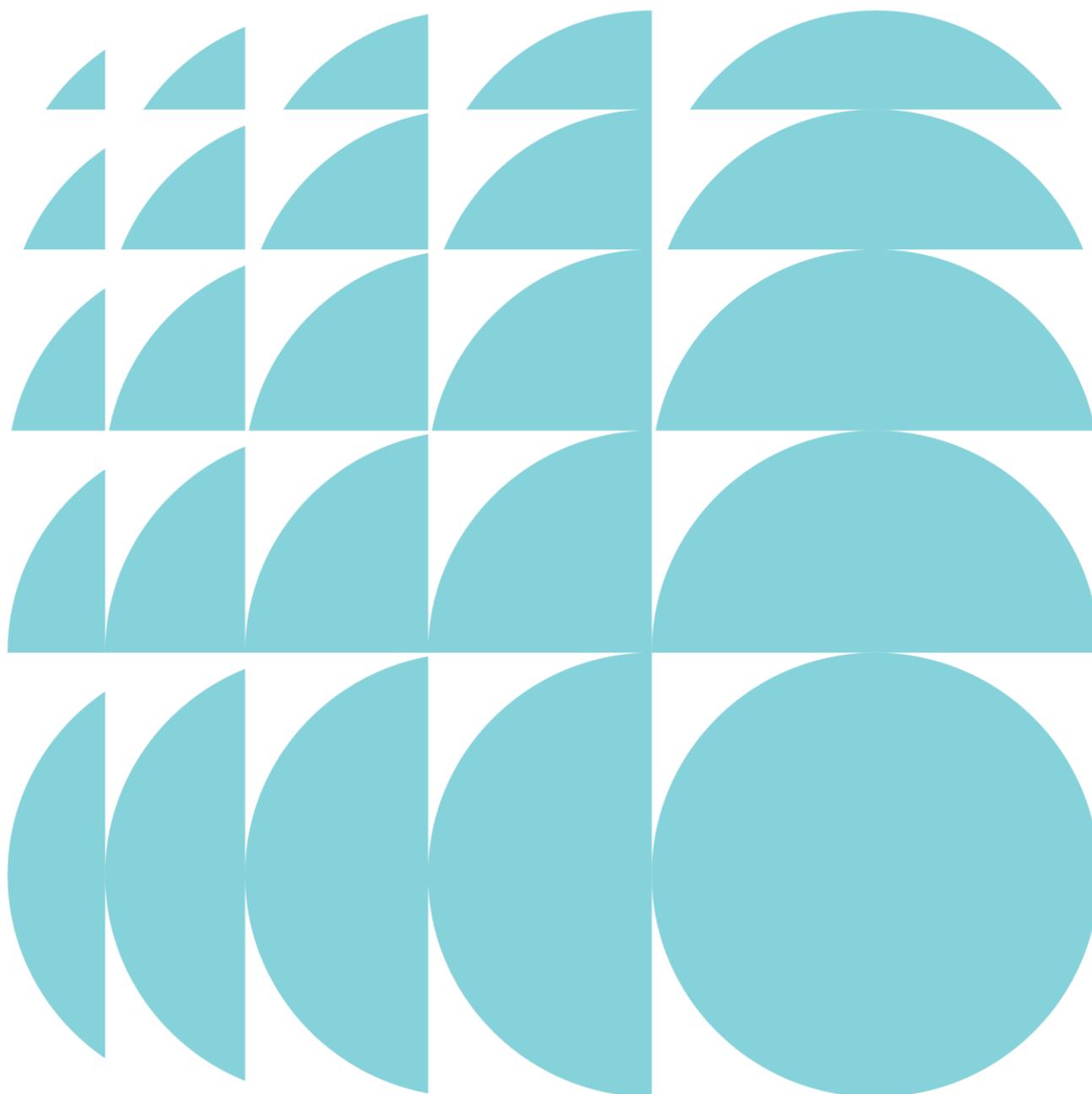


Attachment C

Clause 4.6 - Height of Buildings



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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Mirvac Green Square Pty Ltd and is submitted to the City of Sydney (Council) in support of a development application (DA) for a mixed use development at 960A Bourke Street, Zetland, otherwise known as Site 18 in the Green Square Town Centre (GSTC). It is noted that the DA also applies to the construction of a common basement (below ground only) encompassing Sites 7, 17 and 18, however these parts are not affected by this clause 4.6 variation.

