

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Clause 4.6 Variation Request
Height of Buildings (Clause 4.3)
Sydney LEP 2012

**CONSTRUCTION OF A FIVE (5) STOREY MIXED-USE BUILDING COMPRISING
RETAIL AND COMMERCIAL PERMISES**

117 Flinders Street, Surry Hills



Prepared by Planning Lab

Issued 21 April 2021

Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the Sydney Local Environmental Plan 2012 (SLEP 2012) to support a development application (DA) submitted to City of Sydney Council for the construction of a five (5) storey mixed-use building located at 117 Flinders Street, Surry Hills ('the site').

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the *Sydney Local Environmental Plan 2012* (SLEP 2012). Specifically, this request seeks to vary the 18 m height standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Clause 4.3 of the SLEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827, *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by SLEP 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and*
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with clause 4.6(3) the applicant requests that the height of building development standard be varied.

What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012.

What is the zoning of the land?

The site is zoned B4 – Mixed Use pursuant to the SLEP 2012. Refer to **Figure 1**. Commercial and retail premises are permissible with consent in the zone.

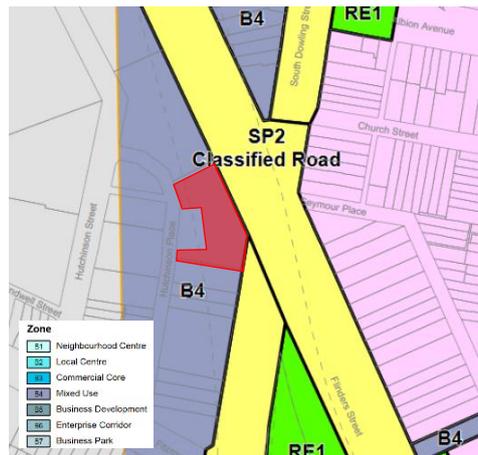


Figure 1 - Extract of Land Zoning Map (Source: Sheet LZN_023 - SLEP 2012)

What is the development standard being varied?

Clause 4.3(2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area 'P' on the Height of Building Map and accordingly, a Height of 18 m applies as shown in **Figure 2**.



Figure 2 - Extract of Height of Buildings Map (Source: Sheet HOB_023 - SLEP 2012)

Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

The site and its context

The site is located by the junction of several arterial roads to the east: Flinders Street and South Dowling Street, leading into Anzac Parade. The site comprises three allotments (Lot 3-5 DP 1090185) with an area of 978.3 m² which are vacant (other than fencing, remnant building material, and retaining walls), and with a street address of 117-119 Flinders Street (**Figure 3**).

