

# **Attachment B**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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## Appendix A

### Clause 4.6 Exception Request for Height Control in Sydney LEP 2012

#### 1. Introduction

This request for an exception to a development standard is submitted in respect of the height control development standard within clause 4.3 of the Sydney Local Environmental Plan 2012 (LEP). The request refers to an application for demolition, and construction of a mixed use commercial and residential flat building at 503-505 Elizabeth Street Surry Hills.

#### 2. Clause 4.6 Exceptions to Development Standards

Clause 4.6 is set out below (but without subsections (6)-(8) inclusive):

#### 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.*

....

The applicant requests that the maximum height of buildings development standard be varied in this application.

### 3. Development Standard to be varied

Clause 4.3(2) of the LEP provides that 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 maximum height shown on the relevant map is 22 metres. The LEP defines this as the height above ground level (existing).

### 4. What is the exceedance?

The site is entirely covered by the existing building. The position from which such a building's ground level (existing) should be measured was canvassed in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070. In that matter Commissioner O'Neill determined (adopting the argument submitted by the City of Sydney) that for a site where the whole of the site was built upon, the RL at the footpath level adjacent to the site boundary was the most appropriate level (rather than for instance a basement).

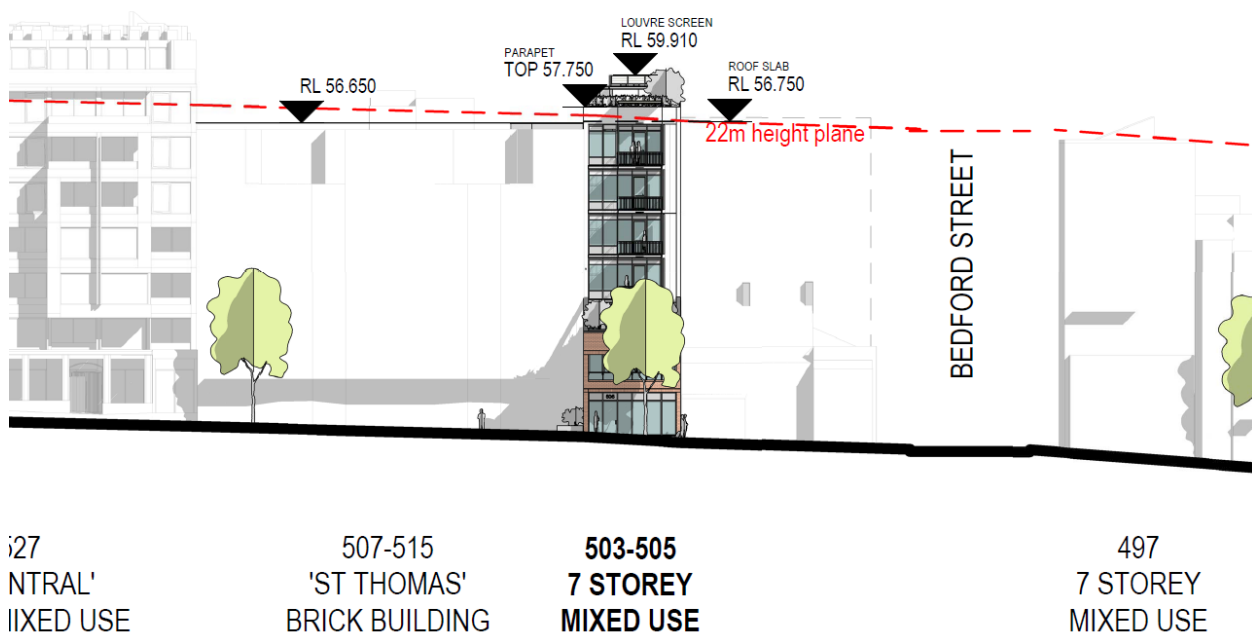
The footpath levels and consequent maximum heights are set out below:

Position	Footpath RL	22m Height Level	Proposed RL	% exceedance
Northeast	34.91	56.91		
Southeast	35.46	57.46		
Southwest	35.49	57.49		
Northwest	35.19	57.19		

Position	Footpath RL	22m Height Level	Proposed RL	% exceedance
Height at greatest exceedance	35.01 (see below)	57.01	59.91	2.9m 13.2% exceedance

The median height on the northern boundary where the greatest height is  $(34.91 + 35.19) / 2 = 35.05$ . The maximum height is a third the distance along the northern boundary closest to Elizabeth Street. The difference in height between the northeastern and north western footpath RLs is 0.28 metres. The estimated ground level (existing) at the position of the greatest height exceedance at the eastern point on the northern boundary where the plant begins is therefore  $34.91 + 0.1 = 35.01$ . This is a height of 24.9 metres.

