

Attachment C

**Clause 4.6 Variation Request –
Height of Buildings**

Sydney LEP 2012
Clause 4.6 Exceptions to
Development Standards –
Height of Buildings

Substantial Alterations and Additions to a Dwelling House
(effectively a new dwelling) at

No. 75 Kepos Street,
Redfern

Prepared for:

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**SYDNEY LOCAL ENVIRONMENTAL PLAN (LEP) 2012
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS**

APPLICANT'S NAME: Lintel Studio

SITE ADDRESS: No. 75 Kepos Street, Redfern

PROPOSAL: Substantial Alterations and Additions to a Dwelling House (effectively a new dwelling)

1. (i) Name of the applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan (LEP) 2012

(ii) The land is zoned:

R1 General Residential. The objectives of the zone are stated, inter alia:

- 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.

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings, which is stated as follows:

- (1) *The objectives of this clause are as follows—*
- (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 outside Central Sydney,*
 - (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
 - (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.*

- (2) *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.*

Note—

No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

- (2A) *Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

2. Overview

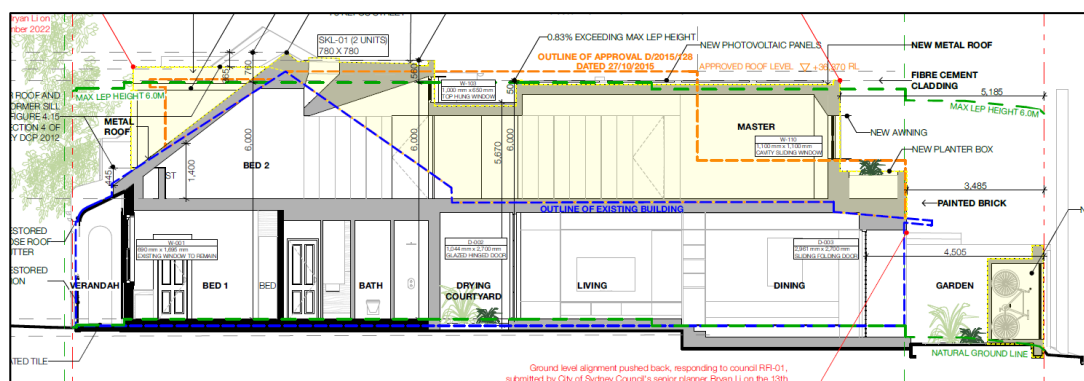
This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation is consistent with the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the Height of Buildings Map which indicates a maximum 6m applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The existing dwelling has a maximum building height of 6.57m, measured from the existing maximum roof ridge (36.37 AHD) to the underside of the existing ground floor slab immediately below. The ridge of the existing roof therefore exceeds the LEP development standard by 8.3%. The previously approved development application (D2018/128) had a maximum building height of 6.875m, resulting in a departure of 14.5%.

The proposal includes reconstruction of the existing roof at the front and a new two storey addition. The proposed building height will range from a compliant 5.67m at the rear of the dwelling to a maximum of 6.76m at the front roof ridge, which exceeds the development standard by 12.67% (see **Figure 1**).



Source: Lintel Studio

Figure 1: Section Demonstrating Maximum Height (LEP height shown in green)

The proposal will continue to have a single storey appearance from Kepos Street, and a two storey appearance at the rear which will be compatible with the height and character of existing dwellings in the locality. The existing non-compliant roof ridge at the front is currently sagging/slanted due to it being left unrepaired over many years. The proposal will repair the roof structure as part of the DA to ensure structural stability as there is no parapet wall dividing the two buildings, which will require lifting and levelling of the roof members to match the ridge level of No. 73 Kepos Street. The area of non-compliance at the rear is a function of the need to provide comfortable floor to ceiling heights of 2.7m.

The departure is confined to the roof structure only and will have no adverse impact on the amenity of neighbouring properties.

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek 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. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- | | |
|----------------------|---|
| <i>Objective (a)</i> | <i>to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i> |
| <i>Objective (b)</i> | <i>to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i> |

Flexibility is sought in the application of the height development standard to the proposed development in the circumstance of this particular case. The variation in part is a function of repairing the existing roof at the front which is sagging, and the desire to maintain comfortable floor to ceiling heights at the first floor level at the rear. The extent of variation is confined to the roof structure only. The additional height facilitates dwelling that has a single storey appearance from the street, and two storeys from the rear, which is consistent with the scale of existing and emerging development along Kepos Street (see **Figure 2** on the following page). A degree of flexibility with the height standard is considered appropriate because the proposed variation has no impact on the amenity of neighbouring sites and the development is consistent with the character of the street.



Source: Lintel Studio

Figure 2: Aerial View of Existing Development Pattern
(two storey additions are outlined in red)

The building height variation is part of the roof articulation and allows for a high-quality built form to enhance amenity, contributing to the mix of local developments. Given the site is located within a heritage conservation area, the proposed building height is considered a desirable alternative to lowering the roof level. This is because the adjoining developments appear to have overall heights that are greater than 6m, and strict compliance would create inconsistencies in the pattern of development in the street (see **Figure 3** on the following page).

