

# **Attachment D**

**Clause 4.6 Variation Request – Height**

CLAUSE 4.6 VARIATION REQUEST - CLAUSES 4.3 AND 6.47  
DEVELOPMENT APPLICATION FOR DEMOLITION OF THE FORMER BABY HEALTH  
CENTRE AND CONSTRUCTION OF A SINGLE RESIDENTIAL DWELLING

87 Lower Fort Street, Millers Point



## Site

87 Lower Fort Street, Millers Point - Lot 26 DP 1221024

## Variation sought

Sydney Local Environmental Plan 2012 (SLEP 2012)

Clause 4.3 - Height of Buildings

Clause 6.47(5) - Millers Point Heritage Conservation Area

## Extent of variation

According to Clause 4.3(2) of the SLEP 2012 the subject site is identified within "Area 10" of the *Height of Buildings Map*. Consequently, Clause 6.47 of the SLEP 2012 which includes site specific provisions for the Millers Point Heritage Conservation Area applies to "Area 10", including the subject site. Clause 6.47(5) states:

*Despite any other provision of this Plan, the maximum height of a building on land to which this clause applies is the height of the building on the land as at the commencement of this clause.*

Accordingly, the maximum permissible height for the site equates to the height of the existing one-storey building on the site, the former Baby Health Centre. Informed by the survey prepared by RPS, the requested variation in height is as follows:

- A 5.98m variation in height is requested in addition to the existing building's height of 2.97m, considering its parapet height at RL +24.36 and the proposed parapet height at RL +30.34 m. This is a variation to the height control of 201 %.
- A 6.44m variation in height is requested in addition to the existing building's height of 4.23m, considering its roof ridge height at RL +25.62m and the proposed roof ridge height at RL +30.34 m. This is a variation to the height control of 152%.

## Summary of non-compliance

Part (2) of Clause 4.3 of the SLEP 2012, states that 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*. However, the site is identified as "Area 10" on the map, which has no specific building height limit. Clause 6.47 relating to site-specific provisions applicable to the Millers Point heritage conservation area, applies to "Area 10" as identified in the *Height of Buildings*, according to part 2 of the Clause. Clause 6.47(5) states that the maximum height of a building on land to which this clause applies is the height of the building on the land as at the commencement of this clause. Considering that the clause took effect on 18 October 2019 and that the height of the proposed building exceeds the height of the existing one-storey building on the site, it is concluded that the proposal departs from the standard of both Clause 4.3 and Clause 6.47 of the SLEP 2012.

Based on the accompanying survey prepared by RPS, **Table 1** below summarises the existing and proposed heights of the development.

**Table 1:** Showing the requested variation in height

Existing Building Height (ground-level set at RL 21.39m, measured at the north-eastern corner)	Proposed Variation in Height (Variation of the existing height)	Proposed Height
Existing building's <b>parapet height = 2.97 m</b> (set at RL 24.36m)	Proposed parapet is set at RL 30.34m (30.34 m – 24.36 m) = <b>5.98 m</b>	<b>8.95 m</b> parapet height
Existing building's <b>roof ridge height = 4.23 m</b> (set at RL 25.62m)	Proposed roof ridge is set at RL 32.06m (32.06m – 25.62m) = <b>6.44 m</b>	<b>10.67 m</b> roof ridge height

Considering that the existing building on the site is identified as a detracting item in the *Building Contributions Map* of the SDCP 2012, and that the proposal is aligned with the site's Conservation Management Plan (CMP) guidelines, this assessment considers that the variation to the height control, as per Clause 6.47(5), is deemed unreasonable in this case. Furthermore, the proposal is supported by a comprehensive analysis of the site's context, resulting in a well-designed addition that demonstrates a sensitive and respectful response to the historic and aesthetic character of the Millers Point Conservation Area, ensuring that the proposed height remains consistent with the surrounding developments.

The CMP guidelines for the site provide that a new building that adopts the prevailing built form of development in the vicinity and incorporates qualities of the surrounding locality would produce a more desirable and appropriate outcome from an urban design perspective and heritage conservation objectives. Substantial alterations, including the replacement of the existing building, are considered appropriate. The departure from the height standard is not anticipated to create an undesirable precedent for other similar residential developments in the locality or diminish the overall effectiveness of the standard for development.

