

Attachment C

Clause 4.6 Variation Requests – Height of Buildings

Clause 4.6 Variation Request

Clause 4.3 - Height of Buildings – Sydney
Local Environmental Plan (Green Square
Town Centre) 2013

Site 1 – Green Square Library Plaza

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Project No. 21-212
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TABLE OF CONTENTS

1. Executive summary	4
2. Introduction.....	5
3. Standard to be varied.....	6
4. Extent of variation	7
5. Unreasonable or unnecessary	9
6. Sufficient environmental planning grounds.....	14
7. Public interest.....	15
8. State or Regional Environmental Planning	16
9. Conclusion	17

1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.3 Height of Buildings of the *Sydney Local Environmental Plan (Green Square Town Centre) 2013* that is proposed in a Development Application (DA) for public art at Green Square, Zetland (the site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

Clause 4.3 of the SLEP prescribes a maximum building height of 26 RL. The proposed public artwork has a maximum height of 30.5 RL, which occurs at the light pole and fibreglass sphere. This equates to a variation to the Height of Building development standard of 17.3%. In summary, the requirement to comply with the development standard is unreasonable and unnecessary in the circumstances for the reasons specified below:

- The proposed development achieves the objectives of the development standard notwithstanding the variation, as follows:
 - The proposed public art is not visible from any heritage items or buildings in heritage conservation areas.
 - The proposed public art will ensure the sharing of views in the Green Square Town Centre as the extent of the variation is minor and limited to the slender light pole and fibreglass sphere.
 - The proposed public art is centrally located within Green Square Town Centre and will be surrounded by developments of greater height and therefore will ensure that acceptable height transitions from Green Square Town Centre to adjoining areas are retained.
 - The proposed public art will improve the amenity of the public domain through the provision of improved seating, plantings, safety improvements and an increase of passive surveillance.
 - The proposed public art will improve the public domain area and contribute to the physical definition of the street network as it provides an improved pedestrian friendly link to other open space along Zetland Avenue.
- The proposed development meets the relevant objects of the Environmental Planning and Assessment Act, 1979, as detailed in Section 6. Of note, the proposal promotes Objects (A and G) for the following reasons:
 - The proposed variation to the height of building development standard assists in promoting object (g) of the Environmental Planning and Assessment Act 1979, as the provision of high-quality public art and improved lighting within the public domain will assist in promoting "*good design and amenity of the built environment*" and does not cause environmental harm.
 - The proposed variation to the height of building development standard assists in promoting object (a) of the Environmental Planning and Assessment Act 1979, as the provision of decorative well designed lighting will improve the decorative sculptural seating elements of the public artwork in a public space which will be used by local community, therefore promoting "*the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources*".

This request demonstrates that compliance with the building height development standard is unreasonable and unnecessary in the circumstances of this case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposed public art is consistent with the objectives of the zone for the site and the development standard itself, and therefore, is in the public interest.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the *Sydney Local Environmental Plan (Green Square Town Centre) 2013* to justify a variation to the Height of Building development standard proposed in a DA submitted to City of Sydney Council for public art within Green Square, Zetland. The legal description of the proposed public art is Lot 2 in DP 1199427 (“the site”).

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

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment’s Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of Building development standard which is set out in clause 4.3 of the *Sydney Local Environmental Plan (Green Square Town Centre) 2013 (SLEP)* as follows:

