

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Request to Vary the Building Height
Standard under Clause 4.6 of S.L.E.P.
2012:

56A Allen Street, Glebe

(2 Storey Rear Addition for 2 Units)

Introduction

This written contravention request supports a development application (DA), for a new rear two-storey addition for 2 units at No. 56A Allen Street, Glebe. It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd, plans by Antonio Caminiti Architect and the information submitted with the DA.

The proposal exceeds the maximum 6m Building Height control in Clause 4.3 of Sydney Local Environmental Plan 2012 (SLEP 2012). This control is a “development standard” in accordance with the definition in Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act 1979).

Clause 4.6 of SLEP 2012 relevantly states:

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.
- (6) –(8)... [not relevant]

1. Identifying and quantifying the non-compliance

Clause 4.3 of Sydney Local Environmental Plan 2012 (“SLEP 2012”) specifies a maximum Building Height of 6m, by reference to the relevant LEP Map (extract below).

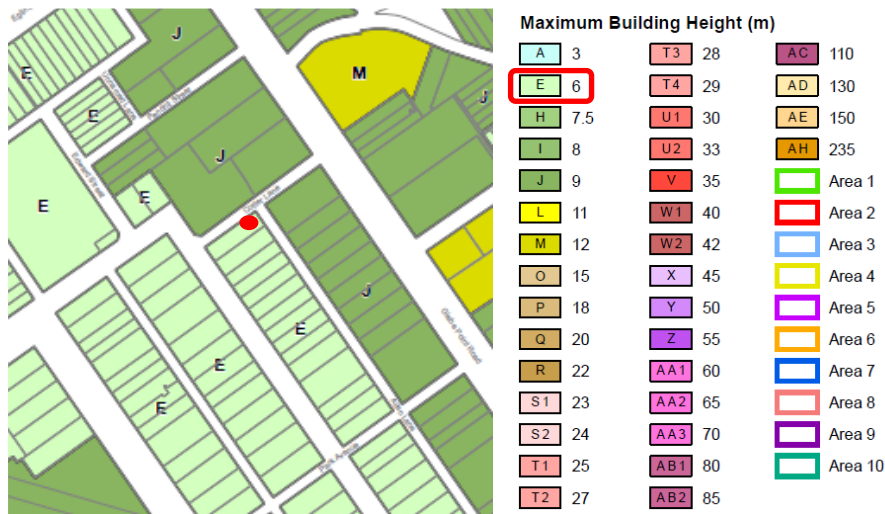


Figure 1 - Building Height Map Extract – SLEP 2012

The proposal exceeds the maximum building height of 6m, with the new proposed addition having a height exceedance ranging from 0mm-400mm above 6m (up to a 6.7% variation). The exceedance is for a small area towards the west of the addition (near the existing residential flat building on the site) and arises from the pitched skillion roof form.

The building height contravention is illustrated in the elevations submitted by Antonio Caminiti Architect:

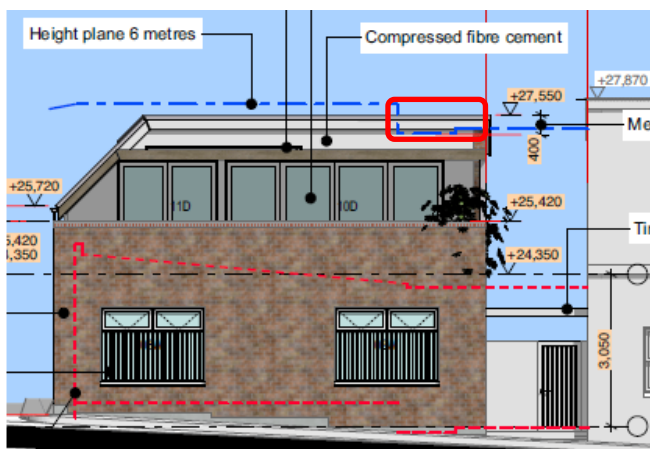


Figure 2 - Height Non-Compliance (northern elevation) – red box added



2. Objectives of Clause 4.6 of SLEP 2012

The objectives of Clause 4.6 of SLEP 2012 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.*