The top RL for the louvre screen shielding the plant on top of the lift overrun and stairway to the rooftop is RL59.91. This represents a height exceedance of 2.9 metres being a 13.2% exceedance over the height limit. **Figure 1** illustrates the 22 metre height plane from the Elizabeth Street façade



**Figure 1** Elizabeth Street façade showing exceedance over the 22m height plane

**Figure 2** illustrates the building height plane of 22 metres and the building height plane of 25 metres (beyond which a competitive design process is required under clause 6.21 of the Sydney LEP 2012). The figure illustrates that the exceedance of the 22 metre

building height plane is limited to the roof slab and plant and equipment and pergola features on the roof. No habitable GFA is within the area above the 22 metre building height plane.



Figure 2 Height Plane Diagram

**5. Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

Traditionally, consideration of this requirement has been undertaken in accordance with the first test of the 5 part test set out in the judgement of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 by showing that the objectives of the standard are achieved notwithstanding the non-compliance with the standard. This test was established to meet the requirements of a SEPP 1 Development Standards objection. That judgement indicates that it is not the only way of establishing that compliance with

the development standard is unreasonable or unnecessary, and presents another 4 methods of establishing unreasonableness or unnecessary.

Clause 4.6(3)(a) requires the consent authority to consider a written request which seeks to justify contravention of the development standard by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

#### 5.1 Test 1 – The objectives of the standard are achieved notwithstanding non-compliance with the standard

The first test identified under *Wehbe v Pittwater Council* is whether the objectives of the standard are achieved notwithstanding non-compliance with the standard.

The objectives of the development standard in clause 4.3 are:

- (a) to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) to promote the sharing of views,*
- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) in respect of Green Square....*

In response to these objectives it is noted:

#### 5.1.1 Objective (a) to ensure the height of development is appropriate to the condition of the site and its context

##### **Condition**

The condition of the site has been examined by a desktop study for contamination which finds that the historical land uses and potential sources of contamination would not preclude the proposed development. Although further work is required by a detailed site investigation, the consultants are of the opinion that the site can be made suitable for the proposed development.

The condition of the existing building is poor. The Heritage Impact Statement (HIS) details that the Elizabeth Street façade has external joinery and a rendered finish in very poor condition, and the Little Buckingham Street façade also being poor –

demonstrating movement cracks, the dislodging of the first floor sill brickwork, exposed and rusting lintel over the southern opening and poor quality joinery. The HIS also notes the extremely poor lighting and ventilation from the interiors of the residences. Internally the brickwork has had the original render removed and is exposed. The internal fitout to the first floor unit is described as rudimentary.

Photographs of the façade conditions are set out in Figure 3 and 4.



**Figure 3** - Elizabeth Street Façade showing poor condition of lintels, joinery and render



**Figure 4** - Little Buckingham Street façade showing poor condition of the facade

Another way of considering the “condition” of the site is to reference the land itself and the subdivision pattern. Within the two blocks from Rutland Street to Belvoir Street on the western side of Elizabeth Street, the site and the three terraces to the north are the only sites retaining the original subdivision pattern. That subdivision pattern has generally been retained on the western side of Little Buckingham Street. This proposal does not seek to alter the subdivision plan.

### Context

The site is located towards the northern end of a block of relatively recently redeveloped contemporary buildings between Belvoir Street to the south and Bedford Street to the north. Immediately north of the site and south of Bedford Street are three original terrace houses which are used as:

- a bar (the Wanderer at 501 Elizabeth Street);
- for offices for not-for-profits organisations (at 499 Elizabeth Street); and
- for offices (at 497 Elizabeth Street).

North of Bedford Street the 7 storey contemporary buildings continue to Rutland Street, although some have been constructed behind original terraces (such as the current construction at 467-473 Elizabeth Street and 481-483 Elizabeth Street).

