

# **Attachment C**

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

# New Automated Public Toilet – Rosebery Park

Clause 4.6 variation request to 'Height of Building' development standard

On behalf of  
QMS Media Pty Ltd  
**Update – July 2023**



# 1 Introduction

This Clause 4.6 Variation Request accompanies a development application (DA) for a new automated public toilet (APT) north of the intersection of Confectioners Way and Crewe Place, Rosebery Park (the site). The development proposes to vary the development standard for Height of Buildings under Clause 4.6 of *Sydney Local Environmental Plan 2012* (SLEP 2012).

The variation in this instance is only 7.5 centimetres (0.075m) – in order to accommodate the 3.075m height of the proposed automated public toilet (APT) structure so that it can be located within the new Rosebery Park – which has a Height of Buildings control under Clause 4.3 of the *SLEP 2012* of 3.0m.

This Clause 4.6 Variation Request demonstrates that compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds based on the public benefit arising from the provision of the APT to justify the very minor contravention.

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

- Is consistent with the objectives of the *Environmental Planning and Assessment Act 1979* (EP&A Act);
- Is consistent with, and achieves the objectives of the Height of Buildings development standard set out under Clause 4.3 of *SLEP 2012*;
- Is consistent with the objectives of the **MU1 Mixed Use** zone under *SLEP 2012*;
- Does not raise any matter of State or regional planning significance;
- Will deliver a development that is appropriate for its context, despite the numerical breach to the development standard, with sufficient environmental planning grounds to justify the variation; and
- Is therefore in the public interest.

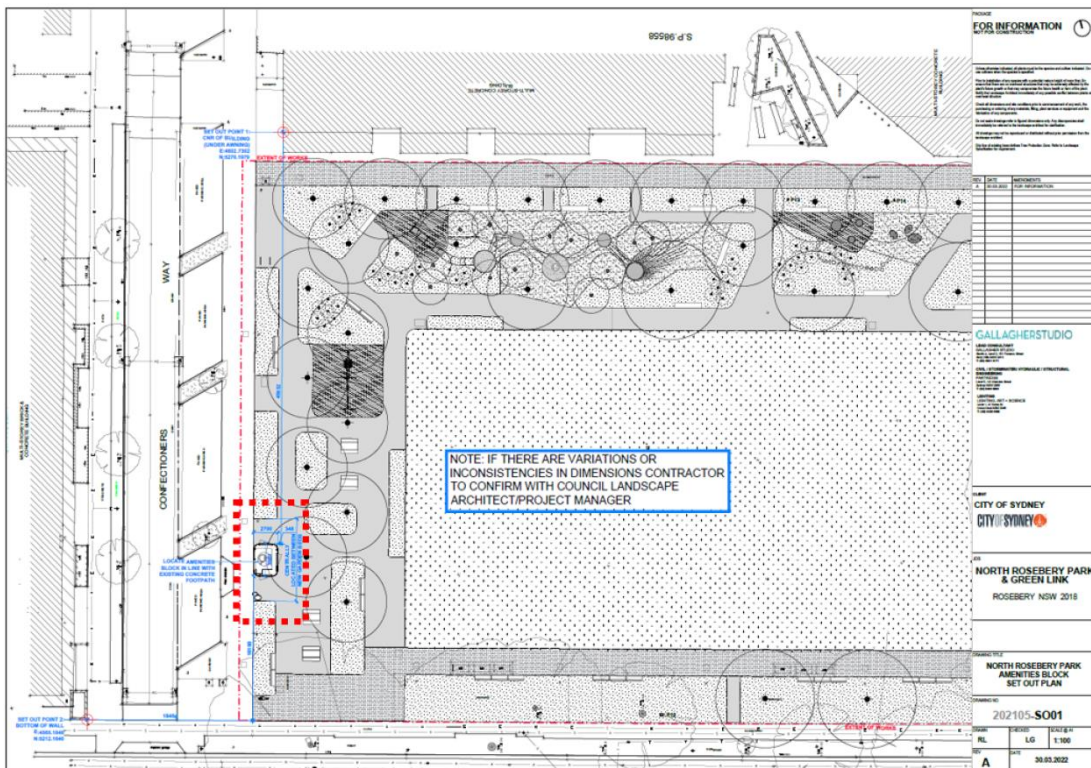
As a result, the development application may be approved notwithstanding the breach of the Height of Buildings development standard in accordance with the flexibility afforded under Clause 4.6 of *SLEP 2012*.