The height of the proposed dwelling was determined by a comprehensive analysis of the site's context outlined within the Design Report prepared by the architects during the concept stage. This analysis included a height plane analysis of the parapets and roof ridges of existing neighbouring buildings. It demonstrates that a 9m height plane aligns with the parapets of the immediate neighbours, while a 12m height plane aligns with the ridges of the roof forms in the immediate context, ensuring that the proposal is consistent with the surrounding developments.

Flexibility is requested in the application of the height controls due to the conditions of the site, which is occupied by an existing building that detracts from the area's heritage character. Additionally, the proposal respectfully responds to its heritage context in consistency with the Conservation Management Plan for the site, having minimal and acceptable environmental impacts. It is therefore considered reasonable and appropriate in this instance to seek to vary the development standard set in Clauses 4.3(2) and 6.47(5) of the SLEP 2012.

## Introduction

This Clause 4.6 Variation Request has been prepared in accordance with Clause 4.6 (Cl 4.6) of the Sydney Local Environmental Plan 2012 (SLEP 2012) to vary Clause 4.3(2) and Clause 6.47(5), relating to the maximum height of buildings permitted within the Millers Point Heritage Conservation Area.

This request supports a Development Application (DA) submitted to the City of Sydney for 87 Lower Fort Street, Millers Point ('the site'). The DA proposes the demolition of the existing structures on the site and the construction of a two-storey residential dwelling with roof form and single basement level.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. This request has been prepared having regard to the following:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Cl 4.3 of the SLEP 2012, being the development standard to which a variation is sought; and,
- The objectives of Cl 6.47 of the SLEP 2012, being the development standard to which a variation is sought; and,
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal regarding Clause 4.6 variations including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* judgement.

This request demonstrates that the variation from Clauses 4.3(2) and 6.47(5), by exceeding the height of the proposed building from the height of the existing building on the site, would result in a development that is compatible with the existing two to three-story height pattern of adjoining and surrounding residential developments. The requested variation in height would allow the proposal to adopt the prevailing built form and incorporate the qualities of the surrounding locality.

Notwithstanding the above, the existing building on the site is identified as a detracting item in the *Building Contributions Map* of the SDCP 2012. The variation would produce a more desirable and appropriate outcome from an urban design perspective and heritage conservation objectives and would not create an undesirable precedent for other similar residential developments in the locality or diminish the overall effect of the standard for development. Additionally, the proposal is a well-designed addition with a positive impact on the historic and aesthetic character of the Millers Point which is aligned with the guidelines of the site's Conservation Management Plan.

## Proposal

The proposal involves the demolition of the existing structures on the site and the construction of a two-storey residential dwelling with roof form and single basement level.

The proposed residential dwelling comprises an open-plan basement level with access to a deep soil central backyard and pool, which are connected via a staircase to a landscaped outdoor garden above. The upper levels are divided at their centre by a glazed flat roof volume, linking the two sections of the house with a central entrance. The two upper stories feature a pattern of doors and windows with linked balconies facing the street on the first floor. The attic level comprises two covered areas, separated by a roof terrace.

The proposed building would result in an FSR of 0.77:1 which complies with the maximum FSR of 2:1 for the site. The proposed building is detailed in the Architectural Plans prepared by Andrew Burns Architecture / Tasman Storey Architect and it is discussed in greater detail in the Statement of Environmental Effects which accompanies the DA.

## Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012, or any other environmental planning instrument, provided it is not expressly excluded from the operation of the clause.

Clause 4.6(3) prevents development consent from being granted under Clause 4.6 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 circumstance of the case, and*
- (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

This Clause 4.6 Variation Request has been prepared to satisfy Clause 4.6(3).

## What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012.

## What is the zoning of the land?

The site is zoned R1 – General Residential, pursuant to the SLEP 2012 (Figure 1). The proposed development is defined in the plan as a “dwelling house” being a “building containing only one dwelling”. The identified zone permits the construction of a “dwelling house”, subject to development consent from Council.



