

# **Attachment D**

<p><b>Clause 4.6 Variation Request – Building Height</b></p>
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12 February 2020

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Request to Vary the Building Height  
Standard under Clause 4.6 of S.L.E.P.  
2012 –

21 Kellett Street, Potts Point, a.k.a. 15  
Ward Avenue

(New Generation Boarding House) –

## Introduction

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This statement supports a development application (DA) for a 4-5 storey “new generation” boarding house development application including 6 rooms, a coffee roaster/stall at ground level, associated demolition of the existing building/garage and associated works at the site known as 21 Kellett Street, Potts Point (a.k.a. 15 Ward Avenue Potts Point). It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd to which it is attached, plans by DesignInc and the information submitted with the DA, including as revised during assessment.

The proposal exceeds the maximum Building Height control in Clause 4.3 of Sydney LEP 2012 (SLEP 2012). This control is a “development standard” in accordance with the definition in Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act 1979).

Clause 4.6 of SLEP 2012 relevantly states:

### **4.6 Exceptions to development standards**

- (1) *The objectives of this clause 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.*
- (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) *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 Director-General has been obtained.*

- (5) In deciding whether to grant concurrence, the Director-General 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.
- (6) –(8)... [not relevant]

## 1. Identifying and quantifying the non-compliance

Clause 4.3 of SLEP 2012 specifies a maximum Building Height of 15m, by reference to the relevant LEP Map (extract below).

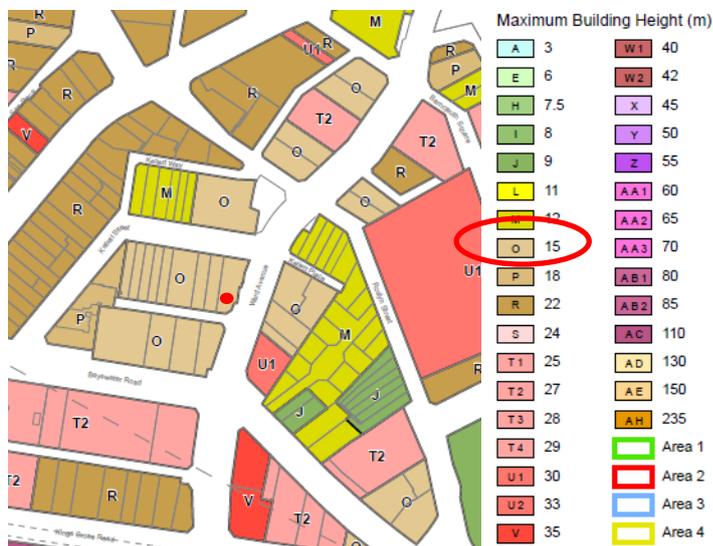


Figure 1 - Building Height Map Extract

The proposed building has a roof level of RL 52.49 and a lift overrun of 53.24. At the lowest point approximately below the roof level (to the east on Ward Avenue), the existing ground level outside the site is RL 36.423. The existing ground level below the lift overrun (from survey RLs on the northern side path) is approximately RL 36.844 at the lowest point. This equates to a maximum height to the roof at its lowest point of approximately 16.07m and to the lift overrun of approximately 16.40m (at the "worst" locations). **The lift overrun exceeds the height limit by 1400mm or approximately 9%. The roof parapet to Ward Avenue exceeds the height limit by 1070mm or approximately 7%.** An extract of the land survey with ground RLs and the Building Section provided by DesignInc illustrating the height non-compliance is provided below (red line for emphasis).

It should be noted the above is based on extrapolated RLs from ground levels around the site (using the "Bettar" Land and Environment Court approach). If the existing ground level is taken from the existing garage slab (RL 37.305 to the eastern portion), **the height non-compliance**



## 2. Objectives of Clause 4.6 of SLEP 2012

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The objectives of Clause 4.6 of SLEP 2012 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.*

There was some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was recently considered and determined in a judgement by the chief justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. That judgement held that the objectives of Clause 4.6 do not need to be specifically considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 (of appropriate flexibility and better outcomes) can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

## 3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

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Clause 4.6(3) of SLEP 2012 states:

- (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*

### **(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

The submission and consideration of Objections under State Environmental Planning Policy No. 1 ("SEPP 1 Objection") and the issue of compliance being "unreasonable or unnecessary" was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council [2007] NSWLEC 827* ("the Wehbe case"). While that judgement applied to SEPP 1 Objections

and not Clause 4.6 Variation requests, the approach in that case has been accepted in subsequent court cases related to Clause 4.6 Variation Requests.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or
- iii. Requiring compliance with the development standard would “thwart” the achievement of the objectives of that standard; or
- iv. The development standard in question has been “virtually abandoned” by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

This written request does not rely on a case related to pathways 2-5 above. However, it is noted that variations to height controls can and do occur on a case-by-case basis.

