

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
--

Clause 4.6 Variation Request
Height of Buildings (Clause 4.3)
Sydney LEP 2012

Hotel and Boarding House Development at 233 and 235 Riley Street, 153-159
Campbell Street, and 8-10 Little Riley Street, Surry Hills



Prepared by Planning Lab
Issued on 14 December 2020

Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the Sydney Local Environmental Plan 2012 (SLEP 2012) to support a development application (DA) submitted to City of Sydney Council for the redevelopment of the Porterhouse Hotel site comprising 233 and 235 Riley Street, 153-159 Campbell Street, and 8-10 Little Riley Street, Surry Hills ('the site').

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the SLEP 2012. Specifically, this request seeks to vary the 12 m height standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Clause 4.3 of the City of Sydney LEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Sydney Local Environmental Plan 2012, or any other environmental planning instrument.

However, 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 clause 4.6(3) the applicant requests that the height of building development standard be varied.

What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the City of Sydney Local Environmental Plan 2012 (SLEP).

What is the zoning of the land?

The site is zoned B4 – Mixed Use pursuant to the SLEP. Refer to **Figure 1**. Boarding houses and food and drink premises (Hotel/Pub) are permissible in the B4 zone with development consent.

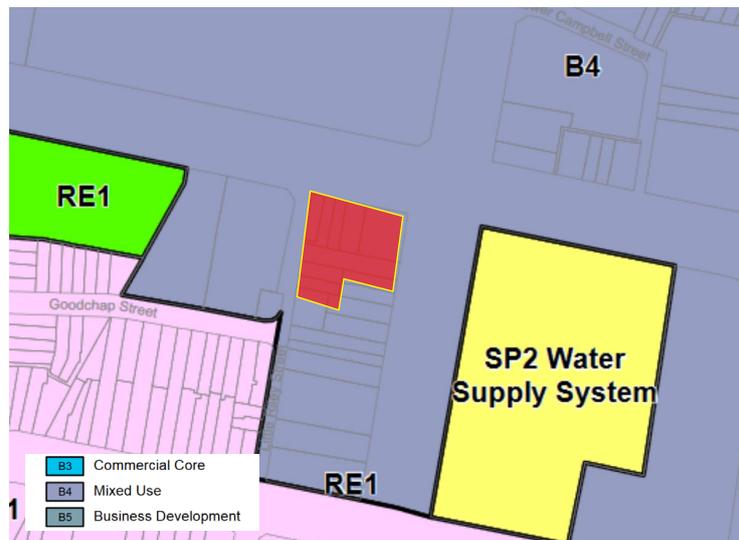


Figure 1: Extract of SLEP 2012 Zoning Map (subject site shaded in red)

Source: NSW Legislation

What is the development standard being varied?

Clause 4.3(2) of the SLEP provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area 'P' on the Height of Building Map and accordingly, a Height of 12 m applies as shown in **Figure 2**.

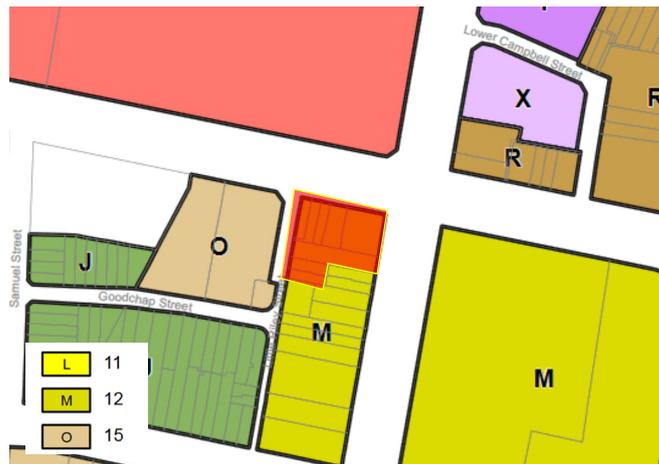


Figure 2: Extract of SLEP 2015 Height of Building Map (subject site shaded in red)

Source: NSW Legislation

Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

The site and its context

The site is located within the inner-city suburb of Surry Hills approximately one kilometre south-east of the Sydney Central Business District and contains 6 adjacent properties, being 233 and 235 Riley Street, 153-157 and 159 Campbell Street, and 8 and 10 Little Riley Street, Surry Hills which are located in the northern portion of the block bound by Campbell Street to the north, Riley Street to the east, Reservoir Street to the south and Little Riley Street to the west. The combined site area is 757 m².