4.3 Height of Buildings

(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.*

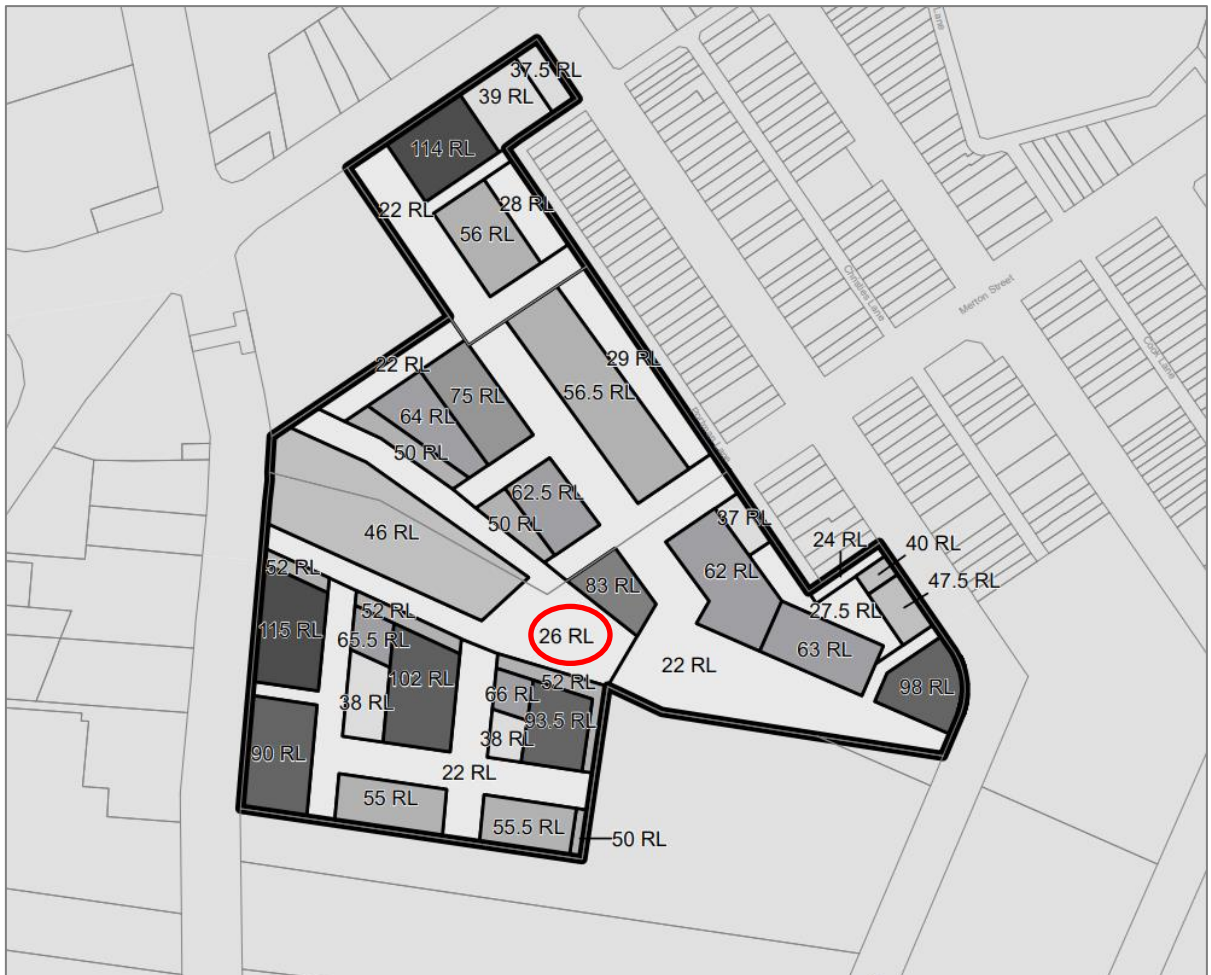


Figure 1: SLEP HoB Map, approximate location of public art at Site 1 (the site) circled in red (Source: NSW Legislation)

The numerical value of the development standard applicable in this instance is 26RL.

The development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

4. EXTENT OF VARIATION

Clause 4.3 of the SLEP prescribes a maximum height of 26 RL for the site.

The proposed public art has a maximum height of 30.5RL, which occurs at the light pole and fibreglass sphere (refer to Figure 2 and Figure 3). This equates to a variation to the Height of Building development standard of 17.3%. The extent of the variation is minor as the light pole is 0.323m in diameter and the fibreglass sphere is 3m in diameter. Otherwise, the proposed public art is wholly located under the 26RL height of building control (refer to Figure 3).

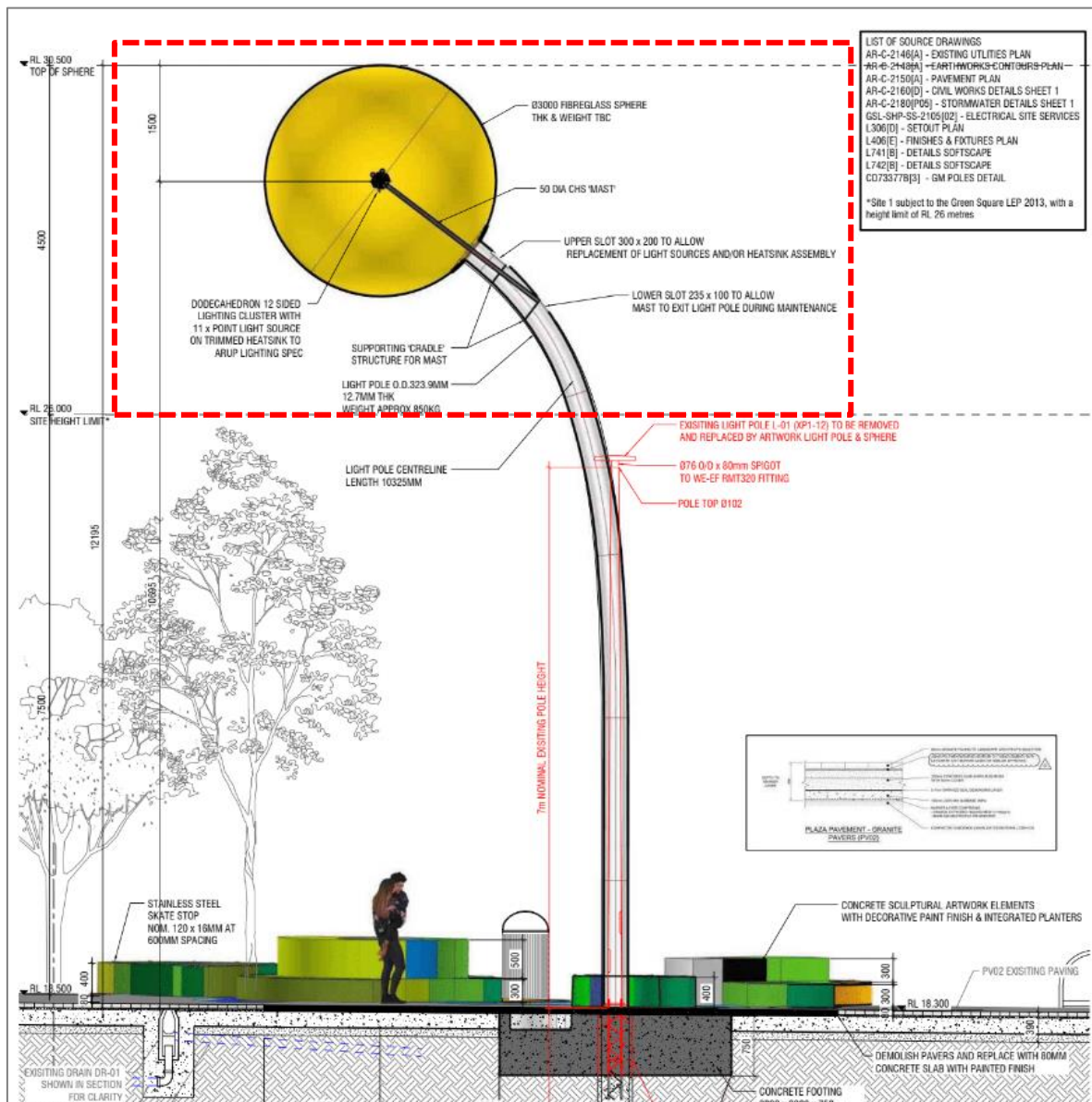


Figure 2: Extract of Vertical Section, height variation dashed in red (Source: Shop 1 Projects)

