

# **Attachment C**

**Clause 4.6 Variation Request**

**CL 4.6 CONTRAVENTION OF DEVELOPMENT STANDARD REQUEST  
327-329 GEORGE STREET, SYDNEY  
DA FOR CONSTRUCTION OF A NEW OFFICE TOWER**



**Photomontage: Melocco & Moore Architects**

**Report Prepared by: Planning Lab**

**Issue Date: 25 May 2020**

## Site

Lots 1&2 in DP448986 - 327-329 George Street, Sydney

## Contraventions sought

Clause 6.16(3) Erection of tall buildings in Central Sydney

## Extent of contraventions

Minimum site area to avoid application of the requirement set out in Clause 6.16(3): 800m<sup>2</sup>

Actual site area: 274.5m<sup>2</sup>

Scale of the contravention: a 291% contravention

## Summary of non-compliance

The proposal is that the development be approved in contravention of clause 6.16(3) based on the established planning intention that the building form part of a street wall as part of an overall site comprising 1,692.1m<sup>2</sup>. The overall site would meet the requirements of clause 6.16(3) if those requirements were applied to that overall site (which includes the 2 sites immediately adjoining the actual site area to the north and south).

Additionally, the building is only marginally above the 55m height threshold which triggers the application of clause 6.16(3) in any event.

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## Summary

This Clause 4.6 Contravention of Development Standards Justification Report has been prepared by Planning Lab to accompany an application for the development of a 15-storey office building at 327-329 George Street, Sydney, known legally as Lots 1 & 2 in DP448986. Architectural drawings have been prepared by Melocco & Moore Architects and are included within this application (and form part of this request).

A description of the proposal is included within the attached Statement of Environmental Effects by Planning Lab (and this statement forms part of this request).

This contravention request is sought in relation to Clause 6.16(3) 'Erection of tall buildings in Central Sydney'. The clause which applies to this proposed building because it:

- is to be within Central Sydney;
- will have a height of greater than 55 metres; and
- will be on a site area of less than 800m<sup>2</sup>.

The proposal is that the development be approved in contravention of clause 6.16(3). This is based on the planning intention for a street wall as part of an overall site comprising 1,692.1m<sup>2</sup>. The overall site will meet the requirements of clause 6.16(3) if those requirements were applied to it.

Additionally — even without taking into account the intention that the building form part of a street wall as part of an overall site — the building is only marginally over the 55 metre height threshold that triggers the application of the clause. Buildings of 55 metres or less on height are not subject to clause 6.16(3), even when the relevant site area is less than 800m<sup>2</sup>. There is no material difference, in terms of adverse impacts, between a building that is 55 metres and the proposed building.

The building reaches a maximum height of 57.6m. The bulk of the proposed building, including all habitable floor space, is located below a height of 55m. Several minor elements on the roof exceed 55m (figure 1). Specifically, a designated envelope which will contain rooftop plant equipment reaches a maximum of 57.6m. Stairwell access to the rooftop plant and equipment exceeds the 55m height limit by up to 1.58m. A very small portion of the lift overrun reaches 55.16m and the rooftop balustrade reaches a height of 55.78m. The dashed blue line in figure 1 indicates the 55m height limit. The points of exceedance are indicated by the red arrows with the size of the exceedance shown. The height of the roof elements has been measured from an incline plane between the highest and lowest points of the site. The highest fixed point measures 56.58m from a ground level of RL 15.66 and the roof top plant envelope theoretically reaches up to 57.6m. The image used for the depiction of the exceedance is a north/south section drawing numbered 142F.

The existing and approved developments immediately surrounding the site either match or exceed the proposed building's bulk and scale. As a result of existing development, the proposal has no additional shadow impacts. Almost all of the additional built form above the 55 metre plane will not be seen from the public domain due to it being set back from the street wall. This built form does not constitute habitable space and will not reduce the privacy or amenity of any other development.

