

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Clause 4.6 Exceptions to development standards Written request – Height of Buildings

Alterations and additions to an existing three storey commercial building



44 Mountain Street, Ultimo

Prepared for: Stangcorp Pty Ltd
Project No: D632
Date: August 2021

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Prepared by:



Brendon Clendenning, Principal
Planner

Reviewed by:



Ben Tesoriero, Director

Authorised by:



Ben Tesoriero, Director

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Clause 4.6 Written Request to Vary a Development Standard
Sydney Local Environmental Plan 2012

Applicant's name	Stangcorp
Site address	44 Mountain Street, Ultimo
Proposal	Extensions to an existing commercial building
Environmental Planning Instrument	<i>Sydney Local Environmental Plan 2012 (SLEP 2012)</i>
Development standard to be varied	Clause 4.3 – Height of buildings The relevant subclause states: <i>(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 (18m).</i>

Below is the written request relating to the proposed variation to Clause 4.3 of SLEP 2012 in accordance with the provisions of clause 4.6 of SLEP 2012.

Details of development standard sought to be varied

Clause 4.3 of SLEP 2012 prescribes the maximum height of buildings for land to which the plan applies. The entirety of clause 4.3 is reproduced below:

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.*

The height of building map prescribes a maximum building height of 18 metres to the subject site.

The proposal includes a maximum building height limit of 21.33m (top of lift overrun) which exceeds the maximum prescribed 18m building height limit. This represents a 3.33m (18.5%) variation to the development standard. Note that this follows consultation with several lift manufacturers to reduce the height of the lift overrun as much as possible from the previously proposed height of 22.12m.

The built form element associated with the contravention relates to the lift overrun and associated rooftop lobby, both of which are to be appropriately screened from the public domain by landscaping treatments. The existing building is three storeys in height and achieves a maximum building height of 15.9m (top of lift overrun). The existing building presents as four storeys to Mountain Street, largely as a result of the high parapet above the third storey.

Amendments to the proposed development have occurred during the assessment process following feedback from Council's planning, heritage and urban design officers. Most notably, the deletion of the sixth storey and provision of a landscaped rooftop terrace at this level. While the proposed building height remains unchanged to that which was lodged, built form elements above the maximum building height of 18 metres constitute the lift core, lift lobby, stairwell, accessible amenities, and mechanical plant only, equating to just 78m² floor area (16m² gross floor area per the standard instrument

definition). The remainder of the rooftop terrace comprises landscaped area, tree plantings and outdoor workspaces. Refer to **Figures 2-7** for detail.