A summary of the developments along the western side of Elizabeth Street from Rutland Street to Belvoir Street is contained in **Table 1** and partially illustrated in DA 004 context elevation **Figure 5**.



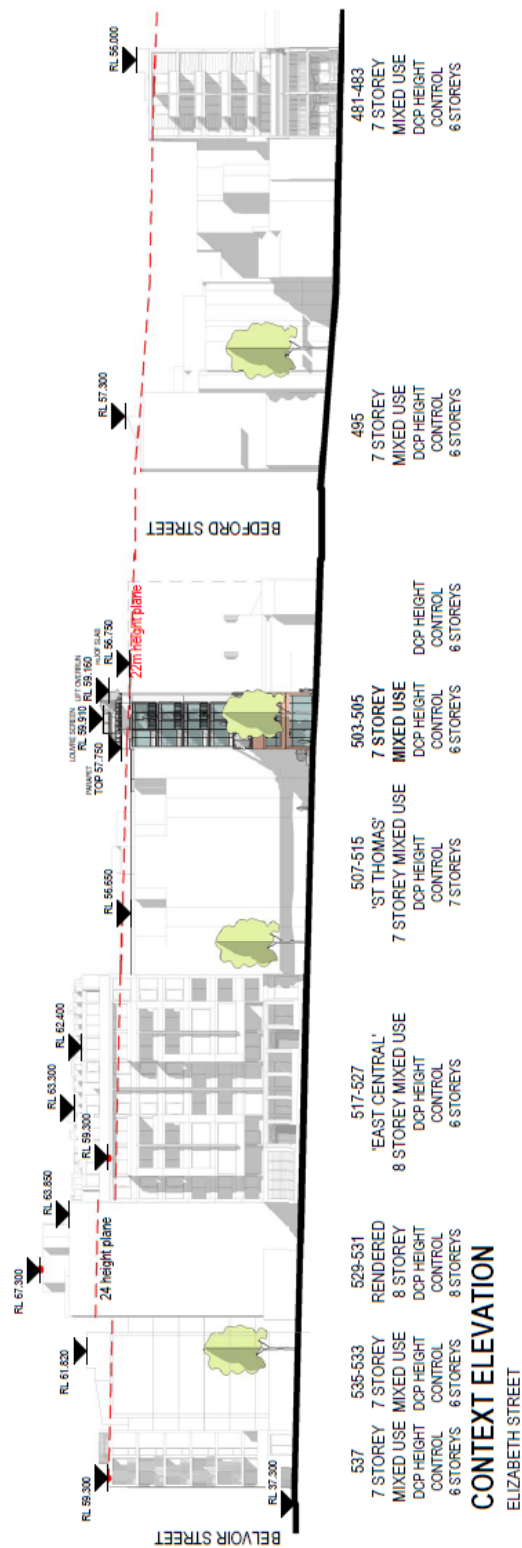


Figure 5 Context Elevation for Elizabeth Street

**Table 1** Height context table for nearby development

Address Elizabeth Street	LEP height Limit	DCP storeys limit	No of storeys	Top RL	Height (m)	DA	Mods	Height exceedance
461-465 (retention of 3 storey terrace at 465	22	6	3 storey terrace at 465 6 on corner 7 at rear	50.97	20m Elizabeth St 21.86 Little Buckingham St	2012/1052	4 mods	Complies
467-473 Retention of terraces on Elizabeth St	22	6	2 storey terraces at front 6 at Elizabeth St 7 at rear	53.42 reduced to 52.85 by a mod	23.95 reduced to 23.38	2014/693	3 mods	Approved 1.95m (8.9%) Reduced to 1.38m 6.3%
475	22	6	2 storeys original			nil		Complies
479	22	6	2 storey terrace			nil		Complies
481-483 Retention of terraces on Elizabeth St	22	6	2 storey terraces at front 7	56	24.2	2014/1071	3 mods	2.2m 10%
485-489 Two storey frontages to Elizabeth St	22	6	2 to Elizabeth St 6 to the rear			Can't find DA		
491-493 Setback from street	22	6	6			Can't find DA		
495	22	6	2 on Elizabeth St 7 + rooftop	57.3 roof feature	23.72	2012/1661	2 mods	1.72 7.8%