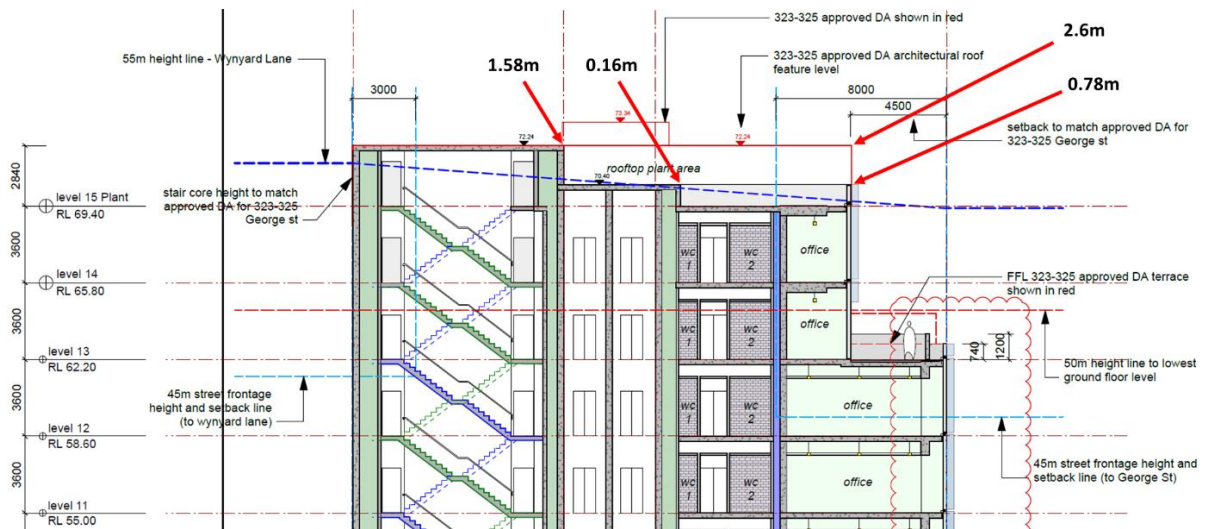


Figure 1 - Points of height exceedance

## Relevant Clause Extracts

The relevant clauses of the Sydney LEP 2012 are CI 4.6 Exceptions to development standards and 6.16 Erection of tall buildings in Central Sydney. They are reproduced in full in the following pages.

### 4.6 Exceptions to development standards

(1) *The objectives of this clause are as follows:*

(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.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(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.*

(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.*

*(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.*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

*(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

*Note. When this plan was made it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.*

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following:*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

*(ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,*

*(cab) clause 4.5A (Balconies on certain residential flat buildings),*

*(cb) clause 5.3A (Development below ground level in Zone RE1),*

*(cc) clause 6.10 (Heritage floor space),*

*(cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),*

*(cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),*

- (ce) clause 6.17 (Sun access planes),*
- (cf) clause 6.18 (Exceptions to sun access planes),*
- (cg) clause 6.19 (Overshadowing of certain public places), except in respect of Australia Square Plaza, Chifley Square, First Government House Place and Sydney Town Hall steps,*
- (cga) clause 6.26 (AMP Circular Quay precinct),*
- (cgb) clause 6.29 (58–60 Martin Place, Sydney),*
- (cgc) clause 6.33 (230–238 Sussex Street, Sydney),*
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,*
- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),*
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),*
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).*

The development standard proposed to be contravened is Clause 6.16(3) which is not expressly excluded from the operation of Clause 4.6.

## 6.16 Erection of tall buildings in Central Sydney

- (1) The objectives of this clause are to ensure that tower development on land in Central Sydney:*
  - (a) provides amenity for the occupants of the tower and neighbouring buildings, and*
  - (b) does not adversely affect the amenity of public places, and*
  - (c) is compatible with its context, and*
  - (d) provides for sunlight to reach the sides and rear of the tower, and*
  - (e) promotes the ventilation of Central Sydney by allowing the free movement of air around towers, and*
  - (f) encourages uses with active street frontages.*
- (2) This clause applies to development involving the erection of a building with a height greater than 55 metres above ground level (existing) on land in Central Sydney.*
- (3) Development consent must not be granted to development to which this clause applies if the building is on land having a site area of less than 800 square metres unless the consent authority is satisfied that:*
  - (a) the building will have a freestanding tower each face of which will be able to be seen from a public place, and*
  - (b) the development will provide adequate amenity and privacy for occupants of the building and will not significantly adversely affect the amenity and privacy of occupants of neighbouring buildings, and*
  - (c) the ground floor of all sides of the building facing the street will be used for the purposes of business premises or retail premises.*

## Background

The subject site for the Development Application is 327-329 George Street which is legally described as Lots 1 & 2 in DP448986 and comprises a site area of 274.5m<sup>2</sup>. This is the 'site area' that applies, in a strict sense.

The existing structure on site is a part-3 part-4 storey commercial building that was originally constructed in the 1950s and which has been substantially altered in the intervening years.

The proposal is for the demolition of the existing building on site and for the construction of a 15-storey office building with retail uses on the lower two storeys and one basement level. It reaches a maximum height of 57.6m at RL 72.24 where the rooftop plant area envelope extends towards the eastern boundary.

The site is located on the western side of George Street approximately 100m from Martin Place. To the rear of the site across Wynyard Lane are 50 and 54-62 Carrington Street which are commercial buildings reaching heights of RL 86.18 and RL 81.53 respectively. Opposite the subject site along the eastern side of George Street are several 5-6 storey commercial buildings.

Importantly, the subject site should be read in the context of an overall site comprising the neighbouring sites immediately to the south and north.

To the south of the site is a 19-storey commercial building located at 333 George Street which is on a prominent corner and reaches a height of RL 81.74. This site is 1,152m<sup>2</sup> in area.

The northern neighbouring building is a two-storey retail building located at 323-325 George Street which is a property with similar dimensions to the subject site. Development consent has been granted for the construction of 17 storey hotel on that site under D/2018/922. The approved building reaches a maximum height of 58.063m at RL 73.34. This site is 265.6m<sup>2</sup> in area.

The proposed building is designed in a manner that responds to and integrates with:

- the existing building at 333 George Street; and
- the approved design of 323-325 George Street (and has a lower height than that building).

The subject site, together with these two neighbouring sites, forms part of an overall site of 1,692.1m<sup>2</sup>.

The maximum height limit applied to the site under Clause 4.3 is determined by the Sun Access Plane to Martin Place. The maximum height given under this Clause is approximately 130m. The proposed building is well under the maximum height limit.