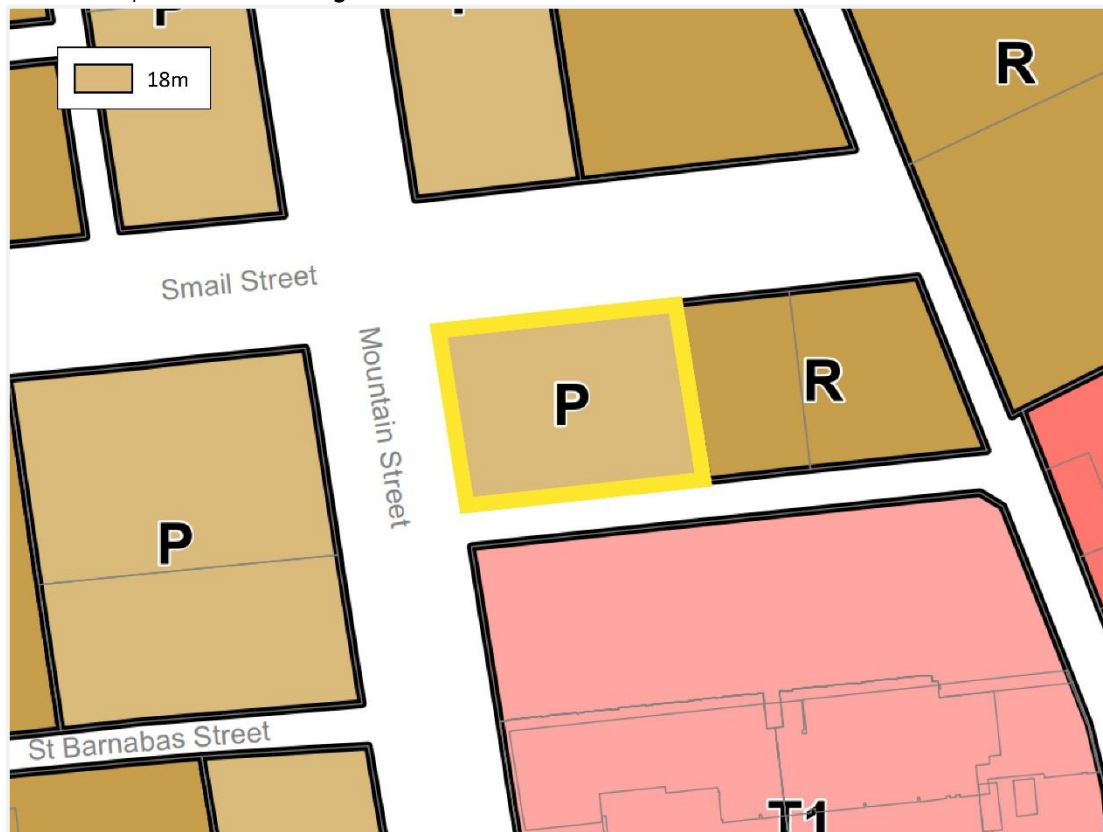


Figure 1 Height of Buildings Map Extract. Subject site identified in yellow outline.

Source: legislation.nsw.gov.au



Figure 2 Photomontage of western elevation (as lodged)
Source: SJB Architects



Figure 3 Photomontage of western elevation (current)
Source: SJB Architects

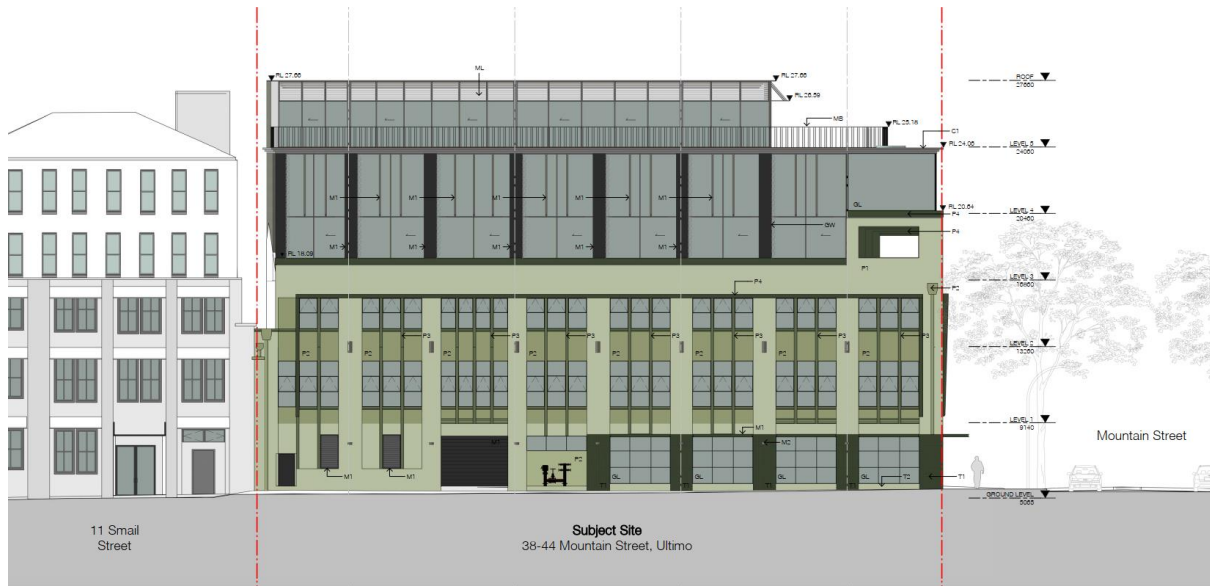


Figure 6 Northern elevation (as lodged)