Extent of Variation to the Development Standard

The vast majority of the proposed building envelope is below or in line with the 12 m height limit. However, the maximum building height, as measured from the 'existing' ground level, is 13.10 metres (RL 55,18) at the ridge line of the proposed new roof top addition as indicated in the architectural drawings prepared by Squillace Architects. Therefore, the proposed development breaches the height standard by a maximum of 1.1 m (9.1%).

The exceedance, being the portion of the building above the 12 m height limit, is attributed to the top section of the proposed new attic level (RL 55,18) and the lift overrun (RL 54,35 or 13.05 m). The extent of the height breach is shown in **Figures 3** and **Figure 4** below.

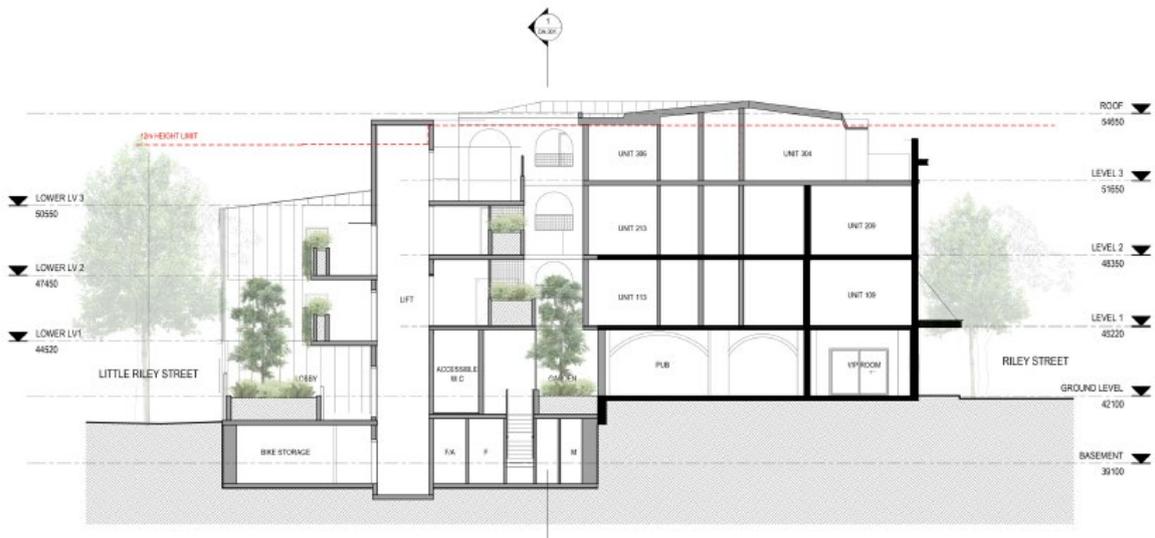


Figure 3: Height Plan – Section (Source: Squillace Architects)



Figure 4: Height Plan – Axonometric View (Source: Squillace Architects)

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

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the 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.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council’s actions in granting consents departing from the standard and hence the standard is unreason
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position 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;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in Table 1 (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

Demonstrating that the proposal will have no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Development Standard Objectives

Objective	Discussion
<p>1(a) to ensure the height of development is appropriate to the condition of the site and its context,</p>	<p>The proposed massing of the building across the site is the result of a considered analysis of the site and surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit and residential amenity for both the residents of the proposed development and neighbouring residential buildings. In order to minimise overshadowing and privacy impacts to the neighbouring apartments at 145-151 Campbell Street, the proposal has been designed to minimise the building height along Little Riley Street, and instead provide the addition mass over the existing Porterhouse building. This creates a stepped building form in line with the fall of the natural ground at Campbell Street (Figure 5).</p> <div data-bbox="619 958 1353 1572" data-label="Image"> <p>The image is an axonometric architectural rendering of a building's height plan. It shows a multi-story building with a complex, stepped roofline. A specific section of the roof is highlighted in a bright yellow color, indicating a key feature of the design. The building is shown in a perspective view, with other buildings and a street visible in the background. The overall style is clean and technical, typical of architectural site plans.</p> </div> <p>Figure 5: Height Plan – Axonometric view (Source: Squillace Architects)</p> <p>Whilst the maximum height of the building as measured to the ridge line of the proposed attic addition is 13.1 m, that vast majority of the structures of the proposed development complies with the 12 m height limit. Furthermore, the non-compliant components of the building do not cause any impact on the surrounding public domain or/and neighbouring properties in</p>

terms of overshadowing, bulk and scale and privacy, as demonstrated in the below assessment:

Overshadowing Impacts

An assessment of the potential overshadowing impacts of the proposed development has been prepared by Squillace Architects (Drawings No. DA-401 B, DA-402 B, DA-431 B, DA-432 B, and DA-452 B DA-460 B). It is noted that these shadow studies demonstrate that the existing east facing apartments at 145-151 Campbell Street currently do not receive more than 2 hours of solar access to their living areas and balconies.

