

Attachment C

<p>Clause 4.6 Variation Request – Height of Ceilings</p>

Clause 4.6 – Exceptions to Development Standards

Request to Vary Floor to Ceiling Height: SEPP 65 & Apartment Design Guide

Address: 13-17 Ithaca Road, Elizabeth Bay

Proposal: Alterations and additions to a residential flat building

Date: 22 April 2022

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of Sydney Local Environmental Plan (SLEP) 2012. The development standard for which the variation is sought is the recommended minimum ceiling heights specified in the design criteria in Part 4C of the Apartment Design Guide (ADG) – deemed a non-discretionary development standard by Clause 30 of *State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development* (SEPP 65).

2.0 Description of the planning instrument, development standard and proposed variation

2.1 *What is the name of the environmental planning instrument that applies to the land?*

The Sydney Local Environmental Plan (SLEP) 2012 applies to the site.

State Environmental Planning Policy No. 65 - *Design Quality of Residential Apartment Development* (SEPP 65) applies to the proposal as it involves alterations and additions to an existing residential apartment development.

2.2 *What is the zoning of the land?*

The land is zoned R1 General Residential.

2.3 *What are the Objectives of the zone?*

The objectives of the R1 General Residential zone are:

- *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; and*
- *To maintain the existing land use pattern of predominantly residential uses.*

2.4 The development standard?

Is the Planning Control in Question a Development Standard?

Clause 30 of the SEPP 65 ‘Standards that cannot be used as grounds to refuse development consent or modification of development consent’ relates to the design criteria in the ADG that specifies minimum car parking, internal apartment areas and ceiling heights. Clause 30 states the following:

30 Standards that cannot be used as grounds to refuse development consent or modification of development consent

(1) If an application for the modification of a development consent or a development application for the carrying out of development to which this Policy applies satisfies the following design criteria, the consent authority must not refuse the application because of those matters –

- (a) if the car parking for the building will be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide,*
- (b) if the internal area for each apartment will be equal to, or greater than, the recommended minimum internal area for the relevant apartment type specified in Part 4D of the Apartment Design Guide,*
- (c) if the ceiling heights for the building will be equal to, or greater than, the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide.*

Note—

The Building Code of Australia specifies minimum ceiling heights for residential flat buildings.

Clause 30(3)(b) of SEPP 65, provided below, identifies that the design criteria specified in 30(1) are non-discretionary standards for the purposes of Section 4.15(2) of the Act.

(3) To remove doubt—

- (a) subclause (1) does not prevent a consent authority from refusing an application in relation to a matter not specified in subclause (1), including on the basis of subclause (2), and*
- (b) the design criteria specified in subclause (1) are standards to which section 4.15(2) of the Act applies.*

Note—

The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant or modify development consent.

We understand Council interpret the word ‘standard’ to mean ‘development standard’ and have deemed a clause 4.6 variation request to be required if the minimum recommended design criteria for ceiling heights are not achieved.

While we do not share this interpretation, as the legislation should be read in its plain meaning, this clause 4.6 variation request is made in abundant caution to facilitate the determination of the proposed DA.

What are the objectives of the development standard?

The objectives of Part 4C of the ADG are as follows:

- *Objective 4C-1 – Ceiling height achieves sufficient natural ventilation and daylight access.*
- *Objective 4C-2 – Ceiling height increases the sense of space in apartments and provides for well-proportioned rooms.*
- *Objective 4C-3 – Ceiling heights contribute to the flexibility of building use over the life of the building.*

What is the numeric value of the development standard?

Part 4C of the ADG establishes recommended minimum ceiling heights as shown in the extract at Figure 1 below.

Design criteria	
1. Measured from finished floor level to finished ceiling level, minimum ceiling heights are:	
Minimum ceiling height for apartment and mixed use buildings	
Habitable rooms	2.7m
Non-habitable	2.4m
For 2 storey apartments	2.7m for main living area floor 2.4m for second floor, where its area does not exceed 50% of the apartment area
Attic spaces	1.8m at edge of room with a 30 degree minimum ceiling slope
If located in mixed used areas	3.3m for ground and first floor to promote future flexibility of use
These minimums do not preclude higher ceilings if desired	

Figure 1: Extract of the recommended minimum ceiling heights (Source: ADG)

2.5 Extent of variation - proposed floor to ceiling height

The floor to ceiling heights of the existing building are below 2.7m. To enhance the amenity of the apartments and achieve the acoustic requirements a 100mm ceiling/acoustic flooring zone is proposed, which will result in a minor reduction of the existing ceiling heights. The existing and proposed ceiling heights are identified in Table 1. It is noted the new addition, level 4, achieves the 2.7m ceiling height.