Source: SJB Architects

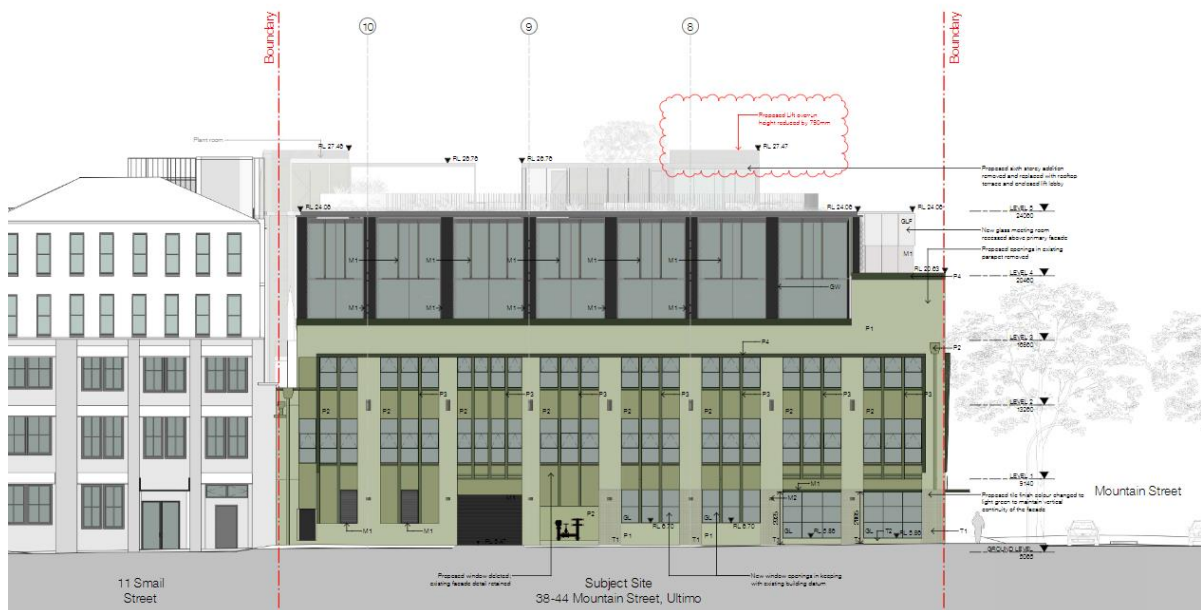


Figure 7 Northern elevation (current)

Source: SJB Architects



Figure 8 Existing commercial development on site, as viewed from the corner of Mountain and Smail Streets.

Source: CPS

Clause 4.6 Exceptions to Development Standards - Sydney Local Environmental Plan 2012

Clause 4.6 of SLEP 2012 is the mechanism by which a consent authority is able to grant consent to a development despite non-compliance with a prescribed development standard noting that the site is not located within an Area 1 or 2 on the height of buildings map. Clause 4.6 is reproduced below:

- (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 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 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(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,*
 - (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),
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),
- (cgj) clause 6.43 (Danks Street South Precinct),
- (cgk) clause 6.52 (1–11 Oxford Street, Paddington),
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).

The statutory obligations of the applicant and Council

The authority established within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides that a 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with that which would be provided by a compliant development.

In light of this judgement, it is also necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant is required only to address the matters required by 4.6(3). Note however that for completeness and to assist Council in its assessment, this variation request has addressed 4.6(3) and 4.6(4). However, given the inevitable overlap between these matters, this request should be read in its entirety as generally fulfilling the applicant's obligations as they are described by 4.6(3).

