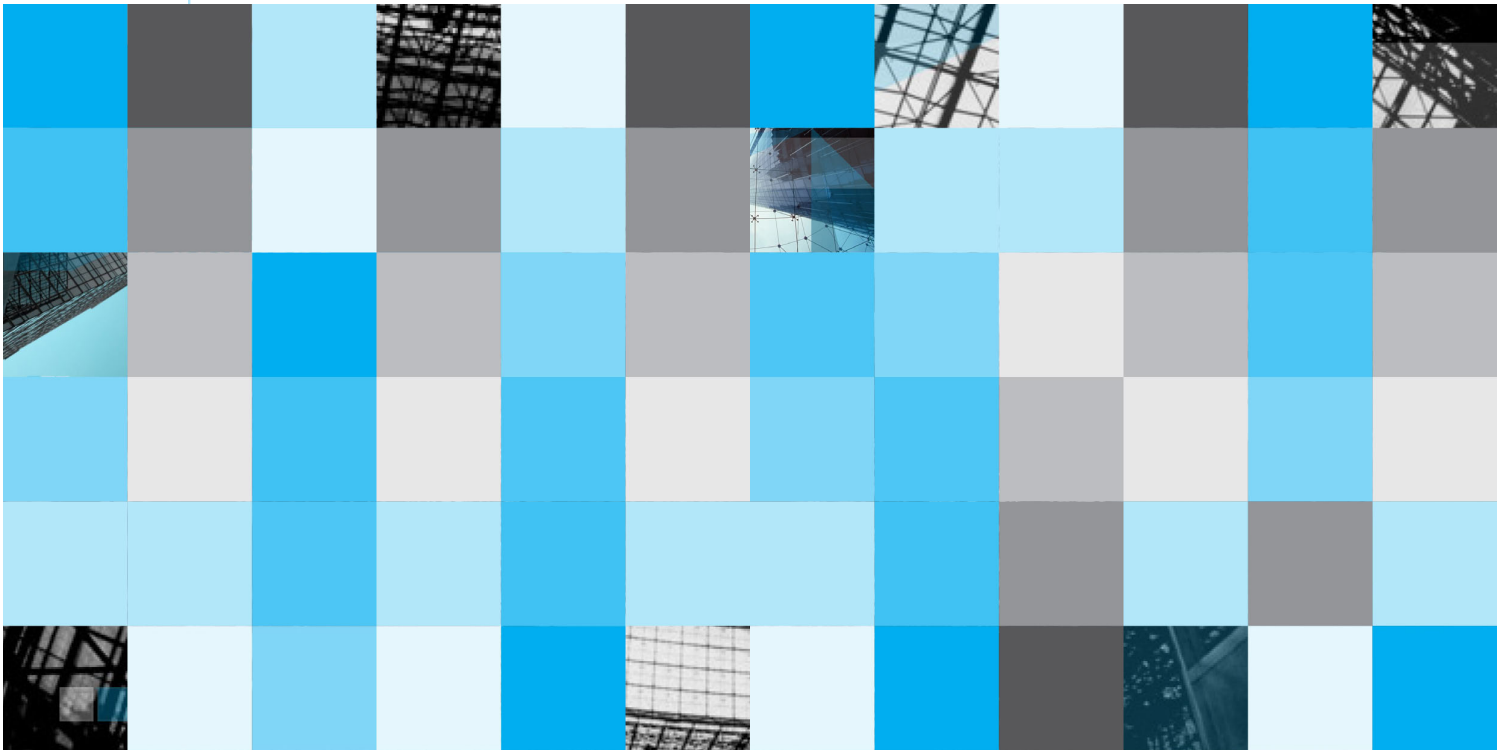


# **Attachment C**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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171B Botany Road, Waterloo

## Clause 4.6 – Building Height Development Standard

# Clause 4.6 – Building Height Development Standard

**171B BOTANY ROAD, WATERLOO**

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Prepared under instructions from  
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## 1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

### 1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Sydney Local Environmental Plan 2012 (SLEP). The request relates to a Development Application for the demolition of existing buildings, excavation and remediation and construction of a 4 storey mixed use development above a single basement level containing 2 retail premises, 47 apartments with 45 car spaces at 171B Botany Road, Waterloo.

### 1.2 Clause 4.6 Exceptions to development standards

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

However, clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

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

### 1.3 Development Standard to be varied

Clause 4.3 states:

- (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,
- (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.

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The maximum height shown for the land on the Map for the site to which the proposed building relates is 15 metres, as shown in Figure 1.

