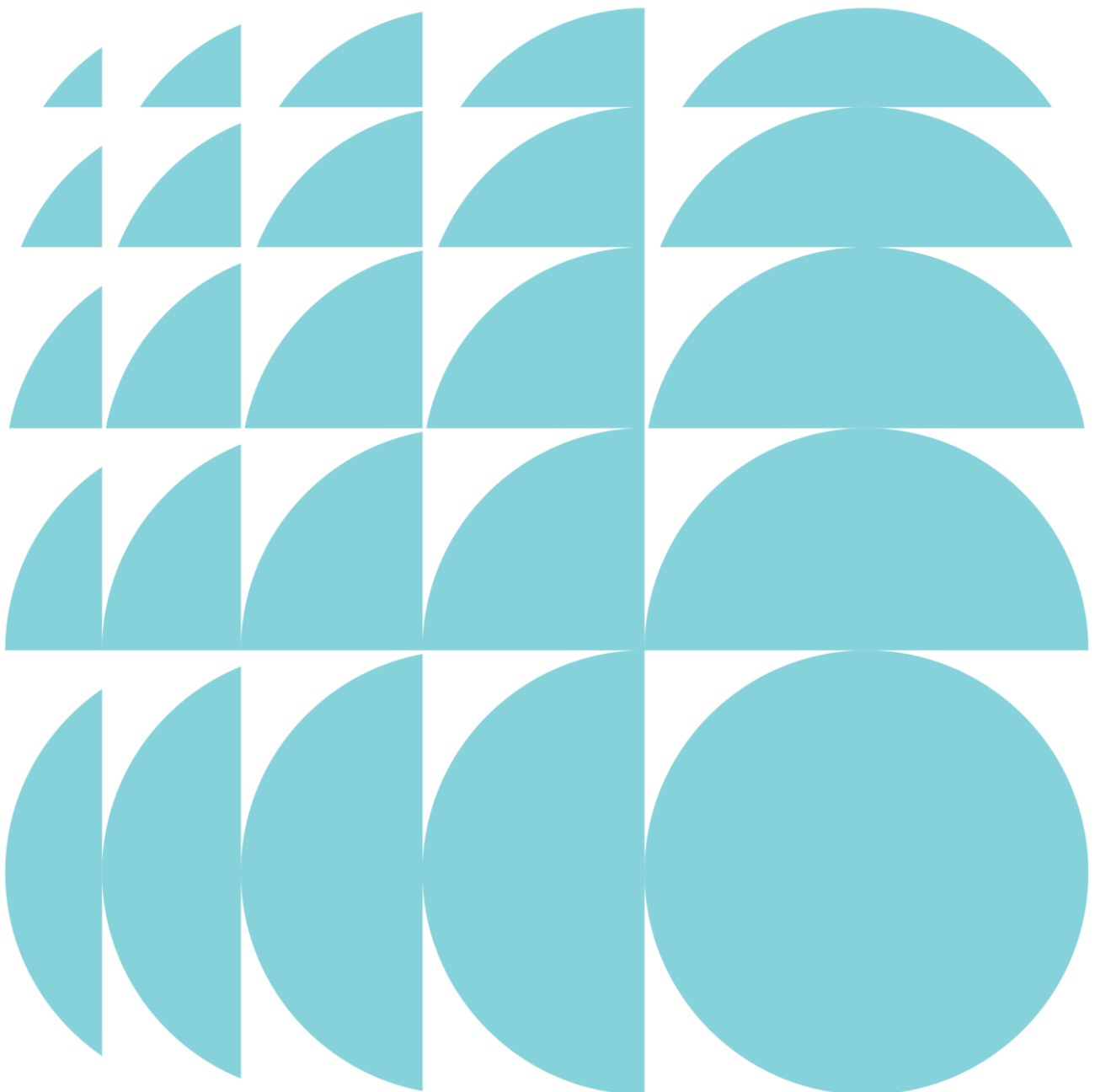


Clause 4.6 Variation

Corner of Blue and William Streets,
North Sydney
Commercial Development

Submitted to North Sydney Council
On behalf of Union Street Developer
Pty Ltd

6 July 2020 | 2190031



CONTACT

Jennie Buchanan Director jbuchanan@ethosurban.com 02 9409 4944

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This document has been prepared by:



Jennie Buchanan

This document has been reviewed by:



Clare Swan

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Ethos Urban Pty Ltd
ABN 13 615 087 931.
www.ethosurban.com
173 Sussex Street, Sydney
NSW 2000 t 61 2 9956 6952

1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Union Street Developer Pty Ltd. It is submitted to North Sydney Council (the Council) in support of a development application (DA) for a commercial development at the corner of Blue and William Streets, North Sydney proposing a variation to the maximum building height limit.

