

# **Attachment B**

<b>Clause 4.6 Variation Requests</b>
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## 21 O'Connor Street, Chippendale

### REQUEST FOR VARIATION TO FLOOR SPACE RATIO OF BUILDINGS DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF CITY OF SYDNEY LEP 2012 Clause 4.4 – Floor Space Ratio

Clause 4.4 of Sydney Local Environmental Plan 2012 and the associated map prescribe a maximum floor space ratio (FSR) of 1.5:1 (144.3m<sup>2</sup>) for this site. The proposal, including an open courtyard enclosed by walls, seeks to provide a maximum FSR of 2:1 (203.7m<sup>2</sup>), providing a non-compliance with this control. The percentage variation is 33%.

It should be noted that the existing building has a greater FSR of 2.1:1 and this is being reduced by the proposal.

Nonetheless, the proposal seeks to vary the FSR development standard.

The objectives of Clause 4.4 are as follows:

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,*
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,*
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.*

The zoning of the land is B4 Mixed Use. The objectives of the zone are:

- to provide a mixture of compatible uses;*
- to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximize public transport patronage and encourage walking and cycling;*
- to ensure uses support the viability of centres*

## Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the 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,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The clause goes on to state:

- (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 Secretary has been obtained.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the FSR development standard.

The NSW Department of Planning and Infrastructure (DP&I) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the DP&I's Guide.

### **Clause 4.6(3) and 4.6(4)**

The proposal is considered against the four matters required to be established under Clause 4.6.

#### **1. Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:**

The most common way of establishing that compliance with a standard is unreasonable and unnecessary is to establish that the objectives of the standard are met, even though the standard is not complied with: see *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245. This objection relies on this method. Compliance with the objectives of the height standard is addressed under **Point 4 below**.

In addition, the following points are raised:

- Compliance with the development standards is unreasonable and unnecessary as the proposal is to renovate an existing building and will result in a reduction in FSR by 0.1:1 or 37.4m<sup>2</sup>
- Exceedance of the FSR control will not create additional building bulk that results in adverse environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in FSR would not create additional benefit for adjoining properties or the locality.

#### **2. There are sufficient environmental planning grounds to justify contravening the development standard:**

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

The proposal is for alterations to an existing building with an FSR of 2.1:1 and an exiting building and will result in a reduction in FSR by 0.1:1 or 37.4m<sup>2</sup>

The proposed FSR can be achieved without adverse impacts as the alterations reflect the desired character of the locality in which it is located and minimises adverse impacts on the amenity of the locality.

In addition, the following is noted:

- The intensity of the development is appropriate and acceptable, having regard to existing development on the site which has greater FSR;
- Non-compliance with the standard does not contribute to adverse environmental impacts;
- The proposed development achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone ; and
- The proposal will provide a suitable design and of suitable amenity in terms of the built environment , which are identified as objects of the Act (Section 1.3 of the EP&A Act, 1979).

Reduction in the FSR would not result in improved amenity for adjoining properties. The lack of impact on adjoining properties in terms of solar access, privacy, view loss and visual bulk establishes sufficient planning grounds (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118).

**3. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):**

The written request adequately addresses the matters referred to above by Clause 4.6(3).

**4. 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 proposal will be in the public interest as it meets the objectives of the FSR development standard as follows:

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**Objective (a)** is not applicable in this case

**Objective (b)** seeks to regulate the density of development. In this case the FSR is being reduced.

**Objective (c)** seeks to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure. In this case the FSR is being reduced.

**Objective (d)** seeks to ensure that new development reflects the desired character of the locality.

In this case the proposed FSR can be achieved without adverse impacts as the alterations reflect the desired character of the locality in which it is located and minimises adverse impacts on the amenity of the locality.

The zoning of the land is B4 Mixed Use. The objectives of the zone are:

- *to provide a mixture of compatible uses;*
- *to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximize public transport patronage and encourage walking and cycling;*
- *to ensure uses support the viability of centres*

The proposal is consistent with the zone objectives, as it will retain, renovate and enhance an existing mixed use building within a Heritage Conservation Area.

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard and the objectives of the R3 zone.