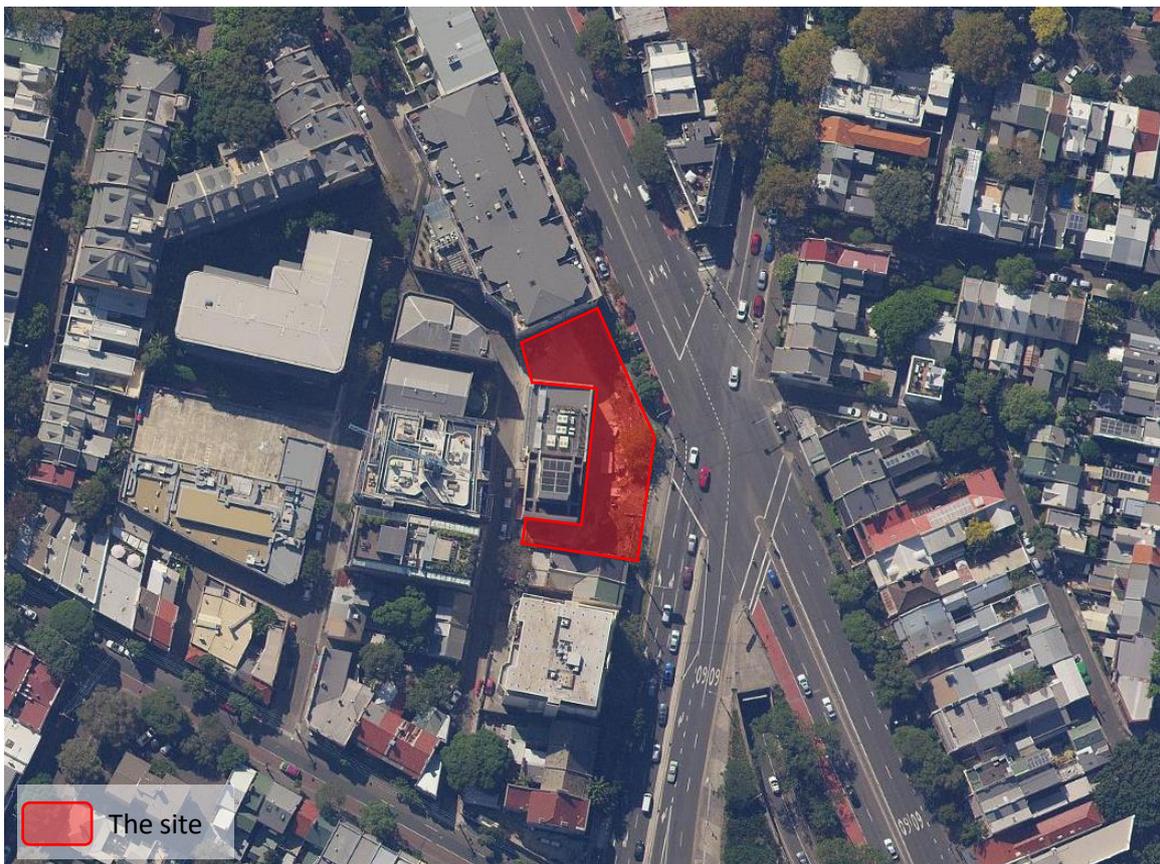


Figure 3 - Site location within the local context (SIX Maps 2020)

Extent of Variation to the Development Standard

The vast majority of the proposed building envelope is below or in line with the 18 m height limit. However, the building exceeds the maximum height at its highest point (i.e. lift overrun) by 4.15 m

being a height of 22.15 m (RL 71.15). Therefore, the proposed development breaches the height standard by a maximum of 23.05%. The exceedance is attributed to the topmost section of the Level 4 and the lift overrun. Due to a slope on the site, the exceedance varies in its size being greater towards the western (Hutchinson Place) and southern facades of the building and lesser towards the eastern (Flinders Street) and northern facades. The variation is not a means of achieving additional development yield on the site or an additional floor level, as demonstrated by the proposed number of storeys being 5 in total, which is consistent with the Height in Storey Control in the *Sydney Development Control Plan 2012* (SDCP 2012).

The additional height will facilitate a built form that has an appropriate scale and density of development that complements the character of an area and in particular the ‘layered’ streetscape quality, caused by the topography, offset street levels and varied development within the area over the past few decades. Further, the proposal’s height maintains the street hierarchy, with taller buildings located at street corners and junctions.

The height variation sought will also have a minimal impact on the surrounding areas in terms of loss of solar access and privacy.

The diagram below (**Figure 4**) clearly illustrates the minor nature of the proposed height breach.

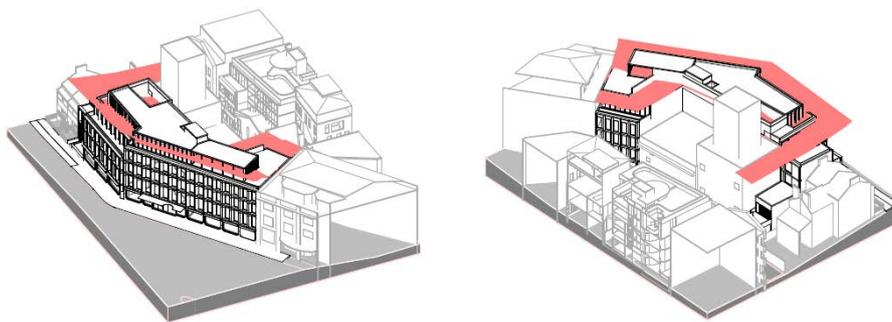


Figure 4: Maximum Building Height – 18 m Height Plan (Source: SJB Associates)

The diagram in **Figure 5** illustrates the area of maximum exceedance at the building’s lift overrun.