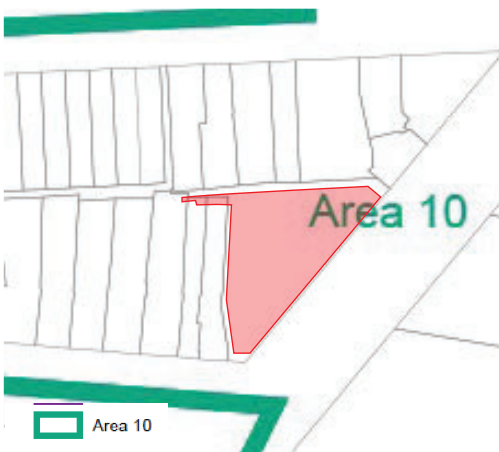
**Figure 1:** Land Zoning Map (Source: Sheet LZN\_013 - SLEP 2012)

## What is the development standard being varied?

Part (2) of Clause 4.3 of the SLEP 2012, states that 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*. However, the site is identified as “Area 10” on the map, which has no specific building height limit. The building height for Area 10 is addressed in part (2) of Clause 6.47 of the SLEP 2012, relating to the site-specific provisions applicable to the Millers Point heritage conservation area, where the site is located.

Part (5) of Clause 6.47 states that the maximum height of a building on land to which this clause applies is the height of the building on the land as at the commencement of this clause. Considering that the clause took effect on 18 October 2019 and that the height of the proposed building exceeds the height of the existing one-storey building on the site, which is the former Baby Health Centre, it is concluded that the proposal departs from the standard of both Clause 4.3 and Clause 6.47 of the SLEP 2012.

According to **Table 1**, the parapet height of the proposal exceeds the parapet height of the existing building by approximately 5.98 m, and the additional variation of the proposed roof ridge from the existing is approximately 6.44 m.



**Figure 2 -** Height of Buildings Map (Source: Sheet HOB\_010 - SLEP 2012)

## Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8). The maximum height development standard is not identified under subclause 4.6(8) and is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

## The Site and its Context

This application relates to 87 Lower Fort Street, Millers Point which is legally known as Lot 26 in DP 1221024 (Figure 3). The site is located on the west side of Lower Fort Street which falls gently (approx. 2.5°) towards the north. Locally, the site is dipping (approx. 6°) towards the west with site levels varying from R.L. 22.50m at the south-west site corner to R.L. 19.50m at the north-west site corner. The allotment has a generally triangular shape with a 45m principal frontage facing Lower Fort Street and site boundaries of approximately 30m. It comprises a total site area of 651.18m<sup>2</sup>.

Surrounding developments are predominantly residential with some commercial uses to the east south of the site. Walsh Bay is situated to the north of the site and the Sydney Harbour Bridge is located to the north-east.

The site is developed with a small, single storey community facility building within a garden setting which was built in 1952 by the City of Sydney Council to be used as a Baby Health Centre (Figure 4). The building currently houses the offices of the Millers Point Co-op. The building is a modest example of post war civic architecture influenced by the Modern movement, domestic in scale and character. It has been identified as not having aesthetic significance such as substantial alterations including its replacement are considered appropriate.

The site is located within the Millers Point Conservation Area (SLEP 2012 Schedule 5, Item No. C35), the Millers Point and Dawes Point Village Precinct (Conservation Area) (NSW State Heritage Register, SHR No.01682) and the Millers Point Conservation Area (NSW State Heritage Register, SHR No. 00884).