Clause 4.6 of the Sydney Local Environmental Plan (Green Square Town Centre) 2013 (Green Square LEP) enables Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request:

- Relates to the development standard for height of buildings under clause 4.3 of the Green Square LEP; and
- Should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by JBA dated March 2017 and Council response letter prepared by Mirvac Green Square dated 25 September 2017 in relation to a proposed mixed use development at Site 18 GSTC.

This clause 4.6 variation request demonstrates that compliance with the height of buildings 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 building height development standard, the proposed development:

- Achieves each of the applicable objectives of the height of buildings development standard and the B4 Mixed Use Zone;
- Does not give rise to any adverse environmental impacts;
- Is in direct response to the design excellence recommendations of the Selection Panel associated with the Competitive Design Alternatives Process;
- Facilitates an urban form which delivers a superior public outcome in respect of Neilson Square and public view corridors within the GSTC; and
- Is in the public interest.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Green Square LEP.

2.0 Background

2.1 Competitive Design Alternatives Process

A Competitive Design Alternatives Process was conducted for Site 18, in accordance with clause 6.9 of the Green Square LEP, the Green Square Town Centre Development Control Plan 2012 (Green Square DCP) and the City of Sydney Competitive Design Policy 2013. A detailed overview of the competitive process is provided at Section 1.1 of the SEE.

A key aspect of the competitive process was a planning opportunity in relation to the Neilson Square setback and the interface between Site 18 and the public domain. Of relevance, the Competitive Design Alternatives Brief specifically encouraged competitors to investigate options for the Neilson Square setback including opportunities to redistribute floor space from lower levels on the building to the top levels. This would result in a design outcome which varied the building envelopes prescribed under the GSTC DCP 2012 and the Green Square LEP.

A total of four design alternatives were presented to the Selection Panel, being:

- Bates Smart;
- Durbach Block Jagers;
- Hassell; and
- LAVA.

The Selection Panel was unable to determine a preferred scheme and requested Bates Smart and Hassell to provide additional information by way of a Stage 2 submission.

2.2 Recommendation of the Selection Panel

Following the Stage 2 submission and presentations of both schemes, the Selection Panel acknowledged that both schemes presented refined and well documented proposals. The Bates Smart scheme was recommended as the winning proposal by the Selection Panel and accepted by the Proponent for the following reasons:

- Embracing and challenging the Competitive Design Brief building envelope in order to deliver a superior site and precinct outcome.
- The careful transition and transfer of building scale from the lower to upper levels, in particular regard to the natural light benefits provided to the surrounding public domain and the view framing to the new library which is achieved through the stepped form.
- The high level of rigour that has been applied to the façade composition which could be enhanced through the design development process.
- The two storey framing of the building façade is a positive design response given the height of the building. This two storey frame gives order to the stepped form, and provides a human scale at the base of the building.
- The ground floor layout provides the opportunity for an active interface with the public domain.
- The proposal generally complies with the building envelope prescribed in the Competitive Design Brief and the provisions of the Green Square DCP 2012.

The Bates Smart scheme has been further refined as per the recommendations of the Selection Panel (refer to Section 1.1 and 4.2 of the SEE) and the proponent and now forms the subject of this DA.

2.3 Council Request for Further Information

Council wrote to the applicant on 22 August 2017, requesting additional information and design amendments to the proposed development. Council recommended that the residential floor to floor heights be raised to 3.1 metres. Mirvac Green Square have incorporated this feedback in a revised submission to Council and this clause 4.6 variation request reflects the increased floor to floor height of the residential levels to 3.08 metres to respond to Council's request and improve the internal amenity of the proposed apartments without compromising solar access to the Drying Green.