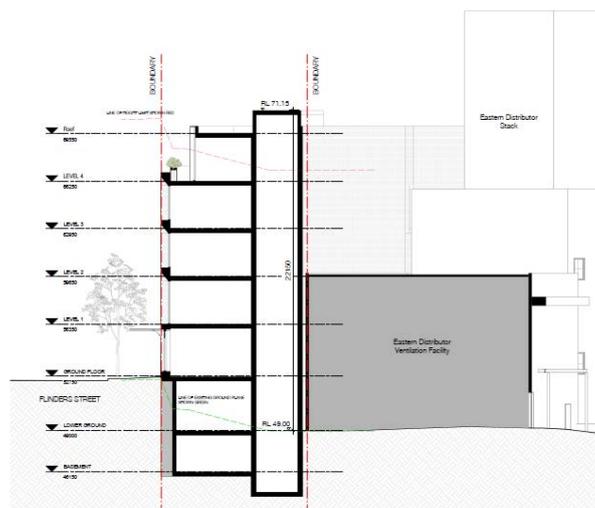


Figure 5: Building Height Section – Area of max. exceedance. (Source: SJB Associates)

It is worth noting that the extent of the proposed exceedance with the LEP height control is compounded by the irregular topography of the site that arises from previous earth works, demolition and excavation carried out in preparation of the construction of the vent shaft of the Eastern Distributor Tunnel. The above works have altered the natural profile of the site to an extent that it currently has no more relationship to the original landform of the site and of its context. Planning lab is of the opinion that if the levels of the site are taken at its interface with the public domain and surrounding properties and the natural fall of a site is averaged in comparison to these land parcels rather than relying on the artificially modified levels, the building's height would be lower and the extent of the building's non-compliance significantly reduced.

SJB Associates has prepared new diagrams consistent with the above approach for the determination of the natural ground level of the site which indicate that the breaching elements are limited to structural elements, being the slab of the roof to Level 4 and the lift over-run, as depicted in **Figures 6** and **Figure 7**. In this scenario, the maximum height of the building would occur at the lift overrun which will extend to a height of 20 metres (i.e. RL 71.15) above ground level (existing) representing a maximum building height non-compliance of 2 metres or 11.1%.

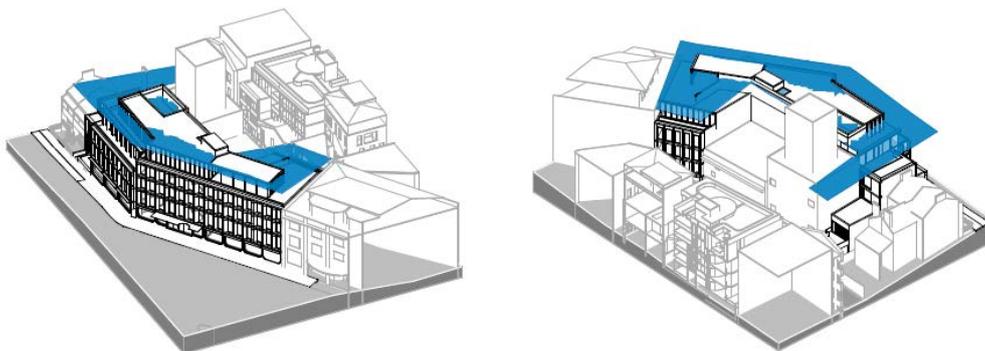


Figure 6: 18 m Height Plan - Assuming approximate natural topography (Source: SJB Associates)