## Request

Under Clause 6.16(3) of the City of Sydney LEP 2012 says that development in Central Sydney must not be approved if:

- it involves the erection of a building with a height greater than 55 metres above ground level (existing); and
- a site area of less than 800 square metres,

unless the consent authority is satisfied that:

- the building will have a freestanding tower each face of which will be able to be seen from a public place;
- the development will provide adequate amenity and privacy for occupants of the building;
- the development will not significantly adversely affect the amenity and privacy of occupants of neighbouring buildings; and
- the ground floor of all sides of the building facing the street will be used for the purposes of business premises or retail premises.

The proposed building's roof plant, roof access, roof balustrade and lift overrun all exceed 55m by between 0.16m-2.6m.

### **The overall site**

There is an established planning intention that the buildings located from

- 333 George Street; and
- 323-325 George Street,

(including the subject site) will contribute to a single street wall without any building separation between them.

### **333 George Street**

333 George Street was approved by development consent D/2012/696. The assessment report was presented to the Central Sydney Planning Committee on 6 December 2012. That report said (in paragraph 24):

*The concept plan details the design resolution of the façade to the north boundary in the event that the northern neighbouring building will be developed. This includes a tightened radius of the curved building element similar on all levels and the shadow gap.*

Paragraph 24 referenced a 'figure 12'. This figure is reproduced below:

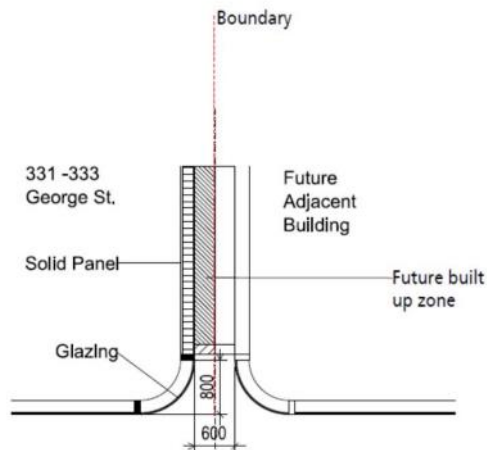


Figure 12 – North boundary design resolution concept

The ‘future adjacent building’ is the building now proposed to be erected on the subject site. It can be seen that it was anticipated that it would directly abut the building on 333 George Street.

333 George Street was approved under the Central Sydney DCP 1996 with a ‘street frontage height’ of 46m-50m. The assessment report says this in the compliance table (after paragraph 46):

**Generally complies:** *The proposed street frontage height ranges between 46m - 50m. The street frontage height is within the design of the glazed ‘veil’. The non-compliance is acceptable in this instance as the location of the site in the street block is a corner site and the built form of the building has been designed to comply with the sun access plane height requirement. Clause 2.2.1 (iii) allows corner sites to generally include special design emphasis such as increased street frontage heights by one or two floors.*

It can be seen from this text that it was anticipated that the street frontage height (together with the ‘building to the street alignment’ requirement) would create a street wall. As a corner site, the building at 333 George Street was expected to present as a taller building at the street frontage (than the buildings to the north). This proposal for the subject site is consistent with that expectation. Significantly, that expectation could not be achieved if the development of the subject site was to be a ‘freestanding tower each face of which will be able to be seen from a public place’ (as required by Clause 6.16(3)(a) of the LEP).

The above analysis is reinforced by the assessment report’s response to a submission from the owner of 327-329 George Street (the subject site). The report says (in paragraph 84(a)):

*327-329 George Street is to be redeveloped in the near future and concern is raised over the northern boundary glazed wall and building name signage located at the top of the building. The redevelopment potential of this site is not to be compromised as a result of the northern boundary glazed wall.*

**Comment:** *The applicant has been advised that should consent be granted, a condition will be imposed to include a boundary covenant requiring the windows to be sealed, bricked up or otherwise enclosed prior to the construction of any building abutting, adjoining or adjacent to such windows. The applicant accepts that a boundary window covenant will be imposed to ensure the development potential on the adjoining site is not compromised by the subject development and glazed northern boundary wall. No signage will be approved as part of this application. A condition will be imposed recommending a Signage Strategy be submitted to detail all proposed future signage for the site.*

The covenant generally anticipated by this comment was imposed under DP1226945 that says (in Section 4.6 Contravention Request | 327-329 George Street, Sydney

term 3(c)):

*The registered proprietor must inform any future lessee of any area affected by this covenant of the possibility that a new building could be erected on the land adjoining to the north, possibly diminishing views and available light.*