Clauses 4.6 and 6.3(3) of the North Sydney Local Environmental Plan 2013 (NSLEP) enable North Sydney Council and the North District Planning Panel to grant consent for development even though the development contravenes the height development standard. The clauses aim to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clauses 4.6 (3) and (4)(a)(ii) require the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard. Clause 4.6(4)(a) 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 demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

The consent authority's satisfaction in respect of those matters must be informed by the objectives of clause 4.6, which are to provide an appropriate degree of flexibility in the application of the relevant controls and to achieve better outcomes for and from the development in question by allowing flexibility in particular circumstances.

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

While these cases referred to the former SEPP 1, the analysis remains relevant to the application of clause 4.6(3)(a). Further guidance on clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the NSLEP requirements, this Clause 4.6 variation request identifies:

- the development standard to be varied (**Section 2**);
- the variation sought (**Section 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.1**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 4.2**);

- demonstrates that the proposed variation is 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 (**Section 4.3**); and
- provides an assessment of the matters the Secretary is required to consider before providing concurrence (**Section 5**).

This clause 4.6 variation request relates to the development standard for building height under clause 4.3 of the NSLEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated March 2020 and response to submissions dated May 2020.

This clause 4.6 variation request demonstrates that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

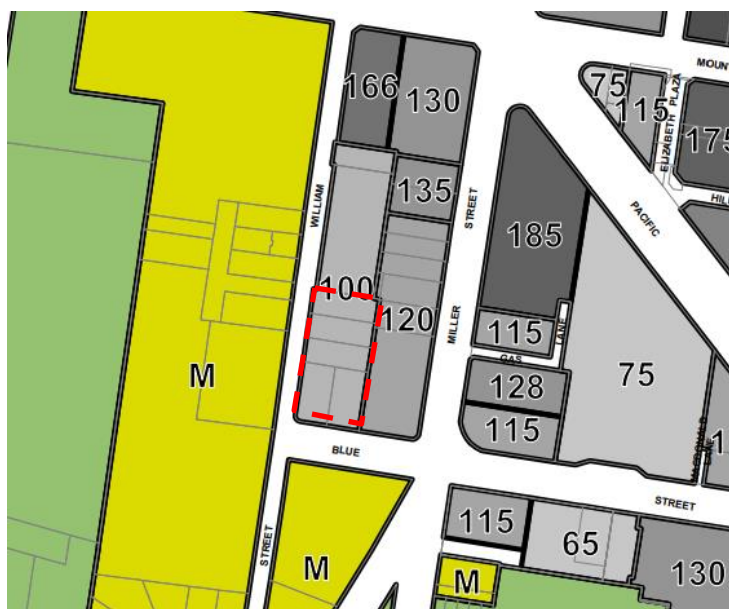
This clause 4.6 variation request demonstrates that,:

- notwithstanding the non-compliance with the maximum height development standard, the proposed development satisfies the tests in clauses 5.6 and 6.3(3) of NSLEP which provide for buildings to exceed the maximum height limit, noting that clause 6.3(3) permits variations to the height of buildings standard subject to certain overshadowing provisions. As clause 6.3(3) prevails to the extent of any inconsistency with other provisions in NSLEP, if complied with, it can be interpreted that compliance with the building height standard is unreasonable and unnecessary;
- there are sufficient environmental grounds to justify the contravention. The proposed height variation does not generate any unacceptable environmental impacts in respect of overshadowing or wind and will not impact on any significant view lines and vistas from the public domain;
- there are site specific environmental grounds which justify the minor breach, in particular the requirement to provide increased setbacks to three of the four site boundaries, which significantly compromise the permissible building envelope;
- notwithstanding the proposed height variation, the proposed development remains consistent with the objectives of the height standard and the B4 Mixed Use zone;
- the proposed height variation will not be perceivable from the public domain and as such the proposed development will have an appropriate impact, in terms of its scale, form and massing;
- Notwithstanding the proposed variation to the height limit, the development has an acceptable impact on a small number of private residential views (2 units) in the context of the North Sydney CBD and that where material view impacts occur these are generated by complying components of the building envelope and over a side boundary and not the portion of the building that exceeds the maximum building height; and
- The proposed development is in the public interest. The proposed development and variation to the height control will enable the orderly and efficient use of the land, in accordance with the objects of the Act.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clauses 4.6 and 6.3(3) of the NSLEP.

