

# **Attachment D**

**Clause 4.6 Variation Request**

## Clause 4.6 – Exceptions to Development Standards

### Request to Vary Clause 4.3 Height of Buildings

**Address:** 61-63 Macleay Street, Potts Point

**Proposal:** Alterations and additions to the existing building, including new basement, new ground floor extension, addition of two (2) storeys, and change of use to hotel accommodation at levels 1-4.

**Date:** 13 November 2023

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#### 1. Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of the Sydney Local Environmental Plan (SLEP) 2012. The development standard for which the variation is sought is Clause 4.3 – Height of Buildings under SLEP 2012.

#### 2. Description of the planning instrument, development standard and proposed variation

##### 2.1. *What is the name of the environmental planning instrument that applies to the land?*

The Sydney Local Environmental Plan (SLEP) 2012.

##### 2.2. *What is the zoning of the land?*

The land is zoned MUI Mixed Use.

##### 2.3. *What are the Objectives of the zone?*

The objectives of the zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities;
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces;
- To minimise conflict between land uses within this zone and land uses within adjoining zones;
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings;
- To ensure land uses support the viability of nearby centres; and
- To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.

**2.4. What is the development standard being varied?**

The development standard being varied is the Height of Buildings development standard.

**2.5. Is the development standard a performance based control?**

No. The Height of Buildings development standard is a numeric control.

**2.6. Under what Clause is the development standard listed in the environmental planning instrument?**

The development standard is listed under Clause 4.3 of SLEP 2012.

**2.7. What are the objectives of the development standard?**

The objectives of clause 4.3 of SLEP 2012 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.”*

**2.8. What is the numeric value of the development standard in the environmental planning instrument?**

Clause 4.3 establishes a maximum building height of 15m as being applicable to the subject site. Refer to extract of the Height of Buildings Map included at Figure 1.



Figure 1: Extract of SLEP 2012 Height of Buildings Map

**2.9. What is the proposed numeric value of the development standard in the development application?**

The development, as proposed, has a maximum height of 16.5m.

**2.10. What is the percentage variation (between the proposal and the environmental planning instrument)?**

The proposed rooftop addition exceeds the maximum building height development standard by 1.5m (maximum). As such, the proposed percentage variation equates to 10%.

An extract of the Height Plane Diagram is included in Figure 2 and demonstrates the extent of the non-compliance.

It is noted that the definition of 'building height' under SLEP 2012 excludes "chimneys, flues and the like". Accordingly, the proposed kitchen exhaust (200mm high) does not contribute to the calculation of building height for the purpose of Clause 4.3.



Figure 2: Extract of Building Height Plane Diagram (Source: SJB Architects)

### 3. Assessment of the Proposed Variation

#### 3.1. Overview

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- (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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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.”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence must consider:

- “(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning;*
- (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.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 248 (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council* (2015) NSWLEC 1386;
- *Randwick City Council v Micaul Holdings Pty Ltd* (2016) NSW LEC7;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *RebelMH Neutral Bay v North Sydney Council* [2019] NSWCA 130;
- *Baron Corporation v The Council of the City of Sydney* [2019] NSWLEC 61; and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245.

### ***3.2. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?***

#### ***3.2.1. Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?***

A development that strictly complies with the Height of Buildings standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposal satisfies the objectives of the MU1 Mixed Use zone and the objectives of the Height of Buildings standard as highlighted above;
- The quantum of additional height above the maximum building height standard is sited away from the southern and eastern primary building setbacks so as to maintain existing privacy impacts for neighbouring properties, particularly for No. 14 Macleay Street to the east, which enjoys substantial building separation (including Macleay St road reserve) from the rooftop addition. Furthermore, the

siting of the addition ensures that new works can be clearly distinguishable relative to the original building in accordance with standard heritage practices;

- Solar access to neighbouring properties will be maintained. Overshadowing will continue to be limited to a small portion of the road reserve and public footpath between 12pm and 3pm midwinter;
- The amended proposal ensures that the extent of impact of view sharing conditions for neighbouring properties ranges from no impact, negligible to minor impact, as views to significant items such as the Sydney CBD skyline and Sydney Harbour Bridge are maintained;
- The non-compliance facilitates the accommodation of density envisaged under the relevant planning controls for the site (i.e., FSR) in a manner that achieves superior amenity outcomes for hotel guests without significantly affecting the amenity of surrounding neighbours;
- Despite an identified non-compliance with Control 4.2.1.1(1) of the Sydney DCP 2012, the proposed five (5) storey building achieves an appropriate height transition relative to surrounding contemporary and heritage listed buildings (as shown in Figure 2), which vary in height from three (3) to nine (9) storeys;
- Notwithstanding previous development approvals involving non-compliances with height development standards, the contemporary aspect of the proposal remains consistent with the scale of neighbouring buildings to the west when viewed from neighbouring properties and the streetscape.