Address Elizabeth Street	LEP height Limit	DCP storeys limit	No of storeys	Top RL	Height (m)	DA	Mods	Height exceedance
503-505	22	6	7 + rooftop	59.91	24.9			2.9m 13.2%
507-515	22	7	7	Parapet 56.65 + services		unknown		unknown
517-527	22	6	7	63.3	24.7	2014/458	LEC mod	2.7m 12.3%
529-531	24	8	8	67.3	31m			7m 29.2%
533-535	22	6	7	61.82	26.6	2012/559	5 mods	4.6m 20.9%
537	22	6	7	60.2	Approx 25.2	2014/1184	3 mods	Approx 3.2m 14.5%

What is clear from this analysis is:

- generally the DCP height in storeys control of 6 metres has been approved for 7 storeys;
- there is generally a height exceedance approved (either by the original application or by way of modifications) to exceed the 22 metre height control which roughly correlates to lift overruns and plant and equipment on the rooftop;
- the plant and equipment is generally centrally located within the site and is therefore not visible from Little Buckingham Street or Elizabeth Street; and
- top habitable levels which mostly exceed the building height plane are generally set back (see 517-527 and 529-531 Elizabeth Street).

The proposal is in line with the development applications and modifications approved over the past 7 years in the area. Although a small part of the roof slab exceeds the height plane, the majority of the exceedance of height comes from the lift over run, plant and the pergola structure providing amenity to the rooftop terrace. The proposal sits easily within the context of the western side of Elizabeth Street when compared to all of the most recent developments.

It is noted that the rooftop streetscape of the western part of Elizabeth Street is interrupted frequently by street trees which make obtaining long views of the rooftops

difficult, especially given that Elizabeth Street is relatively narrow. Hence whilst the context is very important the long view of the street facades is difficult to ascertain from the street. The following figures illustrate this:



**Figure 6** 461-465 at right, construction of 467-473 centre and 479 (green building)



**Figure 7** 475 (beige), 479 (green) and 481-483 beige building to left



**Figure 8** 495 in foreground with 491 brick building behind



**Figure 9** 497 in foreground with 507-515 behind





**Figure 10** 495 to the right, the site in the middle and 507-515 at left



**Figure 11** 507-515 to the right, 515-527 central, 529-531 at left



**Figure 12** Taken from the Opera centre car park - 517-527 to right, 529-531 centre, 533-535 to left and 537 at far left



**Figure 13** 537 looking north west with 533-535, 529-531 and 517-527 heading to the right

The context of Little Buckingham Street is generally:

- garage entrances to 7 storey mixed use buildings on the eastern side of Little Buckingham Street; and
- rear lane entrances to the terraces on the western side of the street north of Bedford Street. There is some pedestrian access to buildings between Belvoir Street and Bedford Street on the western side, as well as garage access. Figures below illustrate:



**Figure 14** Eastern side of Little Buckingham Street north of Bedford Street



**Figure 15** Western side of Little Buckingham Street north of Bedford Street



**Figure 16** Western side of Little Buckingham Street south of Bedford Street



**Figure 17** Eastern side of Little Buckingham Street south of Bedford Street

The proposal will include a single garage entrance to Little Buckingham Street. Whilst most of the garage entrances on the eastern side of Little Buckingham Street have double garage entries, this proposal is retaining the original subdivision width and only a single garage entry can be supported. As with other entries along Little Buckingham Street on the western side south of Bedford Street, a residential entry is provided.

The proposed height is appropriate to the context of the site within both Elizabeth Street and Little Buckingham Street. It will be read from all views as consistent with the new developments in this part of Surry Hills.

5.1.2 Objective (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas

The existing developments described in **Table 1** above are all within the heritage conservation area and as discussed, the proposal is consistent with those buildings' over run of the height limit with plant and lift overruns. The site is not adjacent to any heritage item although it is across the road from the heritage item of the former WC Penfold & Co factory. This development is a narrow development of 6.705 metres width and is greatly dwarfed by the much larger footprints of buildings to the north and south. It has clearly been felt that those buildings provide a satisfactory transition to the heritage item and to the other buildings within the heritage conservation area and there is no reason why this building would not likewise transition satisfactorily.