There has been some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was considered and determined in a judgement by the chief justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. That judgement held that the objectives of Clause 4.6 do not need to be specifically considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 (of appropriate flexibility and better outcomes) can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

Despite this, in very broad terms, better planning outcomes are facilitated by designing a new addition that is contextually appropriate, better activates the public domain, provides a height and number of storeys consistent with Council's Development Control Plan and an addition which respects the attributes of the Conservation Area of which it is part.

3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

Clause 4.6(3) of SLEP 2012 states:

- (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*

The following responds to these provisions.



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

The submission and consideration of Objections under State Environmental Planning Policy No. 1 (“SEPP 1 Objection”) and the issue of compliance being “unreasonable or unnecessary” was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council* [2007] NSWLEC 827 (“the Wehbe case”). While that judgement applied to SEPP 1 Objections and not Clause 4.6 Contravention requests, the approach in that case has been accepted in subsequent court cases related to Clause 4.6 Variation Requests and in town planning practice.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or
- iii. Requiring compliance with the development standard would “thwart” the achievement of the objectives of that standard; or
- iv. The development standard in question has been “virtually abandoned” by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

Pathway (i) above is applied in this instance, although it is noted that height breaches are not uncommon in the area or in the Sydney LGA generally. Despite this, it is not being argued the standard has been “virtually abandoned”.

In terms of the objectives of the standard, Clause 4.3(1) of SLEP 2012 contains the following objectives:

- (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.

The following responds to these objectives:

- a) The height of the development is consistent with the condition of the site and its context. As shown in the photos below, the site is surrounded by higher building forms on the site, to the north and to the east, across Cotter Lane and Allen Lane.



The condition of the site is also on a corner, with a relatively large building over the height limit. The current blank garage poses traffic safety issues and limited surveillance, leading to potential for vandalism and anti-social behaviour, reflected by the current condition:



The context is also affected by the planning controls being in transition around the site, noting:

- A higher height limit to the immediate north and east, being 9m in height (compared to 6m at the site);
- A higher FSR (affecting height and scale) to the immediate north and east, varying from 0.8:1 – 1:1.

Two storey forms (and higher) are common in the immediate context of the site.

It is reasonable to conclude the proposal is appropriate to the current condition and state of the site, and the surrounding context.

- b) The site is in a Conservation Area and is to the south-west of a heritage item.

The proposal does provide a transition in scale to the heritage item to the north-east across Cotter Lane, being significantly lower than that building, and the visual transition being made more prominent due to the slope of the land, lower than land of that heritage item.

The current building/site is nominated as “neutral” in Council’s Development Control Plan (as is the recent building to the north across Cotter Lane), while the building to the east is large and nominated as “detracting”, and the dwelling adjoining to the south is also nominated as “detracting”. So, while the site is in a Conservation Area, the context and setting of this corner site is somewhat unique, being surrounded by detracting or neutral buildings.

The proposed building, including its height non-compliance, helps to improve the design setting of the site and more positively reinforce the attributes of the Conservation Area than the current situation. The proposal, and the proposed height, is supported by an expert Heritage Impact Statement

It is reasonable to conclude the proposal results in an appropriate height transition between the proposal and heritage items and buildings in heritage conservation areas.

- c) The height non-compliance will not affect any views (public or private).

In terms of private views, the views from within surrounding dwellings have not been seen by the author of this report, so according qualification to the comments and conclusions given is needed. However, from a site inspection, interpolation of the site conditions, review of proposed plans, expected views, slope/topography, landscaping and surrounding buildings, it is clear the main potential outlook impacts (as opposed to significant views) would be outlook over the rear of the site from the northern first floor of the townhouse to the north, across Cotter Lane. This would be a degree of outlook rather than views and the proposed height non-compliance is not anticipated to adversely affect views from surrounding development.