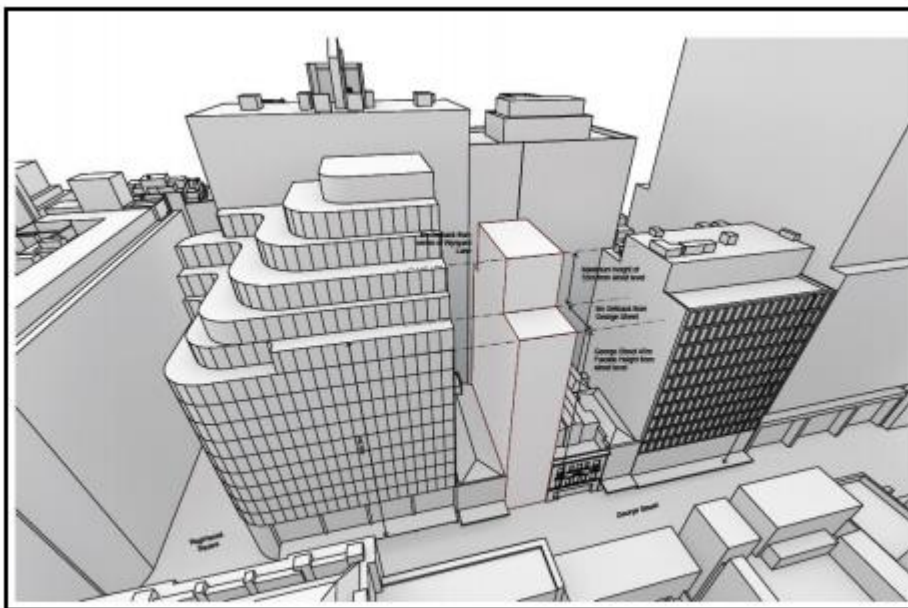
### **323-325 George Street**

323-325 George Street is subject to development consent D/2018/922. The development application was determined in April 2019.

The assessment report indicates that a street wall is expected and desired. It says on page 17:

*The proposal has a street wall height of 48.6m with the upper 2 levels set back 4.4m. ... Council's Urban Design Specialist reviewed the proposal. Surrounding development is mostly commercial, with limited setbacks ...*

The assessment report includes a 'figure 10' which shows how a street wall is to be created. Figure 10 is reproduced below:



**Figure 10:** Isometric representation of the proposed development.

The building to the north of 323-325 George Street is heritage-listed, and it should **not** be assumed that it would be re-developed. However, the context shown in the above figure 10 plainly anticipates that the site to the south (ie the subject site) would be developed to fill in the missing gap in the street wall.

The report details comments from the City's Design Advisory Panel. The panel's (relevant) comment and the City's response (on page 27) are set out below:

*The windows proposed on the southern facade are not supported and require deletion. They rely on borrowed light and impact the possibility of future development of the adjoining site. The windows to the northern boundary are supported in that the adjoining site is a heritage item and is less likely to be*

developed.

**Comment:** The proposal is amended by deleting the south facing windows.

Similarly, the owner of the subject site (being the site to the south of 323-325 George Street) provided a submission and a comment was offered in response as follows (on page 32):

*We are the owners of the building/site adjoining the proposed development to the south. The windows proposed to the southern facade should not be approved as we are proposing to develop the site and a solid wall would be more appropriate.*

**Response** - The application was amended with the deletion of the windows to the southern facade. The windows to the north are acceptable as the site is unlikely to be developed given the sites' heritage status.

The report also says (on page 26):

*As a result of the constraints resulting from the small size of the site no rear or side setbacks have been incorporated into the design. A setback of 4.4m is provided over the street frontage height of 48.6m. In this context the street wall height is acceptable.*

The inevitable consequence from this decision is that, once the subject site is developed, the approved building at 323-325 George Street cannot be 'a freestanding tower each face of which will be able to be seen from a public place' (as would have been required under clause 6.16(3)(a) of the LEP, had a clause 4.6 variation not been approved). The development consent was granted on the basis of clause 4.6 request in relation to clause 6.16 (pages 21-22).

### Planning controls

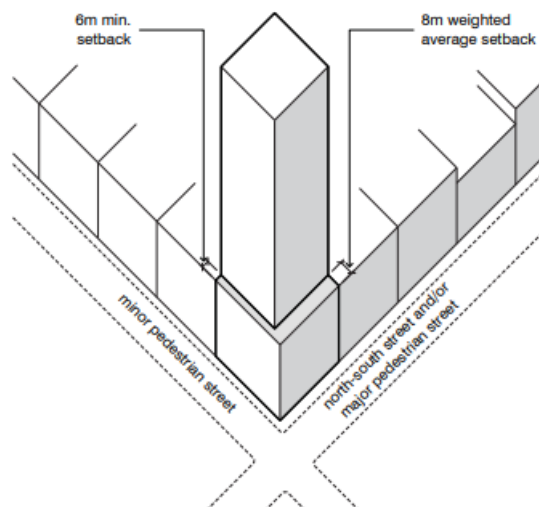
The above planning intent is also consistent with the development controls that were applied in relation to 323-325 George Street and also apply to the subject site.

In section 5.1.2 of the *Sydney Development Control Plan 2012* under the heading 'Side ...setbacks' it says:

*Separation between commercial buildings is not as critical given the reduced requirement for privacy.*

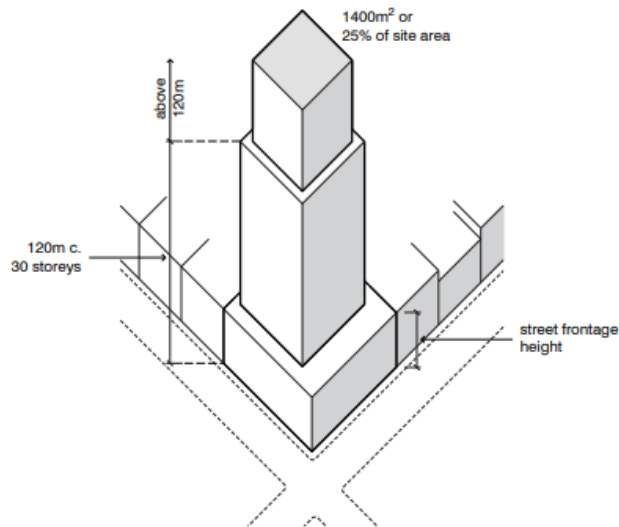
The intended street wall effect is shown in 'figure 5.5' of the DCP (in section 5.1.2). That figure is reproduced below:

**Figure 5.5**  
Front setbacks at street frontage heights may be reduced from the 8m weighted average setback on corner sites on secondary pedestrian streets, provided an average weighted setback of at least 8m is maintained to north-south streets and major pedestrian streets



A similar figure appears as 'figure 5.20' in section 5.1.5 of the DCP:

Figure 5.20  
Upper level  
floor plates for  
commercial  
buildings-



In both figure 5.5 and figure 5.20, the corner building would be the equivalent of 333 George Street. The subject site and 323-325 George Street would be the buildings with no side setback, providing a solid street wall at the street frontage height. This is the building form that the City has plainly been working towards with the two consents it has already given. This building form is not able to be achieved while also adhering to the requirement that each individual building 'will have a freestanding tower each face of which will be able to be seen from a public place' (as per clause 6.16(3)(a)). Of course, the overall site will achieve this effect. That is the site bounded by Regimental Place, Wynyard Lane, the heritage property to the north of 323-325 George Street and George Street.

#### Marginal exceedance of 55 metre height threshold that triggers Clause 6.16(3)

The building reaches a maximum height of 57.6m. The bulk of the proposed building, including all habitable floor space, is located below a height of 55m. Several minor elements on the roof exceed 55m.

The greatest fixed exceedance (of the 55m threshold) arises from the stairs accessing the roof top which is required for the maintenance of roof top plant and equipment. This structure will have an unobtrusive concrete finish which matches the masonry materiality of much of the surrounding development. The greatest possible exceedance may relate to roof top equipment located in the roof top plant area.

Elements of the roof top plant will exceed 55m. The plant is necessary for the operation of the building and does not exceed the approved height of 323 George Street. A balustrade is required to the roof for the safety of anyone who accesses the roof. The balustrade is glass and will not be clearly visible from the public domain due to its location and materiality.

All elements that exceed the height threshold, excluding the glass balustrade, are set within the roof plane and will not be seen from the public domain. The exceedances of the threshold are minor and will be unobtrusive when viewed from surrounding development.

The proposal is acceptable for the site as the marginal height exceedances over the 55m threshold will allow for the proper and safe operation of the building and do not cause any significant adverse environmental effects.

To be clear, the building complies with the maximum height limit for site. This is set under Clause 4.3 and is determined by the Sun Access Plane to Martin Place. The maximum height given under this Clause is approximately 130m.

## Justification

In response to the proposed contravention of Clause 6.16(3), this Clause 4.6 request is provided to seek development consent despite the contravention. This request is based on the established planning intention that the building form part of a street wall as part of an overall site comprising 1,692.1m<sup>2</sup>. The overall site would meet the requirements of clause 6.16(3) if those requirements were applied to that overall site.

It is submitted that the request is well-founded and is worthy of the Council's approval. The following is an assessment of the proposed contravention against the requirements of Clause 6.16 (Erection of tall buildings in Central Sydney) and Clause 4.6 (Exceptions to development standards).

Firstly, the established planning intention for the subject site and its two neighbouring sites is that, together, they will form part of a street wall as part of an overall site comprising 1,692.1m<sup>2</sup>. The overall site would meet the requirements of clause 6.16(3) if those requirements were applied to that overall site.

Secondly, clause 6.16(3) would not apply, in any event, if the building was 55m or less in height. The proposed building height is set to meet anticipated development needs for the foreseeable future and provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure. The proposed development reflects the desired character of Central Sydney and minimises adverse impacts on the amenity of the area.

In particular:

- The exceedance of the 55m threshold is relatively minor with the greatest fixed exceedance being 1.58m and greatest possible exceedance being 2.6m.
- The proposed height supports a positive built form and scale relationship with the neighbouring buildings at 333 and 323 George Street.
- The marginal difference between the proposed height and the 55m threshold does not result in increased density or adverse overshadowing to neighbouring developments or Martin Place.
- This same marginal difference does not give rise to any environmental effect of sufficient significance that would cause concern, and it is considered that the environmental benefits of the proposal deliver environmental planning benefits sufficient to justify the contravention of the development standard.

## Objectives of Clause 6.16(3)

The proposed development will be in the public interest because it is consistent with the development standards' objectives and the zone objectives.

This section of the request deals with the objectives in Clause 6.16(1) (which are the objectives for Clause 6.16(3)). The non-compliance does not violate the objectives of the clause as demonstrated below.

***(1) The objectives of this clause are to ensure that tower development on land in Central Sydney:***

- (a) provides amenity for the occupants of the tower and neighbouring buildings, and***
- (b) does not adversely affect the amenity of public places, and***
- (c) is compatible with its context, and***
- (d) provides for sunlight to reach the sides and rear of the tower, and***
- (e) promotes the ventilation of Central Sydney by allowing the free movement of air around towers, and***
- (f) encourages uses with active street frontages.***

### Objective 1a.

As explained above, the proposal has been designed to be built to the site boundaries to continue the infill of the street wall of George Street. This reflects the established planning intent for the overall site.