The most obvious transition is to the three terrace buildings to the immediate north. The building retains the original narrow subdivision pattern which aids the transition in scale to the narrow terraces. The Heritage Impact Statement has considered the proposed height of the development as part of the evaluation against the recommended management guidelines for the Cleveland Gardens Conservation Area. In section 6.5.2 of that report it is stated:

*In assessing the heritage impact of the proposed height of the new development within the conservation area, the immediate context of the site must be considered. The interface with the adjacent six storey building to the south provides a precedent for the scale and form of development. Figure 42 describes the wider streetscape context. The replacement of the existing two storey building, categorised as making a neutral contribution to the conservation area, with a building that is in line with the existing multi storey development is an acceptable heritage impact.*

The interface between the contemporary multi storey development and low scale terraced housing will remain the same with the development. The interface of two storey terraces to multi storey development is characteristic of the area as found currently from the site to the building at 507-515 Elizabeth Street and in various places along Elizabeth Street north of Bedford Street.

5.1.3 Objective (c) to promote the sharing of views

The building to the immediate south of the site does not have any rooftop terrace which will be interrupted by the proposal. Some views can be obtained from the light

well feature which will be blocked by the development, however this is an anticipated result from any development to the north of that building. They are likely to be services and bedroom windows with living spaces likely to be focused to the east and west street frontages.

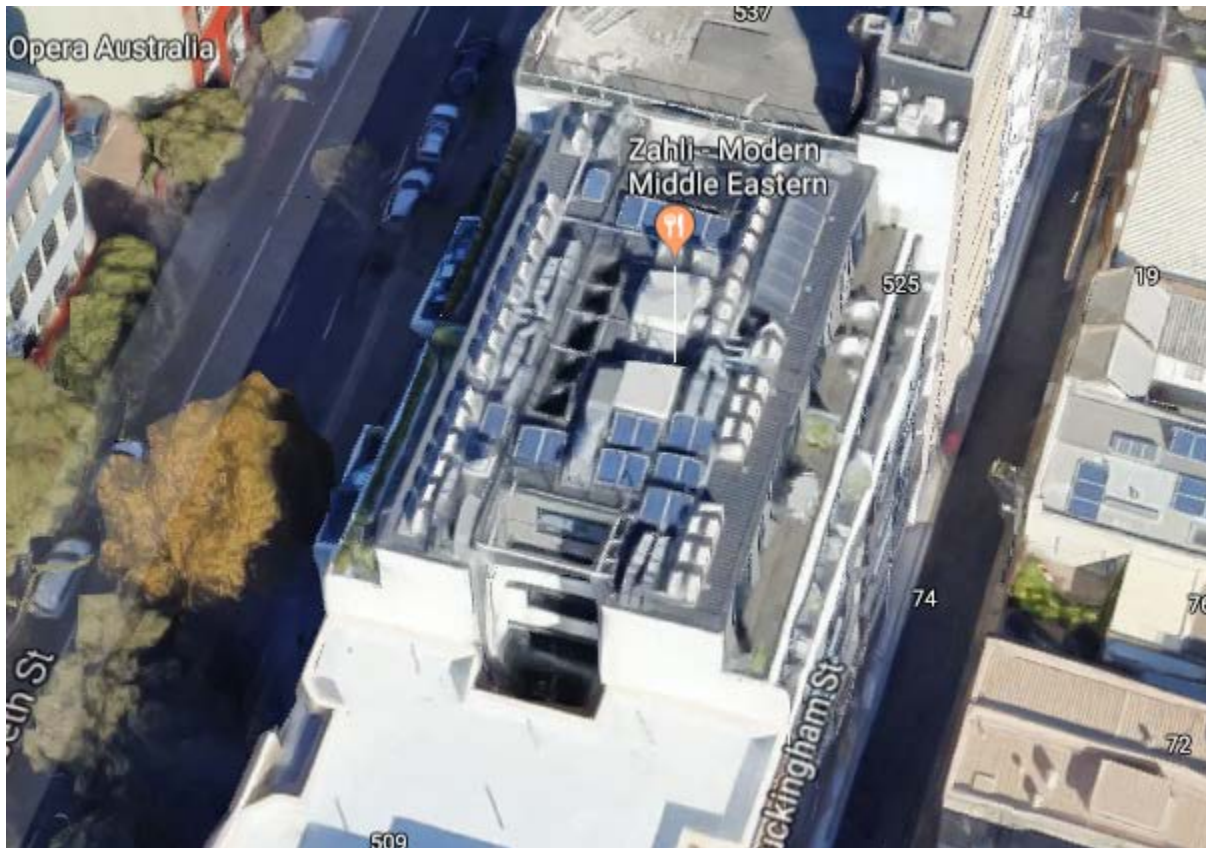
The principle views which the proposal has the potential to interrupt would be:

- northerly views from rooftop gardens from buildings to the south at 517-527 and 529-531 Elizabeth Street. Neither has a rooftop terrace hence no view loss will occur from there.
- Northerly views from the balcony for unit 7 at 517-527 Elizabeth Street.

Comments:

- There are terraces on the eastern and western side of the building – both 2 metres wide and clearly oriented to take advantage of views to the east and west. The terraces are at RL59.10. There is vegetation clearly visible on both northerly edges of the terraces, hence it does not appear that this northerly view is actually taken advantage of by the occupants (see **Figure 18**).
- The roof slab for the proposal's roof garden is at RL56.75 and there will be 1 metre high garden planters and a parapet above that to RL57.75 (1.35 metres lower than the unit 7 terraces).
- The RL for the rooftop plant for the proposal is RL59.91 - 0.81 metres higher than unit 7's terrace. However, that additional height is centrally located within the proposed development's rooftop space and is not within the viewing angle from the northern end of unit 7's terraces.
- Given the orientation of the balconies, it is clear that the principal views are to the east and the west and the potential view loss to the north would be of a minor nature. **Figure 18** is a google 3D view of the landscape treatment of the two northern ends of unit 7's balconies.





**Figure 18:** Oblique view showing terraces for Unit 7, 517-527 Elizabeth Street (source Google Maps)

The other building with the potential for view loss is the southern part of 460-468 Elizabeth Street directly opposite the site (on the corner of Dawson Street). This is a 1980s mixed use building. The southern part directly opposite the site is five storeys high, with the upper two levels being residential development. A tree largely blocks views from the residential dwellings to the street. However, there is a rooftop garden at level 6 which (if not as heavily vegetated as it currently is) would obtain views to the west across the proposed development site. There is however a building to the west of the site which is 5 storeys high which would already provide some restriction of views.



**Figure 19** Rooftop view of 460—468 Elizabeth Street  
Source Nearmap 22/10/19 accessed 4 December 2019

Consideration of the potential view loss has been undertaken in accordance with the four step analysis in *Tenacity Consulting v Warringah* [2004] NSWLEC 140.

1. Assessment of views affected

The potentially affected view is of the suburbs to the west of the site – the inner west. No particular landmarks would be visible. Certainly no iconic features would be impacted.

2. From what part of the property are the view obtained?

The view is over the front boundary from where it is more likely to be reasonable to retain views than a side view. The view would be from a standing position, given the extent of vegetation on the balcony.

3. The extent of the impact

The views from the roof garden will already be somewhat impacted by the 5 storey development at 56 Buckingham Street. Views from living areas are already effectively removed by the trees on Elizabeth Street. The proposal is only 6.7 metres wide. Views to the north west will be retained. It is considered that any view loss will be minor.

4. Reasonableness of the proposal causing the impact

The proposal does breach the height control, however because the roof garden is lower than the height control, a compliant development would not make any difference to the potential view loss. Any view loss does not arise because of the non-compliance, it would result from any building which was at the height control, particularly given the narrowness of the site and the controls which require nil setbacks. A more skillful design would not reduce the impacts.

It is therefore considered that the impact on views from the proposal to both 460-468 Elizabeth Street and 517-527 Elizabeth Street is reasonable.

5.1.4 Objective (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas

Within the context of this objective and the LEP, it is noted that the site is not within either Central Sydney or Green Square. The site is 260 metres from the edge of Central Sydney as mapped in the LEP. Given the height limits between Central Station (within Central Sydney) and the site vary between 3 metres to 27 metres, this objective does not appear relevant to the site.

5.1.5 Objective (e) Green Square – Not applicable

In conclusion it is demonstrated that the objectives of the standard are achieved notwithstanding non-compliance with the development standard, thereby satisfying the first test set out in *Wehbe v Pittwater Council*.