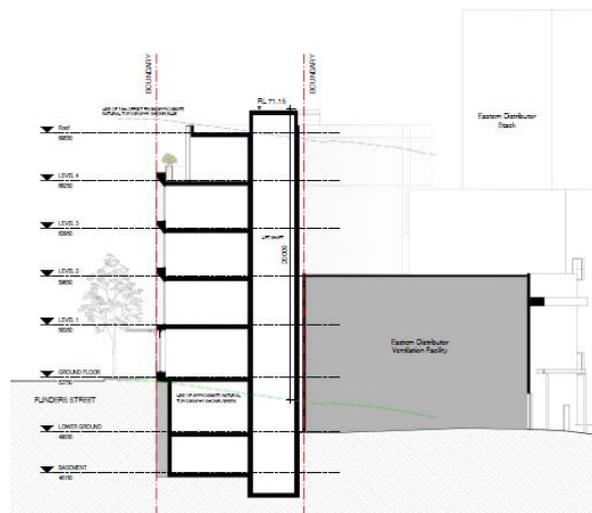


Figure 7: Area of max. exceedance - Assuming approximate natural topography (Source: SJB Associates)

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

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council’s actions in granting consents departing from the standard and hence the standard is unreason;
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or*

unnecessary". Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Development Standard Objectives

Objective	Discussion
<p>1(a) to ensure the height of development is appropriate to the condition of the site and its context,</p>	<p>The building is 5 storeys in height and is consistent with clause 4.21 of the maximum building height in storeys under SDCP 2012.</p> <p>The proposed street frontage height and overall building height is consistent with the height of the adjoining building at 99-115 Flinders Street.</p> <p>The proposal steps down in height to the terraces at 457–459 Flinders Street, providing an appropriate height transition between the site and the taller development at 99-115 Flinders street</p> <p>All non-compliant budling elements sit well below the Eastern Distributor ventilation stack adjacent.</p> <p>Where the proposal varies in height by metres as defined under SLEP2012, it remains consistent with the height in storeys controls being a maximum of 5 storeys and achieves a scale which is envisaged by the planning controls, and aligns with street frontage height</p> <p>Whilst the maximum height of the building as measured at the lift overrun is 22.15 m, it is noteworthy that the vast majority of the structure of the proposed building comply with the 18 m height limit (see Figure 4). As discussed above, the variation is not a means of achieving additional development yield on the site or an additional floor level. In fact, the FSR of the proposed building meets the standard as set out in Clause 4.4 of the SLEP 2021 and the proposed number of</p>