**Figure 3:** Aerial Photograph of 87 Lower Fort Street, Millers Point (Source: SIX Maps 2022)





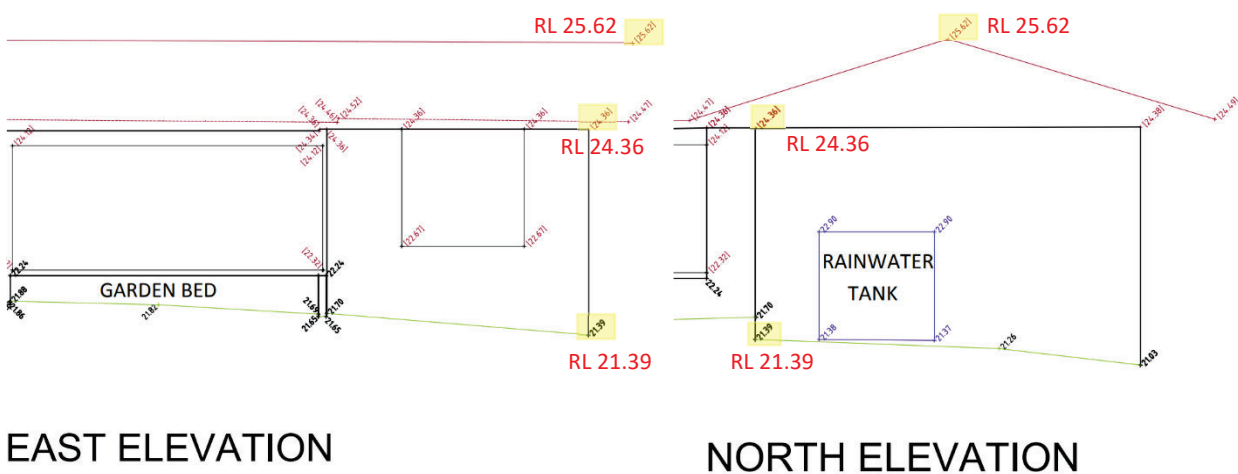
**Figure 4:** The site at 87 Lower Fort Street, Millers Point (Source: Google Street View)

### Extent of Variation to the Development Standard

Despite any other provision, including Clause 4.3. Clause 6.47 (5) provides that the maximum height of a building on land to which this clause applies should be the height of the building on the land as at the commencement of this clause. Consequently, the maximum height applicable to the subject site would be limited to the height of the former Health Baby Health Centre, which is the existing building on the site when the subject clause commenced on 18 October 2019.

The site survey, prepared by RPS, demonstrates that the ground level is set at RL 21.39m on the north-eastern corner of the existing building, where the parapet is set at RL 24.36m, and the roof ridge is set at RL 25.62. The existing building’s parapet height is of 2.97 m above ground level, and the existing roof ridge height is of 4.23 m above ground level.

Considering the above, the variance arising from the proposal equates to an increase of 5.98 m for the proposed new parapet height (proposal is set at RL 30.34), and an increase of 6.44 m for the proposed new roof ridge height (proposal is set at RL 32.06).

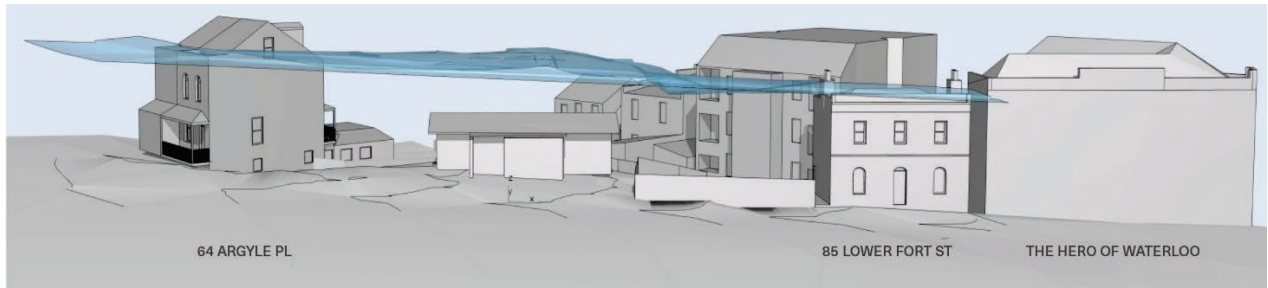


**Figure 5:** Existing building’s north-eastern corner height. Depicted from the existing building’s Survey. (Source: RPS)



