

Woollahra LEP 2014 Clause 4.6 Exceptions to Development Standards – Height of Buildings

Proposed Commercial Development at

**No. 55 Bay Street,
Double Bay**

Prepared for:

Doonside Holdings Pty Ltd

c/- Stafford Architecture

Suite 307/19A Boundary Street

Rushcutters Bay NSW 2011

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WOOLLAHRA LOCAL ENVIRONMENTAL PLAN (LEP) 2014

CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Doonside Holdings Pty Ltd

SITE ADDRESS: No. 55 Bay Street, Double Bay

PROPOSAL: Partial demolition of existing building and construction of a five storey commercial development

1. (i) Name of the applicable planning instrument which specifies the development standard:

Woollahra Local Environmental Plan (LEP) 2014

(ii) The land is zoned:

B2 Local Centre. The objectives of the zone are stated as follows.

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To attract new business and commercial opportunities.*
- *To provide active ground floor uses to create vibrant centers.*
- *To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings. Clause 4.3 states as follows.

4.3 Height of buildings

- (1) *The objectives of this clause are as follows—*
- (a) *to establish building heights that are consistent with the desired future character of the neighbourhood,*
 - (b) *to establish a transition in scale between zones to protect local amenity,*
 - (c) *to minimise the loss of solar access to existing buildings and open space,*
 - (d) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
 - (e) *to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*
- (2) *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.*
- (2A) *Despite subclause (2) and clause 4.3A, the maximum height of a dwelling house, dual occupancy or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.*
- (2B) *Despite subclause (2) and clause 4.3A, the maximum height of a building on a battle-axe lot on land in Zone R3 Medium Density Residential is 9.5 metres.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

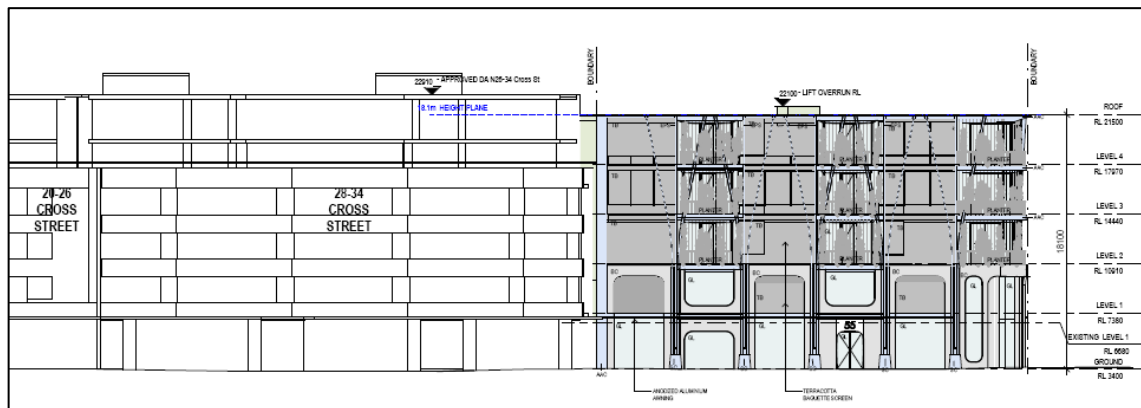
2. Overview

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation achieves the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP - Height of Buildings. This Clause operates in conjunction with the Height Map which indicates a maximum 18.1m applies to the subject site. This is one storey higher than surrounding sites as it is a corner allotment. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

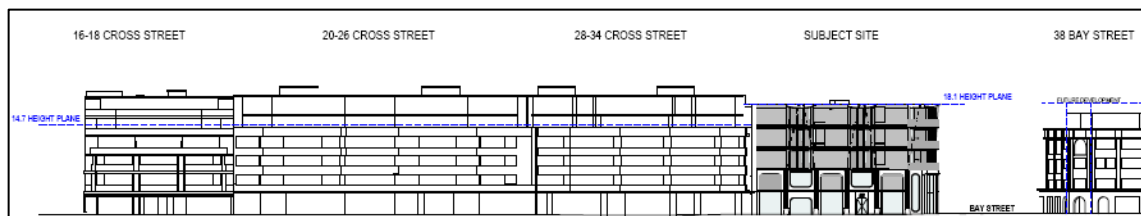
The proposed five storey commercial building will have a compliant building height of 18.1m (RL21.50) at the top of the fifth storey, to a maximum of 18.7m (RL22.10) at the top of the lift overrun (see **Figure 1**). This is measured to the existing ground level immediately below and provides a variation of 3.3%. The minor area of additional height will accommodate a new lift overrun to service the tenancies below.



Source: Stafford Architecture

Figure 1: Streetscape Elevation Showing Relationship to Nos. 28-34 Cross Street

The lift overrun is positioned at the rear southern boundary, away from the building edges to the street, to ensure it is not discernible from opposite sidewalk along either Bay Street or Cross Street. The proposed additional height will not impact on the overall appearance and perceived bulk and scale of the built form, and is necessary to provide access to each level of the development. Further, the proposal will be consistent in the Cross Street streetscape (see **Figure 2**).