## 2 Background

The site is located in North Rosebery Park within Sydney LGA, to the north of the intersection of Confectioners Way and Crewe Place, Rosebery.

This Clause 4.6 request accompanies a Development Application which seeks development consent for the installation of a new automated public toilet (APT) with associated digital advertising signage (three panels) and is identical to other APTs recently approved by the City of Sydney in other locations across the LGA.

The location of the proposed APT is shown on **Figure 1** below within the red dashed line below, overlaid on to the setting out plan for the park, prepared for City of Sydney.



**Figure 1.** Proposed location for the APT  
Source: Gallagher Studio for the City of Sydney

These APTs, all of standard dimensions and heights, are being installed as part of the wider *City of Sydney Street Furniture and Outdoor Media Services Agreement* (Agreement) between the City of Sydney (City) and QMS Media. All existing APTs, bus shelters, street kiosks, double-sided advertising bollards and the majority of payphones are being removed by JCDecaux/Telstra, with new communications pylons, kiosks, and APTs being installed by QMS under the Agreement.

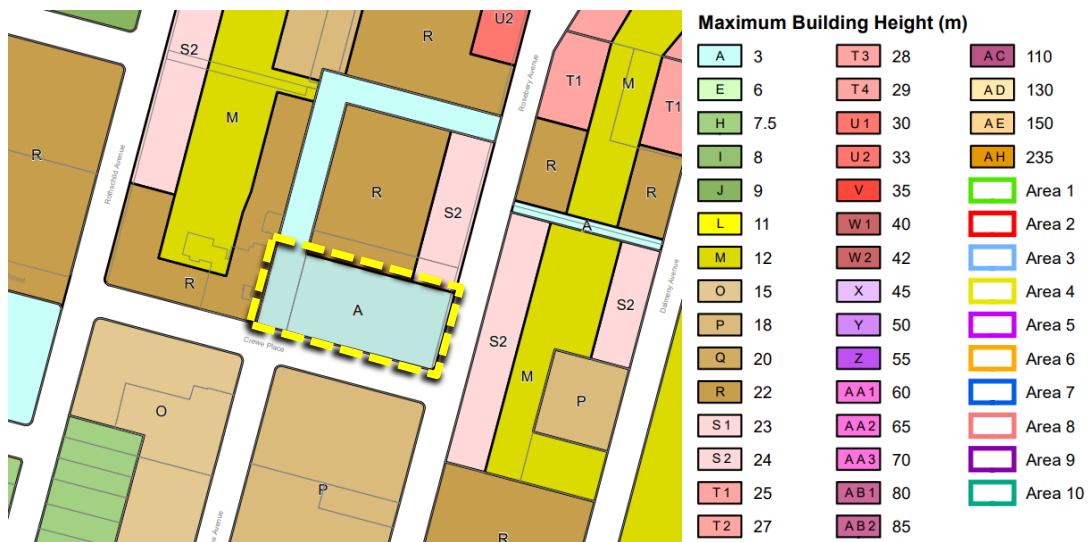
### 3 Development standard to be varied

The development standard sought to be varied under this written request is Height of Buildings as specified in Clause 4.3 of SLEP 2012.

#### Clause 4.3 Height of Buildings

Clause 4.3(2) specifies that 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*. The Map specifies a building height limit of 3 metres for Rosebery Park and Confectioners Way, along which the APT is proposed to be located.

The maximum building height limit as per SLEP 2012 is shown below in **Figure 2**.



**Figure 2.** Height of Buildings Map (site outlined yellow)  
Source: SLEP 2012



## 5 CI4.6(3) Justification for contravention of the development standard

Clause 4.6(3) of SLEP 2012 provides that:

### **4.6 Exceptions to development standards**

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council [2007] NSW LEC 827*
2. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*

The relevant matters contained in clause 4.6 of SLEP 2012, with respect to the Height of Buildings development standard, are each addressed below, including with regard to these decisions.

### 5.1 CI 4.6(3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of SLEP 2012 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five methods outlined in *Wehbe* include:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
- *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 (Fourth Method).*
- *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 (Fifth Method).*

The First Method, in establishing that compliance with a development standard is unreasonable or unnecessary, is relevant to this matter.