6.3 (3) *The consent authority may grant development consent to development on land in the North Sydney Centre that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm from the March equinox to the September equinox (inclusive) will not result in any private open space, or window to a habitable room, located outside the North Sydney Centre receiving—*

- a) if it received 2 hours or more of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less than 2 hours of direct sunlight, or
- b) if it received less than 2 hours of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less direct sunlight than it did immediately before that commencement.



Source North Sydney LEP 2013

3.0 Nature of Variation Sought

The height of the proposed building to the top of the plant and lift overrun is RL 101.8m, which equates to variation of 1.8m (a variation of 1.8%). The proportion of the building envelope above a height of RL100 is shown and highlighted yellow in **Figure 2**. This portion of the building comprises plant and lift overruns. It does not contain any gross floor area.

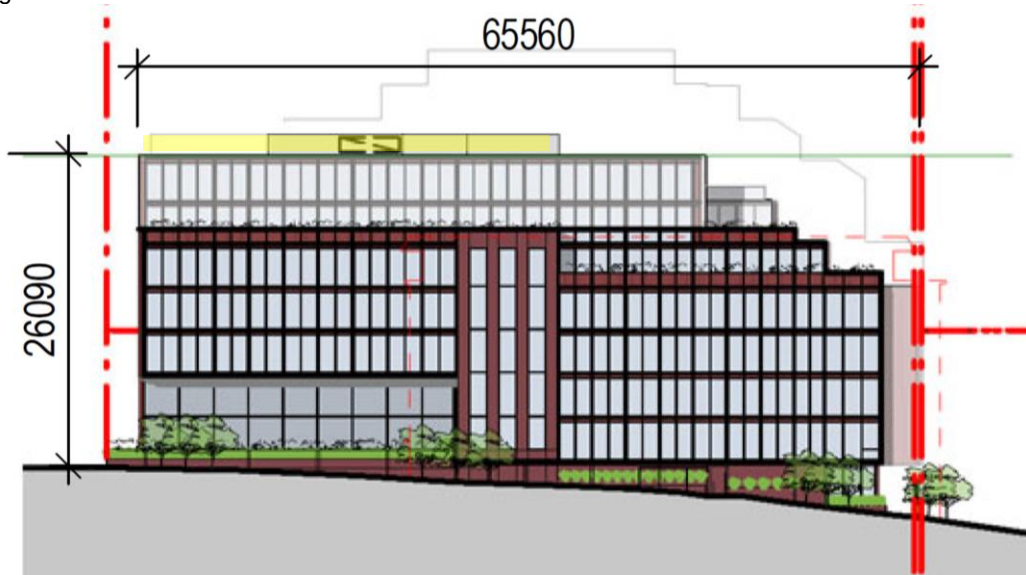


Figure 2 Extent of Building Envelope above a height of RL100 (highlighted yellow)

Source North Sydney LEP 2013

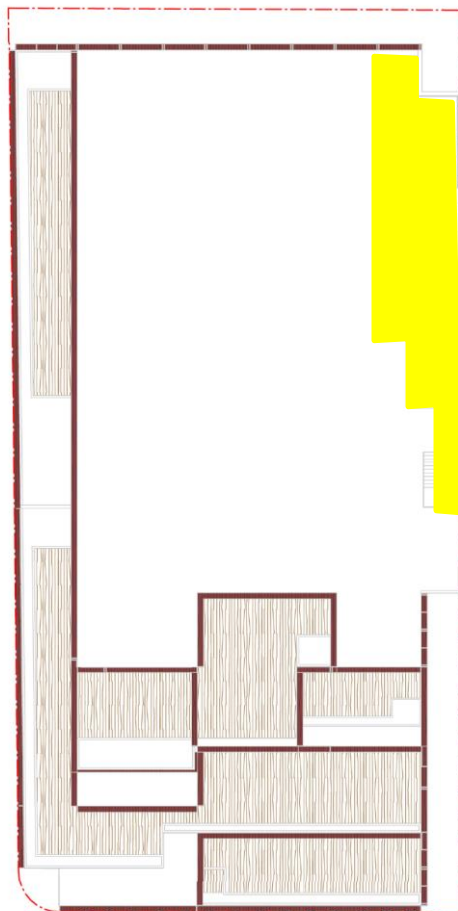


Figure 3 Extent of Building Envelope above a height of RL100 (highlighted yellow)

Source North Sydney LEP 2013

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the NSLEP provides that:

4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the NSLEP 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, and*
 - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the NSLEP, with respect to the maximum building height development standard, are each addressed below, including with regard to these decisions.

