

Attachment C

Clause 4.6 Variation Request – Height of Buildings

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

**THE CATHEDRAL OF THE ANNUNCIATION OF OUR LADY - CONSERVATION
AND EXPANSION PROJECT**

242 Cleveland Street, Surry Hills



Prepared by Planning Lab
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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 a conservation and expansion project for the Cathedral of the Annunciation of Our Lady (“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 9 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**. A place of public worship and the associated proposed uses (i.e. theological college, theological college domiciles, museum, café) are permissible with consent in the zone.



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 'J' on the Height of Building Map and accordingly, an Height of 9 m applies as shown in **Figure 2**.



Figure 2: Extract of SLEP 2012 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 Proposal relates to 242 Cleveland Street, Surry Hills which is described by NSW Land and Property Information as Lot 1 of Deposited Plan (DP) 235433. The suburb of Surry Hills lies within the City of Sydney Council area. The Site comprises an irregularly shaped plot, bounded by Cleveland Street to the south (which runs east-west), Prince Alfred Park to the east and the rail corridor between Central and Redfern Stations to the west and north.

Extent of Variation to the Development Standard

The vast majority of the proposed building envelope is below or in line with the 9 m height limit. However, the proposed Theological College building exceeds the maximum height at its highest point by 1.02 m being a height of 10.20 m (RL 38.62). Therefore, the proposed development breaches the height standard by a maximum of 13%.

The exceedance is attributed to a small triangular section located on the north-western end of the building elevation to the rail corridor. Due to a slope on the site, the exceedance varies in its size being greater towards Prince Alfred Park and lesser towards Cleveland Street. The exceedance at all points contains only a structural element, being the slab of the building roof. The variation is not a means of achieving additional development yield on the site or an additional floor level, as demonstrated by the proposed number of storeys, being 2/3 in total, which is consistent with the Height in Storey Control in the Sydney Development Control Plan 2012.

The encroachment will have a negligible shadow and amenity impact on Prince Alfred Park as the height breach is limited to elements of the building which are located on the north-western elevation of the building to the rail corridor and are set back from the building alignment to the park.

The proposed minor encroachments will mostly be imperceptible from the park and as such, the overall bulk and scale of the building is considered to be consistent with a compliant development.

The diagram below (**Figure 3**) clearly illustrate the minor nature of the proposed height breach.



Figure 3: Maximum Building Height – 9 m Height Plan (Source: Candalepas Associates)

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 there will be 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>As discussed above, whilst the maximum height of the proposed Theological College building as measured at the north-western corner is 10.20 m, it is noteworthy that vast majority of the structure of the building comply with the 9 m height limit (see Figure 3).</p> <p>It is noted that the variation is not a means of achieving additional development yield on the site or an additional floor level. The proposed number of storeys, being 2/3 in total, is consistent with Clause 4.2.1 Building Height in Storeys SDCP 2012 (i.e. 3 storeys)</p>

	<p>As detailed in the supporting Statement of Environmental Effects (SEE) and accompanying shadow diagrams, the proposed height will not result in any adverse visual impact to the surrounding area as the non-complying portion of the building will be visually unnoticeable when viewed from the surrounding public domain.</p> <p>In addition, the shadows caused by the non-compliant elements of the building generally fall within the building itself and therefore have no material impact on the adjoining area.</p> <p>The breach of the standard does not affect consistency with this objective. In fact, the breach of the standard allows for a building that achieves a built form which is consistent with the one anticipated by the planning instruments that apply to the site.</p>
<p>1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p>	<p>The site is listed as a heritage item and is located in the vicinity of heritage conservation areas. As detailed above the proposed height is compatible within its context and is satisfactory in terms of visual impact, privacy and solar access.</p> <p>Further, the proposal has been reviewed by Urbis who has found that its design is sympathetic to the Cathedral of the Annunciation of Our Lady.</p>
<p>1(c) to promote the sharing of views,</p>	<p>There will be no adverse amenity impacts to the properties located in the surrounding area in terms of views as a result of the breach of the height standard.</p>
<p>1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p>	<p>n/a</p>
<p>1(e) in respect of Green Square:</p> <ul style="list-style-type: none"> <i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i> <i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i> 	<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 (Test 1 under Wehbe).

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. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of SLEP, despite non-compliance.

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

The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is achieved despite noncompliance.

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 varied the floor space ratio standard in circumstances where the objectives of the standard are achieved.

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 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 DCP 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.

- The proposed variation to the height of buildings control does not give rise to an impact on the amenity of the locality.

As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

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. Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits. 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 a place of public worship and associated uses (i.e. theological college, theological college domiciles, museum, café) which are all permissible uses within a B4 – Mixed Use Zone. The site has excellent access to public transport being located within 500 m of Central Station with its offer of a broad range of transport options (i.e. train, bus and light rail). The closest bus stops are found on Cleveland Street at approximately 250 m of the site. There is also a cycleway which passes by to the east of the Site.

The proposed mixed-use development will assist in activating both Cleveland Street and Prince Alfred Park and will positively contribute to the vitality of the area, producing positive cultural, social and economic impacts.

For the reasons given the proposal is consistent with the objectives of the B4 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 Candalepas Associates 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 support the ongoing use of a religious complex that has been the principal centre for the Greek Orthodox Church in Sydney since 1970.

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 height standard and the development 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. Further, 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.