

Attachment C

Clause 4.6 Variation Request – Height of Buildings

413-415 Sussex St, Haymarket and 82-84 Dixon Street, Haymarket

Clause 4.6 Variation to Building Height

On behalf of

*Elegant Dixon Property Pty Ltd ATF Elegant Dixon Trust
December 2020 (Amended June 2020)*



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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

This Clause 4.6 Variation Request relates to the Development Application (DA) for 413-415 Sussex Street, Haymarket and 82-84 Dixon Street Haymarket (subject site).

The proposal seeks the demolition of the existing commercial building at 413-415 Sussex Street and construction of a new 17 storey mixed use development comprising student accommodation with approximately 36 rooms plus one boarding manager room, lower retail/commercial floors, communal roof top garden and two levels of basement. In addition, the proposal seeks to undertake conservation works to the heritage item at 82-84 Dixon Street, and the dedication in stratum of level 1 and Level 2 of 84 Dixon Street to Council.

We specifically request to vary the development standard for the maximum building height under Clause 4.3 Height of Buildings of the *Sydney Local Environmental Plan 2012 (SLEP 2012)*.

This Clause 4.6 Variation Request demonstrates that compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Achieves the objective of the development standard in Clause 4.3 of SLEP 2012;
- Achieves the objectives of the B8 Metropolitan Centre zone under SLEP 2012;
- Is consistent with the applicable and relevant State and regional planning policies;
- Has sufficient environmental planning grounds to support the variation; and
- Therefore is in the public interest.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the SLEP 2012.

2 The Development Standard to be varied

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of the maximum height of building development standard as set out in Clause 4.3/(2) of the SLEP 2012. Clause 4.3 states:

4.3 Height of buildings

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

(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—

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

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

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Note—

No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.

As identified on the SLEP 2012 Height of Buildings Map (extract provided in **Figure 1**), the subject site has a building height limit of **50 metres**. The site is **not** located in Area 1, Area 2 or Area 3 on the Height of Buildings Map.



Figure 1. Height of Buildings Map (extract)
Source: SLEP 2012

3 Extent of variation to the development standard

This Clause 4.6 variation supports a development application for a mixed-use development comprising student accommodation and retail premises. This Clause 4.6 application requests a variation to Clause 4.3 height of buildings, which is permitted by Clause 4.6 of the SLEP 2012.

The proposal includes a maximum roof height of 55m (or RL 59.10), plus an architectural roof feature on top, resulting in a total height of 59.75m or RL 64.10. The lowest point of the site is at RL4.10.

The proposal includes a height non-compliance of **5m** to the roof of the building, with an architectural roof feature above the roof line, creating a maximum height exceedance of **9.75m** above the 50m height limit. The proposed height represents a variation of 10% (5m) to the roof of the building, and 19.5% variation (9.75m) to the lift overrun, and is defined as an architectural roof feature in accordance with Clause 5.6 of SLEP 2012, which permits this element to exceed the height limit (Refer to SEE for detailed discussion). Additionally, it is noted that there is no GFA created above 55m. The height exceedance is considered acceptable as it accommodates the loss of GFA for 82-84 Dixon Street. (Refer to **Figure 2** and **Figure 3** below).

