

Attachment C

**Clause 4.6 Variation Request –
Height of Buildings**

22 O' Riordan Street, Alexandria

Clause 4.6 Variation Request to Clause 4.3 Height of Buildings of the Sydney Local Environmental Plan 2012

On behalf of
Markham Real Estate Partners (Green Square) Pty Ltd
May 2021



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1 Introduction

This Clause 4.6 variation request accompanies a Development Application (DA) submitted to the City of Sydney (the City) for a three (3) to five (5) storey commercial development located at 22 O’Riordan Street, Alexandria.

The Clause 4.6 variation request seeks to vary the maximum height of building standard which applies to the site under clause 4.3 of the *Sydney Local Environmental Plan 2012* (the **SLEP**). The maximum height of buildings standard which applies is 22m on the northern portion of the site and 12m on the southern portion of the site.

Clause 4.3 of the SLEP states the following:

“(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.”

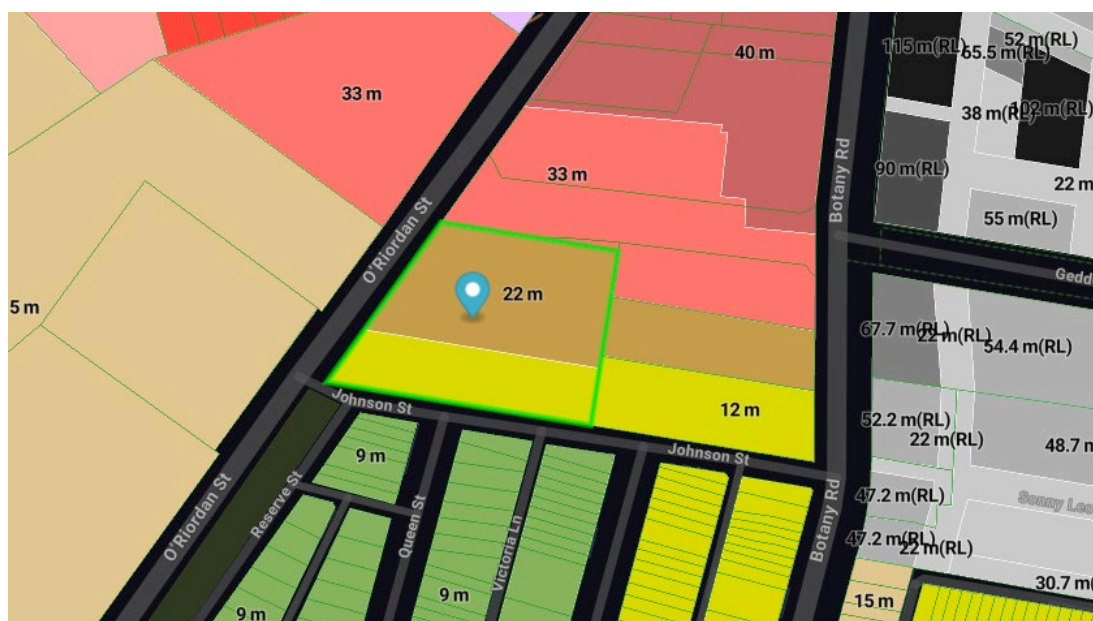


Figure 1. Height of Buildings Control - SLEP2012

Source: Mecone MOSAIC

The table below describes what is proposed at the site and the extent of the variation to the development standard sought:

Table 1. Proposed variation to HOB development standard			
Area	Height permitted under SLEP 2012	Proposed	Variation and comment
Johnson Street (southern portion)	12m (RL+24.000m)	18.9m (RL+30.900m above RL+12.000m (ground level)).	6.9m The variation to the height control is attributed to the extension of levels 3 and 4 towards the south. Refer to Figure 2 below.
O’Riordan Street and Geddes Avenue	22m (RL+34.000m)	25.8 (RL+37.800m above RL+12.000m (ground level)).	3.8m The variation to the height control is attributed to the lift overrun, plants and