### 5.1.1 The underlying objectives or purposes of the development standard

The objectives of the Height of Buildings development standard are specified in Clause 4.3 of SLEP 2012 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 outside Central Sydney,*
- (d) *To ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) *In respect of Green Square –*
  - i. *To ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
  - ii. *To ensure the built form contributes to the physical definition of the street network and public spaces.*

### 5.1.2 The underlying objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe – First method)

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

The proposed height variation will not detract from the condition and character of the site and its context. The height variation is concentrated in a small section of Rosebery Park with a blanket 3-metre height limit. This is in contrast to the 15m, 18m, 22m, and 24m building height limits surrounding the park. The proposed 7.5cm



variation is very minor and appropriately maintains the intended height contrast between the open space of the proposed APT services and the surrounding medium- to high-rise mixed-use buildings that frame the open space.

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

The site is not in proximity to any heritage conservation areas or special character areas. However, the site is located within the vicinity of a local heritage item situated approximately 50 metres south, known as the 'Former Wrigley's Factory'.

The proposed building height is respectful of and leads to a largely imperceptible change to the existing height transitions in place in the vicinity; maintaining a low height around Rosebery Park in contrast to the 15m, 18m, 22m, and 24m building height limits surrounding and framing the park. The variation will not detract from the aesthetic, historical significance, or views of the heritage item.

**Objective (c) To promote the sharing of views outside Central Sydney.**

The proposed variation is not of a height nor located in a manner that will obstruct private view corridors from surrounding mixed-use residential flat buildings to the surrounding landscape or to Rosebery Park.

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

The proposal is located within the Green Square Locality (Locality and Site Identification Map, Sheet 018) and approximately 900m southeast of the Green Square Town Centre. In the context of the surrounding built form, the proposed variation will continue to provide an appropriate transition in height and scale to adjoining areas. The proposed height is well below that of the aforementioned height controls of surrounding buildings and offers an appropriate transition from the taller residential flat buildings to the open space in Rosebery Park.

**Objective (e) in respect of Green Square—**

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

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

The proposal (and variation in the height control of 7.5cm) would maintain public domain amenity of North Rosebery Park, and also maintain the physical definition between the street network and public spaces network.

Overall, with regard to CI 4.6(3)(a), the variation requested is so minor that rigid application of the standard would unreasonably prevent the provision of a beneficial public amenity in a location identified by Council as suitable for this purpose.

## 5.2 CI 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

The environmental planning grounds justifying contravention of the development standard are outlined below.

### 5.2.1 City of Sydney Street Furniture and Outdoor Media Services Agreement

The proposed Automated Public Toilet (APT) has been architecturally designed by Grimshaw Architects to create a clean contemporary appearance, forming one of several new APTs to be installed across the City of Sydney in accordance with the *City of Sydney Street Furniture and Outdoor Media Services Agreement* between the City and QMS Media. The design and appearance of the new suite of street furniture has been subject of a rigorous process addressing all aspects of design, function, meeting necessary *Disability Discrimination Act* (DDA) and Australian Standards (AS). Without revisiting every aspect of the design, functioning, DDA and AS compliance, it is not practical to redesign the APT for this location to reduce the height to achieve strict Height of Building compliance.

It is also not possible to set the structure further into the ground. Given the requirements to achieve accessible wheelchair access to the APT, incorporating a step or ramp makes this option impractical.

### 5.2.2 To promote good design and amenity of the built environment

The proposed height variation will not result in adverse amenity impacts to the built environment, including the surrounding public domain and private properties. The proposal is of an insufficient height to overshadow surrounding residential units, which are elevated above ground floor retail uses.

Furthermore, any potential increased overshadowing cast to the east on Rosebery Park in the late afternoon due to the 7.5cm exceedance will be negligible. Further, given that the APT is substantially lower in height than the existing mixed-use residential building sited across Confectioners Way to the west, it is likely to fall within the shadow envelope of the aforementioned building and thus the exceedance will not cast any significant additional shadows of its own across North Rosebery Park.

### 5.2.3 Absence of Adverse Environmental Impacts

The very minor non-compliance with the development standard does not result in any adverse environmental planning impacts.

Specifically, the proposal:

- Will not impact the surrounding street network or pedestrian movement patterns;
- Provides minimal overshadowing impacts that do not affect sensitive residential uses;
- Provides any accessible community facility for all members of the public;
- Does not materially or adversely impact the visual amenity of the area; and

- Provides an appropriate built form and massing outcome.

For the reasons discussed above, and in relation to CI 4.6(3)(b) there are sufficient environmental planning grounds to justify the contravention to the development standard in the circumstances of the case.

