

Attachment C

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

CLAUSE 4.6 TO CLAUSE 4.3 OF SYDNEY LEP 2012

EXCEPTIONS TO DEVELOPMENT STANDARDS – **HEIGHT VARIATION**

Demolition of the existing multi-unit development and erection of 3 dwellings

50 BRAY STREET, ERSKINEVILLE

PREPARED BY

ABC PLANNING PTY LTD

August 2023

SYDNEY LEP 2012 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

This Clause 4.6 variation request has been prepared to accompany the development application for demolition of the existing multi-unit development and erection of 3 dwellings at 50 Bray Street, Erskineville. This Clause 4.6 accompanies plans dated 16 August 2023 (Rev C).

Clause 4.6 of the Sydney LEP 2012 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide appropriate flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement in *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, and more recently the decision of *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

It is noted in particular that in the SJD decision, the Court at [73] held that "*it should be noted cl 4.6 of [LEP] is as much a part of [LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome.*"

Clause 4.6 is reproduced immediately below, and each aspect of the clause is addressed in this written request.

Clause 4.6 Exceptions to development standards

- (1) *The objectives of this clause 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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (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:*
- (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.*
- (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, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.3 of the *Sydney LEP 2012* - a maximum height of 9m, demonstrated on the LEP map in **Figure 1** below. The proposed variation ranges from 856mm to the centre of the roof plane for the western dwellings to 1.43m on the western side of the western dwelling where the ground level has been subject to previous excavation in a localised manner. Such variations are displayed on the section excerpt diagrams below:

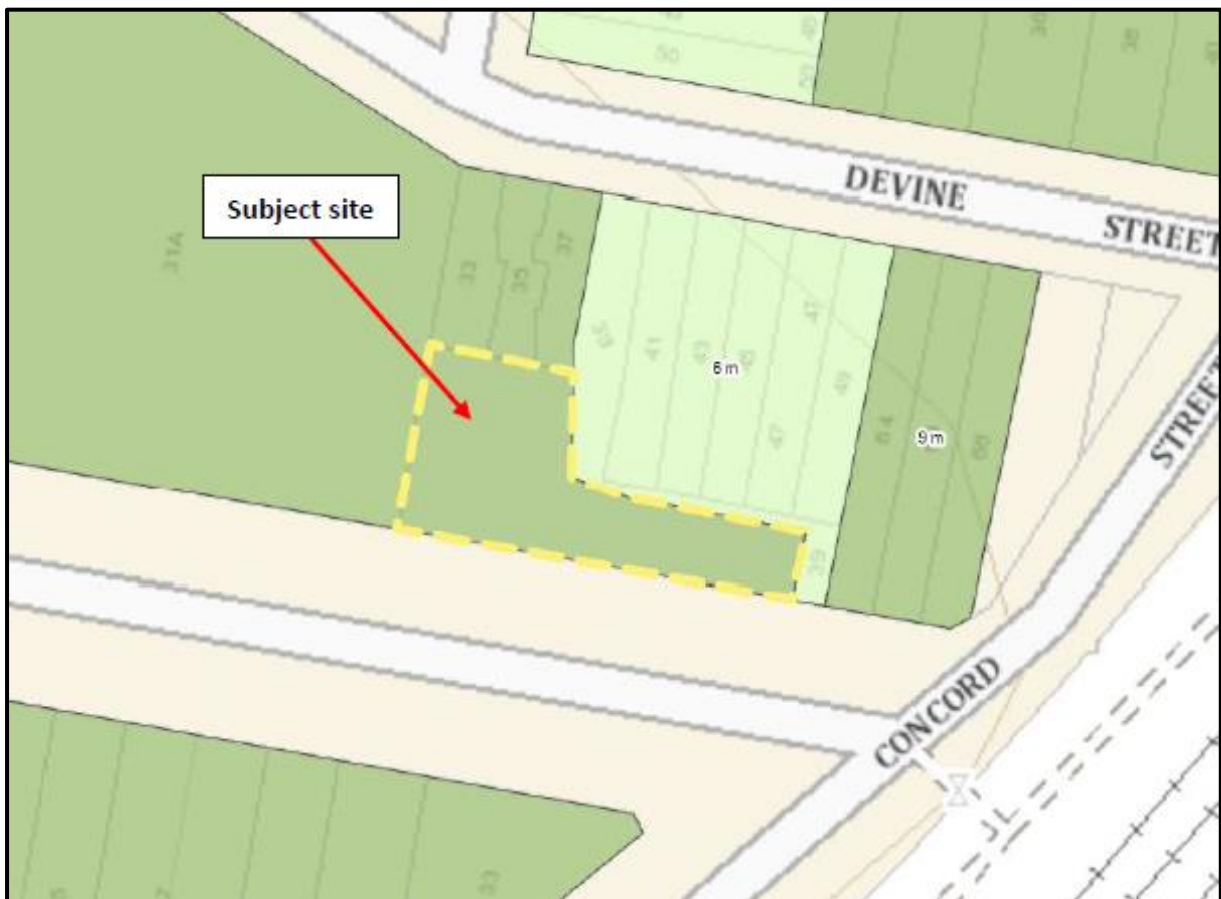


Figure 1: Building Height Map (9-metre height limit)

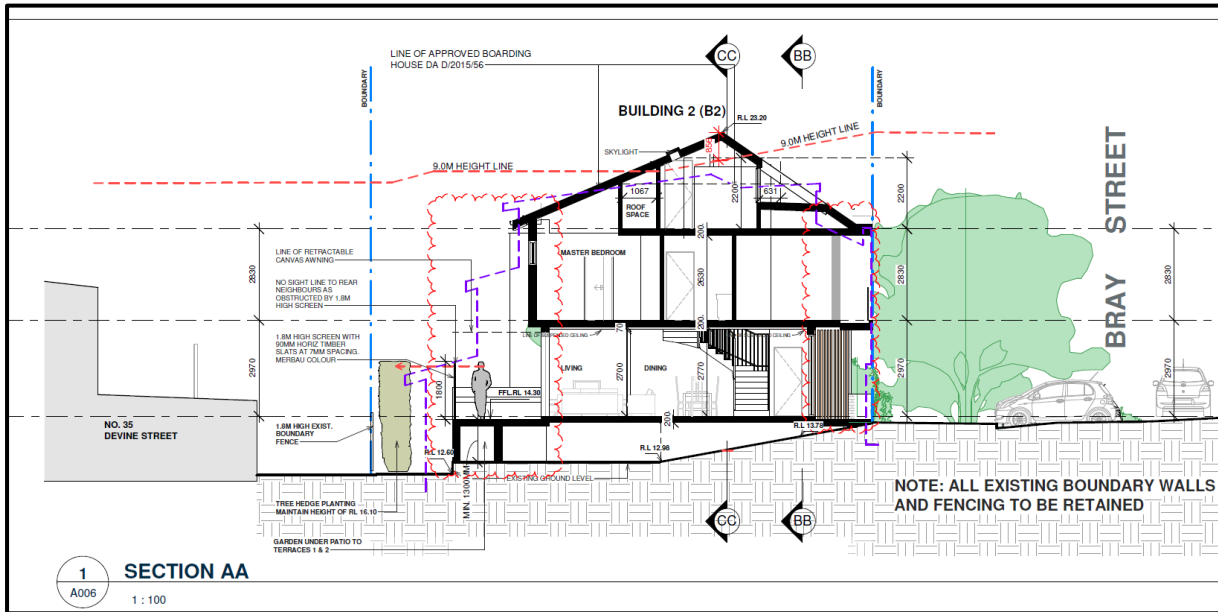


Figure 2: Excerpt of a short section highlighting the minor nature of the height variation (856mm) whilst confirming that prior excavation is responsible for the height variation