3.2.2. Would the underlying objective or purpose be defeated or thwarted if compliance was required?

Not contested.

3.2.3. Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

Not contested.

3.2.4. Is the zoning of the land unreasonable or inappropriate?

Not contested.

**3.3. *Are there sufficient environmental planning grounds to justify contravening the development standard?***

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard, being:

- The proposal satisfies the objectives of the MU1 Mixed Use zone and the objectives of the Height of Buildings standard as highlighted above;
- The reduced mass and scale of the amended proposal, which is the result of a decrease in the overall maximum building height and reconfiguration of the rooftop addition, ensures views over the site to the Sydney CBD skyline and to the Sydney Harbour Bridge are not adversely affected;
- The proposal maintains the significance of the heritage item on the site and other items within its vicinity. The proposed works have been substantially amended to have careful regard to the fabric, setting, or view corridors of the heritage item itself and nearby items;
- When viewed from neighbouring properties, the contemporary rooftop addition remains consistent with the scale of neighbouring buildings to the west. The design of the rooftop addition has been amended to create an increased southern secondary building setback from the original roof form.

Consequently, the proposal creates minimal public domain impacts when viewed from the streetscape along Challis Avenue and Macleay Street;

- The variation to the height control does not increase the density of the development in such a way that it will give rise to significant adverse overshadowing, privacy impacts, or view loss; and
- The proposal is generally compliant with the controls, or the intent of the controls, contained in SDCP 2012.

**3.4. Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?**

3.4.1. Objectives of the Height of Buildings standard

The proposal remains consistent with the objectives of the Height of Buildings standard outlined in Subclause 4.3(1) despite the non-compliance, as demonstrated below:

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

The proposal is of a height and scale that is appropriate to the condition of the site. With respect to the original roof form of the existing building, the increased southern secondary building setback of the rooftop addition creates a substantial recession in the contemporary roof form. As a result, it is considered that any perceived height impacts of the non-compliant aspects of the proposal have been reduced when viewed from the public domain. The height of the rooftop addition actively responds to the context of surrounding development, particularly to the east and west, without resulting in adverse overshadowing, visual privacy, or view sharing impacts.

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

The site includes a local heritage item, 'Flat building "Wirrawa" including interior', which is located within the Potts Point Conservation Area. The proposed contemporary rooftop addition is of an appropriate and reasonable scale by virtue of its reduced overall height and its increased southern secondary building setback from the original heritage roof form. This ensures that the "Wirrawa" building, which will undergo sympathetic heritage design interventions as part of this proposal, remains the predominant built form on the site when viewed from different parts of the Potts Point Conservation Area.

The proposed rooftop addition is consistent with the scale of buildings adjoining the site at Nos. 12-16 Challis Avenue and No. 57-59 Macleay Street, whereby the maximum height of the new building (RL 45.91) sits below the parapet height of these neighbouring buildings (i.e., RL 47.30 and RL 47.12, respectively). On this basis, the amended proposal ensures an appropriate height transition between the rooftop addition, the original roof form of the "Wirrawa" building, and surrounding buildings in the Potts Point Conservation Area.

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

The design of the proposed rooftop addition has been amended to ensure that existing significant views to the Sydney CBD skyline and Sydney Harbour Bridge, whether or not they are already obstructed, will not be obscured further, as concluded within the View Impact Assessment prepared by SJB Planning. Changes to the proposed design of the rooftop addition include, but are not limited to, a reduced height and scale, increased secondary building setback from the southern boundary, and the reduction in the projection of the kitchen exhaust flue. These changes promote view sharing principles, whereby the majority of views from neighbouring properties to the east will be retained.



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

The subject site is not identified as being located within Central Sydney or the Green Square Town Centre. Notwithstanding, the proposal has no impact on the height transition from these Centres 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 subject site is not located within Green Square. Notwithstanding, the proposal has no impact on the amenity or built form of Green Square.