As mentioned before, the proposed development has been stepped towards the western and southern boundaries to allow solar access to the residential apartments behind. The detailed analysis undertaken by Squillace Architects indicates that the proposal will marginally increase the extent of shadow cast by the existing development on the site, however the impact on the current level of solar access of surrounding residential developments will be negligible (i.e. 237 & 239 Riley Street and 145-151 Campbell Street).

145-151 Campbell Street

Some additional shadow will be cast between 9.00 am and 9.30 am on the floor of the balcony of a first-floor apartment located on the Little Riley Street elevation of the building. However, the proposal does not overshadow the balcony at 1m above the floor level.

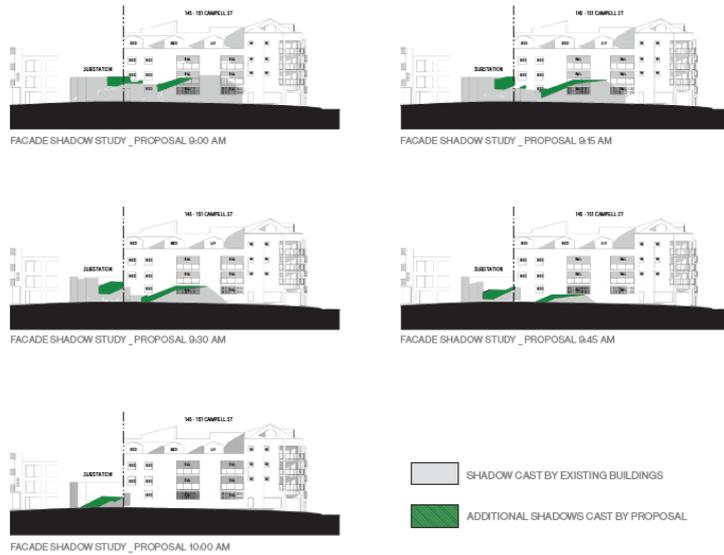
237 Riley Street

The shadow analysis indicates that the window to the principal living space of the terrace house and its private open space are already fully overshadowed. Therefore, the shadows generated by the subject proposal which fall after 12.00 pm on the roof and rear elevation of the building resulting in a negligible impact.

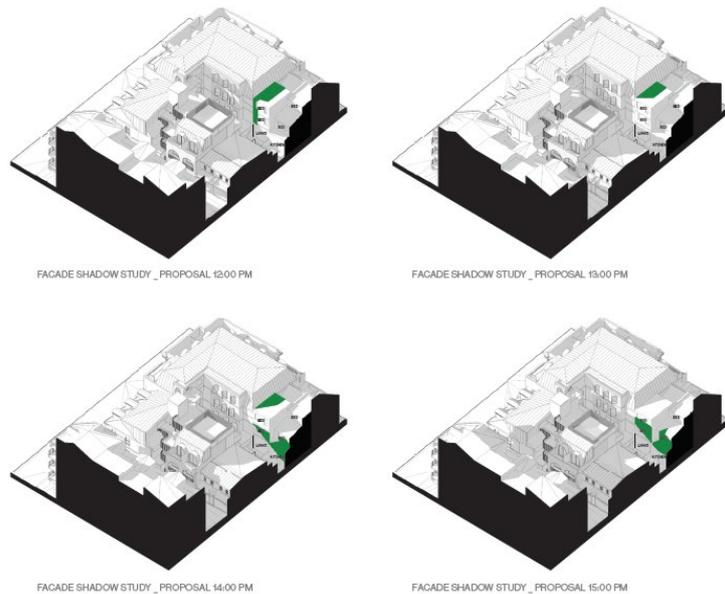
239 Riley Street

Some overshadowing occurs after 2.00 pm when the shadows generated by the proposed works fall on a door to a service corridor at the rear of the terrace house.