Existing Floor to Ceiling Heights	Proposed Floor to Ceiling Heights
• Ground floor: 2.53m	• Ground level: 2.43m
• Level 1: 2.53m	• Levels 1: 2.43m
• Level 2: 2.63m	• Levels 2: 2.53m
• Level 3: 2.52m	• Levels 3: 2.43m
	• Level 4: 2.70m

Table 1: Existing and Proposed Floor to Ceiling Heights

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- “(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”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant, principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (‘Four2Five No 1’);*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (‘Four2Five No 2’);*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (‘Four2Five No 3’);*
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*

- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

3.2 Clause 4.6 (3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the recommended minimum ceiling heights, as specified in Part 4C of the ADG, is unreasonable or unnecessary in this circumstance for the following reasons:

- The floor to ceiling heights of the existing building is less than 2.7m. The proposal maintains key structural elements of the existing building, namely the existing floor slabs which dictates the floor to ceiling heights of the proposal. The departures to the recommended ceiling heights only occur within the existing levels of the building. The proposed addition (level 4) achieves the recommended minimum 2.7m floor to ceiling height.
- The proposal is consistent with the ADG objectives relating to ceiling heights as detailed in Section 3.4.1 and summarised below:
 - The proposal ensures solar access and cross ventilation to apartments in excess of the criteria specified in the ADG.
 - The proposal accommodates large, four (4) bedroom apartments in excess of 368m² to maximise the sense of space for each apartment.
 - As illustrated in the extract of the typical layouts in Figure 2, each apartment has three (3) aspects (north-south-east or north-south-west) to maximise access sunlight and daylight to the habitable spaces.
 - The multiple aspects accommodate windows to maximise natural ventilation.
 - The generous size of the apartments, combined with the well-proportioned rooms which exceed the ADG guidelines, provides flexibility in the use of the apartments despite the reduced ceiling heights.
- The proposal is consistent with the objectives of the R1 General Residential zone as outlined in section 3.4 below.
- The amenity and acoustic benefits of providing the ceiling cavity and acoustic flooring on the ground level and levels 1 to 3, outweighs the minor (100mm) reduction in existing ceiling heights.
- The variation to the standard does not contribute to unreasonable amenity or environmental impacts on site or to adjoining or surrounding properties.
- The site is the subject of an existing consent (D/2015/1200) for alterations and additions to the existing apartment building which also has floor to ceiling heights below the ADG minimum recommended ceiling heights.