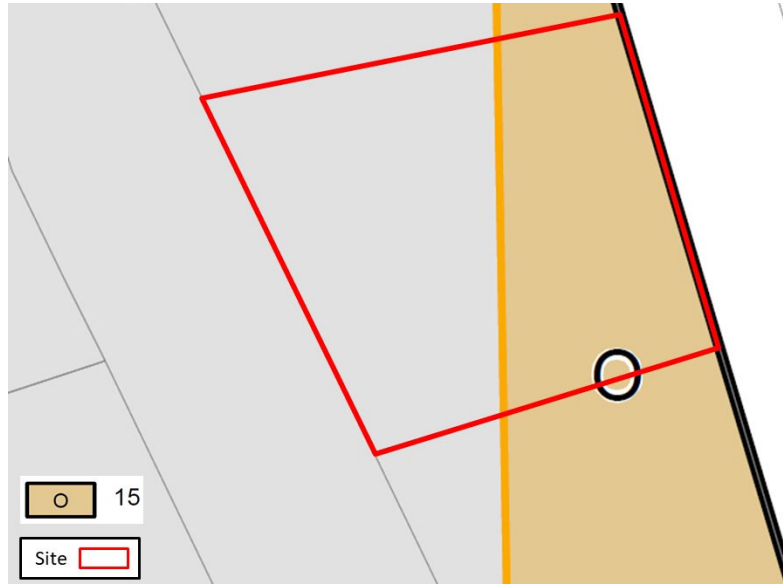


Figure 1:

Extract from the SLEP  
Height of Buildings  
Map

#### 1.4 Extent of Variation to the Development Standard

The roof height plan prepared by DKO (with excerpt below) illustrates that there are several rooftop structures including plant, parapets, clerestory windows, lift overruns and a corner of the roof which exceed the 15 metre height control. The highest point of departure is the plant area for the Cope Street building with a height of 16.76 metres which is a variation to the height of buildings development standard of up to a maximum of 1.76 metres or 11.7%.

These elements are illustrated in the 3D height plane diagram in Figure 2 below. A comparison of the proposed heights against the development standard applicable to the site is illustrated below:

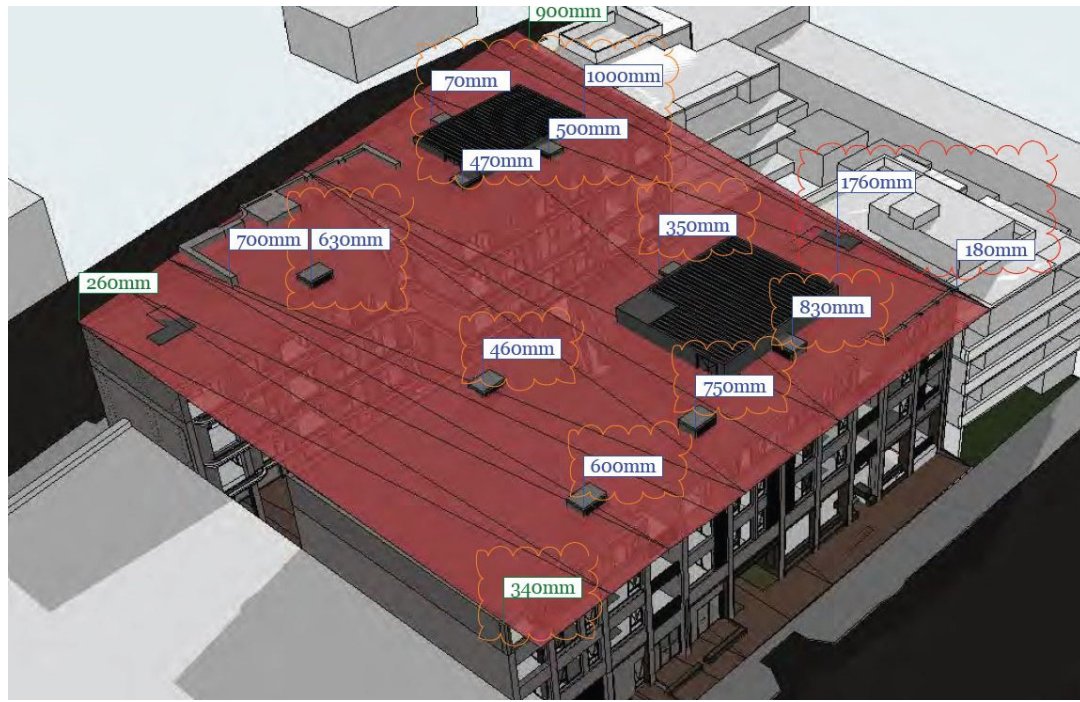


Figure 2:

Height plane drawing which illustrates the components which are above the height control

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

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

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

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

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

The specific objectives of the building height development standard, as specified in clause 4.3 of the Sydney Local Environmental Plan 2012 are identified below. A comment on the proposal’s consistency with each objective is also provided.

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

The vast majority of the development sits below the maximum 15 metre building height control and the majority of the elements proposed above the 15 metre height control only exceed the height control by a very small margin. The elements with the greatest extent of height variation are two centrally located plant areas. The development still presents as 4 storeys in scale to Botany Road and Cope Street and is therefore appropriate to the condition of the site and its context which is characterised by an emerging 4 storey scale along Botany Road.

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

The site does not contain a heritage item nor is it located within a heritage conservation area or special character area, or adjacent to any heritage items.