The particular circumstances of the case to support an increase in the height are:

- The site is very narrow at 6.705 metres, and unlike the development at 537 Elizabeth Street which is also on a narrow site of 6.665-6.745 metres width, this site does not have the benefit of guaranteed side windows as it is midblock;
- The majority of the height exceedance is placed in the middle of the site which will limit any impact on the views which could be obtained from the terraces from Unit 7 at 517-527 Elizabeth Street. The placement of the higher plant and equipment centrally is consistent with the other buildings within the immediate area;
- Almost all of the height exceedance comes from the provision of services which require rooftop sunlight (the photovoltaic cells) or ventilation (air conditioning units). The pergola and associated landscaping features allow the rooftop to provide additional amenity to the occupant of Unit 11. The additional roof landscaping merely makes use of space which otherwise would be unutilised.
- The increased height is placed centrally where its impact on the Elizabeth Street and Little Buckingham Street streetscape is minimised. It will be visible from Bedford Street however the property has been designed to accommodate future redevelopment of the three terraces to the north (similar to development which has been approved elsewhere along this stretch of Elizabeth Street), at which point the plant would be shielded from view from Bedford Street.

Strict compliance with the development standard of the maximum height development standard is considered unreasonable and unnecessary because the objectives of the development standard are still achieved by the proposed development and there are specific circumstances peculiar to this building and site which support the increase in height which is proposed when considered against the objectives of the standard.

5.2 Test 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.

As demonstrated above in **Table 1**, Council has consistently granted consent to development applications and modification applications which have departed from the height standard along this part of western side of Elizabeth Street. Every building (bar the development site and the three terraces to its north) in the block between Belvoir Street and Bedford Street exceeds the height limit. All five developments to the south breach the height limit by between 2.7 metres to 7 metres, giving percentage exceedances of between 12.3% to 29.2 %. In this light, the height exceedance of 2.9 metres or 13.2% is characteristic of the exceedances approved by Council in this vicinity.

In the block between Bedford Street and Rutland Street, three of the four contemporary redevelopments have all breached the height limit.

In these circumstances it would be unreasonable and unnecessary for the consent authority to not accept the clause 4.6 exception request, because previous actions of Council have clearly indicated that height exceedances have been consistently approved within the area.

**6. Clause 4.6(3)(b) Are there sufficient environmental planning grounds to justify contravening the development standard?**

Clause 4.6(3)(a) requires the written request to justify the contravention of the development standard by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24] indicated that the environmental planning grounds must be specific to the contravention of the standard, not on the development as a whole.

The environmental planning grounds justifying the contravention of the development standard for maximum height in this case include:



- No view currently enjoyed by the surrounding developments or from the public domain will be unreasonably affected by the increased height;
- No privacy issues will arise from the increase in height;
- The visual impact on the streetscape from the increased height will be minimal given the setback of the increased height from both streets. Although it will be visible from Bedford Street in the interim period until future development of 497-501 Elizabeth Street is undertaken, it is considered the increase in height visible from Bedford Street will be a relatively temporary outcome;
- The view driving south along Elizabeth Street or walking in either direction is not expansive due to the narrow street and the street trees. The increased height will not present as anything uncharacteristic of the contemporary buildings in the vicinity;
- The reduction in solar access to the light wells for 507-515 Elizabeth Street would arise irrespective of any exceedance of the height limit. That building was clearly designed, acknowledging the likely construction of a building to its north and the proposal has mirrored the light well to ensure reasonable light access to the existing windows;
- As **Table 1** above indicates, 7 storey development is characteristic of this part of Elizabeth Street. In order to provide for 7 storey development, the plant and lift overruns will necessarily exceed the height limit – as demonstrated in other developments; and
- The height exceedance allows for two studio apartments in addition to that which could otherwise be constructed with a compliant development. Those units are ones which will be able to be used by essential workers who work close to the city or are at nearby educational institutions.