	<p>storeys, being 5 in total, is consistent with Clause 4.2.1 Building Height in SDCP 2012.</p> <p>The proposed exceedance is minor and does not result in unreasonable visual and environmental impacts on the public domain and neighbouring properties. There are sufficient environmental planning grounds to justify the non-compliance, in particular:</p> <ul style="list-style-type: none"> - The scale of the development is, generally, consistent with the heights expressed for the site, both in metres and storeys, in the <i>Sydney Local Environmental Plan 2012</i> and <i>Sydney Development Control Plan 2012</i>. Where the proposal varies from the height in metres in the Local Environmental Plan it remains consistent with the height in storeys control and doing so achieves a scale which was envisaged by the planning controls. - The building has been stepped at the western boundary along Hutchinson Place to allow solar access to the residential apartments located at 22 Hutchinson Street on the opposite side of Hutchinson Place. To minimise overshadowing impacts on these units the north-western corner of the proposed building has been stepped resulting in a top level (Level 4) being significantly set back behind the building frontage to the lane. This configuration ensures that solar access to the above-mentioned residential units continue to
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	<p>achieve a minimum of 2hrs sunlight. This is compliant with the DCP control (4.2.3.1 Solar Access) and is not different to the level of solar access provided to these units under the previously approved DA proposal (D/2015/747).</p> <ul style="list-style-type: none"> - By providing a generous setback to the top level along the building's alignments to both Flinders Street and Hutchinson Place, the proposed height will not result in any adverse visual impact to the surrounding area. It is considered that the top floor of the building will be visible from the surrounding public domain, but it will present as a recessive element which will not dominate the streetscape. <p>Furthermore, the proposed height exceedance is also exacerbated by the irregular topography of the site which has been significantly altered as the result of the earth works and excavation conducted in preparation of the construction of the ventilation shaft for the Eastern Distributor tunnel running under the site. If the site were in its undisturbed state, the height of the proposed building would be calculated very differently and result in a more compliant scheme where only parts of the roof structure and the lift overrun extend above the 18 m height limit.</p> <p>In view of the above, it is considered that the breach of the standard does not affect consistency with this objective. In fact, the breach of the standard allows for a building that achieves a built form which is consistent with the one</p>
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	<p>anticipated by the planning instruments that apply to the site.</p>
<p>1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p>	<p>.</p> <p>The proposal will comprise of five stories along Flinders Street with an additional lower ground level along Hutchinson Place and basement levels throughout. The facades has been designed to step to correspond to adjacent buildings. On the northern edge Level 4 has been set back allowing the top volume and parapet to align with no. 99-115 South Dowling Street. The southern end steps back in height and along South Dowling Street to match the scale of the existing adjacent terraced houses.</p> <p>.</p>
<p>1(c) to promote the sharing of views,</p>	<p>There will be no adverse amenity impacts to the properties located in the surrounding area in terms of views as a result of the breach of the height standard.</p>

<p>1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p>	<p>n/a</p>
<p>1(e) in respect of Green Square:</p> <p><i>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p><i>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p>	<p>n/a</p>

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of SLEP, despite non-compliance.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is achieved despite non-compliance.

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;

Council has varied the height of building standard in circumstances where the objectives of the standard are achieved.

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.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the standard as detailed above.
- The proposed development complies with the floor space standard and the DCP Height in Storeys control. As such, the scale of the building is consistent with the desired character of the locality notwithstanding a small variation is proposed to the height of buildings standard.
- The proposed variation to the height of buildings control does not give rise to an unreasonable impact on the amenity of the locality.

As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

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

The proposed massing of the building across the site is the result of a considered analysis of the site and surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit. Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits. In this particular circumstance, there are sufficient environmental planning grounds to warrant the proposed variation to the height of buildings standard.

The site has been significantly altered as a result of the earthworks and excavation conducted in preparation for the ventilation shaft for the Eastern Distributor tunnel running under the site.

As a result, it is not possible to clearly determine "Ground Level Existing" as defined under SLEP 2012.

The ground level has therefore been extrapolated as per the method endorsed by the LEC in *Bettar v City of Sydney*, LEC 1070. However, as the site formally includes the Eastern Distributor Ventilation Stack, the boundary edges must be used rather than the footpath levels.

This results in an exaggerated slope in the centre of the site and much more of the building form being located above the 18m extrapolated height limit than what would have been had it been possible to measure from the public domain at Hutchinson Place.