4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and there are environmental planning grounds to justify the contravention of the standard

The authority established by *Four2Five Pty Ltd v Ashfield Council* (2015) NSWCA 248, necessitates that environmental planning grounds for the proposed variation must be established aside from the consistency of the development with the objectives of the standard and the objectives of the zone.

In *Wehbe V Pittwater Council* (2007) NSW LEC 827, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the*

land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of points 2-5 above.

Having regard for the authority within *Wehbe*, compliance with the maximum height of buildings development standard has been determined to be unreasonable and unnecessary in the circumstances of the case, and the following outlines the environmental planning grounds for the proposed variation:

- The permitted maximum building height does not properly capture the existing pattern of building heights within the locality. Consequently - and also owing to the mismatch between the FSR and building height standards - there are notable instances of variations that have been approved as part of additions or for new development for immediately surrounding sites. The table below summarises both the variations approved by Council, as well as existing known non-compliant buildings within the local area:

Sites	LEP Maximum Height	Approved/Existing height	LEP Maximum FSR	Approved/Existing
Subject site	18m	21.33 (+18.5%)	2.0:1	4.04:1 (+102.1%)
35-39 Mountain Street (D/2013/2004)	18m	22.47m Part 6/Part 7 storeys (+24.83%)	2.0:1	4.65:1 (+132.5%)
41 & 43-49 Mountain Street (U/01/00833, D/2005/1562 and subsequent modifications)*	18m and 22m	27.7m Part 5/Part 7/Part 8 storeys (+53.89%)	2.0:1 & 2.5:1	4.43:1 (+>90%)
11 Smail Street (D/2009/2200 and subsequent modifications)	22m	21.931m Part 5 / Part 6 storey (21.84%)	2.5:1	3.4:1 (+36%)
46-52 Mountain Street (Heritage item with no known additions)	25m	5 storeys	2.0:1	Assumed >4.0:1 (+100%)
22-36 Mountain Street (No record of known additions)	25m	5 Storeys	2.5:1	Assumed >5.0:1 (+100%)

* Development consent was surrendered following a change in land ownership.

Whilst the developments at 11 Smail Street and 41 & 43-49 Mountain Street were approved under the former South Sydney LEP and South Sydney DCP, the prescribed heights and FSR for these sites have not changed or been reduced under the current SLEP 2012. This is despite the context of the heritage conservation area having increased in height and density as a consequence of the various development approvals.

The approved development at 41 & 43-49 Mountain Street allowed for a five storey street wall to Mountain Street and two additional storeys setback 5m from the parapet to achieve a maximum height of 24.5m. An eight storey height with maximum height of 27.7m was also approved at the Smail Street frontage, which is subject to the same 18m height limit.

Further, an exceedance in height of 24.83% (seven storeys) to allow for a similar three storey addition was approved under SLEP 2012 for 35-39 Mountain Street. It is noted this application was approved by the Land and Environment Court via section 34 conciliation agreement. The issues to be resolved in the conciliation did not relate to the proposed building height or bulk of the development.

Throughout the assessment of the above applications, Council acknowledged the existing density of surrounding buildings to be significantly greater than the various height and FSR limits prescribed within the area. Council therefore considered that the prescribed maximum building height of 18m could be exceeded based on a merit assessment of the surrounding context; and where a commensurate well thought out development was proposed. This includes where key characteristics of the existing former warehouse buildings are retained and a sympathetic response to the Mountain Street heritage conservation area streetscape is proposed with regards to visible and transitioning building heights.

Council's assessments also considered the exceedances to the height standard would not set a negative precedent and were generally appropriate for the former commercial/industrial warehouse typology of the area.

