

An architectural rendering of a modern, multi-story building with a distinctive white, grid-like facade. The building features numerous balconies, many of which are covered in lush green plants and flowers, creating a vertical garden effect. The ground floor has large glass windows and doors, and a paved area with people walking and sitting on the grass. The overall scene is bright and sunny, with palm trees and other greenery in the background.

URBIS

CLAUSE 4.6 VARIATION REQUEST: ACTIVE STREET FRONTAGES

9-11 Nelson Street,
Chatswood

Prepared for
VIMC
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1. INTRODUCTION

This clause 4.6 Variation Request (**the Request**) has been prepared on behalf of VIMG (**the applicant**) and accompanies a Development Application (**DA**) for the proposed mixed-use development at 9-11 Nelson Street, Chatswood (**the site**).

The request seeks an exception from the Active Street Frontages Map prescribed for the site under clause 6.7 of Willoughby Local Environmental Plan 2012. The variation request is made pursuant to clause 4.6 of Willoughby Local Environmental Plan 2012 (**WLEP 2012**).

The request is made pursuant to clause 4.6 of the WLEP 2012 and should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated August 2023.

The following sections of the report include:

- **Section 2:** A description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** A brief overview of the history of the project.
- **Section 4:** A brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 5:** Identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 6:** Outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 7:** Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines, planning principles, and judgements issued by the Land and Environment Court.
- **Section 8:** Summary and conclusion.

2. SITE DESCRIPTION

The site is located at 9-11 Nelson Street, Chatswood and is within the Willoughby Local Government Area (LGA). The site is located on the northern side of Nelson Street, between the T1 North Shore Line railway corridor to the east and the Pacific Highway to the west.

The site is broadly regular in shape with street frontages to Nelson Street and Gordon Avenue. Side boundaries to the east and west are obliquely angled. A pedestrian and cycle way runs along the eastern boundary of the site.

Nelson Street and Gordon Avenue are both no-through roads, with the vehicular bridge connecting Nelson Street to Berkeley Court to the east recently removed to allow for Sydney Metro works to commence on the rail line.

The key features of the site are summarised in the following table.

Figure 1 Location Plan



Source: Urbis

2.1. EXISTING DEVELOPMENT

The site currently accommodates a three-storey residential flat building containing 45 units, two levels of basement car parking and central communal gardens.

Vehicle access to the basement is currently located on Nelson Street, while waste collection is from waste storage areas located on the Gordon Avenue frontage. Pedestrian access to the existing development is on both frontages.

There is dense established vegetation located along the western and southern boundaries, with additional mature street trees along both road frontages.

2.2. SURROUNDING CONTEXT

The surrounding development includes:

- **North:** Directly north of the site is Gordon Avenue as well as 1-3 Gordon Avenue and 5-9 Gordon Avenue which are apartments low density.
- **East:** Directly east of the site is a pedestrian and bike pathway, correctly referred to as Frank Shannon Walk. Further east is a train line owned and operated by Transport for NSW (**TfNSW**) which travels in both a northern and southern direction.
- **South:** Directly south of the site is Nelson Street and the Sydney Metro Chatswood Dive Site which helps support the Metro works within the Chatswood vicinity.
- **West:** To the west of the site is 15 Nelson Street and 10 Gordon Avenue which are residential dwellings in the form of low-density apartment buildings.

The site is approximately 520m from the Chatswood transport interchange and 7.5km north of the Sydney CBD. The site is located in the southern periphery of the extended Chatswood CBD boundary as identified in the Chatswood CBD Strategy Map located within the SEE.

3. PROPOSED DEVELOPMENT

3.1. SUMMARY OF PROPOSED DEVELOPMENT

This clause 4.6 Variation Request has been prepared to accompany a DA for the redevelopment of the site in accordance with the outcome of a recently run Architectural Design Competition which proposes a mixed-use development that delivers two podium levels which are supported by a mix of commercial and retail uses, as well as two residential towers above.

A detailed description of the proposed development is provided in the Statement of Environmental Effects (SEE) prepared by Urbis Pty Ltd and dated August 2023. The proposal is supported with architectural, engineering, landscape plans, and other technical reports.