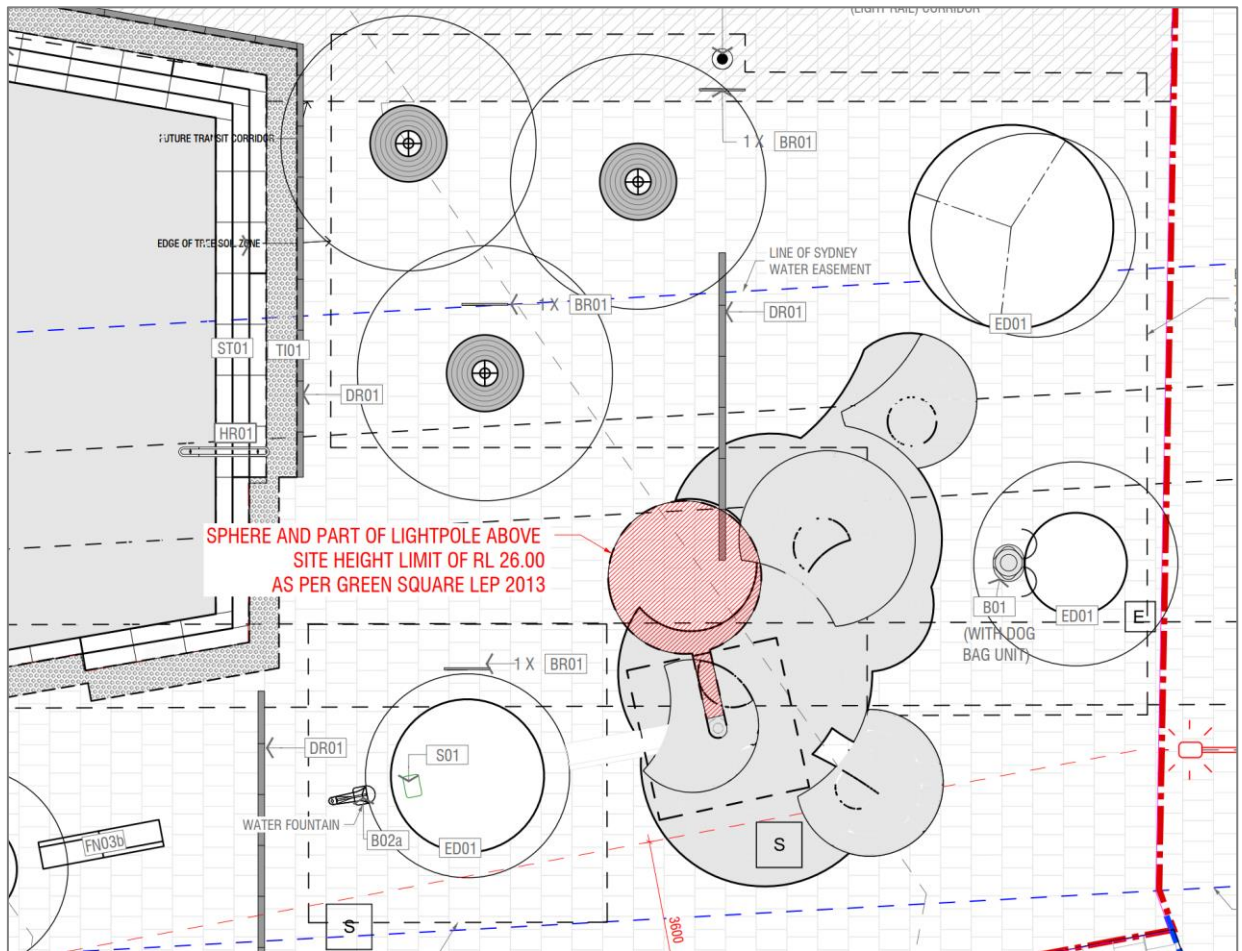


Figure 3: Extract of Height Plane Diagram, portions shaded red located above height limit (Source: Shop 1 Projects)

5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

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

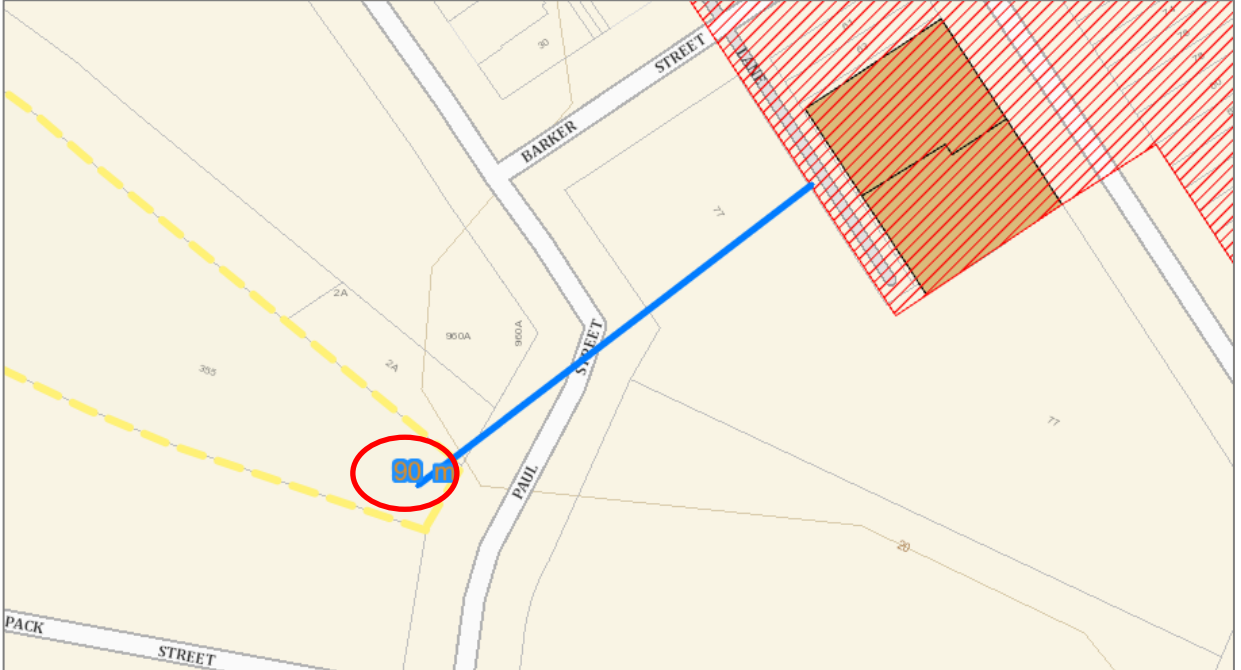
It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

We have considered each of the ways as follows.