Table 1. Proposed variation to HOB development standard

(northern portion)		servicing requirements for the commercial development. Refer to Figure 2 below.
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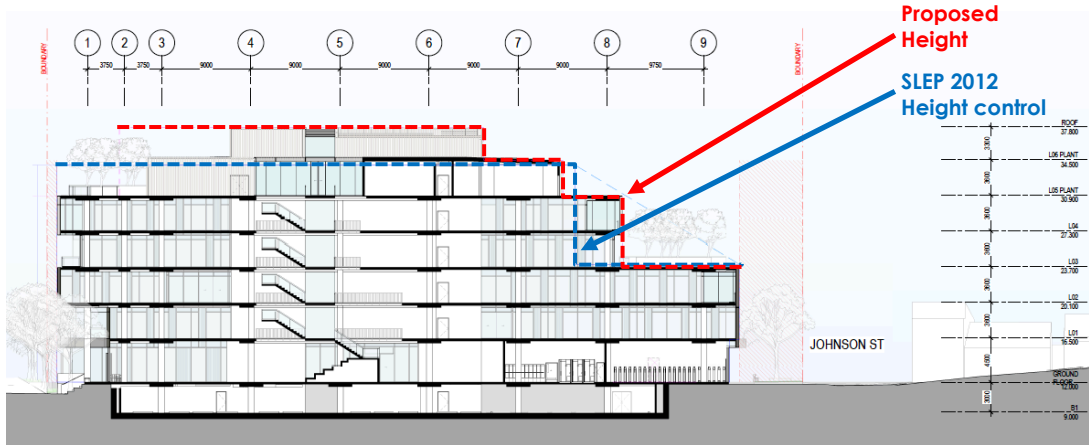


Figure 2. Extract from Section DD – DA3004
 Source: Hassell, modified by Mecone.

The following sections of this report provide an assessment of the request to vary the Development Standard relating to the height in accordance with Clause 4.6 of SLEP. Consideration has been given to the following matters within this assessment:

- Varying Development Standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011; and
- Relevant planning principles and judgements issued by the Land and Environment Court in particular *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2 Exceptions to Development Standards

Clause 4.6 of the SLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are as follows:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing a Consent Authority to support a DA for approval, even where it does not comply with certain development standards where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for the development.

The decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“**Initial Action**”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant’s written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of

applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of LEP provides:

In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Notwithstanding the effect of clause 64 of the EPA Regs, the Council should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation.

Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of LEP from the operation of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6(3) requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- 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.

Furthermore, the Consent Authority must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained. The concurrence of the secretary has been assumed in this instance.

The proposed non-compliance in height has been assessed against the objectives of the zone and development standard in **Section 6** and **Section 8**.

The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP, Clause 4.6(3) Exceptions to Development Standards in the assessment in **Section 5** and **Section 6**

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of the following provisions under the SLEP:

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.
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3 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

1. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].
2. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
3. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].
4. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
5. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
6. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of SLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of SLEP?

4 Is clause 4.3 of SLEP a development standard?

The definition of “development standard” at clause 1.4(c) of the EP&A Act includes:

“the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work”

Clause 4.3 SLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 of SLEP is a development standard.

5 Clause 4.6 (3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater* [2007] NSW LEC 827 (**Wehbe**) a five-part test was established in which a variation to a development standard is considered to be unreasonable or unnecessary as per Clause 4.6(3A). The five tests established in *Wehbe* are (emphasis added):

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 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.*

Satisfaction of any one of these tests is sufficient to demonstrate the compliance with the standard is unreasonable or unnecessary.

This objection is based on the **first test**, which is addressed at **Section 6**.

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

The **first test** of *Wehbe* requires demonstration that the objectives of a development standard can be achieved notwithstanding non-compliance with that particular standard.

In this case, non-compliance with Clause 4.3 height of buildings standard of the SLEP is proposed at the site. Notwithstanding, the objectives of the standard are still achieved as outlined below:

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

- The proposed development seeks to vary the height of building standard to facilitate the redistribution of GFA to enable a new through site link to be provided at the site. The through site link will link Johnson Street (south) to the Future Ashmore Extension Road (north) and allow for improved pedestrian connectivity within the site and the broader area. On this basis, the variation in height (and the through site link which will be facilitated as a result) responds to the condition of the site and its context.
- In addition to the above, notwithstanding the non-compliance, consistency with this objective is achieved by:
 - An appropriate bulk and scale of development being provided which appropriately responds to existing and future development to the east and south of the site; and
 - Ensuring that the development continues to have negligible amenity impacts on surrounding development located to the east and south of the site. The variation to the development standard will not create any unreasonable impacts on surrounding development in the form of overshadowing, privacy or views compared to the approved envelope.
 - Maintaining appropriate setback distances from the heritage conservation area to the south.
- Taking into consideration the above, objective (a) of the standard is achieved, notwithstanding the non-compliance.