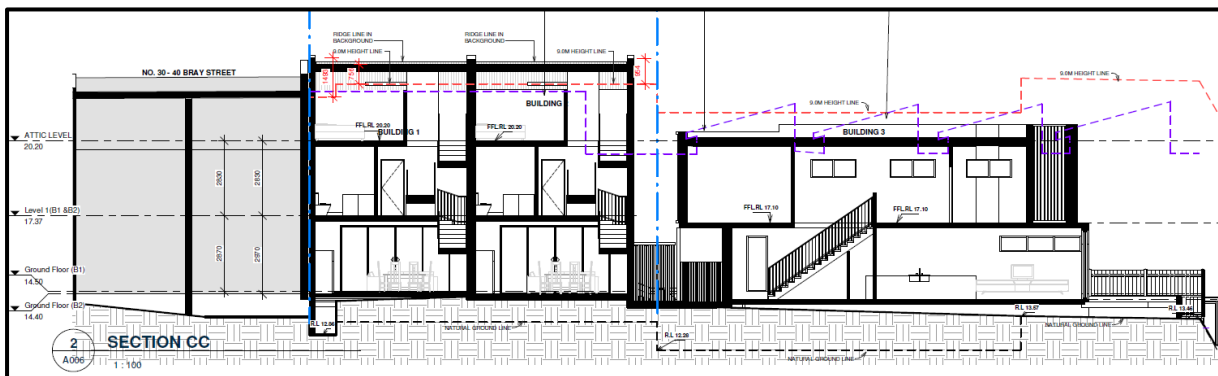


Figure 3: Excerpt of the long section, which shows the isolated extent of height variation (1.43m) at the interface with 30-40 Bray Street, whilst the diagram also confirms that the eastern portion (Building 3) is well below the height limit and is also below the height of the approved boarding house

Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two primary aspects. Both aspects are addressed below:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Assessment: It is considered that strict compliance with the development standard for height on the site is unreasonable and unnecessary in the circumstances for the following reasons:

Indiscernible nature of the variation

- The individually isolated height variations of 856mm to 1430mm are considered to be minor and inconsequential as the height variations are limited to the northern and western sides of the roof form towards the western side of the site. The height variation is due to the excavated nature of the site below street level. On this basis, the built form will present to Bray Street as being compliant with the height limit. The 2-storey dwelling house at the eastern end of the site is 1.5-2 metres below the height limit, whilst it is reiterated that the two western dwellings are below the height limit when viewed from Bray Street. The height variation does not generate any incompatibility with the 2-storey terraces to the west and the 2-storey parapet terraces to the east. On this basis, it is considered that the height variation would be imperceptible from the public domain. The fragmented form of development, rear fencing, rear setbacks and provision of landscaping within the rear boundary also limits the perception of the height variation from the rear of the properties addressed to Devine Street at the rear. The sunken nature of the rear yards and primary living areas of these properties also limits the perception of the height of these properties. The adjoining neighbouring terraces on either side have blank side walls, which avoids any perception of the height variation from these properties.

On this basis, the proposed height variation is indiscernible from both the public domain and neighbouring properties.

Streetscape

- As outlined above, the proposed height variation will not be responsible for any adverse or undesirable streetscape impacts. The proposed 2-storey and 2-storey plus attic form will sit comfortably in the established streetscape along both sides of Bray Street. The following images demonstrate that the built form will appear as being compliant with the height limit as viewed from Bray Street, noting that the eastern dwelling is substantially below the height limit (as shown below):