3.0 Development standard to be varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the Green Square LEP. Clause 4.3 provides:

- (1) *The objectives of this clause are as follows:*
 - (a) *to ensure acceptable height transitions between new development and heritage items and buildings in heritage conservation areas,*
 - (b) *to ensure sharing of views,*
 - (c) *to ensure acceptable height transitions from the Green Square Town Centre to adjoining areas,*
 - (d) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site,*
 - (e) *to ensure the built form contributes to the physical definition of the street network and public spaces.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Buildings Map, in relation to Site 18 is reproduced in **Figure 1** below. The maximum building height for the site is 83 RL.

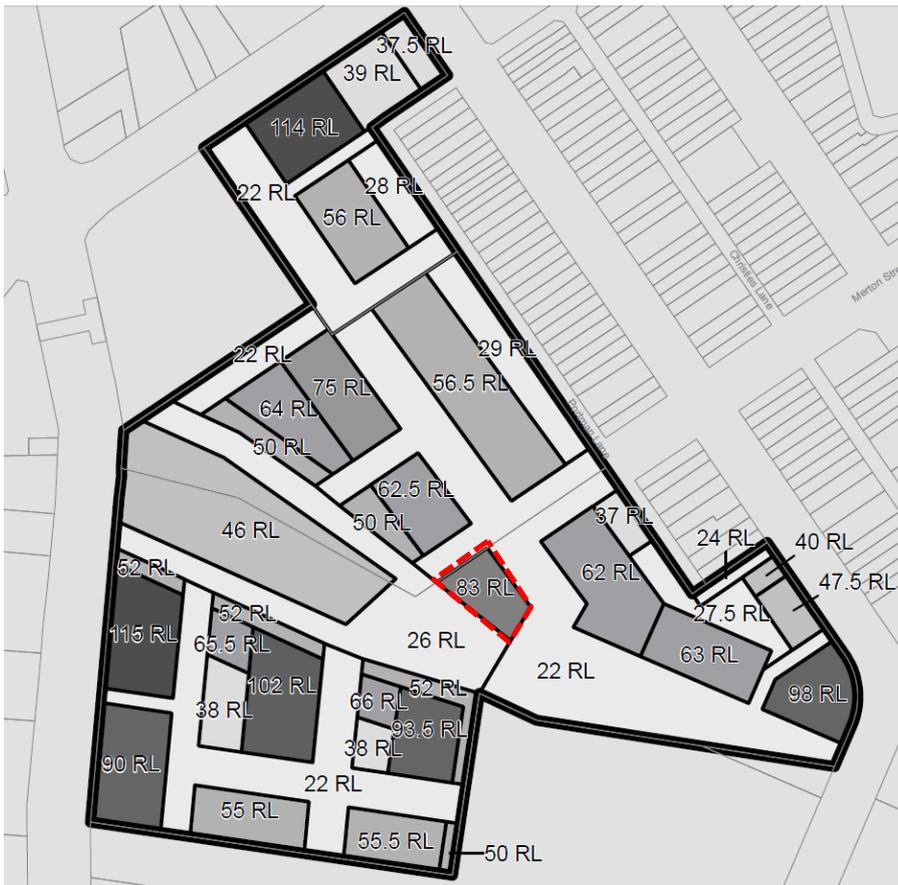


Figure 1 – Height of buildings map

Source: Sydney Local Environmental Plan (Green Square Town Centre) 2013

The proposed development represents a minor exceedance of the 83 RL limit in respect of the roofline, rooftop balustrade and building elements containing gross floor area (see **Figure 4**). The

greater exceedance in height is limited to lift overrun only, meaning that the variation is limited to approximately 11% of the roof area. The highest point of the lift overrun is 86.5 RL, representing an exceedance of three and a half metres. The overall height of the building is approximately 64.2 metres to the parapet and 67.2 metres to the top of the lift overrun. Therefore this variance represents less than a 5% departure from the development standard.