- 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Table 1: Achievement of Objectives of Clause 4.3 of the Sydney Local Environmental Plan (Green Square Town Centre) 2013

OBJECTIVE	DISCUSSION
(a) to ensure acceptable height transitions between new development and heritage items and buildings in heritage conservation areas,	<p>The site is not a heritage item, is not located in a heritage conservation area and is not located in close proximity to any items of heritage significance. The closest heritage items (Terrace Group at 65-75 Portman Street) and heritage conservation areas (Zetland Estate Local Conservation Area) are located 90m (approx.) to the north of the proposed public art (refer to Figure 4).</p> <p>The proposed public art inclusive of the minor portions which exceed the height of building development standard will not be visible from any heritage items or buildings in heritage conservation areas as it will be</p>

OBJECTIVE	DISCUSSION
	<p>surrounded by developments of much greater bulk and scale.</p> <p>Accordingly, the proposed variation to the height of building development standard will not have any adverse impacts in terms of acceptable height transitions between new development and heritage items and buildings in heritage conservation areas.</p> <p><u>Public Interest:</u> The proposed public art as a whole is in the public interest as it will not be visible from any heritage items of heritage conservation areas and therefore will have no adverse impacts.</p>
	
<p>Figure 4: Extract of Heritage Conservation Map (Source: NSW Planning Portal)</p>	
<p>(b) to ensure sharing of views,</p>	<p>The variation of the Height of Building development standard does not affect the sharing of views.</p> <p>Future development surrounding the site will retain a vista along the extent of Green Square Library Plaza as the maximum allowable height of building of</p>

OBJECTIVE	DISCUSSION
	<p>developments is greater than at the subject site. Future adjoining developments will include buildings of up to 93.5RL in accordance with the LEP Height of Buildings Map (refer to Figure 1). The vista is an outlook rather than a view, being general in scope (not of a specific feature) and common in nature. The primary outlooks are between Paul Street and Botany Road.</p> <p>The extent of the variation is minor as the portion of the proposed public art which is located above the maximum Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively. Due to the minor extent to which the light pole and fibreglass sphere exceeds the height of building development standard, there will be no unacceptable impacts to the sharing of views.</p> <p>Further, the proposed public art is located centrally within the Green Square Library Plaza and will assist in wayfinding and ensures that views are maintained from and to Paul Street from Green Square train station.</p> <p><u>Public Interest:</u> The proposed public art as a whole is in the public interest as it will improve the public domain by providing improved seating, lighting, planting and a point of interest whilst ensuring the sharing of views in the locality.</p>
<p>(c) to ensure acceptable height transitions from the Green Square Town Centre to adjoining areas,</p>	<p>As detailed in the LEP Height of Building Map (refer to Figure 1) the maximum allowable height of building for developments surrounding the site and within Green Square Town Centre are much greater than at the subject site.</p> <p>Future surrounding developments within the Green Square Town Centre will include buildings of up to 93.5RL in accordance with the LEP Height of Buildings Map (refer to Figure 1).</p> <p>The extent of the variation is minor as the portion of the proposed public art which is located above the maximum</p>

OBJECTIVE	DISCUSSION
	<p>Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively.</p> <p>Due to the minor extent to which the light pole and fibreglass sphere exceeds the height of building development standard, and that the site’s central location within Green Square Town Centre, with future adjoining development within Green Square Town Centre to be of a greater height and scale, acceptable height transitions will be provided to areas adjoining Green Square Town Centre.</p> <p><u>Public Interest:</u> The proposed public art as a whole is in the public interest as it will improve the public domain by providing improved seating, lighting and a point of interest whilst ensuring acceptable height transitions are provided to adjoining areas.</p>
(d) to ensure the amenity of the public domain by restricting taller buildings to only part of a site,	<p>The variation of the Height of Building development standard will improve the amenity of the public domain, by providing high quality public artwork and a light source which will improve wayfinding within the Green Square Library Plaza.</p> <p><u>Public Interest:</u> The proposed public art as a whole ensures the amenity of the public domain through the provision of improved seating, plantings, safety improvements and surveillance.</p>
(e) to ensure the built form contributes to the physical definition of the street network and public spaces.	<p>The variation of the Height of Building development standard will contribute to the physical definition of Green Square Library Plaza. This is because the height variation allows the proposed light sphere to be viewed from further away, which will assist in the physical definition of the street network and public spaces.</p> <p><u>Public Interest:</u> The public art as a whole helps define the public domain area as it improves safety and passive surveillance and links the future open space to Zetland Avenue.</p>

As demonstrated in Table 1 above, the objectives of the Height of Building development standard are achieved

notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of Building development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 5.2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

- 5.3. The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

- 5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

- 5.5. The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, the elements of the development which contravene the Height of Building development standard are the top of the proposed light pole and the fibreglass sphere.

The environmental planning grounds to justify the departure of the Height of Building development standard are as follows:

- The proposed variation to the height of building development standard assists in promoting object (g) of the Environmental Planning and Assessment Act 1979, as the provision of high-quality public art and improved lighting within the public domain will assist in promoting "*good design and amenity of the built environment*" and does not cause environmental harm.
- The proposed variation to the height of building development standard assists in promoting object (a) of the Environmental Planning and Assessment Act 1979, as the provision of decorative well designed lighting will improve the decorative sculptural seating elements of the public artwork in a public space which will be used by local community, therefore promoting "*the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources*".

7. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the objectives of the zone in which the development is proposed to be carried out. This is required by clause 4.6(a)(ii) of the LEP.

In section 5 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under “public interest” in Table 1).

Table 2 considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency of proposed development with Zone Objectives

OBJECTIVE	DISCUSSION
To provide a mixture of compatible land uses.	The proposed public art is compatible with adjoining land uses as it is located in a public space and will improve the amenity of the public domain.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport and encourage walking and cycling.	The proposed public art will integrate well with adjoining uses and will provide seating and lighting which will encourage walking and cycling throughout the locality. It will also act as a wayfinding point, encouraging walking and cycling by making it easier to navigate the area.
To ensure uses support the viability of centres.	The proposed public art will support the increased use of the public domain by providing a point of interest inclusive of decorative lighting, outdoor seating and landscaping, therefore supporting the viability of the centre.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome prejudicial to planning matters of state or regional significance as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit in maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

9. CONCLUSION

This submission requests a variation, under clause 4.6 of the *Sydney Local Environmental Plan (Green Square Town Centre) 2013*, to the Height of Building development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 zone; and
- There are sufficient environmental planning grounds to justify the contravention.

The consent authority can be satisfied of the above and that the development is in the public interest because it achieves the objectives of the development standard and is consistent with the objectives of B4 zone.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.

Clause 4.6 Variation Request

Clause 4.3 - Height of Buildings – Sydney
Local Environmental Plan (2012)

Site 4 – 14a Defries Avenue, Zetland

submitted to City of Sydney Council
on behalf of City of Sydney Council

This report was prepared by:

Executive Director: David Ryan
Associate Director: Tina Christy
Project Planner: Theo Wilkinson
Project No. 21-212
Report Version: Final
Date: 11 April 2022

Disclaimer

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TABLE OF CONTENTS

1. Executive summary	4
2. Introduction.....	5
3. Standard to be varied.....	6
4. Extent of variation	7
5. Unreasonable or unnecessary	9
6. Sufficient environmental planning grounds.....	15
7. Public interest.....	16
8. State or Regional Environmental Planning	17
9. Conclusion	18

1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.3 Height of Buildings of the *Sydney Local Environmental Plan 2012* that is proposed in a Development Application (DA) for public art at Green Square, Zetland (the site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application. Clause 4.3 of the SLEP prescribes a maximum building height of 3m. The proposed public artwork has a maximum height of 10.907m, which occurs at the light pole and fibreglass sphere. This equates to a variation to the Height of Building development standard of 7.907m. In summary, the requirement to comply with the development standard is unreasonable and unnecessary in the circumstances for the reasons specified below:

- The proposed development achieves the objectives of the development standard notwithstanding the variation, as follows:
 - The proposed public art is not located near to any heritage items or heritage conservation areas (the closest being 180m to the east being the West Kensington Local Conservation Area) so there will not be any unacceptable impacts to heritage items or conservation areas.
 - The proposed public art will ensure the sharing of views within the locality as the extent of the variation is minor and limited to the slender light pole and fibreglass sphere.
 - The proposed public art will be surrounded by future development of greater height and therefore will ensure that acceptable height transitions from Green Square Town Centre to adjoining areas are retained.
 - The proposed public art will improve the amenity of the public domain through the provision of improved seating, plantings, safety improvements and an increase of passive surveillance.
 - The proposed public art will improve the public domain and contribute to the physical definition of the street network as it provides an improved pedestrian friendly link to open space along Defries Avenue.
- The proposed development meets the relevant objects of the Environmental Planning and Assessment Act, 1979, as detailed in Section 6. Of note, the proposal promotes Objects (A and G) for the following reasons:
 - The proposed variation to the height of building development standard assists in promoting object (g) of the Environmental Planning and Assessment Act 1979, as the provision of high-quality public art and improved lighting within the public domain will assist in promoting "*good design and amenity of the built environment*" and does not cause environmental harm.
 - The proposed variation to the height of building development standard assists in promoting object (a) of the Environmental Planning and Assessment Act 1979, as the provision of decorative well designed lighting will improve the decorative sculptural seating elements of the public artwork in a public space which will be used by local community, therefore promoting "*the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources*".

This request demonstrates that compliance with the building height development standard is unreasonable and unnecessary in the circumstances of this case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposed public art is consistent with the objectives of the zone for the site and the development standard itself, and therefore, is in the public interest.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the *Sydney Local Environmental Plan (Green Square Town Centre) 2013* to justify a variation to the Height of Building development standard proposed in a DA submitted to City of Sydney Council for public art at 14a Defries Avenue, Zetland. The legal description of the proposed public art is Lot 203 DP1204419 (“the site”).

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

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment’s Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of Building development standard which is set out in clause 4.3 of the *Sydney Local Environmental Plan 2012* (SLEP) as follows:

4.3 Height of Buildings

(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.*

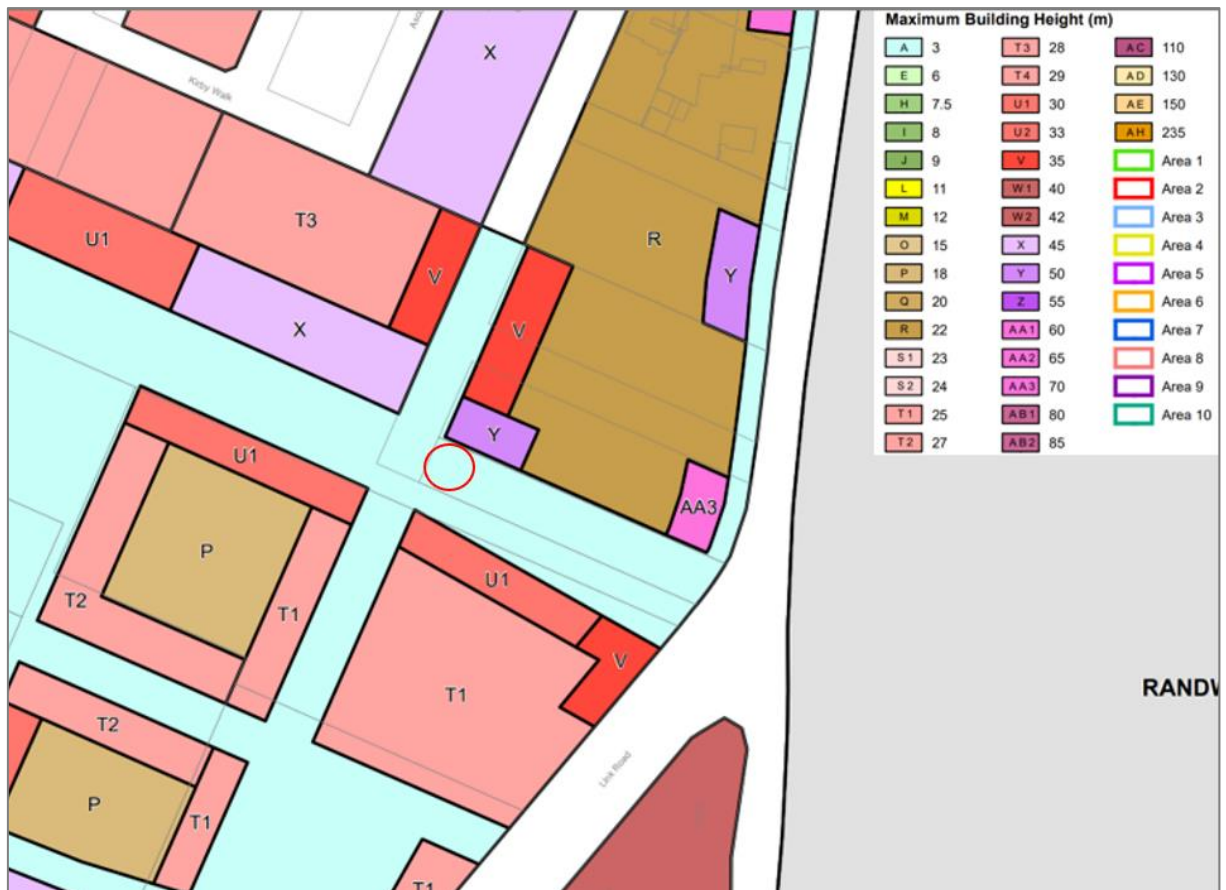


Figure 1: SLEP Height of Buildings Map, approximate location of public art at Site 4 circled in red (Source: NSW Legislation)

The numerical value of the development standard applicable in this instance is 3m.

The development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

4. EXTENT OF VARIATION

Clause 4.3 of the SLEP prescribes a maximum height of 3m for the site.

The proposed public art has a maximum height of 10.907m, which occurs at the light pole and fibreglass sphere (refer to Figure 2 and Figure 3). This equates to a variation to the Height of Building development standard of 7.907m. The extent of the variation is minor as the light pole is 0.323m in diameter and the fibreglass sphere is 3m in diameter. Otherwise, the proposed public art is wholly located under the 3m height of building control (refer to Figure 3).

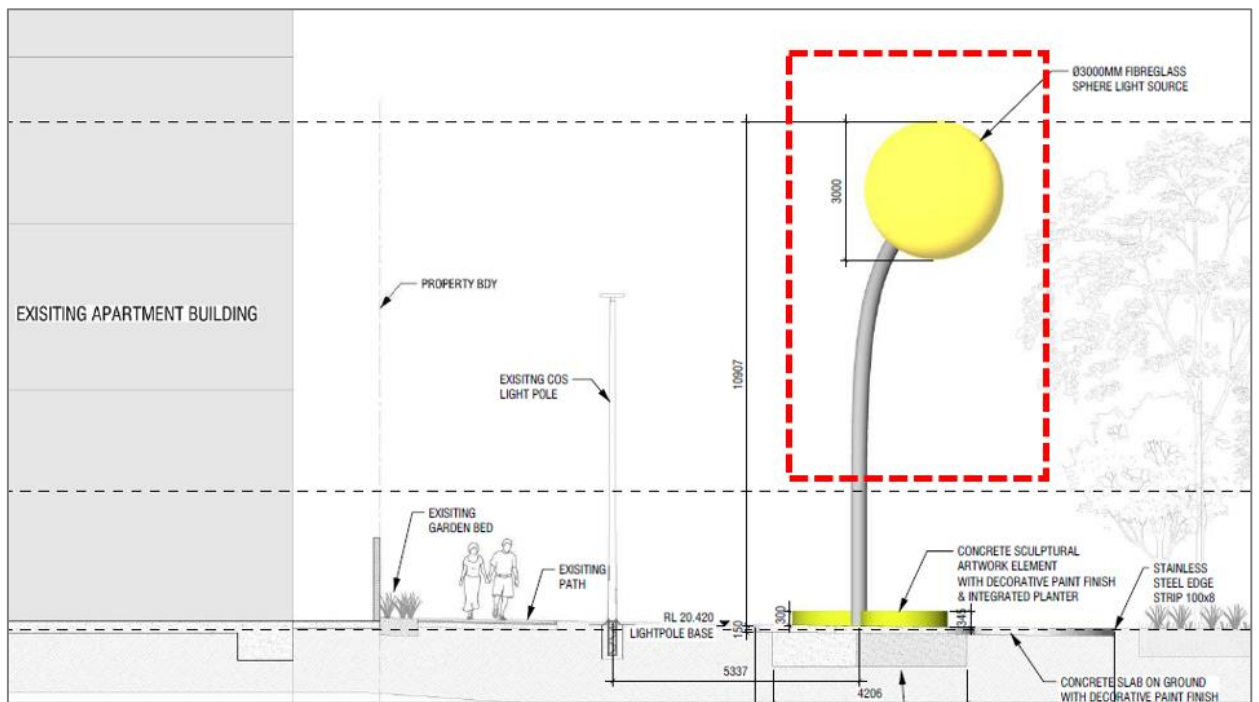


Figure 2: Extract of Vertical Section, height variation dashed in red (Source: Shop 1 Projects)