This written request does argue compliance with underlying objectives of the standard in question are achieved.

In terms of the objectives of the standard, Clause 4.3(1) of SLEP 2012 contains the following objectives:

- (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 following responds to these aims and objectives:

- a) The objective is a key to the argument about why compliance with the height standard is both unnecessary and unreasonable in the circumstances of this case. **The condition of the site and the context** favours a higher building form on this corner site, which appropriately mediates the forms of both adjoining buildings, while helping shield the adjoining blank walls, and provide an appropriate built form to the streetscape.

This is illustrated in the elevation and a photo of the physical model, shown below:





**Figure 3 – 4 - Streetscape Photo, Montage extract (DesignInc)**

The condition of the site is unique, in that there are blank walls to both adjoining private boundaries and an adjoining building to the north being over the height limit.

The HIS by Weir Phillips also outlines the condition of the site and context, and finds the proposal to be appropriate for the site. The proposal has been revised and has reduced by one level, with updated advice from Weir Phillips since DA lodgement.

More recently, the plan has been revised to address potential flooding issues and to ensure an appropriate habitable floor level, as depicted in plans by DesignInc, following engagement with the Council.

- b) Again, the **appropriate height transition** is a key reason to support the proposal and height sought, which is actively sought by the objectives of the standard itself.

This is also shown in the photo and diagram above.

A lower building at the site (e.g. 3-4 storeys and lower than the adjoining buildings), not providing a transition in height would not be appropriate for the site, particularly where an appropriate height transition is sought within the objectives for that standard. This is especially the case for a corner site, where building forms often anchor a street block and are typically slightly larger than their neighbours, being a key feature in Victorian architecture and areas with Victorian influences, such as Potts Point.

The HIS lodged with the DA by Weir Phillips also outlines the massing and context of the site and the response by the proposal, with extracts below:

*The character statement and supporting principles have been central to the design development. Care has been taken to ensure that the proposed design complements the existing scale of the surrounding area and that the proposed building will be of a modern design which clearly reads as dating from the current era. This maintains the integrity of the fabric record.*

*...it is considered that the building will 'fit' within the conservation area and will not detract from the setting of nearby heritage items.*

*...The proposed massing and scale of the new building takes into account the site's corner location and moderates between the varying massing and scale of the immediately adjoining buildings. Santa Fe to the north is four to six storeys in height (and six storeys where adjoining the subject site) while the adjoining building to the west is three storeys in height. The proposal locates its highest level directly adjacent the six storey adjacent building while it steps down in scale towards the adjacent three storey building on the other side. To further manage scale, the upper level is located within a roof form and clad in a differing material while the ground floor is clad primarily in dark face brick to modulate the vertical scale and anchor the building into the ground*

*...the building has been designed with the intention of creating a modern development which responds to, and complements, the surrounding heritage items, streetscapes and laneways without replicating or mimicking the existing buildings or character of the area the replacement building will make an improved contribution to the conservation area given that:*

- *It would remove a severely compromised existing building which presents a damaged remnant internal wall an incomplete façade to the street;*

- It would resolve the scale between two buildings of differing heights on the adjacent sites;
- It would infill an existing tooth gap and conceal the rear and side facades of the adjacent buildings which were not designed to be highly visible but have become so due to the road widening of the early 1970's; and
- It would address and resolve the corner with a sophisticated aesthetic which responds to the scale, proportions and materiality of the conservation area...

The above was in response to the original proposal, which has since been reduced by one level and subsequently revised to address flood planning levels. The revised proposal remains appropriate for the site and its context.

- c) The proposal is considered to achieve view sharing (with some qualification regarding not viewing the site from within adjoining sites). This issue is addressed in the SEE to which this written request is attached (pg. 51).
- d) Not relevant.
- e) Not relevant.

In summary, the proposal is wholly consistent with the objectives of the development standard and using the accepted approach in *Wehbe v Pittwater Council* [2007] NSWLEC 827, compliance with the development standard can be considered unnecessary or unreasonable.