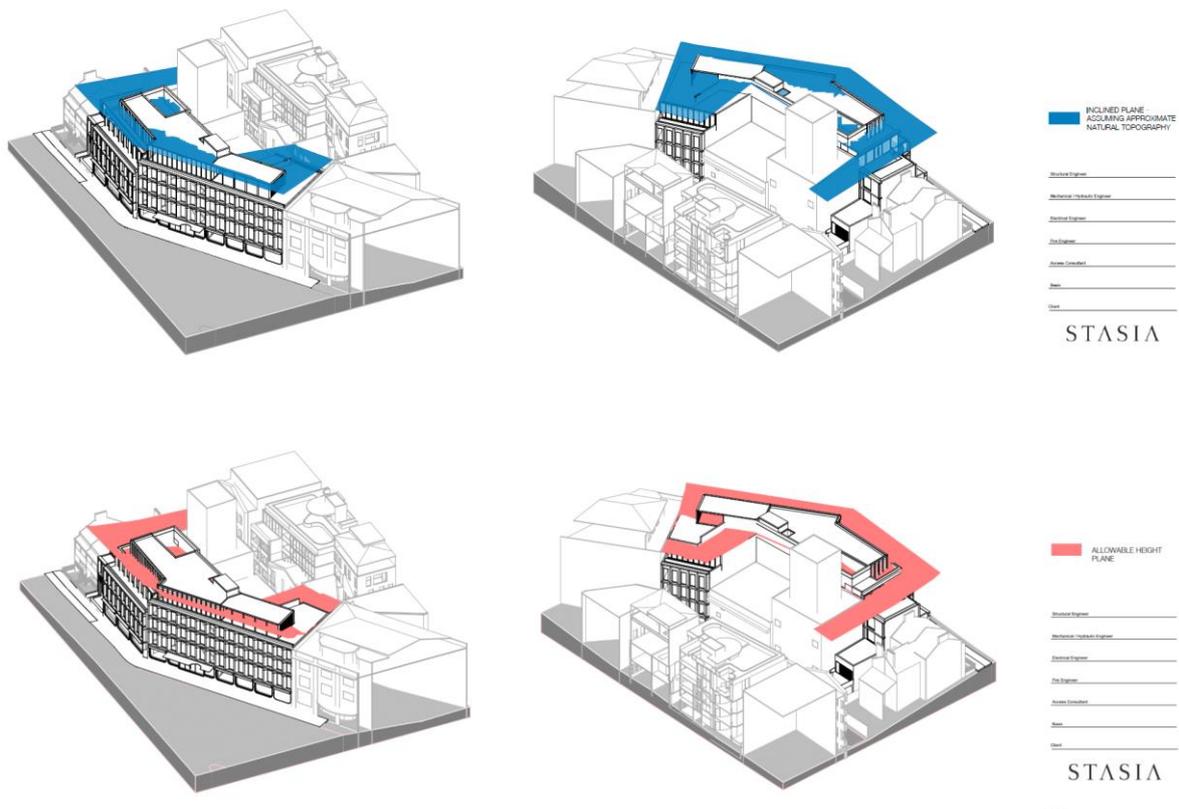


Figure 8: Axonometric Comparison of Ground Level Existing Calculation Methods (Source: SJB Associates)

If the site were in its undisturbed state, the height of the proposed building would be calculated very differently and result in a more compliant scheme where only part of the roof structure and roof overrun would extend over the height limit.

The maximum variance to the height of building development standard would be in the region of 10.5% rather than 23.6 % as proposed.

The building has been carefully sculpted at the upper levels where the noncompliance is situated in order to improve solar access when compared to the previously approved residential scheme.

This is achieved with all properties previously negatively impacted now achieving an improved overshadowing outcome.

Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause

(3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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.

Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 - Mixed Use. The objectives of the 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 proposed development includes commercial and retail premises which are all permissible uses within a B4 – Mixed Use Zone. The site has excellent access to public transport being located within 600 m of the Surry Hills stop (Stop ID 2010109) of the CBD and South East Light Rail. The subject site is also within optimal walking distance of several bus services operating in the locality with the closest bus stop situated at approximately 50 m of the site on Flinders Street.

The proposed mixed-use development will assist in activating both Hutchinson Place and Flinders Street and will positively contribute to the vitality of the area, producing positive social and economic impacts.

For the reasons given the proposal is consistent with the objectives of the B4 zone.

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.*

The architectural package prepared by SJB Architects which accompanies the subject application illustrates the relationship of the proposed development within the context of the site. It demonstrates a high-quality outcome for the site which will create premium quality commercial spaces supporting the local business community and enhancing the distinctive, mixed character of the Surry Hills.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the floor space ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.