

# **Attachment C**

## **Clause 4.6 Variation - Height of Buildings**

# REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

Cl 4.3, Sydney LEP 2012: Height of Buildings



18 City Road, Chippendale NSW

Boarding House

17 February 2021 | P306

(Revision A)

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## 1.0 INTRODUCTION

This request to contravene a development standard in respect of height of buildings under Clause 4.3 of Sydney LEP 2012 is submitted to accompany a development application for:

*alterations and additions to an existing building and change of use to a boarding house*

at 18 City Road, Chippendale NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

## 2.0 THE DEVELOPMENT STANDARD

### 2.1 The applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan 2012 (SLEP 2012)

### 2.2 The number of the relevant clause:

Clause 4.3 – Height of buildings.

### 2.3 The provisions of the relevant clause:

Clause 4.3 – Height of buildings.

The development standard to which this request for contravention relates is Clause 4.3(2) of SLEP 2012 – Height of buildings, which specifies that:

*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 nominated height on the map is 9m.

## 3.0 THE CONTRAVENTION SOUGHT:

### 3.1 Description of the contravention:

The proposed development would contravene the development standard as follows:

#### 3.1.1 Maximum building height:

9m

#### 3.1.2 Existing height:

10.1m (to parapet)

#### 3.1.3 Proposed height:

10.944m (to top of roof)

#### 3.1.4 Extent of proposed contravention:

1.944m (21.6%)

### 3.1.5 Illustration of proposed contravention:

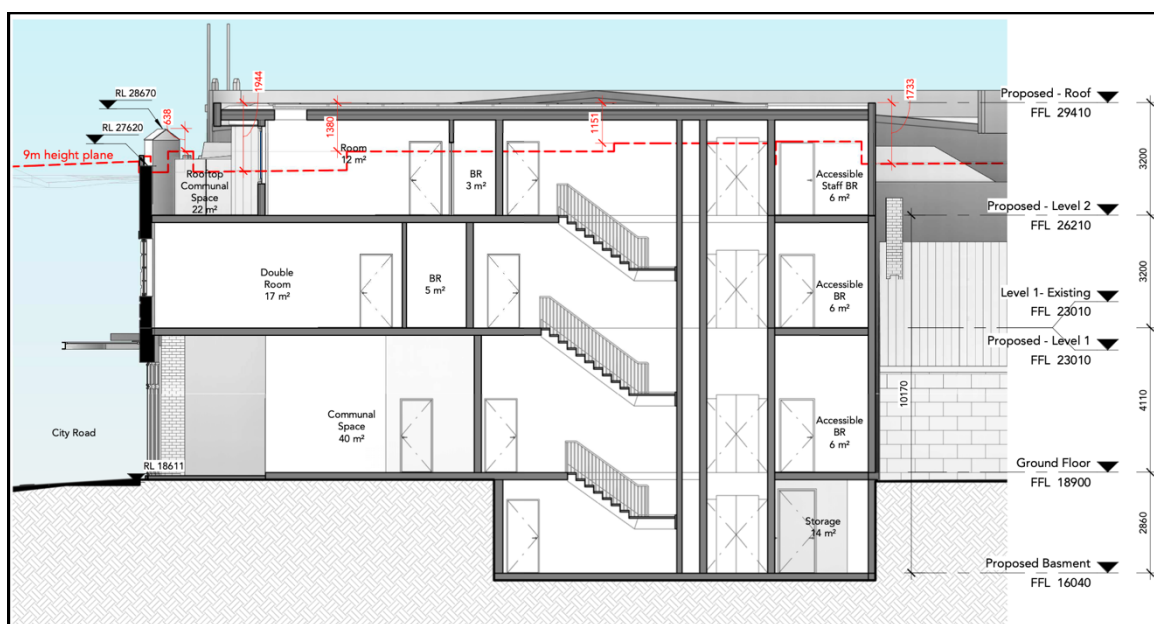


Figure 1: Illustration of contravention (east and west elevations).



Figure 2: Context of the development in City Road.



Figure 3: Relationship of proposal to adjacent heritage item in Elim Street showing transition in scale.