**(b) that there are sufficient environmental planning grounds to justify contravening the development standard**

The case *Four2Five v Ashfield Council* [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248 raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 highlighted that:

1. The term "environmental planning grounds" is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant's written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

Also, given the term “environmental planning grounds” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the Building Height development standard, on this particular site and for this particular development:

- a) The height non-compliance results in an appropriate height transition between neighbouring buildings. The building to the west is three storeys, although with a form equivalent to around 4.5 storeys due to a high parapet and high floor-ceiling heights. The building to the north is 6 storeys high, at the interface with the subject site. It is common for corner buildings in areas with a high influence from the Victoria era, such as this area, to be higher than neighbours, or at least equivalent in height to neighbours and the adjoining forms. The proposed height is below the height of the neighbouring building to the north and mediates its form down to the building to the west, essentially matching the parapet of that building form.
- b) As shown in photographs including above and within the SEE, the site has adjoining blank walls to its northern and western boundaries. These vary from around 4-6 storeys in height. The proposed building visually blocks these blank walls, which is desirable in this instance for visual amenity to the area, and noting the characteristics of the Conservation Area.
- c) The proposed building is found to be appropriate by the Heritage Impact Statement by Weir Phillips, while the revised proposal reduces the height and scale since DA lodgement.
- d) Around half of the height limit non-compliance arises from planning for potential flooding, necessitating the raising of the ground floor level and consequent impacts on the overall building height. Despite this, the building height remains contextually appropriate.
- e) The additional height above the height limit will not have environmental impacts upon neighbours, of any significance. This is aided by the unique aspects of the site including its corner location, being surrounded on two boundaries by public roads, high adjoining buildings and blank walls to the two adjoining private property boundaries to the north and west.
- f) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant height of the building, is consistent with the following Objects of the Act:
  - i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations – noting good amenity from the rooftop areas and improved social gathering for the residents of the building (and addressing flood planning for the area);*

- ii. *to promote the orderly and economic use and development of land – noting the height and appropriate height transition is orderly, also allowing achievement of the FSR standard, which represents economic use of land on a well-connected site, with an appropriate use;*
  - iii. *to promote the delivery and maintenance of affordable housing – noting the delivery of affordable housing is aided by the rooftop areas which slightly exceed the height limit, and noting the limited site area (63sqm) and limited space within the ground floor for communal areas, which would compromise other elements needed for the affordable housing provided or suitable to activate the site at ground level;*
  - iv. *to promote the sustainable management of built and cultural heritage – noting the improved heritage outcome for the site;*
  - v. *to promote good design and amenity of the built environment – for the same reasons above; and*
  - vi. *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants – as the height exceedance and rooftop communal areas allows improved amenity and thereby a healthy environment for residents, without significant impacts to others.*
- g) As noted previously, the Objects of the EPA Act provide a framework for the Act itself, and its operative provisions, which include giving effect to other Environmental Planning Instruments. The proposal and specifically the height non-compliance also facilitates the following aims and objectives within Sydney LEP 2012 (Clause 1.2(2):
- (e) *to encourage the growth and diversity of the residential population of the City of Sydney by providing for a range of appropriately located housing, including affordable housing – by facilitating affordable housing at an appropriate density on the levels below the height limit, and communal facilities partially above;*
  - (g) *to ensure that the pattern of land use and density in the City of Sydney reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport – by facilitating appropriate density at the site with a height that is contextually appropriate, and addresses flood planning levels;*
  - (g) *to enhance the amenity and quality of life of local communities – by improved amenity for the boarding house rooms and communal areas by the positioning of the communal area on the top level with good access to light and outlook, without significantly affecting the amenity of others;*
  - (j) *to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular*

*localities* – by a form and height which is of a high quality, significantly improves the contribution of the site with the area and having a height which is consistent with the desired future character of the area.

- (k) *to conserve the environmental heritage of the City of Sydney* – as the height and form facilitates and appropriate heritage outcome for the site.

