Attachment C

Clause 4.6 Variation – Dwelling Retention

REQUEST TO CONTRAVENE A DEVELOPMENT STANDARD UNDER CLAUSE 4.6

cl. 7.36, Sydney LEP 2012, Dwelling retention



163 Victoria Street, Potts Point NSW

Alterations and additions to existing residential flat building and change of use to dwelling house

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Revision B			
Revision C			

We acknowledge that the land on which we live, learn and work as the traditional country of the Gadigal people of the Eora Nation. We acknowledge these traditional owners of this land and acknowledge their living cultures and the unique roles they have played in maintaining life, language, and culture in this region. We pay respect to their Elders past, present and emerging and all aboriginal people.

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1.0 INTRODUCTION

This request to contravene a development standard in respect of height under Clause 7.36 – *Dwelling retention* of the *Sydney Local Environmental Plan 2012* is submitted to accompany a development application for:

alterations and additions to an existing residential flat building

at 163 Victoria Street, Potts Point NSW.

It has been prepared with particular reference to the decisions of the Court in respect of:

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90;
- Wehbe v Pittwater Council [2007] NSWLEC 827;

and other relevant case law.

2.0 THE DEVELOPMENT STANDARD

2.1 The applicable planning instrument which specifies the development standard:

Sydney Local Environmental Plan 2012

2.2 The number of the relevant clause:

Clause 7.36 – Dwelling retention

2.3 The provisions of the relevant clause:

Clause 7.36(2)

Development consent must not be granted for the following development in relation to a residential flat building or a building containing 3 or more dwellings if the development would reduce the number of dwellings on the site of the building by more than the greater of 15%, rounded to the nearest whole number of dwellings, or 1 dwelling—

(a) making alterations to the building,

(b) enlarging or extending the building,

(c) demolishing the building and erecting a new building.

The existing building is a residential flat building and contains 3 dwellings and, as such, is subject to this clause.

This clause limits the reduction in the number of dwellings to 15% (0.45 dwellings) or one, whichever is the greater – which is one. It therefore limits the resultant number of dwellings to no less than 2.

3.0 THE CONTRAVENTION SOUGHT:

3.1 Description of the contravention:

It is proposed to amalgamate all 3 of the dwellings in the existing building into a single dwelling, resulting a reduction in the number of dwellings by 2.

3.1.1 Maximum permitted reduction in the number of dwellings:

- 1 dwelling

3.1.2 Proposed reduction in the number of dwellings:

- 2 dwellings

3.1.3 Extent of contravention:

- 1 dwelling

3.1.4 Percentage contravention:

- 100%

3.1.5 Cause of the contravention:

The contravention is associated with amalgamation of all 3 existing dwellings into a single dwelling to create a single dwelling.

4.0 PROVISIONS OF CLAUSE 4.6

4.1 Cl. 4.6(1): Objectives

Clause 4.6 seeks 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. The objectives of Clause 4.6 are as follows:

Cl. 4.6(1) Objectives of Clause		
Clause	**Control**	**Justification**
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	The proposal contravenes the development standard which sets a maximum by which the number of dwellings in a building may be reduced. It seeks to utilise this clause to provide appropriate flexibility in application of the standard to permit approval.
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances.	The proposal would achieve better outcomes: • ***For*** the development: The contravention would permit: o Alterations and additions to the existing dwelling to enable the accommodation sought by the present owners and occupants, o A number of dwellings consistent with those approved under the most recent and still active development consent (D/2022/686). • ***From*** the development: The contravention would result in: o A configuration more consistent with the original historical use of the site as a single dwelling house; o Less demand upon local infrastructure.

4.2 Cl. 4.6(2): Development standards excluded form operation of clause

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.

The relevant clause is not expressly excluded from the operation of clause 4.6.

4.3 Cl. 4.6(3): Justification of the Contravention of the Development Standard

Under the provisions of clause 4.6(3) – Exceptions to development standards of *SLEP 2012*, the consent authority must be satisfied that the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the table below:

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**
4.6(3)	Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant has demonstrated that:	This written request addresses this clause.

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**

4.6(3)(a)	compliance with the development standard is unreasonable or unnecessary in the circumstances (see the test under Wehbe v Pittwater Council below and assessment against the objectives of the zone and development standard), and	• Compliance with the development standard is unreasonable given that:
		  • The site has a current consent (D/2022/686) to convert the building to a single dwelling which is still active and does not lapse until 19 June 2028 and could still be acted upon; and
		  • No adverse impacts are associated with the contravention.