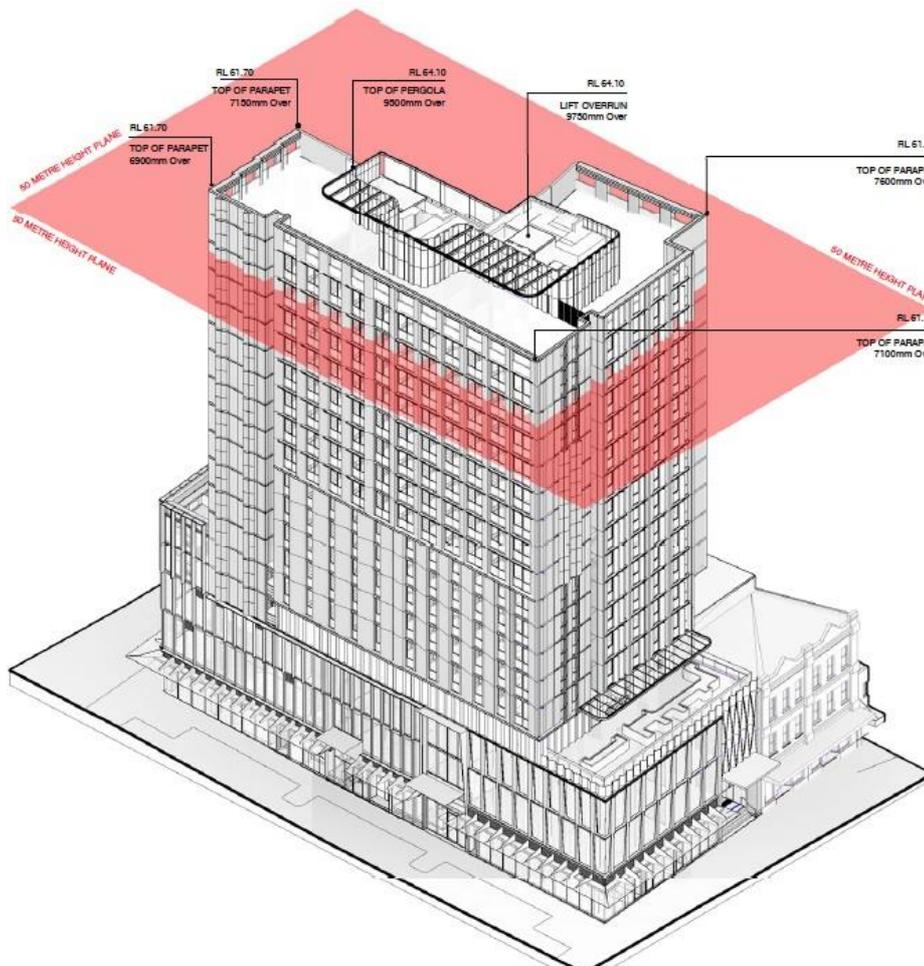


Figure 2 3D Height Plane (50m Height Limit)
Source: PTW Architects

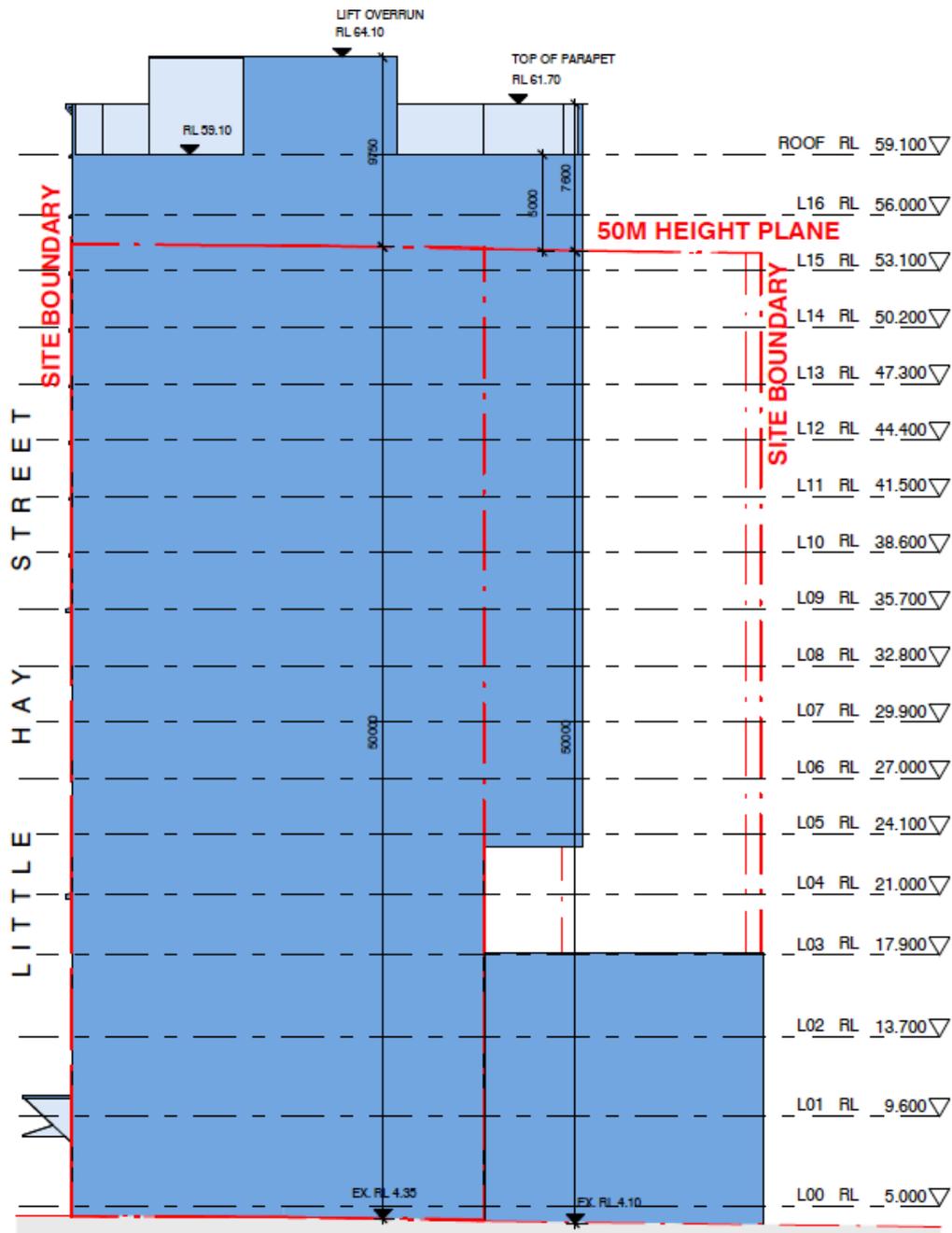


Figure 3 Enlarged Section Plan (50m height limit)

Source: PTW Architects

It is important to note that there is no GFA proposed above 55m height. The architectural roof feature comprises a decorative element concealing equipment such as plant, fire stairs and the like for servicing the building which is 9.75m over the 50m height limit, or 4.75m over the 55m height plane, and decorative element with balustrade to integrate with the overall development which exceeds the 50m height limit by 7.6m, or exceed the 55m height plane by 2.6m. Refer to **Figure 4** and **Figure 5** below.