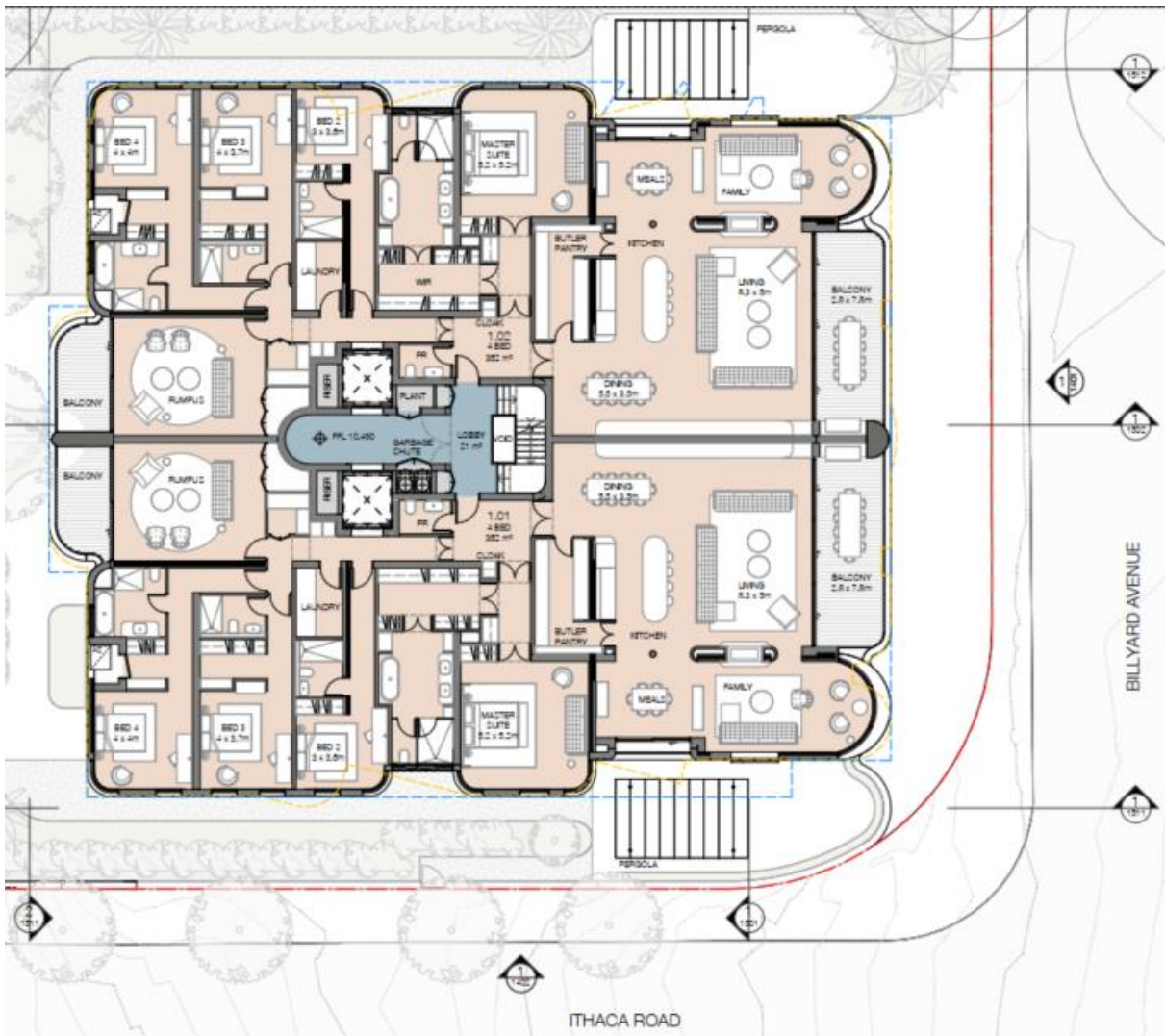


Figure 2: Typical floor plan of apartments within existing levels of the building (L1-3) (Source: SJB Architects)

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

Not contested. The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

Not contested. It cannot be said that the ceiling height standard has been abandoned, however it is noted that the existing development and approved development under DA do not meet the minimum ceiling heights.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

Not contested. The zoning of the land is appropriate for the site.

3.3 Clause 4.6 (3)(b) requires demonstration that are there sufficient environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- The floor to ceiling heights of the existing building is less than 2.7m. The proposal maintains key structural elements of the existing building, namely the existing floor slabs which dictates the floor to ceiling heights of the proposal. The departures to the recommended ceiling heights only occur within the existing levels of the building. The proposed addition (level 4) achieves the recommended minimum 2.7m floor to ceiling height.
- While the inclusion of the ceiling and acoustic flooring zones will reduce the existing floor to ceiling heights on the ground level and levels 1 to 3, it is considered that the amenity and acoustic benefits of providing the ceiling cavity and acoustic flooring outweighs this reduction.
- As a result of the reduction in the number of apartments from the existing building and the provision of two (2), much larger apartments on each floor level, the new apartments will benefit from a significant increase in daylight and sunlight, as well as cross ventilation, which will assist in offsetting the lower ceiling heights.

In conclusion, there are sufficient environmental planning grounds to justify convening the development standard.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the Ceiling Height

The proposal remains consistent with the objectives of the recommended minimum ceiling heights criteria outlined in Part 4C of the ADG despite the non-compliance, as demonstrated in Table 2 below.