A summary of the key features of the proposed development is provided below:

- Demolition of all existing buildings and structures, and excavation for three (3) basement levels for parking, loading and servicing, storage, and associated plant, services and utilities.
- Construction of a 27-storey mixed-use development with a maximum height of 93m (RL195.00) including use for commercial and retail premises within the storey podium and two residential towers above, and a landscaped area of communal open space on the podium rooftop.
- A maximum GFA of 25,097m² which equates to a maximum FSR of 6:1.
- Consolidated vehicular access to the basement via Gordon Avenue (to the north).
- A total of 250 car parking spaces within the basement; 11 motorcycle spaces; and 22 bicycle spaces.
- Public domain and landscape works along Frank Channon Walk.
- Delivery of a 3m wide publicly accessible easement along the eastern boundary of the site.

Figure 2 Development Render



Source: DKO

4. PROPOSED VARIATION TO ACTIVE STREET FRONTAGE MAP STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention.

4.1. DEVELOPMENT STANDARD

This clause 4.6 request seeks a variation to clause 6.7 of the WLEP 2012. As shown in **Figure 3** below, the Active Street Frontages Map (**ASFM**) contained in the WLEP 2012 (as amended by PP 2020/22) identifies the Nelson Street and Gordon Avenue frontages as active street frontages.

Clause 6.7 of the WLEP 2012 defines active street frontages as:

In this clause, a building has an active street frontage if—

- (a) for land in Zone E2 Commercial Centre—all ground floor premises facing the street are used for retail premises or business premises, or*
- (b) otherwise—all ground floor premises facing the street are used for commercial premises.*

A copy of the Active Street Frontages Map relevant to the site can be found in Figure 3 below.

Figure 3 Active Street Frontage Map



Source: Urbis

4.2. EXTENT OF VARIATION TO ACTIVE STREET FRONTAGES MAP

The proposed development seeks to vary the Active Street Frontages Map contained within the WLEP 2012 along Nelson Street only. Certain aspects which make up the development required by law have been

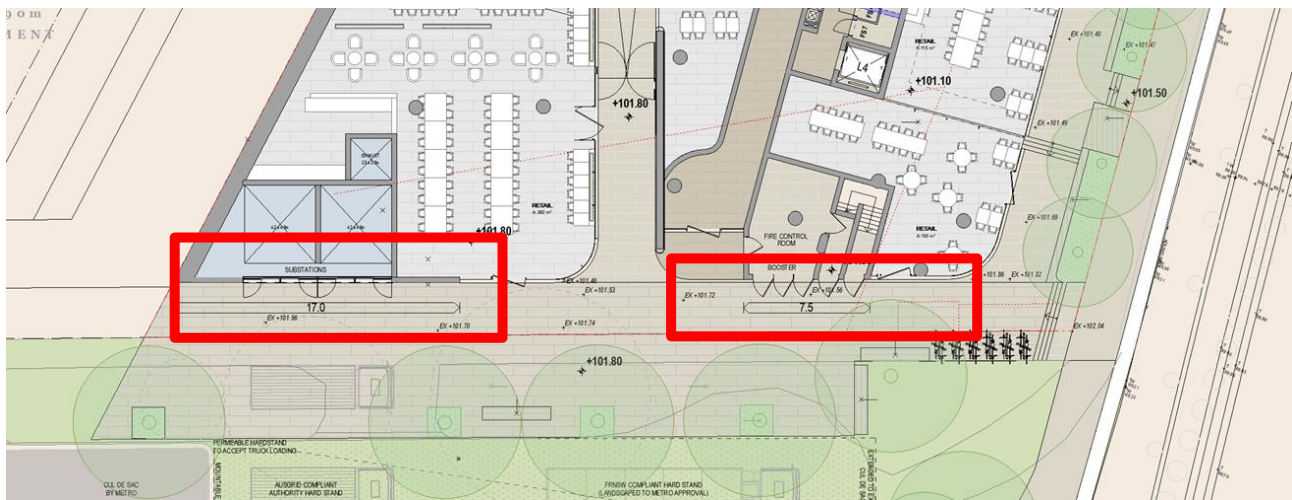
incorporated into the southern frontage, and consolidated to limit the amount of frontage which will not be considered active. This includes:

- **Fire hydrant and fire sprinkler booster cupboards:** The booster is required to be parallel with the street frontage and located at the site entry address within 10m of a hardstand to allow an attending fire truck to connect to the boosters.
- **Fire control room and access door:** The building height and building class dictates that the building must have a Fire Control Room in accordance with the NCC. The Fire Control Room hosts a door which opens directly outside.
- **Fire escape doors:** The NCC requires mandatory escape paths that discharge persons direct to outside the development.
- **Gas meter room:** The gas meter room is within the basement areas and requires a direct stair access from the street.
- **Sub-station:** The site requires high voltage to low voltage authority transformers. These transformers are required to be installed in accordance with Ausgrid Network Standard NS113 which dictates that transformers are to be located with direct access from the street frontage and direct louvre access to outside.

It is acknowledged that under sub clause (4) of cl 6.7 that an active street frontage is not required for part of a building that is used for the access of fire services. For abundant caution, the fire control room and access doors has been considered as part of this request.

Figure 4 below highlights the proposed location for the abovementioned substation and booster and fire escape locations.

Figure 4 Location of proposed substation chamber, fire booster and fire escape locations



Source: DKO

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of the WLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The 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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- (a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (c) There are sufficient environmental planning grounds to justify contravening the development standard.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). Additionally, the consent authority should be satisfied that the proposed development will be in the public interest and remains consistent with the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (d) The public benefit of maintaining the development standard, and*
- (e) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under Clause 55(1) of the Environmental Planning and Assessment Regulation 2021 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel, or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the Active Street Frontages map prescribed for the site in clause 6.7 of WLEP 2012 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the height of building development standard be varied.

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the active street frontage map in accordance with clause 4.3 of the WLEP 2012.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provide detailed responses to the key questions required to be addressed within both the above documents and clause 4.6 within the WLEP 2012.

6.1. CLAUSE 4.6(2) - IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

The active street frontages map prescribed under clause 6.7 of the WLEP is a development standard that is capable of being varied under clause 4.6 of the WLEP.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of the WLEP.

6.2. CLAUSE 4.6(3)(A) – IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater [2007] NSWLEC 827*. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the first method outlined in *Wehbe v Pittwater Council [2007] NSWLEC 827*. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

This request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the developer by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. That is, the developer would be unable to deliver a development which complies with the requirements of the relevant services and emergency authorities. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp [2011] NSWCA 308* at [15]).

The objectives of the standard are achieved notwithstanding non-compliance with the standard (the first method in Wehbe v Pittwater Council [2007] NSWLEC 827 [42]-[43])

The specific objective of clause 6.7 of the WLEP 2012 is detailed in **Table 1** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 1 Assessment of Consistency with Clause 6.7 Objectives

Objective	Assessment
<i>The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages in Zone E1 Local Centre, Zone E2 Commercial Centre, Zone E3 Productivity Support and Zone MU1 Mixed Use.</i>	The design team have sought to minimise, as far as possible, the amount of frontage which does not meet the meaning of 'active frontage', by consolidated the sub-stations together in one location, along with the fire stairs and fire room in another location. This results in 24.5m frontage which does not meet the definition of active frontage (figure 4 above). All remaining sections of the three street frontages are activated through ground floor commercial and retail uses, which will ensure a destinational pedestrian environmental is realised on the site.

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation request.

The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon.

The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

By requiring compliance with the active frontage clause, the development would not be able to be delivered in a manner which complies with the relevant service and emergency authorities. This would arguably result in a disproportionate burden on landowner, by restricting the ability to redevelop the site and realise a development envisaged by Council for this key site.

6.3. **CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There are sufficient environmental planning grounds to justify the variation to the development standard because:

- The need to vary the active street frontages map is driven by the need to locate certain services required by the National Construction Code (NCC), Ausgrid as the electricity provider to the site, New South Whales Fire on a frontage of the site. The WLEP 2012 specifies active street frontages along both Nelson Street and Gordon Avenue, however regard must be given to designing the building to meet other statutory obligations reasonably expected in a development of this nature. As such, this request seeks to vary the requirements of clause 6.7 of the Willoughby LEP 2012.