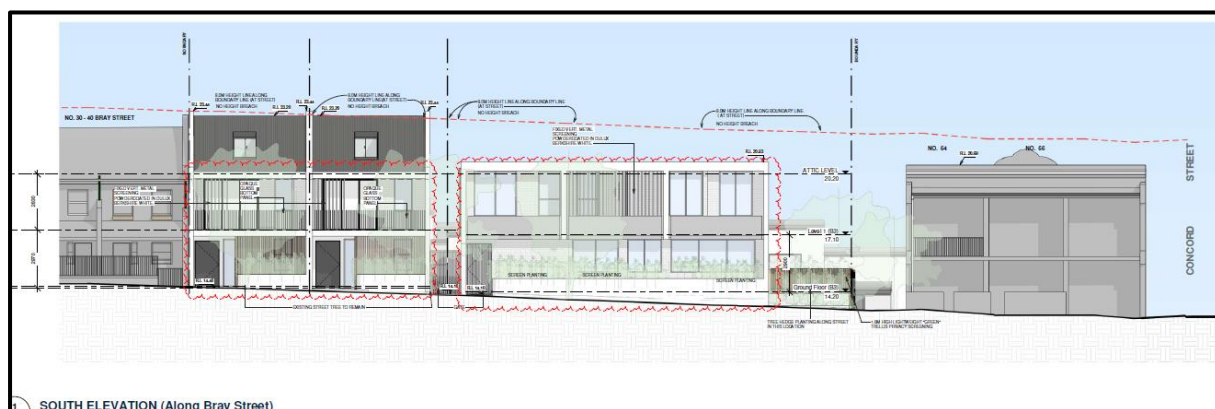


Figure 3: Streetscape excerpt, which shows that the height fronting Bray Street is well below the height limit (red dotted line) for the majority of the site frontage and that the height is also compliant as viewed from Bray Street at the western end of the site



Figure 4: Photomontage, which highlights the 2-storey plus attic form of development, which is consistent with the scale of development within the LEP and DCP height provisions, notwithstanding the numeric height variations (the height variation would be unapparent from the public domain)

Absence of impact

- The proposed height variation is not responsible for any adverse or unreasonable amenity impacts to any neighbouring property.
 - Overshadowing- The site is fortunate in its siting, whereby Bray Street lies to the south, and both adjoining neighbours to the east and west have blank side walls. The shadow diagrams on Sheets A15-16 confirm that all new shadows do not affect any neighbouring property. On this basis, the proposed height variation is not responsible for any adverse shadow impacts beyond that of a development that would be compliant with the 9-metre height standard.
 - Privacy- the roof form component, which is responsible for the height breach, is not responsible for any privacy impacts as the roof form facing towards the northern and side neighbours does not contain any openings that would be capable of overlooking impacts. Openings associated with the attic level, which includes the height variation, are oriented over the Bray Street public domain. On this basis, the proposed height variation is not responsible for any adverse privacy impacts beyond that of a development that would be compliant with the height standard.
 - Views- the proposed height variation will not be responsible for any view impacts from the public domain or adjoining dwellings.

- **Enhanced internal amenity**

The additional height beyond the 9-metre standard contributes to better internal amenity for the dwellings than a compliant development. The height variation is associated with the provision of the 3rd bedroom to the western dwellings, which allows for a higher standard of residential amenity. The 3rd bedrooms also allow for potential study areas, which could allow for work-from-home opportunities.

- **Appropriate distribution of FSR**

The height variation also allows for the achievement of the permitted FSR, which represents an orderly and economical use of the site which is consistent with the Objects of the EP & A Act, 1979. Reallocation of the floor space from the attic could allow for a reduction in height, but such redistribution of GFA to the rear would generate greater visual privacy and visual bulk impacts to adjoining properties whilst it would also generate a built form that would extend beyond the rear building line of the terraces to the west at 30-40 Bray Street. On this basis, it is considered that the additional height facilitates an appropriate distribution of compliant floor space on the site.

Heritage

- The subject application is accompanied by a heritage impact assessment by Archnex (Greg Patch). The report concludes that *the proposed development will revert the subject property to a compatible use (residential) and in a mode that is more consistent with the prevalent building type for the area, albeit in a more contemporary mode. In my view, this approach is supportable and will contribute to the character of the Former Macdonaldtown Estate Heritage Conservation Area.*

On this basis, it is considered that the proposed height variation will not generate any adverse heritage impacts in the conservation area.

