

# **Attachment D**

<p><b>Clause 4.6 Variation Request – Building Height</b></p>
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# Attachment A - clause 4.6 written request to justify the contravention of the height of buildings development standard

## Introduction

This request for an exception to a development standard is submitted for the proposed potential variation of the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 (the LEP).

The request relates to a DA for proposed development is for alterations, conservation and landscaping works at 113 Commonwealth Street, Surry Hills.

## Clause 4.6 Exceptions to development standards

LEP clause 4.6(2) provides that development consent may be granted for development even though the development would contravene a development standard imposed by the LEP or any other environmental planning instrument.

However, LEP clause 4.6(3) states that 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 circumstance of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with LEP clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

## Development Standard to be varied

LEP clause 4.3 states:

- (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,*
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The height of a building is defined as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The maximum permissible height applicable to the site, shown on the LEP's Height of Buildings Map, is 9 metres.

## Extent of Variation to the Development Standard

The submitted architectural drawings include notations for roof framing repairs to be carried out subject to engineer's advice. Potentially this could include works to the structural element of the roof ridge and which has a maximum height of 10.28m.

The height of the existing structural element exceeds the 9m height control by up to 1.28m and which is a 14% variation to the height of buildings development standard as illustrated in Figure 12 below.

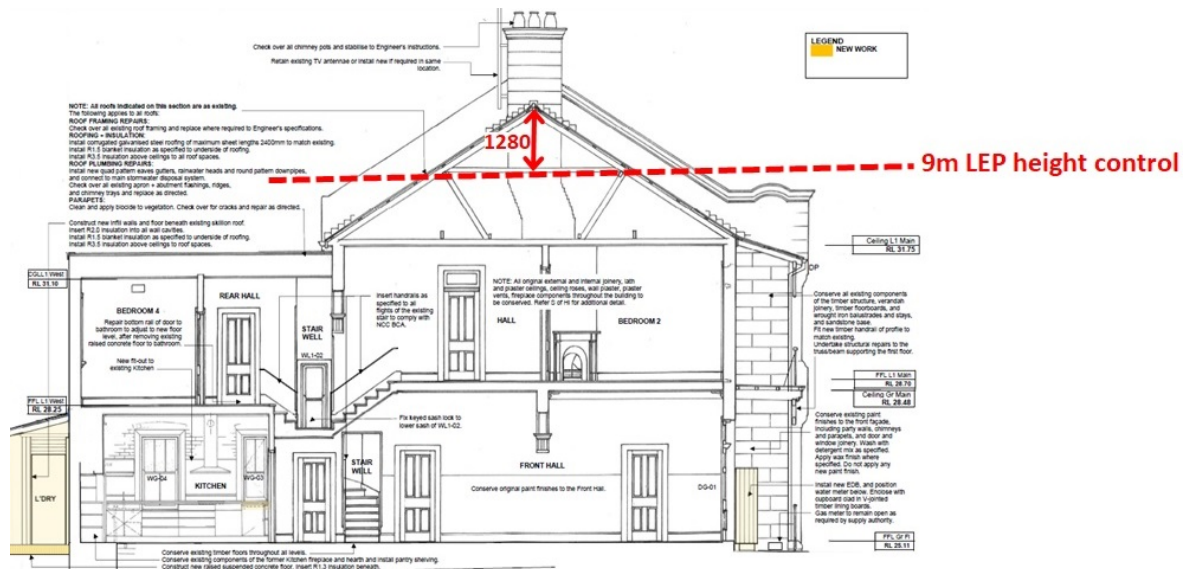


Figure 12 – Section illustrating potential breach of the 9m height control.

## Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

A development standard is often demonstrated to be unreasonable or unnecessary by satisfaction of the first part of the five-part test set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

This request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

### 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Each of the objectives of the height of buildings development standard, as specified in LEP clause 4.3 are addressed below.

(a) to ensure the height of development is appropriate to the condition of the site and its context

The proposed potential works that breach the 9m height control do not seek to change the height of the existing building. Rather those works are to repair any structural elements that need it and are to maintain the roof form that has existed on the site for over 100 years.