- Within this locality, the inevitable FSR and height non-compliances are acknowledged by Council as being common within this form of warehouse building. The proposed exceedances to the FSR and height standards are therefore acceptable given the proposed building form is in keeping with the area's context as established within developments approved for surrounding sites with the similar height and FSR controls.
- The non-complying elements relate largely to the lift overrun and lift lobby entrance associated with the rooftop terrace which is setback from the original building edges by 4.9m to Mountain Street; 17.0m to Smail Street; and 2.8m to Smail Lane. These elements are to be appropriately screened from the public domain and provide access to a high-quality landscaped outdoor work and meeting space that offers attractive commercial floor space for the B4 Mixed Use zone locality.

Despite the non-compliant building height, the proposal provides a suitable contemporary addition to the existing building which retains and revitalises the existing key features of the contributory former warehouse building. Insistence on compliance with the 18m height limit would not improve the development, noting the non-compliant elements are to be screened from the streetscape, and the difference between the proposal and a complying building would not be discernible at the

street level. Further, the proposed density is in keeping with that of nearby former warehouse buildings with similar additions.

- The proposal seeks to revitalise the existing warehouse building through façade upgrades, internal alterations, and a two storey modern addition with landscaped rooftop terrace above. The proposed bulk and scale of additions is proportionally compatible to the existing building and surrounding context by retaining the existing form of the building, whilst introducing a complementary modern addition that expands on the key characteristics of the existing building, including the columns and the parapet to Mountain Street. The additions are setback from the building edges at various points along Smail Street and Mountain Street with floor to ceiling glazing and green walls to provide a clear visual differentiation for the additions.

The proposed height, bulk and scale ensures that an appropriate relationship is achieved between the existing form and the evolving character between historical and contemporary buildings in the area. Despite the non-compliant building height, the proposed additions are complementary to the heritage significance of the existing building and do not constitute an overdevelopment in the context of the surrounding built form. Rooftop mechanical plant represents a 3.74m (20.78%) variation to the development standard; this area is limited to a minor portion of the rooftop adjacent to the site's eastern boundary and it has been sited so as not to be perceptible from the public domain.

- The proposal provides an appropriate transition from the adjoining part five/part six storey building at 11 Smail Street and the adjoining five storey heritage item at 46-52 Mountain Street. The development does not detract from the heritage significance of either adjacent local heritage items, as outlined within the heritage impact assessment accompanying the application.
- The proposal would not result in loss of important views to adjoining properties, which predominately comprise commercial developments, with the exception of the residential apartments at 11 Smail Street to the west, which contains only north and south facing windows. The additional height would have limited impacts on the solar amenity of these apartments. The heritage item to the south is a commercial building and is already overshadowed by the existing commercial building. The rooftop mechanical plant will result in a negligible increase in overshadowing compared with a complying 18m height limit. The height variation does not create unacceptable amenity impacts and compliance with the 18m height requirement would not improve the amenity to adjoining properties or improve the design of the building.
- The proposed development is consistent with the objective of the zone as discussed below.
- The proposed development is consistent with the objectives of the height of buildings development standard as discussed below.
- The proposed development is generally consistent with relevant SDCP 2012 controls as detailed in the Statement of Environmental Effects.

Clause 4(a)(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.

In the judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

The objectives of the B4 Mixed Use zone are as follows:

- *To provide a mixture of compatible land uses.*

The proposal seeks to provide additional and renewed commercial floor space within the B4 zone. The proposed alterations and additions to the existing commercial building are complementary to the Ultimo local centre and B4 Mixed Use zone.

- *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.*

The proposed development is consistent with the above objective as it will provide new and renewed commercial office and retail space for the existing commercial building. The development further seeks to reduce existing provision of car parking from 26 to 13 spaces, whilst introducing end of trip facilities including showers, change rooms, lockers and bicycle parking, which will together promote use of public transport, walking and cycling.

- *To ensure uses support the viability of centres.*

The proposed additional retail and commercial floor space will support the viability of the city centre location including nearby Broadway shopping centre and Central Park through increased commercial floor space and revitalisation of the existing commercial building, thereby enhancing the character of the conservation area.