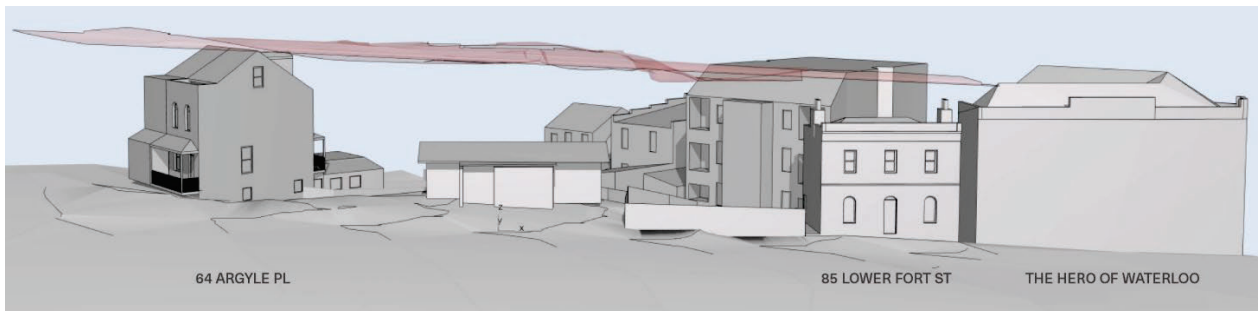
**Figure 6:** Proposed front elevation at 38 Lower Fort Street showing the 9m height plane in dashed blue and the existing height above ground-level in the north-eastern corner of the proposed building. (Source: Andrew Burns Architecture / Tasman Storey Architect)

In order to inform the height of the dwelling, an analysis of the context has been undertaken and is outlined in the proposal's Design Report – Part 2 and Part 4 (Appendix). It includes a height plane analysis where 9-meter and 12-meter height planes have been tested, demonstrating that a 9m height plane aligns with the parapets of the immediate neighbours, referencing the datum established by 64 Argyle Place and 85 Lower Fort St. The massing of the surrounding buildings with the height planes is demonstrated in Figures 7 and 8 below.



9m height plane corresponds the parapet height of 85 Lower Fort Street

**Figure 7:** Showing the 9m parapet height plane in blue, over the site with the existing building. Image depicted from the Design Report- Part 2, pg. 14. (Source: Andrew Burns Architecture / Tasman Storey Architect)



12m height plane corresponds to the ridge heights of 64 Argyle Place and The Hero of Waterloo pub on the corner

**Figure 8:** Showing the 12m roof ridge height plane in red, over the site with the existing building. Image depicted from the Design Report- Part 2, pg. 14. (Source: Andrew Burns Architecture / Tasman Storey Architect)



**Figure 9:** Perspective of the front elevation at 38 Lower Fort Street showing the 9m height plane parapet in dashed blue. (Source: Andrew Burns Architecture / Tasman Storey Architect)

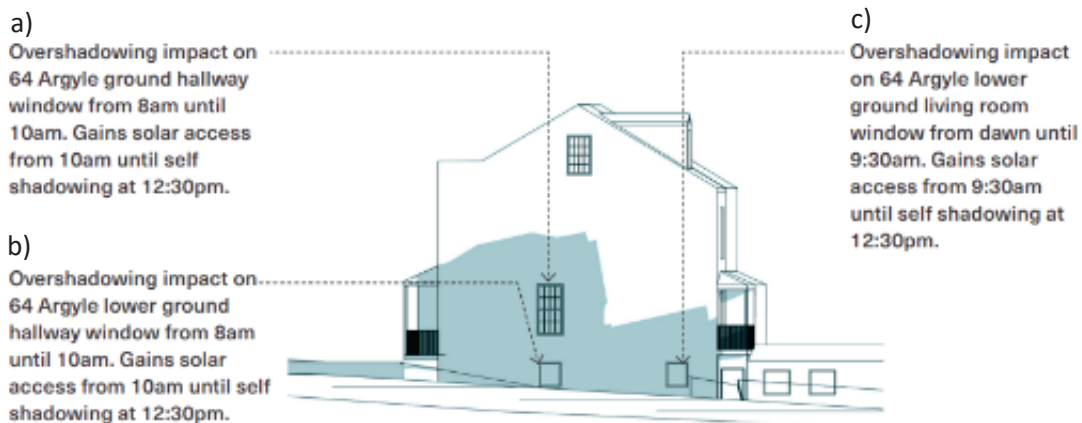
## Overshadowing Impacts

The proposal achieves compliance with the SDCP Part 4, solar access requirements. The building at 64 Argyle Place achieves a minimum of 2 hours direct sunlight between 9am and 3pm on 21 June onto at least 1sqm of living room windows and at least 50% of the minimum amount of private open space. In addition, the proposed development is set back by approximately a minimum of 4.8 m from the side boundary opposite to the windows of 64 Argyle Street.