- The above factors demonstrate that the height variation is reasonable in the circumstances and that the development standard is unreasonable and unnecessary in the circumstances of this application.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Consistency with the objectives of the height standard in the LEP	
Objectives	Assessment
4.3(a) to ensure the height of development is appropriate to the condition of the site and its context,	The proposed height variation provides for a height that is appropriate to its site and context as the minor variation is localised and does not generate any adverse streetscape or heritage impacts. The height variation is associated with a 2-storey plus attic form which is consistent with the height, form and scale of development contemplated by the height standard. The proposed height also sits comfortably in its context alongside the 2-storey terraces on either side of the subject site.
4.3(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,	The proposed height variation contributes to a form of development that is appropriate in its context and conservation area. The pitched roof form of the development sits neatly alongside the 2-storey plus pitched roof townhouses to the west of the site. The proposed design and associated height variation are also supported in the accompanying heritage impact assessment.
4.3(c) to promote the sharing of views outside Central Sydney,	No public or private views are affected by the proposed height variation.
4.3(d) to ensure appropriate height transitions from Central Sydney and	N/A

Green Square Town Centre to adjoining areas,	
4.3(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.	N/A
Consistency with the objectives of the R1 General Residential zone	
Objectives	Assessment
<ul style="list-style-type: none"> • 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. 	<p>It is considered that the proposed minor/localised height variation of 1.43m at the western end of the site facilitates the provision of 3 high-quality dwellings in a superior manner to one which complies with the standard.</p> <p>The height variation assists in providing for the community's housing needs and the provision of various housing types. The additional FSR could be considered to be contained in the attics, which allow for 3rd bedrooms or work-from-home opportunities.</p> <p>On this basis, the height variation assists in achieving consistency with the objectives of the R1 zone.</p>

Based on the above assessment, it is considered that strict compliance with the LEP height standard is unreasonable and unnecessary in this instance.

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

Assessment: It is considered that the above assessment, which determines that the height standard is unreasonable or unnecessary, constitutes sufficient environmental grounds. In brief, the following matters are considered to demonstrate that there are sufficient environmental grounds to permit the height variation in this instance.

- The height variation is due to the already excavated nature of the subject site in isolated locations. The height variation is limited to the parts of the site at the western end of the site and behind the front portion of the site, which has been previously excavated. It is therefore demonstrated that the height variation is generated by previous excavation that has occurred on the site. Such a scenario is consistent with the factors associated with similar circumstances in ***Merman Investments Pty Ltd v Woollahra Council [2021]***, whereby Commissioner O' Neill established that height variations in such circumstances could constitute an environmental planning ground.
- The lack of streetscape, heritage, privacy, shadow, visual bulk and view impacts are considered to constitute sufficient environmental grounds, whilst the minor and localised nature of the height variation is also considered to constitute sufficient environmental grounds on this particular site.

Other Matters for Consideration

4(a)(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

Assessment: The above assessment demonstrates that the proposed height satisfies the objectives of the height standard and the R1 zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape and heritage outcomes associated with the minor height variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

(5) In deciding whether to grant concurrence, the Director-General must consider:
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning

Assessment: The proposed height variation allows for the orderly and economical use of land as envisaged by the *Environmental Planning and Assessment Act 1979*.

The proposed height allows for the achievement of a compatible building envelope without creating a development with overbearing height, bulk or scale and without compromising the desired future character of the area.

Concurrence

The Secretary's concurrence under clause 4.6(4) of the LEP has been delegated to the Council by written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018. The Court may also assume that concurrence pursuant to s39(6) of the Land and Environment Court Act.

(b) the public benefit of maintaining the development standard

Assessment: The above assessment demonstrates that the proposed height satisfies the objectives of the standard and the zone and confirms that the proposed height allows for a better planning outcome on the subject site.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the height variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP and that there are no adverse or unreasonable

impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the height control.

It is also noted that there is no public benefit in maintaining the height standard given the limited amenity impacts associated with the development and the positive streetscape outcome that would arise from the redevelopment of the subject site.

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Assessment: There are not considered to be any additional matters to consider beyond those discussed above.

Generally as to concurrence, for the reasons outlined above – and particularly having regard to the site-specific nature of this clause 4.6 variation request – there is nothing about this proposed height variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. No other relevant matters are requested to be considered before granting concurrence.

Conclusion

For reasons mentioned herein, this Clause 4.6 variation is forwarded to Council in support of the development proposal at 50 Bray Street, Erskineville and is requested to be looked upon favourably by Council and the Court.