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the NSLEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

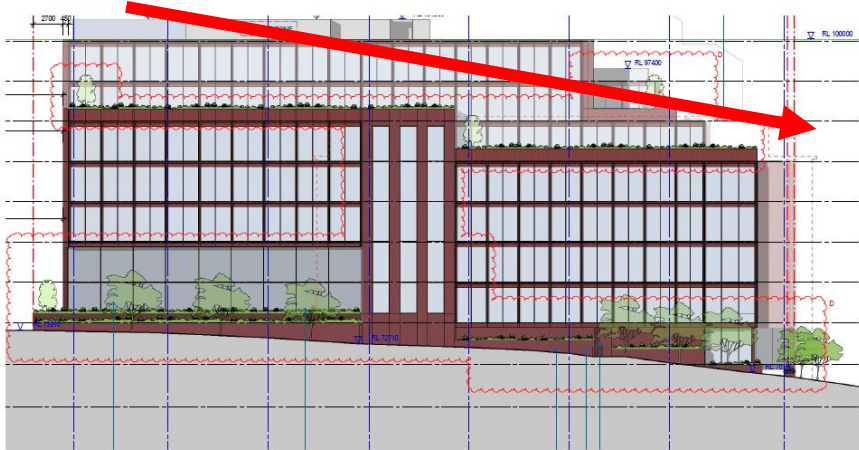
Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**. It is noted that in addition to the objectives, NSLEP also provides specific criteria within 6.3(3) that provides a framework for Council to grant consent to development that exceeds the maximum height control. The proposed building envelope complies with clause 6.3(3) of NSLEP 2013, which explicitly permits variations to the height of buildings standard subject to certain overshadowing provisions. This clause prevails to the extent of any inconsistency with other provisions in NSLEP 2013. As such, compliance with clause 6.3(3) provisions would render compliance with the height standard unreasonable and unnecessary. The proposed development is consistent with clause 6.3(3) (demonstrated in the SEE), and therefore compliance with clause 4.3 is unreasonable and unnecessary.

4.1.1 The underlying objectives or purposes of the development standard are achieved notwithstanding non-compliance with the standard

The objectives of the development standard contained in clause 4.3 of the NSLEP are summarised in **Table 1**. Further objectives in respect of building height in the North Sydney Centre are contained in clause 6.3(1) of the NSLEP. These are also considered in **Table 1**.

Table 1 Assessment of the Objectives of the Height Development Standard

Objective	Proposal
Clause 4.3 (1)	
(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,	• Height controls in the North Sydney centre are set via reduced levels, rather than height in metres, to best respond to variation in natural landforms. The proposed exceedance of the height control does not impact this reflection of natural landforms. In fact, the proposed building (and height variation) better reflects the natural landform than most buildings in North Sydney due to the stepping down of the building envelope to promote solar access to the RE1 zone.

Objective	Proposal
	 Western Elevation - Revised
(b) to promote the retention and, if appropriate, sharing of existing views,	This objective is discussed in more detail at the end of this section of the report.
(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,	- As demonstrated in the overshadowing analysis submitted within the Statement of Environmental Effects, the proposed development (and height variation) will maintain an acceptable level of solar access to existing dwellings, public reserves and streets as outlined in clause 2.3.7 of NSDCP in that it won't generate adverse overshadowing to public spaces between 11.30am and 2.30pm on June 21 . - The building envelope has been significantly reduced at the southern part of the site so as to preserve solar access in accordance with clauses 4.3 and 6.4 of the North Sydney LEP.
(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,	As demonstrated in Section 5.8 of the SEE, the proposed development complies with the required setback from the northern boundary and separation distances consistent with that usually provided under the ADG are maintained between the proposed commercial building and the existing residential building to the north. To further protect privacy of residents located to the north, the northern façade will also be constructed with obscured glazing to prevent overlooking between the two properties.
(e) to ensure compatibility between development, particularly at zone boundaries,	The proposed development is located at the edge of the North Sydney Centre and appropriately transitions down to the zone boundary. Amendments have been made to the development to improve privacy between the development and the residential development to the north and the school to the west by way of additional screening to the glazing and terraces.
(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.	The proposed height variation is minor being only 1.8m above the maximum height limit and covers a small proportion of the roof area. The plant would not be readily visible from the public domain and thus the proposed development consistent with the scale of development expected in the context of the North Sydney CBD and the adjacent buildings notwithstanding the proposed non-compliance at the plant level.
Clause 6.3(1)	
(a) repealed	N/A
(b) to promote a height and massing that has no adverse impact on land in Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map or on the land known as the Don Bank Museum at 6 Napier Street, North Sydney,	- As demonstrated in the overshadowing study the proposed variation to the height control will not have any impact on any land in Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map. - It is noted that the overshadowing controls have had a significant impact on the permissible building envelope resulting in much larger setbacks from the southern boundary that would have otherwise been required under the DCP setback controls.