In addition, the above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

## **Conclusion**

The consistency of the development with the zone objectives and the objectives of the height standard and the lack of impact arising is sufficient grounds to support that breach and confirms the lack of necessity for the development to comply. This therefore demonstrates sufficient environmental

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planning grounds to justify contravening the standard.

In addition, the resultant development will be in the public interest as it complies with the objectives of the zone and the objectives of the development standard.

Despite the breach with the standard, the proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979 (formerly 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, to promote and coordinate orderly and economic use and development of land, to promote good design and amenity of the built environment and to protect the heritage of the built environment.

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 and there are sufficient environmental planning grounds to support the variation.

Lewis Adey RPIA  
Director  
[aSquare Planning Pty Ltd](#)

5 February 2019

## 21 O'Connor Street, Chippendale

### REQUEST FOR VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF SYDNEY LEP 2012

#### Clause 4.3 – Building Height

Clause 4.3 of the Sydney LEP 2012 and the associated map prescribe a maximum building height of 9 metres for this site. The proposal seeks to provide a maximum height of 9.58 metres for the building and 10.83 metres for the handrail providing a non-compliance with this control. The percentage variation is 6.4% and 20.3% respectively.

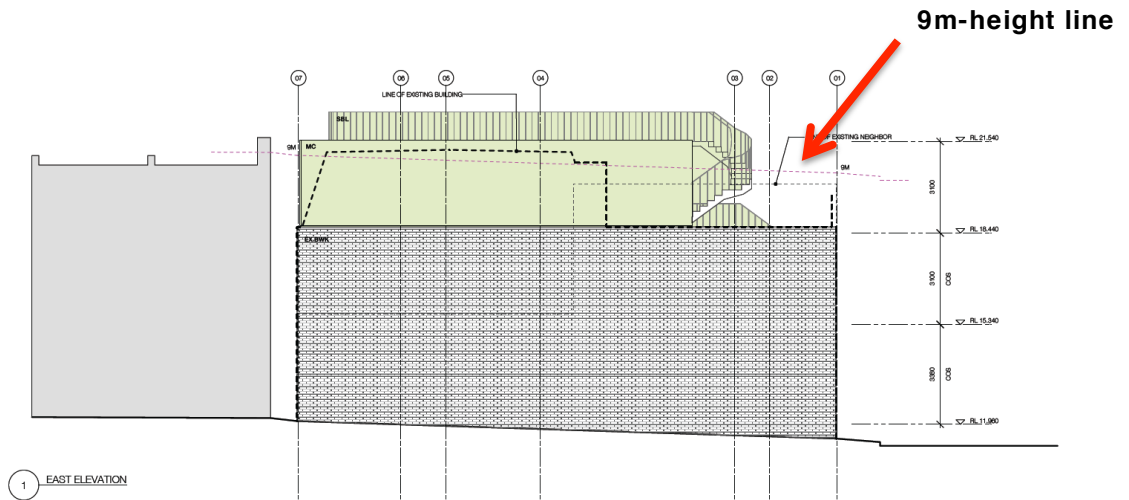
The proposal therefore seeks to vary the building height development standard.

Prior to the approval and construction of the additions approved on 26/08/2013 (D/2013/897) for the demolition of an existing roof-top level, the height was 9.84m. This was reduced to 9.4m as a result of that approval. It is now proposed to be increased by 180mm, excluding the handrail of 1.2m. The handrail will be set in from all sides and will not be visible.

The extract below illustrates the components above the height limit:







The objectives of Clause 4.3 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 zoning of the land is B4 Mixed Use. The objectives of the B4 zone are:

- *to provide a mixture of compatible uses;*
- *to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximize public transport patronage and encourage walking and cycling;*
- *to ensure uses support the viability of centres*

### Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the 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,*

- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The clause goes on to state:

- (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 Secretary has been obtained.**

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the height of building development standard.

The NSW Department of Planning and Infrastructure (DP&I) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the DP&I's Guide.

### **Clause 4.6(3)(a) and (b) and 4.6(4)**

The proposal is considered against the four matters required to be established under Clause 4.6.

#### **1. Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case (4.3(a)):**

The most common way of establishing that compliance with a standard is unreasonable and unnecessary is to establish that the objectives of the standard are met, even though the standard is not complied with: see *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245. This objection relies on this method. Compliance with the objectives of the height standard is addressed under **Point 4 below**.