Objective	Comment
<ul style="list-style-type: none"> • Objective 4C-1 – Ceiling height achieves sufficient natural ventilation and daylight access. • Objective 4C-2 – Ceiling height increases the sense of space in apartments and provides for well proportioned rooms. 	<ul style="list-style-type: none"> • Despite the non-compliance with the recommended ceiling heights, the apartments on the ground level and levels 1 to 3 achieve sufficient natural ventilation and daylight access. As detailed in the SEPP 65 Report prepared by SJB Architects: <ul style="list-style-type: none"> – All apartments (100%) are cross ventilated, which exceeds the ADG criteria for 60%. – All apartments (100%) achieve more than two hours of direct solar access to the window(s) of the living areas and private open space. This exceeds the ADG solar access criteria of 70%. – None of the apartment receive no sunlight. The ADG criteria allows for 15% of apartments to receive no solar access. – Openings are maximised to increase access to daylight and promote heat distribution. – Wall lighting is maximised to limit additional fixtures to the ceiling. – Floor layouts are repeated in order to stack services and risers are flued vertically to limit bulkheads across rooms • Apartments include well-proportioned rooms that exceed the minimum room dimensions recommended by the ADG. As each

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	apartment has openings to three (3) sides, this also contributes to a greater sense of openness.
<i>Objective 4C-3 – Ceiling heights contribute to the flexibility of building use over the life of the building.</i>	The site accommodates an existing residential apartment development within a locality that is dominated by residential uses and is not generally suited to non-residential uses. Notwithstanding, the generous size of the apartments with room sizes in excess of the ADG guidelines, is considered to provide flexibility in the use of the apartments despite the reduced ceiling heights.

Table 2: Assessment against the objectives of Part 4C-1 of the ADG

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

3.4.2 Objectives of the zone

The objectives of the R1 General Residential zone are addressed in Table 3 as follows:

Objective	Comment
<i>To provide for the housing needs of the community.</i>	The proposed development maintains the existing residential flat building with a reduced number of apartments, within the applicable height and FSR limits. The proposal provides for the housing needs of members of the community by delivering larger apartments that are comparable in size to conventional detached dwellings, without the associated maintenance. The size and design of the floor plans greater flexibility overtime to meet the changing needs of the residents
<i>To provide for a variety of housing types and densities</i>	The proposal provides housing diversity by accommodating larger apartments as an alternative to traditional detached housing and smaller apartments within the locality
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	Retail uses and other facilities and services to meet the day to day needs of residents are provided for within developments in proximity to the site.
<i>To maintain the existing land use pattern of predominantly residential uses</i>	The proposal retains and adds to the existing residential flat building, retaining the existing residential use of the site.

Table 3: Assessment against the objectives of R1 General Residential zone under the SLEP 2012

The proposal is considered to be in the public interest as the development is consistent with the objectives of the ADG design criteria, and the land use objectives of the zone.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?

The proposed non-compliance with recommended minimum ceiling heights specified in Part 4C of the ADG will not raise any matter of significance for State or Regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

3.6 Is there public benefit in maintaining the development standard?

The proposed development achieves the objective of the standard, as well as the land use zoning objectives despite the non-compliance.

It is noted that the 'development standard' in question relates to 'recommended' ceiling heights provided in the ADG. The proposed non-compliance is attributed to the proposal relating to alterations and additions to an existing residential apartment building that does not comply with the ceiling heights. As demonstrated in this submission, the proposal achieves the objectives of Part 4C of the ADG despite the non-compliance. Therefore, there is no public benefit of maintaining the standard in the circumstances.

3.7 *Is the objection well founded?*

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

The proposed development will satisfy the R1 zone objectives and the objectives of Part 4C of the ADG and does not hinder the attainment of the objects specified with Section 1.3(a), (b), and (c) of the Act.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the minimum recommended ceiling heights contained in the SEPP 65 ADG.

As demonstrated in this submission, it would be unreasonable for strict compliance with the ceiling heights to be enforced. It is concluded that the variation is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case given the proposed development:

- Achieves the applicable objectives of the ceiling height design criteria and design guidance measures of the ADG;
- Accords with the stated objectives for the R1 Residential zone;
- Has significant planning grounds to justify the variation;
- Does not give rise to any adverse environmental impacts; and
- Is in the public interest.