Objective	Proposal
(c) to minimise overshadowing of, and loss of solar access to, land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone RE1 Public Recreation or land that is located outside the North Sydney Centre.	The additional height above RL 100 does not result in any additional shadow on the residential or open space areas outside of the centre.
(d) to promote scale and massing that provides for pedestrian comfort in relation to protection from the weather, solar access, human scale and visual dominance,	- The proposed building has a lower scale podium form which provides a massing that is complementary to the streetscape setting and also that provides for pedestrian comfort. - The proposed height variation doesn't generate any undue impacts on pedestrian comfort wind impacts etc. Further to the above it is noted that the proposed building envelope is significantly reduced as a result of the overshadowing controls contained within the North Sydney LEP. This design promotes a higher level of solar access to the public domain and will also result in better pedestrian comfort than would otherwise result from a building that could be built under a standard podium/tower form.
(e) to encourage the consolidation of sites for the provision of high grade commercial space.	The proposal consolidates five smaller sites to allow for larger floorplates that are suitable for the proposed commercial use, making more efficient use of the land.

4.1.2 View Sharing

The second objective of the building height control is 'to promote the retention and, if appropriate, sharing of existing views'.

A detailed view analysis was submitted with both the original SEE and the response to submissions. Both of these assessments concluded the following:

- The proposed height variation does not impact on any significant view lines and vistas from the public domain.
- Whilst there are impacts to views to the units at the southern end of 9 William Street, the view impact analysis demonstrates that the view impacts are caused by the complying elements of the building and are considered to be reasonable in the context of the North Sydney CBD. The plant, which exceeds the maximum height limit does not generate any material view impacts.
- Whilst there are two instances when a minor view impact is generated by the non-complying component of the building, the impact is not considered to be material and is considered acceptable in this instance as:
 - The view impact to Unit 904 is to a bedroom (see Figure #) which is not considered to be as significant as a view from a living area. The living room view, i.e. the primary view, of the same unit is not affected by the plant area which exceeds the height limit.
 - The view impact to Unit 905 is to the view from the eastern most window in the living area. It is noted that the portion of the view loss is minor, one building and that the building can be seen from the other two windows within the apartment and also from the balcony. Further, this apartment is a corner apartment and will retain expansive views to the south-west and west.
 - Both views are obtained over a side boundary which are noted by Commissioner Roseth in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC 140, to be harder to retain than views over a front or rear boundary,
 - The majority of the view impact to the affected units are caused by the complying components of the building envelope, the DCP notes that where developments generally comply with a height control they will not be refused on the grounds of view impacts, and
 - The unit is located within the North Sydney CBD. The strategic objective to provide employment within the North Sydney CBD is considered to provide more public benefit, and should therefore be given greater weight than a private view from a bedroom.

It is noted that the following specific design moves have been made to minimise view impacts:

- Roof top plant has been minimised by distributing plant equipment at various levels throughout the building.
- The rooftop plant has been positioned at the north-eastern corner of the building such that the plant sits within the portion of the view corridor that is already obscured by 40 Miller Street.
- The lifts servicing the building have been reconfigured as part of the response to submissions to further reduce the extent of plant and lift overrun that is required above RL100.