Allowing flexibility with the standard will achieve a better outcome for and from the site, by facilitating a built form that is consistent with the desired future character of the streetscape.

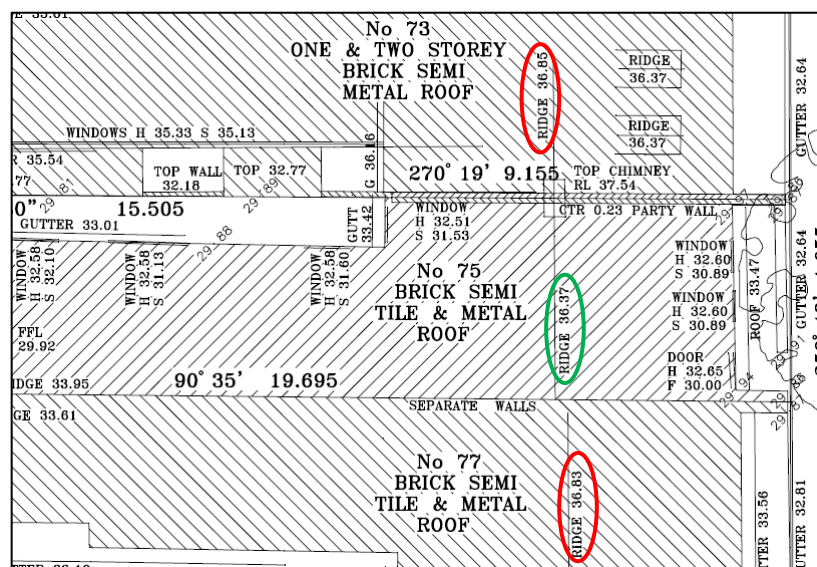
It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant test will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite the proposed development's non-compliance with the applicable height development standard, the proposal is consistent with the desired character of the area. The proposal provides a bulk and scale that is generally consistent with that envisaged by Council's controls. Reasons why the proposed development is consistent with the objectives of the height standard are explained below.

(a) to ensure the height of development is appropriate to the condition of the site and its context,

The additional height is appropriate in the context of surrounding development. The existing dwelling has a ridge level of 36.37 AHD and appears to be sagging due to neglect in repairs. The adjoining properties at Nos. 73 and 77 Kepos Street have roof levels at 36.85 AHD and 36.83 respectively (see **Figure 4** on the following page). Aligning the proposed roof with the adjoining roof of No. 73 demonstrates that the additional height will facilitate a building envelope that proposal will be consistent with the height, bulk and scale of neighbouring developments.



Source: G.K Wilson & Associates

Figure 4: Extract of the Survey Plan and Adjoining Ridge Heights

(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,

The subject site is neither a heritage item, nor located near an item, but is located within a heritage conservation area (HCA) (see **Figure 5** on the following page). Providing height transitions between new development and heritage items is therefore not applicable. Notwithstanding, the proposal is of a height that is compatible with the HCA and this is supported in a Heritage Impact Statement submitted separately.



Figure 5: LEP Heritage Map

(c) to promote the sharing of views outside Central Sydney,

The site is not in an area with significant view corridors. In any event, the area of the variation is minor and the dwelling has a height that matches those of the adjoining developments in the street. Therefore, the proposal is likely to promote the sharing of views outside Central Sydney.

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

(e) in respect of Green Square—

- a. to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and**
- b. to ensure the built form contributes to the physical definition of the street network and public spaces.**

The site is not located in or adjacent to Central Sydney or the Green Square Town Centre. Therefore, these objectives are not relevant.

Accordingly, although portions of the roof structure are above the height plane, this is unlikely to have any significant adverse impacts as the design is consistent with the built form and character of the surrounding context.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are sufficient environmental planning grounds to justify the building height non-compliance, especially as the existing building already exceeds the standard, and the proposed roof ridge will match that of adjoining development when viewed from Kepos Street. Indeed, as the additional height matches or is lower than the maximum ridge levels of the adjoining properties, it will not substantially alter the density and scale of the area. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

The proposal will retain its single storey form from Kepos Street, with the proposed additional height occurring within the roof form when viewed from the street and surrounding development. There are several environmental planning grounds that justify the proposed height, including:

- The proposal is permissible in the R1 General residential zone, is consistent with the zone objectives and satisfies the ‘unreasonable and unnecessary’ test established by the court in *Webbe*.
- The extent of variation is restricted to the roof structure, which will closely match the RLs of adjoining developments and will maintain compatibility with the built form and character within Kepos Street;
- The areas of height variation behind the front roof ridge will be lower than the maximum roof RL and will therefore not be visible from Kepos Street. While it may be visible from Kepos Lane, the two storey built form at the rear will be compatible with the adjoining two storey structure at the rear of No. 73 Kepos Street;
- Despite the variation, the proposed height facilitates a scale of residential development that continues to appear as a single storey with an attic fronting Kepos Street, and two storeys at the rear, which is compatible with the existing and emerging development in the area and consistent with the planning objectives;
- The scale of the proposal will be the same as its existing relationship within the streetscape;
- Removal of the non-complying elements to achieve strict compliance would not result in an improved planning outcome, as this would require the reduction in the height of the existing roof within the HCA. Strict compliance would result in a roof level that is lower than its adjoining neighbours, which would adversely affect the character of the HCA. In other words, the additional height achieves a more appropriate streetscape outcome for the condition of the site and its context, compared to a compliant building height.
- The areas of height variation would not create material impacts on the amenity of adjoining development in respect of privacy given they are incorporated into the existing roof structure;
- The area of height variation will not create adverse material impacts to the amenity of adjoining development in respect of solar access (as outlined in the shadow diagrams submitted separately) and views;
- There are numerous examples of developments in the locality that were supported with heights that also breached the LEP standard. These include:
 - 34 Great Buckingham Street (D/2017/625) – 33% breach
 - 133 Baptist Street (D/2021/336) – 19.6% breach
 - 183 Pitt Street (D/2014/2038) – 17.8% breach
 - 51 Great Buckingham Street (D/2013/1939) – 17% breach
 - 98 Great Buckingham Street (D/2014/438) – 16% breach
 - 183 Pitt Street (D/2021/467) – 15.7% breach
- The variation results in improved internal amenity for the occupants.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing or desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b).

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (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*

The applicant submits that the consent authority can be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this written request, and having regard to the site and locality.

In our opinion, the proposal is consistent with the objectives of the Height of Buildings Development Standard, as already demonstrated; and the R1 General Residential Zone, as discussed below:

Objective: To provide for the housing needs of the community.

Response: The proposal will improve and refine the existing dwelling house. It will provide for the needs of the future residents, while also maintaining the amenity of neighbouring properties. The proposal will also help in allowing growing families to remain in the area with the current dwelling house not catering to a young family of currently 4 members.

Objective: To provide for a variety of housing types and densities

Response: The proposal will retain the existing built form. The dwelling will contribute to the variety of housing types and densities in the locality.

Objective: To maintain the existing land use pattern of predominantly residential uses

Response: The proposal will maintain the residential use, consistent with existing land use pattern in the locality.

From this, we consider the proposal is in the public interest and should be supported.

7. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 55 of the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The height variation will enhance the amenity and functionality of the proposed dwelling without significantly, unreasonably or unacceptably impacting neighbouring properties. This is because the areas of exceedance maintain compatibility with the existing and emerging built form in the locality. The variation has been designed and demonstrated to protect amenity for both the subject site and neighbouring developments.

The public benefit of maintaining the development standard is not considered significant given that strict compliance would require significant reduction and design intrusions which would adversely affect the uniformity of the principal roof forms in the HCA. Notwithstanding the height variation, the proposal will appear consistent in the streetscape.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the precinct and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 1** on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the R1 Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.3: Height of Buildings	
12	What is the control	1 & 2	6m	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) - That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be “sufficient” in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposal is permissible in the R1 General residential zone, is consistent with the zone objectives and satisfies the ‘unreasonable and unnecessary’ test established by the court in <i>Wehbe</i>. The extent of variation is restricted to the roof structure, which will closely match the RLs of adjoining developments and will maintain compatibility with the built form and character within Kepos Street; The areas of height variation behind the front roof ridge will be lower than the maximum roof RL and will therefore not be visible from Kepos Street. While it may be visible from Kepos Lane, the two storey built form at the rear will be compatible with the adjoining two storey structure at the rear of No. 73 Kepos Street; Despite the variation, the proposed height facilitates a scale of residential development that continues to appear as a single storey with an attic fronting Kepos Street, and two storeys at the rear, which is compatible with the existing and emerging development in the area and consistent with the planning objectives; 	YES

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			<ul style="list-style-type: none"> • The scale of the proposal will be the same as its existing relationship within the streetscape; • Removal of the non-complying elements to achieve strict compliance would not result in an improved planning outcome, as this would require the reduction in the height of the existing roof within the HCA. Strict compliance would result in a roof level that is lower than its adjoining neighbours, which would adversely affect the character of the HCA. In other words, the additional height achieves a more appropriate streetscape outcome for the condition of the site and its context, compared to a compliant building height. • The areas of height variation would not create material impacts on the amenity of adjoining development in respect of privacy given they are incorporated into the existing roof structure; • The area of height variation will not create adverse material impacts to the amenity of adjoining development in respect of solar access (as outlined in the shadow diagrams submitted separately) and views; • There are numerous examples of developments in the locality that were supported with heights that also breached the LEP standard; and • The variation results in improved internal amenity for the occupants. 	
26-27	<p>2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.</p>	6	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the R1 Zone.	YES
28-29	<p>Second Precondition to Enlivening the Power – That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.</p>	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES

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