4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	Sufficient environmental planning grounds, in accordance with the criteria established in Initial Action, are outlined below:
	As established in Initial Action [23], 'environmental planning grounds' refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act. These are as follows:	See below:
1.3(a)	to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The contravention would enable the occupation of the site for multi-generational living enabling the care of young children by grandparents who also reside in the same building.
1.3(b)	to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The contravention would have no measurable impact upon the intensity of the development on the site which would, nevertheless, accommodate the same or a greater number of residents as a compliant development – but with more flexibility.
1.3(c)	to promote the orderly and economic use and development of land,	Allowing the use of an existing building in a manner which is consistent with its zoning is consistent with the orderly and economic use of the land.
1.3(d)	to promote the delivery and maintenance of affordable housing,	Not applicable.
1.3(e)	to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The contravention would provide incentive for the upgrading of the existing building to be more energy efficient.
1.3(f)	to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The contravention would be more consistent with the historical form of the building which was originally constructed as a single dwelling.
1.3(g)	to promote good design and amenity of the built environment,	The contravention would provide better amenity for the owner and occupants of the existing dwelling as it would be more suitable to their specific functional requirements.
1.3(h)	to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The contravention would enable alterations and additions to provide a higher standard of thermal performance and more sustainable construction.
1.3(i)	to promote the sharing of the responsibility for environmental planning and assessment between the	Not applicable.

Cl. 4.6(3) Justification of Contravention		
Clause	**Control**	**Justification**
	different levels of government in the State,	
1.3(j)	to provide increased opportunity for community participation in environmental planning and assessment.	Not applicable.

In Wehbe v Pittwater Council [2007] NSWLEC 827, Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. These are examined below:

The Five Part Test: (in accordance with Preston CJ in Wehbe v Pittwater Council [2007] NSW LEC 827)		
Part	**Test**	**Discussion**
1.	The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The objectives of the development standard are achieved. See discussion under 4.4 below.
2.	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	The objectives of the standard are relevant to the proposal and an assessment of compliance is provided above. It is considered that the objectives of the standard have been met and therefore strict compliance is unnecessary.
3.	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object of the development standard would be thwarted if strict compliance were required (see 4.4 below).
4.	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable	It is unknown if the development standard has already been varied although this may be the case.
5.	the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.	Not applicable. The zoning of the land is considered appropriate.

4.4 Cl. 4.6(3)(a) Objectives of the Zone & Development Standard

Under the Five Part Test established in Wehbe v Pittwater Council, it may be demonstrated that the objectives of the standard are achieved notwithstanding non-compliance with the standard. This can be determined by an assessment of the consistency of the contravention with the objectives of the development standard. This assessment is summarised in the table below:

Cl. 4.6(3)(a): Objectives of the development standard		
Clause	**Objectives**	**Justification**
7.36	**Dwelling retention**	
(1)	The objective of this clause is to maximise dwelling retention.	By extrapolation, this objective is also associated with the maximisation of the number of residents which is intended to address the housing shortage.

Cl. 4.6(3)(a): Objectives of the development standard		
Clause	**Objectives**	**Justification**
		The reduction of the number of nominal dwelling son the site, however, does not necessarily imply a reduction in the number of occupants. In this case, it is intended that the existing building will be entirely owner occupied but for three generations of family members to accommodate multi-generational family living. This would include: • The two owners; • Their 2 new children; and • Each of their parents. Because there would be care relationships, especially between the grandparents and the grandchildren, it is most appropriate that this take place under the umbrella of a single dwelling. Instead of reducing supply of residential accommodation, the proposal would allow for a greater number of residents on the site but with the greater level of social connection and support in place as facilitated by multi-generational living.

In circumstances where there are no significant adverse impacts resulting from the contravention of the development standard, it is unreasonable and unnecessary to require strict compliance.

5.0 CONCLUSION

This Clause 4.6 contravention request to clause 7.36 of SLEP 2012 – Dwelling retention, should be supported on the basis that strict application of the development standard is unnecessary and unreasonable given that:

a) The development meets the stated objectives of clause 7.36, specifically:

   a) to maximise dwelling retention.

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

For the reasons set out above, the development may be granted consent notwithstanding the contravention of the development standard in respect of the height of buildings clause 4.36 of the SLEP 2012 – Dwelling retention.