

Attachment C

Clause 4.6 Variation – Height of Buildings

20 NOVEMBER 2025

CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS - CLAUSE 4.3(2)

16-22 COOPER STREET, SURRY HILLS

Introduction

This Clause 4.6 Variation Request as well as accompanying architectural plans (prepared by SJB Architects, dated 20 November 2025) accompanies the Statement of Environmental Effects for the subject Development Application (DA). This request supports the proposal for the construction of a shop top housing development at 16-22 Cooper Street, Surry Hills (subject site).

Clause 4.3(2) of the Sydney Local Environmental Plan 2012 (SLEP 2012) prescribes a 27m Height of Building (HoB) standard for the subject site. The subject DA proposes a maximum height of 29.7m. Therefore, a variation of 2.7m (equivalent to 10%) is sought from the development standard.

This request demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying Clause 4.6(3) of the SLEP 2012.

This written request adequately addresses the matters required under subclause (3) and demonstrates consistency with the objectives of the development standard and the objectives for the subject MU1 – Mixed Use zone as prescribed by the SLEP 2012. On this basis, the variation request can be supported.

The variation can also be supported given City of Sydney (CoS) Council supported an almost identical request as part of Development Consent 2023/904 which was issued on 5 June 2024.

Standard to be varied and permissible floor space ratio

Clause 4.3(2) of the SLEP 2012 prescribes a 27m height of building standard for the subject site, as demonstrated in the mapping extract on the following page.

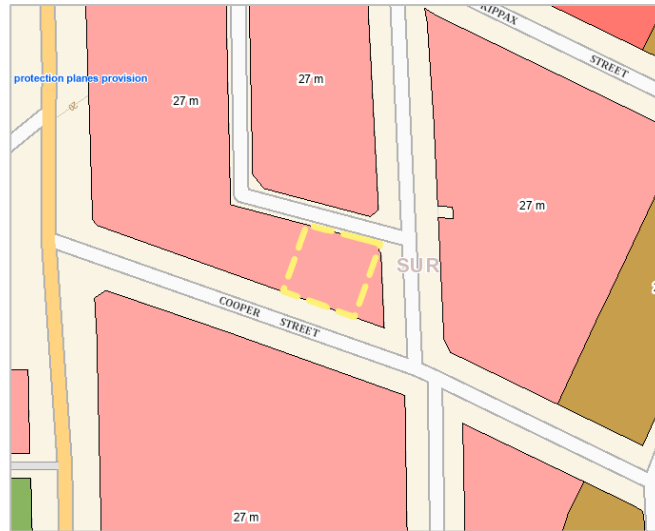


Figure 1: Extract of HoB map with subject site outlined yellow (Source: SLEP 2012/PPUD)

Extent of variation

The proposal includes an overall HoB of 29.7m. This represents a 2.7m exceedance of the HoB standard (which is equivalent to 10%).

Unreasonable or unnecessary

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the SSLEP 2012.

The NSW Land and Environment Court (Court) held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

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

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council [2007] NSWLEC 827, Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22] and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]) and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]*).

Nonetheless, we have considered each of the ways as follows.

First Test

The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Each objective of the Clause is provided below, after which is discussion as to whether it is satisfied.

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

Given that the subject site is in close proximity to Central Station, as well as the core of the Central Business District (CBD) within which there are multiple towers, the proposed height is considered appropriate. There are also several developments in close proximity to the subject site, including 10-14 Cooper Street and 360-370 Elizabeth Street x 8 Cooper Street, which are a similar height to the proposal and rely on similar exceedances (up to 2.35m above the 27m HoB standard).

Along the frontage, the proposal complies with the HoB standard in fact. The exceedance relates to parapets and services which are set within the roof top level. This minimises their visibility and reinforces the overall heights appropriateness.

On this basis, this objective is satisfied.

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

The subject site is not within a heritage conservation area. The nearest heritage item is located at 8 Cooper Street x 360-370 Elizabeth Street (The Evening Star Hotel). This item is equivalent to 3 storeys in height. However, a 9 storey residential flat building is located at 362 Elizabeth Street and 17 Cooper Street, which is located between the subject site and the heritage item. Therefore, there is no or little relationship between the proposal and the heritage item in question. This ensures appropriate transition is achieved between the proposal and the broader context, including The Evening Star heritage item.

On this basis, this objective is satisfied.

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

There are no significant private or public views across the site that would be impacted by the portion of the building exceeding the height limit.

In this case, this objective is not applicable.

- *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*

The site's context is characterised by range of building heights and varied topography. A short distance to the north, buildings start scaling up toward the high rise of Central Sydney. The part of the building exceeding the height is setback from the prominent frontages of the site and will not be readily perceptible in the surrounding public domain. The proposed height variation does not interrupt the nominated height transitions from Central Sydney towards Surry Hills, ensuring that these appropriate transitions are maintained.

On this basis, this objective is satisfied.

- *in respect of Green Square—*
 - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

The subject site is located within Surry Hills, which is a substantial distance from Green Square. In this case, this objective does not apply in this case.