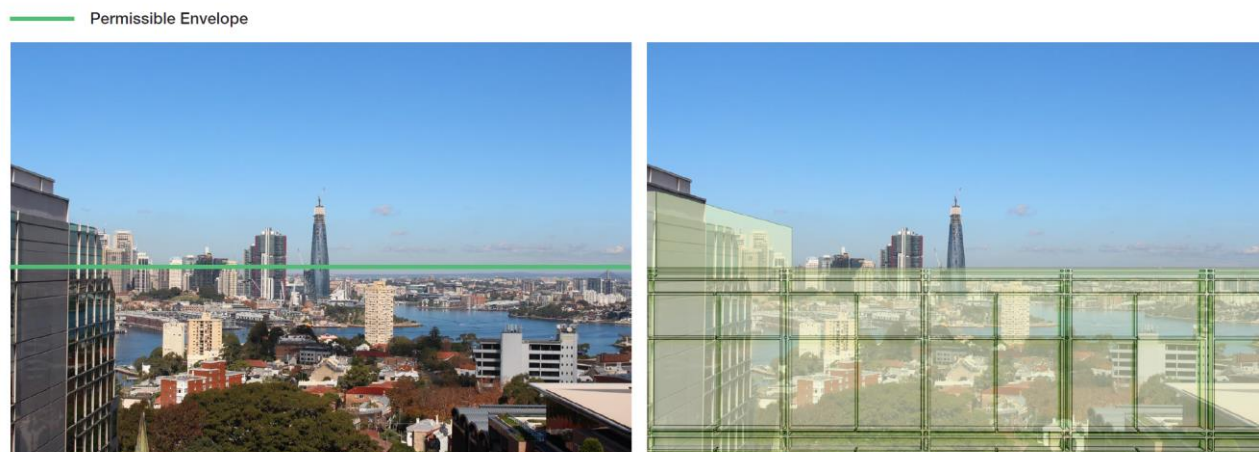


Figure 4 Extent of view impact to bedroom of Unit 904, 9 William Street

Source Woods Bagot

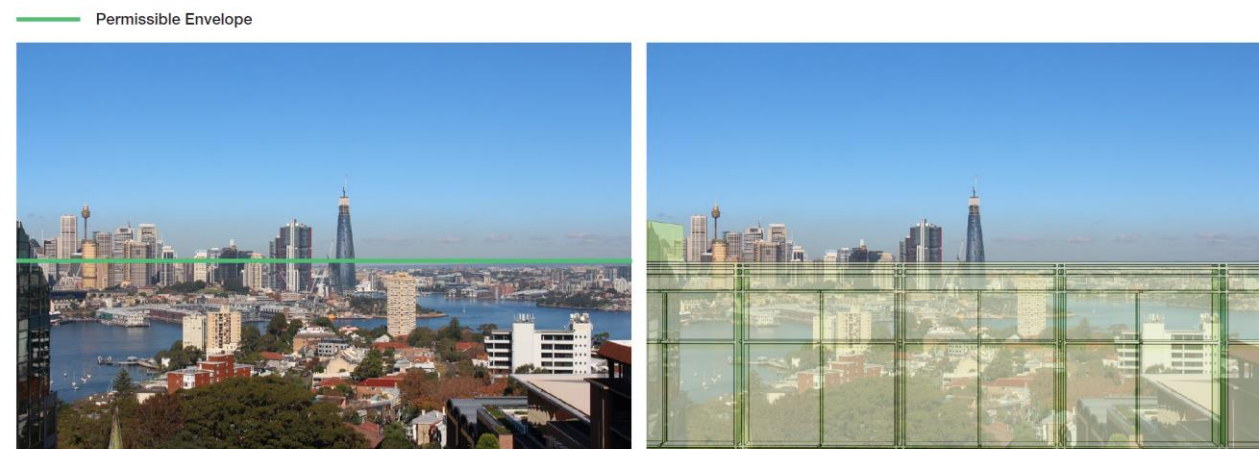


Figure 5 Extent of view impact to the eastern window of the living area of Unit 905, 9 William Street

Source Woods Bagot

4.1.3 Height Variation Permitted by Clause 6.3(3)

In addition to meeting the underlying objectives of Clause 4.3 and 6.3(1), Clause 6.3(3) of the NSLEP also allows for a building to exceed the maximum height of buildings shown for the land on the height of buildings map if the consent authority is satisfied that “any increase in overshadowing between 9 am and 3 pm from the March equinox to the September equinox (inclusive) will not result in any private open space, or window to a habitable room, located outside the North Sydney Centre receiving:

- if it received 2 hours or more of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less than 2 hours of direct sunlight, or
- if it received less than 2 hours of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less direct sunlight than it did immediately before that commencement.”

Through the operation of the above clause, the LEP specifically enshrines flexibility for commercial development in the CBD where that commercial development does not have undue shadow impacts on surrounding residential areas.

As demonstrated in the shadow analysis submitted with the DA, the portion of the development above the height of RL100 does not generate any overshadowing on any residential development outside of the North Sydney CBD. It is therefore within the abilities of the consent authority to approve the proposed height variation.

4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

The following site-specific environmental grounds further justify the proposed variation to the maximum height control:

- The proposed variation is minor, a variation of 1.8%
- The proposed variation only covers a small proportion of the site and has been positioned in a location where impacts are avoided.
- The proposed height variation will not generate any unacceptable adverse environmental impacts in respect of overshadowing, view loss or wind impacts;
- Notwithstanding the proposed height variation, the proposal continues to satisfy the objectives of the relevant objectives of the height control applying to the site;
- The complying building envelope is significantly compromised by the increased setbacks required to be provided from the southern boundary in order to maintain solar access to the RE1 zone within the North Sydney CBD than would otherwise normally be required in the North Sydney CBD. In the most extreme case, at the upper levels of the building, a setback of 24m is proposed compared to the minimum setback control of 5m (refer to **Figure 6**). Woods Bagot estimate that approximately 1,337m² of commercial floorspace is lost with the requirement to provide larger setbacks to the upper levels of the building to retain solar access. This equates to approximately 63 fulltime jobs (assuming a job ratio of 1 job per 21m²) or 167 jobs (assuming a job ratio of 1 job per 8m² as per the proposed design capacity of the building) which could have otherwise been generated.
- The floor plates of the building are also compromised by the requirement to provide an above podium setback to two street frontages being a corner site and a 3m setback to the residential development to the north. If the plant were to be relocated below the RL100 zone, this would further compromise the upper level floors of the building and would result in the loss of 1,050m² of A-grade commercial floorspace or 52.5 full time jobs;
- The breach of building height relates only to a building services zone, and is not in relation to any usable floor area; and
- The proposed variation will not result in a development which is out of character with that envisioned for the North Sydney CBD and is well below a significant number of existing and under construction towers in the CBD.

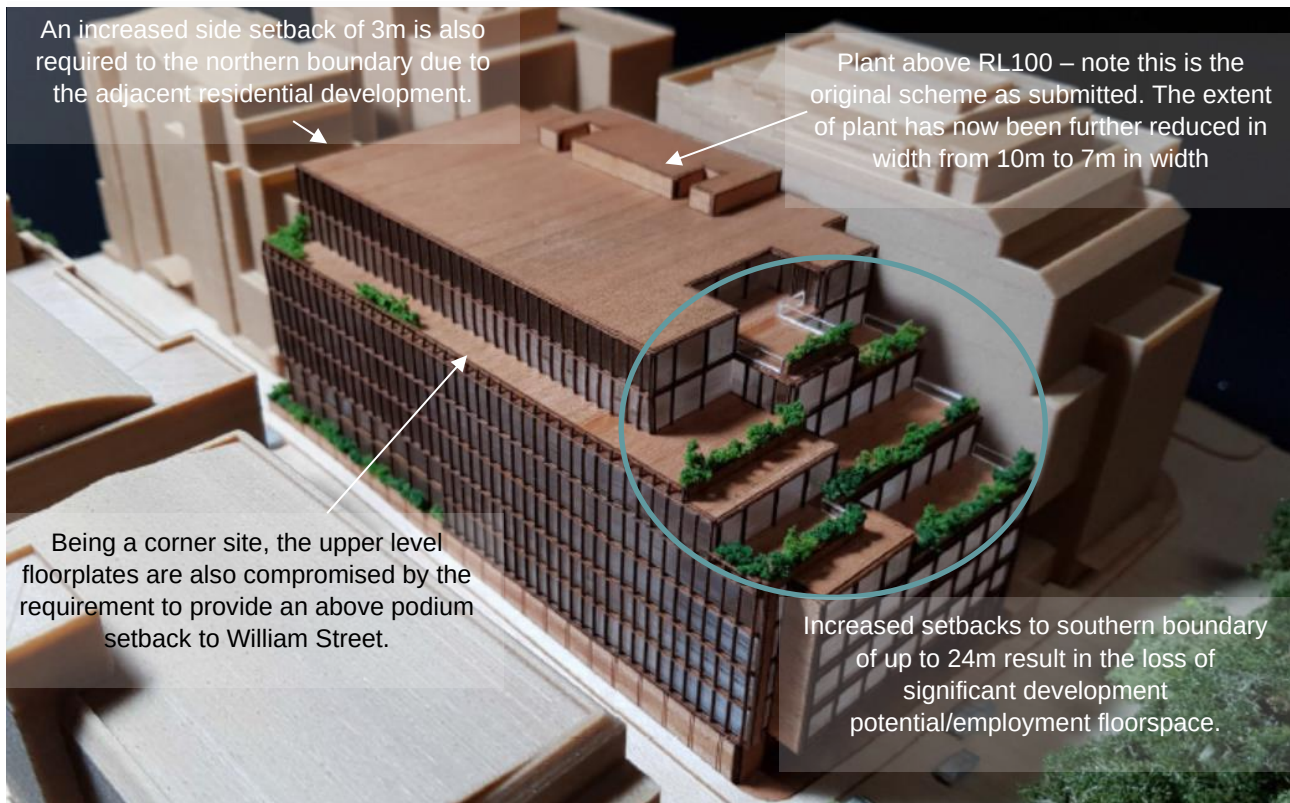


Figure 6 Portion of the building setback further than required due to overshadowing controls

Source Woods Bagot

4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

4.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in section 3.1.1 of this report.

4.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use Zone, as demonstrated in **Table 2**.

