

# **Attachment C**

<b>Clause 4.6 Variation Request</b>
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**Address:** Nos. 135 – 139 McEvoy Street, Alexandria  
**Proposal:** Mixed Use Development  
**AUGUST 2020**

## CLAUSE 4.6 VARIATION



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McEVOY STREET, ALEXANDRIA

## PROJECT INFORMATION

The Proposal: This Clause 4.6 Variation accompanies additional documentation submitted in support of Development Application No. D/2018/1581 for demolition of existing building and construction of 6 storey building to McEvoy Street, and a 4 storey building to the rear comprising 34 residential apartments, ground floor commercial tenancy and 2 levels of basement car parking at Nos. 135 – 139 McEvoy Street, Alexandria.

Site: Lot 1 DP 346555  
Nos. 135 – 139 McEvoy Street  
ALEXANDRIA NSW 2015

Architect: **MATHIESON**  
102/16 – 28 Foster Street  
SURRY HILLS NSW 2010



## CLAUSE 4.6 VARIATION – BUILDING HEIGHT

### SYDNEY LOCAL ENVIRONMENTAL PLAN 2012

The Sydney Local Environmental Plan 2012 (LEP) was gazetted on 14 December 2012 and applies to all land within the Sydney local government area. The aims of the LEP are as follows:

- a) to reinforce the role of the City of Sydney as the primary centre for Metropolitan Sydney,
- b) to support the City of Sydney as an important location for business, educational and cultural activities and tourism,
- c) to promote ecologically sustainable development,
- d) to encourage the economic growth of the City of Sydney by—
  - i. providing for development at densities that permit employment to increase, and
  - ii. retaining and enhancing land used for employment purposes that are significant for the Sydney region,
- 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,
- f) to enable a range of services and infrastructure that meets the needs of residents, workers and visitors,
- 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,
- h) to enhance the amenity and quality of life of local communities,
- i) to provide for a range of existing and future mixed-use centres and to promote the economic strength of those centres,
- 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,
- k) to conserve the environmental heritage of the City of Sydney,
- l) to protect, and to enhance the enjoyment of, the natural environment of the City of Sydney, its harbour setting and its recreation areas.

### Clause 4.3 – Building Height

Clause 4.3 of the LEP prescribes a maximum building height of 22 metres for that portion of the site having frontage to McEvoy Street, and a maximum building height of 15 metres for the rear of the site. The proposal seeks minor variations to the maximum height limits to permit a saw tooth roof feature incorporating clerestory windows.

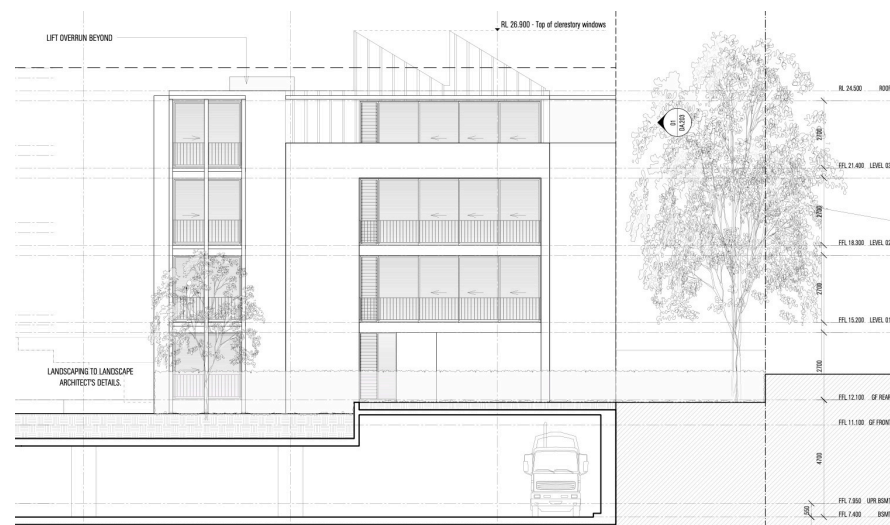


FIGURE 1

Saw tooth roof feature of Building B (dotted line indicates 15m building height).

The maximum proposed building height of the front block:

- Without the roof feature, including all other building elements including lift overrun: 21.95 metres
- With the roof feature: 24.35 metres

The maximum proposed building height of the rear block:

- Without the roof feature, including all other building elements including lift overrun: 14.85 metres
- With the roof feature: 17.25 metres

It is only the architectural roof features of these buildings which exceed the maximum building height limits prescribed by the LEP.