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

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

- At a precinct level, the SLEP provides for a stepping of heights based on somewhat arbitrary property boundaries, with a graduation of heights down from the centre. The Ovo and Infinity towers at the centre of Green Square are subject to RL114m and RL80m height controls, respectively. Moving south from the centre, intervening height controls step down from 33m to 22m, 12m and finally 9m within the Beaconsfield Heritage Conservation Area. Notwithstanding the proposed variations, the proposed development is consistent with the underlying transition of height controls from north to south and east to west (Figures 3 and 4) as envisaged by the controls.
- With the exception of the Heritage Conservation Area, the immediate surrounding properties are currently in the planning process. The development proposed is

designed generally in accordance with the same controls that apply to the site and surrounding developments.

- The variation from the height of buildings standard occurs at the uppermost levels of plant and the lateral encroachment of levels 3 and 4 into the 12m height control portion of the site. The proposed variations at the plant levels will not be readily perceptible from the adjoining footpaths and the 12m height variation is screened via extensive landscaping.
- Both of the building elements that exceed the height controls have significant setbacks from the boundary of the site, including:
 - **12m height control (commercial) encroachment off Johnson Street:** Includes approx. setbacks of 19m at levels 3 and 4;
 - **The 22m height control (plant) encroachment:** The plant at Levels 5 and 6 has the following setbacks:
 - **North (Geddes Avenue):** Approx. setbacks from the northern boundary range from 10-12m at level 5, increasing to 18-20m at level 6;
 - **East (adjoining development):** Approx. setbacks from the boundary line range from 3m towards the south to 21m towards the north. These increase to a full 21m setback at level 6;
 - **South (Johnson Street):** Approx. setbacks from the southern boundary are 24m at level 5 increasing to 33m at level 6;
 - **West (O’Riordan Street):** Approx. setbacks from the western boundary range from 10-20m at level 5 and increase to 23-36m at level 6.
- These setbacks will assist in the development reading as a part 3 and part 5 storey building when viewed from the adjoining public domain, as envisaged by the DCP planning controls. Extensive landscaping on and around the proposed building will further mitigate the bulk of the subject building elements, providing a built form that is appropriate to the condition of the site and its context.
- The proposed extent of variation, which remains below the 33m HOB SLEP 2012 control on the adjoining property to the north, is inconsequential in context when compared to the extent of height demonstrated throughout the precinct.

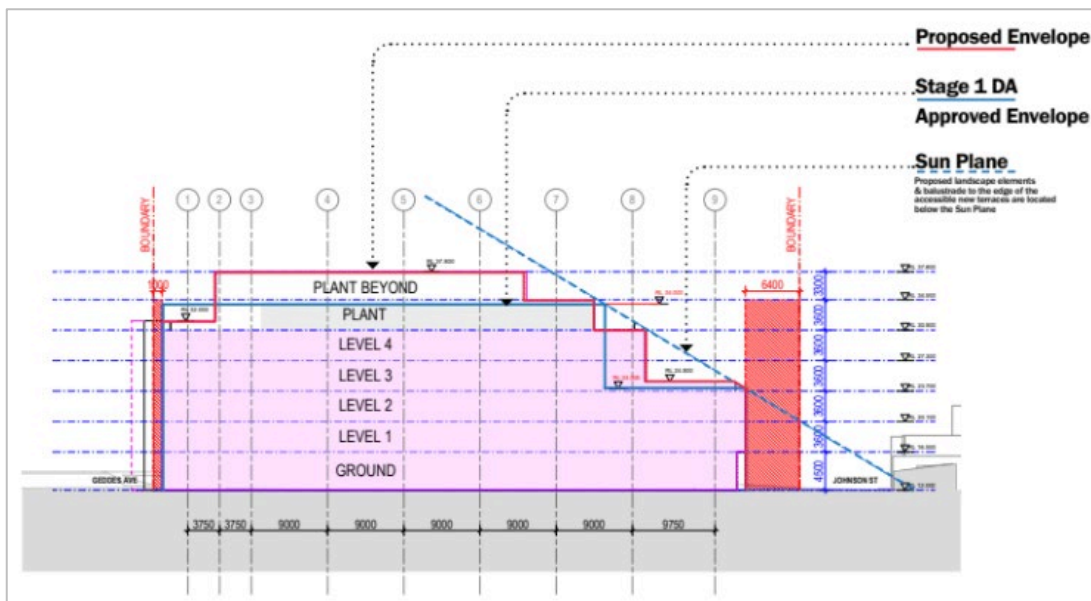


Figure 3. Cross Section illustrating sun plane angle north to south
Source: Hassell