#### **4. Clause 4.6(4) of SLEP 2012**

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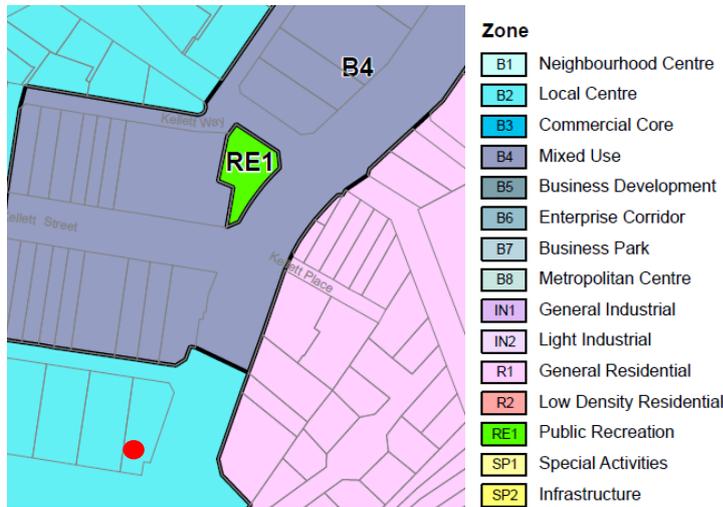
Clause 4.6(4) of SLEP 2012 states:

- (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*

These are matters for the consent authority to be satisfied (as opposed to the applicant justifying as in Clause 4.6(3)). Despite this, further commentary is given to assist the consent authority in its deliberations.

Clause 4.6(4)(a)(i) has been addressed in the previous Section of this written request. The objectives of the standard have also been addressed in the previous Section of this written request.

In terms of the zone objectives, the site is zoned Mixed Use B4 in SLEP 2012. Boarding houses are specifically permitted with development consent.



**Figure 5** – SLEP 2012 Zoning Map Extract

It is important to note that in terms of Clause 4.6(4)(a)(ii) the consistency with the objectives of the standard and zone relate to the **whole** development, not merely the contravention itself.

The objectives of this 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 proposal is consistent with these zone objectives, noting:

- The proposal provides an appropriate use for the site and a diversity of housing choice for the wider area, yet complementing the diverse nature of the area. This is augmented by a coffee roaster/stall which activates Ward Avenue and provides a mix of uses and services for the area. The activation of the corner is positive, particularly given the setback and being historically used as a dumping ground, to instead activate this civic space.

It was interesting to note in the HIS that in 1900 all of the housing in Kellett Street were boarding houses, except Nos. 1 and 19. The site and area has traditionally been associated with boarding house provision;

- The site is well-connected to public transport, jobs and services, to encourage use of public transport, walking and cycling (to a degree that is arguably the most suitable to achieve this objective, further enhanced by not providing on-site parking).

The non-provision of carparking helps to achieve this objective, as does the over-provision of bicycle parking.

The pedestrian environment is improved by activation of the ground floor (which is currently blank to Ward Avenue and subject to consistent dumping of rubbish – see below):



and

- The use and density on the site will support surrounding and wider centres, without providing any direct competing uses to those commercial and retail uses encouraged in centres.

The density complies with the FSR standard, while the height proposed also indirectly assists in the density to support centres, by allowing the provision of accommodation at the lower levels.

The proposal is entirely consistent with the zone objectives applying to the site.

#### **Clause 4.6(4)(b) – Concurrence of the Secretary**

Concurrence of the Secretary is not required.

#### **4. Clause 4.6(5) of SLEP 2012**

Clause 4.6(5) of SLEP 2012 states:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - the public benefit of maintaining the development standard, and*
  - any other matters required to be taken into consideration by the Secretary before granting concurrence.*

In these regard, the City of Sydney is understood to have delegation from the Secretary for the Department of Planning and Environment to consider and decide upon Clause 4.6 Variation Requests.

In terms of Clause 4.6(5) (a)-(c), the following response is given;

- (a) No matter of significance for State or Regional environmental planning arises or is compromised by the non-compliance;
- (b) The integrity of the development standard will not be compromised by granting approval, noting the site-specific and proposal-specific considerations in this instance, which should not give rise to universal precedence elsewhere. In the circumstances of this application, there is no public benefit of marinating the development standard. To the contrary: for the environmental planning reasons outlined in this written request; and given the consistency with the objectives of the development standard and B4 zone, allowing the proposal, including its height non-compliance, will provide a public benefit in this instance;
- (c) There are no other known required or nominated matters by the Secretary to be taken into account.

For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the Building Height development standard in Clause 4.3 of *Sydney Local Environmental Plan 2012*.



Jason Perica  
Director