The location of building elements which extend above the 83 RL are shown in **Figure 2**. The proposed lift overrun, the built form exceeding the development standard, will not be visible from ground level as shown in **Figure 3**.

The increase in building height is a direct result of the design response through the Competitive Design Alternatives Process (detailed in Section 2.0 above and Section 1.1 of the SEE) and the redistribution of floor space from lower levels of the building to upper levels, in combination with the designed lift mechanism providing access to the rooftop garden.

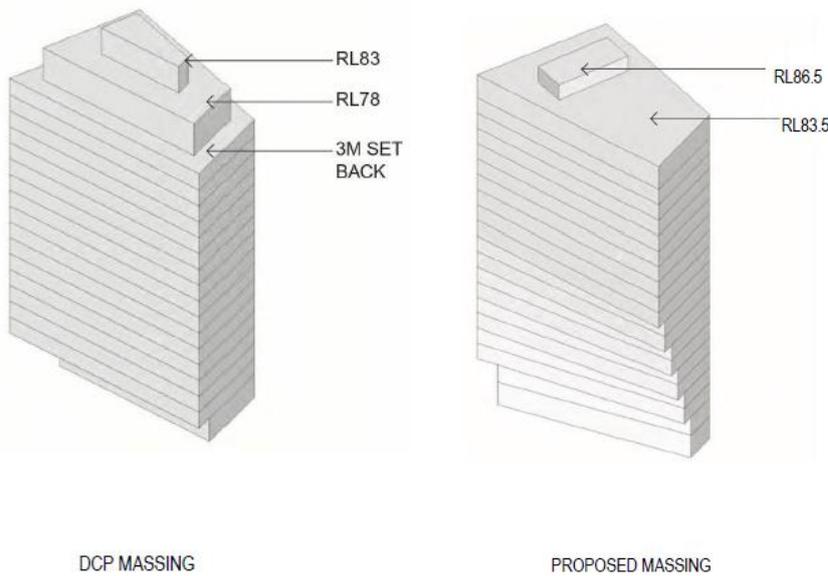


Figure 2 – Massing comparison

Source: Bates Smart



Figure 3 – View of proposed development from ground level

Source: Bates Smart

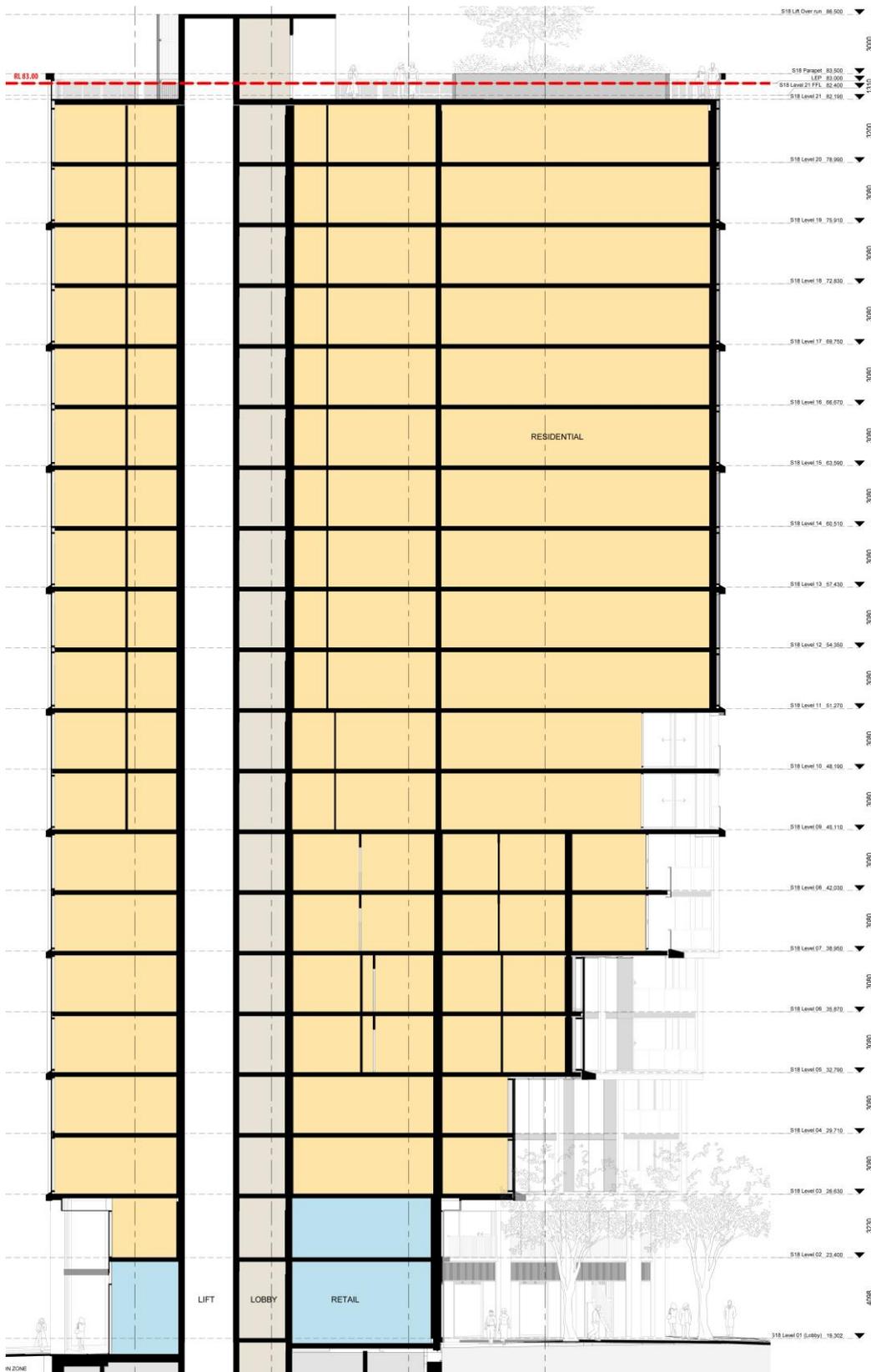


Figure 4 – Extent of building structures greater than 83RL – Section

Source: Bates Smart

4.0 Is the planning control in question a development standard?

Development Standard is defined under Section 4(1) of the EP&A Act as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”

The maximum Height of Buildings standard prescribed under clause 4.3 of the Green Square LEP is clearly and unambiguously a development standard and has continually been applied in this manner by the consent authority.

5.0 Justification for contravention of the development standard

Clause 4.6(3) of the Green Square LEP 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 Green Square LEP 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,*

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 Green Square LEP, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

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

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, 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.

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 (see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 at [61] and [62]).

The five methods outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