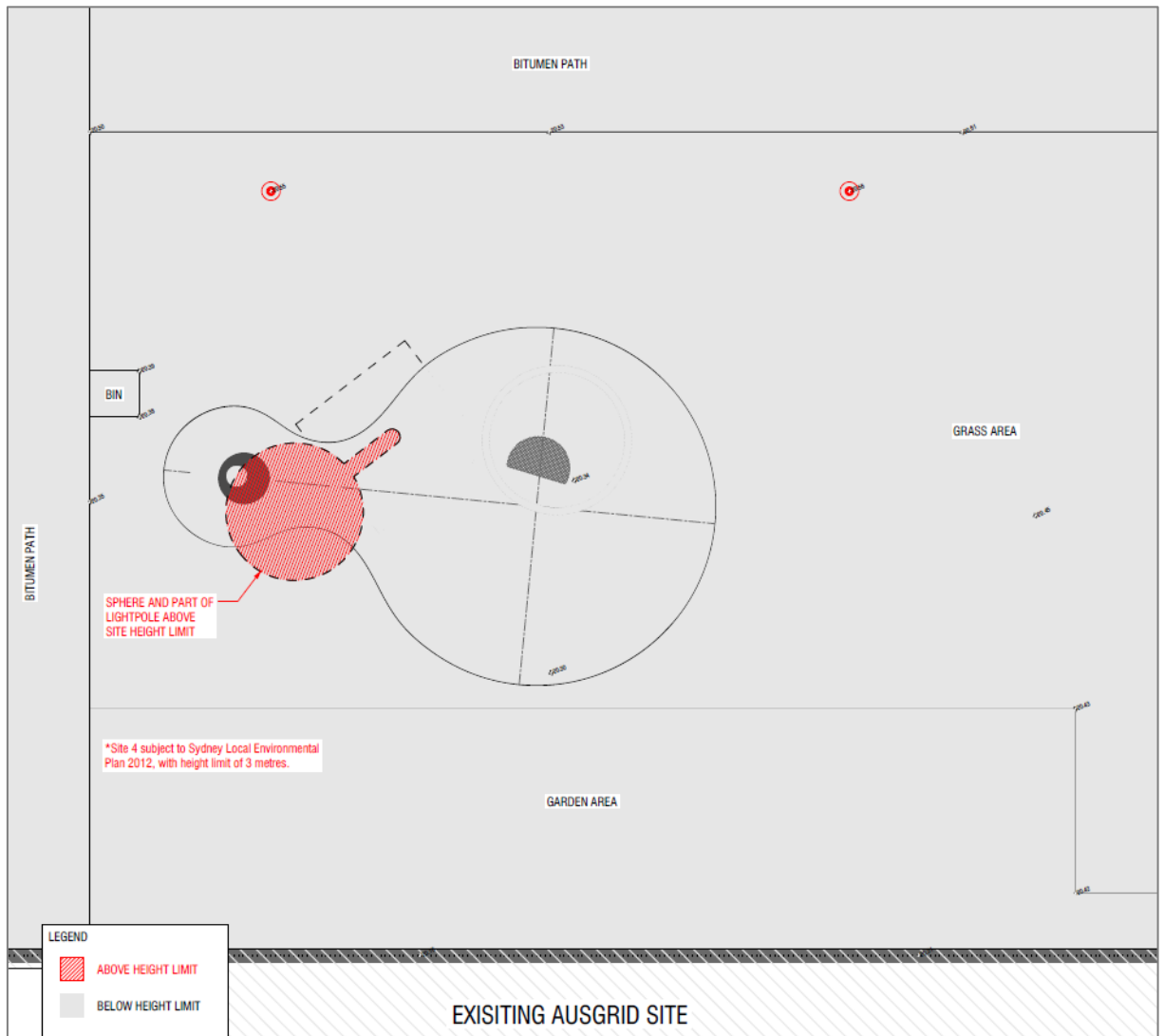


Figure 3: Extract of Height Plane Diagram, portions shaded red located above height limit (Source: Shop 1 Projects).

5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

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

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

We have considered each of the ways as follows.

5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.


The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (Test 1 under *Wehbe*).

Table 1: Achievement of Objectives of Clause 4.3 of the SLEP

OBJECTIVE	DISCUSSION
(a) to ensure the height of development is appropriate to the condition of the site and its context,	<p>The variation of the Height of Building development standard does not cause the proposed public art to be inappropriate to the condition of the site and its context.</p> <p>The extent of the variation is minor as the portion of the proposed public art which is located above the maximum Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively.</p>

OBJECTIVE	DISCUSSION
	<p>Further, the public art is located within open space and is setback 10m (approx.) from the closest adjoining residential development at No. 14 Defries Avenue, Zetland. The public art inclusive of the proposed height variation is minor in scale in comparison to the development at No. 14 Defries Avenue which comprises of a thirteen (13) storey residential flat building. This ensures that the proposed height of the public art is appropriate to the condition of the site and its context.</p> <p><u>Public Interest:</u> The proposed public art as a whole is in the public interest as it will improve the condition of the public domain by providing improved seating, lighting, planting and a point of interest.</p> <p>The surrounding context comprises of buildings of greater height and scale including the adjoining thirteen (13) storey residential flat building at No.14 Defries Avenue. It should also be noted that in accordance with the LEP Height of Buildings Map (refer to Figure 1), buildings of heights up to 50m are permitted.</p> <p>The proposed public art is setback 10m (approx.) from the adjoining residential flat building which ensures that its height is appropriate to the condition of the site and its context.</p>
<p>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p>	<p>The site is not a heritage item and is not located in close proximity to any heritage items of conservation areas. The closest item of heritage significance is the West Kensington Local Heritage Conservation Area which is located 180m to the east of the site.</p> <p>The extent of the variation is minor as the portion of the proposed public art which his located above the maximum Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively. Due to the minor extent to which the light pole and fibreglass sphere exceeds the Height of Building development standard, and the distance of the proposed public art from the West Kensington Conservation Area, there will be no unacceptable impacts to height transitions between new development and buildings in heritage conservation areas.</p>