- d) Objectives (d) and (e) are not relevant to this site and proposal.

In summary, the proposal is wholly consistent with the objectives of the development standard and using the accepted approach in *Wehbe v Pittwater Council* [2007] NSWLEC 827, compliance with the development standard can be considered unnecessary or unreasonable.

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

The case *Four2Five v Ashfield Council* [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248 raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 highlighted that:

1. The term “environmental planning grounds” is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant’s written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

Also, given the term “environmental planning grounds” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the Building Height development standard, on this particular site and for this particular development:

- a) The non-compliance is for a very small area (around 6sqm in plan), and a very small height non-compliance (under 7%);
- b) The proposal achieves a two-storey form, as encouraged by the Council’s specific DCP controls for number of storeys applying to the site:



Figure 3 – SDCP 2012 Extract (Number of Storeys)

- c) The design has not adopted excessive internal ceiling heights in achieving a two-storey form envisaged for the site;
- d) The non-compliance relates to the roof form. The roof form is appropriate and matches the angle and slope of the existing rear skillion form of the existing higher building on the site to the immediate west. This is an appropriate approach for the addition, on a visible corner site, in a Conservation Area;
- e) The roof form and height are supported by heritage considerations and an expert Heritage Impact Statement;
- f) The context of the site and surrounds is in transition from the north and the east, and the height, including the minor height non-compliance, is contextually appropriate, while also reinforcing the land form;
- g) The proposal, including the minor height non-compliance, results in a significant visual and built form improvement and contribution to the area compared to the current situation;
- h) The height non-compliance occurs in the north-western portion of the rear addition, directly adjoining a public road and close to the higher flat building on the subject site, and well removed from surrounding dwellings, such that amenity impacts from the non-complying height are negligible;
- i) Apart from the context, there are a number of sound environmental planning reasons to support a two-storey form location on the site, namely:
 - The unique corner location, surrounded by two lanes and larger blank walls directly to the east;
 - The second level helps provide passive surveillance to the adjoining public domain/lanes;
 - The rear addition is complementary to the building design, massing, shape, roof form and materials of the existing building on the site.
- j) The height and form have been modulated for visual interest and articulation, combined with high-quality materials.
- k) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant height of the building, is consistent with the following Objects of the Act:
 - i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations* – noting the height and design facilitates high amenity on the site yet with acceptable impacts upon others;



- ii. *to promote the orderly and economic use and development of land* – noting the height and height transition in the surrounding context is orderly, while a modest increase in density represents economic use of land on a well-connected site, with an appropriate use existing and permissible in the zone;
 - iii. *to promote the sustainable management of built and cultural heritage* – noting an appropriate heritage outcome for the site; and
 - iv. *to promote good design and amenity of the built environment* – due to the high-quality design and for the same reasons above.
- l) As noted previously, the Objects of the EPA Act provide a framework for the Act itself, and its operative provisions, which include giving effect to other Environmental Planning Instruments. The proposal and specifically the height non-compliance also facilitates the following aims and objectives within Sydney LEP 2012 (Clause 1.2(2)), as outlined below in relation to the height non-compliance:
- *to promote ecologically sustainable development*, for reasons outlined previously;
 - *to encourage the growth and diversity of the residential population of the City of Sydney by providing for a range of appropriately located housing*, as the design and height facilitates a unique and well-considered proposal;
 - *to ensure that the pattern of land use and density in the City of Sydney reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport*, as the benefits of the non-compliant height provide benefits that are not outweighed by disbenefits (and allows removal of car-parking);
 - *to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular localities*, for reasons outlined previously and within the S.E.E. responding to design excellence.

4. Clause 4.6(4) of SLEP 2012

Clause 4.6(4) of SLEP 2012 states:

- (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

These are matters for the consent authority to be satisfied (as opposed to the applicant justifying as in Clause 4.6(3)). Despite this, further commentary is given to assist the consent authority in its deliberations. They also relate to the whole development, not just the non-compliance subject to the Clause 4.6 Contravention request.