#### 3.4.2. Objectives of the zone

The proposal remains consistent with the objectives of the MU1 Mixed Use zone, despite the non-compliance with the Height of Buildings standard as demonstrated in the assessment of the objectives below.

*“To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities”*

The proposal will viably enable the improvement of the subject building to accommodate a diversity of uses including hotel accommodation between Levels 1 to 4, and a restaurant on the ground floor.

*“To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces”*

The amended proposal contains improved active street frontages on its East (Macleay Street) and South Elevations (Challis Avenue) to increase permeability and visual access to the ground level of the subject building.

*“To minimise conflict between land uses within this zone and land uses within adjoining zones”*

The proposal (as amended) will not give rise to significant adverse overshadowing, privacy impacts, acoustic impacts, or view loss for surrounding development in the MU1 Mixed Use zone and R1 General Residential zone to the north. The schedule of amendments made to the proposal, particularly with respect to the rooftop addition that is non-compliant with the maximum building height control, effectively minimises potential land use conflict arising from the new use of Levels 1 to 4 as hotel accommodation.

*“To encourage business, retail, community and other non-residential land uses on the ground floor of buildings”*

An existing approval exists on the site for use of the ground level as a restaurant, which will be improved by the changes proposed as part of this Development Application.

*“To ensure land uses support the viability of nearby centres”*

The continuation of a mix of uses on the site will support the viability of nearby centres without diminishing local centres hierarchy as the proposal does not result in an overdevelopment of the site. The

proposal (as amended) will attract tourism and create benefits for associated night-time economy industries in a viable and controlled manner.

*“To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling”*

The proposal integrates retail and hotel accommodation land uses in a location that is well-served by bus and train services, as well as footpaths conducive to walking. The proposal includes bicycle infrastructure at the street level at the corner of the site to encourage cycling.

**3.5. *Whether contravention of the development stand raises any matter of significance for the State or regional environmental planning?***

The contravention is a local matter and does not raise any matter of state or regional significance. Council can assume the Secretary’s concurrence under Planning Circular PS 18-003 issued on 21 February 2018.

**3.6. *Is there public benefit in maintaining the development standard?***

Generally, there is public benefit in maintaining standards. However, there is also public benefit in maintaining a degree of flexibility in specific circumstances.

In this case, no public benefit would accrue in the circumstances of requiring strict numerical compliance with the Height of Buildings development standard when it has been demonstrated that, despite the numerical non-compliance, the proposal will achieve consistency with the zone and development standard objectives.

**3.7. *Is the objection well founded?***

Yes, the proposal is consistent with the objectives of the MU1 Mixed Use zone and the Height of Buildings development standard.

It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

#### 4. Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the Height of Buildings standard.

The proposal accords with the stated objectives for the MUI Mixed Use zone and Clause 4.3 Height of Buildings development standard. The amended proposal is consistent with surrounding residential, retail, commercial, and tourist accommodation uses, and the overall development will have a positive outcome for the urban aesthetic of the locality. As such, it is considered that the proposal is consistent with the planning purposes for the area.

The non-compliant portion of the building, which includes a rooftop addition on Level 4, will not contribute to any additional adverse overshadowing, visual privacy, or significant adverse view impacts to surrounding properties. Notwithstanding, additional design interventions have been made which has reduced the density and scale of the non-compliant portion of the building. Consequently, the amended proposal further minimises potential land use arising from the development.

The non-compliance to the development standard continues to facilitate the accommodation of density envisaged under the relevant planning controls for the site (i.e., floor space ratio) in a manner that achieves superior amenity outcomes for hotel guests.

It has been demonstrated that the proposal will create positive social and economic impacts. The operation of a boutique hotel will attract tourism and assist in strengthening local retail and dining opportunities within Potts Point and will be of a positive impact for the site and locality.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses. In the context of the locality and the pattern of existing surrounding development, it would be unreasonable for strict compliance to be enforced.

The consent authority should appropriately consider whether the non-compliance of the proposal with the maximum building height development standard is suitable to its context by considering surrounding land to the west, which is currently subject to this same development standard.

The maximum building height control gives effect to the objectives of the development standard to create appropriate amenity outcomes for the site and its surrounding context. The predominant height of development surrounding the site as it relates to the current controls should be factored into the reasonableness of this proposal, as necessary.

It is concluded that the variation to the Height of Buildings development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.