Appendix A of the Design Report comprises an overshadowing analysis of the proposal on pages 53, 54 and 55, where the following is demonstrated:

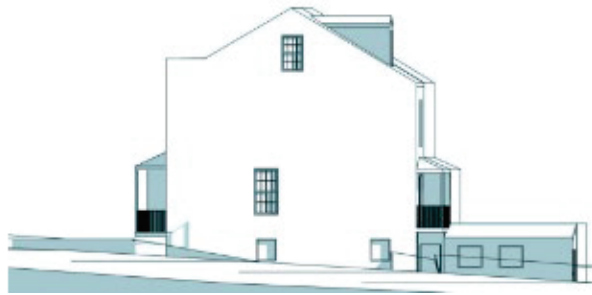
1. There is overshadowing impact to 64 Argyle Pl lower ground hallway, lower ground living and ground hallway from dawn until 10am. Beyond these hours there is no further impact by the proposed works.
  - a) Overshadowing impact on 64 Argyle ground hallway window from 8am until 10am. Gains solar access from 10am until self-shadowing at 12:30pm
  - b) Overshadowing impact on 64 Argyle lower ground hallway window from 8am until 10am. Gains solar access from 10am until self shadowing at 12:30pm.
  - c) Overshadowing impact on 64 Argyle lower ground living room window from dawn until 9:30am. Gains solar access from 9:30am until self shadowing at 12:30pm.

### 9am 21st June Proposed 64 Argyle Elevation



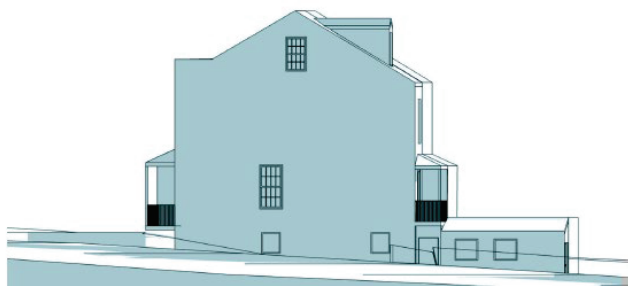
**Figure 10:** Image depicted from page 53 of the Design Report - Appendix A. (Source: Andrew Burns Architecture / Tasman Storey Architect)

2. There is no additional overshadowing impact to 64 Argyle by the proposed works at 12pm.  
**12pm 21st June Proposed 64 Argyle Elevation**



**Figure 11:** Image depicted from page 54 of the Design Report - Appendix A. (Source: Andrew Burns Architecture / Tasman Storey Architect)

3. There is no additional overshadowing impact to 64 Argyle by the proposed works at 3pm.  
**3pm 21st June Proposed 64 Argyle Elevation**



**Figure 12:** Image depicted from page 55 of the Design Report - Appendix A. (Source: Andrew Burns Architecture / Tasman Storey Architect)

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

### Tests

Historically, the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the

first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are that:

1. the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. the objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreasonable; or,
5. the zoning of the land is unreasonable or inappropriate.

The five ways are not exhaustive and it may be sufficient to establish only one. This Request relies on the first way established under *Wehbe*. The remaining 4 are not relevant to the circumstances of the DA.

## Compliance is unreasonable and unnecessary

Compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of this application because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The proposal's compliance with the objectives of the height standard is discussed below.