- The upper plant servicing encroachments also comprise significant setbacks from all boundaries, as detailed in objective (a) above, to mitigate any solar impacts and reducing its visibility when viewed from the public domain and southern footpath along Johnson Street. Despite the minor additional overshadowing east compared to the approved envelope, these shadows fall across the subject site east setback, the proposed roofs and driveway of the neighbouring properties adjacent to the eastern boundary. There is no additional overshadowing as a result of the increase in height to the existing buildings within the heritage conservation area located to the south of the subject site.
- These setbacks continue an appropriate stepped height transition towards the heritage conservation area in the south with the southern elevations incorporating extensive quantities of landscaping at ground, and level 3 to soften the built form; provide additional privacy; and improve provide appropriate transitions to the south.
- Overall, the proposed extent of variation, which remains below the 33m HOB SLEP control on the adjoining property to the north, is inconsequential in context when compared to the extent of height demonstrated throughout the precinct.
- Taking into consideration the above, objective (b) and objective (c) is achieved, notwithstanding the non-compliance with the standard.

(d) to promote the sharing of views,

- The height variation proposed will not obstruct any identified view corridor or the general views into and out of the area.
- The additional height associated with the plant and servicing is setback approx. 32.5m from the Johnson Street boundary and approx. 19m from the Geddes Road boundary. These setbacks minimise the perceived bulk of the addition as viewed from the street and maintain view corridors from neighbouring commercial developments.
- Overall, the site is located at the perimeter of Green Square and the proportion of any view obstructed by the subject building elements will be relatively minor in the context of the expansive views available from the significantly taller development existing and planned to the north.
- Taking into consideration the above, objective (b) and objective (c) of the standard are achieved, notwithstanding the non-compliance.

(e) in respect of Green Square—

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

b. to ensure the built form contributes to the physical definition of the street network and public spaces.

- The subject building elements sit below a winter sun plane projected from the southern edge of the 22m height zone, such that they will not increase the extent of overshadowing resulting from the compliant building envelope. Refer to **Section 5.1.1** of the SEE for detailed discussion.
- The proposed built form will not create any significant additional overshadowing over the approved stage 1 concept envelope. The only minor additional areas of overshadowing are limited to very minor portion of Johnson Street and the rooftops and driveways of 410A Botany Road to the east and 1 Queen Street to the south. These areas are not sensitive to over shadowing. Refer to the Overshadowing Plans in **Appendix 6**.
- Based on the solar access summary, overshadowing remains compliant with Council's controls and will not have any unexpected or unreasonable effect on the

level of solar access and will not create any perceptible additional overshadowing to the public domain or loss of amenity compared to the Stage 1 DA.

- The proposed development ensures the amenity of the public domain and ensures that the built form contributes to the street network and public spaces as:
 - The development maintains street alignments and appropriate podium setbacks as envisaged by the height controls;
 - The development positively contributes to the physical definition of the street network and public spaces through the inclusion of a centralised through site link, ground level retail and activated uses as well as landscaping and footpath widening to be dedicated to the City;
 - The proposed variations are significantly setback from the compliant façade heights.
 - The proposed variations will not result in any perceivable additional overshadowing between 9 am and 3pm or loss of amenity;
 - The taller elements of the building are restricted to only part of the site; and
 - The proposed additions will not be visible from the adjoining streets.
 - Taking into consideration the above, objective (e) of the standard is achieved, notwithstanding the non-compliance.
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Clause 4.6 (3)(b) Sufficient environmental planning ground to justify contravening the development standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard.

In Initial Action the Court found at [23]-[24] that:

1. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
2. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].