## 5.3 Clause 4.6(4)(a)(i) – 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

### 5.3.1 Consistency with the objectives of the development standard

The proposed development is consistent with the objectives of the Height of Buildings development standard for the reasons discussed in **section 5.1.2** of this report.

### 5.3.2 Consistency with the MU1 Mixed Use zoning

The site located within the MU1 Mixed Use zone. As outlined below, the proposed development is in the public interest because it is an ancillary community facility which will support and be consistent with all objectives of the zone, including notably:

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*
- *To ensure uses support the viability of nearby centres.*

This is expanded as follows:

#### **To contribute to vibrant, diverse and functional streets and public spaces**

The proposed development contributes to the existing mixture of compatible land uses by providing a highly accessible public amenity for all members of the public outside of their homes – particularly pedestrians using the street and those using North Rosebery Park as a public recreational and space.

It is important in providing a functional asset for the welfare needs of a wide range of the local population, including families; mature aged adults; people with disabilities, including people living with incontinence; visitors; and people working outdoors.

Additionally, the proposed development is compatible with the recreational land use provided in Rosebery Park by providing amenity for the park's diverse user group such as joggers, walkers and cyclists, and by supporting prolonged visitation by families and the elderly.

***To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling***

The proposed development is located such that it is integrated with surrounding local retail, residential and recreational uses, which will encourage active modes of travel such as walking and cycling.

***To ensure uses support the viability of nearby centres***

The proposal contributes to the liveability of the local area, allowing for city living that supports active travel, shopping, and recreational activities in the precinct. It will not detract from the commercial or residential viability of the local area, or Green Square town centre.

## 6 Secretary's concurrence

Under Clause 4.6(5) of SLEP 2012, the Secretary's concurrence is required prior to granting consent to a variation. Consistent with Clause 55 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice to each consent authority (dated 21 February 2018), that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice.

Planning Circular PS 20-002, issued on 5 May 2020, outlines the conditions for assuming concurrence. The Planning Circular establishes that all consent authorities may assume the Secretary's concurrence under Clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* with some exceptions. SLEP 2012 is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to Clause 4.6(5).

Under the Planning Circular this assumed concurrence is subject to conditions. Where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council unless the Council has requested it. The variation to the clause in this case is 2.5% and accordingly the Secretary's concurrence can be assumed.

### 6.1 Clause 4.6(5)(a): any matters of significance for state or regional environmental planning

The very minor contravention of the Height of Buildings development standard does not raise any matter of State or regional planning significance. The proposed variation will not contravene any overarching State or regional objectives or standards.

### 6.2 Clause 4.6(5)(b): any public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in this instance. As addressed in this variation request, the non-compliance is exceptionally minor in nature and continues to respond to the surrounding urban context.

Strict compliance with the Height of Buildings development standard would encumber the community benefits capable of being provided by the proposal, including:

- Improvement to the amenity of the streetscape and public domain by way of introducing an accessible community facility; and
- A scale of development that positively responds to the scale of existing and future developments surrounding the site, which are earmarked to support high-density mixed-use and residential buildings; and
- A scale appropriate for the site's MU1 Mixed Use zoning.

### 6.3 Clause 4.6(5)(b): other matters required to be taken into consideration before granting concurrence

Other than those identified above, there are no further matters that the Secretary (or consent authority under delegation) must consider before granting concurrence.

## 7 Conclusion

This written request is for a variation to the Clause 4.3 Height of Buildings development standard under Clause 4.6 of SLEP 2012. The request justifies the contravention of the development standard in the terms required under Clause 4.6 of SLEP 2012.

The variation requested is very minor and is an exceedance of the current height control by only 7.5 cm or 2.5%.

This request demonstrates that in the circumstances of the case compliance with the development standard is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify the contravention to the development standard.

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

- Is consistent with the objectives of the *Environmental Planning and Assessment Act 1979* (EP&A Act);
- Is consistent with, and achieves the objectives of the Height of Buildings development standard set out under Clause 4.3 of *SLEP 2012*;
- Is consistent with the objectives of the MU1 Mixed Use zone under *SLEP 2012*;
- Does not raise any matter of State or regional planning significance;
- Will deliver a development that is appropriate for its context, despite the numerical breach to the development standard, with sufficient environmental planning grounds to justify the variation; and
- Is therefore in the public interest.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, the contravention of the development standard is appropriate under the circumstances.

In affording the proposal this flexibility, the proposal will facilitate public benefits, including the provision of an accessible community facility in a mixed-use urban environment and an enhanced public domain capable of supporting the welfare needs of a diverse user base.