

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

Cl 4.3, Sydney LEP 2012: Height of Buildings



5 Victoria Road, Glebe NSW

Alterations and additions to existing dwelling house and change of use to a dual occupancy (detached)

4 March 2022 | P397

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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 dwelling house and change of use to a dual occupancy (detached)

at 5 Victoria Road, Glebe 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 6m.

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:

6m

3.1.2 Existing height:

8.7m (to ridge of existing dwelling)

3.1.3 Proposed height:

8.7m (to ridge of Dwelling 2)

3.1.4 Extent of proposed contravention:

2.7m

3.1.5 Illustration of proposed contravention:

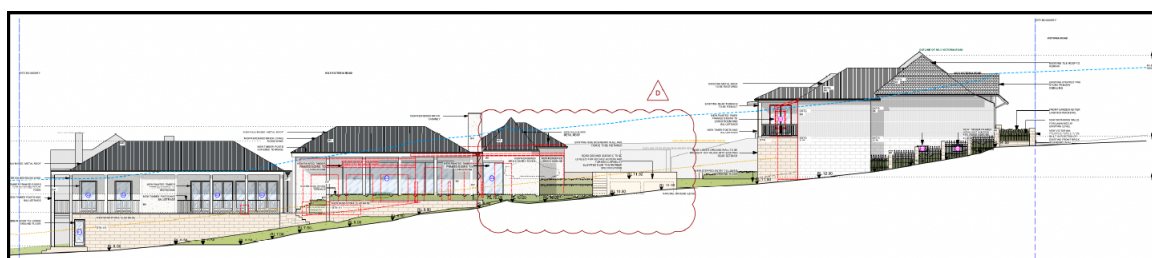


Figure 1: Western elevation showing contravention (in blue dashed line) in the context of the existing dwelling (to right).

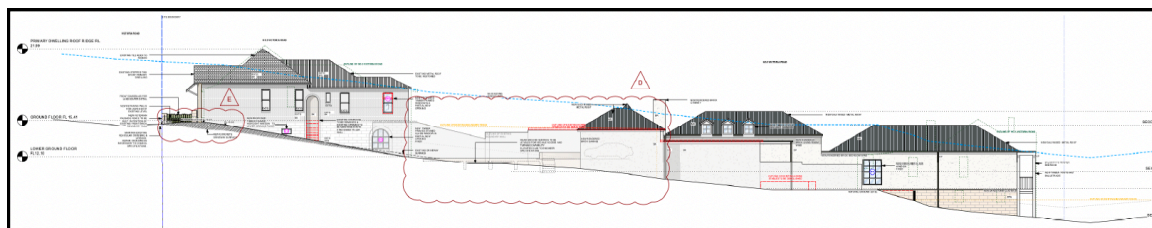


Figure 2: Eastern elevation showing contravention (in blue dashed line) in the context of the existing dwelling (to left).

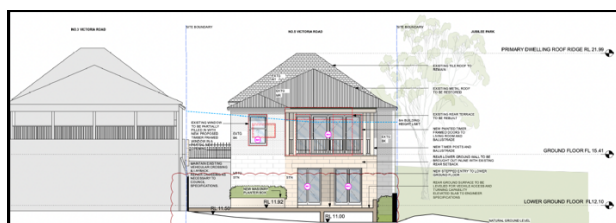


Figure 3: Rear elevation showing contravention (in blue dashed line) in the context of the adjacent dwelling at 1 Alexandra Lane.

3.1.6 Causes of the contravention:

The contravention would result from the following existing circumstances

- The non-compliant height of the existing dwelling which results in a non-compliant height for the roof of the rear balcony addition; and
- The utilisation of a hipped roof of a pitch compatible with the character of the existing dwelling and the conservation area for Dwelling 2.

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	The proposal would achieve better outcomes: <ul style="list-style-type: none"> • For the development: The contravention would permit: <ul style="list-style-type: none"> • A more architecturally appealing built form.

		<ul style="list-style-type: none"> • From the development: The contravention would result in: <ul style="list-style-type: none"> • A more appropriate roof form and pitch compatible with adjacent dwellings the character of the surrounding conservation area.
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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"> • Part of the non-compliance is associated with the non-compliance of the existing dwelling and is unavoidable. <p>Compliance with the development standard is unnecessary given that:</p> <ul style="list-style-type: none"> • The proposal would satisfy the objectives of the development standard and the zone notwithstanding the non-compliance.
4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	<p>Contravention of the development standard would result in a more satisfactory environmental planning outcome. Specifically, the contravention would:</p> <ul style="list-style-type: none"> • Allow additions to the existing dwelling consistent with its current built form; • Provide a built form, roof type and pitch for Dwelling 2 consistent with the height and character of adjacent dwellings and the broader conservation area.

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:

Cl. 4.6(4): Justification of contravention against development standard and zone objectives		
Clause	Objectives	Justification
4.3(2)	Height	
(a)	to ensure the height of development is appropriate to the condition of the site and its context,	The height, roof form and roof pitch would be consistent with that of the existing building on the site, adjacent buildings and the broader conservation area.
(b)	to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	The proposed hipped roof form would be recessive in the context of the conservation area and not compete with the character of existing contributory buildings.

(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.
2.3	Zone R1 – General Residential	
	To provide for the housing needs of the community.	The proposal would provide additional housing on the site.
	To provide for a variety of housing types and densities.	The proposal would provide additional variety of housing in the zone.
	To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal would not be inconsistent with this objective.
	To maintain the existing land use pattern of predominantly residential uses.	The proposal would continue the existing pattern of predominantly residential uses.

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"> • Protecting the character of the streetscape or the conservation area; • Avoiding unacceptable overshadowing, excessive traffic generation; • Protecting trees or other vegetation; or

		<ul style="list-style-type: none"> Preventing privacy or noise impacts upon surrounding properties.
(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' as it would enforce a flat roofed building which would be incompatible with the character of the conservation area.
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	The existing development already breaches the development standard therefore compliance is 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 R1 General Residential zone, specifically:
 - To provide for the housing needs of the community.
 - To provide for a variety of housing types and densities.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To maintain the existing land use pattern of predominantly residential uses.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, specifically:
 - The contravention would:
 - Allow additions to the existing dwelling consistent with its current built form;
 - Provide a built form, roof type and pitch for Dwelling 2 consistent with the height and character of adjacent dwellings and the broader conservation area.

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.