All habitable floor space of 327-329 George Street is located below 55m in height. The amenity for occupants will be high as the development has a relatively small floor plate with access to natural light at both ends. The floor to floor heights throughout the office levels of the development are 3.6m which provides ample ceiling height to allow light to reach the centre of the floor plate.

323-325 George Street and 333 George Street have been designed on the understanding that future development would occur to the boundary on 327-329 George Street. Both buildings were approved on this basis and in acknowledgement that they will provide suitable amenity for occupants. Across the overall site, high levels of amenity have been provided for occupants of the commercial and hotel buildings.

The development across the overall site reflects a standard pattern of development within the Sydney CBD where street wall heights of up to and above 45m are common, including for tower podiums. The amenity of neighbouring sites is not diminished by the development of a consistent street wall along George Street, which is the intended planning outcome of existing and past controls.

The height exceedance (above the threshold that triggers the application of clause 6.16(3)) relates to items (access stairs and protective balustrade) which allow roof access for the purpose of servicing roof top plant and elements of the roof top plant to be determined in detailed design. The minor exceedance relating to the lift overrun allows the building's lifts to operate. In this way, the

exceedances (above the threshold) contribute to the amenity of the proposal for its occupants. The surrounding developments will not be significantly impacted by the exceedances.

#### Objective 1b.

The proposal within the context of the overall site creates a consistent street wall along George Street which is compatible with the planning intention as demonstrated in figures 5.5 and 5.20 of the Sydney DCP 2012. This is a positive urban design response to the existing and desired pattern of development along George Street. The scale of the constructed and the approved development on the overall site is consistent with the pattern of surrounding development and significantly lesser in scale than freestanding towers located in the vicinity. The proposal thereby will not cause any form of visual domination.

The overall site does not cause any unacceptable shadow impacts on the public domain and is within the heights allowable under the solar access planes protecting Martin Place. The proposal for the subject site, as part of the overall site, does not result in any additional overshadowing of the public domain.

#### Objective 1c.

Figure 10 from the Assessment Report produced concerning D/2018/922 (which is reproduced under the 'Request' heading of this request) demonstrates that an infill building with a consistent street wall is expected and desired between 333 George Street and 323-325 George Street. This is to ensure that the overall site corresponds with the pattern of development established by 333 George Street and 309-315 George Street. The overall site is responsive to the street wall height of 309-315 George Street with the buildings at 323-329 George Street both being designed in respect of the street wall height established by 333 George Street and 309-315 George Street. The overall site is compatible with its context.

In terms of the proposal for the subject site, the height of the proposed building is compatible with the neighbouring developments 333 George Street and the DA approved design for 323 George Street. Specifically, the height of the proposal is less than what was approved for the neighbouring 323 George Street. The site is exceptionally well located for a commercial office and retail development being located near public transport and within the Sydney CBD. The design and proposed use are both entirely appropriate to the site's context.

#### Objective 1d.

The overall site provides windows on all sides. All three buildings having windows to the eastern and western elevations. The northern elevation of 323-325 George Street contains windows and the southern elevation of 333 George Street contains windows. The overall site does allow sunlight to reach all sides.

In terms of the proposal for the subject site, the portion of the development which is over 55m in height is limited to the top of a stairwell, lift overrun, balustrade and a rooftop plant envelope area.



The height exceedances have no impact on sunlight reaching the sides or rear of the building. The proposal is not a tower form and it is for this reason that exemption is being sought from this clause.

#### Objective 1e.

The overall site does not contain a tower form (in the sense that the site is occupied by buildings whose height is modest in the context of the Sydney CBD). However, if there is a 'tower' the tower will comprise the three buildings that will contribute to the overall site. The elements of the overall site that do exceed 55m will not prevent the free movement of air within Central Sydney.

Additionally, there will be free movement of air around the three buildings below 55 metres.

In terms of the proposal for the subject site, the minor additional height above 55m will have no impact on the circulation of air. The proposal is not a 'tower' form (as per response to 1(d)) above), but to the extent that there is any 'tower' it is made up by the three buildings that will comprise the overall site.

#### Objective 1f.

The overall site provides active street frontages to George Street and Regimental Place.

An active street frontage is provided to George Street under the proposal.

## Zone objectives

As stated above, the proposed development will be in the public interest because it is consistent with the development standards' objectives and the zone objectives.

The land use table in the LEP specifies the zone objectives and permissible uses. The objectives of the B8 Metropolitan Zone are:

- *To recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia's participation in the global economy.*
- *To provide opportunities for an intensity of land uses commensurate with Sydney's global status.*
- *To permit a diversity of compatible land uses characteristic of Sydney's global status and that serve the workforce, visitors and wider community.*
- *To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.*
- *To promote uses with active street frontages on main streets and on streets in which buildings are used primarily (at street level) for the purposes of retail premises.*

The proposal recognises these objectives for the B8 Metropolitan zone by:

- Providing office and retail space within the CBD.
- Developing a currently under-utilised site in an efficient manner and providing a land use

- and high-quality design that is compatible with Sydney’s role as a global city.
- The site’s land use as a commercial office building with lower level retail is compatible with the surrounding commercial developments and contributes to a diverse land use pattern.
- The site has exceptional access to a wide range of public transport options which will encourage the use of public and active transport.
- An active retail frontage is provided to George Street.

## Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first method of the five methods set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

This first method requires that the objectives of the standards are achieved despite the non-compliance with the standards.

This was re-affirmed as an appropriate method in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17].

This request addresses this first method outlined in *Wehbe*. It should be noted that this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The request also addresses the third method in *Wehbe* — that the underlying objective or purpose of the development standard(s) would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

For completeness, this request also seeks to demonstrate that the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to any adverse consequences attributable to the proposed non-compliant development. This disproportion is, in itself, 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]). In this regard, the burden placed on the community would be:

- the failure to achieve the street wall effect that the City has been working towards and that has been anticipated in the DCP;
- the reduction in commercial floor space that would otherwise benefit the community and assist in achieving important planning goals; and
- the likely sterilisation, or partial sterilisation, of the subject site as a re-development site.

### Consistency with the relevant development standard objectives

This has been demonstrated earlier in this request.

#### No significant adverse impacts

No significant adverse impacts arising from the proposed contravention.

327-329 George Street has a site width of 9.797m as shown on Drawing '1707 D 103 L' by Melocco & Moore Architects. 333 George Street is built to its common boundary with the subject site and 323-325 George Street is approved to be built to both of its common boundaries. For a free-standing tower with windows to all elevations to be constructed on-site, minimum side setbacks of 3m to each boundary would be required which would allow the tower a maximum possible width of 3.797m. It is evident that such a tower would be impractical to construct and would not offer a land use intensity commensurate with the subject site's maximum FSR limit and location in the Sydney CBD. A free-standing tower on the subject site would be incompatible with the desired street wall discussed previously in this Request. It would result in an inferior urban design outcome by creating gaps in the street wall. The sides of the building would still largely not be visible from the public domain (as views would be obscured by the two neighbouring buildings).

In comparison, the proposal completes the street wall and is designed to respond to the height datums established by the neighbouring sites. Infilling the street wall is an appropriate urban design response which will have a positive impact on the streetscape of George Street. The specific areas of the building proposed to exceed 55m do not consist of habitable floor space and are for the purposes of building services and maintenance. With the exception of a glass balustrade, which will be difficult to perceive due to its materiality, these building elements are located behind the parapet and will not be visible from the public domain and have no shadow impact upon it. No significant adverse impacts arise from the height of the lift overrun and other roof features.

Additionally, in terms of the minor exceedance of the 55m height threshold:

- The extent of the exceedance is minor being a maximum of 2.6m which is a variance of 4.73%.
- The height exceedance relates to elements necessary for access to roof top equipment and for the lift overrun.
- The point of greatest height is setback within the centre of the roof which is in turn setback 4.5m from the street wall. The visual impact of the exceedance will be minimal or non-existent from the public domain. When viewed from surrounding tall buildings the elements of height exceedance will appear as integrated components within the buildings design.
- The overall scale and built form will contribute positively to the surrounding area by responding to the scale of existing developments in the vicinity.
- The development otherwise achieves a high-quality design outcome without any significant, adverse impact arising from the exceedance.

The outcome is a building that fits within its surroundings and achieves the objectives of the zone while staying generally within the built form outcome and scale anticipated for the area.

In substance, the development remains compliant with the principles and general parameters of the built form controls and expectations within the planning framework. If approved, the built form outcome of the proposal will be in-keeping with, and will not be detrimental to the amenity of its surroundings.

### Technical issue re the site area

The contravention of the development standard is a technical non-compliance which results from treating the 'site area' as simply being the subject site rather than overall site area which has been the basis for two precedent planning decisions over a seven-year period (that both anticipate the proposed development of the subject site).

If overall site area was taken into consideration when calculating the site area, there would not be any non-compliance (see analysis above).

### Thwarting or undermining certain development standard objectives

If the variation is not approved, then key objectives in the development standard will be thwarted or undermined.

#### Objective 1a.

As discussed under the 'no significant adverse impacts' heading above, the maximum possible width of a free-standing tower of which each face could be seen from the public domain is 3.797m assuming a minimum side setback of 3m to each side boundary. The floor plate of such a tower would be too narrow to provide an adequate level of amenity for occupants. A free-standing tower form would severely reduce the amenity for occupants in comparison to the proposed design which infills the street wall.

The sides of such a building would not be able to be appreciated in any meaningful sense from within any neighbouring buildings.

#### Objective 1b.

As discussed above, a free-standing tower on the subject site would fail to complete the street wall that 333 George Street and 323-325 George Street establish. This would be highly incompatible with the existing pattern of development along that section of George Street. It would also be inconsistent with the expectations of Council established in the approval of 333 George Street and 323-325 George Street that a single street wall would be established. Failure to create a continuous street wall between 333 George Street and 323-325 George Street would diminish the streetscape quality of George Street, reducing the amenity of the public domain.

#### Objective 1c.

The context of the subject site is defined by its relationship to the neighbouring buildings. 333 George Street is constructed to the northern boundary and was approved on the assumption that a neighbouring building would be constructed to that boundary. It has a street wall height of between 46m-50m. 323-325 George Street was approved with a street wall height of 48.6m and building height of 58.063m. Its design responded to the street wall heights established by 333 George Street

and 309-315 George Street. By being built to the boundary and responding to the height datums established by the neighbouring sites, the proposal for 327-329 George Street completes that portion of the street wall and conforms to its context.