- The active street frontages as proposed do not hinder the proposals consistency with the zoning objectives or the active street frontage objectives.
- The proposed location of the fire services ensures compliance with the relevant emergency authorities, while doing so in a manner which does not detract from the overall activation delivered by the development on its three frontages.
- The substations are required to be installed in accordance with the Ausgrid Network Standard NS113, which dictates that they are to be positioned with direct access to the street frontage, with direct louvre access to the street and service vehicles. Arguably there are no environmental impacts that result from the locating of the substations in the south-west corner of the development.

6.4. CLAUSE 4.6(4)(A)(I) – HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (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).

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 ("*Rebel*"), the Court of Appeal held that a consent authority has to be satisfied that an applicant's written request has "*in fact*" or "*directly*" demonstrated both of the matters in clause 4.6(3) and clause 4.6(4). This request is prepared on that basis.

6.5. CLAUSE 4.6(4)(A)(II) – IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST?

Clause 4.6(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 proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

The consistency of the development regarding the objectives of the development standard is discussed above in **Table 1**. The proposed development is consistent with the objectives of the MU1 zone as outlined in **Table 2** below.

Table 2 Assessment of compliance against the land use objectives

Objective	Assessment
<i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i>	The proposed development, inclusive of the small sections of non-active frontage, will continue to encourage a diversity of retail uses that generate employment opportunities for both the incoming and existing community.
<i>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.</i>	The design team has ensured the final design of the ground plane is activated, per the definition, as far as practicable, while still delivering a development with compliant utility and fire service locations. This will ensure ground floor uses attract pedestrian traffic which will contribute to a vibrant, diverse, and functional street.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The site is zoned MU1, consistent with land to the north and south. Land to the west is the subject of a planning proposal which seeks to amend the zone to MU1, while also proposing a two-storey non-residential podium. The development, inclusive of the aspects of the proposal

Objective	Assessment
	which do not meet the definition of active, will not result in conflict between adjoining land uses.
To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.	The proposal delivers non-residential uses along all three street frontages on the ground floor other than small sections requires for services, fire access or the access driveway.
To allow for city living on the edges of the city centre of Chatswood, which encourages public transport use, shopping and the use of businesses and recreational services that contribute to the vitality of the city, without undermining its commercial role.	The proposed variation will not limit the developments' ability to meet this objective.

6.6. CLAUSE 4.6(4) AND CLAUSE 4.6(5) - HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 55(1) of the Environmental Planning and Assessment Regulation 2021.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with clause 6.7 of the WLEP 2012 will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the circumstances of the development.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

There is no public benefit of maintaining the planning control standard. The proposed development continues to achieve the objectives of the active street frontages control despite the non-compliance. Additionally, the proposed variation is in part driven by the need to comply with Ausgrid Network Standard NS113, which requires substations to be located where direct access to the street frontage and direct louvre access to outside the development, as well as NSWFR requirements.

As such, there is no public benefit of maintaining the planning control standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

There are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, compliance with the active street frontages standard contained within clause 6.7 of the WLEP 2012 is unreasonable in the circumstances of the case. It has been discussed that there are sufficient environmental planning grounds to justify a variation to the active street frontages map and it is in the public interest to do so.

It is reasonable and appropriate to vary the active street frontage map to the extent proposed for the reasons summarised below:

- The proposed development facilitates the mixed-use development of the site, consistent with the vision of PP-2021-5704. The development is consistent with the desired built form and land use outcomes at the site and will successfully integrate into the southern area of the Chatswood CBD. The variation to the active street frontage map is driven by the necessity to comply with the Ausgrid Network Standard NS113, and the NSWFR requirements.
- Strict compliance with the development standard is unreasonable and unnecessary as the objectives of clause 6.7 of the WLEP 2012 and the MU1 Mixed Use zone are achieved.
- Strict compliance with the development control does not promote any identifiable public benefit and would hinder the redevelopment potential of the site as envisaged by Councils endorsed documents and controls.
- There are sufficient environmental planning grounds to justify contravening the development standard for the active street frontages map. There will be minimal environmental impacts stemming from the contravention of this development standard. The minor variation will not result in any adverse impacts to neighbouring development.

For the reasons outlined above, this clause 4.6 is well-founded. The development standard is unreasonable in the circumstances and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the active street frontages map should be applied.

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