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

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

As discussed above, the proposed design is consistent with the prevailing and emerging character of developments of a similar scale within the locality. Despite the non-compliant building height, the proposal provides a suitable contemporary addition to the existing building which retains and revitalises the existing key features of the contributory former warehouse building. The proposed height of the development is appropriate to the conditions for the site and its context, to ensure appropriate height transitions between buildings in the heritage conservation area.

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

As discussed above, despite the non-compliant building height, the proposed additions are complementary to the heritage significance of the existing building and do not detract from the heritage significance of either adjacent local heritage items. The proposed bulk and scale of the development ensures an appropriate transition of building heights in keeping with the character of the Mountain Street heritage conservation area. This is supported by the heritage impact assessment accompanying the application.

(c) to promote the sharing of views,

The proposed development will not impact on any significant views that are available from nearby properties, or to or from important landmarks within the locality.

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

The site is located within outskirts of Central Sydney. The proposed building height is in keeping with the density of the Mountain Street heritage conservation area and character of the Ultimo area.

(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 site is not located near Green Square.

Conclusion

Having regard to the judgement in *Wehbe*, the objectives of the B4 Mixed Use zone and objectives of the building height standard, the reasons for the variation can be summarised as follows:

- FSR and height standard exceedances have been approved as part of additions to former historical warehouse buildings or for new development at immediately surrounding sites. Council has repeatedly concluded that the prescribed maximum building height of 18m could be exceeded based on a merit assessment of the surrounding context and where a commensurate well thought out development was proposed that retained the key characteristics of the existing former warehouse buildings. The permitted maximum building height does not properly capture the existing pattern of building heights within the locality and the circumstances associated with existing variations apply to the subject development.
- The proposal seeks to revitalise the existing warehouse building through substantial façade upgrades, internal alterations, and a two storey modern addition with landscaped rooftop terrace above. The proposed bulk and scale of additions is proportionally compatible to the existing building and surrounding context by retaining the existing form of the building whilst introducing a complementary modern addition that expands on the key characteristics of the existing building.
- The proposal provides an appropriate transition from the adjoining part five/part six storey 11 Smail Street and the visible five storey form remains lower than that of the adjacent five storey heritage item at 46-52 Mountain Street. The development, including the proposed height variation, will not detract from the heritage significance of either adjacent local heritage items.

The non-complying elements relates to the lift overrun and associated rooftop lobby, both of which are to be appropriately screened from the public domain by landscaping treatments, and rooftop mechanical plant which has been sited so as not to be perceptible from the public domain. Insistence on compliance with the 18m height limit would not improve the development noting the non-compliant elements would be hidden from the streetscape, and the difference between the proposal and a complying building would not be discernible at the street level.

- The development will not result in any additional adverse environmental impacts beyond those already contemplated within the prescribed height standards for the site and adjoining properties. Compliance with the 18m height requirement would not improve the amenity to adjoining properties nor improve the design of the building. Rather it would decrease the amenity provided to future users of the building and result in non complying floor to floor heights.
- Strict enforcement of the height of buildings development standard in this instance would hinder the desired development outcome for the site, the orderly and economic use of the land, and would not be in line with the scale of the established and desired future character of the Mountain Street heritage conservation area. The proposed variation provides an exceptional opportunity an overall positive addition to the streetscape.
- The proposed development is complementary to the Mountain Street heritage conservation area, Ultimo local centre and B4 Mixed Use zone.

- The proposed development is consistent with the objective of the B4 Mixed Use zone.
- The proposed development is consistent with the objectives of the height of building development standards.
- The proposed development is generally consistent with relevant SDCP 2012 controls.

Compliance with the development standard is unreasonable or unnecessary in the circumstances. There are sufficient environmental planning grounds to justify contravening the height of buildings development standard in this instance. Given the above, the requirements of clause 4.6 have been satisfied and the variation to the height of buildings development standard can be approved.