### 3.1.6 Causes of the contravention:

The contravention would result from the following existing circumstances

- The non-compliant height of the existing building; and
- The retention of the existing first floor level to facilitate an appropriate heritage conservation outcome (in respect of window sill heights, structural stability and retention of original fabric) resulting in a higher ground floor ceiling height than would ordinarily be necessary and which could be compliant if not for this consideration.

## 4.0 PROVISIONS OF CLAUSE 4.6

### 4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. The objectives of Clause 4.6 are as follows:

#### Cl. 4.6(1) Objectives of Clause

Clause	Control	Justification
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the standard which sets a maximum building height. It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances	<p>The proposal would achieve better outcomes:</p> <ul style="list-style-type: none"> <li>• <b>For</b> the development: The contravention would permit: <ul style="list-style-type: none"> <li>• A functional internal relationship with the existing windows and improved occupant amenity; and</li> <li>• Realisation of the development potential of the site.</li> </ul> </li> <li>• <b>From</b> the development: The contravention would result in: <ul style="list-style-type: none"> <li>• Appropriate conservation of the façade of a contributory building in a heritage conservation area without major modification to the original windows fronting City Road;</li> <li>• Retention of original ground floor ceilings and first floor structural elements;</li> <li>• Surety of the structural stability of the contributory facades during the construction process;</li> <li>• Retention of the original relationships between the floor levels and window sills;</li> <li>• Provision of affordable rental housing in an area of high demand;</li> <li>• Provision of an intensity of development envisaged by Sydney LEP2012 for the site.</li> </ul> </li> </ul>

#### 4.2 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of SLEP 2012, the consent authority must consider a written request from the applicant that seeks to justify the contravention of the development standard. This justification is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	Control	Justification
4.6(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:	This written request addresses this clause.
4.6(3)(a)	That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>Compliance with the development standard is unreasonable given that:</p> <ul style="list-style-type: none"> <li>• It would enforce a height for any new work less than that of the existing building on the site; and</li> <li>• It would prevent any work being undertaken to the non-compliant elements of this contributory building.</li> </ul>
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	Contravention of the development standard would result in a more satisfactory environmental planning outcome. Specifically, the contravention would:

		<ul style="list-style-type: none"> <li>• Allow additions consistent in height with the existing building on the site;</li> <li>• Allow conservation works to the elements of the building already exceeding the height limit;</li> <li>• Facilitate the adaptive re-use of an otherwise underutilised building for a use which is sought after in the locality and serves a useful social purpose;</li> <li>• Allow appropriate conservation of the façade of a contributory building in a heritage conservation area without modification of the original windows fronting City Road;</li> <li>• Retain original ground floor ceilings and first floor structural elements which constitute original fabric of a contributory building in a conservation area;</li> <li>• Provide surety of the structural stability of the contributory facades during the construction process;</li> <li>• Retain the original relationships between the floor levels and window sills;</li> <li>• Provide of an intensity of development envisaged by Sydney LEP2012 for the site.</li> <li>• Provide affordable rental housing in an area of high demand; and</li> <li>• Provide an intensity of development envisaged by Sydney LEP2012 for the site.</li> </ul>
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### 4.3 Cl. 4.6(4)(a): Objectives of the Zone & Development Standard

Under the provisions of clause 4.6(4) – Exceptions to development standards of SLEP 2012, the consent authority must be satisfied that contraventions of development standards are consistent with the objectives of both the development standard itself and the zone in which the development is proposed. This assessment is summarised in the table below:

<b>Cl. 4.6(4): Justification of contravention against development standard and zone objectives</b>		
<b>Clause</b>	<b>Objectives</b>	<b>Justification</b>
<b>4.3(2)</b>	<b>Height</b>	
(a)	to ensure the height of development is appropriate to the condition of the site and its context,	The height would be generally consistent with the height of the existing building on the site and any exceedance would generally not be visible outside the site from most nearby vantage points (eg City Road). The height would also be consistent with that of surrounding development including the adjacent and nearby buildings along City Road, many of which have a greater height than the proposed work.
(b)	to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	The proposal is moderated in scale to less than the height limit where it can be viewed adjacent the heritage item to the east at 6 Elim Place. The height is comparable to the adjacent heritage item at 20 City Road. The additional height would generally not be visible from the heritage listed University of Sydney or Victoria Park opposite the site on City Road.
(c)	to promote the sharing of views,	The site is not located in the path of any significant view corridors and as such would not impact upon any significant views.
(d)	to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,	The site is not in the vicinity of Central Sydney or Green Square Town Centre.
(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.	Not applicable – the site is not located in Green Square.
<b>2.3</b>	<b>Zone B4 – Mixed use</b>	
	To provide a mixture of compatible land uses.	The proposal would provide affordable rental accommodation in close proximity to major retail areas and a major educational institution.
	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.	The proposal would provide affordable residential accommodation on a major public transport thoroughfare and within walking distance to the University of Sydney, Broadway Shopping Centre and the King Street retail strip.
	To ensure uses support the viability of centres.	The provision of additional affordable rental accommodation in this location would support the viability of the nearby commercial land uses but not threaten the viability of the Central Business District.

### 4.4 cl. 4.6(4)(b): Concurrence

Under the provisions of clause 4.6(4)(b) – Exceptions to development standards of SLEP 2012, the consent authority must be satisfied that the concurrence of the Secretary (of the Department of Planning and the



Environment) has been obtained before it can exercise the power to grant development consent for development that contravenes the development standard.

Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

#### 4.5 Cl. 4.6(5): Criteria for Concurrence

Under the provisions of clause 4.6(5) – Exceptions to development standards of SLEP 2012, the Council or the Secretary, as the concurrence authority, is required to consider the following matters:

Cl. 4.6(5) Criteria for Concurrence		
Clause	Control	Justification
(a)	whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention of the development standard is associated with minor, local development. It would not materially impact demand for transport or other infrastructure. As such, it would not raise any matter of significance for State or regional environmental planning.
(b)	the public benefit of maintaining the development standard, and	Maintenance of the development standard would not, in this case, result in any public benefit such as: <ul style="list-style-type: none"> <li>Protecting the character of the streetscape or the conservation area;</li> <li>Avoiding unacceptable overshadowing, excessive traffic generation;</li> <li>Protecting trees or other vegetation; or</li> <li>Preventing privacy or noise impacts upon surrounding properties.</li> </ul>
(c)	any other matters required to be taken into consideration by the Secretary before granting concurrence.	The matters requiring consideration are addressed above.

#### 5.0 THE FIVE PART TEST

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

The Five Part Test: (in accordance with Preston CJ in <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827)		
Part	Test	Discussion
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 3(c) above.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard have been met and therefore strict compliance is unnecessary.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object of the development would be thwarted if compliance were required in that the proposal would not achieve one of the objectives of the standard being 'to ensure the height of development is appropriate to the condition of the site and its context'.
4.	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard	The existing development already breaches the development standard therefore compliance is unreasonable.

	and hence compliance with the standard is unnecessary and unreasonable	
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.	Not applicable. The zoning of the land is considered appropriate.

## 6.0 CONCLUSION

This Clause 4.6 contravention request to clause 4.3 – Height of buildings of Sydney LEP 2012 should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

- a) The development meets the stated objectives of clause 4.3, specifically:
  - 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,
- b) The development meets the zone objectives of the Mixed USe zone, specifically:
  - 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.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, specifically:
  - The contravention would:
    - Allow additions consistent in height with the existing building on the site;
    - Allow conservation works to the elements of the building already exceeding the height limit;
    - Facilitate the adaptive re-use of an otherwise underutilised building for a use which is sought after in the locality and serves a useful social purpose;
    - Allow appropriate conservation of the façade of a contributory building in a heritage conservation area without modification of the original windows fronting City Road;
    - Retain original ground floor ceilings and first floor structural elements which constitute original fabric of a contributory building in a conservation area;
    - Provide surety of the structural stability of the contributory facades during the construction process;
    - Retain the original relationships between the floor levels and window sills;
    - Provide of an intensity of development envisaged by Sydney LEP2012 for the site.
    - Provide affordable rental housing in an area of high demand; and
    - Provide an intensity of development envisaged by Sydney LEP2012 for the site.

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of height of buildings in clause 4.3 of SLEP 2012.