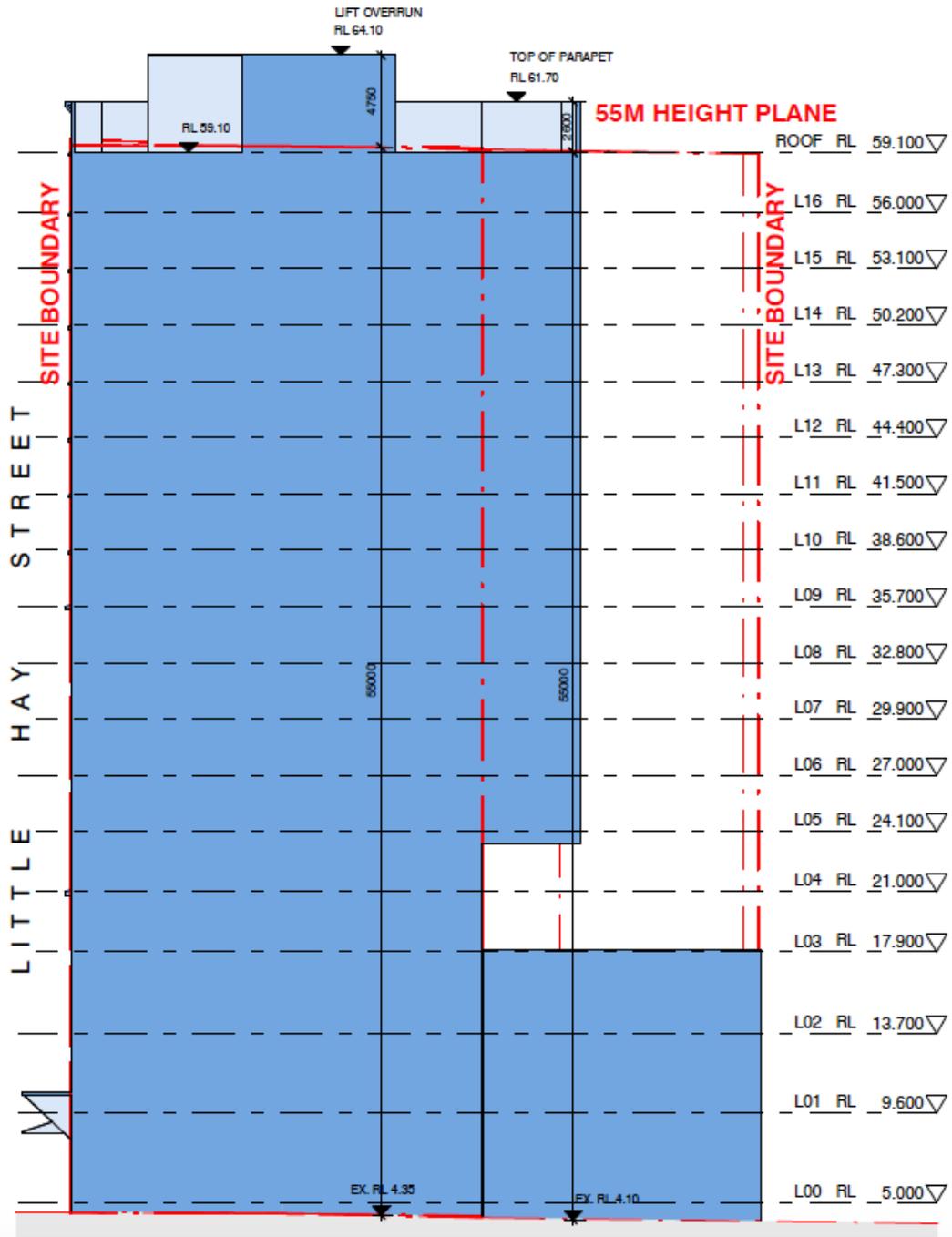


Figure 4 Enlarged Section Plan (55m height limit) – No GFA Above
 Source: PTW Architects