**7. Clause 4.6(4)(a)(i) The Consent Authority must be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

Clause 4.6(4)(a)(i) requires the consent authority to be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3). This matter has been the subject of considerable recent judicial review, most recently in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where Preston CJ of the Land and Environment Court sat on the bench of the Court of Appeal and affirmed the interpretation provided by Basten JA in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* 920180 233 LGERA 170; [2018] NSWCA 245 at [21]-[24] and himself in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [74]-[81]. The determination reached is that only if the request does demonstrate

the achievement of these outcomes will the request have adequately addressed the matters required to be demonstrated by clause 4.6(3)(a) and (b).

This Request has considered the objectives of the development standard and found that compliance with the objectives can be achieved. It has also demonstrated that the Council has effectively abandoned the height control in the vicinity. The Request has detailed many factors which are specific to this site and the circumstances of the case which lead to the conclusion that it is unreasonable and unnecessary in the circumstances of the case for compliance with the development standard to be required. The Request has detailed a number of environmental planning grounds to justify contravening the development standard and the consent authority should be satisfied that the Request has adequately addressed the matters set out in clause 4.6(3).

**8. Clause 4.6(4)a(ii). The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out**

8.1 Objectives of the Development Standard

The objectives of the development standard are set out in section 5.1 of this Request. That section also carefully considers the proposal's consistency with the objectives of the development standard and finds that the proposal is consistent with the standard's objectives.

8.2 Objectives of the B4 Mixed Use zone

The objectives of the B4 zone are:

- *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.*

The proposal is consistent with the objectives of the B4 zone because:

- The development is mixed use – providing a commercial unit at ground floor and providing residential accommodation above. This is consistent with contemporary and older development along this part of Elizabeth Street;
- The building is in an accessible location given the proximity of Central station, the new light rail and various bus routes. Additionally, the site is close to the open

space and swimming pool at Prince Alfred Park and CBD employment opportunities;

- Bicycle parking has been included in the proposal. Only two car spaces are proposed which will encourage walking and cycling and public transport use; and
- The development is relatively small and the commercial unit provides street activation. The residential units will inevitably obtain supplies from local businesses. The site is approximately 1km from the Redfern centre and 750 from the local centre on Cleveland Street to the east. The proposal will not detract from the local centres and increased residential accommodation in the area will help to support local centres.

As the proposed development is consistent with both the objectives of the standard and the objectives of the zone, clause 4.6(4)(a)(ii) indicates that the proposal is therefore in the public interest.

#### **9. Clause 4.6(4)(b) The concurrence of the Secretary has been obtained**

Clause 4.6(4)(b) requires the concurrence of the Secretary to be obtained. It is considered that the consent authority can assume concurrence (see *Moskovich v Waverley Council* [2016] NSWLEC 1015 Tuor C at [70].) Planning Circular PS 19-003 dated 21 February 2018 *Variations to development standards* attaches a notice from the Secretary of the Department Planning and Environment to the effect that concurrence for clause 4.6 exception requests may be assumed for consent authorities which are not the delegate of the consent authority. The notice allows a Local Planning Panel to assume concurrence in this situation.

#### **10. Clause 4.6(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...*

It is not considered that contravention of the development standard would raise any matter for State or regional environmental planning. The minimal environmental impacts are very localized and will not impact upon the heritage values attributed to heritage conservation area.

There are sufficient circumstances particular to this site and this development as detailed above that satisfy the matters set out in clause 4.6(4) such that the public

benefit of maintaining the development standard should not preclude the granting of concurrence. There is a public benefit in maintaining the development standard, however given the objectives of clause 4.6 to provide flexibility and achieve better outcomes, the standard should not be dogmatically followed when there are no significant adverse environmental planning grounds arising from the height exceedance.

#### **11. Objectives of clause 4.6**

The specific objectives of Clause 4.6 are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

As demonstrated above the proposal is consistent with the objectives of the development standard and the zone notwithstanding the variation sought to the maximum height. This Request seeks flexibility in applying the standard because of the limited environmental impacts, and because the redevelopment as a whole will improve the amenity for the occupants of the building with sufficient environmental planning grounds to justify the contravention of the standard. The rooftop area will be used for plant and equipment servicing the building and provide an area of amenity and outdoor area for the occupants of unit 11, to take advantage of the superior view available from this site.

Approval of this clause 4.6 Request will allow for flexibility to relax the development standard in this circumstance, given the consistency with the streetscape and street context of the proposal.

A greater diversity of dwelling sizes and increase in number of dwellings can be achieved as a result of the height exceedance.