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.
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.

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the first method.

5.1.1 The objectives of the standard

Clause 4.3(1) of the Green Square LEP provides the objectives of the height of buildings development standard are:

- (a) to ensure acceptable height transitions between new development and heritage items and buildings in heritage conservation areas,*
- (b) to ensure sharing of views,*
- (c) to ensure acceptable height transitions from the Green Square Town Centre to adjoining areas,*
- (d) to ensure the amenity of the public domain by restricting taller buildings to only part of a site,*
- (e) to ensure the built form contributes to the physical definition of the street network and public spaces.*

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

Objective (a): to ensure acceptable height transitions between new development and heritage items and buildings in heritage conservation areas.

Site 18 is located within the centre of the GSTC, with a number of buildings (Site 15 and Site 16) separating the site from the Zetland Estate heritage conservation area and the listed items within the conservation area. The Heritage Impact Statement prepared by GML and submitted at **Appendix I** of the SEE confirms that a 20 storey building will not have any measurable impact on the heritage conservation area or any listed items. The scale of the anticipated development of both Site 15 and Site 16 will provide a transition zone between Site 18 and the Zetland Estate and associated heritage items. The Heritage Impact Statement provides that owing to the distance from the conservation area, and the scale of development proposed at Site 15 and Site 16, there would be very limited opportunities to view the proposed development above and beyond the roof of

the existing residential properties. The Heritage Impact Statement states that there would be no/negligible heritage impacts on the Zetland Estate heritage conservation area.