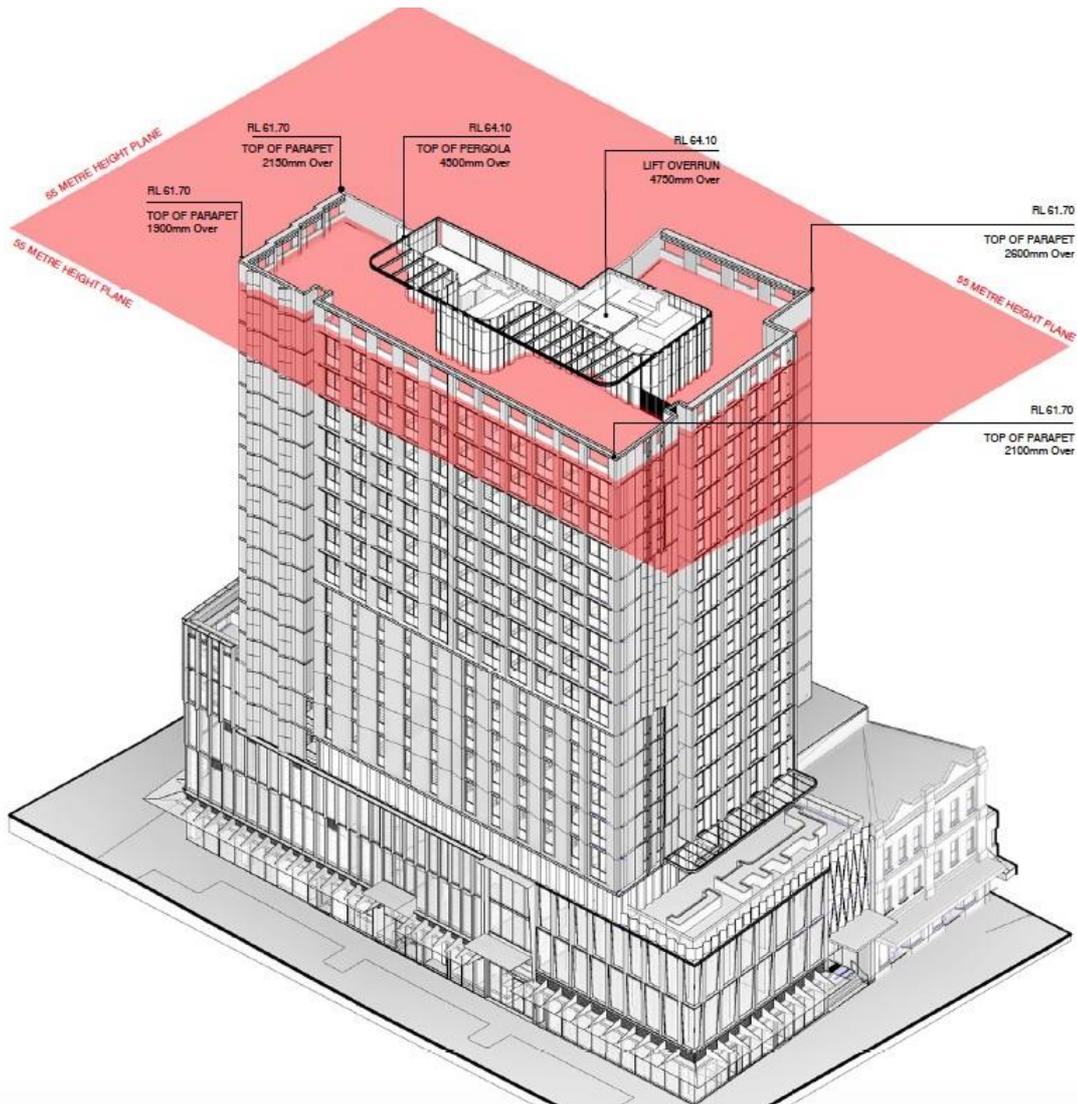


Figure 5 3D Height Plane (55m Height Limit)
 Source: PTW Architects

4 Objectives of the standard

The objectives of the Clause 4.3 Height of Buildings under SLEP 2012 are as follows:

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

5 Objectives of the zone

The objectives of the B8 Metropolitan Centre zone are as follows:

1 Objectives of zone

- *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.*

6 Assessment

6.1 Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the Height of Buildings standard is unreasonable and unnecessary given the following:

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

6.1.1 Wehbe Test 1 – Objectives of the Standard are achieved

Clause 4.3 Height of Buildings

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

- The proposal includes a height non-compliance of **5m** to the roof of the building, with an architectural roof feature above the roof line, creating a maximum height exceedance of **9.75m** above the 50m height limit. No GFA is proposed over 55m. The architectural roof feature and balustrade provides access to rooftop communal open space, contributing to the overall amenity of the development.
- The proposed built form fits in with the surrounding developments and streetscape. The proposed built form will be similar to the scale of surrounding development in the setting of No 82-84 Dixon Street notably the contemporary multi-storey buildings on the north western and north eastern corners of the Dixon Street and Little Hay Street intersection.
- The proposed building is contemporary in form with well-articulated elevations that add visual interest and help break up the massing. The predominant finishes of pre-cast concrete panels and face brickwork are sympathetic to the setting of the subject building.
- The increased height will not unreasonably impact upon the character of the surrounding locality as there are many new and older developments within a 100m radius with heights greater than that proposed. The existing character of the locality is varied in terms of height of buildings and the subject application will not fundamentally affect the Chinatown/Haymarket character (Refer to Figure 6 below).