#### Clause 4.6 – Exceptions to Development Standards

The resultant building form will exceed Council's prescribed maximum building height 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.*

**Comment:** The proposal seeks flexibility in application of the standard, where a breach of the maximum building height arises only as a result of intended architectural roof features. Clause 5.6 of the LEP encourages the provision of architectural roof features and has the following objectives:

- (a) to allow minor architectural roof features to exceed height limits,*
- (b) to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises,*
- (c) to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design.*

The clause permits development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by the LEP. Pursuant to Clause 5.6(3) of the LEP, development consent must not be granted to any such development unless the consent authority is satisfied that:

*(a) the architectural roof feature—*

- (i) comprises a decorative element on the uppermost portion of a building, and*
- (ii) is not an advertising structure, and*
- (iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and*
- (iv) will cause minimal overshadowing, and*

*(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

The proposed architectural roof features cause the building to exceed the maximum prescribed building heights. The proposed non-compliance for the front building equates to 2.35 metres or 10.7% of the 22 metre building height. The proposed non-compliance for the rear building equates to 2.25 metres or 15% of the 15 metre building height.

The proposed clerestory windows inset within the saw tooth roof features proposed are functional in purpose, but are also decorative in nature, respectful of the site's context and industrial past. The proposed architectural roof features do not cause any adverse visual impact, nor do they adversely impact the amenity of neighbouring premises including by way of overshadowing. The saw tooth roof form does not cause any overshadowing of adjoining properties. The roof form does not include floor space area and is not reasonably capable of modification to include floor space area, and is not intended to be used as advertising structures. These features satisfy each of Council's stated objectives in relation to architectural roof features permitted to exceed maximum building heights.

*(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.*

**Comment:** The development standard proposed to be contravened is Clause 4.3(2) Height of Buildings as represented on the Height of Buildings Map, which is a standard not 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.*

**Comment:** This submission is a written request for consideration by the consent authority.

Compliance with the development standard is considered unreasonable and unnecessary in the following circumstances:

- the non-compliance is limited to architectural roof features only, which comprise decorative elements on the uppermost part of the building;
- the non-compliance is minor in nature;
- the proposed development is consistent with the objectives of the building height standard and the zone objectives;
- there is no loss of views or overshadowing or any adverse impacts upon adjacent properties that results of the non-compliance to the building height;
- the architectural roof features are not intended as an advertising structure,
- the roof form does not include floor space area and is not reasonably capable of modification to include floor space area,
- the building height does not create additional overshadowing on any adjacent building, and
- there is no building equipment for servicing the building (including air conditioning plant) contained in or supported by the roof feature.

The development is clearly consistent with the zone objectives which encourage a variety of housing types within a high density mixed use environment. Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard. The more recent Land and Environment Court decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 reinforced that it was necessary to demonstrate the development achieves better outcomes for and from development by allowing flexibility in particular circumstances.

The circumstances applicable are that the development is consistent with the provisions of Clause 5.6 of the LEP, which permits breaches of the maximum building height by architectural roof features where the requirements of that clause are satisfied. The proposed architectural roof features create a unique and distinctive roof form and that is respectful of the site's historic context.

The decorative roof features are also being used for a very functional purpose, providing light and ventilation to upper level apartments.

Compliance with the objectives of the architectural roof features clause indicate that strict compliance with the development standard is unreasonable and unnecessary in the circumstances as it would not achieve the best planning outcome.

*(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.*

**Comment:** The objectives of Clause 4.3 Height of Buildings relevant to the site 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,*

Each of these objectives are satisfied by the proposal. The negligible breach to the maximum building height is a consequence of the architectural roof form, which is intended to be both decorative and functional. The breach to the maximum building height will have no adverse impact on the streetscape or rhythm of the established built form within the locality.

The site is zoned B4 Mixed Use pursuant to the LEP. The objectives of the zone are:

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

The proposed variation to the building height does not hinder the proposal's ability to satisfy the zone objectives. The development will continue to provide for a mix of compatible land uses by integrating retail and residential development.

*(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*



**Comment:** The contravention raises no matters of State or regional significance. It is considered the proposal is consistent with the desired future character of development in the precinct, there is no public benefit in maintaining the development standard given the mitigating circumstances relating to the site's topography, and the very minor nature of the variation proposed. No other matters are required to be taken into consideration by the Director-General.

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*

*(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

*Note. When this plan was made it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*

**Comment:** The proposal is not for contravention of a subdivision control.

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

**Comment:** The consent authority will keep a record of the determination.

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following—*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

*(ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*

*(cab) clause 4.5A (Balconies on certain residential flat buildings),*

*(cb) clause 5.3A (Development below ground level in Zone RE1),*

*(cc) clause 6.10 (Heritage floor space),*

*(cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*

*(cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*

*(ce) clause 6.17 (Sun access planes),*

*(cf) clause 6.18 (Exceptions to sun access planes),*

*(cg) clause 6.19(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,*

*(cga) clause 6.26 (AMP Circular Quay precinct),*

*(cgb) clause 6.29 (58–60 Martin Place, Sydney),*

*(cgc) clause 6.33 (230–238 Sussex Street, Sydney),*

*(cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*

(cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),  
(cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),  
(cgg) clause 6.41 (7–15 Randle Street, Surry Hills),  
(cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),  
(cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),  
(cgj) clause 6.43 (Danks Street South Precinct),  
(ch) Division 1 of Part 7 (Car parking ancillary to other development).

**Comment:** N/A.

A handwritten signature in black ink, appearing to read 'Daniel', with a long horizontal stroke extending to the right.

Daniel McNamara

**Director**