Objective (b): to ensure sharing of views.

The proposed development at Site 18, through the Competitive Design Alternatives Process, has been specifically designed to enhance views within the site and preserve the views from surrounding sites. Through the tapered form of the building and the design of the Neilson Square setback improved view corridors at ground level and within the public domain has been achieved. This is demonstrated in the massing analysis forming part of the Design Report submitted as Appendix D of the SEE and is reproduced in **Figure 5** below. The proposed exceedance in height is generally limited to a small, central portion of the roof area and will not be visible from the surrounding public domain. The building parapet extends above the height limit by 500mm, however this will not detract from views from neighbouring properties. Further, this additional height will not adversely reduce any view corridor opportunities for other tall buildings in the immediate vicinity. Overall, the proposed exceedance will have a positive impact on view sharing within the GSTC.

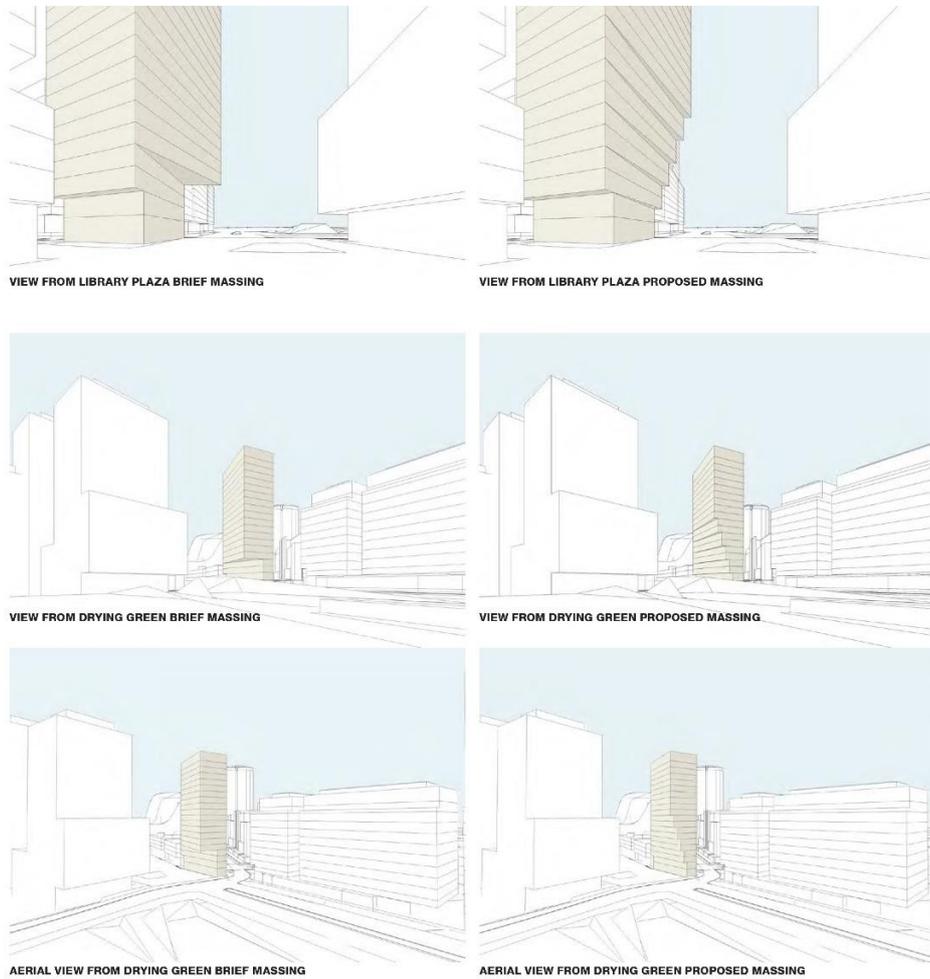


Figure 5 – View analysis comparison

Source: Bates Smart

Objective (c): to ensure acceptable height transitions from the Green Square Town Centre to adjoining areas.