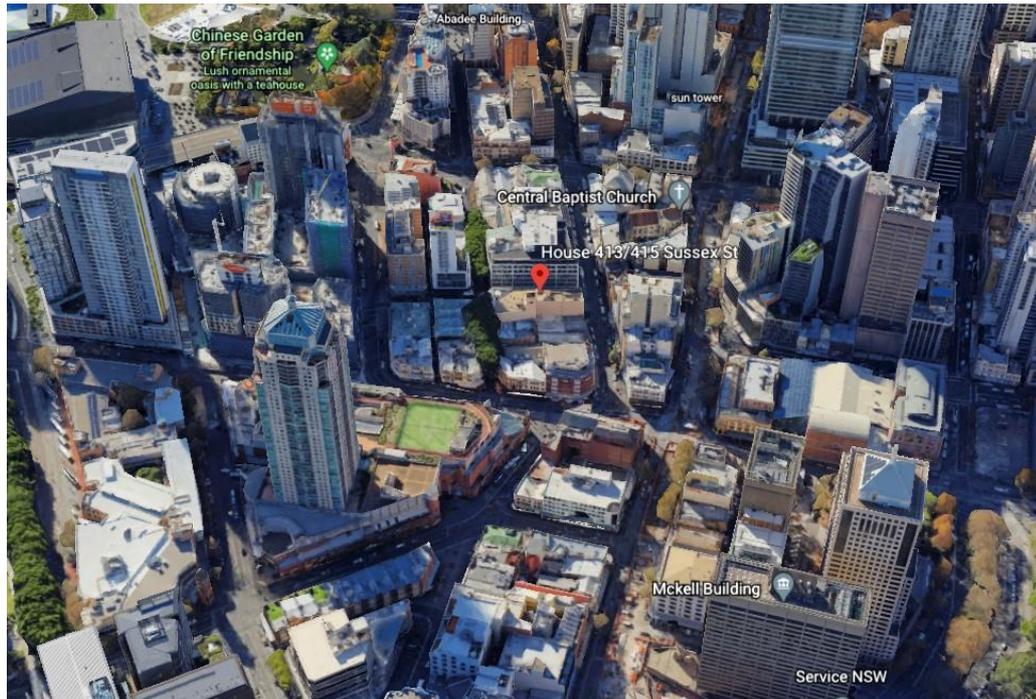


Figure 6 Site Aerial
Source: Google Earth

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

- The proposed additional height will have a negligible impact on the heritage buildings forming part of the development, as well as other elements within the surrounding character area.
- The proposed development, including the building height and cantilevered element, is considered to be compatible within its transitioning context for the Chinatown/Haymarket area in respect of the scale of the desired future surrounding development.
- The proposal includes sufficient setbacks on Dixon Street and Sussex Street to the existing surrounding buildings and includes high quality streetscape, which ensures it achieves an appropriate transition to surrounding key buildings and character elements.
- The cantilevered floor levels of the proposed building set 5m above the roof level of No 82. Dixon Street, will not detrimentally impact on the visual setting of the existing building.
- The proposed mixed-use building is appropriately designed and will provide an interesting visual backdrop when viewed from and in conjunction with No. 82-84 Dixon Street and other heritage items in the vicinity of the site. The slight height exceedance will not have any impact on the transition to 82-84 Dixon Street or other key elements, as the overall development has been carefully designed to provide an appropriate transition.

- The development demonstrates how contemporary and heritage-built form can be successfully integrated to provide a positive built form outcome which is sympathetic to the heritage item at 82-84 Dixon Street and other heritage items located in the vicinity of the site.

Objective (c) to promote the sharing of views,

- The proposed design, including the height variation, represents an appropriate built form in terms of building alignment, modulation and articulation. The proposal will improve the streetscape and landscape quality of the area.
- The site that will be most impacted in terms of view loss will be the residential flat building at 49-55 Dixon Street, Haymarket to the north-west of the subject site, and the hotel at 438 Sussex Street, Haymarket (known as Mantra Sydney Central) across Sussex Street to the east of the site. The view losses to both properties are considered low value based on the Planning Principles established by *Tenacity Consulting v Warringah Council (2004) NSWLEC 140*.
- It was found that the view lost for the residential flat building at 49-55 Dixon Street, Haymarket as result of the height non-compliance relates to open sky towards the east, which is considered low value. Additionally, the western view lost for the Mantra Sydney Central hotel at 438 Sussex Street, Haymarket are largely related to the newly constructed high-rise residential development at Darling Square, which does not involve any water or iconic views. Additionally, a hotel does not have an automatic right to views in accordance with *Tenacity* as it is not a residential flat building.

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

- The site is located in Chinatown/Haymarket area within Central Sydney. The proposal, including the height variation, will not create any significant amenity impacts with regard to overshadowing, privacy and view loss and will provide a contextually appropriate transition within Central Sydney.

Objective (e) in respect of Green Square—

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

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

The subject site is not within Green Square and accordingly this objective is not relevant.

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

In the instance of this development application, there are a number of environmental planning grounds relevant to the subject site that justify a variation to the height of buildings development standard:

- The height exceedance partially results from the lack of any additional floor space on the heritage item at 82-84 Dixon Street. Whilst additional floor space for local and state heritage items can be permissible in appropriate circumstances, the subject application seeks to retain these buildings in their original form and scale to achieve a better heritage and conservation outcome for the site. As such, the development seeks to redistribute some of this space onto the less sensitive new building, which is a reasonable outcome given the proposal meets the objectives of the controls and still doesn't maximise the permissible floor space.
- The additional height above 55m is defined as an architectural roof feature in accordance with Clause 5.6 of SLEP 2012, which permits exceeding the height limit. There is no GFA above 55m. The space at this level incorporates a proposed communal rooftop garden, which does not contain any floor space and is not reasonably capable of modification to include floor space area at a later stage;
- The communal rooftop garden will provide a variety of quality social interaction spaces including the singular, reflective or reading spaces to covered entertaining spaces suitable for large gatherings. The gardens will encourage, foster connections between individuals and wider groups. This is particularly important given the site's Central Sydney location, where communal open space at the ground is very difficult to achieve;
- The additional height does not result in any significant overshadowing onto neighbouring residential developments or public open space;
- The variation will not result in overlooking that would adversely impact the visual privacy of adjoining properties;
- The proposed design represents an appropriate built form in terms to building alignment, modulation and articulation. The proposal will improve the streetscape and landscape quality of the area;
- The proposed height exceedance will not create any significant amenity impacts with regard to overshadowing, privacy and view loss; and
- The site that will be most impacted in terms of view loss will be the residential flat building at 49-55 Dixon Street, Haymarket to the north west of the subject site, and the hotel at 438 Sussex Street, Haymarket (known as Mantra Sydney Central) across Sussex Street to the east of the site. The view losses to both properties are considered low value based on the Planning Principles established by *Tenacity Consulting v Warringah Council (2004) NSWLEC 140*.