(c) to promote the sharing of views,

The proposed development will not impact on any scenic or iconic views.

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

Not applicable.

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

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

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

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the proposed development, it successfully achieves these objectives. Strict compliance with the height control would lead to a less satisfactory outcome as it would negatively impact on the quality of the design and require removal of the plant on the roof elsewhere within the development where it would have a greater impact on residential amenity. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site and surrounding area.

**4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;**

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved.

**5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and**



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

The proposed zoning of the land is considered to be reasonable and appropriate.

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

- The proposal is for a 4 storey development as anticipated by the 15 metre height control and compliant with the Sydney DCP 2012 height in storeys control.
- The majority of the development sits below the maximum 15 metre building height.
- The components on the rooftop which exceed the 15 metre height plane to the greatest extent are discreetly located centrally within the roof of each building and are setback from the edges of the building and will be recessive. These components are unlikely to be readily visible from the street or the ground floor plane of surrounding sites. Accordingly, the proposed areas of variation to the height control do not result in any adverse impact to adjacent properties.
- The ground floor level is established by the Peak Flood Level given the flooding affectation applicable to the site and therefore the development cannot be lowered to reduce the extent of variation.
- The scale of the development in terms of its three dimensional size will not be perceived as jarring or antipathetic in a streetscape and urban design context.
- The elements of the development which exceed a height of 15 metres do not result in any unreasonable impacts on the amenity of the adjoining properties in terms of loss of solar access, loss of privacy or view loss.
- The locality is undergoing a transition in its character and other developments are likely to occur along Botany Road in the vicinity of the site. The proposed variation to the height control is minor and will not result in a building which is inconsistent with the desired future character of development in the zone and locality generally.
- Whilst the building height development standard has not been “virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard”, the Council has nonetheless consistently supported a Clause 4.6 variation to the building height standard. In particular, a similar Clause 4.6 variation for the northern adjacent site, as prepared by Sutherland & Associates Planning, was supported by Council.
- Given that there is no adverse impact in relation to the proposed variation, strict compliance would not result in any benefit to the streetscape or the amenity of the adjoining properties

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

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

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify

contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The primary basis for the proposed variation to the building height control relates to a parapet feature and plant on the rooftop.

Due to the particular site circumstances and the design of the subject proposal, the majority of the components which breach the height control will not be readily visible from the public domain or the ground floor plane of the site, or the extent of breach for parapet components is so minor as to not be perceptible to the casual observer. Furthermore, the overshadowing assessment has demonstrated that the proposed areas of height variation does not generate any additional shadow impact to adjacent sites beyond a compliant height. Accordingly, the proposed areas of variation to the height control do not result in any adverse impact to adjacent properties.

In addition to the above it is noted that the building is required to be raised above the ground level in order to address the flooding affectation on the site. If the site was not constrained by this affection, there would be no height breaches for most components and the extent of variation for the plant would be greatly diminished. The Land & Environment Court matter of Adam Hughes Pty Ltd v Penrith City Council {2018} NSWLEC 1369 recognises that a height non-compliance as a result of a need to respond to a flood constraint is an environmental benefit.

The proposed variation to the height control allows for the most efficient and effective use of the land to maximise residential amenity and architectural merit. Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public in the particular circumstance of this site and this proposal, but would reduce the amenity provided for the future occupants of the development and also diminish the architectural merit of the proposal.

In this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the current height control as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any adverse impact to adjacent sites.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

‘to encourage:

- i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- ii) the promotion and co-ordination of the orderly and economic use and development of land..’

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- The proposed variation allows for the most efficient and economic use of the land, enabling utilisation of the roof top of the building for plant without adversely impacting on amenity of adjacent sites.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

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

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

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

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

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

**Objective of the Development Standard**

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

**Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone pursuant to the SLEP 2012

The objectives of the B4 Mixed Use zone are:

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To ensure uses support the viability of centres.

The proposed mixed use development is a permissible use within the zone and is compatible with the surrounding land uses. The proposed development provides a mixture of non-residential and residential uses which are compatible and complementary with one another. In particular, the proposed use replaces a commercial and industrial use and is more compatible with the emerging residential character of the area.

The site is within close proximity to Green Square train station and the forthcoming Waterloo metro station as well as numerous bus services which will maximise public transport patronage as well as encouraging walking and cycling. For these reasons the proposal is considered to be consistent with the objectives of the B4 zone in that it provides appropriately for a mixture of compatible land uses

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

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the building height development standard 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. Furthermore, the area in which the site is located contains many other approvals which provide for similar variations and there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accord with the vision for the area and maximise residential amenity within the site. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

### 1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are benefits associated with the contravention of the standard. The locality in which the site is located contains many other approvals which provide for similar variations. Accordingly, in an area undergoing transition there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accords with the vision for the area. There is no material impact or benefit associated with strict adherence to the

development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

#### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

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

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would diminish residential amenity as it would force the relocation of plant to other areas within the development which would have a greater impact to the residents.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the positive result for the amenity of the development.

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

#### 1.11 Conclusion

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