As previously stated, Site 18 is located in the centre of the GSTC. Sites 17, 7 and 6 will provide a transition to the existing industrial area to the north west of the GSTC. Sites 15 and 16 will provide a transition to the Zetland Estate heritage conservation area to the east and north east. To the south, public open space will provide separation to Sites 12 and 19. These sites provide a step down in height, through to Sites 9 and 11 and the fine grain residential development in Hansard Street and the industrial area beyond. Overall, the minor increase in the height of Site 18 will not alter the transition in height from the GSTC to the established development in the surrounding areas.

Objective (d): to ensure the amenity of the public domain by restricting taller buildings to only part of a site.

Site 18 directly adjoins Neilson Square and the pedestrianised portion of Zetland Avenue, with The Drying Green to the south west of the site. The proposed development has been specifically designed both in orientation and form to respond to these public areas. Further, the proposed building elements that exceed the maximum height limit are limited to the lift overrun, equating to approximately 11% of the roof area. These aspects were a critical component of the Competitive Design Alternatives Brief. The winning entry of the competitive process, the subject of this DA, was commended for the careful transition and transfer of building scale from the lower to upper levels, in particular regard to the natural light benefits provided to the surrounding public domain and the view framing to the new library which is achieved through the stepped form at the lower levels.

Detailed overshadowing analysis has been undertaken by Bates Smart and Mirvac to understand the impact of the proposed development on the Drying Green on 22 June. The proposed development will ensure that 2,789m² (50.7%) of the Drying Green receiving direct sunlight at 11.00am, 3,762m² (68.4%) at 12 noon, and 3,274m² (59.5%) at 1.00pm. Between 1.45pm and 2.00pm, the proposed development results in 2,583m² (47.0%) of the Drying Green receiving direct sunlight. Between the hours of 11.00am and 2.00pm, the proposed development results in an additional 1,409m² of the Drying Green receiving direct sunlight above the minimum requirements of the Green Square DCP.

Although the proposed development represents a minor exceedance to the building height development standard, the design achieves a superior outcome in relation to the public space adjoining the site and therefore, the proposed development remains consistent with this objective.

Objective (e): to ensure the built form contributes to the physical definition of the street network and public spaces.

Site 18 is a function of the street network of the GSTC, bound by Ebsworth Street, Barker Street, Neilson Square and Paul Street/Zetland Avenue. Through the Competitive Design Alternatives Process, the proposed design was refined to actively respond to the public domain, especially Neilson Square. The proposed exceedance facilitates the definition of public space as this floor area has been relocated to higher levels of the building. The tapering built form allows for light penetration at ground level and presents a superior outcome for both Neilson Square and ground floor retail tenancies oriented to Barker Street and Ebsworth Street. The proposed development enhances these spaces through active uses and high quality design.

5.1.3 Summary

As set out above, the proposed 3.5 metre exceedance of the height of buildings development standard (<5% variation) does not contravene the objectives of the standard. The proposed development achieves the objectives notwithstanding the non-compliance. As per the first method in *Wehbe*, compliance with the standard is unnecessary.

5.2 Clause 4.6(3)(b): There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Green Square LEP 2015 requires the departure from the development standard to be justified by demonstrating:

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

There are considered to be sufficient environmental planning grounds to justify contravention of the Building Height development standard in this specific instance.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. There are particular elements that contribute to the development's variation to the Building Height standard and these are detailed below.

5.2.1 Ground 1: Improved public domain outcome

The proposed exceedance in building height is the direct result of the relocation of floor space from lower levels on the building to upper levels, in response to the planning objective in the Competitive Design Alternatives Brief, as part of the Competitive Process conducted for the site. The proposed development represents a superior public domain outcome by increasing light penetration in Neilson Square and enhancing view corridors within the public domain as shown in **Figure 5**. This design outcome is unique to Site 18 and has been formulated to respond directly to the opportunities of the site's prominent location within the GSTC.