Accordingly, it is considered that there are sufficient environmental planning grounds to justify contravening the development standards, as the development will deliver

one of the key Objects of the Planning Act, while also allowing for the promotion and coordination of the orderly and economic use and development of the land for community housing, community services and local commercial services. In addition, it is noted that the proposed development will still produce a contextually appropriate outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions.

6.3 Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6/(3) by providing a written request that demonstrates;

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
- There are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with the findings of *Commissioner Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request adequately addresses the matters in Clause 4.6(3).

6.4 Clause 4.6(4)(a)(ii) - Is the proposed development 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?

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings;

6.4.1 The objectives of the particular standard

It has been demonstrated elsewhere in this report that the development achieves the objectives of Clause 4.3 Height of Buildings Control to maximum height of buildings within the SLEP 2012 notwithstanding the non-compliance with the standards.

6.4.2 The objectives for development within the zone in which the development is proposed to be carried out

The site falls within the B8 Metropolitan Centre zone. As outlined below, the proposed development is in the public interest because it is consistent with the objectives of the B8 Metropolitan Centre zone;

- **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.**

The proposal includes large retail floor space which contributes to Sydney's global status. The proposed student accommodation will assist in providing a diverse range of residents to the area as well as supporting the Australian Education Market. It is considered that the proposed redevelopment will positively contribute to the vibrant neighbourhood with ground floor activation and student accommodation above and improves the overall visual quality of Sussex Street, Dixon Street and Little Hay Street when viewed from the public domain and within the cityscape context.

- **To provide opportunities for an intensity of land uses commensurate with Sydney's global status.**

The proposal includes a mixed-use development comprising student accommodation and retail premises. The proposal will generate additional direct and indirect employment as a result of providing employment opportunities during construction, as well as stimulating economic activity within the local economy once operational.

- **To encourage the use of alternatives to private motor vehicles, such as public transport, walking or cycling.**

The subject site is within a highly accessible location with close proximity to a number of public transport and commercial services. The proposal includes nil carparking spaces. Additionally, the proposal provides sufficient bicycle parking spaces including a total of 122 bicycle parking spaces.

- **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 includes ground floor retail tenancies on all three street frontages, being Sussex Street, Little Hay Street and Dixon Street, which will increase further pedestrian activations in the locality. The ground floor frontages are predominantly occupied by glazing. The range of retail spaces will enable a variety of retail businesses to be incorporated into the development. The smaller tenancies are retained as a defining characteristic of the Chinatown Precinct.

7 Any matters of significance for State or regional environmental planning

The contravention of the height standard does not raise any matter of State or regional planning significance.

8 Secretary's concurrence

The *Planning Circular PS 18-003*, issued on 21 February 2018 (**Planning Circular**), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The LLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council unless the Council has requested it. The variation to the clause exceeds 10% for the subject site.

Conclusion to variation to Height standard

This written request is for a variation to the Height of Building development standard, under Clause 4.6 of the SLEP 2012. It justifies the contravention to the development standards by demonstrating that compliance is unreasonable and unnecessary in the circumstances of the case because:

- The proposal achieves the objectives of the development standards in Clause 4.3 Height of Buildings under the SLEP 2012 notwithstanding the non-compliance with the numerical control;
- The proposed development achieves the objectives of the B8 Metropolitan Centre zone under SLEP 2012;
- The height exceedance is considered acceptable as it accommodates the loss of GFA for 82-84 Dixon Street. Additionally, there is no GFA proposed over 55m;
- The proposed height exceedance will not create any significant amenity impacts with regard to overshadowing, privacy and view loss.
- The proposal will deliver a development that is appropriate for its local and heritage context, despite the breaches to development standards and therefore has sufficient environmental planning grounds to permit the variation; and
- The proposed development is in the public interest.



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