In the case of the subject development, there are sufficient environmental planning grounds to justify contravening the development standard as the proposed development allows for the following:

Promotion of site connectivity through GFA Redistribution

- While no through site link is required under the SDCP 2012, at the request of Council a landscaped link within the eastern boundary was included in the Stage 1 DA. Design refinement during the design competition process resulted in the relocation of the through-site link centrally within the site to improve site permeability, accessibility and amenity. This centralised through-site link is now provided in conjunction with a landscaped setback along the eastern boundary which will be dedicated to the City upon completion.

Though the centralised through site link provides significant public amenity for the commercial tenancies as well as surrounding locality, it compromises the ability to achieve the gross floor area (GFA) potential of the site within the approved envelope.

The proposed variations to the development standard are a consequence of the redistribution of GFA and servicing in response to both the eastern landscaped setback and centralised through site link.

Overall, the benefits and amenity provided by the through site link significantly outweigh any perceivable impacts of the proposed additional height.

Overshadowing and Amenity

- The proposal has been designed to minimise any unreasonable visual, privacy or solar impacts on surrounding developments. As demonstrated in the Architectural Plans in Appendix 6 and the detailed assessment in Section 5.1 of the SEE, these variations to height will not create any unreasonable impacts on surrounding development in the form overshadowing, privacy or views compared to the approved envelope.

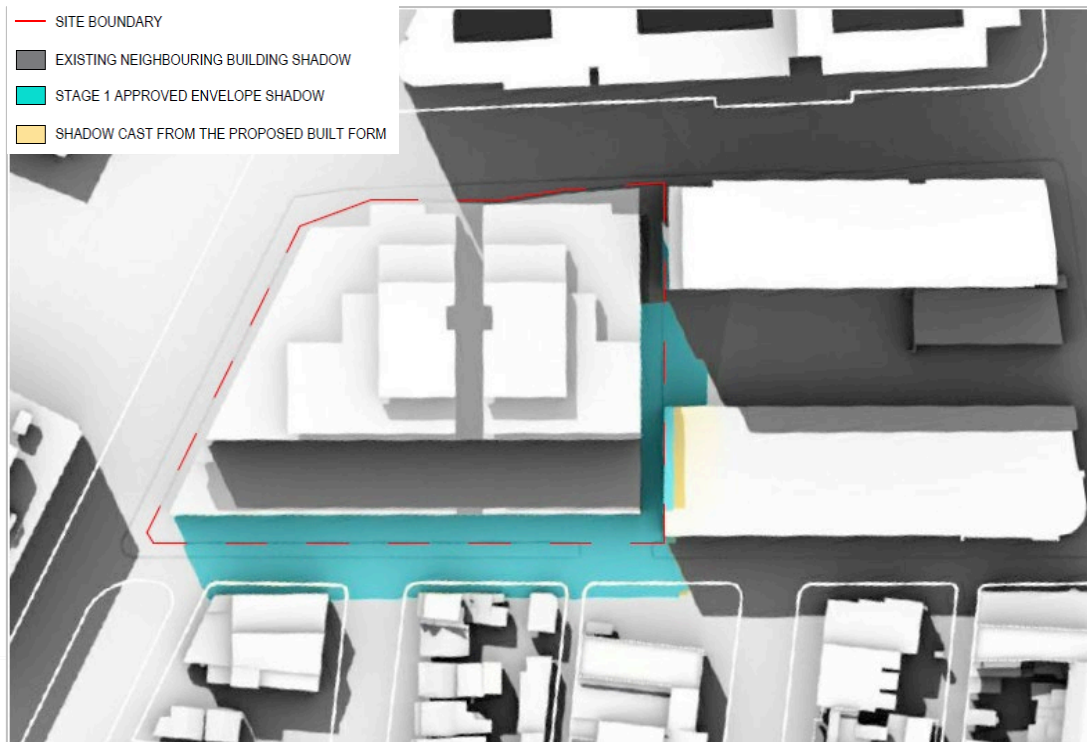


Figure 4. Extent of overshadowing - Winter solstice 21 June - 1300pm

Source: Hassell

Built Form Considerations

- Despite the breach of the numerical height controls, the proposed development is appropriate for its context in that the proposed variations:
 - Will be treated with appropriate materials and finishes to ensure they are recessive in nature and minimise their extent of visibility from the public domain.
 - Will not unreasonably impact upon the character of the surrounding locality as there are new and heritage developments within a 100m radius which exhibit heights greater than the proposed. The development also maintains an appropriate height transitions to the heritage conservation area to the south with the volume's tiered nature aligned with the available solar access plane, naturally mitigating the impact of the built form overshadowing the neighbours.
 - The proposed development has evolved from a design competition and exercises that analysed the surrounding sites and provided an outcome that reflects a consistent built form outcome, that does not unreasonably impact on the adjoining sites, particularly with respect to streetscape character.