*(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas*

The site does not contain a heritage item and is not located within a conservation area. However, it is in the vicinity of several local heritage items and the Fosterville conservation area (C66).

As stated in the SHI that accompanies this DA, the extensive intact terrace row of which the subject site forms part, makes a significant contribution to a number of streetscapes. The terrace row is significant as part of a rare group of six Federation terrace rows within the former Fosterville Estate.

The proposed potential works that breach the 9m height control are to retain and enhance the significance of the site and extant building fabric contained therein.

*(c) to promote the sharing of views*

The proposed potential works that breach the 9m height control will not impact on any scenic or iconic views.

*(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*

The proposed potential works that breach the 9m height control will maintain the existing building's relationship to buildings within Central Sydney.

**2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives as detailed above.

**3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

The underlying objectives of the height of buildings development standard are to ensure development is appropriate to its site and context, and to ensure appropriate height transitions between new development and heritage items and buildings in conservation areas.

If strict compliance was required in this case it would result in a significant alteration of the roof form. Such an alteration would not be in-keeping with the adjoining buildings in the terrace row and the other group of six Federation terrace rows within the former Fosterville Estate and which is now largely protected by the Fosterville conservation area (C66).

Strict compliance would defeat or thwart the objectives and therefore compliance is unreasonable.

**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;**

This request does not seek to justify the proposed potential works that breach the 9m height control on this basis.

**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.**

This request does not seek to justify the proposed potential works that breach the 9m height control on this basis.

**Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?**

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- for there to be 'sufficient' environmental planning grounds to justify a written request under LEP clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in LEP clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

This request justifies the potential breach of the 9m height of buildings control on the basis that the existing building that is part of an intact terrace row that makes a positive contribution to several streetscapes. It responds sympathetically to its context including nearby heritage items and the Fosterville conservation area. The proposed potential works that breach the 9m height control are to repair and maintain the existing building.

Strict compliance with the development standard would be to the detriment of the building's existing relationship with the terrace row, the streetscape and surrounding heritage items.

In this circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the current height control and without any adverse impact to adjacent sites.

The objects specified in section 1.3 of the Act are:

- (f) *to promote the sustainable management of built and cultural heritage*
- (g) *to promote good design and amenity of the built environment*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants*

The proposed development is consistent with the objects of the Act in that the proposed potential works that breach the 9m height control:

- are to maintain the existing building and its sympathetic relationship to nearby heritage items and conservation area;
- are contained within the existing building envelope and will not create any additional amenity impacts; and
- is to maintain the building.

For these reasons, it is demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

**Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)**

LEP clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, environmental planning grounds are established, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

**Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives**

LEP clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

**Objective of the Development Standard**

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

**Objectives of the Zone**

LEP clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone.

The objectives of the B4 Mixed Use 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 subject DA does not propose a change from the existing residential use of the site which has carried on in harmony with surrounding residential and other uses in the neighbourhood for many years.

The site is close to train and bus services and bicycle paths.

The continued residential use of the site will support the viability of centres including the CBD and the local centres of Oxford and Crown Streets.

The above discussion demonstrates that the proposal will be in the public interest notwithstanding the proposed variation to the building height development standard because it is consistent with the objectives of the standard and the objectives for development within the B4 Mixed Use zone.

### **Clause 4.6(5) Secretary Considerations**

The matters for consideration under Clause 4.6(5) are addressed below:

*(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,*

The contravention of the standard does not raise any matters of significance for state or regional environmental planning.

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

*(b) the public benefit of maintaining the development standard,*

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard.

### **Objectives of Clause 4.6**

The specific objectives of 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.*

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of LEP clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard. Requiring strict compliance with the height of buildings development standard would be detrimental to the existing building and its contextual relationship.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of LEP clause 4.6 in that allowing flexibility in relation to the minimum height of buildings development standard will achieve a better design outcome in this instance in accordance with objective 1(b).

### **Conclusion**

Strict compliance with the height of buildings development standard contained in LEP clause 4.3 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation.

For these reasons it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed to facilitate maintenance and repairs to the existing roof structure.