As demonstrated above, the objectives of Clause 4.3 – Height of Building are satisfied. In accordance with the decision in *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118*, *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170*; *[2018] NSWCA 245* and *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130* and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]*, therefore, compliance with the HoB standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

Second Test

The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objectives or purpose is relevant to the development and therefore, this test is not relied upon.

Third Test

The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unnecessary.

The objective would not be defeated or thwarted if compliance was required. Therefore, this test is not relied upon.

Fourth Test

The development standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

The standard has not been entirely abandoned by Council; however, it is worth noting that a substantial number of height related variations pursuant to Clause 4.6 have been issued, as summarised below:

- Consent 2023/195. 27 Hansard Street, Zetland.
- Consent 2022/195. 3 Joynton Avenue, Zetland.
- Consent 2020/93. 888 Bourke Street, Zetland.

Fifth Test

The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore this reason is not relied upon.

Sufficient environmental planning grounds

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure from the HoB standard are as follows:

- Ordinarily, the floor space associated with the height breach would have been located at ground level, in the north eastern corner of the site. Rather, deep soil landscaping, connected to which is the proposal communal open space (CoS), is provided in this area as it was considered that this would provide an improved urban design and street scape outcome to this corner. It provides much needed 'green' visual relief, much needed deep soil, and provides a CoS are within high internal and external amenity. The floor space which would have been located in this corner, has been repositioned above, which results in the subject height variation.

- The proposal does not result in any unreasonable environmental impacts as demonstrated by the associated Statement of Environmental Effects. In particular, there are no unreasonable view, privacy, overshadowing or traffic impacts.
- The extent of the non-compliance, being the equivalent to no more than 10% of the standard, is minor.
- The majority of the roof top level is for environmentally sustainable measures such as photovoltaic panels hot water heat pumps, as well as roof top landscaping.
- The SEE to which this variation request relates has demonstrated that the proposal satisfies the relevant objectives of the subject MU1-Mixed Use zone.

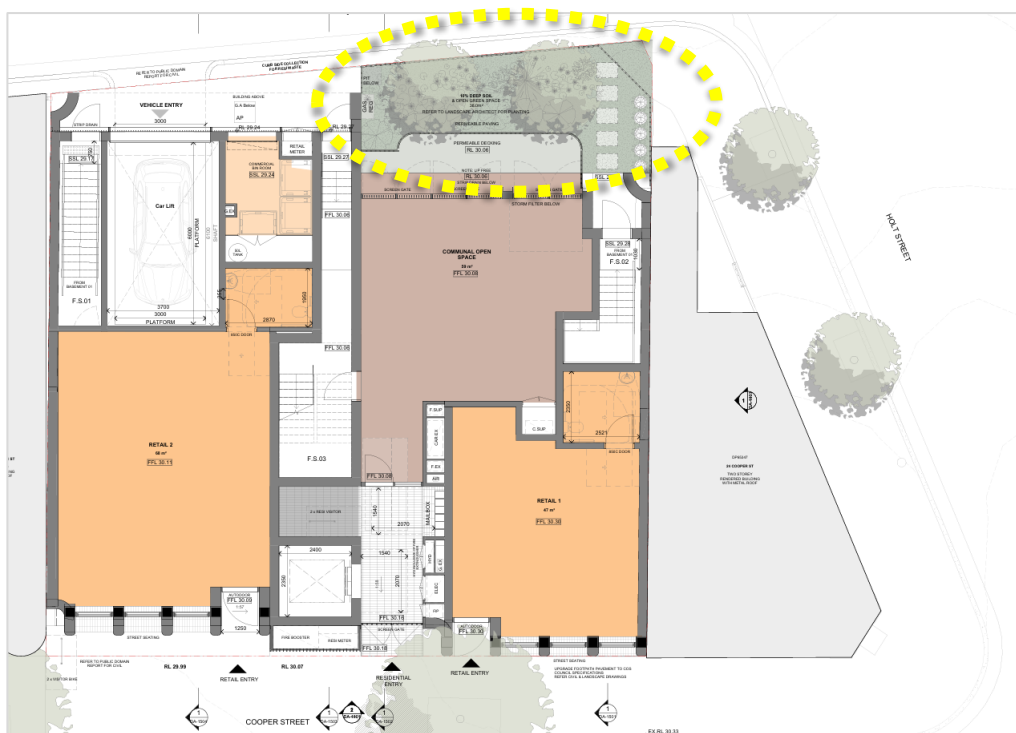


Figure 2: Extract of site plan demonstrating proposed deep soil area which would ordinarily be GFA (Source: SJB/PPUD)

Conclusion

This Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development. This is largely because it has been demonstrated that the objectives of the HoB standard are satisfied, despite the non-compliance.
- There are sufficient environmental planning grounds to support the variation. In summary, those grounds are that the proposal does not result in any unreasonable environmental impacts, the objectives of the standard are met, a better streetscape

outcome is achieved in that additional deep soil provisions are provided, and that the objectives of the zone are satisfied.

It is also important to note that Council supported an almost identical HoB variation request as part of Development Consent 2023/904 which was issued on 5 June 2024.

Given the above, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3).