As demonstrated in **Section 6** of this report, the proposal demonstrates compliance with the objectives of the standard in that:

- It ensures the height of development is appropriate to the condition of the site and its context;
- it ensures appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas;
- it promotes the sharing of views;
- it ensures appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas;
- in respect of Green Square—
 - It ensures the amenity of the public domain by restricting taller buildings to only part of a site, and
 - It ensures the built form contributes to the physical definition of the street network and public spaces.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

Therefore, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard in this instance, as, amongst other reasons listed above, the development will deliver one of the key objectives of the Planning Act, will promote the delivery of efficient, healthy and sustainable office development, while also allowing for the promotion and coordination of the orderly and economic use and development of the land for commercial and retail uses.

In addition, it is noted that the proposed development will still produce a contextually appropriate development outcome consistent with the objectives of the development standards, despite the non-compliances with the numerical provisions.

8 Clause 4.6 (4a) (ii) Public Interest

Clause 4.6(4a)(ii) requires that the consent authority consider whether 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.

Preston CJ in *Initial Action* (Para [27]) described the relevant test for this as follows:

The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

As detailed at **Section 6** the proposed development will be consistent with the objectives of the height standard.

Further, it is considered that the proposal will remain consistent with the objectives of the *B7 Business Park Zone* as summarised below:

- **To provide a range of office and light industrial uses.**
The development will provide A-grade commercial office space within the locality and employment generating uses which will support the viability and growth of the Green Town Centre, located in close proximity the site to the north and east.
- **To encourage employment opportunities.**
The proposal comprises 21,167m² of gross floor area, including some retail tenancies at ground level along the through site link including retail shops and wellness centre.
The proposal will generate employment during both the construction phases as well as operational phases of the development.
- **To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area**
The ground level will comprise some retail activation which in conjunction with the commercial tenancies and through site link, will meet the day to day needs of workers in the area. It will also deliver complementary local services, end of trip facilities and employment opportunities for the community and tenants.
- **To ensure uses support the viability of nearby centres.**
The proposal achieves the objectives as it provides a development outcome which complements the range of existing uses within the locality. These include commercial and retail uses. The proposal provides a commercial office development, suitability located for residents to achieve active transport methods.

As discussed above, the proposal is considered in the public interest as it is consistent with the objectives of the development standard and the B7 Business Park zone.

As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in

which the development is proposed to be carried out.

Accordingly, the Council can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Clause 4.6(5) Grounds for Consideration

In deciding whether to grant concurrence, subclause 4.6(5) requires that the Secretary consider:

1. *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
2. *The public benefit of maintaining the development standard, and*
3. *Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The proposal has been assessed against the relative criteria below:

Would non-compliance raise any matter of significance for State or regional planning?

The non-compliance does not raise any other matter of significance for State or regional planning.

Is there a public benefit of maintaining the development standard?

There is no public benefit associated with maintaining strict compliance with the development standard. Doing so would require infilling of the proposed through site link in order to realise the GFA potential of the site. The loss of amenity from infilling the link would be more significant than the environmental effects of the proposed additional height

Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

Conclusion

It is requested that Council supports the proposed variation to Clause 4.3 Height of Buildings for the following reasons:

- Compliance with the Development Standard is unreasonable and unnecessary as the development is consistent with the objectives of the standard, in that it:
 - maintains the intended transition in height throughout the precinct and immediate context;
 - provides for the sharing of views;
 - restricts taller building elements to the centre of the site;
 - The proposal has been designed to minimise any unreasonable visual, privacy or solar impacts on surrounding developments and public domain; and
 - provides physical definition of the street network and public spaces.
 - The provision of a full height through-site pedestrian link is sufficient environmental planning grounds to justify contravening the Development Standard;
 - There would be no public benefit in maintaining strict compliance with the Development Standard; and
 - It is in the public interest because it is consistent with the objectives of the height standard and B7 Business Park zone, notwithstanding the variation to the height standard.
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