### **Clause 4.3 Objective 1 (a)**

***to ensure the height of development is appropriate to the condition of the site and its context,***

The proposal is consistent with the guidelines for the site's Conservation Management Plan (CMP), and it respectfully responds to its heritage context, having minimal and acceptable environmental impacts. The CMP guidelines for the site provide that a new building which adopts the prevailing built form of development in the vicinity and incorporates qualities of the surrounding locality would produce a more desirable and appropriate outcome, including the replacement of the existing building.

Considering that the existing building on the site is identified as a detracting item in the Building Contribution Map of the SDCP 2012, and that the proposed height was informed by a height plane analysis of the site's context ensuring that the proposed height remains consistent with the height of the surrounding developments, it is concluded that the departure from the height standard of Clause 6.47(5) is appropriate to the condition of the site and its context.

### **Clause 4.3 Objective 1 (b)**

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

Considering that the existing building on the site detracts from the heritage character of the area, and that the proposed dwelling was informed by a height plane analysis, demonstrating that the proposed

height is consistent with the heights of the roof forms and the parapets of existing neighbouring buildings, it is concluded that the replacement of the existing building by the proposed development ensures a more appropriate height transition between the site and its surrounding heritage items and buildings within the Millers Point heritage conservation area.

**Clause 4.3 Objective 1 (c)**

***to promote the sharing of views outside Central Sydney***

A comprehensive analysis of the site's context is part of the Design Report prepared by the architects during the concept stage. Part 4 of the Report includes a comprehensive research and view analysis of the visual impact, and privacy, which has supported the design development of the proposal since its concept stage. Additionally, the appropriate height of the proposed dwelling has been informed by the height planes of the parapets and roof ridges of existing neighbouring buildings, ensuring it is consistent with the surrounding development.

**Clause 6.47 Objective 1 (a)**

***to conserve the heritage items and built form of the Millers Point heritage conservation area,***

A Section 60 application to Heritage NSW (ID2983) was approved on 10th October 2023 and the proposal has been amended to address the one recommendation made in the s60 Approval.

A Heritage Impact Statement (HIS) has been prepared by John Oultram Heritage & Design to accompany this DA, and it supports the proposal. According to the HIS, the proposal is a very well-considered response to the local context and heritage significance of the surrounding area and it is aligned with the relevant conservation and management guidelines.

The proposal is a well-designed building, with a positive impact to the historic and aesthetic character of the Millers Point Conservation Area and it is aligned with site's Conservation Management Plan (CMP) guidelines that a new building which adopts the prevailing built form of development in the vicinity of the site and incorporates qualities of the surrounding locality, would produce a more desirable and appropriate outcome from an urban design perspective and heritage conservation objectives.

Notwithstanding the above, the CMP for the site allows for its replacement and the existing building on the site is identified as a detracting item in the *Building Contributions Map* of the SDCP 2012.

**Clause 6.47 Objective 1 (b)**

***to ensure that conservation management plans endorsed by the Heritage Council are considered in the assessment of development that impacts a heritage item in the Millers Point heritage conservation area***

The following Conservation Management Plans have been considered in the assessment of this application:

- *No. 87 Lower Fort Street, Millers Point, Conservation Management Plan Parts 1 & 2 2017 (CMP)* prepared by Lucas Stapleton Johnson & Partners.

- *Millers Point and Dawes Point Village Precinct (SHR 1682), Conservation Management Plan, Parts 1 of 2 (MPCMP) dated June 2015.*

Additionally, an s60 application of the proposal has been approved by Heritage NSW and the Heritage Impact Statement (HIS) prepared by John Oultram Heritage & Design supports the proposal.

The proposal is a well-designed addition, with a positive impact to the historic and aesthetic character of the Millers Point Conservation Area and it is aligned with site's Conservation Management Plan (CMP) guidelines which state that a new building which adopts the prevailing built form of development in the vicinity of the site and incorporates qualities of the surrounding locality, would produce a more desirable and appropriate outcome from an urban design prospective and heritage conservation objectives.

### Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

Clause 4.3(2) determines that:

*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.*

#### **In relation to Clause 4.3 (2)**

The *Height of Building Map* under Clause 4.3(2) of the SLEP 2012 categorises the subject site within "Area 10". Accordingly, Part 2 of Clause 6.47 of the SLEP 2012 states that the site specific provisions to the Millers Point Heritage Conservation Area applies to "Area 10", which includes the subject site.