Overshadowing Diagrams – Proposed Development



Overshadowing of 145-151 Campbell Street between 9.00 am to 10.00 am @ June 21



Overshadowing of 237 & 239 Riley Street between 12.00 pm and 15.00 pm @ June 21

Visual Bulk

The proposed built form complements the existing ‘layered’ streetscape character, caused by the topography, offset street levels and varied development within the area over the past few

decades and maintains the street hierarchy, with taller buildings to the street corners. The new roof top addition is setback from the parapet of the Porterhouse Hotel and is overall small in its scale. It will largely be obscured from the public domain due to the existing parapet

A view impact study has been prepared by Squillace Architects as part of a detailed Design Report which has been submitted with the application. This study confirms that the proposed attic addition will be mostly concealed from view. Refer to below extracts from the Design Report:



Proposed – View from intersection of Campbell Street.



Proposed – View from Campbell Street.



Proposed – View from Riley Street.

Visual and Acoustic Privacy

The variation of the height standard does not result in additional overlooking of neighbouring residential properties or potential noise disruption as the breach relates to building’s elements that are adequately separated from residential development.

1(b) to ensure appropriate height

The site is not a heritage item, nor is it located within a heritage conservation area or a special character area. It is, however,

<p><i>transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</i></p>	<p>adjacent to a heritage conservation area and contains several contributory items.</p> <p>A detailed in the impact assessment the accompanies the Development Application, the proposed development has been assessed to have a positive impact on the Reservoir Street and Fosterville HCA.</p>
<p>1(c) <i>to promote the sharing of views,</i></p>	<p>There will be no adverse amenity impacts to the properties located in the surrounding area in terms of views.</p>
<p>1(d) <i>to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</i></p>	<p>N/A</p>
<p>1(e) <i>in respect of Green Square:</i></p> <p><i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p><i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p>	<p>N/A</p>

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

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

The underlying objective or purpose of the height standard is relevant. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no adverse impacts to adjacent properties.

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

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the context of the site and maintains or improves views across the site, provides a transition to adjacent properties and preserves the privacy of adjacent properties. Due to the design, location and configuration of the proposed building envelope, the proposal successfully achieves these objectives.

Strict compliance with the height control would not reduce the impact of the development on the streetscape or neighbouring properties. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the site.

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;

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved, particularly where the variation is minor.

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.

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and

unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the standard as detailed above.
- The proposed development complies with the floor space standard and the height in storeys control. As such, the scale of the building is consistent with the desired character of the locality notwithstanding a small variation is proposed to the height of buildings standard.
- Most of the elements of the development which exceed 12 metres are not visible from the public domain because they have been appropriately setback behind the existing building parapet.
- A solar analysis prepared by Squillace Architects accompanies the subject application and demonstrates that the proposed areas of non-compliance do not result in any meaningful difference compared to a compliant height.
- The development has been kept well below the applicable height control at the western frontage to Little Riley Street to allow for the protection of the current level of solar access to east facing units at the lower floors of 145-151 Campbell Street.
- There are no unreasonable impacts in terms of views, visual and acoustic privacy impacts to adjacent sites resulting from the proposed variation to the height development standard which would warrant strict compliance.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Having regard to the planning principle established in the matter of *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

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

The proposed massing of the building across the site is the result of a considered analysis of the site and surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit and residential amenity.

The scale of the proposed development does not result in any unreasonable impacts on the surrounding properties in terms of loss of solar access, loss of privacy or visual impact. The architectural package includes a very detailed solar access analysis which demonstrates that the proposed scale of the development will not unreasonably overshadow residential development on surrounding properties.

The scale of the building will not be perceived as jarring or antipathetic in the existing urban design context of the site and represents a scale which is reasonably contemplated by the planning controls which apply to the site, particularly given the minor nature of the non-compliance.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and in this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard.

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)

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 in this written request 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, the establishment of environmental planning grounds is provided, 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

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 particular 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 consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 - Mixed Use. 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 development includes residential (i.e. boarding house) and food and drink (i.e. Porter House) uses which are all permissible uses within a B4 – Mixed Use zone. The site is suitably located near transport and other services. It is located approximately 800 m from Central Train Station. It is also in the vicinity of a bus stop on Campbell and Oxford Street serviced by numerous bus routes.

The proposed development will positively contribute to the vitality of the area producing positive social and economic impacts.

For the reasons given the proposal is consistent with the objectives of the B4 – Mixed Uses zone.

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.*

The architectural package prepared by Squillace Architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high-quality outcome for the site which will result in the delivery of a mixed-use development which is compatible with the character of development in this location.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any benefit to the streetscape or the amenity of adjoining properties.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. There are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.



Giovanni Cirillo

Director