

Attachment C

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

**REQUEST TO VARY DEVELOPMENT STANDARD PURSUANT TO
CLAUSE 4.6 OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012**

**TO ACCOMPANY A DEVELOPMENT APPLICATION TO
CITY OF SYDNEY COUNCIL FOR THE CONSTRUCTION OF A NEW SINGLE DWELLING**

Property: 56 Allen Street, Glebe.
Proposal: New dwelling.
Zoning: R1 General Residential.

Development standard to which the request to vary the standard is taken: Clause 4.3 of the Sydney LEP 2012 (LEP 2012) prescribes a maximum building height of 6m applying to the site.

1. The Aim of the request

To allow works that are above the 6m height limit, being up to a height of 7.8m.

Clause 4.6 of LEP 2012 allows the applicant to request a departure from compliance with a development standard.

2. Objectives of the Standard

The objectives in relation to Height of Buildings in LEP 2012 are given as,

Clause 4.3 Height of buildings

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,
- (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.

3. Application and Assessment of Clause 4.6 Exceptions to development standards

Clause 4.6 of LEP 2012 is designed to provide the consent authority some flexibility in the strict compliance with the application of the development standard. There have been various Land and Environment Court judgments that have some relevance to addressing the application of Clause 4.6, among them being,

- 1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
- 2. Wehbe v Pittwater Council [2007] NSWLEC 827

3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; NSWLEC 90; NSWCA 248
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015
5. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
6. *Hansimikali v Bayside Council* [2019] NSWLEC 1353
7. *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

In the assessment of using Clause 4.6 it is particularly relevant to address parts (3) and (4) of the clause, being,

- (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 Secretary has been obtained.

In assessment of the proposal against parts 3(a), 3(b) and 4(ii) the following is offered.

How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the non-compliance. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6 (3)(a). Furthermore in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the applicant must demonstrate that Clause 4.6(3) must be adequately justified. The standard method is in using the five part *Wehbe* test (as noted in the judgment) as an approach in justifying this requirement.

The five part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
 - (a) to ensure the height of development is appropriate to the condition of the site and its context,

The works will result in a dwelling that is of a lower and comparable height with the immediately adjoining dwellings. Figure 1 below demonstrates the east and west elevations, noting that the northern neighbour (56a Allen Street) is two storeys plus attic form in height. The southern neighbour (54 Allen Street) is one storey to the main street and two storeys with a lower pitched roof at the rear lane. The proposed form is two storeys, with the upper storey being setback from the ground level which reduces its bulk. Also, the roof form is pitched to replicate the predominant roof form in the street, and the construction uses face brick and has a tiled roof to replicate surrounding forms and further ensure built form consistency.

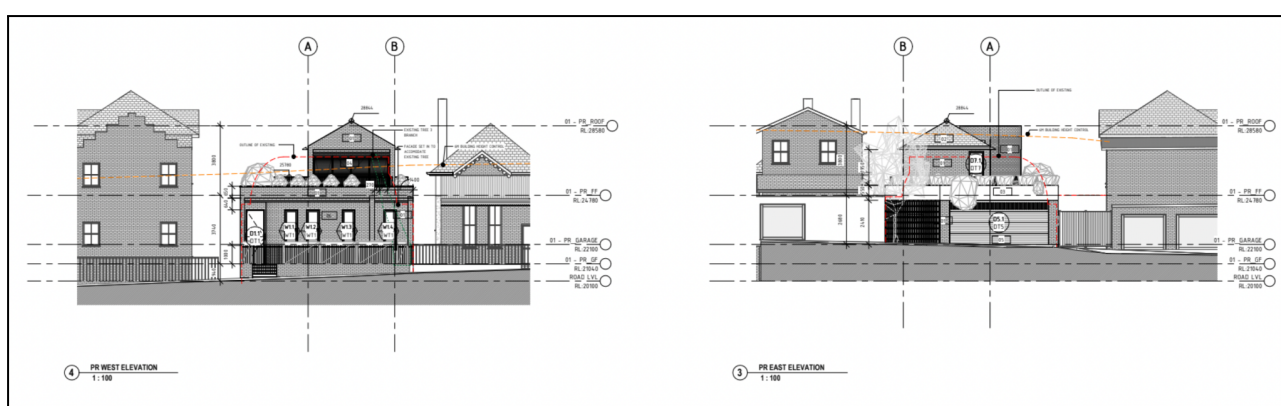


Fig 1 - Demonstrating how the proposed form will sit with the immediately neighboring structures.



Figure 2 - Proposed front facade.



Figure 2 - Proposed rear facade.

The 6m height control appears to relate to the long row of single level Federation era to the south of the site. To the north of the site, the form changes dramatically with a mixture of architectural forms being prevalent. These forms have varying styles and heights resulting in no one form dominating. In this context the proposed form is entirely reasonable, being of a comparable height with the immediate neighbours and much lower than most of the neighbouring forms to the north.

The height of the dwelling is contextually appropriate.

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

The site is within the Toxteth Estate Heritage Conservation Area. The overarching requirement of works is to ensure that the character and appearance of the HCA is maintained. The works are consistent with this requirement given that the works are sympathetic to the appearance of the building and because the consistency in height with adjoining dwellings in the row is maintained. The dwelling will not appear out of place, particularly given its materiality. Accordingly, this objective is satisfied.

(c) to promote the sharing of views,

No view is affected by the works.

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

Not applicable.

(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.

In light of the above, this request provides that the non-compliant height satisfies the objective in question.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

The exception request does not rely on this reason.

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 exception request does not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning of the land is appropriate for the site. The exception request does not rely on this reason.

In addition to demonstrating that the principles of Wehbe are satisfied, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of this case for the following additional reasons.

In the case of *Moskovich v Waverley Council*, the Land and Environment Court accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. For the subject application, the proposed development which seeks to vary the height standard, achieves a better response to the objectives of the subject R1 General Residential Zone in that it provides a high level of internal amenity for occupants and safeguards the street appearance of the site which is consistent with various LEP and DCP heritage requirements.

On the basis of the above, compliance with the standard is considered to be unnecessary and would be unreasonable.

Sufficient environmental planning grounds to justify the contravention

This request provides that there is sufficient environmental planning ground to justify the contravention. Such grounds include:

It has been demonstrated that the proposal and its height breach remains consistent with the objectives of the subject zone as well as Clause 4.3 and 4.6 of the Sydney LEP 2012, despite the numerical non-compliance.

The proposal would not compromise the character or nature of the area sought by the local environmental planning framework.

The non-compliant height does not result in any unreasonable visual impacts. The building height is comparable with adjoining dwellings.

The non-compliant height does not result in any unreasonable overshadowing impacts as demonstrated in the shadow diagrams.

The height non-compliance assists with providing improved internal amenity for residents, and for streetscape amenity given that the roof area to which the proposal relates is an important design feature which enhances the amenity of the site.

Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest. The proposal is considered to 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 objectives of the standard have been addressed above and are demonstrated to be satisfied. The works are consistent with the requirements for the R1 General Residential Zone because of significant improvements to the amenity of the housing stock on the site.

Is the variation well founded?

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the Sydney LEP 2012, that:

Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;

There are sufficient environmental planning grounds to justify the requested contravention;

The development achieves and is consistent with the objectives of the development standard and the objectives of the R1 General Residential Zone;

The proposed development is in the public interest and there is no public benefit in maintaining the standard; and

The contravention does not raise any matter of State or Regional Significance.

The variation is therefore considered well founded.

Prepared by:

A handwritten signature in black ink, appearing to read 'D O'Toole'.

Damian O'Toole
MA Town Planning
Grad Dip Heritage Conservation