Unit 42.2	42.4m ²
	Unit 42.1B	44.5m ²
	Unit 42.2B	45.2m ²
	Unit 42.1C	44.6m ²
	Unit 42.2C	45.1m ²

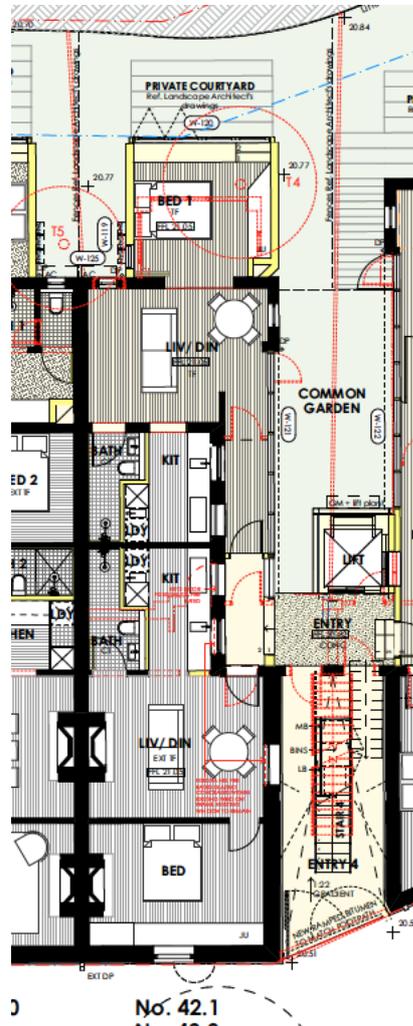
1.0 Introduction

The proposed development comprises alterations and additions to the existing three storey residential flat building at 30 – 42 Lower Fort Street & 2 – 4 Trinity Avenue, Millers Point. The property is a heritage item and the existing building has a height of 13.34m to the top of the parapet, which exceeds the height control of 9m. It is proposed to carry out works to facilitate the continued use of the building as residential flats.

Six of the existing 30 apartments comprise one bedroom units which were adapted from the previous layout in the past and these have been identified as worthy of retention in this form as evidence of the historic layers of change to the building.

Each of these six units is slightly below the contemporary minimum unit size for a 1 bed unit of 50m² under the Apartment Design Guide being

between 42m² and 46m² respectively. This can be understood from the ground floor extract below.



The existing building comprises three generous storeys (3.3m ceiling heights) above the natural ground level and an existing pitched roof behind a parapet.

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.

In this instance the six one bedroom units in the proposed development are the aspect of the development that do not meet the development standard, because the existing building is a State Listed Heritage Item retaining the configuration is desirable and would require a further variation to that standard.

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 Minimum unit size under Clause 4.D of the ADG 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 Minimum unit size 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 4D of the Apartment Design Guide, relating to the Minimum internal area of apartments. Under the ADG, the minimum size of a one bedroom apartment is 50m².

3.0 Nature of the Variation Sought

The minimum size of a one bedroom apartment is 50m² under the ADG, The existing building on the site has six one bedroom apartments which are between 42m² and 46m² respectively and therefore the existing building is already below the minimum unit size for these 6 apartments under the ADG and any work proposed to these apartments requires a variation to the minimum unit size development standard through clause 4.6.

The six units are below the minimum unit size by up to 16% and while works are proposed these apartments are existing in this form.

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 six one bedroom units in the proposed development are the aspect of the development that do not meet the development standard, because the existing building is a State Listed Heritage Item retaining the configuration is desirable and 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 objective of Clause 4D1 in ADG is;

The layout of rooms within an apartment is functional, well organised and provide a high standard of amenity.

Six of the existing 30 apartments comprise one bedroom units which were adapted from the previous layout in the past and these have been identified as worthy of retention in this form as evidence of the historic layers of change to the building.

In this instance the six one bedroom units in the proposed development are the aspect of the development that do not meet the development standard, because the existing building is a State Listed Heritage Item retaining the configuration is desirable and would require a further variation to that standard.

Each of these six units is slightly below the contemporary minimum unit size for a 1 bed unit of 50m² under the Apartment Design Guide being between 42m² and 46m² respectively.

The existing building comprises three generous storeys with 3.3m ceiling heights where the current minimum is 2.7m and the internal spaces have been planned to achieve the requisite functionality, organisation and high standard of amenity by taking advantage of the additional height and room proportions.

It can be noted from the layout plans that the units are very efficient in minimising circulation spaces and making efficient use of the existing building envelope and footprint to achieve this objective.

The unit size 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.

It is demonstrated in the plans that the proposal minimises any overshadowing, loss of privacy and visual impacts for the neighbouring properties. 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 this objective is 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 Minimum unit size 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.

Six of the existing 30 apartments comprise one bedroom units which were adapted from the previous layout in the past and these have been identified as worthy of retention in this form as evidence of the historic layers of change to the building.

In this instance the six one bedroom units in the proposed development are the aspect of the development that do not meet the development standard, because the existing building is a State Listed Heritage Item retaining the configuration is desirable and would require a further variation to that standard.

Each of these six units is slightly below the contemporary minimum unit size for a 1 bed unit of 50m² under the Apartment Design Guide being between 42m² and 46m² respectively.

The existing building comprises three generous storeys with 3.3m ceiling heights where the current minimum is 2.7m and the internal spaces have been planned to achieve the requisite functionality, organisation and high standard of amenity by taking advantage of the additional height and room proportions.

By virtue of the proposal upgrading a property of significant heritage value while retaining evidence of the historic layers of change to the building 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 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 have no significant impact and cause no overshadowing, nor bulk or scale changes to the existing dwelling.

By allowing a variation to the Minimum unit size 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 unit size 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 Minimum unit size 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 standard of SLEP 2012 will not raise any matter in which could be deemed to have State or Regional significance.

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 Minimum unit size 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 in consideration of the surrounding heritage buildings. The proposed variation to the Minimum unit size 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 Minimum unit size development standard contained in Clause 4D of the ADG 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 minimum unit size 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.

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 unit size 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.

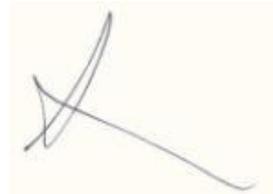
Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, a departure from the Minimum unit size development standard is

considered appropriate in these circumstances.

Despite the numerical non-compliance with the Minimum unit size 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 Minimum unit size development standard under the provisions of Clause 4.6 for the reasons outlined in the preceding discussion.

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Signature:

Name:

Andrew Darroch

Date:

March 2019