OBJECTIVE	DISCUSSION
	<p><u>Public Interest:</u></p> <p>The proposed public art as a whole is in the public interest as it will improve the condition of the public domain by providing improved seating, lighting, planting and a point of interest, while have no impacts to items of heritage significance, while it is located an appropriate distance from any heritage items and conservation areas which will ensure that its height will not cause any unacceptable impacts.</p>
<p>(c) to promote the sharing of views,</p>	<p>The variation of the Height of Building development standard does not affect the sharing of views.</p> <p>Future development surrounding the site will retain a vista north-south on Defries Avenue and east-west along the existing open space towards the Eastern Distributor. The existing thirteen (13) storey residential flat building at No.14 Defries Avenue will retain its vista. The vista is an outlook rather than a view, being general in scope (not of a specific feature) and common in nature.</p> <p>The extent of the variation is minor as the portion of the proposed public art which is located above the maximum Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively. Due to the minor extent to which the light pole and fibreglass sphere exceeds the Height of Building development standard, there will be no unacceptable impacts to the sharing of views.</p> <p>Further, the proposed public art will assist in wayfinding and ensures that views are maintained along Defries Avenue and the existing open space to the Eastern Distributor.</p> <p><u>Public Interest</u></p> <p>The proposed public art as a whole is in the public interest as it will improve the public domain by providing improved seating, lighting, planting and a point of interest whilst ensuring the sharing of views in the locality (refer to Figure 4).</p>

OBJECTIVE	DISCUSSION
 <p data-bbox="256 1391 954 1417"><i>Figure 4: Photomontage of proposed public art (Source: Shop 1 Projects)</i></p>	
<p data-bbox="256 1462 895 1529">(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p>	<p data-bbox="911 1462 1533 1563">The existing residential flat building to the north of the site at No. 14 Defries Avenue has a 13-storey built form and is of a much greater scale than the proposed public art.</p> <p data-bbox="911 1603 1517 1771">The extent of the variation is minor as the portion of the proposed public art which is located above the maximum Height of Building is limited to the upper portion of the slender light pole and fibreglass sphere which have a diameter of 0.323m and 3m respectively.</p> <p data-bbox="911 1812 1533 1977">Due to the minor extent to which the light pole and fibreglass sphere exceeds the height of building development standard, and the height and scale of adjoining development within Green Square Town Centre, acceptable height transitions will be provided to areas</p>

OBJECTIVE	DISCUSSION
	<p>adjoining the Green Square Town Centre.</p> <p><u>Public Interest:</u> The proposed public art as a whole is in the public interest as it will improve the public domain by providing improved seating, lighting, planting and a point of interest whilst ensuring acceptable height transitions are provided to adjoining areas.</p>
<p>(e) in respect of Green Square—</p> <p>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</p> <p>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</p>	<p>The variation of the Height of Building development standard will improve the amenity of the public domain, by providing high quality public artwork and a light source which will improve pedestrian wayfinding within Green Square, particularly on Defries Avenue.</p> <p><u>Public Interest:</u> The proposed public art as a whole ensures the amenity of the public domain through the provision of improved seating, plantings safety improvements and surveillance.</p> <p>The variation of the Height of Building development standard will contribute to the physical definition of Green Square and particularly development on Defries Avenue. This is because the height variation allows the proposed light sphere to be viewed from further away, which will assist in the physical definition of the street network and public spaces.</p> <p><u>Public Interest:</u> The public art as a whole helps define the public domain area as it improves safety and passive surveillance and links the future open space to Zetland Avenue.</p>

As demonstrated in Table 1 above, the objectives of the Height of Building development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of Building development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met in this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 5.2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

- 5.3. The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

- 5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

- 5.5. The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, the elements of the development which contravene the Height of Building development standard are the top of the proposed light pole and the fibreglass sphere.

The environmental planning grounds to justify the departure of the Height of Building development standard are as follows:

- The proposed variation to the height of building development standard assists in promoting object (g) of the Environmental Planning and Assessment Act 1979, as the provision of high-quality public art and improved lighting within the public domain will assist in promoting "*good design and amenity of the built environment*" and does not cause environmental harm.
- The proposed variation to the height of building development standard assists in promoting object (a) of the Environmental Planning and Assessment Act 1979, as the provision of decorative well designed lighting will improve the decorative sculptural seating elements of the public artwork in a public space which will be used by local community, therefore promoting "*the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources*".

7. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the objectives of the zone in which the development is proposed to be carried out. This is required by clause 4.6(a)(ii) of the LEP.

In Section 5 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under “public interest” in Table 1).

Table 2 considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency of proposed development with Zone Objectives

OBJECTIVE	DISCUSSION
To provide a mixture of compatible land uses.	The proposed public art is compatible with adjoining land uses as it is located in a public space and will improve the amenity of the public domain.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport and encourage walking and cycling.	The proposed public art will integrate well with adjoining uses and will provide seating and lighting which will encourage walking and cycling throughout the locality. It will also assist with wayfinding, encouraging walking and cycling by making the area easier to navigate.
To ensure uses support the viability of centres.	The proposed public art will support the increased use of the public domain by providing a point of interest inclusive of decorative lighting, outdoor seating and landscaping, therefore supporting the viability of the centre.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome prejudicial to planning matters of state or regional significance as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit in maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

9. CONCLUSION

This submission requests a variation, under clause 4.6 of the *Sydney Local Environmental Plan 2012*, to the Height of Building development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard and is consistent with the objectives of the B4 zone; and
- There are sufficient environmental planning grounds to justify the contravention.

The consent authority can be satisfied of the above and that the development is in the public interest because it achieves the objectives of the development standard and is consistent with the objectives of B4 zone.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.