Table 2 Assessment of the Objectives of the B4 Mixed Use Zone

Objective	Proposal
B4 Mixed Use Zone	
To provide a mixture of compatible land uses.	The proposed commercial development contribute towards the mix of uses in the nearby vicinity of the site being commercial, residential, education and retail uses. The commercial use, with the mitigation measures proposed will be compatible with the immediately adjacent development.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	The proposed development will increase the density of development on the site with minimal car parking thus encouraging use of more sustainable forms of transport, such as public transport, cycling and walking.
To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.	The proposed development comprises a high quality commercial development that has been designed to maintain the residential amenity of the existing residential dwellings to the north of the site.
To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.	The proposed development does not remove any existing commercial space, but rather proposes to increase commercial space by removing residential dwellings. The lower ground floor uses are non-residential and provide opportunities for street activation.

4.3.3 Overall public interest

The proposed height variation is in the public interest in that it:

- provides a significant uplift in A-Grade commercial floorspace in the North Sydney CBD;
- allows an additional 1,050m² of commercial floorspace or 52.5 full time jobs in an identified global Sydney commercial core, without adverse environmental impacts
- does not generate any unacceptable environmental impacts in respect of overshadowing, material view loss or wind impacts;
- will result in greater section 7.11 contributions, through additional floorspace that will fund the upgrade existing public domain consistent with Council's Education Precinct Masterplan; and
- will promote the orderly and efficient use of land in accordance with the objects of the Act by providing commercial space in a commercial core without adverse environmental impacts.

5.0 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (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.*

These matters are addressed in detail below.

5.1.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the maximum height development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal and height variation is consistent with the most recent metropolitan plan for Sydney, the *Greater Sydney Region Plan* in that it:

- Will enable additional employment generating floorspace and will therefore reinforce the North Sydney CBD as a strong commercial core delivering significant employment opportunities; and
- Will enable additional employment generating floorspace in a location in close proximity to public transport connections.

5.1.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height proposed generally reflects the height of development envisaged in the North Sydney CBD, and the proposed variation does not give rise to any significant adverse environmental impacts. It also meets the LEP specific clause (clause 6.6(3)) that allows height variations and hence meets the LEP threshold test for allowing it, and is hence in accordance with the gazetted statute, which is in the public interest.

If the development standard were to be maintained, the development would be reduced by a commercial level and would result in the loss of 1,050m² of commercial floorspace or 52.5 full time jobs. This would be counter to the public interest in the commercial core.

5.1.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other relevant matters requiring consideration.

6.0 Conclusion

The assessment above demonstrates that compliance with the maximum building height development standard contained in clause 4.3 of the NSLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. Specifically, the proposed development meets the tests of clause 5.6 and 6.3(3) which provide for the consent authority to approve development which exceeds the maximum height control. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner. The development, including height variation, has been designed with a number of specific design moves such as distributing plant throughout the building and locating the plant to the eastern edge of the site, which minimise environmental impacts whilst contributing to desired commercial floorspace in the North Sydney CBD.

It is noted that Clause 6.3(3) of the NSLEP (replicated below) allows a consent authority to approve a building which exceeds the maximum building height and as such it is questionable as to whether or not a clause 4.6 variation request is required however this Clause 4.6 is submitted for the abundance of caution.

6.3 (3) *The consent authority may grant development consent to development on land in the North Sydney Centre that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm from the March equinox to the September equinox (inclusive) will not result in any private open space, or window to a habitable room, located outside the North Sydney Centre receiving—*

- a) *if it received 2 hours or more of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less than 2 hours of direct sunlight, or if it received less than 2 hours of direct sunlight immediately before the commencement of North Sydney Local Environmental Plan 2013 (Amendment No 23)—less direct sunlight than it did immediately before that commencement.*

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed height variation :

- Is consistent with clauses 5.6 and 6.3(3) of NSLEP which allow for a variation to the maximum height control under certain circumstances;
- Is minor, relates only to building services and only exceeds in a small portion of the site;
- Will have an appropriate impact, in terms of its scale, form and massing;
- Will not impact on any significant view lines and vistas from the public domain;
- Has an acceptable impact on a small number of private residential views (2 units) in the context of the North Sydney CBD and that where material view impacts occur, these are generated by complying components of the building envelope and over a side boundary and not the portion of the building that exceeds the maximum building height;
- Will enhance the streetscape in relation to scale, materials and external treatments; and
- Will promote the orderly and efficient use of land, in accordance with the objects of the Act.

The development as proposed maximises employment generation on the site consistent with the metropolitan and district plans as well as Council's Local Strategic Planning Statement.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 and Clause 6,3(3) of the NSLEP.