Clause 6.47(5) determines that:

*Despite any other provision of this Plan, the maximum height of a building on land to which this clause applies is the height of the building on the land as at the commencement of this clause.*

#### **In relation to Clause 6.47 (5)**

The requested variation to clause 6.47(5) is to exceed the height of the currently existing building on the site. The proposal would result in a residential dwelling that is compatible with the two/three-storey height pattern of adjoining and surrounding residential developments. The requested variation in height would allow the proposed building to adopt the prevailing built form of the area and to incorporate the qualities of the surrounding locality. The proposed height of the residential dwelling was informed by a detailed analysis of its context which is outlined in the proposal's Design Report. It demonstrated that a 9m height plane aligns with the parapets of the immediate neighbours and a 12m height plane aligns with the ridges of the roof forms of the immediate context.

The proposal is a well-designed building, with a positive impact upon the historic and aesthetic character of the Millers Point Conservation Area and it is aligned with site's Conservation Management Plan (CMP) guidelines which state that a new building which adopts the prevailing built form of development in the vicinity of the site and incorporates qualities of the surrounding locality, would produce a more desirable and appropriate outcome from an urban design prospective and heritage conservation objectives. The CMP for the site allows for the replacement of the existing building.

The departure from Clause 6.47(5) will not create an undesirable precedent for other similar residential

development in the locality or diminish the overall effect of the standard for development. Notwithstanding the above, the existing building on the site is identified as a detracting item in the *Building Contributions Map* of the SDCP 2012 and a Section 60 application of the proposal was approved by Heritage NSW on 10th October 2023.

### Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3). These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

### Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

#### **Objective of the Development Standard**

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

#### **Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R1 – General Residential zone. 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 subject proposal is consistent with the objectives for the R1 – General Residential zone:

- The proposal is for the construction of a single-dwelling house which will contribute to the housing stock of the local area.
- The residential character of the area and range of housing choices will be improved together with the conservation of the heritage significance of the area.
- The proposed building typology is appropriate for the site. The development respects the adjoining development and maintains the predominantly two to three-storey residential scale of the area.
- The single residential use is consistent with the historic use of the site and maintains the existing land use pattern.

## Objectives of Clause 4.6

The specific objectives of Clause 4.6 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.*

The proposal is a well-designed addition that demonstrates a sensitive and respectful response to the historic and aesthetic character of the Millers Point Conservation Area. A comprehensive analysis of the site's context is part of the Design Report prepared by the architects during the concept stage. The appropriate height of the proposed dwelling has been informed by the height planes of the parapets and roof ridges of existing neighbouring buildings, ensuring it is consistent with the surrounding development.

Aligned with the site's Conservation Management Plan (CMP) guidelines the proposal replaces an existing building which is identified in the *Building Contributions Map* of the SDCP 2012 as a detracting item from the area's heritage character. According to CMP guidelines, a new building that adopts the prevailing built form of development in the vicinity of the site and incorporates qualities of the surrounding locality would produce a more desirable and appropriate outcome from both urban design and heritage conservation perspectives. The departure from the height standard will not create an undesirable precedent for other similar residential developments in the locality, nor diminish the overall effect of the height standard for development.

Notwithstanding the above, a Heritage Impact Statement (HIS) prepared by John Oultram Heritage & Design to accompany the subject DA supports the proposal. According to the HIS, the proposal is a very well-considered response to the local context and heritage significance of the surrounding area, and it aligns with the relevant conservation and management guidelines. Additionally, a Section 60 application of the proposal was approved by Heritage NSW on 10th October 2023.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6. Allowing flexibility in relation to the Height of Buildings development standard will achieve a better outcome in this instance, in accordance with objective 1(b).

## Conclusion

The proposed variance in height has been informed by a detailed analysis of the local context and the heritage significance of the area. Strict compliance with the height of buildings development standard contained within clauses 4.3(2) and 6.47(5) of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Furthermore, is aligned with the relevant conservation and management guidelines for the site and it has been the subject of an s60 application approved by Heritage NSW. There are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.