Source: Stafford Architecture

Figure 2: Streetscape Elevation Showing Subject Site and Nearby Approved Developments

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6(1) and our planning response are as follows:

- | | |
|---------------|---|
| Objective (a) | <i>to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i> |
| Objective (b) | <i>to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i> |

The proposal seeks flexibility in the application of the height development standard to the proposed development in the circumstance of this particular case. The additional height will allow for a building that complies with the height standard at the top of the roof, with only a small area of the lift overrun protruding above the height standard.

Strict compliance would not result in a better outcome for development. Strict compliance would require the deletion of the lift overrun which would necessitate the removal of equitable access arrangements for the upper most floor of the commercial building significantly reducing the useability of the commercial space and the internal amenity.

Flexibility in this circumstance will provide a better outcome from development. The proposed area of additional height will allow for circulation at the lower levels, and will be consistent in the streetscape.

Accordingly, the proposal provides an improved planning outcome both for and from the development and flexibility should be afforded in this instance.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause is stated, inter alia:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant test will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite the proposed development's non-compliance with the applicable height development standard, the proposal is consistent with the desired high-density, commercial character of the area. Reasons why the proposed development is consistent with the objectives of the height standard are explained below.

(a) **To establish building heights that are consistent with the desired future character of the neighbourhood,**

The proposal's height is consistent with the built form in the Double Bay Centre area generally and the southern side of Cross Street specifically. In *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 [63], which also related to a development on the southern side of Cross Street, Preston CJ states, inter alia:

...the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Accordingly, the desired future character is shaped by recent approvals in the vicinity and notionally the priorities of the LEP. These will now be discussed.

Council or the Court has supported a number of developments breaching the height standard.

Recent Approvals in the Vicinity

There are a number of developments in the vicinity of the site approved by the consent authority that are greater than the height standard.

Recent approvals in the area including at Nos. 28-34 Cross Street have permitted building forms which vary the development standard by the provision of additional liveable spaces.

The proposal seeks to deviate from the standard for the purpose of a lift overrun, which is not inconsistent with the context and character of the area.

Local Environmental Plan

'Desired future character' is not defined in the LEP. The meaning of 'desired future character' is instead derived from the text and context of the provisions of the LEP in which it is used and the other provisions of the LEP that form the urban character and built form of the area. The relevant clauses in the LEP which relate to urban character and built form are:

- a. The zoning of the land (clause 2.2 and the Land Zoning Map);
- b. The zone objectives (clause 2.3);
- c. The land use table (at the end of Part 2);
- d. The development standards in Part 4:
 - i. Clause 4.3 Height of Buildings and Height of Buildings Map which prescribes a maximum height of 18.1m;
 - ii. Clause 4.4(A) Floor space ratio which prescribes a maximum FSR of 3:1.

The B2 Local Centre zoning permits a wide range of uses and built form on the site, which promotes the eclectic desired future character. The proposal will contribute to the eclectic mix of permissible uses in the B2 Zone. In our opinion, the proposal is also consistent with the objectives of the zone, as demonstrated in Section 6 of this report.

(b) *To establish a transition in scale between zones to protect local amenity,*

As the subject site does not directly adjoin any other zones, this objective is not relevant. The built form is consistent with what is envisaged for the B2 Local Centre zone and the proposal is considered acceptable in this regard.

(c) *To minimise the loss of solar access to existing buildings and open space,*

The proposed height breach does minimise impacts of loss of solar on adjoining residential and commercial solar receivers.

(d) *To minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*

The proposal is consistent with achieving minimisation of impacts to adjoining and nearby properties, as follows:

Views

Existing view corridors are not affected by the proposed exceedance in the height of the proposed development and accordingly minimises the disruption to views.

Loss of Privacy

As the proposed height non-compliance relates to the lift overrun only, it will minimise privacy impacts to neighbouring residential development.

Visual Intrusion

The setback lift overrun, positioned at the rear boundary and away from the street edge, will not be readily visible from the public domain and will therefore not contribute to visual intrusion.

Overshadowing

As previously discussed, the proposal minimises impacts on solar access to nearby residential and commercial development, and the height exceedance will not impact amenity in this regard.

(e) To protect the amenity of the public domain by providing public views of the harbour and surrounding areas

As previously discussed, the height is a result of the lift overrun to provide circulation between the levels below, and the proposed roof parapet is otherwise compliant with the height standard. Therefore, the proposed minor area of additional height will protect views from the public domain.

Accordingly, although the proposal will slightly exceed the height development standard, it remains consistent with the objectives of the standard, and will provide a consistent built form within the streetscape whilst maintaining amenity.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are a number of environmental planning grounds that justify the additional height in this particular circumstance. In addition to compliance with the objectives of the zone and development standard; environmental planning grounds include the prominent corner site; consistency with the desired future character; commercial use; acceptable environmental impacts; and the urban design benefits of the proposal. These will now be addressed.

Equitable Access

The proposed provision of a lift provides for equitable access to each level of the building, and achieves compliance with the DDA associated with disabled and accessible access.