Clause 4.6(4)(a)(i) has been addressed in the previous Section of this written request. The objectives of the standard have also been addressed in the previous Section of this written request.

The site is zoned **R1 – General Residential** in SLEP 2012, which also applies to the surrounding blocks. The proposal is specifically permissible with consent in the zone (as a residential flat building).

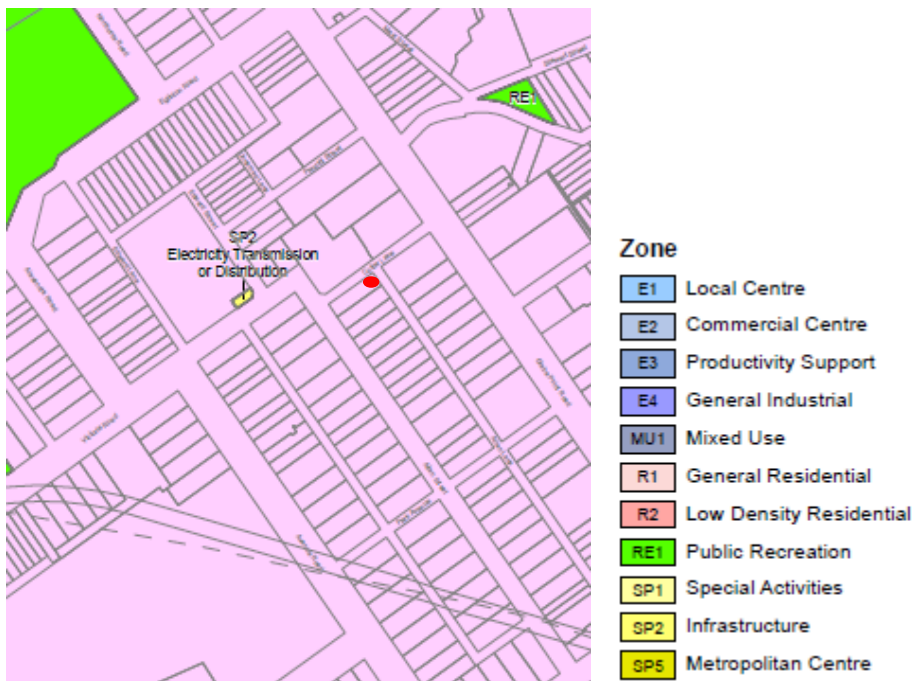


Figure 4 – Zoning Map Extract – SLEP 2012

The objectives of the 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.
- To maintain the existing land use pattern of predominantly residential uses.

The proposal is consistent with these zone objectives, noting:



- The proposal is specifically designed to meet the housing needs of the growing community, and to provide housing choice on a well-connected inner-city site (and likely to be more affordable than housing typical in the area);
- The proposal provides diverse housing due to its unique design responding to the site characteristics, and diversity to single dwellings and houses common in the surrounding area;
- The use is permissible and does not compromise facilities or services being provided elsewhere, but instead supports such services by modest increased density, including business uses along Glebe Point Road; and
- The land use at the site retains the existing use and is residential, as well as being permissible in the zone.

The proposal is entirely consistent with the zone objectives applying to the site.

Clause 4.6(4)(b) – Concurrence of the Secretary

Concurrence of the Secretary is not required.

4. Clause 4.6(5) of SLEP 2012

Clause 4.6(5) of SLEP 2012 states:

- (5) In deciding whether to grant concurrence, the Secretary 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.*

In this regard, the City of Sydney has written notice to assume such concurrence for variations of development standards (other than those to be determined by the Local Planning Panel), through a NSW Department of Planning and Environment Planning Circular.

For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the Building Height development standard in Clause 4.3 of *Sydney Local Environmental Plan 2012*.

Jason Perica
Director