A freestanding tower on the subject site, each face of which will be able to be seen from a public place, would reject the pattern of development that has been established by 333 George Street, 323-325 George Street and 309-315 George Street. It would present undesirable gaps in the street wall which are incompatible with the existing pattern of development along George Street.

## Environmental planning grounds

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

In saying this, we have focused on:

- the aspect or element of the development that contravenes the development standard, not on the development as a whole; and
- why that contravention is justified on environmental planning ground,

*(Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 at [24]).*

There is an absence of environmental harm arising from the contravention, for reasons already set out above.

Additionally, there are planning benefits, for reasons outlined above.

In particular, a proposal for a freestanding tower on the subject site alone would result in a worse environmental planning outcome relative to the proposed building design because:

- A freestanding tower providing minimum setbacks of 3m to each side boundary would have a maximum floor plate width of 3.797m which would be impractical to construct and would have unacceptable amenity outcomes for occupants.
- A freestanding tower would fail to provide a level of land use intensity commensurate to the site's maximum FSR limit under Clause 4.4 of the Sydney LEP 2012 and which is appropriate to its location in the Sydney CBD.
- A freestanding tower would create undesirable gaps in the street wall established by neighbouring sites which would be an unacceptable urban design outcome.

A proposal for a building with a maximum height of less than 55m would result in a worse planning outcome relative to the proposed building design because it would necessitate that either the floor to floor heights within the building be reduced or that one storey be removed from the development. These options are considered below.

Section 4.2.1.2(1)(c) of the Sydney DCP 2012 requires that commercial floors have a minimum floor to floor height of 3.6m. The proposal complies with this section by providing floor to floor heights of 3.6m above the ground floor. A reduction in the floor to floor heights would cause a non-compliance

with Section 4.2.1.2(1)(c) of the Sydney DCP 2012 and would reduce the amenity for occupants creating an unacceptable planning outcome.

The alternative is to remove a storey from the building to reduce the total height below 55m. The subject site has a base FSR 8:1 under Clause 4.4 of the Sydney LEP 2012 and is eligible for an Area 1 bonus of 4.5:1 under Clause 6.4 providing a total maximum permissible FSR of 12.5:1. The proposed design has a total GFA of 3,076.2m<sup>2</sup> which equals an FSR of 11.207:1. If Level 14 were removed from the development, the building's GFA would be reduced by 173.3m<sup>2</sup> to 2,902.9m<sup>2</sup> and the total FSR would be 10.58:1. The removal of a storey from the proposal thereby reduces the FSR to 1.92:1 below the maximum FSR limit. This is a land use intensity which falls well below that which was envisioned in the FSR controls applied to the subject site under the Sydney LEP 2012 and which is inappropriate to its location in the Sydney CBD.

The City of Sydney's Central Sydney Planning Strategy has recommended changes to the planning controls in order to protect and enhance the employment floor space in the Sydney CBD. The proposal is consistent with this strategic direction by providing additional office space in the Sydney CBD which is supremely located in relation to public transport. Any loss of commercial floor space (that can be delivered without significant adverse impacts) is the loss of an environmental planning benefit.

With regard to environmental amenity matters of consideration which are; overshadowing, privacy/overlooking, view loss and visual domination. These matters provide an indication of a proposal's suitability and reflect the matters of consideration under Section 4.15 of the Act.

As indicated previously, the proposed exceedance of the height threshold will not adversely impact on any of those criteria. As reflected in the shadow diagrams submitted with the DA, there is no significant adverse over shadowing effect to neighbouring developments as a result of the exceedance and there is no additional overshadowing to the public domain.

Visual domination is usually associated with the perceptions from the public domain and from multi-storey buildings. In this case, the building responds to existing heights of the neighbouring built and DA approved developments which are of similar or greater scale. From the public domain, the height exceedance will not be readily visible. The building has been designed to be sympathetic to both neighbouring buildings and to contribute to the infill of the street wall of George Street.

In determining the 'aesthetic character of the area' it is reasonable to review the type and form of development in the site vicinity as well as the future character of the area. The existing form is a mix of heritage buildings of between 5-6 storeys, small sites to the north that are underdeveloped and multiple buildings larger contemporary buildings up to and exceeding 55m. The proposal is a suitable part of the ongoing intensification of development along George Street.

The proposed mix of uses as a commercial office building with lower level retail is consistent with the surrounding land uses and the objectives of the B8 Metropolitan Centre Zone.

Therefore, it would appear that neither the environmental amenity nor the aesthetic character of the area, are detrimentally impacted by the proposal. In such a context the contravention of Clause 6.16(3).

## Concurrence of the Secretary

The Secretary of Department of Planning and Environment can be assumed to have concurred to the contravention, provided that the application is not determined under delegation. This is because of Department of Planning Circular PS 08–003 ‘Variations to development standards’, dated 9 May 2008. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*. Under Clause 64(2), a consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The application must not be determined under delegation, as some of the requirements to be varied are not numerical.

In any event, the contravention of the development standard does not raise any matter of significance for State or regional environmental planning.