Consistent with Desired Future Character

This report demonstrates that the proposed additional height is compatible with desired future character the area. The desired future character of this area of Double Bay was discussed in the Judgement for *SJD*, as Clay AC notes at [68]:

The desired future character in my opinion must take into account the form of the buildings to the east [Nos. 16-18 & 20-26 Cross Street] which the Council approved under effectively the same controls as present. Those buildings exceed the height and floor space ratio controls. As the Applicant pointed out in submissions, this is not a case where there is an adjacent development approved and constructed many years ago which sits as an anomaly in the street. The developments under construction represent the recently expressed attitude of the Respondent [Council] to the controls and what is desired in this part of Cross Street.

The scale and bulk of the additional height above the compliant built form is not incompatible with the character of the surrounding approved and constructed built forms.

Retention and Reuse of Existing Built Form

The retention and reuse of the existing building form results in a slight increase in floor to floor levels, that contributes to the breach. The retention of the existing building form allows the orderly and economic use and development of the land, in accordance with the objectives in the EPA Act.

Urban Design Benefits

The proposal provides a high level of urban design which minimises any potential impacts from the non-compliance. The facades will be highly articulated with balconies and soft landscaping which will break up the built form. The area of additional height is not visible when viewed from Cross Street, and the Bay Street intersection, therefore not impacting on its presentation in the streetscape (see **Figure 3** on the following page).



Source: Stafford Architecture

Figure 3: The Proposal in the Streetscape (intersection of Cross and Bay Street)

The additional height allows for circulation between the levels below, without impacting on the relationship with the public domain at a human scale at the corner of Cross and Bay Streets. The proposed awning will also benefit pedestrian amenity. The quality design has the potential to stimulate further renewal in the area, which contributes to the evolving character of the Double Bay Centre.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b). We therefore consider contravening the development standard to be justified.

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can be satisfied that each of the requirements of Clause 4.6(4)(a), have been met for the reasons set out in this request, and having regard to the site and locality. In our opinion, the proposal achieves the objectives of the Height of Buildings Development Standard, as already demonstrated; and the B2 Local Centre Zone, as discussed below:

Objective:	<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</i>
Response:	The proposal provides a mix of retail and office uses to serve people living, working in, and visiting the local area. The tenancies will provide a high level of amenity and accessibility.
Objective:	<i>To encourage employment opportunities in accessible locations.</i>
Response:	The proposal will offer five levels of refurbished and new retail and office floorspace to encourage employment opportunities, with lift access to each level. The site is in highly accessible location nearby bus, train and ferry services, and pedestrian and bike links.
Objective:	<i>To maximise public transport patronage and encourage walking and cycling.</i>
Response:	The subject site is highly accessible by public and active transport networks. There are a range of public transport options in close proximity including bus, train and ferry services. The high level of pedestrian amenity in Double Bay encourages walking and cycling to access the proposed retail/business uses.
Objective:	<i>To attract new business and commercial opportunities.</i>
Response:	The proposal will attract new business and commercial opportunities through the refurbishment of existing retail tenancies and incorporation of new office spaces. The commercial use has higher floor to ceiling height requirements, which contributes to the lift overrun being above the height standard.
Objective:	<i>To provide active ground floor uses to create vibrant centres.</i>
Response:	The proposal retains existing active ground floor uses to contribute to the vibrant local centre.
Objective:	<i>To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.</i>
Response:	The proposed building form is not uncharacteristic of the existing building form in the area, and the bulk and scale is compatible with neighbouring properties. The proposal has been thoughtfully designed to provide appropriate levels of amenity to surrounding residential uses.
Objective:	<i>To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.</i>
Response:	The proposal has a height, bulk and scale that is compatible with neighbouring properties and therefore achieves the desired future character of the area.

From this we consider the proposal is in the public interest and should be supported.

7. **Clauses 4.6(4)(b) and 4.6(5) Requirements**

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. Since the conditions in the table do not apply in this case, the concurrence of the Secretary can be assumed.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal does not raise any matters of significance for the State or Regional EPIs so far as the additional height above the compliant height level does not raise questions in that regard.

Additionally, the public benefit is maintained by virtue of the outstanding design outcome associated with proposal, including its compatibility with the context and character of the zone and surrounding development.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 2** on the following page).

In our opinion the Consent Authority can be satisfied the proposed development will be in the public interest because it is consistent with the evolving character and density of Cross Street; the objectives of the standard and the development objectives of the B2 Local Centre Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 2: Compliance Matrix

Para (Initial Action)	Requirement	Section	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.4 Height of Buildings	
12	What is the control	1 & 2	18.1m	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	4	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	4.1	The proposal is consistent with Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	4.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposed height facilitates a commercial development consistent with the planning objectives of the area; The non-compliance facilitates circulation and equitable access between the commercial levels; and The height will not result in unacceptable environmental impacts. 	YES
26-27	2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is	5	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the B2 Local Centre Zone.	YES

	contravened and the objectives for development for the zone in which the development is proposed to be carried out.			
28-29	Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.	6	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES

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