In addition, the following points are raised:

- Compliance with the development standards is unreasonable and unnecessary as this would compromise the amenity of the upper level with no additional benefit for neighbouring properties or in terms of the overall bulk of the building as presented to the public domain.
- The components of the second floor addition above the height control will not create additional building bulk that results in environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in this bulk would not create additional benefit for adjoining properties or the locality.

## **2. There are sufficient environmental planning grounds to justify contravening the development standard (4.3(b)):**

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

The proposal seeks to provide open space at roof level and improved amenity for the upper level habitable space, with no adverse visual or amenity impacts. This represents a better planning outcome for the residential amenity of the site with no adverse impacts on the area. The proposal overall is therefore considered to be an appropriate response for the site and the non-compliant elements will not affect the amenity of adjoining properties, whilst improving the amenity of the subject property.

The proposed height can be achieved without adverse impacts and the proposal will provide a suitable design and of suitable amenity in terms of the built environment, which are identified as objects of the Act (Section 1.3 of the EP&A Act, 1979).

Reduction in the height of the second floor level will not improve solar access to windows or open space of adjoining properties, as the additional impact from the proposal is limited to minor additional overshadowing of the street (Smithers Street) and over roofs of adjoining residential dwellings.

The provision of the second floor addition as proposed will not result in any additional loss privacy, noting that the balustrade the front deck at this level is compliant in terms of height. The roof terrace is to be located above the height control but this and the acces stairs have been designed and located to ensure overlooking towards adjoining private open space and windows to habitable areas is inhibited.

The visual bulk of the component above the height control has been reduced by providing a 15 degree wall hipped away from the street.

Compliance with the height control will not result in improved amenity for adjoining properties and the visual bulk of the upper level as perceived from the street will not be reduced. The lack of unreasonable impact on adjoining properties in terms of solar access, privacy, view loss and visual bulk establishes sufficient planning grounds.

**3. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):**

The written request adequately addresses the matters referred to above by Clause 4.6(3)(a) and (b).

**4. 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 proposal will be in the public interest as it meets the objectives of the height development standard as follows:

**Objective (a)** seeks to provide appropriate heights, which allow for the environmental amenity of neighbouring properties. The proposal will ensure that adequate solar access is provided to adjoining properties and minimal impact in terms of privacy. In particular, it is noted that the components, which extend beyond the height control will not result in a loss of environmental amenity for the neighboring properties as outlined above.

**Objective (b)** will be met as the proposal ensures an acceptable transition between this building and others in the Conservation Area.

The bulk of the non-compliant height will not be visible from the public domain, with the roof terrace and balustrades being well set back from all sides of the building and the design of the wall of the second floor addition minimizes perceived bulk and scale.

**Objective (c)** is met as no views will be impacted upon and in particular, the non-compliant elements will not affect views from adjoining properties.

**Objective (d)** is not applicable to this site.

**Objective (e)** is not applicable to this site.

The zoning of the property is B4 and the objectives of the zone are:

- *to provide a mixture of compatible uses;*
- *to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximize public transport patronage and encourage walking and cycling;*
- *to ensure uses support the viability of centres*

The proposal is consistent with the zone objectives and in particular, it is noted that the additional height beyond the height standard will not result in a development which is inconsistent with the zoning.

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives of the B4 zone. In addition, the above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

## **Conclusion**

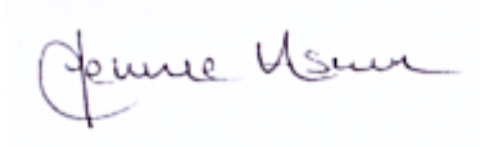
The consistency of the development with the zone objectives and the objectives of the height standard and the lack of impact arising is sufficient grounds to support that breach and confirms the lack of necessity for the development to comply. This therefore demonstrates sufficient environmental planning grounds to justify contravening the standard.

In addition, the resultant development will be in the public interest as it complies with the objectives of the zone and the objectives of the development standard.

Despite the breach with the standard, the proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979 (formerly 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, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

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 and there are sufficient environmental planning grounds to support the variation.



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25 February 2019