When considered holistically, the public domain outcome based on the proposed stepped building form, will result in a more vibrant, healthy and desirable public open space that will function as a core plaza within the future GSTC. This public open space will not be compromised by the non-compliance with the building height development standard and in fact it will result in a superior outcome.

5.2.2 Ground 2: Improved residential amenity

The relocation of floor space from lower levels to upper levels of the proposed development will result in a larger number of apartments at upper levels and larger sized apartments. These apartments will enjoy district views and increased solar access that may not have been achievable in the lower levels of the building. This design solution will also improve the amenity of residential uses at lower levels of neighbouring developments by opening up the public domain, increasing light penetration and promoting view sharing at lower levels of surrounding development providing view lines to key public open space within the GSTC. A small proportion of the variation is the result of Council's recommendation that to achieve a greater level of residential amenity, the floor to floor height of residential levels be increased to 3.1 metres.

The proposed development provides a high level of amenity to residents through the provision of significant communal open space in the form of the rooftop terrace. The proposed exceedance of the height of buildings development standard is a direct result of providing access to this communal open space, responding to the request of the Selection Panel through the Competitive Design Alternative Process to extend the lift shaft to provide access to the rooftop terrace.

The proposed exceedance in building height is generally limited to the lift overrun which takes up a small portion (approximately 11%) of the roof area of the building. This built form will not be visible from ground level (as shown in **Figure 3**) and will not result in any additional overshadowing that may impact on the amenity of neighbouring development. This design outcome will promote view sharing at upper levels and lower levels with neighbouring development.

5.2.3 Ground 3: Potential impact on airspace operations

As per the correspondence received from Department of Infrastructure and Regional Development (dated 11 July 2014) appended as Appendix X of the SEE, the maximum building height for Site 18 is prescribed as 88m AHD, the equivalent to 88 RL. The proposed development, at 86.5 RL, is within this maximum and therefore represents no potential impact on airspace operations.

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

The Land Use Table within the Green Square LEP provides the following objectives for the B4 Mixed Use Zone:

- *To provide a mixture of compatible land uses.*
- *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.*
- *To ensure uses support the viability of centres.*

Notwithstanding the proposed exceedance of the maximum building height, the proposed development is consistent with these objectives on the following grounds:

- The proposed development provides high quality residential development integrated with retail uses.
- The proposed retail uses will provide activation of the public domain including Neilson Square and Barker Street which will contribute to the viability of the locality as a centre.
- The proposed development is situated within close proximity to existing and planned public transport services including Green Square railway station.
- The proposed development will encourage walking and cycling by providing retail uses that are oriented to the public domain including key pedestrian links of Zetland Road and Green Square Plaza.

As demonstrated in Section 5.1 of this report, the proposal is consistent with the objectives of the height of buildings development standard.

5.4 Other matters for consideration

Clause 4.6(5) of the Green Square LEP requires the following additional matters to be considered.

5.4.1 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 height of buildings development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, A Plan for Growing Sydney in that it:

- Provides accommodation and services to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- Is located in an area identified as a Strategic Centre that has been designated for growth in both homes and jobs;
- Is well located to public transport connections; and
- Does not adversely affect any heritage assets.

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

As stated above, maintaining the development standard would result in a lowered public benefit as the proposed development would not be able to achieve the desired access to the communal rooftop open space or would result in a loss of housing in an area where housing supply is currently not meeting demand.

5.4.3 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 matters relevant to the proposed variation that are required to be taken into consideration by the Director-General before granting concurrence.

6.0 Conclusion

The assessment above demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the Green Square LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a better outcome in planning terms.

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

- Achieves each of the applicable objectives of the height of buildings development standard and the B4 Mixed Use Zone;
- Has significant planning grounds to justify the variation;
- Does not give rise to any adverse environmental impacts, particularly with regard to the relationship with the public domain including both Neilson Square and The Drying Green; and
- Is in the public interest.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Green Square LEP.